

**SOLAR POWER STRUGGLE: THE INTER-BRANCH DISPUTE OVER INFORMATION IN THE SOLYNDRA CONGRESSIONAL INVESTIGATION**

*Jason M. Crawford\**

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\*J.D., Georgetown University Law Center; B.A./M.A. Oxford University, B.A. Georgetown University.

## I. INTRODUCTION

The Solyndra congressional investigation prompted an inter-branch struggle over President Obama's withholding of information. One-time presidential candidate Michelle Bachmann went so far as to call Solyndra a "historic scandal" worse than Watergate.<sup>1</sup> However, unlike Watergate, the Solyndra investigation did not lead to a constitutional showdown between the branches of government. Rather, the White House engaged in the sort of give-and-take with Congress that the Constitution encourages. On the other hand, the congressional subcommittee investigating the Solyndra controversy fell short of the good-faith negotiation envisioned by the Framers of the Constitution.

This article examines the Solyndra Congressional investigation as a case study in how the executive and legislative branches should fulfill their constitutional roles while negotiating over access to information. The article concludes by suggesting a legal standard that a court could have used if this inter-branch conflict had been litigated in federal court.

## II. EXECUTIVE PRIVILEGE & THE CONGRESSIONAL POWER TO INVESTIGATE

The text of the Constitution does not explicitly mention executive privilege.<sup>2</sup> Similarly, no constitutional language clearly authorizes Congress to subpoena information from the executive branch.<sup>3</sup> Rather, the Supreme Court has held that the prerogatives of presidential confidentiality and congressional inquiry are rooted in the Constitution's system of checks and balances.<sup>4</sup> Of course, the interests of presidential confidentiality and congressional accountability are often in tension. The following subsections will examine how the Framers approached this tension and explain how the Supreme Court has reconciled these competing interests.

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<sup>1</sup> Christian Heinze, *Bachmann: Solyndra is Worse than Watergate*, THE HILL (Nov. 18, 2011, 1:38 PM), <http://gop12.thehill.com/2011/11/bachmann-solyndra-is-worse-than.html>.

<sup>2</sup> *In re Sealed Case (Espy)*, 121 F.3d 729, 743 (D.C. Cir. 1997).

<sup>3</sup> *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927) (finding that the Congress' power to conduct oversight is inherent in its power to legislate).

<sup>4</sup> *United States v. Nixon*, 418 U.S. 683, 712–13 (1974); *Daugherty*, 273 U.S. at 175.

A. *The Framers' Perspective*

The Framers created a system that recognized the competing interests of presidential confidentiality and congressional accountability. They understood that the President needed a degree of confidentiality to make informed decisions.<sup>5</sup> At the same time, the Framers did not intend for the President to have absolute confidentiality and therefore, equipped Congress with the power to oversee the White House.<sup>6</sup>

The Framers feared a tyrannical executive and wanted Congress to be the strongest of the three branches.<sup>7</sup> *Federalist 51* explains that “[i]n a republican [form of] government, the legislature necessarily predominates.”<sup>8</sup> Based upon lessons from history under the British monarchs, the country’s founders understood the dangers of an uncontrolled executive and wanted the legislature to investigate wrongdoing in the executive branch.<sup>9</sup> At the Constitutional Convention, George Mason said that Congress possessed not just legislative power, but also “inquisitorial powers” and must “meet frequently to inspect the Conduct of the public offices.”<sup>10</sup>

The Framers believed that the competing interests of presidential confidentiality and congressional accountability could coexist in a system of separated powers because each political branch would fight to protect their own prerogatives against encroachment by the other.<sup>11</sup> *Federalist 47* refers to such a system of checks and balances as an “invaluable precept in the science of politics.”<sup>12</sup>

Indeed, the tension between presidential confidentiality and congressional accountability goes as far back as the presidency of George Washington.<sup>13</sup> In 1794, the Senate requested copies of correspondence

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<sup>5</sup> THE FEDERALIST NO. 64 (John Jay) (recognizing that the Constitution entrusts the President with certain matters that require “secrecy”).

<sup>6</sup> LOUIS FISCHER, *THE POLITICS OF EXECUTIVE PRIVILEGE* 5 (2004).

<sup>7</sup> MARK J. ROZELL, *EXECUTIVE PRIVILEGE: PRESIDENTIAL POWER, SECRECY AND ACCOUNTABILITY* 11–12 (3d ed. 2010).

<sup>8</sup> THE FEDERALIST NO. 51 (Alexander Hamilton & James Madison).

<sup>9</sup> ROZELL, *supra* note 7, at 11.

<sup>10</sup> 2 THE RECORDS OF THE CONSTITUTIONAL CONVENTION OF 1787, at 206 (Max Farrand, ed., 1966).

<sup>11</sup> THE FEDERALIST NO. 51 (James Madison) (Oxford Univ. Press ed., 2003) (“Ambition must be made to counteract ambition.”).

<sup>12</sup> THE FEDERALIST NO. 47 (James Madison).

<sup>13</sup> Stephen L. Carter, *Obama Should Still Resist Congress on Solyndra*, BLOOMBERG (Nov. 10, 2011, 10:39 PM), <http://www.bloomberg.com/news/2011-11-11/obama-should-still-resist-congress-on-solyndra-stephen-carter.html>.

between the French government and the United States ambassador.<sup>14</sup> Washington believed that disclosing such correspondence would harm the public interest.<sup>15</sup> After consulting with his Cabinet, Washington decided that he could constitutionally withhold some of the information.<sup>16</sup> Washington wrote to the Senate to let them know that he was sending copies of the correspondence “except in those particulars [which] in [his] judgment, for public considerations, ought not to be communicated.”<sup>17</sup> The first Congress never challenged Washington on this withholding of information, thus creating the precedent that the executive could refuse to disclose communications if the purpose was to protect the secrecy of communications and such a goal was in the public’s interest.<sup>18</sup>

As was the case in the Washington example, most executive privilege disputes regarding access to information are resolved informally without the need for litigation.<sup>19</sup> However, as the next section explains, some disputes have found their way into federal court, thus shaping the legal contours of executive privilege.<sup>20</sup>

#### B. Judicial Interpretation

The leading case on executive privilege is *United States v. Nixon* in which President Nixon invoked executive privilege when Watergate Special Prosecutor Leon Jaworski sought access to tape recordings of Nixon’s conversations with White House advisors.<sup>21</sup> President Nixon argued that he had absolute immunity from requests for information from a grand jury.<sup>22</sup> In fact, Nixon’s attorney, James D. St. Clair claimed that the “[P]resident want[ed] [him] to argue that he [wa]s as powerful a monarch as Louis XIV, only four years at a time, and [wa]s not subject to the processes of any court in the land.”<sup>23</sup>

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<sup>14</sup> ROZELL, *supra* note 7, at 30–32.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Neil Devins, *Congressional-Executive Information Access Disputes: A Modest Proposal-Do Nothing*, 48 ADMIN. L. REV. 109, 115 (1996).

<sup>20</sup> *See, e.g.*, *United States v. Nixon*, 418 U.S. 683 (1974); *Judicial Watch Inc. v. Dep’t of Justice*, 365 F.3d 1108 (D.C. Cir. 2004); *In re Cheney*, 334 F.3d 1096 (D.C. Cir. 2003); *United States v. Am. Tel. & Tel. Co.*, 567 F.2d 121 (D.C. Cir. 1977); Senate Select Comm. on Presidential Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974).

<sup>21</sup> *Nixon*, 418 U.S. at 683.

<sup>22</sup> *Id.* at 686.

<sup>23</sup> Samuel Dash, *Morality in American Politics: Is it Possible?* 39 BRANDEIS L.J. 773, 781

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The Court in *Nixon* made it clear that there was not an unqualified presidential privilege. The Court held that executive privilege is a qualified privilege that can be outweighed by countervailing needs.<sup>24</sup> The Court applied a balancing test, weighing the grand jury's need for information against the President's need for confidentiality.<sup>25</sup> The Court acknowledged the importance of executive branch confidentiality, noting that a President should receive candid advice from White House advisors.<sup>26</sup> However, concern about the public disclosure of advisors' communications could force advisors to hold back their advice.<sup>27</sup> The Court opined that advisors who "expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision-making process."<sup>28</sup> Nonetheless, the Court held that the grand jury's need for important evidence in a criminal investigation outweighed President Nixon's need for confidentiality.<sup>29</sup>

A number of District of Columbia Circuit cases, such as *In re Sealed Case* ("*Espy*"), have put flesh on the bones of executive privilege jurisprudence.<sup>30</sup> Like *Nixon*, *Espy* arose out of a claim of executive privilege against a grand jury's request for information.<sup>31</sup> President Clinton asserted the privilege against Independent Counsel Donald Smaltz's subpoena for materials used to prepare a White House Counsel's Office ("Counsel's Office") report, responding to allegations that Secretary of Agriculture Mike Espy had accepted inappropriate benefits.<sup>32</sup> The District of Columbia Circuit found that the privilege should apply only to communications "authored or solicited and received" by the President's staff members who have "broad and significant responsibility" for offering advice to the President on the matter to which the communications relate.<sup>33</sup> Such a holding is relevant because it will later be analyzed and applied to the Solyndra conflict along with the

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(2001).

<sup>24</sup> *Nixon*, 418 U.S. at 684–85.

<sup>25</sup> *Id.* at 711–12.

<sup>26</sup> *Id.* at 708.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 705.

<sup>29</sup> *Id.* at 713.

<sup>30</sup> *In re Sealed Case (Espy)*, 121 F.3d 729 (D.C. Cir. 1997).

<sup>31</sup> *Id.* at 729.

<sup>32</sup> *Id.* at 734–35.

<sup>33</sup> *Id.* at 758.

potential consequences that could have arisen had the conflict been litigated in federal court.

Just as a grand jury's need to obtain relevant evidence in a criminal trial can outweigh executive privilege, the legislature's need for information can also outweigh the President's need for confidentiality. The Supreme Court has recognized that Congress requires information from the executive branch to fulfill its constitutional duties to legislate and provide oversight.<sup>34</sup> In the leading case of *McGrain v. Daugherty*,<sup>35</sup> the Supreme Court reasoned that Congress' power to conduct oversight is inherent in its power to legislate, finding that a "legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change."<sup>36</sup> Furthermore, history has shown that congressional committees play an important role in uncovering wrongdoing in the executive branch from the Teapot Dome scandal to the Hurricane Katrina congressional hearings.<sup>37</sup>

As a general matter, courts are reluctant to get involved in inter-branch disputes between the executive and the legislature.<sup>38</sup> As a result, the political branches must negotiate with each other over access to information. This sort of inter-branch back-and-forth occurred in the Solyndra investigation, but as the following section explains, the White House was more faithful to the guidance of the *Nixon* Court to resolve "competing interests" in a manner that "preserves the essential functions of each branch."<sup>39</sup>

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<sup>34</sup> *Watkins v. United States*, 354 U.S. 178, 187–88 (1957).

<sup>35</sup> *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927).

<sup>36</sup> *Id.*

<sup>37</sup> *Ensuring Executive Branch Accountability: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 110th Cong. 26–31 (2007) (statement of John Podesta, President, Ctr. for Am. Progress).

<sup>38</sup> TODD GARVEY & ALISSA M. DOLAN, CONG. RESEARCH SERV., RL42670, PRESIDENTIAL CLAIMS OF EXECUTIVE PRIVILEGE: HISTORY, LAW, PRACTICE, AND RECENT DEVELOPMENTS, 1 (2012).

<sup>39</sup> *United States v. Nixon*, 418 U.S. 683, 708 (1974).

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**III. THE SOLYNDRA INVESTIGATION**

The Department of Energy (“DOE”) announced in March 2009 that it would offer a conditional \$535 million loan guarantee to Solyndra, a manufacturer of solar panels based in Fremont, California, to finance the construction of a solar panel manufacturing plant.<sup>40</sup> Solyndra was the first company to receive support through the DOE Loan Guarantee Program created under the Bush administration as part of the Energy Policy Act of 2005.<sup>41</sup> President Obama expanded the program as part of the American Recovery and Reinvestment Act of 2009.<sup>42</sup>

In May 2010, President Obama was scheduled to visit one of Solyndra’s existing plants in California on a trip to highlight his green energy agenda.<sup>43</sup> Some Office of Management and Budget (“OMB”) employees worried about the financial stability of the company.<sup>44</sup> Prophetically, these officials feared that President Obama’s visit would come back to haunt the administration if Solyndra failed.<sup>45</sup> However, after reviewing the matter, the White House decided to proceed with the trip as planned.<sup>46</sup> Months later, Solyndra’s financial difficulties became apparent when the company cancelled an initial public offering.<sup>47</sup> In the fall of 2010, Solyndra closed one of its existing plants and postponed the expansion of the manufacturing facility that was built using the DOE loan guarantee.<sup>48</sup>

In February 2011, DOE generated controversy when it restructured the Solyndra loan.<sup>49</sup> The terms specified that private entities would be

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<sup>40</sup> Andrew Restuccia, *All About Solyndra: A Short Primer*, THE HILL (Nov. 26, 2011, 3:15 PM), <http://thehill.com/policy/energy-environment/195481-all-about-solyndra-a-short-primer-on-the-controversy>.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Restuccia, *All About Solyndra*, *supra* note 40.

<sup>47</sup> *Solyndra Cancels IPO Plans, Instead Sells Debt*, BLOOMBERG BUSINESSWEEK (June 18, 2010, 7:34 AM), <http://www.businessweek.com/ap/financialnews/D9GDLJAG0.htm>.

<sup>48</sup> *Energy & Commerce Leaders Probe OMB or Role in DOE Stimulus Loan Guarantees, Risky Half Billion Award to Solyndra a Top Concern*, HOUSE ENERGY & COMMERCE COMM. (Mar. 14, 2011), <http://energycommerce.house.gov/press-release/energy-commerce-leaders-probe-omb-role-doe-stimulus-loan-guarantees-risky-half-billion>.

<sup>49</sup> Andrew Stiles, *GOP to WH: Stop Stonewalling Us on Solyndra Docs*, NAT’L. REV. ONLINE (Dec. 1, 2011, 7:24 PM), <http://www.nationalreview.com/corner/284679/gop-wh-stop-stonewalling-us-solyndra-docs-andrew-stiles>.

repaid before the federal government if the company defaulted.<sup>50</sup> The loan restructuring prompted the Oversight and Investigations Subcommittee (“Subcommittee”) of the House Energy and Commerce Committee (“Committee”) to launch a probe of the loan guarantee in February 2011.<sup>51</sup> The Chairman of the Committee, Fred Upton (R-MI) and the Chairman of the Subcommittee, Cliff Stearns (R-FL) led the Solyndra investigation.<sup>52</sup> The Committee intensified its investigation after Solyndra declared bankruptcy in August 2011.<sup>53</sup>

In September 2011, the Federal Bureau of Investigation (“FBI”) raided Solyndra’s offices.<sup>54</sup> Photos of FBI agents emerging from Solyndra headquarters ran in newspapers across the country and suggested that a political scandal might be brewing for President Obama.<sup>55</sup> In an effort to ameliorate the Solyndra fallout, White House Chief of Staff Bill Daley announced an independent review of the Energy Department’s loan guarantee portfolio.<sup>56</sup> Nonetheless, it was clear that the Subcommittee intended to ratchet up the political pressure on the White House.

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<sup>50</sup> Joe Stephens & Carol D. Leonnig, *Solyndra Loan Deal: Warning about Legality Came from Within Obama Administration*, WASH. POST (Oct. 7, 2011), [http://www.washingtonpost.com/politics/solyndra-obama-and-rahm-emanuel-pushed-to-spotlight-energy-company/2011/10/07/gIQACDqSTL\\_story.html](http://www.washingtonpost.com/politics/solyndra-obama-and-rahm-emanuel-pushed-to-spotlight-energy-company/2011/10/07/gIQACDqSTL_story.html).

<sup>51</sup> Andrew Restuccia & Ben Geman, *Second Green Flop Stokes Controversy*, THE HILL (Nov. 1, 2011, 12:36 AM), <http://thehill.com/policy/energy-environment/190915-second-green-flop-stokes-controversy>.

<sup>52</sup> Darren Samuelsohn, *Right Nips Fred Upton on Solyndra Handling*, POLITICO (Dec. 7, 2011, 11:55 PM), <http://www.politico.com/news/stories/1211/70043.html#ixzz1pg9Egv3S>.

<sup>53</sup> Andrew Restuccia & Ben Geman, *White House Gives Up More Solyndra Docs*, THE HILL (Feb. 3, 2012, 11:45 PM), <http://thehill.com/blogs/e2-wire/e2-wire/208653-amid-comtempt-threat-white-house-sends-gop-more-solyndra-docs>.

<sup>54</sup> Joe Stephens & Carol D. Leonnig, *FBI Searches Offices of Solyndra; Lawmakers Say They were Misled about Firm’s Finances*, WASH. POST (Sept. 8, 2011), [http://www.washingtonpost.com/politics/fbi-searches-shuttered-solyndra-offices-plant-in-california/2011/09/08/gIQAu4kRCK\\_story.html](http://www.washingtonpost.com/politics/fbi-searches-shuttered-solyndra-offices-plant-in-california/2011/09/08/gIQAu4kRCK_story.html).

<sup>55</sup> *The Solyndra Scandal: The FBI Raids a Beneficiary of Federal Loan Guarantees*, WALL ST. J. (Sept. 9, 2011), <http://online.wsj.com/news/articles/SB10001424053111904836104576558763644374614>.

<sup>56</sup> Scott Wilson, *White House Orders Review of Energy Department Loans Amid Solyndra Fallout*, WASH. POST (Oct. 28, 2011), [http://www.washingtonpost.com/politics/white-house-orders-independent-review-of-energy-department-loans/2011/10/28/gIQASrPQM\\_story.html](http://www.washingtonpost.com/politics/white-house-orders-independent-review-of-energy-department-loans/2011/10/28/gIQASrPQM_story.html).



A. *The Subcommittee's Duty to Investigate Solyndra*

Upton and Stearns had a responsibility to obtain information about the Solyndra loan guarantee. The Solyndra investigation fell squarely under their purview, as Chairmen of the Committee and the Subcommittee, both Representatives held jurisdiction over the affordable energy and DOE programs.<sup>57</sup> Furthermore, the legislation that had created the loan guarantee program had originated in the Committee.<sup>58</sup>

The Supreme Court has held that Congress possesses the constitutional authority to compel disclosure when the investigation is “in aid of legislation.”<sup>59</sup> Clearly, the Solyndra investigation met this standard. Not only had Solyndra received \$535 million of taxpayers’ money, but also the Solyndra loan received was part of a DOE program that had issued over ten billion dollars in loan guarantees.<sup>60</sup> Therefore, problems with the Solyndra loan could be symptomatic of larger problems with the green energy loans program. The Subcommittee also had legitimate concerns that Solyndra might have received a loan because of the company’s financial ties to one of President Obama’s fundraisers, George Kaiser.<sup>61</sup> This was precisely the type of situation in which the Framers wanted Congress to hold the President accountable. As George Mason said at the Constitutional Convention, members of Congress must “meet frequently to inspect the Conduct of the public office.”<sup>62</sup> As such, the Subcommittee had a right to information from the executive branch and a duty to investigate the matter.

Inter-branch conflicts are a normal byproduct of the separation of powers principle, and yet, the Framers expected Congress and the President to resolve “conflicts in scope of authority” in the way most

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<sup>57</sup> Letter from Rep. Fred Upton, Chairman, Comm. on Energy & Commerce, & Rep. Cliff Stearns, Chairman, Subcomm. on Oversight & Investigations, Comm. on Energy & Commerce to Kathryn H. Ruemmler, Counsel to the President (Feb. 9, 2012), *available at* [http://burgess.house.gov/uploadedfiles/02.09.2012\\_letter\\_to\\_white\\_house\\_counsel\\_kathryn\\_ruemmler\\_and\\_cynthia\\_hogan.pdf](http://burgess.house.gov/uploadedfiles/02.09.2012_letter_to_white_house_counsel_kathryn_ruemmler_and_cynthia_hogan.pdf).

<sup>58</sup> Energy Policy Act of 2005, H.R. 6, 109th Cong. (2005).

<sup>59</sup> *Sinclair v. United States*, 279 U.S. 263, 295 (1929).

<sup>60</sup> Sean Higgins, *DOE Mulls Green Energy Loans at \$23 Million per Job*, INVESTOR’S BUS. DAILY (Sept. 27, 2011, 5:59 PM), <http://news.investors.com/article/586155/201109271759/doe-mulls-green-energy-loans-at-23-million-per-job.htm>.

<sup>61</sup> Neela Banerjee, *House to Probe Failed Energy Company Solyndra at Hearing*, L.A. TIMES (Sept. 12, 2011), <http://articles.latimes.com/2011/sep/12/news/la-pn-solyndra-hearing-20110912>.

<sup>62</sup> 2 THE RECORDS OF THE CONSTITUTIONAL CONVENTION OF 1787, at 206 (Max Farrand, ed., 1966).

likely to “result in efficient and effective functioning of our governmental system.”<sup>63</sup> Therefore, the Subcommittee appropriately sent letters to the DOE requesting documents and related information rather than immediately issuing subpoenas, which would have caused the conflict to quickly escalate. The Subcommittee also requested information from OMB, which reviewed and approved the credit subsidy costs of the DOE loan guarantee.<sup>64</sup>

The Subcommittee also exercised prudence by limiting the scope of the investigation to decisions made at the agency level as opposed to immediately requesting information from the White House. Judicial precedent suggests that the rationale for executive privilege is strongest when applied to the Office of the President, but this rationale is less applicable to communications at the agency level.<sup>65</sup> Thus, the Subcommittee did not infringe on the President’s prerogative when it requested information from the agencies.

The focus of the Solyndra investigation shifted from the agencies to the White House after the Subcommittee reviewed emails suggesting that the White House may have exerted political pressure on budget officials to approve the loan guarantee.<sup>66</sup> The communications showed that White House officials repeatedly checked with OMB to see if the loan was approved, in anticipation of a groundbreaking event in September 2009, at which Vice President Biden intended to announce the loan approval.<sup>67</sup> In the emails, some OMB employees complained of pressure from the White House to review the loan.<sup>68</sup> One budget official referred to “the time pressure we are under to sign-off on Solyndra.”<sup>69</sup> Consequently, the Subcommittee sought communications between White House officials and the agencies to determine the extent of the White House’s

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<sup>63</sup> *United States v. Am. Tel. & Tel. Co.*, 567 F.2d 121, 127 (D.C. Cir. 1977); see Orrin G. Hatch, *Avoidance of Constitutional Conflicts*, 48 U. PITT. L. REV. 1025, 1027–28 (1987).

<sup>64</sup> Saqib Rahim, *Republicans Say DOE Had Multiple Signs That Solyndra Was Failing*, N.Y. TIMES (Sept. 13, 2011), <http://www.nytimes.com/cwire/2011/09/13/13climatewire-republicans-say-doe-had-multiple-signs-that-63664.html>.

<sup>65</sup> *Judicial Watch Inc. v. Dep’t of Justice*, 365 F.3d 1108, 1117 (D.C. Cir. 2004).

<sup>66</sup> Joe Stephens & Carol D. Leonnig, *Solyndra Loan: White House Pressed on Review of Solar Company Now Under Investigation*, WASH. POST (Sept. 13, 2011), [http://www.washingtonpost.com/politics/white-house-pushed-500-million-loan-to-solar-company-now-under-investigation/2011/09/13/gIQA3WbQK\\_story.html](http://www.washingtonpost.com/politics/white-house-pushed-500-million-loan-to-solar-company-now-under-investigation/2011/09/13/gIQA3WbQK_story.html).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

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involvement as critical decisions were being made about the loan.<sup>70</sup>

*B. The White House Accommodates the Subcommittee's Initial Request*

At this point in the investigation, the White House properly chose to accommodate the Subcommittee's request for information. Inter-branch conflicts are a natural part of our constitutional system, but these conflicts must be approached with a "spirit of dynamic compromise."<sup>71</sup> The White House chose the right course by fulfilling its constitutional mandate to work with the legislative branch.

The White House could have argued that communications between the White House and the agencies were covered by executive privilege. To be sure, other presidents have argued that executive privilege applies broadly within the executive branch.<sup>72</sup> The Clinton administration claimed that all communications between the White House and federal agencies were presumptively privileged.<sup>73</sup> However, it would have been politically untenable for the White House to invoke executive privilege at this stage in the investigation, and it is doubtful that a court would have upheld the privilege.

Not all types of executive branch communications are protected equally. Courts have divided the broader category of executive privilege into sub-categories, such as the "deliberative process privilege" and the "presidential communications privilege."<sup>74</sup> The deliberative process privilege protects "predecisional" executive branch communications, while the presidential communications privilege protects communications by only the President and his top advisors.<sup>75</sup> A top advisor is defined as someone who works in "operational proximity" to the President.<sup>76</sup> The presidential communications privilege covers both

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<sup>70</sup> *Emails Show White House Pressure Ahead of Solar Company Loan Approval*, FOX NEWS (Sept. 14, 2011), <http://www.foxnews.com/politics/2011/09/13/gop-to-hold-hearing-on-now-bankrupt-solar-company-that-obama-once-touted/>.

<sup>71</sup> *Ensuring Executive Branch Accountability: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 110th Cong. 41 (2007) (statement of Beth Nolan, Former White House Counsel) (quoting *United States v. Am. Tel. & Tel. Co.*, 567 F.2d 121, 127 (D.C. Cir. 1977)).

<sup>72</sup> Carter, *supra* note 13.

<sup>73</sup> GARVEY & DOLAN, *supra* note 38, at 8.

<sup>74</sup> *In re Sealed Case (Espy)*, 121 F.3d 729, 737–40 (D.C. Cir. 1997).

<sup>75</sup> *Id.* at 743 (citing *United States v. Nixon*, 418 U.S. 683, 708 (1974)).

<sup>76</sup> *Ass'n of Am. Physicians & Surgeons v. Clinton*, 997 F.2d 898, 910 (D.C. Cir. 1993).

pre-deliberative and post-decisional materials.<sup>77</sup> The presidential communications privilege is grounded in the separation of powers and is more difficult to overcome.<sup>78</sup> The deliberative process privilege is grounded in the common law and presents a lower bar for parties seeking information from the executive.<sup>79</sup>

The White House could have attempted to withhold sensitive communications under the presidential communications privilege. The Subcommittee requested communications between agency officials and White House staff prior to President Obama's May 2010 visit to a Solyndra plant.<sup>80</sup> The Subcommittee was especially interested in communications from top administration officials, such as White House Senior Advisor, Valerie Jarrett and Vice-President Biden's Chief of Staff, Ron Klain.<sup>81</sup> Under the precedent set by *Espy*, the White House could have argued that the presidential communications privilege applied because Jarrett and Klain "solicited and received" the email communications.<sup>82</sup> Under *Espy*, these two officials had "broad and significant responsibility" for investigating and formulating the advice on Solyndra for the President.<sup>83</sup>

Even though the presidential communications privilege might have applied, the White House made the right decision not to invoke it. In order to invoke the presidential communications privilege, the White House would need to draw attention to the fact that two of President Obama's top aides, Valerie Jarrett and Ron Klain, solicited the communications about Solyndra. The fact that two top aides were so interested in Solyndra would suggest that the White House harbored concerns about Solyndra before the President's trip. Thus, invoking the presidential communications privilege was politically untenable at a time when the White House was attempting to distance itself from the

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<sup>77</sup> *Espy*, 121 F.3d at 745.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Committee Approves Subpoena After White House Fails to Turn Over Internal Solyndra Documents*, HOUSE ENERGY & COMMERCE COMM. (Nov. 3, 2011), <http://energycommerce.house.gov/press-release/committee-approves-subpoena-after-white-house-fails-turn-over-internal-solyndra#sthash.KZ1AA6aV.dpuf>.

<sup>81</sup> *Committee Prepares to Seek Subpoena of White House Documents*, HOUSE ENERGY & COMMERCE COMM. (Oct. 28, 2011), <http://energycommerce.house.gov/News/PRArticle.aspx?NewsID=9055> [hereinafter *Subpoena*].

<sup>82</sup> *Espy*, 121 F.3d at 752.

<sup>83</sup> *Id.*

decisions that were made about Solyndra.

The White House also could have invoked the deliberative process privilege, but such an attempt would likely be unsuccessful. As noted above, the deliberative process privilege is rooted in the common law, and it is easier to overcome.<sup>84</sup> The Solyndra investigation was a legitimate area of congressional oversight. If the battle over information ended up in court at this stage in the investigation, a judge would have to balance the interests of confidentiality against accountability and would likely determine that Congress' right to information was enough to overcome executive privilege.

*C. Request for Internal White House Communications Escalates the Conflict*

Up until this point, the Subcommittee had respected the President's prerogatives while fulfilling its own constitutional duty to conduct oversight. This all changed, however, when the Subcommittee asked for all internal White House communications regarding Solyndra.<sup>85</sup> The Subcommittee's request presented a major logistical challenge because the Counsel's Office would need to sort through every email that mentioned the word "Solyndra."<sup>86</sup> More importantly, the request impeded on the President's prerogative to keep his advisors' communications confidential. The White House likely felt that the Subcommittee was on a fishing expedition. Chairman Sterns acknowledged that the subpoena was broad and said in an interview that he thought the subpoena would even cover communications on President Obama's BlackBerry.<sup>87</sup> Therefore, it was no surprise that White House Counsel, Kathryn Ruemmler told the Subcommittee that the White House could not comply with such an overly broad information request.

Ruemmler did not invoke executive privilege, but she alluded to the

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<sup>84</sup> *Id.* at 745.

<sup>85</sup> Joe Stephens & Carol D. Leonnig, *Solyndra: House Panel Subpoenas Internal White House Documents*, WASH. POST (Nov. 3, 2011), [http://www.washingtonpost.com/politics/solyndra-house-panel-subpoenas-white-house-for-first-time/2011/11/03/gIQAtmjjjM\\_story.html](http://www.washingtonpost.com/politics/solyndra-house-panel-subpoenas-white-house-for-first-time/2011/11/03/gIQAtmjjjM_story.html).

<sup>86</sup> Andrew Restuccia, *White House Delivers Solyndra Documents, Rebuffs Full GOP Subpoena*, THE HILL (Nov. 11, 2011, 10:23 PM), <http://thehill.com/policy/energy-environment/193169-white-house-provides-solyndra-documents-rebuffs-subpoena-request>.

<sup>87</sup> Darren Samuelsohn, *GOP Solyndra Probe Wants Obama's Blackberry Messages*, POLITICO (Oct. 6, 2011, 4:06 PM), <http://www.politico.com/news/stories/1011/65361.html>.

prerogative in her response.<sup>88</sup> She wrote that the Subcommittee's request "implicates longstanding and significant institutional Executive Branch confidentiality interests."<sup>89</sup> Ruemmler also drew upon the language of several District of Columbia Circuit cases when she wrote that the Subcommittee did not articulate how the requested materials were "demonstrably critical" to the Subcommittee's investigation.<sup>90</sup> Ruemmler gently reminded the Subcommittee that they would need to be far more specific in their request if they had any hope of overcoming the White House's presumptive privilege to keep these communications confidential.

Ruemmler was right to challenge the Subcommittee's argument that internal White House communications were required to understand the White House's influence on the agencies during the review of the Solyndra loan. Communications between the White House and the agencies offered the best evidence as to whether the White House asserted political pressure on DOE, OMB, or the Treasury while the Solyndra loan was under review. As Ruemmler noted, the agencies had "produced over 70,000 pages of documents, participated in nine briefings for Committee staff and provided testimony at several Committee hearings" related to Solyndra.<sup>91</sup> Of course, it is not uncommon in congressional investigations for agencies to respond to requests for information by overwhelming investigators with documents of marginal utility.<sup>92</sup> However, the Subcommittee did not argue that they were being flooded with useless documents.

Congress should be circumspect when asking for the communications of presidential advisors and should only demand disclosure when it is in the national interest. The Subcommittee had good reason to disclose communications between the White House and

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<sup>88</sup> Letter from Kathryn H. Ruemmler, Counsel to the President, to Rep. Fred Upton, Chairman, Comm. on Energy & Commerce, & Rep. Cliff Stearns, Chairman, Subcomm. on Oversight & Investigations, Comm. on Energy & Commerce (Oct. 14, 2011), *available at* <http://www.thepoliticalguide.com/Items/Solyndra/WHC%20Response.pdf> [hereinafter Response].

<sup>89</sup> *Id.*

<sup>90</sup> See Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 731 (D.C. Cir. 1974); see also *In re Sealed Case (Espy)*, 121 F.3d 729, 744 (D.C. Cir. 1997).

<sup>91</sup> Response, *supra* note 88.

<sup>92</sup> See, e.g., *Transcript: Sen. Dianne Feinstein Says CIA Searched Intelligence Committee Computers*, WASH. POST (Mar. 11, 2014), [http://www.washingtonpost.com/world/national-security/transcript-sen-dianne-feinstein-says-cia-searched-intelligence-committee-computers/2014/03/11/200dc9ac-a928-11e3-8599-ce7295b6851c\\_story.html](http://www.washingtonpost.com/world/national-security/transcript-sen-dianne-feinstein-says-cia-searched-intelligence-committee-computers/2014/03/11/200dc9ac-a928-11e3-8599-ce7295b6851c_story.html).

agencies, but they had not articulated a strong argument as to why disclosure of internal White House communications was needed.

*D. The Subcommittee Issues White House Subpoenas*

The two political branches must make compromises when negotiating with each other because “accommodation between the two branches” is contemplated by the Constitution.<sup>93</sup> Ruemmler ended her response to the Subcommittee with a promise that the White House would continue to cooperate with “legitimate Congressional requests” for information.<sup>94</sup> Despite the White House’s offer to negotiate, Upton and Stearns announced that they were considering a vote to subpoena the White House.<sup>95</sup> In a joint statement, Upton and Stearns claimed that the Subcommittee would only authorize subpoenas as a last resort, but said that the Subcommittee was prepared to take this “serious step” because of the White House’s “stonewall on Solyndra.”<sup>96</sup> Their claim that the administration was “slow-walking” the investigation seems far-fetched considering the Subcommittee and the administration reached an agreement the previous day that DOE Secretary, Steven Chu, would testify about Solyndra before the Subcommittee.<sup>97</sup>

Despite the White House efforts regarding accommodation, the Subcommittee voted to serve subpoenas on White House Chief of Staff, Bill Daley, and Vice President Joe Biden’s Chief of Staff, Bruce Reed, for all documents “referring or relating” in any way to Solyndra.<sup>98</sup> Issuing such a broad subpoena may have been a negotiating tactic on the part of Upton and Stearns, but it was certainly not the type of dynamic compromise the Framers encouraged. Furthermore, the decision to issue subpoenas was premature considering that the Subcommittee was still in the process of negotiating with the White House. Just the previous day, Ruemmler offered to provide documents if the Subcommittee narrowed the scope of their request.<sup>99</sup>

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<sup>93</sup> United States v. Am. Tel. & Tel. Co., 567 F.2d 121, 131 (D.C. Cir. 1977).

<sup>94</sup> Response, *supra* note 88.

<sup>95</sup> *Subpoena*, *supra* note 81.

<sup>96</sup> *Subpoena*, *supra* note 81.

<sup>97</sup> Darren Samuelsohn, *Steven Chu’s Solyndra Testimony Set for Nov. 17*, POLITICO (Oct. 27, 2011, 6:22 PM), <http://www.politico.com/news/stories/1011/67036.html>.

<sup>98</sup> Andrew Stiles, *WH Rejects House Subpoena for Solyndra Docs*, NAT’L REV. ONLINE (Nov. 4, 2011, 5:17 PM), <http://www.nationalreview.com/corner/282343/wh-rejects-house-subpoena-solyndra-docs-andrew-stiles#>.

<sup>99</sup> Darren Samuelsohn, *W.H. To House: Solyndra Subpoenas Seek Too Much*, POLITICO

Upton and Stearns should have accepted the White House's offer to work with the Subcommittee to respond to a more focused request that would balance the interests of Congress and the President. The Constitution requires that the parties work together to resolve their differences.<sup>100</sup> As one court put it, "[c]ompromise and cooperation, rather than confrontation, should be the aim" of the two political branches.<sup>101</sup> In this instance, the decision to issue subpoenas was aimed at confrontation rather than cooperation.

Previously, the White House aptly accommodated congressional requests, but this time, the White House properly pushed back against the subpoenas. The subpoenas were overly broad and focused on a "general curiosity" about White House communications.<sup>102</sup> The Counsel's Office has a responsibility to protect the prerogatives of the Office of the President.<sup>103</sup> As such, Ruemmler appropriately argued that the Subcommittee's general curiosity did not justify "encroaching on longstanding and important Executive Branch confidentiality interests."<sup>104</sup> To be sure, the White House stood on firm legal ground to push back against the Subcommittee's subpoenas, but political reality, along with the historical and legal precedent, suggested that the White House had to turn over some documents to show that the White House was negotiating in good faith.

#### *E. Pressure on the White House to Respond to Subpoenas*

The Counsel's Office wanted to protect the President's prerogatives, but Ruemmler likely knew that invoking executive privilege would have political ramifications. Ever since the Nixon administration, presidents have been reluctant to invoke executive privilege because of its negative association with the Watergate scandal.<sup>105</sup> Presidents do not want to give the public the impression that they are invoking executive privilege to cover up a politically embarrassing controversy.

It is possible that the Subcommittee subpoenaed the White House in

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(Nov. 4, 2011, 4:49 PM), <http://www.politico.com/news/stories/1111/67654.html>.

<sup>100</sup> *United States v. Am. Tel. & Tel Co.*, 567 F.2d 121, 127 (D.C. Cir. 1977).

<sup>101</sup> *United States v. House of Representatives of United States*, 556 F. Supp. 150, 153 (D.D.C. 1983).

<sup>102</sup> Samuelsohn, *W.H. To House: Solyndra Subpoenas Seek Too Much*, *supra* note 99.

<sup>103</sup> Maryanne Borrelli, Karen Hult & Nancy Kassop, *The White House Counsel's Office*, 31 *PRESIDENTIAL STUD. Q.*, 561, 563 (Apr. 21, 2004).

<sup>104</sup> Samuelsohn, *W.H. To House: Solyndra Subpoenas Seek Too Much*, *supra* note 99.

<sup>105</sup> ROZELL, *supra* note 7, at 121.



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order to force the White House to officially invoke the privilege. A press release issued by the Subcommittee reads “[w]hile we of course respect Executive Privilege, the White House Counsel—in two separate letters to the Subcommittee—has not asserted it.”<sup>106</sup> Republicans might have been pressuring President Obama to assert the privilege to see how he would respond, since his administration had claimed to run the “most transparent administration in the history of our country” and invoking the privilege would make it look like the administration had something to hide.<sup>107</sup>

The fact that the Subcommittee lacked bipartisan legitimacy mitigated the political pressure to disclose internal White House communications. When Upton and Stearns made the decision to issue subpoenas, they lost the backing of the Democratic minority, and the vote to issue subpoenas split along party lines.<sup>108</sup> The Committee’s Ranking Member, Henry Waxman (D-CA), and the Subcommittee’s Ranking Member, Diana DeGette (D-CO), argued that issuing subpoenas was unnecessary, and Waxman went so far as to say that the committee’s leadership was more interested in “confrontation with the president” than “information for the investigation.”<sup>109</sup> This was not simply a situation where Waxman and DeGette were holding the party line and supporting the White House. On the contrary, the two Democrats had written to Stearns after Solyndra declared bankruptcy and asked him to invite former Solyndra Chief Executive Officer, Brian Harrison, to testify before the Subcommittee.<sup>110</sup> Waxman and DeGette were particularly troubled by the fact that Harrison had met with the Committee less than two months earlier and assured them that Solyndra was in a strong

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<sup>106</sup> *Subpoena*, *supra* note 81.

<sup>107</sup> Josh Gerstein and Patrick Gavin, *Why Reporters are Down on Obama*, POLITICO (Apr. 28, 2010, 4:38 AM), <http://dyn.politico.com/printstory.cfm?uuid=42A9C609-18FE-70B2-A84A2D8F74C77116>.

<sup>108</sup> *White House Counsel Slams House Panel’s Solyndra Subpoena*, CNN (Nov. 4, 2011, 8:47 PM), [http://articles.cnn.com/2011-11-04/politics/politics\\_solyndra-subpoena\\_1\\_solyndra-loan-guarantee-subpoena-white-house?\\_s=PM:POLITICS](http://articles.cnn.com/2011-11-04/politics/politics_solyndra-subpoena_1_solyndra-loan-guarantee-subpoena-white-house?_s=PM:POLITICS).

<sup>109</sup> Andrew Restuccia, *House Republicans Vote to Subpoena White House for Solyndra Documents*, THE HILL (Nov. 3, 2011, 2:50 PM), <http://thehill.com/blogs/e2-wire/e2-wire/191563-house-gop-votes-to-subpoena-white-house-for-solyndra-documents>; *White House Counsel Slams House Panel’s Solyndra Subpoena*, *supra* note 108.

<sup>110</sup> Letter from Henry A. Waxman, Ranking Member, Energy & Commerce Comm., & Diana DeGette, Ranking Member, Oversight & Investigations Subcomm. to Cliff Stearns, Chairman, Submcomm. on Oversight & Investigations (Sept. 7, 2011), *available at* <http://democrats.energycommerce.house.gov/index.php?q=news/ranking-members-waxman-and-degette-request-solyndra-ceo-testimony>.

financial position.<sup>111</sup> However, when Stearns and Upton held a vote to subpoena the White House, they lost the Democrats and the credibility that comes with a bipartisan investigation.

The White House may have harbored doubts about the strength of its legal position if the Subcommittee challenged its claim of executive privilege in court. The President's right to confidential advice is strongest when the communications relate to the President's Article II powers, such as the Commander-in-Chief power.<sup>112</sup> The loan guarantee program was created as part of the Energy Policy Act of 2005, so an executive privilege claim might not be as convincing in the context of an energy program created by statute.<sup>113</sup>

Historical precedent suggests that the White House had to make concessions to the Subcommittee. The Counsel's Office generally attempts to compromise with Congress during inter-branch conflicts about access to information as part of the natural give-and-take that occurs in the political process.<sup>114</sup> During the Clinton administration, the Counsel's Office had a policy of complying with congressional requests for information "to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch."<sup>115</sup> Similarly, the George H.W. Bush administration said that it would only invoke executive privilege after the executive had done "the utmost to reach an accommodation" with Congress.<sup>116</sup> Given this precedent, the Counsel's Office was under pressure to make some accommodations to the Subcommittee. As such, the White House turned over 135 pages of documents that the White House said met the "legitimate oversight interests" of the Subcommittee.<sup>117</sup> Ruemmler informed the Subcommittee that the White House was withholding about a dozen documents related to the restructuring of the loan guarantee because of the "deliberative nature" of the communications.<sup>118</sup> However, Ruemmler offered to make

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<sup>111</sup> *Id.*

<sup>112</sup> *See, e.g.,* GARVEY & DOLAN, *supra* note 38; ROZELL, *supra* note 7, at 199.

<sup>113</sup> Restuccia, *All About Solyndra*, *supra* note 40.

<sup>114</sup> GARVEY & DOLAN, *supra* note 38, at 8.

<sup>115</sup> *Id.* at 12.

<sup>116</sup> *Id.* at 12–13.

<sup>117</sup> Restuccia, *White House Delivers Solyndra Documents, Rebuffs Full GOP Subpoena*, *supra* note 86.

<sup>118</sup> Restuccia, *White House Delivers Solyndra Documents, Rebuffs Full GOP Subpoena*, *supra* note 86.

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the documents available to committee staff for review.<sup>119</sup> On its face, this appeared to be a fair concession on the part of the executive without turning over every document that mentioned Solyndra.

*F. The Subcommittee Overreaches and Threatens Contempt Vote*

Under the paradigm prescribed by the Constitution, the White House had met its side of the bargain. The Subcommittee had several options at this point in the investigation. They could (1) drop the investigation; (2) file suit in federal district court to seek civil enforcement of the subpoenas; (3) hold a contempt vote and send the contempt report to the United States Attorney for the District of Columbia and ask him to press charges under federal contempt statutes; or (4) continue to negotiate with the White House and use political pressure to get more information. The fourth option was likely the best option for the Subcommittee if they wanted to continue the investigation. The negotiation between the branches is meant to be a process with a lot of give-and-take, but this process only works if each side makes accommodations. It does not appear that the Subcommittee was interested in negotiating in good faith. Instead, the Subcommittee claimed that the White House had “cherry picked” certain documents to avoid complying fully with the subpoena, and the Subcommittee threatened to hold a contempt vote.<sup>120</sup>

The threat to hold the White House in contempt generated newspaper headlines, and the press reported on the investigation as an inter-branch conflict.<sup>121</sup> Nevertheless, the threat to hold the White House in contempt was just as much about intra-branch and intra-party conflicts. Personality and the personal agenda of members often drive congressional investigations, and such factors were at play in the Solyndra investigation. Subcommittee Chairman Stearns made the push for a contempt vote while Committee Chairman Upton wanted to take a more cautious approach.<sup>122</sup> Upton likely recognized that a contempt vote could lead to a constitutional showdown with the White House, which he preferred to avoid.<sup>123</sup> As Chairman of the Committee, Upton had the final say on all matters, but he may have felt that Stearns was positioning

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<sup>119</sup> Restuccia, *White House Delivers Solyndra Documents, Rebuffs Full GOP Subpoena*, *supra* note 86.

<sup>120</sup> Darren Samuelsohn, *Cliff Stearns: Contempt of Congress Vote under Consideration*, POLITICO (Jan. 31, 2012, 9:42 AM), <http://www.politico.com/news/stories/0112/72203.html>.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> Samuelsohn, *Right Nips Fred Upton on Solyndra Handling*, *supra* note 52.

himself to challenge Upton for the Committee Chairman position after the 2012 elections. As such, Upton possibly felt pressure from his right flank to take a hard stance against the administration.

Upton may have also felt pressure to be aggressive with the investigation because of a disagreement over congressional jurisdiction. Soon after Solyndra declared bankruptcy, House Oversight and Government Reform Chairman, Darrell Issa sent a letter to the White House requesting information regarding the handling of the Solyndra loan.<sup>124</sup> Upton and Issa praised each other publicly for looking into Solyndra, but this struggle over jurisdiction created friction between the two chairmen.<sup>125</sup> It is possible that Upton felt political pressure from both Issa and Stearns to threaten a contempt vote, against his better judgment. Finally, Upton may have taken a hard line because he recognized that he was vulnerable to criticism since he once pushed for the DOE to fund a solar power company in his home state.<sup>126</sup>

#### IV. HOW THE CONFLICT WOULD BE VIEWED BY THE COURTS

The Subcommittee's threat to hold the White House in contempt was the high point of the inter-branch conflict. Soon after, the White House turned over 313 pages of internal communications, and the contempt vote never occurred.<sup>127</sup> In June 2012, Chairman Stearns said that the Committee was "getting closer to getting closure" on the Solyndra investigation, and the investigation was officially closed in August 2012 when the Committee released a report in which it referred to Solyndra as a "cautionary tale."<sup>128</sup> The White House's decision to turn over 313 pages of internal communications prevented further escalation, and it is unknown how the conflict would have been perceived if it had found its

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<sup>124</sup> Jonathan Strong, *A Crowded Line For Solyndra*, ROLL CALL (Oct. 18, 2011, 12:00 AM), [http://www.rollcall.com/issues/57\\_44/Crowded-Line-for-Solyndra-209594-1.html?zkMobileView=true](http://www.rollcall.com/issues/57_44/Crowded-Line-for-Solyndra-209594-1.html?zkMobileView=true).

<sup>125</sup> *Id.*

<sup>126</sup> Steven Mufson & Jia Lynn Yang, *Fred Upton, GOP Critic of Solyndra Loan, Sought Funds for Mich. Solar Firm*, WASH. POST (Nov. 16, 2011), [http://www.washingtonpost.com/business/economy/fred-upton-gop-critic-of-solyndra-loan-sought-funds-for-mich-solar-firm/2011/11/16/gIQAJKGhSN\\_story.html](http://www.washingtonpost.com/business/economy/fred-upton-gop-critic-of-solyndra-loan-sought-funds-for-mich-solar-firm/2011/11/16/gIQAJKGhSN_story.html).

<sup>127</sup> Restuccia & Geman, *White House Gives Up More Solyndra Docs*, *supra* note 53.

<sup>128</sup> Ben Geman, *GOP Probe: Solyndra a "Cautionary Tale"*, THE HILL (Aug. 2, 2012, 4:23 PM), <http://thehill.com/blogs/e2-wire/e2-wire/241869-gop-report-solyndra-collapse-a-cautionary-tale-of-political-pressures>; Andrew Restuccia, *Cliff Stearns: 'Closure' Near in Solyndra Investigation*, POLITICO (June 27, 2012, 10:42 PM), <http://www.politico.com/news/stories/0612/77898.html>.

way into federal court. The following section puts forward a legal standard that a federal court could have followed if the Subcommittee had sought civil enforcement of the subpoenas.

*A. Courts are Reluctant to Intervene in Inter-Branch Disputes*

It is rare for inter-branch disputes to end up in the courts because most controversies regarding the access to information are resolved through compromises between the executive and legislature.<sup>129</sup> Courts have made clear that the political branches should settle their disagreements outside of the judicial system.<sup>130</sup> In *United States v. House of Representatives*, the district court dismissed the case and encouraged the two branches to “settle their differences without further judicial involvement.”<sup>131</sup> Both the legislative and executive branches typically prefer to reach an agreement outside of court, presumably in order to avoid setting judicial precedent.

Even when the executive and legislative branches are prepared to litigate, they are often kept out of the courts because of restrictions on standing. In *Walker v. Cheney*,<sup>132</sup> the Government Accountability Office (“GAO”) sought information from the White House on the National Energy Policy Development Group (“NEPDG”).<sup>133</sup> When the GAO was unable to gain access to the records, the Comptroller General filed suit against Vice President Cheney in the District Court for the District of Columbia.<sup>134</sup> The court dismissed the case when it found that the GAO lacked standing.<sup>135</sup> Several years later in *Committee on House Judiciary v. Miers*,<sup>136</sup> the same district court found that the House Judiciary Committee had standing to bring a civil lawsuit to enforce subpoenas against White House officials, Harriet Miers and Josh Bolton.<sup>137</sup> Thus, the *Miers* decision opens the door for future litigation between the legislative and executive branches.

All three branches may prefer to negotiate inter-branch conflicts outside of courts, but the judiciary has an important role to play if the

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<sup>129</sup> ROZELL, *supra* note 7, at 205.

<sup>130</sup> *United States v House of Representatives*, 556 F. Supp. 150, 153 (D.D.C. 1983).

<sup>131</sup> *Id.* at 153.

<sup>132</sup> 230 F. Supp. 2d 51 (D.D.C. 2002).

<sup>133</sup> *Id.* at 52.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 75.

<sup>136</sup> 558 F. Supp. 2d 53 (D.D.C. 2008).

<sup>137</sup> *Id.* at 68.

executive and the legislative branches are unable to reach a resolution. Some scholars argue that rather than litigating disputes, Congress should use its own “enforcement mechanisms” when trying to get information from the executive.<sup>138</sup> The legislature could, for example, use its power of the purse to reduce the budget of a particular department or the Senate could refrain from confirming nominations.<sup>139</sup>

History, however, suggests that the courts have an important role to play in settling disputes between the branches.<sup>140</sup> *Marbury v. Madison* laid forth the principal that the judiciary has the final authority to determine whether the President and the legislature are acting within the powers granted to them by the Constitution.<sup>141</sup> Constitutional scholar, Raoul Berger has criticized the concept of executive privilege, yet even he argues that Congress cannot “unilaterally decide a boundary dispute with the Executive, for neither branch, in Madison’s words, has an exclusive or ‘superior right of settling the boundaries between their respective powers.’”<sup>142</sup> This power of settling boundary disputes is reserved for the judiciary.<sup>143</sup>

Finally, the judiciary has itself recognized that it may be required to mediate these inter-branch disputes.<sup>144</sup> As noted above, the district court in *United States v. House of Representatives* encouraged the two sides to negotiate an agreement; however, the court also recognized that it would be “required to resolve the dispute by determining the validity of the Administrator’s claim of executive privilege” if the two branches did not reach a settlement.<sup>145</sup>

### *B. What Standard Should a Court Apply?*

Currently, it is not clear what legal standard a court would apply when weighing the President’s claim of executive privilege against Congress’s request for information. The Supreme Court has not addressed how this balancing should be done in the congressional-

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<sup>138</sup> See Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. CHI. L. REV. 1083, 1153 (2009).

<sup>139</sup> *Id.* at 1152.

<sup>140</sup> *Marbury v. Madison*, 5 U.S. 137, 176–78 (1803).

<sup>141</sup> *Id.*

<sup>142</sup> RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 304 (1974).

<sup>143</sup> *Id.*

<sup>144</sup> *United States v. House of Representatives*, 556 F. Supp. 150, 152 (D.D.C. 1983).

<sup>145</sup> *Id.*

executive context, so courts have applied different standards.<sup>146</sup> For example, in *Senate Select Committee on Presidential Campaign Activities v. Nixon* (“*Senate Committee*”), the District of Columbia Circuit evaluated whether the requested materials were “demonstrably critical to the responsible fulfillment of the Committee’s functions.”<sup>147</sup>

This article suggests that a court should apply the legal standard from the *Espy* decision. In *Espy*, the District of Columbia Circuit applied a “specific need” standard when President Clinton asserted executive privilege against a subpoena issued by a grand jury.<sup>148</sup> Building upon the *Nixon* Court’s desire to balance the competing interest of confidentiality and accountability, the District of Columbia Circuit held that a party would need to meet the two parts of the specific need standard to overcome executive privilege.<sup>149</sup> Under this standard, the party had to (1) demonstrate that each discrete group of the subpoenaed materials was likely to contain important evidence and (2) show that the evidence was not available with due diligence elsewhere.<sup>150</sup>

*Espy* explored what is necessary to overcome a claim of executive privilege in the context of a criminal proceeding, but the specific need standard should be transported from the grand jury situation and applied to the congressional-executive context. The same tension between confidentiality and accountability are at stake in both criminal and congressional investigations. Indeed, these are the competing values that the Framers recognized were inherent in a system of checks and balances.

In *Espy*, the Court of Appeals explicitly said, “we underscore that our opinion should not be read as in any way affecting the scope of the privilege in the congressional-executive context.”<sup>151</sup> While the *Espy* court was clear that it did not wish to opine on the congressional-executive context, it makes good sense to look to the *Espy* decision for guidance for two reasons. First, the majority of executive privilege claims arise in the grand jury-executive context so the case law is more developed in this area. Second, the two contexts are analogous in that the court must mediate the conflicting interests of two political branches in both circumstances.

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<sup>146</sup> See, e.g., *In re Sealed Case (Espy)*, 121 F.3d 729 (D.C. Cir. 1997); *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974).

<sup>147</sup> *Nixon*, 498 F.2d at 731.

<sup>148</sup> *Espy*, 121 F.3d at 754.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 753.

The *Espy* court was not overly prescriptive in describing how much “need” a grand jury must show to get access to presumptively privileged material. Certainly, such a test is highly dependent on the facts at hand, but the court was guided by a desire to balance the constitutionally-based interests of two branches.<sup>152</sup> The court concluded its opinion by writing, “[w]e believe that the principles we have outlined in this opinion achieve a delicate and appropriate balance between openness and informed presidential deliberation.”<sup>153</sup> A similar balancing test is needed when the competing interests of the congressional power of inquiry and executive branch confidentiality are at odds. A balancing test helps ensure that the court is protecting the constitutional interests of both the legislature and the executive.

The specific need standard from *Espy* does not explicitly tell future courts how to balance a President’s need for confidentiality against the public’s interest in transparency. However, an overly prescriptive test is not desirable. The flexibility of the specific need standard allows courts to mediate congressional-executive disputes while respecting the separation of powers doctrine. Indeed, the balancing test gives courts the ability to apply the standard to different contexts to ensure that the “constitutionally assigned functions” of the respective branches are protected.<sup>154</sup> For example, Congress would have a higher standard of need if subpoenaing information pertaining to one of the Article II powers, such as national security.<sup>155</sup> However, a President should not be able to guard any or all information by claiming that it pertains to national security. The *Espy* balancing test provides a route for the courts to review, *in camera*, requests for information that the executive has said pertain to national security.

### C. *How Would a Court Resolve the Solyndra Conflict?*

If the Subcommittee had sought the civil enforcement of the subpoenas, and a court had applied the *Espy* standard, the standard would likely favor the protection of the presidential communications. The Subcommittee subpoenaed information from the White House Chief of

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<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 762.

<sup>154</sup> *Nixon v. Adm’r of Gen. Servs. (Nixon II)*, 433 U.S. 425, 443 (1977).

<sup>155</sup> *Espy*, 121 F.3d at 748 (identifying the President’s Article II powers and responsibilities as the constitutional basis of the presidential communications privilege).



Staff and the Vice President's Chief of Staff.<sup>156</sup> Under the standard set forth in *Espy*, these officials would qualify as close White House advisors in "operational proximity" to the President, and so the White House would stand on solid ground to argue that the presidential communication privilege should apply.<sup>157</sup>

Moreover, the Subcommittee would have a difficult task showing that the privilege should be overcome. Under the *Espy* standard, the Subcommittee would need to demonstrate that: (1) each discrete group of the subpoenaed materials was likely to contain important evidence, and (2) the evidence was not available with due diligence elsewhere.<sup>158</sup> The Subcommittee was investigating whether the White House exerted political pressure on budget officials to approve the loan guarantee to Solyndra. The best evidence of political interference would be communications between the White House and the agencies, not communication within the White House. The White House had already supplied the communications between the White House and the agencies, so the Subcommittee would have a difficult time meeting the second prong of the *Espy* standard, that is, important evidence was not available with due diligence elsewhere. Since the White House had already turned over the best evidence, the Subcommittee would be requesting materials that were merely cumulative. Therefore, the Subcommittee would not meet the specific need standard and would not overcome the President's presumptive privilege.

## V. CONCLUSION

When Justice Antonin Scalia was head of the Office of Legal Counsel in the mid-1970s, he testified before Congress on the subject of executive privilege. Scalia explained that in inter-branch conflicts, the resolution is likely to lie in "the hurly-burly, the give-and-take of the political process between the legislative and executive."<sup>159</sup> In the Solyndra investigation, the two branches reached a resolution after the Subcommittee threatened to hold the White House in contempt.<sup>160</sup>

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<sup>156</sup> Stiles, *WH Rejects House Subpoena for Solyndra Docs*, *supra* note 98.

<sup>157</sup> *Espy*, 121 F.3d at 752.

<sup>158</sup> *Id.* at 754.

<sup>159</sup> *Executive Privilege-Secrecy in Government: Hearing on S. 2170, S. 2378, and S. 2420 Before the Subcomm. on Intergovernmental Relations of the S. Comm. on Gov't Operations, 94th Cong. 87 (1975)* (statement of Antonin Scalia, Assistant Att'y Gen. Office of Legal Counsel).

<sup>160</sup> Restuccia & Geman, *White House Gives Up More Solyndra Docs*, *supra* note 53.

Subsequent disagreements were resolved in a manner consistent with the separation of powers principle. For example, in mid-February 2012, the Subcommittee threatened to subpoena five administration officials.<sup>161</sup> The White House responded by arranging for the officials to meet with congressional staff, and the Subcommittee canceled the scheduled subpoena vote.<sup>162</sup> This is exactly the sort of inter-branch negotiation that should have been occurring throughout the Solyndra investigation.

The resolution to the Solyndra controversy was eventually found in the “hurly-burly” of the investigation, but if the controversy had found its way into court, application of the *Espy* specific need standard would have allowed the court to balance Congress’ interest in ensuring transparency against the executive’s interest in secrecy.

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<sup>161</sup> Darren Samuelsohn, *White House Agrees to Let Officials Talk on Solyndra*, POLITICO (Feb. 16, 2012, 5:45 PM), <http://www.politico.com/news/stories/0212/72999.html#ixzz1oMvmtFMf>.

<sup>162</sup> *Id.*