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To an unprecedented degree, the nation's welfare now depends on constitutionally sound outcomes to disputes between Congress and the President over executive branch information. Yet we still lack a satisfying theoretical account of the optimal method for achieving those outcomes. In the years since Watergate, courts and scholars have embraced a theory premised on an unexamined faith that the Constitution's structure embeds in the political process the tools and incentives necessary for each branch to vindicate its interests. Judicial interference, this conventional model further assumes, is both unnecessary and unwise; left to their own devices, the political branches will pursue a salutary course of escalating battle that will ultimately yield the correct constitutional balance in any given information dispute.

This Article subjects that conventional theory to the rigorous examination it has thus far escaped. It begins by dispelling the notion that the theory describes a unique mechanism endemic to one species of constitutional conflict. In fact, the Article reveals, this conventional model is a faithful translation to the separation-of-powers context of an approach that has long (and controversially) governed the relationship between the federal government and the states. Building upon that recognition, the Article exposes an unjustifiable inconsistency between the conventional model and the Court's treatment of broader executive-legislative disagreement. The Article then assesses the model on its own terms, finding powerful reason to doubt that the political process alone will produce a satisfactory allocation of authority over information. Courts, the Article concludes, must play some substantive role in a coherent system for resolving interbranch conflicts of this kind.

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The Political Safeguards of Executive Privilege

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INTRODUCTION

Legal giants cast long shadows. The respect they command from the bench and bar imbues their words with instant authority, elevating their arguments above the realm of mere opinion and creating the appearance of received wisdom. Over time, appearance becomes reality. Scholars repeat those arguments, courts acknowledge the resulting consensus, and soon, what began as a tentative proposition becomes the controlling rule.

So it has been in the three decades since Archibald Cox, the great "conscience of a nation,"[1] penned his seminal article on the nature of executive privilege.[2] Fresh from his tumultuous five-month tenure as the Watergate Special Prosecutor, Cox knew well of what he spoke. His efforts to force the release of the infamous Nixon tapes had not only cost him his job, but ultimately prompted the resignation of a sitting President for the first time in U.S. history. Thus, when Cox wrote about the legal doctrine he had wrestled—its constitutional validity, historical pedigree, and manifestation in various contexts—his views carried an undeniable weight.

Of the many insights in Cox's article, the most influential relates not to the kind of criminal prosecution that Cox conducted, but rather to the distinct topic of disputes between Congress and the President over information in the executive's control. Cox focused his discussion of that topic on the question of resolution: When a

1. *See* KEN GORMLEY, ARCHIBALD COX: CONSCIENCE OF A NATION (1997).
2. Archibald Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383 (1974).

congressional demand for information clashes with a presidential claim of right to withhold, "who, if anyone, shall decide which shall yield and when it shall yield?"[3] He outlined an answer that has come to dominate the field: Because this kind of interbranch conflict "lends itself better to solutions negotiated through the political process than to an 'either-or' judicial determination,"[4] the federal courts should "leave questions of executive privilege vis-a-vis Congress to the ebb and flow of political power."[5] If judges "remi[t] the Executive and Legislature to their political battle," the branches themselves will reach the constitutionally optimal result.[6]

As we shall see, Cox had doubts about whether this approach provided a complete answer. Those doubts, however, never seemed to catch up with the theory itself, which quickly assumed a life of its own. In the ensuing years, scholars have refined and embraced its constituent elements, treating it as the self-evidently "correct" way to resolve information disputes between the political branches.[7] Courts asked to decide such disputes have largely declined to do so, citing the key premises of the model Cox outlined and resting on the faith that the branches, left to their own devices, will get it right.[8] So ingrained is this theory, in fact, that those few scholars who perceive deficiencies in the current process-centered regime have overwhelmingly responded with process-centered reforms, apparently content that the basic framework is sound.[9] The approach, in short, has emerged as something close to conventional wisdom.[10]

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3. *Id.* at 1387.

4. *Id.* at 1427.

5. *Id.* at 1432.

6. *Id.* at 1424.

7. *See infra* notes 12-28 and accompanying text.

8. *See infra* notes 31-68 and accompanying text.

9. *See, e.g.*, William P. Marshall, *The Limits on Congress's Authority to Investigate the President*, 2004 U. ILL. L. REV. 781, 784 (arguing that the political process may systematically favor Congress to the detriment of good government hut that "the appropriate response is one of process"); Joel D. Bush, *Congressional-Executive Access Disputes: Legal Standards and Political Settlements*, 9 J.L. & POL. 719, 745 (1993) (contending that any judicial role "should be confined to reinforcing the political levers of one or both sides, and avoiding any resolution of the constitutional issue on the merits"). This general consensus is not, of course, without exceptions. Arguments urging a departure from the conventional approach typically begin with a predisposition toward one branch or the other and then contend that judicial involvement is necessary to counteract aspects of the political process that, for various practical reasons, disadvantage the favored branch. *See, e.g.*, Stanley M. Brand & Sean Connelly, *Constitutional Confrontations: Preserving A Prompt And Orderly Means By Which Congress May Enforce Investigative Demands Against Executive Branch Officials*, 36 CATH. U. L. REV. 71, 72 (1986) (arguing that where high-level executive officials are involved, criminal prosecution by an independent counsel is necessary to protect congressional interests); James Hamilton & John C. Grabow, *A Legislative Proposal for Resolving Executive Privilege Disputes Precipitated by Congressional Subpoenas*, 21 HARV. J. ON LEGIS. 145, 145 (1984) (citing the same concerns and

This widespread acceptance, however, has occurred largely through inertia, the product more of repetition and accretion than the type of deliberate thought one ordinarily encounters in matters of constitutional law. As a result, the conventional theory has received remarkably little critical attention. Nowhere in the literature is there a sustained effort to examine its underlying assumptions, to locate its mode of reasoning within the realm of constitutional theory, or to ask how it fits within the current jurisprudence on separation of powers. Nor has anyone ventured to examine whether the theory and its central assumptions furnish a compelling narrative about interbranch dynamics and constitutional structure. Instead, the theory has developed in relative seclusion. Information disputes, the literature seems to assume, present a unique species of separation-of-powers conflict, and this model presents an equally idiosyncratic means of resolving them. Thus ensconced in its particular context, the theory has escaped searching review.

Two developments—one theoretical, the other practical—suggest that the time for a critical examination has arrived. First, a growing body of scholarship addressing related areas of constitutional law casts serious doubt on the basic premises that collectively define and support the model Cox outlined. The model's isolated niche, however, has sheltered it from the significant theoretical implications of that scholarship. Second, in post-9/11 America, sensitive information has become the key determinant of crucial policy decisions and the lifeblood of the political branches—both for an executive that considers control over information essential to its effort to safeguard the public and a Congress that deems access to that information indispensable to discharging its historic role as the "grand inquest of the nation."[11] To a degree perhaps unprecedented in our history, therefore, the country's well-being now turns on constitutionally efficient outcomes to interbranch clashes over information. A matter of such tremendous importance may well be best left to the political process and beyond the reach of the courts. That conclusion, however, must emerge not from unquestioned acceptance, but instead from the crucible of rigorous examination and analysis.

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arguing that Congress should enact a civil remedy to enforce subpoenas directed at the executive); Randall K. Miller, *Congressional Inquests: Suffocating the Constitutional Prerogative of Executive Privilege*, 81 MINN. L. REV. 631, 687 (1997) (arguing that a civil remedy is necessary, primarily because the media compares "every president who asserts executive privilege to the worst image of Richard Nixon").

10. *See, e.g.*, Miller, *supra* note 9, at 633-34 ("Observers have concluded that political negotiation regarding access to information is effective and preferable to judicial adjudication.").

11. TELFORD TAYLOR, GRAND INQUEST: THE STORY OF CONGRESSIONAL INVESTIGATIONS 9 (1955) (quoting 13 RICHARD CHANDLER, COMMON DEBATES 172 (1660-1743)).

This Article serves as an effort to conduct that examination. It begins, in Part I, by distilling from the literature a clear articulation of the conventional approach and then tracing the courts' adoption of that approach in the principal cases addressing information-access disputes. Part II reveals that the conventional model is not, in fact, endemic to its specific context, but rather represents an application of a familiar theory of federalism that has sparked sharp debate ever since it first appeared in the scholarship a half-century ago. Defining the conventional approach and placing it in its proper context enables an evaluation, in Part III, of the model's place in the Supreme Court's separation-of-powers jurisprudence. The result of that examination shows that what is "conventional" in information disputes is wholly anomalous elsewhere in the law governing executive-legislative conflict, and further that no distinction can justify this radically divergent treatment. The identification of the conventional approach also informs Part IV, which puts existing law to one side and asks whether, as a de novo matter, that approach nevertheless merits its status because it accurately describes the functional implications of constitutional structure and effectively channels the myriad pressures that shape the relationship between Congress and the President. Informed by recent scholarship on the nature of the political process, this Part concludes that the conventional theory is unsound and its premises unconvincing: There is no reason to believe—and, in fact, powerful reason to doubt—that the political process alone will yield a satisfactory allocation of authority in this context. Courts must play some substantive role in a coherent system for resolving interbranch battles over information.

I. THE CONVENTIONAL APPROACH TO INFORMATION DISPUTES

A. The Escalation Model and Its Premises

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

This conventional approach consists of two primary elements: a core rationale underlying the preference for political solutions, and a

set of three premises that together support the withdrawal of information disputes from the courts.

The basic rationale begins by acknowledging that both branches have legitimate, constitutionally based interests in the disposition of information.[12] The executive requires some level of confidentiality over its papers and conversations to foster the President's ability to receive candid advice and to ensure that he can implement the resulting decisions with "activity, secrecy, and dispatch."[13] Congress, in turn, requires some access to that information to legislate wisely and to oversee the executive's conduct.[14]

The President and Congress, this rationale further assumes, are in the best position both to evaluate the implications of any given information dispute for their respective constitutional interests and to weigh those interests against the costs of waging a battle to vindicate them.[15] Through the constitutional design of "checks and balances," each branch possesses powers sufficient to defend itself in a particular dispute, but each knows that using such weapons carries a potentially high price in political capital.[16] Thus equipped with the necessary tools and aware of the stakes, the branches will engage in a continually escalating political battle over the disputed information. Every time one branch raises the ante, the other must decide, based on the particular circumstances, whether to fight on or whether to surrender.[17] At some point, this escalating process of mutual evaluation and response will end when one branch concludes that the continued expenditure of political capital does not justify the institutional benefits of victory. That precise point, the theory

12. *See, e.g.*, Neal Devins, *Congressional-Executive Information Access Disputes: A Modest Proposal—Do Nothing*, 48 ADMIN. L. REV. 109, 111-14 (1996) (describing the competing interests of Congress and the Executive).

13. THE FEDERALIST NO. 70, at 424 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see infra* notes 146-48 and accompanying text.

14. *See infra* notes 140-44 and accompanying text.

15. Alan B. Sternstein, *The Justiciability of Confrontation: Executive Secrecy and the Political Question Doctrine*, 16 ARIZ. L. REV. 140, 157 (1974) ("Each side must assess the importance of its own position relative to that of the other side and determine to acquiesce or stand its ground.").

16. Jonathan L. Entin, *Separation of Powers, the Political Branches, and the Limits of Judicial Review*, 51 OHIO ST. L.J. 175, 209 (1990) ("Congress and the President possess ample political resources with which to protect their interests" and "also have the practical wisdom to determine for themselves the stakes of any particular controversy.").

17. Patricia M. Wald & Jonathan R. Siegel, *The D.C. Circuit and The Struggle for Control of Presidential Information*, 90 GEO. L.J. 737, 774 (2002) ("At each stage, each branch must determine whether the fight is worth continuing, a determination that is surely influenced by the strength of Congress's need for the requested information and the strength of the Executive's need to withhold it.").

maintains, provides the best approximation of the correct constitutional balance between the branches.[18] To capture the basic mechanism at its core, we will call this theory the "escalation model."

The three premises that bolster this model proceed from a common assumption: If the lifeblood of the escalation model is political battle followed by a calculated surrender, the poison in that system is litigation followed by judicial decree. The first such premise rests on a generally dim view of judicial competence in institutional battles that do not involve the Third Branch. Thus, because judges are not political actors, they can only faintly perceive the true interests of Congress and the President.[19] Dissecting the competing positions under the judicial microscope will therefore yield only "a crude and precarious substitute" for the branches' own assessments of the stakes of any particular dispute.[20] Compounding this incompetence in identifying the relevant interests is an inability to accommodate them: Courts decide constitutional disputes through "balancing tests," which in these circumstances require delicate political judgments of a type that judges are ill-equipped to make.[21]

Second, the escalation model shuns the judicial process not only for its methods but also for its results. Unlike political solutions, which extend no further than the specific dispute, judicial decisions are inherently clumsy, drawing their force from doctrine and reasoning that inevitably cast unintended shadows over future controversies.[22] According to this premise, any fixed decision about

18. *See, e.g.*, MARK J. ROZELL, EXECUTIVE PRIVILEGE: THE DILEMMA OF SECRECY AND DEMOCRATIC ACCOUNTABILITY 83 (1994); Sternstein, *supra* note 15, at 157 (contending that the result of the escalation process is an "ordering of priorities among collective interests by the institutions best suited to the task."). Although this process is sometimes stated in terms of "accommodation" or "compromise," the true dynamic described in the scholarship is adversarial, for only that kind of unrestrained political struggle can produce a faithful accommodation of the full range of powers that the Constitution divides between the branches. Professor Dinh, for example, contends that "judgments about assertions of executive privilege against congressional inquiries . . . are best and properly made through a political process of give, take, and, ultimately, compromise between these two hranches," but he later clarifies that such "compromise" occurs when Congress "use[s] its own constitutional prerogative to extort the information from the executive by deploying [its] arsenal of coercive legislative weapons." Viet D. Dinh, Book Review, 13 CONST. COMMENT. 317, 346, 347, 353 (1996).

19. *See, e.g.*, Dinh, *supra* note 18, at 353 ("The contingent nature of the valuation of hoth the executive interest in confidentiality and the legislative need for information means that the balance between the two is doubly contingent and therefore not fit for adjudication by the judiciary."); Todd D. Peterson, *Prosecuting Executive Branch Officials for Contempt of Congress*, 66 N.Y.U. L. REV. 563, 626 (1991) (contending that courts are "ill-equipped even to define clear standards" and cannot discern the "political needs of Congress for particular documents").

20. Bush, *supra* note 9, at 732.

21. Cox, *supra* note 2, at 1426-27.

22. *See* Louis Fisher, *Congressional Access to Information: Using Legislative Will and Leverage*, 52 DUKE L.J. 323, 401 (2002); Bush, *supra* note 9, at 745 ("The only tool available to a court in resolving disputes is legal precedent, and legal precedent is much too inflexible to apply

access to information will inevitably diminish the flexibility of the branches to reach different results in dissimilar conflicts. Such a decision will also reduce the constitutional uncertainty considered critical to ensuring that "[n]either the executive nor the Congress is very sure of its rights," and thus that both enter the political fray with "a tactful disposition not to push the assertion of their [prerogatives] to abusive extremes."[23] In other words, even if judges could perfectly discern the constitutional balance in a particular dispute, their efforts would do more harm than good because the opinions they write would fundamentally destabilize and prejudice ongoing interbranch dynamics.[24]

The escalation model's third basis for rejecting judicial involvement in executive-legislative information battles draws upon original intent.[25] The Framers, this premise contends, deliberately

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in individual cases of executive-legislative disputes."); Bruce G. Peabody & John D. Nugent, *Toward a Unifying Theory of the Separation of Powers*, 53 AM. U. L. REV. 1, 37 (2003) (noting that "the judiciary is not always able to foresee the implications of its decisions and [the] Court's entry into interbranch and intergovernmental disputes often short-circuits a beneficial process for resolving constitutional ambiguities (and securing other political goals)."); Yaron Z. Reich, Comment, United States v. AT&T: *Judicially Supervised Negotiation and Political Questions*, 77 COLUM. L. REV. 466, 483 (1977) ("By creating a buffer area of related fact situations where conduct is presumed to be controlled by the earlier decision, any substantive delineation of authority would be likely to influence subsequent related interactions . . . .").

23. Joseph W. Bishop, Jr., *The Executive's Right to Privacy: An Unresolved Constitutional Question*, 66 YALE L.J. 477, 491 (1957); *see* Bush, *supra* note 9, at 746 ("Judicial resolution of interbranch information disputes on the merits would set standards for future disputes and thus create disincentives for political compromise and informal settlement practices."); Ronald L. Claveloux, Note, *The Conflict Between Executive Privilege and Congressional Oversight: The Gorsuch Controversy*, 1983 DUKE L.J. 1333, 1350 ("A court ruling in a particular dispute might hamstring either the President or Congress during future disputes in perhaps markedly different political environments."); Cox, *supra* note 2, at 1426 ("Any binding definition of the power of the Senate or House or Representatives to obtain the internal communications of the Executive Branch and of the President to withhold them might greatly affect the relative political power and effectiveness of the Executive and Legislative Branches."); Sternstein, *supra* note 15, at 162 ("Interjecting the principled decisions of the courts into the process [of interbranch negotiation] would tend to prejudice future choices between given collective interests when the options of the majoritarian branches should remain unimpaired.").

24. Devins, *supra* note 12, at 110 (arguing that "greater judicial involvement risks more harm than good"); Entin, *supra* note 16, at 222 ("Judicial opinions . . . raise the stakes of any particular conflict by clearly identifying winners and losers through formal explanations that presumably will control other analytically related disputes . . . . Negotiated resolutions of specific disagreements can decide smaller questions in ways that create a foundation for similarly informal arrangements of future interbranch differences while recognizing the contrasting interests of the governmental institutions involved."); Dawn Johnsen, *Executive Privilege Since* United States v. Nixon*: Issues of Motivation and Accommodation*, 83 MINN. L. REV. 1127, 1129, 1139 (1999).

25. Jonathan L. Entin, *Executive Privilege and Interbranch Comity After Clinton*, 8 WM. & MARY BILL RTS. J. 657, 660 (2000) ("The constitutional design . . . afforded the political branches ample resources with which to defend their positions without relying on the Judiciary to serve as referee."); Michael Stokes Paulsen, *Who "Owns" The Government's Attorney-Client Privilege?*, 83 MINN. L. REV. 473, 490 n.52 (1998) (arguing that "these are matters probably best left to the

distributed to the executive and legislative branches a set of reciprocal political levers sufficient to counter attempts by either to exceed its rightful authority or to interfere unduly with the operation of the other.[26] Madison's famous words in Federalist 51 provide the key support:

> [T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, he made commensurate to the danger of attack. Ambition must be made to counteract amhition. The interest of the man must he connected with the constitutional rights of the place.[27]

From this passage and the spirit it reflects, scholars have inferred an intent by the Framers to embed in the basic structure of the political process the necessary means for resolving information disputes. And from their reading of the historical record, they have concluded that this choice was a wise one—or at least that no harm to either branch or to the Republic has come of it.[28]

B. The Model in the Courts

The escalation model has emerged preeminent not only in the scholarship, but also in the courts. An important measure of that influence, of course, is the cases that the courts have *not* decided. One would expect that widespread acceptance of the escalation model would dissuade both the branches from litigating information disputes and the judiciary from entertaining them. Consistent with that prediction, the branches have for the most part ceased to fight their disagreements over information in court, largely because resort to litigation is perceived as an act of desperation, rather than a legitimate means of vindicating a legal prerogative, in a system where the assumptions of the escalation model have become so ingrained.[29] As a result, the federal judiciary has not often engaged the respective

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political process of constitutional tug-of-war between Congress and the President envisioned by the framers").

26. *See, e.g.*, J. Richard Broughton, *Paying Ambition's Debt: Can the Separation of Powers Tame the Impetuous Vortex of Congressional Investigations?*, 21 WHITTIER L. REV. 797, 797-800 (2000).

27. THE FEDERALIST NO. 51, at 321-22 (James Madison) (Clinton Rossiter ed., 1961).

28. *See, e.g.*, Wald & Siegel, *supra* note 17, at 743-45, 747 (describing the "long and successful history of nonjudicial resolution of information disputes between Congress and the President").

29. *See, e.g.*, Posting of Jack M. Balkin to Balkanization Blog, http://balkin.blogspot.com /2007/03/more-on-executive-privilege-bargaining.html (Mar. 21, 2007, 19:35 EST) (arguing that by "invoking executive privilege and fighting the issue all the way to the Supreme Court," the President engages in "an act of desperation" signifying that "he simply can't afford to let Congress know what's been going on in his White House").

powers of Congress and the President over executive-branch information, and the Supreme Court has never definitively addressed that question.

The impact of the escalation model is equally apparent, however, from the cases the courts have resolved. In those decisions, the federal courts have effectively supplanted the traditional legal method with an unorthodox approach based squarely on the escalation model's anti-judicial premises. This process began in the D.C. Circuit, which stands "on the front lines" of the battle over executive-branch information, and has continued in district court decisions building upon the appeals court's assumptions.[30] The escalation model therefore now occupies the core of the judicial doctrine governing information-access disputes between the political branches.

1. The *AT&T* Opinions

The occasion for the D.C. Circuit's articulation and endorsement of the escalation model was a controversy that erupted in 1976 when a House oversight committee, concerned about the effect of intelligence activities on citizens' privacy rights, issued a subpoena to AT&T requesting documents detailing the extent of the FBI's warrantless wiretapping.[31] Although AT&T stood ready to comply, the White House resisted the subpoena on the ground that release of the documents would undermine the executive's conduct of diplomatic relations and ongoing intelligence operations.[32] Unable to persuade the committee to settle for summarized or edited information, the President instructed AT&T, "as an agent of the United States, to respectfully decline to comply with the Committee subpoena."[33] When AT&T refused that instruction, the Justice Department sued to block the company's compliance.[34]

The district court permanently enjoined the subpoena's execution, approaching the case much as it would any other.[35] Abiding by the judicial script, the court first framed the competing interests: "On the one hand is the power of the Congress to investigate in aid of the legislative function," and on the other "is the authority of the Executive to invoke the claim of privilege concerning matters of

30. Wald & Siegel, *supra* note 17, at 778.

31. United States v. AT&T (*"AT&T I"*), 551 F.2d 384, 385 (D.C. Cir. 1976).

32. *Id.* at 386-88.

33. *Id.* at 387 (quoting letter from President Gerald R. Ford to the Honorable Harley O. Staggers (July 22, 1979)).

34. *Id.* at 387.

35. United States v. AT&T, 419 F. Supp. 454, 456 (D.D.C. 1976).

national security, foreign affairs, or national defense."[36] The court then subjected those dueling objectives to a familiar balancing test that weighed "the necessity for compelling production" against "the circumstances and grounds for the assertion of the privilege."[37] Completing that analysis, the court placed its evaluation of each branch's interest on the scales and ruled in the President's favor: "[T]here are alternative means available for obtaining the information"; the requested documents are "not absolutely essential to the legislative function"; and the President's interest in confidentiality therefore "outweighs the subcommittee's showing of necessity."[38]

The D.C. Circuit rejected this framework, replacing it with a fundamentally different approach that incorporated the key assumptions of the escalation model. Most prominent among those assumptions was the theme of judicial incompetence, particularly in the very task the district court had undertaken: "To decide this case on the merits," Judge Leventhal observed,

> we would be called on to balance the constitutional interests raised by the parties, including such factors as the strength of Congress's need for the information . . ., the likelihood of a leak of the information in the Subcommittee's hands, and the seriousness of the harm to national security from such a release.[39]

Noting that any such effort would inevitably encounter "severe problems in formulating and applying standards," the court suggested—in line with the escalation model's core rationale—that "a better balance would result in the constitutional sense, however imperfect it might be, if it were struck by political struggle and compromise than by a judicial ruling."[40] To this first rationale for avoiding judicial interference with interbranch battle, the court then added the second: "A court decision selects a victor, and tends thereafter to tilt the scales" in future negotiations presenting different circumstances. Especially where "nerve-center constitutional questions" are involved, "[a] compromise worked out between the

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36. *Id.* at 458-59.

37. *Id.* at 459-60 ("Here, the nature, the extent and the relative importance of the power of one coordinate branch of government must be balanced against that of the other.").

38. *Id.* at 460. The district court's opinion largely tracked the reasoning of *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974), in which the D.C. Circuit refused enforcement of a subpoena issued by the Senate committee charged with investigating the events of Watergate. That case arose when the committee, having learned of the existence of tape recordings rumored to contain key conversations between the President and his top aides, sued to enforce a subpoena seeking those tapes in the face of unyielding assertions of executive privilege. *Id.* at 726-27. The appeals court dismissed the suit, holding that the committee's asserted interest was "too attenuated and too tangential to its functions to permit a judicial judgment that the President is required to comply with [its] subpoena." *Id.* at 733.

39. *AT&T I*, 551 F.2d at 391.

40. *Id.* at 391, 394.

branches is most likely to meet their essential needs and the country's constitutional balance."[41]

Hoping for these reasons to avoid a decision on the merits, the court ordered the branches to continue searching for a political solution.[42] When talks again stalled, the case returned to the D.C. Circuit, which adopted the tentative results of the negotiation process but ordered ongoing attempts at compromise in an opinion that emphasized the third, originalist rationale of the escalation model.[43] Contrary to each branch's assertion of "clear and unequivocal constitutional title" over the field, the court explained, "it was a deliberate feature of the constitutional scheme to leave the allocation of powers unclear in certain situations."[44] Thus,

> The framers, rather than attempting to define and allocate all governmental power in minute detail, relied . . . on the expectation that where conflicts in scope of authority arose between the coordinate branches, a spirit of dynamic compromise would promote resolution of the dispute in the manner most likely to result in efficient and effective functioning of our governmental system.[45]

Removing interbranch information-access disputes from the courts, in other words, is not simply an act of judicial pragmatism; it is the recognition of a central aspect of the constitutional system, a fulfillment of the Framers' intent to impose on each branch the "constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation."[46]

The themes underlying the *AT&T* decisions have continued to animate the judiciary's efforts to extricate itself from information battles between Congress and the President. In the two such battles that have since spawned litigation, the courts refused to declare a substantive constitutional rule, opting instead to honor *AT&T*'s overarching instruction to leave the answers to the political process. Those courts less frankly acknowledged the basis for their decision—both avoided the merits through questionable manipulation of procedural barriers—but the reasoning in each case bears the unmistakable imprint of the escalation model.

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41. *Id.* at 394.
42. *Id.* at 395.
43. United States v. AT&T ("*AT&T II*"), 567 F.2d 121 (D.C. Cir. 1977).
44. *Id.* at 127, 130.
45. *Id.* at 127.
46. *Id.*

2. *United States v. House*

The first such decision, *United States v. House of Representatives*,[47] was the culmination of one of the "most protracted and most deeply adversarial" information disputes in recent memory.[48] That controversy arose when a House subcommittee, frustrated in its attempts to pursue concerns about the Reagan administration's lax approach to federal environmental laws, subpoenaed the personal appearance of the administrator of the EPA, Anne Gorsuch, and ordered her to produce all executive-branch documents relating to enforcement of the recently enacted "Superfund" program.[49] When, on the instruction of President Reagan, Gorsuch ignored the committee's order, she became the first agency head in U.S. history to be held in contempt of Congress.[50] The day before Gorsuch's contempt citation was certified to the U.S. Attorney for prosecution, however, the Department of Justice, acting in the name of the United States, sued the House seeking judicial approval of the President's assertion of executive privilege.[51]

The district court declined to reach the merits, instead resting on procedural grounds urged by the subcommittee. According to the court, the proper vehicle for the executive's arguments was not a preemptive civil complaint, but rather a defense to a criminal contempt prosecution.[52] The court's solution raised obvious and profound problems. It permitted the executive branch to fight a finding of contempt only by vigorously prosecuting the very citation it sought to establish as illegitimate, and it stood in considerable tension with the Supreme Court's admonition in *United States v. Nixon* that rigidly adhering to the contempt procedure is "peculiarly inappropriate" and "unseemly" when doing so will delay the resolution of an interbranch conflict.[53] The real motivation for these procedural

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47. United States v. House of Representatives, 556 F. Supp. 150 (D.D.C. 1983).

48. Peter M. Shane, *Negotiating for Knowledge: Administrative Responses to Congressional Demands for Information*, 44 ADMIN. L. REV. 197, 205 (1992).

49. *See House of Representatives*, 556 F. Supp. at 151; Claveloux, *supra* note 23, at 1335-36. "Superfund" refers to a 1.6 billion dollar trust fund established by the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), *see generally* 42 U.S.C. §§ 9601-57 (2007), and designated to pay for cleanup of the most urgent hazardous waste deposits and spills. For a detailed description of the Gorsuch controversy, see Claveloux, *supra* note 23, at 1334-38.

50. Claveloux, *supra* note 23, at 1333-34.

51. *See House of Representatives*, 556 F. Supp. at 152.

52. *See id.* at 152-53.

53. United States v. Nixon, 418 U.S. 683, 691-92 (1974); *see id.* at 692 (noting that such an approach "would present an unnecessary occasion for constitutional confrontation between two branches of the Government"). *Nixon* involved a criminal proceeding in which the district court had ordered production of the assertedly privileged materials, and the Supreme Court thus

contortions, the court indicated, was unease in entering the fray where "[t]he Legislative and Executive Branches of the United States Government are embroiled in a dispute concerning the scope of the congressional investigatory power."[54] And the basis for that unease quite plainly lay in the considerations identified in the *AT&T* opinions. In what could be considered a fair précis of those decisions, the court advised that the "difficulties" in litigating the validity of the executive's position—difficulties that were, of course, largely of the court's own making—"should encourage the two branches to settle their differences without further judicial involvement. Compromise and cooperation, rather than confrontation, should be the aim of the parties."[55]

3. *Walker v. Cheney*

The second case, *Walker v. Cheney*,[56] in many respects presents a mirror image of the first. Like *United States v. House*, it stemmed from congressional dissatisfaction with the President's allegedly pro-business environmental practices. The particular controversy in *Walker* centered on charges that Vice President Cheney, in chairing an energy "task force," had allowed private energy interests to exercise inappropriate influence over the group's recommendations.[57] Amid those suspicions, two congressmen asked the Comptroller General, an agent of the legislative branch who heads the congressionally-chartered Government Accounting Office ("GAO"),[58] to launch an investigation seeking information from the Vice President about the group's meetings and deliberations.[59] As in *United States v.*

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addressed the analytically distinct "threshold question" whether the President could obtain *appellate* review of that order only by disobeying it and raising executive privilege in defense to a contempt prosecution. *See id.* at 690. Although the *Nixon* Court's allowance of immediate review therefore does not control the situation presented in *United States v. House of Representatives*, the spirit and rationale of *Nixon* plainly clash with the district court's adherence to a procedural device that would delay resolution and engender further interbranch conflict.

54. *House of Representatives*, 556 F. Supp. at 152.

55. *Id.* at 153.

56. Walker v. Cheney, 230 F. Supp. 2d 51 (D.D.C. 2002).

57. *See id.* at 54-55. Formally known as the National Energy Policy Development Group, the task force was composed of a number of department heads and other federal officers invited by the Vice President to participate. *Id.* at 55.

58. *See id.* at 53-54. Congress created tbe GAO in 1921 on the view that it " 'needed an officer, responsible to it alone, to check upon the application of public funds in accordance with appropriations.' " Bowsher v. Synar, 478 U.S. 714, 730 (1986). As the district court noted, both Congress and the Supreme Court have "consistently viewed the Comptroller General as an officer of the Legislative Branch." *Walker*, 230 F. Supp. 2d at 53.

59. *See Walker*, 230 F. Supp. 2d at 55. In particular, the Comptroller sought documents describing (1) the attendees at the task-force meetings; (2) other parties with whom the task force members and staff met to gather information; (3) the process by which the Vice President

House, the executive declined to comply.[60] This time, however, the Comptroller General struck first in court, and the institutional roles were therefore reversed: The legislative branch sought judicial assistance in *invalidating* the executive's claimed right to withhold information, and the President responded by urging abstention.[61]

The district court again demurred on procedural grounds. The Comptroller General, it held, lacked standing under Article III to bring the suit, primarily because he asserted an impersonal injury—the "abstract dilution of institutional legislative power"—rather than the type of concrete and particularized harm the Constitution requires.[62] Like the resolution of *United States v. House*, this detour around the merits encountered some significant doctrinal obstacles. The court's conclusion that denial of legislative access to information cannot constitute an injury sufficient to confer Article III standing appeared directly to contradict a line of cases predicated on precisely that type of injury—including a 1998 decision by a three-judge panel of the same court deeming it "well established that a legislative body suffers a redressable injury when that body cannot receive information necessary to carry out its constitutional responsibilities."[63] The court's tenuous efforts to distinguish those cases simply highlighted the true basis for its hesitation.[64] The case presented "a

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decided whom to invite to participate; and (4) the cost incurred by the task force in forming its recommendations. *See id.* at 58.

60. *See id.* at 57.

61. *See id.* at 58.

62. *Id.* at 67 (quoting Raines v. Byrd, 521 U.S. 811, 826 (1997)).

63. United States House of Representatives v. United States Dep't of Commerce, 11 F. Supp. 2d 76, 86 (1998); *see id.* at 85 (holding that receipt of insufficient or incorrect information "constitutes 'informational injury' sufficiently concrete so as to satisfy the irreducible minimum of Article III"). The constitutional sufficiency of such an injury was implicit in *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974), in which the D.C. Circuit ruled on the merits of a suit brought by a Senate committee, and it was explicit in *AT&T I*, where the same court deemed it "clear that the House as a whole has standing to assert its investigatory power, and can designate a member to act on its behalf" by pursuing that body's interests in court. United States v. AT&T (*"AT&T I"*), 551 F.2d 384, 391 (D.C. Cir. 1976).

64. Those efforts purported to rest on Congress's failure either to subpoena the documents itself or specifically to endorse the Comptroller General's suit. *See Walker*, 230 F. Supp. 2d at 70-71. Even if those formal conditions were satisfied, however, the court's stated rationale for rejecting the asserted injury would still apply. That injury, the court held, was inadequate because "the import of the requested documents . . . is essentially that the records will 'assist Congress in the discharge of its legislative functions.' " *Id.* at 67. Injury to those "general interests in lawmaking and oversight" was considered "too vague and amorphous to confer standing." *Id.* Neither issuance of a subpoena nor a formal resolution supporting the suit could change the nature of the legislative function for which the withheld information was sought.

In any event, even if the extent of congressional interest were somehow relevant to the nature of the asserted injury, the court's reasoning rests on the flawed premise that only a subpoena or formal resolution can indicate a level of interest sufficient to sustain standing. Treating such action as a necessary precondition of suit would render wholly meaningless

clear constitutional confrontation between the political branches," involving competing "visions as to the scope of congressional oversight of the President—and thus the balance of power between the Executive and Legislative Branches—that clash at the most fundamental levels."[65] Faced with such a monumental controversy, the court deferred on the view that the best hope for a satisfactory resolution lay in the checks and balances of the political process.[66] As long as that system afforded Congress alternative ways to seek the information,[67] the court saw no license to impose its own view of the proper outcome when "the Article I and Article II Branches have [long] been involved in disputes over documents" without judicial interference.[68]

Together, these decisions define the law governing any attempt by Congress or the President to bring an information dispute before the federal courts. None, of course, fits perfectly within the theoretical mold of the escalation model. The *AT&T* cases involved a form of judicially supervised "negotiation" more constrained than the pure political warfare in which the escalation model places ultimate faith. Similarly, *United States v. House* and *Walker v. Cheney* rested on procedural barriers that might in some theoretical circumstance permit a decision on the merits, and to that extent stray from the escalation model's unconditional rejection of judicial involvement. These theoretical variations, however, simply underscore the broad embrace of the model's core set of premises. The important point is that the federal judiciary has all but eliminated any role for the courts in resolving a key question at the heart of the Constitution's structure. The assumptions that convinced the judiciary to do so deserve a close look.

Congress's decision in 1980 to allow the GAO to sue in its own name to obtain information from the executive branch. *See* 31 U.S.C. § 716(b)(2) (2004). In reality, moreover, Congress will not idly abide a suit with which it disagrees in a matter so high profile as the Cheney litigation. Indeed, when congressional sentiment turned against that litigation following the district court's decision, the suit was promptly dropped. Richard Simon, *Probe of Energy Task Force Ends*, L.A. TIMES, Aug. 26, 2003, at 17.

65. *Walker*, 230 F. Supp. 2d at 61; *see id.* at 65 ("There is no doubt here that the issues framed by the parties invoke core separation of powers questions at the heart of the relationship among the three branches of our government.").

66. *Id.* at 72 n.18 (internal quotation marks omitted).

67. *Id.* at 68; *id.* at 68 n.12 (citing *United States v. AT&T ("AT&T II")*, 567 F.2d 121, 130 (D.C. Cir. 1977) for the proposition that "[n]egotiation between the two branches should thus be viewed as a dynamic process affirmatively furthering the constitutional scheme.").

68. *Id.* at 73.

II. THE ESCALATION MODEL UNMASKED

At first blush, the escalation model seems peculiar, perhaps unique, among constitutional theories. That model posits a question of constitutional law—the boundary between presidential and congressional authority—that is best determined through the outcome of political struggles waged in the fashion of ordinary partisan warfare. It recognizes the "legal" rather than political character of the issue,[69] but it rejects the traditional legal mode of resolution, instead equating the correct constitutional standard with the point at which the power balance rests when the smoke of battle clears. Anomalous as that arrangement may appear, however, it in fact describes almost perfectly an approach that is entirely familiar to scholars of the Constitution's vertical separation of powers between nation and state.

A. The Political Safeguards Theory

The political safeguards approach traces its roots to a celebrated law review article in which Professor Herbert Wechsler argued that the political process, not the courts, should determine the constitutional balance between the federal government and the states.[70] Inherent in the structure of the national government, Wechsler maintained, are a set of structural protections—primarily stemming from the composition of the federal government and the methods for selecting its officers—that are designed to ensure full and adequate representation of local interests.[71] The existence of those

69. The natural inclination, when confronted with an issue of constitutional dimension that the courts elect not to resolve, is to label that issue a "political question" and assume that such a characterization completes the taxonomical inquiry. In these circumstances, however, that reflex would be a mistake. The escalation model defies easy description according to that "odd amalgam of constitutional, functional, and prudential factors that have been used by the courts in determining whether a case presents a nonjusticiable political question." Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 244 (2002). There is no "textually demonstrable constitutional commitment of the issue to a coordinate political department." Baker v. Carr, 369 U.S. 186, 217 (1962). As the D.C. Circuit explained in *AT&T II*, such conflicts present "a clash of authority" in which "[n]o one branch is identified as having final authority in the area of concern." *AT&T II*, 567 F.2d at 126. And although the theme of judicial competence in the escalation-model literature might seem to bring the theory within the "prudential" variant of the political-question doctrine, closer reflection reveals that this, too, is inapplicable. The escalation model fundamentally rests on the assertion that judicial doctrine is unnecessary and unhelpful—not that it is inherently inconceivable. As Professor Cox acknowledged, "[a] judicial robe renders a man no less capable of making up his mind than an executive or legislator" and "courts do develop criteria" when they "move into new ground." Cox, *supra* note 2, at 1430.

70. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

71. *See id.* at 546-58.

"political safeguards" means that "the national political process in the United States . . . is intrinsically well adapted to retarding or restraining new intrusions by the center on the domain of the states."[72] And because that federal-state balance is self-adjusting, "the [Supreme] Court is on weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interest of the states, whose representatives control the legislative process and, by hypothesis, have broadly acquiesced in sanctioning [any] challenged Act of Congress."[73]

The outlines of Wechsler's theory, refined and amplified by subsequent scholars,[74] provided the theoretical basis for the Supreme Court's foundational decision in *Garcia v. San Antonio Metropolitan Transit Authority*.[75] In that case, the Court returned for a third time to an issue that had deeply divided it twice before: whether the minimum wage and overtime requirements of the federal Fair Labor Standards Act may constitutionally apply to a state acting in its "governmental" or "sovereign" capacity.[76] Lurking behind that narrow issue were the more basic questions whether the Tenth Amendment imposes any constitutional constraints on congressional regulation of the states' core functions, and if so, whether the federal judiciary is the proper vehicle for enforcing them.

Ten years before *Garcia*, in *National League of Cities v. Usery*, the Court had answered both questions in the affirmative. On the first issue, the Court held explicitly that "when Congress seeks to regulate directly the activities of States as public employers, it transgresses an affirmative limitation," derived from the Tenth Amendment, "on the exercise of its power."[77] And on the second question, the Court's basic approach—deciding what congressional measures impinged on the states' autonomy and identifying "traditional government functions" immune from federal control[78]—implicitly declared that judges are the designated keepers of the balance between "the federal government's

72. *Id.* at 558.

73. *Id.* at 559.

74. *See, e.g.*, JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 171-259 (1980); D. Bruce La Pierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 WASH. U. L.Q. 779 (1982).

75. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

76. The Court first upheld such an extension in *Maryland v. Wirtz*, 392 U.S. 183 (1968), over a dissent by Justice Douglas charging that the decision represented "such a serious invasion of state sovereignty protected by the Tenth Amendment that it is in my view not consistent with our constitutional federalism." *Id.* at 201 (Douglas, J., dissenting).

77. Nat'l League of Cities v. Usery, 426 U.S. 833, 841 (1976).

78. *See id.* at 833 (quoting Fry v. United States, 421 U.S. 542, 547 (1975)).

interest in regulating a function [and] the state's interest in sovereignty over that function."[79]

In fundamentally reorienting the Court's approach to these issues, *Garcia* gave concrete form to Professor Wechsler's political safeguards model. The Court's new majority agreed with the basic premise of *National League*: "States occupy a special position in our constitutional system," and "the scope of Congress's authority under the Commerce Clause must reflect that position."[80] "[U]ndoubtedly," these Justices thus concluded, the Constitution places "limits on the federal government's power to interfere with state functions."[81] The Court overruled *National League*, however, because it disagreed about the proper method for enforcing those limits.[82] The states' essential place in the federal system, the Court declared, is a product not of the substantive lines drawn by Article III courts, but rather of the basic structure and system the Constitution creates.[83] Because the national political process incorporates local concerns and ensures that federal laws respect them, courts have no warrant to replace the results of that process with their own preferences about the proper federal-state balance.[84] In short, *Garcia* held, "[s]tate sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power."[85]

The embodiment in *Garcia* of Professor Wechsler's political safeguards theory bears an obvious surface resemblance to the escalation model. On the most general level, both reject judicial involvement in disputes between structural components of the constitutional system, instead remitting the power balance between those bodies to the results of the political process. But the similarities between the theories extend far deeper than this general agreement on removing courts from the fray. Indeed, a close examination of the structure of argument in *Garcia* indicates that although it addresses a distinct set of relationships, the political safeguards theory in that case shares each of the key premises and assumptions of the

79. Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 22 n.89 (2004).

80. *Garcia*, 469 U.S. at 547.

81. *Id.*; *see id.* at 549 ("The States unquestionably do 'retain a significant measure of sovereign authority.' " (alteration omitted) (quoting EEOC v. Wyoming, 460 U.S. 226, 269 (1983))).

82. *See id.* at 547 ("What has proved problematic is not the perception that the Constitution's federal structure imposes limitations on the Commerce Clause, but rather the nature and content of those limitations.").

83. *Id.* at 550.

84. *Id.* at 551, 555-56.

85. *Id.* at 552.

escalation model. In form as in function, the two theories are nearly precise analogues.

B. The Premises Compared

Most fundamentally, *Garcia* shares with the escalation model the core assumption that the federal political forum is uniquely suited to an organic resolution of the clashing interests that drive disputes between the Constitution's institutional actors. Just as the escalation model contemplates an ongoing process in which each branch mutually evaluates and asserts its interests through "political struggle and compromise,"[86] *Garcia* assumes that the political system offers the best medium for identifying, expressing, and eventually accommodating national and state concerns.

Both theories anchor this faith in constitutional structure. For the escalation model, the central aspect of that structure is the Constitution's finely balanced and self-reinforcing checks and balances between the legislative and executive branches. When Congress and the President, unhindered by courts, are left to deploy those powers in a dispute over information, the final result is a fair approximation of the correct constitutional line.[87] In *Garcia*, the counterpart of those reciprocal levers is the constitutionally designated methods for selecting federal officeholders. Those methods, the Court maintained, ensure that national politicians will reach and maintain office only if they heed local interests. Citing Professor Wechsler and paraphrasing his core insight, the Court explained that "the composition of the Federal Government was designed in large part to protect the states from overreaching by Congress. The Framers thus gave the states a role in the selection both of the executive and the legislative branches of the Federal Government."[88] Within this framework, when "the people"—acting not through the courts but through their elected representatives—decide "what services and functions the public welfare requires" and what level of government should provide them, those decisions reflect the interests of both state and nation.[89] And the result, like political resolutions of information battles, is therefore presumed to reflect the proper constitutional balance.

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86. United States v. AT&T (*"AT&T I"*), 551 F.2d 384, 391 (D.C. Cir. 1976).

87. *See supra* notes 12-19 and accompanying text.

88. *Garcia*, 469 U.S. at 551 (citations omitted); *id.* at 550-51 (noting that "the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress").

89. *Id.* at 546 (quoting Helvering v. Gerhardt, 304 U.S. 405, 427 (1938) (Black, J., concurring)).

The reasoning in *Garcia* also reflects the three further premises underlying the escalation model's rejection of judicial interference with the political process. First, the Court emphasized the judiciary's relative incompetence in resolving disagreements between the government's collective components. The immediate cause for the Justices' reconsideration of the framework set forth in *National League* was the federal courts' abject failure, after years of struggle, to extract from that doctrine a principled approach to determining which areas of state activity required immunity from federal regulation.[90] That failure, in turn, had resulted from *National League*'s direction that the federal courts undertake the same two basic tasks—evaluation and balancing of political interests—that the escalation model deems beyond judges' capabilities. Thus, *National League* required that courts first isolate and gauge the strength of the states' asserted interests by asking whether the challenged federal measure "regulate[d] the States as States," whether it "address[ed] matters that are indisputably attributes of State sovereignty," and whether it "directly impair[ed] the States' ability to structure integral operations in areas of traditional government functions."[91] With the results of that evaluation in hand, courts were then to engage in what the members of the *National League* majority, reconstituted as the *Garcia* dissent, candidly described as a "balancing test" requiring judges to weigh "the federal interest in the challenged legislation and the impact of exempting the States from its reach" against "the injury done to the States if forced to comply with federal Commerce Clause enactments."[92]

Garcia rejected this approach on the ground that courts are simply not "equipped . . . to make th[e] kind of determination[s]"[93] for which *National League* called. Whatever the method used to evaluate the competing interests, and whatever the considerations guiding the balancing test, judicial analysis informed by legal reasoning is a poor

90. The Court found it "difficult, if not impossible, to identify an organizing principle" in those decisions and dismissed as "elusive at best" any distinctions the outcomes suggested. *Id.* at 539.

91. *Id.* at 537 (quoting Hodel v. Virginia Surface Mining & Recl. Ass'n., 452 U.S. 264, 287-88, 288 n.29 (1981) (internal quotation marks and alterations omitted)) (describing Nat'l League of Cities v. Usery, 426 U.S. 833 (1976)).

92. *Id.* at 563 n.5 (Powell, J., dissenting, joined by the Chief Justice and Justices Rehnquist and O'Connor); *see id.* at 562-63 (describing *National League* and subsequent cases as "adopt[ing] this approach of weighing the respective interests of the States and Federal Government").

93. *Id.* at 545.

surrogate for political outcomes produced by a system designed to absorb and reflect the realities of institutional conflict.[94]

Second, *Garcia* stressed that even apart from failures in the judicial method, judicially decreed results yield a profoundly destabilizing effect on the political process. The escalation model assumes that court decisions ossify the relationship between the branches and thereby threaten their dynamic interaction in future information disputes.[95] So too, the Court in *Garcia* concluded that binding judicial definitions of the scope of state immunity from congressional regulation would artificially limit the range of future political responses to changing circumstances and thus distort the optimal constitutional balance between federal and state power. According to the Court, "the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else—including the judiciary—deems state involvement to be."[96] Because these popular choices depend on political and historical contingencies, the Court reasoned, "[t]here is not, and there cannot be, any unchanging line of demarcation between essential and non-essential governmental functions."[97] Court decisions applying *National League*, however, purported to impose just such an immutable line on the political process. The result, the Court now explained, was a grave disincentive for states later to assume functions held to be outside the judicially protected sphere. States that so departed would incur the added cost of exposure to federal regulation "when they me[t] the changing needs of their citizenry by taking up functions that an earlier day and a different society left in private hands."[98]

Third, in line with the escalation model's final anti-judicial premise, *Garcia* justified the results of its holding on the basis of original intent and historical experience. Leaving to the national political process the task of defining the state's regulatory immunity, the Court explained, is not simply a practical improvement over litigation, nor is faith in that approach merely the by-product of a fortuitous discovery about the mechanics of constitutional structure.

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94. *See id.* at 545-47 (holding that any "judicial appraisal" requiring an evaluation and balancing of competing interests is inappropriate in this context because "[a]ny such rule leads to inconsistent results at the same time that it disserves principles of democratic self-governance").

95. *See supra* notes 22-24 and accompanying text.

96. *Garcia*, 469 U.S. at 546.

97. *Id.* (quoting Helvering v. Gerhardt, 304 U.S. 405, 427 (1938) (Black, J., concurring)).

98. *Id.* at 546. A similar concern led the Court to reject the option of looking to history to isolate essential state functions. "The most obvious defect of a historical approach," the Justices explained, "is that it prevents a court from accommodating changes in the historical functions of States, changes that have resulted in a number of once-private functions like education being assumed by the States and their subdivisions." *Id.* at 543-44.

Rather, the political-safeguards model is a faithful rendering of the views and choices of the Framers themselves.[99] Like the escalation model,[100] *Garcia* placed heavy weight on Madison's writings in the Federalist Papers, and in particular on his prediction that "the residuary sovereignty of the States" would be "implied *and secured*" by their equal representation in the Senate.[101] And also like the escalation model, the Court then characterized the history of federal-state relations as proof that Madison's predictions were correct. Not only have the states "been able to direct a substantial proportion of federal revenues into their own treasuries," the Court reasoned, but at the same time "they have been able to exempt themselves from a wide variety of obligations imposed by Congress under the Commerce Clause."[102] In short, the political-safeguards model is the one the Framers chose, and experience in that system shows that their judgment was sound.[103]

The political safeguards theory thus distills to a familiar set of premises. And the escalation model, rather than an idiosyncratic collection of assumptions indigenous to the circumstances in which it arose, is in truth a close translation to a new setting of a constitutional theory that scholars have debated since it first appeared in the federalism context more than a half-century ago.

The failure previously to make this connection is undoubtedly both a cause and effect of the virtually unanimous acceptance of the escalation model within its limited sphere. Perceptions of the escalation model as essentially *sui generis*—a curious means of resolving a unique kind of conflict—have sheltered that model from a growing body of scholarship attacking the basic assumptions it shares with the political safeguards approach. At the same time, the absence of scholarly efforts to lift the escalation model out of its specific context has hampered any attempt to compare the premises of that model to those governing the courts' more general approach to executive-legislative conflict. That comparison, which is critical to testing the coherence of the escalation model within the broader constitutional framework, is the subject of the next Part.

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99. *Id.* at 551 ("The extent to which the structure of the Federal Government itself was relied on to insulate the interests of the States is evidenced in the views of the Framers.").

100. *See supra* notes 26-28 and accompanying text.

101. *Garcia*, 469 U.S. at 551-52 (quoting THE FEDERALIST NO. 43, at 315 (James Madison) (B. Wright ed., 1961)) (emphasis in *Garcia*).

102. *Id.* at 552-54.

103. *Id.* at 552.

III. CONGRESS AND PRESIDENT IN THE COURTS: THE CONVENTIONAL APPROACH AS RADICAL DEPARTURE

The escalation model and political safeguards theory may share a common structure, but they have drawn drastically different receptions in their respective spheres. Where the former enjoys an unquestioned acceptance as the conventional approach to information disputes between Congress and the President, the latter has met with little in the federalism context but derision and controversy. *Garcia* itself drew dissents so scathing that, as Dean Kramer has quipped, they "lacked only an actuarial table to indicate how soon the Court could expect to lose its older, liberal members."[104] Commentators have minced no words in lambasting the political-safeguards reasoning in that case as everything from "fundamentally mistaken"[105] to "a good-hearted joke."[106] And although the core of *Garcia* remains,[107] the Supreme Court has continued to chip away at its rationale in a series of decisions imposing substantive limitations on the manner in which Congress may regulate the states.[108]

Even that treatment, however, is charitable compared to the experience of the political-safeguards theory where the issue is not the

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104. Larry D. Kramer, *Putting the Politics Back Into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 217 n.11 (2000). Justice Powell wrote the principal dissent, attacking the Court's decision point-by-point; then-Justice Rehnquist more economically declared that he "d[id] not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time command the support of a majority of this Court." *Garcia*, 469 U.S. at 580.

105. Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459, 1460 (2001).

106. William Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709, 1724 n.64 (1985).

107. Kramer, *supra* note 104, at 217 ("[W]bile *Garcia* has suffered both insult and injury in recent years, its 'no substantive review' position is still the rule with respect to most questions of federal power vis-à-vis the states, and Wechsler's article remains this position's chief intellectual prop." (footnote omitted)).

108. *See, e.g.*, New York v. United States, 505 U.S. 144 (1992) (holding that the Tenth Amendment prohibits Congress from "commandeering" state legislatures in pursuit of federal ends); Printz v. United States, 521 U.S. 898 (1997) (extending the "anti-commandeering" principle to congressional measures directed to a state's executive branch); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (denying Congress power under the Commerce Clause to abrogate the states' immunity from suit in federal court); Alden v. Maine, 527 U.S. 706 (1999) (interpreting the Tenth Amendment to prohibit Congress from subjecting nonconsenting states to suit in their own courts). Scholars disagree about the effect of these decisions on *Garcia*'s continuing vitality. *Compare, e.g.*, John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1312 (1997) (arguing that "*Garcia* is no longer the controlling theory concerning judicial review of federalism questions"), *with* Ernest A. Young, *Preemption at Sea*, 67 GEO. WASH. L. REV. 273, 333 n.398 (1999) (contending that even after these decisions, the "political safeguards of federalism . . . remain the primary bulwark of state authority"). This debate simply underscores what is the important point for present purposes: the political safeguards theory continues to prove highly controversial in the federalism arena.

vertical relationship between states and the federal government, but rather the Constitution's horizontal separation of powers between Congress and the President. In that context, the Supreme Court has spoken with a clarity rarely encountered in the "incoherent muddle" of separation-of-powers jurisprudence: Judges, not political processes, draw the constitutional line between the branches.[109]

A. Political Safeguards in the Horizontal Context

If the escalation model's assumptions are trustworthy, political-safeguards reasoning should find a natural home in all cases of executive-legislative disagreement. Thus, where an Act of Congress is challenged in court on the ground that it transgresses the boundary separating legislative from executive authority, the now-familiar steps of the escalation model would dictate a quick dismissal. The court would note first that the branches themselves are best able to judge the institutional implications of a pending measure, and the dynamics of the political process, combined with the procedures for lawmaking designated in the Constitution, afford ample means for expressing and defending those interests. At least in the absence of a presidential veto-override, the law's enactment therefore establishes its constitutionality, for it signifies each branch's mutual calculation that the institutional implications of the measure do not justify the costs of defeating it.[110] The court could then add that the legal method is ill-suited to identifying and balancing core political prerogatives, and it might also surmise that judicial decisions would disrupt the organic process of political accommodation by encouraging the branches to resort to litigation rather than fighting turf battles with the weapons the Constitution provides. In support of all of this, the court could invoke James Madison, who presumably spoke to the whole of the executive-legislative relationship—and not just to information disputes—when he located "the great security" of Congress and the

109. Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1517 (1991).

110. Review of the constitutional and separation-of-powers implications of pending legislation is a routine ingredient in the President's veto consideration. *See, e.g.*, Memorandum from the Office of Legal Counsel for the General Counsels of the Federal Government (May 7, 1996), *reprinted in* 63 J. LAW & CONTEMP. PROBLEMS 514, 560 (2000) (deeming it "imperative" that the President "carefully examine . . . pending legislation for [its] impact on the President's ability to exercise his or her constitutional powers and carry out his or her duties"); *see id.* at 525 ("Executive branch agencies should be careful to object to any legislation that . . . undercuts the constitutional purpose of creating an energetic and responsible executive branch."). Even where Congress enacted a law over the President's veto, the political-safeguards approach might deny the courts competence or authority to displace that result, which embodies the outcome of the political process channeled through constitutionally designated lawmaking procedures.

President in the possession by each of the "necessary constitutional means and personal motives to resist encroachments [by] the othe[r]."[111]

But courts presented with such cases have not followed these steps. Indeed, they have done quite the opposite, repeatedly supplanting the outcomes of the political process with their own substantive conceptions of the legislative-executive balance. Even a cursory review of the Supreme Court's canonical separation-of-powers cases reveals a direct rejection of the political safeguards theory's core premises. In *Myers v. United States*,[112] and more recently in *Buckley v. Valeo*,[113] *INS v. Chadha*,[114] *Bowsher v. Synar*,[115] *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise* ("*MWA*"),[116] and *Clinton v. City of New York*,[117] the Court struck down on separation-of-powers grounds duly enacted federal laws—laws that adjusted the interbranch boundary in ways that had met with the approval of both Congress and the President. The holdings in each case therefore implicitly declare not only that judges are capable of handling politically-charged disputes between the branches, but also that courts—not politics—present the proper forum for a final and conclusive resolution of the Constitution's horizontal structure.[118]

The political safeguards approach has fared no better even where the Court has upheld the challenged measure. In *Nixon v.*

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111. THE FEDERALIST NO. 51, at 262 (James Madison) (Clinton Rossiter ed., 1961).

112. Myers v. United States, 272 U.S. 52 (1926) (holding unconstitutional a statute that prohibited the President from removing without Senate approval certain executive officers he had appointed).

113. Buckley v. Valeo, 424 U.S. 1 (1976).

114. INS v. Chadha, 462 U.S. 917 (1983) (striking down a "congressional veto" provision that allowed either House of Congress to overrule the decision of the executive branch to suspend deportation proceedings in a particular case).

115. Bowsher v. Synar, 478 U.S. 714 (1986) (invalidating a federal law intended to eliminate the federal budget deficit by prescribing procedures under which the Comptroller General would mandate cuts in spending whenever a deficit exceeded the statutory maximum).

116. Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise ("*MWAA*"), 501 U.S. 252 (1991) (holding that Congress exceeded its constitutional authority in creating a Board of Review composed of individual congressmen and empowered to veto decisions of local authorities regarding D.C. area airports).

117. Clinton v. City of New York, 524 U.S. 417 (1998) (invalidating the Line Item Veto Act, which allowed the President to cancel certain items contained in validly enacted laws).

118. That some of these cases arose in the context of apparent harmony between the branches, rather than from a challenge by one to the antagonistic action of the other, does not distinguish them for present purposes. Indeed, the judiciary's willingness to reverse a resolution that the President and Congress have *agreed* upon simply underscores the anomaly of its refusal to step in where the branches *dispute* the proper constitutional balance.

Administrator of General Services ("*GSA*"),[119] for example, the Justices addressed a statute directing an executive-hranch officer to retain and control the disposition of former President Nixon's papers. The law had sped through Congress, fueled by public outrage accompanying the announcement that Nixon had struck a deal prohibiting disclosure of any papers or tapes without his consent.[120] President Ford had signed the law, and President Carter sent his Solicitor General to appear before the Court "vigorously support[ing] its constitutionality."[121] The political process, in short, had spoken with unmistakable clarity.

The Court, however, chose not simply to defer to the branches' own assessment of their institutional interests, implicitly rejecting the position of Justice Powell's concurrence that "[s]ince the incumbent President views this Act as furthering rather than hindering effective execution of the laws, . . . it is not within the province of this Court to hold otherwise."[122] In place of such deference, the Court formulated a test that placed the fulcrum between executive and legislative power squarely in judicial hands. "In determining whether the Act disrupts the proper balance between the coordinate branches," the Court reasoned,

> the proper inquiry focuses on the extent to which it prevents the Executive branch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.[123]

The same process of judicial evaluation and balancing—the two tasks that the political-safeguards approach seeks to remove from the courts—has also guided decisions such as *Humphrey's Executor v. Rathbun*[124] and *Morrison v. Olson*,[125] in which the Court upheld

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119. Nixon v. Adm'r of Gen. Servs., 433 U.S. 425 (1977). Although it involved congressional action directed at presidential records, *Nixon* was not an interbranch information dispute of the kind the escalation model addresses. Rather than a legislative demand for disclosure of records from an unwilling executive, the law at issue in *Nixon* was an agreement by Congress and the President about the proper way to handle information that would remain entirely within the control of the executive branch. As the Court noted, the challenged Act "provide[d] for custody of the materials in officials of the Executive Branch"; it "d[id] not make the presidential materials available to the Congress—except insofar as Congressmen are members of the public and entitled to access when the public has it." *Id.* at 443-44.

120. *See id.* at 431-32 (recounting how public announcement of the Nixon-Sampson agreement was followed ten days later by the introduction of a bill to abrogate it).

121. *Id.* at 441.

122. *Id.* at 502 (Powell, J., concurring in part and concurring in the judgment).

123. *Id.* at 443.

124. Humphrey's Ex'r v. Rathbun, 295 U.S. 602, 629-30 (1935) (upholding a provision of the Federal Trade Commission Act conditioning the President's dismissal of a commissioner on a finding of "inefficiency, neglect of duty, or malfeasance in office").

congressional limitations on the termination of executive branch officers only after reexamining for itself "whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty."[126]

If these rulings do not conclusively demonstrate the general rejection of the political-safeguards theory in controversies between Congress and the President, the Court's words leave no doubt. In only one opinion—and that, a dissent—has anything closely resembling the theory appeared in a Supreme Court decision addressing the executive-legislative boundary. Strongly opposing the Court's ruling in *Bowsher v. Synar*, Justice White argued that the validity of a measure bearing on the interbranch balance is

> to be worked out between the Congress and the President through the legislative process, which affords each branch ample opportunity to defend its interests. [Passage of the] Act . . . represents Congress' judgment that [it] is 'necessary and proper' to the exercise of the power granted the Federal Government by the Constitution; and the President's approval of the statute signifies his unwillingness to reject the choice made by Congress.[127]

The Court squarely dismissed this reasoning, implicitly in the *Bowsher* holding and explicitly in *INS v. Chadha*, where it brushed aside in a footnote the suggestion that the challenged provision was "somehow immunized from constitutional scrutiny because [it] was passed by Congress and approved by the President."[128] In support, the Chief Justice cited by analogy *National League of Cities*—the very decision that *Garcia* and its political-safeguards reasoning later overruled.[129] And in *Garcia* itself, the dissenters pointed to the Court's executive-legislative decisions as confirmation that "[t]his Court has never before abdicated responsibility for assessing the constitutionality of challenged action on the ground that affected

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125. Morrison v. Olson, 487 U.S. 654 (1988) (rejecting a challenge to the independent counsel provisions of the Ethics in Government Act, signed into law by President Reagan).

126. *Id.* at 691.

127. Bowsher v. Synar, 478 U.S. 714, 776 (1986) (White, J., dissenting); *id.* at 759 (noting that the Court's holding serves "as a bar to the attainment of governmental objectives through the means chosen by the Congress and the President in the legislative process established by the Constitution"); *see also* INS v. Chadha, 462 U.S. 917, 992 (1983) (White, J., dissenting) (describing the predecessor to the legislative-veto provision invalidated in that case as a "compromise solution" that "[t]he Executive Branch played a major role in fashioning"). Justice White's flirtation with this aspect of the escalation model should not be mistaken for a full embrace. "Even the results of the constitutional legislative process may be unconstitutional," he cautioned, "if those results are in fact destructive of the scheme of separation-of-powers." *Bowsher*, 478 U.S. at 769. But in his view, substantive review of those results must be highly deferential, the Court's role "limited to determining whether the Act so alters the balance of authority among the branches of government as to pose a genuine threat to the basic division between the lawmaking power and the power to execute the laws." *Id.* at 776.

128. *Chadha*, 462 U.S. at 942 n.13.

129. *See supra* notes 77-85 and accompanying text.

parties theoretically are able to look out for their own interests through the electoral process."[130]

Indeed, the Court's refusal to import the political safeguards theory into this context has been even more direct, complete, and explicit. According to the Court, "the fact that one institution of Government has mechanisms available to guard against incursions into its power by other governmental institutions does not require that the Judiciary remove itself from the controversy."[131] Consistent with that repudiation, the Court has by its own admission willingly adjudicated many separation-of-powers disputes even where "the branch whose power has allegedly been appropriated has both the incentive to protect its prerogatives and institutional mechanisms to help it do so."[132]

Then-Justice Rehnquist, explaining the Court's basic philosophy in his *Nixon v. GSA* dissent, put it perhaps most succinctly. As an original matter, he observed,

> [i]t could have been plausibly maintained that the Framers thought the Constitution itself had armed each branch with sufficient political weapons to fend off intrusions by another which would violate the principle of separation of powers, and that therefore there was neither warrant nor necessity for judicial invalidation of such intrusion.[133]

"But that," he concluded, "is not the way the law has developed in this Court."[134]

B. In Search of a Justification

The exercise in Part II—placing the escalation model in its correct theoretical category—thus allows an examination of that

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130. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 567 n.12 (1985) (Powell, J., dissenting).

131. United States v. Munoz-Flores, 495 U.S. 385, 393 (1990) (citing Mistretta v. United States, 488 U.S. 361 (1989), Morrison v. Olson, 487 U.S. 654 (1988), INS v. Chadha, 462 U.S. 919 (1983)).

132. *Munoz-Flores*, 495 U.S. at 393.

133. Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 559 (1977) (Rehnquist, J., dissenting).

134. *Id.* That *Garcia*'s reasoning has not transferred to the Court's separation-of-powers jurisprudence is not a novel insight, *see, e.g.*, Ernest Young & Lynn Baker, *Federalism and the Double-Standard of Judicial Review*, 51 DUKE L.J. 75, 129-130 (2001), but scholars continue to resist it. A recent article by Professor Levinson, for example, contends that "[t]he political safeguards view of federalism . . . finds a close analogy in the way courts and theorists think about the constitutional separation of powers between the legislative and executive branches." Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 950 (2005). The Justices have left little room for dispute that as a descriptive matter, that analogy is largely incorrect. Thus, althougb it intends the opposite effect, Professor Levinson's core contention—that political actors do not act to aggrandize their institutions, as the political-safeguards theory supposes—in fact *supports* the Court's current approach to cases of executive-legislative conflict. As Part IV explains, however, that contention also severely undermines the coherence of the escalation model. *See infra* notes 191-214 and accompanying text.

model in the broader context of executive-legislative conflict. And that examination, in turn, reveals a striking inconsistency. Ordinarily, courts presented with disputes implicating the constitutional boundary separating Congress and the President will address and decide such cases on the merits, explicitly rejecting any suggestion that the branches should be left to settle their differences through the political tools the Constitution divides between them. Where those controversies center on disagreements about congressional access to information, however, diametrically opposite reasoning prevails. Selectively deploying a political-safeguards rationale that would ordinarily be labeled "judicial abdication,"[135] courts suddenly perceive in the constitutional design an unambiguous preference to leave to the political process the task of drawing the constitutional line between the executive and legislative spheres. The "extreme position" in the non-informational case, in short, becomes the conventional position where access to information is involved.[136]

One consequence of the escalation model's sheltered development is that neither scholars nor courts have taken much notice of this inconsistency. As a result, the scholarship contains no sustained effort to identify a principled justification for the anomalous embrace of political-safeguards reasoning in one corner of a field that has for most other purposes unceremoniously rejected it. And in fact, the search for such a defense proves fruitless. No coherent distinction can separate information disputes from the disagreements presented in cases the Supreme Court has decided on the merits.

1. The Constitutional Significance of Information Disputes

We can imagine several possible arguments that would purport to distinguish information disputes from the broader category of executive-legislative disagreements. One such defense, for example, might posit some difference in the constitutional importance of the controversies. According to this theory, information disputes may be full of political sound and fury, but they signify very little about the Constitution itself. Their causes are practical disagreements implicating only the outer margins of each branch's constitutional authority, their results little more than minor adjustments in an ongoing political turf war. The cases that the Supreme Court has resolved on the merits, in contrast, go to the core of the constitutional

135. Martin H. Redish & Elizabeth J. Cisar, *"If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 491 (1991).

136. Thomas O. Sargentich, *The Contemporary Debate About Legislative-Executive Separation of Powers*, 72 CORNELL L. REV. 430, 441 (1986).

design, raising basic questions about the structural safeguards that shape the national political system. In deciding such cases, therefore, the Court performs a critical role for which information disputes provide no parallel—reinforcement of the Constitution's essential processes and preservation of its integrity.

This defense falters on a deeply flawed premise. To be sure, the executive-legislative cases that fill the U.S. Reports implicate issues vital to the division of power between the political branches. Disputes about the bicameralism requirement and Presentment Clause call on courts to enforce the steps necessary to make binding law and thereby justify faith that the substantive results of the political process accurately reflect each branch's full consideration and influence.[137] Decisions such as *Bowsher* and *MWAA* ensure that Congress's power to create legislation does not creep into the President's power to execute it, forestalling the accumulation of functions within a single department—according to the Framers, "the very definition of tyranny."[138] And judicial resolution of removal-power and Appointments Clause cases proceeds from the recognition both that a certain degree of presidential control over subordinate officers is critical to a unified executive, and that a unified executive, in turn, is indispensable to the proper functioning of the constitutional system.[139]

This characterization, however, does nothing to distinguish interbranch information disputes, which turn on questions about congressional powers and presidential prerogatives that are no less structural in the constitutional sense. Thus, Congress's power to demand executive-branch information both derives from and enables its core lawmaking function.[140] As the Supreme Court has noted, the authority of Congress to obtain information "is as penetrating and far-reaching as [its] potential power to enact and appropriate under the Constitution."[141] The converse is also true: The power to enact and appropriate cannot extend beyond Congress's ability to demand the

137. *See* INS v. Chadha, 462 U.S. 917, 951 (1983); *see also* Clinton v. City of New York, 524 U.S. 417, 440 (1998).

138. THE FEDERALIST NO. 47, at 301 (James Madison) (C. Rossiter ed., 1961); Bowsher v. Synar, 478 U.S. 714, 726-27 (1986).

139. *See, e.g.*, Morrison v. Olson, 487 U.S. 654 (1988) (upholding the independent counsel provisions of the Ethics in Government Act against a challenge based, *inter alia*, on the Appointment Clause and separation-of-powers principle); Humphrey's Ex'r v. Rathbun, 295 U.S. 602, 629-30 (1935) (rejecting on the merits a challenge to a law that placed restrictions on the President's power to remove Federal Trade Commissioners); Myers v. United States, 272 U.S. 52 (1926).

140. *See* McGrain v. Dougherty, 273 U.S. 135, 174 (1927) ("[T]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function."); *see also* Jurney v. MacCracken, 294 U.S. 125 (1935).

141. Barenblatt v. United States, 360 U.S. 109, 111 (1959).

information necessary to discharge those duties.[142] Because "[t]he proper exercise of [all] congressional functions . . . presupposes the existence of an informed judgment,"[143] and because the executive branch is "the repository of the country's most important information for public policy formulation,"[144] Congress's authority to demand that information is arguably the primary structural component of its ability to participate effectively in the political process.

By the same token, the President's right to withhold information from Congress is "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution."[145] Most centrally, that prerogative fosters the basic process by which the President reaches decisions: by preserving the confidentiality of "candid, objective, and even blunt or harsh opinions," it allows the President "to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately."[146] The constitutional design depends at least as much on this structural safeguard of the quality of executive decision making as it does on procedural guarantees of participation in the political process. Without the ability to *decide* what its best interests are, the executive branch is helped

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142. Devins, *supra* note 12, at 111 ("Absent access to accurate, relevant information, it would probably be impossible to legislate either effectively or wisely."); James M. Landis, *Constitutional Limitations on the Congressional Power of Investigations*, 40 HARV. L. REV. 153, 209 ("To deny Congress power to acquaint itself with facts is equivalent to requiring it to prescribe remedies in darkness.").

143. Bernard Schwartz, *Executive Privilege and Congressional Investigatory Power*, 47 CAL. L. REV. 3, 10-11 (1959). Woodrow Wilson's statement of this position remains one of the most forceful:

> Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct.

WOODROW WILSON, CONGRESSIONAL GOVERNMENT 297-303 (1885).

144. Wald & Siegel, *supra* note 17, at 739.

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

146. *Id.*; *see also* Assoc. of Am. Physicians & Surgeons v. Clinton, 997 F.2d 898, 909 (D.C. Cir. 1993) (describing the "Article II right to confidential communications" as allowing the President to "deliberate in confidence" and thus to "decide and act quickly—a quality lacking in the government established by the Articles of Confederation"); *In re* Sealed Case, 121 F.3d 729, 750 (D.C. Cir. 1997) ("[P]residential communication privilege" is "rooted in the need for confidentiality to ensure that presidential decisionmaking is of the highest caliber, informed by honest advice and full knowledge."). Executive-branch secrecy is equally integral to the President's conduct of the Nation's diplomatic, foreign affairs, and law enforcement activities, which depend for their effectiveness on some degree of confidentiality. *See* Robert Iraola, *Congressional Oversight, Executive Privilege, and Requests for Information Relating to Federal Criminal Investigations and Prosecutions*, 87 IOWA L. REV. 1559, 1570-80 (2002).

little by preservation of constitutionally designated opportunities to *assert* those interests. That is presumably why President Eisenhower famously warned that disclosure of "the conversations that take place between any responsible official and his advisors"—even (or perhaps especially) to congressional committees—would "wreck the government."[147]

In short, "[t]he same logic which holds that Congress has the power to investigate so that it may effectively exercise its legislative functions, supports the proposition that the President has the power to withhold information when the use of the power is necessary to exercise his Executive functions effectively."[148] Both powers are essential structural bulwarks supporting and enabling the exercise of the remaining powers delegated to each branch. Both are therefore indistinguishable from the powers and prerogatives implicated in cases that the Supreme Court, without hesitation, has resolved on the merits.

2. The Competence of the Courts

A second defense of the disparate treatment of information and non-information disputes might differentiate between these controversies based on the analytical methods each would require a court to apply. Unlike conflicts over information, which call for "delicate and possibly unseemly" predictions about the degree to which disclosure or non-disclosure will intrude upon and impact the practical functioning of each branch,[149] non-information disputes turn on tasks with which courts are intimately familiar: interpreting constitutional text and structure, extracting from that analysis clear rules and principles, and applying the resulting doctrine to statutory or

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147. PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES, DWIGHT D. EISENHOWER 674 (1955); *see also* Charles Black, Letter to the Editor, N.Y. TIMES, Aug. 3, 1973, at 31, cols. 1-2:

> It is hard for me to see how any person of common sense could think that those consultative and decisional processes that are the essence of the Presidency could be carried on to any good effect, if every participant spoke or wrote in continual awareness that at any moment any Congressional committee, or any prosecutory working with a grand jury, could at will command the production of the verbatim record of every word written or spoken.

Id.

148. Cox, *supra* note 2, at 1386.

149. United States v. AT&T (*"AT&T I"*), 551 F.2d 384, 394 (D.C. Cir. 1976); *see id.* at 391 (noting that to resolve that case, a court "would be called upon to balance the constitutional interests raised by the parties, including such factors as the strength of Congress's need for the information in the request letters, the likelihood of a leak of the information in the Subcommittee's hands, and the seriousness of the harm to national security from such a release").

administrative measures. According to this view, the same judicial competence concerns that underlie the escalation model permit a departure from that model whenever access to information is not involved.

However attractive it might at first appear, this second distinction cannot rationalize the anomalous place of the escalation model within its broader context. As an initial matter, the justification depends on a characterization that is questionable even as to the subset of cases it most clearly describes—those ostensibly decided according to textual commands or clear principles derived from constitutional structure.[150] Although those cases purportedly rested on rigid rules, the Court held such rules applicable only after answering questions that were far less concrete. In *Chadha*, for example, the Constitution's mechanistic lawmaking process required invalidation of the "legislative veto" only because the Court "establish[ed] that the challenged action . . . is of the kind to which the procedural requirements of Art. I, § 7, apply."[151] That determination—whether the conduct qualifies as "an exercise of legislative power"—"depends not on th[e] form" of the action but rather on a functional evaluation of its "character and effects," which in turn calls for an examination of "the constitutional design of the powers of the Legislative Branch."[152] Similarly, the Appointments Clause component of *Morrison v. Olson* appeared to rest on a definite rule: "Principal officers are selected by the President with the advice and consent of the Senate. Inferior officers Congress may allow to be appointed by the President alone, by

150. This subset would presumably include the cases interpreting the lawmaking procedures prescribed in Article I—*Chadha*, *Bowsher*, *MWAA*, and *Clinton*—and it could also extend to the portions of *Morrison v. Olson* and *Buckley* that turned on the Court's interpretation of Article II's Appointment Clause. *See* U.S. CONST. art II, § 2, cl. 2 (specifying the requirements for nominating "Officers of the United States"). Justice Kennedy has seized on this distinction between "explicit constitutional requirement[s]" and inferred principles in attempting to reconcile the analytically distinct double-standard arising from the Supreme Court's sporadic use of a "balancing approach" when resolving separation-of-powers cases. Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 484, 486 (Kennedy, J., concurring). Where the branches' implied powers collide, Justice Kennedy reasoned, the Court is justified in weighing the competing interests. But "[w]here a power has been committed to a particular Branch of the Government in the text of the Constitution, the balance already has been struck by the Constitution itself," and "[i]t is improper for this Court to arrogate to itself the power to adjust [that] balance." *Id.* at 486.

151. INS v. Chadha, 469 U.S. 919, 952 (1982).

152. *Id.* at 952, 956 (citation omitted). *Bowsher*, although ostensibly a simple application of the rule that Congress may not reserve a role in enforcing the laws it enacts, also turned on the same distinction. Concurring in the judgment, Justice Stevens noted that the Court's perfunctory analysis "rests on the unstated and unsound premise that there is a definite line that distinguishes executive power from legislative power." Bowsher v. Synar, 478 U.S. 714, 747 (1986); *see id.* at 749 n.13 ("It is fruitless . . . to try to draw any sharp and logical line between legislative and executive functions.").

the heads of departments, or by the Judiciary."[153] Application of that rule was impossible, however, until the Court first decided the thorny question of whether the Independent Counsel (the "officer" at issue in that case) belonged in the first or second category. And as the Court explained, "[t]he line between 'inferior' and 'principal' officers is one that is far from clear."[154] Because "the Framers provided little guidance into where it should be drawn," the Court could not escape some exploration of the Independent Counsel's duties and their effect on the integrity of the executive branch.[155] It is thus a vast oversimplification to characterize even a portion of the decided cases in this context as resulting from a straightforward application of self-executing constitutional principles, devoid of delicate functional judgments about the realities of interbranch relations.

But even if this characterization could explain some of the executive-legislative cases the Court has decided, it could not encompass the others in any manner that would distinguish them from information disputes. The removal cases, like the Court's resolution of the dispute over the Nixon papers in *GSA*, turned on nothing more concrete than the Justices' own perceptions of whether the challenged law "prevents the Executive branch from accomplishing its constitutionally assigned functions," and if so, whether that intrusion is outweighed "by an overriding need to promote objectives within the constitutional authority of Congress."[156] The baldly predictive judgments this test requires are no different in principle from those necessary to decide, for example, the validity of a claim of executive privilege interposed against a congressional demand. Unless there is something uniquely difficult about evaluating the impact of *information* on the functioning of the branches, no argument based on judicial competence could distinguish one situation from the other.

The Supreme Court long ago declared its ability to evaluate the impact of disclosure, however, in the "closely related and logically indistinguishable" context of information disputes between the executive and judicial branches.[157] The best example of such a dispute is *United States v. Nixon*, which famously precipitated the thirty-seventh President's farewell from office. In that case, the Court addressed the validity of a judicial subpoena, issued at the request of

153. Morrison v. Olson, 487 U.S. 654, 670 (1988) (quoting Buckley v. Valeo, 424 U.S 1, 132 (1976)).

154. *Id.* at 671.

155. *Id.* at 671-77.

156. *See supra* note 123.

157. Bishop, *supra* note 23, at 485.

the Watergate Special Prosecutor (none other than Archibald Cox), seeking documents and tape recordings of Nixon's conversations with his aides. The Special Prosecutor argued that the tapes were critical evidence of guilt in the trial of the President's six indicted co-conspirators, but Nixon refused to produce them on the ground that "the independence of the Executive Branch within its own sphere insulates the President from a judicial subpoena in an ongoing criminal prosecution."[158]

The Court began by emphatically rejecting the President's claim of unreviewable authority over executive-branch information. The answer to the constitutional question, the Court explained, lay not in the political process, but instead in the judicial task of "weigh[ing] the importance of the general privilege of confidentiality of Presidential communications in performance of the President's responsibilities against the inroads of such a privilege on the fair administration of criminal justice."[159] The goal was "to resolve those competing interests in a manner that preserves the essential functions of each branch."[160] That resolution, in turn, required a speculative judgment about the effect of forced disclosure on the functioning of the executive. The Court had little difficulty making such a prediction, balancing the results of disclosure against the interests of the judicial branch, and upholding the subpoena. Presidential advisers, the Court reasoned, "will [not] be moved to temper the candor of their remarks by the infrequent occasions of disclosure" in criminal cases, but "the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the [basic] guarantee of due process of law and gravely impair the basic function of the courts."[161]

This same mode of reasoning, with all the same delicate judgments about how disclosure of information will affect the performance of presidential duties, is manifest in several other judicial-executive cases decided by both the Supreme Court[162] and the

158. United States v. Nixon, 418 U.S. 683, 706 (1974) (internal citations omitted).

159. *Id.* at 711-12.

160. *Id.* at 707.

161. *Id.* at 712; *see id.* at 713 ("The President's broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on . . . pending criminal cases.").

162. *See, e.g.*, Cheney v. U. S. Dist. Court for the Dist. of Columbia, 542 U.S. 367, 378, 382 (2004) (reversing appeals court's conclusion that it lacked power to grant mandamus dismissing a civil action against the Vice President, and suggesting that the suit's intrusion on the executive branch outweighed any interference in the Judiciary's function resulting from non-disclosure); United States v. Reynolds, 345 U.S. 1, 11 (1953) (finding that non-disclosure by the executive branch is appropriate where "there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged").

D.C. Circuit.[163] These cases plainly undermine any reliance on judicial competence as a basis for distinguishing information disputes from other types of controversies between Congress and the President. Courts have willingly and confidently predicted the effects on the executive's institutional interests of forced disclosure in criminal and civil litigation, and there is no reason that they should suddenly become incompetent to make the same judgments simply because the demand for information comes in the form of a congressional, rather than a judicial, subpoena.[164]

3. The Function of Judicial Review in Interbranch Conflicts

The consideration of *Nixon* and interbranch conflicts originating in the courts might, however, suggest a third justification, this one based on the function of judicial review in a constitutional democracy. In all of the decided cases, the constitutional question resulted from claims brought by a private litigant, just as the subpoena dispute in *Nixon* was the offshoot of an individual's criminal trial. In each case, the Court addressed the executive-legislative balance only as an incident to the individual claim and only because resolution of that claim rendered it necessary. But information disputes, the argument runs, involve purely "collective" disagreements

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163. *See, e.g., In re* Sealed Case, 121 F.3d 729, 751 (D.C. Cir. 1997) (concluding, based on predictions about the effect of disclosure on the quality of advice to the President, that the "presidential communications privilege" protecting documents from disclosure in judicial proceedings may extend to conversations to which the President was not a party; "limiting the privilege" to exclude such communications "would indeed impede effective functioning of the presidency"); Nixon v. Sirica, 487 F.2d 700, 721 (D.C. Cir. 1973) (upholding grand jury subpoena for Nixon tapes against assertion of executive privilege).

164. Professor Cox, writing just after the Court's decision in *United States v. Nixon*, disagreed with this conclusion. *See* Cox, *supra* note 2, at 1425-32. "I find marked differences," Cox explained, "between the questions raised by a claim of executive privilege during a judicial proceeding and those presented by an executive refusal of a congressional demand." *Id.* at 1426.

> Defining the rights and privileges of the Congress and President *inter sese* in the legislative process has never been a judicial function. Courts are accustomed to weighing the need for specific pieces of evidence in a judicial proceeding against the public interest in preserving the confidentiality of particular relationships, but they have no experience in weighing the legislative needs of Congress against other public interests.

Id. at 1425-26. The Court's willingness to weigh legislative and executive prerogatives in the intervening years, however, has undermined much of Cox's premise. Whatever the state of affairs in 1974, thirty years later it is simply no longer true that courts "have no experience in weighing the legislative needs of Congress against other public interests." *Id.* In any event, Professor Cox appears later to contradict his own arguments by suggesting a clear set of rules of the type he believes it inappropriate for courts to develop. *See, e.g., id.* at 1434 ("[T]he legislative right should prevail in every case in which either the Senate or the House of Representatives votes to override the Executive's objections, provided that the information is relevant to a matter which is under inquiry and within the jurisdiction of the body issuing the subpoena, including its constitutional jurisdiction.").

between institutional components of government; their resolution serves no purpose external to the immediate task of readjusting the constitutional balance. Only the former cases, therefore, warrant judicial resolution, for they alone further the federal courts' basic mission of providing a forum for adjudication of individual rights.[165]

Regardless how this defense is framed, its logic fails. If by "individual rights" one means *constitutionally secured* individual rights, then this justification would fail to include any of the non-information cases it purports to describe. In none of those cases did the aggrieved individual assert "that he was injured by an unconstitutional [government] action that *neither* branch constitutionally could have taken."[166] Each instead involved a challenge to conduct—the Postmaster's firing in *Myers*, the deportation order in *Chadha*, the budget cancellations in *Clinton*—that was acknowledged to be within the federal government's broad constitutional power if imposed by the proper department.[167] The only alleged constitutional infirmity, in other words, lay in the separation-of-powers question that the Court addressed, not in an abridgment of constitutionally protected individual rights—"those personal liberties that are secured against *all* government abridgments, president or congressional."[168]

Conversely, if this theory invokes individual rights in either the broader sense of "individual liberty" (defined generally as freedom from tyrannical government) or the narrower sense of non-constitutional individual interests, then it would fail to *exclude*

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165. *See id.* at 1423 (concluding that although the Court has properly decided cases "brought by or against a state or a private person who had a material stake in the outcome," "[t]he named parties in an action to enforce a subpoena against a claim of executive privilege might be the Congress or a congressional hody and the President"); *cf.* Raines v. Byrd, 521 U.S. 811, 833 (1997) (Souter, J., concurring) ("[A] dispute involving only officials, and the official interests of those, who serve in the branches of the National Government lies far from the model of the traditional common-law cause of action" that historically occupied the federal courts.); Sternstein, *supra* note 15, at 152, 154, 160 (arguing that "[t]he courts are best equipped to protect individual interests," but in information-access disputes "[t]he problem essentially involves several competing collective interests" and therefore "the people through their representative institutions . . . should be allowed to choose among the claims for ascendancy").

166. CHOPER, *supra* note 74, at 330.

167. *Id.* (noting that a true claim of individual right "can be remedied only by cessation of th[e] conduct, not merely by the constitutionally proper branch doing what the other has already done"). For Professor Choper, the independent constitutional status of the asserted right is the critical factor justifying judicial review. According to his "Separation Proposal," courts should refrain from hearing challenges only to the "constitutional validity of [presidential or congressional] action that affects individual 'freedom' in a way identical to what [the other branch] could have done pursuant to its constitutionally delegated authority." *Id.* at 272. But where one branch allegedly violates a true individual constitutional right, "then, in accord with the Individual Rights Proposal, the Court should intervene." *Id.*

168. *Id.* at 272.

disputes over congressional access to executive-branch information. This shortcoming is particularly clear with respect to the broader construction. Because the very purpose of divided government is preservation of individual liberty, that "[l]iberty is *always* at stake when one or more of the branches seek to transgress the separation of powers."[169] And as we have seen, information disputes, perhaps even more so than other types of executive-legislative conflict, can shift the interbranch balance in fundamental respects.[170] Their outcomes thus have the potential to alter profoundly what Justice Kennedy has called the "vertical axis" of separation of powers—the relationship "between each branch and the citizens in whose interest powers must be exercised."[171]

Equally undeniable is the impact of information disputes on more mundane individual interests. One of the primary bases for presidential refusals to satisfy Congress's information demands is the need to protect individuals from disclosure of allegations that, "although unsubstantiated, might work irreparable injury to private reputations."[172] As then-Attorney General Robert Jackson explained, the risks to individual interests are particularly grave where Congress seeks information about prosecutorial strategy or investigative activities over which the executive demands confidentiality.

> A disclosure of [confidential] sources would embarrass informants—sometimes in their employment, sometimes in their social relations, and in extreme cases might even endanger their lives. . . . Disclosure of information contained in the reports might also be the grossest kind of injustice to innocent individuals. Investigative reports include leads and suspicions, and sometimes even the statements of malicious or misinformed people. Even though later and more complete reports exonerate the individuals, the use of particular or selected reports might constitute the grossest injustice, and we all know that a correction never catches up with an accusation.[173]

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169. Clinton v. City of New York, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) (emphasis added); *see id.* ("Separation of powers was designed to implement a fundamental insight: concentration of power in the hands of a single branch is a threat to liberty."); Public Citizen v. U.S. Dept. of Justice, 491 U.S. 440, 468 (1989) (Kennedy, J., concurring in the judgment) ("When structure fails, liberty is always in peril.").

170. *See supra* notes 141-48 and accompanying text.

171. *Clinton*, 524 U.S. at 452; *see* Victoria Nourse, *The Vertical Separation of Powers*, 49 DUKE L.J. 749, 751-52 (1999).

172. Bishop, *supra* note 23, at 489-90; *see id.* at 487 (noting that among the "executive's interest in the privacy of certain . . . types of information," one "obvious example is the data, derogatory or otherwise, in the security files of individuals"); Cox, *supra* note 2, at 1401-02 (noting that many historical invocations of executive privilege were intended "to protect possibly innocent persons . . . against disclosure of the rumors and loose allegations often found in investigative reports"); *id.* at 1427 ("The Executive must therefore take it upon itself to protect individuals against disclosure of untested allegations and reports.").

173. Position of the Executive Department Regarding Investigative Reports, 40 Op. Att'y Gen. 45, 46-47 (1941); *see* Investigative Authority of the General Accounting Office, 12 Op. Off. Legal Counsel 171, 177-78 (1988) (noting the potential injury to individuals in disclosure of

The particular individuals may be unaware that their interests are threatened, but such a systemic impediment to recognizing and asserting an injury is an argument in *favor* of judicial involvement, not a reason to reject it.[174]

Information battles are therefore not "collective" controversies in any sense that distinguishes them from other executive-legislative cases. Neither category of conflicts implicates individual "rights," but both impact individual liberty and interests, and both can therefore lay an equal claim to judicial resolution consistent with the purposes and traditions of the federal courts.

No distinction, in sum, can explain why information disputes, alone among controversies between the President and Congress, warrant judicial avoidance on a political-safeguards rationale. This recognition goes far toward discrediting the escalation model, for it reveals that the clash between that model and the Court's broader approach is an affront not to foolish consistency but rather to the interests in regularity and analytical coherence that hold particular sway in matters of constitutional structure.[175] Those interests—indeed, the very foundations of the judicial method—direct that courts identify compelling reasons to depart in a specific setting from the approach they have adopted in the general one. The escalation model fails this challenge.

IV. REEVALUATING THE ESCALATION MODEL AND ITS PREMISES

The escalation model's incongruous place in the separation-of-powers context might be tolerable if there were strong reasons to trust its theoretical and historical narratives. Despite the fact that the broader jurisprudence has rejected its basic underpinnings, perhaps the escalation model merits its conventional status because it presents

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"unpublished details of allegations against particular individuals and details that would reveal confidential sources").

174. In any event, an individual's inability to assert his interest has never been thought a basis to deny a judicial forum for resolution of the controversy. *See, e.g.*, Powers v. Ohio, 499 U.S. 400, 410-11 (1991) (noting that third-party standing is appropriate when, *inter alia*, a party is hindered in asserting its own interests). This argument could be recast in doctrinal terms as an assertion that the rule of *Raines v. Byrd*, which held that "abstract dilution of institutional legislative power" is insufficient to confer standing on legislative plaintiffs, should not preclude litigation of interbranch information disputes. 521 U.S. 811, 826 (1997). Even if federal officials do not enjoy standing in their own right, *but see* U.S. House of Representatives v. U. S. Dep't of Commerce, 11 F. Supp. 2d 76, 89-90 (D.D.C. 1998) (three-judge panel) (holding that even after *Raines*, deprivation of information constitutes a legally cognizable injury to the House), the threat to third-party interests should suffice to satisfy Article III.

175. *See* Laurence H. Tribe, Saenz *Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future – Or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110, 164-65 (1999).

an accurate account of the interplay between constitutional structure and political process and a persuasive claim of fidelity to original intent. This Part thus returns as a de novo matter to the rationale and premises underlying that model—now properly identified through the analysis in Part II as an application of the political safeguards theory—and asks whether they comport with history, experience, and current scholarly understandings of the political process.

A. The Core Rationale

The basic theory of the escalation model begins with the commonplace recognition that the Constitution divides reciprocal powers between Congress and the President to ensure that each serves as a check on the other. From that premise, the theory concludes that those self-executing checks, left to deploy unfettered in the political process, will resolve information disputes in a manner that best reflects the constitutional balance between the branches.[176]

The second proposition, however, does not flow so easily from the first. Between them lie a number of implicit assumptions on which a close examination, informed by the broader scholarship on political-safeguards reasoning, casts serious doubt.

1. A Different Kind of "Checks and Balances"

Reference to the "system of checks and balances" between Congress and the President typically denotes the established safeguards in specific government processes that prohibit one branch from taking unilateral action without input from the other. This "first-order" system is designed to ensure participation in the particular activities at which the safeguards are targeted. Thus, where a bill is under consideration, the President possesses a veto power that Congress may override through super-majority vote. Or, to take another classic example, the appointment of principal executive officers results from the combined influence of the President's nomination power and the Senate's advice and consent function. Each of these safeguards is a routine, intentional, and intrinsic part of the particular process to which it applies.

The escalation model's invocation of "checks and balances," however, refers to a fundamentally different dynamic. The Constitution does not grant either branch a formal or self-executing

176. *See, e.g.*, Fisher, *supra* note 22, at 325 ("What informs the process of congressional access to executive branch information is the constitutional structure of separation of powers and the system of checks and balances.").

institutional role in information disputes. The two components of such controversies—congressional demand and presidential withholding—operate outside of the ordinary processes governed by the first-order system of checks and balances. Thus, a single congressional committee can, through issuance of a subpoena, make a demand backed by legal process for information within the executive branch.[177] That action does not require broader legislative approval, nor (because congressional subpoenas are not subject to the presentment requirement) is it vulnerable to presidential veto.[178] By the same token, whether to assert executive privilege in response to such a subpoena is wholly within the President's discretion. No constitutional process channels that decision or affords Congress any prescribed role.

Because information disputes circumvent formal constitutional processes, the first-order system of checks and balances cannot dictate their outcomes. Instead, the escalation model depends on a second-order system, in which the safeguards of the first order are converted for collateral use as tools of coercion or deterrence. The President has no conclusive means of vindicating an assertion of executive privilege, but he can threaten to use his veto power over unrelated legislation if Congress does not relent. Congress, in turn, can attempt to force disclosure of information by refusing to confirm nominees with no connection to the dispute or by denying funds for programs that are particularly important to the President. In this way, prerogatives intended to ensure interbranch participation in formal processes take on an entirely different character in information disputes: They become weapons through which each branch can pressure the other to bend to its will.[179]

This distinction points to a critical aspect of information disputes that a facile reference to "checks and balances" cannot capture. The first-order system is self-executing and dispositive: A

177. SENATE RULE XXVI(1), STANDING RULES OF THE SENATE; HOUSE RULE XI(2)(m)(1)(B), RULES OF THE HOUSE OF REPRESENTATIVES, 110th Cong. (2007).

178. Presentment is constitutionally required only for "Bill[s] which shall have passed the House of Representatives and the Senate." U.S. CONST. art. I, § 7, cl. 2. For an argument that the long-neglected Orders, Resolutions, and Votes Clause also requires presentment of congressional subpoenas, see Gary Lawson, *Burning Down the House (and Senate): A Presentment Requirement for Congressional Subpoenas Under the Orders, Resolutions, and Votes Clause*, 83 TEX. L. REV. 1373, 1374 (2005).

179. *See* Dinh, *supra* note 18, at 353 (defending the escalation model by arguing that Congress may "extort [desired] information from the executive by deploying this arsenal of coercive legislative weapons"). This second-order system is not, of course, exclusive to information disputes. Raw-power struggles routinely and appropriately determine the outcome of political disagreements between the President and Congress on a wide variety of matters. The point is that in information disputes, the self-executing first-order system is entirely unavailable, and therefore neither branch possesses any dispositive means of vindicating its interests in that context.

presidential veto defeats proposed legislation unless Congress can override it, just as the President cannot permanently appoint a principal officer whom Congress rejects. Although political considerations inform the decision whether to invoke each of these prerogatives, once that decision is made, no amount of political will is necessary to ensure that the checks succeed, nor can any amount of muscle defeat them. The second-order system that governs information disputes, however, depends entirely on this sort of political muscle and will. Congress cannot, simply by rejecting a president's prize judicial nominee, overcome an "unrelated" assertion of executive privilege; such a "check" will prevail only to the extent that Congress's will to force disclosure exceeds that of the White House to fight it. Information disputes therefore do not resemble the orderly processes of government that "checks and balances," construed in the first-order sense, channel and control. They are instead naked power struggles, raw "contests for political advantage."[180]

2. Political Motives, Constitutional Interests

The escalation model posits that the outcomes of these unrestrained power struggles will, in the words of the D.C. Circuit, optimally reflect the "country's constitutional balance."[181] That conclusion is warranted, however, only if the constitutional interests of each branch in some way *inform* those disputes. Unless such interests are a significant part of the mix, information disputes are purely political disagreements yielding purely political answers—"politics in, politics out."

The force of the escalation model therefore depends on one of two assumptions. The combatants in an information dispute must either act out of conscious motivation to further the long-term constitutional interests of the branch they represent, or their actions, although motivated by other considerations, must in fact further those interests in a systematic and reliable way.

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180. Cox, *supra* note 2, at 1420, 1432; Michael Stokes Paulsen, Nixon *Now: The Courts and the Presidency After Twenty-Five Years*, 83 MINN. L. REV. 1337, 1375-76 (1999) ("[T]he scope of executive privilege, as an incident of the autonomy of the executive from the other branches, is a function of the circumstances of any particular situation and the vigor with which the executive branch resists the demands . . . for information or materials concerning confidential executive branch deliberations . . . and the result of the struggles between or among the branches on this point . . . .").

181. United States v. AT&T (*"AT&T I"*), 551 F.2d 384, 394 (D.C. Cir. 1976).

a. Conscious Pursuit of Institutional Prerogatives

The first such assumption is belied both by first-hand accounts of information battles and by the conclusions of experts who study them. Participants in such battles report that short-term political calculations consistently trump the constitutional interests at stake. One veteran of the first Bush White House, for example, has explained that rational-choice theory predicts what he in fact experienced:

> The rewards for a consistent and forceful defense of the legal interests of the office of the presidency would be largely abstract, since they would consist primarily of fidelity to a certain theory of the Constitution. . . . The costs of pursuing a serious defense of the presidency, however, would tend to be immediate and tangible. These costs would include the expenditure of political capital that might have been used for more pressing purposes, [and] the unpleasantness of increased friction with congressional barons and their allies.[182]

Louis Fisher, one of the leading defenders of the political branches' competence and authority to interpret the Constitution independently of the courts,[183] acknowledges that politics and "practical considerations" typically override the legal and constitutional principles implicated in information disputes.[184] In his view, although debate about congressional access and executive privilege "usually proceeds in terms of constitutional doctrine, it is the messy political realities of the moment that usually decide the issue."[185] Indeed, Professor Peter Shane, who has extensively studied such conflicts, concludes that their successful resolution in fact *depends* upon the parties focusing only on short-term political

182. Nelson Lund, *Lawyers and the Defense of the Presidency*, 1995 BYU L. REV. 17, 35 ("[W]hen the costs to the president (and to those of his advisors with a broader responsibility for governance than that allocated to separation-of-powers lawyers) become significant, we should expect the lawyers' legal principles to be compromised or abandoned."). Even the Office of Legal Counsel, which has historically served as a politically insulated, quasi-judicial expositor of constitutional interests within the executive branch, approaches the assertion of executive privilege as "a practical undertaking that is not governed by fixed rules but by considerations of prudence that take into account political factors such as public reaction." Legislation Providing for Court-Ordered Disclosure of Grand Jury Materials to Congressional Committees, 9 Op. Off. Legal Counsel 86, 93 (1985).

183. *See, e.g.*, LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS 3 (1988) (arguing generally that "constitutional law is not a monopoly of the judiciary"); Nancy Kassop, *The Courts and the Political Branches: Interpretation, Accommodation, and Autonomy*, *in* POLITICS AND CONSTITUTIONALISM: THE LOUIS FISHER CONNECTION 55, 63 (Robert J. Spitzer, ed., 2000) ("One of Fisher's Hallmark contributions to the study of constitutional law is his firm belief in interpretation outside of the courts.").

184. Fisher, *supra* note 22, at 323.

185. Louis Fisher, *Even When The White House Yells Privilege, The Constitution Yields To Politics*, LEGAL TIMES, Apr. 27, 2004.

considerations.[186] When the participants "get institutional," Shane observes, non-judicial resolution "becomes vastly more difficult."[187]

b. Compatibility of Political Incentives and Institutional Interests

If the actors in an information dispute readily discard constitutional principle for political expediency, what then of the notion that political expediency nevertheless furthers constitutional interest as its incidental but inevitable result? This, of course, is the premise of Madison's Federalist 51, in which the escalation model places ultimate faith. According to this theory, the key to maintaining the constitutional balance between the branches is to "giv[e] to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."[188] The agents of each branch will act out of individual interest and political "ambition," but the effect of their behavior will be to aggrandize their respective departments. "The interest of the man," in Madison's famous words, is intrinsically "connected with the constitutional rights of the place."[189] This coupling of personal ambition and institutional interest is the core rationale driving the escalation model's self-executing system of interbranch boundary control.

But this rationale is also the focus of a growing body of scholarship attacking the basic premise of "incentive-compatibility" on which the political safeguards theory centrally rests.[190] That scholarship began in earnest a decade ago with Dean Kramer's observation that although *Garcia* "left us with a system of federalism that depends overwhelmingly on the political process to ensure an appropriate balance between state and federal governments," scholars had yet to understand "*how* [that process] protect[s] state and federal interests" and knew "amazingly little about the politics of allocating power."[191] Dean Kramer filled those gaps in two important respects. First, he recognized that the aspects of constitutional design that the political safeguards theory traditionally emphasizes do not, in fact, systematically harness the ambitions of federal officeholders in the

186. Shane, *supra* note 48, at 220 ("A problem is most likely to occur when one or the other branch behaves as if the stakes in a particular dispute include an overall adjustment in the relationship between the two branches.").

187. *Id.* at 220-22, 226 (noting that negotiations often break down when the parties focus on "presidential obligation and congressional prerogative").

188. THE FEDERALIST NO. 51, at 321-22 (James Madison) (Clinton Rossiter ed., 1961).

189. *Id.* at 322.

190. MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 95-99 (1999) (reframing the political safeguards theory in terms of incentive-compatibility).

191. Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1487, 1490, 1503-14 (1994).

service of the states' interests.[192] And second, he emphasized that one can understand the dynamics of the political process only by shifting the focus from "formal institutional arrangements"—the federal and state governments as personified actors—"to a more explic[i]t concern with the incentives of [individual] lawmakers, that is, to politics."[193] If we truly want to understand how the political process allocates authority between nation and state, Kramer argued, we need to examine how the ambitions of officeholders are actually "shaped by the political culture in which they live and the intermediate institutions through which they work."[194]

Dean Kramer's work prompted further critiques of the political safeguards rationale, and in particular its assumption of an inherent compatibility between the pursuit of political ambition and the advancement of institutional interest.[195] That scholarship also set the stage for the path-breaking work of Professor Levinson, who has both broadened and refined Kramer's insights about the critical importance of focusing on the real political incentives of individual officeholders. The core conclusion that emerges from Levinson's work has obvious implications for the escalation model: Whether we are talking about the relationship of the federal government to the states or that of the branches to one another, "[t]elling a persuasive story about how these political actors pursuing their various interests will generate the kind of self-aggrandizing institutions that constitutional law and theory envision turns out to be quite difficult."[196]

i. Madisonian Ambition

The self-interest of federal officeholders is principally the product of two complementary and overlapping forces. The first is what Madison simply termed "ambition"—the unalloyed desire for political and personal power. Intuitive appeal and scholarly consensus notwithstanding, "we should not be too quick to assume that a thirst

192. *Id.* at 1520 (concluding that "[t]he structural protections identified by Wechsler, Choper, and company are marginal at best" in maintaining an optimal balance between federal and state government). Dean Kramer ultimately concluded that political parties replaced the original "safeguards" in the *Garcia* model, protecting the states by linking the political fortunes of state and federal officeholders. *See* Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 292 (2000).

193. Kramer, *supra* note 191, at 1521.

194. *Id.* at 1522.

195. *See, e.g.*, Prakash & Yoo, *supra* note 105, at 1479 (noting that the "distinction between the constitutional rights of states and their temporary political interests means that we cannot expect the states to always defend federalism," and that states "will often be tempted by political circumstances to sacrifice federalism for some temporary advantage").

196. Levinson, *supra* note 133, at 920.

for power at the level of individual officials will aggregate to aggrandizement at the institutional level."[197] Close analysis of this dynamic reveals that an official's ambition in fact frustrates the constitutional interests of his branch at least as often as it furthers them.

Power and ambition can be defined many ways. To the extent political power is measured by the achievement of policy objectives, federal officials will often find it more fruitful to defer either to the "opposing" branch or to entities entirely outside of government.[198] Senators hawkish about the War on Terror, for example, will favor broad presidential authority to define and deter domestic security threats, just as a president for whom environmental interests are a lower priority will push for industry self-regulation over executive agency oversight.[199] Each of these actions will serve an official's ambition by advancing his agenda, but each will also diminish the authority and prerogatives of his institution.

Ambition can also assume more selfish forms: the desire for enhanced personal standing and the aspiration for higher office. Pursuit of this sort of ambition bears only a coincidental connection to the furtherance of constitutional prerogatives. Most important, the force of party loyalty bridges the legislative-executive divide in ways that often undermine the institution involved.[200] Political parties rule the fortunes of federal officeholders, divvying up access to the ballot, leadership positions within institutions, and indispensable support in seeking higher office. A legislator eager for the spoils of political success will therefore fare much better choosing party over branch where the two pull in opposite directions. The most obvious manifestation of this common-sense observation is the willingness of Congress, during periods of unified government, to cede core components of its constitutional authority in the service of the ruling party.[201]

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197. *Id.* at 927-28.

198. *Id.*

199. *Id.* at 928.

200. *See* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2317, 2327 (2006) (exploring the effect of political parties on the relationship between the legislative and executive branches); Levinson, *supra* note 133, at 952-53 (emphasizing the important influence of party loyalty on congressional behavior); Robert Cooter, *Who Gets on Top in Democracy? Elections as Filters*, 10 S. CT. ECON. REV. 127, 139-40 (2002) (noting that when one political party controls both the legislature and the executive, party structure undermines the separation of powers).

201. Examples of this phenomenon abound. One of the more noteworthy in recent memory was the serious consideration by Republican legislators of the so-called "nuclear option," which would have significantly diluted the Senate's role in shaping the composition of the judicial branch. Melanie Kirkpatrick, *And the Nominees Are . . .*, WALL ST. J., Nov. 15, 2004, at A23

Two subsidiary points further attenuate the link between ambition and institutional interest. First, the search for power will typically drive officeholders to compete within institutions, not against the opposing branch. "Surely a power-maximizing Senator," Professor Levinson observes, "would receive a higher return on her investment of political capital by angling for a powerful committee chair than by pushing for some procedural innovation, like a legislative veto, that marginally shifts power to the Senate as an institution."[202] Competition along this internal axis is unlikely to aggrandize the institution in which it takes place. Second, politics is an inherently fluid profession in which individuals routinely move from one branch to another. The inevitable result is a reduced sense of identification with that individual's current branch and a concomitantly lessened incentive to defend its prerogatives.[203]

Each of these general observations applies *a fortiori* where the branches collide over access to information. Party loyalty will consistently deter legislators from forcing a friendly president to assert executive privilege, especially when the only mechanism for coercing disclosure is the defeat of nominees or bills that the legislators themselves presumably favor. For the same reasons, the incentive of a president politically aligned with Congress to defend the secrecy of executive-branch information will lag far behind the true institutional interests in doing so. Internal competition within the branches will not temper this effect, and mobility between them will only exacerbate it: A legislator with presidential aspirations will have little to gain by attacking the constitutional interests of the office he hopes to occupy, just as an agency head with the opposite ambitions will hesitate before precipitating a showdown with Congress over the confidentiality of executive files.

ii. Public Opinion

A second force, implicit in the first but worthy of separate emphasis, uniquely undermines the political safeguards rationale in the particular context of information disputes. In a democracy, "[g]overnment behavior is driven at least as much by the interests of constituents as by the self-interested preferences of their representatives."[204] The "interest of the man," in other words, is largely determined by the preferences of the voting public. Even if the

("Senate rules would be reinterpreted so that 51 votes, not a supermajority of 60, would be needed to end debate on judicial nominees and move to an up-or-down vote on the floor.").

202. Levinson, *supra* note 133, at 928.

203. *Id.* at 929.

204. *Id.* at 922.

ambition of an officeholder aligned closely with the constitutional interests of his branch, the official could pursue such ambitious motives only to the extent that his constituents agreed with his position.[205]

Public perceptions of merit thus play a critical role in the resolution of information disputes. The nature of the second-order system of checks and balances means that the prevailing branch will be the one that enjoys the popular support necessary to invoke and sustain the coercive collateral measures with which such disputes are fought. Accordingly, the theoretical coherence of the escalation model depends not only on the positive correlation of ambition and constitutional interest, but also on a close link between the reality and the perception of constitutional merit—between the answer the Constitution contemplates and the answer the voting public wants.

For two reasons—one structural, one historical—such a link simply does not exist. The distribution of public support in an information dispute is unlikely to track in any reliable way the constitutional validity of the competing positions. First, public sentiment about the substantive controversy that gives rise to the information conflict will almost invariably eclipse any interest in the conflict itself. "Separation of powers issues are not the sort that voters get exercised about";[206] voters do, however, pay close attention to the debates—about war, national security, or high-profile appointments—that spawn arguments over access to information. Thus, to cite but one example, where a president enjoys broad popular support on his military agenda, the voting public is unlikely to back Congress's demand for related White House documents, even where the constitutional balance would plainly favor such access.

Second, to the extent the public does focus specifically on information-access issues, considerations external to the particular conflict are likely to jaundice its views. Ironically, the case that formally recognized executive privilege, *United States v. Nixon*,[207] also severely crippled the ability of future presidents to invoke it for valid reasons. The impact of the Nixon presidency reverberates with every mention of executive privilege, and any effort to protect the confidentiality of White House papers prompts charges of conspiracy,

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205. *See id.* at 929-32 ("[U]nless empire-building systematically benefits not just officials, but also the voters and interest groups who make up their constituencies, it is probably a poor candidate for the starring role in which it has been cast by constitutional law and theory.").

206. JOHN HART ELY, WAR AND RESPONSIBILITY 175 n.34 (1993).

207. United States v. Nixon, 418 U.S. 638 (1974), discussed *supra* text accompanying notes 157-61.

corruption, and cover-up.[208] Media fuel this suspicion, not only because the fourth estate is a powerful institutional lobby in favor of disclosure,[209] but also because the modern twenty-four-hour cable news cycle feeds on rumors of high-level malfeasance. The result, as one commentator has put it, is that "the purported trump card in the President's hand, the claim of executive privilege, is actually a joker," because "even a meritorious assertion of privilege can harm the president's political standing."[210] Congress, by contrast, can score political points by forcing the President to invoke that privilege, even if the information demand that prompts the response is abusive or frivolous.[211] This dynamic represents a serious distortion of the incentives the escalation model presupposes. Where Congress can sustain a constitutionally suspect information demand *because* of the political ramifications, not *despite* them, the mechanism at the core of the escalation model breaks down.[212]

The point, however, is not that the political process systematically advantages one branch over the other. Some forces in that process, such as the political salience of the President and his agenda, clearly favor the executive. Others, such as the public's equation of confidentiality with corruption, just as clearly aid

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208. *See* Mark J. Rozell, *Executive Privilege and the Modern Presidents: In Nixon's Shadow*, 83 MINN. L. REV. 1069, 1071 (1999) ("Every President who has asserted executive privilege since [Nixon] has been subject to unflattering characterizations that he is engaging in Nixonian tactics to conceal and deceive."). For examples of this phenomenon, see Miller, *supra* note 9, at 638-39 (describing the difficulty with which President Clinton met in trying to withhold documents relating to Whitewater on the ground of executive privilege); *see also id.* at 657-68 (describing similar difficulties faced by President Reagan).

209. *See* Marshall, *supra* note 9, at 810-11.

210. *Id.* at 811. White House officials from both parties have confirmed this observation. President Clinton's White House Counsel, for example, explained that "the current state of politics is such that, certainly since Richard Nixon, if there's anything that Congress really wants whatever the status of the law of executive privilege, I don't think a president can withstand the political pressure put on to turn things over." Ellen Nakishama & Dan Eggen, *White House Seeks to Restore Its Privileges; Congress Finding Bush Administration Strongly Resists Some Requests for Internal Documents*, WASH. POST, Sept. 10, 2001, at A2. Likewise, President Reagan, explaining his decision to allow congressional access to documents that had sparked a heated interbranch dispute, stated, "I can no longer insist on executive privilege if there is a suspicion in the minds of the American people that it is being used to cover up wrongdoing." Daniel Benjamin, *Mutually Assured Corruption*, WASH. MONTHLY, Jan. 1986, at 12.

211. *Cf.* Marshall, *supra* note 9, at 811 (noting that "invocation [of executive privilege] is often so damaging to a President that forcing the President to claim it can mark the victory of his opponents by itself"); Miller, *supra* note 9, at 674 ("Because Congress's interests are adverse to those of the executive when a committee request is met with an assertion of executive privilege, Congress's institutional objectives and ego extinguish objectivity vis-a-vis executive interests.").

212. *Cf.* Office of Legal Counsel, Legislation Providing for Court-Ordered Disclosure of Grand Jury Materials to Congressional Committees, 9 Op. Off. Legal Counsel 86, 92 (1985) (stating that for Congress, "negotiations for access to documents over which there was a potential claim of executive privilege . . . have entailed both the expenditure of time and political capital").

Congress. The point, rather, is that none of those forces are plausible proxies for the important constitutional interests implicated in disputes over information. The ambitions of executive and legislative actors do not correlate in any systematic way with the constitutional prerogatives of the branches they serve, and the public perceptions that shape and channel those ambitions assign to the competing arguments political values that are unrelated, if not inverse, to constitutional merit. Contrary to Madison's theory and conventional belief, in short, the "interest of the man" in seeking or denying access to information is not logically "connected to the constitutional rights of the place." As a result, there is no reason to believe—and every reason to doubt—that the political process will yield constitutionally optimal outcomes to information disputes.

B. The Anti-Judicial Premises

The escalation model is not just an account of why the political process resolves information conflicts in a manner reflective of the constitutional balance. It is also fundamentally an account of why courts cannot replicate, and therefore should not attempt to usurp, that function. Three premises collectively support this anti-judicial thesis. According to those premises, resolution of information disputes is outside the judiciary's proper domain because courts lack the requisite abilities to decide those cases, because their decisions will disrupt and distort interbranch dynamics, and because the Framers did not prescribe them such a role.[213] This Section evaluates each premise in turn, concluding that none alone—nor all in concert—can salvage a model gutted of its core rationale.

1. Inability to Identify and Balance Interests

The first of these premises—the attack on judicial competence—falls along with the escalation model's basic rationale. It may be true, as this premise asserts, that judicial reasoning will fail precisely to discern the real interests of each branch in a particular information dispute, and it may further be true that "mushy judicial balancing test[s]"[214] are an inelegant means of deciding which of those interests should prevail.[215] But the question of competence is necessarily relative: Are judicial resolutions—imperfect though they

213. *See supra* notes 19- 28 and accompanying text.

214. Paulsen, *supra* note 180, at 1341.

215. *See supra* notes 19-21 and accompanying text.

are—more satisfactory as a constitutional matter than the outcomes that result from the political process?

The collapse of the escalation model's underlying theory of incentive-compatibility, combined with the Supreme Court's general approach to executive-legislative conflict, points to a clear answer. As Part III demonstrated, courts have employed the tools of judicial analysis to identify and weigh competing institutional interests in materially indistinguishable contexts and with results deemed good enough for government work.[216] One can at least say with confidence that courts purport to focus on the constitutional interests at stake (even if they sometimes lack perfect insight) and look to constitutional principles for the proper balance (even if the result may sometimes seem tenuous). The political process, however, does not warrant even this modest level of confidence. Part IV.A demonstrated that the outcomes of unmediated information disputes are keyed to the political incentives of the participants and the preferences of the voting public, neither of which correlates in any reliable way with constitutional interest or principle.[217] Simply put, between these two alternatives—a system that imperfectly answers the right question and a system that perfectly answers the wrong one—the choice seems plain.

2. The Destabilizing Effect of Judicial Precedent

Much the same logic defeats the second premise, which eschews judicial involvement on the ground that "[i]nterjecting the principled decisions of the courts into" the ongoing dialogue between Congress and the President "would tend to prejudice future choices between given collective interests when the options of the majoritarian branches should remain unimpaired."[218] This premise loses all persuasive force when one recognizes that purely political outcomes distort the constitutional balance as often as they reflect it. Like the competence question, this issue is ultimately comparative, and if adjudicated resolutions are constitutionally preferable to politically negotiated ones, then binding judicial precedent is not a wrench in the well-oiled interbranch machinery, but rather an indispensable tool in preserving the balance between Congress and the President.

These observations suffice to rebut the claim that judicial precedent has no place in battles over information. But this second premise nevertheless merits closer examination because it provides a

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216. *See supra* notes 149-164 and accompanying text.

217. *See supra* notes 182-212 and accompanying text.

218. Sternstein, *supra* note 15, at 162; *see supra* notes 22-24 and accompanying text.

useful window through which to assess the basic normative position at the heart of the escalation model. Central to the preference for fluidity over fixed principles is a judgment that the constitutional line between congressional power to obtain information and presidential power to withhold it not only is, but ought to be, a politically and historically contingent one. According to Louis Fisher, "the messy political realities of the moment . . . usually decide the issue," and that is how it should be: "Attempts to announce precise constitutional boundaries between the two branches, indicating when Congress can and cannot have information, are not . . . even desirable."[219] "To be sure," another commentator writes, "the relative powers of Congress and the President would change over time if interbranch disputes were generally negotiated rather than litigated,"[220] but the dispositive role of "political contingencies" counts among the escalation model's "several advantages over reliance upon the courts."[221] Thus, according to this normative proposition, as the President's poll numbers climb, the hegemony of the executive branch over information should expand. When, on the other hand, Congress is the favored branch, legislators should be permitted to peer deeper into the executive's internal affairs and deliberations.[222]

That proposition undeniably offers some intuitive appeal: The branch that holds the people's trust and confidence, it would seem, should have greater authority to decide whether disclosure serves the public interest. But the proposition just as undeniably runs contrary to the ordinary preference in matters of constitutional structure. Capturing the general presumption, Professor Tribe has written that the need for constancy and stability is nowhere greater than in matters of governmental design: the "mechanical rules under which government is to be organized and the concrete steps the government's separate levels and branches must take" in discharging their constitutionally prescribed duties.[223] The Supreme Court has expressed the same preference for "high walls and clear distinctions"

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219. Fisher, *supra* note 185.

220. Entin, *supra* note 16, at 223.

221. *Id.* at 221.

222. Professor Rozell captures this general premise:

> Our constitutional system cannot guarantee certitude with regard to how every information policy dispute in government will be resolved. Nor should it. Two executive privilege claims that, on the surface, appear equally valid may be treated very differently from one another given different circumstances (e.g., political composition of Congress, membership of a particular investigating committee, popularity of the President, etc.).

ROZELL, *supra* note 18, at 153-54.

223. Tribe, *supra* note 175, at 164-65.

between the relative powers of the branches, precisely because anything less might shift in "the heat of interbranch conflict."[224]

Indeed, further reflection suggests that the escalation model's preference for a politically contingent allocation of authority may have it precisely backward. As Professor Cox himself recognized, the "[a]bility to determine what information is released, even within narrow limits, gives enormous power to influence political affairs."[225] Thus, instead of moderating the effects of political fortune, the escalation model amplifies them. It bestows upon the dominant branch yet another "potent political weapon"[226]—access to or control over critical information—and therefore accelerates the accumulation of power in the body whose agenda is already least constrained by the external check of a watchful public.

That effect undermines what is generally considered the fundamental purpose of divided government: to foster accountability between the branches and thereby protect the people from arbitrary and oppressive rule.[227] Applied to this context, that rationale would dictate an *inverse* relationship between the branches' relative political standing and their power over information. Precisely at those times when the public is most willing blindly to trust the executive, Congress's ability to obtain information necessary to oversee the President's activities should be most robust. By the same token, the executive's ability to preserve confidences over internal deliberations, and thus to function effectively as an independent branch capable of checking congressional excess, is most essential when the President's political standing plummets.[228] The basic concept of a tripartite system thus provides a compelling reason to doubt the wisdom of a

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224. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 239 (1995).

225. Cox, *supra* note 2, at 1431.

226. *Id.* at 1433.

227. *See* Brown, *supra* note 109, at 1514 (arguing that the separation of powers "is a vital part of a constitutional organism whose final cause is the protection of individual rights"); *cf.* THE FEDERALIST NO. 47, at 313 (James Madison) (Modern Library ed., 1937) ("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 he pronounced the very definition of tyranny.").

228. As Professor Johnsen explains, "[i]n times of constitutional crisis and a weakened presidency, assertions of executive privilege become particularly easy targets. It is precisely during such times of difficulty, however, that respect for the principle of executive privilege, and maintaining a principled approach to the application of the privilege, is most critical." Johnsen, *supra* note 24, at 1140. Somewhat curiously, Professor Johnsen's recognition of the need for a mediating force in times of interbranch imhalance does not dissuade her from the escalation-model camp. "The institutional conflicts and political motivations sometimes inherent in this aspect of the relationship between the President and Congress," she argues, "are best resolved through a process that allows for flexibility, a balancing of competing interests, and compromise." *Id.* at 1139.

model that, by its very design, compounds the power imbalance between the branches during times of crisis—whether the result is to give Congress the ability to micromanage a weakened presidency by prying into its innermost deliberations, or instead to give a dominant executive the power to hide even its most suspect conduct from congressional scrutiny.

3. Original Intent

The final pillar of the escalation model is its claim of fidelity to original intent. What precisely the Founders believed about the nature of judicial review is, of course, a vast subject, one that occupies volumes of scholarship.[229] This Article does not purport to join that broad debate—nor need it do so, because proponents of the escalation model themselves generally eschew a full consideration of the historical record.

We will instead focus on the source that generally begins and ends originalist justifications of the escalation model: the Founding-era writings of James Madison. In Federalist No. 49, for example, Madison argued that because the branches are "perfectly coordinate," none of them "can pretend to an exclusive or superior right of settling the boundaries between their respective powers."[230] The replacement for judicial supervision of the boundaries between the branches, Madison explained in the oft-quoted passage of Federalist 51, was to be a self-reinforcing system of "opposite and rival interests" shaped by the force of ambition set against competing ambition. A preference—if not a command—for political over judicial resolution of interbranch disputes is even more apparent in another passage that escalation-model proponents often overlook. "There is not one Government," Madison argued,

> in which provision is made for a particular authority to determine the limits of the constitutional division of power between the branches of the Government. In all systems there are points which must be adjusted by the departments themselves, to which no one of them is competent. If it cannot be determined in this way, there is no resource left but the will of the community, to be collected in some mode to be provided by the [C]onstitution.[231]

The historical record, however, is not nearly so conclusive as these selective passages suggest. Indeed, even were the evidentiary

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229. *See, e.g.*, ROBERT LOWRY CLINTON, *MARBURY V. MADISON* AND JUDICIAL REVIEW (1989); SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION (1990); Dean Alfange, Jr., *Marbury v. Madison and Original Understandings of Judicial Review: In Defense of Traditional Wisdom*, 1993 SUP. CT. REV. 329.

230. THE FEDERALIST NO. 49, at 255 (James Madison) (Garry Wills ed., 1982).

231. 1 ANNALS OF CONG. 520 (Joseph Gales ed., 1789).

universe limited to Madison's own writings, as escalation model proponents sometimes appear to assume, the picture would be far from clear. On the judicial role in defining interbranch boundaries, Madison "was guilty, and guilty as a matter of public record, of about as complete inconsistency . . . as was possible."[232] Ten years after declaring on the House floor the branches' equality in interpretive matters, he appeared to reverse course, acknowledging that "the judicial department is, in all questions submitted to it by the forms of the Constitution, to decide in the last resort . . . in relation to the authorities of the other Departments of the [federal] Government."[233] And by the time he retired to Montpelier, Madison had adopted a position almost directly opposed to the statements from which the escalation model seeks to draw historical legitimacy: "[I]t may always be expected that the judicial bench, when happily filled, will . . . most engage the respect and reliance of the public as the surest expositor of the Constitution . . . in questions within its cognizance concerning the boundaries between the several departments."[234]

But even if we ignore Madison's "rapid changing of mind,"[235] crediting only those assertions that support the escalation model, contemporary evidence of original intent cuts against his views. The more general predicate to Madison's argument—that each branch enjoys coordinate authority to determine the extent of its own powers—immediately confronts *Marbury v. Madison*, which has been construed as emphatically declaring, little more than a decade after Madison's protestations to the contrary, that courts are the ultimate arbiters of constitutional meaning.[236] If the Framers intended Article

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232. 2 W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 1011 (1953); *see also* CHOPER, *supra* note 74, at 242; Ralph L. Ketcham, *James Madison and Judicial Review*, 8 SYRACUSE L. REV. 158, 158 (1957) (noting that between 1787 and 1800, Madison took a "bewildering number of positions on the question of interpretation of the Constitution").

233. 6 THE WRITINGS OF JAMES MADISON 294 (Gaillard Hunt ed., 1906).

234. 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 350 (Philadelphia, J.B. Lippincott & Co. 1867).

235. Ketcham, *supra* note 232, at 159. Professor Paulsen disputes the inconsistency in Madison's views, attributing the appearance of a shift to Madison's recognition "that the judiciary generally would be the *last* branch to act of a particular question by virtue of the order in whicb the branches' respective powers would be exercised." Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 235 (1994) (emphasis in original). Even Professor Paulsen is forced to admit, however, that "Madison's views changed over time," *id.* at 235 n.53, and that Madison's post-ratification views "form the strongest evidence against [Paulsen's] thesis" attacking the modern assumption of judicial supremacy in constitutional interpretation. *Id.* at 309. A definitive answer for present purposes is unnecessary; it is enough to ask, as Professor Paulsen does, "[i]f Madison himself would not take the premise of [interpretive coordinacy] so far, how can we?" *Id.*

236. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176-78 (1803). The contemporaneous meaning of *Marbury* is, of course, the focus of intense and sophisticated debate. Recent

III to bestow the authority, indeed the duty, to invalidate legislation that exceeds Article I, then presumably they also intended courts to exercise that authority where the political branches seek to cross the constitutional boundary separating them.

That reading of original intent finds strong support in another source of "contemporaneous and weighty evidence of [the Constitution's] true meaning," the debates of the First Congress.[237] The lengthy discussions that culminated in the "Decision of 1789" focused on a classic question of the boundary between executive and legislative authority: whether the power to remove executive officers resided in the President alone, in the Senate alone, or in some combination of the two. A recurring subject in that debate was whether the House of Representatives should express an opinion on the constitutional issue. Madison's position is well known:[238] He argued strenuously in favor of the President's sole removal power and insisted that the House should decide the question for itself since the courts, in his view, did not have authority to settle it.[239]

Madison's colleagues, however, repeatedly disagreed with his minor premise. Elbridge Gerry, for example, would have left the issue to the Senate and President (the House, he thought, "ha[d] nothing to do with it"), and if they disagreed, "let it go before the proper tribunal; the judges are the constitutional umpires on such questions."[240] Congressman Smith of South Carolina concurred, blasting any "legislative construction" as "an infringement of the powers of the Judiciary," which alone had authority "in expounding the constitution."[241] Others thought that a decision by the House could do no harm, since, in the words of Representative Sylvester, "[i]t is

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scholarship contends that, in fact, the case "broke no new ground in the theory or practice of judicial review" and announced only the proposition "that courts had the same duty and the same obligation to enforce the Constitution as everyone else, both inside and outside of government." Larry D. Kramer, *We the Court*, 115 HARV L. REV. 4, 89-90 (2001); *see also* Paulsen, *supra* note 235, at 245 (arguing that the structure of *Marbury* actually "proves the case for coordinate review hy all branches, not judicial supremacy").

237. Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 297 (1888), *overruled in part on other grounds*, Milwaukee County v. M. E. White Co., 296 U.S. 268 (1935); *see also* Lynch v. Donnelly, 465 U.S. 668, 673-74 (1984) (citing the First Congress' provision for congressional chaplains as evidence that such a practice does not violate the Establishment Clause); Williams v. United States, 289 U.S. 553, 573-74 (1933) (relying on the Judiciary Act of 1789 as evidence of constitutional meaning).

238. *See, e.g.*, Myers v. United States, 272 U.S. 52, 115 (1926) (recounting the debates and Madison's arguments).

239. 1 ANNALS OF CONG. 520 (Joseph Gales ed., 1789) ("I beg to know, upon what principles it can be contended, that any one department draws from the constitution greater powers than another, in making out the limits of the powers of the several departments?").

240. *Id.* at 491-92.

241. *Id.* at 488-89.

certain that the Judiciary will be better able to decide the question of constitutionality in this way than any other"; "if we are wrong," Sylvester reasoned, "they can correct our error."[242] Even those, such as Elias Boudinot of New Jersey, who opined that it would "be improper to leave this question to the judges" did so *not* because they agreed with Madison on that point, but rather because they feared "much inconvenience if the President does not exercise this prerogative *until* it is decided by the courts of justice."[243]

These views were neither isolated nor anomalous. Rather, they ran as a thread throughout the House deliberations, with legislator after legislator standing to urge his colleagues to "leave the constitution to the proper expositors of it."[244] And although these debates only scratch the surface of the historical record on the subject, they do point to an assumption contrary to the unexamined premise so commonly cited in support of the escalation model. A significant portion of Madison's contemporaries appear to have assumed—as Madison himself later came to believe—that the courts, not the political process, would determine the constitutional balance among the branches. There is no hint that interbranch disputes over access to information were somehow excepted from that general principle.

CONCLUSION

Professor Cox, as it turns out, was more prescient than those who built upon his work. He was keenly aware of the perils presented by a system in which access to information is purely a function of political ambition and public sentiment. Indeed, he had seen those dangers first-hand—in President Nixon's repeated claims of executive confidentiality, in the misdeeds that such claims both enabled and concealed, and in the resulting harm inflicted upon the country. "Secrecy, if sanctified by a plausible claim of constitutional privilege," Cox had learned, "is the easiest solution to a variety of problems. The

242. *Id.* at 585; *see id.* at 582 (Baldwin) ("Gentlemen say it properly belongs to the Judiciary to decide this question. Be it so. It is their province to decide upon our laws; and if they find this clause to be unconstitutional, they will not hesitate to declare it so . . .").

243. *Id.* at 488 (emphasis added).

244. *Id.* at 572 (Page); *see, e.g.*, *id.* at 489 (Boudinot) ("A great deal of mischief has arisen in the several States, by the Legislatures undertaking to decide constitutional questions. Sir, it is the duty of the Legislature to make the laws; your judges are to expound them."); *id.* at 477 (Smith) ("[T]he question of right, if it is one, [should be] left to the decision of the Judiciary. . . . I conceive it can properly be brought before that tribunal; the officer will have a right to a mandamus to be restored to his office, and the judges would determine whether the President exercised a constitutional authority or not."); *id.* at 485 (White) ("I would rather the Judiciary should decide the point, because it is more properly within their department."); *id.* at 486 (White) ("[I]f any one supposes himself injured by their determination, let him have recourse to the law, and its decision will establish the true construction of the constitution.").

claim of privilege is a useful way of hiding inefficiency, maladministration, breach of trust or corruption, and also a variety of potentially controversial executive practices not authorized by Congress."[245]

The intervening decades have certainly borne witness to those warnings, but experience has also revealed that excessive presidential confidentiality is only one possible manifestation of the danger the escalation model poses. The broader concern is that disagreements of profound and enduring constitutional significance continue to turn entirely on the political pressures of the moment. Bargaining in a stark partisan glare, unmediated by even the shadow of judge-made law or the prospect of judicial resolution, the branches have prevailed or surrendered in these disputes depending on considerations that have nothing to do with a principled application of constitutional structure. The resulting pattern, moreover, has been one of alternating extremes. Episodes of presidential popularity have permitted increases in secrecy, leading to malfeasance that is uncovered only after political fortunes have changed. The aftermath of those revelations, in turn, prompts intense congressional scrutiny that too often devolves into a political tool rather than an earnest effort to conduct oversight. This ongoing cycle of executive and legislative excess is hardly the salutary process that Madison envisioned; the damage to good government that occurs at its crests and troughs is simply too great. Courts must provide a moderating influence, stabilizing the flow of information between the branches in a way that political safeguards alone cannot.

245. Cox, *supra* note 2, at 1433.