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NOTE

EXECUTIVE PRIVILEGE AS CONSTITUTIONAL COMMON LAW: ESTABLISHING GROUND RULES IN POLITICAL-BRANCH INFORMATION DISPUTES

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INTRODUCTION

In December 2010, U.S. Customs and Border Patrol Agent Brian Terry was killed in a gun battle along the border between the United States and Mexico.[1] Police traced two AK-47 assault rifles found at the scene to Jaime Avila, whom officials at the U.S. Bureau of Alcohol, Tobacco, and Firearms (ATF) had previously suspected of purchasing weapons in the United States on behalf of "violent Mexican drug trafficking organizations."[2] Instead of arresting Avila and a number of other "straw purchasers," however, ATF allowed him to continue buying guns in order to trace his purchases to a "large-scale gun trafficking organization."[3] Unfortunately, this "Operation Fast and Furious" did not turn out as ATF had hoped. Agents never captured any high-level targets, and of the nearly 2000 guns that were allowed to "walk," only a little over 700 were ever recovered.[4] Even worse, two of the guns had apparently been used to murder a federal law enforcement officer.

Operation Fast and Furious became the subject of congressional scrutiny a year later, when ATF whistleblowers anonymously reported the program to the Senate Judiciary Committee.[5] In February 2011, Justice Department officials flatly denied that any guns had been allowed to walk to traffick-

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1 James V. Grimaldi & Sari Horwitz, *ATF Gunrunning Probe Strategy Scrutinized After Death of Border Patrol Agent*, WASH. POST (Feb. 1, 2011, 11:03 PM), http://www.washingtonpost.com/wp-dyn/content/article/2011/02/01/AR2011020106366.html [http://perma.cc/BS86-8LAN].

2 U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., A REVIEW OF ATF'S OPERATION FAST AND FURIOUS AND RELATED MATTERS 1 (2012), http://www.justice.gov/oig/reports/2012/s1209.pdf [http://perma.cc/PX3Y-8ZH5].

3 *Id.*

4 *Id.* at 203 & tbl.4.1.

5 *Id.* at 2.

ers.[6] Congress's investigation pressed on, however, and in December, the Department retracted its earlier denial.[7] As a result, even after the Department admitted fault in 2012 for Operation Fast and Furious,[8] Congress continued to demand an explanation for its apparently false initial denial of the program's existence.[9] The House Committee on Oversight and Government Reform, which had participated in the Senate Judiciary Committee's investigation of Operation Fast and Furious,[10] characterized this denial as "at best, a serious breakdown in communications . . . [and] at worst, . . . a conscious effort . . . to mislead the [Senate] Committee."[11]

To determine what had gone wrong, the House Committee subpoenaed all of the Department's internal documents related to its February 2011 statement.[12] Attorney General Eric Holder refused to turn over any documents created after the statement was issued, however, claiming that President Barack Obama had asserted "[e]xecutive privilege" over them.[13] The Committee held Holder in contempt of Congress for his failure to comply with the subpoena—making him the first sitting cabinet secretary to receive such a citation[14]—and brought suit to enforce the subpoena in August 2012.[15]

In their pretrial motions, both the House Committee and the Department asserted plenary legal authority over the disputed documents.[16] The Department argued that because the documents contained internal discussions about its response to an ongoing congressional investigation, enforcing the sub-

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6 *Id.* Letter from Ronald Weich, Asst. Att'y Gen., U.S. Dep't of Justice, to Sen. Charles E. Grassley, Ranking Minority Member, Senate Judiciary Comm. (Feb. 4, 2011) (describing ATF efforts to "dismantl[e] firearms trafficking organizations"), *reprinted in* U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., *supra* note 2, at app. D.

7 U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., *supra* note 2, at 329.

8 *See id.* at 209. The Justice Department's Inspector General concluded that Operation Fast and Furious "lacked realistic objectives, did not have appropriate supervision . . . , and failed to adequately assess [its] public safety consequences." *Id.*

9 Complaint at 7, Comm. on Oversight and Gov't Reform v. Holder, 979 F. Supp. 2d 1 (D.D.C. 2013) (No. 1:12-cv-01332 (ABJ)).

10 *Id.* at 4.

11 *Id.* at 11–12.

12 *Id.* at 8.

13 *Id.* at 10.

14 Ed O'Keefe & Sari Horwitz, *House Votes to Hold Attorney General Eric Holder in Contempt*, WASH. POST (June 28, 2012), http://www.washingtonpost.com/politics/fast-and-furious-house-plans-vote-on-holding-eric-holder-in-contempt/2012/06/28/gJQAznlG9V_story.html [http://perma.cc/QZY3-VRBE].

15 Complaint, *supra* note 9, at 1.

16 Order at 3–4, *Holder*, 979 F. Supp. 2d 1 (No. 1:12-cv-01332 (ABJ)).

poena would undermine its ability to respond effectively to future investigations.[17] The Committee, by contrast, claimed that its constitutional authority to subpoena executive documents was absolute.[18]

Neither argument persuaded the district court. Instead of resolving the dispute on the parties' motions, it instructed the Department to produce a list describing each allegedly privileged document and "the grounds upon which the privilege is actually being invoked."[19] Then, the court explained, it would resolve the dispute by balancing the parties' competing interests, "which the [parties] cannot articulate with specificity—and the Court cannot assess—until it is clear which documents are being withheld."[20]

The parties' abstract, quasi-constitutional claims—and the court's unwillingness to consider them—illustrate a central difficulty in the law of executive privilege. Although the existence of some privilege of executive confidentiality has been clear since the Supreme Court's landmark decision in *United States v. Nixon*,[21] the contours of that privilege have seen little clarification in the forty years since *Nixon* was decided.[22] Thus, when government officials assert the privilege against Congress in litigation, the debate frequently degenerates into "patently conflicting assertions of absolute authority" in which "[e]ach branch of government claims that . . . its actions are unreviewable by the courts."[23] And courts, lacking any analytical rubric to evaluate such claims, often simply refuse to adjudicate these disputes.[24]

This Note poses a solution to this problem by establishing a clearer doctrinal foundation for the executive privilege. Al-

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17 *See* Defendant's Motion for Summary Judgment at 27–30, *Holder*, 979 F. Supp. 2d 1 (No. 1:12-cv-01332 (ABJ)).

18 *See* Plaintiff's Motion for Summary Judgment at 25–33, *Holder*, 979 F. Supp. 2d 1 (No. 1:12-cv-01332 (ABJ)).

19 Order, *supra* note 16, at 4.

20 *Id.* at 5.

21 418 U.S. 683 (1974).

22 *See In re* Sealed Case, 121 F.3d 729, 742–45 (D.C. Cir. 1997) (reviewing *Nixon* and its subsequent history).

23 United States v. AT&T, 551 F.2d 384, 391 (D.C. Cir. 1976), *appeal after remand*, 567 F.2d 121 (D.C. Cir. 1977).

24 *See, e.g.*, *id.* As a result, scholarly commentary on the executive privilege in the context of congressional investigations has tended to focus on whether disputes over information between the President and Congress are even justiciable. *See, e.g.*, Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. CHI. L. REV. 1083 (2009) (arguing against justiciability); David A. O'Neil, *The Political Safeguards of Executive Privilege*, 60 VAND. L. REV. 1079 (2007) (arguing in favor of justiciability).

though commentators and lower courts seem to have assumed that the executive privilege recognized in *Nixon* is a doctrine of constitutional law,[25] this Note will argue it actually represents a cluster of subconstitutional evidentiary privileges rooted in federal common law.[26] Like traditional common-law privileges, this Note contends, courts can incrementally create, modify, and abrogate *Nixon* privileges in response to narrow policy interests that crop up in specific factual situations.[27] And like other federal common-law doctrines, *Nixon* privileges are subject to legislative revision.[28]

When the *Nixon* privilege is understood in this way—as "constitutional common law"[29]—many problems with its application and expansion fall away. The Fast and Furious litigation, for example, suggests that courts lack "judicially manageable standards" to resolve political-branch information disputes because those disputes turn on abstract questions of political and constitutional balance.[30] But a common-law approach allows courts to apply the *Nixon* privilege incrementally, creating narrow rules that apply only in certain factual situations.[31] Thus, under the proposed regime, courts can evaluate the branches' competing interests in particular cases without ruling on the general balance of constitutional power.

Part I of this Note will survey the background of executive privilege, including its life as a common-law doctrine before *Nixon*, its transformation into quasi-constitutional doctrine in *Nixon*, and its historical status as a political process in the context of congressional demands for information. Part II will then more thoroughly introduce the idea of constitutional common law and argue that the executive privilege is a species of it.

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25 *See In re Sealed Case*, 121 F.3d at 745 ("The [*Nixon*] privilege is rooted in constitutional separation of powers principles and the President's unique constitutional role; the deliberative process privilege is primarily a common law privilege.").

26 *See infra* Subpart II.B.

27 *See infra* notes 153–54 and accompanying text.

28 *See* Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 3 (1975) (advocating "a constitutional common law subject to amendment, modification, or even reversal by Congress").

29 *See id.* This Note applies Professor Monaghan's concept of "constitutional common law" to the executive privilege. *See infra* Subpart II.A.

30 *See* Baker v. Carr, 369 U.S. 186, 217 (1962) (defining nonjusticiable "political question[s]" as lacking "judicially discoverable and manageable standards for resol[ution]").

31 This Note will argue, for example, that the Fast and Furious case should be resolved by crafting an "executive privilege" that applies only to congressional requests for information about an executive official's response to a previous congressional investigation. *See infra* Subpart III.B.

Part III will apply this understanding of the privilege to the facts of *Committee on Oversight & Government Reform v. Holder*,[32] the case arising out of the Fast and Furious dispute. The Conclusion will summarize the insights suggested by a constitutional common-law approach to executive privilege.

I
HISTORICAL ORIGINS OF THE EXECUTIVE PRIVILEGE

Courts and commentators have applied the term "executive privilege" somewhat unevenly to describe various attempts by government officials to shield information from compelled disclosure.[33] Courts, for example, have long recognized government officials' powers to withhold information from disclosure in litigation under certain circumstances.[34] Although these common-law privileges are not uniformly referred to as "executive privileges," they share structural characteristics, policy objectives, and precedential foundations with the executive privilege identified in *United States v. Nixon*.[35] Likewise, although the President is also said to assert his "executive privilege" where he refuses to turn over information to Congress, such disputes have historically been resolved through the political process rather than formal litigation.[36] This Part will give a brief introduction to the family of executive privileges in both litigation and congressional investigations.

A. Common-Law "Executive Privileges" in Litigation

1. *The Military-and-Diplomatic-Secrets Privilege*

By the time the Supreme Court first acknowledged the "privilege which protects military and state secrets" in *United States v. Reynolds*, the doctrine was already "well established in the law of evidence."[37] In *Reynolds*, the Court upheld the confidentiality of a U.S. Air Force report on an aircraft crash,[38]

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32 979 F. Supp. 2d 1 (D.D.C. 2013).

33 *See In re* Sealed Case, 121 F.3d 729, 736 (D.C. Cir. 1997) (describing "a variety of privileges to resist disclosure of information" claimed by executive officials).

34 *See id.* at 738 (noting that "[h]ints" of an executive privilege cropped up as early as the Supreme Court's decision in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)).

35 For terminological uniformity, this Note will refer to any privilege possessed exclusively by members of the executive branch in their official capacity as an "executive privilege." When I refer to the "executive privilege" recognized in *United States v. Nixon*, I will call it the "*Nixon* privilege."

36 *See In re Sealed Case*, 121 F.3d at 739.

37 United States v. Reynolds, 345 U.S. 1, 6–7 (1953).

38 *Id.* at 12.

which had occurred during a test of "secret electronic equipment."[39] Three civilian observers died in the crash, and their survivors brought suit,[40] apparently claiming that the "secret" technology had caused the accident.[41]

In upholding the Air Force's claim of privilege, the *Reynolds* Court applied a "formula of compromise" that future courts would imitate in adjudicating executive-privilege claims.[42] On the one hand, the Court admonished that "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers."[43] But it also recognized that disclosure of military secrets in litigation could "expose military matters which, in the interest of national security, should not be divulged."[44] It noted that 1953, the year of the decision, was "a time of vigorous preparation for national defense," during which "newly developing electronic devices . . . must be kept secret if their full military advantage is to be exploited."[45] Thus, the Court concluded, the Air Force's specific need for secrecy—especially given the United States' involvement in the Cold War—outweighed the plaintiffs' need for the crash report to prove their civil claims.[46]

2. *The Deliberative Process Privilege*

The deliberative process privilege, a less powerful but more easily invoked common-law doctrine, protects policy discussions between government officials and their aides.[47] Its purpose is to facilitate "frank expression and discussion" among policymakers—"those upon whom rests the responsibility for making the determinations that enable government to operate."[48]

A court reviewing a deliberative process claim follows the "formula of compromise" applied in *United States v. Reynolds*.

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39 *Id.* at 3.

40 *Id.* at 2.

41 *See id.* at 11 (denying the plaintiffs' claims because "[t]here is nothing to suggest that the electronic equipment, in this case, had any causal connection with the accident").

42 *Id.* at 9–10.

43 *Id.*

44 *Id.* at 10.

45 *Id.*

46 *Id.* at 11–12. The plaintiffs' claim of necessity was also diminished by the fact that the Air Force had offered to allow the plaintiffs to question the airmen who survived the crash regarding any nonprivileged matter relevant to the case. *Id.*

47 *See* Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 324 (D.D.C. 1966).

48 *Id.*

But first, it must determine whether the privilege's core policy rationale—candor in future policy discussions—is threatened by the disclosure order at hand.[49] Thus, the deliberative process privilege applies only if the assertedly privileged communication is (1) predecisional, such that it took place before a policy decision was made, and (2) deliberative, such that it urged the adoption of a particular course of executive action.[50] The privilege will not protect a communication that merely explains a prior decision, for example, or one that reports facts without synthesizing them into a policy recommendation.[51]

Once these threshold requirements are met, the court determines the risk that disclosure in the present case would chill future discussions among policymakers and then balances that risk against its need for the withheld evidence to resolve the case at hand.[52] Considerations that might affect the need for the evidence include the stakes of the litigation, the relevance of the evidence, and the availability of other nonprivileged evidence that is relevant on the same point.[53] Considerations that might raise the specter of "future timidity by government employees," on the other hand, might include the gravity of the policy decision in question, the government's lack of involvement in the litigation, or the lack of any allegation of wrongdoing against the government.[54]

B. *United States v. Nixon*: An Executive Privilege with "Constitutional Dimensions"

Against this common-law background, the Supreme Court in *United States v. Nixon* first recognized an executive privilege rooted in the constitutional balance of power between the Executive and its coequal branches of government.[55] *Nixon* involved the criminal prosecution of several individuals for their involvement in the 1972 wiretapping of the Democratic National Com-

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49 A similar requirement was implicit in the Supreme Court's decision in *Reynolds*, which required the Air Force to show a "reasonable danger" that military secrets would be divulged by the disclosure of its report. *See Reynolds*, 345 U.S. at 10.

50 *In re* Sealed Case, 121 F.3d 729, 737–38 (D.C. Cir. 1997).

51 *Id.* at 737.

52 *See id.* at 746.

53 *Id.* at 737–38.

54 *Id.* (quoting *In re* Subpoena Served Upon the Comptroller of the Currency, 967 F.2d 630, 634 (D.C. Cir. 1992)).

55 *See* United States v. Nixon, 418 U.S. 683, 707–08 (1974).

mittee's Watergate Hotel headquarters.[56] Although President Nixon himself was not indicted, the Watergate special prosecutor secured a subpoena for audiotape recordings of various conversations between Nixon and his aides.[57] These recordings, the special prosecutor argued, would incriminate the President's coconspirators.[58]

In refusing to comply with the subpoena, President Nixon did not assert the common-law deliberative process privilege.[59] Instead, he argued that as President, he possessed unreviewable constitutional authority to resist the court's order.[60] First, Nixon claimed, this authority is incidental to the President's Article II powers.[61] As the Court would acknowledge in its opinion, "Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests."[62] Such an encumbrance on the President's ability to solicit candid advice would impair his capacity to "take care that the laws be faithfully executed" as required by Article II.[63] Second, Nixon argued that general separation-of-powers principles prohibited courts from compelling the President to disclose information.[64]

The Court agreed with Nixon that a "privilege of confidentiality of Presidential communications in the exercise of Art[icle] II powers" inheres in Article II and in the separation of powers between the branches.[65] It disagreed, however, that the privilege could never be overcome. "[A]n absolute, unqualified privilege," the Court explained, "would plainly conflict with the function of the courts under Art[icle] III," which includes "do[ing] justice in criminal prosecutions."[66]

Like its common-law predecessors, therefore, the *Nixon* privilege is a balancing act: it facilitates candid policy advice on

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56 *Id.* at 687–88; *see also* United States v. Mitchell, 377 F. Supp. 1326, 1328 (D.D.C. 1974) (denying President Nixon's motion to quash the subpoena at issue in *Nixon*).

57 *Mitchell*, 377 F. Supp. at 1328, 1331.

58 *See id.* at 1328.

59 Perhaps this was because he believed that it would be too easily overcome. *See supra* notes 49–54 (explaining the requirements for invoking the privilege).

60 *See Nixon*, 418 U.S. at 703.

61 *Id.* at 705.

62 *Id.*

63 U.S. CONST. art. II, § 3; *see also Nixon*, 418 U.S. at 715 (explaining that the privilege reflects "the singularly unique role under Art. II of a President's communications and activities, related to the performance of duties under that Article").

64 *Nixon*, 418 U.S. at 706.

65 *Id.* at 705.

66 *Id.* at 707.

the one hand[67] and the just resolution of litigation on the other.[68] But the *Nixon* privilege also possesses "constitutional dimensions"[69] because derogating from either norm in the context of an interbranch information dispute would impair one branch's ability to exercise its responsibilities under the Constitution.[70] The *Nixon* privilege encourages deliberative candor not just because candid advice leads to good policy decisions but also because it allows a President to exercise his Article II powers more effectively.[71] Likewise, the privilege is not overcome by a criminal litigant's showing of need simply because such a result is fair but also because the litigant's need invokes the judiciary's "manifest duty" under the Constitution to ensure the integrity of criminal proceedings.[72] In this way, the privilege is "inextricably rooted" in the Constitution.[73]

After identifying the constitutional interests at stake, the Court proceeded to balance those interests in the context of Nixon's refusal to disclose his tapes. The Court was incredulous that "advisers will be moved to temper the candor of their remarks . . . because of the possibility that such conversations will be called for in the context of a criminal prosecution."[74] It therefore concluded that the chilling effect of disclosure would be minimal.[75] "[W]ithhold[ing] evidence that is demonstrably relevant in a criminal trial," by contrast, "would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts."[76] As a result, the Court ordered disclosure.[77]

Thus, *Nixon* recognized a privilege allowing the President to withhold communications with his policy advisors[78] from dis-

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67 *See supra* note 63 and accompanying text.

68 *See Nixon*, 418 U.S. at 711 ("It is the manifest duty of the courts to vindicate [a criminal defendant's constitutional] guarantees, and to accomplish that it is essential that all relevant and admissible evidence be produced.").

69 *Id.*

70 *See id.* at 707 ("To read the Art. II powers of the President as providing an absolute privilege as against a subpoena essential to enforcement of criminal statutes . . . would . . . gravely impair the role of the courts under Art. III.").

71 *See id.* at 705 ("[T]he privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties.").

72 *Id.* at 711.

73 *Id.* at 708.

74 *Id.* at 712.

75 *Id.*

76 *Id.*

77 *Id.* at 713–14.

78 The Court later clarified that the *Nixon* privilege—similarly to the deliberative process privilege—applies only to communications made in the course of the President's performance of his Article II duties. *See* Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 449 (1977).

closure in litigation.[79] But it did not expressly limit the application of its reasoning to disclosures implicating the deliberative-candor rationale.[80] If the Court could justify the creation of a privilege facilitating deliberative candor because that policy interest assumed "constitutional dimensions" in political-branch information disputes, it must find principled grounds to distinguish other confidentiality interests that could affect the constitutional balance in similar situations. Absent such grounds, a refusal to expand the privilege to cover such confidentiality interests seems indefensible.

C. The "Escalation Model": Executive Privilege in Congressional Investigations

Historically, presidential refusals to disclose information to Congress have played out as political rather than legal processes,[81] and courts have only rarely been involved.[82] Instead, Congress and the President tend to engage in a sort of tango that is aptly deemed the "escalation model."[83] Each branch exercises its various political prerogatives against the other—denying appointments, vetoing legislation, and so forth—until one branch capitulates and relinquishes its claim to the information.[84] Although this practice appears to have taken shape by default rather than by design,[85] some scholars have argued that it is in fact the preferable way of resolving interbranch information disputes.[86] This is because it ensures

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79 Initially, *Nixon*'s holding was limited to the context of criminal litigation. *Nixon*, 418 U.S. at 711–12, 712 n.19 ("We are not here concerned with . . . the need for relevant evidence in civil litigation, nor with . . . congressional demands for information . . . ."). However, the privilege has subsequently been applied to civil litigation. *See* Cheney v. U.S. Dist. Court, 542 U.S. 367, 381–82 (2004).

80 This is one of several ways in which the Court's holding in *Nixon* was remarkably narrow. For further discussion, see *infra* notes 144–149 and accompanying text.

81 For an overview, see Archibald Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383, 1395–1405 (1974).

82 *See In re* Sealed Case, 121 F.3d 729, 739 (D.C. Cir. 1997).

83 *See* O'Neil, *supra* note 24, at 1084–85.

84 *Id.*

85 *Cf. id.* at 1087 ("[S]cholars have inferred an intent by the Framers to embed in the basic structure of the political process the necessary means for resolving information disputes.").

86 *See id.* at 1084–85 ("At some point, this escalating process . . . will end when one branch concludes that the continued expenditure of political capital does not justify the institutional benefits of victory. That precise point, the theory maintains, provides the best approximation of the correct constitutional balance between the branches.").

that whichever branch values a piece of information most will ultimately gain control of it.[87]

Two problems with the escalation model should be immediately apparent. First of all, it is far from clear that whichever political branch values a piece of information most should control that information.[88] Suppose Congress seeks to investigate presidential wrongdoing, for example, but the President is willing to spend more political capital to conceal his misdeeds than his opponents in Congress are to uncover them. Although the escalation model would dictate confidentiality in such a case, from a normative perspective, disclosure is clearly preferable. Second, the escalation model seems wasteful. Why put appointments on hold and delay the passage of legislation if a court can adjudicate the dispute according to neutral, external standards?[89]

Proponents offer several reasons that the escalation model is, despite its flaws, preferable to judicial resolution of political-branch information disputes. One has already been suggested: such disputes may present nonjusticiable "political questions."[90] In his seminal article on executive privilege, Archibald Cox, the first Watergate special prosecutor,[91] argued that the difficulty of developing judicially manageable standards for resolving information disputes between Congress and the President was reason enough to keep those disputes out of court.[92] Could a judge realistically be expected, Cox asked, to "decide whether the legislative need [for subpoenaed information] is real or only professed by Senators or Representatives seeking political advantage . . . ?"[93] Finding himself unable to "formulate [a] rule of law not turning upon judgments of motive and political desirability," Cox concluded that "questions of executive privilege vis-à-vis Congress" should be "[left] to the ebb and flow of political power."[94]

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87 *Id.*

88 O'Neil compares this premise to the flawed reasoning of the "political safeguards" theory of the Tenth Amendment. *See id.* at 1098–1101.

89 Some proponents of the escalation model have even gone so far as to suggest that Congress could impeach and, if necessary, imprison noncompliant executive officials. *See, e.g.*, Chafetz, *supra* note 24, at 1152–53.

90 *See* Baker v. Carr, 369 U.S. 186, 217 (1962).

91 President Nixon dismissed Archibald Cox in what would later become known as the "Saturday Night Massacre." *See* Bart Barnes, *Watergate Prosecutor Faced Down the President*, WASH. POST (May 30, 2004), http://www.washingtonpost.com/wp-dyn/articles/A1755-2004May29.html [http://perma.cc/LQP6-3VJ9].

92 Cox, *supra* note 81, at 1430.

93 *Id.* at 1429.

94 *Id.* at 1429–32.

Another objection to the judicial resolution of political-branch information disputes is that it would create restrictive precedent. Because any such judicial decision would "have an impact beyond the precise factual issue that was litigated," the argument goes, it would likely "impinge upon [the branches'] flexibility" in future negotiations.[95] The D.C. Circuit articulated this concern in *United States v. AT&T*, in which it declined to adjudicate the Federal Bureau of Investigation's refusal to comply with a congressional subpoena for information regarding a warrantless wiretapping program.[96] Because "[a] court decision selects a victor," the court explained, "[it] tends thereafter to tilt the scales."[97] Thus, the argument goes, the ambiguity of the branches' entitlements under the escalation model is desirable because it encourages careful conciliation rather than stubborn cross-assertions of "rights" handed down in previous judicial decisions.[98]

This review of the objections to the justiciability of political-branch information disputes highlights some of the most salient points raised by scholars and courts. The debate itself is ongoing, however, and need not be fully recapitulated here.[99] For now, it is enough to expose the main strengths and weaknesses of the current escalation model political-branch information disputes. This will allow for critical evaluations of suggestions for its improvement later on.

Admittedly, the justiciability of political-branch information disputes remains an open question. This does not render an exploration of the executive privilege in congressional investigations premature, however. First, as this Note will show, a clearer focus on the source of law from which the executive privilege is drawn will assuage some concerns about its justiciability.[100] Second, although scholars appear to be split on whether such disputes are justiciable, several courts have recently found the disputes justiciable and proceeded to hear them on their merits.[101] Finally, and perhaps most impor-

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95 Yaron Z. Reich, Comment, United States v. AT&T*: Judicially Supervised Negotiation and Political Questions*, 77 COLUM. L. REV. 466, 483 (1977).

96 *See* United States v. AT&T, 551 F.2d 384, 385–86 (D.C. Cir. 1976).

97 *Id.* at 394.

98 *See* O'Neil, *supra* note 24, at 1085–86.

99 For a fuller discussion, including an original-intent argument in favor of the escalation model, see *id.* at 1083–87.

100 *See infra* Subpart II.C.

101 *See* Comm. on Oversight & Gov't Reform v. Holder, 979 F. Supp. 2d 1 (D.D.C. 2013); Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53 (D.D.C. 2008); *see also* Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 728–29 (D.C. Cir. 1974) (not disturbing the district court's holding

tantly, Congress in recent years seems to have discarded whatever historical reluctance it held to roping the federal courts into its information disputes with the President.[102] If these trends continue, a firm understanding of the privilege will help courts shape the law of executive privilege to meet the needs of the political branches, which appear to be evolving.

II
THE *NIXON* PRIVILEGE AS CONSTITUTIONAL COMMON LAW

A. What is Constitutional Common Law?

Professor Henry Monaghan first developed the idea of "constitutional common law" as a tool for understanding judge-made remedies for violations of constitutional rights.[103] Monaghan also recognized, however, that his concept was potentially applicable to a variety of other quasi-constitutional doctrines.[104] This Part will briefly introduce the concept of constitutional common law and then demonstrate its applicability to the executive privilege recognized in *Nixon*.

Professor Monaghan was particularly intrigued by the Fourth Amendment exclusionary rule, which the Supreme Court appeared to recast as a nonconstitutional doctrine in *United States v. Peltier*.[105] The *Peltier* Court explained that the rule—which makes evidence obtained in violation of a criminal defendant's Fourth Amendment rights inadmissible against that defendant at trial[106]—is not a personal constitutional right but rather a judge-made prophylactic measure designed to deter police misconduct.[107] Thus, *Peltier* held, the rule applies only where its core deterrence rationale is served.[108] It does not, for example, provide for the retroactive reversal of a conviction obtained using evidence whose collection was lawful at the time but which would be prohibited under subsequently decided case law.[109]

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that "the issues presented to it [concerning President Nixon's assertion of executive privilege against a congressional subpoena] were justiciable").

102 *See* Chafetz, *supra* note 24, at 1155–56 (criticizing Congress for "shortsightedly[ ] be[ing] an enthusiastic supporter" of what he calls "the courts' arrogation of [the] power" to decide privilege disputes).

103 *See* Monaghan, *supra* note 28, at 2–3.

104 *See id.* at 40.

105 422 U.S. 531 (1975).

106 *Id.* at 535.

107 *Id.* at 538–39.

108 *See id.* at 535–39.

109 This, of course, is because police officers have no way of foreseeing whether their now-lawful conduct will later be considered unconstitutional. Retroactively

Monaghan was chiefly puzzled by the Court's premise that the exclusionary rule "is a judicially created remedy designed to safeguard Fourth Amendment rights" and not "a personal constitutional right of the party aggrieved."[110] If the exclusionary rule is not part of the substantive content of a defendant's Fourth Amendment rights, then what is it?[111]

In posing a solution to this puzzle, Monaghan first questioned the assumption—"fostered," in his view, by "the Court's great prestige"—"that every detailed rule laid down [by the Court] has the same dignity as the constitutional text itself."[112] While some judicial decisions clearly add to the substantive content of constitutional provisions, Monaghan argued, others—like the Fourth Amendment exclusionary rule, *Miranda* warnings,[113] and *Bivens* actions[114]—merely establish one of multiple conceivable mechanisms for carrying the substance of such provisions into effect.[115] Rules in this latter category should not be treated as part of the Constitution itself, but rather as a "substructure of substantive, procedural, and remedial rules" that "draw[ ] their inspiration and authority from, but [are] not required by, various constitutional provisions."[116]

Monaghan characterized this body of law as "specialized" federal common law[117] of the type authorized by *Erie v. Tompkins*.[118] Under *Erie* and its progeny, federal law provides the rule of decision on issues where federal interests

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excluding evidence obtained by such conduct would therefore do little to deter police from intentionally violating the law. *Id.* at 540–42.

110 *Id.* at 538 (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)); *see* Monaghan, *supra* note 28, at 4.

111 And equally puzzlingly, how can the Supreme Court insist that state courts apply the rule, as it has since 1961? *See* Mapp v. Ohio, 367 U.S. 643, 654–55 (1961). Monaghan envisioned a scenario where a state legislature instructed its courts to forego the exclusionary rule and instead apply a different remedy for Fourth Amendment violations—a generous award of money damages, perhaps. Monaghan, *supra* note 28, at 7–8 ("[C]an the Supreme Court [nonetheless] insist upon exclusion of the evidence?").

112 Monaghan, supra note 28, at 2.

113 *See* Miranda v. Arizona, 384 U.S. 436 (1966). The Supreme Court has since rejected the notion that *Miranda* is a purely nonconstitutional doctrine. *See* Dickerson v. United States, 530 U.S. 428, 444 (2000). This does not necessarily foreclose a constitutional common-law interpretation of *Miranda*, however. *See infra* note 167.

114 *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

115 Monaghan, *supra* note 28, at 23–24.

116 *Id.* at 2–3.

117 *See id.* at 10 (quoting Henry J. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405 (1964)).

118 Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

predominate over state interests[119] and where a uniform national rule is needed to discourage forum shopping and prevent "inequitable administration of the laws."[120] Furthermore, where federal law must provide the rule of decision for an issue but no existing statute or constitutional provision applies, a court must fashion a rule of federal common law.[121] This is especially so where a federal statute or constitutional provision appears to authorize federal common-law making.[122]

Monaghan's key insight is that the enforcement of constitutional guarantees is an area where federal law must provide the rules of decision.[123] Because the federal government has historically been charged with enforcing constitutional rights, its interests predominate over those of the states in deciding how constitutional rights should be enforced.[124] And nationally uniform standards are necessary to establish "a nationwide floor below which state experimentation will not be permitted to fall."[125] Finally, the Constitution itself should be read to authorize federal common-law remedies or other doctrines that implement its substantive guarantees.[126] Thus, where Congress has failed to enforce a constitutional guarantee and where the Constitution itself prescribes no remedial mechanism, courts should fill in the gaps with federal common law.[127] Monaghan calls constitutional rules created pursuant to this authority "constitutional common law."[128]

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119 *See* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 431–32 (1996) (quoting Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 537 (1958)).

120 *See id.* at 428 (quoting Hanna v. Plumer, 380 U.S. 460, 468 (1965)).

121 *See* Clearfield Tr. Co. v. United States, 318 U.S. 363, 367 (1943).

122 *See* Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 887 (1986) (arguing that in order to exercise its federal common law-making power, a court must "point to a federal enactment, constitutional or statutory, that it interprets as authorizing the federal common law rule").

123 *See* Monaghan, *supra* note 28, at 19.

124 *See id.* ("The Court's history and its institutional role in our scheme of government, in which it defines the constitutionally compelled limits of governmental power, make it a singularly appropriate institution to fashion many of the details as well as the framework of the constitutional guarantees.").

125 *Id.*

126 *See* Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 62 (1997) (arguing that because "some constitutional norms may be too vague to serve directly as effective rules of law," courts are responsible for constructing "the doctrinal tests by which those norms are implemented").

127 *See* Monaghan, *supra* note 28, at 13 ("The Constitution is no less susceptible to interpretation through a consideration of its text, structure and purposes than are statutes. There is accordingly no a priori reason to suppose that it should differ from statutes in providing a basis for the generation of federal common law." (footnote omitted)).

128 *Id.* at 3.

The Fourth Amendment exclusionary rule, Monaghan concludes, is an example of constitutional common law.[129] It applies against the states without being a substantive component of the Fourth Amendment because, like all federal law, federal common law preempts contrary state law.[130] Treating constitutional remedies as federal common law has other practical advantages:[131] for example, if a judge-made constitutional remedy is treated as federal common law, Congress can modify it through subsequent legislation. Thus, while courts can provide immediate, interstitial remedies to enforce constitutional guarantees, Congress can later revise those remedies using its superior fact-finding and law-making competencies.[132]

Monaghan admits that the line between true constitutional interpretation and rules of constitutional common law can be difficult to draw.[133] In some cases, the Supreme Court specifically designates which parts of its decision are legislatively reversible rules of implementation.[134] The warnings prescribed by *Miranda v. Arizona*,[135] for example, must be given to a person in police custody unless "other fully effective means are adopted to notify the person of his [or her] right of silence."[136] In other cases, however, constitutional interpretation inevitably "shades into judicial lawmaking on a spectrum."[137] Monaghan's admittedly imperfect solution is that "the distinction . . . lies in the clarity with which the [rule] is perceived to be related to the core policies underlying the constitutional provision."[138] Thus, the Constitution does not require a state's police officers to quote verbatim from the Supreme Court's opinion in *Miranda*, because no single, exact phrasing of *Mi-*

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129 *Id.* at 40–41.

130 *Id.* at 12–13.

131 *Id.* at 26–30 (describing the "desirable . . . coordinate roles for the Court and Congress" that follow when remedies are treated as constitutional common law).

132 *Id.* at 28 ("Supreme Court use of constitutional common law, because it allows a coordinate role for Congress in protecting constitutional liberties, should increase the likelihood that Congress' special institutional competence will be brought to bear on the problems of protecting individual liberty.").

133 *Id.* at 31–33.

134 *Id.* at 31.

135 384 U.S. 436 (1966). An arrestee must be warned "that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Id.* at 479.

136 *Id.*

137 Monaghan, *supra* note 28, at 33 (quoting P. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 770 (2d ed. 1973)).

138 *Id.*

randa warnings is strictly necessary to appraise arrestees of their constitutional rights.[139]

B. Why is *Nixon* Constitutional Common Law?

Just as the exclusionary rule enforces the Fourth Amendment's prohibition on unreasonable searches and seizures, executive confidentiality allows the President to "take care that the laws be faithfully executed,"[140] as Article II requires, and to do so independently, as the separation of powers between the branches implies that he must. At the same time, however, "[n]owhere in the Constitution . . . is there any explicit reference to a privilege of confidentiality."[141] Thus, although the Constitution seems to require *some* form of executive confidentiality,[142] it provides neither the rule governing that confidentiality nor any language from which one could plausibly deduce such a rule. And where the Constitution announces a norm but provides no mechanism to implement it, courts must fashion a rule of federal common law to effectuate it.[143] Therefore, like the constitutional remedies in Monaghan's analysis, the *Nixon* privilege is a doctrine of constitutional common law.

The Supreme Court's language and reasoning in *Nixon* is consistent with this interpretation. By describing the executive privilege in vague terms, *Nixon* connected it to constitutional principles without decisively elevating it to the status of constitutional law.[144] The Court described the privilege as "constitutionally based,"[145] possessing "constitutional dimensions,"[146] and "rooted"—albeit "inextricably"—"in the separation of powers under the Constitution."[147] But it never explicitly cloaked

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139 *Id.* at 33–34.

140 U.S. CONST. art. II, § 3.

141 United States v. Nixon, 418 U.S. 683, 711 (1974). It is also implausible to suggest that an incidental power like the executive privilege should be read into Article II's substantive content, particularly because Article II—unlike Article I—contains no provision authorizing such incidental powers. *Compare* U.S. CONST. art. I, § 8, cl. 18, *with* U.S. CONST. art. II.

142 *See, e.g.*, *Nixon*, 418 U.S. at 708 ("The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.").

143 *Cf.* Clearfield Tr. Co. v. United States, 318 U.S. 363, 367 (1943) (fashioning federal common law to fill in the gaps of a federal statute).

144 *See In re* Sealed Case, 121 F.3d 729, 745 (D.C. Cir. 1997) (noting a general confusion over the privilege's exact source of law).

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

146 *Id.*

147 *Id.* at 708.

the privilege in the mantle of constitutional doctrine.[148] This ambiguity may have been intentional, given the Court's overall reluctance to tip the constitutional balance in the President's favor.[149] But in any case, treating the privilege as constitutional common law is consistent with the Court's ambiguous language.

Finally, the history of the various privileges protecting executive confidentiality interests buttresses the conclusion that the *Nixon* privilege is federal common law. From the founding era until 1974, when *Nixon* was decided, the various doctrines allowing government officials to withhold information from compelled disclosure—including the military-and-diplomatic-secrets and deliberative process privileges—were based in common law.[150] The *Nixon* Court drew on these doctrines in fashioning its own privilege. It distinguished *Nixon* from cases like *Reynolds*, in which the information sought contained military or diplomatic secrets,[151] and it recited almost verbatim the deliberative-candor rationale of the deliberative process privilege.[152] Thus, the executive privilege—like nearly all other evidentiary privileges—is firmly rooted in the common law. The fact that the *Nixon* Court happened to consider the interests of constitutional actors neither requires nor justifies a departure from these roots.

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148 In one particularly puzzling passage, the Court explained that "[c]ertain powers and privileges flow from the nature of enumerated powers," *id.* at 705 & n.16, and referred in a footnote to *McCulloch v. Maryland*, the case in which the Court first acknowledged that a branch of government possessed implied powers incidental to its enumerated powers. *See id.* at 706 n.16 (citing McCulloch v. Maryland, 17 U.S. (4 Wheat) 316 (1819)). Instead of explicitly applying *McCulloch*'s analysis to the privilege, however, the Court simply remarked that "the protection of the confidentiality of Presidential communications has similar constitutional underpinnings"—and moved on. *Id.* at 705–06.

149 *See id.* at 711–12, 712 n.19 (limiting its holding to the specific facts of the case); *id.* at 707 (firmly rejecting the idea that the presidential privilege was absolute). Indeed, if the Court's ambiguity was in fact intentional, a constitutional common-law privilege comports with its hesitancy to confer constitutional power on the executive branch.

150 For a review, see *supra* Subpart I.A.

151 *Nixon*, 418 U.S. at 710–11. Indeed, interpreting *Nixon* as true constitutional law seems to lead to an odd situation in which the confidentiality of a president's communications are protected as a matter of constitutional law but military and diplomatic secrets are shielded only by a common-law privilege.

152 *See id.* at 706 (emphasizing "[t]he President's need for complete candor and objectivity from advisers"). Indeed, subsequent courts and commentators have struggled to distinguish the two doctrines. *See In re* Sealed Case, 121 F.3d 729, 745 (D.C. Cir. 1997).

C. Advantages of the Constitutional Common-Law Interpretation

As Professor Monaghan found was the case with constitutional remedies, treating the *Nixon* privilege as constitutional common law comes with a distinct set of practical advantages. For example, the approach recommends a preexisting body of law—the common law of evidentiary privileges—as a model for applying the executive privilege against Congress. And because evidentiary privileges respond to changing relationships and social values, they are uniquely suited to common-law development.[153] Courts need the flexibility to create, revise, and perhaps even discard privileges as society evolves.[154]

A constitutional common-law privilege also provides a solution to the fundamental dilemma faced by courts adjudicating information disputes between the political branches. Until now, courts have generally assumed that the *Nixon* privilege is a doctrine of constitutional law.[155] Thus, while courts may have realized that the escalation model encourages wasteful political brinkmanship and provides no guarantee of desirable results, they have seen no viable alternative.[156] They have assumed that extending the privilege would irrevocably arrogate power to one branch and impair both branches' ability to negotiate in the future.[157]

By preserving much of the ambiguity—but none of the wastefulness or arbitrariness—of the escalation model, a constitutional common-law interpretation of *Nixon* offers a way out of this conundrum. A common-law approach allows courts to decide cases on their facts and to construe precedent nar-

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153 Congress recognized this fact by rejecting a fixed set of proposed evidentiary privileges in favor of Federal Rule of Evidence 501, which simply provides that "[t]he common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege" in federal court. FED. R. EVID. 501. Thus, Rule 501 "did not freeze the law governing the privileges of witnesses . . . at a particular point in our history, but rather . . . 'continue[d] the evolutionary development of testimonial privileges.'" Jaffee v. Redmond, 518 U.S. 1, 9 (1996) (quoting Trammel v. United States, 445 U.S. 40, 47 (1980)).

154 *Jaffee*, 518 U.S. at 8.

155 *See In re Sealed Case*, 121 F.3d at 745 (describing the "question of whether presidential privilege is rooted in the common law or the Constitution" as "not 'very meaningful'" (quoting Paul A. Freund, *The Supreme Court, 1973 Term—Foreword: On Presidential Privilege*, 8 HARV. L. REV. 13, 20 (1974)).

156 *See, e.g.*, United States v. AT&T, 551 F.2d 384, 394 (D.C. Cir. 1976).

157 *See id.* (expressing concern about "tilt[ing] the scales" and concluding that a "compromise worked out between the branches is most likely to meet their essential needs and the country's constitutional balance").

rowly.[158] For example, as Part III will suggest, the court in *Committee on Oversight and Government Reform v. Holder* could construct a specific *Nixon* privilege to govern cases where Congress seeks information regarding the Executive's response to a prior congressional investigation.[159] Such narrow, situation-specific rules will generally leave the political branches with few clues about the rules of decision that will apply to future information disputes. In most cases, the complex factual background of any given dispute will provide ample grounds for distinguishing existing precedent. Even when a prior decision appears to be directly on point, either branch can urge a court to reverse its federal common-law holding. Thus, the political branches will be discouraged from relying too heavily on judicial determinations to structure their rights vis-à-vis one another.

This ambiguity creates desirable incentives for negotiation and litigation between the branches. Where an information dispute's political stakes are low—or where one branch's entitlement to information is relatively clear—the risk of setting adverse precedent should dissuade both sides from litigating the dispute. But where the stakes of the dispute are high, or where its resolution is a closer question, the branches will be incentivized to take the dispute to court and forego negotiations, which would likely be futile anyway. Under this model, then, the federal judiciary acts as a kind of safety valve. It incentivizes negotiation in minor information disputes, but when a truly explosive dispute arises, it offers judicial resolution as an alternative to wasteful political brinksmanship.

Treating the *Nixon* privilege as constitutional common law also responds to the concern that information disputes between Congress and the President are nonjusticiable political questions.[160] The difficulty of formulating "judicially manageable standards" for resolving privilege disputes is less present when each dispute can be decided individually, on its facts, and without the necessity of annunciating a broad constitutional principle to justify the decision. The branches' constitutional interests are fairly specific, for example, in cases where Congress requests information about the Executive's response

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158 *Cf. Jaffee*, 518 U.S. at 8 ("The Senate Report accompanying the 1975 adoption of the [Federal] Rules [of Evidence] indicates that . . . [']the recognition of a privilege . . . should be determined on a case-by-case basis.'" (quoting S. REP. No. 93-1277, at 13 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 7051, 7059)).

159 *See infra* Subpart III.B.

160 *See* Baker v. Carr, 369 U.S. 186, 217 (1962); *supra* notes 91–94 and accompanying text.

to a prior congressional investigation. It is therefore much less daunting to identify and weigh those interests than to attempt to balance the branches' more general constitutional interests in having access to information.[161]

Furthermore, by encouraging courts to construe the holdings of prior executive privilege decisions narrowly, a constitutional common-law approach also assuages concerns about setting restrictive judicial precedent.[162] Because a *Nixon* privilege would apply only to the factual situation occasioning its creation, future courts would be free to disregard it except where that precise factual situation arises again. The danger that judicial resolution of that case would "tilt the scales" between the political branches in future information disputes is therefore limited.

Finally, and perhaps most importantly, treating the *Nixon* privilege as a rule of constitutional common law gives it a more rigorous theoretical motivation and a clearer role in our constitutional system of government. A useful comparison can be drawn with ordinary common-law evidentiary privileges, which control the flow of information from the individual citizen to the collective in a legal proceeding.[163] A common-law privilege vests an "entitlement" to an individual's information either in society, which might legitimately need the information to resolve a conflict between its constituents, or in the individual, who may have created the information under circumstances giving rise to a reasonable expectation that it would be kept confidential. By regulating these conflicts through stable doctrinal rules, the law ensures that conflict resolution and confidentiality can coexist.

Nixon privileges should be similarly viewed as a mechanism for mediating the flow of information between constitutional actors. When Congress and the courts seek information from executive officials, the branches' legitimate constitutional interests conflict in ways similar to the legitimate social interests of the individual and the collective in the common-law privilege context. By allocating information entitlements between the branches in a principled way, a well-crafted doctrine of executive privilege can foster a more peaceful constitutional coexistence. And treating *Nixon* privileges as federal common law allows courts—and possibly also Congress—to develop, ex-

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161 *See infra* Section III.B.2.

162 *See* O'Neil, *supra* note 24, at 1085–86.

163 *See* EDWARD J. IMWINKELRIED, 2 THE NEW WIGMORE: A TREATISE ON EVIDENCE: EVIDENTIARY PRIVILEGES § 1.2.1 (2014).

tend, and modify this doctrine so that it can be fitted to its unique constitutional role.

Thus, a constitutional common-law model of *Nixon* privileges is consistent with Professor Monaghan's seminal theory, the Supreme Court's reasoning in *Nixon*, and the executive privilege's roots as a common-law doctrine. It provides an improved incentive structure for negotiation and litigation, addresses concerns about justiciability, and prevents judicial decisions from needlessly restricting future interactions between the political branches. Finally, it unlocks the privilege's potential to act as a judicial tool for regulating the flow of information between the political branches. Courts should therefore interpret *Nixon* as authorizing a body of constitutional common-law privileges that together govern information disputes between constitutional actors and, more specifically, between the political branches.

D. Some Potential Objections: Legislative Revision of *Nixon* Privileges

Although it addresses many of the issues that currently plague the law of political-branch information disputes, the constitutional common-law approach proposed here is not without its potential criticisms. Perhaps the most immediately obvious of these is that, like all federal common law, Congress can modify constitutional common law. Whereas Monaghan touted this feature as an advantage in the context of enforcing individual rights,[164] at first blush, it seems rather problematic when applied to *Nixon* privileges. If Congress can modify the rules governing executive confidentiality, will it not upset legislatively whatever constitutional balance judges might construct through careful common-law making? Moreover, what is to stop Congress from abolishing executive confidentiality altogether?

Constitutional common law is unique, however, in that Congress cannot abrogate it without providing an adequate substitute.[165] This much is clear from the Supreme Court's decision in *Dickerson v. United States*, which struck down a federal statute that "explicitly eschew[ed] a requirement of [*Mi-*

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164 *See supra* notes 131–32 and accompanying text.

165 *See* Dickerson v. United States, 530 U.S. 428, 440 (2000). Although *Dickerson* did not explicitly characterize *Miranda* as constitutional common law, its analysis was consistent with that approach. *See* Michael C. Dorf & Barry Friedman, *Shared Constitutional Interpretation*, 2000 SUP. CT. REV. 61, 69 (2000) (characterizing *Dickerson* as an "invitation" to Congress to replace *Miranda* with a set of rules that adequately protect a suspect's right to remain silent).

randa] warnings" and instead considered "the administration of such warnings as only one factor" affecting the admissibility of a suspect's confession.[166] Although the Constitution does not "preclude legislative solutions that differ[] from the prescribed *Miranda* warnings," the Court explained, any substitute for those warnings would have to be "at least as effective in apprising accused persons of their right[s]," which the statute at issue was not.[167] The same analysis would apply to *Nixon* privileges: while Congress is free to design a more effective mechanism to enforce executive confidentiality, an enactment that seriously undermines executive confidentiality—whether by wholesale abrogation or otherwise—would be tantamount to a primary constitutional violation.

Sweeping congressional abrogation might not be the most salient objection to a constitutional common law of *Nixon* privileges, however. Because *Nixon* privileges are deliberately narrow in scope, the reversal of any single privilege is unlikely to jeopardize the constitutional core of executive confidentiality. Thus, incremental legislative revision may pose a more serious threat: Congress, a critic might argue, could selectively overturn individual *Nixon* privileges without violating *Dickerson*'s prohibition on constitutional underenforcement. It could thereby incrementally shape a body of constitutional common law that favors its interests over those of the executive branch.

This objection is well taken as a matter of constitutional theory. But as a matter of political practice, it is unrealistic. As noted above, in most cases where Congress decides to legislatively reverse a *Nixon* privilege, the privilege will favor the Executive. The President will therefore have every reason to veto its legislative reversal.[168] Congress would need to muster the support of two-thirds of its members to overcome that veto, but because of the bipartisan unity that this would require, such overrides would be exceedingly rare. Thus, the likely scenario would proceed as follows: the dominant party in Congress would seek information from an opposing-party president, attempt to reverse an adverse *Nixon* privilege, but fail to garner enough support from the opposing party in Congress to overcome a presidential veto of its reversing legislation. The fear that Congress could usurp control of the law of executive

166 *Dickerson*, 530 U.S. at 442.

167 *Id.* at 440 (quoting Miranda v. Arizona, 384 U.S. 436, 467 (1966)).

168 Of course, if the President instead signs the rule into law, we can assume that the President and Congress have reached an agreement between themselves on how to handle a particular aspect of information disputes between them. The intervention of the courts in such a situation would be unnecessary.

privilege through piecemeal legislative revision is therefore ill founded.

Of course, it may still seem problematic to leave important questions of constitutional implementation to the exigencies of politics. But recall Archibald Cox's framing of the fundamental problem presented by political-branch information disputes: How can judges distinguish between a legitimate congressional need for information and one that is "only professed by Senators or Representatives seeking political advantage"?[169] One way might be to infer that, when legislators put aside their political affiliations and join together to reverse a *Nixon* privilege over an executive veto, they act pursuant not to their competing political interests but rather to their collective institutional interest in defending congressional power. Thus, the political system appears to achieve *de facto* what judges cannot achieve directly: where Congress attempts to overturn a *Nixon* privilege purely for political advantage, the legislature will split along political lines, and the privilege will stand following an executive veto of the reversing legislation. Where they truly believe that a *Nixon* privilege upsets the constitutional balance between the political branches, by contrast, some legislators in the President's party may be moved to override the President's veto, and the privilege could fall.

III
THE *NIXON* PRIVILEGE IN CONGRESSIONAL INVESTIGATIONS

If *Nixon* opens the door to an evolving body of constitutional common-law privileges, equally applicable in litigation as in congressional investigations, courts will need guidance on how and when to recognize new *Nixon* privileges. Of course, *Nixon* itself must govern situations where the President seeks to withhold information on grounds that it contains confidential policy deliberations.[170] In this respect, however, *Nixon*'s specific deliberative-candor privilege should be thought of as only one of many possible constitutional-common-law privileges authorized by that decision. In order to determine whether the privilege should be expanded to cover a new situation, courts should look to the federal common law of evidence, which provides instructive—although not necessarily binding—guidance on this question.[171]

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169 Cox, *supra* note 81, at 1429.

170 *See* United States v. Nixon, 418 U.S. 683, 713 (1974).

171 *See* Jaffee v. Redmond, 518 U.S. 1, 9 (1996) (enunciating the "common-law principles underlying the recognition of testimonial privileges").

A. How and When Should the *Nixon* Privilege Be Extended?

In general, federal courts follow a four-step process for deciding whether to recognize a new privilege at common law. First, courts identify the confidentiality interest protected by the claimed privilege.[172] Second, they determine whether that confidentiality interest is beneficial to the public.[173] Third, they determine whether the benefit to the public in preserving the confidentiality interest outweighs the detriment to the public caused by withholding the information in question from a tribunal.[174] And finally, if the first three steps indicate that a privilege should be created, courts determine whether that privilege should be qualified—that is, potentially overcome by a litigant's showing of need—or absolute.[175] Fusing this process with the principles underlying the Supreme Court's decision in *Nixon* leads to a coherent analytical framework for extending and applying the *Nixon* privilege.

1. *Is There a Confidentiality Interest?*

Because privileges exist to encourage different types of confidential communications, the first step in building a new privilege is to identify the confidentiality interest that it is intended to protect.[176] The attorney-client privilege, for example, facilitates open communication between attorneys and their clients. Likewise, the deliberative process privilege protects the relationship between a policymaker and his or her advisors.[177]

On its facts, the privilege applied in *Nixon* protected the President's interest in the confidentiality of policy discussions with his advisors.[178] But nothing in the Court's reasoning limited the privilege's applicability to that specific type of communication.[179] Thus, in determining whether to recognize a *Nixon* privilege, a court's first task is to identify the confidentiality

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172 *See id.* at 10–11.
173 *See id.* at 11.
174 *See id.* at 11–12.
175 *See id.* at 17–18.
176 *See id.* at 10–11.
177 *See* Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 324 (D.D.C. 1966).
178 *See* United States v. Nixon, 418 U.S. 683, 705 (1974).
179 The D.C. Circuit, for example, has extended the privilege to apply to policy discussion between presidential advisors even if those discussions do not actually involve the President. *See In re* Sealed Case, 121 F.3d 729, 751–52 (1997) (holding that the *Nixon* privilege extends to a communication between the President's White House advisors, even if that communication never actually reached the President).

interest alleged. It should then proceed to the second step of the analysis.

2. *Does the Confidentiality Further a Constitutional Policy?*

Under Federal Rule of Evidence 501, which governs claims of privilege in federal courts, a court may recognize a new privilege only if the confidentiality interest it protects furthers the public interest.[180] Thus, a privilege under Rule 501 protects the confidentiality of communications between a therapist and his or her patient because that guarantee of confidentiality encourages patients to seek psychotherapy.[181] By contrast, courts are unlikely to recognize a privilege protecting communications between criminal coconspirators, because such communications facilitate criminal activities. This characteristic of common-law privileges gives rise to their key difference from *Nixon* privileges: while a Rule 501 privilege can be extended to protect the confidentiality of communications that serve the broader public interest, a *Nixon* privilege can be created only to protect confidentiality interests that serve some *constitutional* purpose.

This distinction is derived from the Court's reasoning in *Nixon*. The public's interest in the confidentiality of presidential communications was a necessary condition for creating the privilege as a rule of constitutional interpretation in that case, but it was not sufficient.[182] The Court also based its holding on the fact that the confidentiality of the President's deliberative communications was critical to the independent and effective execution of his responsibilities under Article II. "Whatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Art[icle] II powers," the Court explained, "[it] can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties."[183] Thus, constitutional concerns in large part justified the privilege the Court applied in *Nixon*.

So as the foregoing discussion suggests, the *Nixon* privilege should be extended to protect a confidentiality interest if, and only if, that interest has "constitutional dimensions"—that is, if the President must be able to expect that a given type of communication will be kept confidential in order to effectively and

180 See *Jaffee*, 518 U.S. at 11.
181 *See id.*
182 *See Nixon*, 418 U.S. at 708.
183 *Id.* at 705.

independently perform his Article II responsibilities. It would be futile for a president to assert, for example, that his communications with the First Lady were privileged under *Nixon*.[184] The President does not need to be able to have confidential conversations with his spouse in order to carry out his Article II responsibilities.

3. *Does the Balance of Constitutional Policies Favor Confidentiality or Disclosure?*

Just as the confidentiality interest protected by a proposed *Nixon* privilege must be "constitutionally based," any countervailing considerations favoring the disclosure of allegedly privileged information must also affect a coordinate branch of government's ability to carry out its constitutional responsibilities.[185] This distinction again tracks the Court's analysis in *Nixon*, which balanced the constitutional benefits of its new privilege against "the inroads of such a privilege on the fair administration of criminal justice."[186] Like the President's interest in confidentiality, the Court explained, the "right to the production of all evidence at a criminal trial . . . has constitutional dimensions."[187] Article III confers on the federal judiciary a "primary constitutional duty . . . to do justice in criminal prosecutions."[188] The Sixth Amendment, which affords criminal defendants the right to "be confronted with the witnesses against [them],"[189] and the Fifth Amendment, which prohibits any deprivation of liberty without due process of law,[190] further reinforce this "constitutional duty."[191] Thus, at least in the context of criminal litigation, a court considering a new *Nixon* privilege must balance the constitutional aspects of the Executive's asserted confidentiality interest against the judiciary's constitutional duty to ensure a fair trial.

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184 Of course, these communications might fall under a common-law spousal privilege, and they might even fall under the deliberative process privilege. *See In re* Grand Jury Proceedings, 5 F. Supp. 2d 21 (D.D.C. 1998), *aff'd in part, rev'd in part sub nom. In re* Lindsey, 158 F.3d 1268 (D.C. Cir. 1998) (treating the President's wife as a policy advisor under the deliberative process privilege).

185 *See* Chad T. Marriott, Comment, *A Four-Step Inquiry to Guide Judicial Review of Executive Privilege Disputes Between the Political Branches*, 87 OR. L. REV. 259, 302–09 (2008) (arguing that courts engaged in a balancing analysis under *Nixon* should only consider those confidentiality interests that might "disrupt the constitutionally assigned functions" of another branch of government).

186 *Nixon*, 418 U.S. at 711–12.

187 *Id.* at 711.

188 *Id.* at 707.

189 U.S. CONST. amend. VI.

190 *Id.* amend. V.

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

Some courts have already explored how this analysis would play out in the legislative context. In *Senate Select Committee on Presidential Campaign Activities v. Nixon*,[192] for example, the Senate Select Committee on Presidential Campaign Activities brought suit to enforce a subpoena against President Nixon, again for incriminating audiotapes related to the Watergate scandal.[193] The tapes, the Senate Select Committee urged, were needed to determine "the extent of malfeasance in the executive branch" and "whether legislative involvement in political campaigns is necessary."[194] In other words, the Committee sought the tapes pursuant to its oversight authority (its power to expose executive wrongdoing)[195] and its fact-finding authority (its power to ascertain facts about the external world in order to craft legislation).[196]

The D.C. Circuit proceeded to hear the case on the assumption that, "at least by analogy," the executive privilege applies against a congressional subpoena.[197] And the court was apparently persuaded that, at least in some cases, Congress's oversight and fact-finding needs might be sufficient to overcome an assertion of executive privilege.[198] Indeed, it seems that this must be the case; Congress has the authority to make law under Article I,[199] and it must have the power to make factual findings in order to carry out this law-making power effectively.[200] The Supreme Court has also held that Congress has inherent authority to investigate executive

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192 498 F.2d 725 (D.C. Cir. 1974); *see also* Marriott, *supra* note 185, at 307–09 (proposing a balancing test for resolving information disputes between Congress and the President). Although *Senate Select* was decided before the Supreme Court's decision in *United States v. Nixon*, it relied on a D.C. Circuit decision that, like *United States v. Nixon*, recognized a qualified executive privilege but nonetheless ordered President Nixon to comply with a criminal subpoena for audiotapes related to Watergate. *See* Nixon v. Sirica, 487 F.2d 700, 718 (D.C. Cir. 1973).

193 *Senate Select Comm.*, 498 F.2d at 727.

194 *Id.* at 731 (quoting Brief of the Senate Select Committee at 27–28, *id.* (No. 74-1258)).

195 *Id.* ("Congress has, according to the Committee, power to oversee the operations of the executive branch, [and] to investigate instances of possible corruption and malfeasance in office . . . .").

196 *Id.*

197 *Id.* at 729. The case to which the court analogized was *Nixon v. Sirica*. *Id.*

198 *Id.* at 732 ("In the circumstances of this case, we need neither deny that the Congress may have, quite apart from its legislative responsibilities, a general oversight power, nor explore what the lawful reach of that power might be under the Committee's constituent resolution.").

199 U.S. CONST. art. I, § 8.

200 Indeed, Congress's fact-finding power is often cited as a source of its unique competence to make law. *See, e.g.*, Monaghan, *supra* note 28, at 28–29.

wrongdoing.[201] Recognizing a *Nixon* privilege, therefore, likely derogates from Congress's ability to perform its constitutionally assigned law-making and oversight functions.

Senate Select also provides a model for how specific congressional interests, rather than broad assertions of Congress's constitutional supremacy, might be evaluated with respect to the facts of a particular information dispute. In *Senate Select*, the Committee argued that the court categorically lacked "authority to . . . pass judgment on the magnitude of need underlying [its] decision to authorize and issue a subpoena."[202] The court's holding, however, was much narrower. Because the House Judiciary Committee had obtained "copies of each of the tapes subpoenaed by the Select Committee" in deciding whether to initiate impeachment proceedings against President Nixon, the court reasoned, the Committee's "immediate oversight need for the subpoenaed tapes [was] . . . merely cumulative."[203] The subpoena was therefore not "demonstrably critical to the . . . fulfillment of the Committee's functions,"[204] and the President's assertion of executive privilege prevailed.[205]

Thus, in *Senate Select*, the D.C. Circuit considered the impact of executive confidentiality on Congress's ability to carry out its constitutional responsibilities in a specific situation: where Congress already possesses the information it seeks to subpoena. Indeed, the court could have easily proceeded to create a constitutional common-law *Nixon* privilege to shield all such information from disclosure. Although it did not go quite so far, *Senate Select* nonetheless provides an example of how a fact-specific analysis reduces broad constitutional arguments—like the Committee's insistence that its subpoena power was unreviewable—to more manageable constitutional claims. By narrowing a court's focus to the specific facts of an information dispute, a constitutional common-law framework further encourages this approach.

Once the branches' competing constitutional interests in a specific situation have been identified, a court's task is to balance them and determine whether, in light of its "reason and experience,"[206] a privilege should apply. Although this may

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201 *See* Cox, *supra* note 81, at 1430 (quoting Watkins v. United States, 354 U.S. 178, 200 (1957)).

202 *Senate Select Comm.*, 498 F.2d at 729.

203 *Id.* at 732.

204 *Id.* at 731.

205 *Id.* at 733.

206 *Cf.* FED. R. EVID. 501 (authorizing federal courts to craft common-law privileges "in the light of reason and experience").

seem like a monumental task, several considerations weigh against the impulse to keep such policy balancing out of judges' hands. First, the common-law nature of the *Nixon* privileges allows judges to decide cases on their facts, read precedent narrowly, and revise prior decisions in light of subsequent experiences with a rule.[207] It is far less daunting to balance constitutional interests in the context of a specific fact pattern than to balance them generally and in the abstract. Second, our legal system trusts judges to balance competing interests in society at large when presented with claims of common-law privileges.[208] So far, they have been up to the task. Finally, and perhaps most saliently, the alternative to judicial action is the escalation model. Compared to a political process with wasteful collateral consequences and no inherent tendency to yield justifiable results, a narrow, fact-specific balancing of constitutional interests appears far less problematic.

4. *If a Privilege Should Be Created, Is It Qualified?*

Once a court has identified a privilege, its final determination must be whether that privilege is qualified or, relatedly, subject to any exceptions.[209] This final step is closely tied to the outcome of the policy-balancing analysis required by the preceding step. Thus, where a confidentiality interest decisively outweighs all relevant countervailing disclosure interests, a court might conclude that the clarity and simplicity of a categorical, unqualified privilege justify its potential overinclusiveness.[210] But where the policy-balancing act yields more equal results, a judge is more likely to create a qualified privilege, which can be overcome pursuant to a fact-specific evaluation of an adversary's showing of need.[211]

Whether a *Nixon* privilege should be qualified or subject to exceptions is again a matter for decision by courts. And although this again seems like a demanding task, courts have successfully performed it in the past. Courts have long held, for example, that because the deliberative process privilege protects a less important public policy than the military-and-diplomatic-secrets privilege, the deliberative process privilege

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207 *See supra* note 158 and accompanying text.

208 *See* Jaffee v. Redmond, 518 U.S. 1, 8–9 (1996).

209 *Id.* at 17–18 (declining to create exceptions to the psychotherapist-patient privilege).

210 *Id.* (creating an unqualified psychotherapist-patient privilege).

211 The privilege applied in *Nixon* is a qualified privilege. *See* United States v. Nixon, 418 U.S. 683, 706 (1974).

is more heavily qualified and easier for litigants to overcome.[212] Furthermore, because federal common law can be altered by subsequent law-making authorities, a court need not worry that its weighing of constitutional interests will be irreversible if "reason and experience" later suggest a different result.

Thus, in deciding whether to recognize a privilege allowing the President to resist disclosing communications to Congress, a court should ask four questions: (1) Has the President asserted a cognizable confidentiality interest? (2) Does the confidentiality interest further the President's ability to independently carry out his functions under Article II? (3) Does that constitutional interest in confidentiality—as implicated by the facts of the case at hand—outweigh any cognizable countervailing constitutional interest in disclosure? And (4) does the confidentiality interest so outweigh the disclosure interest that the privilege should be unqualified, or are the interests close enough in relative importance that Congress should be able to overcome the privilege with a particularized showing of need? This analysis should guide courts in developing a constitutional common law of executive privilege incrementally, without fear of exceeding their competence as rule makers.

B. The *Nixon* Privilege in Action: *Committee on Oversight and Government Reform v. Holder*

To demonstrate how this analysis should function in practice, this subpart will suggest a new *Nixon* privilege and apply it to the facts of *Committee on Oversight and Government Reform v. Holder*. Again, in that case,[213] the House Committee on Oversight and Government Reform sued the Justice Department to enforce a subpoena for information related to the Department's previous false statement to Congress. The Justice Department refused to cooperate, and President Obama asserted executive privilege over the information on the Department's behalf.[214]

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212 *See In re* Sealed Case, 121 F.3d 729, 737, 743 n.12 (D.C. Cir. 1997) (explaining that while "claims of privilege for military and state secrets would be close to absolute," "[t]he deliberative process privilege . . . can be overcome by a sufficient showing of need").

213 For a full review of the facts of *Holder*, see *supra* Introduction.

214 Whether the President has the power to assert the privilege "on behalf" of a cabinet secretary is itself an unsettled issue. *See In re Sealed Case*, 121 F.3d at 752 (holding that "the privilege should not extend to staff outside the White House in executive branch agencies"). For the sake of argument, however, this Note will assume that President Obama has validly asserted executive privilege on Attorney General Holder's behalf.

At first, the case against the Department seems damning. After all, it made the false statement toward the beginning of a congressional investigation, and it retracted the statement only after the investigation had been ongoing for nearly ten months.[215] Because broader constitutional interests are at play, however, this Part will argue that a *Nixon* privilege should be developed and applied to shield the Department's post-response deliberations.

1. *A Confidentiality Interest with Constitutional Dimensions*

In order to construct a *Nixon* privilege, a court must first identify an executive confidentiality interest with constitutional dimensions. In *Committee on Oversight and Government Reform v. Holder*, the Justice Department stressed the constitutional implications of the House Committee's request, urging the court to reject "a two-step strategy in which [Congress] demand[s] information from the Executive Branch about a matter, and then subsequently request[s] all documents prepared by the Executive Branch in the course of responding to the previous demand for information."[216] Unless the executive privilege is interpreted to protect such information, the Department urged, executive-branch officials are left to face congressional investigations "without any protection of confidentiality whatsoever for the Executive's deliberations about how to respond."[217] Such a result would "not only chill Executive deliberations" but would also "provide Congress overwhelming leverage in any investigation or request for information."[218]

Having made a compelling argument about the balance of power in the American constitutional system, the Department grasped unsuccessfully for a doctrinal hook. It somewhat helpfully analogized its interpretation of the executive privilege to the attorney work-product doctrine,[219] which "recognizes that confidentiality is necessary to allow for an attorney's independent functioning."[220] But ultimately, the Department rested its argument on policy grounds: "A congressional right of access to the Executive's congressional response work product," it claimed, "would . . . weaken[ ] the dynamic accommodation

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215 *See supra* note 7 and accompanying text.
216 Defendant's Motion for Summary Judgment, *supra* note 17, at 30.
217 *Id.* at 26.
218 *Id.*
219 *See* FED. R. CIV. P. 26(b)(3) (codifying in part the common-law work product doctrine recognized in Hickman v. Taylor, 329 U.S. 495 (1947)).
220 Defendant's Motion for Summary Judgment, *supra* note 17, at 28.

process and thus harm[ ] both the separation of powers and the constitutional system that it supports."[221]

In rejecting the Department's argument, the court was clear that it was unwilling to address the "hypothetical possibilities" that it raised.[222] The Department's claim "that all documents . . . can be withheld . . . is unsustainable," the court explained, because it failed to demonstrate with specificity that the assertedly privileged documents met the elements of a cognizable executive privilege.[223] Thus, the Department's position, which may have seemed compelling as a matter of policy, was problematic in part because it lacked any sort of doctrinal mechanism to structure its application to the case at hand.

A constitutional common-law approach to *Nixon* would provide that missing doctrinal mechanism. Instead of arguing that, in general, it is poor public policy to allow Congress to compel the disclosure of communications regarding a response to a previous congressional subpoena, the Department could simply urge a new *Nixon* privilege on the court. A "congressional response privilege" might hold that where, as here, an executive official communicates in confidence with a policy advisor for the purpose of preparing a response to a congressional investigation, that communication is privileged against compelled disclosure in future congressional investigations.[224]

The court would begin its evaluation of the proposed privilege by determining whether it protected an executive confidentiality interest with constitutional dimensions. First, the court might reason, if executive officials expected that any internal discussion regarding a response to a congressional subpoena might be subject to disclosure in a subsequent congressional investigation, they might be discouraged from preparing responses at all.[225] This would not only be detrimental to the

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221 *Id.* at 30.

222 Order at 4, *supra* note 16, at 4.

223 *Id.* at 3–4 ("This assertion does not satisfy either of the essential components of the [deliberative process] privilege, and the Attorney General has not cited any authority that would justify this sort of blanket approach.").

224 Although the Department makes an apt analogy to the work product doctrine, the privilege suggested here is modeled after the attorney-client privilege. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 (AM. LAW INST. 2000). This is more appropriate because the work product doctrine's policy motivation—facilitating the adversarial process—is less applicable in congressional investigations, which are less adversarial than traditional litigation. *See Hickman*, 329 U.S. at 511.

225 *See* United States v. Nixon, 418 U.S. 683, 705 (1974) (predicting a similar chilling effect on policy deliberations).

truth-seeking function of congressional investigations[226] but it would also impair the Executive's ability to create policy in the first place. A president, knowing that he would be unable to fully defend a policy decision in a subsequent congressional investigation would be forced to more carefully examine his decisions from the perspective of potential political consequences. Adopting a congressional response privilege, by contrast, would incentivize independent judgment by executive officials because it would guarantee that, in the event of a subsequent congressional investigation, those officials could discuss and develop a defense of their prior policy decisions.

Thus, because executive officials require some degree of confidentiality in discussing their responses to congressional investigations—both to respond effectively and to create effective public policy—a privilege protecting that confidentiality would enable the President to "take care that the laws be faithfully executed."[227] Furthermore, a congressional response privilege is desirable in its own right, because it preserves the semi-adversarial nature—and therefore the truth-seeking function—of congressional investigations. Thus, like the privilege recognized in *Nixon*, the congressional response privilege protects a confidentiality interest that furthers both constitutional and public policies.

2. *Countervailing Congressional Interests and the Privilege's Shape*

The court would then evaluate the arguments favoring confidentiality alongside Congress's countervailing constitutional interests in disclosure. When seeking to discover the Executive's thought process in a prior congressional investigation, Congress's general oversight and law-making powers boil down to two specific interests: (1) holding the Executive accountable for dishonesty in congressional investigations and, possibly, (2) enacting legislation in order to correct defects in the Department's internal information-sharing process.[228] The court's task is to balance these interests (and their effects on

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226 In this way, the congressional response privilege is similar to the work product doctrine, which preserves the adversarial nature of litigation by shielding each litigant's attorney work product from discovery by the other. *See Hickman*, 329 U.S. at 511. This rule has a fairness rationale (why should one litigant get the benefit of the other's work?) as well as an efficiency rationale (if each side could discover the other's work product, neither would have any incentive to produce work product in preparation for trial). *Id.*

227 U.S. CONST. art. II, § 3.

228 *See* Complaint, *supra* note 9, at 11–12.

Congress's Article I powers) against the President's competing confidentiality interest (and its effect on his Article II powers).

The outcome of this policy-balancing analysis has a clear result. On the one hand, where Congress has reason to suspect dishonesty by the Executive, Congress's need to ensure veracity in its investigatory proceedings is more pressing than the President's general need to control his defense in a congressional investigation. On the other hand, where there are no indices of wrongdoing in the prior proceeding, Congress's general interest in legislating best practices with respect to the Department's internal procedures is insufficient to overcome the President's need for confidentiality in preparing responses to congressional subpoenas.

Thus, like the common-law attorney-client privilege,[229] the congressional response privilege should come with an exception. Where Congress can show "a factual basis adequate to support a good faith belief by a reasonable person" that the President engaged in intentional misconduct in response to a prior subpoena, the court should inspect the assertedly privileged communications *in camera*.[230] Based on that review, the court should determine whether wrongdoing likely occurred and whether the privileged communications should be disclosed. Without the requisite showing, however, the documents must be shielded, even from "the limited intrusion represented by *in camera* examination."[231]

At first, this solution may seem like sleight of hand. After all, creating a "congressional response privilege" does not resolve the fundamental difficulty identified by Cox, because it still requires judges to determine "when [the] congressional power of oversight [overrides] the interest in encouraging freedom and candor of deliberation in the Executive Branch."[232] But by narrowing the question to a more palatable level of abstraction, the judicial inquiry goes from impossible to merely difficult. Indeed, courts routinely follow the process outlined above to decide claims under the crime-fraud exception to the attorney-client privilege.[233] Labeling such standards as "judi-

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229 *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 (AM. LAW INST. 2000).

230 United States v. Zolin, 491 U.S. 554, 572 (1989) (quoting Caldwell v. Dist. Court, 644 P.2d 26, 33 (Colo. 1982)).

231 Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 730 (D.C. Cir. 1974) (emphasis added).

232 Cox, *supra* note 81, at 1430.

233 *See Zolin*, 491 U.S. at 574–75.

cially unmanageable" would run contrary to judicial experience.

In *Holder*, the Department's actions—particularly the false statement and its subsequent retraction ten months later—likely provide the "factual basis" required for the House Committee to obtain *in camera* review of the allegedly privileged documents. Absent a clear showing of actual wrongdoing, however, the court should refuse to order production of the documents. Thus, rather than chill executive responses to congressional subpoenas, as would a categorical rejection of the privilege, the congressional response privilege and its "crime-fraud exception" would simply encourage executive officials to deal honestly with Congress during investigations in order to preserve the confidentiality of their communications. The privilege would apply narrowly, leaving open the resolution of any other type of interbranch information dispute and avoiding unnecessary encumbrances on future negotiations between the political branches. And it would be reversible if subsequent judicial experience proved its underlying assumptions to be flawed or insufficiently nuanced.

The congressional response privilege therefore provides a desirable alternative to the extremes urged by both parties in *Holder*. Full disclosure would be detrimental to the President's ability to carry out his assigned functions and to the investigatory process itself,[234] while complete confidentiality might allow executive officials to get away with wrongdoing. A limited common-law privilege with a time-tested exception is a better way to reconcile the competing constitutional interests of the political branches in cases like *Holder*.

CONCLUSION

By locating the doctrinal foundations of the executive privilege recognized in *United States v. Nixon*, this Note offers a workable alternative to the prevailing escalation model of information disputes between Congress and the President. It involves courts in these disputes in a limited, ad hoc fashion that encourages the political branches to negotiate where possible but provides a forum for resolving high-stakes claims when necessary. It assuages fears that setting restrictive precedent

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234 The Supreme Court made a similar argument in *Jaffee v. Redmond*, 518 U.S. 1 (1996). "Without a privilege," the Court pointed out, "much of the desirable evidence to which litigants such as petitioner seek access . . . is unlikely to come into being." *Id.* at 12. The harm done by recognizing the privilege was therefore reduced. *Id.*

will arrogate power to either of the political branches. And finally, it creates a more productive role for the *Nixon* privilege in our constitutional system by equipping the privilege to regulate the flow of information between constitutional actors.

The approach suggested by this Note could be used to answer additional questions about *Nixon* and executive privilege. For example, it could help courts decide whether traditional common-law evidentiary privileges should apply in congressional investigations.[235] Or it might help determine whether the President can assert the privilege on behalf of lower-level officials.[236]

But, of course, a shortage of questions has never been the problem faced by scholars and courts trying to untangle *United States v. Nixon*. Rather, what has been lacking so far is a doctrinal structure capable of channeling broad political and philosophical arguments into administrable legal rules for deciding specific information disputes. Treating *Nixon* as a federal common-law rule of constitutional interpretation provides this structure and, as cases like *Holder* demonstrate, offers a way out of the morass of abstract considerations that has thus far plagued executive privilege jurisprudence.

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235 Can Congress, for instance, compel an executive official to disclose the identity of an informant? *See* George C. Fisher, FEDERAL RULES OF EVIDENCE: 2014–2015 STATUTORY AND CASE SUPPLEMENT 364–65 (reprinting the text of Proposed Rule of Evidence 510, proposed by the Supreme Court but not adopted by Congress, which would have provided an evidentiary privilege for the identity of government informers).

236 *See* Raoul Berger, *The Incarnation of Executive Privilege*, 22 UCLA L. REV. 4, 22–26 (1974); *supra* note 214 and accompanying text. As noted above, *Holder* itself seems to raise this question. *See* Comm. on Oversight & Gov't Reform v. Holder, 979 F. Supp. 2d 1, 16 n.7 (D.D.C. 2013).