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EXECUTIVE PRIVILEGE AT THE STATE LEVEL

The doctrine of executive privilege has a long legal history,¹ but only recently has it become the subject of serious public concern. The Watergate affair has demonstrated that claims of executive privilege can be used to obstruct investigations of governmental corruption and abuse. As public reaction to Watergate leads to increased concern with corruption and abuse in all levels of government,² the resulting investigations into corruption in state government will undoubtedly be resisted by claims of executive privilege. Thus, the problem of executive privilege at the state level is likely to grow in practical importance. Moreover, executive privilege is intimately related to a problem involving the basic structure of state government: the problem of reconciling the separation of powers doctrine with the ideal of government of laws rather than men. In turn, this problem is closely related to very practical questions concerning the availability of judicial relief from arbitrary executive action.

Although claims of executive privilege raise similar issues in state and federal government, executive privilege at the state level requires separate treatment because of the great structural differences between the two levels of government. For example, the state governor occupies an office far different from the Presidency,³ a political reality that any meaningful discussion of executive privilege at the state level must take into account. Moreover, unlike the federal executive's privilege, the state executive's privilege cannot be considered solely in relation to the internal structure of government. Because the states are embedded in the federal system and subject to the supremacy clause, federal constitutional guarantees must also be considered.⁴

This comment will discuss the judicial response to claims of executive privilege by state officials.⁵ Three major topics will be examined: the

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¹ The earliest federal case was United States v. Burr, 25 F. Cas. 30 (No. 15692d) (C.C.D. Va. 1807). The earliest significant state case was Thompson v. German Valley R.R., 22 N.J. Eq. 111 (Ch. 1871). A few minor cases, such as Captain McKenzie's Case, 2 Pars. Eq. Cas. 229 (Pa. C.P. 1843), can be found prior to Thompson.

² Watergate has prompted a movement toward passage of tougher state campaign financing laws. Wall St. J., Nov. 6, 1973, at 1, col. 1 (eastern ed.).

³ Very few governors have powers comparable to the President's. McKean, The Politics of the States, in The Forty-Eight States: Their Tasks as Policy Makers and Administrators 74 (1955). Generally, governors are chief executives in name only. G. Mitau, State and Local Government: Politics and Processes 25 (1966). In the words of one commentator, the typical governor, unlike the President, is an officer whose formal powers are "woefully inadequate" in relation to his responsibilities. C. Johnson, American State and Local Government 124 (1965).

⁴ Despite these important differences, the issues are similar enough to those at the federal level that an examination of the state experience may shed significant light on the direction federal law should take.

⁵ Some commentators believe that the issues involved are identical whether the executive claims the privilege in a judicial or legislative inquiry. Nixon v. Sirica, 487 F.2d 700, 771 (1973) (dissenting opinion); Bishop, The Executive's Right of Privacy:
amenability of the governor and other officials to subpoena and other compulsory process, the conclusiveness of an executive determination that evidence is privileged, and the scope of the evidentiary privilege. These issues often appear sequentially in a single case. For example, after a subpoena is issued to the governor, he may first claim that he is under no duty to respond at all. That claim failing, he may argue that a formal assertion that subpoenaed evidence is privileged is a sufficient answer to the subpoena. If the court refuses to accept the governor's assertion of privilege, it then must determine for itself whether the communications or topics contained in the evidence are privileged. Because these issues commonly arise in the course of the same case, courts frequently confuse them.

The threshold question is whether the public official involved is amenable to subpoena, for the case ends if he is found to be immune from subpoena and declines to furnish the evidence voluntarily. This question is most difficult to resolve when the official is the chief executive. Only two state courts have directly confronted this issue and neither can be said to have authoritatively resolved it. In Hartranft's Appeal, the Pennsylvania Supreme Court held, over a strong dissent, that the governor could not be subpoenaed by a grand jury investigating an attack by National Guardsmen on strikers. The court rejected the possibility of allowing a judicial determin-

An Unresolved Constitutional Question, 66 Yale L.J. 477, 485 (1957). For this reason, cases involving the scope of the executive privilege in legislative inquiries will be cited in footnotes where relevant, although they will not be discussed in the text. For a general discussion of the legislative privilege see Dorsen & Shattuck, Executive Privilege, the Congress and the Courts, 35 Ohio State L.J. 1 (1974).

6. This breakdown of the executive privilege problem is suggested by Professor Wigmore. 8 J. Wigmore, Evidence § 2367, at 745-46 (J. McNaughton rev. ed. 1961) [hereinafter cited as Wigmore].

7. 8 Wigmore § 2371, at 752 n.4.

8. Courts have generally been willing to subpoena lower officials and documents in their possession. See text accompanying notes 70-76 infra. Only the governor has been granted immunity from subpoena.


10. An early Pennsylvania case concerned an attempt to subpoena records in the possession of a governor but the case did not turn on the governor's amenability to process. Rather, the decision was based on the conclusiveness of a gubernatorial claim of privilege. Gray v. Pentland, 2 S. & R. 23, 32 (Pa. 1815). A concurring opinion, by deciding the case on the best evidence rule, emphasized a different legal theory entirely. A recent Florida decision that may also have some relevance upheld a legislative subpoena of the records of a quasi-governmental club closely related to the governor's office, as part of an investigation of the governor. Hagaman v. Andrews, 232 So. 2d 1, 6, 9 (Fla. 1970). The dissent protested that the subpoena violated the separation of powers doctrine. Id. at 13.

11. 85 Pa. 433 (1877).

12. Id. at 450 (Agnew, C.J.). The dissent is far more persuasive than the majority opinion on several points. For example, the majority feared dire consequences would result from forcing the governor to leave the seat of government. Id. at 449. The dissent pointed out that the governor was often absent from the seat of government and that at the time of the bloody riots that gave rise to the case, he was in the Rocky Mountains en route to California. Id. at 457.
nation of the confidentiality of the evidence, reasoning that judicial inquiry—which the court said must always be public—would destroy the confidentiality of the evidence.13 This argument has lost whatever value it may have had when Hartranft was decided, as in camera examination is now a recognized form of judicial inquiry.14 Moreover, the Pennsylvania Supreme Court now reads Hartranft merely as an expression of judicial reluctance to proceed against the governor, not as an expression of judicial inability to do so.15

The only other state court to directly confront the question of the governor’s liability to subpoena, a New Jersey trial court, hedged the issue. Thompson v. German Valley Railroad16 concerned the legality of a pocket veto of private legislation. The governor initially refused to produce the legislation in court or to testify about the circumstances surrounding the attempted veto. The Thompson court distinguished between personal testimony and the production of documents. The court said that the governor had discretion as to the production of documents but not as to personal testimony, since every person is bound to appear in court and testify.17 To avoid conflict with the executive branch, however, the court declined to order the governor to appear.18 Thompson expressly left open the possibility that contempt proceedings against the governor might be proper in some future case.19

Although the question of the governor’s amenability to subpoena has arisen only twice, the courts of almost every state have considered the related question of the governor’s amenability to mandamus.20 The authorities are closely divided, but the majority view appears to be that governors cannot be compelled to perform even purely ministerial acts.21 Courts taking

13. Id. at 447. Wigmore terms the failure of some courts to consider the possibility of in camera examination “ludicrous.” 8 Wigmore § 2379, at 812 n.6.
14. Indeed, except where national security information is involved, in camera proceedings are a matter of course in cases involving executive privilege. Ethyl Corp. v. EPA, 478 F.2d 47, 51-52 (4th Cir. 1973); 8 Wigmore § 2379, at 812 n.6.
15. Harding v. Pinchot, 306 Pa. 139, 145, 159 A. 16, 18 (1932). If the judiciary were denied the power to restrain the governor, the court said, the governor would be free from any real constitutional restrictions. Nevertheless, the court reiterated that process should not be issued against the governor except in extreme cases.
16. 22 N.J. Eq. 111 (Ch. 1871).
17. The court noted that official duty might be a valid excuse, although dignity of office would not be. Id. at 113.
18. Id. at 114. The clerk had already issued a subpoena; the issue was whether an enforcement order should be issued.
19. Id. at 115. Notably, the governor voluntarily furnished the subpoenaed documents, though he refused to appear personally. Id. at 114.
21. Garvey, The Amenability of the Governor to Court Processes, 7 How. L.J. 120, 121 (1961). Some states are difficult to classify. In New York, for example, the governor is immune from judicial process even in the performance of purely ministerial duties, but he is subject to injunction if he violates the state constitution. Gaynor v. Rockefeller, 21 App. Div. 2d 92, 98-99, 248 N.Y.S.2d 792, 801 (1964). Under pre-Revolutionary English law, colonial governors were not amenable to process in the local courts, but they were subject to the jurisdiction of the King’s courts in England. Mosyn v. Fabrigas, 1 Cowp. 160, 172-73, 98 Eng. Rep. 1021, 1028 (K.B. 1774).
this position have relied on three different theories: first, that the separation of powers doctrine places the governor outside the jurisdiction of the courts; second, that judicial interference with the governor’s activities would disrupt the functioning of the executive branch; and finally, that a court order addressed to the governor would be meaningless because the court lacks the power to enforce it. The courts have also expressed concern about the “unseemly” appearance presented by open conflict between the executive and the judiciary.

Courts taking the majority view have used the separation of powers doctrine as a justification for two distinct positions. Some courts have granted personal immunity to the governor, apparently on the theory that power over an individual implies that individual's inferiority. For a trial judge to issue any order to the governor would imply that the governor was the judge’s inferior, an implication these courts think inconsistent with the equality of the three branches of government. Other courts hold only that they lack power to compel the governor to perform any official act. The rationale of these opinions is that ordering the governor to perform an official act is equivalent to the court's performing the act itself, which would be an invasion of the executive's functions. Neither position is supportable. Providing personal immunity would immunize the governor even from court orders totally unrelated to his office. Common sense cannot be reconciled with a position that would leave the governor immune from being ordered to pay child support or alimony. If, as other courts hold, the immunity extends only to orders to perform official acts, the difficult problem of drawing a line between official and unofficial acts arises. Moreover, both positions seem to apply as much to the lowest public officer as to the governor. The separation of powers doctrine applies to all members of the executive branch; the courts have no more right to usurp the duties of the dogcatcher.

22. Garvey, supra note 21, at 124, 128, 131.
23. See, e.g., Sutherland v. The Governor, 29 Mich. 320, 329 (1874); Hartranft's Appeal, 85 Pa. 433, 446 (1877). Cf. 8 Wigmore § 2379, at 815. Hopefully, concern with governmental etiquette has not played a major role in motivating the decisions.
24. State ex rel. Robb v. Stone, 120 Mo. 428, 437, 25 S.W. 376, 378 (1893); cf. Kirk v. Baker, 229 So. 2d 250, 252 (Fla. 1969) (“[i]t is unthinkable that any inferior officer of this state, could in the guise of the exercise of the judicial power, thwart the powers of the executive. . . .”)
26. Garvey believes that “extremely few” courts would go so far as to disallow proceedings against a governor for personal transgressions of the law. Garvey, supra note 21, at 127. James St. Clair, Counsel for President Nixon, admitted during the oral argument of United States v. Nixon, 42 U.S.L.W. 5237 (U.S. July 24, 1974), that the President is subject to civil suit for his private acts. Transcript of Oral Argument, July 8, 1974, at 80 (Hoover Reporting Co.) (in University of Illinois Law Library) [hereinafter cited as Watergate Oral Argument].
27. For instance, a subpoena for evidence relating to official acts clearly has some relationship to the duties of office, but the act of obeying a subpoena, required of all citizens alike, is not peculiarly within the scope of the governor's duties. See Thompson v. German Valley R.R., 22 N.J. Eq. 111, 113, 115 (Ch. 1871); 8 Wigmore § 2370, at 748. Another borderline case can be found in Kirk v. Baker, 229 So. 2d 250, 252 (Fla. 1969), holding conversations with a judge about a pending case to be within the governor’s official duties. Determining what constitutes an official act by a legislator has also proved difficult in practice. See generally Reinstein & Silverglate, Legislative Privilege and the Separation of Powers, 86 HARV. L. REV. 1113 (1973).
than those of the governor. Yet, the courts have not been willing to extend
the immunity from compulsory process to lower officials. More importantly,
both theories overlook the basic purpose of the separation of powers doc-
trine. Separation of powers was not intended as an end in itself. Rather, it
was considered a means of ensuring government by laws instead of men.29
Allowing any public official to willfully disregard his legal duties in the name
of separation of powers frustrates the very purpose of the doctrine. Some
courts have responded to this argument by saying that impeachment provides
a sufficient remedy for abuse of power.30 Impeachment, however, does not
appear to be a viable remedy. In this century, only four governors have been
impeached, none since 1930.31 If the vitality of the separation of powers
doctrine is to be preserved, the courts must be prepared to hold officials to
their legal duties.

The second basis for refusing to issue process against the governor is the
desire of some courts to avoid interference with the performance of his offi-
cial duties.32 Such interference could result from his being forced to attend
court, from diverting his attention from other duties, or from his imprison-
ment for contempt. The issue is most dramatically presented in cases deal-
ning with the arrest of the governor. Arrest immediately interrupts the gover-
nor’s activities and is likely to be followed by a period of prolonged per-
sonal attendance at court. Even a serious threat of arrest may distract the
governor’s attention from his official duties.

While courts have uttered frequent dicta on the subject of arrest,34 the
necessity for squarely deciding the question has arisen only twice. In State

29. The classic statement of the strict separation of powers doctrine is found in the
Massachusetts Constitution of 1780: “In the government of this commonwealth, the legis-
lationary department shall never exercise the executive and judicial powers, or either of
them; the executive shall never exercise the legislative and judicial powers, or either of
them; the judicial shall never exercise the legislative and executive powers, or either of
them: to the end it may be a government of laws and not of men.” MASS. CONST.
art. 30 (emphasis added). In the words of Justice Brandeis, “Checks and balances
were established in order that this should be ‘a government of laws and not of
Gibbons, The Interdependence of Legitimacy: An Introduction to the Meaning of Sepa-
exercise of power).

30. See, e.g., Rice v. The Governor, 207 Mass. 577, 580, 93 N.E. 821, 823 (1911)
governor is answerable only to his conscience, the electorate, and a court of impeach-
ment); Hartranft’s Appeal, 85 Pa. 433, 439 (1877) (only punishment for abuse of power
is impeachment).

31. C. JOHNSON, supra note 3, at 129. According to one writer, impeachment is
“scarcely more appropriate for . . . control of administration than is Russian roulette
for assuaging boredom.” Keefe, The Functions and Powers of the State Legislature, in
STATE LEGISLATURES IN AMERICAN POLITICS 45 (A. Heard ed. 1966). In general, legis-
lative oversight of the executive through such mechanisms as investigations and budge-
tary control has been less effective at the state than at the federal level. Id. at 47.

32. See, e.g., State ex rel. Low v. Towns, 8 Ga. 360, 372 (1850); State v. Holden,
64 N.C. 829, 830 (1870). The current view is that as a general rule judicial review
need not weaken the administrative process. 4 K. DAVIS, ADMINISTRATIVE LAW TREA-
TISE § 28.21, at 112 (1958).

33. Even though the chief executive may be required to testify, he generally is not
required to attend court; a deposition suffices. 8 WIGMORE § 2371(d), at 749, 752.

34. See, e.g., Martin v. Ingham, 38 Kan. 641, 655, 17 P. 162, 169 (1888) (governor
could be imprisoned for contempt); Latture v. Frazier, 114 Tenn. 516, 519, 86 S.W. 319,
320 (1905) (court could not imprison governor).
v. Holden, the North Carolina Supreme Court refused to issue a bench warrant for the governor's arrest for illegal use of military force. According to the court, issuance of the warrant would be tantamount to deposing the governor. Nevertheless, the court left open the possibility that arrest would be proper if the governor were charged with a violation of the law in his individual capacity. Leaving this possibility open, however, is inconsistent with the court's rationale, because the extent of interference with the governor's performance of his duties does not depend on the origin of the charge.

The opposite result was reached by an Illinois trial court in People v. Small. Small involved the indictment of a governor for embezzlement committed during his prior term as state treasurer. Because the constitution specifically granted immunity to state legislators, but was silent about the governor, the Illinois court concluded that the governor was subject to arrest. The court was also strongly influenced by the possibility that the statute of limitations would bar prosecution after the governor's term had expired. Under the separation of powers doctrine, the court added, the responsibility for correcting any resulting interference with executive functioning rested on the state legislature.

Although possible interference with gubernatorial functioning merits some concern, the gravity of such interference should not be exaggerated. Continuity in office is far less important under state constitutions than in the federal system. Under many state constitutions, the lieutenant governor assumes the governor's office if the governor becomes incompetent or leaves the state. These provisions may become operative upon the governor's arrest.

In addition, the governor does not play the crucial role in state government that the President plays in the federal government. Governors lack many important presidential powers, such as the President's foreign policy power, his broad appointment power, and his power to remove those he appoints. Furthermore, the typical governor is only one of several autonomous heads of the executive branch, although other state officials are less powerful than

35. 64 N.C. 829 (1870).
36. Id. at 830.
37. Id.
39. This inference was entirely correct. An attempt was made to create gubernatorial immunity in the Illinois Constitutional Convention but it was rejected, primarily because the statute of limitations might run while the governor was still in office. 1 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ILLINOIS 749, 792 (1870).
41. Hartranft's Appeal, 85 Pa. 433, 461 (1877) (dissenting opinion); Garvey, supra note 21, at 141-44; cf. Opinion of the Justices, 3 Neb. 463, 464 (1873) (governor suspended from office during impeachment trial).
43. W. ANDERSON, C. PENNIMAN & E. WEIDNER, GOVERNMENT IN THE FIFTY STATES, 267, 268 (rev. ed. 1960); C. JOHNSON, supra note 3, at 133, 137; G. MITAU,
the governor. Interference with the governor's activities may adversely affect state government, but the effect would be far from catastrophic.

When presented with the argument that subjecting the governor to process will interfere with the performance of his duties, courts should consider the experience of the jurisdictions that allow process against the governor. The many states that allow mandamus against the governor apparently have not suffered from ineffective executives, nor has subjecting the governor of Illinois to arrest rendered him politically impotent. The Prime Minister of England has been liable to subpoena for more than 50 years without obvious harm. In short, the fear that subjecting the chief executive to court orders will weaken his ability to govern has proved absolutely unfounded.

Probably the most important reason for refusing to issue process against the governor is fear that he will disobey. Courts envision the possibility of a governor openly defying the judiciary, and perhaps using the militia or National Guard to resist service of process or arrest. Lacking the physical power to enforce their orders, these courts feel that their orders to the governor would be mere advisory opinions. One commentator has referred to the courts' obsession with this possibility as the "spectre of disobedience," because the greatly feared confrontation between court and governor has never occurred.

Courts frequently assume that the executive will automatically be the victor in any direct confrontation with the judiciary. The courts obviously could not prevail in a physical confrontation, because the sheriff is no match for the militia or the National Guard. But a military confrontation is hardly inevitable. Even a President may find it extraordinarily difficult to resist the public reaction to open defiance of a court order. In the Watergate tapes cases, for example, President Nixon ultimately found it impossible to disobey several subpoenas duces tecum. And as studies show, a governor

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44. Mandamus against the governor has been allowed in roughly 15 states. See the sources cited note 20 supra.


46. The mayor of New York has long been liable to subpoena by city council investigating committees, La Guardia v. Smith, 288 N.Y. 1, 7, 41 N.E.2d 153, 156 (1942), without the disastrous results feared by the LaGuardia dissent. The degree of interference with performance of executive duties should be no greater when a judicial subpoena is involved.


49. Garvey, supra note 21, at 131.

50. See, e.g., Nixon v. Sirica, 487 F.2d 700, 792 (D.C. Cir. 1973) (dissenting opinion) ("it can hardly be questioned that the executive must prevail in any direct confrontation with the judiciary"); Sutherland v. The Governor, 29 Mich. 320, 329 (1874) (governor could disobey courts with impunity). Cf. Elkern v. McGovern, 154 Wis. 157, 215 (1913) (governor has greater power of resistance than court could overcome without support of the people).

51. N.Y. Times, Oct. 24, 1973, at 1, col. 8 (late city ed.). Of course, an additional factor was present in the first tapes case: public reaction was partially attributable to the President's discharge of Special Prosecutor Archibald Cox. This factor is counterbalanced by the fact that the court order involved was never affirmed by the Supreme
is in a weaker position than a President, for he has much less public support on which to draw.\textsuperscript{52} Public opinion polls reveal that the President begins any struggle against the judiciary with a decided edge. He enjoys a substantially higher level of public trust than even the Supreme Court. In contrast, the public has no more trust in the governor than in a local judge.\textsuperscript{53} Thus, although segments of the public may be willing to attribute good intentions to a President who disobeys a court order, the reaction to gubernatorial disobedience is likely to be more cynical. Moreover, the governor has fewer formal powers than the President and is highly dependent on his public prestige as a source of power.\textsuperscript{54} Openly defying a court could result in a disastrous loss of gubernatorial power, endangering all of the governor’s programs. Thus, without the support of public opinion, gubernatorial defiance is likely to be short-lived.

To successfully resist a court order, the governor also needs the support of his subordinates. In many cases, they could render gubernatorial resistance ineffective by complying with the court order themselves. For example, the governor’s subordinates can frustrate his attempt to withhold subpoenaed documents by simply delivering those currently in their possession to the court. In any physical confrontation with the courts, the governor must be supported by the militia or National Guard unless he is willing to engage in hand-to-hand combat with the county sheriff. For example, one governor was unable to resist an effort to drag him from the statehouse because a high-ranking law enforcement official refused to intervene. The official disobeyed the governor's direct order because he felt that the action against the governor was justified.\textsuperscript{55} This example demonstrates that the governor may not receive the necessary aid of his subordinates. Indeed, even a President cannot count on having his orders automatically obeyed, especially when subordinates doubt the legitimacy of the orders.\textsuperscript{56} A governor, lacking the President’s broad removal power, is in a weaker position with respect to subordinates.\textsuperscript{57} Thus, successful gubernatorial resistance to a court order is
 unlikely.\textsuperscript{58}

As a matter of general principle, some courts refuse to even consider the possibility of disobedience, reasoning that their duty is to declare the law regardless of the consequences.\textsuperscript{69} Ideally, perhaps, this possibility should be ignored. Nevertheless, because gubernatorial resistance to a court order would provoke a serious constitutional crisis, some attention should be given to the possible resolution of this crisis.

When a state court has exhausted its means of inducing executive compliance, the litigant may turn to federal court for relief. By doing so, he can escape the constitutional deadlock created in state government by a gubernatorial refusal to obey a court order. The federal courts have undisputed authority to compel action by a governor\textsuperscript{60} if their jurisdiction is properly invoked. The question, then, is whether the governor's refusal to obey a valid court order is a violation of a litigant's constitutional rights. More specifically, is a governor's refusal to obey a subpoena a violation of due process?\textsuperscript{61}

The due process clause is a broad guarantee against unfair or arbitrary government action.\textsuperscript{62} The clause forbids deprivation of property or liberty except by process of law;\textsuperscript{63} clearly, a willfully illegal act cannot qualify as part of the process of law. Historically, the concept of due process de-
rives from the law-of-the-land clause of Magna Carta, the primary purpose of which was to curb the lawless habits of the King and his officers. Magna Carta subjected the King, who formerly had been free to disregard the law, to its demands. The great charter’s present-day counterpart, the due process clause, should do no less. The current understanding is that the due process clause encompasses those rights fundamental to ordered liberty. Chief Justice Marshall used words that foreshadowed this test when he said, in a case involving the refusal of a cabinet officer to obey the law, that the right to judicial redress is “the very essence of civil liberty.” This vital right would be meaningless without the means to secure executive compliance with court orders. When the court order is a subpoena, the violation of due process is compounded, for the effect of disobedience is to disrupt the course of judicial proceedings, thus denying a litigant his right to a trial in accordance with established legal procedure.

Because gubernatorial defiance of a court order may constitute a due process violation, federal court intervention is a real possibility. This should help to dispel any fears a state court may have that its orders will be disobeyed, for the power of the federal government ultimately stands behind its

hold public office is not property protected by the due process clause. See Taylor v. Beckham, 178 U.S. 548, 576 (1900). The early cases seem irreconcilable with the Roth line of cases, which have greatly expanded the property concept. See generally Note, Violations by Agencies of Their Own Regulations, 87 Harv. L. Rev. 629, 653-55 (1974).


65. 1 G. Trevelyan, History of England 227-30 (3d ed. reissued with minor corrections 1953). One of the final terms of the Charter required the King to allow the barons to use force against him if he broke any term of the Charter. Id. at 232. This provision is of some interest in light of the controversy concerning whether state governors are amenable to arrest.


67. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 161 (1803); accord, Elkern v. McGovern, 154 Wis. 157, 207, 142 N.W. 595, 607 (1913) (without right to judicial redress for wrongs, neither life, liberty, nor happiness would be secure; purpose of constitution would be frustrated). According to Justice Frankfurter, “Man being what he is he cannot safely be trusted with complete immunity from outward responsibility in depriving others of their rights. At least such is the conviction underlying our Bill of Rights.” Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 171 (1951) (concurring opinion). See also Panama Refining Co. v. Ryan, 293 U.S. 388, 446 (1935) (Cardozo, J., dissenting) (order of executive cannot stand if mere arbitrary fiat); Greene v. McElroy, 360 U.S. 474, 493 n.22 (1959) (individual has right to be free from arbitrary government acts); Berger, Executive Privilege v. Congressional Inquiry, 12 U.C.L.A.L. Rev. 1044, 1115-17 (1965) (free government requires that executive be subject to law). On the other hand, when official disobedience of the law is redressable in state court, due process is satisfied. Poulos v. New Hampshire, 345 U.S. 395, 409 (1953). An unenforceable decree can hardly be considered effective redress; nor can impeachment be considered a form of redress for the individual litigant. 19 Tul. L. Rev. 147, 150 (1944).

68. The right to orderly judicial proceedings is mentioned in many cases. See, e.g., Pennoyer v. Neff, 95 U.S. 714, 733 (1877). In depriving the litigant of this right to orderly judicial procedure, the governor is acting under color of law, as defined in United States v. Classic, 313 U.S. 299, 326 (1941). This is as much a deprivation of procedural due process as if the governor had forcibly prevented a litigant from defending a suit. The effect may be much the same in practical terms. Cf. Screws v. United States, 325 U.S. 91, 106 (1945) (use of force in order to prevent trial of prisoner denied him procedural due process).
orders to the governor. Thus, neither the difficulty of enforcing a court order, the separation of powers doctrine, nor the possibility of interference with executive efficiency, need prevent a court from issuing process against a governor. The only barrier to issuing such process is judicial self-restraint.

Fortunately, the difficulties involved in subpoenaing a governor are absent in the more common case in which the subpoena is directed to a lower official. Lower officials are generally held to have the same duty as the ordinary citizen to give evidence in court. The possibility of inconvenience to these officials is not thought to justify judicial creation of a blanket exemption. Based on this reasoning, state courts have upheld subpoenas of a wide range of public officials, including policemen, a state superintendent of public works, officials of a state banking department, and administrative assistants.

Although subpoenaing these officials has not proved difficult, the subpoena is only the first step in obtaining their evidence. Once in court, the official may claim that the subpoenaed evidence is privileged and that his formal claim of privilege is binding on the court. The argument for making this claim conclusive is fairly simple: resolution of the privilege question requires a determination of whether disclosure would be in the public interest. Because this determination involves the weighing of so many public policies, and because it may depend on special expertise and access to information not available to the judiciary, the final decision must be left to the executive.

Although this argument has some theoretical validity, practical experience not only fails to support it, but suggests that the executive cannot be trusted to control the disclosure of evidence. Executive cooperation with the judiciary has been poor. Frequently, officials have withheld information simply to avoid embarrassment or inconvenience. The original decision to withhold is generally made by lower officials who are unwilling to take the responsibility for disclosure. This decision is often announced, however, as


75. Watergate Oral Argument 138 (statement by counsel for President Nixon); Gray v. Pentland (41 Pa. 22 18,15); Rogers, Constitutional Law: The Papers of the Executive Branch, 44 A.B.A.J. 941, 942, 1012 (1958); Zagel, supra note 47, at 880-84, 897.


77. C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 235 (2d ed. 1972);
that of a high ranking officer whose actual participation is limited to rou-
tinely initialling a paper. Once the decision to withhold is made, it is seldom
reversed. If challenged, higher officials successively reaffirm the decision.
Thus, in one minor personal injury case, the initial refusal was made by a
petty official but the final claim of privilege was made by the Secretary of
the Army "as a representative of the President." Executive resistance to
public disclosure laws has also been widespread and in some cases has
amounted to virtual sabotage of the disclosure law. On this record, little
credence can be given to the argument that executive discretion affords the
best protection of the public interest.

The courts have generally refused to leave the final determination of the
privilege issue to the executive. For example, the Arizona Supreme Court,
in a case dealing with the governor's right to withhold from the public an
investigative report by the attorney general of the state concerning the state
land commissioner, held that the confidentiality of the report was a matter
for judicial determination. Allowing the governor to be the final judge of
confidentiality, the court declared, would be inconsistent with "all principles
of democratic government." The court therefore remanded for an in cam-
era examination of the report to determine its confidentiality. Similarly, in
a case involving illegal electronic surveillance by federal agents, the Nevada
Supreme Court held that the trial judge, not the federal executive, must make
the final determination of whether subpoenaed evidence was privileged.
This was a classic case of unjustified invocation of executive privilege, as the
eavesdropping campaign was not only illegal but had received wide publicity.

Even where the final decision is to be made by the executive, however,
due process may demand that the litigant seeking the evidence be given a
hearing on the issue of executive privilege. Determining the scope of due
process generally requires a consideration of the precise nature of the gov-
ernment function involved and the individual interest affected.

The individual interest affected here is an important one. Lack of vital evidence may
imperil the litigant's chances of prevailing at trial, thus impairing his ability
to obtain judicial redress for his injuries. Moreover, the individual has

WIGMORE § 2378, at 798n (McNaughton rev. ed. 1961); Note, Policing the Executive
78. Mitchell, Government Secrecy in Theory and Practice: "Rules and Regula-
79. Hearings on S. 1125 Before the Subcomm. on Separation of Powers of the
Comm. on the Judiciary, 92d Cong., 1st Sess. 600-04 (1971) [hereinafter cited as 1971
Hearings].
80. Indeed, vesting complete discretion over production of evidence in the executive
may violate the separation of powers doctrine. United States v. Nixon, 42 U.S.L.W.
5237, 5244 (U.S. July 24, 1974); Nixon v. Sirica, 487 F.2d 700, 714-15, 4 MOORE FED-
ERAL PRACTICE ¶ 26.61, at 26-319 (2d ed. 1970). Normally, determining questions of
privilege is a judicial function. See generally C. McCormick, supra note 77, at 121, 235;
8 WIGMORE § 2372, at 755.
81. 8 WIGMORE § 2379, at 809.
Mathews concerned an attempt to force disclosure to the general public, the court's rea-
soning would seem to apply a fortiori rom. to disclosure in a judicial proceeding.
85. Indeed, in many cases, a successful claim of privilege will terminate the case.
Hanson v. Rowe, 18 Ariz. App. 131, —, 500 P.2d 916, 919 (1972); 8 WIGMORE § 2378,
at 792-93.
more than a unilateral expectation of receiving the evidence he needs; he is entitled to it unless it is actually covered by a specific evidentiary privilege.88

In general, the "secret, one-sided determination of facts decisive of rights" is inconsistent with the fairness required of democratic government.87 When judicial review of executive or administrative action is not available, an administrative hearing is even more vital. As early as 1890, the Supreme Court struck down a statute that failed to provide judicial review of an administrative decision made without a hearing.88 More recently, the Court has intimated that failure to provide either a hearing or judicial review might violate both due process and the first amendment right to petition for grievances.89 When the executive undertakes to make a final determination of the privilege question without hearing or judicial review, he bears a heavy burden of showing the necessity of such a procedure.90

The executive's only legitimate interest in avoiding a hearing is that a hearing may increase the chances of improper public disclosure. This risk is not grave unless military or diplomatic secrets are involved,91 and can be minimized by use of a reliable hearing officer and by carefully structuring the hearing.92 The state's interest in further reducing this slight risk must be balanced against its interest in ensuring that information is not wrongfully concealed from the public and that litigants are afforded a fair opportunity to

86. Thompson v. German Valley R.R., 22 N.J. Eq. 111, 115 (Ch. 1871) (governor liable in damages for abuse of privilege); Rogers, Constitutional Law: The Papers of the Executive Branch, 44 A.B.A.J. 941 (1958); Zagel, supra note 47, at 889 (in Britain, even though court will not review executive's decision, executive is not entitled to withhold capriciously but must apply legal standard). To have a protected property interest in a benefit, a person must have more than a mere unilateral expectation. Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

Determining whether information is privileged is not an area traditionally reserved to the executive, nor is the government acting in its proprietary function in a field in which private individuals normally have complete discretion. Thus, cases involving proprietary functions, such as Cafeteria Workers Local 743 v. McElroy, 367 U.S. 886, 896 (1961), do not support denial of a hearing in the executive privilege area.

87. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring). As a general rule, when a government action seriously affects an individual and the reasonableness of the action depends on factual findings, the basis of the action must be disclosed so that the individual can rebut it. Greene v. McElroy, 360 U.S. 474, 496 (1959).

88. Chicago M. & St. P. Ry. v. Minnesota, 134 U.S. 418, 457 (1890); see also Ohio Bell Tel. Co. v. Public Utilities Comm'n, 301 U.S. 292, 304 (1937) (need for fair hearing "all the more insistent" when no effective judicial review available).


90. Only the narrowest exceptions to the hearing requirement have been recognized. The exceptions fall into two classes: well-entrenched historical practices and those required by "obvious necessity." Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 164 (1951) (concurring opinion by Frankfurter, J.). Claims of executive privilege do not fall into the first category. Thus, "obvious necessity" must be shown.

91. The same risks and state interests are involved when the question is whether a judicial hearing is required. The courts have not found these interests compelling. See text accompanying notes 83-85; cf. United States v. Reynolds, 345 U.S. 1, 7-11 (1953).

92. These techniques may reduce the risk of disclosure to acceptable levels even when national security information is involved. See generally Zagel, supra note 47, at 897-903.
prove their cases. The latter interest is especially important when the litigant is acting as a private attorney general, attacking governmental misconduct or neglect. In view of the strong value democratic societies attach to the procedural safeguards of notice and hearing, the executive’s interest in avoiding a hearing on the privilege issue is insufficient to overcome the vital interest of the litigant in obtaining a hearing. Thus, due process requires a hearing before material evidence is withheld from a litigant.

The form of that hearing can be determined by the state within the constraints of procedural due process. In Goldberg v. Kelly, the Supreme Court outlined these constraints in the context of the informal administrative hearing. At a minimum, according to the Goldberg Court, the decision must rest on the legal rules and evidence adduced at the hearing. To demonstrate compliance with this requirement, the reasons for the decision must be stated. More importantly, an effective opportunity to confront adverse witnesses and to present additional evidence must be provided. This requires that witnesses be made available for cross-examination who can testify as to the nature of the evidence claimed to be privileged and the reasons for the claim. The most vital requirement of due process is that the decision be made by an impartial tribunal, free not only from actual bias but from even the probability of bias. For this reason, no man can be judge when he has an interest in the outcome. At least when the evidence for which the privilege is claimed may prove embarrassing to the department, the final decision may not be left to any member of that department. The possibility of bias would be too great. Finding an appropriate hearing officer may be difficult, however, when the privilege is claimed by the governor or by a department head. One possibility is the use of a special administrative tribunal to decide questions of executive privilege, although this tribunal would probably not have enough business to justify its existence. Another possibility is the use of the state attorney general as a hearing officer. This duty could be delegated to the members of his staff except in extraordinary cases. The state attorney general is an almost ideal choice, because he is experienced in legal matters and independent of the rest of the executive branch in most states. The obvious danger is that

93. See 5 Wigmore, Evidence § 2378, at 194-98 (2d ed. 1923).
94. 397 U.S. 254, 267, 269, 271 (1970). See also Ohio Bell Tel. Co. v. Public Utilities Comm'n, 301 U.S. 292, 302 (1937) (Cardozo, J.) (factual basis of decision must appear on record if hearing is to be more than an empty form).
96. Sanford, Evidentiary Privileges Against the Production of Data Within the Control of the Executive Department, 3 Vand. L. Rev. 73, 94 (1949) (bias inevitable if head of department decides question of privilege); cf. 8 Wigmore § 2379, at 810. In Goldberg v. Kelly, 397 U.S. 254, 271 (1970), the Court held that a participant in the decisionmaking process could not properly act as a hearing officer in a review of that decision.
97. Sanford, supra note 96, at 95. Some writers think it desirable, however, to place the responsibility for making the decision on a politically sensitive individual. Note, supra note 77, at 580.
98. This procedure may have been informally adopted in Hartranft's Appeal, 85 Pa. 433 (1877), which is discussed in text accompanying notes 10-14 supra. The Hartranft court noted early in its opinion that the attorney general had examined the testimony that the governor would give and concluded that disclosure would not serve the public interest. The weight given the attorney general's determination by the court is unclear.
his decisions might be politically motivated. The only apparent means of reducing this danger is to allow some form of judicial review, but this would defeat the purpose of delegating the determination to an administrative officer. Indeed, the elaborate hearing procedure outlined in Goldberg v. Kelly\(^\text{100}\) offers little advantage to the executive over the very similar procedure the courts have generally used for determining questions of executive privilege. From the point of view of the litigant, however, the Goldberg procedures should at least ensure decision by a responsible official after thorough consideration.

Whether the determination of privilege is made by a judge or an administrator, the ultimate question is whether the evidence is privileged.\(^\text{101}\) At the federal level, executive privilege has two branches. One branch applies to state secrets and protects military and diplomatic secrets from disclosure.\(^\text{102}\) Because war and foreign relations are the exclusive domain of the federal government, the state secrets privilege belongs solely to the federal government and cannot be claimed by the states.\(^\text{103}\) The second branch of the executive privilege protects intragovernmental communications from judicial inquiry. This privilege did not become firmly entrenched in American law until the 1950's\(^\text{104}\) and some authorities doubt that it should exist at all. They see little reason to create yet another barrier to obtaining government information, especially a barrier that is so vague and difficult to define with precision.\(^\text{105}\) Other authorities believe that the privilege should be absolute; they argue that efficient government requires that decisions be based on totally free and candid discussions. The mere possibility of judicial disclosure of these conversations would, they fear, hamper this essential communication between officials.\(^\text{106}\)

Failure to recognize an absolute privilege seems unlikely, however, to have a chilling effect on government officials. The contents of an intragovernmental communication will rarely be material to a judicial inquiry. In most of those cases in which the communication is material, the litigant will be unable to show good cause for overriding a qualified privilege. Unless officials are extremely sensitive to the possibility of public disclosure, the rare cases in which judicial disclosure is actually ordered are unlikely to deter candid discussions within the government.\(^\text{107}\) A recent empirical study indicates that members of the governor's staff, at least, are relatively indifferent to ad-

\(^{100}\) 397 U.S. 254 (1970).

\(^{101}\) In addition to the executive privilege, state governments can claim several other privileges. Perhaps the most commonly invoked is the informer's privilege, which is often encountered in criminal cases. Statutes in many states also create privileges for various compulsory reports such as tax returns. Application of this privilege is generally a matter of statutory construction and has given the courts little difficulty. See generally 8 Wigmore §§ 2374-77.


\(^{103}\) Id.

\(^{104}\) Berger, supra note 67, at 1292. See also Sandford, supra note 96, at 78. As of 1949, when Sanford's article appeared, most cases involving the intragovernmental communications privilege were British and there was very little American authority.


\(^{106}\) 1971 Hearings 424-25 (testimony of William P. Rehnquist); Rogers, supra note 75, at 942; contra, Berger, supra note 105, at 22.

verse publicity and thus unlikely to be affected by fear of judicial disclosure. This study reveals that staff members perceive one of their major roles to be that of deflecting public hostility from the governor by taking the blame for his mistakes. Commonly, gubernatorial decisions unfavorable to important political groups are announced as the decisions of subordinates so that the governor can later claim to have had no part in the decision. Because staff members already court hostile public reactions, the risk of occasional judicial disclosure seems unlikely to have any substantial impact on the candor of their advice to the governor.

The courts have accepted neither the argument against recognizing any privilege nor the argument for recognizing an absolute privilege. Instead, they have compromised by establishing a qualified privilege, that is, a privilege that can be overcome under some circumstances. This qualified privilege does not attach to all communications between public officials. Only communications made by an official in the course of his official duties and in the public interest are protected by the privilege. Under this test, a conversation involving a criminal conspiracy or mere partisan politics could never be privileged, for the officials involved would have been acting neither in the furtherance of public business nor in the public interest. The slight benefits obtained from recognizing executive privilege are certainly insufficient to justify preventing the disclosure of a crime. When the qualified privilege does attach, it can be overcome by a showing that the litigant's interest in disclosure outweighs the government's interest in concealment. The degree of the litigant's need for the evidence, the specificity of his demand, the reliability of the evidence, and its materiality, are all elements to be considered in making this determination. But the basic question in applying this balancing test has been left unanswered: how heavily must the balance weigh in favor of the litigant to entitle him to disclosure? Some courts speak in terms of the state's carrying the burden of showing grounds for concealment.

108. Wyner, Staffing the Governor's Office, 30 PUB. ADMIN. REV. 17, 21 (1970). Staff members are apparently undisturbed by this exposure to adverse public reactions; their level of job satisfaction is said to be very high. Id. at 22-23. This complacent reaction to public opinion is remarkable in light of the fact that many staff members intend to pursue political careers. Sprengel, The Governors' Staffs—Background and Recruitment Patterns, in THE AMERICAN GOVERNOR IN BEHAVIORAL PERSPECTIVE 112 (T. Beyle & J. Williams ed. 1972).


110. Counsel for President Nixon admitted that the executive privilege attached only to statements made in the course of the President's duties. Watergate Oral Argument 84. Cf. Zagel, supra note 102, at 892 (privilege attaches whenever material is "connected with the executive's constitutional duties"). But see United States v. Nixon, 42 U.S.L.W. 5237, 5247 (U.S. July 24, 1974) (need for confidentiality extends to "idle conversations with associates in which casual reference might be made concerning political leaders within the country or foreign statesmen").


while others speak of the litigant making a clear showing of entitlement.\textsuperscript{114} Because the balancing test is vague, the final result may often be determined by the location of the burden of proof.

Two lower courts have recently developed an approach to this question that deserves to be followed. Rather than adopting an inflexible standard, these courts have emphasized the nature of the suit in which the privilege is claimed. In \textit{Wood v. Breier},\textsuperscript{115} the plaintiff in a civil rights action against several policemen sought to discover interagency memoranda. The federal district court began its analysis by stressing that plaintiff was acting as a private attorney general in bringing the suit. Because the plaintiff was acting as a guardian of the public’s constitutional rights, the court said, it was of “special import” that the suit “be resolved by a determination of the truth rather than by a determination that the truth shall remain hidden.”\textsuperscript{116} After applying the balancing test in the light of this element, the court concluded that the privilege could not stand. In \textit{Hanson v. Rowe},\textsuperscript{117} an Arizona appellate court took a similar approach to the application of a statutory privilege. \textit{Hanson} arose out of the murder of a child by a foster parent; the plaintiff claimed that the state negligently failed to foresee this risk before placing the child in the foster home. In order to obtain evidence that other children placed in the foster home had been mistreated, the plaintiff sought to discover the names of the parents of these children. The court concluded that nondisclosure might encourage weak supervision over the foster parent program and ordered disclosure.\textsuperscript{118}

Although neither the \textit{Wood} nor the \textit{Hanson} court spoke of altering the burden of proof, the underlying rationale in both cases seems to have been that disclosure should be fostered when serious government misconduct is alleged. The ideal solution to the burden of proof problem would seem to be a dual standard. In litigation involving serious charges of governmental misconduct, the government should bear a heavy burden of showing good cause for concealing relevant evidence.\textsuperscript{119} On the other hand, when no governmental misconduct is charged, perhaps the litigant seeking disclosure should bear the burden of proof.\textsuperscript{120} This system for allocating the burden would regulate the disclosure of evidence by maximizing control over official misconduct and minimizing the impact on the efficiency of the executive branch.


\textsuperscript{117} 18 Ariz. App. 131, 500 P.2d 916 (1972).

\textsuperscript{118} \textit{Id.} at —, 500 P.2d at 920.


\textsuperscript{120} \textit{But see} 8 \textit{Wigmore} § 2379, at 812 (government should generally bear the burden); Zagel, \textit{supra} note 102, at 902.
Given its relative lack of experience with the executive privilege problem, the judiciary will inevitably make mistakes in striking the balance between disclosure and efficiency. If mistakes are to be made, however, they should be made in favor of disclosure. The harm done to the litigant by concealment is immediate and irreparable; the harm done to the government by disclosure is delayed and relatively slight in any single case. If experience reveals that disclosure has been granted at the expense of injury to the executive, the legislature can protect the executive from further injury. As the many statutes now in effect indicate, the legislature has been quite willing to provide this protection to the executive.\textsuperscript{121} The disappointed litigant, however, might find it rather difficult to secure legislative relief.

In conclusion, a review of the major issues reveals that reconciling the competing interests of executive efficiency and control of official misconduct is the crux of the executive privilege problem. The first issue is the amenability of the executive to judicial process. Some would argue that this prerequisite to controlling official misconduct cannot be achieved because the executive cannot be compelled to obey court orders. A more realistic appraisal indicates that successful executive disobedience of a court order is unlikely and that subjecting the chief executive to judicial process does not impair his efficiency. The second issue is whether a naked claim of privilege by the executive is sufficient to prevent disclosure. Due process requires that litigants be provided a hearing to ensure that officials do not claim the privilege arbitrarily or to conceal official misconduct; many courts have demanded that this hearing be judicial to minimize the likelihood of improper claims of privilege. Finally, because granting an absolute privilege seriously harms litigants without correspondingly increasing administrative efficiency, a qualified privilege is preferable. To maximize control over official misconduct, this qualified privilege should be weakest in cases involving allegations of serious governmental misconduct. At each stage of this analysis, the basic consideration is that of combining maximum disclosure to the litigant with minimum harm to governmental efficiency. In seeking the proper balance between disclosure and efficiency, courts must be careful not to sacrifice honest government merely to achieve marginal increases in efficiency.

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DEFENSE ACCESS TO EVIDENCE OF DISCRIMINATORY PROSECUTION

Selective enforcement of the criminal law is the practice of prosecuting “some and not . . . others, when all have engaged in conduct similarly prohibited by a given criminal law, and when all have an equal chance of being convicted.”\textsuperscript{1} This practice is an integral part of the American criminal justice system,\textsuperscript{2} which traditionally has accepted the assumption that a prose-

\textsuperscript{121} The statutes are set out in 8 Wigmore § 2371, at 754; § 2378, at 799 n.9.