Comments

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A Four-Step Inquiry to Guide Judicial Review of Executive Privilege Disputes Between the Political Branches

On June 28, 2007, the White House Counsel wrote to notify the House and Senate Judiciary Committees that President George W. Bush would invoke executive privilege to protect documents related to the firing of nine U.S. Attorneys in 2005 and 2006.[1] The letter from the White House Counsel represents

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[1] Documents were subpoenaed from the White House custodian of documents, from former Deputy Assistant to the President and Director of Political Affairs Sara M. Taylor, and from former Counsel to the President Harriet E. Miers. Letter from Fred F. Fielding, Counsel to the President, to Patrick Leahy, Chairman, U.S. Senate Comm. on the Judiciary, and John Conyers, Jr., Chairman, H.R. Comm. on the Judiciary, at 1 (June 28, 2007), *available at* http://judiciary.house.gov/hearings/pdf/FieldingToConyers070628.pdf [hereinafter Fielding Letter]. The nine U.S. Attorneys were David C. Iglesias (District of New Mexico), Daniel Bogden (District of Nevada), Paul K. Charlton (District of Arizona), Carol Lam (Southern District of California), John McKay (Western District of Washington), Margaret Chiara (Western District of Michigan), Kevin Ryan (Northern District of California), Todd Graves (Western District of Missouri), and H.E. "Bud" Cummins (Eastern District of Arkansas). *See* COMM. ON THE JUDICIARY, RESOLUTION

the third time since 2001 that President Bush invoked executive privilege and the second time his administration has withheld documents subpoenaed by a congressional committee.[2] Amid allegations that the White House has politicized the Justice Department, President Bush's latest invocation of executive privilege brings executive-legislative disputes over information to the forefront of the American political and judicial landscape. Presidents since George Washington have asserted executive privilege over information sought by Congress through its investigative committees, but resolution through litigation has virtually always given way to political brinksmanship.[3]

The current conflict between Congress and the President, however, represents the first viable opportunity since 1983 for the courts to reach the merits of an executive-privilege claim between the political branches.[4] The D.C. Circuit has already

RECOMMENDING THAT THE HOUSE OF REPRESENTATIVES FIND HARRIET MIERS AND JOSHUA BOLTEN, CHIEF OF STAFF, WHITE HOUSE, IN CONTEMPT OF CONGRESS FOR REFUSAL TO COMPLY WITH SUBPOENAS DULY ISSUED BY THE COMMITTEE ON THE JUDICIARY, ADDITIONAL VIEWS OF CHAIRMAN CONYERS AND SUBCOMMITTEE CHAIR SÁNCHEZ, H.R. REP. NO. 110-423, at 22 n.10 (2007), *available at* http://judiciary.house.gov/hearings/pdf/MajorityView071105.pdf; *see also* MORTON ROSENBERG, PRESIDENTIAL CLAIMS OF EXECUTIVE PRIVILEGE: HISTORY, LAW, PRACTICE AND RECENT DEVELOPMENTS 24 (Cong. Research Serv., RL30319, Apr. 16, 2008).

[2] In the first instance, on December 12, 2001, President Bush ordered Attorney General John Ashcroft not to comply with a congressional subpoena for documents related to a House Committee on Government Reform investigation of alleged corruption in the FBI's Boston regional office. H.R. REP. NO. 108-414, at 130 (2004). Shortly after the Committee concluded its investigation, the documents were released. *Id.* at 132–33. In the second instance, President Bush asserted the presidential-communications privilege over pardon documents held by the Department of Justice's Office of the Pardon Attorney and requested by a nonprofit organization under the Freedom of Information Act. Judicial Watch, Inc. v. Dep't of Justice, 365 F.3d 1108, 1109–10 (D.C. Cir. 2004). The District of Columbia Court of Appeals denied the privilege. *Id.* at 1110; *see also* ROSENBERG, *supra* note 1, at 33.

[3] Clashes between Congress and the executive have resulted in litigation only three times: *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974); *United States v. House of Representatives*, 556 F. Supp. 150 (D.D.C. 1983); and *United States v. American Telephone & Telegraph Co.*, 551 F.2d 384 (D.C. Cir. 1976). Of those three cases, only *Senate Select Committee* reached a decision on the merits. *See Senate Select Comm.*, 498 F.2d at 730–33.

[4] On March 10, 2008, the Judiciary Committee of the House of Representatives filed a civil suit in district court against Harriet Miers and Joshua Bolten demanding that they produce documents and testimony concerning the President's dismissal of nine U.S. Attorneys in 2006. Complaint for Declaratory and Injunctive Relief at

circumscribed the scope of the privilege in two contexts: (1) where information is requested by the public under the Freedom of Information Act ("FOIA"),[5] and (2) where information is compelled under subpoena in criminal proceedings.[6] However, courts have avoided defining the scope of the privilege where information is requested pursuant to a congressional investigation of the President or of an executive agency. To date, the courts have advocated resolution through political processes instead. Recent scholarship has suggested that there is no legal foundation for the courts' hesitation.[7] Ultimately, the courts have little guidance when faced with a properly postured challenge to an executive-privilege claim asserted against Congress. This Comment seeks to aid the courts in tackling the tough constitutional separation of powers question by recommending a four-step inquiry to guide judicial resolution of executive-legislative disputes.

Using the current controversy as a backdrop, the four Parts of this Comment highlight the courts' hesitation to define the scope of the privilege and explore whether existing analytical regimes can adequately resolve disputes between Congress and the President. Existing case law does not provide a way for courts to address executive-privilege claims in executive-legislative

32–35, Comm. on the Judiciary v. Miers, No. 1:08-cv-00409 (D.D.C. Mar. 10, 2008), *available at* http://judiciary.house.gov/hearings/pdf/ContemptComplaint080310.pdf. The complaint was filed after months of negotiations between the committee and the White House both before and after the President's claim of privilege was asserted. *See id.* at 13–24.

The facts underlying *United States v. House of Representatives* were similar to the current controversy. However, according to the district court, the procedural posture of the parties was improper for resolution of the executive-privilege claim in that case. *House of Representatives*, 556 F. Supp. at 152–53. After the court dismissed the Department of Justice's claim for declaratory relief on procedural grounds, the parties reached an agreement and settled the dispute. *See* ROSENBERG, *supra* note 1, at 9. Because of the settlement, the court was never forced to reach the merits of the executive-privilege claim.

5 *See Judicial Watch*, 365 F.3d at 1123–24 (applying 5 U.S.C. § 552 (2006)). The claim filed by the Judiciary Committee on March 10, 2008, in contrast, is properly postured for a resolution on the merits.

6 *See* United States v. Nixon (*Nixon I*), 418 U.S. 683, 712 n.19 (1974); *In re* Sealed Case (*Espy*), 121 F.3d 729, 753 (D.C. Cir. 1997).

7 David A. O'Neil, *The Political Safeguards of Executive Privilege*, 60 VAND. L. REV. 1079, 1083 (2007) (arguing that "what is 'conventional' in [judicial review of] information disputes is wholly anomalous elsewhere in the law governing executive-legislative conflict, and . . . no distinction can justify this radically divergent treatment").

disputes. A review of the nine federal cases that give contour to the privilege and a comparison of the current dispute to the analyses set out therein lead to two conclusions. First, courts have not used executive privilege to draw a line between the President's powers under Article II and Congress's powers under Article I. Second, judicial review of the President's executive-privilege claim would be proper,[8] but the frameworks used to analyze the scope of executive privilege in FOIA claims and criminal proceedings cannot adequately balance the separation-of-powers concerns inherent in interbranch disputes.

Part I of this Comment provides an overview of the current controversy, including pertinent dates, facts, players, and roles. Part II reviews case law, revealing that the courts have avoided providing a framework for analyzing executive privilege in interbranch disputes, and confirming that the executive-privilege claim in the current dispute is justiciable. Part III allies this Comment with recent scholarship and establishes that the courts have a proper role as arbiter of interbranch disputes. Part IV then applies the facts of the U.S. Attorney firings to the D.C. Circuit's analyses of executive-privilege claims in criminal proceedings and FOIA claims. In addition, Part IV recognizes that applying case law to interbranch disputes would tilt the balance of power toward the executive in some cases and recommends a four-step inquiry to resolve disputes over information between the political branches. Based on the premises that (1) a balancing test is inevitable for judicial

[8] Judicial review of the underlying privilege claim *would* be proper *if* the Department of Justice prosecuted Congress's contempt charge as is required by 2 U.S.C. § 194. *See* 2 U.S.C. § 194 (2006) (describing the procedure for certification of a contempt of Congress charge "to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action"). While Attorney General Michael Mukasey did name Nora Dannehy, Acting U.S. Attorney in Connecticut, as special prosecutor "to continue the inquiry and determine whether anyone should be prosecuted," Eric Lichtblau & Sharon Otterman, *Special Prosecutor Named in Attorney Firings Case*, N.Y. TIMES, Sept. 30, 2008, at A16, the Department of Justice has so far refused to prosecute either Miers or Bolten under the statute, stating "'that the contempt of Congress statute was not intended to apply and could not constitutionally be applied to an Executive Branch official who asserts the President's claim of privilege,'" Letter from Michael B. Mukasey, Attorney General, to Nancy Pelosi, Speaker of the House of Representatives, at 1 (Feb. 29, 2008), *available at* http://www.judiciary.house.gov/hearings/pdf/Mukasey080229.pdf (quoting *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 102 (1984)).

resolution and (2) developing a common law of executive privilege is necessary for flexibility, this inquiry provides a road map for the courts and explicitly restricts the scope of the privilege to the President's Article II powers.

I
NINE U.S. ATTORNEYS ARE FORCED TO RESIGN

A. Congressional Investigations Launched amid Allegations of Impropriety

The events precipitating the current dispute between Congress and the President over documents and testimony date back to 2005 and involve executive-branch staff both inside and outside the White House. Between February 2005 and December 2006, the Justice Department considered dismissing as many as twenty-six of the ninety-three U.S. Attorneys, but only nine were actually asked to resign.[9] The circumstances surrounding the dismissals were, and remain, unclear. Both the Senate and House Judiciary Committees launched investigations in early 2007 into whether the terminations were politically motivated.[10] In March 2007, then-Attorney General Alberto

[9] *See* COMM. ON THE JUDICIARY, RESOLUTION RECOMMENDING THAT THE HOUSE OF REPRESENTATIVES FIND HARRIET MIERS AND JOSHUA BOLTEN, CHIEF OF STAFF, WHITE HOUSE, IN CONTEMPT OF CONGRESS FOR REFUSAL TO COMPLY WITH SUBPOENAS DULY ISSUED BY THE COMMITTEE ON THE JUDICIARY, ADDITIONAL VIEWS OF CHAIRMAN CONYERS AND SUBCOMMITTEE CHAIR SÁNCHEZ, H.R. REP. NO. 110-423, at 22 n.10 (2007), *available at* http://judiciary.house.gov/hearings/pdf/ContemptReport071105.pdf (naming David C. Iglesias (District of New Mexico), Daniel Bogden (District of Nevada), Paul K. Charlton (District of Arizona), Carol Lam (Southern District of California), John McKay (Western District of Washington), Margaret Chiara (Western District of Michigan), Kevin Ryan (Northern District of California), Todd Graves (Western District of Missouri), and H.E. "Bud" Cummins (Eastern District of Arkansas) as the nine dismissed attorneys); *see also Memos Suggested DOJ Fire 26 U.S. Attorneys*, WASH. POST, May 17, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/05/17/AR2007051700605.html.

[10] Since March 2007, the Senate Judiciary Committee has held seven hearings in a series titled "Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?" Those hearings were held on February 6, 2007; March 6, 2007; March 29, 2007; May 15, 2007; June 5, 2007; July 11, 2007; and August 2, 2007. *See generally* http://www.judiciary.senate.gov/hearings/hearing-search.cfm (search "Search Hearing Notices" for "preserving prosecutorial independence"). Similarly, since March 2007 the House Judiciary Committee and its Subcommittee on Commercial and Administrative Law conducted no fewer than nine hearings on the continuing investigation of the firings, allegations of selective prosecution, subpoena authorization, and executive

Gonzales characterized the controversy as "an overblown personnel matter," saying that the Justice Department "never asked a U.S. Attorney to resign in an effort to retaliate against him or her or to inappropriately interfere with a public corruption case (or any other type of case, for that matter)."[11] Throughout his tenure, Mr. Gonzales maintained that the attorneys were dismissed for performance reasons "related to policy, priorities and management."[12] Critics in the press, however, suggested that the attorneys were fired for precisely the reasons Mr. Gonzales denied, and the ensuing public outcry set the tone for subsequent hearings in both the House and the Senate. Critics, including some of the dismissed attorneys, publicly alleged that the firings were in retribution for either failing to prosecute Democratic politicians or for actually prosecuting Republican politicians,[13] and that the administration wanted to make room for U.S. Attorneys who were more sympathetic to the President's political agenda.[14] The House Judiciary Committee's investigation supports these allegations.[15]

branch accountability generally. Those hearings were held on March 21, 2007; March 29, 2007; May 3, 2007; May 10, 2007; May 23, 2007; June 21, 2007; July 12, 2007; October 11, 2007; and October 23, 2007. *See generally* http://www.judiciary.house.gov/hearings/legislation.html.

11 Alberto R. Gonzales, *They Lost My Confidence: Attorneys' Dismissals Were Related to Performance, Not to Politics*, USA TODAY, Mar. 7, 2007, at A10.

12 *Id.*

13 *See, e.g.*, Dan Eggen & Amy Goldstein, *Voter-Fraud Complaints by GOP Drove Dismissals*, WASH. POST, May 14, 2007, at A4; *Fired U.S. Attorney Alleges Political Pressure*, DALLAS MORNING NEWS, Feb. 28, 2007, *available at* http://www.dallasnews.com/sharedcontent/dws/news/nation/stories/030107dnnatattorney.398bb40.html.

14 *See, e.g.*, David Bowermaster, *Charges May Result from Firings, Say Two Former U.S. Attorneys*, SEATTLE TIMES, May 9, 2007, *available at* http://seattletimes.nwsource.com/html/localnews/2003699882_webmckayforum09m.html; Jane Ann Morrison, *Bush Administration's Ouster of U.S. Attorneys an Insulting Injustice*, LAS VEGAS REVIEW-JOURNAL, Jan. 18, 2007, *available at* http://www.reviewjournal.com/lvrj_home/2007/Jan-18-Thu-2007/news/12044953.html.

15 COMM. ON THE JUDICIARY, RESOLUTION RECOMMENDING THAT THE HOUSE OF REPRESENTATIVES FIND HARRIET MIERS AND JOSHUA BOLTEN, CHIEF OF STAFF, WHITE HOUSE, IN CONTEMPT OF CONGRESS FOR REFUSAL TO COMPLY WITH SUBPOENAS DULY ISSUED BY THE COMMITTEE ON THE JUDICIARY, ADDITIONAL VIEWS OF CHAIRMAN CONYERS AND SUBCOMMITTEE CHAIR SÁNCHEZ, H.R. REP. NO. 110-423, at 24 (2007), *available at* http://judiciary.house.gov/hearings/pdf/ContemptReport071105.pdf ("The [c]ommittee's investigation suggests that U.S. Attorneys may have been placed on or removed from the firing list based on their actions in bringing or not bringing

In March 2007, House Committee Chairman John Conyers, Jr., and Chairwoman Linda Sánchez of the Subcommittee on Commercial and Administrative Law initiated a series of hearings "focus[ed] on testimony with respect to actions of present and former Department of Justice ("DOJ") officials and employees as well as DOJ documents relat[ed] to the matter."[16] At a hearing on March 20, 2007, the subcommittee authorized Chairman Conyers to issue subpoenas "for current and former White House and Justice Department officials Karl Rove, Harriet Miers, William Kelley, Scott Jennings and Kyle Sampson, as well as documents that the [c]ommittee [had] not yet received. . . . [S]pecifically, unredacted documents that [had] not previously been provided."[17] During three months of subsequent negotiations with the White House, the committee also authorized a subpoena and sought a judicial order of limited immunity for former Justice Department liaison to the White House Monica Goodling.[18] The committee also subpoenaed documents and electronic information from Attorney General Gonzales.[19] In the letter accompanying the subpoena to the attorney general, Chairman Conyers recounted the two sides' unsuccessful efforts to reconcile their respective positions, noting specifically that the committee had been "patient" and "sought to accommodate" Attorney General Gonzales's concerns regarding the sensitive nature of certain requested materials.[20] However, the letter included firm language refusing to accept

politically sensitive prosecutions. In other cases, it seems relatively clear that Republican complaints about the enforcement decisions made by some U.S. Attorneys in controversial vote fraud cases may also have led to their being placed on or removed from the list."). While both the House and Senate Judiciary Committees have been conducting interviews and investigating the firings, this Comment will focus on the efforts of the House Committee because it is closer to litigation.

16 ROSENBERG, *supra* note 1, at 24.

17 Press Release, H.R. Comm. on the Judiciary, Judiciary Subcommittee Authorizes Chairman Conyers to Issue Subpoenas in US Attorney Investigation (Mar. 20, 2007).

18 *See* Press Release, H.R. Comm. on the Judiciary, House Judiciary Committee Approves Immunity Order, Authorizes Subpoena for Former DoJ Official Monica Goodling (Apr. 25, 2007).

19 *See* Letter from John Conyers, Jr., Chairman, H.R. Comm. on the Judiciary, to Alberto R. Gonzales, Attorney General of the United States, at 1 (Apr. 10, 2007), *available at* http://judiciary.house.gov/hearings/pdf/AGSubpoena070410.pdf.

20 *Id.* at 1.

"the [d]epartment's unilateral judgment as to how much of [the] information it needs to disclose, or its unilateral judgment as to whether limited viewing of certain information [on terms set out by the Justice Department] is sufficient to permit effective and efficient review."[21] Thus, the committee subpoenaed a broad spectrum of documents.[22]

B. The Justice Department Reacts to Congressional Subpoenas: The Clement Letter

It was not until June 13, 2007, that Chairman Conyers subpoenaed White House Chief of Staff Joshua Bolten, as custodian of White House documents,[23] and former White

[21] *Id.* at 2 ("Recent developments, including the apparent inconsistencies between your statements and the testimony of your former chief of staff, Kyle Sampson, declarations that your former senior counsel and White House liaison, Monica Goodling, intends to invoke her Fifth Amendment privilege against self-incrimination rather than answer the Subcommittee's questions, and a series of recent resignations by senior officials at the [d]epartment, including Mr. Sampson and Ms. Goodling, have only increased my conviction that the Subcommittee must have all potentially relevant information that it has requested without further delay. Under these circumstances, you must understand why we cannot accept the [d]epartment's unilateral judgment as to how much of this information it needs to disclose, or its unilateral judgment as to whether limited viewing of certain information, on [d]epartment premises and under [d]epartment supervision, and with no copying or note-taking permitted, is sufficient to permit effective and efficient review.").

[22] *Id.* at 6–7. The subpoenaed documents included "[c]omplete and unredacted versions, including complete paper and electronic versions, of any and all" (1) "documents created by or sent to anyone at the [d]epartment, referring or otherwise relating in any way" to the firing of the former U.S. Attorneys; (2) "documents referring to or otherwise relating in any way to a communication between anyone at the [d]epartment and any [m]ember of Congress concerning any of the terminated U.S. Attorneys"; (3) "documents that anyone at the [d]epartment submitted to, or that refer or otherwise relate in any way to a communication" between anyone at the department and any of the terminated attorneys "concerning any failure in performance, including any failure to comply with [d]epartment priorities and directives"; and (4) "documents previously requested in writing by the [s]ubcommittee that the [d]epartment has withheld, in whole or in part, from production on any basis or for any reason, including . . . those documents 'generated within the [e]xecutive [b]ranch for the purpose of responding to the congressional (and media) inquiries about the resignations.'"

[23] Subpoena from John Conyers, Jr., Chairman, H.R. Comm. on the Judiciary, to Joshua Bolten, White House Chief of Staff (June 13, 2007), *available at* http://judiciary.house.gov/hearings/pdf/BoltenSubpoena070613.pdf.

House Counsel Harriet Miers[24] for documents and testimony. These subpoenas, issued simultaneously with the Senate committee's subpoena to Sara Taylor, former Deputy Assistant to the President and Director of Political Affairs,[25] precipitated the President's suggestion two weeks later that he would assert executive privilege if the dispute was not resolved. After the committees issued the subpoenas and the Justice Department's Office of Legal Counsel reviewed the responsive documents, Paul Clement, Solicitor General and Acting Attorney General, notified President Bush that "the documents fall within the scope of executive privilege" and that "Congress's interest in the documents and related testimony would not be sufficient to override an executive-privilege claim."[26] In support of this assertion, Mr. Clement discussed separately the three categories of documents requested: (1) "documents and testimony consist[ing] of internal White House communications," (2) "communications between White House officials and individuals outside the Executive Branch," and (3) "communications between the Department of Justice and the White House."[27]

Mr. Clement made several arguments regarding internal White House communications. First, deliberations between White House officials about the wisdom of dismissing and replacing U.S. Attorneys, specific individuals who could be removed, potential replacements, and possible responses to inquiries about the dismissals all "fall squarely within the scope of executive privilege."[28] Second, Congress's oversight authority arguably does not extend to the President's constitutionally vested power to nominate and remove U.S. Attorneys, and, even if it does, the Judiciary Committees have not demonstrated that their interest in the subpoenaed materials outweighs the

[24] Subpoena from John Conyers, Jr., Chairman, H.R. Comm. on the Judiciary, to Harriet Miers (June 13, 2007), *available at* http://judiciary.house.gov/hearings/pdf/MiersSubpoena070613.pdf.

[25] *See* Fielding Letter, *supra* note 1, at 1.

[26] Letter from Paul D. Clement, Solicitor General and Acting Attorney General of the United States, to George W. Bush, President of the United States, at 1 (June 27, 2007), *available at* http://judiciary.house.gov/hearings/pdf/Clement070627.pdf [hereinafter Clement Letter].

[27] *See id.* at 2, 5, 6.

[28] *Id.* at 2.

presumptive nature of the privilege.[29] Third, the committees' need for the information has been "sharply reduced" by the volume of documents and the number of interviews the Justice Department provided in the preceding months.[30] Finally, Mr. Clement challenged the assertion that the committees were entitled to internal White House documents simply because Justice Department officials had provided "written misstatements" and "false statements" to committee investigators in preceding months. Ultimately, the Justice Department provided all documents related to statements by department officials that were challenged for their veracity, meeting the committees' "legitimate oversight interests."[31]

Mr. Clement wrote that communications between White House officials and individuals outside the executive branch are within the scope of executive privilege. In addition, Mr. Clement argued that presidential aides must, at times, solicit information from outside the executive branch, and "the President's ability to obtain such information often depends on the provider's understanding that his frank and candid views will remain confidential."[32] Thus, the mere fact that the advice comes from individuals outside the executive branch does not eviscerate the President's confidentiality interests. Further, the committees may not overcome the presumptive nature of an executive-privilege claim where they offer no compelling reason why the communications are essential to the fulfillment of the committees' functions.

Mr. Clement divided his discussion of documents and testimony related to communications between the White House and the Justice Department into three subcategories: (1) White House-department communications that had not been disclosed to the committees, (2) White House-department communications that had been disclosed to the committees, and (3) testimony from current or former White House officials about previously disclosed communications.[33] The President has

29 *Id.* at 2–3. The Supreme Court's unanimous opinion in *United States v. Nixon* held that the presumptive nature of the privilege is founded on "a [p]resident's generalized interest in confidentiality." *Nixon I*, 418 U.S. 683, 711 (1974).

30 Clement Letter, *supra* note 26, at 3.

31 *Id.* at 4.

32 *Id.* at 5.

33 *Id.* at 6.

a "powerful" interest in protecting undisclosed communications between the White House and the Justice Department, Mr. Clement asserted, "particularly given Congress's lack of legislative authority over the nomination or replacement of U.S. Attorneys."[34] Moreover, Mr. Clement described the committees' need for previously disclosed communications as "weak."[35] The fact that the White House provided documents and information to Congress "does not constitute a waiver and does not preclude the President from asserting executive privilege with respect to White House materials or testimony concerning such communications."[36] The process of mutual accommodation would be undermined by a system where the President was not able to assert a privilege over information and testimony solely because the documents were provided in a good-faith effort to resolve a dispute. Finally, "investigating the replacement of U.S. Attorneys clearly falls outside [Congress's] core constitutional responsibilities," and any legitimate interest Congress may have in testimony from current or former White House officials was already satisfied by the department's "extraordinary accommodation."[37]

C. The White House Responds to the Subpoenas: The Fielding Letter

On June 28, 2007, the day after the White House received Mr. Clement's letter, Fred Fielding, Counsel to the President, issued a joint letter to Chairman Conyers and Senate Judiciary Committee Chairman Leahy, stating that "the President is satisfied that the testimony sought from Sara Taylor and Harriet Miers is subject to a valid claim of [e]xecutive [p]rivilege and is prepared to assert the [p]rivilege with respect to that testimony if the matter cannot be resolved."[38] The Fielding Letter affirms the legal conclusions set out in the Clement Letter and establishes the White House's position:

> [F]or the Presidency to operate consistent with the Constitution's design, Presidents must be able to depend upon

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34 *Id.*

35 *Id.* at 7.

36 *Id.*

37 *Id.*

38 Fielding Letter, *supra* note 1, at 3.

> their advisors and other [e]xecutive [b]ranch officials speaking candidly and without inhibition while deliberating and working to advise the President. The doctrine of [e]xecutive [p]rivilege exists, at least in part, to protect such communications from compelled disclosure to Congress, especially where, as here, the President's interests in maintaining confidentiality far outweigh Congress's interests in obtaining deliberative White House communications.[39]

The letter concludes that "there is no demonstration that the documents and information [the committees] seek by subpoena are critically important to any legislative initiatives that [the committees] may be pursuing or intending to pursue."[40] By affirming Mr. Clement's analysis, the Fielding Letter signaled that the coordinate branches had reached an impasse.

D. The Judiciary Committee Pursues Contempt Charges

On June 29, 2007, Chairmen Leahy and Conyers responded to both the Clement and Fielding letters by accusing the White House of "Nixonian stonewalling" and reliance on "a blanket executive-privilege claim"[41] that "belies any good faith attempt to determine where privilege truly does and does not apply."[42] The committees also demanded a privilege log outlining the legal and factual bases for the President's executive-privilege claim for each document withheld.[43] On July 9, the deadline for receipt, the White House refused to comply.[44] The White House Counsel reasserted that access to the documents was not critical to Congress's ability to fulfill its duties and stated that Congress lacked authority to demand a privilege log from the President.[45] The same day, Ms. Miers informed Chairman Conyers that, pursuant to letters received from White House counsel, she

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39 *Id.* at 2.

40 *Id.* at 2–3.

41 Letter from Patrick Leahy, Chairman, U.S. Senate Comm. on the Judiciary, and John Conyers, Jr., Chairman, H.R. Comm. on the Judiciary, to Fred Fielding, Counsel to the President, at 1 (June 29, 2007), *available at* http://judiciary.house.gov/hearings/pdf/Conyers-Leahy070629.pdf.

42 *Id.* at 2.

43 *Id.* at 3.

44 *See* Letter from Fred Fielding, Counsel to the President, to Patrick Leahy, Chairman, U.S. Senate Comm. on the Judiciary, and John Conyers, Jr., Chairman, H.R. Comm. on the Judiciary, at 2 (July 9, 2007), *available at* http://judiciary.house.gov/hearings/pdf/Fielding070709.pdf.

45 *Id.*

would neither produce documents nor testify before the committee.[46] Subcommittee Chairwoman Sánchez rejected both Ms. Miers's[47] and Mr. Bolten's[48] claims of privilege on July 12 and July 19, respectively. On July 25, the full committee issued a report recommending that the House of Representatives approve contempt of Congress citations against the two,[49] and the report was presented to the full House for consideration on November 5, 2007.[50]

E. The Contempt Report

In their additional views submitted with the contempt report, Chairman Conyers and subcommittee Chairwoman Sánchez asserted that the information subpoenaed from the White House is essential for the committee to (1) conduct meaningful oversight and (2) consider modifying or enacting federal laws to curb future wrongdoing.[51] Mr. Conyers and Ms. Sánchez went

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[46] Letter from George T. Manning, Counsel for Harriet Miers, to John Conyers, Jr., Chairman, H.R. Comm. on the Judiciary, and Lamar Smith, Ranking Member, at 1 (July 9, 2007), *available at* http://judiciary.house.gov/hearings/pdf/Manning070709.pdf ("I must inform you that in light of the President's assertion of [e]xecutive [p]rivilege, Ms. Miers cannot provide the documents and testimony that the [c]ommittee seeks."). The following day, Miers announced that she would not appear for the hearing at all. ROSENBERG, *supra* note 1, at 26; *see also* Michael Roston, *BREAKING: Bush Blocks Miers from Appearing Before House Judiciary Committee, Contempt Charges Possible*, RAW STORY, July 11, 2007, http://rawstory.com/news/2007/BREAKING__Bush_blocks_Miers_from_0711.html.

[47] *See* ROSENBERG, *supra* note 1, at 27.

[48] *See* Thomas Ferraro, *Bush Chief of Staff Faces Possible Contempt Charge*, REUTERS, July 20, 2007, http://in.reuters.com/article/worldNews/idINIndia-28568320070720.

[49] Dan Eggen & Paul Kane, *House Panel Backs Citing Bush Aides for Contempt*, WASH. POST, July 26, 2007, at A3.

[50] *See* COMM. ON THE JUDICIARY, RESOLUTION RECOMMENDING THAT THE HOUSE OF REPRESENTATIVES FIND HARRIET MIERS AND JOSHUA BOLTEN, CHIEF OF STAFF, WHITE HOUSE, IN CONTEMPT OF CONGRESS FOR REFUSAL TO COMPLY WITH SUBPOENAS DULY ISSUED BY THE COMMITTEE ON THE JUDICIARY, H.R. REP. NO. 110-423 (2007), *available at* http://judiciary.house.gov/hearings/pdf/ContemptReport071105.pdf.

[51] *See* COMM. ON THE JUDICIARY, RESOLUTION RECOMMENDING THAT THE HOUSE OF REPRESENTATIVES FIND HARRIET MIERS AND JOSHUA BOLTEN, CHIEF OF STAFF, WHITE HOUSE, IN CONTEMPT OF CONGRESS FOR REFUSAL TO COMPLY WITH SUBPOENAS DULY ISSUED BY THE COMMITTEE ON THE JUDICIARY, ADDITIONAL VIEWS OF CHAIRMAN CONYERS AND SUBCOMMITTEE CHAIR SÁNCHEZ, H.R. REP. NO. 110-423, at 54–60 (2007), *available at* http://judiciary.house.gov/hearings/pdf/MajorityView071105.pdf (relying on the Supreme Court's rulings in *Watkins v. United States*, 354 U.S. 178, 187 (1957) ("The

on to reject Ms. Miers's and Mr. Bolten's claims of executive privilege for four reasons. First, the privilege was not properly asserted because "there has been no signed or personal statement from the President himself asserting the privilege."[52] Second, neither Ms. Miers nor Mr. Bolten provided a privilege log describing the documents withheld "as directed by the subpoenas" and as "the courts have required."[53] Third, as to Ms. Miers's claim, "neither the White House nor Ms. Miers . . . demonstrated that the presidential communications executive privilege even applies in this case."[54] As a private party at the time of the hearing, Ms. Miers should not be able to rely on a third party's assertion of privilege to justify the refusal to produce documents or testimony.[55] Fourth, refuting claims set out in the Clement and Fielding letters, Mr. Conyers and Ms. Sánchez argued that even if the subpoenaed information properly falls under executive privilege and the privilege was properly invoked, "any such privilege is outweighed by the compelling need for the House to have access to this information."[56] In defense of this argument, Mr. Conyers and Ms. Sánchez cited the committee's responsibility to investigate executive wrongdoing.[57]

F. The House of Representatives Sues to Enforce Contempt Charges Against Miers and Bolten

On February 14, 2008, the House of Representatives voted to hold Ms. Miers and Mr. Bolten in contempt of Congress for failure to testify and produce documents in the Judiciary

power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste."), and *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927) ("[T]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.")).

52 *Id.* at 68.

53 *Id.* at 69.

54 *Id.*

55 *See id.* at 71.

56 *Id.* at 70.

57 *See id.* at 70–71 & nn.320–23.

Committee's investigation.[58] Before Ms. Miers and Mr. Bolten, no White House official had ever been cited for contempt. Pursuant to 2 U.S.C. § 194,[59] the Justice Department should have referred the charges to the U.S. Attorney for the District of Columbia for commencement of a grand jury investigation. However, as anticipated,[60] the Justice Department refused. In a letter to the Speaker of the House on February 29, Attorney General Michael Mukasey said that he would not prosecute Mr. Bolten or Ms. Miers because their refusal to comply with the committees' subpoenas "did not constitute a crime."[61] Ten days later, in response to the Justice Department's failure to act, the House of Representatives filed a civil suit in district court to enforce the subpoenas.[62] This was unprecedented. It was the only time that Congress has sued to enforce compulsory process against a member of the White House staff. Existing case law provides little guidance about how the courts will resolve the dispute because of the unique status and posture of the parties.

II

BACKGROUND: EXECUTIVE PRIVILEGE CASE LAW

To date, executive-privilege claims have been litigated in four contexts: (1) cases arising from subpoenas in criminal investigations, (2) a president's affirmative challenge to a federal

58 The House approved Resolution 982, H.R. Res. 982, 110th Cong. (2008) (enacted), which provides for the adoption of Resolution 979, H.R. Res. 979, 110th Cong. (2008) (enacted), recommending that the House of Representatives find Harriet Miers and Joshua Bolten in contempt of Congress for refusal to comply with subpoenas issued by the Judiciary Committee, and adoption of Resolution 980, H.R. Res. 980, 110th Cong. (2008) (enacted), authorizing the Judiciary Committee to initiate or intervene in judicial proceedings to enforce certain subpoenas. *See also* Paul Kane, *West Wing Aides Cited for Contempt: Refusal to Testify Prompts House Action*, WASH. POST, Feb. 15, 2008, at A4; Speaker Nancy Pelosi, Current Legislation: Upholding the Constitution, http://www.speaker.gov/legislation?id =0159 (last visited June 6, 2008).

59 The statute describes the procedure for certification of contempt of Congress charge "to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action." 2 U.S.C. § 194 (2005).

60 *See* Ari Shapiro, *All Things Considered: Bush Aides in Contempt; Will They Be Prosecuted?* (National Public Radio broadcast July 25, 2007), *available at* http://www.npr.org/templates/story/story.php?storyId=12234115.

61 Letter from Michael B. Mukasey, Attorney General, to Nancy Pelosi, Speaker of the House of Representatives, at 2 (Feb. 29, 2008), *available at* http://judiciary.house.gov/hearings/pdf/Mukasey080229.pdf.

62 *See* Complaint for Declaratory and Injunctive Relief, *supra* note 4.

statute, (3) requests for information under FOIA, and (4) cases arising from subpoenas in congressional investigations of the executive branch. This Part organizes the landscape of executive-privilege cases according to these four circumstances to highlight two points.[63] First, the Supreme Court and the D.C. Circuit have gone to great lengths to eschew proposing an analytical framework for the scope of executive privilege in interbranch disputes. Avoiding the issue has left Congress and the President free from constraint in their negotiations over the release of information. However, avoiding the issue has also left scant precedent to aid courts in resolving the aftermath of a breakdown in those negotiations. Second, the House has standing in the District Court for the District of Columbia for judicial review of an interbranch executive-privilege question.

A. Cases Arising from Subpoenas in Criminal Investigations

The bulk of the executive-privilege doctrine has arisen from claims asserted to thwart criminal investigations of the executive branch. Presidents have resisted subpoenas from trial courts, special prosecutors, and grand juries in active or pending litigation to prevent the release of documents and testimony related to alleged criminal conduct. Cases involving former President Nixon are the most well-known.[64] While all four

[63] Some may argue that a chronological approach to analyzing the development of the executive-privilege doctrine is more logical because it provides the reader a better understanding of how each holding either draws on or builds upon those that preceded it. Because the universe of executive-privilege case law is so small, and the privilege is "bottomed on a recognition of the unique role of the President[,]" the premise that each case bears on the others regardless of the source of the information request seems logically sound. *Espy*, 121 F.3d 729, 752 (D.C. Cir. 1997). However, a categorical approach better highlights the courts' hesitance to adjudicate disputes in the executive-legislative context. While it seems logical to assume that the courts will continue to refer to their prior reasoning, both the Supreme Court and the D.C. Circuit have disavowed any implication that the logic used to dispose of cases in other contexts can be extrapolated to conflicts between the President and Congress.

[64] Between 1972 and 1974, multiple investigations were launched to determine the extent of President Nixon's involvement in illegal activities carried out by his staff and those loyal to him. Tape recordings of conversations made by President Nixon in the White House revealed that he obstructed justice and attempted to cover up the June 17, 1972, break-in at the Democratic National Committee headquarters at the Watergate hotel complex. Discovery of those tape recordings led to four lawsuits and precipitated Nixon's eventual resignation from office on

Watergate cases were linked to recorded conversations between President Nixon and other members of the executive branch, only two were litigated pursuant to claims of executive privilege in ongoing criminal investigations: *Nixon v. Sirica*[65] and *United States v. Nixon* (*Nixon I*).[66]

1. The Nixon Cases

Sirica and *Nixon I* define the broad contours of executive privilege relating to criminal proceedings. In *Sirica*, the D.C. Circuit addressed the Special Prosecutor's petition for an order to show cause when neither President Nixon nor any subordinate official would produce certain tape recordings in compliance with a grand jury subpoena *duces tecum*.[67] The court relied on established and venerable precedent to reject President Nixon's claim that executive privilege is an absolute privilege.[68] While the tapes under subpoena from the Special Prosecutor were "presumptively privileged,"[69] the "application of [e]xecutive privilege depends on a weighing of the public interest protected by the privilege against the public interests that would be served by disclosure in a particular case."[70] The court balanced the public interests and determined that "the public interest in confidentiality must fail in the face of the uniquely powerful showing made" in support of disclosure.[71] The characteristics of the Special Prosecutor's "uniquely powerful

August 9, 1974. *See generally* Howard Ball, "We have a Duty": The Supreme Court and the Watergate Tapes Litigation (Contributions in Legal Studies) (1990).

65 487 F.2d 700 (D.C. Cir. 1973).

66 *Nixon I*, 418 U.S. 683 (1974). The other two cases, *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974), and *Nixon v. Administrator of General Services (Nixon II)*, 433 U.S. 425 (1977), had different origins and will be discussed later.

67 *Sirica*, 487 F.2d at 704–06. A subpoena *duces tecum* is a court order requiring named parties to appear and produce tangible evidence (e.g., documents, books) for use at a trial or hearing.

68 *Id.* at 714 (quoting Comm. for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 788, 793 (D.C. Cir. 1971) ("Any claim to executive absolutism cannot override the duty of the court to assure that an official has not exceeded his charter or flouted the legislative will."), and Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.")).

69 *Id.* at 717.

70 *Id.* at 716.

71 *Id.* at 717.

showing"[72] went undefined and the Supreme Court did not subsequently adopt that language.

Nine months after the D.C. Circuit's decision in *Sirica*, the Supreme Court laid the cornerstone of federal jurisprudence on executive privilege with its unanimous decision in *Nixon I*. There, President Nixon asserted executive privilege to deny production of documents and tape recordings subpoenaed by the Watergate Special Prosecutor.[73] The Court responded with several key holdings in rejecting President Nixon's assertion. First, the Court established that executive privilege derives from "the supremacy of each branch within its own assigned area of constitutional duties."[74] The privilege was therefore "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution."[75] Second, the Court held that although presidential communications are presumptively privileged,[76] the privilege is qualified and not absolute: "neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified [p]residential privilege of immunity from judicial process under all circumstances."[77]

While these two central holdings paralleled the D.C. Circuit's decision in *Sirica*, the Supreme Court went on to address the scope of executive privilege in criminal proceedings more thoroughly. Specifically, the Court explained that "great deference" should be given to a President's need to receive candid, objective advice from advisers in the course of exercising his Article II powers.[78] However,

> [t]o read the Art. 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 nonmilitary and nondiplomatic discussions would upset the

72 *Id.*

73 *See Nixon I*, 418 U.S. 683, 688 (1974).

74 *Id.* at 705.

75 *Id.* at 708.

76 *Id.*

77 *Id.* at 706.

78 *Id.*

> constitutional balance of "a workable government" and gravely impair the role of the courts under Art. III.[79]

The judiciary's ability to conduct their own constitutionally designated function provided the foundation for the Court's decision that the tapes must be released. Seeking to resolve the "competing interests in a manner that preserves the essential functions of each branch,"[80] the Court balanced the need for release of the information with the President's need for confidentiality—a balancing test similar to that undertaken by the court in *Sirica*. While a "President's acknowledged need for confidentiality in the communications of his office is general in nature," the "constitutional need" for relevant evidence in a particular criminal trial is "specific and central to [its] fair adjudication."[81]

2. In re Sealed Case *(*Espy*)*

Following the Watergate scandal, executive privilege was rarely invoked in criminal investigations[82] and it took more than twenty years for another presidential assertion of the privilege in this context. In 1997, the D.C. Circuit began to address lingering questions about the scope of executive privilege in the criminal context when it decided *In re Sealed Case*, commonly known as *Espy*.[83] The *Espy* decision stands as the most significant discussion of executive privilege since *Nixon I*, and the D.C. Circuit relied upon and further developed its holding in subsequent FOIA litigation.[84]

In *Espy*, the appeals court addressed President Clinton's assertions of executive and deliberative process privilege over eighty-four documents related to Agriculture Secretary Mike Espy's resignation in 1994. In the course of a grand jury investigation into Mr. Espy's alleged improprieties, the grand jury issued a subpoena *duces tecum* seeking documents from the

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79 *Id.* at 707.

80 *Id.*

81 *Id.* at 712–13.

82 In two prosecutions arising out of the Iran-Contra investigation, the courts noted that the subpoenas implicated executive privilege but did not reach the issue. *See* United States v. Poindexter, 727 F. Supp. 1501 (D.D.C. 1989); United States v. North, 713 F. Supp. 1448 (D.D.C. 1989).

83 *Espy*, 121 F.3d 729.

84 *See* Judicial Watch, Inc. v. Dep't of Justice, 365 F.3d 1108 (D.C. Cir. 2004).

Office of Independent Counsel that were "'accumulated for, relating in any way to, or considered in any fashion, by those persons who were consulted and/or contributed directly or indirectly to all drafts and/or versions' of the White House Counsel's report" for the President on the allegations against Espy.[85] Importantly, it was undisputed that none of the documents was actually viewed by the President. The case brought issues to the foreground that were left unresolved by the *Nixon* cases, including (1) "the precise parameters of the presidential executive privilege," (2) "how far down the chain of command the privilege reaches," (3) "what showing is necessary to overcome a valid claim of privilege," and (4) "whether the President has to have seen or had knowledge of the existence of the documents for which he claims privilege."[86]

The court first addressed the scope of the privilege by making a careful distinction between the presidential-communications privilege and the deliberative-process privilege.[87] It explained that, "[a]lthough executive privilege in general is no stranger to the courtroom, one form of the executive privilege is invoked only rarely and that is the privilege to preserve the confidentiality of presidential communications."[88] The court followed *Nixon I*, reiterating that there is "a presumptive privilege for [p]residential communications founded on a President's generalized interest in confidentiality"[89] and added that the privilege should apply only to "direct decisionmaking by

85 *Espy*, 121 F.3d at 735.

86 ROSENBERG, *supra* note 1, at 17.

87 While the presidential communications privilege and the deliberative process privilege are closely affiliated, the two privileges are distinct and have different scopes. Both are executive privileges designed to protect executive branch decisionmaking, but [the deliberative process privilege] applies to decisionmaking of executive officials generally, [and the presidential communications privilege applies] specifically to decisionmaking of the President. The presidential privilege is rooted in constitutional separation of powers principles and the President's unique constitutional role; the deliberative process privilege is primarily a common law privilege. Consequently, congressional or judicial negation of the presidential communications privilege is subject to greater scrutiny than denial of the deliberative privilege.

Espy, 121 F.3d at 745 (citation omitted).

88 *Id.* at 738.

89 *Id.* at 743 (internal quotation marks and citation omitted).

the President."[90] Within that scope, however, the privilege applies to "documents in their entirety, and covers final and post-decisional materials as well as pre-deliberative ones."[91]

Second, the court established how far from the President executive privilege may extend. Noting that the language used in *Nixon I* to describe the scope of the privilege vacillated between broad and narrow, the court explained that the public interest is best served by extending the presidential-communications privilege to "communications made by presidential advisers in [the] course of preparing advice for [the] President . . . even when these communications are not made directly to [the] President."[92] The court also held that communications "authored [by]" as well as those "solicited and received [from others]" by either a presidential adviser or an adviser's staff "who have broad and significant responsibility for investigating and formulating the advice to be given the President" should be protected by the privilege.[93] The court recognized the risk to open government of "expanding to a large swath of the executive branch a privilege that is bottomed on a recognition of the unique role of the President" and carefully delineated its boundaries.[94] Specifically, the court held that "the privilege should not extend to staff outside the White House in executive branch agencies"[95] because only communications within the bounds of the White House "are close enough to the President to be revelatory of his deliberations or to pose a risk to the candor of his advisers."[96]

After the court's decision in *Espy*, uncertainty remained because "[t]he appeals court's limitation of the presidential communications privilege to 'direct decisionmaking by the President' makes it imperative to identify the type of decisionmaking to which it refers."[97] Further, the parameters of the privilege are confined "to those Article II functions that are identifiable as 'quintessential and non-delegable,'" including the

90 *Id.* at 752.

91 *Id.* at 745.

92 *Id.* at 752.

93 *Id.*

94 *Id.*

95 *Id.*

96 *Id.*

97 ROSENBERG, *supra* note 1, at 19.

appointment and removal power that was under scrutiny in *Espy*, "the commander-in-chief power, the sole authority to receive ambassadors . . . , the power to negotiate treaties, and the power to grant pardons and reprieves."[98] Thus, "[t]he limiting safeguard is that the privilege will apply in those instances where the *Constitution* provides that *the President alone* must make a decision," but "decisionmaking vested by statute in the President or agency heads . . . would not necessarily be covered."[99]

Turning next to the "focused demonstration of need,"[100] the court held that the standard for a party seeking to overcome the privilege has two components. First, each group of subpoenaed materials must "likely contain[] important evidence."[101] Second, the evidence contained in the subpoenaed materials must "not [be] available with due diligence elsewhere."[102] Such a demonstration of need is necessary "even when there are allegations of misconduct by high-level officials."[103] Finally, by holding that the Office of Independent Counsel had demonstrated sufficient need to overcome the presidential-communications privilege, the court implicitly held that the President did not have to see the documents under subpoena to assert privilege over them.

B. Presidential Affirmative Challenge of a Federal Statute

The second context for executive-privilege litigation arose during the Watergate scandal when President Nixon demanded changes to the statute governing presidential records. *Nixon v. General Services Administration* (*Nixon II*)[104] is unique because it is the only time the privilege has been used as an offensive tool to initiate litigation to protect a president's interests. On the surface, *Nixon II* reinforces the Court's holding in *Nixon I*, but it also provides substantive language for the development of the four-step inquiry set out in Part IV, *infra*.

98 *Id.* at 19–20.

99 *Id.* at 20 (emphasis added).

100 *Espy*, 121 F.3d at 746.

101 *Id.* at 754.

102 *Id.*

103 *Id.* at 746.

104 433 U.S. 425 (1977).

In *Nixon II*, President Nixon challenged the constitutionality of the Presidential Recordings and Materials Preservation Act ("PRMPA").[105] The statute required that all recordings and papers produced during Nixon's presidency be released for archival scrutiny.[106] Nixon argued, *inter alia*, that releasing any of the materials without his consent would violate the "generalized Presidential privilege [that] survive[d] the termination of the President-adviser relationship" when he left office.[107] In dismissing President Nixon's privilege claim against the executive branch, the Supreme Court invoked *Nixon I*, noting that the privilege is qualified and not absolute, that it derives from the separation of powers, and that the public interest in releasing the documents should be balanced against the public interest in preserving the confidentiality of the President's decision-making process.[108] The Court went on to hold that PRMPA can achieve its purpose through archiving while effectively preserving executive confidentiality: "[a]n absolute barrier to all outside disclosure is not practically or constitutionally necessary."[109] Finally, the Court considered the weight of public interest decisive in upholding the statute against a claim of privilege, finding that Congress might use tapes and papers in exercising its "broad investigative power[s]" to "aid the legislative process."[110] Specifically, the Court found it important to broadcast the events leading up to President

105 Presidential Recordings and Materials Preservation Act, Pub. L. No. 93-526, 88 Stat. 1695 (codified as amended at 44 U.S.C. § 2111 (2006)).

106 *Id.* at § 101 ("[A]ny Federal employee in possession shall deliver, and the Archivist of the United States . . . shall receive, obtain, or retain, complete possession and control of all original tape recordings of conversations which were recorded or caused to be recorded by any officer or employee of the Federal Government and which—(1) involve former President Richard M. Nixon or other individuals who, at the time of the conversation, were employed by the Federal Government; (2) were recorded in the White House or in the office of the President in the Executive Office Buildings located in Washington, District of Columbia; Camp David, Maryland; Key Biscayne, Florida; or San Clemente, California; and (3) were recorded during the period beginning January 20, 1969, and ending August 9, 1974.").

107 *Nixon II*, 433 U.S. at 440.

108 *See id.* at 446–47.

109 *Id.* at 450.

110 *Id.* at 453.

Nixon's resignation so Congress could "gauge the necessity for remedial legislation."[111]

Thus, *Nixon II* represents a solidification of the public interest balancing test that the Supreme Court set out in *Nixon I* and that the D.C. Circuit later elaborated upon in *Espy*. However, *Nixon II* also included language that is important to discussions in Parts III and IV, *infra*, about whether judicial review of executive-legislative disputes is proper and whether the courts have a role in arbitrating those disputes. Further, the Court in *Nixon II* subtly inserted itself as the "fulcrum between executive and legislative power."[112] The Court reasoned that,

> [i]n determining whether [PRMPA] disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which [the Act] prevents the [e]xecutive [b]ranch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.[113]

Thus, the Court asserted itself as the proper venue for determining whether presidential secrecy outweighs Congress's powers to legislate and conduct investigations.[114]

C. Public Requests for Information Under the Freedom of Information Act

The third context for executive-privilege litigation arose in 2004, and the D.C. Circuit's opinion represents the culmination of judicial thought on the subject. *Judicial Watch, Inc. v. Department of Justice*[115] involved a public-interest judicial-watchdog organization that sought documents under FOIA related to former President Clinton's pardon requests. In its

111 *Id.*

112 O'Neil, *supra* note 7, at 1105.

113 *Nixon II*, 433 U.S. at 443 (citations omitted).

114 *See also* McGrain v. Daugherty, 273 U.S. 135, 173–74 (1927) (recognizing Congress's power to subpoena witnesses and documents: "[T]he two houses of Congress . . . possess not only such powers as are expressly granted to them by the Constitution, but such auxiliary powers as are necessary and appropriate to make the express powers effective. . . . We are of opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.").

115 365 F.3d 1108 (D.C. Cir. 2004).

decision, the appeals court adopted much of its reasoning from *Espy* and further expounded on the parameters of executive privilege. Just as *Espy* resolved questions left unanswered by *Nixon I*, the D.C. Circuit addressed additional unresolved issues in *Judicial Watch*. Like the appointment and removal power at issue in *Espy*, *Judicial Watch* involved a core, nondelegable presidential function—the pardon power. When applying the *Espy* analysis the court was faced with a new question: whether the proper boundaries of executive privilege should be defined by the organization of the executive branch or by the functional roles of executive officials. Ultimately, the appeals court determined that an organizational test better comports with the Court's analysis in *Nixon I*.[116]

In 2004, Judicial Watch, Inc., challenged an extension of the presidential-communications privilege beyond the walls of the White House to internal Department of Justice documents.[117] In its original request, Judicial Watch sought release of "[a]ny and/or all [p]ardon [g]rants by former President Clinton in January 2001, and [a]ny and/or all pardon applications considered" by the former president.[118] The Justice Department invoked the presidential-communications privilege to protect 4341 documents[119] under FOIA Exemption 5, which protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."[120] The Department of Justice argued that because "the Pardon Attorney's 'sole' responsibility was to advise the President on pardon applications. . . . [he] is, in effect, a White House adviser," and the presidential-communications privilege should apply to all pardon-related documents produced by him, regardless of his function within the hierarchy of the Justice Department.[121] Further, the Justice Department argued

116 *See id.* at 1123–24.

117 *Id.* at 1110.

118 *Id.* (internal quotation marks omitted).

119 *See id.* Judicial Watch argued that the privilege had not been properly invoked because an executive department does not have a right to assert it. However, because Judicial Watch did not raise the argument in the district court, it was not preserved for appeal. *Id.* at 1114 ("[T]he issue of whether a [p]resident must personally invoke the privilege remains an open question and the court need not decide it now.") (citation omitted).

120 5 U.S.C. § 552(b)(5) (2006).

121 *Judicial Watch*, 365 F.3d at 1112.

that documents prepared pursuant to the President's exercise of a "quintessential and non-delegable" power, like the pardon power, should be protected under the penumbra of executive privilege regardless of the functional role of the executive official producing the documents and regardless of whether the documents were solicited and received by White House advisers as required under *Espy*.[122]

The appeals court disagreed, noting that "[f]urther extension of the privilege to internal Justice Department documents that never make their way to the Office of the President on the basis that the documents were created for the sole purpose of advising the president on a non-delegable duty [would be] unprecedented and unwarranted."[123] Also, the court parroted *Espy*, holding that "the presidential communications privilege applies only to those pardon documents 'solicited and received' by the President or his immediate White House advisers who have 'broad and significant responsibility for investigating and formulating the advice to be given the President.'"[124] The court held that while a bright-line rule mandating application of the privilege to all documents created in the process of providing pardon advice to the President would be easier to implement, "such a bright-line rule is inconsistent with the nature and principles of the presidential communications privilege, as well as the goal of best serving the public interest."[125] Indeed, the court saw "fundamental conceptual difficulties" with a test based on the functional role of executive officers.[126]

While recommendations about who should be pardoned may be relayed from the pardon attorney[127] to the President through

122 *Id.* at 1119.

123 *Id.* at 1116–17.

124 *Id.* at 1114 (quoting *Espy*, 121 F.3d 729, 752 (D.C. Cir. 1997)).

125 *Id.* at 1117; *see also id.* at 1119 ("Extension of the presidential communications privilege beyond the limits of [*Espy*] to all documents prepared or received by the Pardon Attorney or his Office simply because they are produced for the sole function of assisting the Deputy Attorney General in presenting pardon recommendations for the President would have far-reaching implications for the entire executive branch that would seriously impede the operation and scope of FOIA.").

126 *Id.* at 1122.

127 The Office of the Pardon Attorney within the Department of Justice assists the President in exercising his clemency power. Clemency requests for federal criminal offenses are submitted to the Office of the Pardon Attorney which, in consultation with the attorney general, prepares and submits the department's

the deputy attorney general, the line for privileged advice was drawn between the President and the deputy attorney general in this case, *not* between the President and the pardon attorney. Therefore, while the pardon attorney *functionally* contributes to the advice ultimately offered to the President, it is the *organizational structure* of the Office of the President that defines the boundary of the presidential-communications privilege. The court held that if the privilege is interpreted to encompass all those who functionally give advice to the President on his Article II powers, the rule "would sweep within the reach of the presidential privilege much of the functions of the executive branch."[128] In adopting an organizational test and retaining the "solicited and received" language from *Espy*, the court noted that direct communications between the pardon attorney or the deputy and White House counsel or other immediate presidential advisers would still be protected, as would any documents, reports, or recommendations submitted by the deputy to the Office of the President.[129]

Finally, it is important to note for the analysis in Part IV that the appeals court in *Judicial Watch* refused to draw a line demarking the boundary of the executive privilege at the President's Article II powers. Reasoning that such a line would be arbitrary, the court found that "presidential decisions that could have been delegated, but were not, [should not be] entitled to less candid or confidential advice than those that could not have been delegated at all."[130] Therefore, under *Judicial Watch*, executive privilege is available to protect information in a President's exercise of powers reserved to him both by the Constitution and by statute. Writing in dissent, Judge Randolph argued that the privilege should extend beyond those "quintessential and nondelegable Presidential power[s]" set forth in Article II.[131] Furthermore, a functional test is appropriate to determine whether the privilege applies to documents created by agency officials, regardless of the author's "operational proximity" to the President, and regardless of

recommendation to the President for final review and disposition. *See generally* http://www.usdoj.gov/pardon (last visited Nov. 21, 2008).

128 *Judicial Watch*, 365 F.3d at 1122.

129 *See id.* at 1123–24.

130 *Id.* at 1123.

131 *Id.* at 1139 (Randolph, J., dissenting).

whether those documents were actually "solicited and received" by the White House.[132] According to Judge Randolph, the privilege should apply to anyone, in any agency, at any level who assists in providing advice to the President in his fulfillment of an Article II power.

D. Cases Arising from Subpoenas in Congressional Investigations

Executive-legislative disputes represent the last of the four contexts in which executive-privilege claims have been litigated. In *Cheney v. U.S. District Court for the District of Columbia*,[133] the Supreme Court recognized the unique nature of interbranch information disputes, saying "[o]nce executive privilege is asserted, coequal branches . . . are set on a collision course"; for that reason, "occasion[s] for constitutional confrontation between the two branches should be avoided whenever possible."[134] Indeed, this view has been pervasive in interbranch disputes since the conclusion of the Watergate cases and Archibald Cox's seminal publication on executive privilege in 1974.[135] In that article, Cox asserted that such disputes "lend[] [themselves] better to solutions negotiated through the political process than to an 'either-or' judicial determination."[136] The best possible balance of constitutional powers will result by "leav[ing] questions of executive privilege vis-à-vis Congress to the ebb and flow of political power."[137] As a result, courts have both explicitly and implicitly kept claims of executive privilege in interbranch disputes at arm's length: explicitly in *Nixon I* and *Espy*, and implicitly in *Nixon II* and *Judicial Watch*.

In 1974, the Supreme Court recognized a constitutional basis for executive privilege. In *Nixon I*, the Court noted in plain terms that its holding did not reach "the balance between the President's generalized interest in confidentiality . . . and

132 *Id.* at 1138 (emphasis omitted).

133 542 U.S. 385 (2004).

134 *Id.* at 389–90 (internal quotation marks omitted).

135 *See generally* Archibald Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383 (1974).

136 *Id.* at 1427.

137 *Id.* at 1432.

congressional demands for information."[138] Twenty-three years later the D.C. Circuit explained that its decision in *Espy* was similarly "limited to the context . . . where information generated by close presidential advisers is sought for use in a judicial proceeding," and that its decision "should not be read as in any way affecting the scope of the privilege in the congressional-executive context."[139]

Neither *Nixon II* nor *Judicial Watch* explicitly states that its holding cannot apply to interbranch disputes. However, subsequent treatment of *Nixon II* and *Espy* (on which *Judicial Watch* so heavily relies) suggests that courts may not be willing to look to those cases for precedent in disputes between the President and Congress. For example, *Nixon II* was not cited by the D.C. Circuit in *United States v. House of Representatives*,[140] nor was it cited by the district court in *Walker v. Cheney*,[141] the only interbranch disputes to be litigated since the Supreme Court's decision in *Nixon I*. Similarly, *Espy* was not cited by the district court in *Walker v. Cheney*, the only interbranch dispute litigated since 1997.

Because both *United States v. House of Representatives* and *Walker v. Cheney* were dismissed on procedural grounds, it might be too much to say that *Nixon II* and *Judicial Watch* do not limit the scope of the privilege in executive-legislative disputes. However, the quoted excerpts from *Nixon I* and *Espy* clearly articulate that no burden can be placed upon the political branches by the courts' decisions in the context of criminal investigations. Based on that language and the courts' refusal to cite *Espy* and *Nixon II* in subsequent litigation of interbranch disputes, only those decisions reported in cases between the political branches should bear on the scope of executive privilege.

Not only have the courts explicitly and implicitly stated that holdings from other contexts should not circumscribe the scope of executive privilege in interbranch disputes, the courts have refused to draw a line between Article I and Article II powers in the three cases that have reached the courts. In fact, these cases

138 *Nixon I*, 418 U.S. 683, 712 n.19 (1974).

139 *Espy*, 121 F.3d 729, 753 (D.C. Cir. 1997).

140 556 F. Supp. 150 (D.D.C. 1983); *see also infra* Part IV.D.3.

141 230 F. Supp. 2d 51 (D.D.C. 2002).

support the notion that the district court and the D.C. Circuit "have effectively supplanted the traditional legal method [of adjudicating interbranch disputes] with an unorthodox approach."[142] This approach, aptly dubbed the "escalation model,"[143] favors an "escalating process of mutual evaluation and response [that ends only] when one branch concludes that the continued expenditure of political capital does not justify the institutional benefits of victory."[144] By subscribing to the premise that "litigation followed by judicial decree" is "poison" in a system carefully calibrated on "political battle[s] followed by . . . calculated surrender[s],"[145] the courts have institutionalized political brinksmanship and relied upon it to refrain from adjudicating the separation of powers question inherent in executive-legislative disputes.

The leeway courts have given the political branches to resolve these disputes is in stark contrast to the intricate analysis laid out by the D.C. Circuit in *Espy* and *Judicial Watch* for resolving executive-privilege claims in criminal proceedings and FOIA litigation. However, the current dispute is unique. As highlighted in the discussion of *United States v. House of Representatives* below, by holding Ms. Miers and Mr. Bolten in contempt, the House of Representatives initiated a suit that is in the exact procedural posture the district court described as necessary for judicial review of an interbranch executive-privilege question. As a result, the courts may finally be forced to circumscribe the privilege in that context.

1. Senate Select Committee on Presidential Campaign Activities v. Nixon

Although the D.C. Circuit's opinion in *Senate Select Committee*[146] preceded the Supreme Court's decision in *Nixon I*, the court's holding is salient for two reasons. First, it provides the most comprehensive analysis of the need that a congressional committee must show to overcome the

142 O'Neil, *supra* note 7, at 1088.

143 *Id.* at 1085.

144 *Id.* at 1084.

145 *Id.* at 1085.

146 Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974).

presumptive nature of an executive-privilege claim. Because the Supreme Court's discussion of the special prosecutor's showing of need in *Nixon I* does not apply to interbranch disputes,[147] the discussion of requisite need in *Senate Select Committee* still controls in the D.C. Circuit. Second, *Senate Select Committee* is the only executive-privilege case in any context to be decided on the merits. While the court's holding was narrowly focused, it provides a good foundation for analyzing subsequent interbranch disputes.

The Senate Select Committee on Presidential Campaign Activities was created by a resolution of the Senate in 1973 to "investigate illegal, improper or unethical activities" connected to the presidential campaign and election of 1972 and to determine whether new legislation was needed to protect the integrity of the electoral process.[148] Pursuant to its charge, the committee subpoenaed President Nixon to obtain tape recordings and other records that related to alleged criminal acts tied to the election.[149] President Nixon refused to comply, asserting executive privilege to justify his decision.[150]

Basing its decision on the "staged decisional structure" set out in *Sirica*,[151] the court found that events subsequent to the district court's ruling, including the commencement of a House Judiciary Committee inquiry and that committee's possession of the tapes at issue, had changed the circumstances surrounding the Select Committee's original complaint.[152] According to the court, the Select Committee "failed to make the requisite showing" that "the subpoenaed evidence [was] demonstrably critical to the responsible fulfillment of [its] functions."[153] In reaching this conclusion, the appeals court made two notable findings.

147 *Nixon I*, 418 U.S. 683, 712 n.19 (1974).

148 *Senate Select Comm.*, 498 F.2d at 726 (internal quotation marks omitted).

149 *Id.* at 726–27.

150 *Id.* at 727.

151 *Id.* at 730.

152 *See id.* at 731–32.

153 *Id.* at 731. Because the appeals court explicitly invoked the "staged decisional structure" of *Sirica*, it is reasonable to infer that the "demonstrably critical" language used to describe the committee's requisite showing of need is intended to expound on the *Sirica* court's vague reference to the Special Prosecutor's "uniquely powerful showing." *See* Nixon v. Sirica, 487 F.2d 700, 717 (D.C. Cir. 1973).

First, from a congressional perspective, the Select Committee's oversight need was "merely cumulative" because (1) that need was "premised solely on an asserted power to investigate and inform," (2) the House Judiciary Committee had the subpoenaed materials in its possession, and (3) "there [was] no indication that the findings of [the Judiciary Committee] and, eventually, the House of Representatives itself, [were] likely to be inconclusive or long in coming."[154] Second, the Select Committee did not prove that the subpoenaed documents were "critical to the performance of its legislative functions" because events subsequent to its complaint undermined the argument that the legislative process required access to a "precise reconstruction of past events" as might be found on the tapes.[155] Thus, in the particular circumstances before the court, the Select Committee's claim of need was "too attenuated and too tangential to its functions to permit a judicial judgment that the President is required to comply with the [c]ommittee's subpoena."[156]

2. United States v. American Telephone & Telegraph Co.

In the first post-Watergate case, the D.C. Circuit feigned resolution of a dispute between the Department of Justice and the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce and set forth its reasoning in favor of the escalation model. With a mandate to examine the nature and extent of the Justice Department's domestic warrantless-wiretapping program and to determine whether a need for remedial legislation to prevent abuse of the power existed, the subcommittee subpoenaed AT&T to obtain national security request letters regarding the company's involvement in the program.[157] In an effort to preclude the subcommittee's efforts, the Justice Department sued to enjoin AT&T from complying with the subpoenas, and the House of Representatives intervened.[158] Approaching the issue for a

154 *Senate Select Comm.*, 498 F.2d at 732–33.

155 *Id.* at 732.

156 *Id.* at 733.

157 United States v. Am. Tel. & Tel. Co., 567 F.2d 121, 123 (D.C. Cir. 1977).

158 *Id.* at 122–24.

second time,[159] the D.C. Circuit was asked to overturn a district court injunction that prevented release of the documents.[160] While the appeals court recognized that judicial review was proper, its adopted role resembled that of a mediator rather than an arbiter of disputes.

The court invalidated each branch's absolute claim to the information requested.[161] However, it was unwilling to balance Congress's demand for information against a claim of executive privilege, choosing instead to continue its "approach of gradualism," allowing the two branches to try again in good faith to resolve the dispute on their own.[162] The court saw the political battle as "a dynamic process affirmatively furthering the constitutional scheme," and believed that the judiciary's role was to reach a "judgment that reflect[ed] the compromises achieved through negotiation."[163] To that end, it sustained the district court's injunction until the parties showed that a subsequent attempt at mutual accommodation also failed.[164]

3. United States v. House of Representatives

Six years after *AT&T*, the District Court for the District of Columbia mirrored the D.C. Circuit's reluctance to resolve an interbranch executive-privilege dispute when it dismissed *United States v. House of Representatives* on procedural grounds.[165] In a situation strikingly similar to that presented by the firing of the nine U.S. Attorneys, the Oversight and Investigations Subcommittee of the House Committee on Public Works and Transportation subpoenaed the Administrator of the

159 The first time the case was before the D.C. Circuit, the court refrained from deciding the merits of the parties' claims, resolved the issue of whether the case presented a nonjusticiable political question, and remanded the record to the district court with directions to negotiate a settlement. *See id.* at 123.

160 *See id.* at 122–23.

161 *See id.* at 128 ("The executive would have it that the Constitution confers on the executive absolute discretion in the area of national security. This does not stand up."); *id.* at 129 ("[T]he [Speech and Debate] Clause does not and was not intended to immunize congressional investigatory actions from judicial review. Congress' [sic] investigatory power is not, itself, absolute.").

162 *Id.* at 131.

163 *Id.* at 130.

164 *See id.* at 133.

165 *See* United States v. House of Representatives, 556 F. Supp. 150, 153 (D.D.C. 1983).

Environmental Protection Agency for documents pertaining to the agency's enforcement of the Comprehensive Environmental Response, Compensation and Liability Act of 1980.[166] In a hearing before the subcommittee, Administrator Gorsuch stated that President Reagan asserted executive privilege and that she was instructed not to provide the subcommittee with any "sensitive documents found in open law enforcement files."[167] Following Ms. Gorsuch's testimony, the committee reported the incident to the full House of Representatives in a resolution. The House cited Ms. Gorsuch with contempt of Congress less than a week later.[168] She was the first head of an executive agency to be held in contempt of Congress.

On the same day Ms. Gorsuch was found in contempt, the Justice Department filed suit against the House of Representatives in district court to preempt the chain of events set in motion by the contempt citation pursuant to 2 U.S.C. § 194. According to the statute, the Speaker of the House "shall" certify the statement of facts concerning the contempt citation to the U.S. Attorney for the District of Columbia, "whose duty it shall be to bring the matter before the grand jury for its action."[169] The Justice Department sought a declaratory judgment stating whether the Administrator acted lawfully in withholding the documents under the President's claim of executive privilege.[170]

The court dismissed the case on procedural grounds, noting that under the provisions of 2 U.S.C. §§ 192 and 194 "constitutional claims and other objections to congressional investigatory procedures may be raised as defenses in a criminal prosecution."[171] The court noted that the Justice Department was permitted to invoke executive privilege as a plaintiff-intervener in *AT&T* because it would not have been a defendant in criminal contempt charges brought by Congress against AT&T to compel production of the documents.[172] In *House of*

166 *Id.* at 151.

167 *Id.*

168 *Id.*

169 2 U.S.C. § 194 (2006).

170 *House of Representatives*, 556 F. Supp. at 152.

171 *Id.*

172 *Id.*

Representatives, however, the court found that the Justice Department raised its "executive privilege defense as the basis for affirmative relief" and held that "[j]udicial resolution of this constitutional claim . . . will never become necessary unless Administrator Gorsuch becomes a defendant in either a criminal contempt proceeding or other legal action taken by Congress."[173]

The court made two important observations by holding that a claim of executive privilege in a direct dispute between Congress and the executive must be asserted as an affirmative defense. First, the district court noted that it would be "required to resolve the dispute by determining the validity of the [a]dministrator's claim of executive privilege" if the two branches failed to resolve the matter through the political process.[174] Second, the court recognized "[t]he difficulties apparent in prosecuting Administrator Gorsuch for contempt of Congress" and encouraged the parties to "settle their differences without further judicial involvement."[175]

The facts surrounding the U.S. Attorneys' resignations illustrate the district court's discussion. The letters exchanged by the parties clearly indicate that the House Judiciary Committee and the White House have not yet been able to resolve the matter through the political process, prompting the House of Representatives to find Ms. Miers and Mr. Bolten in contempt of Congress. Although Attorney General Mukasey refused to initiate a grand jury investigation,[176] the district court in the Judiciary Committee's civil suit against Ms. Miers and Mr. Bolten[177] is still bound by the language in *United States v. House of Representatives*. The complaint brings the political branches into precisely the procedural posture described by the district court as proper for adjudication of an executive-privilege claim.

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173 *Id.* at 153.

174 *Id.* at 152.

175 *Id.* at 153.

176 Dan Eggen, *Mukasey Refuses to Prosecute Bush Aides*, WASH. POST, Mar. 1, 2008, at A2.

177 *See* Complaint for Declaratory and Injunctive Relief, *supra* note 4.

III
PROPRIETY OF JUDICIAL REVIEW IN EXECUTIVE-LEGISLATIVE DISPUTES

Judicial review of executive-privilege claims in interbranch disputes is proper for both ideological and practical reasons. First, judicial review is appropriate to prevent an imbalance in the separation of powers. Second, judicial review is proper because the Supreme Court has asserted itself as the fulcrum between the political branches.

As Part II.D, *supra*, demonstrated, federal courts have been reluctant to embroil themselves in this constitutional separation of powers question. The idea that the judiciary should "leave questions of executive privilege vis-à-vis Congress to the ebb and flow of political power"[178] has settled with both judges and scholars who agree that executive-legislative disputes lend themselves "better to solutions negotiated through the political process than to an 'either-or' judicial determination."[179] Such a regime correctly recognizes executive-privilege questions as "political" constitutional questions but incorrectly distinguishes the courts' responsibility to intervene and address them. A President's decision to assert executive privilege is a choice to expend political capital regardless of whom the President is asserting the privilege against. In *Nixon I*, the Supreme Court held that the President's claim of executive privilege could not impair the judiciary's proper constitutional mandate to decide cases and controversies under Article III. To resolve the two branches' competing interests "in a manner that preserve[d] the essential functions of each branch,"[180] the Court adopted a balancing test that pitted the "President's acknowledged need for confidentiality" against the judiciary's "constitutional need" for evidence in criminal proceedings.[181] Since the Supreme Court reached a decision on the merits when Article III powers were in jeopardy, federal courts can, and should, similarly address the merits of executive-privilege disputes between Congress and the executive when Article II powers are

178 Cox, *supra* note 135, at 1432.

179 *Id.* at 1427.

180 *Nixon I*, 418 U.S. 683, 707 (1974).

181 *Id.* at 712–13.

threatened and Congress demonstrates a "constitutional need" for the information in question.[182]

While the Court in *Nixon I* justified the judiciary's involvement in disputes between the *courts* and the executive, the judiciary cannot avoid involving itself in disputes between *Congress* and the executive just because the parties are political by nature. Courts cannot refuse to decide an executive-privilege claim asserted against Congress on the merits simply because the President and Congress are political branches of the federal government. True inequity arises when the courts do not reach executive-privilege claims asserted against Congress but repeatedly reach those claims when they are asserted in criminal proceedings—a context that implicates the courts' powers under Article III. By reviewing privilege claims in the latter but not the former, the courts imply that executive privilege has more weight when asserted against Congress than it does in other contexts. If the courts refuse to settle disputes between the political branches where negotiations have obviously broken down, the door is left wide open for an expansion of executive privilege not consistent with a balance of equal but separate powers. The President who invokes the privilege will always have the upper hand in negotiations, even when the issue involves potential wrongdoing by a member of the executive branch. If "[i]t is emphatically the province and duty of the judicial department to say what the law is,"[183] then the courts must step in where the two political branches have been unable to resolve an executive-privilege dispute.

Even scholars who argue that claims of constitutional executive privilege have no place in federal court recognize that extreme cases may deserve judicial scrutiny.[184] The definition of "extreme cases," however, should not be a narrow one. Rather,

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182 By way of corollary, federal courts should properly adjudicate disputes between the executive and Congress when, in the face of an assertion of privilege under the Speech or Debate Clause, U.S. CONST. art. I, § 6, cl. 1, the executive demonstrates a "constitutional need" for information sought from a member of Congress, her staff, a committee, or committee staff.

183 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

184 *See, e.g.*, Michael Stokes Paulsen, Nixon *Now: The Courts and the Presidency After Twenty-Five Years*, 83 MINN. L. REV. 1337, 1378 (1999) ("[O]utside of extreme cases, a claim of constitutional executive privilege should have no status in the courts, and should supply no defense to an otherwise appropriate judicial subpoena, summons, or other order.") (emphasis omitted).

"extreme cases" should include all actions taken by one coequal branch to thwart the efforts of another exercising its constitutional role.

Recent scholarship has begun to question the soundness of the escalation model alluded to in 1974[185] but only defined recently.[186] Courts must play a substantive role in interbranch conflicts over information because "[t]here is no reason to believe—and, in fact, powerful reason to doubt—that the political process alone will yield a satisfactory allocation of authority in this context."[187] The three premises that bolster the escalation model[188] have been dismissed because the model "recognizes the 'legal' rather than political character of the issue, but it rejects the traditional legal mode of resolution, instead equating the correct constitutional standard with the point at which the power balance rests when the smoke of battle clears."[189]

Not only is the judicial abdication embodied in the escalation model inconsistent with the goal of achieving a proper balance of powers, it is also inconsistent with the position the Supreme Court took in *Nixon II*. The Court in *Nixon II* inserted itself as the "fulcrum between executive and legislative power."[190] When a statute potentially infringes on executive power, the Court held that it must determine whether Congress's power to legislate overrides the executive's power to carry out its assigned functions.[191] While the firing of the nine U.S. Attorneys represents a role reversal in the assertion of the privilege from *Nixon II*, the courts' role remains the same. Rather than forsaking their responsibility in favor of escalation, federal courts should conduct a four-step inquiry to determine the merits of the privilege claim; such an inquiry was implied in the language of *Nixon II* and is proposed formally in Part IV.C, *infra*.

185 *See* Cox, *supra* note 135, at 1432.

186 *See* O'Neil, *supra* note 7, at 1085.

187 *Id.* at 1083.

188 *See id.* at 1085–87.

189 *Id.* at 1095 (footnote omitted).

190 *Id.* at 1105.

191 *See Nixon II*, 433 U.S. 425, 443 (1977).

IV
A FOUR-STEP INQUIRY TO GUIDE RESOLUTION OF EXECUTIVE-LEGISLATIVE DISPUTES

The political branches need as much flexibility as possible to resolve information disputes outside of the courts. As the current controversy demonstrates, however, resolution through accommodation is not always possible. In such cases, the courts must have a method for resolving disputes that can be applied consistently and does not unduly constrain future negotiations. This Part points out the danger of applying existing case law to disputes between the political branches and suggests a four-step inquiry to guide courts in resolving interbranch disputes and to serve as the foundation for a common law of executive privilege in that context.

A. The Problem with Applying Existing Case Law to Executive-Legislative Disputes

Applying existing case law to executive-legislative disputes is problematic because the cases do not adequately prepare the courts to deal with the political constitutional questions that are raised when negotiations break down. Part II.D, *supra*, showed that the Supreme Court and the D.C. Circuit have explicitly and implicitly exempted conflicts between the political branches from the analyses set out for executive privilege in criminal proceedings and FOIA litigation. The courts have sought to avoid suggesting that they would apply either analysis to decide an executive-legislative dispute so that Congress and the President would not be artificially constrained in future interactions. Even though the courts have not wanted the political branches to use those decisions to guide future negotiations, judges will want to reference them when an executive-legislative dispute is properly before the courts because these decisions represent the body of executive-privilege case law. But therein lies the problem. The Supreme Court's balancing test in *Nixon I* and the D.C. Circuit's analysis of need in *Senate Select Committee* may be useful to the district court in the current controversy. However, the D.C. Circuit's decision in *Judicial Watch* not to limit the privilege to powers assigned to the President in Article II is problematic because it

does not respect the unique balance of power issues presented in executive-legislative disputes.[192]

In determining the scope of the privilege in the context of a FOIA request, *Judicial Watch* held that limiting the protection of the privilege to quintessential and nondelegable powers under Article II would unnecessarily exclude powers assigned to the President by statute that may otherwise be delegated.[193] However, denying privilege protection to documents and testimony produced pursuant to statutory powers does not draw an "arbitrary line" in conflicts between the political branches. The proper balance of power is disrupted when an act by one branch encroaches upon the "constitutionally assigned functions" and "constitutional authority" of a coordinate branch.[194] A President may be able to assert the same level of privilege protection over documents and testimony related to both constitutionally assigned and statutorily granted powers in the face of a citizen's challenge under FOIA. However, a President should *not* be granted the same level of privilege protection when Congress subpoenas documents and testimony pursuant to its constitutionally assigned powers. In contrast, the delicate constitutional balance of power is not questioned when the President invokes executive privilege to protect documents against a FOIA claim. While the majority's rebuff of Judge

192 The two central holdings of *Judicial Watch* may, however, be of some use. The appeals court upheld the "solicited and received" language of *Espy* in the FOIA context and held that the boundaries of executive privilege should be defined by the organizational structure of the Office of the President. *See* Judicial Watch, Inc. v. Dep't of Justice, 365 F.3d 1108, 1114, 1122–23 (D.C. Cir. 2004). Both of these holdings may have equivalent weight in the context of executive-legislative disputes insofar as they limit *whose* documents may be considered under the privilege. In other words, these holdings may be applied by a court analyzing an executive-privilege claim in any context, including cases arising from subpoenas in congressional investigations, because the holdings contemplate the genesis of the information in question and the proximity of an official to the President. The holdings do not, however, contemplate *the subject matter* of the communications—the critical consideration in conflicts between the executive and Congress, each of which was assigned specific powers under the Constitution.

193 *See id.* at 1123 ("[T]he dissent's qualification that the protection of the presidential communications privilege would attach only if the advice is on a quintessential and nondelegable [p]residential power . . . draws an arbitrary line, for it provides no reason to conclude that presidential decisions that could have been delegated, but were not, are entitled to less candid or confidential advice than those that could not have been delegated at all." (internal quotation marks omitted)).

194 *Nixon II*, 433 U.S. at 443.

Randolph's dissenting opinion in *Judicial Watch* may be upheld in that context,[195] the majority's interpretation of the scope of the privilege cannot be adopted to resolve interbranch disputes.

In executive-legislative disputes, as opposed to FOIA litigation, Congress's powers under Article I are in conflict with the President's powers under Article II. If Congress must show a need that is "demonstrably critical" to fulfilling its "legislative functions" in order to overcome the presumption of privilege[196] (clearly limiting the scope of its need to Article I), then the President should not be able to extend the presumption beyond the powers assigned to him in Article II. Allowing the President to assert executive privilege over documents and testimony related to powers granted by statute, rather than assigned by the Constitution, would shift the balance of power in favor of the executive unless the need to be shown by Congress was reduced below the "demonstrably critical" threshold.

B. Two Premises Underlying the Four-Step Inquiry

Derived from the Supreme Court's language in *Nixon II* and both supplemented and supported by the D.C. Circuit's narrow holding in *Senate Select Committee*, the four-step inquiry described in Part IV.C, *infra*, sets parameters for resolving interbranch disputes and provides the branches maximum flexibility in future negotiations. The inquiry is based on two general premises: (1) a balancing test is inevitable for judicial resolution of executive-privilege claims in interbranch disputes; and (2) a common law of executive privilege, not bright-line rules or intricate analytical structures, will provide the political branches the most flexibility in future negotiations.

1. A Balancing Test Is Inevitable

While the balancing test set forth in *Nixon I* has been criticized as inappropriate for determining the scope of a constitutionally based privilege,[197] a balancing test is inevitable

195 *Cf. Judicial Watch*, 365 F.3d at 1123. See *supra* Part II.C for discussion.

196 Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 731, 732 (D.C. Cir. 1974).

197 *See* Paulsen, *supra* note 184, at 1341 (The scope of executive privilege "is not left to an ad hoc judicially-created constitutional balancing test exclusively the province of the courts, as [*Nixon I*] held, and certainly not to the poorly-designed

when the political branches cannot define the boundaries of executive privilege themselves.[198] The Court in *Nixon I* made clear that its holding does not apply to interbranch disputes,[199] but a balancing test in that context is sound in principle nonetheless. The fact that the parties reach litigation over a privilege that the Supreme Court has said unequivocally is not absolute demands that a balancing take place. However, *when* to balance and *what* to balance are separate questions. The first is a question of scope. The second is a question of defining interests. The first three questions of the four-step inquiry laid out in Part IV.C, *infra*, dictate *when* the courts should balance Congress's and the President's interests. The fourth question discusses *what* interests must be balanced.

2. A Common Law of Executive Privilege Is Preferable

A common law of executive privilege in interbranch disputes is preferable to bright-line rules or judicial abdication because it is the only way to resolve the tension between the political branches' need for flexibility and a proper balance of powers. Bright-line rules are easy to use, but they comport with neither the give-and-take nature of the political process nor the nature and principles of executive privilege.[200] Moreover, because the Constitution establishes three *coequal* branches, the judiciary cannot implement bright-line rules to broadly define the limits of executive privilege between Congress and the President. If the

balance the Court constructed in [*Nixon I*]. The Constitution simply does not authorize creation of a mushy judicial balancing test for determining the scope of constitutionally-based executive privilege.") (emphasis omitted).

198 In fact, it would be against the interest of the political branches to define the limits of the privilege on their own. Both Congress and the President benefit from the maximum flexibility they are granted under the current state of the law, and the current state of the law in executive-legislative disputes is that there are no rules. Since the courts have expressly precluded application of their holdings in *Nixon I* and *Espy* to disputes between the political branches, the parties are operating in a framework where the only general understanding is that a President's claim of executive privilege is not absolute. Therefore, if the political branches were to voluntarily limit the scope of the privilege as between them, they would be conceding their own perceived power under the Constitution.

199 *Nixon I*, 418 U.S. 683, 712 n.19 (1974).

200 *See Judicial Watch*, 365 F.3d at 1117.

courts did so, they would overstep their own constitutional authority by dictating the powers of a coordinate branch.[201]

A common law of executive privilege that takes into account "constitutional concerns, as well as accommodate[s] the view of the judiciary to the view of the executive,"[202] must also accommodate the view of the executive to the view of the legislature in disputes between the political branches. This three-way balancing act is unique to litigation involving both political branches, and successfully developing a common law of the privilege depends on respecting the distinct roles of each branch. Executive-privilege disputes in the contexts of FOIA requests and criminal proceedings do not pose the same balancing problems because the court is not required to simultaneously equilibrate the interests of both parties in litigation with its own dual role as arbiter and coequal branch. If the courts established bright-line rules to govern interbranch disputes, they would effectively tip the balance of power in favor of the judiciary while simultaneously frustrating the process of accommodation favored by Congress and the executive. Alternatively, if the courts abdicated their role as arbiter, the balance of power would tip in favor of the executive because there would be no check on a President who used the privilege to expand executive power.

Providing for a common law in interbranch disputes thus requires a set of threshold questions to guide intensive, fact-based inquiries. These threshold questions should not forecast the outcome of a particular dispute when answered; such outcome-determinative questions would preempt the judicial discretion necessary for establishing a common law of the privilege. Rather, as the four-step inquiry set out below demonstrates, the threshold questions should articulate the scope of the privilege between Congress and the President and narrow the courts' scope of review to minimize the impact their decisions have on future negotiations and litigation.

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201 *Nixon I*, 418 U.S. at 703 ("In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others.").

202 Paulsen, *supra* note 184, at 1379.

C. The Four-Step Inquiry

The four-step inquiry set forth herein is derived from the Supreme Court's language in *Nixon II* and is both supplemented and supported by the D.C. Circuit's narrow holding in *Senate Select Committee*.[203] In *Nixon II*, the Court laid out the conditions precedent to a judicial balancing of the President's desire for secrecy and Congress's power to legislate and conduct investigations: only where an act of one political branch may potentially disrupt the constitutionally assigned functions of the other must the courts determine whether the "impact is justified by an overriding need to promote objectives within the constitutional authority" of the first branch.[204] Therefore, in the context of a President's claim of executive privilege against Congress, the inquiry includes four questions: (1) Does the act of withholding documents or testimony under a claim of executive privilege have the potential to disrupt the constitutionally assigned functions of Congress?; (2) Has Congress established a valid constitutional need for each piece of information or testimony requested?; (3) Does the dispute concern testimony or documents created pursuant to a power assigned to the executive under Article II?; and (4) Does the President's need for secrecy in deliberations regarding the Article II power in question outweigh Congress's established constitutional need?

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203 The D.C. Circuit's decision in *Senate Select Committee*, 498 F.2d 725 (D.C. Cir. 1974), is the only executive-privilege case brought in any court that was decided on the merits.

204 *Nixon II*, 433 U.S. 425, 443 (1977). To help understand the motive for such an inquiry, recall the Supreme Court's commentary on the clash between the judiciary and the President in *Nixon I*:

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

Nixon I, 418 U.S. at 707. Whether or not the current controversy implicates a power reserved to the President in Article II, it calls into question the President's assertion of privilege against *Congress's legislative authority* on no more than a generalized need for secrecy in nonmilitary and nondiplomatic discussions. Therefore, the constitutional balance of a workable government demands that the court conduct an inquiry into whether the privilege was properly asserted against Congress.

1. The Potential to Disrupt Requirement

Whether the privilege claim has the potential to disrupt the constitutionally assigned functions of Congress should be addressed as a pleading requirement. Whether Congress has asserted a short and plain statement to satisfy the requirement should be an easy question to answer; the bar is low. At the point where the parties are in litigation over the release of documents, both will likely have asserted claims to the information based on the powers vested in them by the Constitution. In the current controversy, Congress has alleged that the President's invocation of executive privilege encroaches on its Article I powers to conduct oversight and propose legislation,[205] while the President has alleged that Congress's demand for information encroaches on his appointment and removal power under Article II.[206] Whether the President *actually* disrupts a constitutionally assigned function of Congress is the ultimate constitutional question to be addressed by the balancing test proposed in question (4) below. Therefore, judicial evaluation of *actual disruption* becomes the fundamental basis for the common law of executive privilege. In this first step, the burden rests with Congress to show the potential for disruption, and the complaint filed by Congress on March 10, 2008, easily meets this minimum threshold requirement.[207]

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205 *See* Complaint for Declaratory and Injunctive Relief, *supra* note 4, at 10 ("The legislative purposes of the Investigation fall into two main categories: (1) investigating and exposing malfeasance, abuse of authority and possible violations of law by Executive Branch personnel; and (2) considering whether the conduct uncovered warrants additions or modifications to existing federal law.").

206 *See* Fielding Letter, *supra* note 1, at 2 ("Presidents would not be able to fulfill their responsibilities if their advisors—on fear of being commanded to Capitol Hill to testify or having their documents produced to Congress—were reluctant to communicate openly and honestly in the course of rendering advice and reaching decisions. These confidentiality interests are especially strong in situations like the present controversy, where the inquiry seeks information relating to the President's powers to appoint and remove U.S. Attorneys—authority granted exclusively to the President by the Constitution."). *See also* U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the [S]upreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.").

207 *See* Complaint for Declaratory and Injunctive Relief, *supra* note 4.

2. The Valid Constitutional Need Requirement

The second question, whether Congress has established a "constitutional need" for each document or type of information in dispute, reflects the fundamental, bright-line requirement that a balancing of constitutional powers requires each branch to assert valid constitutional authority. For Congress, demonstrating a constitutional need depends on the Supreme Court's interpretation of Article I. Importantly, under *McGrain v. Daugherty*, the powers of Congress include "not only such powers as are expressly granted to [it] by the Constitution, but such auxiliary powers as are necessary and appropriate to make the express powers effective," including "the power of inquiry [and] process to enforce it."[208] Therefore, a constitutional need may be established by Congress operating in its investigatory capacity as long as the investigation is to determine whether remedial legislation is required. However, partisan investigations launched as mere fact-finding missions do not pass muster.[209]

The D.C. Circuit's analysis in *Senate Select Committee* is helpful in determining whether Congress has established a constitutional need. According to the appeals court, Congress may show a constitutional need for subpoenaed information if its need is "demonstrably critical" to fulfilling "its legislative functions"[210] and is not "merely cumulative."[211] However, *Senate*

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208 McGrain v. Daugherty, 273 U.S. 135, 173, 174 (1927).

209 *See* Cheney v. U.S. Dist. Court for the Dist. of Columbia, 542 U.S. 367, 382 (2004) (acknowledging that the president is not above the law and saying that "the public interest requires that a coequal branch of [g]overnment afford [p]residential confidentiality the greatest protection consistent with the fair administration of justice . . . and give recognition to the paramount necessity of protecting the [e]xecutive [b]ranch from vexatious litigation that might distract it from the energetic performance of its constitutional duties" (internal quotation marks omitted)).

210 Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 731, 732 (D.C. Cir. 1974). The Select Committee did not demonstrate that the subpoenaed documents were "critical to the performance of its legislative functions" because events subsequent to its complaint undermined any argument that the legislative process required access to a "precise reconstruction of past events" as might be found on the tapes. *Id.* at 732.

211 *Id.* at 732–33 (From a congressional perspective, the court determined that the Select Committee's oversight need was "merely cumulative" because (1) that need was "premised solely on an asserted power to investigate and inform," (2) the House Judiciary Committee had the subpoenaed materials in its possession, and (3) "there [was] no indication that the findings of [the Judiciary Committee] and,

Select Committee does not stand for the proposition that Congress's interest is less compelling when a committee's primary interest is investigation.[212] As long as Congress can explain why each document requested is not "too attenuated and too tangential" to the legislative purpose asserted,[213] it has demonstrated a constitutional need. Because the weight of Congress's need can only be understood relative to the President's, the balancing of needs is reserved for Step (4) of the inquiry. This balancing is coextensive with the court's determination of whether the President's privilege claim actually disrupts Congress's ability to carry out its legislative function.

In the current controversy, Congress has requested, and the White House has refused to produce, a privilege log indicating the subject of each document requested and the basis for the President's privilege claim.[214] Even if the White House does not have to produce a record of the documents withheld from Congress during the accommodation process, production of a record for the court during litigation would serve two purposes in this four-step inquiry. First, relevant to Step (2), the court can use the privilege log to determine whether Congress has asserted

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eventually, the House of Representatives itself, [were] likely to be inconclusive or long in coming.").

212 *See* ROSENBERG, *supra* note 1, at 4 ("The D.C. Circuit's view in *Senate Select Committee* that the Watergate committee's oversight need for the requested materials was 'merely cumulative' in light of the then concurrent impeachment inquiry, has been utilized by the [e]xecutive as the basis for arguing that the Congress' [sic] interest in executive information is less compelling when a committee's function is oversight than when it is considering specific legislative proposals. This approach, however, arguably misreads the carefully circumscribed holding of the court, and would seem to construe too narrowly the scope of Congress' [sic] investigatory powers." (footnote omitted)).

213 *See Senate Select Comm.*, 498 F.2d at 733 ("We conclude that the need demonstrated by the Select Committee in the peculiar circumstances of this case, including the subsequent and on-going investigation of the House Judiciary Committee, is too attenuated and too tangential to its functions to permit a judicial judgment that the President is required to comply with the [c]ommittee's subpoena.").

214 *See* Letter from Fred F. Fielding, Counsel to the President, to Patrick Leahy, Chairman, U.S. Senate Comm. on the Judiciary, and John Conyers, Jr., Chairman, H.R. Comm. on the Judiciary, *supra* note 44, at 2 ("We are aware of no authority by which a congressional committee may 'direct' the [e]xecutive to undertake the task of creating and providing an extensive description of every document covered by an assertion of Executive Privilege."). This refusal is not consistent with the executive's track record of producing privilege logs in association with deliberative process privilege claims, however.

a valid constitutional need for each. This may be by *in camera* review. Based on the legislative purpose asserted, the court can determine whether Congress's need is too attenuated or too tangential to require release of particular documents. Second, relevant to Step (4), *infra*, if Congress has asserted a valid constitutional need, a privilege log would provide the basis for the President's privilege claim relative to each document. Both the President's basis for the privilege and Congress's asserted right to the information are necessary for the courts to balance each party's needs. If the courts do not require a privilege log either before or after litigation commences, then the back-and-forth of accommodation, and the courts' responsibility to equilibrate the roles of the three coordinate branches, can be subverted by what Chairmen Conyers and Leahy called a "blanket" claim of privilege.[215]

3. The Article II Requirement

The third question, whether the dispute concerns documents created by the President pursuant to Article II, is notably different from the D.C. Circuit's position in *Judicial Watch*. However, the question is justifiable based on the nature of executive-legislative disputes as described in Part IV.A, *supra*. If the President asserts the privilege pursuant to statutory authority outside those powers set out in Article II, and Congress has established a constitutional need under Article I, then the analysis should end here and Congress should be granted access to the documents and testimony. On the other hand, if the President asserts the privilege pursuant to an enumerated power under Article II, and Congress has established a constitutional need under Article I, then the presumption of privilege discussed in *Sirica* and *Nixon I* should weigh in favor of the President.

This Step of the inquiry strikes at the heart of executive privilege by suggesting that the scope of the privilege should be different in interbranch disputes than in other contexts. This assertion can be inferred from the Supreme Court's decision in *Nixon I*. The *Nixon I* Court held that while a "President's acknowledged need for confidentiality in the communications of

215 Letter from Patrick Leahy, Chairman, U.S. Senate Comm. on the Judiciary, and John Conyers, Jr., Chairman, H.R. Comm. on the Judiciary, to Fred Fielding, Counsel to the President, *supra* note 41, at 1.

his office is general in nature," the "constitutional need" for relevant evidence in a particular criminal trial is "specific and central to [its] fair adjudication."[216] The Court went on to hold that the judiciary's constitutional need required release of the recordings withheld. A constitutional need that can be asserted by a coordinate branch *per se* outweighs a President's general need for confidentiality in communications with White House advisers when the President's action is not taken pursuant to an enumerated power under Article II.

In the current dispute, President Bush has asserted a privilege claim over documents and testimony related to his exercise of the appointment and removal power.[217] In response, Congress has asserted a valid constitutional need for the release of some or all of the responsive documents withheld. Normally the mutual accommodation process leads to a resolution of these conflicts. By filing for declaratory and injunctive relief, however, the House Judiciary Committee has signaled that the accommodation process has broken down. Because the President is withholding documents pursuant to an Article II power, the White House should not be required to produce the documents in question unless the court determines that Congress's constitutional need outweighs the presumption of privilege in favor of the President. That analysis is at the core of the balancing test set out in Step (4).

4. The Balancing Test

Ultimately, the presumption of privilege can only be rebutted if the court's analysis of the facts in light of the fourth question demonstrates that Congress's established constitutional need outweighs the President's need for secrecy.[218] Borrowing language from *Sirica*, "the public interest in confidentiality must

216 *Nixon I*, 418 U.S. 683, 712–13 (1974).

217 *See* U.S. CONST. art. II, § 2, cl. 2 ("[The president] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the [S]upreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.").

218 Implicit in the presumption, however, is the idea that no communications are categorically off limits for consideration by the court, a necessary conclusion if the ultimate goal is preservation of a proper balance of power.

fail in the face of [a] uniquely powerful showing" made by Congress in support of disclosure.[219] Such a uniquely powerful showing may be demonstrated if the President's invocation of the privilege *actually disrupts* Congress's ability to carry out its constitutionally assigned functions. This is a heavy burden for Congress, and the courts must make intensive, fact-based inquiries to determine if the burden has been carried. A balancing test framed in this way comports with what the limited case law suggests about resolving executive-legislative disputes and provides a foundation for a common law of the privilege.

If the court holds that Congress's need outweighs the presumption in favor of the President, the court must then interpret the need itself and determine how to meet it. There are two options. First, the court may liken Congress's constitutional need to an empty pool, whereby each document released adds water, and the need is met once there is sufficient water to swim, even if the pool is not entirely full. Releasing *all* of the responsive documents, therefore, would not be necessary for Congress to fulfill its constitutionally assigned function. Instead, judges would be required to assess the breadth and depth of the accommodation process that took place prior to the breakdown of negotiations and determine how many, and which, documents must be released. This view favors the President, and the executive has repeatedly advocated for it in the current controversy.[220]

Alternatively, the court may liken Congress's constitutional need to an ice cube tray, whereby each document released fills one cube and the need is only met when the tray is full. This interpretation represents a "winner-takes-all" approach that is constrained only by the court's determinations in Step (2). By limiting the scope of documents for which Congress has established a constitutional need in Step (2), the court would stem the tide of documents flowing from the White House.

219 Nixon v. Sirica, 487 F.2d 700, 717 (D.C. Cir. 1973).

220 *See* Clement Letter, *supra* note 26, at 3 ("[A]ny legitimate oversight interest the Committees might have in internal White House communications about the proposal is sharply reduced by the thousands of documents and dozens of hours of interviews and testimony already provided to the Committees by the Department of Justice as part of its extraordinary effort at accommodation."); Fielding Letter, *supra* note 1, at 2 ("[I]t remains unclear precisely how and why your Committees are unable to fulfill your legislative and oversight interests without the unfettered requests you have made in your subpoenas.").

Unmitigated, this view favors Congress and decreases the President's ability to abuse the privilege, or to shield critical, smoking-gun documents from a subpoena.

Both interpretations of Congress's constitutional need go to the rationale for the privilege: that protecting communications between the President and his close aides and advisers is in the public interest.[221] However, preventing unwarranted expansion of executive power by judicial validation of legislative oversight is also in the public interest. Where Congress provides sufficient evidence to overcome the presumption in favor of the President, little should stand in the way of obtaining subpoenaed documents.

CONCLUSION

Weighing the public interest in secrecy against the public interest in disclosure of executive communications is an unwelcome task for courts when the balancing involves the political branches. For that reason, "occasions for constitutional confrontation between the two branches should be avoided whenever possible."[222] However, when the accommodation process breaks down and Congress resorts to litigation, the courts cannot abdicate their responsibility to determine the limits of executive privilege as between the parties. While existing case law provides little guidance for evaluating the balance of power issues inherent in interbranch disputes, it does suggest some guiding principles. First, the nature of executive privilege favors intensive, fact-based inquiries. These inquiries should lead to narrow decisions that minimize the impact on future negotiations between the political branches. Second, balancing the valid constitutional needs in interbranch disputes is unique. Neither criminal proceedings nor FOIA claims require a court to equilibrate three competing coequal powers: Congress's legislative power under Article I, the executive's power to carry out its assigned functions under Article II, and the judiciary's power to decide cases and controversies under Article III. To effectively balance these competing interests, the

221 *Nixon I*, 418 U.S. at 705.

222 Cheney v. U.S. Dist. Court for the Dist. of Columbia, 542 U.S. 365, 389–90 (2004) (internal quotation marks omitted).

courts should restrict the scope of executive privilege to the President's Article II powers when it is asserted against Congress and carefully fashion their decisions to preserve the political branches' freedom to negotiate.