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The Confrontation of the Legislative And Executive Branches: An Examination of the Constitutional Balance of Powers and the Role of the Attorney General

The United States Constitution created an internally dependent tripartite governing scheme which relied upon a carefully drafted system of checks and balances as a means of self-regulation. Recent years have seen increased conflicts between the separate branches, the most recent of which is the occasion for this article. The article traces the rise and fall of the power exercised by the various branches and then focuses on the recent confrontation between Congress and the executive branch concerning the actions of the Environmental Protection Agency and the subsequent resignation of Anne McGill Burford. Of particular interest to this inquiry is the role of the Attorney General of the United States during inter-branch confrontations. The article concludes that congressional inertia has led to a distortion of both the roles of the President and the Attorney General and then examines methods for restoring the branches to their proper constitutional roles.

I. INTRODUCTION

The American Constitution introduced a new concept to a nation still in its infancy — the separation of powers.¹ The founding fathers attempted to draft a workable compromise between two conflicting realizations: the need for a central repository of power in a strong federal government and the fear of the corruption that often accompanies such a consolidation of power. The solution was found in a series of checks and balances, a system creating three separate, yet by necessity, coordinate branches of federal government.² The Constitution thus implemented an internally

1. The concept of separation of powers was unknown in the eighteenth century and still remains a rare form of government today. Prior to the eighteenth century, the general belief was that an effective government required a unification of authority. Our founding fathers, however, chose to adopt a tripartite system — with a legislative, executive, and judiciary branch — as a means of allocating constitutional power. This system is known as checks and balances. A. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* vii (1973) [hereinafter cited as SCHLESINGER].

2. The theory of separation of powers is based, in part, upon a belief that there are limits to which one individual may push another without the latter pushing back. The theory, although a simplistic approach, is nonetheless an accurate reading of human nature. "But the [same] great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and

dependent tripartite governing scheme which relied upon a carefully drafted system of checks and balances as a means of self-regulation. The system, as noted by Justice Brandeis, was intended "not to promote efficiency but to preclude the exercise of arbitrary power."³

Recent years have seen an increase in conflicts between the separate branches, the most recent of which is the occasion for this article. The confrontation involved Congress and the executive branch of the Reagan administration concerning the actions of the Environmental Protection Agency and the subsequent resignation of Anne McGill Burford. Of particular interest to this inquiry is the role played by the Attorney General of the United States during inter-branch confrontations. The Department of Justice not only ignored a valid contempt of Congress citation, but it also filed a lawsuit against the Congress. The actions of all three branches provide an interesting study of the separation of powers.

The term "separation of powers" is itself a misnomer. Although the functions of the federal government are apportioned into three divisions, each branch must rely upon the other two in order to see its policies effectuated. This reliance has created certain gray zones between the clear boundaries which separate the duties and powers of each branch. These zones of uncertainty serve to demonstrate the foresight of the drafters of our Constitution. Instead of defining a rigid and precisely delineated governmental structure, the founding fathers envisioned a Constitution which would be capable of evolving concurrently with the newly created nation.⁴

personal motives to resist encroachments of the others." *THE FEDERALIST*, No. 51, at 337 (J. Madison), (Modern Library ed. 1937).

3. *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting). Justice Brandeis went on to state that "[t]he purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy." *Id.*

4. Mr. Chief Justice Marshall articulately expressed the view, and necessity, of a living, growing Constitution in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819), stating that:

A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations, found in the ninth section of the 1st article, introduced? It is also, in some degree, warranted by their having omitted to use any

The zones of uncertainty and flexibility, as to specific allocations of power, allowed room for the continuing spirit of balance and compromise; however, the survival of an effective system of separation of powers depends, by definition, upon the continued assertions by each branch of its respective powers. A failure by one branch to exercise its constitutionally authorized checks will result in a corresponding shift in the constitutional balance of powers. It is the author's position that Congress has failed to fully exercise its constitutionally mandated authority.⁵ This failure contributed to the creation of what Arthur Schlesinger has termed *The Imperial Presidency*.⁶ Accordingly, Congress, and only Congress, is the appropriate body to reestablish the constitutional balance between the legislature and the presidency. As stated so aptly by Mr. Justice Jackson, "[i]f not good law, there was worldly wisdom in the maxim attributed to Napoleon that 'The tools belong to the man who can use them.' We may say that power . . . belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers."⁷

This article examines the problem of assuring an adequate diffusion of executive information to the legislative branch. This includes the role of Congress in obtaining the information necessary to legislate effectively and to monitor the personnel of various agencies and commissions and the necessary interaction with the President and, more particularly, the United States Attorney General. This article examines the evolution of the shift of the constitutional scales as well as arguing for the restoration of the constitutional balance of power between the two branches.⁸

restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget, that it is a *constitution* we are expounding.

Id. (emphasis added).

5. Although Congress has allowed invasions by both the executive and judicial branch, this article will focus primarily on the confrontations between the legislative and executive branch.

6. See SCHLESINGER, *supra* note 1.

7. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (Jackson, J., concurring) [hereinafter cited as the *Steel Seizure Case*].

8. The system of checks and balances supplied by the Constitution relies, in part, on the spirit of compromise in order to operate in an effective manner. The continued failure by the branches to exercise their constitutionally granted checks, as well as adopting a degree of self-restraint in other areas, may ultimately be the downfall of a working tripartite system. When all inter-branch conflicts are deferred to judicial resolution rather than mutual compromise, the practical result would be the creation of an unworkable governmental system; judicial resolution

II. CONGRESSIONAL INVESTIGATIONS

A. *The Power to Investigate Executive Conduct*

The role of Congress in investigating the actions of the executive branch dates back to the origins of our nation. Congress was entrusted with both the power and the *duty* to investigate the executive to ensure that the President is faithfully performing his duties—a sort of “grand inquest.”⁹ Such authorization is not found within the text itself; yet, to question the source of the authority is not to deny the power itself.¹⁰

Power is seldom unaccompanied by a corresponding duty. To function properly within a government of allocated powers, it is the duty of each branch to maintain its own realm of authority. The power entrusted to Congress is one which only Congress itself is capable of protecting. In 1944, then Senator Truman stated his belief in the importance of congressional investigations: “In my opinion, the power of investigation is one of the most important powers of Congress. The manner in which that power is exercised will largely determine the position and prestige of the Congress in the future.”¹¹ While some may doubt Truman’s assessment of the importance of congressional inquiry,¹² his estima-

of every dispute between the two branches would be so inefficient that the system would eventually grind to a halt waiting for the court to make the necessary determinations.

9. During the Constitutional Convention, references were made to the effect that the House of Representatives was to act as the “grand inquest of the nation.” 2 ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION II (2d ed. 1836); 2 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 154 (1937). In his comprehensive study on executive privilege, Professor Berger has placed a significant amount of importance on the “grand inquest” references. See R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH (1974) [hereinafter cited as BERGER]. On the other hand, Philip Kurland has stated his belief that the reference was intended to be limited to the impeachment power. The exact quotation was: “The House of Representatives shall be the grand Inquest of this Nation; and all Impeachments shall be made by them.” See P. KURLAND, WATERGATE AND THE CONSTITUTION 19 (1978) [hereinafter cited as P. KURLAND]. Regardless of the degree of importance properly attributable to the “grand inquest” reference, the subsequent actions of the Congress, i.e., the St. Clair Inquiry, indicate a clear belief by Congress that it was intended to perform investigatory functions. See *infra* notes 13-20 and accompanying text.

10. For example, the exact source for the authority of the Supreme Court to review the propriety of congressional actions is also a matter of uncertainty. However, the continual acquiescence by the other branches of government, as to the validity of that power, has firmly established the power of judicial review as one beyond question today. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803).

11. See D. RIDDLE, THE TRUMAN COMMITTEE (1964).

12. For example, Rep. Lindsay C. Warren (D. N.C.) stated in 1935 that “[i]n my opinion, 95 percent of these investigations are absolutely worthless and nothing has been accomplished by them.” M. MCGEARY, THE DEVELOPMENT OF CONGRESSIONAL INVESTIGATIVE POWER 7 (1966). Walter Lippman once stated his belief “that legalized atrocity, the congressional investigation, in which congressmen,

tion that the power of Congress will ultimately be determined by the use of the investigatory process appears to have hit the mark.

Congressional investigations were first utilized in 1792 when Congress began to investigate the defeat of the American Army, under the guidance of General St. Clair, by the Indians at the Wabash River on November 4, 1792.¹³ The investigation was sparked by the Secretary of War's questionable report to Congress that the defeat was due to "a deficient number of good troops."¹⁴ Unsatisfied with the explanation, Congress began its first investigation.

The infant nation became aware of the importance of the precedent which would be established during the course of the inquiry. General St. Clair, who had led the American troops to defeat, had himself asked for a court of inquisition to absolve him of any wrongdoing; President Washington declined his request. Congress struggled in an attempt to define its constitutional role in the events which were unfolding. Congressman Vining of Delaware believed the role of Congress was premised upon its impeachment power.¹⁵ He believed that because Congress had been expressly given the power to impeach it must also have the implied power to conduct necessary investigations leading to an impeachment. Congressman Smith of South Carolina opposed the notion of implied authority, believing that it was the President who had the authority to investigate the Army's actions.¹⁶ This belief was premised on the fact that the execution of the laws of the United States had been entrusted to the executive branch. Thus, Smith thought that the duty to investigate belonged to Washington, rather than to Congress. Congress, however, chose to exercise its own authority.¹⁷

starved of their legitimate food for thought, go on a wild and feverish manhunt, and do not stop at cannibalism." C. PRITCHETT, *THE AMERICAN CONSTITUTION* 214 (1968).

13. A resolution was passed by the House of Representatives requesting the President to have the proper individuals "lay before this House such papers of a public nature" which might aid the House in its investigation of St. Clair's defeat. P. KURLAND, *supra* note 9, at 22.

14. 1 SCHLESINGER & BRUNS, *CONGRESS INVESTIGATES: A DOCUMENTED HISTORY 1792-1974* 8 (1975) (five volume set) [hereinafter cited as SCHLESINGER & BRUNS]. The lack of good troops was an answer too simple to satisfy anyone.

15. See P. KURLAND, *supra* note 9, at 21-22.

16. *Id.*

17. Most of the members of the House were aware of the precedent-setting aspects of the proposal, but they also believed the virtual destruction of the nation's military force and the huge expenditure of funds de-

The House requested documents and information from the President which would facilitate its investigation. Aware of the significance of his response, President Washington called a rare meeting of his cabinet to obtain its views on a proper response to the congressional request:

Jefferson noted that the group reached unanimity on the essential points: the House could conduct an inquest, institute inquiries, and call for papers. The President, however, could release such papers as the "public good would permit and ought to refuse those the disclosure of which would injure the public." Jefferson wrote that neither the House nor the committee had a right to call on department heads to release records. Requests for Executive records were to be made directly to the President.¹⁸

The significance of the executive's response was two-fold. First, it gave birth to a concept which has become known as "executive privilege."¹⁹ Second, and perhaps of greater importance, it established executive recognition of the power and legitimacy of Congress to investigate, and by logical necessity, demand the production of information from the executive. The ultimate result of the St. Clair affair was that the President turned over to the House all the documents it had requested.²⁰

manded a public accounting. The motion [to establish a committee of inquiry] passed on a vote of 44 to 10.

SCHLESINGER & BRUNS, *supra* note 14, at 10 (quoted in P. KURLAND, *supra* note 9, at 22).

18. *Id.* at 4 (quoted in P. KURLAND, *supra* note 9, at 22).

19. Almost every administration since 1792 has faced some confrontation with Congress concerning the use of "executive privilege." Stated in the simplest of terms, executive privilege refers to the practice of the executive branch to deny access to certain information which it has in its possession in spite of congressional (or possibly judicial) requests, or on occasion, demands for access to the information. Despite the repeated invocation of the "privilege," the propriety of its use is still a matter both of constitutional uncertainty and controversy.

Nonetheless, although not precisely defining the scope of the privilege, the Supreme Court has stated that some kind of "animal" *does exist* and that "[t]he privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *United States v. Nixon*, 418 U.S. 683, 708 (1974).

Notwithstanding the apparent difference of opinion between the Court and Professor Berger, the two may actually be in agreement. See BERGER, *supra* note 9, at 1. Berger was discussing the authority of the executive to withhold information from Congress, whereas the Supreme Court was discussing the withholding of information from a federal *criminal trial proceeding*. The Court acknowledged the narrowness of its holding in a footnote:

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

Id. at 712 n.19 (emphasis added). Therefore, the direct conflict between Congress and the executive branch has yet to be examined by the current Court.

20. P. KURLAND, *supra* note 9, at 22.

The St. Clair inquiry established the legitimacy of congressional inquiries. Once that power was established, the precise grounds upon which it was based became a matter of academic inquiry. The authority resided either within the power to impeach or within the duty to inform the public of the actions of the executive branch. Perhaps the power was borrowed from the established practices of the sixteenth century British House of Commons,²¹ although parliamentary inquiries were primarily political in nature.²² Woodrow Wilson once asserted that "[t]he information function of Congress should be preferred even to its legislative function."²³ Suffice it to say that the power is generally recognized as a necessary counterpart, an intrinsic component, of the power to legislate. This power, however, is not limited to the need of obtain information for the purpose of drafting legislation.

B. The Power to Punish for Contempt

1. The Inherent Power of Contempt

Historically, the power of contempt has been considered a necessary means of self-defense and self-preservation. "Incarceration by the legislature was not an end in itself but a means to an end, i.e., the freedom to perform its public duties which could only be obtained by imprisonment of the [offending party]."²⁴

21. The House of Commons first utilized its power to investigate its own membership. The power was later expanded to investigate and oversee other governmental officials who had been entrusted with responsibility. The drafters of the Constitution were so aware of this practice that they assumed it to be such an intrinsic part of the power to legislate that it was not deemed necessary to expressly grant this authority through the document itself. See CONGRESSIONAL QUARTERLY'S GUIDE TO CONGRESS 142-43 (2d ed. 1976) [hereinafter cited as GUIDE TO CONGRESS].

22. Despite the apparent similarities between the British House of Commons and the American Congress, the underlying functions of the Common's inquiries were quite different from those of Congress. The inquiries by the House of Commons were essentially politically motivated, seeking to point out the past failures of one faction or another — their purpose was rarely a search for the truth. Additionally, the House of Commons was granted quasi-judicial powers, i.e., the power to prescribe bills of attainder and ex post facto laws. These powers were expressly rejected by the founding fathers. Therefore, any arguments that the power of inquiry of the Congress was derived from the English Parliamentary system must be balanced against the inherent differences between the two legislative bodies. See GUIDE TO CONGRESS, *supra* note 21.

23. W. WILSON, CONGRESSIONAL GOVERNMENT 303 (1967).

24. *State ex rel. Groppi v. Leslie*, 44 Wis. 2d 282, 291, 171 N.W.2d 192, 195-96 (1969), *rev'd on other grounds*, 404 U.S. 496 (1972) (stemming from a writ of habeas

Like the investigative power, the power of Congress to hold an individual in contempt cannot be found within the Constitution.²⁵ The power of contempt is an inherent governmental power which traces its origins to parliamentary procedures dating back to Elizabethan times.²⁶ The power is a necessary counterpart to the power to investigate. Without the power to summarily discipline a defiant or reluctant witness, the congressional power of investigation would be of little or no value.

The roots of the contempt power lie somewhere within the practices of the British Parliament; however, the value of the British precedent has been questioned on the grounds that Parliament, as opposed to Congress, derived its power from an "assumed blending of the legislature and judicial authority possessed by Parliament when the House of Lords and the Commons were one"²⁷ Regardless of its form, legislative or judicial, the substance of the power cannot be denied. Stated simply, it is the power of effective self-preservation.

In 1821, the constitutionality of congressional use of summary contempt proceedings power was upheld in *Anderson v. Dunn*.²⁸ The Supreme Court held that the power to legislate created an implied right in Congress to preserve itself, i.e., to deal with direct obstructions of its legislative duties by way of contempt.²⁹ Without such a power, Congress would be "exposed to every indignity and interruption that rudeness, caprice, or even conspiracy, may

corpus for release of a protester who briefly took over the Wisconsin legislature and was subsequently imprisoned for contempt).

25. One narrow exception exists. The Constitution does provide Congress with the power to punish its own members. "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member." U.S. CONST. art. I, § 5.

26. For a history on the contempt power, see generally, C. BECK, CONTEMPT OF CONGRESS (1959) [hereinafter cited as C. BECK]; R. GOLDFARB, THE CONTEMPT POWER (1963) [hereinafter cited as R. GOLDFARB].

27. 44 Wis. at 292, 171 N.W.2d at 196. Parliament, being originally a judicial body, exercised judicial powers concurrently with its legislative powers. Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 HARV. L. REV. 153, 159-60 (1926). Professor Redlich contends that the contempt power grew out of the functions of Parliament as a supreme representative assembly. See 1 REDLICH, PROCEDURE OF THE HOUSE OF COMMONS 24, 25 (1908). Another commentator has argued, however, that the House of Commons was basically no more of a judicial body than the House of Representatives. See Potts, *Power of Legislative Bodies to Punish for Contempt*, 74 U. PA. L. REV. 691 (1926).

28. 19 U.S. (6 Wheat.) 204 (1821). The action arose out of an attempt by John Anderson to bribe a member of the House of Representatives to help him push through a land claim. Anderson was given a summary trial, reprimanded and released. He subsequently brought an action for assault and battery against the Sergeant at Arms, Thomas Dunn. The lower court as well as the Supreme Court ruled against Anderson, thus upholding the contempt power of Congress. See R. GOLDFARB, *supra* note 26, at 163.

29. *Id.* at 228-34.

mediate against it.”³⁰ The Court, however, did limit the authority to “the least possible power adequate to the end proposed,” and held that imprisonment of an individual could not extend beyond the adjournment of Congress.³¹ The Court held that while the contempt power of the House of Commons was not applicable to Congress because of the limits of its delegated powers, nonetheless Congress did possess certain limited implied powers of contempt. The contempt power was deemed ancillary and incidental to the legislative powers granted Congress.³²

The Court has continued to uphold the authority of Congress to invoke its summary contempt power.³³ “The past decisions of this Court expressly recognizing the power of the Houses of the Congress to punish contemptuous conduct leave little question that the Constitution imposes no general barriers to the legislative exercise of such power.”³⁴ Furthermore, there is no reason why the contempt power of a legislature should be any different than the contempt power of a court. “A legislature, like a court, must, *of necessity*, possess the power to act ‘immediately’ and ‘instantly’ to quell disorders in the chamber if it is to be able to

30. *Id.* at 228. The Court stated its belief in the necessity of the contempt power:

But if there is one maxim which necessarily rides over all others, in the practical application of government, it is, that the public functionaries must be left at liberty to exercise the powers which the people have entrusted to them. The interests and dignity of those who created them, require the exertion of the powers indispensable to the attainment of the ends of their creation.

Id. at 226.

31. *Id.* at 231 (emphasis omitted).

32. The Court stated the significance of the implied power:

On this principle it is, that Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates, and, as a corollary to this proposition, to preserve themselves and their officers from the approach and insults of pollution.

Id. at 227.

33. See *Groppi v. Leslie*, 44 Wis. 2d 282, 171 N.W.2d 192 (1969), *rev'd on other grounds*, 404 U.S. 496 (1972). The Court reversed the contempt conviction on the grounds that the State Legislature of Wisconsin had waited two days after the allegedly contemptuous acts to sentence the defendant and that he had been denied notice of the charges and an opportunity to answer. The contempt conviction was found to have violated the defendant's procedural due process rights. The defendant had been denied both notice of the charges and an opportunity to be heard. In spite of the reversal, the body of the opinion upheld the general authority, and necessity, of a legislative body to invoke the contempt power.

34. 404 U.S. at 499. See, e.g., *Jurney v. MacCracken*, 294 U.S. 125 (1935); *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821).

maintain its authority and continue with the proper dispatch of its business.”³⁵

2. The Addition of the Criminal Contempt Statute

The creation of a contempt statute, in addition to the common law power of contempt, was first proposed by Thomas Jefferson. He believed that Congress should enact legislation which would specifically delineate the scope of the contempt power “thereby hanging up a rule for the inspection of all” potential offenders.³⁶ In 1857, Congress enacted a statute defining the scope of a new statutory power of contempt.³⁷ The motivation for this additional remedy appears to have been two-fold. The statute allowed Congress to transfer a lengthy and laborious process to the judicial branch. Additionally, and perhaps of greater importance at the time, the statute provided a means for increasing the punishment of contemptuous individuals.³⁸

The statute was created in a reaction to the comments of Mr. J. W. Simonton, a journalist with the *New York Times*, who had stated that certain members of Congress had offered to sell him their votes. He was subsequently called before Congress and stated that he could not answer the questions asked of him be-

35. 404 U.S. at 503-04 (emphasis added).

36. 2 HINDS, PRECEDENTS § 1597 (1907) (containing comments by Jefferson).

37. The Act of 1857. Section 1 of the Act provided:

That any person summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter before either House, or any committee of either House of Congress, who shall willfully make default, or who, appearing, shall refuse to answer any question pertinent to the matter of inquiry in consideration before the House or committee by which he shall be examined, shall *in addition to the pains and penalties now existing*, be liable to indictment as and for a misdemeanor, in any court of the United States having jurisdiction thereof, and on conviction, shall pay a fine not exceeding one thousand dollars and not less than one hundred dollars, and suffer imprisonment in the common jail not less than one month nor more than twelve months.

11 Stat. 155 (1857) (emphasis added).

A third section was added which stated that:

Then when a witness shall fail to testify as provided in the previous sections of this act, and the facts shall be reported to the House, it shall be the duty of the Speaker of the House or the President of the Senate to certify the fact under the seal of the House or Senate to the district attorney for the District of Columbia, whose duty it shall be to bring the matter before the grand jury for their action.

Id.

38. The penalty provided for a possible monetary fine (up to one thousand dollars) and imprisonment up to twelve months. The twelve month period may have extended beyond the adjournment of Congress, thereby potentially increasing the duration of confinement. See *supra* note 37. Recall that under the holding of *Anderson v. Dunn*, a party could not be imprisoned beyond a period when Congress adjourned. See *supra* notes 28-32 and accompanying text.

cause to do so would be a breach of confidence.³⁹

The dilemma before Congress was that, under the rule of *Anderson v. Dunn*,⁴⁰ Mr. Simonton could not be imprisoned beyond the session of Congress. Consequently, because the proceedings had not commenced until January 21, 1857, and the Thirty-fourth Congress was due to adjourn on March 4, 1857, the maximum term of imprisonment could not exceed the six week period. This was believed to be an insufficient punishment for one found to be in contempt of Congress. Accordingly, legislation was proposed to enable Congress to impose a punishment of greater duration.⁴¹ Shortly thereafter the Act of 1857⁴² was passed. The Act allowed criminal sanctions to be imposed against an individual who refused to provide information requested by either chamber.

In spite of this new weapon, however, the majority of contumacious witnesses from 1857 to 1876 were punished under the previously recognized inherent power of contempt.⁴³ Even Simonton, the impetus of the legislative action, was not punished under the new statute. Nonetheless, when one examines the general purpose of the power, this result is not surprising. The power of confinement was employed in the belief that a few days imprisonment would tend to induce a witness to cooperate. Congress undoubtedly preferred to keep a close watch over the stub-

39. See Moreland, *Congressional Investigations and Private Persons*, 40 S. CAL. L. REV. 189, 203-04 (1967).

40. See *supra* notes 28-32.

41. Representative Orr spoke in support of the proposed legislation:

Suppose that two days before the adjournment of this Congress there is a gross attempt on the privileges of the House by corrupt means of any description: then the power of this House to punish extends only to those two days. Is that an adequate punishment? Ought we not, then, to pass at once a law which will make the authority of the House respected; and, in addition to that, after this bill has passed, this House will turn these matters over to the courts—tribunals which have the time, education, and facilities, for investigating such charges? This House cannot undertake to constitute itself a court to determine all these things, because it would consume too much of its time. Our entire session might be exhausted by them, if there were a series of contempts.

CONG. GLOBE, 34th Cong., 3rd Sess. 406 (1857).

42. 11 Stat. 155 (1857). The statute was intended to be an addition, not substitution, to the concurrent common law power of contempt. This was expressly stated in the language of the original statute: "[I]n addition to the pains and penalties now existing. . . ." 11 Stat. 155. See *supra* note 37 for the text of the statute.

43. See Moreland, *supra* note 39; *Senate Comm. on Privileges and Elections, Precedents*, S. Misc. Doc. No. 68, 52d Cong., 2d Sess. 45-101 (1893) (for a list of the contempt actions in the Senate from 1857-92).

born witness, rather than turn the individual over to the courts, thus placing him out of the reach of the committee. Because of pressing time constraints on the Congress and the growth of court review of summary congressional punishment, however, the Congress began to turn more frequently to prosecutions under the statute of 1857. As a result, the statute has become the exclusive remedy for congressional contempt citations since 1945.⁴⁴

3. The Use of the Contempt Power

Between 1789 and 1976 Congress voted to issue 384 contempt citations.⁴⁵ The citations were primarily aimed at a witness who refused to do one of three things: appear before a committee, answer questions asked of him, or produce requested documents. The majority of these citations occurred subsequent to 1945 as a result of the actions of the House Un-American Activities Com-

44. See GUIDE TO CONGRESS 143 (2d ed. 1976). The statutes were incorporated with minor revisions in the United States Revised Statutes as §§ 102, 103 and 104. The statutes in their current form provide that:

§ 192. Refusal of witness to testify or produce papers

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than \$1,000 nor less than \$100 and imprisonment in a common jail for not less than one month nor more than twelve months.

§ 193. Privilege of witnesses No witness is privileged to refuse to testify to any fact, or to produce any paper, respecting which he shall be examined by either House of Congress, or by any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or by any committee of either House, upon the ground that his testimony to such fact or his production of such paper may tend to disgrace him or otherwise render him infamous.

§ 194. Certification of failure to testify or produce; grand jury action

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

2 U.S.C. §§ 192-94 (1976).

45. GUIDE TO CONGRESS, *supra* note 21, at 143.

mittee. From 1792 to 1942 only 108 contempt citations were issued as a result of only 600 congressional investigations.⁴⁶

Both the frequency and the method of issuing citations changed around 1945. The reason for the change was due in part to an increased reliance on the judicial system.⁴⁷ Once Congress decided it would leave the determination of guilt or innocence to the judicial branch, the issuance of a contempt citation became simply a procedural practice. Indeed, Congress was no longer even burdened with prosecuting the contempt action; this responsibility had been turned over to the Justice Department.⁴⁸ As a result, of the 226 contempt citations presented to Congress between 1945 and 1957, few were discussed on the floor, fewer were debated, and none were defeated.⁴⁹

The procedures required for invoking Congress' inherent common law power of contempt are quite simple. The sanction is requested by a subcommittee which introduces a resolution directing the presiding officer of the chamber to issue a warrant for the arrest of the contemptuous witness. The Sergeant at Arms is directed to bring the witness before the bar of the House or Senate. Depending on the subsequent testimony of the witness, he is either placed in confinement, reprimanded by the presiding officer, or simply discharged.⁵⁰

The statutory contempt power is currently embodied in 2 U.S.C. §§ 192-94.⁵¹ In addition to certain procedural safeguards, the statutory power differs from the common law power in that it is in the nature of a criminal proceeding. Should a committee wish to hold

46. *Id.* See generally R. GOLDFARB, *supra* note 26, at 196, and C. BECK, *supra* note 26, at appendix.

47. The contempt citations generally fall into one of two classes: 1.) Those involving affirmative acts by individuals, i.e., bribery or attempting to interfere with the legislative process by some form of obstruction, and; 2.) Those involving negative acts, i.e., refusals by witnesses to do certain acts such as offer testimony or the production of documents. See C. BECK, *supra* note 26, at 185; GUIDE TO CONGRESS, *supra* note 21, at 144.

48. This is provided for by the language of the statute itself. See *supra* note 44.

49. See C. BECK, *supra*, note 26, at 185.

50. GUIDE TO CONGRESS, *supra* note 21, at 144. An argument could be presented that such a determination by Congress is not reviewable by the courts. Just as the courts have recognized the independent judicial sovereignty of Article II courts for court martials, so too does the possibility of judicial sovereignty of Article I courts exist, thus making the congressional determination nonreviewable by Article III courts. See *Reid v. Covert*, 354 U.S. 1 (1957).

51. For the text of the statute see *supra* note 44.

a witness in contempt under this authority, it introduces a resolution to the parent body and upon a simple majority vote, the citation is referred to a U.S. Attorney for presentation to a grand jury.⁵² The attractiveness of this method is obvious. It frees Congress from the burden of sitting as prosecutor, judge, and jury and allows it to continue with its current business. The executive branch is left to prosecute the case and the judicial branch is left to decide the merits of the citation. The statute simply delegates powers held within Congress' inherent authority to the other branches of government.

Before examining the role of the executive, a short examination of three judicial decisions should help to bring into focus the proper scope and use of the contempt power. The inquiry actually requires two examinations. One examination is required for the common law inherent contempt power, and the other is necessary for the statutory contempt power.

Congress continued to expand its use of the contempt power until 1880.⁵³ This trend was suddenly reversed in the case of *Kilbourn v. Thompson*.⁵⁴ Hallett Kilbourn was subpoenaed and subsequently appeared before the House, but refused to answer certain questions or to turn over requested documents. Kilbourn was cited for contempt and subsequently incarcerated in the congressional jail. Kilbourn invoked the jurisdiction of the Court by a petition for a writ of habeas corpus.⁵⁵ A unanimous Court granted Kilbourn his freedom, finding the acts of the Congress wholly unauthorized.⁵⁶

52. See GUIDE TO CONGRESS, *supra* note 21, at 144.

53. Beginning with the St. Clair Inquiry, Congress continued to increase the number of its investigations. For example, there was the extensive work of the Joint Committee on the Conduct of the [Civil] War as well as the flurry of 37 congressional investigations surrounding Grant's eight years as President into accusations of maladministration. See J. HARRIS, CONGRESSIONAL CONTROL OF ADMINISTRATION 253-55 (1964).

54. 103 U.S. 168 (1880). The decision arose from an investigation by the House of Representatives into the bankruptcy of Jay Cooke & Co., which had as one of its creditors the United States.

55. On April 12, 1876, the Speaker reported to the House that a writ of habeas corpus had been served on the Sergeant at Arms commanding the production of Kilbourn before the Supreme Court of the District of Columbia. After considerable debate over whether the courts had authority to command the relinquishment of the custody over Kilbourn, a resolution was adopted permitting the transfer. Following the court's determination that Congress lacked the power to impose summary punishment against a witness, Kilbourn proceeded to sue the Sergeant at Arms as well as others for assault and false imprisonment. See Moreland, *supra* note 39, at 212-14.

56. 103 U.S. at 189-97. The Court refused to acknowledge any similarity between the contempt power of Congress and that of a court. The Court resolved that the investigation was merely an investigation into the private life of Mr. Kilbourn and as such, Congress lacked any power to investigate "the private affairs of

Writing for the Court, Justice Miller found that Congress lacked the authority to punish individuals for their conduct, with the narrow exception of sanctions against its own members.⁵⁷ Justice Miller rejected both grounds upon which Congress claimed the power to punish for contempt. First, the Court held that the contempt power was not a means necessary to allow Congress to adequately perform its legislative duties.⁵⁸ Second, the Court rejected the contention that it was a power which the Congress inherited from Parliament.⁵⁹ Expanding on this second point, the Court noted that Parliament had been a body of both judicial and legislative powers. The Court found that no such grant of judicial power had been given to the Congress.

Justice Miller's conception of separation of powers is too simplistic. The Constitution does not contain three neatly wrapped parcels of power which are entirely divisible. Recognition of the congressional contempt power would not defeat the notion of separation of powers, but would actually strengthen it by providing a means for Congress to ensure its effective legislation and investigation without relying on the judiciary in all instances.

The Court's opinion is also questionable on two other grounds. First, the Court failed to recognize the *nature* of the contempt citation. The contempt action is one of the rare uses by Congress of its own inherent contempt power. Such a power is of a different nature than the utilization of the statutory contempt citation. Imprisonment is not requested from the courts, but is summarily imposed by the legislative branch. Accordingly, the proper scope of the Court's review of the writ of habeas corpus should be limited to the legality of the detention, rather than the guilt or innocence of the prisoner.

Another problem was that the Court chose to express its own

the citizen." *Id.* at 190. Simply, Congress had acted beyond the scope of its constitutionally delegated powers.

57. *Id.* The decision is significant in that it marked the first occasion where the Court would refuse to uphold a congressional contempt citation, the result being the insertion of a degree of paranoia into any future contempt considerations by Congress. Two other points were established. First, it established a precedent for judicial review for a writ of habeas corpus stemming from a congressional contempt citation. Second, while denying any general parliamentary type summary contempt power, the Court implied in dictum that under limited constitutionally authorized situations, Congress may indeed have some restricted contempt powers. See Moreland, *supra* note 39, at 213-16.

58. 103 U.S. at 197.

59. *Id.* at 189.

personal hostilities towards the invocation of legislative investigations, rather than properly limiting the scope of its review to the jurisdictional propriety of the confinement. It is unlikely that the *Kilbourn* decision would stand today. The Court has come to view legislative inquiries with less hostility and has subsequently noted the validity of their purpose.⁶⁰

It was not until 1927, in *McGrain v. Daugherty*,⁶¹ that the Supreme Court had an occasion to uphold the power of Congress to punish a witness for contempt. This validation centered on Congress' use of the statutory power of contempt, which required the invocation of the judicial power prior to sentencing. The inquiries arose out of investigations into the Teapot Dome scandal.⁶² The Court took a more deferential view of Congress' authority to issue a contempt citation. The Court did not require a specific piece of legislation authorizing the investigation. It was enough that the inquiry involved the administration of the Department of Justice—a proper area for congressional legislation.⁶³ The Court noted, "We are of opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function."⁶⁴

The Court recognized that the power of investigation was a necessary counterpart to the power to legislate. Although recognizing the power, the Court premised its exercise upon the need for legislation. Such a restriction ignores the role of Congress as a body entrusted with overseeing the proper administration of the executive branch, as well as its role as an information gatherer to act on behalf of the public. If history had taught anything prior to 1927, it was that the investigatory functions of Congress were not

60. See *Sinclair v. United States*, 279 U.S. 263 (1929) (the Court reemphasized its belief that it no longer viewed congressional inquiries with the hostile attitude it had previously expressed in *Kilbourn*).

61. 273 U.S. 135 (1927).

62. The Teapot Dome scandal centered around the activities leading up to governmental leasing of naval oil reserves in the Elk Hills reserve in California and the Teapot Dome reserve in Wyoming. President Harding had transferred jurisdiction of the reserves over to the Department of the Interior, headed by the Secretary of the Interior Albert B. Fall. Mysteriously, shortly after the signing of leases by private oil companies, Secretary Fall became quite wealthy. Congress instituted a series of investigations which revealed that Fall had received bribes amounting to over \$400,000. The revelation led to the criminal conviction of Fall as well as other investigations into the Harding administration. See *Harris, supra* note 53, at 259; *GUIDE TO CONGRESS, supra* note 21, at 163.

63. Mr. Justice Van Devanter stated: "[T]he subject to be investigated was the administration of the Department of Justice—whether its functions were being properly discharged. . . . Plainly the subject was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit." 273 U.S. at 177.

64. *Id.* at 174.

limited to the preparation of legislation. Most major investigations, dating from the St. Clair inquiry on, were premised on the need for congressional oversight, not congressional legislation.⁶⁵

The final consideration relevant to the scope of the contempt power is of more recent vintage. In *Watkins v. United States*,⁶⁶ the Court imposed restrictions on the congressional statutory contempt power, not because of limits of power granted to the legislative branch, but rather due to specific constitutional inhibitions which applied to all branches of government. The decision did not question the basis of the authority for congressional investigations or contempt citations. Rather it imposed certain constitutionally mandated procedural requirements which Congress was obligated to follow, thus preserving the congressional powers of self-help and self-preservation.⁶⁷

III. THE ROLE OF THE UNITED STATES ATTORNEY GENERAL

A. *Creation and History of the Office*

The Office of the Attorney General⁶⁸ was established by Con-

65. For a summary of congressional investigations, see P. KURLAND, *supra* note 9, at 27.

66. 354 U.S. 178 (1957). The Court determined that the charter of authority to the committee had been too vague regarding the scope of the committee's investigatory power. This left the witness unable to determine whether the propounded questions were actually pertinent to the authorized investigation.

67. The Court, speaking through Chief Justice Warren, stated:

It is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action. . . . This, of course, assumes that the constitutional rights of witnesses will be respected by the Congress as they are in a court of justice. The Bill of Rights is applicable to investigations as to all forms of governmental action. Witnesses cannot be compelled to give evidence against themselves. They cannot be subjected to unreasonable search and seizure. Nor can the First Amendment freedoms of speech, press, religion, or political belief and association be abridged.

354 U.S. at 187-88. The value of the self-help remedy is somewhat dubious if attempted against a member of the executive branch. Unless the Sergeant at Arms would deputize a militia, it would seem unlikely that he would be allowed past the White House security. Even with an army of deputies, what would he do once they arrived?

68. The Attorney General of the United States runs the largest law office in the world but he has only one client, the government of the United States. The basic function of the Department of Justice, of which the attorney general is the head, is to represent the interests of the United States in the courts. The attorney general is the government's law enforcement officer.

Huston, *History of the Office of the Attorney General*, in ROLES OF THE ATTORNEY GENERAL OF THE UNITED STATES 1 (1963) [hereinafter cited as Huston].

gress in The Judiciary Act of 1789.⁶⁹ The Act provided that the Attorney General was to "prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned" and to render opinions on questions of law to the President and heads of the departments when so requested.⁷⁰ Although responsible to the President in the performance of his discretionary duties, the grant of his power, as well as the ultimate performance of his duties, are subject to congressional control.⁷¹

The Office of the Attorney General did not always have the power and prestige that it possesses today. In fact, as originally occupied, "the office could not have been smaller and scarcely more poorly paid. [He] received \$1,500 per year and had to pay his own rent, pay his own stamps and stationery, and furnish his own heat and light. He had no assistant."⁷² It was not until 30 years after the formation of the federal government that Congress saw fit to provide the Attorney General with government office space, a \$1,000-a-year legal clerk, and a fund of up to \$500 to pay for such things as stationery, stamps, and a "boy to attend to menial duties."⁷³

The first recipient of the office was Edmund Randolph. Although aware of the general unattractiveness of the position, President Washington was also familiar with human nature. He enticed Randolph into accepting the position by pointing out that the office would "confer pre-eminence" upon the individual and therefore provide him with a "decided preference of professional employment."⁷⁴ Originally serving as de facto counsel for Congress,⁷⁵ the Attorney General eventually became absorbed by the executive branch, becoming the head of an executive department

69. Act of Sept. 24, 1789, ch. 20, § 35, 1 Stat. 92.

70. *Id.* at 93.

71. Senator Sam J. Ervin stated his position on the power of Congress to regulate the functions of the Attorney General: "All powers of the Attorney General and the Department of Justice flow from Acts of Congress. There can be little doubt—in fact, no doubt at all—that what Congress gives, Congress can take away." *Removing Politics from the Administration of Justice: Hearings on S.2803 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 3 (1979). The Supreme Court in *McGrain v. Daugherty*, 273 U.S. 135 (1926), seemed to concur with such an evaluation, stating that "the functions of the Department of Justice, the powers and duties of the Attorney General, and the duties of his assistants are all subject to regulation by congressional legislation. . . ." *Id.* at 178. It seems only natural that a creature of statute should be subject to modification or even elimination by statute.

72. Huston, *supra* note 68, at 1-2.

73. *Id.* at 5. The office was only a part time job until 1853 when Caleb Cushing took office at a salary of \$8,000.

74. Huston, *supra* note 68, at 5-6.

75. HUSTON, THE DEPARTMENT OF JUSTICE 8 (1967); *see infra* notes 79-81 and accompanying text.

in 1870.⁷⁶ With the rise of the imperial presidency, the division between the Attorney General's role as the chief legal officer of the United States and as adviser to the executive has become more uncertain.

B. Conflict of Loyalty: The Attorney General's Three Masters

The confusion surrounding the role of the Attorney General is due in part to the fact that the office has a built-in schizophrenic nature. The office is required to serve not one, but "three masters — the President, the Congress, and the Judiciary."⁷⁷ In addition, the loyalty of the office is divided into two other segments — legal and political. Edward Bates, the Attorney General under President Lincoln, once stated his belief as to the loyalty of the office: "The office of Attorney General is not properly *political*, but strictly *legal*, and it is my duty, above all other ministers of State to uphold the law and to resist all encroachments, from whatever quarter, or mere will and power."⁷⁸

The Judiciary Act of 1789⁷⁹ did not define the role to be played by the Attorney General toward the Congress. Yet, from the date of its creation, the office was seen by Congress as a valuable source for legal opinions on the propriety and constitutionality of proposed legislation.⁸⁰ For the next 20 years, Congress increasingly relied upon the advice of the Attorney General, although not always following it. However, the relationship rapidly became a burden on the Attorney General's office and in 1819, Attorney General William Wirt put an end to the practice of providing such advice to Congress. In a memorandum to President James Monroe, Wirt stated that, as he perceived the role of his office, the opinions which had been generated for the Congress had been simply a matter of courtesy. Accordingly, Wirt, apparently being less courteous than his predecessors, felt that if the practice was

76. *Id.* at 35-36. The Attorney General actually became an integral part of the executive branch much earlier. Dating back to the first Attorney General, Edmond Randolph, the occupant of that office has often attended cabinet meetings. Randolph was present at the first cabinet meeting called by a President.

77. Huston, *supra* note 68, at 3.

78. Bates was one of the few Attorney Generals to successfully resist political affiliation with the President. Quoted in Miller, *The Attorney General as the President's Lawyer*, in *ROLES OF THE ATTORNEY GENERAL OF THE UNITED STATES* 41, 51 (1968).

79. *See supra* note 69.

80. Huston, *supra* note 68, at 6-7.

to continue, the Congress should enact the appropriate legislation.⁸¹

Congress has yet to enact legislation which would more carefully define the role of the Attorney General. Rather, if Congress desires the opinion of the Attorney General, the modern practice is simply to request his testimony as to the propriety of pending legislation.⁸² As a result of the actions of Attorney General Wirt, Congress has increasingly relied on the advice of internal counsel as an aid in drafting legislation. Today, congressional committees of the House and the Senate each have an office of legislative counsel staffed by their attorneys, a practice which further separates the interests of the Congress and the Attorney General and concurrently reinforces the loyalty and dependence of the latter upon the President.⁸³

Neither the statutes nor the Constitution define the role of the Attorney General in relation to the judicial branch. The only guidance from the Judiciary Act of 1789 is that he should be "a meet person, learned in the law, to act as attorney general for the United States."⁸⁴ Furthermore, the Attorney General is given the responsibility to "prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned."⁸⁵

In an effort to more carefully define this judicial role, Congress in 1870 provided for the office of another individual "learned in the law," the Solicitor General.⁸⁶ Although acting under the Attorney General, the Solicitor General has the inherent ability to

81. *Id.*

82. *Id.*

83. *Id.* See *Removing Politics from the Administration of Justice: Hearings on S.2803 and S.2978 Before the Subcomm. on Separation of Powers of the Senate Judiciary Comm.*, 93d Cong., 2d Sess. 1-529 (1974).

84. See *supra* note 69, at 93.

85. *Id.* The office was not entirely without precedent. A similar office evolved in England during the fourteenth and fifteenth centuries. During this period, kings began to increasingly conduct legal matters through one attorney with a broad charter rather than numerous attorneys whose powers were confined to a particular court, region or matter. By the end of the sixteenth century, such attorneys became the primary representative of the crown in the courts. G.W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 458-61 (1924 ed.); see also Cooley, *Predecessors of the Federal Attorney General: The Attorney General in England and the American Colonies*, 2 AM. J. HIST. 304, 309 (1958).

86. The office of the Solicitor General was created by the Judiciary Act of 1870, ch. 150, § 2, 16 Stat. 162. The Solicitor General, as the government's head of litigation, enjoys a wide breadth of power. He has the power to deny government agencies and departments access to the Supreme Court, to decide whether to appeal cases unsuccessfully litigated by the Justice Department, and to act as *amicus curiae* in the appellate courts. For a discussion on the role of the Solicitor General see Note, *The Solicitor General and Intragovernmental Conflict*, 76 MICH. L. REV. 324 (1977). For the current statutory provisions defining the role of the Solicitor General, see 28 U.S.C. §§ 505, 517, 518 (1976).

maintain a more neutral stance towards the executive than does the Attorney General.⁸⁷ The more detached neutrality may be due in part to what Archibald Cox termed as a "sense of loyalty to the Court" which may temper the advocate's zealotry.⁸⁸ As noted by former Attorney General Biddle, "[t]he Solicitor General has no master to serve except his country."⁸⁹

The Solicitor General is not charged with advising the President. Quite the opposite, the Solicitor General has often been described as an advocate entrusted with protecting the people's interest in upholding the Constitution.⁹⁰ He fulfills his role by participating as an amicus curiae on behalf of the interests of the United States.⁹¹ His role as amicus curiae allows him a degree of autonomy free from the politicalization of the executive branch. Conversely, the Attorney General, in his capacity as adviser to the President, tends to be engulfed in the politicalization of the executive branch. As such, the Attorney General's inability to act in a politically neutral fashion, free from the influence of the executive, casts further doubt upon his ability to act on behalf of the public.

The executive is the third master served by the Attorney General. In his capacity as a cabinet officer, by necessity he has a

87. This is due in part simply because he is one more step politically removed from the President. Another source of his autonomy stems from his special relationship as amicus curiae with the courts. See Note, *supra* note 86, at 327-28. Despite the degree of autonomy, on only one reported occasion has the Solicitor General defied the executive branch, and his refusal simply amounted to a refusal to argue for the government. See Lewis, *Our Extraordinary Solicitor General*, THE REPORTER 27, 30-31 (May 5, 1955) (regarding the refusal of the Solicitor General to appear in *Peters v. Hobby*, 349 U.S. 331 (1955)). The degree of self-autonomy granted the Solicitor General has created some interesting situations. Not only is he the only party who may argue for a governmental agency in the Supreme Court, but he is also an amicus curiae to the Court. This dual loyalty can create a lack of effective representation for the particular governmental agency. For example, in *Dirks v. SEC*, 103 S. Ct. 3255 (1983), the Solicitor General actually *opposed his own brief* in a closing footnote. At the conclusion of a fairly scant brief filed with the Court on behalf of the SEC, the Solicitor General included a footnote stating his belief that the defendant had been improperly convicted and urged the Court to disregard, in effect, his brief, and reverse the conviction. See Respondent's Brief in Opposition at 17-18, *Dirks v. SEC*, 103 S. Ct. 3255 (1983).

88. Cox, *The Government in the Supreme Court*, 44 CHI. B. REC. 221, 222 (1963).

89. F. BIDDLE, IN BRIEF AUTHORITY 98 (1962).

90. See, e.g., Cox, *supra* note 88, at 223; Sobeloff, *Attorney for the Government: The Work of the Solicitor General's Office*, 41 A.B.A. J. 229 (1955).

91. See *supra* notes 86-90 and accompanying text.

close and ongoing relationship with the President.⁹² In legal theory, there is a direct avenue of authority running from the President to the Attorney General in carrying out the President's duties "to take care that the laws be faithfully executed."⁹³ Viewing the role of the Attorney General as a conduit of the President's constitutional duty to faithfully execute the laws of the United States, it is not difficult to understand why the Attorney General feels his loyalty must ultimately rest with the executive.

The loyalty of the Attorney General to the President, however, is based upon two foundations — political and legal. As stated by Professor Arthur S. Miller, "[t]he relationship of the attorney general to the President is made more difficult because the attorney general is a *political* officer charged with *legal* duties."⁹⁴ These conflicting loyalties often force the Attorney General to choose between his legal and political affiliations.⁹⁵

The tension between the political and legal duties of the Attorney General is further exasperated by the fact that he is an individual who serves at the pleasure of the President.⁹⁶ In constitutional theory, although perhaps not in reality, his obligations are clear. As an individual entrusted with the faithful execution of the law, his ultimate duty lies with the Constitution and

92. Since the appointment of the first Attorney General, the President has relied upon his legal advice. The continuation of his employment also depends on a close relationship with the President due to the fact that he may be dismissed by the President at any time. Justice Sutherland observed that, "[I]t is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will." *Humphrey's Executor v. United States*, 295 U.S. 605, 622 (1935).

93. Miller, *The Attorney General as the President's Lawyer*, in *ROLES OF THE ATTORNEY GENERAL OF THE UNITED STATES*, 41, 45 (1968).

94. *Id.* at 51.

95. Miller points out the clash of opposing loyalties through the use of two quotations:

Attorney General Edward Bates (appointed by President Lincoln):
The office I hold is not properly *political*, but strictly *legal*; and it is my duty, above all other ministers of State to uphold the Law and to resist all encroachment, from whatever quarter, of mere will and power. [emphasis added].

Reportedly President Andrew Jackson took the opposite view of the attorney general during the controversy over the national bank in the 1830's. Senator George H. Williams, who was later to become attorney general himself, said many years later:

Consulting with his Attorney General, he [President Jackson] found that some doubts were entertained by that officer as to the existence of any law authorizing the Executive to do that act [designating certain banks to be depositories of U.S. funds], whereupon Old Hickory said to him, "Sir, you must find a law authorizing the act or I will appoint an Attorney General who will."

Id.

96. See *supra* note 92.

not with the President.⁹⁷ As noted by Mr. Chief Justice Marshall, this is a "government of laws, and not of men."⁹⁸

C. Prosecutorial Discretion

1. Overview

Prosecutor and discretion: each has a well understood meaning. Yet when placed side by side they seem to take on an almost mystic significance. They create the power to sit as accuser, judge, and jury. The argument is that the doctrine of prosecutorial discretion is an inherent power of the executive, a power which is transferred to the Attorney General.⁹⁹ The argument also musters support from the concept of separation of powers.¹⁰⁰

However, to state that the Attorney General has an unlimited inherent right to determine whether to prosecute in all matters is to apply too simplistic an answer to a complex question. Two additional divisions of the inquiry are required. First, a determination must be made as to whether the role to be exercised is of constitutional or congressional origin.¹⁰¹ If the power is one of

97. As an officer appointed to uphold the Constitution as well as his allegiance to the Constitution through his role as an attorney, there can be no doubt that his ultimate loyalty must lie with the Constitution.

98. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

99. See *Newman v. United States*, 382 F.2d 479 (D.C. Cir. 1967); *United States v. Cox*, 342 F.2d 167 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965).

100. The Court has declared that "[a] lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'" *Buckley v. Valeo*, 424 U.S. 1, 138 (1976) (citation omitted). The argument, however, assumes the "faithful" execution by the executive. Should the executive fail to faithfully execute the laws, some remedy must be available to Congress to achieve enforcement of its statutes.

Practical realities also demand that the Attorney General be given some flexibility in his prosecutions, as do the constraints of time and money. Unable to prosecute all violations, the executive must be allowed the ability to design some enforcement hierarchy. This discretion, however, does not allow for the enforcement only of those statutes the executive feels like enforcing. Rather, it only allows for a modification of *how* to enforce certain statutes, not *what* statutes to enforce. See *National Treasury Employees Union v. Nixon*, 492 F.2d 587, 604 (D.C. Cir. 1974) ("constitutional duty [of the President to see to the faithful execution of the laws] does not permit the President [and his Attorney General] to refrain from executing laws duly enacted by the Congress as those laws are construed by the judiciary").

101. Where the role is defined by statute, the determination is relatively simple if the statute specifies the duties to be executed, provided, of course, that they are not inconsistent with the Constitution. A role of constitutional origin is more diffi-

constitutional nativity, an argument could be advanced that, in acting pursuant to the President's constitutional authority, the Attorney General is himself cloaked with a shroud of immunity from congressional control. The argument has a separation of powers flavor and can be traced back to *Marbury v. Madison*.¹⁰² On the other hand, if the power originates solely from Congress, the Attorney General is acting principally as an agent of Congress and is, therefore, required to follow congressional instructions. Accordingly, any discretion exercised by the Attorney General would exist only through the grace of Congress.¹⁰³

Further clarification of any discretionary powers belonging to the Attorney General requires an understanding of the difference between ministerial and discretionary duties. A ministerial duty is one where nothing is left to discretion but rather a simple and definite duty is imposed.¹⁰⁴ Conversely, a discretionary duty is one in which the manner and extent of execution is left to the individual's own judgment.¹⁰⁵ Therefore, prior to determining the validity of a doctrine of prosecutorial discretion, an examination should be made as to the nature of the alleged power.

2. Search for Common Law Roles

In searching for another possible source to define the Attorney General's role, one commentator has suggested looking to the common law as a means of finding direction.¹⁰⁶ An examination of common law powers should begin with an inquiry into the pow-

cult to define. In view of the supremacy clause, U.S. CONST. art. VI, cl. 2, the President's duty to execute the laws may be arguably to execute only those laws which are constitutional. A refusal to execute a law believed to be unconstitutional by the executive may be found to be consistent with the faithful execution clause. Taken a step further, as a constitutional officer, the President may even be *obligated* to challenge a law he finds unconstitutional. See *supra* note 86, at 353 n.141.

102. 5 U.S. (1 Cranch) 137 (1803):

The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.

Id. at 170.

103. Compare *United States v. Morgan*, 222 U.S. 274 (1911), with *Powell v. Katzenbach*, 359 F.2d 234 (D.C. Cir. 1965), *cert. denied*, 384 U.S. 906 (1966), to get a feeling as to the differing judicial viewpoints on the discretionary power.

104. See BLACK'S LAW DICTIONARY 899 (5th ed. 1979). See *Wilbur v. United States ex rel. Kadrie*, 281 U.S. 206, 218-19 (1930): "Where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command it is regarded as being so far ministerial that its performance may be compelled by mandamus, unless there be provision or implication to the contrary." *Id.*

105. See BLACK'S LAW DICTIONARY 419 (5th ed. 1979).

106. Note, *supra* note 86, at 334-46.

ers of state attorneys general. In contrast to the United States Attorney General, state attorneys general enjoy a wide latitude of independent authority to support or contest governmental actions on behalf of the public, either through an electoral mandate by the public or through a broad statutory or constitutional grant of authority to act on behalf of the public interest.¹⁰⁷

The common law power has been found to provide some state attorney generals with a paramount duty to act on behalf of the public, independent of, and even in opposition to, their duties to advocate on behalf of the state government.¹⁰⁸ This power, or duty as the case may be, is thought to be derived in part from the connections to the English Attorney General, an individual responsible for the interests of the sovereign crown in the courts.¹⁰⁹ Accordingly, the American state attorney general, with his corresponding common law power, is granted authority to represent the interests of the sovereign public.

In contrast to state attorneys general, the United States Attorney General completely lacks his own constituency.¹¹⁰ He is a creature of statute. He derives no independent authority from the common law or from any power to speak for the public. This does not mean that the Attorney General has no right to contest government actions or to represent the interests of the public; but it should be recognized that the independent right to speak for the public is not an inherent power within the office. The Attorney General serves at the pleasure of the President and his duties may be regulated by Congress.¹¹¹ Thus, any assertions on behalf of the public interest by the Attorney General result from *acquiescence* on the part of Congress and the President, and should not be viewed as a positive grant of power to act in the public

107. See NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, REPORT ON THE OFFICE OF ATTORNEY GENERAL 43-57 (1971) [hereinafter cited as REPORT]; see also NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, COMMON LAW POWERS OF STATE ATTORNEYS GENERAL (1975). As of 1971, 42 states elected attorneys general, six were selected by the governor, one by the legislature, and one by the state supreme court. REPORT, *supra* note 107, at 62-63.

108. See Commonwealth *ex rel.* Hancock v. Paxton, 516 S.W.2d 865 (Ky. 1974); State *ex rel.* Dunbar v. State Bd. of Equal., 140 Wash. 433, 249 P. 996 (1926).

109. See O. HAMMONDS, THE ATTORNEY GENERAL IN THE AMERICAN COLONIES 3 (Anglo-American Legal Hist. Series, ser. 1, No. 2, 1939); for a brief summary of the English Attorney General see *supra* note 85.

110. Cf. Position Paper of Att'y Gen. Louis J. Lefkowitz, presented to N.Y. Constitutional Convention, Comm. on the Executive Branch, Albany, N.Y. (June 1, 1967). See Note, *supra* note 86, at 345 n.100.

111. See *supra* notes 71, 92 and accompanying text.

interest.¹¹²

3. The Commands of 2 U.S.C. § 194

The commands of section 194 are quite simple. Once certified by the House or Senate, the contempt citations shall be referred "to the appropriate United States attorney, whose *duty* it shall be to bring the matter before the grand jury for its action."¹¹³

The Attorney General was to play a minor role, that of a mere messenger, but, *he was given a role*. In *Ex Parte Frankfeld*,¹¹⁴ the court doubted the role of the Attorney General:

It seems quite apparent that Congress intended to leave no measure of discretion to either the Speaker of the House or the President of the Senate . . . but made the certification of facts to the district attorney a mandatory proceeding, and it *left no discretion with the district attorney as to what he should do about it. He is required under the language of the statute, to submit the facts to the grand jury.*¹¹⁵

The conclusion seems obvious; Congress is to enact the laws. The executive, and therefore the Attorney General, is to "take Care that the Laws be faithfully executed."¹¹⁶ Acting as an agent of Congress, executive officials are not given discretion to ignore statutes which prescribe required conduct. The required activity is a ministerial, not a discretionary power.

The exercise of discretion by an individual cannot exceed the scope of the power or right granted to him. To grant absolute discretion to the executive branch in its prosecution or non-prosecution of all laws would effectively cancel the lawmaking powers of Congress.¹¹⁷ Under such an analysis, the executive, and not Con-

112. See, e.g., *United States v. Morgan*, 222 U.S. 274 (1911) (imposing a duty on the District Attorney to commence prosecution without delay). Cf. *Powell v. Katzenbach*, 359 F.2d 234 (D.C. Cir. 1965), *cert. denied*, 384 U.S. 906 (1966) (question of whether and when to prosecute was within discretion of United States Attorney General).

113. See *supra* note 44 (emphasis added). It is the function of the United States Attorneys to exercise the traditional functions of the Attorney General at the district level. The United States Attorney General acts primarily as an administrator, overseeing the operations of the Department of Justice.

114. 32 F. Supp. 915 (D.D.C. 1940).

115. *Id.* at 916 (emphasis added).

116. U.S. CONST. art. II, § 3. The Supreme Court has also recognized the authority of Congress to require certain acts from the Justice Department. See *McGrain v. Daugherty*, 273 U.S. 135, 178 (1927) ("the functions of the Department of Justice, the powers and duties of the Attorney General and the duties of his assistants, are all subject to regulation by congressional legislation").

117. Justice Jackson expressed a similar concern in the famous *Steel Seizure Case*, stating his concern over an alleged inherent power in the Executive to act without control by Congress or the courts: "Such power either has no beginning or it has no end. If it exists, it need submit to no legal restraint. I am not alarmed that it would plunge us straightway into dictatorship, but it is at least a step in that wrong direction." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 653 (1952) (Jackson, J., concurring).

gress, would become the lawmaker because he alone would dictate how, when, where, and why to prosecute. Such an interpretation violates the separation of powers doctrine. However, accepting the premise that the executive has *some* undefined scope of prosecutorial discretion, the definition of the exact nature of that power should depend on the particular application. It must be recognized that prosecutorial discretion is not an absolute power under all circumstances.¹¹⁸

Assuming that an executive power of prosecutorial discretion exists, the most logical method of determining the proper scope of that power would be to examine the statute defining the particular offense. Should the statute allow for discretion, or fail to specify a duty to prosecute, arguably the executive would have a degree of discretion on whether or not to prosecute in a specific instance. The power would stem either from an inherent executive right or from the grace of Congress.¹¹⁹ In either case, should the statute *require* affirmative prosecution by the executive, the executive would have to comply, assuming, of course, that such conduct is not found unconstitutional by the courts. An understanding that discretion can only be allowed to the degree it is permitted mandates the need for statutory interpretation to determine statutory rights.¹²⁰

The duties of the executive under section 194 are mandatory.¹²¹ The statute calls on the executive, as the enforcer of the laws, to act as a necessary conduit between the legislative and judicial branches. The required action involves neither independent judgment of guilt or innocence nor a great expenditure of time, effort, or expense. It simply requires the presentation of the contempt citation to a grand jury.¹²² The allegation that discretion exists is

118. The argument assumes that some degree of discretion is inherent in all prosecutors. However, an equally strong suggestion is that the only possible source of discretion stems from congressional statutes. The executive is not granted any degree of prosecutorial discretion by the Constitution, only those certain delegated powers of Article II are conferred upon him. Thus, the only remaining source would be his grant of authority by statute. Accordingly, only the statute could provide any degree of discretion, if at all.

119. Several courts have chosen to examine the particular statute as an indicator of whether Congress intended to allow the executive discretion on whether to prosecute. See *Boyd v. United States*, 345 F. Supp. 790 (E.D.N.Y. 1972); *Moses v. Kennedy*, 219 F. Supp. 762 (D.D.C. 1963).

120. See *supra* note 104 and accompanying text.

121. See *supra* note 44. The United States Attorney is imposed with a duty—"to bring the matter before the grand jury for its action." *Id.*

122. *Id.*

without legal or logical foundation.

IV. THE PRESIDENT AND EXECUTIVE PRIVILEGE

A. *Reliance on Executive Privilege*

1. The Concept

Executive privilege is a nebulous concept. It consists of the alleged authority of the executive to deny access to information in its possession to Congress or the judiciary, even when those branches have affirmatively requested or commanded that the executive produce such information.¹²³ When examined more carefully, the privilege consists of at least five individual components. Each component carries with it a separate justification for its purpose. Professor Kurland lists these components as the ability to withhold:¹²⁴ (1) the content of confidential communications between the President and his advisers in order to protect the ability of the executive to ensure candid and honest discussions as a necessary protection to the proper functioning of his office; (2) military secrets necessary to protect the defense of the nation; (3) diplomatically sensitive data necessary to maintain sensitive international agreements; (4) data concerning individuals who are or have been the subject of civil or criminal investigations; and (5) information requested by Congress where it would be administratively cumbersome to supply the requested information.

An inquiry into the integrity of the privilege should focus on the *nature* of the invocation, rather than the individual who has invoked the privilege.¹²⁵ The fact that a communication stems from the lips or pen of the President should not grant it some mystical protection impenetrable by Congress or the courts. Rather, the *nature* of the communication should be determinative of the degree of protection that is warranted. The application of the analysis of the former would extend the privilege to a conversation between the President and a White House gardener concerning an upcoming World Series, while possibly denying the privilege to discussions between the White House Counsel and the Secretary of State concerning sensitive international negotiations. Argua-

123. P. KURLAND, *supra* note 9, at 36.

124. *Id.* at 36-37.

125. The danger of absolute discretion inherent within the executive is obvious and it runs counter to the separation of powers doctrine. *See supra* note 30 (comments of Justice Jackson); see also *Nixon v. Fitzgerald*, 102 S. Ct. 2690, 2709 (1982) (White, J., dissenting), where Justice White objects to the application by the majority of an absolute immunity to the *office* of the presidency, as opposed to particular *functions* of the president. The Supreme Court has, on occasion, adopted an approach of examining and balancing the competing interests. *See United States v. Nixon*, 418 U.S. 683 (1974).

bly, the scope of this suggested analysis is too narrow.¹²⁶ However, a privilege which depends upon the source of the executive communication would possibly encompass every employee within the executive branch as being a potential source of privileged communications. A more defensible position would be to extend the privilege, if at all, only to high level aides in the administration, then to further analyze the situation whether the nature of the communication warrants the invocation of the privilege by the President.

Ultimately the propriety of the invocation of the privilege must turn on the *nature* of the *particular* communication. An examination of the nature of the claim will not by any means conclusively determine the validity of the privilege, but it should aid in the determination as to the propriety of the invocation by serving as an initial presumption.¹²⁷

First, the power to reject a judicial subpoena rests upon a weak foundation.¹²⁸ Such an action would constitute direct defiance by the executive branch of an order from the judicial branch. Since our country is a nation of laws and not men and the Supreme Court is to act as the final arbiter as to the law, it would seem untenable to assert that the executive should have such an unlimited power.¹²⁹

In dealing with situations involving military secrets or sensitive data, it must be recognized that the privilege relates to the President's power over foreign affairs. The President has consistently been looked to as the individual entrusted to the management of foreign affairs. Accordingly, when the privilege is invoked on this

126. An expansive argument would be that certain individuals' communications, whatever their actual content, must be regarded as confidential. See P. KURLAND, *supra* note 9, at 37. There is, however, no basis in either history or logic for such an extension.

127. An attempt to examine the narrow basis as to each justification is preferable to an unlimited, undefined, inherent power. See Justice Jackson's three categories of presidential power, *infra* notes 156-64 and accompanying text.

128. *United States v. Nixon*, 418 U.S. 683, where the Court, speaking through Chief Justice Burger, stated: "It is the manifest duty of the courts to vindicate those guarantees [the rights of the accused according to the fifth and sixth amendments] and to accomplish that it is essential that all relevant and admissible evidence be produced." *Id.* at 711. The Court also spoke of the President's claim of an inherent right to withhold information: "No case of the Court, however, has extended this high degree of deference to a President's generalized interest in confidentiality." *Id.*

129. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (the Court imposed a "duty" upon itself to determine, as the final arbiter, the meaning of the law).

basis, the greatest possible deference should be granted.¹³⁰

Perhaps the most interesting use of executive privilege involves the claims of the sensitivity of ongoing civil and criminal prosecutions.¹³¹ Let us set the stage. Congress, and only Congress, is entrusted with the duty to make the laws.¹³² The executive is entrusted with the responsibility to see that the laws be faithfully executed. Viewed in this limited capacity, the executive is essentially an agent acting on behalf of Congress. The executive merely executes Congress' will. If the disclosure of data concerning ongoing investigations to Congress might in some way interfere with the prosecutions of those individuals, this is of no concern to the executive. If Congress chooses to foolishly divulge sensitive materials, this is Congress' choice. They have the right to make the mistake.

The executive, as an agent of the legislature, should have no right to refuse the commands of his principal regarding such disclosure. As so eloquently stated by Justice Black, "[t]he Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times."¹³³ Correct or incorrect, the decision is that of the lawmaker.

Finally, the privilege may be invoked on the grounds that it would be administratively cumbersome.¹³⁴ Such an invocation generally receives little sympathy. If the burden interferes with an area of exclusive executive concern, judicial resolution may be appropriate as to whether the request for information has been so burdensome that it effectively interferes with the proper functioning of the executive branch. On the other hand, where the requested information concerns an area primarily under the control of Congress, which is funded by Congress, the propriety of the in-

130. The Supreme Court has repeatedly referred to the special role of the President in foreign affairs. For example, see Justice Sutherland's broad reading of the President's foreign affairs power in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). It is the President alone who has the power to speak for the nation. Although he makes treaties with the advice and consent of the Senate, only the President is the negotiator. The Congress is powerless to invade his power. *Id.* at 319. See also *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948) (relying on the President's role as Commander-in-Chief, the Court found that certain information received by his intelligence networks were meant only for the President, and not fit for publication to the world); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (note Justice Harlan's dissent recognizing the exclusive role of the President in foreign affairs).

131. See *infra* notes 171-75 and accompanying text.

132. See *The Steel Seizure Case*, 343 U.S. 579 (the President's seizure of steel plants was held invalid without statutory authority to use seizure as a remedy against labor unrest).

133. *Id.* at 589.

134. See *infra* note 171 (Reagan administration basing a refusal to turn over documents in part on grounds of administrative inconvenience).

vocation must be doubted because any expense incurred by the investigation is ultimately funded by Congress.

2. Executive Privilege and Watergate

Watergate did not create the distortions inherent in the concept of executive privilege, but it did elevate the political abuses of that doctrine to a new standard.¹³⁵ President Nixon was determined to oppose perceived incursions upon executive privilege by the legislature and the judiciary—both of which were co-equal branches with the executive branch. In one instance he was denying Congress access to information.¹³⁶ Additionally, in what proved to be the decisive conflict, he also chose to confront the judicial branch by refusing to permit information to be revealed in a grand jury proceeding. Nixon stated his beliefs in a letter to Senator Sam J. Ervin, Jr., the Chairman of the Senate Watergate Committee:

No President could function if the private papers of his office, prepared by his personal staff, were open to public scrutiny Formulation of sound public policy requires that the President and his personal staff be able to communicate among themselves in complete candor. . . . If I were to testify before the committee irreparable damage would be done to the constitutional principle of separation of powers.

This dogmatic approach by Nixon made compromise difficult, if not impossible, thus providing the setting for an historic constitutional controversy.

The Supreme Court was to strike a fatal blow to the President's position by unanimously ordering Nixon to turn over the subpoenaed White House tapes.¹³⁸ The decision was significant for three reasons. First, reaffirming its 1803 decision of *Marbury v. Madison*,¹³⁹ the Court held that the judicial branch had the power to act as the final arbiter of actions by the other two branches. This concept, dating back to *Marbury*, has allowed the

135. The Watergate era has been extensively written on. For a few examples, see R. BERGER, *EXECUTIVE PRIVILEGE* (1974); GUIDE TO CONGRESS, *WATERGATE: CHRONOLOGY OF A CRISIS* (1975); A. SCHLESINGER, *THE IMPERIAL PRESIDENCY* (1973).

136. Nixon had refused to appear before a Senate committee or hand over requested Presidential papers. See J. HAMILTON, *THE POWER TO PROBE* 189 (1975).

137. See Letter from President Nixon to Senator Sam J. Ervin, Jr. (July 6, 1973), reprinted in part in GUIDE TO CONGRESS, *supra* note 21, at 158.

138. *United States v. Nixon*, 418 U.S. 683, 714-16 (1974). They contained revelations that the President himself had participated in the cover-up of the break-in of the Democratic Headquarters at the Watergate complex. *Id.*

139. 5 U.S. (1 Cranch) 137 (1803).

Court to effectively exercise its constitutional authority with the scheme of checks and balances, as established by the constitutional trinity.

Second, the Court rejected Nixon's claim of an absolute executive privilege. "[N]either the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances."¹⁴⁰ The Court refused to recognize any significant degree of deference to "a President's generalized interest in confidentiality."¹⁴¹ Rather, the Court chose to adopt a balancing approach by examining the *nature* of the privilege weighed against the needs for fair administration of the criminal justice system. The Court found that, under the circumstances presented, the presidential privilege would have to give way.¹⁴²

Although Nixon lost the battle, the Presidency may have won the war. The Court did recognize that executive privilege was not a mere myth, but was in fact a *reality*. "The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution."¹⁴³ Unfortunately, this broad dictum does not aid in an understanding of the scope of the privilege.

The Court's decision is also significant in regard to a determination which the Court expressly refused to make. The Supreme Court was faced with a confrontation on two fronts — the executive vis-a-vis the Congress and the judiciary. Yet the decision turned solely upon the resolution of the confrontation concerning the latter. Specifically, the Court noted:

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

140. 418 U.S. at 706.

141. *Id.* at 711.

142. *Id.* at 711-13.

143. *Id.* at 708. The Court continued: "Freedom of communication [is] vital to [the] fulfillment of the aims of wholesome relationships . . . [G]overnment . . . needs open but protected channels for the kind of plain talk that is essential to the quality of its functioning." *Id.* at 708 n.17 (quoting *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 325 (D.D.C. 1966)). See also *THE FEDERALIST*, No. 64 (Jay) (S. Mittell ed. 1930).

It is quite possible that the reason that Nixon was unsuccessful was simply a lack of clearly stating *any* definite grounds for the invocation of the privilege. Had he described the *nature* of the invocation with *any* justifiable specificity, history may have been written differently. The main tenor of the Court's decision spoke only of the rejection of such a generalized invocation. 418 U.S. at 711-12.

tutional need for relevant evidence in criminal trials.¹⁴⁴

This disclaimer is recognition by the Court that executive privilege must depend upon the nature of the invocation.¹⁴⁵ The disclaimer might also suggest a higher degree of scrutiny by the Court when information is refused to the Congress. However, whatever importance one may attempt to attribute to this limiting language, it must be balanced against the Supreme Court's broad dictum relating to the constitutional importance of what it called "the confidentiality of Presidential communications."¹⁴⁶

V. THE CONFRONTATION OF THE LEGISLATIVE AND EXECUTIVE BRANCHES

A. *The Nature of Congressional Legislation v. Executive Privilege*

The power of the legislature to conduct widespread investigations dates back to the colonial legislatures and the British Parliament.¹⁴⁷ There is no evidence from the Constitutional Convention that the President was intended to be shielded from this inquiry. Clearly, the first Congress was not reluctant in demanding information from President Washington concerning the St. Clair inquiry.¹⁴⁸ There exists no sound reason to grant an implied immunity to the individual entrusted with seeing that the laws be "faithfully executed" from the branch whose laws he is supposedly "faithfully" executing. In the Constitution, the legislative power is given to the legislative branch and the enforcement to the executive branch.¹⁴⁹

144. 418 U.S. at 712 n.19 (emphasis added).

145. Viewed in this regard, perhaps Raoul Berger was correct in his assertion that the doctrine of executive privilege is a myth:

"Executive privilege" — the President's claim of constitutional authority to withhold information from Congress — is a myth. Unlike most myths, the origins of which are lost in the mists of antiquity, "executive privilege" is a product of the nineteenth century, fashioned by a succession of presidents who created "precedents" to suit the occasion. The very words "executive privilege" were conjoined only yesterday, in 1958.

R. BERGER, *EXECUTIVE PRIVILEGE* 1 (1974). Berger discussed the right of the executive to withhold information from Congress, while the Supreme Court has only recognized the power of the President to withhold information from the *judicial* branch. Thus, both may be in agreement.

146. 418 U.S. at 706; *see generally* 418 U.S. at 705-12.

147. *See supra* notes 9-23 and accompanying text.

148. *See supra* notes 13-20 and accompanying text.

149. The Steel Seizure Case, 343 U.S. at 587. The power is the ability to create

The creation of the Presidency, on the other hand, was unique. The President was unlike anything existing in the Parliamentary system.¹⁵⁰ In contrast to Congress, the President was not granted all powers necessary and proper to carry out his respective duties. Rather, the executive was given only certain enumerated powers which were even further limited by the legislature. According to the Constitution, "treaties and certain appointments required Senate consent, and Congress was empowered to override the President's veto, thus being made the final arbiter of what laws are necessary."¹⁵¹ As pointed out by Chief Justice Taney, the framers carefully chose to withhold from the executive branch "many of the powers belonging to the executive branch of the English government . . . and conferred (and that in clear and specific terms) those powers only which were deemed essential . . ."¹⁵²

It is the President, and not Congress, who has a *duty* "from time to time to give to the Congress Information of the State of the Union."¹⁵³ This duty has often been construed to only require the delivery of an annual Presidential State of the Union address.¹⁵⁴ Justice Story chose to read the requirement in a more realistic fashion: The President

must possess more extensive sources of information, as well in regard to domestic as foreign affairs, than can belong to Congress. The true workings of the laws . . . are more readily seen, and more constantly under the view of the executive. . . . There is great wisdom, therefore, . . . in requiring the President to lay before Congress all facts and information which may assist their deliberations.¹⁵⁵

Furthermore, such an interpretation is more consistent with Congress' traditionally viewed function as the grand inquest of the nation.¹⁵⁶ It is beyond question that Congress has the power to investigate the conduct of the executive. Any assertion that the executive has the power to unilaterally execute uncontrolled

law; without the law, there is, by necessity, no corresponding duty to enforce the law. It is the creation of the law which brings to life the authority to enforce it. Therefore, the President's powers to enforce the laws are completely dependent upon Congress' power as lawmaker. See 343 U.S. at 579.

150. He was to be neither king nor puppet. Yet without precedent, no one could be certain what he would become. The founding fathers "were determined to fashion for themselves a Presidency that would be strong but still limited." A. SCHLESINGER, *THE IMPERIAL PRESIDENCY* (1973).

151. Berger, *Executive Privilege v. Congressional Inquiry*, 12 UCLA L. REV. 1044, 1075 (1965).

152. *Ex Parte Merryman*, 17 Fed. Cas. 144, 149 (C.C. Md. 1861) (No. 9487).

153. U.S. CONST. art. II, § 3.

154. Berger, *supra* note 151, at 1077. Thus imposing a duty to furnish information which the Grand Inquest was historically authorized to require. *Id.*

155. 2 STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 367 (4th ed. 1873).

156. See *supra* note 9 and accompanying text.

discretion to refuse information to Congress, therefore, is both logically and constitutionally unfounded. The more reasonable interpretation would support the obligation of the executive to furnish all information necessary and proper to the Congress to aid in the performance of congressional duties.¹⁵⁷

As a final prelude to an examination into the scope of executive authority, the writings of Justice Jackson may be of assistance. The proper inquiry into separation of powers has few guideposts. Rather than examining the problem as a nebulous, totally undefined concept, Justice Jackson sought to delineate specific areas of conflict which might possibly arise when searching for the proper scope of the executive's power. Justice Jackson believed that presidential powers are not fixed, but rather, fluctuate, "depending upon their disjunction or conjunction with those of [the] Congress."¹⁵⁸ Accordingly, an examination as to the *nature* of the executive power was believed to more precisely define the *scope* of that power. Three categories were possible, each carrying with it a certain presumption:

1. "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."¹⁵⁹ Any actions pursuant to such authorization can fairly be said to constitute the action of the United States and shall therefore be accorded the strongest presumptions of validity and the widest latitude of judicial interpretation.

2. "When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain."¹⁶⁰ In such areas, congressional action or lack of action may tend to invite efforts of independent presidential power. In these situations, "any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."¹⁶¹

3. "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest

157. See *supra* note 155 and accompanying text.

158. 343 U.S. at 635 (Jackson, J., concurring).

159. *Id.*

160. *Id.* at 637.

161. *Id.*

ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”¹⁶² When such a direct confrontation occurs, the “[c]ourts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.”¹⁶³

Under the aforementioned analysis, the first inquiry must scrutinize the nature of the invocation of the executive privilege. Assigning such a label to the claim will outline both the supportive and counter policies surrounding the invocation. Secondly, once the nature of the claim is established, the congressional statute should be examined to determine the appropriate judicial latitude which can fairly be attributed to the invocation.¹⁶⁴

B. The Rise of the Imperial Presidency

Our constitutional system of government is premised upon the notion of conflict. However, a system of checks and balances is only effective if each branch actually exercises its constitutionally granted powers. In the last two centuries, the Presidency has grown to proportions never originally contemplated, thus precipitating a corresponding reduction in the power of Congress.¹⁶⁵

162. *Id.*

163. *Id.* at 637-38 (footnote omitted).

164. These categories were never intended to be conclusive. Such an interpretation completely misreads Justice Jackson's purpose. Rather, they serve as *some* form of guidance in an otherwise undefined “twilight” zone of Presidential power. Justice Jackson's opinion should be granted particular deference in light of the fact that he had at one time personally advocated directly for the executive power. Justice Jackson, named to the Court by President Franklin D. Roosevelt, was the Attorney General of the United States at the time of his nomination. Thus, this Article III Justice was also very much aware of the power, and potential abuse thereof, of individuals in the Article II branch. See 343 U.S. at 635-54 (Jackson, J., concurring).

165. At best, the Presidency was intended as a check on the legislative exercise of power—a co-equal balance, provided with the executive veto power. At worst, he was intended merely to act as the enforcement branch of the legislature. See *supra* notes 148-55 and accompanying text. Justice Jackson offered his view as to the reason for the reallocation of power:

Executive power has the advantage of concentration in a single head in whose choice the whole Nation has a part, making him the focus of public hopes and expectations. In drama, magnitude and finality his decisions so far overshadow any others that almost alone he fills the public eye and ear. No other personality in public life can begin to compete with him in access to the public mind through modern methods of communications. By his prestige as head of state and his influence upon public opinion he exerts a leverage upon those who are supposed to check and balance his power which often cancels their effectiveness.

343 U.S. at 653-54.

This consequence is perhaps not so much a result of presidential usurpation as it is a matter of congressional abdication.

In all of their wisdom, the founding fathers could not envision everything the future would hold. Global satellite communication, nuclear warfare, and the uncontrolled growth of the bureaucracy were never imagined. Contemporary America created a need for instantaneous decisions. Such decisions involve both national and foreign concerns. But it was primarily the growth of the President's power in the latter concern that allowed the Presidency to take on superconstitutional dimensions.¹⁶⁶ Such a shift caused an erosion of both the expressed checks found within the Constitution and the implied checks found within the practical realities of a tripartite governing system. The author shares the opinion of Mr. Schlesinger that "[t]he answer to the runaway Presidency is not the messenger-boy Presidency. The American democracy must discover a middle ground between making the President a czar and making him a puppet . . . we need a strong Presidency—but a strong Presidency *within the Constitution*."¹⁶⁷

C. *Interbranch Litigation: United States v. House of Representatives*

1. The Controversy

*United States v. House of Representatives*¹⁶⁸ provides an unprecedented and interesting study into interbranch litigation and the political abuse prevalent within governmental litigation. The central hub of the commencement of the activity was a congressional contempt citation.¹⁶⁹ In the fall of 1982, several House sub-

166. Arthur Schlesinger, in commenting on the growth of the Imperial Presidency, wrote that:

The assumption of that power by the Presidency was gradual and usually under the demand or pretext of emergency. . . . As it took place, there dwindled away checks, both written and unwritten, that had long held the Presidency under control. The written checks were in the Constitution. The unwritten checks were in the forces and institutions a President once had to take into practical account before he made decisions of war and peace — the cabinet and the executive branch itself, the Congress, the judiciary, the press, public opinion at home and the opinion of the world. By the early 1970s the American President had become on issues of war and peace the most absolute monarch (with the possible exception of Mao Tse-tung of China) among the great powers of the world.

A. SCHLESINGER, *THE IMPERIAL PRESIDENCY* ix (1973).

167. *Id.* at x (emphasis in original).

168. 556 F. Supp. 150 (D.D.C. 1983) (order dismissing the suit).

169. H. R. Res. 632, 97th Cong., 2d Sess., 128 CONG. REC. 10,040 (1982) (on De-

committees began investigating the Environmental Protection Agency's [hereinafter EPA] action, or more appropriately inaction, concerning the \$1.6 billion "superfund" program; a bill designed to clean up hazardous waste sites and prosecute illegal dumpers of toxic wastes.¹⁷⁰ On November 22, 1982, the House Public Works and Transportation Committee, chaired by Elliott H. Levitas, subpoenaed EPA documents relating to the inquiry. Anne McGill Burford, the EPA's Director, declined to turn over certain documents, relying, she stated, on President Reagan's invocation of executive privilege on the grounds that the documents contained sensitive enforcement information. On December 16, 1982, the full House voted to charge Mrs. Burford with contempt of Congress, the first such citation of an executive official by Congress.¹⁷¹

The Attorney General, William French Smith, and the Department of Justice acted immediately. Dissatisfied with his minor "messenger boy" role in the affair,¹⁷² the Attorney General declined to turn the contempt citation over to a grand jury as required by statutory mandate. Instead, he elected to *sue* the House of Representatives in the name of the United States of America.¹⁷³ The lawsuit was dismissed by Judge Smith. His decision urged the administration and congressional leaders to work

On December 16, 1982, the Speaker of the House certified the report of the Committee on Public Works and Transportation as to the contumacious conduct of Anne M. Gorsuch, the Administrator of the EPA, for refusing to furnish documents in compliance with a subpoena duces tecum from a duly constituted subcommittee. The matter was subsequently referred, pursuant to statute, to the United States Attorney for the District of Columbia).

170. See Comprehensive Environmental Response, Compensation and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (1980). This act defined liability and compensation for injuries occurring due to hazardous substance use.

171. See N.Y. Times, Mar. 14, 1983, at A13, col. 3. The request for documents was not a minor matter. In order to attempt to comply, at least with the vast majority of the documents required by the subpoena, the EPA had offered to produce or make available for copying by the subcommittee approximately 787,000 pages of documents, at a cost of approximately \$223,000, and requiring an expenditure of more than 15,000 personnel hours. However, the EPA refused to turn over a small number of documents on the grounds that it would endanger enforcement procedures. See Plaintiff's Amended Complaint at 4, *United States v. House of Reps.*, 556 F. Supp. 150 (D.D.C. 1983).

172. His role was simply to see to it that the United States Attorney for the District of Columbia present the citation to a grand jury. See 2 U.S.C. § 194 (1976) (this article will generally only refer to the Attorney General and not to the United States Attorney entrusted with the actual prosecution. The United States Attorney General acts primarily as an administrator over the personnel of the Department of Justice. The actions of the U.S. Attorney, at least in this matter, are fairly attributable to the actions or policies of the Attorney General).

173. *United States v. House of Reps.*, 556 F. Supp. 150, 151 (D.D.C. 1983). Actually, the original complaint sought injunctive and declaratory relief. The Department of Justice subsequently filed an amended complaint seeking only declaratory relief.

out a compromise for access to the documents withheld by the EPA.¹⁷⁴ Ultimately, after a series of negotiations and the revelation of damaging information concerning the EPA, the executive privilege claim was withdrawn and the documents were made available to Congress.¹⁷⁵

The abstract of the performance is certainly interesting, yet, it is the performance by the players which makes the drama truly intriguing. The role of Congress is an uncertain one. On the one hand, Congress, most admirably, challenged the executive and came out the apparent victor. It chose to issue a contempt citation against an executive officer for the first time.¹⁷⁶ Subsequently, it continued to pressure the executive for access to requested documents despite the presidential invocation of executive privilege. Congress even successfully resisted a lawsuit brought by the Justice Department in an attempt to block its contempt citation.

On the other hand, Congress did not demand that the Justice Department enforce the contempt citation;¹⁷⁷ it did not transfer the citation to another United States Attorney;¹⁷⁸ it did not pur-

174. *Id.* at 153.

175. During the course of the congressional investigation, additional information became available bringing into question the propriety of the actions of both the EPA and the Justice Department. Allegations of perjury, conflict of interest, and obstruction of justice flourished. The subcommittees continued to remain suspicious that important records may have been lost or destroyed by agency paper shredders, installed only after the subcommittees pressed for releases of the documents. Questioned as to why two extra paper shredders had been installed at the last minute, EPA enforcement counsel Eugene Lucero replied that it simply "seemed like a good idea." Subcommittee Chairman Elliott Levita's reply: "It's got to be one of the stupider actions I've ever heard of—moving a [paper] shredder in . . . after a subpoena and a contempt of Congress vote." See *The Toxic Tar Baby at Reagan's EPA*, Newsweek, Feb. 28, 1983, at 14-15.

176. See *supra* note 169.

177. See N.Y. Times, Mar. 10, 1983, at A1, col. 6, and B12, col. 1. The resignation of Mrs. Burford (Ms. Gorsuch married and became Mrs. Burford during the EPA controversy) on March 9, 1983 explains Congress' lack of action subsequent to this date, but it does not explain the inaction from February 3, 1983 (the date the lawsuit was dismissed by Judge Smith) to March 9, 1983. In defense, Congress was involved in negotiations with the executive for the disclosure of documents and, in this situation, the methods of Congress were successful. The affair served to demonstrate the importance of the nonconstitutional checks and balances inherent in our political system.

178. The statute requires the action to be turned over to the "appropriate United States Attorney." Apparently allowing for a transfer to a *more* appropriate United States Attorney, i.e., one who would enforce the contempt citation. The statute formerly required presentation to only the "District Attorney for the Dis-

sue the citation after the dismissal of the lawsuit;¹⁷⁹ it did not utilize its own inherent common law contempt power;¹⁸⁰ and it did not seek the impeachment of any executive officers. Rather, it was to settle for the resignation of a minor player, Mrs. Burford.¹⁸¹ On balance, however, Congress managed to successfully obtain the information it requested within a reasonable time period and without further erosion of its constitutional powers.

The President's handling of the affair was also the subject of criticism.¹⁸² In an apparent attempt to strengthen the executive privilege doctrine, President Reagan has, if anything, impaired the doctrine. His pendulum-like attempt to expand the privilege to matters concerning environmental management by the EPA has resulted in a reactive motion, at least for the present, to contract the strength of the doctrine.¹⁸³ The attempted expansion was premised on several misconceptions. First, there was the attempt to extend executive privilege to matters clearly within the internal oversight functions of the Congress. While the privilege may have some vitality concerning matters of national security—

trict of Columbia." See Moreland, *supra* note 39, at 204-05 (reference to 2 U.S.C. § 194 (1976)).

179. See *supra* note 177.

180. See *supra* notes 24-35 and accompanying text.

181. Mrs. Burford was referred to as the "Ice Queen" throughout the entire EPA affair. As noted by one author:

The career of Anne Gorsuch as head of the Environmental Protection Agency is proof, in the eyes of her critics, that bad intentions alone are never enough: it takes incompetence and arrogance as well to seriously weaken in two years what it took a decade to build. Behind the public demeanor — the forceful intelligence even her enemies have come to respect, the "Ice Queen" stare as cold as a faceful of acid rain — there is, at bottom, a two-term Colorado legislator with virtually no environmental experience at the head of one of the most sensitive agencies in the federal government. The result is not merely that she has, in the opinion of former EPA assistant administrator William Drayton, "demolish[ed] the nation's environmental management capacity"; it is, in the words of a key administration official, who has watched the Superfund scandal spread like dioxin from a leaky barrel, "a bleeping disaster."

Adler, *Ice Queen Under Fire*, Newsweek, Feb. 21, 1983, at 24.

182. A large part of the EPA's failings were attributed to the President. For example, see *Reagan's Toxic Turmoil*, Newsweek, Feb. 21, 1983, at 22-23; *Storm Over the Environment*, Newsweek, Mar. 7, 1983, at 16-24. Additionally, it may be that the Justice Department and the White House had "set up" Mrs. Burford to act as a test case to extend executive privilege. It was only after the advice of the Justice Department and insistence of the President that she refused to turn over the documents on grounds of executive privilege. Having lost the executive privilege battle, President Reagan withdrew the invocation leaving Mrs. Burford to fend for herself. The issue had become too "hot" and Mrs. Burford had become a political liability.

183. By pressing for the extension of executive privilege in such uncharted waters and then subsequently withdrawing the invocation, the President has only raised the confidence of those who will seek to challenge future invocations of the privilege.

areas within the President's exclusive jurisdiction—the privilege would hardly seem to exist over matters concerning the pollution of America's interior. It is Congress, and not the President, which has the balance of power in this area.¹⁸⁴

Second, the President misconstrued the nature of the privilege. In a memorandum to the House subcommittees, the President presented an elaborate series of procedures that would be implemented prior to the invocation of the privilege.¹⁸⁵ Apparently, the

184. When enforcing congressional statutes, the President is essentially acting as a de facto agent for Congress. See *supra* notes 131-33, 171-75 and accompanying text.

185. The President set out a list of procedures which he stated "shall be followed whenever congressional requests for information raise concerns regarding the confidentiality of the information sought":

1. Congressional requests for information shall be complied with as promptly and as fully as possible, unless it is determined that compliance raises a substantial question of executive privilege. A "substantial question of executive privilege" exists if disclosure of the information requested might significantly impair the national security (including the conduct of foreign relations), the deliberative processes of the Executive Branch or other aspects of the performance of the Executive Branch's constitutional duties.

2. If the head of an executive department or agency ("Department Head") believes, after consultation with department counsel, that compliance with a Congressional request for information raises a substantial question of executive privilege, he shall promptly notify and consult with the Attorney General through the Assistant Attorney General for the Office of Legal Counsel, and shall also promptly notify and consult with the Counsel to the President. If the information requested of a department or agency derives in whole or in part from information received from another department or agency, the latter entity shall also be consulted as to whether disclosure of the information raises a substantial question of executive privilege.

3. Every effort shall be made to comply with the Congressional request in a manner consistent with the legitimate needs of the Executive Branch. The Department Head, the Attorney General, and the Counsel to the President may, in the exercise of their discretion in the circumstances, determine that executive privilege shall not be invoked and release the requested information.

4. If the Department Head, the Attorney General or the Counsel to the President believes, after consultation, that the circumstances justify invocation of executive privilege, the issue shall be presented to the President by the Counsel to the President, who will advise the Department Head and the Attorney General of the President's decision.

5. Pending a final Presidential decision on the matter, the Department Head shall request the Congressional body to hold its request for the information in abeyance. The Department Head shall expressly indicate that the purpose of this request is to protect the privilege pending a Presidential decision, and that the request itself does not constitute a claim of privilege.

6. If the President decides to invoke executive privilege, the Department Head shall advise the requesting Congressional body that the claim of executive privilege is being made with the specific approval of the President.

rationale behind the scheme was that if there was a consensus within the executive branch that the materials deserved the protection of executive privilege, its invocation must *truly* be correct. This concept misconstrues the doctrine of executive privilege. If such a power does exist, it is the *nature* of the information that warrants the privilege, not approval by all the king's horses and all the king's men.¹⁸⁶ Additionally, the President was forced to admit that, even though he had invoked the privilege for the subpoenaed documents, he had never actually examined the documents himself.¹⁸⁷

In contrast, the role of the court was admirable. Rather than diving head-first into an undeveloped confrontation, it dismissed the lawsuit, urging a spirit of compromise between the co-equal branches.¹⁸⁸

2. Beyond Discretion to Interference

The most interesting role in this constitutional drama is that of the Attorney General. The nature of the office itself is ripe for conflict of interest in that the occupant of the office serves three masters.¹⁸⁹ Yet by definition, the Attorney General is an "attorney". As an attorney he is expected to act as an advocate on behalf of his client's best interests, within the limit of legal ethics.¹⁹⁰

Memorandum for the Heads of Executive Departments and Agencies, Subject: Procedures Governing Responses to *Congressional Requests for Information*, from President Ronald Reagan (Nov. 4, 1982). See Plaintiff's Amended Complaint at Appendix, *United States v. House of Reps.*, 556 F. Supp. 150 (D.D.C. 1983).

186. See *supra* notes 131-33, 171-75 and accompanying text.

187. See *Storm Over the Environment*, Newsweek, Mar. 7, 1983, at 17. The entire course of the Justice Department actions is questionable. Its desire to invoke executive privilege over such unimportant documents is dubious at best; its motivations are unknown. Perhaps the invocation was to act as a test case for an extension of the privilege, but critics have charged that the real motive of the administration was to limit the functions of congressional oversight committees—a concern of some validity (44 subcommittees claim jurisdiction over the EPA alone). Charges continue that Attorney General Smith may be guilty of obstructing justice by putting political loyalty before constitutional duty. Regardless of the intentions of the administration and the Justice Department, the decisions in the words of House General Counsel Stanley Brand, "shows bad judgment and poor legal advice." *Id.*

The use of the privilege concerning documents never examined by the President renders the invocation of the privilege questionable at best. If such a power as "executive privilege" does exist, it must exist within the office of the President, not any employee of the administration. Consequently, it must be the President, and the President alone, who shall be allowed, if at all, to invoke the privilege. See *supra* notes 125-30 and accompanying text.

188. *United States v. House of Reps.*, 556 F. Supp. at 153.

189. See *supra* notes 77-98 and accompanying text.

190. The Department of Justice disagrees with this position:

[T]he issue is not so much one of ethics . . . as comity. Where a legislative codefendant has been made aware of a contrary Department of Justice view, retains its own counsel on that issue, and requests the

His client, by statute, is the "United States."¹⁹¹ Accordingly, any conflict of interest concerning his loyalty towards the executive and the United States must ultimately be resolved in favor of the broader duty owed to his principal client, the United States.

The interest of the United States in interbranch litigation is not easily identified. The United States clearly has an interest in the enactment of legislation, the enforcement of presumptively valid legislation, and the subsequent punishment of statutory violators. This interest is clear and distinct. It is at least equal to, and arguably superior to, any presidential claim of executive privilege. In interbranch litigation, it is unwarranted to claim that the narrow interests of the executive fully represent the broader interests of the United States. Thus, if the Attorney General chooses to bring suit at all, it would appear more appropriate to bring the action in the name of the executive: *President v. Congress*, not in the name of the United States.¹⁹²

The Attorney General had two roles to play in the EPA affair. First, he, or more precisely, Mr. Harris, the United States Attorney for the District of Columbia, was required to present a criminal case against the EPA Administrator to a grand jury.¹⁹³ He failed to do so. The propriety of this lack of action is questionable at best because the unambiguous language of the federal statute

Department to continue representation on issues where there is no difference of opinion, the precise manner of submitting the Attorney General's views becomes one of accommodation and not ethics.

Representation of Congress and Congressional Interests in Court: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 94th Cong., 2d Sess. 138 (1976). The Department of Justice was referring to *Buckley v. Valeo*, 424 U.S. 1 (1976), where it submitted its so-called amicus brief on behalf of the Federal Election Commission. The first four sections of the brief did contain an amicus brief; however, the fifth section took the role of advocate and argued that the statute should be declared unconstitutional.

191. 28 U.S.C. § 517 (1976) (the Attorney General, or his delegate, shall attend to the interests of the "United States"); 28 U.S.C. § 1345 (1976) (the statute grants original jurisdiction over all suits brought by the "United States").

192. On November 14, 1978, the Department of Justice Appropriation Authorization Act, Pub. L. No. 95-624, 92 Stat. 3459 (Fiscal Year 1979) received final congressional approval. Section 13 was a result of an amendment introduced by Congressman Elliot Levitas. Section 13 requires the Department of Justice to relay to Congress a report within thirty days concerning any statute which the Department believes is unconstitutional. Additionally, the Act required the Department of Justice to declare in court that it is only representing the position of the executive branch and not the position of the "United States." For a discussion of the Act, see Miller & Bowman, *Presidential Attacks on the Powers Problem*, 40 OHIO ST. L.J. 51, 76-80 (1979).

193. See 2 U.S.C. § 194 (1976).

imposes a "duty" to commence a grand jury proceeding.¹⁹⁴ In his defense, the Department of Justice claimed absolute prosecutorial discretion in this matter.¹⁹⁵ However, the Attorney General chose another role to play. He went beyond his discretionary boundaries and arguably entered the realm of direct interference.

The Attorney General, in an attempt to block a valid contempt citation from Congress, filed a civil lawsuit against the House of Representatives of the United States: *United States v. House of Representatives*.¹⁹⁶ The complaint alleged that "the President [had] concluded that dissemination of [EPA] documents would impair his solemn responsibility to enforce the law."¹⁹⁷ The standing of the United States was alleged to exist because:

[t]he acts of [the House and its members] . . . have injured plaintiffs [U.S. and Anne Gorsuch] by impairing their ability to meet their obligation to execute the laws of the United States faithfully, by impeding them in the lawful exercise of the powers conferred upon the Executive Branch by the Constitution and . . . creating inconsistent obligations, and by damaging their reputation for obedience to the rule of law.¹⁹⁸

The question raised by these allegations is whether this action can be said to be fairly attributable to the interests of the United States. In *United States of America v. American Telephone and Telegraph*,¹⁹⁹ the court was faced with a similar question as to the propriety of the Attorney General's attempt to secure jurisdiction under 28 U.S.C. § 1345—the section granting jurisdiction to suits brought by the United States.²⁰⁰ The Department of Justice had sought an injunction to prevent AT&T from complying with a subpoena issued by a House subcommittee. The information sought concerned warrantless "national security" wiretaps. The Attorney General commenced the action under the name of the United States, allegedly to protect the "public interest." The court, although finding jurisdiction to exist,²⁰¹ expressed concerns over

194. *Id.*

195. Telephone interview with Lewis K. Wise, Attorney for the Department of Justice (approximately Feb. 7, 1983).

Mr. Harris, the United States Attorney delegated the duty to prosecute, stated that "I was the one who had to decide what to do . . . I didn't discuss it, and no one else did either." Mr. Harris stated that he felt he could not simultaneously prosecute the EPA Chief and play a role in the civil suit challenging the validity of the citation against her. See N.Y. Times, Mar. 14, 1983, at A13, col. 6.

196. 556 F. Supp. 150 (D.D.C. 1983).

197. Plaintiff's Amended Complaint at 5, *United States v. House of Reps.*, 556 F. Supp. 150 (D.D.C. 1983).

198. *Id.* at 7.

199. 551 F.2d 384 (D.C. Cir. 1976).

200. 28 U.S.C. § 1345 (1976) provides jurisdiction for suits brought by the United States. For an analysis of the AT&T case, see Comment, *United States v. AT&T: Judicially Supervised Negotiations and Political Questions*, 77 COLUM. L. REV. 466 (1977).

201. The suit was also brought under 28 U.S.C. § 1331 (1976), which provides ju-

"whether a suit is brought 'by the United States' within § 1345 when the executive branch is seeking to enjoin the legislative branch."²⁰²

Recent allegations made by the Attorney General in the EPA matter that he is representing the interests of the United States are even more dubious. The only inherent exclusive representation the executive holds on behalf of the United States concerns matters of foreign policy and national security.²⁰³ The EPA matter, on the other hand, involves only internal domestic enforcement policies.

Thus, in addition to the normal invasions by the President into areas of traditional congressional control, the Attorney General, through the Department of Justice, not only refused to prosecute a valid congressional contempt citation, but elevated his status to that of an independent challenger of the authority of Congress. As an attorney for the United States, this course was unwarranted.

Such action has not gone unnoticed by Congress. On December 27, 1982, the Chairman of the Subcommittee on Investigations and Oversight of the Committee on Public Works and Transportation, after notification from the United States Attorney that he would not prosecute the EPA Administrator, called for the impeachment of the Attorney General and the United States Attorney.²⁰⁴ Stanley M. Brand, general counsel to the Clerk of the House, has stated that the failure to present the case to a grand jury "might be an obstruction of justice to try to control [the] faithful discharge of [the duty to see the laws faithfully executed]."²⁰⁵

3. Can the United States Sue the United States?

The simple answer is no—the United States cannot sue the

jurisdiction for cases "aris[ing] under the Constitution, laws, or treaties of the United States . . ." (the statute at the time of the litigation had a \$10,000 minimum amount in controversy requirement, which has subsequently been removed). The court found jurisdiction under 28 U.S.C. § 1331 and failed to rule on the issue of jurisdiction under 28 U.S.C. § 1345. *See* 651 F.2d at 388-89.

202. *Id.* at 389.

203. *See* *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) (President is the sole authority with respect to foreign affairs). The action brought against the House of Representatives was alleged to have jurisdiction under §§ 1331 and 1345. *See* Plaintiff's Amended Complaint at 1, *United States v. House of Reps.*, 556 F. Supp. 150 (D.D.C. 1983).

204. Plaintiff's Statement of Material Facts at 4, *United States v. House of Reps.*, 556 F. Supp. at 203.

205. *See* N.Y. Times, Mar. 14, 1983, at A13, col. 6.

United States. Based upon technical and historical grounds, no one is permitted to sue himself.²⁰⁶ The principle is applicable not only to natural persons but to artificial persons as well, e.g., corporations, and by logical inference, states.

The nation was first given life as a legislative body in October, 1774, when the First Continental Congress created the "Declarations and Resolves of the First Continental Congress."²⁰⁷ Prior to the adoption of the 1787 Constitution, all acts of the nation were executed in the person of the Congress.²⁰⁸ As noted by one commentator, "the signature of the Association by members of Congress may be considered as the commencement of the American Union."²⁰⁹ But this Congress was an incomplete creature. It was denied the power to enforce its own legislation. Thus, even though Congress could call for money from the states, it was forced to wait until the states chose to voluntarily comply. Hamilton noted that Congress, having "total want of *sanction* to its laws,"²¹⁰ made its resolutions mere recommendations which the states observe or disregard at their option.²¹¹

Not surprisingly, one of the paramount concerns of the Constitutional Convention was to provide Congress with the means to enforce its acts. For instance, delegate Sherman thought that the executive should be a mere extension of Congress, an agent of sorts, responsible for the enforcement of congressional mandates and accountable directly to the legislature.²¹² The original "Randolph Plan" went so far as to provide for the election of the executive by the legislature. This plan was eventually rejected, but it is worthy of note that the plan received majority approval throughout the Convention.²¹³

The final plan was that of a series of checks and balances.²¹⁴ As noted by one author, it was an attempt "to achieve a balance between efficiency and tyranny."²¹⁵ The point of this review is not

206. See Miller & Bowman, *supra* note 192, at 72.

207. H. COMMAGER, DOCUMENTS OF AMERICAN HISTORY 82 (5th ed. 1959).

208. At that time, Congress was the body of the Union. Accordingly, Congress was the only entity capable of acting on behalf of the United States. See H. HOCKETT, POLITICAL AND SOCIAL GROWTH OF THE UNITED STATES 246 (1933).

209. 3 R. HILDRETH, HISTORY OF THE UNITED STATES 46 (1982).

210. THE FEDERALIST, No. 2, at 186 (A. Hamilton) (B. Wright ed. 1961) (emphasis added).

211. THE FEDERALIST, No. 15, at 158 (A. Hamilton) (B. Wright ed. 1961).

212. See J. MADISON, DEBATES IN THE FEDERAL CONVENTION OF 1787, at 5 (G. Hunt, J. Scott eds. 1920); THE FEDERALIST, No. 15, at 157 (A. Hamilton) (B. Wright ed. 1961).

213. See generally E. DUMBAULD, THE CONSTITUTION OF THE UNITED STATES 255-63 (1968).

214. See Miller & Bowman, *supra* note 192, at 61-62.

215. *Id.* at 61.

to suggest that the present is bound by the ideas of the past. The recognition is simply one of perspective.

The United States is therefore a "metaphysical entity."²¹⁶ It exists only in constitutional theory, not as a definable physical entity. It is the sum of the Congress, the executive, and the judiciary. However, it is also a nation and a people. Legally, it is the creation of a government of delegated powers from the populace. It has a legal interest which it has a right to protect in the courts of law. Its interests may be governmental, proprietary, or foreign in nature. When threatened by another, a delineation of the rights of the United States vis-a-vis a citizen or corporation may not be overly complex. However, the respective branches of the United States may turn on one another. The interest of the United States in interbranch disputes becomes much more difficult to define. It becomes difficult, if not impossible, to bestow the status of the United States upon any one branch.²¹⁷ The great seal of the United States is not one banner, but three. Each branch is entrusted with its own shield to bear; its own piece of the constitutional pie. Therefore, in interbranch confrontations the United States may not have *any* role to play.²¹⁸

a. The Problem of Standing

Article III of the Constitution establishes as a condition precedent to litigation within the judicial branch a case or controversy which must exist before the court has jurisdiction over a particular dispute.²¹⁹ Beyond the limited constitutional "case or controversy" requirement, however, the Supreme Court has formulated certain providential standing requirements. The first requirement is that a plaintiff must demonstrate, through sufficient allegation, an "injury in fact."²²⁰ Second, the plaintiff must allege a causal

216. *Id.* at 63.

217. Miller and Bowman have advanced the argument that the United States simply has no interest in interbranch litigation. The President has an interest in maintaining executive privilege and Congress has an interest in seeing to the enforcement of its statutes. Therefore, "[t]he interest of 'the United States,' if anything, is the interest . . . of constitutional provisions and in adequate, responsive government." *Id.* at 67-68.

218. See *supra* notes 216-17 and accompanying text.

219. U.S. CONST. art. III, § 2; see *Baker v. Carr*, 369 U.S. 186, 204 (1962).

220. *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38-39 (1976); *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152 (1970). The requirement has two benefits; it not only serves to preclude unnecessary litigation but it also allows for the granting of narrow relief which will not be broader than is

link between the action of the defendant and the harm suffered,²²¹ which is nothing more than a logical nexus requirement. Finally, the alleged injury must be of a type "likely to be redressed by a favorable decision."²²² As a natural corollary to this prerequisite, a requirement that the alleged infringement be demonstrated as arguably within the zone of interests protected or regulated by the Constitution or by statute has often been included.²²³

The American judicial system allows for not only the initiation of suits by private individuals, but also by individuals acting in some form of official capacity, e.g., guardians ad litem or trustees in bankruptcy.²²⁴ Congressmen, as individuals and officials, have seized upon this concept and brought suits alleging an injury to their official capacity.²²⁵ Viewed as such, when the effectiveness of the Congress is impaired, the imputation of the injury to each congressman seems a logical extension. As a member of Congress, any diminution of Congress' interests has a pro rata impact upon a congressman's effectiveness as a legislator. Since his harm is only derivative from that of the parent body, the observation by the court in *Kennedy v. Sampson*²²⁶ that "the influence of any one legislator upon the political process is in great measure dependent upon the stature of the governmental branch of which he is a member" appears to be accurate.

Kennedy v. Sampson involved a request by Senator Kennedy for a declaratory judgment that a bill which he had voted for had become law in spite of a presidential pocket veto. Kennedy's standing was granted on the grounds that the indirect injury suffered by members of Congress were in fact a "derivative, but . . . nonetheless substantial"²²⁷ personal injury. The Court stated that

required by the facts of the controversy before the court. By stating overly broad holdings the Court only tends to unnecessarily bind itself to past decisions. Judicial decisions need only decide the controversy before the court and leave the remaining issues to be decided another day. See *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221-22 (1974).

221. See *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. at 41-42.

222. *Id.* at 38.

223. See *Harrington v. Bush*, 553 F.2d 190, 205 n.68 (D.C. Cir. 1977). The Supreme Court has continued to refer to the "zone of interest" requirement. See *Simon*, 426 U.S. at 39 n.19. This so-called fourth requirement has been severely criticized. See K. DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES* § 22.02-11 (1976).

224. See 3A J. MOORE, *FEDERAL PRACTICE* ¶ 17.18-20 (2d ed. 1974).

225. See *Harrington v. Bush*, 553 F.2d 190 (D.C. Cir. 1977) (Congressman Harrington sought an injunction to discontinue the use of secret funding and certain reporting provisions of the Central Intelligence Act of 1949 used to conceal illegal activities).

226. 511 F.2d 430, 436 (D.C. Cir. 1974).

227. *Id.* The court reasoned that to whatever extent the Congress itself was damaged, so too were the interests of all of its members. Article I, section 7 of the

when the powers of Congress were impaired, a concurrent diminution occurs to each congressman because his office confers a right to participate in the exercise of the powers of the institution.²²⁸

The recognition of the participatory interest of each congressman depends on the powers and interests of the Congress itself. Since Congress is not simply an enactor of laws, but has additional investigative and oversight functions, it would seem that congressmen could suffer a derivative injury to these powers as well. Although the courts have generally failed to expand the standing of congressmen so broadly,²²⁹ the point is simply that Congress, as well as its individual members, has a broad base of power upon which an "injury in fact" could be premised. Additionally, suits brought by individual congressmen are brought on behalf of the individual affected, not in the name of the United States.

The executive does not enjoy such a broad base of potential standing.²³⁰ When viewed within the narrow context of executive privilege, any assertions as to a particularized injury become quite dubious. As the enforcer of the laws of Congress, any particular interests peculiar to the executive become quite finite.

Constitution had previously been construed to provide that once a bill is passed by both houses and presented to the President less than ten days (excepting Sundays) before a *sine die* adjournment at the end of a session it does not become law if it is not signed by the President. The Pocket Veto Case, 279 U.S. 655 (1929). The theory is that because the President is prevented by the adjournment from returning the bill to Congress if he objects to the legislation, he may "pocket" it, the practical effect being the same as a formal veto. For a discussion of the "pocket veto" at issue in *Kennedy v. Sampson*, see Comment, *The Veto Power and Kennedy v. Sampson—Burning a Hole in the President's Pocket*, 69 NW. U.L. REV. 587 (1974).

228. 511 F.2d at 435-36.

229. The rejection of standing for a congressional plaintiff has generally been upon separation of powers grounds, for although Congress is the maker of the law, it is the executive who is entrusted with its execution. Accordingly, a congressman's standing exists *only* concerning the *pre-enactment* stage of legislation. See, e.g., *Harrington v. Bush*, 553 F.2d 190, 213-14 (D.C. Cir. 1977). This pre-enactment interest is only effected when the ability to enact legislation has been injured. See, e.g., *Harrington v. Bush*, 553 F.2d at 212-13. However, such a narrow reading completely disregards congressional investigation and oversight functions. Note that in none of these cases did the congressional plaintiffs bring suit in the name of the United States. Rather, the actions were only brought in the name of the individual litigants themselves.

230. The means whereby the legislative branch is able to interfere with the functions of the executive are far more limited. Additionally, the President does not share a reciprocal oversight function over the general operations of Congress.

First, the executive has the power to commence litigation which is expressly authorized by statute.²³¹ Second, the executive has an interest in protecting the proprietary interests of the United States.²³² Congress, lacking its own enforcement power, has entrusted the executive with the responsibility of protecting the property interests of the United States. Finally, largely through historical evolution, the executive has obtained a certain amount of autonomy over foreign affairs.²³³

b. The Political Question Doctrine

Even if a constitutional litigant manages to clear the standing threshold, he must still avoid having the dispute dismissed as involving a political question. The political question doctrine states that, *inter alia*, under the constitutional scheme of separation of powers, certain issues require resolution by the political branches of the government, not the judiciary.²³⁴ Accordingly, should a plaintiff present a political question to the courts, it should be dismissed as nonjusticiable. Under a closer examination, political questions consist of the issues which are committed by the text of the Constitution, either explicitly or implicitly, to the exclusive control of a coordinate branch.²³⁵

In connection with the political question doctrine, the courts

231. As the "faithful" executor of the laws, this power is quite obvious. One cannot faithfully execute the laws if they fail to commence prosecutions against those who violate them.

232. The protection of property notion has been stretched so far as to allow the President, through the Attorney General, to commence prosecutions for public nuisance. For example, *In re Debs*, 158 U.S. 564 (1895), granted a recognition of the United States interest in ensuring its ability to ensure the safe transportation of the mails. The Pullman Railroad Union, through certain officials, was ordered to discontinue the strike. An action was commenced against Debs for his failure to terminate the workers' strike.

233. For an expansive opinion on the strength of the President's own inherent Article II authority within the sphere of foreign affairs, see Justice Sutherland's opinion in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) (the office of the President is "the keeper of foreign affairs"). The President has his own inherent Article II powers within the purview of foreign affairs—a sort of built-in necessary and proper clause.

234. See *infra* notes 235-36 and accompanying text.

235. See Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 7-9 (1959); see also *Cooper v. Aaron*, 358 U.S. 1, 18-20 (1958); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803). There can be two possible situations giving rise to the political question doctrine. First, where the court determines that either the executive or the legislature has been granted exclusive jurisdiction for the resolution of the issue in the controversy by virtue of a constitutional provision. Second, where the executive or the legislature challenges the propriety of the actions of the other branch and the court determines that the co-equal branch has not exceeded the scope of its textually granted constitutional power. See generally *Baker v. Carr*, 369 U.S. 186, 211 (1962); Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 606 (1976). The political question doctrine is not the only nonjusticiable issue.

have also vacillated between the notion of exercising judicial self-restraint and acting as the final federal "umpire" in determining the propriety of the exercises of power by the other two branches.²³⁶ Merit can be found in either position. Besides creating a system of controversy, the founders envisioned a government held together by a series of checks and balances. This is a system which implies a degree of compromise. Two co-equal branches should not require the resolution of their difficulties by the third branch every time a dispute arises.²³⁷ Even when they do request the action of the judiciary, the courts should realize that not all controversies belong in the judicial system and dismiss those cases accordingly. On the other hand, as a branch with a "duty" to determine what the law is, the court has an obligation to resolve controversies which threaten the constitutional allocation of power.

D. Obstacles to a Restoration of a Balance of Power

The inability of Congress to restore a balance of power is due to two major factors: the concentration of power in the Presidency, coupled with a concurrent abdication of that power by Congress.

The founding fathers never envisioned the resulting growth of the Presidency. If anything, it was the fear of the legislature which concerned the framers the most. In the Federalist No. 48, Madison spoke of the dangers of tyranny inherent in the legislative branch.²³⁸ And, unlike Thomas Jefferson, Madison was unconcerned that the judicial branch might overstep its own boundaries.²³⁹ History has proved Madison wrong. Even the judicial branch has, in an ever-increasing fashion, sought additional power while at the same time Congress has continued to surrender those powers entrusted to it by the Constitution.²⁴⁰

236. *Baker v. Carr*, 369 U.S. 186 (1962) (recognition of the textual commitment doctrine as a constitutionally imposed judicial restraint on the power of review); *cf.* *United States v. Nixon*, 418 U.S. 683, 703-05 (1974) (it is the "duty" of the Court to act as the ultimate interpreter of the Constitution—a duty which should not be avoided merely because of a potential conflict between the co-equal branches). Professor Choper has advanced the argument that in federalism and interbranch litigation, any judicial intervention is improper. See J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* (1980).

237. 556 F. Supp. 150; *see supra* note 168.

238. See THE FEDERALIST No. 48.

239. See P. KURLAND, *supra* note 9, at 163.

240. *Id.* For example, the line of decisions stemming from *Lochner v. New*

Philip Kurland has outlined three judicially created constructions which have effectively enabled the executive branch to secure the dominant position among the supposedly co-equal constitutional branches.²⁴¹ The first judicial doctrine was that the power over foreign affairs did not derive from the Constitution itself, but from the very nature of the national government. It was not a delegated power, but rather, an inherent power of the Article II branch. This was the view of Justice Sutherland in *United States v. Curtiss-Wright Export Corp.*²⁴² The power was not a delegated power but an inheritance of the royal prerogative directly from our English antecedents. In the area of foreign affairs, the power is "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress. . . ."²⁴³

The second line of cases adding strength to the imperial presidency was the Court's licensing of the power of the national administration to completely occupy the field of government and regulation, practically ignoring the existence of state powers in this area. The expansion began with *United States v. Butler*,²⁴⁴ where the Court found the general welfare clause of the Constitution to constitute a substantive grant of power to Congress. The *Butler* decision chose the broader Hamiltonian construction of the clause, finding a separate authority granted by the clause to collect and spend money for the general welfare of the United States.

A subsequent expansion of the commerce clause power further enlarged the federal power to cover not only national, but most local business activities.²⁴⁵ Recent decisions have extended it to *all* commercial activity, regardless of any demonstration of the indi-

York, 198 U.S. 45 (1905) (judiciary sitting as a "super legislature"), and more recently, decisions such as *Roe v. Wade*, 410 U.S. 113 (1973) (where the Court is essentially drafting an abortion statute).

241. P. KURLAND, *supra* note 9, at 172.

242. 299 U.S. 304, 318-19 (1936). Such a conclusion is supported by both logic and necessity. However, it is the continued abuse of this power, coupled with other expansions, which has jeopardized the constitutional scales.

243. *Id.* at 316-20.

244. 297 U.S. 1 (1936) (the Court was interpreting the general welfare clause — "Congress shall have power to lay and collect taxes . . . to pay the debts and provide for the common defense and general welfare of the United States." U.S. CONST. art. I, § 8, cl. 1).

245. *Wickard v. Filburn*, 317 U.S. 111, 128 (1942) (the Court found that even "[h]ome-grown wheat . . . competes with wheat in commerce."); *Katzenbach v. McClung*, 379 U.S. 294, 305 (1964) (Ollie's Barbecue, a small family run restaurant was found to be a business "plainly appropriate in the resolution of what the Congress found to be a national commercial problem of the first magnitude.").

vidual transactions with interstate commerce.²⁴⁶ This expansion has left the federal government free to regulate practically anything. Thus, a nation of delegated powers has evolved into a practical sovereignty.

Finally, there is the massive amount of delegation. The delegation primarily involves a willing transfer of authority from Congress to the executive. The transfer of power has grown to such a degree that Congress has authorized the President to draft and enact legislation, subject only to a possible congressional veto.²⁴⁷ The need for delegation has risen with the growth of bureaucracy. However, continued delegations to independent agencies, with little or no congressional guidance, has nonetheless been sustained by the courts. For example, the Federal Communications Commission was delegated the authority to license radio stations whenever, in the view of the Commission, it was in the "public convenience, interest or necessity" to do so.²⁴⁸ Similarly, the Interstate Commerce Commission was authorized to set rates as long as they were "just and reasonable."²⁴⁹ This continued congressional abdication of its constitutional powers only serves to further strengthen the executive and weaken the legislature. Thus, through abdication of its powers and a concurrent strengthening of the executive's power, Congress loses more and more of its ability to correct the constitutional imbalance.

E. Avenues of Possible Congressional Remedies

Congress was intended to be dominant.²⁵⁰ However, a form of constitutional Darwinism has decided otherwise. Political office attracts ambition and that ambition can only be checked by the ambition of another.²⁵¹ Unchecked, the evolution of our nation, along with an evolution of the constitutional balance of power, has created the imperial presidency. But the shift of constitu-

246. See *Perez v. United States*, 402 U.S. 146 (1971) (extension of commerce clause to loan sharking activity occurring solely within one state).

247. Reorganization Act of 1977, Pub. L. No. 95-17, 91 Stat. 29 (1977). The continuing spiral growth of governmental bureaucracy has forced Congress to increasingly delegate more and more responsibility to administrative agencies under the executive branch.

248. *Federal Radio Comm'n v. Nelson Bros.*, 289 U.S. 266, 285 (1933) (the agency is currently named the Federal Communications Commission).

249. *Interstate Commerce Comm'n v. Illinois Cent. R.R.*, 215 U.S. 452, 476 (1910).

250. See *supra* notes 9-23 and accompanying text.

251. A form of unwritten, human checks and balances. See *supra* note 2 and accompanying text.

tional power is not yet fatal. Congress still has available potential avenues of action to reset the constitutional scale. The shift did not occur overnight and an immediate remedy is simply not possible.²⁵² However, this is not an excuse for congressional inaction. There are at least three courses of conduct available to Congress to enable it to restore the constitutional balance against the expansion of the Presidency. The first avenue concerns strengthening its own branch, the second concerns checking the executive branch, and the third concerns a restoration of the notion of compromise. The three are not mutually exclusive, but rather, necessarily dependent on one another for their success.²⁵³

Congress needs to begin by strengthening its *own* internal powers and legal counsel. First, Congress needs an individual capable of fully representing congressional interests in the courts.²⁵⁴ History has demonstrated that in times of interbranch conflict, the Attorney General cannot be counted on; his ultimate loyalty tends to lie with the President.²⁵⁵

Second, Congress should create a more centralized mechanism to keep Congress informed of exactly how the executive and judicial branches are enforcing its laws.²⁵⁶ One problem facing current congressional legislation is that, once enacted, legislation tends to drift completely out of Congress' grasp. Moreover, once out of reach, Congress permits the executive to distort the legislature's intended manner of enforcement and the judiciary to independently interpret its spirit and purpose.²⁵⁷ Finally, if Congress

252. Jefferson wrote to Madison shortly before Washington's inauguration, stating "[t]he tyranny of the legislature is really the danger most to be feared, and will continue to be so for many years to come . . . [but] [t]he tyranny of the executive power will come in its turn, but at a more distant period." Jefferson to Madison, Mar. 15, 1789, quoted by ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 1, ch. 15. For a study on the growth of the imperial presidency see SCHLESINGER, *supra* note 1.

253. Reshifting the balance of constitutional power is not a task for monomaniacs, i.e., single minded individuals. The changes required two hundred years to progress to this point and any attempted restoration of a balance of power will require an examination and pursuit of all possible remedies.

254. Congress has already taken the initial step of establishing the office. The current General Counsel to the Clerk of the House is Stanley M. Brand. Congress has also utilized the General Accounting Office as an effective means of congressional oversight. However, to counter the executive, the legal counsel's office requires supplementation and centralization of all congressional actions in order to offset the power of the Department of Justice.

255. See *supra* notes 94-98 and accompanying text (he is, of course, an executive cabinet officer who serves at the pleasure of the President).

256. See P. KURLAND, *supra* note 9, at 196-97. "This function could be performed by the office of Congressional Legal Counsel. Congress would then be in a position to redesign or restructure the governing legislation if its enforcement does not truly conform to the legislative purpose and intent at the time of enactment." *Id.* at 197.

257. The area of preemption, for example, has often turned into an area where

is dissatisfied with the manner in which the Attorney General is prosecuting, or failing to prosecute, its contempt citations (due to a claimed ambiguity or any permissible discretion in the statute itself), Congress should simply redraft 28 U.S.C. § 194 so that it *does not permit any discretion*.²⁵⁸

Secondly, Congress needs to find methods of effectively checking the growth of the executive power. Always available, yet seldom utilized, is the power of impeachment—unquestionably the most awesome, though infrequently used, constitutional power vested in the legislature.²⁵⁹ Stripped of its complexities, it is basically a political action, premised in legal terminology, aimed at the removal of an official of the federal government. The problem with the remedy is that it is an incredibly blunt instrument with an ultimate sanction allowing no compromise. The point is that, although not appropriate in all circumstances, the power *does exist*. Yet the power is only to be implemented in extreme emergencies. This remedy is of no value to the daily confrontations between the two branches.

Congress has debated whether or not to legislate on executive privilege.²⁶⁰ In 1973, the Senate Government Operations Committee reported a bill requiring all requested information to be disclosed unless the President, through a written order, required the information to be withheld. The bill also provided for oversight of the President's decision and for enforcement procedures.²⁶¹ The bill passed in the Senate, and was sent to the House Government Operations Committee. The Committee was sharply divided over

the *courts* are the ones deciding what *Congress* meant through its legislation. *See, e.g., Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 147 (1963) (the Court was unable to find an "unambiguous congressional mandate"); *Campbell v. Hussey*, 368 U.S. 297 (1961) (finding an intention by Congress to preempt concurrent state regulation of the methods of labeling tobacco).

258. Congress is discussing this possibility again. "At the very least, says one source on the Judiciary Committee, Congress is likely to revise the law so that an attorney general has no choice but to follow through on a contempt-of-Congress citation — even if the person cited is a fellow member of the administration." *Again, Executive Privilege*, *Newsweek*, Mar. 7, 1983, at 18. Unfortunately, Congress has yet to act.

259. Madison realized both the need and the power of impeachment. Corruption or loss of capacity in a President was "within the compass of probable events . . . Either of them might be fatal to the Republic." *See DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES* 417-19 (C. Tansill, ed. 1927).

260. *See GUIDE TO CONGRESS*, *supra* note 21, at 152.

261. *Id.*

the wisdom of the legislation and it was never brought up on the House floor.²⁶²

Those in support of the legislation felt it provided access to information "in a way which [balanced] the needs of the executive . . . with the needs of the Congress It [gave] neither branch a veto over the desires of the other, but [placed] the burden of justifying any denials of information on the President."²⁶³ Those who opposed the bill did so for diametrically opposed reasons. The Justice Department found the bill overly restrictive: "A claim of executive privilege . . . is essentially a presidential constitutional responsibility; the form in which it is to be exercised therefore is to be determined by the President and not by the Congress."²⁶⁴

A polar extreme apart, the other faction saw the legislation as *recognizing*, not restricting, executive privilege.²⁶⁵ All three arguments contain some merit, but the entire question may be moot because such legislation may be an unconstitutional encroachment by the Congress into the executive sphere.²⁶⁶

At the risk of sounding inconsistent, as a final avenue of exploration, Congress and the President should not forget the magic of the spirit of compromise.²⁶⁷ Our constitutional government, as reminded by Justice Jackson, "enjoins upon its branches separateness but *interdependence*, autonomy but *reciprocity*."²⁶⁸ Unfortunately, Congress, and even the executive, have increasingly relied on the courts as the forum to review the validity of each other's actions.²⁶⁹ Such a continued proliferation of litigation will undoubtedly have a number of effects upon the delicate constitutional separation of powers.

262. The Committee feared that legislation on executive privilege would implicitly acknowledge the existence of the privilege in law. *Id.*

263. *Id.*

264. *Id.* Attorney General Richard D. Kleindienst, during a hearing on April 10, 1973, stated his view that, "[y]our power to get what the President knows is in the President's hands." *Id.* If not constitutionally correct, the statement is, if nothing more, a practical assessment of the situation.

265. House Committee Chairman Chet Hatfield stated that "[t]his would be the first time that the [executive privilege] doctrine would find its way into the statute books." See GUIDE TO CONGRESS, *supra* note 21, at 152.

266. The Supreme Court has expressly recognized executive privilege as an inherent power of the Presidency. However, the Court also expressly failed to render any determination on the validity of the privilege when confronted with a congressional demand for information. *United States v. Nixon*, 418 U.S. at 712 n.19. See *supra* note 144 and accompanying text.

267. Quite simply, there is a time to remain strong and unyielding and a time to compromise. Both are admirable qualities; they are *not* mutually exclusive.

268. 343 U.S. at 635 (Jackson, J., concurring) (emphasis added).

269. See Note, *Congress Versus the Executive: The Role of the Courts*, 11 HARV. J. ON LEGIS. 352 (1974).

First, reliance on the courts as an arbiter for every interbranch dispute will not only enlarge the power of the judiciary but also reduce the powers of Congress. Ultimately it will only serve to increase the politicization of the courts, requiring the determination of essentially *political*, not legal questions.²⁷⁰ Second, it will only serve to increase the separation between the executive and legislative branch, essentially forcing more formalistic relationships between the two branches, making compromise even more difficult. "The legal brief may become the substitute for the negotiated compromise."²⁷¹

Continued reliance on the judicial branch to enforce congressional decisions will also cause the transfer of Congress' powers. This effect would be twofold: first, it would strengthen the judiciary; second, it would strengthen the executive, in that it would relate a feeling of weakness from Congress because of a reliance on the courts to enforce, or at least pursue, actions the Congress lacked the will to enforce.

Finally, judicial reliance would only serve to further fragment an already divided Congress.²⁷² The process allows a junior legislator to break ranks and turn to the judicial branch for a remedy for his own personal grievance. Furthermore, should conflict arise within the Congress on the issue, it would make almost impossible the task of the courts in determining which party truly represented the legislative branch, in addition to the obvious dissension it would cause between the already divided respective congressional factions.

VI. CONCLUSION

The constitutional allocation of powers is reaching a point of irreparable imbalance. The foundations of our representational government are slowly giving way under the increasing pressure of the imperial presidency. The founding fathers feared such a consolidation of power. Rather than establishing a parliament, a king, or a czar, the founders entrusted the care of our nation to a

270. *Id.* at 400. Cf. Comment, *Judiciary's Role in Mediating Political Convention Delegate Seating Disputes*, 86 HARV. L. REV. 218, 223 (1972). Perhaps this is what Justice Douglas feared when he stated that the courts should not become ombudsmen in disputes between Congress and the executive. *Gravel v. United States*, 408 U.S. 606, 639-40 (1972) (Douglas, J., dissenting).

271. See Note, *supra* note 269, at 401.

272. See *id.*

constitutional system of separation of powers. Not merely intended as a parchment barrier, the doctrine was intended to be viable and evolving. By establishing a system of checks and balances, the feared growth of tyranny in one branch would constantly be checked and kept in constitutional balance by the remaining two branches. The power to guarantee this balance was not intended to come solely from a parchment known as the Constitution; it was only to serve as a set of rules, a system of allocation of authority and responsibility to the respective players. Rather, the drafters entrusted the governing of a nation to human nature and provided a means to check the unharnessed ambition of one individual against other individuals in differing branches of government.

Congressional inertia has led to a distortion of the roles of both the President and the United States Attorney General. It has given rise to the imperial presidency, an office increasingly taking on extraconstitutional dimensions. Some of the expansions of the office's power occurred through necessity. The increasing bureaucratization of our governmental system coupled with the growing importance of global affairs has required a need for the United States to be able to act rapidly and affirmatively through a single voice. However, this necessary increase in stature does not justify the continued defiance of the President toward the Congress.

In the middle of the struggle between the executive and legislative branches is the Attorney General. An individual of both political and legal loyalties, he has unfortunately too often placed his primary loyalty with the former and neglected the latter. The Attorney General has lost perspective of his proper constitutional role. While owing allegiance to both the President and the United States, in times of conflict he owes a *duty* to the interests of the United States *first*, and a *loyalty* to the President *second*.

Unfortunately, the Attorney General is part of a political power base. Our government today has distorted constitutional duty because of political loyalty. Accordingly, any correction of his role must come from the Congress itself. As a creature of statute, the office of Attorney General is realistically only open to legislative remedy.

Justice Jackson stated his warnings over thirty years ago, that "[i]f not good law, there was worldly wisdom in the maxim attributed to Napoleon that 'The tools belong to the man who can use them.' We [the court] may say that power . . . belongs in the hands of Congress, but only Congress itself can prevent power

from slipping through its fingers.”²⁷³

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273. 343 U.S. at 654. The author would like to thank Professor Richard H. Seeburger for his friendship, guidance, and assistance in the preparation of this article. All viewpoints and opinions, however, should be attributed solely to the wanderings of the author.

