NOTE: THE NEGATIVE EXECUTIVE PRIVILEGE

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INTRODUCTION

In January 2007, the Justice Department dismissed seven U.S. Attorneys: Kevin Ryan of San Francisco, Carol Lam of San Diego, Daniel Bogden of Nevada, David Iglesias of New Mexico, H.E. Cummins III of Arkansas, Paul Charlton of Arizona, and John McKay of Washington State.[1] Congressional

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* J.D., Stanford Law School, 2008. Many thanks to Professor Mariano-Florentino Cuéllar for his help and inspiration in developing this Note.

1. David Johnston, *Justice Dept. Names New Prosecutors, Forcing Some Out*, N.Y. TIMES, Jan. 17, 2007, at A17; *see also* Allegra Hartley, *Timeline: How the U.S. Attorneys*

Democrats branded the dismissals a "political purge, intended to squelch corruption investigations or install less independent-minded successors."[2]

As Democrats pushed forward with an investigation, the issue of executive privilege came to the forefront. Senator Patrick J. Leahy of Vermont, chairman of the Senate Judiciary Committee, "insisted . . . that Karl Rove and other top aides to President Bush must testify publicly and under oath" about the scandal.[3] The White House responded that it was "highly unlikely" that the President would "waive executive privilege to allow his top aides to testify publicly,"[4] and instead offered to allow private interviews with Deputy Chief of Staff Karl Rove and White House Counsel Harriet Miers, as well as access to e-mail messages and communications about the dismissals, but not those between White House officials.[5] Democrats rejected the offer and threatened to subpoena Mr. Rove and others.[6]

Congress decided to take action, causing the conflict over executive privilege to enter formal, rather than simply rhetorical, channels. After congressional subpoenas were issued for documents related to the dismissal of the U.S. Attorneys, the White House invoked executive privilege and refused to comply.[7] Congress demanded that Ms. Miers testify and that White House Chief of Staff Joshua Bolten turn over related documents; Ms. Miers did not show up and Mr. Bolten failed to comply with the request.[8] The full House of Representatives voted to hold Ms. Miers and Mr. Bolten in contempt of Congress.[9] In February 2008, the Speaker of the House certified a Contempt Report to Jeffrey A. Taylor, U.S. Attorney for the District of Columbia, directing Mr. Taylor to present

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Were Fired, U.S. NEWS & WORLD REPORT, Mar. 21, 2007, *available at* http://www.usnews.com/usnews/news/articles/070321/21attorneys-timeline_2.htm. The House of Representatives Committee on the Judiciary additionally named Todd Graves of Missouri and Margaret Chiara of Michigan as having been subject to forced resignations and characterized all dismissals as occurring in 2006. *See* Comm. on the Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53, 57 (D.D.C. 2008).

2. David Johnston et al., *A New Mystery to Prosecutors: Their Lost Jobs*, N.Y. TIMES, Mar. 4, 2007, at A1.

3. Sheryl Gay Stolberg, *Senator Insists That Bush Aides Testify Publicly*, N.Y. TIMES, Mar. 19, 2007, at A1.

4. *Id.*

5. Sheryl Gay Stolberg, *Bush in Conflict with Lawmakers on Prosecutors*, N.Y. TIMES, Mar. 21, 2007, at A1.

6. *Id.*

7. Sheryl Gay Stolberg, *Bush Moves Toward Showdown with Congress on Executive Privilege*, N.Y. TIMES, June 29, 2007, at A23.

8. Editorial, *Defying the Imperial Presidency*, N.Y. TIMES, July 26, 2007, at A18. The congressional focus on Chief of Staff Bolten apparently replaced the earlier focus on Deputy Chief of Staff Rove.

9. Comm. on the Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53, 63 (D.D.C. 2008).

the contempt charges against Ms. Miers and Mr. Bolten to a grand jury.[10] Attorney General Michael B. Mukasey, however, foreclosed the possibility of criminal enforcement after determining "that non-compliance . . . with the Judiciary Committee subpoenas did not constitute a crime, and therefore the Department will not bring the congressional contempt citations before a grand jury or take any other action to prosecute Mr. Bolten or Ms. Miers."[11] In response, the House Committee on the Judiciary filed an action seeking declaratory judgment and injunctive relief compelling Mr. Bolten and Ms. Miers to comply with the previously issued subpoenas.[12]

The motivating question behind this Note is how a court should deal with the above scenario—the effort by a congressional committee to enforce a subpoena against executive branch officials where the executive branch officials, in turn, attempt to forestall the inquiry by asserting executive privilege. The recommendation of this Note is that courts should view such cases through the prism of a *negative* executive privilege, which focuses on the information-seeker's legal entitlement to executive branch information rather than the executive's affirmative power to resist requests for such information.

In *Committee on the Judiciary v. Miers*,[13] Judge John Bates of the District Court for the District of Columbia made his own effort to address the U.S. Attorney conflict. The opinion, however, deals primarily with a number of peripheral issues—including standing, justiciability, and discretionary powers—and not the specific issue of executive privilege.[14] The only place where the decision comes close to addressing a claim of executive privilege is where it holds that Ms. Miers and Mr. Bolten cannot assert absolute immunity in the face of the issued subpoenas. This, however, is a different issue, based on a different legal theory.[15] Thus, the question remains unexamined whether execu-

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10. *Id.*
11. *Id.* at 63-64.
12. *Id.* at 64.
13. *Id.*
14. *Id.* at 55-56.
15. Judge Bates acknowledges in his opinion that the "decision . . . is very limited." *Id.* at 56. "The specific claims of executive privilege that Ms. Miers and Mr. Bolten may assert are not addressed—and the Court expresses no views on such claims." *Id.*

It is nonetheless important, so as to avoid confusion, to explain why one of Judge Bates' conclusions—that there is no absolute immunity for Ms. Miers and Mr. Bolten in this case—leaves the question of executive privilege unanswered. The argument by Ms. Miers and Mr. Bolten that Judge Bates addresses is that they are both absolutely immune from congressional inquiry, based not on the line of executive privilege cases that will be discussed later in this Note, but rather on a particular case, *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982) (holding that the President "is entitled to absolute immunity from damages liability predicated on his official acts"). *See Miers*, 558 F. Supp. 2d at 100. Ms. Miers and Mr. Bolten argue that "[those] same principles apply just as clearly to the President's closest advisors." *Id.* Judge Bates rightly dismisses the notion that somehow an absolute immunity

tive privilege, as opposed to a different theory of immunity, should block such a congressional inquiry.

Before delving into this question, it is necessary to understand the scope of the inquiry. This Note is limited to analyzing claims of executive privilege, not other forms of privilege or immunity.[16] Executive privilege refers to "the executive's 'right to withhold information from either Congress or the judicial branch'—and thus, indirectly, from the people."[17] This Note is also limited to analyzing executive privilege in the context of executive branch communications and deliberations *not* related to national security. There are three reasons

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from damages liability for the President applies by extension to his closest advisors in a case involving the enforcement of an investigatory subpoena. Judge Bates cites *Harlow v. Fitzgerald*, 457 U.S. 800, 812-13 (1982), for the proposition that:

> In order to establish entitlement to absolute immunity a Presidential aide first must show that the responsibilities of his office embraced a function so sensitive as to require a total shield from liability. He then must demonstrate that he was discharging the protected function when performing the act for which liability is asserted.

Judge Bates holds that neither of these conditions is satisfied because the matter does not involve national security "or other particularly sensitive functions that Harlow indicates may warrant absolute immunity." *Miers*, 558 F. Supp. 2d at 101. Judge Bates does not consider the other possibility of "qualified immunity" because "the Executive has not offered any independent reasons that Ms. Miers should be relieved from compelled congressional testimony beyond its blanket assertion of absolute immunity." *Id.* at 105.

This leaves the question of a theoretical assertion of executive privilege unanswered. As described in this Note, a line of cases dissecting executive privilege, as opposed to *Harlow*-type immunity, exists separately and with a separate standard for its application, typically a balancing test. Judge Bates considers the claim of absolute immunity only under *Harlow* standards, not under executive privilege standards. Moreover, Judge Bates creates a two-tiered system of analysis that does not necessarily have any grounding in case law. The first tier in Judge Bates' system is that the *Harlow* test for absolute or qualified immunity must be met. If it is not met, then the subpoenaed parties must testify. The second tier then comes into play: once the parties have presented themselves for testimony, they can then raise executive privilege claims on a claim-by-claim basis to specific requests for information. The reality, though, is that executive privilege, and the standards that govern it, could in theory preclude parties from having to testify in the first place. Thus, the question remains after the Bates decision whether Ms. Miers and Mr. Bolten would have to testify at all under an executive privilege analysis rather than a *Harlow*-type of immunity analysis. The general framework provided in this Note, hopefully, will provide an answer to that question. In the Conclusion, this Note addresses the possibility that Judge Bates considered *Harlow* to exist within the context of executive privilege jurisprudence; the conclusion of this Note, however, is that it does not change the type of analysis suggested by the negative executive privilege discussed herein.

16. See, for example, Judge Bates' discussion of *Harlow v. Fitzgerald* for possibly another type of immunity. *Id.* at 100-06.

17. ROBERT M. PALLITTO & WILLIAM G. WEAVER, PRESIDENTIAL SECRECY AND THE LAW 193 (2007); *see also* 26A CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5673 (1982) (describing executive privilege as "the power of the *President* to withhold information from the courts and Congress") (emphasis added).

for this limitation. First, a separate "state secrets" privilege covers national security matters. "[S]tate secrets relate to national security and are protected by absolute privilege, while executive privilege relates to non-national security matters and is a qualified privilege, capable of being overcome upon a proper showing of need."[18] When "the layer of 'national security' issues is peeled away, it is easier to focus on the true competing interests in play."[19] Second, the state secrets privilege raises issues specifically related to national security,[20] not to the general assertions of privilege at issue, for example, during Watergate or the U.S. Attorney scandal.[21] Third, this limitation allows for a more focused inquiry: the right of coordinate branches to access the internal communications and deliberations of executive branch officials.

The general question—how courts should handle executive privilege cases—is worth asking because existing case law and scholarship do not provide any simple answers. The leading U.S. Supreme Court case, *United States v. Nixon*,[22] states unequivocally that an executive privilege exists:

> The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications.[23]

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18. PALLITTO & WEAVER, *supra* note 17, at 214. The fact that an executive privilege claim can exist independently of a state secret or national security type of privilege renders further support to the notion that Judge Bates based his denial of absolute immunity to Ms. Miers and Mr. Bolten on a type of immunity other than executive privilege, as his main basis for denying absolute immunity was that it did not involve national security or foreign policy. *Miers*, 558 F. Supp. 2d at 81. If this were the sole basis for executive privilege, then there would be no executive privilege outside the national security or foreign policy context, which there clearly is based on the other cases in which the concept has arisen.

19. *Miers*, 558 F. Supp. 2d at 81.

20. *See, e.g.*, 26A WRIGHT & GRAHAM, *supra* note 17, § 5667 (citing the application of the state secrets privilege to such national security-related issues as, inter alia, "designs for military hardware," "capabilities of weapons," "military or naval plans," "details of ongoing military operations," "foreign or wartime intelligence activities," "information gathered by intelligence agencies," "foreign government information," and disclosure as to whether such information exists).

21. *See infra* Part III for an overview of several executive privilege cases. These cases all involve requests for communications or deliberative materials from executive branch officials.

22. 418 U.S. 683 (1974).

23. *Id.* at 708.

But the guidance it provides lower courts is, at best, unhelpful: "[T]he legitimate needs of the judicial process *may outweigh* Presidential privilege."[24] Thus, the Supreme Court appears to call for a balancing test, but there is little indication as to when (aside from specific criminal cases[25]) one might outweigh the other, at least based on the language of the test alone.[26]

Existing scholarship is also of limited value, at least as related to the adjudication of executive privilege disputes. Scholars have discussed a diverse array of issues, none of which have any direct bearing on the adjudication process, including why the political process largely resolves, or should resolve, executive privilege issues;[27] why courts should be more proactive in making executive privilege decisions;[28] why executive privilege actually does not, or should not, exist at all;[29] why executive privilege does not exist, but Congress should codify it by statute;[30] and how an executive order has helped to wrongly

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24. *Id.* at 707 (emphasis added).

25. *See infra* Part II.A for a discussion about *Nixon*'s holding that the need for evidence in a specific criminal investigation trumped any executive claim of privilege.

26. Admittedly, Part III of this Note is devoted to showing that there is a somewhat predictable outcome in executive privilege jurisprudence that arguably debunks the notion that the Supreme Court's balancing test is devoid of content and guidance. However, the predictability of jurisprudential outcomes only supports the point further, since it highlights that *other* principles, aside from the language of the balancing test, supply the predictability, and the balancing test itself only obscures the hidden thought processes behind judicial decisionmaking.

27. *See, e.g.*, MARK J. ROZELL, EXECUTIVE PRIVILEGE: THE DILEMMA OF SECRECY AND DEMOCRATIC ACCOUNTABILITY 147 (1994) ("[C]ongress and the judiciary, when given good reason to believe that the claim of privilege is being abused, have institutional mechanisms that can be used to compel the president to divulge information."); Irving Younger, *Congressional Investigations and Executive Secrecy: A Study in the Separation of Powers*, 20 U. PITT. L. REV. 755, 784 (1959) ("A solution is to be sought in the need of practical politicians to make precise adjustments among incommensurate quantities. So long as party politics thrive, the reconciliation between open discussion and unhindered efficiency will be assured.").

28. *See, e.g.*, PALLITTO & WEAVER, *supra* note 17, at 215 ("[C]ourts must be willing to confront the secret presidency and to fashion rules that resolve competing claims of secrecy and openness. The courts must help to establish what the separation of powers is, rather than using that phrase itself as a justification for staying out of the fray altogether.").

29. *See, e.g.*, RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 1 (1974) ("Executive privilege—the President's claim of constitutional authority to withhold information from Congress—is a myth."); Stephen W. Gard, *Executive Privilege: A Rhyme Without a Reason*, 8 GA. L. REV. 809, 821 (1973) ("Overall, historical support does not appear to exist for the proposition that the Executive possesses an inherent power to withhold information from the Congress."); Bernard Schwartz, *Executive Privilege and Congressional Investigatory Power*, 47 CAL. L. REV. 3, 7 (1959) ("There is little doubt that the claim of executive immunity . . . is an anachronistic survival of monarchical privilege, derived from the basic doctrine of sovereign immunity—perhaps the most incongruous of all doctrines in our public law.").

30. *See, e.g.*, Saikrishna Bangalore Prakash, *A Critical Comment on the Constitutio-*

expand executive privilege.[31] In 1957, Joseph Bishop attempted to describe how courts handle different types of executive privilege cases,[32] but his work preceded the modern executive privilege cases and did not offer any prescriptions. David Frohnmayer and Ellen Stanton have made theoretical contributions to the debate over executive privilege, but they too have not directly addressed how courts are to make such decisions.[33] Thus, after all this scholarly treatment, the work on executive privilege amounts to an unhelpful morass of concepts and ideas with no clear guidance for courts.

This Note presents a new analytical framework for courts to employ in adjudicating cases in which the executive attempts to resist demands for internal executive branch communications and deliberations. Under a negative executive privilege, the executive derives its privilege to withhold information from the *absence* of the information-seeker's power to compel disclosure. In other words, courts should examine the legal entitlement of the information-seeker to

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nality of Executive Privilege, 83 MINN. L. REV. 1143, 1185 (1999) ("Congress plainly controls most of the more significant means of executing executive authority: the purse, the raising of armed forces, and the creation of executive officers and departments. . . . Given gress's control of these vital means, one might infer that Congress generally resolves whether the President will enjoy powers that seem incidental to his constitutional powers. In particular, one could conclude that Congress must judge, via legislation, if it is necessary and proper for the President to utilize an executive privilege."); Brian D. Smith, *A Proposal to Codify Executive Privilege*, 70 G.W. L. REV. 570, 611 (2002) ("Because the courts have failed to give protection to the communications that Nixon demands be considered privileged, the core executive privilege—the presidential communications privilege—should be codified to give presidents greater protection and more consistent application of executive privilege.").

31. *See* Marcy Lynn Karin, Note, *Out of Sight, But Not Out of Mind: How Executive Order 13,233 Expands Executive Privilege While Simultaneously Preventing Access to Presidential Records*, 55 STAN. L. REV. 529, 570 (2002) ("[T]he executive branch has exceeded its authority and demonstrated a desire to override the congressional and judicial interpretations of a constitutionally based privilege.").

32. *See* Joseph W. Bishop, Jr., *The Executive's Right of Privacy: An Unresolved Constitutional Question*, 66 YALE L.J. 477, 483 (1957) ("Peering darkly through the glass of these judicial precedents . . . one can deduce the following propositions: (1) Where the government is the defendant in a civil suit, it may be compelled to choose between losing the suit and producing an unprivileged document. (2) Where the government prosecutes a criminal action, it may be compelled to choose between losing the action and producing any relevant document, even one which is privileged. This may be true where the government is the plaintiff in a civil action. (3) The courts have had no occasion and inclination to attempt other methods of compelling the government to produce evidence.").

33. *See* David B. Frohnmayer, *An Essay on Executive Privilege*, *in* ESSAYS ON EXECUTIVE PRIVILEGE 1 (1974) ("Any legal doctrine that denies information to legislatures or courts threatens the essence and independence of these institutions and must therefore be justified, if it can be justified at all, only by the most compelling considerations of law and policy."); Ellen M. Stanton, *Executive Privilege: An Institutional Perspective*, *in* ESSAYS ON EXECUTIVE PRIVILEGE 32 (1974) ("The President is peculiarly suited to determine what degree of disclosure is consistent with the proper functioning of his office; another branch cannot make that determination without running the risk of destroying the very confidentiality which the privilege is intended to protect.").

executive branch communications and deliberations instead of the power of the executive to resist demands for such information. While this Note does not provide simple, clear-cut rules that will make executive privilege decisions easy, it does offer an analytical framework for courts to employ that will provide more coherence to executive privilege decisions in light of logic, the Constitution, and established principles of law.

Part I of this Note explains the lack of a constitutional foundation for an affirmative executive privilege, or a constitutionally-rooted power bestowed upon the executive to resist legal requests. Part II describes the general contours of the more defensible negative executive privilege in the context of requests for information by criminal courts, civil courts, and Congress. Part III shows that the negative executive privilege not only works as a normative model but also as a descriptive theory of how courts have actually, if not explicitly, made executive privilege decisions in the past. This Note concludes with a brief application of negative executive privilege principles to the U.S. Attorney controversy, as well as a brief discussion of how the negative executive, as opposed to the affirmative executive privilege employed by courts up to the present, enhances democratic and rule-of-law values. Under a negative executive privilege analysis, executive branch officials lacked a sufficient basis for resisting congressional inquiry into the internal deliberations leading up to the firing of the seven Bush Administration U.S. Attorneys because Congress had a legal entitlement to such information.

I. THE LACK OF A CONSTITUTIONAL FOUNDATION

The U.S. Constitution does not expressly grant the executive branch an affirmative power to block enforceable requests for internal communications and deliberations, at least under the commonly employed interpretive techniques of textual, structural, intentional, and historical analysis. The silence of the Constitution on the matter, through these varied methodologies, suggests that no such affirmative privilege should exist, despite the contrary position of many courts. Moreover, the primary arguments that support the existence of an affirmative privilege rooted in the Constitution fail, as they ultimately reflect mere policy preferences or else are irrelevant to the issue.

A. *A Constitutional Reading*

1. Text

A fair reading of the text of the Constitution reveals no affirmative execu-

tive privilege.[34] Article II provides the President with a number of specific powers, such as the power of "commander in chief of the Army and Navy,"[35] the power to "require the opinion, in writing, of the principal officer in each of the executive departments,"[36] the power, "by and with the advice and consent of the Senate, to make treaties,"[37] the power to "nominate . . . [and] appoint ambassadors, other public ministers and counsels, judges of the Supreme Court, and all other officers of the United States,"[38] and the power to "fill up vacancies that may happen during the recess of the Senate."[39] None of these powers in any way allows the President to withhold information.[40]

If anything, Article II requires the President to *reveal* information, not to hold it in confidence. Under Article II, section 3, the President is required to "give to the Congress information of the state of the union, and recommend to their consideration such measures as he shall judge necessary and expedient."[41] While this does not require the President to reveal confidential communications and deliberations, it does indicate that the Constitution contemplates a flow of information from the President to Congress. It also suggests that the President is accountable to Congress, reducing any expectation of privacy surrounding executive branch information.[42]

Article I, in contrast, explicitly grants Congress the power to withhold information. Although Article I requires the House and Senate to "keep a journal of [their] proceedings," they can withhold "such parts as may in their judgment require secrecy."[43] In addition, "for any speech or debate in either House,

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34. *Accord* BERGER, *supra* note 29, at 10 ("Neither the congressional power of inquiry nor executive privilege are expressly mentioned in the Constitution."); Prakash, *supra* note 30, at 1145 ("Familiar originalist tools such as text, structure, and history furnish only dubious support for an executive privilege, of whatever scope. In fact, the use of such tools arguably leads to the opposite conclusion, i.e., that the chief executive lacks a constitutionalized executive privilege."); Schwartz, *supra* note 29, at 41 ("[T]he extreme claims of complete executive discretion to withhold information from Congress have no legal justification.").

35. U.S. CONST. art. II, § 2, cl. 1.

36. *Id.*

37. *Id.* cl. 2.

38. *Id.*

39. *Id.* cl. 3.

40. Frohnmayer, *supra* note 33, at 5 ("The few textual provisions of article II enumerating presidential powers make no mention of an executive privilege to withhold information.").

41. U.S. CONST. art. II, § 3.

42. *Accord* BERGER, *supra* note 29, at 3 (arguing that "the Constitution contemplates executive accountability to Congress, as the Article II, § 3 provision that the President 'shall take care that the laws be faithfully executed' alone should show").

43. U.S. CONST. art. I, § 5, cl. 3.

[members of the House or Senate] shall not be questioned in any other place."[44] If the Constitution has the capacity to speak clearly on the matter in certain instances, then its silence in others suggests that such immunities may not extend to the executive branch.

2. Structure

The structure of the Constitution does not imply an affirmative executive privilege. The Constitution sets forth "separated institutions which were designed to deliberately share a wide range of overlapping powers and functions."[45] This observation, however, has nothing to do with the flow of information among the branches of government.[46] Thus, although the Constitution certainly contemplates some level of overlap and tension among the branches of government, there is no implicit existence of a privilege to withhold information from coequal branches on that basis alone.[47]

Moreover, the structure of the Constitution may *favor* the flow of information from the executive to the other branches. First, the mere existence of a legislative branch may suggest few limitations in its ability to gather information from any source.[48] As Raoul Berger states: "Since lawmaking confessedly needs to be based on an informed judgment, this requires the widest access to information."[49] Second, the Constitution's protection of a democratic system of

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44. *Id.* § 6, cl. 1.

45. Frohnmayer, *supra* note 33, at 6.

46. *Id.* at 7 ("[A] properly understood doctrine of separation of powers yields no inference, as a matter of deductive logic, from which the power to withhold information necessarily flows. In truth, the obverse, interdepartmental comity in sharing information, would seem a more justifiable inference.").

47. In *Nixon*, the Supreme Court arguably roots the existence of an executive privilege in structural foundations. *See* United States v. Nixon, 418 U.S. 683, 708 (1974) ("[T]he expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations . . . has all the values to which we accord deference for the privacy of all citizens and . . . is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking."); *see also id.* at 706 ("Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings."). Under this line of thinking, the mere existence of an executive branch and the mere fact that a privilege would be useful to the operation of the executive imply a structural basis for the privilege. This, however, seems to be more of a policy preference (due to its usefulness) rather than a necessary implication from the structure of the Constitution.

48. In Part II.C, however, I explain that there are certain well established limitations on the power of Congress. The point here is simply that the Constitution does not contain an affirmative privilege in favor of the executive.

49. BERGER, *supra* note 29, at 3.

government—however limited[50]—may also imply few barriers to the collection of information, as "[a] democratic system rests on full access to information and accountability to the people."[51] Third, the wide-ranging powers of Congress over executive authority suggest that, if any executive privilege is to exist, it should come with Congress' approval—which Congress has never granted.[52]

3. Intent

There is no clear indication that the Framers of the Constitution intended an affirmative privilege to exist. First, if the Framers had intended an executive privilege to exist, they would have included it in Article II.[53] Second, the Framers were deeply fearful of the potential for tyranny and accordingly favored an executive subordinate to the Congress.[54] Third, even if some sort of intent for an executive privilege could be gleaned from the beliefs of certain Founders, the measurement of the "intent" of a group of disparate individuals is not particularly trustworthy, and, to the extent that any original intent is observable, the absence of such an intent is more striking than the presence of such an intent.[55] Fourth, there is evidence that the Framers were largely influenced by British precedents in their view of Congress' power to extract information from the executive.[56] Since "Parliament enjoyed an untrammeled power of inquiry into executive conduct," the Framers, consistent with their being influenced by

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50. Admittedly, the Constitution does not guarantee a democratic system of government, but rather a "republican" form of government. *See* U.S. CONST. art. IV, § 4 ("The United States shall guarantee every State in this Union a Republican form of government . . . ."). Still, the Constitution contemplates at least some minimal degree of democracy in the election of members of the House of Representatives. *See id.* art. I, § 2 (stating that members of the House shall be "chosen . . . by the People of the several States").

51. BERGER, *supra* note 29, at 344.

52. Prakash, *supra* note 30, at 1145 (arguing that "the negative implications stemming from congressional control of funds and of officers strongly suggest that Congress may control the availability of other means of carrying presidential power into execution, including executive privilege").

53. *See* ROZELL, *supra* note 27, at 8-9.

54. *See id.* at 12 ("[T]he Framers so feared executive power that they made the legislative the supreme branch of government in all policy areas—even foreign affairs."); BERGER, *supra* note 29, at 346 ("He who controls the flow of information rules our destinies. . . . It was not the design of the Founders that the people and the Congress should obtain only so much information as the President concluded was fitting for them to have. As the partner—the senior partner—in the conduct of our government, Congress is entitled to share *all* the information that pertains to its affairs.").

55. *See* Frohnmayer, *supra* note 33, at 8 ("Insofar as historical claims with respect to the framers' intentions can be evaluated safely, opponents of an executive privilege have marshaled by far the most impressive evidence.")

56. BERGER, *supra* note 29, at 243-44.

British precedent, likely did not consciously deny Congress the power of inquiry into executive conduct in the United States.[57]

4. History

There is little historical support for any understanding of executive privilege as an implied power granted in the Constitution. Frohnmayer believes that the precedents in which executive privilege has been invoked or threatened "are of limited value."[58] "They bear all the earmarks of their essential character as political compromises and thus yield no unitary conception of the constitutional basis of a privilege."[59] Stephen Gard, moreover, explains why the historical record does not yield any support for the existence of an executive privilege:

> Overall, historical support does not appear to exist for the proposition that the Executive possesses an inherent power to withhold information from the Congress. Such an "historical usage" justification, if valid, would mean that history would reveal a series of presidential refusals to speak and a meek Congress' rushing to acquiesce. An objective view of history does not disclose such occurrences. More fundamentally, even if such usage were found, when two governmental branches clash over the legitimacy of a power, the Constitution, and not mere repetition, must provide the answer.[60]

Thus, while the executive has on a number of occasions attempted to prevent disclosure of its internal deliberations and communications,[61] these instances do not indicate widely held acceptance of a constitutional foundation for an affirmative executive privilege.

B. *Counter-Arguments*

Despite the foregoing, some still argue in favor of a constitutionally-based affirmative executive privilege. In fact, Chief Justice William Rehnquist once said of executive privilege:

> I think most would agree that the doctrine [of executive privilege] is an absolutely essential condition for the faithful discharge by the executive of his constitutional duties. It is, therefore, as surely implied in the Constitution as is the

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57. *Id.*

58. Frohnmayer, *supra* note 33, at 9.

59. *Id.*

60. Gard, *supra* note 29, at 821-22; *see also* Prakash, *supra* note 30, at 1145 ("[M]uch of the English and American history thought to firmly ground executive privilege in our Constitution has been woefully oversold; practices and episodes in England and during the early post-ratification era in America simply do not provide the unambiguous support claimed by proponents of a privilege.").

61. For a discussion of various instances, see ROZELL, *supra* note 27, at 25-48.

power of Congress to investigate and compel testimony.[62]

The arguments in favor of an affirmative executive privilege, however, are weak, as they are either rooted in policy preferences or else are irrelevant to the issue.

One argument in favor of executive privilege is the President's need for candid advice. As Rozell explains, "[i]f officers of the executive branch believed that their confidential advice could eventually be disclosed, the quality of that advice would suffer serious damage."[63] Since a "president's constitutional duties necessitate his being able to consult with advisers, without fear of public disclosure of their advice,"[64] the President must be able to invoke executive privilege to prevent the specter of such disclosure.

There are three problems with this argument. First, an affirmative executive privilege may not significantly impact the nature of the advice the President receives.[65] Second, even if executive branch officials would alter their advice without such a privilege, it is not clear that this would be a problem: the President, elected every four years, is supposed to be accountable to the public.[66] Third, regardless of the value of insulated advice in the executive branch, the Constitution does not mention it, and the Framers did not clearly intend it. In other words, the value placed on candid executive branch communications is a *policy preference*, not a constitutional mandate.

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62. *Id.* at 49. As mentioned in note 50, *supra*, one could argue that an argument such as Rehnquist's actually functions as a "structural" argument. However, it is the position of this Note that a strong "structural" argument, at least when it comes to the content of the Constitution, must be based on a conclusion that almost *necessarily* follows from other elements of the Constitution. In this case, although Rehnquist's points may be good reasons for having an executive privilege, they do not make one necessarily implicit, only useful—hence, the assertion of this Note that such reasons amount to policy preferences. If something is merely a good idea, and not necessarily implicit in the Constitution, the more defensible approach is legislation, not interpretation. *See generally* Prakash, *supra* note 30.

63. ROZELL, *supra* note 27, at 53-54.

64. *Id.*; *see also* United States v. Nixon, 418 U.S. 683, 708 (1974) ("The expectation of a President to the confidentiality of his conversations and correspondence . . . has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately.").

65. *See, e.g.*, Gard, *supra* note 29, at 832-33 ("The assertion that the privilege is necessary to assure that the President receives honest, candid and frank advice, which he allegedly would not receive absent a guarantee of absolute confidentiality to his advisers, rings hollow since executive privilege does not guarantee confidentiality to the adviser.").

66. *See, e.g.*, Michael B. Rappaport, *Replacing Independent Counsels with Congressional Investigations*, 148 U. PA. L. REV. 1595, 1600 (2000) ("In a democracy, persons who exercise . . . discretion are generally made accountable to the public. Thus . . . the President stand[s] for election, and many executive officials take direction from the President.").

Another argument in favor of an affirmative privilege is that other branches exercise broad powers of confidentiality. Members of Congress utilize a wide array of powers to protect the confidentiality of their communications with staff and communications among themselves; they also enjoy the protection of immunity with respect to various statements made in full public view.[67] Judges, as well, enjoy secrecy with respect to their deliberations and immunity from having to respond to congressional subpoenas.[68] Thus, so the argument goes, there is no reason why there should not be a similar or related protection for the executive branch from inquiries into its inner workings.

The problem with this argument, however, is that the existence of a privilege in the context of other branches has no bearing on whether one exists in the executive branch. In the congressional context, the Constitution explicitly delineates certain privileges and immunities for members of Congress; thus, in the absence of such explicit delineations for the executive branch, there is no basis to extend such privilege or immunities by analogy.[69] As for the judicial branch, although there is no explicit mention of a judicial privilege, at least one scholar has discussed the possible basis for such a privilege.[70] The position of this Note, regardless, is that the privileges of each branch must stand firmly on their own merits; even if there is a valid congressional or judicial privilege, it does not imply one in the executive branch.

II. WHAT IS LEFT OVER: THE NEGATIVE EXECUTIVE PRIVILEGE

In the absence of a constitutional basis for an affirmative executive privilege, a *negative* executive privilege remains.[71] Its contours are implied by both

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67. *See* ROZELL, *supra* note 27, at 59 ("Members of Congress enjoy a constitutional form of privilege that absolves them from having to account for their official behavior, particularly regarding speech, anywhere but in Congress.").

68. *Id.*

69. *See, e.g.*, U.S. CONST. art. I, § 5, cl. 3 ("Each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either House on any question shall, at the desire of one fifth of those present, be entered on the journal."); *id.* § 6, cl. 1 (Senators and Representatives "shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place.").

70. *See generally* Kevin C. Milne, Note, *The Doctrine of Judicial Privilege: The Historical and Constitutional Basis Supporting a Privilege for the Federal Judiciary*, 44 WASH. & LEE L. REV. 213 (1987) (supporting a historically and constitutionally-rooted power of the judiciary to maintain the secrecy of its internal deliberations and communications).

71. While no scholars of executive privilege have expressly considered a negative executive privilege, at least two have identified the significance of the entitlement, or lack thereof, of those seeking executive branch information, though only with respect to congres-

statutory and constitutional limitations on the power of the three traditional seekers of executive information—civil courts, criminal courts, and Congress[72]—to compel disclosure of internal communications and deliberations within the executive branch. Civil and criminal courts, as well as Congress, have only limited power to compel the disclosure of information, whether the target is the executive branch or a private citizen. Therefore, even in the absence of an affirmative executive privilege, the executive has a basis for resisting inquiries into its internal communications and deliberations. This *negative* executive privilege derives from the absence of power to compel information disclosure rather than the affirmative power to foreclose compelled disclosure.

A. *The Subpoena Power in Criminal Cases*

Grand jury subpoenas. Grand juries are generally entitled to wide-ranging access to information. In *United States v. Dionisio*,[73] a grand jury subpoenaed approximately twenty individuals to produce voice exemplars to compare with recorded conversations already received into evidence. The Supreme Court explained:

> Although the powers of the grand jury are not unlimited and are subject to the supervision of a judge, the longstanding principle that 'the public . . . has a right to every man's evidence,' except for those persons protected by a constitutional, common law, or statutory privilege, is particularly applicable to grand jury proceedings.[74]

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sional investigations, and definitely not as part of any broader theory of executive privilege. Rozell acknowledges that there are limits on congressional inquiry:

> Although opponents of executive privilege argue that Congress has an absolute right of inquiry into the workings of the executive branch, a distinction must be drawn between sources of information generally and those the legislative branch needs to perform its functions. There is generally a strong presumption of validity to a congressional request for information clearly relevant to its investigatory function. There is no such presumption in the case of a congressional "fishing expedition"—a broad, sweeping quest for any and all executive branch information that might be of interest to Congress for one reason or another.

ROZELL, *supra* note 27, at 56. Frohnmayer also mentions that the scope of legislative investigations could be the source of a claim of privilege. "This rationale for an executive privilege has a certain initial appeal, particularly since the right of privacy has been given an explicit constitutional justification. Moreover, there is some suggestion that the Supreme Court might recognize the right of privacy as a substantive limitation on congressional powers of investigation." Frohnmayer, *supra* note 33, at 11; *see also* Doe v. McMillan, 412 U.S. 306 (1973). Thus, Frohnmayer says that "[i]t is better to focus on the limits of congressional power to demand rather than on any substantive executive power to withhold." Frohnmayer, *supra* note 33, at 12. However, neither Rozell nor Frohnmayer treat this perspective as more than one out of many different ways to view executive privilege, and they do not explore it as a general theory of executive privilege.

72. *See* 26A WRIGHT & GRAHAM, *supra* note 17, § 5667.

73. 410 U.S. 1 (1973).

74. *Id.* at 9 (quoting United States v. Bryan, 339 U.S. 323, 331 (1950)).

This means that "[a] grand jury has broad investigative powers to determine whether a crime has been committed and who has committed it. The jurors may act on tips, rumors, evidence offered by the prosecutor, or their own personal knowledge."[75] While this power is broad, however, a grand jury cannot "require a witness to testify against himself" or "require the production by a person of private books and records that would incriminate him."[76] In addition, a grand jury subpoena cannot be "'too sweeping in its terms' to be regarded as reasonable."[77]

Trial subpoenas. Prosecutors face more extensive barriers if they ask a court to compel the production of information sought in a trial subpoena.[78] At least one commentator has expressed the belief that a prosecutor has almost unhindered power to obtain information through a federal criminal subpoena.[79] This view, however, is misleading, as Federal Rule of Criminal Procedure 17(c) sets forth a rule limiting the power of a prosecutor to issue a subpoena *duces tecum*: "On a motion made promptly, the court may quash or modify [a] subpoena if compliance would be unreasonable or oppressive."[80] *United States v. Nixon* elaborates on the requirements of Rule 17(c). The prosecutor must show:

> (1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence;

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75. *Id.* at 15.

76. *Id.* at 11.

77. *Id.* at 11 (quoting Hale v. Henkel, 201 U.S. 43, 76 (1906)). *Hale* involved a challenge to a grand jury subpoena demanding production of corporate documents in connection to an investigation into antitrust violations. The Court held that a subpoena was far too sweeping in its terms to be reasonable: "It does not require the production of a single contract, or of contracts with a particular corporation, or a limited number of documents, but all understandings, contracts, or correspondence . . . as well as all reports made, and accounts rendered . . . ." *Hale*, 201 U.S. at 76-77. The Court concluded that "many, if not all, of these documents may ultimately be required, but some necessity should be shown . . . or some evidence of their materiality produced, to justify an order for the production of such a mass of papers." *Id.* at 77. For a more recent case discussing limitations on grand jury subpoenas, see United States v. R. Enter., 498 U.S. 292, 299 (1991) ("Grand juries are not licensed to engage in arbitrary fishing expeditions, nor may they select targets of investigations out of malice or an intent to harass."). *But see* RONALD J. ALLEN ET AL., COMPREHENSIVE CRIMINAL PROCEDURE 995 (2d ed. 2005) ("Today, subpoenas are rarely quashed because they are . . . 'too sweeping . . . to be regarded as reasonable.' It would be an exaggeration to say that there is *no* Fourth Amendment regulation of subpoenas. But it would not be much of an exaggeration.").

78. *See R. Enterprises*, 498 U.S. at 723 ("A grand jury subpoena is . . . much different from a subpoena issued in the context of a prospective criminal trial, where a specific offense has been identified and a particular defendant charged.").

79. *See* William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 864 (2001) ("[T]he federal subpoena power [is] something akin to a blank check. Prosecutors can go after whomever they like; they can be as intrusive as they choose; they can fight as hard as they want.").

80. FED. R. CRIM. P. 17(c).

> (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application [for the subpoena] is made in good faith and is not intended as a general "fishing expedition."[81]

The Court condensed these requirements into "three hurdles" for the prosecutor to clear: "(1) relevancy; (2) admissibility; (3) specificity."[82] Thus, in *Nixon*, the Court did not conclude that the district court erred in refusing to quash a subpoena for President Nixon's taped conversations because "there was a sufficient likelihood that each of the tapes contains conversations relevant to the offenses charged," there was "sworn testimony or statements . . . as to what was said at the time," and "the identity of the participants and the time and place of the conversations . . . permit a rational inference that at least part of the conversations relate to the offenses charged."[83]

Thus, in the absence of an affirmative executive privilege, executive branch officials subpoenaed in criminal cases regarding their internal communications and deliberations can still claim a *negative* executive privilege, or the lack of a legal basis for compelling them to disclose the information. If an executive branch official is called before a grand jury, there is little basis for the official to invoke a negative privilege unless the request for information would involve self-incrimination or constitute a so-called "fishing expedition." If an executive branch official is subpoenaed before trial, the official is more likely to succeed in blocking the request if the information called for is irrelevant, non-admissible for an independent reason, or lacking in specificity. While the negative privilege may be weak in a criminal context, it can still protect executive branch officials from mandatory disclosure in these limited circumstances.

B. *The Subpoena Power in Civil Cases*

The first and primary limitation on civil discovery—whether in the form of interrogatories, requests for admission, requests for the production of documents, or subpoenas *duces tecum*—is relevance. As stated in Federal Rule of Civil Procedure 26(b)(1), "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party."[84] This limitation, however, may not play a significant role in the evaluation of discovery abuses, as "[g]iven the capacity of the human imagination, the relevancy criterion is virtually without boundary."[85] Therefore, "it is an uphill battle to

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81. United States v. Nixon, 418 U.S. 683, 699-700 (1974).
82. *Id.* at 700.
83. *Id.*
84. FED. R. CIV. P. 26(b)(1).
85. STEPHEN N. SUBRIN ET AL., CIVIL PROCEDURE: DOCTRINE, PRACTICE, AND

convince a court that discovery sought by opposing counsel is so unrelated to any claim or defense of any party that it cannot be said to be 'relevant' within the expansive meaning of that term in Rule 26."[86] Thus, one might think that there really are no effective limitations on the power of civil litigants to obtain information from parties or non-parties relevant to a case.

This is not completely true. Rule 26(2) contains various limitations to the permissive boundaries established in Rule 26(1). These limitations appear designed to prevent the enforceability of discovery requests that place an excessively high burden on the responding party in relation to the corresponding benefit that would result from compliance. For example, in Rule 26(b)(2)(B), a party does not have to provide requested information if it is "not reasonably accessible because of undue burden or cost."[87] More important, under Rule 26(b)(2)(C), a court can limit the use of discovery methods if "the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues."[88] Thus, courts can engage in something of a cost-benefit analysis to determine whether to grant a respondent's motion to quash a discovery request.[89]

In the absence of an affirmative executive privilege, executive branch officials subpoenaed in civil cases regarding their internal communications and deliberations can still claim a negative executive privilege.[90] First, they can argue a lack of relevance to the claims or issues in dispute. Second, they can argue that the burden imposed on the executive branch outweighs its benefit to the resolution of the case. Consequently, the negative executive privilege still provides limited protection to executive branch officials in a civil context, with a

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CONTEXT 296 (2d ed. 2004).

86. *Id.*

87. FED. R. CIV. P. 26(b)(2).

88. FED. R. CIV. P. 26(b)(2)(C)(iii).

89. *See, e.g.*, Wiwa v. Royal Dutch Petroleum Co., 392 F.3d 812, 818 (5th Cir. 2004) (In determining whether a subpoena causes undue burden, courts generally balance the following factors: "(1) relevance of the information requested; (2) the need of the party for the documents; (3) the breadth of the document request; (4) the time period covered by the request; (5) the particularity with which the party describes the requested documents; and (6) the burden imposed.").

90. Stephen Subrin et al. state, as to the role of information in civil cases, that:

> [t]he primary function of the discovery process is to provide litigants with an opportunity to review all of the pertinent evidence prior to trial. This function is thought to be consistent with the pursuit of justice for at least three reasons. First, it reduces the chance of trial by ambush and facilitates determination upon the merits of the case. Second, it promotes settlement because it enables parties to assess the merits of their case well before trial. And third, it reduces the drain on the resources of the court because discovery educates the parties and often narrows the scope of issues in dispute.

SUBRIN ET AL., *supra* note 85, at 296.

greater significance ascribed to "burden" than in the criminal context.

C. *The Subpoena Power of Congress*

Congress also has the power to subpoena the executive branch. If Congress resorts to the courts to compel the disclosure of executive branch information, it does so not on the basis of a civil lawsuit or a criminal prosecution; it does so based on its power, either under the Constitution or by statute,[91] to compel the disclosure of information. While Congress' powers are broad, they are not without limitation.[92]

The Constitution does not appear to provide any basis for Congress to procure information from the executive branch.[93] The Framers, however, "understood that legislatures must oversee the executive branch."[94] This view was bolstered by a number of early precedents, from 1791 through 1812, which suggested that Congress had a power, however undefined, to investigate and procure information from the executive branch. Thus, "[w]hat was left silent [in the Constitution] would be filled within a few years by implied powers and legislative practice."[95] Within that time period, Congress engaged in the following investigations: (1) an investigation into the conduct of Robert Morris as Superintendent of Finance during the period of the Continental Congress,[96] (2) an investigation into the request by Treasury Secretary Alexander Hamilton seeking financial compensation for Baron von Steuben,[97] (3) an investigation into the heavy military losses suffered by the troops of Major General Arthur St. Clair to tribes of Native Americans,[98] (4) contempt proceedings over the conduct of Representative William Smith of South Carolina regarding his plan to grant twenty million acres and reserve half to lawmakers who assisted him,[99] (5) an

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91. There may also be statutory bases for compelling information, although they are not at issue here. *See, e.g.*, 5 U.S.C. § 552 (2006), *as amended by* Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048.

92. *See* LOUIS FISHER, CONGRESSIONAL RESEARCH SERVICE, CONGRESSIONAL INVESTIGATIONS: SUBPOENAS AND CONTEMPT POWER 1 (2003) ("When conducting investigations of the executive branch, congressional committees and Members of Congress generally receive the information required for legislative needs. If agencies fail to cooperate or the President invokes executive privilege, Congress can turn to a number of powers that are likely to compel compliance.").

93. *Id.* (asserting that "the congressional power to investigate is not expressly provided for in the Constitution").

94. *Id.*

95. *Id.* at 1-2.

96. *Id.* at 2.

97. *Id.*

98. *Id.*

99. *Id.* at 3.

investigation into material published by William Duane, editor of the *Aurora* newspaper,[100] and (6) contempt proceedings for Nathaniel Rounsavell, a newspaper editor charged with releasing sensitive information to the press.[101] Thus, while it was apparent that Congress had some power to conduct investigations, the extent of its power to obtain information had not yet been judicially defined.

Over time, the courts began to provide some boundaries and contours to the power of Congress to compel the disclosure of information in the course of an investigation. In the 1821 case of *Anderson v. Dunn*,[102] the Supreme Court considered whether the House of Representatives had the power to hold Colonel John Anderson in contempt and to order the Sergeant at Arms to take him into custody after Colonel Anderson offered Representative Lewis Williams five hundred dollars in exchange for certain favors. The Court ruled that the House did have the power to hold someone in contempt or else it would be "exposed to every indignity and interruption that rudeness, caprice, or even conspiracy may mediate against it."[103] The power, however, had limits: the House had to exercise the least possible power adequate to fulfill legislative needs (in this case, the power of imprisonment), and the duration of punishment could not exceed the life of the legislative body.[104]

In the 1881 case of *Kilbourn v. Thompson*,[105] the Court again suggested that congressional power should be limited to fulfill basic legislative needs. At issue was the power of Congress to investigate the affairs of private citizens engaged in a real-estate pool. The Court ruled that the judicial branch, rather than Congress, was the proper place for such an investigation to occur because Congress should only investigate with "valid legislation" in mind.[106] The Court was worried about "a fruitless investigation into the personal affairs of individuals."[107]

In the 1927 case of *McGrain v. Daugherty*,[108] however, the Court loosened somewhat the requirements for Congress to conduct a valid investigation. At issue was a Senate resolution to launch an investigation of the Justice Department. The conflict with past case law arose because the Senate resolution did not "in terms avow that it is intended to be in aid of legislation."[109] It did show,

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100. *Id.*
101. *Id.* at 4.
102. 19 U.S. (6 Wheat.) 204 (1821).
103. *Id.* at 228.
104. *Id.* at 231.
105. 103 U.S. 168 (1881).
106. *Id.* at 195.
107. *Id.*
108. 273 U.S. 135 (1927).
109. *Id.* at 177.

however, that

> the subject to be investigated was the administration of the Department of Justice—whether its functions were being properly discharged or were being neglected or mistreated, and particularly whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and prosecution of proceedings to punish crimes and enforce appropriate remedies against the wrongdoers—specific instances of alleged neglect being recited.[110]

In light of these purposes, the Court found that the investigation did not run afoul of the Constitution. The Court held that an investigation only must be "one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit."[111] Only the *potential* for legislation was needed "to compel witnesses to provide testimony pertinent to the legislative inquiry."[112] It is apparent that a court should enforce a congressional subpoena as long as it is "authorized by Congress, *pursue[s] a valid legislative purpose*, raise[s] questions relevant to the issue being investigated, and inform[s] witnesses why questions put to them are pertinent."[113]

Thus, even in the absence of an affirmative executive privilege, executive branch officials subpoenaed by Congress regarding their internal communications and deliberations can still claim a negative executive privilege; they can argue that the subpoenaed information is not relevant to any possible legislative purpose and therefore is not within the court's authority to compel disclosure. While such a claim may be perilous, as courts may doubt their competence in

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110. *Id.*

111. *Id.*

112. *Id.* at 180; *see also* FISHER, *supra* note 92, at 6 (emphasis in original) (explaining that only "a *potential* for legislation was sufficient"). In the later case of *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491 (1975), the Court noted that, "[t]o be a valid legislative inquiry there need be no predictable end result," and that the issuance of a congressional subpoena is "an indispensable ingredient of lawmaking." *Id.* at 505.

113. FISHER, *supra* note 92, at 6 (emphasis added); *see also* Wilkinson v. United States, 365 U.S. 399, 409 (1961); Ashland Oil, Inc. v. FTC, 409 F. Supp. 297, 305 (D.D.C. 1976). Note that Fisher believes that "[f]ederal courts give great deference to congressional subpoenas. If the investigative effort falls within the 'legitimate legislative sphere,' the congressional activity—including subpoenas—is protected by the absolute prohibition of the Speech and Debate Clause, which prevents Members of Congress from being 'questioned in any other place.'" FISHER, *supra* note 92, at 7. Even so, "[c]ongressional inquiries may not interfere with adjudicatory proceedings before a department or agency." SUBRIN ET AL., *supra* note 85, at 6-7; *see also* Pillsbury Co. v. FTC, 354 F.2d 952, 963 (5th Cir. 1966).

Also note that a subpoena need not be issued by the entire congressional body to be valid; it can also be issued by a committee or subcommittee. *See* House Rule XI(2)(m); Senate Rule XXVI(1); *see also* Exxon Corp. v. FTC, 589 F.2d 582, 592 (D.C. Cir. 1978), *cert. denied* 441 U.S. 943 (1979) (holding that a committee subpoena "has the same authority as if [it] were issued by the entire House of Congress from which the committee is drawn").

determining what a valid legislative purpose might be,[114] courts still may exercise this power, as the Court did in *Kilbourne*.[115]

III. MAKING SENSE OF EXECUTIVE PRIVILEGE JURISPRUDENCE

The judicial opinions related to executive privilege do not speak of a negative executive privilege. In fact, the U.S. Supreme Court held, in *United States v. Nixon*, that executive privilege does exist, and that its roots are in the Constitution itself.[116] In light of the *Nixon* Court's balancing test, one might expect to find a heterogeneous array of ad hoc decisions reflecting the predilections of individual courts and judges. The reality is the opposite. In each of the decisions discussed below, the deciding court, although ostensibly employing an affirmative executive privilege rooted in a *Nixon*-style balancing test, renders a decision that is entirely consistent with an outcome that could be generated from the negative executive privilege analysis advocated in this Note. Thus, while courts may believe that there is an actual *affirmative* executive privilege, the reality is that, in almost any factual scenario, courts do not perceive a constitutional mandate that overrides the fundamental limitations on the power of the criminal courts, civil courts, or Congress, effectively applying a negative executive privilege while using the language of an affirmative executive privilege. In failing to find any constitutional principles that override the limitations on the powers of the courts or Congress, courts implicitly endorse the basic

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114. For example, in *United States v. House of Representatives*, 556 F. Supp. 150, 152 (D.D.C. 1983), the court dismissed a suit by the House to compel the production of internal Environmental Protection Agency documents containing internal deliberative materials in order to delay judicial intervention into an executive-legislative dispute "until all possibilities for settlement have been exhausted." Thus, courts may find themselves unsuited for the task of determining a valid legislative purpose.

115. It is true that the Bates opinion in *Miers* seems to assume that Congress is entitled to information if a subpoena is issued pursuant to its own rules and it is not barred by an independent privilege, immunity, or other form of legal impediment, as once such impediments are removed, Bates concludes that the subpoena should be enforced. Indeed, it is not common to hear about congressional inquiries limited by anything except for the imagination of the members. The principles of cases, such as *Kilbourne*, still make sense in 2008 because a Congress without any limitations on its power to investigate could trample into areas reserved for other branches—such as criminal cases against individuals. More important, the Constitution establishes *enumerated* powers for Congress, not unlimited general welfare power. Thus, it is legally illogical that Congress could have the power to investigate and elicit information for matters completely unrelated to its constitutional limitations. *See* U.S. CONST. art. I, § 8.

116. *See* United States v. Nixon, 418 U.S. 683, 705-06 (1973) ("[T]he privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings.").

premise of the negative executive privilege: that there is not a sufficient affirmative constitutional privilege to override other principles of our legal system. As a predictive tool, then, the negative executive privilege may be superior to airy balancing tests for prospective litigants. Moreover, courts should consider employing the negative executive privilege explicitly rather than perpetuating confusion and uncertainty by overtly relying on the affirmative version of the privilege.

A. *Criminal Cases*

United States v. Nixon.[117] In this case, an indictment alleged violations of various federal statutes by members of the White House staff and political supporters of President Nixon. A special prosecutor filed a motion, pursuant to Federal Rule of Criminal Procedure 17(c), for a subpoena *duces tecum* for the production of audio tapes and documents in the possession of President Nixon that related to precisely identified conversations and meetings. The President filed a motion to quash the subpoena based on executive privilege. The district court denied the President's motion, the President petitioned for appellate review, and the special prosecutor filed a writ for certiorari before judgment, which the Supreme Court granted.

The Court acknowledged that

> the expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations . . . has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision-making.[118]

Thus, the Court stated that there is a "presumptive privilege for Presidential communications."[119] The Court qualified this by stating that "the legitimate needs of the judicial process may outweigh Presidential privilege."[120] In this case, the Court held that it did:

> But his presumptive privilege must be considered in light of our historic commitment to the rule of law. This is nowhere more profoundly manifest than in our view that "the twofold aim (of criminal justice) is that guilt shall not escape or innocence suffer" . . . . The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of

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117. 418 U.S. 683.
118. *Id.* at 708.
119. *Id.*
120. *Id.* at 707.

the rules of evidence.[121]

The Court rejected the President's executive privilege argument and ordered Nixon to turn over the subpoenaed tapes and documents. "The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial."[122]

If the Court had explicitly employed negative executive privilege, it would have arrived at the same outcome, and for many of the same reasons. The requirements for a valid subpoena *duces tecum* in a criminal case are (1) relevancy, (2) admissibility, and (3) specificity.[123] The tapes in question were without question relevant to the criminal charges in the indictment, as they contained conversations in which the President and his aides discussed plans for the Watergate burglaries and means of subverting the investigation into those activities. The tapes were also admissible because they did not violate the President's Fifth Amendment right against self-incrimination; they functioned as evidence in a criminal case against people other than the President. The tapes were also specifically identified in the subpoena *duces tecum*, as the content of the various conversations was previously documented.[124]

If the Court had employed the negative executive privilege, moreover, its primary aim would have been achieved. The Court's main concern, aside from a "presumptive" privilege, was that the "ends of criminal justice" not be defeated. The negative executive privilege would have ensured the same result, as it would have limited any objections by the President to the violation of systemic safeguards (such as the rules for a valid subpoena *duces tecum*). Either way, the Court would have ordered the tapes to be produced so that the President could not have hidden behind privilege to prevent justice from being served.

In re Sealed Case.[125] In this case, a grand jury was investigating former Secretary of Agriculture Mike Espy. The grand jury issued a subpoena *duces tecum* seeking documents related to the White House Counsel's own investigation. The White House withheld certain documents based on the assertion of two privileges: the deliberative process privilege and the presidential communications privilege. The district court upheld the White House's claim of privilege, and the independent counsel appealed to the U.S. Court of Appeals for the District of Columbia Circuit.

The court, even more forcefully than the *Nixon* Supreme Court, asserted

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121. *Id.* at 708-09.

122. *Id.* at 713.

123. *Id.* at 700.

124. For background on the specific details of Watergate and the circumstances leading up to this case, see generally BOB WOODWARD & CARL BERNSTEIN, THE FINAL DAYS (1976).

125. 121 F.3d 729 (D.C. Cir. 1997).

that two different types of executive privileges exist. The deliberative process privilege "allows the government to withhold documents and other materials that would reveal 'advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'"[126] The purpose of such a privilege is "'to prevent injury to the quality of agency decisions' by allowing government officials freedom to debate alternative approaches in private."[127] However, it "is a qualified privilege and can be overcome by a sufficient showing of need. This need determination is to be made flexibly on a case-by-case, ad hoc basis."[128] Moreover, the President can invoke the presidential communications privilege "when asked to produce documents or other materials that reflect presidential decisionmaking and deliberations and that the President believes should remain confidential. If the President does so, the documents become presumptively privileged."[129] Again, though, "the privilege is qualified, not absolute, and can be overcome by an adequate showing of need."[130] According to the D.C. Circuit, therefore, an adequate showing of need can trump both privileges.[131]

Despite this grand talk about multiple tiers of executive privilege, the court held that the independent counsel demonstrated a sufficient showing of need to obtain certain documents withheld by the White House, although it left the district court to determine the specific documents to be turned over.[132] The court would have reached the same outcome if it had applied the notion of a negative executive privilege. The threshold question would have been the same as with any other grand jury request for evidence: a grand jury subpoena, while endowed with wide-ranging power, cannot be "'too sweeping in its terms' to be regarded as reasonable." If, as the court determined, the grand jury had a reasonable use for some but not all subpoenaed documents, then the grand jury subpoena was "too sweeping" in certain respects; therefore, the court's decision

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126. *Id.* at 737 (quoting Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 324 (D.D.C. 1966), *aff'd*, 384 F.2d 979 (D.C. Cir. 1967)).

127. *Id.* (quoting NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151-53 (1975)).

128. *Id.*

129. *Id.* at 744.

130. *Id.* at 745.

131. The court explained that

> the two privileges are distinct and have different scopes. Both are executive privileges designed to protect executive branch decisionmaking, but one applies to decisionmaking of executive officials generally, the other specifically to the 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.

Id.

132. *Id.* at 757.

to remand the case for a document-by-document assessment by the district court was a defensible solution to the problem. One could argue that because grand juries have a wide-ranging entitlement to information, the court incorrectly decided this case. Such a view, however, fails to recognize that, even in *Dionisio*, the subpoenaed information was in some way relevant to the grand jury's criminal inquiry; obviously irrelevant documents do not appear to be within the legitimate purview of a grand jury subpoena.

B. *Civil Cases*

Dellums v. Powell.[133] This was a class action suit alleging violations of plaintiffs' constitutional rights arising from the arrest of about 1200 persons at the U.S. Capitol during "May Day Demonstrations" in 1971. The plaintiffs issued a subpoena *duces tecum* calling for the production of all tapes and transcripts of White House conversations that discussed the demonstrations at the time they occurred. Former President Richard Nixon filed a motion to quash the subpoena. The district court denied the motion. Former President Nixon appealed the decision to the Court of Appeals for the District of Columbia.

The court, after acknowledging the existence of an executive privilege, held that it did not apply in this case. The court stated that

> the privilege asserted . . . is . . . premised on the needs of present and future Presidents to maintain the confidentiality of communications with their advisors in order to encourage the candid advice necessary for effective decisionmaking. The privilege rooted in confidential communications with the President is constitutionally based, and entitled to great weight . . . but it has been consistently viewed as presumptive only.[134]

The court indicated, in typical fashion, that a balancing test is an appropriate way to assess assertions of the privilege: "a balancing approach, weighing 'the detrimental effects of disclosure against the necessity for production shown.'"[135] In this case, however, the court rejected the former President's claim of privilege because of the "strong constitutional value in the need for disclosure in order to provide the kind of enforcement of constitutional rights that is presented by a civil action for damages."[136]

The same outcome would have been appropriate under analysis based on the negative executive privilege.if it had applied the notion of a negative executive privilege. In any civil case, a court will not compel compliance with a sub-

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133. 561 F.2d 242 (D.C. Cir. 1977).

134. *Id.* at 246.

135. *Id.* (quoting Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 327 (D.D.C. 1966)).

136. *Id.* at 247.

poena *duces tecum* if the information sought is irrelevant or else the burden imposed on the respondent outweighs the benefit of compliance. In this case, the court identified a potential burden imposed by compliance—the chilling effect that it might have on candor and exchange of information in the executive branch. However, the court concluded that this burden did not outweigh the need for plaintiffs to have their constitutional rights vindicated. This makes sense because the information sought was limited to that related specifically to the violation of plaintiffs' constitutional rights; it is doubtful that such a limited foray into the executive branch could create any discernible chill on White House communications. Moreover, since this case dealt with a former President, the court may have reasonably concluded that releasing past communications would not have had any impact on the current administration. Thus, the court, although using the language of executive privilege, could have conducted the same analysis, and with the same effect, by using the basic limitations on civil discovery.

Cheney v. United States District Court for the District of Columbia.[137] This case did not involve a formal claim of executive privilege, but it did raise executive privilege issues in the context of a civil action against the Vice President. In this case, a public interest organization and environmental group sued the National Energy Policy Development Group (NEPDG) and individual members, including Vice President Cheney, alleging that the NEPDG was subject to disclosure requirements of the Federal Advisory Committee Act[138] (FACA) and failed to comply with those requirements. The defendants moved to dismiss the case on separation of powers (not executive privilege) grounds. The district court granted the motion in part and denied it in part, allowing plaintiffs to engage in civil discovery. In the defendants' appeal, the Vice President argued that, if discovery were required, it could result in a "substantial intrusion on the process by which those in closest operational proximity to the President advise the President."[139] The plaintiffs argued that the court had no power to issue mandamus because the defendants had to assert executive privilege in district court.[140]

The Supreme Court, while asserting that an executive privilege does exist, ruled for the defendants. The Court stated that "a coequal branch of Government" should "afford Presidential confidentiality the greatest protection consistent with the fair administration of justice."[141] The executive branch should be protected from "vexatious litigation that might distract it from the energetic

137. 542 U.S. 367 (2004).
138. 5 U.S.C.A. app. 2 § 2 (West 2009).
139. *Cheney*, 542 U.S. at 381.
140. *Id.* at 380.
141. *Id.* at 382.

performance of its constitutional duties."[142] Even if the defendants did not assert executive privilege, "[a]ccepted mandamus standards are broad enough to allow a court of appeals to prevent a lower court from interfering with a coequal branch's ability to discharge its constitutional responsibilities."[143] The Court, therefore, concluded that the disruption of executive branch activity caused by the discovery would have justified the issuance of mandamus to block the discovery (though the Supreme Court left the decision ultimately to the court of appeals):

> The District Court ordered discovery here, not to remedy known statutory violations, but to ascertain whether FACA's disclosure requirements even apply to NEPDG in the first place. . . . [T]he only consequence from respondents' inability to obtain the discovery they seek is that it would be more difficult for private complainants to vindicate Congress' policy objectives under FACA. . . . [I]t does not follow that a court's Article III authority or Congress' central Article I powers would be impaired.[144]

The Court noted, though, that "all courts should be mindful of the burdens imposed on the Executive Branch in any future proceedings."[145]

The negative executive privilege would have led to the same results. While the Court used the language of executive privilege, the actual considerations it examined (the burden on the executive branch versus the benefit to the requesting party) tracked almost precisely the standards that would have been employed had the Court simply adhered to the language of civil discovery limitations. The Federal Rules of Civil Procedure require courts to consider the relative burdens and benefits of discovery requests in deciding whether they should be sustained over an objection. While courts may differ on how such a test is applied, it does not require an assertion of executive privilege (or, as in *Cheney*, a discussion of separation of powers) in order to conduct such a balancing of interests. In fact, the Court did exactly that in this case: it balanced the burden, as it understood it, on the executive branch versus what it considered to be dubious benefits to the plaintiffs. Thus, a negative executive privilege would have resulted in the same outcome, based on the Court's reasoning, but simply would have used the language of civil discovery, rather than that of an affirmative executive privilege.

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142. *Id.*
143. *Id.*
144. *Id.* at 385.
145. *Id.* at 391.

C. *Cases Involving Congress*[146]

Senate Select Committee on Presidential Campaign Activities v. Nixon.[147] In this case, the U.S. Senate Select Committee on Presidential Campaign Activities sought a declaration from the court that President Nixon had a legal duty to comply with its subpoena *duces tecum* directing him to produce original tapes of five conversations between him and his former counsel, John W. Dean, III. The difference between this case and *United States v. Nixon* was that the latter subpoena was issued in the context of a criminal indictment against individuals other than the President (the President was an unindicted co-conspirator),[148] while in this case a U.S. Senate committee was established to investigate the President directly. The district court, however, dismissed the action, and the committee appealed to the D.C. Circuit Court of Appeals.

As usual, the court reaffirmed its commitment to an executive privilege: "[P]residential conversations are 'presumptively privileged,' even from the limited intrusion represented by in camera examination of the conversations by a court. The presumption can only be overcome by an appropriate showing of public need by the party seeking access to the conversations."[149] The court held that, in this case, the committee "failed to make the requisite showing. . . . [T]he Committee . . . seeks the materials in question in order to resolve particular conflicts in the voluminous testimony it has heard, conflicts relating to 'the extent of malfeasance in the executive branch,' and, most importantly, the possible involvement of the President itself."[150] This was not sufficient because "the Committee's showing must depend solely on whether the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the Committee's functions."[151] The court explained at length that the stated purpose for the information sought was not sufficiently related to the committee's legislative functions:

> The sufficiency of the Committee's showing of need has come to depend, therefore, entirely on whether the subpoenaed materials are critical to the performance of its legislative functions. There is a clear difference between Congress's legislative tasks and the responsibility of a grand jury, or any institution engaged in like functions. While fact-finding by a legislative committee is undeniably a part of its task, *legislative judgments normally depend more on*

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146. One additional case involving Congress, which is not mentioned in this Section, has been mentioned elsewhere in this Note: *Comm. on the Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008). As discussed in the Conclusion, this case—although perhaps not dealing specifically with executive privilege—concludes in a manner entirely consistent with the prescriptions of the negative executive privilege.

147. 498 F.2d 725 (D.C. Cir. 1974).

148. *See* United States v. Nixon, 418 U.S. 683, 687 (1974).

149. *Senate Select Comm*, 498 F.2d at 730.

150. *Id.* at 731.

151. *Id.*

> *the predicted consequences of proposed legislative actions and their political acceptability, than on precise reconstruction of past events*; Congress frequently legislates on the basis of conflicting information provided in its hearings. In contrast, the responsibility of the grand jury turns entirely on its ability to determine whether there is probable cause to believe that certain named individuals did or did not commit specific crimes. If, for example, as in *Nixon v. Sirica*, one of those crimes is perjury concerning the content of certain conversations, the grand jury's need for the most precise evidence, the exact text of oral statements recorded in their original form, is undeniable. We see no comparable need in the legislative process, at least not in the circumstances of this case.[152]

As it turns out, despite the court's flowery discussion of executive privilege as a separate consideration, not only would the court's decision likely have been the same if it had employed a negative executive privilege instead, but the court actually *uses the language* of the negative executive privilege in this discussion. The negative executive privilege would have directed the court to look at the powers of Congress instead of the powers of the executive in determining whether Congress was entitled to the information. As discussed earlier, Congress is only entitled to information sought in a subpoena if it is for a "valid legislative purpose." While reasonable people might disagree about what constitutes a valid legislative purpose, the court decided for itself by saying that "legislative judgments normally depend more on the predicted consequences of proposed legislative actions and their political acceptability, than on precise reconstruction of past events."[153] The court decided that Congress' subpoena, designed to elicit specific information so as to reconstruct precisely the past events surrounding Watergate and President Nixon's role, did not pass muster under the "valid legislative purpose" test. Thus, the court's decision could have been exactly the same, with the same criteria and language, if the court had employed the negative executive privilege.

Other Congressional Cases. In other cases, the courts have attempted to avoid imposing a judicial resolution—or at least to delay such an outcome. For example, in *United States v. AT&T*,[154] a House of Representatives subcommittee issued a subpoena to telephone companies in the course of investigations into warrantless wiretaps. The Justice Department brought an action to enjoin the telephone companies from complying. The court used a flexible approach in handling the situation, involving limited committee access and verification and in camera resolution of disputes. The court made sure to announce, however, that the "simple fact of a conflict between the legislative and executive branches over a congressional subpoena does not preclude judicial resolu-

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152. *Id.* at 732 (emphasis added).
153. *Id.* at 732.
154. 567 F.2d 121 (D.C. Cir. 1977).

tion."[155]

In another example, *United States v. House of Representatives*,[156] the Administrator of the Environmental Protection Agency brought an action under the Declaratory Judgment Act to determine whether executive privilege would allow her to withhold certain documents from the House of Representatives. In this case, the court declined to intervene at all: "Since the controversy which has led to [this case] clearly raises difficult constitutional questions in the context of an intragovernmental dispute, the Court should not address these issues until circumstances indicate that judicial intervention is necessary."[157]

Does negative executive privilege have any bearing on these types of cases? Since in both of these cases the courts restrained themselves from making a final decision on the merits but did not disavow the ability to do so if they chose, these cases are consistent with a negative executive privilege. The negative executive privilege is a way for courts, when they choose to intervene, to make decisions. Courts always have the prerogative to wait until the matters in dispute are ripe for adjudication.

CONCLUSION

In the midst of the morass of executive privilege case law and scholarship, this Note has attempted to clarify the task of courts faced with a dispute involving a subpoena for executive branch communications or deliberations, on the one hand, and a claim of executive privilege, on the other. The basic lesson of this Note is that courts should employ the following, fundamental framework—referred to herein as the "negative executive privilege"—in addressing *all* claims of executive privilege, regardless of whether information is sought in the context of a criminal case, a civil case, or a congressional inquiry: (1) identify the information-gathering powers of the information-seeker and ask whether the requested information falls within the ambit of those powers; (2) if the information-seeker is a civil or criminal court, use normal civil or criminal discovery methods (although be wary of the potential for executive history to be misleading, irrelevant, or—in the civil courts especially—particularly burdensome on the executive branch); and (3) if the information-seeker is Congress, closely scrutinize whether there is a conceivably valid legislative purpose for the information sought. The reason for this suggested approach is simple: there is no convincing reason why a special, affirmative executive privilege should be read into the Constitution. Upon tabling the notion of an affirmative privilege, however, we are left with pre-existing legal principles—both statutory and

155. *Id.* at 126.
156. 556 F. Supp. 150 (D.D.C. 1983).
157. *Id.* at 152.

constitutional—that define the *limits* on the power of the traditional seekers of executive branch information to compel the disclosure of such information. The limits, in turn, define what this Note has called the *negative* executive privilege.

The motivating question behind this inquiry was one case in particular, the contest between the House Committee on the Judiciary, on the one side, and Ms. Miers and Mr. Bolten, on the other. As described in the Introduction, much of the public rhetoric surrounding this matter involved threats by Ms. Miers and Mr. Bolten to employ executive privilege as a defense against any attempt by the Committee to compel them to testify about the U.S. Attorney dismissals of 2007. And yet, in the opinion by Judge Bates in *Committee on the Judiciary v. Miers*, the issue (aside from extraneous issues such as standing, cause of action, justiciability, and discretion) was not executive privilege, per se, but rather a claim of absolute immunity based on the case of *Nixon v. Fitzgerald*.[158] This Note does not dispute the reasoning Judge Bates employed in rejecting the claim of absolute immunity.[159] The *Miers* opinion, however, raises more questions than answers with respect to executive privilege and the dispute as a whole, including whether Ms. Miers and Mr. Bolten attempted to assert executive privilege but mistakenly framed their claim as *Fitzgerald* absolute immunity and whether Judge Bates relied on a line of reasoning that, in his mind, was equivalent to executive privilege analysis. (In other words, does he view the *Harlow* case as existing within the same theoretical framework as *United States v. Nixon* and subsequent cases based explicitly on the theory of executive privilege?) There is reason to believe that the latter was not the case, as Judge Bates explicitly stated that "[t]he specific claims of executive privilege that Ms. Miers and Mr. Bolten may assert are not addressed—and the Court expresses no view on such claims,"[160] and that "Ms. Miers remains able to assert privilege in response to any specific questions or subject matter."[161] Thus, regardless of the reason, Judge Bates's opinion apparently does not address the specific question posed at the outset of this Note—how should a claim of *executive privilege* by Ms. Miers and Mr. Bolten be adjudicated?

If the issue of an executive privilege claim were to be addressed, the recommendation of this Note is that the negative executive privilege be used to adjudicate the specific claim. The first step in the process is to identify the party who seeks information from the executive branch officials. In this case, the seeker is a congressional committee. The second step, since the information seeker in this case is a congressional committee, is to look at the pre-existing legal entitlement of the committee to the information sought. In the case of

158. 457 U.S. 731, 749 (1982).

159. *See supra* text accompanying note 15.

160. Comm. on the Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53, 56 (D.D.C. 2008).

161. *Id.* at 105.

congressional subpoenas, Congress only has an entitlement to information "on which legislation could be had" and if Congress "would be materially aided by the information which the investigation was calculated to elicit."[162] If this standard, expressed by the Court in 1927 and never challenged, has any meaning, then an adjudicating court should not simply sit idly and accept that Congress can demand information from anyone at anytime for any reason and obtain total deference from the courts in assuming that the request has some legitimate legislative purpose. Instead, a court should in good faith ask the question (if an executive privilege claim is raised) whether there is, *in fact*, any legislative purpose for the inquiry and whether Congress would, *in fact*, be aided to such an end by eliciting the requested information.

Under this framework, the question in the U.S. Attorney matter is whether Congress, in fact, had a legitimate legislative purpose for subpoenaing Ms. Miers and Mr. Bolten and whether their testimony would actually be helpful to that end. Ms. Miers and Mr. Bolton could make at least two arguments in this case. First, they could argue that an investigation with no objective beyond uncovering factual information serves no legitimate legislative purpose, in line with *Senate Select Committee on Presidential Campaign Activities v. Nixon*.[163] Second, they could argue that there is no clear legislative purpose in mind; the goal is simply to elicit embarrassing information for political purposes, and, even if there were legitimate legislative purposes, the danger of misuse and abuse far outweigh any purposes that might exist.

On the other hand, Congress could make a compelling argument for why, despite the dangers of executive history, the disclosure of the requested information would serve a specific legislative purpose.[164] The statute regarding the hiring and firing of U.S. Attorneys, as it currently exists, states that "[e]ach United States attorney is subject to removal by the President."[165] The law does not provide any conditions, suggesting that the President can simply remove the U.S. Attorney at will for any reason or no reason at all.[166] Congress could legitimately argue that it is considering amending this open-ended provision, and the only way to know for sure if there is a problem is to examine the *reasons* for White House decisions to fire U.S. Attorneys. This would require deliberations and communications on the subject. If Congress found that *political* rea-

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162. McGrain v. Daugherty, 273 U.S. 135, 177 (1927).

163. 498 F.2d 725 (D.C. Cir. 1974); *see supra* Part III.C.

164. As of the writing of this Note, however, it is not clear that Congress has adopted any of the following arguments as its specific rationale for the inquiry.

165. 28 U.S.C. § 541(c) (2006).

166. *See, e.g.*, Frank Bowman, *He's Impeachable, You Know*, N.Y. TIMES, May 3, 2007, at A23, *available at* http://www.nytimes.com/2007/05/03/opinion/03bowman.html ("United States attorneys . . . serve at the pleasure of the president. As a constitutional matter, the president is at perfect liberty to fire all or some of them whenever it suits him.").

sons were behind the spate of firings, Congress could legitimately decide to pass a "good cause" provision or other limitations to 28 U.S.C. § 541(c).

Apparently, Congress has a substantial basis for making this very argument. According to the Contempt Report, the Committee on the Judiciary issued the subpoenas to Ms. Miers and Mr. Bolten in order to

> (1) investigat[e] and expos[e] any possible malfeasance, abuse of authority, or violation of existing laws on the part of the Executive Branch related to these concerns, and (2) consider[] whether the conduct uncovered may warrant additions or modifications to existing Federal Law, such as more clearly prohibiting the kinds of improper political interference with prosecutorial decisions as have been alleged here.[167]

Assuming that at least the second purported reason in this report is a legitimate legislative purpose—although one could always devise an argument that it is not—it is probable that the negative executive privilege would not shield Ms. Miers and Mr. Bolten in this case from having to testify before the committee. Thus, whether his opinion was based on executive privilege or not, Judge Bates seems to have been correct in his following summation of the rationale for denying Mr. Bolten's and Ms. Miers's assertion of immunity:

> Congress . . . is acting pursuant to a legitimate use of its investigative authority. Notwithstanding its best efforts, the Committee has been unable to discover the underlying causes of the forced terminations of the U.S. Attorneys. The Committee has legitimate reasons to believe that Ms. Miers's testimony can remedy that deficiency. There is no evidence that the Committee is merely seeking to harass Ms. Miers by calling her to testify.[168]

Judge Bates's statement that "Ms. Miers remains able to assert privilege in response to any specific question or subject matter"[169] also makes sense because, although there is no apparent basis for asserting privilege, if the committee were to veer away from its valid legislative purposes and, for example, start questioning Ms. Miers about unrelated personal matters, it would be outside the rationale for the inquiry in the first place and therefore protected by the negative executive privilege.

The foregoing process of employing the negative executive privilege is valuable because it flows reasonably from logic, the Constitution, and preexisting legal principles. In addition, two policy rationales provide support for the use of the negative executive privilege, over airy balancing tests: the process functions as a way to protect the rule of law and democratic values, to the extent that they relate to the flow of information from the executive branch to Congress and the courts. Thus, for jurists on the fence about going against

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167. Comm. on the Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53, 58 (D.D.C. 2008) (alterations in original).

168. *Id.* at 105.

169. *Id.*

the amorphous grain of the language in *Nixon v. United States*, these policy rationales may provide a sufficient impetus for moving forward with the more sensible negative executive privilege.

First, the negative executive privilege protects rule-of-law values. "Although the 'rule of law' is a protean concept, one prominent strand is the idea that the rule of law requires fair public notice of legal requirements."[170] Under the prevailing approach to executive privilege jurisprudence, courts have spoken grandly of an affirmative executive privilege rooted in the Constitution and yet, simultaneously, have asserted that it should be applied in the form of vague balancing tests without clear guidelines, while deciding such cases in ways that fall well short of detailing the true, underlying values at play. The process described in this Note provides much clearer notice to prospective executive privilege litigants. The negative executive privilege helps potential litigants to understand the legal principles and sources that courts will use to make executive privilege decisions. It also avoids muddying the waters of the Constitution by creating concepts that are clearly not present in the document's text or structure. The concept of executive history, furthermore, helps to emphasize—in the context of congressional investigations—the heightened burden on the plaintiff to prove its entitlement to executive branch communications and deliberations—further clarifying the legal principles at play. The principles related to interbranch conflict and overlapping powers, while not providing clear answers to litigants, at least reduce the judicial veil of secrecy in such cases and offer parties the opportunity to frame better arguments and better understand the consequences of a judicial decision.

Second, the negative executive privilege protects the ideals of a democratic government. The U.S. government is structured in such a way that the laws are ultimately traceable, though in various ways, to the will of the people.[171] The persistence of the Constitution implies that a sufficient number of citizens support it in its current state—which, as discussed earlier, does *not* include special provisions for affirmative executive privilege. At the same time, citizens, through their representatives, have *not* called for a codification of executive privilege or any other law that creates a special power in the executive, beyond the existing legal framework, to withhold its communications and deliberations

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170. Adrian Vermeule, *Judicial History*, 108 YALE L.J. 1311, 1345 (1999); *see also id.* at 1345 n.134 ("All laws should be prospective, open, and clear . . . . The law must be open and adequately publicized. If it is to guide people they must be able to find out what it is.") (alterations in original) (quoting JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 214 (1979)).

171. *See, e.g.*, STEPHEN G. BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 5 (2005) ("[C]ourts should take greater account of the Constitution's democratic nature when they interpret constitutional and statutory texts."). Breyer argues, in light of the Constitution's democratic nature, for "judicial modesty": "The judge, compared to the legislator, lacks relevant expertise." *Id.*

from subpoenas for its disclosure. Thus, the American people have, at least tacitly, made a judgment that the executive branch is *not* above the law simply because of its unique position as the branch with the responsibility to implement the nation's laws. The concepts of negative executive privilege, executive history, and overlapping powers fit executive privilege firmly within established legal principles, generated through democratic institutions, and place the executive branch, as well as Congress, where the American people apparently want them: without any special privileges with respect to internal communications and deliberations but with a *negative* privilege, like everyone else.