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Stephen C. N. Lilley

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## Suboptimal Executive Privilege

Stephen C. N. Lilley\*

### ABSTRACT

*Executive privilege disputes between the political branches shape the boundaries of presidential secrecy and congressional authority. Those disputes often give rise to calls for political rather than judicial resolution. The existing academic literature and judicial doctrine in this area offer limited theoretical accounts of when courts should abstain from or resolve the executive privilege disputes presented to them by the political branches. This Article provides an analytical framework for evaluating the outcomes provided by judicial and political resolution of executive privilege disputes and then explores how those evaluations inform judicial decisions to abstain from or resolve executive privilege disputes. Political resolution of these disputes produces constitutionally acceptable, but suboptimal, outcomes. Courts can provide preferable outcomes in some cases, but judicial involvement in executive privilege disputes between the political branches also can threaten the legitimacy of courts. This raises the constitutional stakes of executive privilege disputes and argues for abstention in many cases. Courts conceivably could address those legitimacy concerns by sitting as courts of constitutional equity or doctrinalizing their discretion to entertain executive privilege disputes between the political branches. Such changes appear unwise and unlikely. Courts can change their doctrine at the margins to encourage more productive negotiations between the political branches and thus improve upon suboptimal outcomes. However, a default judicial abstention from executive privilege disputes between the political branches, governed by a nondoctrinalized prudential discretion, appears appropriate and likely to endure.*

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## I. INTRODUCTION

Few separation of powers issues have been as consistently contentious over the last fifty years as the existence, scope, and proper use of executive privilege: the power of a President to withhold certain types of information, even from Congress. The debate between the need for secrecy and candor within the executive branch and the need for congressional oversight has simmered—and occasionally raged—since the beginning of the republic, even if not framed in terms of “executive privilege.”<sup>1</sup> Most commentators now

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1. “The term *executive privilege* originated in the Eisenhower administration . . . .”  
MARK J. ROZELL, EXECUTIVE PRIVILEGE: PRESIDENTIAL POWER, SECRECY, AND

recognize Congress's power to oversee the executive branch and the President's power to withhold information when doing so is in the public interest. Yet the extent of these implied constitutional powers and which of the two must yield during a dispute over a congressional demand for information remain hotly debated.<sup>2</sup>

The administration of President George W. Bush closed, for example, with an ongoing executive privilege dispute. Critics contended that political operatives in the White House had engineered the removal of competent United States Attorneys because they had failed to advance Republican interests or had offended local Republican politicians.<sup>3</sup> Both the Senate and House Judiciary Committees investigated the firings, and the Attorney General ultimately resigned.<sup>4</sup> The investigations in the House of Representatives went all the way to federal court after the Department of Justice declined to prosecute the contempt citations issued by the House Judiciary Committee.<sup>5</sup>

The United States Attorneys investigation featured characteristics common to many executive privilege disputes: congressional

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ACCOUNTABILITY 39 (2d ed. 2002). Even without that moniker, President George Washington and Congress disputed information disclosure. *See* LOUIS FISHER, *THE POLITICS OF EXECUTIVE PRIVILEGE* 10–11 (2004).

2. This Article focuses on executive privilege disputes between Congress and the executive branch (*i.e.*, the President and proxies). The models it offers, *see infra* Parts III and IV, do not address disputes between the executive branch and an investigative official, or between the executive branch and a private party.

3. *See* Editorial, *A Scandal that Keeps Growing*, N.Y. TIMES, May 6, 2007, § 4, at 13. The Office of the Inspector General and the Office of Professional Responsibility have issued a report criticizing these firings. *See* U.S. Department of Justice Office of the Inspector General and Office of Professional Responsibility, *An Investigation into the Removal of Nine U.S. Attorneys in 2006* (Sep. 2008), available at <http://www.usdoj.gov/oig/special/s0809a/final.pdf>.

4. *See, e.g.*, Philip Shenon & David Johnston, *A Defender of Bush Power, Gonzales Resigns*, N.Y. TIMES, Aug. 28, 2007, at A1.

5. *See generally* Complaint, Comm. on the Judiciary, House of Representatives v. Miers, No. 08-cv-0409 (D.D.C. Mar. 10, 2008). The Committee won the first round in District Court, *see* Comm. on the Judiciary, House of Representatives v. Miers, 558 F. Supp. 2d 53, 105–06 (D.D.C. 2008) (rejecting claim that presidential aide has absolute immunity from testimony and requiring her to appear before the House Judiciary Committee to assert executive privilege), but the Court of Appeals deferred consideration of the case until the next Congress, *see* Comm. on the Judiciary, House of Representatives v. Miers, 542 F.3d 909, 910 (D.C. Cir. 2008) (*per curiam*), placing the Committee's litigation in peril of becoming moot. This was avoided by an agreement, facilitated by the Obama Administration, between the House Judiciary Committee and the Bush Administration. Carrie Johnson, *House Panel Interviews Karl Rove About Attorney Firings*, WASH. POST, July 8, 2009.

committees, split along party lines, investigating perceived misconduct in the executive branch;<sup>6</sup> an administration defending itself from charges of wrongdoing, accusing Congress of undertaking a political witch-hunt, and asserting its need to avoid information disclosure that would chill advice-giving in the White House;<sup>7</sup> a series of offers for partial disclosure, counteroffers, and escalating political threats;<sup>8</sup> an awkward litigation posture when the dispute reached the courts;<sup>9</sup> and finally a compromise.<sup>10</sup> The investigation also shared another common feature of executive privilege disputes: calls for political, rather than judicial, resolution of the disputes.<sup>11</sup>

Great attention has been paid to the substantive merit of individual assertions of executive privilege. In contrast, preferences for either political or judicial resolution of executive privilege disputes have only begun to receive critical scrutiny. The preference for political resolution has been criticized,<sup>12</sup> but no theory has emerged to explain the tradeoffs between political and judicial resolution, or to identify factors that courts should consider in deciding whether to wade into an executive privilege dispute between the political branches. This Article undertakes that analysis. It explains that executive privilege disputes likely will end with suboptimal outcomes. It offers schematic models to build an analytical framework for evaluating whether courts or the political process will provide a constitutionally preferable outcome in an executive privilege dispute. It does not attempt to identify the best

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6. See, e.g., Gail Russell Chaddock, *Bid to Punish Bush Aides May Fail*, CHRISTIAN SCI. MONITOR, July 27, 2007, at 3 (describing party-line House Judiciary Committee vote to cite presidential aides with criminal contempt).

7. See, e.g., Peter Wallsten & Richard B. Schmitt, *Democrats Content to Let Gonzales Twist in the Wind*, L.A. TIMES, Aug. 7, 2007, at A8 (recounting Vice President Cheney's description of congressional investigations as "a bit of a witch hunt on Capitol Hill, as they keep rolling over rocks hoping they will find something").

8. See, e.g., Paul Kane, *Senate Panel Approves Subpoenas for 3 Top Bush Aides*, WASH. POST, Mar. 23, 2007, at A4 (describing rejection of the Bush administration's offers to testify behind closed doors without a transcript and not under oath).

9. See *supra* note 5.

10. See Agreement Concerning Accommodation, House of Representatives v. Miers, No. 08-cv-0409, available at <http://judiciary.house.gov/hearings/pdf/Agreement090304.pdf>.

11. See, e.g., Del Q. Wilber, *Judge Urged to Order Associates of President to Honor Subpoena*, WASH. POST, June 24, 2008, at A15 (describing call of Deputy Associate Attorney General for Congress to rely on political weapons and compromise to resolve the dispute).

12. See David O'Neil, *The Political Safeguards of Executive Privilege*, 60 VAND. L. REV. 1079, 1083-87 (2007).

method for resolving every executive privilege dispute, but rather provides an analytical framework for reaching such a conclusion in an individual dispute. It explains that a default preference for political resolution is reasonable in a realm of high constitutional stakes, a broad array of constitutionally acceptable, but suboptimal outcomes, no clear solutions, and unknown consequences. Yet it also identifies a role for courts and describes doctrinal approaches that courts can take on the margins to help ensure constructive political negotiation of executive privilege disputes.

Part II describes existing executive privilege doctrine and scholarship and explores the need for a more theoretical understanding of the quality and relative advantages of judicial and political resolution of executive privilege disputes between the political branches. It observes the contrast this makes with the well-theorized and much-debated approaches to abstention in other contexts.

Part III evaluates political negotiation of executive privilege disputes. It identifies the constitutional values appropriate for assessing outcomes to executive privilege disputes: first, the extent to which an outcome supports the effectiveness of the government as a whole, and second, the degree to which an outcome supports the governmental structure provided by the Constitution. The section uses these values to build a descriptive model of the political resolution of executive privilege disputes. It rejects claims that political compromise generates constitutionally *optimal* outcomes to executive privilege disputes. It instead identifies a more realistic model for the political resolution of executive privilege disputes that focuses on constitutionally *acceptable* outcomes. This model in turn rests on three key assumptions that make the political resolution of executive privilege disputes between the political branches constitutionally acceptable in most cases: a range of constitutionally acceptable outcomes to executive privilege disputes exists, the political branches generally negotiate outcomes that fall within that range, and the procedure or substance of negotiations does not favor either of the political branches, so that, over time, negotiated outcomes favor neither branch. The section evaluates the reasonableness of these assumptions. It concludes that political negotiation generally, but not always, may be expected to generate constitutionally acceptable, if suboptimal, outcomes to executive privilege disputes. It recognizes the concerns about imperfect or

unacceptable outcomes generated by political resolution, but notes the advantage of the lack of precedential effect for these imperfect outcomes.

Part IV turns to judicial involvement in executive privilege disputes between the political branches. It predicts that, were the combined effectiveness of the political branches and the division of power between them the only concern in an executive privilege dispute, courts routinely would intervene whenever they could identify a constitutionally preferable level of disclosure to that generated by political negotiation. It argues that the difference between this expectation and courts' actual tendency to abstain from executive privilege disputes stems from two concerns about the legitimacy of judicial involvement: one caused by the awkward procedural postures of executive privilege disputes between the political branches, and another by the substance of disputes involving abstract questions of constitutional structure. As seen in the model this section provides, these legitimacy concerns do not bar judicial involvement in executive privilege disputes between the political branches, but they do give courts reason to act cautiously in the executive privilege context. Courts conceivably could minimize these legitimacy concerns by sitting as courts of constitutional equity or doctrinalizing rules governing the types of executive privilege disputes that they will entertain. This section argues that such substantial changes are unwise and unlikely. Courts nonetheless can change existing doctrine on the margins to encourage good faith negotiation and thereby improve the negotiation of executive privilege disputes between the political branches. Even with those changes, courts probably will continue to exercise an undocrinalized prudential discretion to decide whether to abstain from executive privilege disputes between the political branches. Constitutionally suboptimal outcomes to those executive privilege disputes are likely to remain the norm.

## II. THE UNDERTHEORIZED RESOLUTION OF EXECUTIVE PRIVILEGE DISPUTES

Commentators have endorsed political, rather than judicial, resolution of executive privilege disputes between the political branches. Yet both this and contrary views lack significant theoretical support in existing judicial doctrine and academic literature. This section first places the question how to resolve those executive

privilege disputes in the context of a brief history of executive privilege and a discussion of the many open questions and academic disputes regarding its specific substance and scope. Second, the section explores the undertheorized views on the quality and relative advantages of political and judicial resolution of executive privilege disputes between the political branches. It points out the greater development of views about judicial intervention and abstention in other contexts, such as when a federal court perceives companion litigation in a state court.

*A. Historical Assertions of Executive Privilege*

Presidents have asserted the power to withhold information since the tenure of President George Washington. In 1792, for example, the congressional inquiry into Major General St. Clair's failed military expedition in Ohio led Washington to convene his cabinet and consider what information was appropriate to furnish to Congress.<sup>13</sup> Washington decided to produce the information Congress sought but established that he stood ready to refuse to release any papers to Congress, "the disclosure of which would injure the public."<sup>14</sup> President Grover Cleveland successfully stood on this principle in 1886, when he refused to disclose information pertaining to removal of executive branch officials during his showdown with Congress over the Tenure of Office Act.<sup>15</sup>

The asserted authority to withhold information from Congress received the name "executive privilege" in the Eisenhower administration, which invoked the privilege more than forty times, including during skirmishes with Congress over the Army-McCarthy hearings.<sup>16</sup> Executive privilege disputes have been a consistent feature of the political landscape ever since. Presidents Kennedy and Johnson did not invoke executive privilege as extensively as Eisenhower, but both accepted its validity as a constitutional principle.<sup>17</sup> The Nixon administration famously ended in a

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13. See FISHER, *supra* note 1, at 10–11.

14. *Id.* at 11.

15. See *id.* at 19–25.

16. See ROZELL, *supra* note 1, at 39. For an exhaustive discussion of the Eisenhower administration's use of executive privilege, see Robert Kramer & Herman Marcuse, *Executive Privilege—A Study of the Period 1953–1960, Part I*, 29 GEO. WASH. L. REV. 623 (1961), *Part II*, 29 GEO. WASH. L. REV. 827 (1961).

17. See ROZELL, *supra* note 1, at 41 (describing President Kennedy's view of executive



showdown over the President's assertion of an unreviewable executive privilege.<sup>18</sup> The Ford and Carter administrations unsurprisingly took care to avoid similar conflagrations but nonetheless did not disclaim the privilege.<sup>19</sup> Presidents Reagan, George H.W. Bush, and Clinton asserted executive privilege more aggressively.<sup>20</sup> President George W. Bush's invocation of executive privilege raised outcries of an imperial presidency,<sup>21</sup> and left unresolved issues that spilled into President Obama's administration.<sup>22</sup>

The Supreme Court recognized executive privilege as a "constitutionally based" qualified privilege in *United States v. Nixon*, the decision that led to President Nixon's resignation.<sup>23</sup> It explained that courts can review assertions of executive privilege and should weigh them against other constitutional interests; in that case, the government's interest in prosecution.<sup>24</sup> The Court did not address congressional demands for information but it laid the groundwork for a similar balancing of the political branches' constitutional interests in such a future dispute.<sup>25</sup>

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privilege as less expansive than Eisenhower's, and describing Kennedy's willingness to use the privilege to prevent oversight of foreign policy); *id.* at 42 (cataloging the Johnson administration's refusals to provide information to Congress).

18. *Id.* at 54–71 (cataloging Nixon's abuse of executive privilege).

19. *See id.* at 72–92.

20. The Reagan administration saw a number of high profile executive privilege disputes, and President George H.W. Bush defended his interest in limiting information disclosure even as he avoided the phrase "executive privilege." *See id.* at 93–119. The Clinton administration was the end of the "era of presidential reluctance to use executive privilege . . ." *Id.* at 122.

21. *See, e.g.*, ROBERT M. PALLITO & WILLIAM G. WEAVER, PRESIDENTIAL SECRECY AND THE LAW 193–216 (2007); ROZELL, *supra* note 1, at 147–54; CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY 97 (2007); Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489, 491–92, 541–42 (2007); Doug Kmiec, *The Use of Executive Privilege Must Be Reined In: Problematic Claims of Privilege Regarding the U.S. Attorney Firings and Torture Policies*, FINDLAW, July 24, 2008, [http://writ.news.findlaw.com/commentary/20080714\\_kmiec.html](http://writ.news.findlaw.com/commentary/20080714_kmiec.html).

22. *See, e.g.*, Marisa Taylor & Margaret Talev, *Obama Seeks Delay in Deciding on Rove Subpoena*, MCCLATCHY NEWSPAPERS, Feb. 16, 2009, available at <http://www.mcclatchydc.com/homepage/story/62290.html>.

23. *United States v. Nixon*, 418 U.S. 683, 711 (1974).

24. *Id.* at 711–13.

25. *See, e.g.*, 13 Op. Off. Legal Counsel 77, 82–83 (1989) (citing *Nixon* and describing weighing of congressional and executive branch interests: "The more generalized the executive branch interest in withholding the disputed information, the more likely it is that this interest will yield to a specific, articulated need related to the effective performance by Congress of its

Subsequent courts have done little to quell the rancorous disputes between the political branches over the substance of executive privilege. The Supreme Court never has resolved an executive privilege dispute between the political branches on the merits. Questions left open by the courts include who can assert executive privilege, the extent to which a sitting President can override the executive privilege claim of a former President, the length of the period of secrecy justified by a President's need for candid advice, and whether a President can compel the silence of subordinates by invoking executive privilege.<sup>26</sup>

Many commentators accept the constitutional basis of a qualified executive privilege.<sup>27</sup> In contrast, support for an unchecked and unqualified executive privilege does not appear in the academic literature.<sup>28</sup> Shortly before *Nixon*, Raoul Berger espoused a strong

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legislative functions. Conversely, the more specific the need for confidentiality, and the less specific the articulated need of Congress for the information, the more likely it is that the Executive's need for confidentiality will prevail.”)

26. The United States Court of Appeals for the District of Columbia Circuit has provided some structure to the law in this area. *See In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1998) (distinguishing between (1) the deliberative process privilege, derived from common law, which protects predecisional, deliberative documents and that applies to executive officials generally; and (2) the presidential communications privilege, rooted in the separation of powers and the President's unique constitutional role, which covers predecisional documents and other materials that reflect presidential decision-making and deliberations). That court's continued willingness to make law in this area appears somewhat doubtful. *See Comm. on the Judiciary, House of Representatives v. Miers*, 542 F.3d 909, 910 (D.C. Cir. 2008) (*per curiam*) (declining to hear and resolve appeal on an accelerated basis).

27. *See, e.g., ROZELL, supra* note 1, at 7–18 (cataloging arguments against the legitimacy of executive privilege); *id.* at 19–53 (concluding that “[w]hen exercised under the appropriate circumstances, executive privilege has clear constitutional, political, and historical underpinnings,” and enumerating arguments in favor of the legitimacy of executive privilege); Louis Fisher, *Invoking Executive Privilege: Navigating Ticklish Political Waters*, 8 WM. & MARY BILL RTS. J. 583, 584 (2000) (acknowledging that it is “routine . . . to consider both [a congressional power of inquiry and the executive privilege] powers implied in the operation of the executive and legislative branches”). *But see* Saikrishna Bangalore Prakash, *A Critical Comment on the Constitutionality of Executive Privilege*, 83 MINN. L. REV. 1143, 1152–70, 1185–87 (1999) (discussing reasons to doubt existence of a valid executive privilege, but ultimately concluding that a narrow executive privilege, subject to the control of Congress, does exist).

28. *See* Mark Rozell, *The Law: Executive Privilege Definition and Standards of Application*, 29 PRESIDENTIAL STUD. Q. 568, 568 (1999) (“On the fringes of the debate are those, such as scholar Raoul Berger, who have argued that executive privilege simply does not exist in our constitutional system, and those, such as former President Richard Nixon, who maintained that this power is absolute and not open to challenge by the coordinate branches of government.” (citing RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH (1974); Letter from President Richard M. Nixon to Judge John Sirica, District Court Judge

view on the invalidity of any claim of executive privilege.<sup>29</sup> Others have voiced similar concerns or expressed doubts.<sup>30</sup> Proponents of statutory controls on executive privilege view its perceived constitutional basis as mistaken or subject to reasonable procedural rules and congressional interpretation.<sup>31</sup> Commentators have disagreed even more when actual disputes force them to draw constitutional lines and define the scope and substance of executive privilege.<sup>32</sup> In short, a healthy academic debate persists on the substance and scope of executive privilege.

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(July 25, 1973) (Nixon Presidential Materials Project, Alexandria, Va.).

29. See generally BERGER, *supra* note 28.

30. See, e.g., PALLITO & WEAVER, *supra* note 21, at 213–14 (concluding that a “convincing case for a constitutionally based executive privilege has not yet been made,” but accepting executive privilege as “an established feature of our government of separate powers, in which each branch checks the others”); Kitrosser, *supra* note 21, at 493 (concluding that “there is no such thing as a constitutionally based executive privilege”).

31. See, e.g., Kitrosser, *supra* note 21, at 493 (“[C]ourts should order compliance with any statutorily authorized demands for executive branch information.”); Emily Berman, *Executive Privilege: A Legislative Remedy*, BRENNAN CENTER FOR JUST. 5 (2009) (discussing proposed statute and stating: “The statute’s chosen balance reflects a particular understanding of the relative weight of the interests at stake. While both Congress’s right to information and the President’s right to assert executive privilege are grounded in the Constitution, the burden placed on Congress by the withholding of necessary information is greater than the burden placed on the President by requiring disclosure. The Act’s standards regarding when the President’s zone of confidentiality must give way to congressional need recognize this distinction.”); Brian D. Smith, *A Proposal to Codify Executive Privilege*, 70 GEO. WASH. L. REV. 570, 600–12 (2002) (reviewing other codification proposals and arguing for a codification that creates a presumption of privilege). But see Neal Devins, *Congressional-Executive Information Access Disputes: A Modest Proposal—Do Nothing*, 48 ADMIN. L. REV. 109 (1996) (asserting that most members of Congress are happy with the current imperfect system); Rett D. Ludwikoski, *Politicization and Judicialization of the U.S. Chief Executive’s Political and Criminal Responsibility*, 50 AM. J. COMP. L. SUPP. 405, 432–36 (2002) (arguing that the judiciary should not allow Congress to define the scope of executive privilege through legislation since that would politicize rule of law and destabilize government). This Article departs from Devins’ support of the status quo by proposing specific steps that courts can take to improve the outcomes of political negotiation. This Article also offers a new theoretical explanation of the relative values of political negotiation and judicial resolution of executive privilege disputes.

32. Compare Randall K. Miller, *Congressional Inquests: Suffocating the Constitutional Prerogative of Executive Privilege*, 81 MINN. L. REV. 631, 654–57 (1997) (arguing that congressional investigation of the executive has gone too far, resulting in the chilling of the ability to assert executive privilege), with Mark J. Rozell, *Executive Privilege and the Modern Presidents: In Nixon’s Shadow*, 83 MINN. L. REV. 1069, 1122–24 (1999) (criticizing the Clinton administration’s “unprecedented” assertions of executive privilege).

*B. The Undertheorized Process of Resolving Executive Privilege Disputes*

The process of resolving executive privilege disputes among the political branches has received less sustained analysis than the substance and scope of executive privilege. The Supreme Court has not explained when courts should entertain executive privilege disputes between the political branches and when they should leave them to the political process. Courts have appeared to avoid the merits of executive privilege disputes between the political branches.<sup>33</sup> They have allowed, encouraged, and expressed a preference for political negotiation of executive privilege disputes between the political branches.<sup>34</sup> Yet they have not provided a coherent or consistent theoretical justification for that preference,

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33. *See, e.g.*, ROZELL, *supra* note 1, at 164–65; Vikram David Amar, *The Cheney Decision*, 2004 CATO SUP. CT. REV. 184, 189–99 (2004) (describing Supreme Court’s decision in *Cheney v. U.S. Dist. Court*, 542 U.S. 367 (2004), as an example of the Court declining to decide a case and criticizing the Court for failing to clarify executive privilege doctrine).

Procedural doctrines developed by the courts also have limited the courts’ ability to resolve executive privilege disputes, thus leaving them to the political process. *See, e.g.*, Walker v. Cheney, 230 F. Supp. 2d 51 (D.D.C. 2002) (concluding that the Comptroller General lacked standing to bring suit because he did not assert a personal injury); United States v. House of Representatives, 556 F. Supp. 150 (D.D.C. 1983) (holding that proper vehicle for pressing executive privilege arguments was a defense to a criminal prosecution, not a civil declaratory judgment action); *see also* Devins, *supra* note 31, at 130–32; O’Neil, *supra* note 12, at 1087–94; Patricia M. Wald & Jonathan R. Siegel, *The D.C. Circuit and the Struggle for Control of Presidential Information*, 90 GEO. L.J. 737, 752–53 (2002).

34. *See, e.g.*, United States v. AT&T, Inc., 567 F.2d 121, 127 (D.C. Cir. 1977) (“The framers, rather than attempting to define and allocate all governmental power in minute detail, relied, we believe, on the expectation that where conflicts in scope of authority arose between the coordinate branches, a spirit of dynamic compromise would promote resolution of the dispute in the manner most likely to result in efficient and effective functioning of our governmental system. Under this view, the coordinate branches do not exist in an exclusively adversary relationship to one another when a conflict in authority arises. Rather, each branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation. This aspect of our constitutional scheme avoids the mischief of polarization of disputes.”); United States v. AT&T, Inc., 551 F.2d 384, 391 (D.C. Cir. 1976) (“[A] better balance would result in the constitutional sense, however imperfect it might be, if it were struck by political struggle and compromise than by a judicial ruling.”); Comm. on the Judiciary, House of Representatives v. Miers, 558 F. Supp. 2d 53, 56–57, 98 (D.D.C. 2008) (“Although standing ready to fulfill the essential judicial role to ‘say what the law is’ on specific assertions of executive privilege that may be presented, the Court strongly encourages the political branches to resume their discourse and negotiations in an effort to resolve their differences constructively, while recognizing each branch’s essential role. . . . The process contemplates a long period of negotiation with resort to the judiciary, if at all, only in the case of a legitimate impasse.”).

even though academic literature and judicial doctrine has provided theoretical justifications for judicial abstention in other contexts.

Academic accounts have provided little theoretical support for a preference for either judicial or political resolution of executive privilege disputes between the political branches. A common view<sup>35</sup> that political negotiation best resolves executive privilege disputes draws upon Madison's description of our constitution's system of checks and balances that makes "[a]mbition . . . counteract ambition."<sup>36</sup> The structured opposition of the branches of government may render resort to the courts unnecessary in executive privilege disputes to the extent that the "several constituent parts [of the interior structure of government] may, by their mutual relations, be the means of keeping each other in their proper places."<sup>37</sup> However, general support for checks and balances does not explain if and when courts have a role in executive privilege disputes between the political branches. It does not clarify, for example, why courts should have no role in an executive privilege dispute when their involvement could avert a constitutional crisis.

Archibald Cox, the Watergate Special Prosecutor, argued that executive privilege disputes lend themselves "better to solutions negotiated through the political process than to an 'either-or' judicial determination."<sup>38</sup> In his view, courts should leave such disputes "to the ebb and flow of political power."<sup>39</sup> Mark Rozell has added his own rejection of judicial or legislative solutions to executive privilege disputes. He contends that each branch has sufficient political levers to protect its interests: "Through the normal political process of confrontation, compromise, and accommodation, the coordinate branches can usually satisfactorily resolve their differences over executive privilege. We cannot solve our modern dilemma by resort to the solution that was rejected by

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35. See O'Neil, *supra* note 12, at 1083 ("The scholarship addressing information disputes between Congress and the President speaks with a remarkably unified voice on the critical issue of how such controversies are best resolved. Reduced to its essentials, that scholarship contends that in any given conflict over information, the Constitution's structural distribution of powers will guide the political process to an optimal accommodation of the competing interests of each branch. External standards imposed by courts and judges, the literature assumes, will disrupt that organic process.").

36. THE FEDERALIST No. 51, at 319 (James Madison) (Isaac Kramnick ed., 1987).

37. *Id.* at 318-19.

38. Archibald Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383, 1427 (1974).

39. *Id.* at 1432.

the Framers—that is, by demanding constitutional certitude.”<sup>40</sup> Viet Dinh has criticized this view for leaving the door open to a vague judicial process as a complement to political resolution, but Dinh also has offered only the view that decisions about assertions of executive privilege are “best and properly made through a political process of give, take, and, ultimately, compromise between [the political] branches.”<sup>41</sup> Other scholars have struck similar notes. Jonathan Entin has argued in favor of negotiation because frequent resort to litigation undermines valuable inter-branch comity.<sup>42</sup> Louis Fisher has added that “what usually breaks the deadlock” in an executive privilege dispute is “a political decision” by one of the negotiating branches, not a court decision.<sup>43</sup> Peter Shane has provided detailed suggestions for optimizing political negotiation, with the goal of structuring discussions to encourage sensible agreement.<sup>44</sup>

Supporters of judicial resolution of executive privilege disputes also have not provided an analytical framework that can explain when

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40. ROZELL, *supra* note 1, at 167. He also has commented that most executive privilege disputes can be resolved “through the normal ebb and flow of politics as envisioned by the Framers of our governing system.” *Id.* at 166; *see also*, Mark J. Rozell, *Executive Privilege Revived? Secrecy and Conflict During the Bush Presidency*, 52 DUKE L.J. 403, 421 (2002) (“The resolution to conflicts over executive privilege resides in the theory of separation of powers as envisioned by the framers of the Constitution. Congress and the courts possess the institutional powers needed to challenge presidential exercises of executive privilege.”).

41. Viet D. Dinh, Book Review, 13 CONST. COMMENT. 346, 347, 352–55 (1996) (reviewing MARK J. ROZELL, *THE DILEMMA OF SECRECY AND DEMOCRATIC ACCOUNTABILITY* (1994)).

42. Jonathan L. Entin, *Executive Privilege and Interbranch Comity After Clinton*, 8 WM. & MARY BILL RTS. J. 657, 664 (2000); *see also* Jonathan L. Entin, *Separation of Powers, the Political Branches, and the Limits of Judicial Review*, 51 OHIO ST. L.J. 175, 209 (1990).

43. FISHER, *supra* note 1, at xi; *see also id.* at xv, 259 (“Attempts to announce precise boundaries between the two branches, indicating when Congress can and cannot have information, are not realistic or even desirable.”).

As Pallitto and Weaver state, *see* PALLITTO & WEAVER, *supra* note 21, at 193, the three major book-length studies of executive privilege are those by Fisher, *see supra* note 1, Rozell, *see supra* note 1, and Berger, *see supra* note 28. Berger and Rozell debate whether a constitutionally based executive privilege exists. Fisher, on the other hand, focuses on the tools and leverage used by the political branches during executive privilege disputes. He sees the constitutional “battles as largely a standoff,” and describes court decisions in the executive privilege area as “interesting but hardly dispositive.” FISHER, *supra* note 1, at xi; *see also* Louis Fisher, *Congressional Access to Information: Using Legislative Will and Leverage*, 52 DUKE L.J. 323, 325–26 (2002) (explaining that political branches normally can resolve disputes and that courts have (and should have) a limited role).

44. Peter M. Shane, *Negotiating for Knowledge: Administrative Responses to Congressional Demands for Information*, 44 ADMIN. L. REV. 197, 226–34 (1992).

and why judicial resolution of executive privilege reaches constitutionally preferable outcomes to those achieved by political negotiation. For example, Patricia Wald, former Chief Judge of the D.C. Circuit, and Jonathan Siegel defend the judicial role in executive privilege disputes, but they do not analyze the likely quality and relative advantages of political and judicial resolution of executive privilege disputes.<sup>45</sup>

David O'Neil recently described a general preference for political resolution of executive privilege disputes between the political branches as having emerged "largely through inertia."<sup>46</sup> Yet, although he rebuts one possible theoretical justification for that preference,<sup>47</sup> he does not provide an alternative theory in its place that describes the appropriate roles of each method for resolving executive privilege disputes. He does not explain what role courts should have in executive privilege disputes between the political branches and what principles should guide their discretion. He observes that "[c]ourts must provide a moderating influence, stabilizing the flow of information between the branches in a way that political safeguards alone cannot," but does not elaborate on this proposal.<sup>48</sup>

The existing academic literature and judicial doctrine thus has not sufficiently analyzed the relative quality of political and judicial resolution of executive disputes, or when or how a court should decide to entertain or abstain from an executive privilege dispute

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45. See Wald & Siegel, *supra* note 33, at 766–67 (defending the judicialization of executive privilege disputes and asserting the special role and ability of the United States Court of Appeals for the District of Columbia Circuit, although recognizing the role of political negotiation); see also Gia B. Lee, *The President's Secrets*, 76 GEO. WASH. L. REV. 197, 253 (2008) (rejecting notion that disclosure of information should be subject to political negotiation without discussing comparative advantages); Miller, *supra* note 32, at 633–34, 654–55 (noting that "[o]bservers have concluded that political negotiation regarding access to information is effective and preferable to judicial adjudication," and arguing that contemporary politics lacks the civility and ethic of cooperation necessary for negotiation to resolve executive privilege disputes, but providing limited comparison and evaluation of outcomes generated by political and judicial resolution of executive privilege disputes).

46. O'Neil, *supra* note 12, at 1082.

47. O'Neil explains that nothing in separation of powers doctrine supports a judicial refusal to adjudicate executive privilege disputes between the political branches. See *id.* at 1102–17. He argues convincingly that neither Madisonian principles of checks and balances, concerns about judicial expertise or the destabilizing effect of judicial precedent, or original intent preclude a role for the courts in executive privilege disputes between the political branches. *Id.*

48. *Id.* at 1137.

brought to it by the political branches. This stands in notable contrast to the extensive judicial theorization and academic commentary in other contexts where courts must decide whether to entertain or abstain from a dispute. The doctrines of *Younger*,<sup>49</sup> *Pullman*,<sup>50</sup> *Burford*,<sup>51</sup> and *Colorado River*<sup>52</sup> abstention each help define the relationship between state and federal courts. *Younger* alone has been cited over 9,000 times.<sup>53</sup> The political question doctrine and its appropriate application, whether with respect to gerrymandering cases or *Bush v. Gore*, also has been much cited and debated.<sup>54</sup> Whether courts should entertain or abstain from executive privilege disputes very conceivably could be doctrinalized or theorized in a similar fashion. Through its analysis of the quality of judicial and political resolution of executive privilege disputes, this Article provides a framework for answering that question.

### III. NEGOTIATED RESOLUTION OF EXECUTIVE PRIVILEGE DISPUTES BETWEEN THE POLITICAL BRANCHES

A comparative analysis of political and judicial resolution of executive privilege disputes between the political branches requires measures for evaluating the outcomes generated by each system. This section identifies two values for analyzing outcomes: the resulting overall effectiveness of government<sup>55</sup> and the degree to which an outcome imperils or strengthens the Constitution's systems of

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49. See *Younger v. Harris*, 401 U.S. 37 (1971) (directing abstention from suit for declaratory relief as to a state statute's validity while being prosecuted under that statute in state court).

50. See *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941) (allowing abstention in order to allow state courts to evaluate state laws challenged as unconstitutional).

51. See *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) (permitting a federal court sitting in diversity jurisdiction to abstain where the state courts likely have greater expertise in a particularly complex area of state law).

52. See *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976) (allowing prudential abstention where parallel litigation is occurring in state and federal courts).

53. Westlaw search performed on Aug. 16, 2009.

54. See generally *THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES* (Nada Mourtada-Sabbah & Bruce E. Cain eds., 2007).

55. The Article uses the term "overall effectiveness of government" to mean the sum of the degree to which an outcome ensures the effectiveness of each branch, weighted by the relative importance of the task facing each branch. Like the degree of fidelity to the system of constitutional structure, this metric allows simple discussion in the abstract, but obviously is hard to measure in any individual situation.



separated powers and checks and balances. This section then rejects claims that political negotiation will generate constitutionally optimal outcomes to executive privilege disputes. It offers a descriptive model of political negotiation of executive privilege disputes that recognizes an array of constitutionally acceptable, if suboptimal, outcomes. This section explains why political negotiation generally is likely to produce constitutionally acceptable outcomes to executive privilege disputes, an important fact given that many executive privilege disputes are resolved by negotiation and never presented to the courts. It argues that, because the political resolution of executive privilege disputes bestows limited precedential effect on the resulting outcomes, concerns about constitutionally suboptimal outcomes are reduced in the negotiation context.

#### *A. Constitutional Values and Executive Privilege Disputes*

An executive privilege dispute between the two political branches implicates two recognized constitutional powers: Congress's power of oversight<sup>56</sup> and the President's power to withhold information.<sup>57</sup> The Supreme Court has justified executive privilege, and its protection of candid advice-giving, as necessary to the effective discharge of executive duties.<sup>58</sup> The Court similarly has indicated that Congress's power to investigate flows from its need to perform its legislative and oversight roles effectively.<sup>59</sup> Conceived of in these terms, the resolution of a dispute over a congressional demand for information compromises the effectiveness of at least one of the political branches. But this mistakes the forest for the trees, as the Constitution ultimately is concerned with the combined effectiveness of the three branches of government.<sup>60</sup> Accordingly, this Article

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56. See *Watkins v. United States*, 354 U.S. 178 (1957) (identifying Congress's inherent power of inquiry).

57. See *United States v. Nixon*, 418 U.S. 683, 711 (1974) (describing executive privilege as "constitutionally based").

58. See, e.g., *id.* at 705 ("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 to the detriment of the decisionmaking process."); ROZELL, *supra* note 1, at 47-48.

59. See, e.g., *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927) ("[T]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.").

60. The Constitution's Preamble speaks to this larger goal of an effective system of government that will provide for the needs of its citizens. U.S. CONST. pmb. ("We the People

makes the utilitarian assumption that the quality of an outcome to an executive privilege dispute depends on the extent to which it advances the overall effectiveness of the government. The calculation of this value depends on the relative impact of an outcome on each branch's effectiveness at performing its constitutional functions. That calculation also considers the relative importance of the task undertaken by the respective branches.<sup>61</sup> For example, the balance "usually shifts decisively in Congress's favor" in an impeachment proceeding.<sup>62</sup> Similarly, the President arguably has strong claims to withhold information from Congress in the realm of foreign affairs.<sup>63</sup> The specific facts involved in a dispute between Congress and the executive branch control. There appear to be no rules hard-wired into the Constitution regarding what information Congress may demand or what the President may withhold.<sup>64</sup>

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of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America." The checks and balances established by the Constitution may compromise a single branch's effectiveness in a given instance, but they help maintain the integrity and effectiveness of the constitutional system as a whole, making up "by opposite and rival interests" for "the defect of better motives." THE FEDERALIST No. 51, at 320 (James Madison) (Isaac Kramnick ed., 1987); *see also id.* at 319 ("But the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.").

61. To put these factors in a simple equation: Impact of an outcome on the overall effectiveness of government = (impact of the outcome on the effectiveness of the legislative branch x the importance of the legislative functions affected by the outcome) + (impact of the outcome on the effectiveness of the executive branch x the importance of the executive functions affected by the outcome). In a given instance, an outcome might have a negative impact on one branch's important function and a limited impact on another branch's less important function. The goal of dispute resolution should be to find the outcome that maximizes the value of the combined outcome. This example excludes the judicial branch only because this section discusses political negotiation.

62. ROZELL, *supra* note 1, at 27.

63. *See id.* at 4 ("[T]he presumption in favor of executive privilege has always been strongest in areas of national security and foreign policy."); *id.* at 136 (characterizing as strong the claims of Attorney General Reno on this point and noting "the less controversial position[] that . . . the conduct of diplomatic relations requires that the president be able to communicate in secret with foreign leaders"); *id.* at 164 ("The Court made it clear" when protecting matters of national security or foreign relations that claims of executive privilege are "often difficult for another branch to overcome in a balancing of constitutional powers"). *But see* Louis Fisher, *Congressional Access to National Security Information*, 45 HARV. J. ON LEGIS. 219, 220 (2008) (arguing that Congress has no reason to defer to executive claims that Congress should not have access to national security information).

64. ROZELL, *supra* note 1, at 166–68 (rejecting search for constitutional absolutes or

The second key value for evaluating outcomes to executive privilege disputes between the political branches is the degree to which the outcome supports the structure of government provided by the Constitution. An exclusively utilitarian focus in executive privilege disputes might lead to ignoring constitutional limits on the balance of power among the branches.<sup>65</sup> The Constitution has provided a very effective system of government, but the next century might see our government operate more effectively with either an executive branch that pays no heed to congressional demands for information or with a Congress that controls the executive branch through intense and invasive oversight. Abandoning our system of checks and balances in such a fashion would represent a departure from “the commitment to a belief that the Constitution means something and is binding.”<sup>66</sup> Outcomes to executive privilege disputes between the political branches that preserve the governmental structure established by the Constitution thus obviously are constitutionally preferable to those that do not.<sup>67</sup> Similarly, an outcome that fits comfortably within that structural system would be constitutionally preferable to an outcome that strains or brushes up against the structural limits imposed by the Constitution.

These two values permit analysis of tradeoffs in executive privilege disputes. The messy reality of an executive privilege dispute certainly makes precise evaluation impossible. Nonetheless, these two measures provide a basis for evaluating the best method for resolving an executive privilege dispute.

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certitude in executive privilege context).

65. See, e.g., *INS v. Chadha*, 462 U.S. 919, 944 (1983) (“[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.”). Fisher has criticized *Chadha*’s rejection of “pragmatic agreements hammered out between the elected branches.” Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 LAW & CONTEMP. PROBS. 273, 273 (1993). Even if incorrectly applied in *Chadha*, however, it seems unobjectionable as a general matter that, however effective a device agreed upon by the political branches may be, its contravention of rules of constitutional structure renders it constitutionally invalid.

66. PALLITO & WEAVER, *supra* note 21, at 225.

67. The effectiveness of government raises questions of degree, *i.e.*, whether an outcome to an executive privilege dispute produces a more or less effective government than an alternative outcome. The constitutional limitations on government structure, on the other hand, likely will generate the either/or question whether or not an outcome to an executive privilege dispute satisfies those principles.

*B. The Unlikelihood of Constitutionally Optimal Outcomes*

Having identified these values, the question becomes how well political resolution can satisfy them in executive privilege disputes between the political branches. Judge Harold Leventhal, writing for the District of Columbia Circuit in *United States v. AT&T Co.*, counseled that, in the case of interbranch disputes, “each branch should take cognizance of an implicit constitutional mandate to seek *optimal* accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation.”<sup>68</sup> O’Neil describes justifications for a preference for political resolution of executive privilege disputes (which he rejects) in a similar fashion: “[I]n any given conflict over information, the Constitution’s structural distribution of powers will guide the political process to an *optimal* accommodation of the competing interests of each branch.”<sup>69</sup> These references may describe a relative optimum compared to available alternatives,<sup>70</sup> but they nonetheless prompt questions whether political resolution can provide absolutely optimal outcomes to executive privilege disputes.

The word “optimal” suggests a model of negotiation along a single dimension of the amount of information disclosure with one constitutionally optimal point:

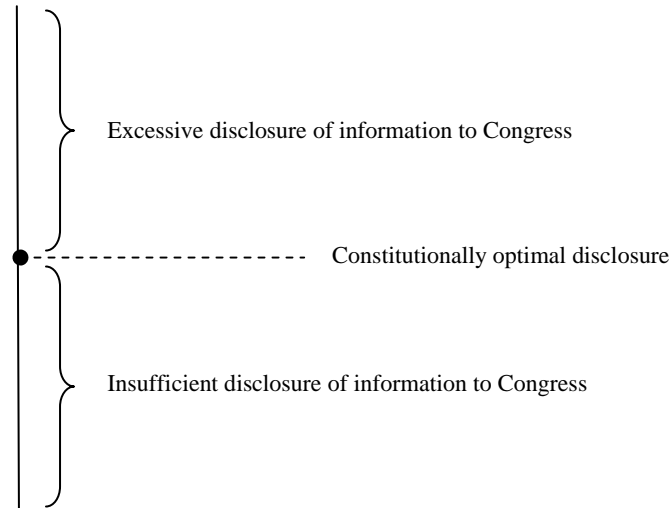
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68. *United States v. AT&T Co.*, 567 F.2d 121, 127 (D.C. Cir. 1977) (emphasis added).

69. O’Neil, *supra* note 12, at 1083 (emphasis added); *see also id.* at 1121–24 (rejecting notion that the political process necessarily will lead to constitutionally proper outcomes).

70. Judge Leventhal suggests as much by not repeating the word “optimal” elsewhere in his opinion. He discusses the negotiation process as constructive, for example, but does not suggest it is perfect. *See AT&T*, 567 F.2d at 130 (“The course of negotiations reflects something of greater moment than the mere degree to which ordinary parties are willing to compromise. Given our perception that it was a deliberate feature of the constitutional scheme to leave the allocation of powers unclear in certain situations, the resolution of conflict between the coordinate branches in these situations must be regarded as an opportunity for a constructive *modus vivendi*, which positively promotes the functioning of our system.”).

Total and immediate disclosure by President of information sought by Congress



No disclosure by President of information sought by Congress

This model is plausible if the political branches share a collective constitutional insight that allows them to reach the constitutionally optimal outcome in all executive privilege disputes. Both Congress and the President have institutional resources for expert analysis of executive privilege disputes,<sup>71</sup> but to date they do not appear to have combined these expert views into coherent collective constitutional decisions. Moreover, no matter how well such experts inform the branches, accounts of interbranch negotiations suggest that principles of constitutional interpretation do not guide the ultimate resolution of these disputes. One scholar has called them, “naked power struggles,”<sup>72</sup> for example, and then-Assistant Attorney General Antonin Scalia has described the “hurly-burly, the give-and-take of the political process between the legislative and the executive.”<sup>73</sup>

71. *See, e.g.*, Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act, 10 Op. Off. Legal Counsel 68 (1986); History of Refusals by Executive Branch to Provide Information Demanded by Congress, 6 Op. Off. Legal Counsel 751 (1982); *see also* Congressional Research Service, Presidential Claims of Executive Privilege: History, Law, Practice and Recent Developments 2–44 (Aug. 21, 2008).

72. O’Neil, *supra* note 12, at 1121.

73. FISHER, *supra* note 1, at 258 (quoting *Executive Privilege—Secrecy in Government: Hearings Before the Subcomm. on Intergov. Rels. of the S. Comm. on Gov. Ops.*, 94th Cong. 87 (1975) (statement of Antonin Scalia, Assistant Attorney General, Office of Legal Counsel)).

Dawn Johnsen has characterized the negotiation process as “messy” and as taking into account “institutional, partisan and personal interests.”<sup>74</sup> It is hard to imagine how such a process in which the executive privilege question never is disaggregated from other political issues and the political branches only have blunt political tools at their disposal could lead to a purely reasoned outcome. No commentator has explained convincingly, for example, why each side getting out its constitutional cudgels—the President vetoing all bills, for example, and the Congress cutting off all funds or shutting down the nomination process—will lead to constitutionally optimal results.<sup>75</sup> Nor would it necessarily even be preferable for the political branches to frame their disputes in terms of crucial issues of constitutional structure. Shane, for example, has described how the articulation of large constitutional principles in executive privilege disputes tends to harden lines of confrontation.<sup>76</sup> This potential

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74. Dawn Johnsen, *Executive Privilege Since United States v. Nixon: Issues of Motivation and Accommodation*, 83 MINN. L. REV. 1127, 1139 (1999).

75. See, e.g., Shane, *supra* note 44, at 198 (explaining that the adversarial nature of the negotiation process does not guarantee “that the optimal amount of information sharing will finally occur”). For example, nothing in the literature on executive privilege explains why one branch, at the height of political popularity, could not force the other branch, languishing in the depths of public opinion, to accept an outcome that shifts the balance of power among the branches. The use of all available constitutional weapons could exacerbate the problem in that situation as the unpopular branch might find itself even more damaged in the eyes of the electorate and thus weakened in the interbranch standoff if it uses the most serious constitutional weapons.

76. See *id.* at 220–21 (“Fueled by misunderstandings, however, about the other branch’s knowledge and intentions, the negotiators seem quickly to have shifted their rhetoric to general statements about presidential obligation and congressional prerogative. Once negotiators begin to act as though that level of principle is implicated in their disagreement, accommodation becomes vastly more difficult. In the words of former White House Counsel Fred Fielding: ‘If both parties are acting in good faith, you can negotiate a resolution to any issue unless or until it becomes an institutional clash. Once that occurs, resolution is very difficult because the issue has changed.’”). Thus, even though the political branches should take their institutional (rather than party) obligations seriously, see, e.g., FISHER, *supra* note 1, at 257 (“Whether lawmakers actually receive the requested information depends on their willingness, skills, and ability to devote the energy and time it takes to overcome bureaucratic hurdles. To do that job well, lawmakers have to think of themselves as belonging to an *institution* rather than to a composite of local interests.”), they should not necessarily frame the immediate practical concerns at hand as matters of high constitutional import if they wish for a speedy resolution. Any desire for the political branches to share in the obligation to perform constitutional analysis does not rebut these pragmatic views. See, e.g., Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707 (1985) (arguing that Congress has an independent duty to interpret the Constitution); Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 677–84 (2005) (describing the executive branch’s capacity for constitutional interpretation and

hardening creates few incentives for the political branches to reason through the constitutional concerns present in an executive privilege question. A recent report lists a number of reasons to doubt why the “shifting balance of partisan forces” will allow the political branches to confront and resolve “the fundamental question whether Congress’s interest in disclosure outweighs the Executive’s interest in nondisclosure,”<sup>77</sup> let alone do so in an optimal fashion. These include that political resolution can depend on the degree of press interest or scandal and can favor short-term political interests over long-term constitutional interests, that Congress always must overcome collective-action problems, and that the executive branch can extend an executive privilege dispute and make any information no longer timely.<sup>78</sup> Each gives rise to significant concern. This is particularly true in a period of one-party government, when concerns are heightened that the separation of powers system has changed into a system of separation of parties.<sup>79</sup>

Alternatively, the value of interbranch cooperation conceivably could justify whatever result Congress and the President reach. But this view would mean sacrificing government effectiveness and constitutional structure in favor of cooperation. It surely would not be constitutionally optimal for Congress to negotiate away its power to conduct oversight of the executive branch, or for the President to agree to provide Congress unlimited real-time access to all documents involving foreign relations decisions.<sup>80</sup> Nor does the constitutionally optimal model find support in the fact that courts

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identifying possibilities for improvement).

77. Berman, *supra* note 31, at 16–23.

78. *Id.*

79. See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2324–25 (2006) (“[T]he bottom line remains that in the broad run of cases—which is, after all, the relevant perspective for constitutional law—party is likely to be the single best predictor of political agreement and disagreement. It is impossible to grasp how the American system of government works in practice without taking account of how partisan political competition has reshaped the constitutional structure of government in ways the Framers would find unrecognizable. Yet the constitutional law and theory of separation of powers has proceeded, for the most part, as if parties did not exist and the branches behaved in just the way Madison imagined.” (footnote omitted)).

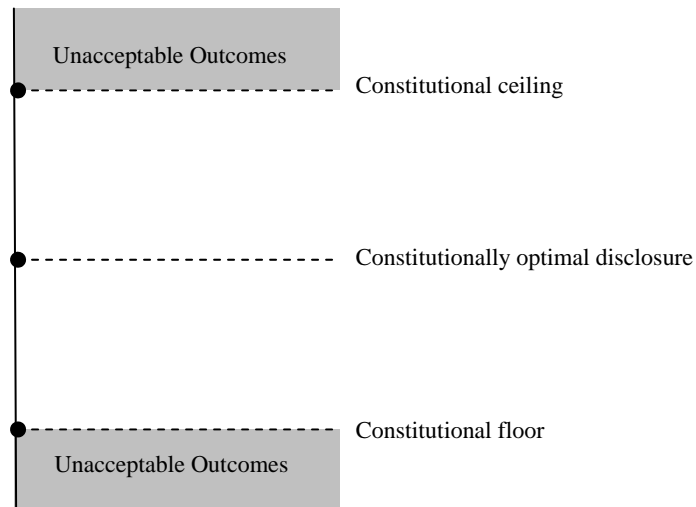
80. The Supreme Court has held in other separation-of-powers contexts that the political parties’ agreement to such an unconstitutional distribution of powers does not cure the agreement’s flaws. See, e.g., *INS v. Chadha*, 462 U.S. 919, 941–42 (1983) (“No policy underlying the political question doctrine suggests that Congress or the Executive, or both acting in concert and in compliance with Art. I, can decide the constitutionality of a statute; that is a decision for the courts.”); see also *supra* note 65.

might produce a worse outcome in a given executive privilege dispute. That would describe only the relative superiority of political resolution. It would not prove that the political branches can achieve the exactly correct outcome in the executive privilege disputes between them.

*C. The Likelihood of Constitutionally Acceptable Outcomes*

Scant, if any, grounds exist for the view that political negotiation will produce a constitutionally optimal outcome to an executive privilege dispute between the political branches. This suggests a more modest schematic for the political resolution of executive privilege disputes between the political branches. It focuses on constitutionally acceptable outcomes and their converse, constitutionally unacceptable outcomes:

Total and immediate disclosure by President of information sought by Congress



No disclosure by President of information sought by Congress

This model envisions the political branches resolving executive privilege disputes in ways that fall within a range of constitutionally acceptable outcomes, even if those negotiations do not reach the constitutionally optimal outcome. But it also recognizes that political negotiation can fail to meet constitutional standards. Rather than calling such outcomes unconstitutional, which implies judicial



review,<sup>81</sup> this model identifies those outcomes as constitutionally unacceptable.<sup>82</sup> A few broadly sketched hypotheticals demonstrate how the constitutional floor, ceiling, and optimum—measured on overall government effectiveness and fidelity to the intended constitutional structure—shift from one dispute to the next:

*Example One:* Imagine that a journalist reveals that the President has kept a log detailing the sale of nominations for federal judgeships. Congress surely would initiate impeachment proceedings and seek disclosure of the log. Its interest in and claim to disclosure would be extremely high. An ensuing concession that the President could withhold the log would amount to an abdication of Congress's impeachment power. In contrast, neither the need for effective government nor fidelity to constitutional structure support withholding of the information. Immediate full disclosure would seem the constitutionally optimal result, rendering any constitutional ceiling moot.<sup>83</sup>

*Example Two:* Imagine a head of a congressional committee who uses the investigatory authority of the committee to harass the President for political reasons. Imagine further a President engaged in the process of secretly negotiating a delicate international security agreement. In those circumstances, limited or no disclosure in the short term, followed by full disclosure at a later date, should be constitutionally acceptable.<sup>84</sup> It should ensure the effective functioning of both branches and should not cause any obvious shift in the balance of power between the political branches. The constitutional floor and ceiling likely would define a wide range of constitutionally acceptable outcomes. Total and immediate public

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81. See, e.g., ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–17 (2d ed. 1986) (discussing “judicial review” and the power of the Supreme Court to declare a statute “unconstitutional”).

82. Other writers have used this term. E.g., CASS R. SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* 202 (2001). This Article uses the term to avoid the implication that judicial review is necessary to establish the constitutional validity of a given outcome.

83. The exact timing and mechanics of disclosure (to whom to give the log and how much of the log to reveal immediately) might trigger some reasonable debate. The possibility of debate suggests the existence of a constitutional floor slightly beneath the constitutionally optimal point (*i.e.*, there may be a constitutionally acceptable outcome that involves slightly slower disclosure than the optimal outcome). Such a floor would define a narrow range of constitutionally acceptable negotiated outcomes.

84. See, e.g., Shane, *supra* note 44, at 218–19 (outlining possible negotiated release of information in timed stages).

disclosure would seem to be an abdication of the President's responsibility to advance national security interests.<sup>85</sup> In contrast, Congress likely would abdicate its own responsibilities in foreign affairs and thus reduce the future effectiveness of government if it agreed never to know the contents of the negotiations.<sup>86</sup>

*Example Three:* Imagine a committee inquiry, as part of the budgeting process, into the number of employees of certain pay grades within an administrative agency. Assuming that the information was not otherwise available, the President likely would have little or no justification for refusing to disclose this information to Congress. But the President also probably would offend no constitutional principle by offering (at least at first) information about another region or pay grade on the ground that it was more readily available than the information sought. Such an outcome might be constitutionally optimal if it maximizes the government's effectiveness. In contrast, nondisclosure to Congress likely would fall below the constitutional floor. It would compromise effective government by rendering Congress unable to fulfill its constitutional responsibilities for appropriations, budgeting, and oversight.<sup>87</sup> The constitutional ceiling likely would fall at a point where the request's negative impact on the executive effectiveness substantially outweighs the value of the requested information.

The model and hypotheticals demonstrate the difficulty of identifying an optimal outcome to an executive privilege dispute, even with perfect insight into congressional and presidential interests and motives. Even if all agree on the proper values for evaluating outcomes, the imperfect information in an actual executive dispute makes it hard to identify the optimal outcome and ranges of acceptable outcomes to that dispute. This raises doubts as to whether political negotiation routinely generates constitutionally acceptable outcomes to such disputes. Whether it meets that standard in turn rests on the assumptions that (1) a range of constitutionally acceptable outcomes to executive privilege disputes exists; (2) the

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85. See, e.g., ROZELL, *supra* note 1, at 43–46 (articulating need for secrecy and arguments for availability of executive privilege in national security context).

86. See, e.g., FISHER, *supra* note 1, at 230 (observing Congress's "express constitutional powers and duties in the fields of military affairs and national security").

87. See, e.g., ROZELL, *supra* note 1, at 124 (rejecting notion that Congress has a less valid claim to executive branch information when performing oversight than when performing its legislative function).

political branches generally negotiate outcomes that fall within that range; and (3) the procedure or substance of negotiations does not favor either of the political branches, so that, over time, negotiated outcomes favor neither branch.

Each of these assumptions appears to be generally valid. The first flows from the principle that the Constitution allows some play in the joints of our system of government.<sup>88</sup> The second has not been contradicted by one of the political branches having been forced to compromise, substantially or permanently, its performance of constitutional responsibilities.<sup>89</sup> Fears about the increased priority of party rather than institutional affiliation<sup>90</sup> appear somewhat allayed by views that persistent congressional committees generally have managed to gain the information they seek eventually.<sup>91</sup> The third assumption appears to be supported by the historical record. Apparently, the prevailing view is that political negotiation leads to disclosure because of the large number of coercive tools at Congress's disposal.<sup>92</sup> As recent history has demonstrated, however, a determined administration willing to endure the resulting political backlash can withstand congressional inquiries at least long enough to avert significant disruption of the performance of its constitutional duties.<sup>93</sup> Indeed, at least two recent Presidents have formally indicated a preference for negotiation.<sup>94</sup> Moreover, existing academic

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88. See *Bain Peanut Co. of Tex. v. Pinson*, 282 U.S. 499, 501 (1931) (“The interpretation of constitutional principles must not be too literal. We must remember that the machinery of government would not work if it were not allowed a little play in its joints.”).

89. See, e.g., FISHER, *supra* note 1, at 258 (expressing need for Congress to assert its prerogatives but noting that “political battles between Congress and the executive branch are generally effective in resolving executive privilege disputes”).

90. See Levinson & Pildes, *supra* note 79, at 2324–25 (discussing shift from “separation of powers” to “separation of parties”); see also Berman, *supra* note 31, at 8 (arguing that “[i]n the face of an Executive willing to stonewall, [Congress] is toothless”).

91. See *supra* notes 40–43 and accompanying text.

92. See, e.g., FISHER, *supra* note 21, at 258 (“Congress has the theoretical edge because of the abundant tools at its disposal. To convert theory to practical results requires from lawmakers an intense motivation, the staying power to cope with a long and frustrating battle, and an abiding commitment to honor their constitutional purpose.”).

93. As discussed above, the Bush administration refused to cooperate with congressional investigations into the firings of nine United States Attorneys in 2006. See Editorial, *Investigating a Scandal*, N.Y. TIMES, Oct. 1, 2008, at A28.

94. Lloyd Cutler, Special Counsel to the President, *Memorandum for All Executive Department and Agency Counsels re. Congressional Requests to Departments and Agencies for Documents Protected by Executive Privilege* (Sept. 28, 1994), reprinted in Congressional Research Service, Congressional Oversight Manual App. C (May 1, 2007) (“In the last resort,

accounts and analyses do not demonstrate that negotiation itself causes permanent damage to the presidency or leads to results that do not comport with the balance of powers anticipated by the Constitution.<sup>95</sup>

In sum, although grounds for concern exist, the assumptions beneath acceptance of political resolution of executive privilege disputes appear reasonable, indicating that political negotiation likely will generate constitutionally acceptable, if suboptimal, outcomes to executive privilege disputes. This conclusion does not mean that political negotiation will provide acceptable outcomes on all occasions or that a court could not produce a better outcome in any given dispute.<sup>96</sup> However, it does permit a general acceptance of political negotiation as a constitutionally valid means for resolving executive privilege disputes. This is important given that many executive privilege disputes are never presented to the courts, but are resolved by political compromise.

Constitutionally acceptable does not mean irreproachable, of course. History may disprove one of the assumptions identified above. As noted, serious concerns exist that political negotiation will generate imperfect or even unacceptable outcomes.<sup>97</sup> Fortunately, the limited precedential nature of these outcomes lessens their impact; negotiated outcomes may establish norms for future

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this balancing [of the political branches' interests] is usually conducted by the courts. However, when executive privilege is asserted against a congressional request for documents, the courts usually decline to intervene until after the other two branches have exhausted the possibility of working out a satisfactory accommodation. It is our policy to work out such an accommodation whenever we can . . . ."); Ronald Reagan, *Memorandum for the Heads of Executive Departments and Agencies re. Procedures Governing Responses to Congressional Request for Information* (Nov. 4, 1982), reprinted in Congressional Research Service, Congressional Oversight Manual App. B (May 1, 2007) ("Historically, good faith negotiations between Congress and the executive branch has minimized the need for invoking executive privilege, and this tradition of accommodation should continue as the primary means of resolving conflicts between the Branches.").

95. This does not rule out the possibility that negotiation will lead to a constitutionally improper result that will become a "new normal." See *Restoring the Rule of Law: Hearing Before the Subcomm. on the Const. of the S. Comm. on the Judiciary*, 110th Cong. 16 (2008) (statement of Harold Koh, Dean, Yale Law School) (arguing that major question following a period of constitutionally improper policies is whether the "pendulum . . . swing[s] back from where it has been pushed" or whether that extreme becomes the "new normal").

96. See, e.g., Shane, *supra* note 44, at 224 (describing congressional complaints about executive branch information disclosure in the existing system that prefers negotiation).

97. See *supra* notes 72–79 and accompanying text (describing limitations of political resolution of executive privilege disputes).

disputes, but they lack the authoritative effect of legal judgments.<sup>98</sup> Relevant factors for political negotiation include elements unfamiliar to judicial decisions: party loyalties, the election cycle, the opportunity for politicians to make names for themselves, and the timeliness of the issue.<sup>99</sup> With that provenance, negotiated outcomes do not merit the status of legal precedent. Rejecting the precedential effect of negotiated outcomes reflects the recognition that, whatever each branch's capacity for constitutional interpretation may be, political negotiation is not interpretation and the outcome is not equivalent to a considered judicial judgment. Moreover, even if such negotiated outcomes did have precedential effect, the widely varying facts and political contexts of various executive privilege disputes would make them hard to draw upon in a new context. This limited precedential effect releases pressure from the system. By limiting the effect of any particular dispute, it allows the future correction of constitutionally imperfect (or potentially unacceptable) negotiated outcomes.<sup>100</sup>

#### IV. JUDICIAL RESOLUTION OF EXECUTIVE PRIVILEGE DISPUTES BETWEEN THE POLITICAL BRANCHES

This section turns from political negotiation to evaluating judicial resolution of executive privilege disputes. The imperfection of politically negotiated outcomes would seem to leave a lot of room for judicial involvement (with the exception, of course, of disputes

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98. Michael J. Gerhardt has recently defined “non-judicial precedents as any past constitutional judgments of non-judicial actors that courts or other public authorities imbue with normative authority.” Michael J. Gerhardt, *Non-Judicial Precedent*, 61 VAND. L. REV. 713, 715 (2008). He views nonjudicial precedent as “democratiz[ing] the implementation of the Constitution” by giving the public “some say over the implementation of constitutional values.” *Id.* at 780. Gerhardt’s analysis does not appear to speak to executive privilege disputes. As discussed above, notes 71–75, *supra*, nothing in the existing literature suggests that outcomes to executive privilege disputes represent collective, unified constitutional judgments of the political branches. Executive privilege disputes thus do not produce a considered judgment. The resulting compromise appears unlikely to represent the considered judgment of either branch. The absence of a collective constitutional conclusion would seem to deprive an outcome of precedential effect under Gerhardt’s definition. Moreover, executive privilege negotiations may occur outside the public eye, reducing the democratizing effect discussed by Gerhardt.

99. *See, e.g.*, Paul Gewirtz, *Realism in Separation of Powers Thinking*, 30 WM. & MARY L. REV. 343, 347–53 (1989).

100. *See, e.g.*, FISHER, *supra* note 1, at 258 (describing risk of judicial establishment of “standards and doctrines that are too broad and awkwardly drawn”); ROZELL, *supra* note 1, at 167.

that are resolved before either party tries to present the case to the courts). The foregoing discussion models executive privilege disputes as occurring along a single dimension, with the quality of outcomes measurable by their proximity to the optimal amount and timing of information disclosure. Under this unidimensional view, courts seemingly should resolve disputes any time they can identify an outcome that makes the political branches collectively more effective and that better supports the constitutional structure than the outcome offered by the political process. This section argues that courts take a more limited role because their involvement adds another dimension: concerns about judicial legitimacy stemming from the procedural posture of executive privilege disputes and the substance of those disputes. It employs a model to contend that, when considered along that additional dimension, outcomes to executive privilege disputes reached by courts will not routinely be preferable to those produced by negotiation. It notes that courts conceivably could escape these legitimacy concerns by relaxing procedural standards and sitting as courts of constitutional equity, or articulating clear rules as to the types of executive privilege disputes that they will entertain. The section explains that these steps are unwise and unlikely. Courts can make limited doctrinal changes on the margins to maximize the quality of political negotiation and thus improve the outcomes to executive privilege disputes between the political branches. However, courts are likely to continue to exercise an undocrinalized prudential discretion to abstain from or resolve executive privilege disputes between the political branches.

#### *A. Judicial Legitimacy and Executive Privilege Disputes*

Executive privilege disputes pose at least two threats to the legitimacy of courts and their judgments. First, the awkward procedural postures of these disputes can undermine the legitimacy of the courts and their decisions. Second, the constitutional magnitude and political character of the disputes can raise questions about whether they are appropriate for judicial resolution. These legitimacy concerns add another dimension to executive privilege disputes and create challenges for courts as they face executive privilege disputes between the political branches.

*1. Procedural exceptionalism*

Straining procedural doctrines to reach the merits of a case—what might be called procedural exceptionalism—in executive privilege disputes threatens to delegitimize the courts and their judgments. As Alexander Hamilton explained, courts have power over neither the purse nor the sword, so they must rely on the strength of their judgments for their authority.<sup>101</sup> The legitimacy of a judgment in American law depends in part on judicial fidelity to the adversary system and legal rules.<sup>102</sup> This principle is expressed in the Article III requirement that courts only exercise jurisdiction over cases and controversies<sup>103</sup> and the correlative prohibition on advisory opinions.<sup>104</sup> Similarly, the standing doctrine ensures that courts only consider questions presented by parties with a meaningful interest in the outcome<sup>105</sup> and the ripeness and mootness doctrines guarantee that courts only consider timely disputes.<sup>106</sup> Straining any of these doctrines can represent a departure from the adversary principles underlying our legal system and delegitimize both the court and its decision.

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101. THE FEDERALIST No. 78, at 437 (Alexander Hamilton) (Isaac Kramnick ed., 1987) (“The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.”).

102. *See, e.g.*, United States v. Nixon, 418 U.S. 683, 709 (1974) (“[With respect to the need to provide evidence to prosecutors, w]e have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive.”).

103. U.S. CONST. art. III, § 2, cl. 1.

104. *Chicago & S. Air Lines v. Waterman Steamship Corp.*, 333 U.S. 103, 113–14 (1948) (“This Court early and wisely determined that it would not give advisory opinions even when asked by the Chief Executive. It has also been the firm and unvarying practice of Constitutional Courts to render no judgments not binding and conclusive on the parties and none that are subject to later review or alteration by administrative action.”).

105. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 565 (1992) (explaining that, to satisfy the constitutional minimum of the standing doctrine, a litigant must show injury, causation, and redressability); *see also* *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (“In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.”).

106. *See* *Nat’l Park Hospitality Ass’n v. Dep’t of the Interior*, 538 U.S. 803, 807–08 (2002) (describing the ripeness doctrine); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1997) (describing the mootness doctrine).

As discussed above, *Nixon* remains a central executive privilege decision because of its recognition of a constitutionally based executive privilege. Yet commentators have criticized it extensively,<sup>107</sup> including on the ground that the Court stretched procedural doctrines in order to reach the merits of the case.<sup>108</sup> Like other separation of powers cases, it posed important constitutional questions and arose in the context of a dramatic constitutional showdown between the political branches, creating incentives to resolve the merits of the dispute. But it also raised serious questions about the entitlement of the parties to assert the constitutional interests at stake since it pitted a member of the executive branch against the President.<sup>109</sup> The Supreme Court never has ruled on an executive privilege dispute directly between the two most appropriate parties to any law-making in this area, the President and Congress. The only cases that have reached the Court have involved assertions of institutional claims by proxy, raising questions about the ability of the parties to press institutional interests.<sup>110</sup> It even is unclear whether a direct conflict, hypothetically styled *Congress v. President*, would vindicate the long-term institutional interests rather than those of the individual office holders.<sup>111</sup> There thus exists

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107. Akhil Reed Amar has described *Nixon* as a dishonest precedent that only can be explained by the assumption that the Supreme Court already had smoking gun evidence of President Nixon's criminality. Akhil Reed Amar, *Nixon's Shadow*, 83 MINN. L. REV. 1405, 1420 (1999) (describing *Nixon* as a "crooked precedent[]" impeding both dishonest and honest presidents). Paul J. Mishkin has blamed the negotiated character of the opinion for its weaknesses and criticized the political branches for forcing the courts to address the question. Paul J. Mishkin, *Great Cases and Soft Law: A Comment on United States v. Nixon*, 22 UCLA L. REV. 76, 87–88, 91 (1974).

108. *E.g.*, Steven G. Calabresi, *Caesarism, Departmentalism, and Professor Paulsen*, 83 MINN. L. REV. 1421, 1424 (1999) (arguing that the *Nixon* dispute was nonjusticiable because it was purely an intrabranched dispute); William Van Alstyne, *A Political and Constitutional Review of United States v. Nixon*, 22 UCLA L. REV. 116 (1974).

109. *See* *United States v. Nixon*, 418 U.S. 683, 697 (1974) ("[T]he fact that both parties are officers of the Executive Branch cannot be viewed as a barrier to justiciability.").

110. For example, *Cheney v. U.S. Dist. Court*, 542 U.S. 367 (2004), and the related *Walker v. Cheney*, 230 F. Supp. 2d 51 (D.D.C. 2002), involved Vice President Cheney asserting the executive branch's interests and, on the other side, good government groups and, at least at the beginning of the litigation, the Government Accountability Office—the investigative arm of Congress—asserting the disclosure interest. Moreover, it may be appropriate for each political branch to consider the other branch's interests, thus undoing the adversary posture of the case. *See* *United States v. AT&T*, 567 F.2d 121, 127 (D.C. Cir. 1977).

111. An expansive view of presidential power does not necessarily advance the interests of the presidency. For example, as former head of the Office of Legal Counsel, Jack Goldsmith,



serious cause for concern that executive privilege disputes directly between the branches will ever have the procedural postures that confer legitimacy on decisions reached by Article III courts. The fact that executive privilege disputes so rarely reach the courts likely exacerbates such concern.

## 2. *Substantive concerns*

In addition to these procedural concerns, executive privilege disputes between the political branches may raise concerns about the capacity of courts to provide satisfactory outcomes given the substance of these disputes. Judicial involvement may impose negative effects upon our constitutional system to the extent that frequent resort to litigation harms interbranch comity.<sup>112</sup> More generally, it may be unwise to “draw the judiciary into intragovernmental controversies in their raw, politically-tinged state” where “the judicial touch is likely to be unsure.”<sup>113</sup> This concern may be overstated to the extent that the Supreme Court routinely resolves the most politically controversial legal issues arising in the United States.<sup>114</sup> At the very least, it suggests that disputes among the branches will generate enormous scrutiny that will magnify any flaws in the resulting outcome and potentially strain the decision-

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explains, an administration can accomplish more of its objectives when it cooperates with Congress rather than taking unyielding positions on presidential power. See JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 177–215 (2007). Similarly, the interest of the presidency in an executive privilege dispute may be total withholding of information in some cases, but in others it may tend toward effective performance of its office, even if that means yielding some information. Whatever the presidency’s interest in candid advice, other interests exist, such as the ability for the administration to continue to press its agenda and to prevent wrongdoing within the executive branch. In waiving executive privilege “voluntarily,” for example, President Nixon asserted that he did so to protect the institutional interests of the presidency. See ROZELL, *supra* note 1, at 66. It is hard to believe that the institutional interests of the presidency were identical to the individual interests of President Nixon. See *generally* O’Neil, *supra* note 12, at 1121–29 (noting the unlikelihood that institutional interests will align with the interests of the occupant of that institution).

112. See Entin, *supra* note 42, at 664. A destruction of comity would reduce the attractiveness of any judicial resolution to an executive privilege dispute, even if the courts resolved the case with perfect adherence to constitutional precedent and principle.

113. Paul A. Freund, *The Supreme Court, 1973 Term—Foreword: On Presidential Privilege*, 88 HARV. L. REV. 13, 38–39 (1974).

114. See *INS v. Chadha*, 462 U.S. 919, 942–43 (“[T]he presence of constitutional issues with significant political overtones does not automatically invoke the political question doctrine.”).

making process.<sup>115</sup>

Others have argued that executive privilege disputes constitute political questions that are entirely inappropriate for judicial review. In 1975, for example, then-Assistant Attorney General Scalia argued before a Senate Subcommittee that attempting to weigh the presidential interest in withholding information against Congress's need for disclosure is "the very type of political question from which . . . the courts [should] abstain."<sup>116</sup> However, Scalia's view appears to depend more on the perceived inappropriateness of bringing a President into court than on factors articulated by the Supreme Court (and particularly the classic restriction on deciding issues over which a coordinate branch has discretion).<sup>117</sup> A separate but related concern is reflected in an analogous context in then-Justice Rehnquist's separate opinion in *Goldwater v. Carter*.<sup>118</sup> Rehnquist states concerns regarding whether courts should rule on abstract questions of constitutional structure (although these concerns find no obvious root in the factors listed in *Baker v.*

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115. See Mishkin, *supra* note 107, at 87–88 (arguing that courts do not necessarily perform at their best in high-profile cases where their legitimacy may be called into question because they strain to reach unanimous outcomes).

116. See *Executive Privilege—Secrecy in Government, Hearings Before the Subcomm. on Intergov. Rel. of the S. Comm. on Gov. Ops.*, 94th Cong. 83 (1975).

117. See *Baker v. Carr*, 369 U.S. 186, 217 (1962) ("Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.").

118. *Goldwater v. Carter*, 444 U.S. 996, 1003 (1979) (Rehnquist, J., concurring) ("In light of the absence of any constitutional provision governing the termination of a treaty, and the fact that different termination procedures may be appropriate for different treaties, the instant case, in my view, also 'must surely be controlled by political standards.'" (internal citations omitted)). Focusing on the absence of a textual grant of discretion, Rehnquist's view reverses the classical strand of the political question doctrine, which bars consideration of issues over which another branch has discretion pursuant to a specific textual grant. See *Baker*, 369 U.S. at 217; see also Rachel E. Barkow, *The Rise and Fall of the Political Question Doctrine*, in *THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES*, *supra* note 54, at 36 (describing prominence of this factor, the "'classical' formulation of the doctrine," in political question cases after *Baker v. Carr*, and its root in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803) ("Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.")).

*Carr*,<sup>119</sup> the seminal modern political question case). His view may reflect the awkward procedural postures of disputes between the executive and legislative branches, concern about placing the judiciary above the political branches and the possibility that the political branches might retaliate or ignore a court decision,<sup>120</sup> or a preference for not rendering constitutional law fixed.<sup>121</sup> Whatever the exact nature of this concern, it adds to substantive concerns about judicial involvement in executive privilege disputes, even if the existing political question doctrine or other rules governing the substance of disputes courts may entertain do not require courts to abstain from these disputes.

### 3. *Implications of legitimacy concerns*

These procedural and substantive concerns suggest that the threats to courts' legitimacy associated with judicial involvement in an executive privilege dispute between the political branches introduce additional constitutional risks. Conversely, inappropriate abstention may pose comparable dangers. The courts could conceivably permit a constitutional crisis to occur if they refused to resolve an executive privilege dispute. If "[i]t is emphatically the province and *duty* of the judicial department to say what the law is,"<sup>122</sup> circumstances surely can be imagined in which the failure to adjudicate a dispute would constitute a constitutionally unacceptable

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119. *Baker*, 369 U.S. 186.

120. *See, e.g.*, BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY* 16–35 (2007) (depicting political retaliation against the Supreme Court in the founding period).

121. *See, e.g.*, MICHAEL FOLEY, *THE SILENCE OF CONSTITUTIONS* 76–77 (1989); *see also* ROZELL, *supra* note 1, at 167 (discussing Foley's views).

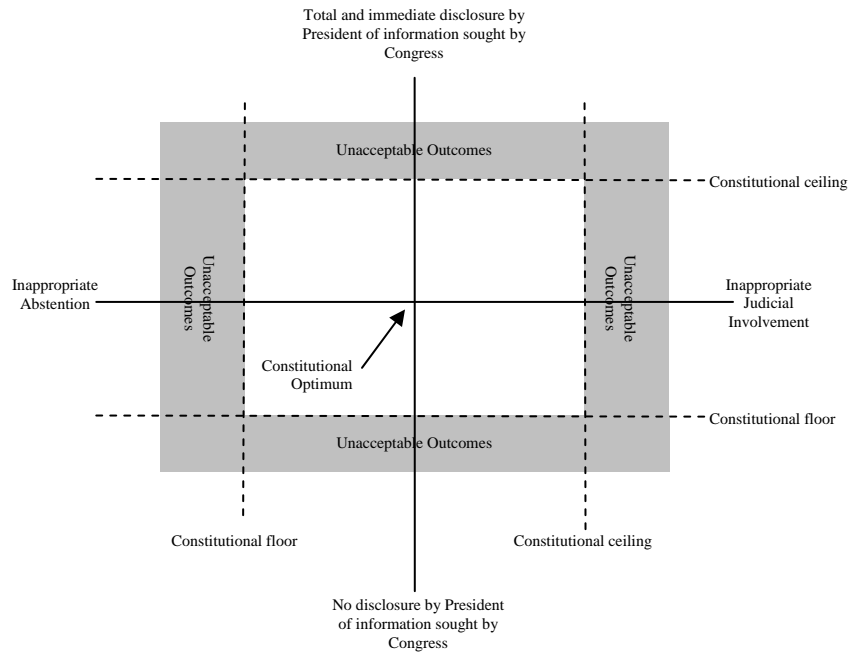
122. *Marbury*, 5 U.S. at 177 (emphasis added). There are, of course, weighty arguments that the political branches have a coequal responsibility to interpret the Constitution. Each branch must consider its own constitutional duties and act accordingly. *See, e.g.*, FISHER, *supra* note 1, at 259 ("Lawmakers, assigned specific constitutional duties over the military and national security, have no reason to defer to presidential claims of exclusive or overriding power."); Gerhardt, *supra* note 98, at 718 (contending that "judicial supremacy is not a fact of our constitutional life" given the expansive stretches of law that the courts do not determine); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 221 (1994) (arguing that each branch of government has a coequal power to interpret the Constitution). This section does not argue that courts alone have such a responsibility. It advances the more modest point that there likely are occasions on which the courts have a duty to resolve cases to validate their role in the constitutional system and to avoid constitutional crises.

result (independent of the merits of the underlying dispute). Declining a case in the face of corruption or an extreme abuse of power might undermine the rule of law.<sup>123</sup> For example, an executive privilege dispute could ensue were Congress to demand documents that would form the basis of impeachment if released. By refusing to exercise jurisdiction, courts would disclaim the authority to remedy a failure of the political process to produce a constitutionally unacceptable outcome.

The constitutional risks associated with overassertive judicial intervention in, or inappropriate judicial abstention from, executive privilege disputes between the political branches suggest another dimension to the model for resolving these disputes. Depicted as a horizontal axis, it has as its poles inappropriate judicial abstention and overly assertive judicial involvement. When combined with the existing model, a zone of constitutionally acceptable results falls within a ring of constitutionally unacceptable outcomes:

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123. Michael Stokes Paulsen, *Nixon Now: The Courts and the President After Twenty-five Years*, 83 MINN. L. REV. 1337, 1400–01 (1999). Michael Stokes Paulsen has argued that, in *Nixon*, the Court inappropriately displaced Congress as the body with the primary responsibility for checking an out-of-control President because it cut short impeachment proceedings and weakened the impeachment power. This raises fundamental questions about the proper role of the courts in our system of constitutional government. For example, it poses the question whether courts may strain their judicial role when they have clear evidence of criminal wrongdoing. This Article does not answer such questions. Instead, it assumes that some circumstances (even if limited) exist in which the abstention of the courts represents a constitutionally unacceptable outcome. *See, e.g.*, *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 370 (2004) (describing *Nixon* as a situation in which “a court’s ability to fulfill its constitutional responsibility to resolve cases and controversies within its jurisdiction hinged on the availability of certain indispensable information”).



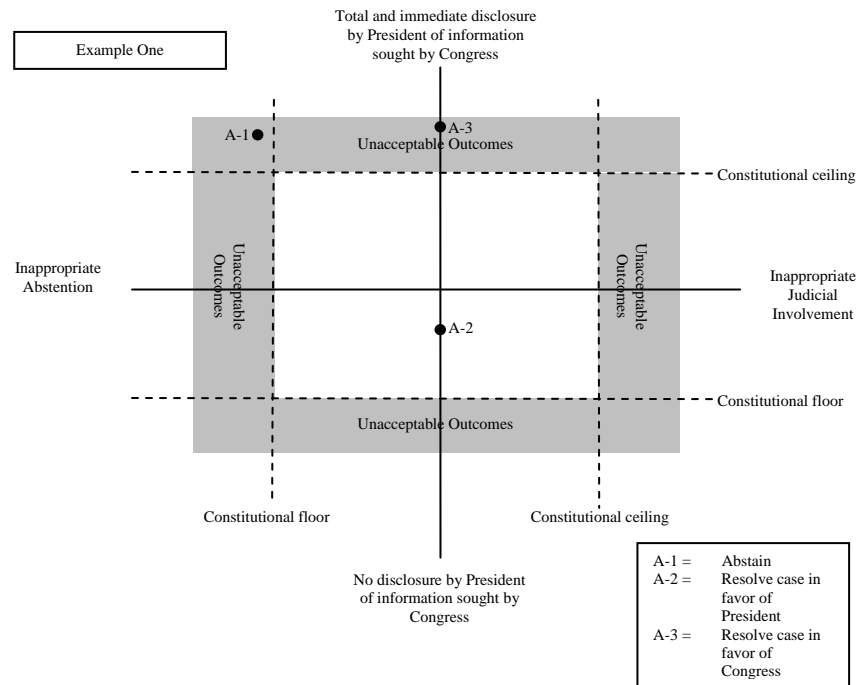
The additional dimension is not the only difference between the political and judicial models for resolving executive privilege disputes. Negotiation offers as many possible outcomes as the negotiators can imagine.<sup>124</sup> The judicial process, on the other hand, can offer as few as three outcomes: those offered by the two parties, and abstention. Courts may be able to fashion other remedies, but they lack the flexibility offered by negotiation.<sup>125</sup> Courts might send the political branches away for more negotiation, for example, but at some point that delay becomes judicial abstention, leaving courts with the three original optional outcomes. As sketched in the following pair of examples, these outcomes may not present attractive alternatives for a court.

*Example One:* Imagine a congressional committee that has run roughshod over the administration in a political witch-hunt that

124. See, e.g., Devins, *supra* note 31, at 125–26 (describing a number of different ways that Congress and the President can compromise). See generally FISHER, *supra* note 1 (detailing compromises struck by political branches throughout nation’s history).

125. See, e.g., Todd D. Peterson, *Prosecuting Executive Branch Officials for Contempt of Congress*, 66 N.Y.U. L. REV. 563, 626 (1991) (“The creative compromises that can be achieved through the political process are better tailored to resolving a specific dispute than the ‘either-or’ solutions generated by judicial resolution.”).

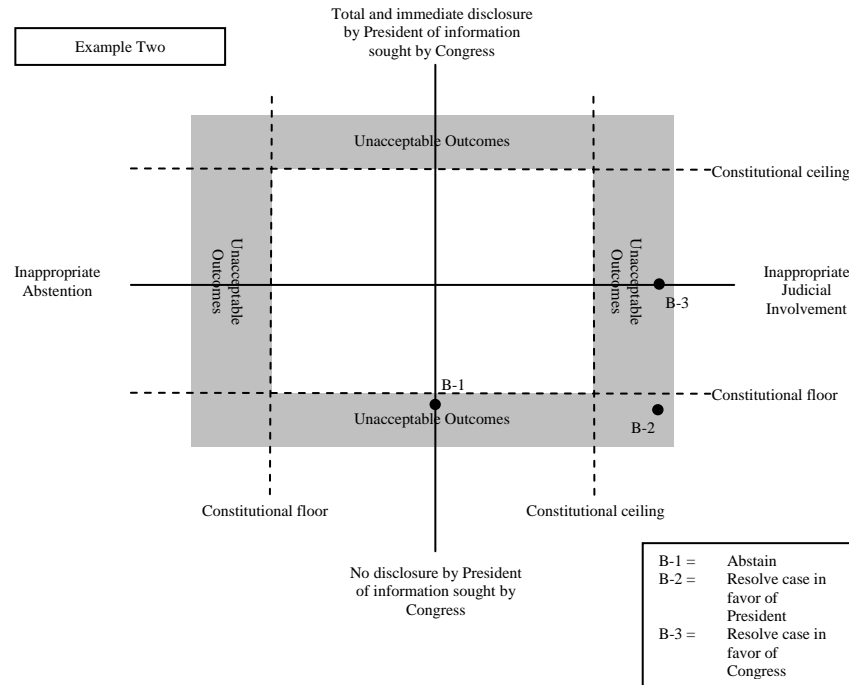
began as a search for employees sympathetic to a foreign sovereign. The committee seeks preliminary advice given to the President by a subset of those employees. Imagine that the President has invoked executive privilege and Congress has brought a civil action that satisfies, at least as much as possible, justiciability requirements. Under those assumptions, the court might have the options illustrated in the following figure:



Refusal to resolve the dispute (point A-1) likely would result in a constitutionally unacceptable outcome if the politically powerful Congress subsequently won disclosure through the political process. Such a result would measure poorly with respect to both constitutional values discussed in Part III: it would result in the impairment of the effectiveness of the government as a whole and the courts would have disclaimed their potential role as a protector of the constitutional structure. Resolving the case in favor of the President (point A-2) by allowing the administration to withhold certain contested documents which have no particular relevance to a legitimate congressional inquiry likely provides a constitutionally

acceptable outcome. Finally, resolving the case in favor of the committee (point A-3) likely would make government less effective by making the presidency susceptible to virtually unlimited and unfocused inquiry and harassment by Congress. Given these options, the court should entertain the case and resolve the dispute at point A-2. The resolution may not be optimal, but (under the present assumptions) it is not constitutionally unacceptable and produces a better outcome than the available alternatives.

*Example Two:* Imagine an administration that declines to provide Congress with routine operational information, resulting in a lawsuit. Assume also that the case comes to the courts in a procedural posture that does not provide a clear basis for jurisdiction; for instance, a group of minority party members have brought the suit. The court might be able to force the administration to turn that information over to Congress, but it would have to strain procedural doctrines to do so. Under those assumptions, the court's options might look as follows:



Abstaining in this case (B-1) would be appropriate under existing procedural rules and thus likely would not put the court's legitimacy at issue. However, abstention could result in a major defeat of Congress and the creation of an unacceptable example of the President stymieing routine oversight. A ruling on the merits in the administration's favor would result in damage to both the court and Congress (B-2). Resolving the case in favor of Congress (B-3) would result in an optimal result from the standpoint of disclosure but damage the court in the form of legitimacy lost by overreaching. No option, in other words, would provide a constitutionally acceptable result, leaving the court to pick among evils.<sup>126</sup>

126. Because each outcome is unsatisfactory, constitutionally unacceptable outcomes become relative here. This might suggest that the denomination "constitutionally unacceptable" becomes redundant, since the courts only must focus on picking the least imperfect result. It remains relevant, however, as a mechanism for evaluating whether the political branches have inflicted harm on the constitutional order by failing to negotiate a constitutionally unacceptable outcome. The political branches likely could have averted such a Hobson's choice through good faith, reasonable negotiation, and the wise use of political levers. The cost of a resulting constitutionally unacceptable outcome lies at their feet. *See, e.g., FISHER, supra* note 1, at 259 (arguing that courts and Congress should not retreat in the face



These examples sketch the tradeoffs facing courts in executive privilege disputes. While this schematic has limitations, it provides two insights. First, the introduction of courts into executive privilege disputes raises the constitutional stakes by putting that branch's legitimacy at issue. Second, the introduction of courts does not prevent an executive privilege dispute from ending with the type of suboptimal result seen in political negotiation. Courts may generate a better answer than the political branches to the question of the appropriate amount of information disclosure, but broader constitutional considerations may make outcomes provided by judicial resolution constitutionally infirm. Courts generally face a tough choice. They can leave the political process to generate an imperfect, but acceptable, outcome that does not have precedential effect. Or they can resolve a case, possibly improving the outcome with respect to the information disclosure ordered, but setting a possibly imperfect precedent for future disputes and unleashing unknown collateral constitutional costs. An exceptional case, such as one involving clear presidential wrongdoing, might make that equation simpler, but these disputes generally pose murky and difficult questions. With such profound constitutional issues put at stake by their involvement, courts often are reasonable to abstain and leave these disputes to the political process.

*B. The Possible (but Unlikely) Expansion of the Judicial Role*

The preceding discussion described how procedural exceptionalism and substantive concerns in executive privilege disputes threaten the legitimacy of courts that resolve these disputes. Courts purportedly address these problems by strictly adhering to established procedural doctrines. However, these efforts at procedural integrity seem prone to failure at important moments or to appearing like ways of avoiding the merits or indirectly reaching a sought-after result.<sup>127</sup> A changed approach at least merits consideration.

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of assertions of executive privilege). Describing the quality of outcomes in a purely relative manner downplays that responsibility.

127. See, e.g., *supra* notes 107–08 (discussing criticisms of *Nixon* despite its explicit treatment of procedural arguments); Amar, *supra* note 33, at 192–207 (criticizing *Cheney* decision for failing to resolve ambiguities in executive privilege doctrine).

*1. Courts of constitutional equity*

One conceivable alternative to the status quo would be for courts to relax procedural doctrines substantially. That step might limit the precedential effect of the resulting judgment, but our system might benefit from such a tradeoff. Courts could acknowledge the enduring procedural complexities—for example, that suits among the political branches raise questions about the ability of litigants to press the long-term institutional interests at stake—but nonetheless resolve the disputes. In other words, courts could conceivably sit as courts of constitutional equity.<sup>128</sup> Sitting in constitutional equity would free the courts from strict substantive or procedural rules and doctrine and allow them to generate equitable, largely non-precedential outcomes. In keeping with equitable practice, courts could require submission of the most information possible to the court before crafting injunctive relief designed to maximize the constitutional interests at stake.<sup>129</sup>

This would be a drastic reversal of the courts' historic approach. Courts have never claimed this expansive, equitable role. They appear to have purposefully avoided such a role by limiting the scope of their executive privilege decisions and their ability to demand the information necessary to make an equitable judgment.<sup>130</sup> Perhaps

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128. This option arguably has a textual basis in the Constitution. The judicial power of the United States “extends to all Cases, in law and equity.” U.S. CONST. art. III, § 2, cl. 1. If the Constitution grants courts the authority to say what the “law” is in separation of powers disputes, *see* *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 177 (1803), it conceivably could empower courts to identify where the constitutional equities lie in a dispute between the branches.

129. *See generally* 1 W. S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 467–69 (3d ed. 1922) (describing freedom allowed to a court sitting in equity).

130. For example, in the dispute over the disclosure of the names of the energy task force led by Vice President Cheney (concededly not one directly between the President and Congress), the Supreme Court limited discovery through an extraordinary writ of mandamus, concluding that the executive need not assert executive privilege before a court can consider separation of powers arguments. *See* *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 390–91. Even when courts arguably have tested the limits of the judicial process, *see* Wald & Siegel, *supra* note 33, at 745–47 (defending judicialization of executive privilege disputes and describing *AT&T* cases, which saw repeated efforts by the courts to encourage negotiation, as highly unusual cases that tested the limits of the judicial process by stressing negotiation over the adversary, party-driven approach common to our system), they have encouraged negotiation without demanding full disclosure of the contested information to the court for review. *See* *United States v. AT&T, Inc.*, 551 F.2d 384, 394 (D.C. Cir. 1976); *see also* Comm. on Judiciary, U.S. House of Representatives v. Miers 558 F. Supp. 2d 53, 56–57, 98 (D.D.C. 2008).

John Marshall could have claimed this power had the occasion arisen, but at this point, such a power of constitutional equity lies down a fork in the road that our constitutional history has left long behind. Asserting such a power now and loosening or casting aside the extensively doctrinalized procedural prerequisites to suit, such as standing, ripeness, and mootness,<sup>131</sup> would be an enormous claim by the judicial branch. It is hard to imagine such a move given the likely attacks on an “activist” judicial branch. This potential means for avoiding accusations of procedural exceptionalism thus would appear to be a non-starter.

*2. Doctrinalization of judicial discretion to entertain executive privilege disputes*

Courts could avoid, or at least reduce, concerns about their ability to entertain certain substantive categories of disputes by articulating clear rules regarding the categories of executive privilege disputes they will entertain. As noted previously, the existing political question doctrine does not clearly mandate judicial abstention from executive privilege disputes. However, the calculus a court likely would engage in to determine whether to entertain an executive privilege dispute suggests the possibility of a prudential version of the political question doctrine.<sup>132</sup> Such a prudential approach might serve as a “general tool of avoidance,” allowing courts to maintain their legitimacy rather than engaging in what might be perceived as activist judicial review in politically charged circumstances.<sup>133</sup> Alexander Bickel described prudential abstention as one of the passive virtues of courts in the face of judicial anxiety and doubt that courts will reach the right outcomes.<sup>134</sup>

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131. *See supra* notes 105–06 and accompanying text.

132. *See, e.g.*, Barkow, *supra* note 118, at 28–33 (discussing prudential considerations in the historical application of political question doctrine).

133. *Id.* at 33.

134. BICKEL, *supra* note 81, at 184 (describing as foundation of political question doctrine: “(a) the strangeness of the issue and its intractability to principled resolution; (b) the sheer momentousness of it, which tends to unbalance judicial judgment; (c) the anxiety, not so much that the judicial judgment will be ignored, as that perhaps it should but will not be; (d) finally (‘in a mature democracy’), the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from.”); *see also* Mark Tushnet, *Law and Prudence in the Law of Justiciability*, in *THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES*, *supra* note 54, at 47, 69–74 (discussing Bickel).

A prudential doctrine, largely unattached to constitutional text, lacks a clear limiting principle.<sup>135</sup> The doctrinalization of the political question doctrine in *Baker v. Carr* arguably did away with or significantly curtailed the sort of free-flowing prudential calculations imagined by Bickel.<sup>136</sup> Courts could undertake a similar doctrinalization in the executive privilege field.<sup>137</sup> They could carve out specific types of executive privilege cases they would consider and limit the subject matters that remain nonjusticiable regardless of the procedural posture. For example, courts could require a threshold showing that failure to resolve the case would impinge on a core constitutional function of one of the branches. The creation of such rules could insulate courts from criticism that they entertain the substance of executive privilege disputes between the political branches erratically or without guiding principle.

Doctrinalization appears unwise and unlikely, however. Courts have indicated no willingness to doctrinalize the categories of executive privilege disputes they will entertain. Nor should courts attempt to impose such limitations. One apparent lesson from *Baker v. Carr* and its progeny is that prudential limitations that courts impose upon themselves have little force when push comes to shove.<sup>138</sup> Courts likely will discredit themselves if similar self-imposed prudential principles in the executive privilege context fall by the wayside when a high profile dispute tests judicial commitment to those constraints.

Executive privilege disputes between the political branches thus may represent an enduring enclave of non-doctrinalized prudential judicial decisions as to justiciability. Successful judicial pressure on the political branches to negotiate outcomes to executive privilege disputes likely will allow it to remain that way.<sup>139</sup> The fewer executive

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135. See Barkow, *supra* note 118, at 33.

136. Tushnet, *supra* note 134, at 73.

137. See, e.g., *supra* notes 49–54, and accompanying text (describing doctrinalization of abstention rules in other contexts).

138. See 369 U.S. 186 (1962); Barkow, *supra* note 118, at 36 (indicating that prudential strands of political question doctrine—*i.e.*, those not pertaining to the textually demonstrable grant of discretionary authority to a coordinate branch of government—have had little or no effect since being articulated in *Baker*).

139. See Devins, *supra* note 31, at 131–32 (“For better or worse, the courts are extremely hesitant to play a leading role in defining executive-legislative relations. On such issues as war powers, the veto power, the incompatibility clause, and recess appointments, the courts have used justiciability and other devices to sidestep resolution of executive-legislative disputes. In

privilege cases that require adjudication, the less courts will need to articulate standards for deciding which executive privilege cases to entertain. If history is a guide, courts likely will continue to make discretionary calculations, through muddy constitutional waters, as to when it is best for them to entertain or abstain from executive privilege disputes between the political branches.

### *C. Remaining Opportunities for the Judiciary*

Courts can play a legitimate role in executive privilege disputes between the political branches even if they do not make dramatic changes in their treatment of these disputes. As an initial matter, courts can still stand ready to resolve executive privilege disputes between the political branches as a last resort, even if they are unlikely to expand their role in these disputes dramatically. Negotiation could fail in a number of ways: a political branch could refuse to negotiate in good faith or have no incentive to negotiate;<sup>140</sup> one branch might not be able to use the political weapons at its disposal because of the greater political popularity of the other branch, or because the political cost to itself of using one of its political weapons might outweigh any political benefit;<sup>141</sup> one branch might overvalue or undervalue its constitutional interest or that of the other political branch;<sup>142</sup> or the political branches might negotiate a fair, but unconstitutional, redistribution of their powers (for example through an agreement for Congress to exercise legislative veto authority in exchange for a renunciation of certain oversight powers). Each of these possible scenarios suggests the

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this way, the Court maximizes utility among the branches and, thus, minimizes the chance of retaliation against its own interests. Specifically, by ducking the substantive issues raised in these disputes, the courts have found a graceful way of avoiding substantive decisions against one or the other elected branch.” (internal quotation marks and citations omitted)).

140. The Nixon-era controversy over disclosure of the Oval Office tapes likely fell in this category. Nixon’s political survival apparently depended on absolute withholding of the tapes sought in *Nixon*, so he had no incentive to negotiate in good faith. President Nixon resigned effective August 9, 1974, after the Supreme Court issued its decision on July 24.

141. Under this view, an administration likely can get away with conduct that is not sufficiently harmful to justify the heavy steps available to the other branch. One might wonder, for example, whether an administration might recognize its ability to defy Congress when the Congress does not have sufficient political support to refuse to process all presidential nominees or to cut off funding to a specific executive department.

142. Criticism describing the Bush administration, and particularly Vice President Cheney, as overly dedicated to the concept of executive power suggests that negotiation with that administration would fail for this reason. *See, e.g.*, SAVAGE, *supra* note 21, at 330.

benefit of judicial involvement in executive privilege disputes between the political branches. They represent a breakdown of the incentive and valuation systems necessary for successful negotiation. Courts may be able to avert a constitutionally unacceptable outcome by hearing such cases, a likelihood that particularly argues for their continued involvement in executive privilege disputes.

Furthermore, courts can improve the outcomes to executive privilege disputes between the political branches without actually resolving them on the merits.<sup>143</sup> As noted above, it appears likely that courts will continue to abstain from resolving the merits of many executive privilege disputes between the political branches. However, courts still may be able to encourage good faith negotiation in three different ways.

First, courts should avoid erecting unnecessary procedural hurdles. This step could prevent executive privilege disputes between the political branches from expiring at the courthouse door. Procedural hurdles render it easier for the executive branch to use delay and procedural maneuverings to succeed in keeping information secret and permit congressional bullying to endure unnecessarily.<sup>144</sup> In whatever way courts weigh the competing constitutional interests, it seems unwise to establish a thicket of procedural rules or opportunities for delay in executive privilege cases. These procedural rules may impede a court from addressing an important dispute in the future or, if the court sidesteps those rules to address the merits, delegitimize a subsequent decision. To avert procedural delay and gamesmanship and to encourage good faith

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143. Gia Lee recently has argued for a change in the way that courts resolve executive privilege disputes. She contends that courts should evaluate the claims made by both branches. She particularly argues that courts should evaluate the quality of individual claims that the disclosure of executive branch communications would reduce the President's ability to receive candid advice. Lee, *supra* note 45, at 260. Evaluating the veracity of executive claims for the need for candor could provide welcome specificity and legitimize a resulting court decision by grounding it in the facts. However, that calculus also raises concerns about judicial involvement in the intimate details of the executive branch and questioning that branch's assessment of its own needs. Such a searching inquiry gives cause for hesitation as does Lee's rejection of political negotiation. *See id.* at 253. As discussed above, both political and judicial resolution of executive privilege disputes are likely to deliver constitutionally suboptimal outcomes, but political negotiation generally provides a lower-stakes method for resolving such disputes.

144. *See* Cheney v. U.S. Dist. Court, 542 U.S. 367, 390-91 (2004) (allowing the executive branch to press separation of powers arguments before an official assertion of executive privilege is made). *See generally* FISHER, *supra* note 1, at 258 (describing administration's efforts to defeat negotiation even when promising to cooperate).

negotiation, courts should make clear that they can and will entertain executive privilege disputes.<sup>145</sup> Retaining discretion to abstain from or entertain executive privilege disputes provides a mechanism for courts to manage the inflow of executive privilege disputes that will not bind courts more tightly than they might hope in subsequent disputes.

Second, to the extent possible, courts should consider the approach taken to the negotiations by each political branch. The failure of one branch to negotiate in good faith should inform a court's decision whether to entertain the merits of an executive privilege dispute. Courts should not allow either a Congress resolute to get to court, or a President resolute to stay out of court, to achieve its goal merely by refusing to negotiate or by going through the motions. Instead, courts should take advantage of opportunities to verify the quality of negotiations and manage the case accordingly. Concern about the commitment to resolving a dispute could appear in a number of contexts. For example, Justice Ginsburg noted in her dissenting opinion in *Cheney* the irony of the government's request, on behalf of executive branch officials, for a writ of mandamus to limit discovery when it had made no motion in the district court to narrow discovery.<sup>146</sup> A branch's behavior in negotiations may give rise to similar inferences about the seriousness of its commitment to resolving the dispute amicably.

Third, courts should limit the scope of any ruling on executive privilege questions in recognition of the complicated procedural postures and infrequent adjudication of such disputes. Clear rules might facilitate the negotiation of executive privilege disputes but clear, imperfect rules could make negotiation no longer likely to produce results within the range of the branch's settled expectations.

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145. Neal Devins has argued for the status quo, contending that courts should not expand their role in executive privilege disputes. See Devins, *supra* note 31, at 111. He takes a position consistent with that taken here, maintaining that "greater judicial involvement risks more harm than good," and uses this insight to argue against reforming existing approaches. *Id.* at 110. Since Devins' writing, however, the Cheney energy task force and Miers subpoena cases suggest that, under that status quo which prefers negotiation, courts may run the risk of allowing their procedures to ensure slow, procedural deaths for executive privilege disputes. See, e.g., Comm. on the Judiciary, House of Representatives v. Miers, 542 F.3d 909, 910–11 (D.C. Cir. 2008); Adam Clymer, *Agency Ends Pursuit of Cheney Energy Panel Data*, N.Y. TIMES, Feb. 8, 2003, at A18. Opportunities for reform thus may exist in developing judicial doctrine to encourage good faith negotiation, even without an expansion in the cases that courts resolve on the merits.

146. *Cheney*, 542 U.S. at 403–04 (Ginsburg, J., dissenting).

Limiting rulings as much as possible to the facts of the case might encourage the political branches not to approach each dispute as an opportunity to win more constitutional territory. Lowering the stakes of executive privilege disputes between the political branches could facilitate more reasonable negotiation.<sup>147</sup>

#### IV. CONCLUSION

Executive privilege disputes between Congress and the President pit two sets of constitutional interests against each other, raising important questions of constitutional structure. These high stakes would seem to demand clear rules for deciding when courts or the political process should resolve these disputes. The existing process for resolving executive privilege disputes, which mixes political negotiation with infrequent and halting judicial involvement, disappoints any such expectations. Political negotiation is likely to produce constitutionally acceptable, but suboptimal, outcomes when measured on the dimensions of overall government effectiveness and support for the structure of government prescribed by the Constitution. Courts can disaggregate the information disclosure question from other existing political issues and thus may provide a better answer to the specific information disclosure question posed by an executive privilege dispute. However, judicial involvement raises other constitutional concerns, making it likely that judicial resolution of executive privilege disputes also will be constitutionally suboptimal. The likely imperfections of both judicial and political resolutions to executive privilege disputes present a choice between imperfect, non-precedential politically negotiated outcomes and possibly better, precedential judicial resolutions that may trigger constitutional imbalances. A default preference for political negotiation of most executive privilege disputes is supported by reasonable assumptions about the quality of the outcomes generated by political negotiation and legitimacy concerns regarding judicial resolution of such disputes. Courts can make limited doctrinal changes to encourage constructive negotiation. That said, they likely will and should continue to abstain from resolving the merits of many of the executive privilege disputes presented to them, even

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147. See Shane, *supra* note 44, at 220–21 (describing difficulty in reaching a negotiated result once the political branches conceive of the dispute through the lens of constitutional principle and the rhetoric of each branch's prerogatives).



though this may ensure the suboptimal resolution of those disputes.