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PARADISE LOST: THE CLINTON ADMINISTRATION AND THE EROSION OF EXECUTIVE PRIVILEGE

JONATHAN TURLEY*

INTRODUCTION

In *Paradise Lost*, Milton once described a “Serbonian Bog . . . [w]here Armies whole have sunk.”¹ This illusion could have easily been taken from the immediate aftermath of the Clinton crisis. On a myriad of different fronts, the Clinton defense teams advanced sweeping executive privilege arguments, only to be defeated in a series of judicial opinions. This “Serbonian Bog” ultimately proved to be the greatest factor in undoing efforts to combat inquiries into the President’s conduct in the Lewinsky affair and the collateral scandals.² More importantly, it proved to be the undoing of years of effort to protect executive privilege from risky assertions or judicial tests.³ In the course of the Clinton litigation, courts imposed a series of new

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1. JOHN MILTON & ISAAC ASIMOV, ASIMOV’S ANNOTATED *Paradise Lost* 88 (1974).

2. I obviously come to this subject with established views. I have been critical of the Clinton administration’s use of executive privilege arguments and its underlying theories supporting these assertions in both the impeachment context and other contexts. See, e.g., Jonathan Turley, *Checking the Executive Pulse: Mr. President, Where Is Thy Blush?; Impeachment: For Censure to Work, Clinton Would Need to Have the Capacity to Feel Shame*, L.A. TIMES, Nov. 19, 1998, at B9; Jonathan Turley, *Clinton Maneuvers Threaten His Office*, NAT’L L.J., Feb. 23, 1998, at A19 [hereinafter *Clinton Maneuvers*]; Jonathan Turley, *Guarding the King, Not His Secrets*, LEGAL TIMES, Feb. 2, 1998, at 27 [hereinafter *Guarding the King*]; Jonathan Turley, *Nothing Bars Questioning the President’s Bad Ideas; Executive Privilege: The Right to Refuse to Divulge How FALN Clemency Decision Was Made Is Not Absolute, or Unwarranted Here*, L.A. TIMES, Sept. 27, 1999, at B7 [hereinafter *Nothing Bars Questioning*]; Jonathan Turley, *Rule of Law: Praetorian Privilege*, WALL ST. J., Apr. 27, 1998, at A23 [hereinafter *Praetorian Privilege*]; Jonathan Turley, *The President and the Damage Done; Legal Costs of Clinton’s Defense Outweigh Financial Costs*, LEGAL TIMES, Apr. 20, 1998, at 23.

3. It has been suggested by former White House Counsel Abner Mikva that the administration had no alternative but to litigate these privileges. See Jim Oliphant, *Losing Privilege: A Scandal-Scarred Legacy for Future Presidents: White House Counsel Without a Shield*, LEGAL TIMES, Mar. 6, 2000, at 20 (reporting Mikva’s statements that because prior attorney-client rulings did not allow the presidency to function as it should, the Clinton administration was forced to litigate). Such a statement is manifestly at odds with the more cautious approach of prior administrations. See *infra* notes 15, 135-152 and accompanying text (discussing the historical use of executive privilege). The White House is never compelled to litigate executive privilege on questionable grounds. An administration could waive privilege as to some of the information and still preserve objection for future cases. Unlike court edicts, such waivers do not bind future administrations. Ultimately, Mikva’s view proved highly imprudent in an acutely sensitive and protected area.

and restrictive decisions that ranged from a unanimous ruling of the Supreme Court that the president is susceptible to civil suit during his term,⁴ to the rejection of the “protective function privilege” for Secret Service agents,⁵ to the loss of privilege protections for White House staff in certain circumstances.⁶ This Article explores the intriguing question of what can be done in the area of executive privilege in the aftermath of Clinton’s failed assertions, or rather, what remains for the next occupant of the Oval Office. Obviously, the rulings against the Clinton administration will stand until challenged. Moreover, there is little likelihood that such challenges would succeed in the near future, and there is seemingly little incentive for future administrations to challenge the rulings on the controversial grounds chosen by the Clinton administration. Therefore, it may be more useful to discuss how future administrations can avoid such privilege conflicts by addressing the underlying causes and mistakes that led to these unsuccessful claims and the ultimate narrowing of the power of executive privilege.

Executive privilege and attorney-client privilege became the main battlegrounds in the struggle between President Clinton and a variety of legal adversaries, ranging from congressional committees to the Independent Counsel. It is somewhat ironic that the most enduring legacy of the Clinton administration may prove to be its effect on the law of executive privilege. After all, the First Couple sharpened their political teeth during the 1960s and 1970s opposing the “imperial presidency” of President Nixon.⁷ Yet it would be President Clinton who

4. *Clinton v. Jones*, 520 U.S. 681, 692 (1997) (finding that the President’s argument that “‘in all but the most exceptional cases,’ . . . the Constitution affords the President temporary immunity from civil damages litigation arising out of events that occurred before he took office—can not be sustained on the basis of precedent”).

5. *See In re Sealed Case*, 148 F.3d 1073, 1079 (D.C. Cir. 1998) (per curiam) (holding that the Secret Service “failed to carry its heavy burden . . . of establishing the need for the protective function privilege” that would have protected Secret Service agents from having to testify regarding information obtained while performing their protective function in physical proximity to the president).

6. *See In re Grand Jury Proceedings*, 5 F. Supp. 2d 21 (D.D.C.) (prohibiting Deputy White House Counsel Bruce Lindsey from using attorney-client privilege to withhold information about possible criminal misconduct by the President), *aff’d in part, rev’d in part sub nom. In re Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998) (per curiam); *see also In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 925-26 (8th Cir. 1997) (finding that the First Lady could not rely on attorney-client privilege in meetings in which both private and government counsel participated).

7. Bill Clinton protested the Vietnam War as a student in Britain, while Hillary Clinton worked as a staff attorney on the House committee that voted to impeach Nixon. Thomas B. Rosenstiel, *Richard Nixon: 1913-1994; Clinton Plays an Ironic Role for Nixon Funeral; Presidency: Two Decades Ago, He Protested the War While Hillary Rodham Aided Watergate Probe. Now the White House Is Planning Rites for a Respected Adviser*, L.A. TIMES, Apr. 25, 1994,

would help rewrite this area of constitutional law by advancing and losing a series of privilege assertions.⁸

While assertions of executive privilege in some form can be traced back to George Washington,⁹ the modern doctrine of executive privilege was the creation of the Supreme Court's 1974 decision in *United States v. Nixon*,¹⁰ where the Court compelled President Richard Nixon to surrender audio tapes from the White House that were relevant to the Watergate scandal.¹¹ Prior to 1974, however, presidents had struggled over the disclosure of information with both the

at A16; see also Turley, *Clinton Maneuvers*, *supra* note 2, at A19 (noting the irony of Bill Clinton's criticism of the Watergate scandal in light of his own "sweeping" assertions of executive privilege).

8. In addition to invoking privileges in proceedings involving allegations of misconduct by the President, the First Lady, or high-ranking officials, the Clinton administration aggressively asserted executive authority or discretion in a host of other areas. For example, the administration objected to the application of the Privacy Act to the White House. See, e.g., Jonathan Groner, *A Matter of Privilege: The Latest Battle*, LEGAL TIMES, May 22, 2000, at 7 (reporting Deputy Assistant Attorney General William Schultz's argument that the Privacy Act does not apply to the White House); John Mintz, *Judge: White House Broke Law; Release of Willey Letters Seen as Privacy Act Violation*, WASH. POST, Mar. 30, 2000, at A1 (reporting the assertion by White House Counsel Beth Nolan "that releasing the Willey notes was 'fully consistent with the law and the Justice Department's advice' that White House files are not covered by the Privacy Act"). See generally United States House of Representatives, Comm. on Gov't Reform, Subcomm. on Criminal Justice, Drug Policy, and Human Resources (Sept. 8, 2000) (Federal Document Clearing House) (prepared statement and testimony of Jonathan Turley, J.B. & Maurice Shapiro Professor of Public Interest Law, George Washington University Law School) (discussing "the presidency and the Privacy Act"). The assertion that the Privacy Act does not apply to the president was made in court in defense of the President's release of letters to discredit Kathleen Willey, who accused the President of molesting her in the Oval Office when she came to discuss a paid position with the White House. See Mintz, *supra*, at A1.

The Clinton administration has also adopted extreme interpretations of privilege under the Military and State Secrets Privilege. See 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE Std. 509-1 (Joseph M. McLaughlin ed., 2d ed. 2000) ("The government has a privilege to refuse to give evidence and to prevent any person from giving evidence upon a showing of reasonable likelihood of danger that the evidence will disclose a secret of state or official information . . ."). The "Area 51 litigation" provides an example. In the Area 51 litigation, current and former workers of a facility located ninety miles northwest of Las Vegas alleged that they may have been exposed to extremely harmful levels of hazardous wastes. Jonathan Turley, *Through a Looking Glass Darkly: National Security and Statutory Interpretation*, 53 SMU L. REV. 205, 210-13 (2000). In response to discovery requests, the Air Force asserted the "state secrets privilege." *Id.* at 215. On September 29, 1995, President Clinton issued a presidential determination that exempted from public disclosure any information relating to Area 51 that had been classified by the Air Force. *Id.* at 217.

9. See *infra* notes 136-139 and accompanying text (discussing President Washington's use of executive privilege).

10. 418 U.S. 683 (1974).

11. *Id.* at 713-14.

judicial and legislative branches.¹² Yet the privilege assertions made by past presidents are strikingly different from the Clinton assertions in two important respects. First, while most prior administrations studiously avoided court tests of privilege claims, the Clinton administration used privilege arguments comparably freely in litigation.¹³ The result of this strategy may prove to be markedly negative for future administrations. Second, the Clinton administration used privilege arguments in controversies that were sharply removed from areas of official conduct or matters of state.¹⁴ Where prior administrations had almost exclusively raised privilege arguments with regard to official duties,¹⁵ the Clinton administration aggressively pursued the application of privileges in matters relating to the President's private conduct. This further accelerated the loss of privilege protections, as even conservative judges who would normally gravitate in favor of presidential powers found the Clinton administration's claims lacking in legal substance and constitutional support.¹⁶

12. See MARK J. ROZELL, EXECUTIVE PRIVILEGE: THE DILEMMA OF SECRECY AND DEMOCRATIC ACCOUNTABILITY 37-48 (1994) (discussing the use of executive privilege until the Nixon administration).

13. The Clinton administration invoked privilege repeatedly in congressional and judicial proceedings involving allegations of misconduct by either the President, the First Lady, or high-ranking officials. See *supra* notes 3-8 and accompanying text.

14. See *supra* note 8 (providing examples from the wide array of privilege claims asserted by this President).

15. For example, in the nineteenth century, James Madison withheld information regarding French trade restrictions against the United States. ROZELL, *supra* note 12, at 38. President James Monroe "withheld information from Congress regarding the U.S. takeover of the Florida territory." *Id.* President Andrew Jackson refused to divulge information concerning U.S. negotiations with the Republic of Buenos Aires. *Id.* In the 20th century, President William McKinley withheld from the Senate information on a War Department investigation of expenditures of Cuban funds. *Id.* at 42. Despite a disclosure request from the Senate, President Calvin Coolidge kept confidential details on companies being investigated by the Bureau of Internal Revenue. *Id.* at 42-43. The Eisenhower administration invoked the privilege over forty times, often in relation to the army-McCarthy hearings. *Id.* at 44-45.

16. It is notable that the most damaging rulings came out of the Court of Appeals for the D.C. and Eighth Circuits—home to some of the country's most conservative jurists. See, e.g., *In re Sealed Case*, 148 F.3d 1073, 1074 (D.C. Cir. 1998) (per curiam) (refusing to recognize a protective function privilege for Secret Service agents subpoenaed to testify before a grand jury); *In re Sealed Case*, 121 F.3d 729, 734 (D.C. Cir. 1997) (ordering the *in camera* review of certain withheld documents asserted as privileged by the White House in the investigation of former Secretary of Agriculture Michael Espy); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 925-26 (8th Cir. 1997) (reversing and remanding an order of the district court that denied the Office of the Independent Counsel's motion to compel the production of documents subpoenaed by a federal grand jury investigating the alleged Whitewater scandal). Judges who are known to be highly deferential to presidential power were given a series of executive privilege assertions that were simply beyond the pale and impossible to justify. It is an indication of the extreme interpretations of the Clinton administration that these and other negative opinions were written by judges like District

It will fall on the next president to reestablish clear guidelines for privilege assertions and to restore to the Office of the President a degree of luster after years of ignoble scandal.¹⁷ Yet it is important not to overstate the practical effect of Clinton's privilege assertions on future administrations. The Clinton administration unsuccessfully argued extreme assertions of privilege that hopefully few presidents will find necessary to make. Clinton attempted to exercise privilege to refuse evidence requested by another governmental branch in a criminal investigation¹⁸ and to stymie a civil lawsuit stemming from his conduct as a private citizen before taking office.¹⁹ Few presidents have ever faced such scandals, and none but Nixon felt the need to invoke executive privilege in such a context. On some level, these rulings simply confirmed the view of some academicians that over the years executive privilege has been artificially inflated.²⁰ There will clearly be practical changes in how White House meetings occur and in the willingness of some staffers to take detailed notes on some subjects.²¹ The most significant impact on future administrations, how-

Judge Norma Holloway Johnson and appellate judges Douglas Ginsburg, Raymond Randolph, and Stephen Williams—jurists who would normally be expected to favor such arguments. See, e.g., *In re Sealed Case*, 148 F.3d at 1074 (per curiam opinion of Judges Ginsburg, Randolph, and Williams affirming Judge Norma Holloway Johnson's rejection of the protective function privilege).

17. Shortly before this Article went to print, George W. Bush was inaugurated as the 43rd President of the United States. Arguments in this Article, however, were not written with the expectation of either a Gore or Bush administration.

18. See *In re Sealed Case*, 116 F.3d 550, 582 (D.C. Cir. 1997) (denying the White House's attempt to exercise privilege to withhold from criminal investigators documents concerning the White House's initial investigation of former Secretary of Agriculture Michael Espy).

19. See *Clinton v. Jones*, 520 U.S. 681, 684 (1997) (rejecting Clinton's argument that the president is immune to civil damages liability arising out of actions occurring before his term began). In some cases, the use of privilege arguments appeared to serve tactical interests in litigation rather than true constitutional purposes. See Mark J. Rozell, *Executive Privilege and the Modern Presidents: In Nixon's Shadow*, 83 MINN. L. REV. 1069, 1125 (1999) (stating that the "White House [made] efforts to obstruct and delay for the sake of some perceived political advantage [and such efforts] cynically undermined both the privilege and the principle"); Turley, *Clinton Maneuvers*, *supra* note 2, at A19 (discussing the Clinton administration's use of litigation where "[t]he unstated policy has been to defuse or settle any conflicts, to avoid restricting future administrations with judicial decisions").

20. See, e.g., RAOUL BERGER, *EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH* 1 (1974) (prophesying that "[e]xecutive privilege—the President's claim of constitutional authority to withhold information from Congress—is a myth" (footnote omitted)); Louis Fisher, *Invoking Executive Privilege: Navigating Ticklish Political Waters*, 8 WM. & MARY BILL OF RTS. J. 583, 583 (2000) (concluding that the "scope of presidential authority" in the realm of executive privilege "has been greatly exaggerated").

21. One of the most significant losses was the determination that White House legal aides do not share the same privileges as private counsel. See *In re Lindsey*, 158 F.3d 1263, 1266 (D.C. Cir. 1998) (per curiam) (finding that attorneys in the Office of the President

ever, is the loss of a basis for negotiation and of the ability to essentially bluff in struggles over the production of documents. What was once a matter of debate is now a certainty—to the disadvantage of future administrations.²²

The Clinton administration's assertions of privilege were not only unconvincing; they also threatened core values of good government. Underlying these cases are fundamental questions about the appropriateness of governmental employees working in areas of the personal interest of the First Couple or resisting efforts to investigate criminal conduct. Particularly in the first five years of the administration, there was little discernible effort to ensure that White House personnel were serving the interests of the presidency and not the interests of the President as an individual.²³ This lack of division created the very conditions that led to the overbroad assertions and the many errors of judgment committed by White House personnel. It is for this reason that the next president would be well-served to implement operational changes that would protect executive privilege by reducing the number of circumstances in which it would be needed.²⁴

Discussions of executive privilege often tend to be somewhat detached from the underlying causes or circumstances for its assertion. To understand the future significance of executive privilege, one must look not to the internal conflicts within the first three Articles of the Constitution, but to the internal workings of the White House and its staff. Specifically, the next administration should look closely at the role of the Secret Service, the White House counsel, the first lady,

are "government employees doing government business, and neither legal authority nor policy nor experience suggests that a federal government entity can maintain the ordinary common law attorney-client privilege to withhold information relating to a federal criminal offense"). These aides, however, still remain protected by executive privilege under a variety of prior decisions. *See id.* at 1278 (holding that although a government employee could not claim traditional attorney-client privilege "he continues to be covered by the executive privilege to the same extent as the President's other advisers"). *See generally In re Sealed Case*, 116 F.3d 550, 557 (D.C. Cir. 1997) (per curiam) (citing prior cases where executive officials have claimed numerous privileges "to resist disclosure of information the confidentiality of which they felt was crucial to fulfillment of the unique role and responsibilities of the executive branch of our government").

22. In the short term, for example, this loss of bargaining position will be felt in the daily struggle with congressional oversight committees.

23. For example, at a grand jury proceeding, Bruce R. Lindsey, Deputy White House Counsel and Assistant to the President, declined to answer questions relating to the President's possible misconduct in the Monica Lewinsky matter, which was investigated as part of Starr's Whitewater inquiry. *In re Lindsey*, 158 F.3d at 1267.

24. Some of the areas in need of reform obviously extend beyond simple problems with executive privilege and touch on a host of other issues ranging from attorney-client privilege to nepotism. These will likely remain high-risk areas after the Clinton administration and are naturally the subject of this Article.

and, ultimately, the president himself in the area of executive privilege. For better or worse, the next president has the opportunity to make some significant and highly beneficial changes in the wake of the Clinton crisis. A new legacy can be established that reduces past dependence on executive privilege and defines the underlying legal relationships and communications within the Executive Office of the President. Significant questions of public policy lurk beneath the surface of these issues. While these ethical and constitutional problems were often presented in raw partisan terms during the Clinton crisis, their origins pre-date the Clinton administration and only became magnified during the crisis. Both the legislative and executive branches can now return to these questions outside of the partisan context of an impeachment to seek reasonable and positive changes. This Article offers only a brief treatment of four issues relevant to the future of executive privilege: the role of the Secret Service, the White House counsel, the first lady, and the chief executive. There are obviously a host of insular issues that can and should be addressed by the incoming administration. However, this Article primarily seeks to show that, like more conventional subjects for transition teams, this is an area that warrants comprehensive and deliberate reform. Before the next president sets out a new course in federal policies, he should direct his transition efforts, in part, to repairing damage to the presidency itself. It may prove the most defining moment for the next president and the most lasting reform for his administration.

I. LIVING WITHIN CONSTITUTIONAL MEANS: FOUR AREAS OF REFORM FOR THE NEXT PRESIDENT

A. *The Role of the Secret Service*

The most immediate area to address in the new administration may be the role of the Secret Service. During the Clinton crisis, the administration attempted to establish a new privilege that would have barred a federal grand jury from acquiring evidence from Secret Service personnel.²⁵ Legislation creating such a protective function privi-

25. See *In re Sealed Case*, 148 F.3d 1073, 1074 (D.C. Cir. 1998) (per curiam). See generally Peter Baker, *Clinton's Trust in Agents Evolves; Despite Testimony, Secret Service Has Not Been Pushed Away*, WASH. POST, July 19, 1998, at A6 (discussing the possible ramifications of compelling Secret Service agents to testify against a president); Peter Baker, *Starr Subpoenas Top Clinton Agent; 6 Other Secret Service Officers Summoned*, WASH. POST, July 15, 1998, at A1 (discussing the move by Starr to subpoena Secret Service agents and the order compelling those agents to testify).

For the purpose of full disclosure, I served as counsel to four United States Attorneys General who filed briefs in opposition to the protective function privilege and appeared before the Court of Appeals in that case. The four attorneys general were William Barr,

lege has been drafted and may be reintroduced after the November election.²⁶ The next president would serve a great public interest by renouncing efforts to create a privilege that would bar testimony of Secret Service agents in criminal cases.

While personal privileges, such as the attorney-client privilege, may be claimed by a president as an individual, assertions of executive privilege have been confined to the realm of executive functions and duties based on Article II of the Constitution.²⁷ Privileges within the executive branch are both narrow in scope and narrowly construed in cases.²⁸ Both the testimonial and nontestimonial privileges serve a

Griffin Bell, Edwin Meese, and Dick Thornburgh. See Peter Baker, *Assassination Risk Cited in Ex-Agents' Brief to Block Queries*, WASH. POST, June 16, 1998, at A9; *Former AGs Offer Pointed Advice*, LEGAL TIMES, June 1, 1998, at 9. I also served as a legal analyst in media coverage in this area. See, e.g., *Meet the Press: Michael Leibig, Leon Panetta, Jeff Connaugh, Jonathan Turley and Stuart Taylor Discuss Ken Starr's Investigation of President Clinton* (NBC television broadcast, July 19, 1998) (discussing Ken Starr's subpoena of Secret Service agents and what information he hoped to gain from their testimony); *The Newshour with Jim Lehrer: Starr vs. the Secret Service* (MacNeil/Lehrer television broadcast, July 15, 1998) (offering differing viewpoints on the propriety of Kenneth Starr's issuance of seven subpoenas to Secret Service agents and the court order mandating their testimony).

26. Secret Service Protective Privilege Act of 1999, S. 1360, 106th Cong. (1999). The articulated purpose of this Act is "[t]o preserve the effectiveness of Secret Service protection by establishing a protective function privilege." *Id.* at 1. When this new privilege was proposed by the Clinton administration in court, it was heavily criticized by some members of Congress. See, e.g., 144 CONG. REC. S8466 (daily ed. July 17, 1998) (statement of Sen. Orrin Hatch) (criticizing the proposed privilege, but suggesting the possibility of a protective function privilege that would be more limited than the one asserted by President Clinton); 144 CONG. REC. E1182 (daily ed. June 19, 1998) (statement of Rep. Tom DeLay) (identifying myriad reasons why the administration's assertion of the "specious privilege" was "deeply troubling," and arguing that the Attorney General should withdraw her appeal of Judge Johnson's decision to compel Secret Service agents to testify against the President).

27. See *supra* note 15 (giving an historical overview of past presidents' more traditional use of executive privilege—confined to the realm of executive functions); cf. *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982) (holding that "petitioner, as a former President of the United States, is entitled to absolute immunity from damages liability predicated on his official acts"); *United States v. Nixon*, 418 U.S. 683, 710 (1974) ("As to . . . areas of Art[icle] II duties the courts have traditionally shown the utmost deference to Presidential responsibilities.").

28. Courts have narrowly construed assertions of the military and state secrets privilege, see *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953) (finding a valid claim of privilege, but warning that the privilege "is not to be lightly invoked," and that "[t]here must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer. The court itself must determine whether the circumstances are appropriate for the claim of privilege . . ."), the deliberative process privilege under the Freedom of Information Act, see *Army Times Publ'g Co. v. Dep't of the Air Force*, 998 F.2d 1067, 1070, 1072 (D.C. Cir. 1993) (demonstrating the narrow scope of executive privilege by recognizing that the privilege exists, but remanding the case and instructing the Air Force to demonstrate that no segregable information existed within the documents held), and the presidential communications privilege, see *In re*

common purpose in protecting the executive branch from distractions or unfounded litigation arising out of the performance of executive branch functions.²⁹ Executive privileges, therefore, ultimately coincide with official duties of the executive branch. As such, the Supreme Court has distinguished criminal investigations from inquiries generally covered by the privileges.³⁰ Because the president is required by oath to uphold the nation's criminal laws, any criminal act falls outside of the duties of his office—and, by extension, outside of the privileges created to advance those duties.³¹ As the Supreme Court cautioned in *United States v. Nixon*, the need to protect presidential communications must yield to the public's great need for evidence in criminal proceedings:

A President's acknowledged need for confidentiality in the communications of his office is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice. Without access to specific facts a criminal prosecution may be totally frustrated. . . .

. . . The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.³²

The proposed protective function privilege represented a generalized assertion of privilege made by federal employees to cover information that is clearly outside the scope of both the deliberative

Sealed Case, 121 F.3d 729, 757 (D.C. Cir. 1997) (per curiam) (holding that the presidential communications privilege applied to all documents withheld by the White House, but stating that privilege can be overcome by a specific showing of need, and that the Office of Independent Counsel conveyed such a showing of need sufficient to obtain information in some of the documents).

29. See generally *supra* note 15 (citing instances where executive privilege has been invoked by past presidents to protect the executive branch in its executive function).

30. See *Nixon*, 418 U.S. at 707. The *Nixon* Court explained:

To read the Art[icle] II powers of the President as providing an absolute privilege as against a subpoena essential to enforcement of criminal statutes on no more than a generalized claim of the public interest in confidentiality of non-military and nondiplomatic discussions would upset the constitutional balance of "a workable government" and gravely impair the role of the courts under Art[icle] III.

Id.

31. The Constitution mandates that the president must swear to the following oath: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States." U.S. CONST. art. II, § 1, cl. 7. The Constitution further provides that the president "shall take Care that the Laws be faithfully executed." *Id.* § 3.

32. *Nixon*, 418 U.S. at 712-13.

process and presidential communications.³³ At no time in our history has a federal court adopted such a broad claim of privilege, let alone applied such a privilege to relevant evidence in a criminal investigation.³⁴ The United States Court of Appeals for the District of Columbia Circuit was no exception when it rejected the Clinton administration's effort to fashion this new privilege for use during the crisis.³⁵

33. This places the proposed privilege in conflict with the traditional view that the law does not protect "purely factual or investigatory reports," but rather "internal communications consisting of advice, recommendations, opinions, and other material reflecting deliberative or policy-making processes." 3 WEINSTEIN & BERGER, *supra* note 8, § 509.23[2]. The proposed privilege would not distinguish between official and unofficial conduct or the content of a communication. See Secret Service Protective Privilege Act of 1999, S. 1360, 106th Cong. (1999); *id.* at 6 (providing only a single content-based exemption "with respect to information that, at the time the information was acquired by Secret Service personnel, was sufficient to provide reasonable grounds to believe that a crime had been, was being, or would be committed").

34. The former Secret Service agents that filed an amicus brief when *In re Sealed Case* reached the D.C. Circuit stressed that Chief Judge Johnson committed reversible error by not holding a full evidentiary hearing on the basis of the privilege. Brief of Amici Curiae at 18, *In re Sealed Case*, 148 F.3d 1073 (D.C. Cir. 1998) (No. 98-3069). According to the former agents, Federal Rule of Evidence 501 "virtually mandates" that a court hold such a hearing and "its decision should [have been] reversed for this reason alone." *Id.* This argument was meritless. No circuit court has imposed such a burdensome requirement that, in the absence of a full evidentiary hearing, a court commits reversible error in denying the creation of a new privilege. Any profession or organization can assert a new privilege in the course of a criminal proceeding, but it is hardly logical to suggest that courts must, as a matter of law, give each claim a full evidentiary hearing. Moreover, it is an extraordinary accomplishment to devise a congressional intent for such hearings from the mere use of the word "experience" in Rule 501. FED. R. EVID. 501 ("[T]he privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."). Chief Judge Johnson considered the factual submissions of the White House and found them insufficient to support a new, sweeping privilege. See *In re Grand Jury Proceedings*, Misc. No. 98-148, 1998 U.S. Dist. LEXIS 7734, at *10-*15 (D.D.C. May 22, 1998). The fact that the court rejected these assertions is not proof that it gave too little consideration to the representations, but rather that there was too little in the representations to support a new privilege.

35. *In re Sealed Case*, 148 F.3d at 1079 (refusing to recognize the Secret Service's claimed privilege and holding that such a privilege did not protect agents from being compelled to testify); see also Susan Schmidt, *Starr Wins Appeal in Privilege Dispute; Secret Service Fears Dismissed by Court*, WASH. POST, July 8, 1998, at A1 (summarizing the court's decision to compel the agents to testify and reporting that the court "dismiss[ed] as 'vague fears' the agency's claim that such testimony could endanger the life of the president").

Not only is there an absence of any prior judicial recognition of this privilege, but the proposed privilege also would conflict with the traditional view of the obligations of federal employees in supplying information in criminal proceedings. As the United States Court of Appeals for the Eighth Circuit explained in *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 920 (8th Cir. 1997), "executive branch employees, including attorneys, are under a statutory duty to report criminal wrongdoing by other employees to the Attorney General." *Id.* (citing 28 U.S.C. § 535(b) (1994)). Courts have repeatedly stressed that law

Under Rule 501 of the Federal Rules of Evidence, Congress specifically allowed for the recognition of certain privileges “governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.”³⁶ The federal courts, however, have traditionally disfavored new privileges and have construed narrowly the scope of existing privileges.³⁷

enforcement personnel have an obligation to the public to disclose any evidence of crime, and the failure to do so can be grounds for removal or even prosecution in some circumstances. *See, e.g.,* *Watson v. Dep’t of Justice*, 64 F.3d 1524, 1530 (Fed. Cir. 1995) (explaining that a law enforcement officer had “an overriding duty to report violations of law in a timely fashion” and that an officer who fails to so report “risks punishment for untimely disclosure”). This duty was codified by Congress in 28 U.S.C. § 535(b) (1994), which requires “[g]overnment officers and employees” to “expeditiously” report any criminal conduct. A court cannot continue to apply a common law evidentiary privilege in the face of a directly conflicting statute, let alone (as suggested here) create a privilege in the midst of such a conflict. *See* *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 (1981) (“We have always recognized that federal common law is ‘subject to the paramount authority of Congress.’” (quoting *New Jersey v. New York*, 283 U.S. 336, 348 (1931))); *Scheuer v. Rhodes*, 416 U.S. 232, 248 (1974) (discussing why a federal common law privilege of immunity was barred by a countervailing federal statute). Such was the case in *United States v. Arthur Young & Co.*, 465 U.S. 805 (1984), where the Supreme Court refused to recognize a new work-product privilege that would conflict with a section of the Internal Revenue Code of 1954. *Id.* at 817-19. This section authorized the Secretary of the Treasury to summon and “examine any books, papers, records, or other data which may be relevant or material” to a tax inquiry. 26 U.S.C. § 7602(a)(1) (1994). It was not within the Court’s power to create such an overriding privilege. The Court explained that “[i]f the broad latitude granted to the IRS by § 7602 is to be circumscribed, that is a choice for Congress, and not this Court, to make.” *Arthur Young*, 465 U.S. at 817.

36. FED. R. EVID. 501.

37. *See, e.g.,* *Univ. of Pa. v. EEOC*, 493 U.S. 182, 189 (1990) (refusing to create a new privilege against the disclosure of a university’s peer review materials and explaining that “[w]e are especially reluctant to recognize a privilege in an area where it appears that Congress has considered the relevant competing concerns but has not provided the privilege itself”); *Nixon*, 418 U.S. at 707 (refusing to recognize the presidential communications privilege as absolute and reasoning that such a construction of the privilege would place an impediment “in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions”).

This hesitancy to expand privilege is based on the oft-repeated principle that the public is entitled to “every man’s evidence” and that disclosure of such evidence is particularly important to the functioning of the grand jury system. *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972) (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950)); *Blackmer v. United States*, 284 U.S. 421, 438 (1932)); *see also In re Sealed Case*, 676 F.2d 793, 806 (D.C. Cir. 1982) (“Nowhere is the public’s claim to each person’s evidence stronger than in the context of a valid grand jury subpoena.”). The type of arguments put forth by the Clinton administration certainly showed why federal courts are wise to be skeptical and slow in the development of new privileges. In the litigation over the protective function privilege, former Secret Service agents warned the court that “the decision of the District Court in refusing to recognize a Protective Function Privilege will lead inexorably to the successful assassination of another American President in our lifetime.” Brief of Amici Curiae at 1, *In re Sealed Case* (No. 98-3069). Likewise, the court was told that any decision not giving the Secret Service this new special status would “threaten[] the very security of our Nation.” *Id.* at 9. Finally, the former agents offered as an aside comment that “one wonders how

There was no compelling need for the articulated protective function privilege until the Clinton crisis.³⁸ Notably, the need was "compelling" only in the self-interest of the President and not in the general interest of the public. President Clinton committed acts that were sufficient to trigger impeachment, as well as sanctions by a federal court,³⁹ a recommendation for disbarment,⁴⁰ and a protracted grand jury investigation for possible indictment.⁴¹ These are circumstances that have not been common among our presidents, and they should not influence the creation of a sweeping new privilege. Also, these are not circumstances sufficiently related "to the effective discharge of a president's powers"⁴² to constitute a constitutional basis for an assertion of privilege.

While the proposed privilege *refers* to the protective function of the Secret Service,⁴³ the actual physical protection of the president and information relevant to protective functions are not at risk of disclosure. Existing common law privileges and statutory law protect actual security-related information.⁴⁴

many centuries of Presidential assassination attempts the District Court would require before recognizing the importance of the Protective Function Privilege." *Id.* at 18 n.23. Such hyperbole has no place in federal court. These arguments only serve to reaffirm the decision of the trial court that the representations of the Secret Service in this case were untenable. *See In re Grand Jury Proceedings*, 1998 U.S. Dist. LEXIS 7734, at *15. Certainly these arguments hardly encourage a court to recognize such unprecedented and unilateral authority in this small governmental unit.

38. *But see* Declaration of Lewis C. Merletti, Director, United States Secret Service, *In re Grand Jury Proceedings*, 1998 U.S. Dist. LEXIS 7734. Merletti claimed that the need for close proximity between a president and Secret Service agents is inherent in the organization's historical duty to protect the president's safety. *Id.* ¶ 17. For this reason, Merletti argued, the protective function privilege should have been recognized to ensure an "atmosphere of complete trust between a President and his protective detail." *Id.* ¶ 18.

39. *See Jones v. Clinton*, 36 F. Supp. 2d 1118, 1120 (E.D. Ark. 1999) (adjudging President Clinton to be in contempt of court and liable for the expenses caused by his failure to obey the court's discovery orders). *See generally* Jonathan Turley, *Rule of Law: What's Wrong with Wright*, WALL ST. J., Apr. 19, 1999, at A23 (summarizing Judge Susan Webber Wright's findings of several instances of willful misconduct by the President).

40. John F. Harris, *Ark. Panel Supports Disbarring Clinton; Court Committee Calls Testimony Serious Misconduct*, WASH. POST, May 23, 2000, at A1 ("The Arkansas Supreme Court's disciplinary committee recommended yesterday that President Clinton be disbarred for what it described as 'serious misconduct' by the president when he gave misleading answers under oath in the Paula Jones sexual harassment case.").

41. *See generally* Jonathan Turley, "From Pillar to Post": *The Prosecution of American Presidents*, 37 AM. CRIM. L. REV. (forthcoming 2001); R.G. Ratcliffe, *Bush Says No Pardon Without Indictment*, HOUS. CHRON., Jan. 9, 2001, at A3.

42. *Nixon*, 418 U.S. at 711.

43. Secret Service Protective Privilege Act of 1999, S. 1360, 106th Cong. (1999).

44. Most security-related documents and information would be easily shielded from disclosure under the military and state secrets privilege. *See United States v. Reynolds*, 345 U.S. 1, 11-12 (1953) (upholding the ability of the Air Force to withhold documents under

The decision in *Clinton v. Jones*⁴⁵ demonstrates the ability of the courts to encourage traditional or statutory means to protect any information that would undermine a president's security.⁴⁶ Courts often act in such a way in cases where classified or sensitive information is sought.⁴⁷ Where a compelling claim can be made for a protective order, courts will restrict the disclosure of information to protect the president's security.⁴⁸ More specifically, courts have often accommodated the security-related concerns of the Secret Service.⁴⁹ While the Secret Service has been asked for information disclosure, no federal court has ordered the release of sensitive security information inimical to the president's safety.

The proposed privilege, therefore, would not be used to withhold security-related information sought in either criminal or civil litigation; such information is already covered by existing privileges and law.⁵⁰ Nor would the new privilege be used to withhold nonsecurity information sought in any civil litigation related to official duties; such

the military and state secrets privilege). *But see supra* note 37 (indicating that the privilege is narrowly construed). In addition to this privilege, classification laws impose heavy restrictions on and procedures for the use of such information. The Classified Information Procedures Act (CIPA) protects classified information—determined to be such pursuant to an executive order—in the interest of the national defense and the foreign relations of the United States. 18 U.S.C. app. III (1994). Courts routinely exempt classified information in criminal cases under the Classified Information Procedures Act. *See, e.g.*, *United States v. Johnson*, 138 F.3d 1359, 1365 (11th Cir. 1998); *United States v. Noriega*, 117 F.2d 1206, 1215-16 (11th Cir. 1997). Likewise, in civil suits seeking information from the Secret Service, sensitive or "law enforcement" information is clearly exempted from disclosure under the Freedom of Information Act (FOIA). *See* 5 U.S.C. § 552(b)(7) (1994) (exempting from FOIA "records or information compiled for law enforcement purposes").

45. 520 U.S. 681 (1997).

46. *See id.* at 708-09 (relying on general principles of litigation and statutory law to rebut notions that the ruling might impede the performance of presidential duties).

47. *See supra* note 44 (discussing the protections afforded by FOIA and CIPA, and the Supreme Court's treatment of sensitive or classified information). While statutory means of protection are encouraged, often the interest of courts in protecting sensitive information has led to conflicted and, at times, excessive rulings. *See generally* Turley, *supra* note 8 (highlighting the difficulty and inconsistencies of both courts and academicians in interpreting statutes related to national security by examining two conflicting opinions in factually similar cases).

48. *See, e.g.*, *Moorefield v. United States Secret Serv.*, 611 F.2d 1021, 1026 (5th Cir. 1980) (restricting the disclosure of information pursuant to a FOIA request by denying plaintiff's request to obtain the file maintained on him by the United States Secret Service); *id.* at 1022, 1026 (noting that the plaintiff bringing the FOIA request had been convicted twice for threatening the President's life).

49. *See, e.g.*, *Accuracy In Media, Inc. v. United States Secret Serv.*, No. 97-2108, 1998 U.S. Dist. LEXIS 5798, at *13 (D.D.C. Apr. 16, 1998) (denying a FOIA request for information related to the death of the late Deputy White House Counsel Vincent W. Foster, Jr., based on the assertion of the Secret Service that disclosure could interfere with the consequent investigation of Foster's death).

50. *See supra* note 44 and accompanying text.

litigation is already barred by the common law.⁵¹ The only applied purpose of a new protective function privilege would be to protect nonsecurity information that is relevant to a criminal investigation.⁵² However, as shown below, this purpose would not be achieved under a protective function privilege.⁵³

51. See *United States v. Nixon*, 418 U.S. 731, 749 (1982) (holding that the president "is entitled to absolute immunity from damages liability predicated on his official acts").

52. The defense of the protective function privilege has often turned on maddening generalities. For example, on the *Newshour with Jim Lehrer*, Professor Ronald K. Noble insisted that a clear line exists between reporting criminal and noncriminal conduct. See *The Newshour with Jim Lehrer: Presidential Investigation* (MacNeil/Lehrer television broadcast, Feb. 12, 1998) [hereinafter *Newshour*] ("In order for [Secret service agents] to be trusted they've got to be able to maintain confidences of non-criminal conduct that they might observe or overhear."). This point is rather illusory, however, since noncriminal conduct is often material evidence of a crime. If an agent should be required to report a crime, it is difficult to see how Professor Noble's principled distinction would prevent the same agent from reporting conduct proving such a crime occurred. Thus, an agent would be able to report that he saw the president murder a staffer, but not that he saw the president running from the scene that night or washing his hands after the alleged incident. It is a meaningless distinction upon which to base a privilege and is one that is unlikely to offer much assurance to a president concerned about revealing evidence of criminality. Cf. *In re Sealed Case*, 148 F.3d 1073, 1077 (D.C. Cir. 1998) (per curiam) ("[B]ecause the President cannot know whether an agent will realize he is witnessing the commission of a felony . . . the President will have to discount substantially the value of the protective function privilege (and thus perhaps be tempted to distance himself from his protectors all the same)."). The agents in the Clinton crisis were asked for confirmation of events denied by the President under oath—evidence that would directly support a criminal charge of perjury. See Peter Baker, *Clinton Perjury Allegations*, WASH. POST, Sept. 24, 1998, at A14 (reporting that "six Secret Service officers testified they saw Clinton and Lewinsky alone," which was in apparent contrast to Clinton's prior statement that he could not recall being alone with Lewinsky). Professor Noble, however, believes that a distinction could be drawn that only requires testimony when an agent witnesses "the president engaged in patently or obvious criminal conduct." *Newshour*, *supra*. Such a subjective distinction would be unique in our system and impossible to define. Given the ad hoc nature of such suggestions, it is not surprising that the court found little foundation for a protective function privilege and concluded that such a privilege would materially undermine the role of the Secret Service as a law enforcement agency. See *In re Sealed Case*, 148 F.3d at 1078 (finding that "strong congressional policy that executive branch employees must report information 'relating to violations of [the federal criminal code]' . . . weighs against judicial recognition of the privilege proposed here").

53. Ironically, the proposed privilege cannot possibly achieve its objective of assured confidentiality without extending this special status to all security and nonsecurity personnel who could be called as witnesses. By shielding only a small percentage of the federal employees who witness presidential communications and conduct, the proposed privilege would leave the same information susceptible to disclosure by other federal employees. See Secret Service Protective Privilege Act of 1999, S. 1360, 106th Cong. (1999) (proposing a new privilege that would only apply to Secret Service personnel). Specifically, the proposed privilege would not prevent the identical communications from being revealed by legal staff, political staff, administrative staff, household staff, retired security staff, or state or local security officers. A president, therefore, would not achieve any measurable degree of added confidentiality from this privilege because most individuals who participate in (or witness) communications or conduct would not be covered by this new privilege.

In the Oval Office, a pantry is staffed by employees who can be (and have been) called as witnesses in criminal investigations.⁵⁴ As public employees, these individuals must give relevant information to criminal investigators.⁵⁵ Likewise, White House lawyers, secretaries, and administrative staff can be (and have been) called to testify in criminal investigations.⁵⁶ These “unprivileged” employees would hear the same communications presumably overheard by Secret Service agents.

Even security staff would not be completely shielded from making disclosures under a protective function privilege. The president is often guarded by a host of state and federal law enforcement personnel beyond the relatively small contingent of Secret Service agents.⁵⁷ Moreover, Secret Service personnel who retire or leave federal employment would not clearly fall under the privilege, despite the fact that the most noted public disclosures of information have been traced to retired or former security personnel.⁵⁸ As a result, this new

Throughout a given day, the president is surrounded by personnel performing security, administrative, and catering functions. Ironically, the Secret Service has long maintained that the president is in the greatest danger during his time in crowds, not in the White House or in private meetings where this privilege presumably would have its greatest effect. See UNITED STATES DEPARTMENT OF THE TREASURY, PUBLIC REPORT OF THE WHITE HOUSE SECURITY REVIEW 92 (1995). The Department of the Treasury reports:

Although . . . Presidents have been exposed to deadly or life-threatening assaults with frightening regularity, not one of these assaults has occurred within the White House Complex. Indeed, each assassination or potentially deadly assassination attempt has occurred when the Presidential protectee was away from the White House, in the proximity of a crowd.

Id.

54. Several White House stewards testified during the Independent Counsel investigation of President Clinton. See Susan B. Glasser, *A Parade of Witnesses*, WASH. POST, Aug. 2, 1998, at A1 (reporting that White House steward Bayani Nelvis, who was assigned to the pantry outside the Oval Office and “ha[d] a firsthand view of much of what [went] on in the president’s suite,” was called to testify during the investigation); *id.* (acknowledging that other stewards testified as well).

55. See 28 U.S.C. § 535(b) (1994).

56. For example, in 1973, Nixon White House Counsel John Dean testified before the Watergate Grand Jury. KATY J. HARRIGER, *THE SPECIAL PROSECUTOR IN AMERICAN POLITICS* 20 (2d ed. 2000). In 1973, U.S. District Judge John Sirica called President Nixon’s personal secretary, Rose Mary Woods, to explain the infamous “gaps” in the Nixon Oval office tapes. STANLEY I. KUTLER, *THE WARS OF WATERGATE: THE LAST CRISIS OF RICHARD NIXON* 429-30 (1990). In 1998, Independent Counsel Kenneth Starr subpoenaed Betty Currie, President Clinton’s personal secretary, to testify regarding the President’s relationship with Monica Lewinsky. James Bennet, *The President Under Fire: The Prosecutor; With an Uneasy Look, President’s Secretary Goes Before a Grand Jury*, N.Y. TIMES, Jan. 28, 1998, at A23.

57. See Official Website, United States Secret Service, at <http://www.treas.gov/usss/> (last visited Nov. 28, 2000) (noting that “the assistance of . . . state, county, and local law enforcement organizations is a vital part of the entire security operation”).

58. See, e.g., WALTER S. BOWEN & HARRY EDWARD NEAL, *THE UNITED STATES SECRET SERVICE* (1960) (offering untold stories from Secret Service agents at the White House); SEY-

privilege would achieve little for the president in terms of added guarantees of nondisclosure, but it would alter our traditional view of the Secret Service and its function.

The proposed protective function privilege also would produce a fundamental change in the status and role of our Secret Service. The Secret Service was created in 1865 as a law enforcement agency to combat counterfeiting.⁵⁹ For more than 125 years, the Secret Service has functioned in the same capacity as all federal law enforcement agencies without ever claiming any special status based upon the protective functions they perform for the president. Adoption of a separate privilege would convert these law enforcement officers into something akin to personal guards with all of the dangers and ambiguities of that new status.⁶⁰ Both the Secret Service and its protective function originated under a standard law enforcement model—law enforcement duties performed by law enforcement personnel.⁶¹ Due

MOUR M. HERSH, *THE DARK SIDE OF CAMELOT* (1997) (containing several first-hand accounts of former agents regarding the personal affairs and sexual liaisons of President Kennedy); DENNIS V.N. MCCARTHY & PHILIP W. SMITH, *PROTECTING THE PRESIDENT: THE INSIDE STORY OF A SECRET SERVICE AGENT* (1985) (offering an inside view of the administrations of Presidents Johnson, Nixon, and Reagan); GEORGE RUSH, *CONFESSIONS OF AN EX-SECRET SERVICE AGENT: THE MARTY VENKER STORY* (1988) (describing from first-hand accounts, the career of Secret Service agent Marty Venker). Additionally, one of the Secret Service agents subpoenaed by Independent Counsel Starr during the Lewinsky investigation was retired. See Susan Schmidt, *Clinton, Lewinsky Met Alone, Guard Says; Retired Secret Service Officer Recalls Visit by Intern in Late '95*, WASH. POST, Feb. 11, 1998, at A1 (discussing the testimony of former uniformed Secret Service Officer Lewis C. Fox).

59. BOWEN & NEAL, *supra* note 58, at 11. For an account of the events surrounding the creation of the Secret Service, see *id.* at 1-11. For a general history of the Secret Service, see MARCIA ROBERTS, *DEPARTMENT OF THE TREASURY, UNITED STATES SECRET SERVICE, MOMENTS IN HISTORY: 1865-1990* (1990).

60. See Turley, *Praetorian Privilege*, *supra* note 2, at A23 (arguing that “[t]hese new Praetorians would come with dangerous legal and historical implications”). The Secret Service motto, “Worthy of Trust and Confidence,” refers to a public, not a personal, trust accepted by every agent upon entering federal service. Not only did the Secret Service begin as a law enforcement agency, but the Secret Service’s protective function on the White House grounds was originally performed by local police units as a standard law enforcement responsibility. ROBERTS, *supra* note 59, at 14. Until 1930 (when these duties were transferred to the Secret Service), White House security was performed by District of Columbia Metropolitan Police officers and a small military guard. *Id.* Similarly, the Secret Service’s protective function for foreign diplomats was previously performed by local police, who still support the Secret Service in its various duties. See *id.* at 15. The officer who gave his life to protect President Harry Truman in 1950, Leslie Coffelt, was not a member of the Secret Service, but a member of the White House Police, *id.* at 19, whose members were recruited from the ranks of the Metropolitan Police Department. BOWEN & NEAL, *supra* note 58, at 132.

61. See *supra* note 60 (discussing the origins of the agency). The relationship between the local police and the Secret Service continues to this day. By statute the Secret Service “possess[es] privileges and powers similar to those of the members of the Metropolitan Police of the District of Columbia.” 3 U.S.C. § 202 (1994). Secret Service agents are often

to this history, the Secret Service has traditionally emphasized its law enforcement traditions, as opposed to an image of a palace or presidential guard. While many ancient and modern governments have the model of a personal guard, this country has always preserved a bright-line rule for all federal law enforcement personnel who are called to give evidence in criminal investigations.⁶² History is rife with examples of the excesses and dangers of a personal guard with special legal status.⁶³ The most famous historical model, the Praetorian Guard of ancient Rome, was roughly the same size as the current Secret Service.⁶⁴ This specially trained outfit ultimately became intimately involved in the governance of Rome, as well as in its murderous conspiracies.⁶⁵ Other nations have followed the personal guard model and have established special palace or presidential guards around their leaders, with highly destabilizing or undemocratic results.⁶⁶ The United States has stood proudly for a different

appointed from District police ranks and share some of the same salary, employment benefits, and privileges as District police. See *Floyd v. District of Columbia*, 129 F.3d 152, 154 (D.C. Cir. 1997).

62. See Turley, *Praetorian Privilege*, *supra* note 2, at A23 (“[A]s law enforcement officers, Secret Service members were compelled to share any possible evidence of criminal conduct in their possession.”). The model of a personal, presidential guard whose members swear loyalty to a leader, not his office, has been a common one throughout history. See generally F.C. AVIS, *HISTORICAL BODYGUARDS* (2d ed. 1974) (providing examples of such systems and discussing their destabilizing influence throughout history).

63. See generally AVIS, *supra* note 62 *passim*.

64. The Praetorian Guard under Augustus contained nine cohorts of 500 men each, for a total of 4500 to 5000 men. GRAHAM WEBSTER, *THE ROMAN IMPERIAL ARMY OF THE FIRST AND SECOND CENTURIES A.D.* 97 (3d ed. 1985). The Secret Service employs approximately the same amount: 2100 special agents, 1200 Uniformed Division officers, and approximately 1700 other technical, professional, and administrative support personnel. Official Website, United States Secret Service, at <http://www.treas.gov/ussf/faq.htm> (last visited Nov. 28, 2000).

65. See BRIAN CAMPBELL, *THE ROMAN ARMY, 31 BC-AD 337: A SOURCEBOOK* 40 (1994) (noting that upon his capture of Rome in 193 A.D., Septimius Severus immediately moved to disband the old Praetorian Guard, “which had already connived at the overthrow of two emperors”); WEBSTER, *supra* note 64, at 96 (noting that the “political importance of the Guard was always a factor in the choice of an emperor, whatever the Senate may have thought or decided”).

66. Notably, many of the most repressive world leaders have created and deployed special presidential guards against political opponents, reporters, and other perceived threats. See, e.g., Douglas Farah, *Slaying Gives Life to Opposition; Death of Crusading Journalist Puts Pressure on Burkina Faso President*, WASH. POST, June 4, 2000, at A23 (noting evidence that a leading journalist and human rights activist was assassinated by members of the Burkina Faso presidential guard). Often such special detachments have become increasingly independent and have repeatedly overthrown governments, removed political leaders, or started civil unrest, which has included the commission of genocidal crimes. See, e.g., Frank Smyth, *French Guns, Rwandan Blood*, N.Y. TIMES, Apr. 14, 1994, at A21 (noting that “[h]ours after the President was killed last Wednesday, his Presidential Guard went on a rampage. They killed Prime Minister Uwilingiyimana, along with Belgian peacekeepers who had

principle. Due to such historical examples as the Praetorians, this country has long followed the alternative model of a professional law enforcement agency with special responsibilities, but no special status within the federal system.⁶⁷ The Clinton administration stood on the wrong side of history in asserting this special privilege.

Recent history has demonstrated how even large agencies, like the Central Intelligence Agency can be co-opted into participating in illegal conduct at the behest of the White House.⁶⁸ As a result of Watergate, federal standards were enacted to further clarify the public duties of these agencies and their separation from White House or political operations.⁶⁹ In comparison to other law enforcement or intelligence agencies, the Secret Service is at far greater risk of such manipulation if it is placed into the ambiguous role inherent in the proposed privilege. Because of their continual and close proximity to the president, Secret Service agents can develop strong personal relationships that could overwhelm the judgment of even the most conscientious law enforcement officers. The new privilege would only strengthen this relationship to an uncomfortable degree. As with the Secret Service's historical antecedents in other countries, a special

tried to save her; most other opposition party members, priests and nuns, journalists and human rights monitors."); *Ivory Coast Ruler Tells of Assassination Attempt*, N.Y. TIMES, Sept. 19, 2000, at A4 (describing the role of the Ivory Coast presidential guard in an assassination attempt); *Niger's President Assassinated by Soldiers; Premier Dissolves Parliament and Suspends Political Activity*, L.A. TIMES, Apr. 10, 1999, at A3 (reporting the announcement of the State Department that Niger's president "was assassinated by members of his presidential guard"); *Roving Gangs Raising Rwanda's Death Toll*, CHI. TRIB., Apr. 16, 1994, at A3 (noting that "the Hutu-dominated presidential guard was being blamed for the massacre" of civilians during the genocidal crimes in Rwanda).

67. See *supra* notes 59-62 and accompanying text (discussing the prevailing model of the Secret Service).

68. Perhaps the best known example was President Nixon's use of the CIA to gather domestic intelligence on political opposition and dissent. See ATHAN THEOHARIS, *SPYING ON AMERICANS: POLITICAL SURVEILLANCE FROM HOOVER TO THE HUSTON PLAN 13-39, 186-95* (1978) (detailing the CIA's illegal domestic intelligence operations performed at the command of President Nixon). After Congress blocked aid to the Nicaraguan Contras in 1984, the Reagan White House used the CIA to manage the aid operation covertly, using funds from secret arms shipments to Iran. See LAWRENCE E. WALSH, *IRAN-CONTRA: THE FINAL REPORT 199-311* (1994) (providing a detailed account of the CIA's role in the Iran-Contra operation).

69. See Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1802 (1994) (restricting intelligence gathering directed against U.S. citizens); S. Res. 400, 94th Cong. (1976) (creating the Senate Select Committee on Intelligence (SSCI) to strengthen oversight of the intelligence gathering community); Exec. Order No. 11,905, § 5, 41 Fed. Reg. 7703 (Feb. 18, 1976) (restricting intelligence surveillance of U.S. citizens); Exec. Order No. 12,036, §§ 2-202, 3, 43 Fed. Reg. 3674 (Jan. 24, 1978) (prohibiting the CIA from engaging in any electronic surveillance within the United States and creating an Intelligence Oversight Board within the White House).

privilege for the president's security staff could easily degrade into an isolated environment ripe for abuse and subterfuge.

Moreover, it is precisely the function of the Secret Service that makes this privilege so disabling for criminal investigations. Secret Service agents often bar or restrict access to the president.⁷⁰ This security function tends to reduce the number of potential witnesses to criminal conduct, which, in turn, magnifies the importance of the Secret Service agents as witnesses in a criminal investigation of alleged criminal conduct of a president.⁷¹ Also, the inherent dangers of the new privilege would likely grow with time. If Secret Service agents are given special status, there would be an obvious incentive for the president to rely on these employees to the greatest possible extent in White House operations. To guarantee the privacy that they seek, presidents could substitute Secret Service agents for other federal employees who are not shielded from criminal inquiries. It would be natural for presidents to prefer Secret Service agents with this new privilege to other security or White House staff who, as traditional public employees, cannot refuse to supply relevant evidence to a criminal investigation.⁷² As a result, the role of the Secret Service would become increasingly defined by its one overriding distinction: a quasi-immunity from testimony.

The Secret Service has a proud and unique role in American history as a law enforcement body.⁷³ These professionals were shaped by a tradition that rejected the model of a personal guard in favor of a public servant model.⁷⁴ That tradition would be eviscerated by the

70. See Official Website, United States Secret Service, at <http://www.treas.gov/usss/> (last visited Nov. 28, 2000) (outlining some of the functions of the Secret Service with respect to presidential protection and access).

71. The importance of the testimony of such witnesses is enhanced when a president, as was the case with President Clinton, initially declines to appear before the grand jury to respond to questions under oath. See, e.g., Peter Baker, *Clinton May Drop Appeal on Privilege; Strategy Could Avert Supreme Court Review*, WASH. POST, June 1, 1998, at A1 (reporting President Clinton's resistance to requests by Independent Counsel Starr's requests to appear before a grand jury); John F. Harris & Susan Schmidt, *Starr Seeks Clinton Testimony on Lewinsky; Lawyers Have Rebuffed Requests; Advisers Split on Merits of Grand Jury Visit*, WASH. POST, Mar. 12, 1998, at A8 (same).

72. See 28 U.S.C. § 535(b) (1994); *In re Grand Jury Proceedings*, 5 F. Supp. 2d 21, 35 (D.D.C.) ("White House attorneys, like all other executive branch employees, have a statutory duty to report any criminal misconduct by other employees to the Attorney General."), *aff'd in part, rev'd in part sub nom. In re Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998) (per curiam).

73. See BOWEN & NEAL, *supra* note 58, at v (noting the Secret Service's historical investigative and law enforcement role in combating counterfeiting, fraud, espionage, and other crimes).

74. See *supra* notes 59-62 and accompanying text (explaining the current model of the Secret Service as a law enforcement agency).

proposed privilege, to the detriment of both the Service and the public. Our presidents have always represented a tradition of citizen-leaders, protected by law enforcement personnel with public, not personal, duties. Despite the efforts of the current management of the Secret Service, this is a tradition worth preserving as a quintessential and core American symbol.⁷⁵ To that end, the next president could serve both the public interest and the traditions of the Secret Service in opposing efforts to resurrect the protective function privilege.⁷⁶

B. *The Role of the Office of White House Counsel*

Any discussion of the future role of executive privilege must necessarily include a determination of the role of the Office of White House Counsel. This office is inevitably involved in efforts to secure documents from the White House; these documents are often generated or held by lawyers in the office.⁷⁷ Where such documents are sought, the White House counsel often raises both attorney-client and executive privilege arguments as an initial position.⁷⁸ Nevertheless, past White House counsels have long preferred to leave questions of privilege unresolved and to operate within the ambiguity of executive privilege to negotiate compromises with Congress or the judiciary.⁷⁹

75. The construction of any new privilege will rest with Congress. The Supreme Court opted, by a 7-2 vote, not to consider this issue. See *Rubin v. United States*, 525 U.S. 990, 990 (1998) (denying Secretary of the Treasury Robert Rubin's petition for writ of certiorari to consider whether federal law recognizes the protective function privilege); Joan Biskupic, *Court Lets Stand Rulings on Secret Service, Lawyers' Testimony*, WASH. POST, Nov. 10, 1998, at A4 (noting that only Justices Ruth Bader Ginsburg and Stephen G. Breyer voted to hear the case).

76. Such a resurrection would only come from Congress, where the matter was appropriately left by the D.C. Circuit. See *In re Sealed Case*, 148 F.3d 1073, 1079 (D.C. Cir. 1998) (per curiam) ("[W]e leave to the Congress the question whether a protective function privilege is appropriate in order to ensure the safety of the President and, if so, what the contours of that privilege should be.").

77. See Editorial, *A Very Privileged Executive*, WASH. TIMES, Oct. 4, 1996, at A22 (noting that "White House Counsel Jack Quinn claimed executive privilege for 2,000 Travelgate documents that had been subpoenaed by [the] House Government Reform and Oversight Committee"). The misuse of executive privilege became one of the issues for impeachment before Congress. See *Text of the Draft Articles of Impeachment*, CHI. TRIB., Dec. 10, 1998, at 4.

78. See Francine Kiefer, *Starr's Slow Pace Boosts Clinton*, CHRISTIAN SCI. MONITOR, June 8, 1998, at 3 ("By fighting subpoenas and invoking claims of executive privilege, lawyer-client privilege, and spousal privilege, the White House counsel has been able to slow independent prosecutor Kenneth Starr enough to buy the president a significant chunk of time."); *GOP Stumbles While White House Stonewalls Investigators*, USA TODAY, May 6, 1998, at 12A (criticizing the extensive use of privilege by the Clinton administration).

79. C. Boyden Gray, former White House Counsel to President Bush, noted that "[t]he real value of executive privilege is its exquisite ambiguity . . . and in the bargaining

Certainly, the Clinton administration cannot be faulted for trying to defend the confidentiality of certain information sought during the Clinton crisis. Rather, the fault with the Clinton White House counsels lies in their failure to avoid such issues of privilege by allowing unnecessary, and at times inappropriate, roles for White House counsel staff.⁸⁰ Future executive privilege fights will be heavily influenced by the role that the next White House counsel defines for his office and staff.

Created during the administration of Franklin D. Roosevelt,⁸¹ the role of the White House counsel has historically been controversial and dangerously fluid.⁸² This uncertain role was at the heart of many of the controversies during the Clinton administration and was a contributor to the blurring of defenses belonging to the President in his official capacity, rather than as an individual. Perhaps the greatest example of the confusion over the role of this office was found in Bernard Nussbaum.⁸³ Fiercely loyal to the First Couple, Nussbaum

that goes on with Congress or others trying to define it.'" James Toedtman, *Legal Experts Concerned Presidential Power Eroding*, LAS VEGAS REV.-J., Aug. 3, 1998, at 1A (quoting C. Boyden Gray).

80. Perhaps the most unnecessary and controversial role was the decision by the White House counsel to remove material from the office of Vincent Foster after his suicide, but before the arrival of criminal investigators. Peter Baker, *One Death Altered Path of Presidency; Five Years Later, Clinton White House Still Facing Aftermath of Foster Suicide*, WASH. POST, July 20, 1998, at A1 ("The way the White House seemed to stand in the way of the Justice Department and others investigating Foster's death and the belated discovery that Whitewater files had been removed from his office . . . generated a brush fire of speculation that there must be something the Clintons were hiding."). There is no question that the White House counsel had an interest in being present and objecting to the removal of any confidential material during the criminal investigation. However, the decision to unilaterally remove material was ill-advised and undermined the need of the White House to convey an open and cooperative message in the ensuing scandal. While some controversies during the Clinton years were not well-based and appeared more politically driven, some allegations of interference by White House counsel staff were made, not by Congress, but by other executive branch employees. See, e.g., Jerry Seper, *Clinton Counsel Ordered to Testify; Lindsey Named in Commerce Suit*, WASH. TIMES, Dec. 6, 2000, at A7 (noting an affidavit from a government employee that alleged various improprieties by White House counsel staff, including a sworn statement that the employee knew that Cheryl Mills, "in her position as deputy counsel to the president, advised Commerce officials to withhold certain documents In many years working with the federal government, I have never known or heard of a federal agency collaborating or discussing releasing or withholding documents with White House officials.").

81. NANCY V. BAKER, *CONFLICTING LOYALTIES: LAW AND POLITICS IN THE ATTORNEY GENERAL'S OFFICE, 1789-1990*, at 13 (1992).

82. See Jeremy Rabkin, *White House Lawyering: Law, Ethics, and Political Judgments*, in *GOVERNMENT LAWYERS: THE FEDERAL LEGAL BUREAUCRACY AND PRESIDENTIAL POLITICS* 107-42 (Cornell W. Clayton ed., 1995) (presenting an overview of the fluid nature of the office and the dilemma faced when having to represent the presidency, but not the president independently).

83. White House Counsel under President Clinton, 1993-1994.

evidenced little concern for distinguishing between areas properly handled by White House counsel and areas appropriately left to either private counsel or federal investigators.⁸⁴ Taking a position that was roundly criticized, Nussbaum viewed his role as largely the same as that of a private lawyer.⁸⁵ Nussbaum's failure to distinguish between these two roles ultimately led to his resignation in the midst of questions concerning his participation in meetings about the criminal investigation of the First Couple for acts that occurred before President Clinton took office.⁸⁶ Nussbaum personified the Clinton administra-

84. See Oliphant, *supra* note 3, at 20 ("The [Clinton] administration's critics have always held that the president's legal advisers were ill-served by involving themselves in matters involving the Whitewater probe, Paula Jones' harassment suit, and the Monica Lewinsky investigation."). Nussbaum was widely criticized for his style and lack of judgment:

Nussbaum, in many ways, set the tone for the Clinton chief counsel. A high-powered litigator from Wachtell, Lipton, Rosen & Katz and a stranger to the Clinton circle, he aggressively defended the president from attack. He resigned in 1994 amid charges that he had improperly interfered in several Whitewater-related investigations. He was criticized for going through the office of Deputy White House Counsel Vince Foster following Foster's suicide.

Id. Even Nussbaum's friend, Webster Hubbell, criticized him as "too eager to get involved in matters from which he should have withdrawn." Neil A. Lewis, *At the Bar; Wherein a 'New York Style Litigator' Is Cast as the Heavy in the Whitewater Affair*, N.Y. TIMES, July 28, 1995, at B18 (citing Hubbell's testimony before the Senate committee investigating Whitewater).

85. See Nelson Lund, *Lawyers and the Defense of the Presidency*, 1995 BYU L. REV. 17, 18 (1995) (citing criticism by C. Boyden Gray, White House Counsel during the Bush administration, and Lloyd Cutler, Nussbaum's successor as White House Counsel under President Clinton). Former White House Counsel C. Boyden Gray criticized Nussbaum for "confus[ing] his fiduciary role as a temporary occupant of that office with the no-holds-barred role a private litigant would have. He is not [the Clintons'] private lawyer. He is the lawyer for the Oval Office." Naftali Bendavid, *Whitewater Meets the Washington Legal Culture*, LEGAL TIMES, Mar. 14, 1994, at 1 (quoting C. Boyden Gray).

86. See Nelson Lund, *Guardians of the Presidency: The Office of the Counsel to the President and the Office of Legal Counsel*, in GOVERNMENT LAWYERS: THE FEDERAL LEGAL BUREAUCRACY AND PRESIDENTIAL POLITICS 209-10 (Cornell W. Clayton ed., 1995) (explaining that Nussbaum was forced to resign after widespread denunciation of meetings he had held with officials of an independent regulatory agency investigating the Clintons' financial dealings). As the *New York Times* reported:

As White House counsel, Mr. Nussbaum deployed his use-every-legal-means-at-my-disposal defense of the Clintons in several ways. When Mr. Nussbaum met with Treasury Department lawyers to determine the progress of investigations into a failed Arkansas savings and loan association, Madison Guaranty, he was perhaps doing what he did as a corporate litigator for Wachtell, Lipton, Rosen & Katz in New York: trying to find out as much as he could about the case against his clients. But as White House counsel, he represents the President; thus, his action raised profound questions about tampering with a Government investigation.

Lewis, *supra* note 84, at B18. The *Times* also reported in March 1994:

Last month, it was disclosed that the United States Park Police, who had investigated the apparent suicide last July of Vincent W. Foster Jr., the deputy White House counsel, had accused Mr. Nussbaum in a confidential report of having impeded their inquiries. The report said, for example, that Mr. Nussbaum in-

tion's persistent problem with fluid lines of concern for the White House staff.⁸⁷

This problem was certainly not confined to the White House counsel's office; various White House officials were tied to efforts to discredit individuals in the scandals of Clinton's presidency.⁸⁸ There

sisted that lawyers from the White House counsel's office sit in on police interviews with staff members, perhaps intimidating them from being candid.

Neil A. Lewis, *Nussbaum's New York Tactics Falter in Washington*, N.Y. TIMES, Mar. 6, 1994, at A24.

87. It is notable that Charles Ruff appeared to take a more restricted view. Former White House Special Counsel Lanny Davis, who carried out an aggressive defense of the President on all fronts, noted that his efforts to get information from Ruff were often not rewarded. Ruff, he noted, was "very stubborn" in "his reticence to share information with me." Howard Kurtz, *Lanny Davis's Original Spin*, WASH. POST, Apr. 12, 1999, at C1 (quoting Lanny Davis).

88. The leading figure cited for engaging in White House smear tactics was Sidney Blumenthal, who was repeatedly accused of having a role in the genesis or distribution of false stories about individuals ranging from House Judiciary Chairman Henry Hyde to anti-Clinton Democratic Congressman Paul McHale. While Blumenthal denied under oath that he was the source of attack stories targeting Monica Lewinsky, see Al Kamen, *Blumenthal Remarks Challenged by Friend; Clinton Aide Had Described Lewinsky as 'Stalker,' Journalist Says in Affidavit*, WASH. POST, Feb. 7, 1999, at A10 (noting Blumenthal's denial in his testimony), various reporters contradicted him, and several House managers attempted to introduce evidence that Blumenthal had lied about his role in sparking the rumors. See *id.* (discussing the affidavit of reporter Christopher Hitchens, Blumenthal's friend, who stated that Blumenthal did speak with him about a smear story that painted Monica Lewinsky as a "stalker"); *Nightline: The Trial—Fighting to the Bitter End* (ABC television broadcast, Feb. 8, 1999) (reporting that House managers were asking for subpoenas for "[j]ournalists who said White House Aide Sidney Blumenthal had told them the misleading story, casting Monica Lewinsky as the stalker"). Blumenthal similarly denied spreading rumors of Henry Hyde's extramarital affair and was similarly contradicted in the media. See *ABC This Week: Chairman Hyde's Extramarital Affair* (ABC television broadcast, Sept. 20, 1998) (discussing Blumenthal's denial of spreading rumors about Hyde, but reporting that "news organizations . . . including ABC News, have told their viewers or readers that Sidney Blumenthal in fact, has spoken to reporters about this type of rumor" and quoting an article by Doug Ireland in *The Nation*, which reported that "[t]hree members of the media have confirmed to me that Sidney Blumenthal . . . had indeed been spreading such stories").

In addition to rumors spread about the sex life of Judiciary Chairman Henry Hyde, the White House was accused of spreading a false story that Democratic Congressman Paul McHale had lied about his war record. See Howard Kurtz, *Clinton Critic in House, McHale, Assails Attack on Military Record*, WASH. POST, Aug. 27, 1998, at A9 (quoting Congressman McHale as stating that it was "'reprehensible' for a presidential ally to leak false charges" about his military service); *House Republicans See Assault on Hyde; Call for FBI Inquiry*, ARK. DEMOCRAT-GAZETTE, Sept. 18, 1998, at A1 (reporting on a letter sent by House Republicans that "singled out White House Aide Sidney Blumenthal for suspicion," an allegation denied by Blumenthal). McHale was one of the few Democrats to call for the impeachment of President Clinton. See Kevin Sack, *Testing of a President: The Dissident; An Iconoclastic Democratic Congressman Takes a Dramatic Stand*, WASH. POST, Aug. 20, 1998, at A21. Speculation again tied Sidney Blumenthal to the story. *Press Briefing by Mike McCurry*, Federal Document Clearing House, Sept. 8, 1998 (statement of White House Press Secretary Mike McCurry responding to press reports tying Blumenthal to the McHale story and other attacks). CNBC ran the false story and stated that the information came from a source

was little apparent concern that these governmental employees should be addressing official matters and leaving the personal defense of the President to his private counsel,⁸⁹ except where legitimate issues of privilege are raised.⁹⁰

What is curious about the failure of the Clinton administration to protect this line between official and unofficial duties in the Office of White House Counsel is that the President and First Lady had a battery of private counsel to ably protect those interests not connected to

“very close to the president.” Howard Kurtz, *Hyde Story Stirs Hostilities; GOP-White House Trade Charges of Leaks, Smear Attacks*, WASH. POST, Sept. 18, 1998, at A1 (quoting CNBC talk show host Geraldo Rivera). White House staff appeared to exercise little restraint in their involvement in any scandal involving the President. Thus, it was common to see officials like White House Spokesperson Ann Lewis attacking women who accused the President of misconduct. See Editorial, *Presidential Character*, N.Y. TIMES, Mar. 17, 1998, at A24 (“Ann Lewis used the ‘Today’ show yesterday to . . . do to Ms. Willey what former Senator John Danforth and other Republicans did to Anita Hill. . . . [T]here will be a continuing effort to paint [Willey] as an erotically obsessed person who continued to write and call her accused attacker.”); *CNN Today, White House Challenges Willey’s Credibility* (CNN television broadcast, Mar. 16, 1998) (noting that Lewis “suggest[ed] that Kathleen Willey was friendly after this alleged incident in 1993”). What is astonishing is not simply that these attacks were made by high White House officials, but that the officials did not appear concerned that this role was well outside of their function as public employees.

89. The alternative view of the role of counsel to the president can seem almost quaint by current standards. Edward Bates became attorney general with the understanding that “[t]he 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 encroachments, from whatever quarter, of mere will and power.” Arthur Selwyn Miller, *The Attorney General as the President’s Lawyer*, in *ROLES OF THE ATTORNEY GENERAL OF THE UNITED STATES* 41, 51 (1968) (emphasis omitted) (unsourced quotation from Edward Bates).

90. The unofficial smear efforts of White House staff was reportedly the subject of testimony before a federal grand jury. See William Neikirk & Michael Tackett, *GOP, Democrats Race to Leak Tidbits; Both Parties Reveal New Starr Evidence Favorable to Their Own Views*, CHI. TRIB., Sept. 30, 1998, at 4. Dick Morris, President Clinton’s former political consultant, told a federal grand jury “that he believed the White House maintained a ‘secret police operation to go around and intimidate women’ who had some kind of secret relationship with the president.” *Id.* Morris identified the members of this operation as “private investigators Terry Lenzer and Jack Palladino and White House Deputy Chief of Staff Bruce Lindsey.” *Id.* Morris also testified that “he knew of two instances, one involving himself, in which the White House had leaked damaging information.” *Id.* Other incidents included the release of Linda Tripp’s personnel file by Defense Department spokesman Kenneth Bacon. *Id.* Independent Counsel Kenneth Starr further accused the White House of a number of leaks. See *Impeachment Notebook; Starr Says Other Guy’s to Blame for Leaks*, STAR TRIB. (Minneapolis), Jan. 28, 1999, at 14A (reporting Starr’s assertion in court documents that “there is a strong prima facie case that the president and his agents . . . are responsible for many of the alleged ‘leaks’” (alteration in original) (internal quotation marks omitted)); *Military Pay Raise Issue Awaits Senate After Trial*, USA TODAY, Jan. 28, 1999, at 10A (reporting that “Starr filed papers saying the Clinton White House ‘has employed a concentrated strategy of leaking harmful material to the media at an early stage to reduce long-term damage’”).

the President's official duties.⁹¹ Yet on certain issues, the White House counsel staff allowed itself to cross over the line into the realm of private counsel.⁹² This action brought about damaging judicial rulings.

The court losses of the Clinton administration offer some obvious lessons for the future. In *In re Grand Jury Subpoena Duces Tecum*,⁹³ the United States Court of Appeals for the Eighth Circuit considered whether the Office of Independent Counsel could secure documents from the White House counsel through a federal grand jury subpoena.⁹⁴ These documents were the notes of Miriam Nemetz, Associate Counsel to the President, and the notes of Jane Sherburne, Special Counsel to the President.⁹⁵ The notes were taken during meetings with First Lady Hillary Clinton and her private counsel, David Kendall.⁹⁶ The meetings dealt with the Whitewater scandal and the investigation of the First Couple for alleged criminal conduct before the election of President Clinton.⁹⁷ Ultimately, the White House dropped its executive privilege claims,⁹⁸ and the case turned on attorney-client privilege and work-product arguments.⁹⁹ The Court of Appeals, however, delivered a strong rebuke to the White House for

91. The President's private attorneys included Robert Bennett of Skadden, Arps, Slate, Meagher & Flom, who represented the President in the Paula Jones sexual harassment case; David Kendall and Nicole Seligman of Williams & Connolly, who represented the Clintons during the Whitewater and subsequent OIC investigations, including the House and Senate impeachment proceedings; and Mickey Kantor, who served Clinton as trade negotiator and then Commerce Secretary before joining the President's legal team. See Francis X. Clines, *Clinton's Counsel Keeps His Own*, N.Y. TIMES, May 31, 1997, at A8 (comparing the discreet manner of David Kendall with the more media-savvy attitudes of Robert Bennett and Kenneth Starr); Lloyd Grove & David Segal, *The President's Lawyer; Bennett Jumps a Hurdle on His Victory Lap*, WASH. POST, Apr. 3, 1998, at A34 (discussing Robert Bennett's representation in the Paula Jones case); Richard W. Stevenson, *President Triple-Teams His Lewinsky Problem*, N.Y. TIMES, Aug. 5, 1998, at A20 (discussing Clinton's reliance on David Kendall, Mickey Kantor, and Nicole Seligman).

92. See Susan Schmidt & Ruth Marcus, *First Lady's Subpoena Raises Political Stakes; Scheduled Grand Jury Appearance Also Adds to Tension Within the Clintons' Legal Team*, WASH. POST, Jan. 24, 1996, at A4 (noting "frayed relations between White House and [the Clintons'] private lawyers" and characterizing the Clinton legal team as a "hydra-headed creature, with conflicting strategies and no clear leader").

93. 112 F.3d 910 (8th Cir. 1997).

94. *Id.* at 915.

95. *Id.* at 914.

96. *Id.*

97. *Id.* The first meeting between Mrs. Clinton, Ms. Sherburne, Ms. Nemetz, and Mr. Kendall concerned Mrs. Clinton's activities following Vincent W. Foster, Jr.'s death. *Id.* The second meeting, attended by Ms. Sherburne, Mrs. Clinton, Mr. Kendall, Mr. Kendall's partner Nicole Seligman, and, at times, John Quinn, Counsel to the President, concerned billing records of the Rose Law Firm found in the White House residence. *Id.*

98. *Id.*

99. *Id.*

attempting to define the role of government lawyers as including the right to withhold evidence relevant to criminal investigations.¹⁰⁰ Critical to the court's analysis was precedent that limited such privilege arguments in criminal matters.¹⁰¹ This issue—whether executive privilege permits government attorneys to withhold evidence in criminal investigations—had been addressed with similar results in *In re Lindsey*.¹⁰² In *Lindsey*, Independent Counsel Kenneth Starr sought to overcome both executive privilege and attorney-client privilege assertions by Bruce Lindsey, Deputy White House Counsel.¹⁰³ Once again, the question ultimately turned on the attorney-client privilege, which the majority ruled was overcome by “[t]he public interest in honest government and in exposing wrongdoing by government officials.”¹⁰⁴

The White House counsel's office must now take greater care to define its function in any given meeting to avoid a waiver of privilege. When meeting with private counsel for the president or discussing potentially criminal matters, the White House counsel is now subject to greater presumed restrictions on his or her ability to act with a guarantee of confidentiality.¹⁰⁵ Certainly, the president's right to “accurate, frank, and robust advice”¹⁰⁶ must be protected. However, the White House counsel staff must adopt some new methods to better compartmentalize different functions of its office and to avoid some functions altogether.¹⁰⁷ Some of these new steps are obvious. When

100. See *id.* at 921 (“We . . . believe that to allow any part of the federal government to use its in-house attorneys as a shield against the production of information relevant to a federal criminal investigation would represent a gross misuse of public assets.”).

101. See *id.* at 919 (discussing *United States v. Nixon*, 418 U.S. 683 (1974)).

102. 158 F.3d 1263, 1266 (D.C. Cir. 1998) (*per curiam*). The court in *Lindsey* found that:

the Office of the President is a part of the federal government, consisting of government employees doing government business, and neither legal authority nor policy nor experience suggests that a federal government entity can maintain the ordinary common law attorney-client privilege to withhold information relating to a federal criminal offense.

Id.

103. *Id.* at 1267.

104. *Id.* at 1266.

105. See Michael K. Forde, *The White House Counsel and Whitewater: Government Lawyers and the Scope of Privileged Communications*, 16 YALE L. & POL'Y REV. 109, 162 (1997) (discussing the likely implications of recent privilege precedents and finding that “[i]t is thus clear that the White House will face an uphill battle in making a privilege claim that it can justify publicly”).

106. Randall K. Miller, *Congressional Inquests: Suffocating the Constitutional Prerogative of Executive Privilege*, 81 MINN. L. REV. 631, 640 (1997).

107. Cf. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 916 (8th Cir. 1997) (noting that in the context of government attorney-client privilege, “[m]ore particularized rules may be necessary where one agency of government claims the privilege in resisting a

asked to give advice on personal matters with potential criminal liability, White House counsel staff should demur. During the Clinton administration, there was little reason (beyond a possible reluctance to decline participation in a meeting desired by the First Lady) for the White House staff to involve itself in some of the joint meetings with private counsel. In the future, the White House counsel will have to implement a more rigorous "traffic cop" system in which certain private matters are sent to private counsel, or, at the very least, given to a White House counsel designated to handle such ambiguous cases. Such a policy will require the creation of firewalls to isolate lawyers exposed to such information and to avoid serious injury to either the president's interests or to those of the White House counsel.

One significant change should come not from the White House, but from Congress. The position of White House counsel should be made an appointed post that requires Senate confirmation. The highest legal positions at the Justice Department are filled by presidential nomination under the Appointments Clause.¹⁰⁸ Described as "among the significant structural safeguards of the constitutional scheme,"¹⁰⁹ the Appointments Clause allows Congress to check abuses of the executive branch and to reaffirm the obligations of executive officials.¹¹⁰ The White House counsel, however, continues to be appointed without Senate confirmation, despite the position's importance to a variety of public policy matters.¹¹¹ This state of affairs tends to reaffirm the White House counsel's role as one of personal obligation to the president—akin to a quasi-private counsel, as opposed to a govern-

demand for information by another" (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 124 cmt. b (Proposed Final Draft No. 1, 1996)).

108. U.S. CONST. art. II, § 2, cl. 2 (providing that the president "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States").

109. *Edmond v. United States*, 520 U.S. 651, 659 (1997).

110. *See id.* at 660. The Framers considered the Appointments Clause to be central to the constitutional scheme and the system of checks and balances. *See, e.g.*, THE FEDERALIST NO. 77 (Alexander Hamilton) (discussing why the Appointments Clause would prevent any branch of government from monopolizing appointment power).

111. In fact, the last White House counsel for President Clinton, Beth Nolan, was moved into this position after being delayed by controversy in the Senate over her appointment as head of the Office of Legal Counsel at the United States Department of Justice. *See* Turley, *supra* note 41. While Ms. Nolan was clearly well-suited for this position and should have had little trouble with confirmation, the shift from a Senate-approved position to a discretionary position highlights the problem in this area. It was in the best interests of both Ms. Nolan and the relationship between the branches for a resolution to be reached on any lingering concerns. A confirmation hearing would have cleared any question as to Ms. Nolan's suitability for the office and would have established the agreement of Congress that she was both well-qualified and beyond any taint of prior controversy.

ment attorney serving in a high government office.¹¹² Any confirmation of a White House counsel would likely be given generous treatment by the Senate, but requiring Senate confirmation would make the appointment of this office a joint decision by the president and the public. Such a confirmation would also bolster the authority of the White House counsel in refusing certain roles suggested by the president or the first lady. The next president could demonstrate a commitment to clarifying the role of White House counsel by proposing such a change, thus yielding a presidential prerogative in the interest of good government.

C. *The Role of the First Lady*

The role of the first lady has become increasingly controversial as modern first ladies have begun to perform official or quasi-official functions. Most first ladies have tended to follow a nonpolicy course in establishing their role. This is true even of modern first ladies like Jacqueline Kennedy, who insisted that she “‘wanted to be First Wife and First Mother, not First Lady.’”¹¹³ While first ladies have long served as advisors to their spouses,¹¹⁴ direct policy roles in government have been a rarity. No first lady has had the pronounced policy-based role of Hillary Clinton.¹¹⁵ To her credit, Clinton was open

112. In comparison, assistant attorneys general are required to be confirmed by the Senate. 28 U.S.C. § 506 (1994).

113. John Dwight Ingram, *The American “First Lady,”* 27 CAP. U. L. REV. 487, 500 (1999) (citing GIL TROY, *AFFAIRS OF STATE* 2 (1997)).

114. See T. Natasha Patel, *First Lady, Last Rights? Extending Executive Immunity to the First Lady*, 25 HASTINGS CONST. L.Q. 585, 592-94 (1998) (discussing the active roles that Edith Galt Wilson and Eleanor Roosevelt played in their husbands’ presidencies). Even Rosalynn Carter, who played a far less official role in her husband’s administration, was criticized for assuming ambassadorial responsibilities on limited occasions. Ingram, *supra* note 113, at 497.

115. See generally Ruth Marcus, *Now ‘A Different Kind of First Lady’; Hillary Clinton’s Role Is Likely to Be Activist*, WASH. POST, Jan. 20, 1993, at F20 (discussing Hillary Clinton’s substantial role as adviser to her husband throughout his career in state politics and her potentially active role as adviser to her husband during his presidential administration). Some first ladies have had controversial roles due to their influence. This included Edith Galt Wilson, who, after the President suffered a stroke in 1919:

became the “gatekeeper” to the President, and only she and his doctors ever knew how strong a role she played. She was his close confidante and knew his thoughts on many subjects. She continued to read everything addressed to the President, sought his opinion on those questions she considered important, and then informed the official involved of the President’s decision.

Ingram, *supra* note 113, at 502 (citations omitted); see also Patel, *supra* note 114, at 592 (discussing Edith Galt Wilson’s role as “the President’s sole advisor”). Eleanor Roosevelt is also often cited as an example of a more politically active first lady, though she was ultimately forced to resign as head of an office for the advancement of women and women’s issues. See Patel, *supra* note 114, at 593-94. As noted, Rosalynn Carter also drew strong

about her different perception of the role of the first lady and her view that the election elevated both the president and his wife to higher office.¹¹⁶ Clinton's more active role as first lady, however, produced a major court challenge as to her official duties and contributed substantially to some of the recent privilege conflicts.

The issue of the first lady's role came to a head during the first term of the Clinton administration when Hillary Clinton was made the Chair of the President's Task Force on National Health Care Reform.¹¹⁷ This task force was enormously important; it would determine whether a national health care system was needed and, if so, would establish the parameters of such a system.¹¹⁸ At the time, health care was one of the leading political issues before Congress and the public.¹¹⁹ When various health care and policy reform groups sued for access to the deliberations of the task force,¹²⁰ the First Lady's role became an issue under the Federal Advisory Committee Act (FACA), which requires that "advisory committee" meetings be open to the public.¹²¹ The government argued that the Task Force was not an advisory committee subject to FACA, and that "the Task Force was exempt from FACA because all of its members—including Mrs. Clinton—were government officers and employees."¹²² Ulti-

criticism at home and abroad when she assumed ambassadorial responsibilities during her husband's administration. See *supra* note 114.

116. See Sally Quinn, *Campaign Puzzle: Is America Ready For Hillary Clinton?; The Candidate's Wife Is the Very Model of the Modern Working Woman*, WASH. POST, Aug. 9, 1992, at C1 (referencing Clinton's "'If-you-vote-for-him-you-get me' remark" and finding that this remark "gave some the impression that she planned to be co-president").

117. See Dana Priest, *Clinton Names Wife to Head Health Panel; President Says Plan Is Due at End of May*, WASH. POST, Jan. 26, 1993, at A1. Hillary Clinton's role in health care issues was not her only high-profile involvement in the administration. The First Lady also had a prominent role in the selection of nominees like Judge Kimba Wood for attorney general. See Carl David Wasserman, Note, *Firing the First Lady: The Role and Accountability of the Presidential Spouse*, 48 VAND. L. REV. 1215, 1219 (1995) ("It was leaked that [First Lady Clinton] spent more time interviewing Judge Kimba Wood . . . than the President did.").

118. See *Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 901 (D.C. Cir. 1993) ("President Clinton charged this body with the task of 'listen[ing] to all parties' and then 'prepar[ing] health care reform legislation to be submitted to Congress within 100 days of our taking office.'" (alteration in original) (quoting 29 WEEKLY COMP. PRES. DOC. 96 (Feb. 1, 1993))).

119. The promise of health care reform legislation was a major part of the Clinton campaign platform. *Id.*

120. See *id.* The groups demanding access were "the Association of American Physicians and Surgeons, which represents physicians; the American Council for Health Care Reform, which represents health care consumers; and the National Legal & Policy Center, which seeks to promote ethics in government." *Id.*

121. 5 U.S.C. app. § 10(a)(1) (1994).

122. *Ass'n of Am. Physicians*, 997 F.2d at 901.

mately, because Hillary Clinton was deemed a close advisor to the President, she was exempted from FACA disclosure requirements.¹²³

I must confess that I have considerable unease with the pronounced policy role of a first lady as a federal official.¹²⁴ There is no question that the first spouse will always be a close advisor, if not the closest advisor, to the president. Moreover, the time when a first spouse had no career independent of the president is largely past. It is inevitable that first spouses will enjoy outside activities and will have professional careers. Yet the formal assumption of governmental responsibilities creates a host of legal and policy issues that make the costs of an official role prohibitive in our system.¹²⁵ Not only does such a role raise questions under prohibitions of nepotism¹²⁶ and under other laws such as the Antideficiency Act,¹²⁷ but the first lady also assumes a position as an executive branch official who is not elected, not confirmed, not subject to impeachment, and not freely

123. *Id.* at 911. The White House later succeeded in securing recognition that communications with the first lady, as a senior advisor, are entitled to some protection under executive privilege. See *In re Grand Jury Proceedings*, 5 F. Supp. 2d 21, 27-28 (D.D.C.) (citing *Ass'n of Am. Physicians* in finding that because the first lady is considered a presidential advisor, conversations with her are protected under executive privilege), *aff'd in part, rev'd in part sub nom. In re Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998) (per curiam).

124. The basis of this objection is not to Hillary Clinton assuming such a role, but is directed at any first lady assuming official authority. Similarly, the enactment of the Federal Anti-Nepotism statute was not a condemnation of Robert Kennedy as attorney general. 5 U.S.C. § 3110(b) (1994) (barring public officials from appointing relatives to positions in agencies over which the public official exercises jurisdiction or control). One can be a fan of Kennedy's (as I am) and still believe (as I do) that President Kennedy exercised extremely poor judgment in appointing a sibling to that high office.

125. These issues are not limited in application to first ladies. Former Speaker Thomas Foley showed poor judgment in allowing his spouse to serve as an unpaid chief of staff and advisor. See Sara Krausert, Comment, *From Baking Bread to Making Dough: Legal and Societal Restrictions on the Employment of First Ladies*, 5 U. CHI. L. SCH. ROUNDTABLE 243, 260-61 (1998). This resulted in a series of distracting allegations and objections. See *id.* (discussing the public controversy surrounding Mrs. Foley).

126. See *supra* note 124.

127. 31 U.S.C. §§ 1341-1342 (1994) (limiting the ability of government officials to expend funds or accept volunteer services without express congressional approval). Laws such as these create questions regarding the legality of the first lady assuming official positions within the executive office. Krausert, *supra* note 125, at 247-53 (discussing the legal restrictions on government employment of first ladies). "[A] First Lady may be caught between a rock and a hard place: she may not be able to hold a government job which pays because of the Anti-Nepotism Act, and yet she may also be unable to hold an unpaid job because of the Antideficiency Act." *Id.* at 251. There is also some question as to the criminal conflict of interest statute's impact on the first lady's handling of official duties. 18 U.S.C. § 208(a) (1994) (preventing employees of the executive branch from personally and substantially engaging in government decisions that affect their financial interests or the financial interests of their spouse); Krausert, *supra* note 125, at 252-53 (discussing the implications of the criminal conflict of interest statute on the first lady).

criticized within the White House due to her spousal relationship.¹²⁸ Putting aside the legal issues, so enhancing the role of the first lady has an unnecessary and destabilizing effect in a system based on accountability.

Hillary Clinton, however, raised the contemporary fact that first spouses will increasingly come to the White House with careers distinct from the president's.¹²⁹ Certainly, having a professional or independent spouse did not prove disabling for world leaders like Margaret Thatcher,¹³⁰ and it should not be a barrier for the first couple in the United States. However, there have been few substantive legislative or policy changes to reflect the new modern look of first couples. It is therefore important to reexamine the role of the first spouse and the need to create clear lines as to the involvement of White House personnel in issues relating to his or her private or professional interests.

The next administration should address these issues by promulgating a formal policy on legal issues stemming from private or pre-election interests of the first lady. Such matters should be subject to a presumption that they will be given to private counsel with minimal involvement of White House staff. The most difficult question arises when the first lady assumes a more official role or plays a part in policy decisionmaking.¹³¹ These issues have long been left unresolved to avoid difficult legal and social questions.¹³² The Clinton crisis, however, shows that the legislative and executive branches should openly

128. See generally Wasserman, *supra* note 117 (discussing the legal ramifications of a first lady's involvement in White House affairs—specifically, Hillary Clinton's open and active involvement in the Clinton administration).

129. Ultimately, this new role would include her election as a United States Senator during the term of her spouse, albeit shortly before the end of his final term. See, e.g., Ellen Gamberman, *Hillary Clinton Sworn in amid Senate Ceremony; Through Tears, President Sees Wife Become Only First Lady in Elective Office*, BALT. SUN, Jan. 4, 2001, at 6A.

130. Thatcher's husband was known for his avoidance of all things political and "was never heard to utter a political sentiment within earshot of reporters." Alexander MacLeod, *Career-juggling at Britain's 10 Downing Street*, CHRISTIAN SCI. MONITOR, Aug. 14, 2000, at 1. Likewise, Prime Minister John Major's wife "loathed publicity" and spent most of her time pursuing her career as an author of books about opera singers. *Id.*

131. See Wasserman, *supra* note 117, at 1218-25 (discussing the problems posed by Hillary Clinton's appointment as head of the President's Task Force on National Health Care Reform with respect to the interpretation of FACA); cf. *Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993) (considering the issue of whether the President's Task Force on National Health Care Reform is an advisory group and thus subject to FACA disclosure requirements).

132. Cf. *Ass'n of Am. Physicians*, 997 F.2d at 905 ("[T]he government is uncomfortable at having to choose whether Mrs. Clinton should be thought of as an officer or employee. The government's discomfort is quite understandable."); Krausert, *supra* note 125, at 247-56 (discussing the legal and societal restrictions on the first lady's employment options).

address this issue. Compelling arguments exist for and against the formal involvement of a first lady in governmental positions.¹³³ The role of presidential spouses is not a question of executive privilege per se. However, as we saw with First Lady Hillary Clinton, the ambiguities surrounding a presidential spouse engaged in an official capacity can produce difficult privilege questions. Some of these questions may be worth reexamination. However, the next administration would be well-served in starting with the more fundamental question of the proper role of a presidential spouse in government. While I believe that the next president would best serve the interests of government by promising not to use his spouse in such an official capacity, it is an issue that should be part of a serious dialogue among the political branches. Frankly, it would be a healthy and long-overdue debate.

D. *The Role of the Chief Executive*

Obviously, the most important and defining moment for the next president will be how he defines his role vis-à-vis executive privilege. One of the most important tasks for a new administration is to establish executive privilege as a narrow doctrine tied closely to the official functions and interests of the president as an office-holder, as opposed to the president as an individual.¹³⁴ The greatest damage caused by the Clinton administration was the reduction of executive privilege to a tactical device used in highly extenuated circumstances. The result was a fundamental undermining of both the privilege and the office that it was designed to protect.

Past presidents have had radically different views of the scope of their authority in withholding information as a constitutional preroga-

133. See, e.g., *Ass'n of Am. Physicians*, 997 F.2d at 903-05 (describing the Government's assertions that, due to Mrs. Clinton's status as the first lady, her position is the functional equivalent of a government officer or employee, and that her assistance to the President is not limited to mere ceremonial duties, as well as the appellees' assertion that Congress intended that a first lady only be allowed to aid a president with the discharge of his ceremonial duties).

134. The Supreme Court articulated the importance of this relationship in *United States v. Nixon*, 418 U.S. 683, 706 (1974). The *Nixon* Court explained:

The President's need for complete candor and objectivity from advisers calls for great deference from the courts. However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises. Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material [related to high-level communications] for *in camera* inspection with all the protection that a district court will be obliged to provide.

Id.

tive.¹³⁵ Tensions between the chief executive and the judicial and legislative branches began almost immediately in the newly-created government. George Washington first invoked the doctrine that certain documents were outside the legitimate interests of Congress and could be withheld by the president.¹³⁶ In 1796, when Congress asked for information on the negotiations of the controversial Jay Treaty,¹³⁷ Washington insisted that such information was inherently and exclusively within the domain of the executive branch.¹³⁸ Invoking the principle of the separation of powers, Washington insisted that “the boundaries fixed by the Constitution between the different departments should be preserved, a just regard to the Constitution and to the duty of my office . . . forbids a compliance with your request.”¹³⁹ Like Washington’s, many of the early assertions of executive privilege are generally acknowledged as excessive interpretations of presidential power.¹⁴⁰ The conflicts between Congress and the first dozen presidents often dealt with matters considered well-within Congress’s authority to investigate. Although many of these claims were illegitimate, they were driven by core governmental issues.¹⁴¹

135. See ROZELL, *supra* note 12, at 35-48 (discussing the use of executive privilege by numerous presidents with different views regarding the scope of the privilege).

136. See *id.* at 34-36 (noting Washington’s use of executive privilege in 1794, when he allowed Congress to view only some portions of correspondence between U.S. government officials and the French government, and in 1796, when he refused to disclose information pertaining to the negotiations of the Jay Treaty).

137. The Jay Treaty was negotiated with Great Britain by John Jay. *Id.* at 35. The Treaty concerned unsettled issues from the American Revolution, and many members of Congress felt that the terms were unfavorable to the United States. *Id.*

138. *Id.* at 35-36.

139. *Id.* at 35 (quoting 1 JAMES RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 186-87 (1897)).

140. Cf. Louis Fisher, *Invoking Executive Privilege: Navigating Ticklish Political Waters*, 8 WM. & MARY BILL RTS. J. 583, 589 (2000) (finding Washington’s use of executive privilege unsatisfactory because the Jay Treaty had already been ratified, and the House needed the documents to make an informed decision regarding the appropriation of funds in order to implement the Treaty). It is interesting that the first such conflict involved a congressional request that was manifestly proper. Congress was legitimately interested in documents relating to a failed military campaign by General Arthur St. Clair against Native Americans. See ROZELL, *supra* note 12, at 33. While Washington considered refusing the request, he ultimately relented. *Id.* Likewise, President John Adams balked at a legitimate congressional demand for information on the “XYZ Affair,” in which French agents demanded bribes in exchange for France’s cooperation in negotiating an international trade treaty. See *id.* at 36. Adams eventually turned over much, but not all, of the requested information. *Id.* Thomas Jefferson also improperly resisted efforts by Congress to secure information about the Aaron Burr conspiracy on the basis that it was “the necessary right of the President of the United States to decide, independently, what papers coming to him as President, the public interest permit to be communicated, and to whom.” *Id.* at 37.

141. See ROZELL, *supra* note 12, at 36 (acknowledging President Adams’s use of executive privilege during the XYZ Affair to protect the safety of American diplomats abroad); *id.* at

Although the true scope of executive privilege was not established until the Supreme Court's decision in *United States v. Nixon*,¹⁴² modern presidents obviously made the privilege central to their claims of constitutional authority. President Eisenhower was particularly robust in his use of such claims.¹⁴³ One factor in the establishment of the Eisenhower doctrine of privilege was his commendable resistance to the army-McCarthy hearings,¹⁴⁴ though his statement of the doctrine proved far more sweeping:

Because it is essential to efficient and effective administration that employees of the Executive Branch be in a position to be completely candid in advising with each other on official matters, and because it is not in the public interest that any of their conversations or communications, or any documents or reproductions, concerning such advice be disclosed, you will instruct employees of your Department that in all of their appearances before the Subcommittee of the Senate Committee on Government Operations regarding the inquiry now before it they are not to testify to any such conversations or communications or to produce any such documents or reproductions. This principle must be maintained regardless of who would be benefitted by such disclosures.¹⁴⁵

Yet if the next president follows the historical pattern, he will downplay the use of executive privilege after this most recent period

41 (noting President Polk's initial refusal to disclose information concerning the negotiations of an 1848 U.S. treaty with Mexico because disclosure could have been prejudicial to the public interest); *id.* at 38-39 (noting, among other uses of privilege, President Andrew Jackson's refusal to give information to Congress regarding U.S. negotiations with Buenos Aires because such disclosure would have been adverse to the public interest, and his refusal to provide the Senate with information pertaining to the removal of U.S. Surveyor General Gideon Fitz because the removal was a decision that dealt with exclusively executive issues).

142. 418 U.S. 683 (1974).

143. It is notable that some of the most expansive views of privilege have come from former generals. See ROZELL, *supra* note 12, at 32-46 (discussing the use of executive privilege by former generals such as Presidents George Washington, Andrew Jackson, James K. Polk, and Dwight D. Eisenhower). While certainly not an exclusive list, it does suggest a certain cultural predilection toward claims of authority to withhold information for the greater good. In addition to Presidents Washington and Eisenhower, Presidents (and former Generals) Jackson, Polk, and Grant were particularly resistant to congressional demands. See *id.*

144. For a discussion of Eisenhower's assertion of privilege in these hearings, see *id.* at 44-45.

145. President Dwight D. Eisenhower, Letter to the Secretary of Defense Directing Him to Withhold Certain Information from the Senate Committee on Government Operations, 1954 PUB. PAPERS 483, 484 (May 17, 1954).

of abuse of the privilege. After the Nixon crisis, the next two administrations showed both a notable disinclination for assertions of privilege and a determination not to test the scope of privilege in court.¹⁴⁶ The presidencies of Gerald Ford and Jimmy Carter were called “the open presidencies,” due, in part, to their reluctance to rely on executive privilege.¹⁴⁷ Conversely, the Reagan administration “on several occasions boldly proclaimed its constitutional prerogative to assert executive privilege”¹⁴⁸ and took expansive measures to enhance secrecy in the executive branch.¹⁴⁹ The Reagan White House considered using the privilege to resist inquiries into controversies ranging from the failure to carry out environmental laws¹⁵⁰ to the Iran-Contra affair.¹⁵¹ The Bush administration that followed again tacked back on the use of executive privilege and maintained that it would be used “only if absolutely necessary.”¹⁵²

What is striking about this history is how far the Clinton assertions stand outside the historical use of the executive privilege.¹⁵³

146. See ROZELL, *supra* note 12, at 83-107 (discussing the somewhat limited use of executive privilege during the presidencies of Gerald Ford and Jimmy Carter).

147. *Id.* at 83.

148. *Id.* at 125. Ultimately, however, due to political and public pressures, the Reagan administration was limited in its effective use of the privilege. *Id.*; see also *id.* at 109 (“The Reagan administration—accused by many critics of being overly prone to secrecy and deception—showed great reluctance to fully exercise executive privilege.”); *id.* at 111 (“The Reagan administration adopted a number of measures to enhance secrecy in government. Nonetheless, the administration, despite such measures, did not vigorously employ or defend executive privilege.”).

149. See *id.* at 111-14 (discussing measures taken by the Reagan White House to maintain the secrecy of executive branch activities); *cf. id.* at 109 (“Ford and Carter mistakenly assumed after the Watergate scandal that a policy of openness best suited the demands of presidential leadership. Reagan perhaps better understood that information control, not openness, enhances presidential power.”).

150. See *id.* at 117-20 (recounting the Reagan administration’s initial assertion of executive privilege and eventual compromise in response to congressional requests to release documents relating to Superfund cleanup regulations).

151. President Reagan was largely cooperative with Congress’s Iran-Contra investigation:

In all, the Reagan administration furnished over three hundred thousand White House, State Department, Defense Department, CIA, and Justice Department documents [dealing with Iran-Contra] to Congress. The investigating committees deposed numerous executive branch officials. The president waived executive privilege for executive branch officials who testified before Congress.

Id. at 121. Reagan, however, considered asserting executive privilege to impede Congress’s access to his personal diaries during the Iran-Contra investigation. *Id.* at 121-23. Reagan ultimately decided not to assert the privilege to protect these materials. *Id.* at 122-23.

152. *Id.* at 125.

153. The Clinton assertions of privilege often appeared calculated to protect a more tactical, personal ground than constitutional ground. See Turley, *Guarding the King*, *supra* note 2, at 27 (discussing Clinton’s attempt to invoke privilege to prevent members of the Secret Service from providing information about the President’s personal relationship with Monica Lewinsky); Turley, *Nothing Bars Questioning*, *supra* note 2, at A1 (discussing Clin-

The vast majority of past assertions dealt with efforts to acquire information relating to core governmental functions and decisions.¹⁵⁴ The losses of the Clinton administration offer clear and, in my view, correct guidelines for future assertions. The use of the privilege in criminal investigations or litigation involving unofficial conduct is presumably invalid.¹⁵⁵ Future assertions must steer clear of claiming privilege over “[p]urely private conversations that [do] not touch on any aspect of the President’s official duties or relate in some manner to presidential decision-making.”¹⁵⁶ Of course, the president will continue to have the benefit of other privileges accorded to all litigants or targets of criminal investigations.¹⁵⁷ When defending actions as a citizen, however, he must do so as a citizen.

The most vital task for the next president is to reestablish clear lines between the personal and public interests of the president. It will fall upon this president to instruct his staff to protect the presidency, and not the president, in periods of controversy. This symbolic message should be reinforced with new guidelines for separating matters that would properly be handled by private counsel from matters that should be handled by White House staff. Most importantly, the next president should select a White House counsel who is committed to policing these guidelines and who is not viewed as a personal friend of the First Couple. Ironically, a presidential legacy may be best protected not by close friends, but by detached counsel.

ton’s invocation of privilege after Congress’s request for information regarding his decision to grant clemency to two members of the Armed Forces of National Liberation (FALN)).

154. See *supra* note 15 and accompanying text.

155. Cf. *United States v. Nixon*, 418 U.S. 683, 713 (1974) (concluding that “when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice”); *In re Lindsey*, 158 F.3d 1263, 1278 (D.C. Cir. 1998) (per curiam) (finding that a White House attorney may not assert attorney-client privilege “to avoid responding to the grand jury if he possesses information relating to possible criminal violations”); *In re Sealed Case*, 148 F.3d 1073, 1079 (D.C. Cir. 1998) (per curiam) (declining to recognize a protective function privilege that would have entitled Secret Service agents to withhold information about President Clinton’s personal relationship with Monica Lewinsky).

156. *In re Grand Jury Proceedings*, 5 F. Supp. 2d 21, 26 (D.D.C.), *aff’d in part, rev’d in part sub nom. In re Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998) (per curiam).

157. The Fourth, Fifth, Sixth, Seventh, and Eighth Amendments to the Constitution presumably apply to the president as well. See *Nixon*, 418 U.S. at 709-11 (implying that a president, as a defendant, is still entitled to the same basic constitutional rights as all other citizens, such as the guarantees against compelled self-incrimination, the right to due process, and the right to privileged conversations made to priests and attorneys when revealed in professional confidence).

The assertions of privilege during the Clinton scandals, however, should not be the sole source of concern for the new administration.¹⁵⁸ The Clinton administration made several controversial assertions of executive privilege in areas unrelated to the various scandals.¹⁵⁹ Most notable was the invocation of privilege in 1999 to bar inquiries into the presidential clemency given to Puerto Rican terrorists.¹⁶⁰ President Clinton used his pardon powers to release over a dozen terrorists who were members of the Armed Forces of National Liberation (FALN) and the FALN subset group known as *Los Macheteros*, or “the Machete Wielders.”¹⁶¹ FALN was responsible for 130 bombings that killed six people and maimed others in a campaign of terror during in the 1970s and 1980s.¹⁶² Clemency for terrorism was itself controversial at a time when world governments struggled

158. Another concern was highlighted in the final days of the Clinton administration. While not the focus of this Article, President Clinton’s use of recess appointments is another matter that raises serious constitutional concerns that should be addressed directly by the next president. With only weeks left in his term, President Clinton gave a recess appointment to the United States Court of Appeals for the Fourth Circuit to Roger Gregory. Lyle Denniston, *Politics, Race Cloud Naming of Judges to U.S. 4th Circuit; Clinton Ducks Senate to Appoint First Black*, BALT. SUN, Jan. 8, 2001, at 1A. Such recess appointments to the bench were once common, and hundreds of such appointments have been made in the past. See Dan Eggen, *Clinton Names Black Judge to Appeals Court; Recess Choice for Richmond Circuit is Challenge to GOP*, WASH. POST, Dec. 28, 2000, at A1 (“The tactic hasn’t been employed since 1980, but more than 300 recess appointments have been made to the federal judiciary in the two centuries before that.”). However, such appointments violate the system of checks and balances, which requires Senate confirmation and guarantees life tenure for Article III judges. In the case of Gregory, he will now rule for a year as a judge in the very status that Article III attempts to avoid: a judge who has a direct interest in the popularity of his decisions. See Brooke A. Masters & Spencer S. Hsu, *Allen, Warner Support Clinton’s 4th Circuit Appointee*, WASH. POST, Jan. 26, 2001, at B5 (noting Judge Gregory’s precarious status as a recess appointee). Gregory will rule on cases while his nomination remains before the Senate. *Id.* Every vote that he makes will influence any later confirmation vote, depriving litigants of the neutrality of a fully vested Article III judge. Recess judicial appointments should be condemned by the next president, as well as by senators from both parties as inimical to our constitutional and political processes.

159. See, e.g., Turley, *Nothing Bars Questioning*, *supra* note 2, at B7 (discussing Clinton’s assertion of privilege to bar disclosure of documents pertaining to his decision to grant clemency to FALN members).

160. I was highly critical of this decision and the subsequent claims of executive privilege. See *id.* (criticizing President Clinton’s assertion of privilege in the FALN matter as “too broad and based on a flawed concept of our separation of powers” and stating that President Clinton’s use of privilege during his terms in office was “extreme and unfounded”).

161. Sean Scully, *FBI Disputes Clinton’s Portrayal of FALN Members; Terrorism Expert Calls Clemency Group a Threat to Nation*, WASH. TIMES, Sept. 22, 1999, at A1.

162. Charles Babington & David A. Vise, *Clinton Explains Clemency; Politics Had No Role in Decision, President Tells House Member*, WASH. POST, Sept. 22, 1999, at A2.

with the threat of terrorist attacks.¹⁶³ Moreover, the Justice Department, the Federal Bureau of Investigation, and various other federal officials opposed the clemencies as unjustified and even threatening to the nation.¹⁶⁴ These concerns took on a particularly harsh light when it was alleged that President Clinton was motivated not by mercy, but rather by First Lady Hillary Clinton's campaign for the Senate in New York, where a large Hispanic population was heavily in favor of the FALN clemencies.¹⁶⁵ Before the FALN decision, President Clinton had only granted three commutations in his two terms,¹⁶⁶ and his selection of sixteen terrorists from hundreds of petitions seemed highly suspicious to Congress.¹⁶⁷ Congress demanded information on the process involved in the FALN decision.¹⁶⁸ Presi-

163. Ironically, one argument in favor of pardoning such domestic revolutionaries can be traced to Alexander Hamilton, who noted that:

the principal argument for reposing the power of pardoning in this case in the Chief Magistrate is this: in seasons of insurrection or rebellion, there are often critical moments when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth; and which, if suffered to pass unimproved, it may never be possible afterwards to recall.

THE FEDERALIST NO. 74, at 449 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

164. See Babington & Vise, *supra* note 162, at A2 (quoting the FBI's Assistant Director for National Security as stating that "[t]hey are criminals, and they are terrorists, and they represent a threat to the United States"); David Johnston, *Federal Agencies Opposed Leniency for 16 Militants*, N.Y. TIMES, Aug. 27, 1999, at A1 (noting the unanimous opposition of federal law enforcement agencies to leniency for the FALN members); cf. Babington & Vise, *supra* note 162, at A2 (quoting FBI Director Louis J. Freeh as stating that "[t]he FBI has consistently advised the Department of Justice . . . in writing, that the FBI was opposed to any such pardon and/or commutation of sentences for any of these individuals" (internal quotation marks omitted)).

165. See Babington & Vise, *supra* note 162, at A2.

166. See Margaret Colgate Love, *Of Pardons, Politics and Collar Buttons: Reflections on the President's Duty To Be Merciful*, 27 FORDHAM URB. L.J. 1483, 1493 n.38 (2000).

167. See Babington & Vise, *supra* note 162, at A2 (noting Republicans' immediate suspicions as to Clinton's motives in the FALN pardons). The past clemency decisions by the President seemed strikingly different in terms of the underlying criminal conduct and the support from officials in his administration:

Prior to the FALN commutations in 1999, President Clinton had granted only three commutations: one in 1994 to Ernest Krikava, a Nebraska hog farmer sentenced in 1993 to five months' imprisonment for perjury in a bankruptcy proceeding, whose clemency petition had attracted intense media interest and support of family farm groups; and two in 1995 to individuals convicted of drug trafficking offenses who had cooperated with the government. One of these was made to Johnny Palacios, sentenced in 1991 to 71 months' imprisonment for distribution of marijuana, whose cooperation the court refused to recognize for jurisdictional reasons; and the other was made to Jackie Trautman, sentenced in 1992 to 33 months' imprisonment (as reduced) for distribution of cocaine, whose cooperation had already earned her two sentence reductions from the court on motion of the U.S. Attorney.

Love, *supra* note 166, at 1493 n.38.

168. Turley, *Nothing Bars Questioning*, *supra* note 2, at B7.

dent Clinton invoked executive privilege and refused to disclose the information.¹⁶⁹

The Constitution makes it expressly clear that the “Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment” rests exclusively with the president.¹⁷⁰ It is equally clear that Congress cannot interfere with the decision of the president in granting this relief.¹⁷¹ With the FALN case, however, Congress was not trying to stop or reverse the clemency decisions of the terrorist members. Rather, it was demanding information to determine whether such decisions were made for improper or unlawful purposes.¹⁷² In response, the Clinton administration and various law professors argued that, since clemency is not subject to congressional approval, it is an absolute executive power that cannot be subject to congressional inquiry.¹⁷³ This argument was both extreme and untenable. Professor Peter Shane, for example, insisted that “[i]n short, for

169. *Id.*

170. U.S. CONST. art. II, § 2, cl. 1.

171. *See Ex parte Garland*, 71 U.S. 333, 380 (1866) (“Congress can neither limit the effect of [the president’s] pardon, nor exclude from its exercise any class of offenders.”).

172. *See Hearings Concerning Clemency for FALN Members Before the Senate Comm. on the Judiciary*, 106th Cong., Oct. 20, 1999, Federal News Service, Inc. [hereinafter *Senate FALN Hearings*] (prepared testimony of Sen. Orrin G. Hatch) (discussing possible justifications for Clinton’s clemency decision and suggesting that the decision was improper because “there was [no] medical reason for any of the clemency offers,” and that “the sentences received by [the] defendants [were] consistent with the sentences they would have received under the Sentencing Guidelines . . . [and] nothing produced . . . gives any suggestion that any of the 16 offered clemency ever cooperated with law enforcement regarding open cases or the apprehension of fugitives”).

173. *See, e.g., id.* (statement of Eric Holder, Deputy Attorney General) (testifying that President Clinton’s assertion of executive privilege prevents him from disclosing information pertaining to advice given to the President about clemency to the FALN members and that an assertion of executive privilege is valid, as in this case, when the matter concerns presidential pardons); Neal Kumar Katyal, *Executive Privilege, Confidentiality, Trust; The Road to a Compromise Between the White House and Congress*, WASH. POST, Sept. 24, 1999, at A31. Professor Katyal defended the use of privilege in the FALN matter:

The Constitution gives the president an absolute right to grant pardons that neither Congress nor anyone else can ever undo. And the practice of the Justice Department for more than 100 years has been not to provide information about clemency to Congress—at least when that material concerns internal deliberations. Given all this, Congress should think twice before trying to uncover the reasons motivating a particular pardon.

Katyal, *supra*, at A31. Congress was not, of course, suggesting that it could undo the FALN decisions, but rather was asserting that it could inquire as to areas of alleged abuse of this power. *See Turlley, Nothing Bars Questioning, supra* note 2, at B7. It is difficult to imagine when such a congressional inquiry is appropriate if not in the case of a clemency of unrepentant terrorists in a matter with alleged benefits to a member of the president’s family. Nevertheless, Professor Katyal presents a more moderate approach in suggesting that, after asserting privilege, the White House should have yielded [with certain guarantees] to some of these inquiries. *See Katyal, supra*, at A31 (stating that “[n]evertheless, there are circum-

better or worse, Congress has no institutional responsibilities with regard to pardons.”¹⁷⁴ Professor Shane, however, went on to add that “[t]he only exception would arise if it appeared that criminality had tainted the pardon process—for example, if the U.S. pardon attorney were accepting bribes to recommend presidential leniency.”¹⁷⁵ Thus, it would appear that Congress does have some “institutional responsibilit[y] with regard to pardons.” To carry out this responsibility, though, Congress must exercise its authority to investigate allegations of such misconduct, which should not be limited to criminal acts in a case of impeachment.¹⁷⁶

No power in the Constitution is truly absolute; other governmental branches reserve various methods to respond to abusive decisions. When a power is given exclusively to one branch, that power can be abused. It is then that the other branches play a vital role in addressing the alleged abuse.¹⁷⁷ Thus, while Congress cannot interfere with the issuance of a clemency, it has the power of oversight, the power of the purse, and even the impeachment power to respond to abuses of presidential authority.¹⁷⁸ In fact, in 1787, the abuse of the pardon power was a matter of concern during the drafting and ratification of

stances in which political necessity might demand an explanation” and concluding that both branches of government should make concessions in the case).

174. Peter M. Shane, *Clinton's Right; He Shouldn't Turn Over the Clemency Records*, WASH. POST, Sept. 26, 1999, at B1.

175. *Id.*

176. I only disagree with Professor Shane's point in isolating criminal conduct. An impeachment can occur for noncriminal conduct. See Jonathan Turley, *The Executive Function Theory, the Hamilton Affair, and Other Constitutional Mythologies*, 77 N.C. L. REV. 1791, 1844 (1999) (stating that “Congress always has followed a broad definition of impeachment that includes non-criminal conduct and not simply abuse of . . . authority”); *id.* (explaining that “[t]he appropriate question is not whether officials can be removed for non-criminal conduct, but rather what is the scope of non-criminal conduct for which they can be removed”); *id.* (citing previous noncriminal yet impeachable offenses, such as abusive use of authority, alcoholism, and abusive personal conduct).

177. Ordinarily, it is the legislative branch rather than the judicial branch that is most likely to respond to such controversies. Cf. *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981) (“[P]ardon and commutation decisions have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review.”). Courts are most likely to become involved in disputes over the validity of executive privilege assertions in response to congressional inquiry. See, e.g., *United States v. Nixon*, 418 U.S. 683 (1974); *In re Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998) (*per curiam*).

178. Ironically, while it was the potential political benefit to the First Lady that sparked the FALN controversy, the final day of the Clinton administration established the need for full oversight of pardon decisions as they relate to familial conflicts. President Clinton waited until the final hours of his term to pardon his own brother, Roger, of his prior drug convictions. *Clinton Brother, Hearst Make List*, CHI. TRIB., Jan. 21, 2001, at 16. Such a pardon was clearly within his authority, but it was also an outrageous and unethical use of official power for personal advantage. Had such a pardon been issued earlier, Congress would have been negligent not to call for hearings as part of its oversight function.

the Constitution.¹⁷⁹ In a speech that could have been taken from the current debate, one delegate noted:

[S]hould the President pardon . . . or afterwards forgive notorious villains, or persons who should be unfit objects of mercy, this would be such a misfeasance of his office, as would subject himself to be personally impeached. He is as responsible for transactions in one part of his office as another.¹⁸⁰

If judged by the Clinton administration's consistent and recent behavior, a president can refuse information to Congress even in matters which, if proven, would be a potential basis for impeachment. Thus, assuming arguendo that the president sold a clemency, Congress would have legitimate grounds to seek impeachment.¹⁸¹ In a system built on checks and balances, no reasonable court would refuse to compel disclosure of information on the suggestion of an abuse of an "absolute" power of the president.¹⁸² The concerns behind Congress's requests in the FALN matter were neither trivial nor misplaced. After showing no inclination to use this power in all but a few uncontroversial cases,¹⁸³ the President, over the objections of officials in his own administration,¹⁸⁴ granted clemency to a group of terrorists in a manner that would be of potential benefit to his spouse.¹⁸⁵ Moreover,

179. See, e.g., *An Impartial Citizen V*, PETERSBURG VIRGINIA GAZETTE, Feb. 28, 1788, in 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUTION BY THE STATES: VIRGINIA 428 (John P. Kaminski & Gaspare J. Saladino eds., 1988) (discussing various Framers' views on the advantages and pitfalls of the pardoning power); cf. George Mason, *Objections to the Proposed Federal Constitution (1787)*, in 1 DOCUMENTS OF AMERICAN CONSTITUTIONAL & LEGAL HISTORY 115, 117 (Melvin I. Urofsky ed., 1989) ("The President of the United States has the unrestrained Power of granting Pardon for Treason; which may be sometimes exercised to screen from Punishment those whom he had secretly instigated to commit the Crime, and thereby prevent a Discovery of his own Guilt.").

180. *An Impartial Citizen V*, *supra* note 179, at 429-30 (emphasis omitted).

181. See U.S. CONST. art. II, § 4 ("The President . . . shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.").

182. Cf. *Nixon*, 418 U.S. at 706 (stating that "neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications . . . can sustain an absolute, unqualified Presidential privilege of immunity").

183. See *supra* note 167 (describing Clinton's other uses of the power to grant clemency).

184. See *supra* note 164 (noting the opposition in the executive branch to Clinton's decision to grant clemency in the FALN matter).

185. See *supra* note 165 and accompanying text (citing the potential political benefit to Hillary Clinton of granting clemency to FALN members); see also Susan Baer, BALT. SUN, Jan. 21, 2001, at 23A (noting that on his final day in office, Clinton granted clemency to "many who are personally close to Clinton, . . . [including] Susan McDougal, a former

the clemency decisions contradicted federal guidelines and were supported by challenged statements of fact.¹⁸⁶

The assertion of executive privilege in the FALN clemency matter was not inherently wrong, but rather was stated too expansively. The President could have legitimately protected communications with his advisers on this issue. Yet some of the inquiries of Congress fell squarely within its oversight functions.¹⁸⁷ Where communications were not disclosed directly, summaries could have been supplied to meet congressional needs.¹⁸⁸ Putting aside the question of the limits of privilege in such inquiries, values of good government should have prompted greater cooperation with Congress to resolve public questions about the FALN decision.¹⁸⁹ This is precisely the type of conflict

Whitewater business partner who went to prison and steadfastly refused to cooperate, as well as his half-brother, Roger Clinton”).

186. See *Senate FALN Hearings*, *supra* note 172 (prepared testimony of Sen. Orrin G. Hatch). Senator Hatch stated that:

Our investigation has led us to three troubling conclusions: - First, the President's proffered reasons in support of the clemency do not survive scrutiny; - Second, the Justice Department appears to have ignored its own rules for handling clemency matters and modified its original recommendation against clemency; and - Third, the Justice Department itself has concluded that the release of these individuals may well increase the risk of domestic terrorism.

Id.

187. See *supra* notes 177-178 and accompanying text (discussing the legitimacy of such congressional oversight inquiries).

188. Cf. ROZELL, *supra* note 12, at 33-48 (setting forth examples of presidential decisions to partially comply with congressional requests for information); *infra* note 190 (discussing the compromises of the Ford, Carter, and Bush administrations).

189. One of the more problematic aspects of the Clinton administration was its increasingly evasive approach to Congress. In various areas, the administration took controversial steps to avoid congressional involvement on issues of national importance. This included an attempt to use the courts rather than Congress to increase regulation of the tobacco industry. See Jonathan Turley, *A Crisis in Faith: Tobacco and the Madisonian Democracy*, 37 HARV. J. ON LEGIS. 433, 454 (2000) (noting the Clinton administration's decision "to pursue a judicial remedy in the tobacco crisis"). It also included the use of executive orders to set aside huge tracts of federal land from commercial uses or roadbuilding at the very end of the second term. See Lee Davidson, *Parting Shot: 7 New Monuments*, DESERET NEWS, Jan. 20, 2001, at A10 (reporting that, including areas protected in his final days in office, "Clinton has now proclaimed 16 national monuments and expanded three others, covering a total of 5.6 million acres"). Likewise, President Clinton used recess appointments when Congress expressed opposition to nominees like acting Assistant Attorney General for Civil Rights Bill Lann Lee. See *Clinton Keeps Lee as Civil Rights Chief*, CHI. TRIB., Aug. 4, 2000, at A20. One of the most alarming acts, however, came in the final days of the Clinton administration when a recess appointment was given to Roger Gregory to the United States Court of Appeals for the Fourth Circuit. See *supra* note 158. Such measures tear at the fabric of the tripartite system and the system of checks and balances. Certainly, some of these orders are defensible uses of executive authority in areas such as federal lands. However, taken as a whole, they represent a disturbing pattern. At a minimum, the next president should consider policy changes to better align executive actions with the basic principles of the Madisonian democracy. This should include a statement denouncing the use of recess

upon which presidents like Ford, Carter, and Bush had previously compromised.¹⁹⁰ There is nothing more corrosive for the political system than lingering questions of misuse of power. To avoid further erosion and controversy, the tendency of the Clinton administration to state privilege in absolute terms must be replaced by the incoming president with a more moderate and balanced approach.

II. CONCLUSION

A review of the current status of executive privilege reveals, as Milton once described in *Paradise Lost*, “[n]o light, but rather darkness visible.”¹⁹¹ After the rulings against the Clinton administration, executive privilege has been defined largely in terms of the “darkness visible”—the areas now largely barred to the use of executive privilege or governmental attorney-client privilege. Instead of vainly hoping for any light revealed by the Clinton crisis, the next administration would be best to avoid the darkness by adopting bright-line rules and new policies in these core areas of conflict.

To a certain extent, the continued viability of executive privilege will depend on whether the next administration exercises a degree of restraint in using this tempting avenue to resist congressional or judicial inquiries. The Ford, Carter, and Bush administrations demonstrated that such restraint is possible and not inimical to the functioning of the executive branch. The next president, however, will be called upon to take proactive steps and not simply remain pas-

appointments to the judiciary, a practice that is poorly suited to a democratic system and ultimately undermines both the nominee and the court for which he is nominated.

190. See ROZELL, *supra* note 12, at 90-91 (pointing out President Ford’s willingness to eventually comply with congressional requests regarding the decision-making process involved in pardoning President Nixon and his partial compliance in divulging CIA documents concerning that agency’s complicity in assassination schemes, but only to the extent that such documents were relevant to Congress’s specific inquiries); *supra* notes 146-147, 152 and accompanying text (discussing the “open presidencies” of Ford and Carter, and President Bush’s narrow view of executive privilege).

President Carter shied away from issuing a formal policy that specified his administration’s position on executive privilege. See ROZELL, *supra* note 12, at 97. This prompted his administration to rarely invoke the privilege. See *id.* at 101-07 (discussing Carter’s limited use of the privilege).

During the Bush administration, controversy arose between Congress and President Bush over Bush’s Persian Gulf policy. *Id.* at 130. Congress sought numerous and specific military documents pertaining to various issues such as Iraqi military capabilities, the possible consequences of conflict on international oil supplies, and U.S. vulnerability to terrorist attacks. *Id.* The Bush administration eventually complied with the request, but only provided a summary of the information in order to protect national security to the maximum extent possible. *Id.* at 131-32.

191. MILTON & ASIMOV, *supra* note 1, at 10.

sive in the area of executive privilege. The substantive and symbolic losses that occurred during the Clinton administration should be addressed at the very start of the new administration. The next president has the ability to establish a new bright line for future presidential conduct. To a certain extent, this will require surrendering certain prerogatives like the unilateral appointment of White House counsel or the continued assertion of a protective function privilege.¹⁹² It is never easy to take such steps, particularly after a series of losses of privilege under the prior chief executive. Yet establishing a good government initiative as a central part of the transition process, the next president can forge a legacy that is not dependent on a divided Congress. Rather, he can begin the process of reform by first bringing his own office into order. Rather than yielding to continued recriminations concerning the prior administration, such reform can be based on a frank reappraisal of the conditions that produced the conflicts and controversies of the last eight years. Of course, nothing is more difficult for a new officeholder than to forego privileges or prerogatives of office. Certainly, in a town where personal loyalty is a rare and needed commodity, it is hard for a president to take measures to guarantee that members of his staff always place the interests of the presidency before those of the president. However, nothing would speak more forcibly or eloquently to his leadership and to the future of the presidency.

192. The new administration has the opportunity to make significant changes to establish core values of good government that extend beyond the general proposals discussed above. One such change would be the immediate reversal of a decision made by President Clinton in the waning days of his final term. Over the objection of various public interest groups, President Clinton rescinded Executive Order 412834 that he signed on his first day in office in 1993. See Frank James, *Clinton Not Going Quietly*, CHI. TRIB., Jan. 6, 2001, at A1. This order barred senior officials in the executive branch from lobbying for five years. *Id.* The decision to rescind the order at the end of his second term appeared cynical and opportunistic. See *Revolving Door Is Back*, THE HILL, Jan. 10, 2001, at 20 (reporting that "Clinton apparently acted after a number of his current and recently departed appointees complained that they faced a tough job market in a town ruled by a Republican president and GOP control of Congress"). What is clear is that this decision served the interests of a relatively small number of senior officials over the interests of government ethics and the public. The ban on lobbying should be both reinstated and reinforced by the next president. Such a commitment must have a permanency that extends beyond any temporary political benefit. Like other suggestions in this Article, such a ban constitutes something of a sacrifice for the new administration. However, few policies are more demonstrative of a commitment to high-level appointees who do the public's business exclusively and faithfully.