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PRESIDENTIAL ADVISORS AND THEIR MOST UNPRESIDENTIAL ACTIVITIES: WHY EXECUTIVE PRIVILEGE CANNOT SHIELD WHITE HOUSE INFORMATION IN THE U.S. ATTORNEY FIRINGS CONTROVERSY

Abstract: On March 10, 2008, the House Judiciary Committee sued White House Chief of Staff Joshua Bolten and former White House Counsel Harriet Miers seeking to overcome White House claims of executive privilege in the committee's investigation of the 2006 U.S. attorney firings. Since the U.S. Supreme Court first recognized the executive privilege over thirty years ago in *United States v. Nixon*, it has remained controversial and unclearly defined. In an attempt to clarify the relevant principles that the courts should apply to the recent House lawsuit, this Note examines executive privilege jurisprudence from the Nixon cases to recent opinions of the U.S. Court of Appeals for the District of Columbia Circuit. It concludes that executive privilege, which is intended to protect the public interest, must never stray far from the Executive in whose name it is invoked. Thus, because the White House has maintained that President Bush was not involved in the U.S. attorney purge, the privilege must fail.

INTRODUCTION

Executive privilege has long been a contentious doctrine,¹ and, given that its recognition by the U.S. Supreme Court during the Nixon years will forever be tied to the abuses of that administration, it may be destined to remain a black sheep amongst presidential powers.² Subsequent Presidents have done little to remove the tarnish on executive privilege.³ President Bill Clinton was the first President since Nixon to make a truly demonstrative attempt to revive executive privilege, but, like Nixon before him, Clinton invoked the privilege in an attempt to

¹ Executive privilege has been defined as "a claim by the President of a constitutional right to withhold information from Congress, the courts, or persons or agencies empowered by Congress to seek information." Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489, 491-92 (2007).

² See generally *United States v. Nixon*, 418 U.S. 683 (1974) (addressing the constitutionality of executive privilege for the first time).

³ MARK J. ROZELL, *EXECUTIVE PRIVILEGE: PRESIDENTIAL POWER, SECRECY, AND ACCOUNTABILITY* 72 (rev. 2d ed., Univ. Press of Kan. 2002) (1994).

hide personal wrongdoing.⁴ President George W. Bush has used executive privilege to expand executive power more generally, at the expense of Congress's powers and the public's access to government information.⁵

Executive privilege received renewed criticism when the Bush administration used it to block congressional investigations into the forced resignation of at least nine U.S. attorneys in late 2006.⁶ After the Bush administration invoked the privilege to block the investigations, the House Committee on the Judiciary filed a lawsuit against former White House Counsel Harriet Miers and White House Chief of Staff Joshua Bolten, both of whom had defied subpoenas ordering them to appear before the committee.⁷ The suit is the first executive privilege battle between Congress and the President to hit the courts in twenty-five years.⁸

The controversy began when, under powers granted by a little-known provision in the USA PATRIOT Act, then-Attorney General Alberto Gonzalez removed the attorneys and appointed interim replacements without presidential nomination or Senate confirmation.⁹ When the dismissals came to light amidst allegations that the firings were politically motivated, both the House and Senate Judiciary Committees,

⁴ See *id.* at 122.

⁵ See *id.*

⁶ See, e.g., Robert Barnes & Dan Eggen, *Hill Panel Initiates Contempt Charges Against Miers*, WASH. POST, July 13, 2007, at A3; Dan Eggen, *Justice Department Fires 8th U.S. Attorney*, WASH. POST, Feb. 24, 2007, at A2; Dan Eggen, *U.S. Attorney Firings Set Stage for Congressional Battle*, WASH. POST, Feb. 4, 2007, at A7 [hereinafter Eggen, *Congressional Battle*]; Paul Kane, *West Wing Aides Cited for Contempt*, WASH. POST, Feb. 15, 2008, at A4.

⁷ See Complaint for Declaratory and Injunctive Relief at 1, Comm. on the Judiciary v. Miers, No. 08-cv-00409 (D.D.C. Mar. 10, 2008), available at <http://judiciary.house.gov/Media/PDFS/ContemptComplaint080310.pdf>; William Branigin, *House Panel Sues to Force Bush Aides to Table*, WASH. POST, Mar. 11, 2008, at A3.

⁸ See generally *United States v. House of Representatives*, 556 F. Supp. 150 (D.D.C. 1983) (dealing with an executive privilege dispute between Congress and the executive branch most recently, outside of the present discussion).

⁹ See H.R. REP. NO. 110-423, at 55-56 (2007), available at <http://purl.access.gpo.gov/GPO/LPS90292>; Eggen, *Congressional Battle*, *supra* note 6. Prior to the 2005 reauthorization of the PATRIOT Act, the Attorney General had the authority to appoint an interim U.S. attorney for up to 120 days. See H.R. REP. NO. 110-423, at 56. Upon expiration of this 120-day period, the district court could appoint the same or a different individual to serve in the position until the Senate confirmed a permanent replacement. See *id.* The PATRIOT Act altered this process by removing the 120-day limit on interim appointments and the provisions requiring court involvement, giving the Attorney General unreviewable power to make interim appointments of unlimited duration. See *id.* This essentially gave the Attorney General greater appointment power than the President, whose nominations require Senate confirmation. See U.S. CONST. art. II, § 2, cl. 2.

pursuant to their legislative and oversight authority, opened investigations.¹⁰ During subpoenaed testimony before Congress, many of the dismissed attorneys testified that Department of Justice ("DOJ") officials and Republican lawmakers pressured and threatened them regarding corruption investigations of Democratic politicians, actions that may have constituted obstruction of justice and unlawful politically-motivated retaliation.¹¹ The controversy ultimately led to the resignation of Attorney General Gonzales.¹² The White House maintained that President Bush was neither involved in, nor aware of, the removal process.¹³

During Congress's investigations, both the Senate and House Judiciary Committees issued subpoenas directed at numerous White House officials, including Miers, Bolten, and then-Deputy White House Chief of Staff Karl Rove.¹⁴ In response, the White House asserted executive privilege, citing the President's need to receive candid advice from his staff without the chilling effect that fear of public scrutiny could produce.¹⁵ Miers and Rove failed to appear as directed by the subpoenas, and Bolten refused to turn over subpoenaed documents.¹⁶ After

¹⁰ See H.R. Doc. No. 109-157, R. X(1)(k), at 454 (2007); *id.* R. X(2), at 479; S. Doc. No. 110-9, R. XXV(1)(m), at 25 (2007); Eggen, *Congressional Battle*, *supra* note 6.

¹¹ See Dan Eggen & Paul Kane, *Prosecutors Say They Felt Pressured, Threatened*, WASH. POST, Mar. 7, 2007, at A1. A removal intended to influence a politically sensitive prosecution could amount to obstruction of justice. See 18 U.S.C. §§ 1503, 1505 (2000 & Supp. IV 2004); 18 U.S.C.A. § 1512(c)(2) (West Supp. 2007); see also H.R. REP. NO. 110-423, at 26, 28. Further, if any attorney was removed to influence the outcome of elections, or in retaliation for failing to bring politically charged prosecutions that lacked a good faith legal or factual basis, such actions could violate civil and criminal portions of the Hatch Act. See 5 U.S.C. § 7323(a)(1) (2000 & Supp. IV 2004) (prohibiting a federal employee from "us[ing] his official authority or influence for the purpose of interfering with or affecting the result of an election"); 18 U.S.C. § 606 (2000) (forbidding a federal employee from "discharg[ing] . . . any other officer or employee . . . for giving or withholding or neglecting to make any contribution of money or other valuable thing for any political purpose"); see also H.R. REP. NO. 110-423, at 26, 28.

¹² Dan Eggen & Michelle A. Fletcher, *Embattled Gonzales Resigns*, WASH. POST, Aug. 28, 2007, at A1.

¹³ See H.R. REP. NO. 110-423, at 55-56, 69-70.

¹⁴ Paul Kane, *Senate Panel Approves Subpoenas for 3 Top Bush Aides*, WASH. POST, Mar. 23, 2007, at A4; Jonathan Weisman & Paul Kane, *House Panel Authorizes Subpoenas of Officials*, WASH. POST, Mar. 22, 2007, at A1.

¹⁵ H.R. REP. NO. 110-423, at 5; Letter from Fred Fielding, Counsel to the President, to Senator Patrick Leahy, Chairman, Senate Comm. on the Judiciary & Senator Arlen Specter, Ranking Member, Senate Comm. on the Judiciary (Aug. 1, 2007) [hereinafter Letter from Fred Fielding], available at <http://leahy.senate.gov/press/200708/07-08-01%20white%20house%20rove.pdf>.

¹⁶ H.R. REP. NO. 110-423, at 6; David Stout, *Senate Panel Votes to Cite 2 Bush Aides*, N.Y. TIMES, Dec. 14, 2007, at A36.

months of legal wrangling, the House of Representatives voted 223 to 32 to hold Miers and Bolten in contempt of Congress for failure to appear before the House Judiciary Committee.¹⁷ The Senate Judiciary Committee likewise found Rove and Bolten in contempt.¹⁸

Upon passage of the House contempt citations, House Speaker Nancy Pelosi referred the citations to the DOJ in accordance with the contempt of Congress statute and requested a grand jury investigation.¹⁹ As anticipated, newly appointed Attorney General Michael Mukasey declared that the DOJ would not pursue a grand jury investigation, as, in his opinion, the officials had committed no crime.²⁰ As a result, on March 10, 2008, the House Judiciary Committee filed a civil suit in the U.S. District Court for the District of Columbia, seeking an order that Miers and Bolten comply with the subpoenas.²¹ In light of the House lawsuit, Congress and the executive branch seem unlikely to reach the sort of compromise that typically resolves such disputes.²²

¹⁷ See Kane, *supra* note 6.

¹⁸ See Stout, *supra* note 16. The Senate resolution has yet to receive a full floor vote. See Kane, *supra* note 6.

¹⁹ See Pelosi Urges Probe into Bush Aides' Refusals, WASH. POST, Feb. 29, 2008, at A2. By law, a vote to issue a contempt citation must be taken by the full house whose committee issued the original subpoena. See 2 U.S.C. §§ 192, 194 (2000). The Speaker of the House or Senate President then certifies the citation to the U.S. Attorney for the District of Columbia, who is charged with bringing the citation before a grand jury. See *id.*; see also MORTON ROSENBERG & TODD B. TATELMAN, CONG. RESEARCH SERV., CONGRESS'S CONTEMPT POWER: LAW, HISTORY, PRACTICE, AND PROCEDURE 23–24 (2007).

²⁰ See Dan Eggen, Mukasey Refuses to Prosecute Bush Aides, WASH. POST, Mar. 1, 2008, at A2. In 1984, the Office of Legal Counsel at the DOJ opined that Congress could not compel the DOJ to prosecute an executive branch official who has claimed executive privilege to resist a congressional subpoena, as such compelled prosecution would violate the separation of powers. See 8 Op. Off. Legal Couns. 101, 128 (1984). The Attorney General referred to this opinion in support of his decision. See Eggen, *supra*.

²¹ See Branigin, *supra* note 7. Anticipating the DOJ's refusal to pursue criminal contempt, the House contempt resolution also authorized the House general counsel to file a civil suit to compel disclosure. See Kane, *supra* note 6; see also ROSENBERG & TATELMAN, *supra* note 19, at 37–46. The Senate also has a civil contempt statute at its disposal. See ROSENBERG & TATELMAN, *supra* note 19, at 33–37. In addition, Congress could have used its "inherent contempt" power to order the Sergeant-at-Arms of the House to arrest the offending officials in advance of holding its own contempt trial. See *id.* at 12–20. The imprisoned officials would likely then petition for writs of habeas corpus, forcing the court to rule on the executive privilege claims in the process. See RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 312 (1974). The procedure, however, has not been used since 1934, and Democratic leaders have not displayed eagerness to revive the practice. See Dan Eggen & Amy Goldstein, Broader Privilege Claimed in Firings, WASH. POST, July 20, 2007, at A1.

²² Barnes & Eggen, *supra* note 6. According to the Congressional Research Service, Congress has cited ten high-level executive branch officials for contempt of Congress since 1975. Weisman & Kane, *supra* note 14. In all cases, the executive branch has turned over all or part of the subpoenaed information before criminal contempt proceedings began. *Id.*

Thus, the courtroom stage has been set for another constitutional showdown between the legislative and executive branches.²³

In the more than three decades since the U.S. Supreme Court first recognized a constitutional basis for executive privilege in the 1974 case of *United States v. Nixon*, the Court has not further defined the scope of the privilege, instead leaving that task to the U.S. Court of Appeals for the District of Columbia Circuit and the U.S. District Court for the District of Columbia.²⁴ In that time, only three cases have involved executive branch information disputes with Congress,²⁵ and only one of those resulted in a ruling on the merits.²⁶ As a result, large holes remain in executive privilege jurisprudence, particularly with regard to conflicts between the legislative and executive branches.²⁷ Despite these gaps, however, the courts have decided other cases that help clarify certain questions that *Nixon* left unanswered.²⁸ These cases help articulate the standards that the courts should apply to the executive privilege claims in the U.S. attorney firings controversy.²⁹

This Note examines existing executive privilege jurisprudence, focusing on the efforts of the D.C. courts to articulate more fully the contours of the privilege.³⁰ Though the Supreme Court in *Nixon* expressly limited its holding to the context of a criminal trial subpoena,³¹

Only once, in the case of Environmental Protection Administration head Anne Gorsuch, did such a conflict reach the courtroom, and in that instance the court held that the executive privilege claim was not properly before the court, as Gorsuch had filed for declaratory relief and was not yet a defendant in a criminal contempt proceeding. See *House of Representatives*, 556 F. Supp. at 153.

²³ See Branigin, *supra* note 7.

²⁴ See MORTON ROSENBERG, CONG. RESEARCH SERV., PRESIDENTIAL CLAIMS OF EXECUTIVE PRIVILEGE: HISTORY, LAW, PRACTICE AND RECENT DEVELOPMENTS 2 (2007).

²⁵ See generally *United States v. AT&T (AT&T I)*, 551 F.2d 384 (D.C. Cir. 1976), *appeal on remand*, 567 F.2d 121 (D.C. Cir. 1977); Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974); *House of Representatives*, 556 F. Supp. at 150.

²⁶ See *Senate Select Comm.*, 498 F.2d at 733; see also ROSENBERG, *supra* note 24, at 1.

²⁷ See, e.g., *In re Sealed Case (Espy)*, 121 F.3d 729, 753 (D.C. Cir. 1997) (refusing to rule on the proper balance between conflicting information needs of Congress and the President).

²⁸ See Peter M. Shane, *Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims Against Congress*, 71 MINN. L. REV. 461, 471-77 (1987) (drawing on post-*Nixon* cases to develop an executive privilege doctrine applicable to Congress). These questions include how far from the President executive privilege extends and the degree of need necessary to overcome the privilege is. See *Espy*, 121 F.3d at 742.

²⁹ See Kitrosser, *supra* note 1, at 501 (noting that, despite the Supreme Court's caution that *Nixon* does not concern disputes with Congress, courts have applied its framework in other contexts); Shane, *supra* note 28, at 471-77; see also *Judicial Watch v. Dep't of Justice*, 365 F.3d 1108, 1112-24 (D.C. Cir. 2004); *Espy*, 121 F.3d at 742-57.

³⁰ See *infra* notes 73-211 and accompanying text.

³¹ See 418 U.S. at 712 n.19.

courts have applied its reasoning, and that of other Nixon-era executive privilege cases, to a range of information disputes with the executive branch.³² These cases offer insight into how the courts should rule in the U.S. attorney dispute.³³ This Note draws on those precedents to argue that the claims of executive privilege asserted by the White House in response to the congressional subpoenas must fail, primarily because the President was never involved in, nor advised of, the plan to remove the attorneys.³⁴ The Note suggests, however, that the courts may deem the conflict not yet ripe for adjudication and may order further negotiation before ruling on the claims of privilege.³⁵

Part I briefly surveys the history of executive privilege from the time of President Washington to the Nixon era.³⁶ Part II examines the essential elements of the doctrine, drawing on the Nixon cases and their progeny to articulate the standards that should apply to the present controversy.³⁷ Part III applies these standards to the House and Senate Judiciary Committee subpoenas in the U.S. attorney investigation and concludes that the claims of privilege should fail, while noting that a court might pass on the issue in favor of further negotiation.³⁸

I. EXECUTIVE PRIVILEGE: A BRIEF HISTORY

Although the term executive privilege was not used until 1954, Presidents have exercised a right to withhold sensitive information throughout American history.³⁹ As explored below, George Washington withheld information from Congress on three occasions, claiming the need to protect the national interest.⁴⁰ Later Presidents invoked this

³² See Kitrosser, *supra* note 1, at 501; Shane, *supra* note 28, at 471. See generally *Judicial Watch*, 365 F.3d 1108 (Freedom of Information Act suit); *Espy*, 121 F.3d 729 (grand jury subpoena); *AT&T I*, 551 F.2d 384 (congressional subpoena); *In re Grand Jury Proceedings*, 5 F. Supp. 2d 21 (D.D.C. 1998) (grand jury subpoena); *House of Representatives*, 556 F. Supp. 150 (congressional subpoena).

³³ See Kitrosser, *supra* note 1, at 501; Shane, *supra* note 28, at 471-77. Though only Miers and Bolten are named in the House lawsuit, this Note's analysis applies equally to Rove, a close presidential advisor who served in the Office of the President. See *infra* notes 235-241 and accompanying text. In light of the Senate Judiciary Committee's recent contempt vote against Rove (and the possibility of a similar suit by the Senate), the Note includes Rove in its discussion of the executive privilege claims. See Stout, *supra* note 16.

³⁴ See *infra* notes 212-317 and accompanying text.

³⁵ See *infra* notes 318-328 and accompanying text.

³⁶ See *infra* notes 39-72 and accompanying text.

³⁷ See *infra* notes 73-211 and accompanying text.

³⁸ See *infra* notes 212-328 and accompanying text.

³⁹ See ROZELL, *supra* note 3, at 28; see also *infra* notes 43-72 and accompanying text.

⁴⁰ See *infra* notes 43-60 and accompanying text.

rationale by arguing that confidentiality promotes candor necessary to the public interest in informed presidential decision making.⁴¹ Presidents continue to articulate this logic as the primary justification for the privilege to withhold presidential communications.⁴²

A. Washington as a Model for Future Presidents

Critics of executive privilege often point out that it appears nowhere in the text of the Constitution and is contrary to the democratic ideal of open government.⁴³ Despite the strength of these arguments, in 1974, the U.S. Supreme Court, in *United States v. Nixon*, held that the privilege is implicit in the President's Article II powers and in the Constitution's separation of powers scheme.⁴⁴ The Court's reasoning echoes arguments used to justify the earliest claims of executive privilege: those made by George Washington.⁴⁵

The first American President was acutely aware that his actions would have great precedential value for future executives.⁴⁶ Records of three recorded disputes offer insight into Washington's views on the President's power to withhold information from Congress.⁴⁷ Although scholars accord different weight to the significance of these events, Washington clearly believed that his constitutional duties required him to withhold presidential information when disclosure would harm the national interest.⁴⁸

Washington's first dispute with Congress over access to executive branch information arose during a congressional investigation into the St. Clair incident, a failed military expedition in 1791.⁴⁹ Upon receiving Congress's request for information, Washington's cabinet counseled him that he should withhold sensitive information if disclosure would harm the public good.⁵⁰ Though Washington eventually complied with Congress's request, the incident illustrates the Founding Fathers' belief

⁴¹ See *infra* notes 61–72 and accompanying text.

⁴² See *United States v. Nixon*, 418 U.S. 683, 705 (1974); Kitrosser, *supra* note 1, at 500.

⁴³ See ROZELL, *supra* note 3, at 7, 12–15; Raoul Berger, *Executive Privilege: A Presidential Pillar Without Constitutional Support*, 26 VILL. L. REV. 405, 405 (1981).

⁴⁴ See 418 U.S. at 705–06, 708.

⁴⁵ See ROZELL, *supra* note 3, at 29–32; Randall K. Miller, *Congressional Inquests: Suffocating the Constitutional Prerogative of Executive Privilege*, 81 MINN. L. REV. 631, 632 (1997).

⁴⁶ See ROZELL, *supra* note 3, at 28.

⁴⁷ See *id.* at 29–32; Saikrishna Bangalore Prakash, *A Critical Comment on the Constitutionality of Executive Privilege*, 83 MINN. L. REV. 1143, 1177–84 (1999).

⁴⁸ See ROZELL, *supra* note 3, at 29–32.

⁴⁹ See *id.* at 29.

⁵⁰ *Id.*

that the Executive could withhold information, but only insofar as withholding served the public interest.⁵¹

Washington relied on the public interest rationale several years later in responding to Senate requests for certain correspondence between the President, the Secretary of State, and France.⁵² The President's cabinet was divided between those who advised against any disclosure, and those who suggested that he disclose redacted copies of the communications.⁵³ Washington chose the latter course and informed the Senate that he was withholding some information "for public considerations."⁵⁴ The Senate never challenged him.⁵⁵

In a third incident, Washington withheld information from a House investigation into the negotiation of the Jay Treaty, a 1794 agreement with Great Britain that settled many outstanding issues from the Revolutionary War.⁵⁶ Washington argued that the House had no right to such information, as the Constitution excluded the House from treaty making.⁵⁷ He also repeated his prior assertion that he could withhold information in the public interest and fixed his refusal in the doctrine of separation of powers.⁵⁸

These examples reveal that Washington had a firm, though somewhat vague conception of executive privilege as a tool necessary to protect the "national" or "public" interest.⁵⁹ Future Presidents more clearly articulated what that interest demands.⁶⁰

⁵¹ See *id.* at 29-30. Some see Washington's concession as undercutting the incident's value as a precedent for executive privilege. See BERGER, *supra* note 21, at 167-68. Others, however, argue that Washington's ultimate compliance with Congress's request may signal nothing more than his conclusion that disclosure would not harm the national interest and was necessary to exonerate General St. Clair. See ROZELL, *supra* note 3, at 29. It does not necessarily detract from Washington's belief in the presidential prerogative to withhold information. See *id.*

⁵² ROZELL, *supra* note 3, at 30-31.

⁵³ See *id.* at 30.

⁵⁴ *Id.* at 30-31.

⁵⁵ *Id.* at 31.

⁵⁶ *Id.*

⁵⁷ ROZELL, *supra* note 3, at 31.

⁵⁸ See *id.* at 31-32. Washington's treaty-making argument is somewhat shortsighted, as it overlooks the fact that the House's appropriation power gives it a role in treaty implementation. See U.S. CONST. art. I, § 9, cl. 7.

⁵⁹ See ROZELL, *supra* note 3, at 29-32. Importantly, the national interest did not require protecting the President from embarrassing or politically damaging information. See *id.* at 30.

⁶⁰ See *id.* at 32-42. Throughout the remainder of the eighteenth, nineteenth, and early twentieth centuries, Presidents continued to invoke the right to withhold information from Congress. See *id.* at 32-39. Presidents most frequently justified nondisclosure on the grounds that releasing certain information would harm the public interest, although occasionally the President would elaborate more fully, claiming the need to protect diplomats

B. *The Twentieth Century: Presidential Overreaching Sets the Stage for Judicial Intervention*

The term "executive privilege" first arose during the Eisenhower administration and gained prominence in a memorandum by Deputy Attorney General William P. Rogers, who wrote to defend President Eisenhower's decision to order certain Department of Defense officials not to testify at the Army-McCarthy hearings.⁶¹ At this time, the "candid interchange" doctrine took center stage in the executive privilege debate as a justification for presidential secrecy.⁶² Eisenhower argued that the President needs blunt, candid advice from his advisors to fulfill his constitutional duties responsibly and that the threat of compelled disclosure before Congress would have a chilling effect on the candor of this advice.⁶³ Connecting the need for candid advice with the familiar "public interest" rationale, Eisenhower maintained that the resulting impact on the quality of presidential decision making would ultimately harm the public interest.⁶⁴

Executive privilege received its most widespread criticism under President Richard Nixon, and the power has never quite recovered from the abuses of the Nixon administration.⁶⁵ Nixon claimed that executive privilege was absolute and that judicial or congressional review of a President's assertion of privilege violated the separation of powers.⁶⁶ Nixon also argued that the President may assert executive privilege over the executive branch generally, essentially extending the privilege to the entire federal bureaucracy.⁶⁷

abroad and to preserve the secrecy of pending negotiations, the right to maintain confidences within the executive branch, the Executive's exclusive province over a particular competency, the need to protect national security and military secrets, or the President's duty to honor promises of secrecy made to foreign nations. *See id.*

⁶¹ BERGER, *supra* note 21, at 1–2 & n.3, 234–35; ROZELL, *supra* note 3, at 39.

⁶² *See* ROZELL, *supra* note 3, at 39.

⁶³ *See* BERGER, *supra* note 21, at 234; ROZELL, *supra* note 3, at 39. Critics have argued that this logic, accepted by the Supreme Court in *United States v. Nixon*, is, at best, an untested assumption. *See* BERGER, *supra* note 21, at 240; Bruce Fein, *Executive Nonsense*, SLATE, July 11, 2007, <http://www.slate.com/id/2170247>. For example, one of the fiercest critics of executive privilege noted that the government seemed to function just fine without it for nearly two hundred years. *See* BERGER, *supra* note 21, at 240.

⁶⁴ *See* ROZELL, *supra* note 3, at 39.

⁶⁵ *See id.* at 54.

⁶⁶ *See Nixon*, 418 U.S. at 703, 706; ROZELL, *supra* note 3, at 63–64. Nixon later argued that presidential power is generally unlimited and that "when the president does it, that means it is not illegal." *See* ROZELL, *supra* note 3, at 63.

⁶⁷ ROZELL, *supra* note 3, at 65–66. Nixon also claimed that executive privilege could be used to defy a congressional subpoena during impeachment proceedings. *See id.*

Nixon repeatedly maintained that he invoked executive privilege to protect the institution of the presidency and, by extension, the public interest—not himself, personally.⁶⁸ He claimed, as had Eisenhower, that if confidential White House deliberations were susceptible to compelled disclosure, presidential advisors would temper their candor, eroding the quality of advice essential to informed presidential decision making.⁶⁹ Nixon also argued that executive privilege was necessary to protect national security.⁷⁰ Despite his belief that the courts had no jurisdiction to review the President's use of executive privilege, the judicial branch refereed executive privilege disputes under Nixon on four occasions.⁷¹ These decisions, and those that followed, form the basis of the legal standards that should apply to the U.S. attorney firings controversy.⁷²

II. NOT SO ELEMENTARY: THE ELEMENTS OF EXECUTIVE PRIVILEGE

Though executive privilege battles rarely make their way to the courtroom, existing case law delineates the basic contours of the doctrine.⁷³ The privilege over presidential communications is constitutional and presumptive, but not absolute.⁷⁴ Executive privilege extends to the President and to his immediate advisors who share significant responsibility in presidential decision making, as well as to their staff.⁷⁵ It covers communications between the President and his advisors, as well as any materials solicited and received by such advisors to advise the President.⁷⁶ The privilege does not, however, extend to matters that do not call for direct decision making by the President.⁷⁷ As a qualified privilege, executive privilege can be overcome by a sufficient showing of need, based on a balancing of interests.⁷⁸ Recently, however, the courts have been reluctant to rule on executive privilege disputes between

⁶⁸ See *id.* at 66–68.

⁶⁹ See *id.*

⁷⁰ See *id.* at 68–69.

⁷¹ See generally *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425 (1977); *Nixon*, 418 U.S. 683; *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974); *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973).

⁷² See Kitrosser, *supra* note 1, at 501; Shane, *supra* note 28, at 471–77.

⁷³ See Kitrosser, *supra* note 1, at 501; Shane, *supra* note 28, at 471–77.

⁷⁴ See *infra* notes 83–100 and accompanying text.

⁷⁵ See *infra* notes 101–130 and accompanying text.

⁷⁶ See *infra* notes 131–143 and accompanying text.

⁷⁷ See *In re Sealed Case (Espy)*, 121 F.3d 729, 752 (D.C. Cir. 1997).

⁷⁸ See *infra* notes 144–193 and accompanying text; see also Kitrosser, *supra* note 1, at 502.

Congress and the President and have encouraged compromise between the parties rather than ruling on the merits.⁷⁹

A. Forms of the Privilege

Scholars and political figures have used the term "executive privilege" rather loosely; as a result, it is difficult to define which government privileges the term actually includes.⁸⁰ Even the U.S. Court of Appeals for the District of Columbia Circuit, in its 1997 ruling in *In re Sealed Case (Espy)*, suggested that the executive privilege includes a wide array of privileges, including the right to withhold documents that might reveal military or state secrets, the right to absolute presidential immunity from civil liability for official acts, and the right to avoid judicial compulsion to perform discretionary acts.⁸¹ Despite this confusion, executive privilege has come to refer primarily to the privilege that the U.S. Supreme Court sanctioned in 1974, in *United States v. Nixon*: the privilege concerning the confidentiality of presidential communications.⁸²

⁷⁹ See *infra* notes 194–211 and accompanying text; see also Kitrosser, *supra* note 1, at 502.

⁸⁰ See 26A CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE § 5673, at 13 (1992).

⁸¹ See 121 F.3d at 736–37. One author lamented the failure of scholars to distinguish between presidential privileges that can be asserted against the judiciary and those that can be used against Congress. See Gerald Wetlaufer, *Justifying Secrecy: An Objection to the General Deliberative Privilege*, 65 IND. L.J. 845, 845 n.3 (1990). He nonetheless proceeded to group twelve different privileges under a list of those available to "the federal executive." See *id.*

⁸² See 418 U.S. 683, 705–06 (1974); 26 WRIGHT & GRAHAM, *supra* note 80, § 5662, at 490 n.3 (acknowledging that executive privilege refers primarily to the presidential communications privilege); see also Kitrosser, *supra* note 1, at 492 n.6. Courts often see the deliberative process privilege as a form of executive privilege. See, e.g., *Espy*, 121 F.3d at 737 (viewing the deliberative process privilege as the most frequently litigated form of executive privilege). The deliberative process privilege covers deliberations of the executive branch generally, as opposed to just communications of the President. See *id.* It can "kick in" to shield communications of executive branch officials not covered by the presidential communications privilege. See *id.* at 737, 745. For the sake of clarity, this Note uses the term "executive privilege" to refer to the privilege over presidential communications. See 26 WRIGHT & GRAHAM, *supra* note 80, § 5662, at 490 n.3; Kitrosser, *supra* note 1, at 492 n.6. Though a full analysis of the deliberative process privilege is beyond the scope of this Note, because the deliberative process privilege would extend to Miers, Rove, and Bolten in the absence of the presidential communications privilege, it bears noting. See *Judicial Watch v. Dep't of Justice*, 365 F.3d 1108, 1121 (D.C. Cir. 2004).

B. Constitutional Basis

Accepting President Nixon's arguments, the Supreme Court in *Nixon* held that, though not stated explicitly in the Constitution's text, executive privilege has a constitutional basis.⁸³ The Court took cues from the supremacy of each branch of government within its sphere of authority and relied on the longstanding principle that any grant of power must be seen as including those powers and privileges that are reasonably appropriate and relevant to its exercise.⁸⁴ Executive privilege flows from the President's supremacy in the area of Article II powers and derives from the Constitution's separation of powers.⁸⁵

The Court found the need for confidentiality in presidential communications to be self-evident and necessary to the effective discharge of the President's duties.⁸⁶ The Court reasoned that, absent such protection, there might be a chilling effect on the candor of presidential advice, impairing the President's ability to carry out his constitutional duties.⁸⁷ Thus, the Court vindicated the position of Eisenhower, Nixon, and others who argued that maintaining the confidentiality of presidential communications serves the public interest by strengthening the presidential decision-making process.⁸⁸

C. Presumed Privileged Until Proven Otherwise

Concerned that presidential communications might be treated as simply another source of information, the Court in *Nixon* also held that such communications are presumptively privileged.⁸⁹ The Court was persuaded not only by a general respect for the privacy of all citizens, but also by the public's interest in "candid, objective, and even blunt or harsh opinions in presidential decision making."⁹⁰ The Court found

⁸³ See 418 U.S. at 705-06, 708, 711; see also Miller, *supra* note 45, at 638; Shane, *supra* note 28, at 471-72.

⁸⁴ See *Nixon*, 418 U.S. at 705-06 & n.16 (quoting *Marshall v. Gordon*, 243 U.S. 521, 537 (1917)).

⁸⁵ See *id.* at 705, 708; *Espy*, 121 F.3d at 743; see also U.S. CONST. art II.

⁸⁶ See *Nixon*, 418 U.S. at 705, 711; see also Miller, *supra* note 45, at 640.

⁸⁷ See *Nixon*, 418 U.S. at 705; see also Miller, *supra* note 45, at 640.

⁸⁸ See *Nixon*, 418 U.S. at 705, 708, 711; see also ROZELL, *supra* note 3, at 67-68.

⁸⁹ See 418 U.S. at 708 (quoting *Nixon v. Sirica*, 487 F.2d 700, 717 (D.C. Cir. 1973)); *Espy*, 121 F.3d at 755; see also Roberto Iraola, *Congressional Oversight, Executive Privilege, and Requests for Information Relating to Federal Criminal Investigation and Prosecutions*, 87 IOWA L. REV. 1559, 1585 (2002).

⁹⁰ See *Nixon*, 418 U.S. at 708.

that a presumption of privilege would protect the public interest to which executive privilege is tied.⁹¹

In 1973, less than a year earlier, the D.C. Circuit reached the same conclusion in *Nixon v. Sirica*.⁹² Although it affirmed the district court's enforcement of a grand jury subpoena for copies of taped conversations between Nixon and his aides, the D.C. Circuit held that the great public interest in effective presidential decision making required a presumption that the tapes were privileged.⁹³ The court later established that this presumption arises at the President's discretion, attaching to the disputed information upon mere invocation by the President.⁹⁴

D. A Qualified Privilege

Having acknowledged its constitutional foundations, the Supreme Court in *Nixon* quickly dispelled the notion that executive privilege is absolute.⁹⁵ Though it concluded that presidential privilege claims should be treated with utmost deference, the Court pointed out that an absolute privilege to withhold information would conflict with other values.⁹⁶ Such unchecked discretion would impair the courts' fulfillment of their own constitutional duties, interfere with effective functioning of the government, and undermine constitutional principles such as due process.⁹⁷ Accordingly, though the Court realized that confidentiality was important to presidential decision making, it held that "neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege."⁹⁸

⁹¹ See *id.*

⁹² 487 F.2d at 717; accord *Nixon*, 418 U.S. at 708; see also Patricia M. Wald & Jonathan R. Siegel, *The D.C. Circuit and the Struggle for Control of Presidential Information*, 90 GEO. L.J. 737, 767 (2002).

⁹³ See *Sirica*, 487 F.2d at 717.

⁹⁴ See *Espy*, 121 F.3d at 744. In the *Espy* opinion, the D.C. Circuit observed that the question of whether other executive branch officials could invoke the privilege was an open one. See *id.* at 744 n.16. Although it found support in other cases for the view that the President must personally assert the privilege, it left the question unanswered. See *id.*

⁹⁵ See 418 U.S. at 706.

⁹⁶ See *id.*

⁹⁷ See *id.* at 707, 712.

⁹⁸ *Id.* at 706; see also Wald & Siegel, *supra* note 92, at 767-68. The Court suggested, in dicta, that military, diplomatic, or national security secrets would require greater deference. See *Nixon*, 418 U.S. at 706, 710. The Court repeated this suggestion a few years later in *Nixon v. Administrator of General Services*, interpreting the distinction made between a general need for confidentiality and the need to protect state secrets to mean that a privilege extending to the latter would be less qualified. See 433 U.S. 425, 447 (1977). The *Espy* court extended this reasoning even further, suggesting that the privilege over military and

The Court's conclusions in *Nixon* tracked those of the D.C. Circuit in *Sirica*.⁹⁹ In *Sirica*, the court decisively rejected President Nixon's assertion of an absolute privilege to defy compelled disclosure of the Nixon tapes and asserted its right to review the President's privilege claims.¹⁰⁰

E. *Filling in the Gaps Left by Nixon*

For all its landmark importance, the *Nixon* opinion is relatively short.¹⁰¹ The Supreme Court decided only what was necessary to resolve the case: that presidential communications are presumptively privileged, but that a generalized need for confidentiality must yield to the specific need for information in a criminal trial.¹⁰² The Court carefully limited its holding to the context of a criminal trial subpoena and warned that it did not necessarily apply to civil litigation, disputes with Congress, or state secrets.¹⁰³ As a result, when President Clinton asserted executive privilege over documents produced by the White House Counsel's office, but never actually seen by the President himself, the D.C. Circuit in *Espy* faced several questions unanswered by earlier decisions: to whom and to what does executive privilege extend, and what showing of need is necessary to overcome a claim of executive privilege?¹⁰⁴

state secrets would be close to absolute, though it warned that information disputes with Congress would involve different considerations. See 121 F.3d at 743 n.12, 753. In the one case where the executive branch did invoke national security concerns as part of an executive privilege claim against Congress, the D.C. Circuit found no precedent for judicial deference to the Executive in national security matters when such deference would prevent Congress from exercising valid legislative powers. See *United States v. AT&T (AT&T I)*, 551 F.2d 384, 392 (D.C. Cir. 1976), *appeal on remand*, 567 F.2d 121 (D.C. Cir. 1977).

⁹⁹ See *Nixon*, 418 U.S. at 706; *Sirica*, 487 F.2d at 716.

¹⁰⁰ See *Sirica*, 487 F.2d at 716.

¹⁰¹ See 418 U.S. at 683-716.

¹⁰² See *id.* at 705-06, 708, 713.

¹⁰³ See *id.* at 712 n.19.

¹⁰⁴ See *Espy*, 121 F.3d at 742. Before analyzing the form of executive privilege at issue in *Nixon*—the “presidential communications privilege”—the D.C. Circuit in *Espy* noted that the most frequently litigated form of “executive privilege” is the deliberative process privilege. See *id.* at 737. *But see* 26 WRIGHT & GRAHAM, *supra* note 80, § 5662, at 490 n.3 (noting that executive privilege refers primarily to the presidential communications privilege).

The deliberative process privilege is a common law privilege by which the government can withhold information relating to “advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.” See *Espy*, 121 F.3d 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)). The privilege extends to executive branch officials generally. *Id.* at 745. Constructed in the negative, the deliberative process privilege extends to anyone within the executive branch not covered by the presidential communications privilege. See *Judicial Watch*, 365 F.3d at 1121.

1. The D.C. Circuit Extends Executive Privilege Beyond the President

In 1994, at President Clinton's request, the White House Counsel opened an investigation into bribery allegations against Secretary of Agriculture Mike Espy.¹⁰⁵ A concurrent investigation by the Office of Independent Counsel resulted in a grand jury subpoena for all documents collected by the White House Counsel's office during its own investigation, none of which President Clinton had ever seen.¹⁰⁶ Because most of the Nixon cases involved communications to which President Nixon had been a party, there had been no occasion to decide whether the privilege over presidential communications extended to conversations and documents with which the President was not familiar.¹⁰⁷ On the one hand, the Supreme Court in *Nixon* recognized the President's need for confidentiality "in the communications of his office" and remarked that the President "and those who assist him" must be free to speak candidly, suggesting that a President need not be personally involved to invoke executive privilege.¹⁰⁸ On the other hand, the *Nixon* opinion repeatedly referred to the confidentiality of *presidential* communications, suggesting that the privilege is tied very closely to the President.¹⁰⁹

Attempting to chart a middle path, the D.C. Circuit in *Espy* endorsed a limited extension of executive privilege, holding that it applies both to the President and to communications made by presidential advisors in the course of preparing to advise the President, even when those communications never reach the President.¹¹⁰ The privilege extends to immediate White House advisors and their staff who have "broad and significant responsibility" for advising the President.¹¹¹ The court acknowledged the U.S. Supreme Court's general admonition that privileges should be narrowly construed,¹¹² but it nonetheless reasoned that this limited extension was necessary to promote the candid advice

¹⁰⁵ See *Espy*, 121 F.3d at 734-35.

¹⁰⁶ See *id.* at 734-35, 746.

¹⁰⁷ See *id.* at 747.

¹⁰⁸ See *id.* (emphasis added by court) (quoting *Nixon*, 418 U.S. at 708, 712-13).

¹⁰⁹ See *id.* The *Espy* court found a similar spectrum of alternately broad and narrow descriptions present in *Sirica*. See *id.* On the one hand, the court in *Sirica* explained that the privilege was intended to preserve executive decision making. See *id.* On the other hand, the court described executive privilege as protecting communications made in the "President's performance of his official duties." See *id.* (emphasis added by court) (quoting *Sirica*, 487 F.2d at 717).

¹¹⁰ See *Espy*, 121 F.3d at 752; see also Wald & Siegel, *supra* note 92, at 769-70.

¹¹¹ *Espy*, 121 F.3d at 752; see also Wald & Siegel, *supra* note 92, at 769-70.

¹¹² See *Espy*, 121 F.3d at 749 (quoting *Nixon*, 418 U.S. at 710).

essential to quality presidential decision making.¹¹³ As a result, the court held that the privilege attached to documents that the White House Counsel had obtained in the course of preparing to advise the President on the *Espy* situation.¹¹⁴

The court, however, was careful to point out that the privilege does *not* extend to all persons—in the executive branch or otherwise—who play some role in advising the President.¹¹⁵ The privilege is limited to immediate White House advisors and their staff and does not extend to staff in executive branch agencies generally.¹¹⁶

The limitations articulated in *Espy* were the main focus of the D.C. Circuit's 2004 decision in *Judicial Watch v. Department of Justice*.¹¹⁷ In 2001, Judicial Watch filed a Freedom of Information Act ("FOIA") request for copies of reports prepared by the Pardon Attorney and the Deputy Attorney General to advise President Clinton on potential Article II pardons.¹¹⁸ Although both officials were DOJ employees—not White House advisors—and although none of their preliminary reports had reached the White House, the DOJ asserted the presidential communications privilege.¹¹⁹ The court denied the privilege claims and rejected a functional approach that would have extended the privilege to any executive branch employee who advised the President on nondelegable Article II powers.¹²⁰ Instead, the court adopted an organizational approach based on proximity to the President, and affirmed what it saw as *Espy*'s holding: that the presidential communications privilege extends only to those documents and communications authored by or "solicited and received" by the President or immediate advisers in the Office of the President who have "broad and significant responsibility" for advising the President.¹²¹

The court distinguished between immediate advisors in the Office of the President and other executive branch officials even though the latter may play a significant role in advising the President.¹²² According

¹¹³ See *id.* at 749–50.

¹¹⁴ See *id.* at 752–53.

¹¹⁵ *Id.* at 752.

¹¹⁶ *Id.*

¹¹⁷ See 365 F.3d at 1112–24.

¹¹⁸ See *id.* at 1110.

¹¹⁹ See *id.* at 1110–11.

¹²⁰ See *id.* at 1112.

¹²¹ See *id.* at 1114 (quoting *Espy*, 121 F.3d at 752). As the court noted, the Office of the President is a smaller unit within the Executive Office of the President and includes immediate presidential advisors such as the Chief of Staff and the White House Counsel. See *id.* at 1109 n.1.

¹²² See *Judicial Watch*, 365 F.3d at 1116, 1123.

to the court, the White House Counsel was an immediate advisor; the Pardon Attorney, Deputy Attorney General, and Attorney General—employees of the DOJ—were not.¹²³

Judge Randolph, dissenting, rejected as dicta *Espy's* restriction of the presidential communications privilege to White House advisors and their staff.¹²⁴ He also attacked the majority's slippery slope argument, which warned that extending the privilege beyond the White House would bring a large swath of the executive branch within reach of the privilege.¹²⁵ Judge Randolph argued that the court's organizational approach was inconsistent with the purpose of the privilege.¹²⁶ He noted that working documents of the Pardon Attorney—whose sole duty is to advise on presidential pardons—would reveal as much about presidential deliberations as would communications made by immediate White House staff.¹²⁷ Randolph favored a standard based on the function performed by the official, rather than one dictated by an organizational chart.¹²⁸ Quoting from *Espy*, he distinguished between advice regarding "a quintessential and nondelegable Presidential power," which should be privileged, and information regarding governmental decisions not involving the President, which should not be.¹²⁹ Although the organizational approach is the current law in the D.C. Circuit, the U.S. Supreme Court has not ruled affirmatively on this issue and may find the dissenting judge's reasoning persuasive.¹³⁰

2. The Scope of Information Protected by Executive Privilege

The U.S. Supreme Court first touched on the scope of the presidential communications covered by executive privilege in 1977, in *Nixon v. Administrator of General Services*.¹³¹ Drawing on language from *Nixon*, the Court in *General Services* indicated that the presidential communications privilege extends only to communications made "in performance of (a President's) responsibilities,' 'of his office,' and made 'in the proc-

¹²³ See *id.* at 1120. The court noted that non-White House advisors are covered by the deliberative process privilege, which extends to executive branch officials generally. See *id.* at 1121.

¹²⁴ See *id.* at 1138 (Randolph, J., dissenting).

¹²⁵ See *id.* at 1138–39.

¹²⁶ See *id.*

¹²⁷ See *Judicial Watch*, 365 F.3d at 1139 (Randolph, J., dissenting).

¹²⁸ See *id.*

¹²⁹ See *id.* (quoting *Espy*, 121 F.3d at 752).

¹³⁰ See *id.*

¹³¹ See 433 U.S. at 449.

ess of shaping policies and making decisions.'"¹³² The D.C. Circuit in *Espy* explored this more fully, holding that the presidential communications privilege pertains only to those materials reflecting presidential decision making and deliberations.¹³³ It applies specifically to decision making of the President, as opposed to executive branch decision making generally.¹³⁴ Further, the court held that the presidential communications privilege covers information in its entirety, both predeliberative and postdecisional, as well as factual.¹³⁵

The court in *Espy* was careful to limit the privilege only to communications that fall within the ambit of *presidential* decision making.¹³⁶ It held that only those communications solicited and received in the course of advising the President on official government business could qualify for the privilege.¹³⁷ The court warned that executive privilege should never be used to shield matters that do not require direct presidential decision making.¹³⁸ In the case of "dual hat" advisors who perform important government functions other than advising the President, executive privilege covers only those communications they make in the course of advising the President.¹³⁹

In addition to covering the communications of immediate presidential advisors, executive privilege also covers materials not authored by, but nonetheless "solicited and received" by the Office of the President.¹⁴⁰ Thus, in *Espy*, the privilege extended to non-White House documents collected by the White House Counsel in the *Espy* investigation.¹⁴¹ In contrast, in *Judicial Watch*, the presidential communications

¹³² See *id.* (quoting *Nixon*, 418 U.S. at 711, 713, 708) (citations omitted). It is worth noting that the Court in *General Services*, quoting from *Nixon*, held that the privilege covered "communications," rather than "[p]residential communications," the full phrase used by the Court in *Nixon*. Compare *Gen. Servs.*, 422 U.S. at 449, with *Nixon*, 418 U.S. at 711. Interestingly, however, the D.C. Circuit in *Espy* continued to refer to the confidentiality of "presidential communications," when endorsing an extension of the privilege to communications to which the President was not a party. See 121 F.3d at 747, 749-50.

¹³³ See 121 F.3d at 744.

¹³⁴ See *id.* at 745.

¹³⁵ See *id.* In contrast, the deliberative process privilege covers only those materials that are predeliberative and deliberative in nature. See *id.* at 737. It does not, however, cover postdecisional materials, such as those that merely state or explain a decision already made, nor does it protect facts, unless they are so inextricably entwined with deliberative materials as to reveal those deliberations. See *id.*

¹³⁶ See *id.* at 752.

¹³⁷ See *id.*; see also Wald & Siegel, *supra* note 92, at 770.

¹³⁸ See *Espy*, 121 F.3d at 752; see also Wald & Siegel, *supra* note 92, at 770.

¹³⁹ See *Espy*, 121 F.3d at 752.

¹⁴⁰ See *id.*; see also *Judicial Watch*, 365 F.3d at 1114.

¹⁴¹ See 121 F.3d at 758.

privilege did not cover the draft pardon reports of the Pardon Attorney and Deputy Attorney General because the Office of the President never received those drafts.¹⁴² As the D.C. Circuit noted, though the privilege can cover information solicited and received by presidential advisors, it does not extend to materials authored by executive branch agencies that never reach the White House, even if generated as precursors to presidential advice.¹⁴³

G. *In Search of Standards: The Showing Necessary to Overcome Executive Privilege*

As noted by the D.C. Circuit in *Espy*, the body of executive privilege case law does not clearly articulate the showing that a party must make to overcome executive privilege.¹⁴⁴ For this reason, the court undertook a careful examination of cases from the U.S. Supreme Court, the D.C. Circuit, and the U.S. District Court for the District of Columbia, in an attempt to trace the major contours of the necessary showing.¹⁴⁵ Several requirements emerged.¹⁴⁶ First, the desired information must be sought in pursuit of an important and appropriate function.¹⁴⁷ Second, the party seeking the information must have great need for the information; it must be relevant and unavailable with due diligence elsewhere.¹⁴⁸ Finally, courts balance the public interests served by confidentiality with those served by disclosure.¹⁴⁹

1. An Appropriate Function

The D.C. Circuit has emphasized that a party seeking to defeat a claim of executive privilege must do so in pursuit of a legitimate function.¹⁵⁰ The court alluded to this requirement in *Sirica*, when it highlighted the constitutionally mandated function of the grand jury and described its vital role in the criminal justice system.¹⁵¹ The court found

¹⁴² See 365 F.3d at 1117.

¹⁴³ See *id.* at 1116.

¹⁴⁴ See 121 F.3d at 742; see also Wald & Siegel, *supra* note 92, at 770 (noting that *Nixon* was vague with regard to the necessary showing of need).

¹⁴⁵ See *Espy*, 121 F.3d at 753-57.

¹⁴⁶ See *infra* notes 150-193 and accompanying text.

¹⁴⁷ See *infra* notes 150-161 and accompanying text.

¹⁴⁸ See *infra* notes 162-180 and accompanying text.

¹⁴⁹ See *infra* notes 181-193 and accompanying text.

¹⁵⁰ See Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 731 (D.C. Cir. 1974); see also *Nixon*, 418 U.S. at 707; *AT&T I*, 551 F.2d at 385, 388, 394; *Sirica*, 487 F.2d at 717.

¹⁵¹ See 487 F.2d at 717; see also U.S. CONST. amend. V.

that the grand jury's importance, combined with its need for the Nixon tapes to fulfill its function,¹⁵² had contributed to the "uniquely powerful showing" made by the Special Prosecutor.¹⁵³

Less than a year later, in 1974, the D.C. Circuit in *Senate Select Committee on Presidential Campaign Activities v. Nixon* took this reasoning to its logical conclusion and held that the presumption of privilege hinges "not on the nature of the presidential conduct that the . . . material might reveal, but, instead, on the nature and appropriateness of the function [for] which the material [is] sought, and the degree to which the material [is] necessary to its fulfillment."¹⁵⁴ The court's remarks illustrate the strength of the presumption in favor of presidential confidentiality: it can withstand the threat of compelled disclosure even when maintaining confidentiality may shield illegal activity.¹⁵⁵

The Supreme Court in *Nixon* emphasized the importance of a legitimate function when it spoke of the harm that would be done to the "primary constitutional duty of the Judicial Branch" in criminal justice, if a generalized interest in presidential confidentiality were to prevail.¹⁵⁶ The legitimacy of a constitutionally vested function clearly buttressed the Court's finding that the privilege had been overcome.¹⁵⁷

The D.C. Circuit implicitly invoked this reasoning in 1976, in *United States v. AT&T*, in which the DOJ sought to enjoin AT&T's compliance with a congressional subpoena for documents related to a warrantless government surveillance program.¹⁵⁸ The court initially highlighted the oversight and legislative functions of the House Subcommittee on Oversight and Investigations.¹⁵⁹ Later, the court noted the validity of these interests, observing that Congress has the power to investigate all areas

¹⁵² See *infra* notes 162-180 and accompanying text (explaining that the required showing also turns on the necessity of the information to responsible fulfillment of the function).

¹⁵³ See *Sirica*, 487 F.2d at 717.

¹⁵⁴ See 498 F.2d at 731 (emphasis added); see also *Espy*, 121 F.3d at 746 (noting that the Supreme Court in *Nixon* never mentioned that the tapes were to be used in the criminal conspiracy trial of former presidential aides and finding *Senate Select Committee's* holding to be in accordance).

¹⁵⁵ See *Senate Select Comm.*, 498 F.2d at 731. In contrast, the deliberative process privilege is typically overcome when there is any reason to believe that the information sought might reveal government misconduct. See *Espy*, 121 F.3d at 738.

¹⁵⁶ See 418 U.S. at 707 (emphasis added); see also U.S. CONST. art. III (vesting judicial power in the courts).

¹⁵⁷ See *Nixon*, 418 U.S. at 707.

¹⁵⁸ See 551 F.2d at 385.

¹⁵⁹ See *id.*

in which it can legislate.¹⁶⁰ The court suggested that these legitimate functions would weigh heavily in the committee's favor.¹⁶¹

2. A High Standard of Need

The D.C. Circuit's opinion in *Sirica* also set a high standard for the degree of need required to overcome executive privilege, holding that the privilege had been overcome because the information sought by the grand jury was "peculiarly necessary" to its Watergate investigation, as it might be conclusive to the jury's decisions.¹⁶² The Nixon tapes were "evidence for which no effective substitute [was] available."¹⁶³

The D.C. Circuit, in *Senate Select Committee*, drew from *Sirica* and articulated a similar need standard in the context of a congressional committee's subpoena for some of the Nixon tapes.¹⁶⁴ The court required that the Senate committee demonstrate that its functions "[could] not responsibly be fulfilled" without the tapes.¹⁶⁵ The court tied the necessary showing to the committee's legislative and oversight functions in the Watergate scandal and required the committee to prove that the information was "demonstrably critical" to responsible performance of its duties.¹⁶⁶

The Supreme Court in *Nixon* maintained this high standard, reasoning that the Watergate Special Prosecutor's "demonstrated, specific need" for President Nixon's tapes in a criminal trial justified overcoming the privilege.¹⁶⁷ The Court noted that without the contested evidence, the prosecution might be "totally frustrated," meaning that the judicial branch could not responsibly fulfill its constitutional function.¹⁶⁸ By enforcing the subpoena, the Court ensured that the essential functions of the judicial and executive branches were preserved.¹⁶⁹

¹⁶⁰ See *id.* at 388, 393 (citing *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504, 506 (1975)). The court also noted that the committee's purpose was not harassing in nature—it was not seeking to "expose for the sake of exposure." See *id.* at 393 (quoting *Watkins v. United States*, 354 U.S. 178, 200 (1957)).

¹⁶¹ See *id.* at 394.

¹⁶² See 487 F.2d at 717.

¹⁶³ See *id.*

¹⁶⁴ See *Senate Select Comm.*, 498 F.2d at 730; see also *Iraola*, *supra* note 89, at 1581; *Wald & Siegel*, *supra* note 92, at 771.

¹⁶⁵ See *Senate Select Comm.*, 498 F.2d at 730.

¹⁶⁶ See *id.* at 731; see also *Iraola*, *supra* note 89, at 1581.

¹⁶⁷ See 418 U.S. at 712–13. The Court also remarked that the Watergate Special Prosecutor had demonstrated a "specific and central" need for the information. See *id.* at 713.

¹⁶⁸ See *id.* at 712–13.

¹⁶⁹ See *id.* at 707, 713.

The D.C. Circuit's 1997 decision in *Espy* represented an opportunity for the court to articulate a need standard based on the body of executive privilege cases, most of which had been decided more than two decades prior.¹⁷⁰ Drawing from the Supreme Court's opinion in *Nixon*, the court held that a party seeking to overcome the presidential communications privilege must always demonstrate a focused, specific need for the information.¹⁷¹ It found the Supreme Court's characterization of the standard, however, to be vague and inconsistent.¹⁷² The court rejected a standard of mere relevancy as redundant; such a standard would serve no purpose beyond that already fulfilled by Rule 17(c) of the Federal Rules of Criminal Procedure.¹⁷³ It reasoned, however, that a higher standard—one that made the information "critical to an accurate judicial determination"—was incompatible with *Nixon*'s focus on relevancy.¹⁷⁴ The court therefore held that the need standard is met when: (1) the materials likely contain important, directly relevant evidence; and (2) the information is unavailable with due diligence elsewhere.¹⁷⁵ The court recognized that the second component would pose a significant burden to a party seeking to overcome executive privilege but saw it as necessary to comport with the Supreme Court's insistence in *Nixon* that presidential communications not be regarded as simply another source of information.¹⁷⁶

In articulating the need standard, the *Espy* court attempted to harmonize other cases' varying characterizations of the standard.¹⁷⁷ The court concluded that *Nixon* and *Sirica* both articulate the same need standard, even though the former dealt with a trial subpoena and the latter a grand jury subpoena.¹⁷⁸ It also read the *Senate Select Committee* standard for congressional subpoenas—requiring that evidence be "demonstrably critical to the responsible fulfillment" of a congressional function—to be consistent with the *Sirica* and *Nixon* standards.¹⁷⁹ Ac-

¹⁷⁰ See *Espy*, 121 F.3d at 742.

¹⁷¹ See *id.* at 746; see also Iraola, *supra* note 89, at 1576.

¹⁷² See *Espy*, 121 F.3d at 753-54. On the one hand, *Nixon* referred to information that was "essential to the justice of the [pending criminal] case," but, on the other hand, it suggested that the information must simply be "preliminarily shown to have some bearing on the pending criminal cases." See *id.* at 754 (quoting *Nixon*, 418 U.S. at 713).

¹⁷³ See *id.* at 754 (noting the *Nixon* Court's discussion of "Rule 17(c)'s tripartite requirement of relevance, admissibility, and specificity").

¹⁷⁴ See *Espy*, 121 F.3d at 754.

¹⁷⁵ See *id.* at 754; see also Wald & Siegel, *supra* note 92, at 770.

¹⁷⁶ See *Espy*, 121 F.3d at 755.

¹⁷⁷ See *id.* at 756.

¹⁷⁸ See *id.*

¹⁷⁹ See *id.* (emphasis added by court) (quoting *Senate Select Comm.*, 498 F.2d at 731).

cordingly, within the D.C. Circuit, *Espy's* need standard—as a cumulative expression of the *Sirica*, *Nixon*, and *Senate Select Committee* standards—should carry significant weight in the context of a congressional subpoena.¹⁸⁰

3. Balancing the Interests

To resolve contested executive privilege claims, the D.C. Circuit in *Sirica* espoused a balancing test.¹⁸¹ The court tied the privilege to the public interest in quality presidential decision making and held that a proper analysis would weigh the public interests served by maintaining confidentiality against those furthered by disclosure.¹⁸² The court, however, did not outline any factors to guide such a balancing and engaged in an ad hoc analysis of the competing interests, which, it held, came out in favor of disclosure.¹⁸³ Ultimately, the court was persuaded by the public interest in the grand jury investigation of the Watergate break-in.¹⁸⁴

The Supreme Court resolved the dispute in *Nixon* similarly and weighed the President's general interest in confidentiality against the public interest in a fair criminal justice system.¹⁸⁵ The Court concluded that the threat to candor from infrequent disclosure of presidential communications was not great enough to outweigh the need for evidence necessary to guarantee due process and fulfill a basic judicial function.¹⁸⁶

The D.C. Circuit in *AT&T* was reluctant to weigh the presidential and congressional interests implicated by a congressional subpoena of documents regarding a warrantless government surveillance pro-

¹⁸⁰ See *id.* at 754–57; see also *Senate Select Comm.*, 498 F.2d at 729 (holding that *Sirica* was, by analogy, controlling on the President's assertion of executive privilege against the Senate committee).

¹⁸¹ See 487 F.2d at 716; see also Wald & Siegel, *supra* note 92, at 767.

¹⁸² See *Sirica*, 487 F.2d at 716–17.

¹⁸³ See *id.* at 716–18. In *Senate Select Committee*, the D.C. Circuit also endorsed a similar balancing test. See 498 F.2d at 730–31. The court, however, never weighed the interests because it found that the Senate committee had failed to show an appropriate purpose and a “demonstrably critical” need. See *id.* at 732–33. It held that the committee's investigative interest had been undermined by the release of the Nixon tapes to the House Judiciary Committee and that the committee had not met its burden of showing that the tapes were critical to fulfillment of its legislative function. See *id.*

¹⁸⁴ See *Sirica*, 487 F.2d at 717–18.

¹⁸⁵ See 418 U.S. at 711–12; see also Shane, *supra* note 28, at 472.

¹⁸⁶ *Nixon*, 418 U.S. at 712; accord *Gen. Servs.*, 433 U.S. at 447 (interpreting *Nixon* to have involved a balancing of the interests).

gram.¹⁸⁷ Before remanding the case for further negotiations, however, the court suggested some factors that would weigh into a ruling on the merits.¹⁸⁸ Those factors included (1) the degree of Congress's need for the information; (2) the likelihood that the subcommittee would leak the information, including an examination of the subcommittee's track record for security, and the likelihood of a leak from other House members; (3) the seriousness of any resulting harm to national security, including intelligence activities and foreign relations; and (4) the reasonableness of alternative solutions proposed by the parties.¹⁸⁹ Ultimately, the court chose not to undertake a balancing of these interests, leaving unfulfilled the quest for clearer balancing standards.¹⁹⁰

Espy endorsed the "public interests" balancing test employed in *Nixon, General Services, Sirica*, and other executive privilege cases.¹⁹¹ The D.C. Circuit, however, saw no need to "weigh anew" the interests at stake in a grand jury subpoena, for the *Nixon* cases established that, in a grand jury proceeding, the scales tip in favor of disclosure upon a sufficient showing of need.¹⁹² Because the courts have not struck a similarly definitive balance for either side in the congressional-executive context, the issue remains an open question.¹⁹³

H. *A Spirit of Compromise*

The judicial branch has long been reluctant to referee power disputes between the legislative and executive branches, and executive

¹⁸⁷ See 551 F.2d at 391, 394.

¹⁸⁸ See *id.* at 391.

¹⁸⁹ See *id.* at 391, 394.

¹⁹⁰ See *id.* at 394.

¹⁹¹ See *Espy*, 121 F.3d at 753.

¹⁹² See *id.* In contrast, the court in *Espy* described a far clearer balancing test for the deliberative process privilege. See *id.* at 737-38. Although it noted that the deliberative process privilege requires a flexible, case-by-case analysis, the court nonetheless held that several interests should be considered. See *id.* These factors include the information's relevance, the availability of other evidence, the seriousness of the litigation, the government's role in the litigation, and the potential chilling effect on government deliberations resulting from disclosure. See *id.* (citing *In re Subpoena Served Upon the Comptroller of the Currency*, 967 F.2d 630, 634 (D.C. Cir. 1992)). Further, the court made it clear that the privilege evaporates when the materials are purported to reveal government misconduct, as secrecy in such cases does not serve the public interest. See *id.* at 738, 746; see also Wald & Siegel, *supra* note 92, at 768.

¹⁹³ See Shane, *supra* note 28, at 471; cf. Miller, *supra* note 45, at 684 n.251 (interpreting *Nixon* to have suggested, in dicta, that a balancing test is appropriate for information disputes with Congress).

privilege is no exception.¹⁹⁴ Although the D.C. Circuit in *Senate Select Committee* chose to rule on President Nixon's assertion of executive privilege against a congressional committee,¹⁹⁵ the courts have since indicated their willingness to rule on such a claim only as a matter of last resort.¹⁹⁶

In examining the DOJ's assertions of executive privilege to resist congressional investigations into a warrantless surveillance program, the D.C. Circuit, in *AT&T*, returned to its earlier opinion in *Sirica*.¹⁹⁷ In that case, the court suggested that compromise might have achieved a more favorable settlement than the district court's order.¹⁹⁸ Inspired by this idea, the court in *AT&T* remanded the case for further negotiations between the parties.¹⁹⁹ Later, after the parties failed to reach a settlement, the court again refused to rule affirmatively for either party and outlined a proposed settlement, which it encouraged the parties to adopt.²⁰⁰ The court grounded its continual refusal to rule on the merits in the text of the Constitution.²⁰¹ Drawing inspiration from a lecture by Judge Henry Friendly, the court found in the generality of the Constitution's language "a spirit of dynamic compromise," which would promote the most efficient and effective resolution of interbranch conflicts.²⁰² Observing that further negotiations had, in fact, brought the parties' interests into sharper focus, the court continued to move the parties toward the constitutional ideal of accommodation.²⁰³ Ultimately, the parties agreed on a procedure whereby committee counsel was granted access to certain intelligence memoranda, and the suit was dismissed.²⁰⁴

In 1983, the U.S. District Court for the District of Columbia adopted a similar approach in *United States v. House of Representatives*.²⁰⁵

¹⁹⁴ See, e.g., *Baker v. Carr*, 369 U.S. 186, 217 (1962) (political question doctrine); see also *United States v. House of Representatives*, 556 F. Supp. 150, 152 (D.D.C. 1983) ("Courts have a duty to avoid unnecessarily deciding constitutional issues." (citing *United States v. Rumely*, 345 U.S. 41, 45-46 (1952))).

¹⁹⁵ See 498 F.2d at 733.

¹⁹⁶ See *United States v. AT&T (AT&T II)*, 567 F.2d 121, 127 (D.C. Cir. 1977); *House of Representatives*, 556 F. Supp. at 152; see also Müller, *supra* note 45, at 633, 654; David A. O'Neil, *The Political Safeguards of Executive Privilege*, 60 VAND. L. REV. 1079, 1089-91 (2007).

¹⁹⁷ See *AT&T I*, 551 F.2d at 394.

¹⁹⁸ See *id.* (quoting *Sirica*, 487 F.2d at 723).

¹⁹⁹ See *id.* at 394-95.

²⁰⁰ See *AT&T II*, 567 F.2d at 131-33.

²⁰¹ See *id.* at 127.

²⁰² See *id.*

²⁰³ See *id.* at 127, 131-33.

²⁰⁴ ROZELL, *supra* note 3, at 82.

²⁰⁵ See *House of Representatives*, 556 F. Supp. at 152-53.

During an oversight investigation into certain environmental enforcement actions at the Environmental Protection Agency (the "EPA"), the House Subcommittee on Investigations and Oversight subpoenaed EPA Administrator Anne Gorsuch.²⁰⁶ At President Reagan's instruction, Gorsuch defied the subpoena on grounds of executive privilege; the House responded by citing her for contempt of Congress.²⁰⁷ Gorsuch then filed a suit seeking a declaratory judgment that the executive privilege claims were valid.²⁰⁸ The court dismissed the case, interpreting *AT&T* to mean that courts should intervene in legislative-executive information disputes only as a matter of last resort, when a settlement appears impossible.²⁰⁹ The court echoed the "spirit of the Constitution" language of *AT&T* and stated that the parties should seek compromise and cooperation instead of confrontation.²¹⁰

Taken together, these cases suggest that the courts might require Congress and the President to exhaust all options for compromise before ruling affirmatively for either party in an executive privilege dispute.²¹¹

III. APPLYING THE STANDARDS OF THE D.C. CIRCUIT: WHY THE EXECUTIVE PRIVILEGE CLAIMS IN THE U.S. ATTORNEY FIRINGS CONTROVERSY MUST FAIL

Though the Constitution's grant of executive power to the President affords a presumptive privilege over presidential communications, the privilege is no more absolute when asserted against Congress than against the courts.²¹² Executive privilege would seem to extend to Harriet Miers, Karl Rove, and Joshua Bolten, as all were immediate White House advisors at the time of the U.S. attorney firings.²¹³ But the privilege in the context of the U.S. attorney firings does not withstand scrutiny for a simple reason: the White House has asserted it over matters to which President Bush was never a party.²¹⁴ Furthermore, even if executive privilege were to attach to the communications of Miers, Bolten,

²⁰⁶ See *id.* at 151.

²⁰⁷ See *id.*

²⁰⁸ See *id.* at 152.

²⁰⁹ See *id.* (citing *AT&T I*, 551 F.2d at 393-95). The court noted that the judiciary did not need to resolve the conflict until Gorsuch became a defendant in a criminal contempt trial or other legal action. See *id.* at 153.

²¹⁰ See *House of Representatives*, 556 F. Supp. at 153.

²¹¹ See *AT&T II*, 567 F.2d at 127; *House of Representatives*, 556 F. Supp. at 152-53; see also Wald & Siegel, *supra* note 92, at 774.

²¹² See Shane, *supra* note 28, at 471-72, 476.

²¹³ See *infra* notes 230-246 and accompanying text.

²¹⁴ See *infra* notes 247-254 and accompanying text.

and Rove that pertained to the U.S. attorney firings, the public interest in ensuring a nonpoliticized Department of Justice should overcome a general desire for confidentiality in the White House.²¹⁵

A. *Executive Privilege in the U.S. Attorney Firings Controversy Is Constitutional but Not Absolute*

The U.S. Supreme Court has not ruled on whether the President may constitutionally assert executive privilege against Congress.²¹⁶ Although this scenario raises unique constitutional questions, if the President can claim executive privilege in judicial proceedings, surely he can do so against Congress, even in light of Congress's legislative and oversight powers.²¹⁷ The same rationale for maintaining the confidentiality of presidential communications applies: it promotes the candor essential to quality presidential decision making.²¹⁸ As a result, the Court would likely hold that a President's assertion of executive privilege against Congress is constitutional in a matter such as the U.S. attorney firings controversy.²¹⁹

A court's analysis of the U.S. attorney firings controversy would begin with a presumption that the testimony and documents sought

²¹⁵ See *infra* notes 262–317 and accompanying text.

²¹⁶ See *United States v. Nixon*, 418 U.S. 683, 712 n.19 (1974) (limiting its holding on the balance between the President's generalized confidentiality interest and the constitutional need for relevant evidence to the criminal trial context); see also Shane, *supra* note 28, at 471.

²¹⁷ See Senate Select Comm. on Presidential Campaign Activities v. *Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (holding that the presumptive privilege for presidential communications applies to the same degree in the context of a congressional subpoena as in the context of a grand jury investigation); see also *United States v. AT&T (AT&T I)*, 551 F.2d 384, 393 (D.C. Cir. 1976) (leaving unanswered the question of whether and to what extent the Executive can block congressional access to national security information, given that the two branches usually act in concert in national security matters, but proceeding as if the privilege were a valid exercise of power), *appeal on remand*, 567 F.2d 121 (D.C. Cir. 1977); Shane, *supra* note 28, at 473 (noting that presidential communications are no less deserving of protection from exposure to Congress than to the courts). But see BERGER, *supra* note 21, at 12–16 (arguing that Congress's role as Grand Inquest of the nation grants it a nearly absolute right of access to executive branch information).

²¹⁸ See *Nixon*, 418 U.S. at 705 (assuming, as a matter of human experience, that presidential advisors would withhold candid advice if their comments were susceptible to public disclosure). To the degree that this supposition is valid, it applies with equal force to compelled disclosure before Congress. See *id.* But see BERGER, *supra* note 21, at 240, for an argument that the view of executive privilege as indispensable to candid interchange, and therefore to good government, is at best an untested assumption. The government seemed to function perfectly well without the protections of a constitutionally sanctioned executive privilege for nearly two hundred years. See BERGER, *supra* note 21, at 240; see also Fein, *supra* note 63.

²¹⁹ See *Nixon*, 418 U.S. at 705; see also Shane, *supra* note 28, at 476.

from Miers, Rove, and Bolten are privileged.²²⁰ The presumptive nature of executive privilege supports its core purpose of promoting the public interest in quality presidential decision making.²²¹ This presumption tends to shield communications regarding matters such as the U.S. attorney firings from public scrutiny, which might otherwise temper the objective and candid advice of the President's aides.²²² President Bush's mere invocation of executive privilege establishes this presumption, which Congress bears the burden of overcoming.²²³

Nonetheless, as the U.S. Supreme Court noted in 1974, in *United States v. Nixon*, the presidential power to withhold information conflicts with other values, including Congress's legislative and oversight duties.²²⁴ The courts should treat the present privilege claims with the utmost deference, as they pertain to internal personnel decisions within the executive branch.²²⁵ Such deference accords with the courts' desire to avoid treating the executive branch as just another source of information.²²⁶ The President's generalized need for confidentiality, however, without more, cannot justify an absolute privilege over White House communications.²²⁷ The White House has not suggested, for example, that the subpoenaed information contains national security secrets.²²⁸ The courts should therefore hold that executive privilege in the U.S attorney firings controversy is, at best, a qualified privilege.²²⁹

²²⁰ See *Nixon*, 418 U.S. at 708 (citing *Nixon v. Sirica*, 487 F.2d 700, 717 (D.D.C. 1973)); *In re Sealed Case (Espy)*, 121 F.3d 729, 742 (D.C. Cir. 1997) (citing *Sirica*, 487 F.2d at 717).

²²¹ See *Nixon*, 418 U.S. at 705, 708; *Espy*, 121 F.3d at 742.

²²² See *Nixon*, 418 U.S. at 705, 708.

²²³ See *id.* at 708; *Espy*, 121 F.3d at 744.

²²⁴ See *Nixon*, 418 U.S. at 706; *AT&T I*, 551 F.2d at 393; see also Shane, *supra* note 28, at 476.

²²⁵ See *Nixon*, 418 U.S. at 708. Congress, through the PATRIOT Act, removed itself from the U.S. attorney appointment process by delegating an indefinite interim appointment power to the Attorney General. See H.R. REP. NO. 110-423, at 56 (2007). The advice and consent of the Senate was not required for confirmation of nominees. See *id.*

²²⁶ See *Espy*, 121 F.3d at 755.

²²⁷ See *Nixon*, 418 U.S. at 706; *Espy*, 121 F.3d at 743.

²²⁸ See H.R. REP. NO. 110-423, at 70. Even so, many have argued that the supposedly near-absolute privilege over state secrets would not apply to Congress, given its constitutionally contemplated role in national security and foreign policy. See BERGER, *supra* note 21, at 116; see also *AT&T I*, 551 F.2d at 393 (noting the difficulty in determining whether the Executive can conceal information from Congress, given that the two branches are typically partners in national security).

²²⁹ See *Nixon*, 418 U.S. at 706; *Espy*, 121 F.3d at 745; *Sirica*, 487 F.2d at 716.

B. *As Advisors in the Office of the President, Miers, Rove, and Bolten Fall Within the D.C. Circuit's Limited Extension of Executive Privilege*

The organizational approach to executive privilege, espoused by the U.S. Court of Appeals for the District of Columbia Circuit in 1997, in *In re Sealed Case (Espy)*, would seem to extend executive privilege to Miers, Rove, and Bolten.²³⁰ Bolten is the current White House Chief of Staff.²³¹ At the time of the attorney dismissals, Miers was White House Counsel and Rove was a Deputy White House Chief of Staff.²³² All three positions are part of the Office of the President, and thus fall within *Espy's* limited extension of the privilege to immediate White House advisors.²³³

At the time that Miers was subpoenaed, she had resigned her position as White House Counsel.²³⁴ Though Rove still worked in the White House when President Bush invoked executive privilege, he has also since resigned.²³⁵ These two advisors are therefore, at present, somewhat removed from the sphere of immediate White House advisors to whom *Espy* extended executive privilege.²³⁶ The courts have not ruled on whether executive privilege can be invoked over the testimony of a former White House advisor.²³⁷ Precedent, however, strongly favors extending the privilege to a former aide.²³⁸ To hold otherwise would undermine the primary purpose of the presidential communications privilege: promoting the candor necessary to quality presidential decision making.²³⁹ If the communications of a presidential advisor were vulnerable to compelled disclosure upon resignation, aides might temper their candor, thereby undermining the decision-making process, a

²³⁰ See 121 F.3d at 752; see also *Judicial Watch v. Dep't of Justice*, 365 F.3d 1108, 1114 (D.C. Cir. 2004).

²³¹ See FEDERAL STAFF DIRECTORY, WINTER 2007, at 3 (Penny E. Perry ed., 2006) [hereinafter FEDERAL STAFF DIRECTORY].

²³² See FEDERAL STAFF DIRECTORY, *supra* note 231, at 3, 9.

²³³ See *Judicial Watch*, 365 F.3d at 1114; *Espy*, 121 F.3d at 752; FEDERAL STAFF DIRECTORY, *supra* note 231, at 3, 9.

²³⁴ See H.R. REP. NO. 110-423, at 1 (2007).

²³⁵ See Peter Baker & Michael A. Fletcher, *Rove to Leave White House Post*, WASH. POST, Aug. 14, 2007, at A1.

²³⁶ See 121 F.3d at 752; see also *Judicial Watch*, 365 F.3d at 1114.

²³⁷ See, e.g., *Judicial Watch*, 365 F.3d at 1109-10 (documents of sitting Deputy Attorney General and Pardon Attorney); *United States v. House of Representatives*, 556 F. Supp. 150, 150-51 (D.D.C. 1983) (then-serving Environmental Protection Agency Administrator).

²³⁸ See *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 448-49 (1977) (extending executive privilege to a former President); *Nixon*, 418 U.S. at 705.

²³⁹ See *Nixon*, 418 U.S. at 705; *Espy*, 121 F.3d at 743.

result the courts are anxious to avoid.²⁴⁰ If a former President can assert executive privilege, then a sitting President should be able to assert the privilege over the testimony of former advisors.²⁴¹

In contrast, under the functional approach Judge Randolph advocated in dissent in the 2004 D.C. Circuit case of *Judicial Watch v. Department of Justice*, the three advisors would not be covered by executive privilege.²⁴² Judge Randolph's test would focus on whether the advice pertained to a "quintessential and nondelegable Presidential power."²⁴³ Congress, by statute, delegated the power to appoint interim U.S. attorneys to the Attorney General, and the White House has claimed that President Bush was never advised of or involved in the terminations.²⁴⁴ The advice that the White House seeks to protect therefore fails this functional test.²⁴⁵

Nonetheless, under the standard favored by the majority of the D.C. Circuit, Miers, Rove, and Bolten, as White House advisors, may qualify for the protections of executive privilege.²⁴⁶

C. *Executive Privilege Does Not Extend to Information Regarding the Removal of the U.S. Attorneys*

Though executive privilege would generally extend to advisors like Miers, Rove, and Bolten, it cannot apply to their testimony in these particular circumstances for a single reason: the President played no role in the removal of the U.S. attorneys.²⁴⁷ When the D.C. Circuit in *Espy* extended the presidential communications privilege to immediate White House advisors and their staff, it expanded the scope of the privilege to the pre- and postdecisional communications of individuals like Miers, Rove, and Bolten.²⁴⁸ By including other communications solicited and received by these advisors, the court essentially cloaked anything known to them with the protections of executive privilege.²⁴⁹ Recognizing, however, that such an extension could sweep a large swath of the executive branch within reach of the presidential communica-

²⁴⁰ See *Nixon*, 418 U.S. at 705; *Espy*, 121 F.3d at 743.

²⁴¹ See *Gen. Servs.*, 433 U.S. at 448-49.

²⁴² See 365 F.3d at 1139 (Randolph, J., dissenting).

²⁴³ See *id.*

²⁴⁴ See H.R. REP. NO. 110-423, at 12, 55-56, 69-70 (2007).

²⁴⁵ See *Judicial Watch*, 365 F.3d at 1139 (Randolph, J., dissenting).

²⁴⁶ See *id.* at 1115-16 (majority opinion); *Espy*, 121 F.3d at 752.

²⁴⁷ See H.R. REP. NO. 110-423, at 12, 69-70.

²⁴⁸ See 121 F.3d at 752. The privilege covers such information in its entirety, pre- and postdecisional, as well as factual. See *id.* at 745.

²⁴⁹ See *id.* at 752.

tions privilege, the court issued a caveat that proves fatal to the executive privilege claims in the U.S. attorneys controversy: the court held that the privilege over presidential communications can never be used to withhold information on matters that do not call for the President's direct involvement.²⁵⁰

The White House has made it clear that President Bush himself was neither party to any of the conversations that preceded the firings, nor a participant in the final decisions regarding which attorneys to terminate.²⁵¹ Yet, the White House has repeatedly asserted the need to protect the presidency and promote informed presidential decision making.²⁵² This logic is utterly unconvincing: if the President himself was not involved in the decision to fire the attorneys, then there can be no risk to the integrity of presidential decision making by forcing Miers, Rove, and Bolton to comply with the subpoenas.²⁵³ The primary justification for the presidential communications privilege evaporates.²⁵⁴

Although the White House privilege claims must fail under the law in the D.C. Circuit, it should be noted that the U.S. Supreme Court has never ruled specifically on the degree of presidential involvement necessary for executive privilege to attach.²⁵⁵ The question has never been raised before the Court, as the only Supreme Court cases to rule on the merits of executive privilege involved communications to which President Nixon was a party.²⁵⁶ In the present controversy, the Court might choose to clarify its prior case law and correct the D.C. Circuit's focus

²⁵⁰ See *id.* The U.S. Supreme Court's decisions in *Nixon* and *General Services* confirm this requirement. See *Gen. Servs.*, 433 U.S. at 449 ("[T]he privilege is limited to communications 'in performance of [a President's] responsibilities . . .'" (quoting *Nixon*, 418 U.S. at 711)). Information relating to executive branch decisions generally is the proper subject of the deliberative process privilege. See *Espy*, 121 F.3d at 745; see also *supra* note 135.

²⁵¹ See H.R. REP. NO. 110-423, at 12, 69-70.

²⁵² See, e.g., Branigin, *supra* note 7; Letter from Fred Fielding, *supra* note 15.

²⁵³ See *Nixon*, 418 U.S. at 705, 708 (tying concerns for candor to the quality of presidential decision making); *Judicial Watch*, 365 F.3d at 1122 (recognizing that concern for tempering candor becomes more attenuated the further a person is from the President); *Espy*, 121 F.3d at 752 (reasoning that only communications close to the President are likely to reveal his deliberations and diminish candor of advisors). The three advisors are the type of "dual hat" advisors contemplated by the court in *Espy*. See 121 F.3d at 752. Though their primary duty is to advise the President, they cannot claim the protections of that status when they are performing other government functions. See *id.*

²⁵⁴ See *Nixon*, 418 U.S. at 705, 708; *Judicial Watch*, 365 F.3d at 1122; *Espy*, 121 F.3d at 752.

²⁵⁵ See *Espy*, 121 F.3d at 747 (observing that most of the Nixon cases involved information with which the President was personally familiar).

²⁵⁶ See *id.*

on the requirement of direct presidential involvement.²⁵⁷ The Court could reason that the public interest in promoting candid decision making within the White House should not rise and fall on the technicality of whether the President happened to be aware of a particular matter.²⁵⁸ Or, further investigation may reveal that President Bush was aware of the termination process, even if he was not involved in the final decisions.²⁵⁹ Although the D.C. Circuit position reflects a more proper understanding of the President's unique constitutional status,²⁶⁰ on this issue the Court might hold that extending the privilege to Miers, Rove, and Bolten is consistent with the public interest in promoting candid decision making within the White House.²⁶¹

D. *Balancing the Interests: The Scales of Justice Tip in Favor of Disclosure*

Even if the courts determine that executive privilege extends to the information possessed by Miers, Rove, and Bolten, Congress can, and should, be able to overcome the privilege.²⁶² The investigation into the U.S. attorney firings is an appropriate exercise of the legislative and oversight authority of both the House and Senate Judiciary Committees.²⁶³ Given that the subpoenaed officials are near the top of the

²⁵⁷ See *id.* at 744–45, 752. Though the court in *Espy* held that executive privilege can only cover matters in which the President is involved, the language in *Nixon* and *General Services* is not quite as explicit. Compare *id.*, with *Gen. Servs.*, 433 U.S. at 449, and *Nixon*, 418 U.S. at 711, 713. The latter two cases tied executive privilege to the President's responsibilities and the "communications . . . 'of his office.'" *Gen. Servs.*, 433 U.S. at 449 (citation omitted) (quoting *Nixon*, 418 U.S. at 713); *Nixon*, 418 U.S. at 711. The Supreme Court may interpret these terms to refer to those responsibilities falling under a President's general duty to take care that the laws be faithfully executed, many of which are performed by others within the Office of the President. See U.S. CONST. art. II, § 3; *Gen. Servs.*, 433 U.S. at 449; *Nixon*, 418 U.S. at 711; see also *Espy*, 121 F.3d at 752 (acknowledging that a President's powers to take care that the laws be faithfully executed can be exercised without the President's direct involvement). If so, the Court could hold that executive privilege attaches to matters that the President has delegated to his immediate White House advisors, meaning that Miers, Rove, and Bolten would benefit from a presumption of privilege. See *Gen. Servs.*, 433 U.S. at 449; *Nixon*, 418 U.S. at 711.

²⁵⁸ See *Nixon*, 418 U.S. at 705, 708; see also ROZELL, *supra* note 3, at 46–47.

²⁵⁹ Cf. *Espy*, 121 F.3d at 752. In such a case, the requirement for direct presidential decision making might be relaxed to include matters over which the President has only tangential supervision. See *id.*

²⁶⁰ See *Nixon*, 418 U.S. at 708 (cautioning against proceeding against the President as against "an ordinary individual" (quoting *United States v. Burr*, 25 F. Cas. 187, 192 (C.C.D. Va. 1807) (No. 14,694))).

²⁶¹ See *Nixon*, 418 U.S. at 705, 706, 708; see also ROZELL, *supra* note 3, at 46–47.

²⁶² See *infra* notes 268–317 and accompanying text.

²⁶³ See H.R. Doc. No. 109-157, R. X(1)(k), at 454; *id.* R. X(2), at 479; S. Doc. No. 110-9, R. XXV(1)(m), at 25 (2007); see also *infra* notes 268–280 and accompanying text.

White House hierarchy, it is highly unlikely that the information they possess on the firings is available elsewhere.²⁶⁴ The committees have great need for the information; it may well be vital to the passage of remedial legislation and the oversight of potentially impeachable offenses committed during the attorney purge.²⁶⁵ On balance, although the general public interest in presidential confidentiality should be respected, the potential politicization of the DOJ evokes concerns for the "fair administration of . . . justice" similar to those that caused the privilege to fail in the Nixon cases.²⁶⁶ Such considerations should tip the scales in Congress's favor.²⁶⁷

1. The Senate and House Judiciary Committee Subpoenas Are Issued Pursuant to an Appropriate Exercise of Legislative and Oversight Authority

The Senate and House Judiciary Committees both have legislative and oversight interests in the U.S. attorney firings controversy.²⁶⁸ These interests are sufficient to meet the requirement that the party seeking to overcome executive privilege must do so in the exercise of an appropriate function.²⁶⁹

In undertaking its investigations, Congress sought to uncover the reasons and procedures whereby the attorneys were removed in order to enact any necessary remedial legislation.²⁷⁰ As a result of the investiga-

²⁶⁴ See *Espy*, 121 F.3d at 754, 755.

²⁶⁵ See *id.* at 754; H.R. REP. NO. 110-423, at 22-43 (2007). Beyond its general oversight of judicial matters, the House Judiciary Committee would also play a primary role in the impeachment of any officials involved in the controversy, as impeachment can only be initiated within the House of Representatives. See U.S. CONST. art I, § 2, cl. 5.

²⁶⁶ See *Nixon*, 418 U.S. at 711-12; *Sirica*, 487 F.2d at 717; see also Gia B. Lee, *The President's Secrets*, 76 GEO. WASH. L. REV. 197, 260-61 (2008) (noting the great public interest in the integrity of the DOJ, and suggesting that it outweighs the presidential confidentiality interest in staffing deliberations).

²⁶⁷ See *infra* notes 296-317 and accompanying text.

²⁶⁸ See H.R. DOC. NO. 109-157, R. X(1)(k), at 454 (2007); *id.* R. X(2), at 479; S. DOC. NO. 110-9, R. XXV(1)(m), at 25.

²⁶⁹ See *Senate Select Comm.*, 498 F.2d at 731; see also *Nixon*, 418 U.S. at 707 (emphasizing the constitutional duty of the courts with regard to criminal justice); *Espy*, 121 F.3d at 746 (citing *Senate Select Committee* favorably on this issue); *AT&T I*, 551 F.2d at 385 (noting with approval the oversight and legislative functions of the House Subcommittee on Oversight and Investigations); *Sirica*, 487 F.2d at 717 (highlighting the constitutionally mandated role of the grand jury).

²⁷⁰ See H.R. REP. NO. 110-423, at 7, 54-60; S. COMM. ON THE JUDICIARY, 110TH CONG., RULING ON THE WHITE HOUSE'S CLAIMS OF EXECUTIVE PRIVILEGE AND IMMUNITY MADE IN RESPONSE TO SENATE JUDICIARY COMMITTEE SUBPOENAS 5 (2007) (ruling of Sen. Patrick

tions, Congress repealed the provisions in the USA PATRIOT Act that empowered the Attorney General to make indefinite interim attorney appointments.²⁷¹ Yet Congress's legislative interests are ongoing.²⁷² These interests include further revisions to the interim appointment process, limitations on the removal of attorneys, laws aimed at protecting the prosecutorial function from political influence, and legislation clarifying the correct role of political factors in agency staffing decisions, among others.²⁷³ The D.C. Circuit expressly acknowledged in 1976, in *United States v. AT&T*, that Congress generally has the power to investigate all areas in which it can legislate.²⁷⁴ The committees' investigations are thus a legitimate exercise of this long-acknowledged and appropriate exercise of congressional power.²⁷⁵

The committees also have a strong oversight interest in this investigation, another legitimate function that supports enforcement of the subpoenas.²⁷⁶ The investigation has uncovered evidence that suggests that laws may have been broken in the firings and that Congress may have been deliberately misled during its investigations.²⁷⁷ Although Congress's investigatory powers are not without limit, to the degree that it investigates in areas of proper legislation, Congress has a valid interest in unearthing corruption, abuse, and illegal activity by federal officials.²⁷⁸ Further, the House of Representatives, in particular, has the

Leahy, Chairman, S. Judiciary Comm.) [hereinafter *SENATE RULING ON EXECUTIVE PRIVILEGE CLAIMS*], available at <http://judiciary.senate.gov/pdf/07-11-29ExecutiveRuling.pdf>.

²⁷¹ See H.R. REP. NO. 110-423, at 56.

²⁷² See *SENATE RULING ON EXECUTIVE PRIVILEGE CLAIMS*, *supra* note 270, at 4-5; H.R. REP. NO. 110-423, at 7, 55-60.

²⁷³ See H.R. REP. NO. 110-423, at 55-60; see also *SENATE RULING ON EXECUTIVE PRIVILEGE CLAIMS*, *supra* note 270, at 5.

²⁷⁴ See *AT&T I*, 551 F.2d at 388 (citing *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 506 (1975)); see also *Eastland*, 421 U.S. at 509 ("To be a valid legislative inquiry, there need be no predictable end result.").

²⁷⁵ See *AT&T I*, 551 F.2d at 388.

²⁷⁶ See *id.*; *Senate Select Comm.*, 498 F.2d at 731; see also H.R. DOC. NO. 109-157, R. X(2), at 479 (2007) (authorizing general oversight of any matter within the legislative jurisdiction of a standing committee); S. DOC. NO. 110-9, R. XXV(1)(m), at 25 (2007) (granting general authority over matters within the jurisdiction of the Committee on the Judiciary). The general investigatory power of Congress is deeply rooted in law and history. See *Watkins v. United States*, 354 U.S. 178, 187 (1957); *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927); BERGER, *supra* note 21, at 12-13, 15-16. But see *Senate Select Comm.*, 498 F.2d at 732 (holding that the Senate Committee's oversight interest had been weakened because the House Judiciary Committee had begun impeachment inquiry).

²⁷⁷ See H.R. REP. NO. 110-423, at 22-54.

²⁷⁸ See *AT&T I*, 551 F.2d at 388 (citing *Eastland*, 421 U.S. at 506); see also *Watkins*, 354 U.S. at 187.

power to investigate as a precursor to impeachment.²⁷⁹ As with their legislative interests, the committees have asserted their subpoena power pursuant to a valid and appropriate oversight interest in the U.S. attorney firings controversy.²⁸⁰

2. Congress Has a Great Need for Critical Information That Is Not Available From Other Sources

Because of the organizational seniority of Miers, Rove, and Bolten, Congress can satisfy the need standard from the D.C. Circuit's decision in *Espy*: the subpoenaed materials contain important information that is (1) directly relevant to central issues in the controversy, and (2) unavailable with due diligence elsewhere.²⁸¹

The first prong of the need standard—relevance—is easily satisfied in the case of the U.S. attorney investigations.²⁸² Though somewhat conflicting, evidence thus far suggests that Miers, Rove, and other senior Bush administration officials were architects of the removal plan.²⁸³ Their testimony and related documents will be directly relevant to how the plan was conceived and executed.²⁸⁴ The documents subpoenaed from Bolten will be equally revelatory.²⁸⁵ Although the relevance prong can serve to weed out evidence that is only tangentially relevant, that is not the case here.²⁸⁶ As individuals high in the decision-making hierarchy, the testimony of these advisors goes to the heart of the controversy.²⁸⁷ Not only is the subpoenaed testimony directly relevant, but the

²⁷⁹ See BERGER, *supra* note 21, at 4, 262–64; see also ROZELL, *supra* note 3, at 27. Because the Senate cannot conduct an impeachment trial until after the House has issued articles of impeachment, the Senate may not be able to assert the impeachment power as a basis of oversight authority to the same degree that the House Committee can. See U.S. CONST. art I, § 3, cl. 6; see also *Senate Select Comm.*, 498 F.2d at 732.

²⁸⁰ See *Senate Select Comm.*, 498 F.2d at 731; see also *Nixon*, 418 U.S. at 707; *Espy*, 121 F.3d at 746; *AT&T I*, 551 F.2d at 385; *Sirica*, 487 F.2d at 717. Although the D.C. Circuit in *Sirica* suggested that a general fishing expedition would not be an appropriate function even for a grand jury, the subpoenas in the present case are limited to a specific series of events. See 487 F.2d at 717. They pertain solely to the removal of U.S. attorneys and do not constitute a general investigation into DOJ practices. See *id.* Neither committee is in danger of overreaching in the way that *Sirica* suggested would be inappropriate. See *id.*

²⁸¹ See 121 F.3d at 753–56; see also *Nixon*, 418 U.S. at 713; *Senate Select Comm.*, 498 F.2d at 730, 731.

²⁸² See *Espy*, 121 F.3d at 754–55, 757.

²⁸³ See H.R. REP. NO. 110-423, at 15–20 (2007).

²⁸⁴ See *Espy*, 121 F.3d at 754–55; H.R. REP. NO. 110-423, at 15–20.

²⁸⁵ See *Espy*, 121 F.3d at 754–55; H.R. REP. NO. 110-423, at 15–20.

²⁸⁶ See *Espy*, 121 F.3d at 755.

²⁸⁷ See H.R. REP. NO. 110-423, at 15–20.

evidentiary record is also conflicting and incomplete.²⁸⁸ Congress therefore cannot responsibly fulfill its legislative and oversight functions without such central evidence.²⁸⁹

The unavailability prong requires that a party explore other sources of information before intruding into the sphere of presidential communications.²⁹⁰ This requirement imposes a greater burden than the relevance prong and is rooted in the Supreme Court's admonition not to treat presidential communications as any other source of information.²⁹¹ Nonetheless, it is difficult to imagine that the information sought by the committees is available in other areas of the government.²⁹² If executive privilege applies to Miers, Bolton, and Rove, then it also applies to any communications they had with others in the executive branch, including the Attorney General and others within the DOJ.²⁹³ Any attempts to acquire this information through other channels would almost certainly be met with an identical executive privilege claim.²⁹⁴ The D.C. Circuit in *Espy* contemplated this exact situation and suggested that unavailability would be easy to demonstrate when the conduct of White House officials was at issue.²⁹⁵

²⁸⁸ See *id.* at 15–20, 43–54.

²⁸⁹ See *Espy*, 121 F.3d at 755–56; *Senate Select Comm.*, 498 F.2d at 730, 731. Although the D.C. Circuit in *Senate Select Committee* opined that a precise reconstruction of events will rarely be necessary to enact corrective legislation, the Senate Committee's need for President Nixon's tapes had also been eroded by the release of the tapes to the House Judiciary Committee and the President's public release of transcripts. See 498 F.2d at 732. Here, the legislative need remains unsatisfied, given the gaps and contradictions in testimony. See H.R. REP. NO. 110-423, at 43–60. Further, in contrast to the position taken by the D.C. Circuit in *Senate Select Committee*, the U.S. Supreme Court in *General Services* affirmed Congress's need to preserve the complete records of the events leading to President Nixon's resignation as the basis for remedial legislation. See *Gen. Servs.*, 433 U.S. at 453. Congress can therefore properly assert a need to complete the evidentiary record. See *id.*

²⁹⁰ See *Espy*, 121 F.3d at 755.

²⁹¹ See *id.*

²⁹² See *id.* (acknowledging that the unavailability prong will be easy to satisfy in the case of inquiries into acts of White House advisors, as non-White House sources are unlikely to have equivalent information).

²⁹³ See *id.* at 752; see also *Judicial Watch*, 365 F.3d at 1114.

²⁹⁴ See *Judicial Watch*, 365 F.3d at 1114; *Espy*, 121 F.3d at 752.

²⁹⁵ See 121 F.3d at 755. Traditionally, a claim of executive privilege is accompanied by a privilege log, at least with regard to documents. See *id.* at 760; ROZELL, *supra* note 3, at 156–57 (explaining that assertion of executive privilege must be accompanied by a sufficient showing that the information actually involves deliberations or state secrets—a mere assertion that such is the case need not be accepted by Congress at face value). In the case of the U.S. attorney firings, the White House has not provided such a privilege log. See SENATE RULING ON EXECUTIVE PRIVILEGE CLAIMS, *supra* note 270, at 3; H.R. REP. NO. 110-423, at 78, 83 (2007). This makes it difficult for either the House or Senate committees to demonstrate that it has attempted to obtain the subpoenaed evidence through other

3. The Public Interests at Stake Require Disclosure

Since the D.C. Circuit's 1973 decision in *Nixon v. Sirica*, courts have used a balancing test to resolve an otherwise valid claim of executive privilege.²⁹⁶ The analysis consists primarily of an ad hoc weighing of the public interests served by maintaining confidentiality against those served by disclosure.²⁹⁷ The D.C. Circuit in *AT&T* also articulated several factors specifically relevant to disputes between the legislative and executive branches that are helpful here.²⁹⁸ On balance, the public interests demand disclosure of the subpoenaed information.²⁹⁹

Under the broad "competing public interests" view of *Sirica*, later adopted by the Supreme Court in *Nixon*, the public interest in a non-politicized Department of Justice outweighs the general confidentiality interest that theoretically promotes effective executive branch decision making.³⁰⁰ Although the courts have held that this confidentiality interest is strong—so strong that presidential communications are presumptively privileged—the U.S. attorneys controversy involves the same generalized concern for confidentiality that failed to convince the Court in *Nixon*.³⁰¹ The White House has not expressed concern that disclosure would reveal state secrets or the details of ongoing criminal investigations but has focused exclusively on the candid advice rationale.³⁰² In

channels. See *Espy*, 121 F.3d at 755. The D.C. Circuit has recognized the difficulty inherent in identifying other sources of information without knowing what information is contained in privileged materials but has made it clear that the party seeking access bears the burden of showing due diligence. See *id.* at 760. The futility of any attempt to obtain the information outside of the White House, however, undercuts the need to investigate other avenues. See *supra* notes 293–294 and accompanying text.

²⁹⁶ See 487 F.2d at 716; see also Wald & Siegel, *supra* note 92, at 767.

²⁹⁷ See *Gen. Servs.*, 433 U.S. at 447; *Nixon*, 418 U.S. at 711; *Espy*, 121 F.3d at 753; *AT&T I*, 551 F.2d at 391, 394; *Sirica*, 487 F.2d at 716–17. But see Miller, *supra* note 45, at 685 (focusing inquiry more on balance of institutional interests of the President and Congress, rather than directly on public interests).

²⁹⁸ See *AT&T I*, 551 F.2d at 391, 394; see also *supra* notes 187–190 and accompanying text.

²⁹⁹ See *Gen. Servs.*, 433 U.S. at 447; *Nixon*, 418 U.S. at 711; *Espy*, 121 F.3d at 753; *AT&T I*, 551 F.2d at 391, 394; *Sirica*, 487 F.2d at 716–17.

³⁰⁰ See *Nixon*, 418 U.S. at 711 (weighing general presidential interest in confidentiality against interest in fairness in the criminal justice system); *Sirica*, 487 F.2d at 716; see also Lee, *supra* note 266, at 260–61 (suggesting that public interest in integrity of DOJ outweighs presidential confidentiality interest in staffing deliberations).

³⁰¹ See 418 U.S. at 708, 713; see also Shane, *supra* note 28, at 472 (acknowledging that a generalized interest in confidentiality is accorded less weight than a narrower claim, such as the need to protect military secrets).

³⁰² See, e.g., Letter from Fred Fielding, Counsel to the President, to Senator Patrick Leahy, Chairman, Senate Comm. on the Judiciary & Representative John Conyers, Chairman, House Comm. on the Judiciary (June 28, 2007), available at <http://judiciary.house.gov/Media/PDFS/FieldingToConyers070628.pdf>.

contrast, Congress's investigations have uncovered evidence that the purge of U.S. attorneys was politically motivated, that laws may have been broken in the process, and that Congress may have been lied to as part of a cover-up.³⁰³ Such actions within the DOJ could impair the fair functioning of the criminal justice system, a concern that moved the courts in the Nixon cases to hold that the privilege had been overcome.³⁰⁴

Not only does the public interest in a fair judicial system mandate disclosure, but Congress's need for the information is also particularly acute, another factor that weighs strongly in its favor.³⁰⁵ Only Miers and Rove, the senior architects of the removal plan, can clarify inconsistencies and fill holes in the investigatory record.³⁰⁶ The documents sought from Bolten are critical for the same reason.³⁰⁷ This information is necessary not only to enact further corrective legislation but also to determine whether laws prohibiting obstruction of justice, political retaliation, making false statements to Congress, or obstructing congressional investigations, were violated.³⁰⁸ Congress simply cannot, "responsibly" or otherwise, fulfill its duties without the subpoenaed information.³⁰⁹ Indeed, it is difficult to subject Congress's interests to any weighing test,

³⁰³ See H.R. REP. NO. 110-423, at 22-43. Although the executive branch generally ought to have wide latitude in agency staffing decisions, a removal intended to influence a politically sensitive prosecution could amount to obstruction of justice. See 18 U.S.C. §§ 1503, 1505 (2000 & Supp. IV 2004); 18 U.S.C.A. § 1512(c)(2) (West Supp. 2007); see also H.R. REP. NO. 110-423, at 26, 28. Further, if any attorney was removed to influence the outcome of elections, or in retaliation for failing to bring politically charged prosecutions that lacked a good faith legal or factual basis, such actions could violate civil and criminal portions of the Hatch Act. See 5 U.S.C. § 7323(a)(1) (2000 & Supp. IV 2004) (prohibiting a federal employee from "us[ing] his official authority or influence for the purpose of interfering with or affecting the result of an election"); 18 U.S.C. § 606 (2000) (forbidding a federal employee from "discharge[ing] . . . any other officer or employee . . . for giving or withholding or neglecting to make any contribution of money or other valuable thing for any political purpose"); see also H.R. REP. NO. 110-423, at 26, 28.

³⁰⁴ See *Nixon*, 418 U.S. at 707, 711, 713; *Sirica*, 487 F.2d at 717-18; see also *Esby*, 121 F.3d at 753 (interpreting *Nixon* and *Sirica* to have held that public interest required disclosure in criminal proceedings upon adequate demonstration of need).

³⁰⁵ See *AT&T I*, 551 F.2d at 394.

³⁰⁶ See H.R. REP. NO. 110-423, at 43-54.

³⁰⁷ See *id.*

³⁰⁸ See *id.* at 54-55.

³⁰⁹ See *Nixon*, 418 U.S. at 713 (recognizing that, without access to the Nixon tapes, the prosecution might have been "totally frustrated"); *Senate Select Comm.*, 498 F.2d at 730 (noting that a showing that information was critical to responsible performance of the committee's duties would weigh heavily in favor of disclosure); see also *AT&T I*, 551 F.2d at 394.

given that it is acting on the basis of its legitimate power to monitor the executive branch, a power implicit in the Constitution.³¹⁰

The D.C. Circuit in *AT&T* also suggested that a court should weigh the reasonableness of alternative solutions offered by the parties.³¹¹ The White House has offered to allow private conversations with White House aides, on the conditions that the aides not be placed under oath and that no transcript be recorded.³¹² This proposal is not an acceptable alternative because it fails to satisfy Congress's information needs.³¹³ The Supreme Court has recognized the public interest in preserving the record of controversies such as the U.S. attorney firings in order for Congress to enact remedial legislation.³¹⁴ Further, concerns have emerged that laws may have been broken in the firings, and Congress may have been lied to or misled in its investigation.³¹⁵ If Congress's oversight function is to have any bite, Miers and Rove, architects of the removal plan, must be under oath and on the record.³¹⁶

In light of the great public interest in ensuring that political interests do not taint the fair administration of laws within the Department of Justice, Congress's great need for the subpoenaed information, and the insufficient alternatives offered by the White House, the courts should require disclosure.³¹⁷

³¹⁰ See *AT&T I*, 551 F.2d at 391, 394.

³¹¹ See *id.* In addition to the degree of Congress's need for the information and the reasonableness of alternative solutions, the D.C. Circuit also suggested that a court should weigh the seriousness of any harm to national security resulting from compelled disclosure and the likelihood that the committee would leak any materials that it agreed to keep confidential. See *id.* The White House has not implicated any national security concerns. See H.R. REP. NO. 110-423, at 70. Assessing the likelihood of a leak would require an examination of each Committee's track record for security and is beyond the scope of this Note. See *AT&T I*, 551 F.2d at 394. But, given the committees' insistence that any testimony be under oath and on the record, they have made no promises of confidentiality, and the issue may be irrelevant. See *id.*

³¹² See Weisman & Kane, *supra* note 14; Letter from Fred Fielding, White House Counsel, to Senator Patrick Leahy, Chairman, Senate Comm. on the Judiciary et al. (Mar. 20, 2007), available at <http://judiciary.house.gov/Media/PDFS/Fielding070320.pdf>.

³¹³ See *AT&T I*, 551 F.2d at 394; H.R. REP. NO. 110-423, at 12.

³¹⁴ See *Gen. Servs.*, 433 U.S. at 453.

³¹⁵ See H.R. REP. NO. 110-423, at 22-43.

³¹⁶ See *AT&T I*, 551 F.2d at 395 (recognizing that Congress is not required to take the executive branch at its word and had legitimate reasons to view independent verification of White House claims as vital to responsible performance of its legislative function). Informal, off-the-record briefings have thus far proved unsatisfactory and incomplete. See Letter from Senator Patrick Leahy, Chairman, Senate Comm. on the Judiciary et al., to Fred Fielding, White House Counsel (Mar. 22, 2007) [hereinafter Letter from Senator Patrick Leahy], available at <http://leahy.senate.gov/press/200703/3-22-07%20Fielding%20Dem%20letter.pdf>.

³¹⁷ See *Gen. Servs.*, 433 U.S. at 447; *Nixon*, 418 U.S. at 711-12; *Espy*, 121 F.3d at 753; *AT&T*, 551 F.2d at 391, 394; *Sirica*, 487 F.2d at 716-17; see also Lee, *supra* note 266, at 260-

D. Prudential Considerations: The Courts May Order Further Negotiation

Though the courts have not declared congressional-executive information disputes to be off-limits as political questions, they have been reluctant to insert the judiciary into such conflicts.³¹⁸ On the one hand, a court could easily rule on the merits of the dispute if it follows the teachings of *Espy*.³¹⁹ The law within the D.C. Circuit makes it clear that President Bush's lack of involvement in the firings is fatal to the executive privilege claims.³²⁰

If the past is any indicator, however, the courts may seek a middle ground that avoids affirmatively ruling for either side.³²¹ In fact, the U.S. District Court for the District of Columbia, in its 1983 decision in *United States v. House of Representatives*, went so far as to hold that ruling on the legality of an executive privilege claim should be a matter of last resort.³²² Though the U.S. attorneys purge first came to light in late 2006, attempts at negotiation have been in a stalemate since mid-2007.³²³ Following the cue of *AT&T*, a court might take the opportunity to further refine the issues and move the parties toward the spirit of compromise that the D.C. Circuit found inherent in the Constitution.³²⁴

61. In the wake of the failure of executive privilege, Miers, Rove, and Bolten could still assert the deliberative process privilege. See *Judicial Watch*, 365 F.3d at 1121; *Espy*, 121 F.3d at 737. Because the deliberative process privilege extends to the executive branch generally and does not require presidential involvement, the White House may properly assert this privilege. See *Espy*, 121 F.3d at 745. The privilege covers predecisional government communications, a description that covers the vast majority of information sought in the subpoenas. See *id.* at 737.

Yet under the facts of the U.S. attorney firings controversy, the deliberative process privilege is easily overcome. See *id.* at 738, 746. The courts would use a looser balancing test to analyze the deliberative process privilege, which would roll the appropriateness inquiry, the need analysis, and an ad hoc balancing of interests into a single framework. See *id.* at 737-38. Ultimately, however, the deliberative process privilege must fail because of allegations of improper and illegal activity. See *id.* at 738, 746; H.R. REP. NO. 110-423, at 22-43. The deliberative process privilege vanishes in the face of any evidence to suggest the occurrence of government misconduct. See *Espy*, 121 F.3d at 738, 746.

³¹⁸ See *AT&T I*, 551 F.2d at 394-95; *House of Representatives*, 556 F. Supp. at 152-53. Of the three cases involving executive privilege battles with Congress, only one has resulted in a ruling on the merits. See *Senate Select Comm.*, 498 F.2d at 733.

³¹⁹ See 121 F.3d at 744-45, 752.

³²⁰ See *id.* at 752; see also *supra* notes 247-254 and accompanying text.

³²¹ See *United States v. AT&T (AT&T II)*, 567 F.2d 121, 127 (D.C. Cir. 1977); *House of Representatives*, 556 F. Supp. at 152.

³²² See 556 F. Supp. at 152.

³²³ See H.R. REP. NO. 110-423, at 12 (2007). As of the November 5, 2007 House Judiciary Committee report, White House Counsel had not responded to Chairman Conyers' most recent letter written July 25, 2007. See *id.*; see also Letter from Senator Patrick Leahy, *supra* note 316 (rejecting, on March 22, 2007, White House offers of off-the-record interviews).

³²⁴ See *AT&T II*, 567 F.2d at 127.

On the other hand, the litigation posture of the House suit may diminish the court's ability to suggest compromise, as the District Court for the District of Columbia indicated in *House of Representatives*.³²⁵ After noting that a court should delay resolution until a settlement is not possible, the court held that a contempt trial, or similar legal action by Congress, would provide a proper setting to litigate an executive privilege claim.³²⁶ Although the DOJ's refusal to pursue contempt charges has taken contempt off of the table, the House lawsuit is essentially the civil counterpart to a contempt proceeding.³²⁷ It therefore provides a proper context to rule on the executive privilege claims.³²⁸

CONCLUSION

Properly conceived, executive privilege can strengthen the process of Presidential decision making, but it becomes problematic when asserted against a coequal branch with which the Executive is supposed to be a partner in government. For some, the very notion of an insurmountable wall of secrecy is incompatible with democratic ideals. Given these tensions, the U.S. Supreme Court wisely limited the scope of executive privilege in *United States v. Nixon*. Though it expanded the reach of executive privilege, the U.S. Court of Appeals for the District of Columbia Circuit, expounding upon the *Nixon* doctrine, made its judgment clear that the privilege should never stretch too far from the Executive in whose name it is invoked.

The Bush administration's executive privilege claims in the U.S. attorney firings controversy reach beyond the circumstances that justify the privilege in the first place. If the President was not involved in the plan to fire and replace the attorneys, then it is difficult to see how compelled testimony of those involved would chill the candor of presidential aides when they advise the President. Miers, Rove, and Bolten should not be protected by executive privilege simply because they work at 1600 Pennsylvania Avenue any more than the White House groundskeeper should be.

Though executive privilege cases involving the executive and legislative branches are rare, the general body of case law articulates relevant principles that should guide a court's analysis of the present dis-

³²⁵ See *House of Representatives*, 556 F. Supp. at 153.

³²⁶ See *id.* at 152, 153; see also Miller, *supra* note 45, at 633; O'Neil, *supra* note 196, at 1091.

³²⁷ See Eggen, *supra* note 20; Kane, *supra* note 6.

³²⁸ See *House of Representatives*, 556 F. Supp. at 153.

pute. Though Miers, Rove, and Bolten would normally fall under *Espy's* extension of executive privilege to White House staff, the President's lack of involvement is fatal. This is as it should be. Executive privilege is tied to the Executive, in whose absence there is no privilege at all. Further, Congress is engaged in a valid legislative and oversight process to which the information held by these three individuals is vital. The White House has not justified the invocation of executive privilege beyond the generalized assertion of a need to promote candid advice. When compared with the public interest in a Department of Justice that is more committed to the pursuit of justice than to political ends, the scales tip in favor of disclosure.

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