

Principled Accommodation: The Bush Administration's Approach to Congressional Oversight and Executive Privilege

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The Constitution establishes a federal government with a legislative, executive, and judicial branch, each of which is entrusted with specific powers and responsibilities.¹ In performing their respective functions, the three coordinate branches balance the spectrum of specific powers vested in the national government by the American people.² In so doing, each branch also serves as an important check on the powers exercised by the other branches.³ Fundamental to the checks and balances that underlay the Constitution's separation of powers is the principle that each branch must respect the province of the others.⁴ Yet the prerogatives of the individual branches can and often do conflict. For example, when Congress's need for information held by the executive branch runs counter to the President's need to keep that information confidential—or the President's

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¹ U.S. CONST. arts. I, II, III.

² *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (recognizing that the will of the People as embodied in the Constitution “organizes the government and assigns to different departments their respective powers. It may either stop here or establish certain limits not to be transcended by those departments. The government of the United States is of the latter description.”).

³ THE FEDERALIST NO. 47 (James Madison) (Clinton Rossiter ed., 1999) (“The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny.”).

⁴ *Bond v. United States*, 541 U.S. 211, 222 (2011) (“Separation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others.”); *Miller v. French*, 530 U.S. 327, 341 (2000) (“While the boundaries between the three branches are not ‘hermetically sealed,’ the Constitution prohibits one branch from encroaching on the central prerogatives of another”) (internal quotation marks and citations omitted); *New York v. United States*, 505 U.S. 144, 182 (1992) (“The Constitution’s division of power among the three branches is violated where one branch invades the territory of another, whether or not the encroached-upon branch approves the encroachment.”).

need for totally candid advice from his closest aides—a prolonged stalemate has the potential to escalate into a constitutional crisis. Presidents and Members of Congress must therefore proceed in a manner that is most faithful to the Constitution. During his two terms in office, President George W. Bush approached congressional demands for information in such a manner. He facilitated reasonable accommodations that safeguarded the executive branch's sensitive deliberations in a manner consistent with the constitutional separation of powers while respecting the authority of Congress to inform its legislative function through its power of inquiry.

This article aims to outline the constitutional principles underlying President Bush's approach to accommodating congressional oversight requests during the years 2001 through 2009, and to provide an account of each of the six matters in which he concluded it was necessary to invoke executive privilege—including two instances where the invocation was ultimately not communicated to Congress. Part I summarizes the relevant body of law, which has been influenced as much by the tradition of interbranch relations as it has been by judicial decisions. Part II provides an overview of the hundreds of individual requests by Congress during the eight years of the Bush Administration, the vast majority of which were promptly satisfied by executive branch officials. In considering the larger historical backdrop of congressional information requests, one is better able to place President Bush's specific assertions of executive privilege in context. Finally, Part III details President Bush's assertions of the privilege in six matters by examining the events that led to each impasse, the offers of accommodation made to Congress, and the constitutional principles on which each of the President's assertions rested.

I. THE LAW AND TRADITION OF EXECUTIVE PRIVILEGE

The concept of executive privilege has long been a part of the American presidency, with its roots stretching back to President George Washington. Since the beginning of our republic, there has been a recognized need to protect the confidentiality of communications between and among the President and his closest advisers and other kinds of sensitive information generated within the executive branch. President Washington first articulated that need in 1793 when responding to an inquiry by the House of Representatives concerning a failed U.S. military expedition against

Native Americans.⁵ As later recounted by then-Secretary of State Thomas Jefferson, President Washington advised his Cabinet that the “Executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would injure the public.”⁶ Ultimately, the Washington Administration determined the materials requested by the House in that instance could be provided without the need to invoke any privilege. But that was not the case four years later when the House demanded that President Washington provide materials related to his communications with the U.S. envoys who had negotiated the highly controversial Jay Treaty with Great Britain.⁷ Citing both the Constitution’s specific exclusion of the House from the treaty ratification process and the necessity of keeping the details of executive branch negotiations with foreign nations confidential,⁸ President Washington refused to yield to the House’s demands—and thus brought into being the doctrine of executive privilege.⁹

Nearly every U.S. President since then has recognized that his ability to fulfill the constitutional and statutory responsibilities of the Office necessitates that sensitive executive branch information and communications be safeguarded from disclosure.¹⁰ In modern times the

⁵ 3 ANNALS OF CONG. 493 (1792) (authorizing a House committee to request from the executive branch “such persons, papers, and records, as may be necessary to assist their inquiries” into the failed expedition of General Arthur St. Clair in 1792 that resulted in the deaths of more than 600 soldiers).

⁶ History of Refusals by Exec. Branch Officials to Provide Info. Demanded by Cong., 6 Op. O.L.C. 751, 752 (1982) (emphasis omitted) (quoting 1 THE WRITINGS OF THOMAS JEFFERSON 303–04 (Lipscomb ed., 1905)).

⁷ 5 ANNALS OF CONG. 394 (1796); see also LOUIS FISHER, CONG. RESEARCH SERV., RL 30966, CONGRESSIONAL ACCESS TO EXECUTIVE BRANCH INFORMATION: LEGISLATIVE TOOLS 5–9 (2001) (recounting the floor debate surrounding the resolution requesting executive branch correspondence in connection with the Jay Treaty).

⁸ Because Article II, Section 2, clause 2 of the U.S. Constitution explicitly provides a clear role for the Senate in the treaty ratification process, President Washington had previously provided that body with “all the papers affecting the negotiation with Great Britain.” 1 AMERICAN STATE PAPERS 551, 551 (1796).

⁹ It bears mention that “[n]either the congressional power of inquiry nor executive privilege are expressly mentioned in the Constitution.” RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 10 (1974). Nevertheless, as discussed *infra* Sections I.A, I.B, the Supreme Court has recognized both congressional oversight authority and the doctrine of executive privilege as fundamental constitutional prerogatives of the Legislature and Executive, respectively.

¹⁰ See, e.g., History of Refusals by Exec. Branch Officials to Provide Info. Demanded by Cong., 6 Op. O.L.C. 751 (1982) (describing incidents in U.S. history in which a President directed the withholding of information from Congress); LOUIS FISHER, THE POLITICS OF EXECUTIVE PRIVILEGE 19 (2004) (“In the nineteenth century, one of the most effective presidential challenges to a legislative demand for documents came from Grover Cleveland. Under great pressure, he refused to buckle to principles he considered fundamental to the effective discharge of executive duties.”); JACK MITCHELL, EXECUTIVE PRIVILEGE: TWO CENTURIES OF WHITE HOUSE SCANDALS 32 (1992) (President Thomas Jefferson “got himself and his party into hot water in late 1805 with the passage of a piece of legislation called the Two Million Act. Jefferson and his secretary of state, James Madison, wanted Congress to

concept has become formalized, with the term “executive privilege” first used by President Eisenhower¹¹ and with the Supreme Court in 1974 affirming its legitimacy in *United States v. Nixon* as “fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.”¹²

In the context of Congress’s demands for information from federal departments and agencies,¹³ the doctrine of executive privilege ensures that critical confidentiality interests of the executive branch—indeed of the Presidency itself—are appropriately safeguarded to ensure the effective functioning of the federal government.¹⁴ Although a formal assertion of executive privilege by the President sometimes becomes necessary to preserve the Constitution’s separation of powers, in most instances the executive branch and Congress are able to reach an accommodation that respects the other’s constitutional prerogatives. Understanding the law and tradition of executive privilege therefore requires an appreciation of three related subjects: Congress’s oversight authority and its limits, the specific doctrine of executive privilege, and the constitutionally-mandated accommodation process.

approve the appropriation of two million dollars, then a very healthy sum, to buy Florida border lands under the control of the Spanish. Unfortunately for them, they chose to exercise ‘executive privilege,’ and declined to tell Congress exactly how much money they wanted or why.”)

¹¹ Robert Kramer & Herman Marcuse, *Executive Privilege: A Study of the Period 1953-1960*, 29 GEO. WASH. L. REV. 623 (1961) (discussing the assertion of “executive privilege” during the Eisenhower Administration); Todd David Peterson, *Contempt of Congress v. Executive Privilege*, 14 U. PA. J. CONST. L. 77, 136 (2011) (“President Eisenhower was the first to use the term ‘executive privilege,’ and he utilized that doctrine on more than forty occasions.”). Although President Eisenhower was the first president to formalize the term, his immediate predecessor, President Harry Truman, also recognized the existence of such a privilege. Indeed, President Truman later asserted that the privilege extends to former Presidents when questioned about their tenure in the Office. See Laurent Sacharoff, *Former Presidents and Executive Privilege*, 88 TEX. L. REV. 301, 302 (2009) (“President Truman, after he left office, refused to testify before Congress despite a subpoena. Though the Constitution does not mention executive privilege, Truman argued that its structure for separation of powers immunized Presidents as well as former Presidents from any obligation to testify.”) (emphasis omitted).

¹² *United States v. Nixon*, 418 U.S. 683, 708 (1974) (“The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking.”).

¹³ This article focuses on the doctrine of executive privilege in the context of congressional inquiries, and not in other circumstances such as civil or criminal litigation before the courts or with respect to the press or private individuals seeking executive branch materials or other information—though many of the same principles outlined in this article may apply in such other contexts.

¹⁴ The Supreme Court has recently expressed the same principle in analogous circumstances: “Even when a branch does not arrogate power to itself,’ therefore, it must not ‘impair another in the performance of its constitutional duties.’” *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 500 (2010) (quoting *Loving v. United States*, 517 U.S. 748, 757 (1996)).

A. The Scope of Congressional Oversight Authority

Congress alone has the power to legislate.¹⁵ But the Framers sought to limit that power by specifically enumerating in Article I of the Constitution those particular subjects on which Congress may enact legislation.¹⁶ And, of course, the Constitution indirectly limits Congress's authority by vesting other specific powers and responsibilities in the coordinate branches. Nevertheless, Congress's legislative authority both serves as an important constitutional check on presidential power and ensures that the executive branch will be held accountable for implementing federal statutory programs.

In particular, the Supreme Court has long recognized that Congress has the power "to make investigations and exact testimony" in order to "exercise its legislative function advisedly and effectively."¹⁷ This quasi-investigatory function—generally referred to as "congressional oversight"—is important to ensure that Congress has the information necessary to develop legislation as well as to gauge the performance of executive branch departments and agencies in fulfilling their statutory functions.¹⁸ Although potentially broad, Congress's oversight authority is necessarily far from absolute.

Indeed, by definition, Congress's oversight authority is limited to those areas in which it may potentially "legislate or appropriate."¹⁹ That is, the chief purpose of that authority is to permit Congress to "oversee" the implementation of its legislation. That authority does not extend to matters within the "exclusive province" of either the executive or judicial branch.²⁰

¹⁵ U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").

¹⁶ *Id.* art. I, § 8 (enumerating the areas for which Congress may legislate).

¹⁷ *McGrain v. Daugherty*, 273 U.S. 135, 161 (1927).

¹⁸ *See Watkins v. United States*, 354 U.S. 178, 187 (1957) ("The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them.").

¹⁹ *Barenblatt v. United States*, 360 U.S. 109, 111–12 (1959). Although congressional oversight necessarily involves investigations into the use of appropriated funds, such as "probes into departments of the Federal Government to expose corruption, inefficiency or waste," *Watkins*, 354 U.S. at 187, Congress may not rely on its appropriations authority to inquire into matters involving the President's discharge of his constitutional functions. The Supreme Court has explicitly stated: "Since Congress may only investigate into those areas in which it may potentially *legislate or appropriate*, it cannot inquire into matters which are within the [Executive's] exclusive province." *Barenblatt*, 360 U.S. at 111–12 (emphasis added).

²⁰ *Barenblatt*, 360 U.S. at 112. Although Congress lacks the authority to conduct oversight of the President's discharge of his constitutional functions, we recognize that Congress may inquire into presidential actions relating to the executive branch's discharge of statutory duties. However, as

Such non-legislative matters would include, for example, the President's exclusive power to pardon, his duty to sign or to veto legislation upon presentment, and his prerogative to appoint officers of the United States.²¹ As for the judiciary, its unique authority to decide particular cases and controversies falls outside the legislative realm.²² Lastly, there is another critical limitation on oversight power even where congressional demands for information are legitimately legislative in nature: Congress's authority may be subordinated to certain executive branch confidentiality interests under the doctrine of executive privilege.

B. The Doctrine of Executive Privilege

The doctrine of executive privilege is a key element of the Constitution's separation of powers. As with the members of the legislative and judicial branches, officials within the executive branch must be able to engage in decisionmaking processes free from improper interference. Most importantly, the President—in order to carry out his constitutional and statutory duties—must be able to maintain the confidentiality of certain types of documents and communications. Executive privilege accomplishes precisely that: it protects the confidentiality interests necessary for effective decision making by preventing the disclosure of sensitive executive branch information. In explaining the constitutional basis of the privilege, the Supreme Court has instructed that the “President and those who assist him must be free to explore alternatives in the process of shaping policies and to do so in a way many would be unwilling to express except privately.”²³

explained further below, the constitutional separation of powers necessitates limits on the timing and scope of those inquiries as well as the accommodation of such requests.

²¹ See, e.g., *Assertion of Exec. Privilege With Respect To Clemency Decision*, 23 Op. O.L.C. 3–4 (1999) (“[I]t appears that Congress’ oversight authority does not extend to the process employed in connection with a particular clemency decision, to the materials generated or the discussions that took place as part of that process, or to the advice or views the President received in connection with a clemency decision.”).

²² U.S. CONST. art. III, § 2 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls; —to all Cases of admiralty and maritime Jurisdiction; —to Controversies to which the United States shall be a party; —to Controversies between two or more States; —between a State and Citizens of another State; —between Citizens of different States; —between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”).

²³ *United States v. Nixon*, 418 U.S. 683, 708 (1974).

To be sure, the doctrine of executive privilege cannot be applied with mathematical precision.²⁴ Its contours are largely contextual and its application in a given situation demands a careful weighing of the relative institutional interests and constitutional prerogatives of both Congress and the presidency.²⁵ But the doctrine is by no means vacuous. The modern doctrine of executive privilege is best understood as a body of several related, yet distinct, components—or individual “privileges,” as the courts have commonly referred to them. Although these components differ as to their subject matter and relative weight, they all serve to ensure a degree of executive branch confidentiality necessary for the President to discharge his responsibilities. Though the courts have periodically helped to define the contours of some of these components, the truth is that, when “executive-legislative clashes occur, they are seldom resolved judicially.”²⁶ Thus, tradition has played just as important a role in the development of executive privilege as have judicial decisions. Based upon a combination of caselaw and the practices of the executive and legislative branches over the last fifty years,²⁷ most lawyers and scholars would recognize today at least four separate privileges covering the following information: presidential communications, deliberative process, law enforcement, and state secrets.

The components of executive privilege most often relevant to the congressional oversight process are the “presidential communications

²⁴ Deciding when and how to invoke executive privilege requires adherence to constitutional principles in a manner that also reflects considerable prudential judgment. As former White House Counsel Ted Sorensen has advised: “White House decision-making is not a science but an art. It requires, not calculation, but judgment.” THEODORE C. SORENSEN, *DECISION-MAKING IN THE WHITE HOUSE: THE OLIVE BRANCH OR THE ARROWS* 10 (1963).

²⁵ Louis Fisher, a former expert with the Congressional Research Service has remarked: “When these two implied powers collide, which should give way? No magic formula yields a ready and reliable answer, for too much depends on individual circumstances and political requirements.” FISHER, *supra* note 10, at 6.

²⁶ *Id.* at 4.

²⁷ The dearth of relevant case law—particularly Supreme Court decisions—on executive privilege is notable but not surprising. As explained, *infra* Section I.C, most disagreements between Congress and the executive branch are successfully settled through the constitutionally-mandated accommodation process. Furthermore, even when a congressional committee brings a civil action to enforce a subpoena the controversy frequently becomes moot before reaching the U.S. Court of Appeals or the Supreme Court. See FISHER, *supra* note 10, at 3 (observing that “most of the disputes are resolved through political accommodations”); Kenneth A. Klukowski, *Making Executive Privilege Work: A Multi-Factor Test in an Age of Czars and Congressional Oversight*, 59 CLEV. ST. L. REV. 31, 53 (2011) (noting that “[t]here are few Supreme Court cases” in this area of the law and that “D.C. Circuit and D.C. District precedents supply most of the controlling authority on executive privilege cases,” a feature which is “partly due to the political calendar, as the relatively-short windows between presidential and congressional elections often result in executive privilege cases becoming moot or otherwise nonjusticiable”).

privilege” and the “deliberative process privilege.”²⁸ The presidential communications privilege protects communications generated by certain executive branch staff in the course of advising the President in the exercise of his powers as head of the executive branch.²⁹ The President’s need to receive candid and comprehensive advice from his White House advisers and Cabinet officials cannot be overstated: “The Washington experience underscores a repeated lesson from presidential history. The best presidents are ones who surround themselves with the best advisers.”³⁰ The same can be true of information generated by other executive branch personnel in formulating national policies. Accordingly, the deliberative process privilege protects communications made in connection with the decision-making processes of personnel within federal departments and

²⁸ See, e.g., *Judicial Watch, Inc. v. Dep’t of Justice*, 365 F.3d 1108, 1113–14 (D.C. Cir. 2004) (reviewing the history of and explaining the principles underlying these two components of executive privilege).

²⁹ The courts have identified two principal limitations on the scope of the presidential communications privilege: that it applies only to “operations that . . . call ultimately for direct decision-making by the President” and that it does not apply to staff in “executive branch agencies.” *In re Sealed Case*, 121 F.3d 729, 752 (D.C. Cir. 1997). In *Judicial Watch*, the D.C. Circuit in dictum construed *In re Sealed Case*’s use of the phrase “White House adviser” when describing these limitations as restricting the privilege to the President’s “immediate advisers in the *Office of the President*.” 365 F.3d at 1124 (emphasis added); see *id.* at 1109 n.1, 1116–17, 1123–24. Arguably, this assumption too narrowly construes *In re Sealed Case*, which simply used the term “White House adviser” as shorthand for describing the presidential advisers who enjoy “operational proximity” to the President. See *In re Sealed Case*, 121 F.3d at 752. Nothing in the opinion suggests that the court intended the term—which the court never defined—to exclude from the protection of the privilege other staff within the larger “Executive Office of the President” or even the executive branch writ large who regularly advise the President on extremely sensitive matters. *Id.* *In re Sealed Case*’s explicit holding that communications by “presidential advisers” and “their staff” made in the course of preparing advice for the President come under the presidential communications privilege indicates at the very least that the privilege must encompass staff outside the Office of the President that prepare advice for the President, such as, for example, the staff of the National Security Council and certain officials within the Office of Management and Budget. See *id.* at 752–53.

³⁰ DAVID GERGEN, *EYEWITNESS TO POWER: THE ESSENCE OF LEADERSHIP* 351 (2000); see also JOHN P. BURKE, *THE INSTITUTIONAL PRESIDENCY: ORGANIZING AND MANAGING THE WHITE HOUSE FROM FDR TO CLINTON* 206 (2000) (“[T]he president’s staff system can powerfully affect his performance in office. Some presidents have responded successfully to the need to turn to others for information and advice and occasionally to delegate their authority, and others have not.”); MICHAEL A. GENOVESE, *MEMO TO A NEW PRESIDENT: THE ART AND SCIENCE OF PRESIDENTIAL LEADERSHIP* 192 (2008) (“How a president organizes and interacts with top staff during a crisis matters greatly. The first presidential decision involves whom to bring into the inner decision circle. There are a wide range of options, but it is important that the president solicit a wide range of ideas and opinions, avoid yes-men or groupthink, and insist on the presence of a devil’s advocate within the proximate decision-making structure.”); RICHARD E. NEUSTADT, *PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP* 153 (1960) (“A President is helped by what he gets into *his* mind. His first essential need is information. No doubt he needs the data that advisers can provide. He also needs to know the little things they fail to mention.”); SORENSEN, *supra* note 24, at 75–76 (“The opposite extreme is the adviser who tells his President only what he thinks the President wants to hear — a bearer of consistently good tidings but frequently bad advice.”).

agencies.³¹ The courts have held that this component may protect executive branch deliberations even when they do not directly involve the President or his immediate advisers.³² Again, both of these privileges recognize that the potential for disclosure of sensitive deliberations may prevent the frank and candid exploration of alternatives that is necessary for sound decision-making.³³ The Supreme Court has remarked that “the importance of this confidentiality is too plain to require further discussion,”³⁴ and the Justice Department has long taken the view that senior White House advisers consequently are immune from compelled congressional testimony.³⁵

A third area in which executive branch confidentiality interests are especially acute—and executive privilege is particularly important in the context of congressional investigations—is the arena of law enforcement. Outside the impeachment process, the Constitution assigns to Congress nothing resembling a prosecutorial role. On the contrary, the authority to prosecute persons for violations of federal law—implicit in the Take Care

³¹ See *Army Times Publ'g Co. v. Dep't of the Air Force*, 998 F.2d 1067, 1070 (D.C. Cir. 1993) (explaining that the deliberative process privilege “rests most fundamentally on the belief that were agencies forced to operate in a fishbowl, the frank exchange of ideas and opinions would cease and the quality of administrative decisions would necessarily suffer”) (internal quotations marks omitted) (quoting *Dudman Commc'ns Corp. v. Dep't of the Air Force*, 815 F.2d 1565, 1567 (D.C. Cir. 1987)).

³² See *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8–9 (2001) (instructing that “officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and [the deliberative process privilege’s] object is to enhance the quality of agency decisions, by protecting open and frank discussion among those who make them within the Government”) (internal quotation marks and citations omitted); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975) (explaining that the deliberative process privilege is premised on the belief that disclosing the “communications and the ingredients of the decision-making process” would inevitably “injur[e] the quality of agency decisions” by inhibiting “frank discussion of legal or policy matters”); *In re Sealed Case*, 121 F.3d at 737 (clarifying that the deliberative process component of executive privilege applies to the *entire* executive branch and protects documents that reflect advisory opinions, recommendations, and other deliberative communications generated during governmental decision-making).

³³ White House scholars and veterans alike have observed that the increased threat of disclosure of internal White House communications in recent years has led to a growing trend of presidential advisers being far more guarded in providing counsel—particularly in written form—to the President. See *THE WHITE HOUSE WORLD: TRANSITIONS, ORGANIZATION, AND OFFICE OPERATIONS* 104 (Martha Joynt Kumar & Terry Sullivan eds., 2003) (“With litigation now such an important factor in White House work life, there has been something of a common understanding among staff that one limits the amount of notes one takes. . . . [E]verybody just knew that writing in [the Clinton] administration turned out to be deadly to people and nobody wanted to get subpoenaed.”); LANNY J. DAVIS, *TRUTH TO TELL* 178–79 (1999) (“It is a sign of our times, dominated as they are by investigations and subpoenas . . . that people working in the White House are deathly afraid of writing down anything that might be subject to a subpoena. Which is to say, people in the White House are deathly afraid of writing anything down at all.”).

³⁴ *United States v. Nixon*, 418 U.S. 683, 705–06 (1974).

³⁵ See *infra* text accompanying notes 94–107.

Clause of Article II—is vested solely in the Executive.³⁶ To protect the integrity and independence of federal prosecutions and enforcement proceedings, the Justice Department and law enforcement agencies within the executive branch must be able to rely on candid and confidential advice about the merits of potential legal actions.³⁷ As a result, Congress and the courts have not seriously challenged the executive branch's longstanding position that the doctrine of executive privilege includes a law enforcement component that specifically protects deliberations concerning whether the government should initiate an investigation into, or enforcement proceedings against, a specific individual or group.³⁸

The fourth component of executive privilege concerns the national defense. The Supreme Court has recognized that if the President believes the disclosure of "state secrets" could adversely affect the Nation's security, then he may assert a privilege "to protect military, diplomatic, or sensitive national security secrets."³⁹ This component of executive privilege derives from the President's exclusive authority as Commander-in-Chief and from his constitutional duty to conduct the nation's foreign affairs—spheres of executive branch power where "the courts have traditionally shown the utmost deference to Presidential responsibilities."⁴⁰ Furthermore, the courts have clarified that the state secrets component is

³⁶ U.S. CONST. art. II, § 3 ("he shall take care that the laws be faithfully executed"); *see also* *Balt. Gas & Elec. Co. v. FERC*, 252 F.3d 456, 459 (D.C. Cir. 2001) ("The power to take care that the laws be faithfully executed is entrusted to the executive branch—and only to the executive branch. One aspect of that power is the prerogative to decline to enforce a law, or to enforce a law in a particular way.") (citation omitted).

³⁷ *Assertion of Exec. Privilege with Respect to Prosecutorial Documents*, 25 Op. O.L.C. 1, 1 (2001) ("[T]he Attorney General and other Department decisionmakers must have the benefit of candid and confidential advice and recommendations in making investigative and prosecutorial decisions.")

³⁸ *See* *Investigative Auth. of the Gen. Accounting Office*, 12 Op. O.L.C. 171, 177 (1988) ("With respect to open law enforcement files, it has been the policy of the executive branch throughout our Nation's history to protect these files from any breach of confidentiality, except in extraordinary circumstances."); *Response to Cong. Requests for Info. Regarding Decisions Made Under the Indep. Counsel Act*, 10 Op. O.L.C. 68, 75–78 (1986) (explaining the executive branch's authority to withhold open and closed law enforcement files from Congress); *Prosecution for Contempt of Cong. of an Exec. Branch Official Who Has Asserted a Claim of Exec. Privilege*, 8 Op. O.L.C. 101, 117 (1984) ("Since the early part of the 19th century, Presidents have steadfastly protected the confidentiality and integrity of investigative files from untimely, inappropriate, or uncontrollable access by the other branches, particularly the legislature."); *Assertion of Exec. Privilege in Response to Cong. Demands for Law Enf't Files*, 6 Op. O.L.C. 31, 32–33 (1982) (same concerning law enforcement files of the Environmental Protection Agency); *Position of the Exec. Dep't Regarding Investigative Reports*, 40 Op. Att'y Gen. 45, 49 (1941) (same concerning investigative files of the Federal Bureau of Investigation).

³⁹ *United States v. Nixon*, 418 U.S. 683, 706; *see also* *United States v. Reynolds*, 345 U.S. 1, 10–11 (1953) (recognizing the state secrets privilege in civil litigation involving military equipment).

⁴⁰ *Nixon*, 418 U.S. at 710, 712 n.19.

“absolutely privileged”⁴¹ and that “[n]o competing public or private interest can be advanced to compel disclosure.”⁴² And although no court has specifically addressed the question, the Justice Department has consistently taken the position that the body of relevant case law “supports the President’s assertion of an absolute privilege for state secrets against Congress.”⁴³ As a consequence, the state secrets component of executive privilege historically has been viewed as paramount within the “hierarchy of executive privilege claims.”⁴⁴

With the possible exception of state secrets, the components of executive privilege are not absolute—particularly when Congress is demanding the information at issue—but they are difficult to override. The courts have instructed that even when acting pursuant to a legitimate oversight function, a given congressional committee must show the specific information it seeks is “demonstrably critical to the responsible fulfillment of [the committee’s] functions.”⁴⁵ Only after the committee has made such a demonstration can Congress overcome the President’s assertion of the privilege. It should not be surprising that many congressional subpoenas fail to satisfy this standard. For seldom, if ever, does Congress need specific deliberative materials, records, and other internal executive branch communications to evaluate and formulate legislative proposals. As the U.S. Court of Appeals for the D.C. Circuit has observed, “legislative judgments normally depend more on the predicted consequences of proposed legislative actions and their political acceptability, than on precise reconstruction of past events.”⁴⁶ In short, effective congressional oversight typically does not require the kind of detailed factual information that often would be necessary, for example, in the context of litigating a criminal or civil case where factual disputes form the basis of a controversy. Consequently, congressional demands for the

⁴¹ *Halkin v. Helms*, 690 F.2d 977, 990 (D.C. Cir. 1982).

⁴² *In re United States*, 872 F.2d 472, 476 (D.C. Cir. 1989) (quoting *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983)).

⁴³ Memorandum from J. Michael Luttig, Principal Deputy Assistant Att’y Gen., Dep’t of Justice Office of Legal Counsel, to C. Boyden Gray, Counsel to the President, at 7 (Dec. 21, 1989), https://www.justice.gov/sites/default/files/olc/pages/attachments/2014/12/30/1989-12-21_-_pdaag_luttig_-_cong_access_to_pres_communications_ocr.pdf; see also *Exec. Privilege – Secrecy in Gov’t: Hearings Before the Subcomm. on Intergovernmental Relations of the Comm. on Gov’t Operations, United States Senate*, 94th Cong., 113 (1976) (statement of Antonin Scalia, Assistant Att’y Gen., Dep’t of Justice Office of Legal Counsel) (*United States v. Nixon* “suggest[s] strongly” that the state secrets privilege “could not even be defeated” by the “legitimate demands of another branch of the Government.”).

⁴⁴ Memorandum from J. Michael Luttig to C. Boyden Gray, *supra* note 43, at 2.

⁴⁵ Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 731 (D.C. Cir. 1974).

⁴⁶ *Senate Select Comm.*, 498 F.2d at 732.

transcripts or details of specific conversations between White House and other executive branch officials may fail to overcome an assertion of executive privilege.

C. *The Constitutionally-Mandated Accommodation Process*

As outlined above, the Constitution specifically authorizes Congress to conduct oversight, but the President is empowered to withhold information where appropriate. Both are important elements of the constitutional separation of powers the Framers had envisioned. At the same time, the Framers did not intend to create a government of perpetual gridlock. Instead, the Nation's Founders understood—as the Supreme Court has noted—that “[s]eparation-of-powers principles are vindicated, not disserved, by measured cooperation between the two political branches of the Government.”⁴⁷ The Constitution thus requires the branches to seek mutual “accommodation” before resorting to measures that impede further discourse—such as Congress’s use of its subpoena and contempt powers and the President’s formal assertion of executive privilege.⁴⁸

The Constitution mandates an accommodation process, however, only insofar as that process respects constitutional principles. Above all, any accommodation offered must be consistent with the Constitution’s separation of powers, not at odds with it. As the Justice Department affirmed more than 30 years ago, “[t]he accommodation required is not simply an exchange of concessions or a test of political strength . . . [but] an obligation of each branch to make a *principled* effort to acknowledge, and if possible to meet, the legitimate needs of the other branch.”⁴⁹

D. *The Challenge of Accommodation: Placing Principles over Politics*

The eight years of the Bush Administration were marked by a number of flash points involving congressional demands for executive branch

⁴⁷ *Loving v. United States*, 517 U.S. 748, 773 (1996); see also *United States v. AT&T*, 567 F.2d 121, 127 (D.C. Cir. 1977) (discussing the Framers’ understanding “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”).

⁴⁸ *AT&T*, 567 F.2d at 130. (“[T]he 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. The Constitution contemplates such accommodation. Negotiation between the two branches should thus be viewed as a dynamic process furthering the constitutional scheme.”).

⁴⁹ Assertion of Exec. Privilege in Response to a Cong. Subpoena, 5 Op. O.L.C. 27, 31 (1981) (opinion of Att’y Gen. William French Smith) (assertion of executive privilege to protect deliberative materials held by the Department of Interior) (emphasis added).

information. During those years, the Bush Administration sought to pursue a policy of *principled accommodation* in response to oversight requests. In real terms, that meant seeking and offering accommodations not based on relative political muscle or public opinion polls, but rather on fundamental constitutional principles—including a genuine respect for Congress’s legitimate informational needs. Through this approach, the Bush Administration satisfied Congress’s oversight interests by successfully responding to hundreds of congressional investigations and inquiries. Despite the enormous burdens placed on executive branch personnel—and particularly White House staff—the Bush Administration worked in good faith with congressional committees to ensure Congress had the information it required to pursue its important legislative responsibilities.⁵⁰

The Bush Administration’s policy was also principled, safeguarding and establishing important precedents for future presidential administrations. Where acquiescence to congressional demands for information would have impinged on any one of the executive branch’s constitutionally protected confidentiality interests or would have otherwise seriously impaired executive functions more generally, President Bush and his White House staff worked to accommodate Congress’s legitimate needs in a manner consistent with those interests. But in a handful of instances where Congress issued ultimatums that the President believed failed to respect those constitutional boundaries, President Bush stood on principle to preserve the constitutional separation of powers. On each of these occasions, as detailed in this article, President Bush determined that acquiescing to congressional demands—even if it would have gained him “political capital” in the short-term—would have impaired executive branch functions and confidentiality interests, thereby permanently endangering the Constitution’s separation of powers by establishing precedents that would weaken future administrations.⁵¹

⁵⁰ Of course, these efforts to respond to the congressional investigations and inquiries simultaneously occurred while many of those officials were engaged in continuing the war against terrorism and grappling with the global financial crisis of 2008-09.

⁵¹ President Clinton’s White House Counsel, Lloyd Cutler, has candidly explained:

The temptation of the president and his political advisers is, even though you could refuse to produce these documents on the grounds of executive privilege, since they *do* constitute advice and communications with the president – and that would be better for the institution as a whole – the short-term political consequences of doing it are so adverse – “He’s covering up!” – that “executive privilege” has virtually disappeared. One result is that few if any people now give written advice to the president.

II. SATISFYING LEGITIMATE OVERSIGHT REQUESTS

A concomitant review of history and context must accompany an examination of President Bush's specific assertions of executive privilege during the eight years he served in office. Far from an incessant tug-of-war between Congress and the Executive, the presidency of George W. Bush involved satisfactory responses to congressional requests for information on virtually a weekly basis. In the period between 2002 and 2007, the Administration met literally hundreds of specific congressional requests for information without reaching an impasse requiring the assertion of executive privilege.⁵²

Nevertheless, congressional scrutiny of the executive branch increased markedly when the Democratic Party took control of both the House and the Senate in the 110th Congress following the 2006 midterm elections.⁵³ From January 2007 until the end of the Administration two years later, the executive branch as a whole responded to hundreds of additional congressional inquiries. The Administration successfully addressed the overwhelming majority of these requests. Indeed, there were more than 700 distinct executive branch investigations or inquiries during the 110th Congress, involving more than 1,500 requests for documents, interviews, or testimony.⁵⁴ Moreover, during that same period, Congress held more than 1,700 oversight hearings, requiring more than 1,350 executive branch officials to testify before Congress.⁵⁵ The executive branch produced or made available nearly two million pages of documents.⁵⁶ Executive branch employees spent an estimated 168,000 hours responding to such oversight requests.⁵⁷ In addition, the executive branch cooperated with

BRADLEY H. PATTERSON, JR., *THE WHITE HOUSE STAFF: INSIDE THE WEST WING AND BEYOND* 109–10 (2000).

⁵² Although President Bush first asserted the privilege within a year of taking office, he did so in December 2001 in a matter involving documents initially sought by Congress during the Clinton Administration (an assertion that had no political benefit).

⁵³ When the political party not holding the Presidency manages to win or increase its majority in either or both Houses, increased oversight of the executive branch is likely to follow. *See, e.g.*, JOHN ACACIA, CLARK CLIFFORD: *THE WISE MAN OF WASHINGTON* 337–38 (2009) (describing the “assertive Congress, then controlled by Democrats, insisting on greater oversight of the executive branch” after the election of 1974 in which Democrats had captured nearly 50 additional seats in the House of Representatives).

⁵⁴ Memorandum from Fred F. Fielding, Counsel to the President, to George W. Bush, President of the United States, at 2 (Jan. 16, 2009) (on file with authors).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

investigations conducted by the Justice Department and responded to inquiries from the Government Accountability Office (“GAO”).⁵⁸

Beginning in early 2007, congressional committees targeted the White House in more than 80 investigations. Indeed, the White House received more than 130 requests for documents, interviews, or testimony, and produced or made available more than 40,000 pages of documents by the end of the Administration.⁵⁹ In the overwhelming majority of these interactions with Congress, the Department of Justice, and the GAO, the White House was able to respond to requests with an accommodation that satisfied all parties involved. In short, President Bush’s approach was no different than President Reagan’s approach—“to comply with Congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the executive branch.”⁶⁰

III. SPECIFIC ASSERTIONS OF EXECUTIVE PRIVILEGE

President Bush asserted executive privilege in six matters. The White House informed Congress of four of the six matters: (1) Clinton Administration prosecution memoranda; (2) documents and testimony relating to the resignations of nine U.S. Attorneys in 2006; (3) Environmental Protection Agency (“EPA”) and Office of Management and Budget (“OMB”) documents concerning two pollution decisions; and (4) documents from the Justice Department’s investigation into the leak in 2003 of Valerie Plame Wilson’s identity as an operations officer in the Central Intelligence Agency (“CIA”). In the remaining two matters, however, the White House did not communicate the assertions due to last-minute developments in the accommodation process. Nevertheless, this article addresses these matters because President Bush had formally committed to protecting the disclosure of these materials: (5) draft EPA documents concerning greenhouse gas regulations, and (6) three categories of Justice Department documents demanded in a wide-ranging subpoena.⁶¹

⁵⁸ *About GAO*, GOV’T ACCOUNTABILITY OFFICE, <http://www.gao.gov/about/> (last visited Nov. 10, 2016) (“The U.S. Government Accountability Office (GAO) is an independent, nonpartisan agency that works for Congress. Often called the ‘congressional watchdog,’ GAO investigates how the federal government spends taxpayer dollars.”).

⁵⁹ Memorandum from Fred F. Fielding to George W. Bush, *supra* note 54, at 2.

⁶⁰ Memorandum from Ronald W. Reagan, President of the United States, to Heads of Exec. Dep’ts and Agencies, (Nov. 4, 1982), <https://www.gpo.gov/fdsys/pkg/GPO-CHRG-REHNQUIST/pdf/GPO-C HRG-REHNQUIST-4-16-4.pdf>.

⁶¹ The six matters, addressed chronologically in this article, involved nine assertions of the privilege made on eight separate occasions. The matters are grouped chronologically as follows: (1) Clinton Administration prosecution documents; *see* Memorandum from George W. Bush, President of

A. Clinton Administration Prosecution Memoranda

The first test of the Bush Administration's commitment to a principled approach to accommodating congressional requests for information and documents came in 2001. The inquiry involved Justice Department law enforcement memoranda from the Clinton Administration.⁶² The head of the Justice Department's campaign finance unit had recommended, without success, that Attorney General Janet Reno appoint a Special Counsel to investigate allegations of campaign finance violations involving Vice President Al Gore. With Republicans holding majorities in both the House and the Senate, the House Committee on Oversight and Government Reform ("Oversight Committee") had demanded related documents and memoranda from Attorney General Reno in the final months of the Clinton Administration.⁶³

The Oversight Committee renewed its demands for these campaign finance memoranda and ultimately issued a subpoena to Attorney General John Ashcroft on September 6, 2001.⁶⁴ This subpoena also demanded several other prosecution memoranda, including a memorandum related to a decision by Clinton Administration officials not to pursue perjury charges against a Drug Enforcement Administration agent who had provided a briefing to Oversight Committee staff. Also contained in the subpoena was a wholly new demand for prosecution memoranda related to an investigation into the Boston office of the Federal Bureau of

the United States, to John Ashcroft, Attorney Gen. (Dec. 12, 2001), <https://www.gpo.gov/fdsys/pkg/WCPD-2001-12-17/pdf/WCPD-2001-12-17-Pg1783.pdf>; (2) U.S. Attorneys resignations; *see* Memorandum from George W. Bush, President of the United States, to Fred Fielding, Counsel to the President (Aug. 1, 2007) (on file with authors); Memorandum from to George W. Bush, President of the United States, to Fred Fielding, Counsel to the President (July 9, 2007) (on file with authors); Memorandum from George W. Bush, President of the United States, to Fred Fielding, Counsel to the President (June 28, 2007) (on file with authors); (3) EPA greenhouse gas rulemaking (not communicated); *see* Memorandum from George W. Bush, President of the United States, to Stephen Johnson, Adm'r of the EPA (May 21, 2008) (on file with authors); (4) Two assertions: EPA California waiver decision and ozone standards decision, and OMB analysis of the ozone standards decision; *see* Memorandum from George W. Bush, President of the United States, to Stephen Johnson, Adm'r of the EPA (June 20, 2008) (on file with authors); Memorandum from George W. Bush, President of the United States, to Jim Nussle, Dir. of the Office of Mgmt. and Budget (June 20, 2008) (on file with authors); (5) Justice Department leak investigation; *see* Memorandum from George W. Bush, President of the United States, to Michael Mukasey, Attorney Gen. (July 15, 2008) (on file with authors); and (6) Three categories of Justice Department documents (not communicated); *see* Memorandum from George W. Bush, President of the United States, to Michael Mukasey, Attorney Gen. (Sept. 16, 2008) (on file with authors).

⁶² The Supreme Court has held that both incumbent and former Presidents enjoy the right to assert executive privilege over communications and other information generated during the President's tenure in the Office. *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 439 (1977).

⁶³ *See, e.g.*, Robert Suro & Susan Schmidt, *Funds Probe Panel Seeks Freeh's Memo*, WASH. POST (Dec. 6, 1997), <http://www.washingtonpost.com/wp-srv/politics/special/campfin/stories/cf120597.htm>.

⁶⁴ Memorandum from George W. Bush to John Ashcroft, *supra* note 61, at 1.

Investigation (“FBI”) involving mob informants and allegations of corruption dating back to the 1960s.

Before Oversight Committee Chairman Dan Burton issued the subpoena, the Justice Department had attempted to accommodate Congress’s oversight of the Department in a manner consistent with protection of executive branch confidentiality interests. For example, on October 5, 2000, Attorney General Reno had answered questions from Chairman Burton and committee counsel about her decision not to appoint a special counsel in the campaign finance matter.⁶⁵ In the perjury matter, Justice Department officials provided a comprehensive briefing to Oversight Committee staff explaining the Department’s decision not to prosecute. Furthermore, the Justice Department had been providing extensive materials relating to the Boston FBI investigation even before the Oversight Committee unexpectedly demanded the prosecution memoranda by subpoena.

The dispute with the Oversight Committee directly implicated the law enforcement component of executive privilege. As highlighted above, the Justice Department has long taken the position that prosecution and declination memoranda—internal documents that recommend for or against criminal prosecution—are especially sensitive deliberative materials that must remain confidential.⁶⁶ Consistent with that approach, Attorney General John Ashcroft determined that providing them in this particular context would compromise the President’s constitutional law enforcement responsibilities.⁶⁷ Specifically, he reasoned: “If these deliberative documents are subject to congressional scrutiny, we will face the grave danger that prosecutors will be chilled from providing the candid and independent analysis essential to the sound exercise of prosecutorial discretion and to the fairness and integrity of federal law enforcement.”⁶⁸ Disclosure could also politicize prosecutions as well as potentially “be devastating” to individuals discussed in the memoranda but not charged with crimes.⁶⁹ Furthermore, in this case, the Oversight Committee had not

⁶⁵ See H.R. REP. NO. 106-1027, pt. 1, at x (2000).

⁶⁶ See Legislation Providing for Court-Ordered Disclosure of Grand Jury Materials to Cong. Comm., 9 Op. O.L.C. 86, 91 n.4 (1985) (“The justifications for invoking executive privilege with respect to investigative files are rooted in the principles of separation of powers and due process An additional reason for withholding investigative files is that effective and candid deliberations among the numerous advisers who participate in a case in various roles and at various stages of a prosecution would be rendered impossible if the confidential deliberative communications were held open to public scrutiny.”); Cong. Subpoenas of Dep’t of Justice Investigative Files, 8 Op. O.L.C. 252, 262–63 (1984).

⁶⁷ Assertion of Exec. Privilege with Respect to Prosecutorial Documents, 25 Op. O.L.C. 1 (2001).

⁶⁸ *Id.* at 2.

⁶⁹ *Id.*

adequately explained its need for the documents but had merely expressed “its disagreement with a prosecutorial decision.”⁷⁰ The Attorney General appropriately concluded that because the Oversight Committee had failed to make any demonstration that the documents were critical to the fulfillment of its oversight functions, the Oversight Committee could not overcome a claim of executive privilege.⁷¹

Following the Attorney General’s determination, President Bush asserted executive privilege over the memoranda on December 12, 2001.⁷² Clearly, politics did not drive the President’s decision. The documents at issue were the product of the previous, Democratic Administration and the body demanding them was a Republican-controlled congressional committee. President Bush had little to gain politically from safeguarding President Clinton’s documents, and he risked alienating his allies in Congress during the critical first year of his Presidency. This initial decision to place principle above politics set the tone for subsequent decisions to invoke the privilege in his second term.

Equally noteworthy is the fact the Justice Department continued to accommodate the Oversight Committee’s interests with respect to the Boston FBI documents, even though the Oversight Committee had not attempted to participate in any accommodation process with regard to these documents before issuing its subpoena. What is more, executive branch officials concluded that in this instance the Oversight Committee did in fact have a legitimate need for some of the information contained in the Boston FBI memoranda, largely because the FBI had acknowledged wrongdoing relating to the underlying matters and the Justice Department had filed criminal charges alleging corruption in the FBI investigative process.⁷³ Thus, in this instance, there was incontrovertible evidence that an executive branch agency had fallen far short of fulfilling its statutory obligations. Ultimately, the Department and the Oversight Committee reached a compromise in early 2002. The Department provided limited access to a number of the Boston documents for use in the Oversight

⁷⁰ *Id.* at 3.

⁷¹ *Id.* (“We believe that the Committee has failed to provide a sufficient reason to disclose these sensitive prosecutorial documents. Congress cannot justify a demand for a document based on its disagreement with a prosecutorial decision. In any event, even if the Committee has a legitimate oversight interest in these documents, its oversight needs cannot outweigh the Executive Branch’s interest in the confidentiality of prosecutorial and our concerns about congressional influence on such in individual cases.”) (citation omitted).

⁷² Memorandum from George W. Bush to John Ashcroft, *supra* note 61.

⁷³ See H.R. REP. NO. 108-414, at 1 (2004) (investigating the misuse of informants by the FBI in New England).

Committee's investigation, but with redactions and other safeguards intended to protect the executive branch's acute confidentiality interests in the prosecutorial decisionmaking process.⁷⁴

B. U.S. Attorneys Inquiry

The Bush Administration reached its next impasse with Congress in connection with the investigation of the Justice Department's dismissal and replacement of nine U.S. Attorneys in 2006. In early 2007, the Senate and House Committees on the Judiciary ("Judiciary Committees") began to investigate allegations that the dismissals were inappropriately motivated. The Judiciary Committees began their investigations by requesting documents from the Justice Department and scheduling hearings to question Department officials—including Attorney General Alberto Gonzales.

Unlike most prosecutors within the Justice Department, U.S. Attorneys are nominated by the President and confirmed by the Senate. As political appointees performing an executive function and subject to no statutory removal protections, they serve at the President's pleasure and may be removed without cause.⁷⁵ Because a President's decision to request the resignation of any or all U.S. Attorneys involves the exercise of his exclusive removal power under Article II of the Constitution, a congressional inquiry into such a matter arguably falls outside Congress's legitimate oversight authority.

Notwithstanding the questionable legitimacy of Congress's inquiry juxtaposed with the critical executive branch interests at stake, the Bush Administration sought to accommodate Congress by making Justice Department officials available for interviews and testimony and by providing thousands of relevant documents. Ultimately, the Justice Department provided over 7,850 pages of documents (including more than

⁷⁴ Melissa B. Robinson, *Justice Department Agrees to Committee's Request for Boston FBI Documents, Lawmaker Says*, ASSOCIATED PRESS, Feb. 28, 2002 (Lexis Advance); Press Release, H Comm. on Gov't Reform, Comm. to Review Justice Dep't Documents (Feb. 27, 2002), <http://www.fas.org/sfp/congress/2002/h022702.html>; see also H.R. REP. NO. 108-414, at 7 (referring to documents received by the Committee that were redacted).

⁷⁵ See *Wiener v. United States*, 357 U.S. 349, 353 (1958) (explicit statutory and implied restrictions may be placed by Congress on the President's authority to remove executive branch appointees holding quasi-legislative or quasi-judicial offices); *Humphrey's Ex'r v. United States*, 295 U.S. 602, 627–28 (1935) (holding that the Constitution prohibits removal restrictions on the President with respect to "purely executive" political appointees); see also HAROLD J. KRENT, *PRESIDENTIAL POWERS* 45–46 (2005) ("In short, the president must be able to exercise plenary removal authority over all principal officers when most critical to discharging his constitutionally assigned functions and exercising initiative in law enforcement. The power to remove enhances the president's accountability to the public for his administration's actions, while limiting congressional influence.").

2,200 pages from the Office of the Attorney General and 2,800 from the Office of the Deputy Attorney General) and made another 3,750 pages available for review.⁷⁶ Many of these documents contained communications with White House personnel. All told, fourteen Justice Department officials, including the Attorney General and the incumbent and former Deputy Attorneys General, testified before the Judiciary Committees or submitted to interviews with their staffs.⁷⁷

Despite these accommodations, the Judiciary Committees broadened their inquiry, requesting documents from the White House and testimony from White House employees.⁷⁸ On March 20, 2007, the Counsel to the President explained to congressional leaders that if questions remained after their extensive investigation of the Justice Department, White House officials would be available for interviews to discuss any communications between White House staff and persons outside the White House concerning the resignations of the U.S. Attorneys in question.⁷⁹ Administration officials also offered to provide copies of a range of documents, including communications between the White House and the Justice Department as well as communications between White House staff and Members of Congress.⁸⁰ Given the confidentiality interests at stake, and the questionable legitimacy of congressional inquiries into the President's exercise of his removal power, the Administration believed that this offer accommodated the Judiciary Committees' interests more than adequately.

Congressional leaders rejected this offer. On June 13, the Judiciary Committees issued a total of five subpoenas demanding White House documents as well as formal, public testimony under oath from White

⁷⁶ *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 59 (D.D.C. 2008).

⁷⁷ See generally, *Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?* Hearing Before the S. Comm. on the Judiciary, 110th Cong. (2007) (including statements of numerous former U.S. Attorneys).

⁷⁸ Letter from Patrick Leahy, Chairman, Senate Judiciary Comm., and Arlen Specter, Ranking Member, Senate Judiciary Comm. to Fred F. Fielding, Counsel to the President (Mar. 13, 2007), <https://web.archive.org/web/20070927062215/http://leahy.senate.gov/press/200703/3-13-07%20-%20Fielding%20Invite.pdf>; Letter from John Conyers, Jr., Chairman, House Judiciary Comm., and Linda T. Sanchez, Chairwoman, House Judiciary Comm., to Alberto Gonzalez, Attorney Gen. (Mar. 8, 2007), http://media.washingtonpost.com/wp-srv/politics/documents/Letter_to_Gonzalez_030807.pdf.

⁷⁹ Letter from Fred F. Fielding, Counsel to the President, to Patrick Leahy, Chairman, Senate Judiciary Comm., Arlen Specter, Ranking Member, Senate Judiciary Comm., John Conyers, Jr., Chairman, House Judiciary Comm., Lamar S. Smith, Ranking Member, House Judiciary Comm., and Linda T. Sanchez, Chairwoman, House Judiciary Subcomm., at 1 (Mar. 20, 2007) (offering to make available for interviews "the President's former Counsel; current Deputy Chief of Staff and Senior Advisor; Deputy Counsel; and a Special Assistant in the Office of Political Affairs"), <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/20/AR2007032001027.html>.

⁸⁰ Letter from Fred F. Fielding to Patrick Leahy et al., *supra* note 79.

House officials relating to the U.S. Attorneys matter. The subpoenas demanding documents from the White House were addressed to President Bush's Chief of Staff, Joshua Bolten, whom the Committees had named as the "custodian of records" for the White House.⁸¹ The subpoenas also demanded documents in the possession of those officials who were ordered to testify.⁸²

1. White House Documents

Responsible for providing legal advice and assistance to the President and executive branch agencies, the Justice Department's Office of Legal Counsel ("OLC")⁸³ reviewed the White House documents responsive to the subpoenas. These documents included internal White House communications as well as communications between White House staff and others outside the Executive Office of the President, including Justice Department officials. In a detailed legal analysis, Solicitor General Paul Clement—then serving as Acting Attorney General for all matters pertaining to the removal of the U.S. Attorneys⁸⁴—concluded that the documents and testimony were properly subject to an executive privilege claim.⁸⁵ Solicitor General Clement explained that the nomination and removal of U.S. Attorneys "necessarily relate to the potential exercise by the President of an authority assigned to him alone," and that Congress's demands trenched on highly sensitive executive branch deliberations that implicated "compelling confidentiality concerns."⁸⁶ With the responsibility of making thousands of federal appointments during the course of his administration, the President must be able to depend on

⁸¹ See Motion for Partial Summary Judgment at Ex. 13–14, *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008) (No. 08-cv-409).

⁸² *Id.*

⁸³ The Office of Legal Counsel is an office in the U.S. Department of Justice that assists the Attorney General in his role as legal adviser to the President and other executive branch agencies. The OLC drafts legal opinions of the Attorney General and also provides written opinions to the White House Counsel, various agencies of the executive branch, and offices within the Justice Department. See U.S. DEP'T. OF JUSTICE, OFFICE OF LEGAL COUNSEL, <http://www.justice.gov/olc/> (last visited Nov. 10, 2016); see also U.S. DEP'T. OF JUSTICE, JUSTICE MGMT. DIV., ORG. MISSION & FUNCTIONS MANUAL, OFFICE OF LEGAL COUNSEL, <http://www.justice.gov/jmd/mps/manual/olc.htm> (last visited Nov. 10, 2016) ("The mission of OLC is to assist the Attorney General in carrying out his/her statutory responsibility of furnishing legal advice to the President and the heads of the executive and military departments, and to provide legal advice and assistance to other components of the Department of Justice upon request.").

⁸⁴ Because Attorney General Gonzales himself was a target of the congressional investigation, he was recused from acting on the Department's behalf in the investigation.

⁸⁵ Letter from Paul D. Clement, Solicitor Gen. and Acting Att'y Gen., to George W. Bush, President of the United States, at 8 (June 27, 2007), <https://www.fas.org/sgp/bush/sg062707.pdf>.

⁸⁶ *Id.* at 3, 7.

uninhibited deliberations and candid advice from his advisers as to whether a given individual should be appointed or removed. As noted above, the courts have recognized that the presidential communications and deliberative process components of executive privilege protect precisely those needs.⁸⁷ Moreover, the voluminous documents and testimony the Justice Department had already provided to the Judiciary Committees sharply reduced any legitimate congressional oversight interest in internal White House deliberations.⁸⁸ Furthermore, the Judiciary Committees had rejected the White House's standing offer of interviews and documents.

Consequently, on June 28, 2007, President Bush asserted executive privilege over the documents sought by the Judiciary Committees, including those in the possession of the officials who had been subpoenaed to testify.⁸⁹ At the same time, the President made clear to all White House and Justice Department officials that they should "remain willing to meet informally with the Committees to provide such information as [they] can, consistent with [their] obligations of confidentiality to the President, and without creating a precedent that would violate the constitutional doctrine of separation of powers."⁹⁰ The Committees' chairmen responded heatedly, with accusations of "stonewalling," but made no serious attempt to address the analysis provided in the Solicitor General's letter.⁹¹ The chairmen also demanded a detailed description of each of the documents as well as the specific reason each document was withheld.⁹² The Bush Administration declined this request. In the Administration's view and in light of the important confidentiality interests at stake, the Judiciary Committees plainly had not established that the documents and testimony sought from the White House were "demonstrably critical" to the Committees' fulfillment of their oversight function.⁹³

2. *White House Testimony*

On July 9, 2007, President Bush again asserted executive privilege in the U.S. Attorneys matter, this time over the testimony sought from Harriet

⁸⁷ See *infra* text accompanying notes 29–36.

⁸⁸ See *infra* text accompanying notes 29–36.

⁸⁹ Memorandum from George W. Bush, President of the United States, to the Counsel to the President, at 1 (June 28, 2007) (on file with authors).

⁹⁰ *Id.* at 2.

⁹¹ Letter from Patrick Leahy, Chairman, Senate Judiciary Comm., and John Conyers, Jr., Chairman, House Judiciary Comm., to Fred F. Fielding, Counsel to the President (June 29, 2007), <https://web.archive.org/web/20090622024732/http://leahy.senate.gov/press/200706/062907%20conyers-leahy%20letter%20to%20fielding.PDF>.

⁹² *Id.*

⁹³ See Letter from Paul Clement to George W. Bush, *supra* note 85.

E. Miers, former Counsel to the President, and Sara M. Taylor, former White House Political Affairs Director.⁹⁴ For the same reasons that led to his assertion of executive privilege over the documents, President Bush concluded that the confidentiality interests at issue far outweighed the Committees' legislative needs—particularly when Administration officials had been willing to provide the same information through interviews.⁹⁵ The Counsel to the President conveyed this decision to the Committees, and also explained that the Bush Administration would not comply with the intrusive and burdensome demand that it create and provide extensive descriptions of every single document that had been withheld.⁹⁶

The House Judiciary Committee subpoenaed Ms. Miers on June 13, 2007.⁹⁷ On July 10, the OLC formally advised the Counsel to the President of the Justice Department's longstanding view—expressed by several administrations of both political parties since at least the 1940s—that the same separation of powers principles that protect the President from compelled congressional testimony also apply to senior presidential advisers.⁹⁸ Nearly 40 years ago, then-Assistant Attorney General William H. Rehnquist articulated the position of the Justice Department:

The President and his immediate advisers—that is, those who customarily meet with the President on a regular or

⁹⁴ Memorandum from George W. Bush, President of the United States, to the Counsel to the President, at 1–2 (July 9, 2007) (on file with authors).

⁹⁵ *Id.*

⁹⁶ Letter from Fred F. Fielding, Counsel to the President, to Patrick Leahy, Chairman, Senate Judiciary Comm., and John Conyers, Jr., Chairman, House Judiciary Comm. (July 9, 2007), <https://fas.org/sgp/bush/wh070907.pdf>.

⁹⁷ David Stout, *2 Ex-Bush Aides Subpoenaed in Attorneys Case*, N.Y. TIMES (June 13, 2007), <http://www.nytimes.com/2007/06/13/washington/13cnd-attorneys.html?hp>.

⁹⁸ Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att'y Gen., to the Counsel to the President, at 1 (July 10, 2007), <https://www.justice.gov/sites/default/files/olc/opinions/attachments/2015/06/01/op-olc-v031-p0191.pdf>. In 1968, for example, the Senior Associate Counsel to President Lyndon Johnson declined to appear before the Senate Judiciary Committee, explaining:

It has been firmly established, as a matter of principle and precedents, that members of the President's immediate staff shall not appear before a Congressional committee to testify with respect to the performance of their duties on behalf of the President. This limitation, which has been recognized by the Congress as well as the Executive, is fundamental to our system of government.

History of Refusals by Exec. Branch Officials to Provide Info. Demanded by Cong., 6 Op. O.L.C. 751, 777–78 (1982) (quoting *Nominations of Abe Fortas and Homer Thornberry: Hearings before the S. Comm. on the Judiciary*, 90th Cong. 1347, 1363 (1968)). Similarly, in 1948, President Truman instructed John Steelman, one of his principal White House aides, not to appear before a subcommittee of the House of Representatives. *Id.* at 772.

frequent basis—should be deemed absolutely immune from testimonial compulsion by a congressional committee. They not only may not be examined with respect to their official duties, but they may not even be compelled to appear before a congressional committee.⁹⁹

Consistent with that position, the OLC concluded here that, as a former Counsel to the President, Ms. Miers was immune from compulsion to testify before the Committee.¹⁰⁰ At the President's direction, Ms. Miers declined to appear at a hearing scheduled for July 12, 2007.¹⁰¹

The Senate Judiciary Committee subpoenaed Ms. Taylor to testify at a hearing scheduled for July 11, 2007. Because Ms. Taylor was not an immediate presidential adviser, she was therefore not immune from testifying before Congress. Ms. Taylor appeared at the July 11 hearing, providing limited factual testimony while honoring President Bush's invocation of executive privilege.¹⁰²

On August 1, 2007, in the third and final instance involving the U.S. Attorneys matter, President Bush asserted executive privilege in response to two Senate Judiciary Committee subpoenas.¹⁰³ These subpoenas, issued July 26, 2007, demanded documents and testimony from J. Scott Jennings, Deputy Director of the White House Office of Political Affairs, and Karl C. Rove, Senior Advisor to the President and Deputy Chief of Staff. In this instance, Solicitor General Clement concluded—for the same reasons previously expressed in connection with the Bolten, Miers, and Taylor subpoenas—that the documents were subject to the assertion of executive privilege in order to protect the acute confidentiality interests at risk.¹⁰⁴ The OLC separately opined that Mr. Rove, like Ms. Miers, was an immediate presidential adviser and therefore was immune from compelled congressional testimony about the U.S. Attorneys matter.¹⁰⁵ At the President's direction, Mr. Rove declined to appear at the Senate Judiciary

⁹⁹ Memorandum from Steven G. Bradbury to the Counsel to the President, *supra* note 98, at 1.

¹⁰⁰ *Id.* at 3.

¹⁰¹ *Panel Moves Toward Holding Miers in Contempt*, NPR (July 12, 2007), <http://www.npr.org/templates/story/story.php?storyId=11868980>.

¹⁰² David Stout, *Bush Instructs His Ex-Counsel Not to Appear at Hearing*, N.Y. TIMES (July 11, 2007), <http://www.nytimes.com/2007/07/11/washington/11cnd-attorneys.html>.

¹⁰³ Memorandum from George W. Bush, President of the United States, to the Counsel to the President, at 2 (Aug. 1, 2007) (on file with authors).

¹⁰⁴ Letter from Paul D. Clement, Solicitor Gen. and Acting Att'y Gen., to George W. Bush, President of the United States (Aug. 1, 2007), http://www.politico.com/pdf/PPM43_07-0801_whitehouse_rove.pdf.

¹⁰⁵ Memorandum from Steven G. Bradbury to the Counsel to the President, *supra* note 98, at 1.

Committee hearing scheduled for August 2, 2007.¹⁰⁶ In the case of Mr. Jennings, because he, like Ms. Taylor, was not a senior adviser, he provided limited factual testimony at that hearing.¹⁰⁷

3. House Judiciary Committee v. Miers, et al.

Meanwhile, the House Judiciary Committee pursued contempt-of-Congress citations against Ms. Miers and Mr. Bolten for their compliance with President Bush's assertion of executive privilege and the OLC's conclusion that Ms. Miers was immune from compelled testimony. On July 25, 2007, the House Judiciary Committee voted, 22-to-17, to pursue contempt charges before the full House.¹⁰⁸ The Bush Administration continued to offer a reasonable accommodation by way of a series of informal interviews and access to a range of documents—if the House would reconsider its position. But seven months later, on February 14, 2008, the House revived the matter by voting to hold Mr. Bolten and Ms. Miers in contempt of Congress.¹⁰⁹

On February 29, 2008, following established Justice Department legal policy, recently-confirmed Attorney General Michael Mukasey appropriately refused to pursue criminal contempt charges. In a letter informing the Speaker of the House of his decision, the Attorney General explained, “as you know, the President, asserting executive privilege, directed that Joshua Bolten, chief of staff to the President, and Harriet Miers, the former counsel to the President, not release certain documents or provide related testimony subpoenaed by the Committee on the Judiciary of the House of Representatives.”¹¹⁰ Then, on March 10, 2008,

¹⁰⁶ See *White House Staffer Refuses to Testify, Rove a No-Show at Senate Hearing*, CNN: POLITICALTICKER (Aug. 2, 2007, 2:21 PM), <http://politicalticker.blogs.cnn.com/2007/08/02/white-house-staffer-refuses-to-testify-rove-a-no-show-at-senate-hearing/>. This immunity also subsequently shielded Mr. Rove from compelled testimony before Congress in July 2008 regarding the U.S. Attorneys matter. The House Judiciary Committee and its Subcommittee on Commercial and Administrative Law had sought Mr. Rove's testimony. The Committee also requested information from Mr. Rove about his knowledge or involvement in the criminal prosecution of former Alabama Governor Don Siegelman. Mr. Rove offered to be interviewed by the Committee with regard to the Siegelman prosecution matter and, on July 22, 2008, he provided written answers to questions posed by the Committee's Ranking Member.

¹⁰⁷ *Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys? - Part VII: Hearing Before the S. Comm on the Judiciary*, 110th Cong. 464-491 (2007) (statement of J. Scott Jennings, Deputy Dir., White House Office of Political Affairs).

¹⁰⁸ H.R. REP. NO. 110-941, at 39 (2009).

¹⁰⁹ Press Release, White House Office of the Press Sec'y, Statement by the Press Sec'y (Feb. 14, 2008), <https://georgewbush-whitehouse.archives.gov/news/releases/2008/02/20080214-7.html>.

¹¹⁰ See Letter from Michael Mukasey, Att'y Gen., to Nancy Pelosi, Speaker, H. Rep. (Feb. 29, 2008), <https://www.documentcloud.org/documents/373620-mukasey-letter-to-pelosi-feb-29-2008.html>;

the House of Representatives took the extraordinary step of filing a lawsuit against Ms. Miers and Mr. Bolten in federal district court in the District of Columbia.¹¹¹ Bush Administration lawyers contended that this type of interbranch constitutional dispute between Congress and the executive branch was not appropriate for the courts to adjudicate. The court rejected this position.¹¹² The district court also rejected the Administration's contention that Ms. Miers could not be forced to appear before Congress concerning her official responsibilities as a senior adviser to the President.¹¹³ The district court did recognize, however, that Congress lacked the authority to demand "privilege logs" exhaustively describing the documents that had been withheld under the claim of privilege.¹¹⁴

In response, Ms. Miers and Mr. Bolten filed an interlocutory appeal in the U.S. Court of Appeals for the D.C. Circuit. Although the district court had denied a stay pending the appeal, the D.C. Circuit concurred in the Administration's position and granted the stay.¹¹⁵ Meanwhile, during the pendency of the appeal, the parties reached a compromise that effectively resolved the dispute.¹¹⁶ According to the terms of the compromise, Ms. Miers and Mr. Rove would participate in transcribed interviews before the House Judiciary Committee (as opposed to formal testimony); the Committee would be provided access to certain specified documents; and following completion of these interviews, copies of the interview transcripts and of documents provided to the Committee could be made public (without the need for televised hearings).¹¹⁷ Simultaneously, the House Judiciary Committee negotiated an agreement with the Justice Department, providing that upon completion of the terms of the "Agreement Concerning Accommodation," the Justice Department would move to dismiss its appeal before the D.C. Circuit with prejudice, and the House Judiciary Committee would then move to dismiss its district court complaint with prejudice.¹¹⁸

Mike Allen, *Mukasey Swiftly Rebuffs Pelosi*, POLITICO (Feb 29, 2008), <http://www.politico.com/news/stories/0208/8776.html>.

¹¹¹ See Complaint for Declaratory and Injunctive Relief at 1, *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008) (No. 08-409).

¹¹² See *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 108 (D.D.C. 2008).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ See *Comm. on the Judiciary v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008).

¹¹⁶ See Unopposed Motion to Dismiss at Ex. A, *Comm. on the Judiciary v. Miers*, 542 F. Supp. 2d 53 (D.D.C. 2008) (No. 08-cv-409).

¹¹⁷ See Carrie Johnson, *Deal Clears Rove, Miers to Discuss Prosecutor Firings*, Wash. Post. (Mar. 5, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/04/AR2009030403445.html>.

¹¹⁸ See Unopposed Motion to Dismiss at Ex. B, *Comm. on the Judiciary v. Miers*, 542 F. Supp. 2d 53 (D.D.C. 2008) (No. 08-cv-409).

The House Judiciary Committee conducted transcribed interviews with Harriet Miers on June 15, 2009 and Mr. Rove on July 7 and July 30, and the Committee gained access to certain documents it had sought. On August 11, the Committee made the interview transcripts and produced documents public.¹¹⁹ Accordingly, the Justice Department filed a motion to dismiss its appeal with prejudice, which the D.C. Circuit granted on October 14.¹²⁰ The district court granted the House Judiciary Committee's motion to dismiss its complaint on October 23.¹²¹ In the end, the constitutionally-mandated accommodation process had finally settled the matter, but unfortunately only after both Congress and the executive branch had endured litigation before the courts.

C. The EPA's Greenhouse Gas Rulemaking

In the spring of 2008, the EPA deliberated over its response to the Supreme Court's decision in *Massachusetts v. EPA*, which held that various "greenhouse gases" fall within the definition of pollutants under the Clean Air Act.¹²² On April 3, the House Select Committee on Energy Independence and Global Warming ("Select Committee") issued a subpoena to the EPA Administrator, demanding two agency documents related to these deliberations that had not yet been finalized.¹²³ The first document was a preliminary draft regulatory proposal concerning motor vehicle greenhouse gas emissions. The second document was a draft analysis of whether greenhouse gas emissions pollute the air in a way that might endanger the public health or welfare.

The senior leadership of the EPA strongly objected to what they considered congressional interference with an ongoing agency policymaking process.¹²⁴ The draft motor vehicle proposal was a

¹¹⁹ See *White House E-Mails Shed New Light on Rove's Involvement in U.S. Attorney Firings*, FOXNEWS, Aug. 11, 2009, <http://www.foxnews.com/politics/2009/08/11/white-house-e-mails-shed-new-light-roves-involvement-attorney-firings.html>.

¹²⁰ See *Comm. on the Judiciary v. Miers*, No. 08-5357, 2009 WL 3568649, at *1 (D.C. Cir. Oct. 14, 2009).

¹²¹ See *Order, Comm. on the Judiciary v. Miers*, No. 08-0409 (D.D.C. Oct. 23, 2009).

¹²² *Massachusetts v. EPA*, 549 U.S. 497 (2007) (holding that the Clean Air Act authorizes the EPA to regulate greenhouse gas emissions from new motor vehicles and that the EPA can avoid regulating such emissions only if the EPA determines that they do not cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare).

¹²³ See Press Release, House Select Comm. on Energy Independence and Global Warming, Anniversary Gift: Markey, Select Comm. to Issue Subpoena to EPA for Global Warming Docs Today (Apr. 2, 2008), http://www.markey.senate.gov/GlobalWarming/mediacenter/pressreleases_id=0197.html.

¹²⁴ Letter from Christopher P. Bliley, Assoc. Adm'r, Env'tl. Prot. Agency, to Edward J. Markey, Chairman, House Select Comm. on Energy Indep. & Glob. Warming (Apr. 16, 2008), <https://web>.

preliminary document that had been shared with some mid-level officials at the U.S. Department of Transportation but had not yet been reviewed and approved by EPA senior management. As for the draft endangerment proposal, it also had never been completed but had been tabled pending legislative developments. As the EPA's Associate Administrator observed, any forced release of these preliminary working drafts might "have a chilling effect on further deliberations in this and other matters; it may create erroneous impressions of the Agency's thinking; and it may raise questions about the Agency having reacted in response to, or having been influenced by, proceedings in a legislative or public forum outside the established administrative process."¹²⁵ In short, the subpoena appeared to be an impermissible congressional intrusion into the functions of an executive branch agency in violation of the Constitution's separation of powers.¹²⁶

The Bush Administration nonetheless attempted in good faith to accommodate what it saw as the Select Committee's broader oversight interest in understanding the EPA's rulemaking process. Stephen Johnson, the EPA's Administrator, testified before the Select Committee on March 13, 2008.¹²⁷ Moreover, on March 27, EPA leadership informed the Select Committee that it planned to present an Advance Notice of Proposed Rulemaking at the end of the spring, and was even prepared to share the two draft proposals at that time.¹²⁸

Attorney General Mukasey agreed with the EPA that the Select Committee's demand for these documents raised serious separation of powers concerns.¹²⁹ In his view, with that demand, Congress had attempted to insert itself into executive branch deliberations, thereby threatening to inhibit the ability of the EPA—and, by implication, all other executive branch agencies—to perform clearly defined statutory duties.¹³⁰ The confidentiality interests in these pre-decisional deliberative documents

archive.org/web/20090407141142/http://wonkroom.thinkprogress.org/wpcontent/uploads/2008/04/epa_subpoena_defiance_4-26-08.pdf.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Massachusetts v. U.S. EPA, Part II: Implications of the Supreme Court Decision: Hearing Before the H. Select Comm. on Energy Indep. & Glob. Warming*, 110th Cong. 11–18 (2008) (statement of Stephen L. Johnson, Administrator, Environmental Protection Agency).

¹²⁸ Letter from Stephen L. Johnson, Adm'r, Env'tl. Prot. Agency, to Henry A. Waxman, Chairman, Select Comm. on Glob. Warming & Energy Indep. and James Sensenbrenner, Tom Davis, Ranking Member, Select Comm. on Glob. Warming & Energy Indep. (Mar. 27, 2008), <http://www.markey.senate.gov/GlobalWarming/tools/assets/files/0451.pdf>.

¹²⁹ Letter from Michael B. Mukasey, Att'y Gen., to George W. Bush, President of the United States (May 21, 2008) (on file with authors).

¹³⁰ *Id.*

were especially acute given that the EPA's deliberative process was ongoing and the agency bore the responsibility of complying with the established process mandated by the Administrative Procedure Act.¹³¹ Draft documents—such as the two preliminary proposals at issue—typically reflect alternative policy options and the give-and-take of internal deliberations that allows an agency to reach a final decision. Candor during this process is essential, and the risk of public exposure could seriously undermine the frankness of discussions. The Attorney General concurred in determining that the Select Committee had failed to demonstrate a critical need for the documents that could overcome an assertion of executive privilege, especially in light of the offer to share the two documents later that spring.¹³²

Initially, the Select Committee rejected these accommodations. On May 21, President Bush committed himself to preventing the inappropriate disclosure of these documents after the Select Committee scheduled a vote to cite Administrator Johnson for contempt.¹³³ The President's assertion of executive privilege was not communicated to Congress, however, due to the Select Committee's eleventh-hour decision to reconsider and essentially accept the Administration's offer to view the documents upon the issuance of the Advance Notice of Proposed Rulemaking on or before June 20, 2008.¹³⁴ The Select Committee postponed its vote, and the White House and the EPA made the documents available for review on June 20.

D. The EPA's California Waiver and Ozone Standards Decisions

The next impasse also involved the EPA. In the spring of 2008, the House Oversight Committee investigated two EPA administrative decisions. The first was the agency's decision to deny a request by the State of California for a waiver from federal preemption in order to enact more stringent pollution regulations for automobiles.¹³⁵ The second decision involved new, stricter air quality standards for ozone.¹³⁶ The Oversight Committee issued subpoenas on April 9, 2008 and May 5, 2008

¹³¹ *Id.*

¹³² *Id.*

¹³³ Memorandum from George W. Bush, President of the United States, to Stephen L. Johnson, Adm'r, Envtl. Prot. Agency (May 21, 2008).

¹³⁴ H.R. REP. NO. 110-915, at 107 (2008).

¹³⁵ Notice of Decision Denying a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 73 Fed. Reg. 12,156 (Mar. 6, 2008).

¹³⁶ National Ambient Air Quality Standards for Ozone, 73 Fed. Reg. 16,436 (Mar. 27, 2008) (codified at 40 C.F.R. pts. 50, 58).

to the EPA in connection with both actions, and to the OMB¹³⁷ in connection with its involvement in the ozone standards decision.¹³⁸

1. *The California Waiver Decision*

The State of California had requested a pre-emption waiver under the Clean Air Act in order to maintain state greenhouse gas regulations for certain new vehicles. In considering whether to grant the waiver, the EPA held two public hearings, examined thousands of pages of scientific documentation, and reviewed over 100,000 written comments.¹³⁹ On December 19, 2007, Administrator Johnson announced the EPA's conclusion that California did not have a "need to meet compelling and extraordinary conditions," and that he would deny the requested waiver.¹⁴⁰ The decision proved controversial for some in Congress, and the Oversight Committee launched an investigation with the purported goal of assessing the EPA's compliance with the Clean Air Act in reaching its decision.¹⁴¹ The Oversight Committee requested all documents involving communications between the EPA and persons within the White House relating to the waiver.¹⁴² The EPA's senior leadership and civil service personnel alike worked to accommodate the Committee's oversight interests in the months that followed. EPA personnel devoted more than 2,200 hours to complying with the requests and provided over 7,000 documents.¹⁴³ The dispute next centered on approximately 150 documents implicating White House interests. White House staff and EPA officials engaged in a series of discussions with Oversight Committee staff to reach

¹³⁷ "The core mission of the OMB is to serve the President of the United States in implementing his vision across the Executive Branch. OMB is the largest component of the Executive Office of the President. It reports directly to the President and helps a wide range of executive departments and agencies across the Federal Government to implement the commitments and priorities of the President." OMB is "the implementation and enforcement arm of Presidential policy government-wide." OFFICE OF MGMT. & BUDGET, THE MISSION AND STRUCTURE OF THE OFFICE OF MANAGEMENT AND BUDGET, http://www.whitehouse.gov/omb/organization_mission/ (last visited Sept. 29, 2016).

¹³⁸ See Assertion of Exec. Privilege Over Commc'ns Regarding EPA's Ozone Air Quality Standards and California's Greenhouse Gas Waiver Request, 32 Op. O.L.C. 1 (2008).

¹³⁹ Letter from Stephen L. Johnson, Adm'r, Env'tl. Prot. Agency, to Arnold Schwarzenegger, Governor, State of California (Dec. 19, 2007), <https://www.epa.gov/sites/production/files/2016-10/documents/20071219-slj.pdf>; Richard Simon & Janet Wilson, *California Emissions Law Rejected*, L.A. TIMES (Dec. 20, 2007), <http://articles.latimes.com/2007/dec/20/local/me-EPA20>.

¹⁴⁰ Letter from Stephen L. Johnson to Arnold Schwarzenegger, *supra* note 139.

¹⁴¹ See Letter from Henry A. Waxman, Chairman, House Comm. on Oversight & Gov't Reform, to Stephen L. Johnson, Adm'r, Env'tl. Prot. Agency (Dec. 20, 2007), <http://www.cleancarscampaign.org/web-content/newsroom/docs/WaxmanRequest-12-20-07.pdf>.

¹⁴² See *id.*

¹⁴³ Richard Simon, *White House Says No to Congress' EPA Subpoena*, L.A. TIMES (June 21, 2008), <http://articles.latimes.com/2008/jun/21/nation/na-epa21>.

an accommodation. During the course of those discussions, the Bush Administration shared or provided more than ninety of the disputed documents. Nevertheless, the Oversight Committee issued a subpoena on April 9, 2008.

Ultimately, following these discussions, fifty-one documents remained at issue. The withheld documents included thirty-one redacted copies of calendar entries and e-mails reflecting White House meetings and participant lists. Sixteen of the documents related to preparations for President Bush to speak with or write to the Governor of California about the waiver issue. Three were draft talking points for the Administrator's use at a meeting with senior White House staff. The last document had been prepared in response to a White House request for an update on the EPA's priorities. EPA officials and White House staff met with Oversight Committee staff on a number of occasions, providing descriptions of the content of the redacted materials along with a detailed overview of the 51 documents at issue. Eight senior EPA officials, including the Associate Deputy Administrator, either testified before the Committee or agreed to interviews with the Committee's staff.

Administrator Johnson appropriately determined that these remaining 51 documents could not be provided without posing a serious threat to the constitutional separation of powers.¹⁴⁴ The documents directly implicated the presidential communications and deliberative process components of executive privilege. Disclosing them would undermine the ability of the President and senior executive branch officials to obtain candid and uninhibited advice and recommendations from advisers in important matters of public concern. An equally important consideration in this instance was the Oversight Committee's inability to articulate any particular legislative need for the remaining documents. The Oversight Committee had already obtained extensive documentation describing the reasons for the EPA's decision as well as descriptions of the withheld information contained in the remaining documents. Indeed, the Committee had already completed a report outlining the conclusions of its investigation.¹⁴⁵

The Administration declined further accommodation, with the Attorney General having determined that the 51 documents were subject to the

¹⁴⁴ Letter from Stephen L. Johnson, Adm'r, Envtl. Prot. Agency, to George W. Bush, President of the United States (June 18, 2008) (on file with authors).

¹⁴⁵ See Memorandum from Majority Staff, Comm. on Oversight & Gov't Reform, to Members of the House Comm. on Oversight & Gov't Reform, EPA's Denial of the California Waiver, at 20 (May 19, 2008).

protections afforded by the doctrine of executive privilege.¹⁴⁶ Noting the EPA's "extraordinary" efforts to accommodate Congress, the Attorney General also concluded that the documents were not critical to the Oversight Committee's legislative responsibilities.¹⁴⁷ On June 20, 2008, the day the Oversight Committee had planned to consider citing Administrator Johnson for contempt of Congress, President Bush asserted executive privilege over the California waiver documents.¹⁴⁸

2. *The Ozone Standards Decision*

On March 12, 2008, the EPA decided to promulgate new, more stringent air quality standards for ozone, following an extensive scientific review as well as numerous hearings and over 90,000 public comments on the subject.¹⁴⁹ The House Oversight Committee launched an investigation, however, stating that its goal was to assess whether White House staff complied with the Clean Air Act when evaluating the EPA's ozone proposal.¹⁵⁰ The EPA provided the Committee with more than 4,000 documents, including many deliberative communications within the EPA and all communications between the EPA and the OMB, which had performed a review of the proposed ozone standard. Amid attempts to accommodate the Oversight Committee's interest in about 160 documents that also involved senior White House staff, the Committee on May 5 issued Administrator Johnson another subpoena.¹⁵¹

The EPA continued to accommodate the Oversight Committee during the next several weeks. Specifically, the EPA made several additional document productions and Administrator Johnson appeared before the Committee on May 20 to answer Members' questions about his decision.¹⁵² These efforts resulted in an impasse over twenty-one documents. Of these,

¹⁴⁶ Assertion of Exec. Privilege Over Commc'ns Regarding EPA's Ozone Air Quality Standards and California's Greenhouse Gas Waiver Request, 32 Op. O.L.C. 1 (2008).

¹⁴⁷ *Id.*

¹⁴⁸ Memorandum from George W. Bush, President of the United States, to the Adm'r of the Env'tl. Prot. Agency (Undated) (on file with authors).

¹⁴⁹ National Ambient Air Quality Standards for Ozone, 73 Fed. Reg. 16,436 (Mar. 27, 2008) (codified at 40 C.F.R. pts. 50, 58); Press Release, Office of Air and Radiation, Env'tl. Prot. Agency, EPA Strengthens Smog Standards to Better Protect Human Health and the Env't (Mar. 12, 2008), <http://yosemite.epa.gov/opa/admpress.nsf/7ebdf4d0b217978b852573590040443a/325164c014b3b8538525740a00745786!OpenDocument>.

¹⁵⁰ *Assertion of Exec. Privilege*, 32 Op. O.L.C. at 4.

¹⁵¹ See Letter from Henry A. Waxman, Chairman, House Comm. on Oversight & Gov't Reform, to Stephen L. Johnson, Adm'r, Env'tl. Prot. Agency (Aug. 5, 2008) (noting the Committee issued a subpoena to Johnson on May 5, 2008) (on file with authors).

¹⁵² *EPA's New Ozone Standards: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 110th Cong. 66-75 (2008) (statement of Stephen L. Johnson, Administrator, Environmental Protection Agency).

twenty were subsequently produced by the EPA in redacted form: e-mails and calendar entries identifying communications or meetings between senior EPA officials, White House advisers, and certain Cabinet officials. The only document actually withheld in its entirety was a deliberative memorandum—specifically prepared for President Bush’s consideration—addressing the revised ozone standard and containing Administrator Johnson’s recommendations with respect to the issue.

As with the California waiver documents, the Oversight Committee’s demand directly implicated the presidential communications and deliberative process components of executive privilege. The Attorney General again determined that disclosure could inhibit candor in future deliberations between the White House and executive branch agencies, particularly on politically sensitive matters.¹⁵³ And again, the Attorney General concluded that the documents were not critical to any legitimate oversight function, especially in light of the extensive accommodations offered and the information already at the Oversight Committee’s disposal.¹⁵⁴ Together with the California waiver documents discussed above, President Bush on June 20, 2008 asserted executive privilege over the one document in full and over the redacted text in the twenty remaining documents.¹⁵⁵

3. OMB Review of the Ozone Standards Decision

Before the EPA issued its decision on ozone standards on March 12, 2008, the OMB had conducted a routine review of the matter pursuant to Executive Order 12866, signed by President Clinton in 1993, to determine whether the decision was “consistent with applicable law, the President’s priorities . . . and [did] not conflict with the policies or actions of another agency.”¹⁵⁶ As part of its overall investigation into the EPA’s decisions, the Oversight Committee sought documents relating to the OMB’s review from the Administrator of its Office of Information and Regulatory Affairs (“OIRA”).¹⁵⁷

¹⁵³ Assertion of Exec. Privilege Over Commc’ns Regarding EPA’s Ozone Air Quality Standards and California’s Greenhouse Gas Waiver Request, 32 Op. O.L.C. 1 (2008).

¹⁵⁴ *Id.*

¹⁵⁵ Memorandum from George W. Bush to the Adm’r of the Env’tl. Prot. Agency, *supra* note 148.

¹⁵⁶ Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,742 (Sept. 30, 1993), *see also* Letter from Susan E. Dudley, Adm’r, Office of Info. & Regulatory Affairs, to Stephen L. Johnson, Adm’r, Env’tl. Prot. Agency (Mar. 13, 2008) https://www.reginfo.gov/public/postreview/Steve_Johnson_Letter_on_NAAQs_final_3-13-08_2.pdf.

¹⁵⁷ OIRA is an office within the OMB that reviews all collections of information by the federal government. OIRA also develops and oversees the implementation of government-wide policies in several areas, including information quality and statistical standards, and reviews draft regulations. *See*

Once again, Bush Administration officials went to considerable lengths to accommodate the Oversight Committee's demands before reaching an impasse. In February and March of 2008, OMB officials met regularly with congressional staff and released over 6400 pages of documents.¹⁵⁸ The materials contained communications at all levels among the OMB, the EPA, and other executive branch agencies, and provided detailed explanations of the OMB's views on proper ozone standards, those of the EPA, as well as President Bush's own views on the subject.

Notwithstanding this extensive cooperation, the Oversight Committee on April 16 issued a subpoena for additional documents, addressed to OIRA Administrator Susan Dudley.¹⁵⁹ The OMB provided additional documents on April 18 and April 21, and on May 2 permitted the Oversight Committee's staff to review 680 pages of documents relating to consultations with other agencies during the inter-agency review process. Administrator Dudley testified at a three-hour hearing before the Committee on May 20.¹⁶⁰ Oddly, at the hearing, she received just four questions, none of which related to the OMB's deliberations or consultations with the White House, and none of which revealed any apparent need for the Oversight Committee to receive additional documents. Indeed, in the weeks after the hearing, the Oversight Committee did not communicate any need for further information—until the Committee skipped to the step of scheduling a contempt hearing for June 20, 2008.¹⁶¹

The impasse concerned 1956 pages of documents.¹⁶² Of these, 221 pages reflected communications within the Executive Office of the President between OMB officials and White House staff. The remainder were internal OMB documents.¹⁶³ As OMB Director Jim Nussle explained in his request to President Bush to assert executive privilege:

OFFICE OF MGMT. & BUDGET, ABOUT OIRA, http://www.whitehouse.gov/omb/inforeg_administrator (last visited Oct. 23, 2016).

¹⁵⁸ Letter from Jeffrey A. Rosen, Gen. Counsel, Office of Mgmt. & Budget, to Henry A. Waxman, Chairman, House Comm. on Oversight & Gov't Reform (Apr. 21, 2008), https://georgewbush-whitehouse.archives.gov/omb/inforeg/letters/waxman_042108.pdf.

¹⁵⁹ See Letter from Henry A. Waxman, Chairman, House Comm. on Oversight & Gov't Reform., to Susan E. Dudley, Adm'r, Office of Info. & Regulatory Affairs (June 19, 2008) (noting the Committee issued a subpoena to Dudley on April 16, 2008) (on file with authors).

¹⁶⁰ *EPA's New Ozone Standards: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 110th Cong. 76–85 (2008) (statement of Susan E. Dudley, Administrator, OIRA).

¹⁶¹ Letter from Henry A. Waxman to Susan E. Dudley, *supra* note 159.

¹⁶² Letter from Jim Nussle, Dir., Office of Mgmt. & Budget, to Henry A. Waxman, Chairman, House Comm. on Oversight & Gov't Reform (June 20, 2008), <http://www.alston.com/files/docs/NussleLetterWaxman.pdf>.

¹⁶³ *Id.*

These documents relate to a policy issue that was ultimately presented to you for resolution. It is essential that the advice you and future Presidents receive be candid and unhesitant, free from the “chilling effect” that disclosure and second-guessing can cause. A fully-effective OMB must be able to provide complete and uninhibited analysis, advice, and recommendations for Presidential decisions, whether presented directly to you or to the senior advisors upon whom you often rely. Moreover, this confidentiality interest, relating to deliberations within OMB and between OMB and your other advisers within the [Executive Office of the President], is reflected in Executive Order (EO) 12866 [which] does not require OIRA to disclose OIRA’s internal deliberations or OIRA’s deliberations with the White House.¹⁶⁴

Once again, the disputed documents fell directly within the presidential communications and deliberative process components of executive privilege. And once again, the Oversight Committee did not meaningfully attempt to demonstrate any particular legislative need for the withheld documents, which, of course, would have been difficult given the Administration’s considerable efforts in helping the Committee understand the ozone decision.¹⁶⁵ The Attorney General supported Director Nussle’s request,¹⁶⁶ and on June 20, 2008, President Bush asserted executive privilege over the OMB’s ozone decision materials.¹⁶⁷ The President’s decision served to protect future administrations from the chilling effects of releasing confidential communications from units within the Executive Office of the President.¹⁶⁸

¹⁶⁴ Memorandum from Jim Nussle, Dir., Office of Mgmt. & Budget, to George W. Bush, President of the United States (June 18, 2008) (on file with authors).

¹⁶⁵ See Letter from Jim Nussle to Henry A. Waxman, *supra* note 162.

¹⁶⁶ Assertion of Exec. Privilege Over Commc’ns Regarding EPA’s Ozone Air Quality Standards and California’s Greenhouse Gas Waiver Request, 32 Op. O.L.C. 1 (2008).

¹⁶⁷ Memorandum from George W. Bush, President of the United States, to Director, Office of Mgmt. & Budget (on file with authors).

¹⁶⁸ *Id.*

E. The Justice Department Leak Investigation

In the fall of 2003, *The Washington Post* reported that Valerie Plame Wilson's identity as a CIA operations officer had been leaked to the media.¹⁶⁹ At the end of December, Deputy Attorney General James B. Comey, acting on behalf of Attorney General Ashcroft, appointed Patrick J. Fitzgerald, U.S. Attorney for the Northern District of Illinois, as special counsel to lead an investigation into the circumstances surrounding the leak.¹⁷⁰ Mr. Fitzgerald's investigation involved interviews with a number of senior White House and other executive branch officials, including interviews with President Bush and Vice President Cheney. After Mr. Fitzgerald and the Justice Department concluded the investigation, the Oversight Committee announced that it had requested that the GAO conduct a further inquiry into White House procedures for safeguarding classified information.¹⁷¹ The Committee requested numerous records that the Justice Department had obtained or created during its investigation, many of which were promptly provided.¹⁷²

Despite significant and ongoing efforts at accommodation, however, the Committee on June 12, 2008 issued a subpoena to the Attorney General.¹⁷³ The subpoena demanded copies of unredacted FBI reports, handwritten notes of FBI agents taken during interviews, notes taken by the then-Deputy National Security Advisor during conversations with the Vice President and other senior White House officials, and other documents the White House had provided to Mr. Fitzgerald and the Justice Department during the course of the investigation.¹⁷⁴ Notably, the Oversight Committee also insisted on obtaining the FBI report (commonly known as a "302") of the interview with the Vice President though it eventually declined to pursue further the report of the FBI's interview with President Bush.

¹⁶⁹ Mike Allen and Dana Priest, *Bush Administration Is Focus of Inquiry*, WASH. POST (Sept. 28, 2003), <https://www.washingtonpost.com/archive/politics/2003/09/28/bush-administration-is-focus-of-inquiry/5221389a-cd92-437a-b66d-d0483982a068/>; Robert Novak, *Mission To Niger*, WASH. POST (July 14, 2003), <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/20/AR2005102000874.html>.

¹⁷⁰ Letter from James Comey, Acting Att'y Gen., to Patrick Fitzgerald, U.S. Att'y (Dec. 30, 2003), https://www.justice.gov/archive/osc/documents/ag_letter_december_30_2003.pdf.

¹⁷¹ Press Release, Cong. of the United States, GAO Asked to Investigate White House Protection of Classified Material (Jan. 26, 2004), <http://oversight-archive.waxman.house.gov/documents/20040607091525-93306.pdf>.

¹⁷² *Id.*

¹⁷³ See Jason Ryan, *Attorney General Threatened with Contempt of Congress over CIA Leak Documents*, ABC NEWS (July 8, 2008), <http://abcnews.go.com/TheLaw/story?id=5333956&page=1>.

¹⁷⁴ *Id.*

Before the Committee subpoenaed the Attorney General, the Justice Department had provided the Oversight Committee with a large number of documents, including the reports of interviews with dozens of executive branch officials outside the White House.¹⁷⁵ In addition, the Justice Department either made available for review—or was preparing to make available—minimally redacted copies of all of the requested interview reports involving all White House officials, except for the Vice President’s report.¹⁷⁶ The redactions addressed internal White House deliberations and communications involving sensitive issues that did not bear on the Oversight Committee’s stated interest in understanding classified information procedures.¹⁷⁷ Because the report of the interview with the Vice President raised heightened separation of powers concerns, the Justice Department declined to offer it to the Committee.¹⁷⁸

After the subpoena, the Bush Administration continued to act in good faith to accommodate the Oversight Committee’s demands, consistent with the constitutional separation of powers. With the exception of the report of the Vice President’s interview, the Justice Department granted the Oversight Committee access to each and every interview responsive to the subpoena.¹⁷⁹ The Department was even willing to consider making available specific redacted portions of the FBI’s 302s with respect to White House staff, provided the Oversight Committee could demonstrate the requisite need for that information.¹⁸⁰

In addition to concerns over the disclosure of presidential communications and deliberative processes of executive branch officials, the Oversight Committee’s demands implicated the law enforcement component of executive privilege. The White House staff—along with the President and Vice President—maintained the longstanding tradition of cooperation with criminal investigations by providing informal interviews with Mr. Fitzgerald and his team. As the Attorney General explained in

¹⁷⁵ Letter from Keith B. Nelson, Principal Deputy Assistant Att’y Gen., to Henry A. Waxman, Chairman, House Comm. on Oversight & Gov’t Reform (June 24, 2008), <https://web.archive.org/web/20080815171321/http://www.talkingpointsmemo.com/docs/letter-from-keith-nelson-to-chairman-henry-waxman-refusal-of-subpoenaed-documents/?resultpage=3&>.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*; see also *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 385 (2004) (encouraging “special considerations” where civil discovery requests are directed to the Vice President and others who advise and assist the President).

¹⁷⁹ Letter from Keith B. Nelson, Principal Deputy Assistant Att’y Gen., to Henry A. Waxman, Chairman, House Comm. on Oversight & Gov’t Reform (July 16, 2008), <https://web.archive.org/web/20090120010535/http://oversight.house.gov/documents/20080716104053.pdf>.

¹⁸⁰ *Id.*

requesting that the President order that documents relating to those investigations be withheld, any acquiescence to the Oversight Committee's demands in this instance could undermine this important tradition of cooperation in future administrations.¹⁸¹ He further explained:

“Were future Presidents, Vice Presidents or White House staff to perceive that such voluntary cooperation would create records that would likely be made available to Congress (and then possibly disclosed publicly outside of judicial proceedings such as a trial), there would be an unacceptable risk that such knowledge could adversely impact their willingness to cooperate fully and candidly in a voluntary interview.”¹⁸²

Fear of disclosure of this sensitive information to Congress thus “would significantly impair” future investigations by the Justice Department.¹⁸³ White House officials would have little choice but to insist that the Justice Department pursue investigations using the more cumbersome grand jury process, which is governed by secrecy rules.

Finally, as explained at the outset of this article, Congress does not possess freestanding authority to gather information on whichever subject matter it chooses.¹⁸⁴ Here, the Oversight Committee fell short of demonstrating that the withheld information was critical to the fulfillment of its legislative responsibilities. With regard to the Vice President's interview report in particular, the Oversight Committee did not articulate any specific interest at stake. What is more, even if the Oversight Committee had possessed some legitimate legislative objective in understanding any involvement the Vice President might have had with respect to the leak, the Committee enjoyed access to ample relevant information contained in the FBI interview reports that were provided, as well as in numerous public materials, including the testimony and exhibits from the I. Lewis Libby perjury trial.¹⁸⁵ Given the executive branch's

¹⁸¹ Assertion of Exec. Privilege Concerning the Special Counsel's Interviews of the Vice President and Senior White House Staff, 32 Op. O.L.C. 7 (2008).

¹⁸² *Id.* at 11.

¹⁸³ *Id.*

¹⁸⁴ See *Barenblatt v. United States*, 360 U.S. 109, 111–12 (1959).

¹⁸⁵ See Trial Exhibits, *United States v. Libby*, No. 05-CR-00394 (D.D.C. Oct. 28, 2005), <http://nsarchive.gwu.edu/NSAEBB/NSAEBB215/> (for links to all of the Government's exhibits introduced at trial); see also Neil Lewis, *Libby Guilty of Lying in C.I.A. Leak Case*, N. Y. TIMES (Mar.

abundant interest in protecting the confidentiality of internal White House deliberations and maintaining the integrity of future criminal investigations, the Oversight Committee would not have been able to overcome an assertion of executive privilege in this instance. Consequently, when the Oversight Committee scheduled a hearing to consider a resolution citing Attorney General Mukasey for contempt of Congress, President Bush on July 16, 2008 formally asserted executive privilege over the Justice Department's leak investigation documents.¹⁸⁶

F. Multi-Topic House Judiciary Committee Subpoena

The final matter in which the Bush Administration practiced principled accommodation involved several concurrent investigations by the House Judiciary Committee. The Judiciary Committee issued a broad subpoena on June 27, 2008, demanding twenty-one categories of documents from various Executive Branch officials.¹⁸⁷ Both before and after the Committee issued the subpoena to Attorney General Mukasey, the Justice Department worked to accommodate congressional oversight interests by providing thousands of responsive documents.¹⁸⁸ The Judiciary Committee scheduled a hearing for September 17, indicating that it might vote on a resolution citing the Attorney General for contempt of Congress for non-compliance with its subpoena.¹⁸⁹ For purposes of the contempt vote, three categories of documents were at issue: (1) the FBI's 302s reflecting the interviews with the President and Vice President in the Valerie Plame Wilson leak investigation (detailed above); (2) "all non-classified, non-public [OLC] opinions" on a broad range of topics issued since the beginning of the Bush Administration; and (3) Justice Department prosecution memoranda relating to the ongoing prosecution of former Alabama Governor Don Siegelman.¹⁹⁰

6, 2007), <http://www.nytimes.com/2007/03/06/washington/06end-libby.html?ex=1188795600&en=1963fd2ac8d8931e&ei=5087&excamp=GGNlibbytrial>.

¹⁸⁶ Memorandum from George W. Bush, President of the United States, to Michael B. Mukasey, Att'y Gen. (Undated) (on file with authors).

¹⁸⁷ Letter from John Conyers, Jr., Chairman, House Judiciary Comm., to Michael B. Mukasey, Att'y Gen. (June 27, 2008), <https://web.archive.org/web/20080730214720/http://judiciary.house.gov/news/pdfs/Conyers080627.pdf>.

¹⁸⁸ Letter from Keith B. Nelson, Principal Deputy Assistant Attorney Gen., to John Conyers, Jr., Chairman, House Judiciary Comm. (Sept. 9, 2008), <https://web.archive.org/web/20080915221713/http://judiciary.house.gov/News/PDFs/Nelson080909.pdf>.

¹⁸⁹ Letter from John Conyers, Jr., Chairman, House Judiciary Comm., to Michael B. Mukasey, Att'y Gen. (Sept. 10, 2008), <https://web.archive.org/web/20080915221713/http://judiciary.house.gov/News/PDFs/Nelson080909.pdf>

¹⁹⁰ *Id.*

Based on the accommodations and principles discussed below, the Attorney General recommended that President Bush assert executive privilege.¹⁹¹ On September 16, 2008, the President determined that the documents should not be produced.¹⁹² Ultimately, the President's assertion of the privilege was not communicated, however, because the Committee did not pursue its threat to schedule a contempt vote.

1. FBI Reports on Investigation Interviews

The Judiciary Committee demanded the FBI's 302s reflecting the interviews of both the President and Vice President in the Valerie Plame Wilson leak investigation.¹⁹³ As discussed above, the Oversight Committee had earlier demanded these two reports—though the Oversight Committee later suspended its request for the 302 relating to the President's interview—and President Bush subsequently asserted executive privilege with regard to the report on the Vice President's interview.¹⁹⁴

In response to the Judiciary Committee's subpoena, the Attorney General once again determined that the interview reports of the President and Vice President should not be disclosed.¹⁹⁵ As he had done earlier, Attorney General Mukasey explained that those two reports in particular raised self-evident, "heightened" separation of powers concerns.¹⁹⁶ Specifically, those reports summarized conversations between the President and his advisers, indisputably implicating the presidential communications and deliberative process components of the privilege.¹⁹⁷ The 302s likewise directly implicated the law enforcement component of the privilege, as their disclosure would establish a precedent likely to threaten the integrity and effectiveness of future investigations.¹⁹⁸

2. OLC Opinions

The second category of documents sought by the Judiciary Committee encompassed "all non-classified, non-public [OLC] opinions addressing issues related in any way to national security, war, terrorism, interrogations, civil or constitutional rights of U.S. Citizens, or

¹⁹¹ Letter from Michael B. Mukasey, Gen., to George W. Bush, President of the United States (Sept. 16, 2008) (on file with authors).

¹⁹² Memorandum from George W. Bush to Michael B. Mukasey, *supra* note 61.

¹⁹³ Letter from John Conyers, Jr. to Michael B. Mukasey, *supra* note 187.

¹⁹⁴ Memorandum from George W. Bush to Michael B. Mukasey, *supra* note 61.

¹⁹⁵ Letter from Michael B. Mukasey to George W. Bush, *supra* note 191.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

presidential, congressional, or judicial power . . . issued since January 20, 2001.”¹⁹⁹ Housed within the Justice Department, OLC provides confidential legal advice to the executive branch, including in response to questions from the White House Counsel and other senior presidential advisers.²⁰⁰ The legal opinions issued by OLC are necessarily highly deliberative and, among other things, fall squarely within the scope of the deliberative process component—and, in some cases, the presidential communications component—of executive privilege.²⁰¹ Disclosure of these opinions would undoubtedly discourage senior executive branch officials, including the President and his close advisers, from seeking legal advice on difficult or controversial subjects.²⁰² Such a result would clearly impair the President’s ability to “take care that laws be faithfully executed” and to fulfill his many other constitutional and statutory duties.²⁰³ It is thus the OLC’s longstanding policy to publish its opinions only when doing so would not undermine executive branch confidentiality interests.²⁰⁴ In this case, the Justice Department nevertheless made ample accommodations (some unprecedented) where the Judiciary Committee articulated a particularized need for certain information. As a result, the Judiciary Committee was permitted to review a number of sensitive and highly classified opinions.²⁰⁵

3. *Prosecution Memoranda*

Finally, the House Judiciary Committee demanded prosecution memoranda and other deliberative materials relating to the prosecution of former Alabama Governor Don Siegelman.²⁰⁶ Governor Siegelman had been convicted in federal court on corruption charges and his appeal from that conviction was pending at the time of the subpoena.²⁰⁷ The

¹⁹⁹ Letter from John Conyers, Jr., to Michael B. Mukasey, *supra* note 187.

²⁰⁰ *About the Office*, DEP’T OF JUSTICE, OFFICE OF LEGAL COUNSEL, <http://www.justice.gov/olc/> (last visited Oct. 23, 2016) (“[T]he Office of Legal Counsel provides authoritative legal advice to the President and all the executive branch agencies. The Office drafts legal opinions of the Attorney General and also provides its own written opinions and oral advice in response to requests from the Counsel to the President [and] the various agencies of the executive branch . . .”).

²⁰¹ Letter from Michael B. Mukasey to George W. Bush, *supra* note 191.

²⁰² *Id.*

²⁰³ U.S. CONST. art. II, § 3.

²⁰⁴ See Memorandum from Dep’t of Justice, Office of Legal Counsel, Memorandum for Attorneys of the Office: Best Practices for OLC Opinions, at 4 (May 16, 2005), <http://fas.org/irp/agency/doj/olc/best-practices.pdf>.

²⁰⁵ Letter from Keith B. Nelson to John Conyers, Jr., *supra* note 188.

²⁰⁶ Letter from John Conyers, Jr., to Michael B. Mukasey, *supra* note 187.

²⁰⁷ Press Release, Dep’t of Justice, Former Alabama Governor Don Siegelman, Former HealthSouth CEO Richard Scrushy Convicted of Bribery, Conspiracy and Fraud (June 29, 2006), http://www.justice.gov/opa/pr/2006/June/06_crm_409.html.

Committee sought the prosecution memoranda as a part of its investigation into allegations of selective, politicized prosecutions by U.S. Attorneys.²⁰⁸

As noted above, however, the Justice Department's position was that because criminal prosecution is a core executive power, deliberative documents such as prosecution memoranda should remain confidential except where the circumstances are truly "extraordinary."²⁰⁹ The argument against disclosure was even stronger in this particular instance because the Judiciary Committee effectively sought to interfere in an ongoing case. Because former Governor Siegelman's conviction was on appeal when the Judiciary Committee sought the prosecution memoranda, there was still a possibility of a retrial.²¹⁰ As noted above, the President's assertion of the privilege was never communicated, however, because the Judiciary Committee did not schedule a contempt hearing.²¹¹

IV. CONCLUSION

In defending his Administration's decision to consummate the Jay Treaty with Great Britain in 1795, President Washington declared: "The Constitution is the guide which I never will abandon."²¹² It was this governing principle that obligated him to refuse the House of Representatives' demand for confidential executive branch correspondence relating to the treaty's negotiations. Some two centuries later, the nation's forty-third President emulated his initial predecessor in making the Constitution his controlling guide to resolving interbranch disputes.

President Bush and his Administration worked diligently to accommodate Congress's legitimate need for executive branch information in a manner that respected the Constitution's separation of powers. Even

²⁰⁸ Letter from John Conyers, Jr., Chairman, House Judiciary Comm., to Alberto Gonzales, Att'y Gen. (Sept. 10, 2007), <https://web.archive.org/web/20070926210151/http://judiciary.house.gov/Media/PDFS/Conyers-Sanchez070910.pdf>.

²⁰⁹ See Cong. Requests for Info. from Inspectors Gen. Concerning Open Criminal Investigations, 13 Op. O.L.C. 77, 83 (1989) ("[I]n light of established executive branch policy and practice, and absent extraordinary circumstances, an IG should not provide Congress with confidential information concerning an open criminal investigation.").

²¹⁰ Letter from Michael B. Mukasey to George W. Bush, *supra* note 191.

²¹¹ Subsequently, in March 2009 and again in May 2011, the U.S. Court of Appeals for the Eleventh Circuit held there was sufficient evidence to sustain former Governor Siegelman's conviction on the charges of federal funds bribery and obstruction of justice. See *United States v. Siegelman*, 561 F.3d 1215 (11th Cir. 2009) (affirming conviction on five of seven charges); see also *Siegelman v. United States*, 561 U.S. 1040 (2010) (vacating and remanding the 11th Circuit's decision for further consideration in light of *Skilling v. United States*, 561 U.S. 358 (2010)); *United States v. Siegelman*, 640 F.3d 1159 (11th Cir. 2011) (affirming bribery and obstruction convictions).

²¹² Letter from George Washington, President of the United States, to Boston Selectmen (July 28, 1795) in *THE FOUNDERS' ALMANAC* 147 (2004).

in those instances where a given request was of questionable legislative purpose, the Bush Administration sought to share information while safeguarding executive branch confidentiality interests and avoiding the creation of precedents harmful to a future President's ability to properly govern. When the disclosure of specific documents and e-mails demanded by Congress would have endangered the separation of powers by potentially chilling discourse within the executive branch, the Bush Administration worked diligently to provide accommodations to satisfy each inquiry. And when Congress invited the executive branch to disregard constitutional boundaries during his two terms in office, President Bush firmly declined to do so.

Faced with hundreds of separate congressional inquiries for executive branch information during his tenure, President Bush asserted executive privilege with respect to six matters. In each case detailed in this article, the President and members of his Administration made a genuine attempt at principled accommodation before reaching an impasse. The President never reversed direction or yielded "in the face of superior political muscle by a Congress determined to exercise the many coercive tools available to it."²¹³ But there was no reason for him to do so, because the Bush Administration's approach to congressional oversight was based on constitutional principles, not fleeting considerations of tactical political advantage. President Bush simply approached congressional oversight the same way he approached all aspects of his Presidency—perhaps best explained in his own words: "*I've learned enough about Washington to know you can't make decisions unless you make them on principle. And once you make a decision based upon principle, you stand by what you decide.*"²¹⁴ In all respects, the principled approach of the nation's forty-third President will be an enduring legacy to his successors and to the constitutional separation of powers.

²¹³ LOUIS FISHER, *THE POLITICS OF EXECUTIVE PRIVILEGE* xv (2004).

²¹⁴ George W. Bush, President of the United States, Address in N. C. on the War on Terror (Apr. 6, 2006), <http://www.presidentialrhetoric.com/speeches/04.06.06.html> (emphasis added).