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# BREAKING THE LOGJAM: PRINCIPLES AND PRACTICE OF CONGRESSIONAL OVERSIGHT AND EXECUTIVE PRIVILEGE

## HEARING

BEFORE THE

## SUBCOMMITTEE ON FEDERAL COURTS, OVERSIGHT, AGENCY ACTION AND FEDERAL RIGHTS

OF THE

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# C O N T E N T S

**AUGUST 3, 2021, 2:34 P.M.**

STATEMENTS OF COMMITTEE MEMBERS



WITNESSES

# BREAKING THE LOGJAM: PRINCIPLES AND PRACTICE OF CONGRESSIONAL OVERSIGHT AND EXECUTIVE PRIVILEGE

**TUESDAY, AUGUST 3, 2021**

UNITED STATES SENATE,
SUBCOMMITTEE ON FEDERAL COURTS, OVERSIGHT,
AGENCY ACTION, AND FEDERAL RIGHTS,
COMMITTEE ON THE JUDICIARY,
*Washington, DC.*

The Subcommittee met, pursuant to notice, at 2:34 p.m., Room 226, Dirksen Senate Office Building, Hon. Sheldon Whitehouse, Chair of the Subcommittee, presiding.

Present: Senators Whitehouse [presiding], Hirono, Booker, Ossoff, and Kennedy.

## OPENING STATEMENT OF HON. SHELDON WHITEHOUSE, A U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Chair WHITEHOUSE. Let me call this hearing of the Courts Subcommittee of the Senate Judiciary Committee to order and express my appreciation to the four outstanding witnesses who are here and to my distinguished colleague, Senator Kennedy of Louisiana, who has been very helpful in this hearing. I will open with a statement and some introductions of the witnesses and then turn to Senator Kennedy for his statement, if that's all right.

I wanted to hold this hearing to help us rebuild the process and the substance of executive privilege determinations. I find there is a long-standing foundation for us working together to reclaim. One block in that foundation is Ronald Reagan's Presidential memorandum on executive privilege. Other blocks come from court decisions, negotiated compromises, and published legislative and executive memoranda.

There are three lessons that I hope we can all agree on. The first is that there is much consensus about the substance of executive privilege. It's pretty well agreed that, A, it exists; B, it is not absolute but yields to other, competing interests; and, C, it must balance the public value of transparency against the need for confidentiality around certain Presidential decision-making. It's also pretty well agreed that some compulsory process is essential to support the also essential legislative power of inquiry, what Woodrow Wilson called "vigilant oversight of administration."

The second lesson is that there is an established process for resolving conflicts. Under the Reagan memo, the executive agency first flags a substantial question of privilege, which then goes to

DOJ's Office of Legal Counsel to coordinate with White House counsel. If they agree, it then goes to the President to assert the privilege.

The ground rules are that the assertion is only made in compelling circumstances, after careful review, and that it disappears altogether as to Government misconduct, and that it can be waived. The branches work together in an, what's called, accommodations process, sometimes with the help of a court, to resolve conflicts.

The third lesson is that good faith, what CRS called a "flexible and cooperative approach" and what one court called a "spirit of dynamic compromise," is needed to make all this work. OLC needs to be an honest ombudsman. Absent good faith, it becomes "a process of intransigence and delay ending in stalemate," as one observer noted.

I thank Senator Kennedy for his bipartisan approach to this hearing, which I hope enables us to reclaim this long-standing substance and process for executive privilege assertions. For those circumstances where intransigence emerges around executive privilege assertions, I hope we can work toward a bipartisan law allowing expedited consideration by courts.

It is often enough for a court to remind the parties of basic executive privilege guardrails to reset the accommodations process and help the parties achieve resolution. The mere availability of rapid judicial response neuters the advantage of delay tactics, so this need not become a recurring burden for courts. The D.C. Circuit has told us we need to pass a law to get courts involved, so let's get to work: first, agreeing on and repairing the foundation, and second, solving the impasse dilemma.

Senator Kennedy is an extremely able and savvy lawyer. We have a common interest as legislators in assuring a healthy process for policing executive privilege assertions. We have considerable foundation to build upon, and that gives me optimism that a solution can be achieved that will enjoy broad support.

To help us achieve this solution, we have Professor Kate Shaw, professor of law at the Benjamin N. Cardozo School of Law. She's written extensively about Presidential powers, and her scholarly writing has appeared, among other places, in the Columbia Law Review, the Cornell Law Review, and the Northwestern University Law Review, and her popular writing in The New York Times, The Washington Post, and The Atlantic. She served as an associate counsel in the White House Counsel's Office, so she knows this space, and she clerked for Justice John Paul Stevens and Judge Richard Posner.

Professor Jonathan David Shaub is an assistant professor at the University of Kentucky, J. David Rosenberg School of Law. His research focuses on Presidential power and congressional oversight, which is very appropriate and germane, and has been published in the Duke Law Journal and Harvard Journal on Legislation, among other places. He's a contributing editor for the Lawfare blog and previously served in the Office of Legal Counsel, giving him, also, practical experience, and then afterwards as assistant solicitor general for the State of Tennessee. He clerked for the Fourth Circuit and served as a Bristow Fellow in the U.S. Solicitor General's Office.

Professor Mascott—I'm jumping the queue, here—is assistant professor of law and co-executive director of the C. Boyden Gray Center for the Study of Administra—State at the Antonin Scalia Law School of George Mason University. Let me put quotation marks around "Administrative State," for my own editorial intervention. She previously also served within the Department of Justice in the Office of Legal Counsel and as an Associate Deputy Attorney General.

Finally, Mark Rozell is the dean of the Schar School of Policy and Government at George Mason University, where he holds the Ruth and John Hazel faculty chair in public policy, and is the author of the book "Executive Privilege: Presidential Power, Secrecy, and Accountability."

Thank you for your willingness to help us work through these issues and find common cause going forward, and I turn it over now to my colleague and friend, our Ranking Member, Senator Kennedy.

**OPENING STATEMENT OF HON. JOHN KENNEDY, A U.S. SENATOR FROM THE STATE OF LOUISIANA**

Senator KENNEDY. Thank you, Mr. Chairman. Our Chairman has raised some very interesting questions on a subject that I think we're all interested in. I came today to try to learn. Based on the credentials of this panel, I think I'll learn a lot. I want to thank you for coming. I'm going to stay as long as I possibly can.

Please tell us what we need to hear. Tell us what's working, but I'd also like to know what's not working, and what you think we should do to fix it. Again, thanks to our Chair.

Chair WHITEHOUSE. Let me thank Senator Hirono for joining us and recognize that she is present, and invite the witnesses to give their statements for five minutes apiece, if you don't mind. Professor Shaw.

**STATEMENT OF KATE SHAW, PROFESSOR, BENJAMIN N. CARDOZO SCHOOL OF LAW, YESHIVA UNIVERSITY, NEW YORK, NEW YORK**

Professor SHAW. Great. Chairman Whitehouse, Ranking Member Kennedy, and distinguished Members of the Subcommittee, thank you for the invitation to testify today. My name is Kate Shaw. I am a professor at Cardozo Law School, and as the Chairman said, before I began teaching, I served as a lawyer in the White House Counsel's Office from 2009 to 2011. I understand that the purpose of today's hearing is to evaluate the current process for resolving conflicts between executive privilege and congressional oversight.

I will start by saying that my view, as a scholar and a former White House lawyer who believes both in a constitutionally grounded executive privilege and in the importance of robust congressional oversight, is that the current process is very much in need of reform. In recent years, long-standing norms of interbranch cooperation and accommodation have largely broken down, and Congress has been denied meaningful access to much executive branch information. This development is a worrying one from the perspective of executive branch accountability and general separation of powers principles.

My written testimony provides background on executive privilege, both generally and in the context of congressional oversight, so in the interest of time, I'll just say that the judicial authority in this area forms the backdrop against which disputes between the political branches play out. On the substance, it is relatively favorable to Congress, but in every major recent dispute that has ended up in court, the judicial opinion has come too late to have much impact at all.

As important as the caselaw is, equally or more important is the authority from the political branches, in particular the numerous written opinions and directives from Presidents and senior DOJ officials that have guided the executive branch's approach to these issues for many years.

Taken together, these documents reflect a strong vision of executive privilege, a power which the executive branch understands to have constitutional foundations, to keep certain information confidential, but they also reflect a recognition of Congress's authority to access some executive branch information. Guided by the need to respect these two competing principles, the executive branch has, in countless inquiries over the years, worked with Congress to grant some information access while withholding documents the executive branch believes warrant protection in keeping with the basic purposes of executive privilege.

In the view of the executive branch, those purposes are largely, though not exclusively, about protecting the President's decisional processes. As the Supreme Court explained in *United States* v. *Nixon*, a President and those who assist him must be free 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. This cooperative give-and-take has largely broken down in recent years. I will highlight just a few developments and then briefly touch on several possible reforms.

The first novel development is the emergence of protective or prophylactic assertions or mere suggestions of executive privilege, whereby witnesses appear to testify but refuse to answer specific questions on the grounds that the President might later assert executive privilege or where executive branch officials refuse to provide any documents or testimony on the grounds that some of what is sought might later be subject to a privilege assertion.

The second, related, development is the outright refusal to cooperate in any way in particular investigations. The third is rooted in long-standing executive branch positions that close Presidential advisors enjoy absolute immunity from compelled testimony, but the most recent administration took an exceptionally broad view of that immunity.

Briefly, what reforms would I recommend? First, internal executive branch reforms. The executive branch's increasing tendency to invoke just broad and undifferentiated confidentiality interests should yield to a requirement that assertions of executive privilege be made only upon a detailed description of the specific executive branch interest that would be threatened by the production of documents or testimony.

Second, the executive branch could refine and formalize its approach to documents or testimony that contain evidence of wrong-

doing or misconduct. Lawyers within the executive branch have generally adhered to a strong norm in which documents or testimony that would reveal wrongdoing are not viewed as candidates for an assertion of the executive privilege, but it's not clear that that principle has held, in recent years, so the practice needs to be strengthened and perhaps formalized.

Since I'm running out of time, I'll touch briefly on two more matters. One, congressional practice. It's important that congressional committees engaging in oversight work to ensure that their requests for information or testimony are reasonable and not overbroad. In addition, committees should work to minimize the extent to which their requests duplicate or overlap other requests.

The executive branch, as those of us on this panel who have worked there know well, is actually pretty leanly staffed, in particular the Office of Legal Counsel, so requests that seek enormous volumes of documents that require time-consuming review by lawyers are unrealistic and, frankly, unreasonable.

Finally, as the Chairman alluded to in his opening, on courts, my view is that it would be better for most or all of these disputes to be resolved out of court, but if they are going to be resolved in court, it would be well advised to consider legislation that would expedite judicial resolution. I see my time has expired. Thank you so much for the invitation, and I look forward to your questions.

[The prepared statement of Professor Shaw appears as a submission for the record.]

Chair WHITEHOUSE. Thank you, Professor Shaw. Professor Shaub.

**STATEMENT OF JONATHAN SHAUB, ASSISTANT PROFESSOR, J. DAVID ROSENBERG SCHOOL OF LAW, UNIVERSITY OF KENTUCKY, LEXINGTON, KENTUCKY**

Professor SHAUB. Chairman Whitehouse, Ranking Member Kennedy, and distinguished Members of the Committee, thank you for the invitation to appear and talk about two subjects dear to my heart: congressional oversight and executive privilege. I am honored to be part of this esteemed panel and look forward to the discussion.

Congress's authority to conduct oversight and the executive branch's authority to withhold information are both implicit constitutional authorities. Neither appears in the text of the Constitution. Accordingly, the scope of executive privilege has been, as you know, the subject of considerable controversy and dispute.

In individual oversight disputes, this constitutional ambiguity has historically been resolved outside the courts, through negotiation and compromise. Known as the accommodation process, the back-and-forth negotiation between Congress and the executive branch over access to information has been called a dance, because it's a flexible, ever-evolving process governed as much by normative and historical practice, as well as current politics, as by legal principles.

Normative practice fades easily in the context of the intense partisan battles that have lately come to characterize oversight, and in such disputes, the executive branch's views ultimately govern, because the executive branch holds the information.

As later Chief Justice William Rehnquist explained when he was the head of OLC, the executive branch has a head start in any controversy with the legislative branch, since the legislative branch wants something the executive branch has, and therefore the initiative lies with the former. All the executive has to do is maintain the status quo, and he prevails. Given that head start and the lack of applicable judicial authority, the executive branch's internal constitutional doctrine is the primary source of legal authority that governs its responses to congressional oversight.

In my view, that comprehensive doctrine, put into practice, has led over time to an imbalance in congressional oversight. By relying on its view of executive privilege as well as a series of prophylactic doctrines deemed constitutionally necessary to protect executive privilege, the executive branch now has the tools to stymie any congressional oversight it so chooses. Understanding this internal executive branch doctrine is vital to understanding the state of the oversight.

My written testimony describes these principles in detail, principles that I helped to put into practice while I was working at OLC. I have since studied and written about these principles and their historical development. Although often unstated, these constitutional principles inform almost every aspect of the accommodation process that occurs between the branches today.

Scholars and commentators have called on Congress to act aggressively and urged it to deploy various constitutional tools to attempt to rectify the current imbalance and force the executive branch's hand. My view, however, is that none of Congress's current tools are effective if the executive branch decides to play constitutional hardball, which it has done with increasing frequency. In short, in current practice, the executive branch has essentially unchecked authority to withhold any piece of information it chooses from Congress.

I would like to note at the outset that I believe this fundamental disagreement between the branches that has led to the current imbalance is an institutional disagreement, not necessarily a partisan one, although oversight disputes often become embroiled in partisan politics. Oversight related to the Operation Fast and Furious during the Obama administration or the Mueller Report during the Trump administration are two recent examples. The foundations of the doctrine on which the executive branch relies to withhold information and testimony are bipartisan, both in their creation and their execution.

That is not to say that all oversight disputes are created equally. Some Presidential claims of privilege or related doctrines such as immunity are more extreme and have substantially less historical support than others and, as a result, warrant criticism and controversy, but they share a common wellspring, a comprehensive constitutional doctrine developed almost wholly within the executive branch, that elevates the executive branch's institutional interests over Congress's.

I do not suggest that this doctrine has been developed in bad faith, and few would argue with the proposition that the executive branch has real confidentiality interests that warrant consideration, but these internal constitutional tenets equip executive

branch actors with powerful weapons that are difficult to resist deploying during these disputes.

Whether this current imbalance is a problem in need of reform or an appropriate mechanism for protecting executive branch confidentiality interests is a matter of debate, of course, but if reform is the goal, my view is that the necessary first step in rebalancing the branches' respective authorities is judicial resolution of the fundamental constitutional oversight questions at the heart of the disagreement between the branches.

Judicial resolution of individual disputes has proven ineffective, due to the length of time necessary and the appeals, but judicial consideration and resolution of antecedent constitutional questions has proven vital and necessary in the past, when claims of absolute constitutional authority have inhibited the resolution of interbranch disputes.

Precedential appellate decisions on these issues have proven elusive, and Congress has at times chosen not to pursue its institutional interests in seeking such precedent. If reform is the goal, congressional action should be directed to legislation that increases the likelihood and the availability of a judicial decision on the merits of executive privilege. Thank you.

[The prepared statement of Professor Shaub appears as a submission for the record.]

Chair WHITEHOUSE. Thank you, Professor. Mr. Rozell.

**STATEMENT OF MARK ROZELL, DEAN,**
**SCHAR SCHOOL OF POLICY AND GOVERNMENT,**
**GEORGE MASON UNIVERSITY, ARLINGTON, VIRGINIA**

Mr. ROZELL. Ranking Member Kennedy and Senator Hirono, thank you for the invitation to testify. I have submitted for the record a detailed version of my testimony that is based on my past and ongoing research on executive privilege and, here, would like to focus on the accommodation process.

Among scholars, there is very little debate about the legitimacy of executive privilege, as a principle. As this doctrine is well established in practice and in law, the focus of academic debates is the scope and limits of this power.

It is widely recognized that Presidents have occasional secrecy needs, and that the right to withhold information and testimony from those with compulsory power also is not absolute, and that the power to compel disclosure, excuse me, is not absolute. Like other constitutionally based powers, any claim of executive privilege is subject to a balancing test. Presidents and their advisors may require confidentiality, but Congress needs access to information from the executive branch to carry out its lawmaking, oversight, and investigative functions.

Not all Presidents have exercised executive privilege judiciously. Some have used it to cover up embarrassing or politically inconvenient information or even outright wrongdoing. As with all other grants of authority, the power to do good things is also the power to do bad things. The only way to avoid the latter is to strip away the authority altogether and thereby eliminate the ability to do the former.

Permanently constraining this executive power because of the actions of any current or former President would not, in my view, serve the national interest. At various times there have been calls for legislative or judicial imposed restrictions on executive privilege, and here I disagree. It is impossible to determine in advance all the circumstances under which Presidents may have to exercise that power.

The resolution to executive privilege disputes is found, I believe, in the political ebb and flow of the separation of powers, not in the courts defining in advance the guardrails. Congress already has the institutional capability to challenge claims of executive privilege by means other than attaching statutory restrictions on the exercise of that power. For example, Congress may withhold support for the President's agenda or for the President's nominees for executive branch and judicial positions.

In one case during the Nixon years, the Senate Judiciary Committee threatened not to confirm a Cabinet nominee until the President dropped an executive privilege claim to prevent a White House staff member from testifying. Senator Sam Ervin even threatened to filibuster the nomination if it cleared the Senate. The Senate's pressure resulted in President Nixon withdrawing his privilege claim and allowing the White House aide to testify in person and to answer additional written questions from the Committee.

Similarly, Members of the Senate Judiciary Committee in 1986 threatened not to confirm the nomination of William Rehnquist as Chief Justice of the U.S. Supreme Court until President Reagan dropped an executive privilege claim over documents from Rehnquist's tenure in the Department of Justice. Here a bipartisan majority of the Committee supported a subpoena of key documents, leading to the President eventually compromising and agreeing to allow the Committee to access the selected categories of documents.

If information can be withheld only for the most compelling reasons, it is reasonable for Congress to try to force the President's hand by making him weigh the importance of withholding the information against that of moving forward a nomination or a piece of legislation. Presumably, information being withheld for purposes of vital national security or constitutional concerns would take precedence for the President over pending legislation or a pending appointment. If not, then there appears to be little justification in the first place for withholding the information.

Congress has many other tools, as well. Control over the Government's purse strings, the threat of cutting agency staff and funding, is a powerful tool, for sure. In addition, Congress has successfully used the subpoena power and contempt of Congress charge to compel the release of information. I cite numerous examples in my research where that has been very successful.

In an ideal world, all such issues would be resolved on the objective merits of the positions of the executive and the legislative branches. In reality, political considerations and public opinion play important, often determinative, roles, as in most other interbranch disputes and negotiations. Again, I bring forth some examples to illustrate where that has worked in the past and where political considerations have been key in many of those cases.

I believe Congress has the responsibility to consider the President's reasoning for an executive privilege claim. There are occasions when, after doing so, Congress has either given deference to the President's position or decided that the stakes involved were not worth an interbranch fight.

The vast majority of cases in history verifies this point. It can be expected that the President will comply with requests for information, rather than withstand retaliation from Congress. History is replete with many such examples. If Members of Congress believe that a particular exercise of privilege poses a threat to the constitutional balance of power, the answer resides not in crippling Presidential authority, but exercising to full effect the vast array of tools at Congress's disposal. Thank you.

[The prepared statement of Mr. Shaub appears as a submission for the record.]

Chair WHITEHOUSE. Thanks very much. Professor Mascott.

**STATEMENT OF JENNIFER MASCOTT, ASSISTANT PROFESSOR, ANTONIN SCALIA LAW SCHOOL, GEORGE MASON UNIVERSITY, ARLINGTON, VIRGINIA**

Professor MASCOTT. Chairman Whitehouse, Ranking Member Kennedy, and Members of the Subcommittee, good afternoon. Thanks for the invitation to appear today. Today I'll build on my prepared testimony by briefly unpacking the constitutional principles and history related to oversight and privilege, discussing practice across administrations, and addressing the path forward for Congress if it seeks more control over the substance of executive branch authority.

First, is there a constitutional problem with executive and legislative disagreement over information disclosure? Are there roadblocks that need addressing, and if so, what are their scope?

The constitutional system is designed to embody divided Government, both the vertical division between State and Federal Government and the horizontal division among the three Federal branches. Two of the branches, the political branches, have their own independent constituencies. In contrast to the judiciary, the executive and legislature are directly accountable back to the American people, and these two branches therefore have a natural rivalry. They favor distinct institutional interests by design.

Paraphrasing the well-known Federalist Paper Number 51, the constitutional framers contrived the interior structure of the Federal Government so that its several parts, through their mutual and careful interactions, would be the means of keeping each other in their proper places. Divided Federal Government, at times inefficient Government that's slow and deliberate, has always been a key safeguard for individual rights. When the executive and Congress disagree over information disclosure, it's not surprising. In a sense, those disagreements stem from a mutual and constitutionally intended interbranch back-and-forth.

That said, all three branches have acknowledged that intractable conflict should be avoided wherever possible, and formal executive branch policy for decades has been to disclose as much as possible when Congress requests information related to its constitutional functions.

The Supreme Court's repeatedly observed the congressional power to pose inquiries is broad and indispensable, but the courts also specify that information requests must be related to and in furtherance of a legitimate task. Therefore, analysis of executive branch disclosure should start with the threshold jurisdictional question of whether an information request is incident to one of Congress's enumerated powers.

In other words, is the request tailored to achieve a legitimate legislative purpose? Only then would any potential privilege claim come into play. The Constitution does not expressly discuss executive privilege or expressly grant any power of oversight or investigation, but modern doctrine grounds executive privilege in the constitutional need for executive branch confidentiality and candor in advice-giving, and each branch has a measure of sovereignty over its deliberations and use of information to carry out its functions, such as the critical executive role in national security and foreign affairs.

That said, as a practical matter, the executive branch often provides extensive information without asserting privilege, and in disputes, executive and legislative officials often resolve differences through the accommodation process, which has existed in some form since the first Presidential administration.

For example, after George Washington's objection to a House committee request in 1792, the House narrowed the request. A few years later, Thomas Jefferson provided just a limited set of documents and summary of relevant events when Congress requested comprehensive records related to a possible conspiracy involving foreign affairs.

Accommodation can involve negotiations over the scope of disclosure but also its form, with the executive branch sometimes providing access to documents for a limited time period, for in camera review, or through the provision of summaries of requested documents. There have been suggestions that recently the practice of executive privilege has significantly expanded, but I think, in contrast, practice over multiple administrations has been by and large remarkably consistent.

In 1982, the Department of Justice catalogued more than 60 instances, spanning 27 administrations, in which presidents had claimed executive privilege. Protective privilege assertions are not new, and past administrations of both political parties have asserted absolute testimonial immunity for certain senior Presidential advisors. Then, if Congress wants to assert its own institutional interest in exerting control over the substance of executive administration of law, what is the path forward?

As some of my colleagues have suggested, Congress could pose narrower initial information requests, making even clearer on the face of requests their constitutional objective. Congress can exert control through appropriations or its role in consenting to nominations. Congress also could legislatively impose new affirmative reporting requirements, seeking data for potential legislation, which would relieve pressure on targeted oversight requests once controversy's already arisen.

Most fundamentally, Congress can alter its balance of power of the executive by more vigorously enacting specific substantive pol-

icy instructions on the front end through legislation. In addition to the use of oversight as a tool toward legislation, Congress has the power to directly alter the policy itself. Congressional action will have the most bite when it legislatively cabins executive discretion and policymaking before that action ever takes place. Thank you.

[The prepared statement of Professor Mascott appears as a submission for the record.]

Chair WHITEHOUSE. Thank you very much. This has been a great panel. I carefully read each of the full testimoneys that you all filed, and the first thing I was struck by is how much overlap there is amongst what you all had to say.

In particular, I just want to make sure that I'm correct on this, it seems to me that each one of you agrees that we should do something, that the present status quo, just left to its own devices, would be suboptimal, and that there are good steps that we could take to improve the engagement between the executive and legislative branches on discovery and privilege. Is that correct? Professor Shaw is saying yes; Professor Shaub, yes. Mr. Rozell? Limited, but yes.

Mr. ROZELL. Yes.

Chair WHITEHOUSE. This is not an idle effort of ours.

Mr. ROZELL. It's not an idle effort.

Chair WHITEHOUSE. Professor Mascott.

Professor MASCOTT. Yes, but I would address it more through legislative on the front end, rather than——

Chair WHITEHOUSE. Understood.

Professor MASCOTT [continuing]. The oversight process.

Chair WHITEHOUSE. I think there's also pretty broad agreement that there's a broad, common, well-established understanding of the law of executive privilege. There are, of course, concerns around the margins, but this is not an undeveloped area of law nor one in which there is some massive conflict between one school and another. We actually have a pretty good substantive foundation to proceed from. Is that also commonly agreed? Professor Shaw is yes.

Professor SHAUB. I'm not sure. I mean, I think there are really fundamental disagreements between what Congress views as executive privilege and what the executive branch—I mean, the amount of information that Congress views as protected by executive privilege is limited to Presidential communications, and the executive branch has a number of components, and——

Chair WHITEHOUSE. Yes.

Professor SHAUB [continuing]. So I think there's a pretty wide disparity——

Chair WHITEHOUSE. There're some wide definitional questions in there.

Professor SHAUB. Yes.

Chair WHITEHOUSE. Got it. Understood. Mr. Rozell.

Mr. ROZELL. Yes. I agree. Even among scholars, although there is widespread agreement about the legitimacy of the principle of executive privilege, not everybody agrees on exactly what the scope and limits of that power is.

Chair WHITEHOUSE. Yes. Professor Mascott.

Professor MASCOTT. Yes. I think historically the practice has been pretty consistent, yes.

Chair WHITEHOUSE. The actual procedure that one is expected to go through in a conflict over the production of information from the legislative branch seems to me to have been pretty well established by the Reagan memo, and I don't know that there's any different—there may be people who have not complied with the Reagan memo, but it seems to me that that is the process foundation for us to begin our work in this Committee. Would you agree with that?

Professor SHAW. Yes. I mean, I think that's right, that there's been pretty broad bipartisan adherence to that general kind of flow between the branches, although, as I said in my opening, I think that their compliance with those general procedures was lacking in recent years.

Chair WHITEHOUSE. Yes, we've seen some real breakdowns recently, and that's why we're having this hearing, to try to see if we can find a way to steer through those breakdowns. One of the things that seems to be very important in this is OLC's role as an honest ombudsman, to help kind of be a bit of an honest broker for the executive branch with Congress. Is that important, and is that enforceable? If we could write something that said, "The OLC shall be an honest ombudsman," would that be enough? Professor Shaw?

Professor SHAW. You know, I'm not sure what it would do, quite honestly. I think that every administration has taken seriously——

Chair WHITEHOUSE. Let me put it a different way. Does the Reagan memo contemplate OLC having something of an ombudsman role?

Professor SHAW. Yes, I think so. I think that every subsequent OLC has understood itself to have that role, but I think, just as Professor Shaub suggested, the contours of the privilege and the obligations of each administration, as understood by each Office of Legal Counsel, you know, sort of has shifted to some degree. I think OLC understands itself to serve that role. The larger executive branch understands OLC to serve that role. I mean, I think it's a question maybe for the Committee, how well OLC has discharged its obligations, but——

Chair WHITEHOUSE. Of course, whatever they do, Congress has very little to say about, so it's unenforceable if they should depart from their role as an honest ombudsman. That takes us to the general importance of good faith, in this process, which I think everybody concedes is essential to its succeeding. One, two, three, four, yes.

Then what happens if good faith breaks down? That's where we get to where it gets interesting, to me, anyway, and what judicial process should look like. I'm a recovered lawyer, and I recall in cases where you had two contesting parties, in a big case where they were really fighting with each other, and the way in which the court would handle that would be either to have the judge or the magistrate judge schedule status conferences and give, every 30 days or 60 days, the lawyers a chance to come in, yell at each other in front of the magistrate, explain why they're being treated unfairly, and have the magistrate judge say, "Look, I'm not making a ruling on this, but if this were to go to a ruling, you, sir, have a terrible argument, and you really look like you're going to win. So, you know, take that as a guidance, and I'll see you in 30 days."

Things would, you know, tick along pretty well, and you end up cutting through a lot of the nonsense without having to wait through full decision and appeal.

Do you think the status conference procedural mechanism, that kind of—some kind of more constant but less final judicial intervention might be appropriate? If that's too much to ask you in the time that I have, please take that as a question for the record, mull on it, bring your experience and expertise to bear, and give me an answer for what the judicial approval might look at.

Senator KENNEDY. I'd like to hear their answers.

Chair WHITEHOUSE. All right. Let's—we'll keep rolling, then, with the permission of the Ranking Member. Who wants to jump in on that? Professor Mascott, I see you reaching for your button.

Professor MASCOTT. Thank you. I mean, I guess if the question is just generally judicial involvement, I mean, just as—stepping back for a second, I mean, we've got the President's Supreme Court reform commission going on right now. I mean, it seems as though there are folks on all sides who have concerns about the amount of power that the judiciary has within the system. So it does seem curious that we would turn to the judiciary at this point to try to solve——

Chair WHITEHOUSE. Well——

Professor MASCOTT [continuing]. This particular problem. Also, you know, concerns—I mean, folks on both sides complaining about, you know, the role in sort of emergency proceedings. I mean, for there to be something done in a timely fashion, are we going to have more process on kind of the emergency docket? It just seems like an awful lot of power to give to the apolitical branch, and the Court itself, I think, would be resistant to it, because in 2020, in the *Mazars* decision, it noted it had never before weighed in on an oversight decision.

I guess I just sort of step back and say, generally, it seems to me that the political process is working fairly well in this area and is sort of functioning as it's supposed to, which sometimes is just going to have conflict but often has——

Chair WHITEHOUSE. Let me tell you where I disagree with you, to——

Professor MASCOTT. Yes, Senator.

Chair WHITEHOUSE [continuing]. React.

Professor MASCOTT. Okay.

Chair WHITEHOUSE. That is, to Mr. Rozell's point about the political forces being brought to bear by Congress to push for a resolution, that's not something one Senator does. That's something the entire body has to do.

I will assert to you all that there are innumerable inquiries that are made for information from the executive branch that never rise to that level of—what did Professor Rozell say? Where the stakes are worth the fight of going up.

I do think that even if the stakes aren't worth the fight of getting an entire house of Congress engaged in trying to get information to a Committee or a Subcommittee or to a Senator, there's still public value in a Senator having someplace to go, or a House Member or a Subcommittee. That's where I think some judicial intervention that is carefully limited so that it's really kind of like a—

more like a status conference—anyway, I've said enough. We can continue the conversation. I'm turning to Professor Kennedy.

I get forgotten, I guess, is my personal thing. I get forgotten, if it takes the Speaker of the House or the Senate Majority Leader for me to get an answer, and there are dozens of Senators like me whose concerns with not getting information are simply never going to rise to that level. Sorry, John.

Senator KENNEDY. No, no. Very valid point. I mean, it has gotten worse. I don't know whether the abuse of executive privilege tracks exactly the increase in partisanship in our country, but I bet it's close. I mean, it seems to me, and you folks would know better than I would but—because you've studied it, but inevitably there is going to be some friction, and there should be some friction. I don't think our objective ought to be to make a good faith cat love a good faith dog. They're not supposed to, under our separation of powers.

There's been a lot of bad faith, and I don't know whether the answer is to codify the so-called Reagan memorandum. You can't—I mean, you can say to OLC, "Be a neutral arbiter," but, you know, we live in a real world. I don't see any way to get a quick resolution without involving the judiciary. I just don't, as a practical matter. Should we have to? No. We don't live in a perfect world. I think that if you did have some sort of mechanism to get the judiciary involved, you would have a lot of people in both the legislative branch and the executive branch have an epiphany, and say, "You know, maybe we ought to try to work these things out on our own."

I guess my question is, let's assume for a second we—and I could be wrong. Okay? You could convince me that, as the professor said, maybe the worst thing we could do would be to involve the judiciary. My mind is open. Let's assume at some point we do have to involve the judiciary. How would you design that? It would have to be quick, and it would have to be accessible. You shouldn't have to get the Majority Leader or the Minority Leader's permission or the Speaker's permission. For the BIPs like me, "Barely Important Persons," I'd like to be able to have access to do it, too. But tell me how you'd design it, Professor Shaw.

Professor SHAW. Maybe I'll say, in general, that there may be a way between the sort of two paths that we are outlining, one of which is essentially to cede final authority over the resolution of these disputes to the judiciary, and the other of which is to say the political branches just need to work it out on their own. Maybe a middle path is to design an expedited judicial resolution procedure that is rarely invoked because its very existence forces everyone to the table to actually resolve these disputes, so maybe it occasionally is invoked, but it is not——

Senator KENNEDY. Don't you think you'd have to invoke it a couple of times before people——

Professor SHAW. Sure. Hopefully that would be enough, and then you wouldn't——

Senator KENNEDY. Sure.

Professor SHAW. Sorry to interrupt, Senator. But——

Senator KENNEDY. Yes.

Professor SHAW [continuing]. Yes, so that, maybe, you do a couple of times, and then it is clear there will be, you know, con-

sequences for failure to negotiate in good faith and to reach reasonable accommodations. I suppose it would just be—now, whether a Committee, a Chair and a Ranking Member together, or a single Member of a Committee—I guess I haven't thought carefully enough about who could initiate the process, to speak really definitively about it here, but that would require, you know, an expedited resolution, potentially the chairman's suggestion of, you know, 30-day status conferences until something—some kind of resolution is reached. The fact of the process would serve a forcing mechanism.

I mean, my general instinct is that the less judicial involvement, the better. I don't think either political branch should want to cede the ultimate authority over these important constitutional questions to the judiciary, and yet we do seem to be at a stalemate moment in which some third party may need to be pulled in.

Senator KENNEDY. I don't think the judiciary will like it, as Professor Mascott said, but——

Mr. ROZELL. I think that's right. Yes, I don't think the courts would want this role, quite frankly. Political matters should be solved between the political branches, and there is a long history of an accommodation process between the legislative and the executive, in which these disputes have been resolved by good faith negotiations and compromises, over time. So——

Senator KENNEDY. "Over time" is the key——

Mr. ROZELL. Right.

Senator KENNEDY [continuing]. Expression.

Mr. ROZELL. Over time is okay, I would say. I don't see why there should be a rush to move things forward, necessarily. Part of the separation of powers system means that things oftentimes have to move very deliberately——

Senator KENNEDY. Yes.

Mr. ROZELL [continuing]. And take their time, and that's quite natural to the process, and I don't think that there's anything wrong with that. I don't see the courts wanting to get involved in this. I worry about what it says about the nature of the process that some would believe that the courts need to step in and resolve what the legislative and executive can't do themselves.

Chair WHITEHOUSE. I guess because we start from the proposition that this doctrine has been developed by courts, and that's how we are. It's *Marbury* v. *Madison*, what the law is. Senator Hirono.

Senator HIRONO. Thank you, Mr. Chairman. I thought the role of the courts is to resolve constitutional disputes. We're here because it would be nice if, in situations where the executive evokes—invokes an executive privilege and the legislative branch disagrees, and so it would be nice if the accommodation process would indeed result in that way of resolving these kinds of conflict, but that's not what we've seen recently.

We're here because, in those instances, there probably should be some sort of an expedited review process, because I recall the situation related to Don McGahn, where I think it took a year or something for the courts to tell us that he indeed should have to come to testify. I think that was the result.

Professor Mascott has said that, you know, she cautions us from giving power to the apolitical branch. I mean, we can have a dispute about how apolitical the judiciary actually is, but let's assume that for the moment. So—but that's one of the reasons that maybe in these conflict situations, we want the apolitical branch to help us figure it out.

I kind of like the idea of the Chairman's status conference situation. Those of us who have practiced law, we are familiar with the judge coming in, or magistrate, bringing the parties together and saying, "Okay, you know, I've listened to both sides, and here's what you should do."

Professor Shaw, you indicate that maybe we should think about some sort of an expedited process. Could you elaborate on that a little bit more? For example, as a structural reform, what if we were to give exclusive original jurisdiction to challenge a subpoena to a three-judge district court panel in the District of Columbia, say, under 20 U.S.C. § 2284, which states that a district court of three judges shall be convened when otherwise required by an act of Congress? We could do such an act. That would expedite the proceedings.

Professor SHAW. I think that Congress clearly has the constitutional authority to provide for such a procedure, and presumably there would be, then, direct appeal to the U.S. Supreme Court. I mean, I do continue to think that, symbolically and practically, there is something troubling about the political branches appearing to signal the superiority on matters of constitutional, you know, debate and interpretation to the judiciary.

Of course, you know, *Marbury* v. *Madison* does tell us that the courts will say what the law is, but I think that Congress and the executive branch have important roles in resolving disputed constitutional questions, as well. I worry that too much—ceding too much power to the courts is a troubling development from the perspective of broader separation of powers concerns or from the perspective of the kind of value of the separation of powers.

If we assume that the bridge has been crossed, right, that from—basically, from the 1970's, the courts have been turned to as kind of arbiters of these disputes between Congress and the executive, and the question is just how better to design a judicial process so that we get to some final resolution that, again, serves as kind of an overhang, so that most of these disputes can be resolved outside of the courts. I think that, you know, a three-judge court mechanism with a mandatory appeal or a right of appeal to the Supreme Court is very much worth considering.

I'm not sure if you would legislate or, you know, if you would sort of require a 30-day process in the legislation. I'm not aware of any three-judge court with such a procedure, but I don't, at least initially, see any constitutional problems with requiring some such process.

If the bridge has been crossed, then I think that this is very much worth considering. I guess I would just raise a caution: are there—are there other mechanisms that should be considered in lieu of or in addition to focusing exclusively on the judiciary?

Senator HIRONO. Do you see a status conference kind of a situation as a prelude to something more, such as a three-judge panel?

Professor SHAW. I mean, I think that you could do them both, right, that the—I don't—I think that the panel itself could conduct such conferences. I think, to be fair, the district courts that have already, you know, overseen litigation around some of the privilege and oversight disputes, you know, have been pretty active in trying to move the parties along. I'm not sure this would be something wildly novel; it would just potentially kind of formalize the role. I do think, to a degree, it is already happening.

Senator HIRONO. Professor Shaub, do you have a comment?

Professor SHAUB. Sure. Yes. I tend to take, I guess, more of a view that judicial intervention is necessary, at this point. I mean, so, if we look at the foundational cases that——

Senator KENNEDY. Could you say that again?

Professor SHAUB. Sorry. I take the view that I think judicial intervention is—has become necessary because of the place that we've arrived to as a matter of sort of constitutional law with the two branches, right? You can negotiate in good faith, but if each of your good faith bases from which you start are wildly different, then you're never going to reach any sort of middle ground.

The way that executive privilege now is sort of practiced—in the Obama and Trump administrations, combined, there were two formal assertions of executive privilege. That was it. Despite all the controversies and disputes, there were a couple of protective assertions, there were claims of immunity, but in terms of executive privilege itself, there were two formal assertions, and almost everything else occurred with these other doctrines that surround executive privilege and that give the executive branch sort of rationale to deny congressional oversight requests.

Of course, Congress disputes those. Congress disputes that those exist, and they are the subject of controversy and scholarship written about them, but there's no way to sort of statutorily fight them, because the executive branch views them as constitutionally grounded principles. You can pass a law, and the executive branch says, "That's an unconstitutional law that won't be followed." The same—the *McGahn* opinion, about former White House counsel, and other opinions say, "Congress cannot exercise even inherent contempt, lawfully, because it would be unconstitutional given the executive branch's constitutional doctrine."

I think there is a sort of fundamental constitutional disagreement that will not be resolved until there is a precedential appellate decision that forces the executive branch or Congress to sort of adjust its view and change the guardrails. That's what happened in Nixon. Nixon claimed an absolute right to privilege without any judicial review, and the Supreme Court rejected that.

In the *AT&T* case which is cited as the basis for the accommodation process, Congress claimed absolutely—to be absolutely immune, under the speech and debate clause. Ford and the executive branch claimed absolute executive privilege over national security. The Court said, before we can get to an accommodation, we have to address these claims of absolute constitutional authority first.

I think there needs to be a precedential opinion. This is about these sort of fundamental constitutional disputes, and in the mine run of cases, I think you will eventually come to this, where—the sort of extrajudicial, with a status conference model or whatever it

might be, and you can resolve these disputes. First there needs to be some sort of fundamental constitutional principles on which both branches can start from, to get to an agreement.

Chair WHITEHOUSE. To be clear, in my questions I wasn't suggesting that whatever we should come up with by way of a judicial intervention should displace the accommodations process. Rather, it should provide guardrails to keep the accommodations process within some reasonable bounds.

I'll give you an example. I've been looking at FBI tip line practices. I asked the FBI two years ago, "What's your policy for how you run a tip line?" No answer. Lindsey Graham heard me bother them enough that he actually got the Deputy Attorney General up in his office to say, "What the hell? Would you please answer these questions?" This is presumably public information. In fact, ultimately, by doing a search on the internet, we found a YouTube in which the FBI explained its tip line procedures, but they had refused to comply.

If there were—you know, that's really hard to countenance under any process of accommodation. They didn't answer. When the DAG came up here, it was just mumblety-peg; nothing happened. If they knew that I had a court to go to, to say, "Come on, Your Honor, please, this is ridiculous. Can we formalize an accommodations process and have you supervise it until you're comfortable that both sides are acting in good faith?"—that seems to me to be a kind of sensible intermediate step, just for your, you know, reference, since you're mulling on this notion, which I will ask you to think more about and answer as a question for the record.

Professor Mascott, you mentioned two things that you recommended: one, that when there's a subpoena or some other request for information, Congress should be clearer about what it wants and why it wants it, so it can jump over the legislative purpose hurdle. I agree with those things, and we might want to, you know, bake that into what we're doing.

Then there's the question of misconduct, which in theory blows up executive privilege. Presumably, at some point early on, if Congress is going to assert that misconduct is the purpose of our investigation, we need to let that be known and explained pretty early on, so that anybody who's considering this, whether it's a court or OLC or whomever, can, A, determine that the misconduct concern or allegation is real enough to justify it; and, B, if that's the case, boom, there goes the privilege. Reactions?

Professor MASCOTT. Yes, Senator. I mean, first, on the idea that the misconduct purpose is absolute, I mean, I do think the Court has acknowledged that, I mean, even where there are concerns of misconduct, that there are certain kinds of information like classified information or national security and foreign affairs concerns that still might come into play. I don't know that it's 100 percent absolute.

I do—I do acknowledge that it's a concern. I guess what I would say, though, is, I'm not sure that even—that Congress has been authorized, constitutionally, just with general blanket investigative power. Even, I think, in the area of misconduct investigations, there would still presumably be a particular law or legal requirement that Congress had felt was broken and needed to see if it

needed to be addressed, complied with more adequately, fixed in the legislative process, and that in explaining the need for documents, you know, there would need to be some tieback to legislation.

Alternatively, of course, the constitutional process for investigation is an impeachment. I know, you know, there were obviously conflicts over wanting to get information in—in recent history. You know, the rules of the road change, of course, once the House would have authorized an impeachment inquiry, but that is really the constitutional method to go through for just pure misconduct claims. Once such an inquiry were started, of course there'd be different rules than if Congress were just acting out of its legislative power.

If I could just say—make a couple quick comments about the judicial question. The Senators are obviously correct that, in *Marbury*, there's discussion about, you know, the courts having a role in determining constitutionality, what the law is, but you know, the Article III power, I think, distinct from the Article I and Article II powers, is just limited to resolving cases and controversies.

When we're thinking about judicial process, I mean, there're all kinds of questions, I think, that would not maybe be adequately addressed by just having a new judicial commission to look at oversight. You know, one is, there's got to be a limited case and controversy. Someone has to have standing to bring the claim. There—what would the judicially manageable standards be, if the Constitution doesn't address information acquisition specifically?

Then, stepping back even further, I mean, we have talked about today, and the Supreme Court agrees, that as part of the legislative function, Congress needs information. I feel like we're starting from an assumption that necessarily, you know, we should just have access to all executive branch information at all times, and obviously every branch is interested in——

Chair WHITEHOUSE. I'm not, just for the record.

Professor MASCOTT. Okay. Every branch is interested in confidentiality, of course; the legislative staff, committee staff, things like that. I don't—you know, when we're talking about information, again, I think it needs to always be tied back to, what is the legislation that we're trying to put forward?

If there are concerns about the executive branch having too much authority, it's much better to handle that through legislation that specifically guides and constrains what folks can do, rather than—what I'm concerned about on the back end is giving power to the executive and then, in a way that's not intended by the Constitution, sort of interfering with or questioning how it's executed. I think it's better to just give limited power in the first place, rather than to interrupt the confidentiality and candor in advice-giving that's really essential for the executive to get good advice, once the power's been given.

Chair WHITEHOUSE. Yes, and the interesting thing about pretty much everything you've said is that's all stuff that courts have told us is the law. That puts us right back to courts again, as far as I can tell.

Senator Hirono, do you want to continue? This is—we're down to——

Senator HIRONO. Well, I——

Chair WHITEHOUSE [continuing]. The two of us. We've got a terrific panel and an interesting question, so have at it.

Senator HIRONO. I know. I feel as though we should make use of all these——

Chair WHITEHOUSE. I know.

Senator HIRONO [continuing]. Brains sitting in front of us. One description is that—and I think this is something that Professor, well, Mascott pointed out, that, you know, Congress should need to show, let's say we're in court, that there's a legitimate legislative purpose for the information we seek.

Let's assume that Congress shows that. Does that shift the burden to the executive to show that they can withhold the information? They have to do more than just say, "Well, you know, we're asserting executive privilege." They have to show us why. The burden shifts. Is that what should be happening?

Professor MASCOTT. I think—so, the executive branch, in a January 2021 opinion, talked a little bit about this process and that the threshold jurisdictional thing that the executive's going to look at first is the legitimate legislative purpose and looking for whether it's narrowly tailored to the stated objectives. The Supreme Court also addresses this a little bit in the *Mazars* decision, that it needs to be narrowly tailored, not just a roving, broad request. Yes, presuming that the request is tailored toward legislation——

Senator HIRONO. Yes.

Professor MASCOTT [continuing]. Then, adjunct to Congress's legislative powers, I think the general assumption would be that the executive branch then needs to carefully respond. You know, what happens as a matter of practice is often the accommodation process begins or executive privilege is asserted, but that happens in relatively rare occasions. Once that process is invoked, of course the executive would, you know, explain reasons, as it often does through letters and other statements to Congress about why it's not handing over the information.

Senator HIRONO. I think it's that part that I—the process that I'm interested in. When the burden shifts to the executive branch, they can't just simply say, "Assert executive privilege." They have to show why they think that this information is—so, is it related to national security? What, right? They have to be very specific. Would you agree with that, Professor Shaw?

Professor SHAW. Yes. I mean, just the way this works in practice is, so, assuming that the threshold—I'm not sure I fully subscribe—well, I'll say I don't fully subscribe to the general overview in the January 2021 OLC memo that suggests a pretty rigorous kind of threshold determination of the legitimacy of legislative purpose. I'm not sure that's an appropriate inquiry for the executive branch to be engaging in.

Assuming whatever that inquiry looks like, there is a legitimate legislative purpose everyone believes is satisfied, generally speaking—so, say there are 1,000 documents that are in the category that have been requested, the executive branch will take a look and say, "Of these 1,000, you know, maybe 900 of them are completely,

you know, uncontroversial, and we'll hand those over now. As to 100 of them, they may reflect internal deliberations, potentially even advice to or discussions about advising the President, and so we're going to need to go—we're going to need to engage in a process with you in which we'll ask you a little bit more specifically about the nature of your interest, and we can negotiate down from, you know, that 1,000 documents to 10 documents, and potentially, at the end of the day, we will need to assert executive privilege over those 10, if pressed, but hopefully we won't be pressed because you'll be able to get the information that you need, based on reviewing the rest of the documents."

I would say that would be the process that would typically proceed, once the threshold determination has been made and it is determined there is some privileged material in the larger set of documents that are being requested.

Senator HIRONO. Are you saying that in that process where you're arguing over the 100 documents that executive privilege may apply to, that that is not being overseen by a court?

Professor SHAW. Typically not, no. It'll just be between—you know, at the staff level, potentially at the member level and the principals level in the executive branch, that sort of narrowing and winnowing occurs, and yes, it often does happen—again, in the shadow of these judicial opinions that sort of structure the process, but often without involving any court at all. Very often, at least until the last couple of years, the process has actually, to my mind, worked relatively well. Each side has been a little unhappy at the end of the day but has gotten most of what it views as really important.

Senator HIRONO. Yes, I think we all agree that the accommodation process should be the first way that we do this, but we're here because that—what happens when that process is not proceeding in good faith? Thank you, Mr. Chairman.

Chair WHITEHOUSE. Thanks. If I could just turn this for a moment—you know, we've been looking at this as, the courts, they have a role in this, making substantive determinations, but one of the things that strikes me is that part of what goes awry in these disputes, often, is not substantive disagreement but process simply not happening.

We have been treated, particularly in this Committee, to so many non-assertion assertions of the privilege, that it seems that the process has very much broken down. My understanding is that it's supposed to be only in compelling circumstances that the assertion is made. There's got to be a careful review. It starts in the agency, but OLC has to come right in and offer its own, for want of a better word, ombudsman view and then go through White House counsel to the President, to say, "Mr. President, this is important enough we actually want you to assert executive privilege here."

Unless, and until, the President does, there isn't a proper assertion of the privilege; there's only the abeyance moment awaiting the proper assertion of the privilege.

It would seem to me that it would be really easy for a judge or a panel of judges looking at this to go through the checklist of, okay, agency did a compelling review; OLC has been involved;

White House counsel is involved; oh, and the President has asserted the privilege. Great. Okay, now we can get to this.

If those things have not been done, and the thing has jammed up just with an agency asserting a privilege without the OLC yet offering its opinion, without the White House counsel yet being involved, you just—like a stopper, right there at the agency, "We're not answering your question; go pound sand," that's a pretty easy one for a court to break through without having to intervene in, you know, challenging ways in the larger political process, because somebody's clearly playing outside the foul lines on process. If we could get the process enforced, I think that smooths out a lot of these other things. Mr. Rozell?

Mr. ROZELL. Just one point. I find that you may end up in a challenging situation where, under those circumstances, Presidents would simply avoid at all costs using the words "executive privilege" and resorting to other rationales for what——

Chair WHITEHOUSE. We'd see documents stamped "constitutional privilege" because——

Mr. ROZELL. Right.

Chair WHITEHOUSE [continuing]. They didn't want to say "executive privilege."

Mr. ROZELL. You know, there is a long history of that, right, particularly in the early post-Watergate era, when executive privilege had a bad name. Presidents avoided the use of the phrase "executive privilege" because they knew it was politically toxic, but they still wanted all the advantages, right?

Chair WHITEHOUSE. That's the case still? It doesn't seem like it's the case any longer.

Mr. ROZELL. I think the embarrassment over the phrase "executive privilege" is not as great as it was——

Chair WHITEHOUSE. Yes.

Mr. ROZELL [continuing]. During that period, for sure. If you establish a process by which the courts are going to be involved, right, and anytime the President utters the words "executive privilege," you know, there's going to be this intervening process to try to solve these disputes, I think that gives an incentive for Presidents to simply, once again, start avoiding the use of the phrase "executive privilege" and resort to other rationales for withholding information, which ultimately, you know, is a kind of, you know, playing word games, in a sense——

Chair WHITEHOUSE. Yes.

Mr. ROZELL [continuing]. In order to get around the process that you would like to see put in place, I assume.

Chair WHITEHOUSE. Although I would say that they don't get—a President doesn't get to not give Congress information——

Mr. ROZELL. Right.

Chair WHITEHOUSE [continuing]. For no stated reason.

Mr. ROZELL. Right. Oh, I agree with that.

Chair WHITEHOUSE. You can say, "Law enforcement matters." You can say, you know, "Grand jury matters." You can say, "National security matters." We can say, "Too classified for you", or, "too much danger of improper release." We've got the whole deliberative process, executive privilege nexus of ideas, and you can kind of call it what you want, but I think at the end of the day,

"No, and I'm not saying why", isn't an answer that should survive any kind of scrutiny or contest. Professor Shaub, are you—go ahead.

Professor SHAUB. Yes.

Chair WHITEHOUSE. Then I'll let you all go, unless Professor Hirono has other questions.

Professor SHAUB. Just to sort of follow-up on the process, in terms of what actually happens within the executive branch, I mean, I think your, sort of, retelling of it is mostly accurate. What happens at the first stage is more of, here's a broad request for information. Let the agency, the counsel, Legislative Affairs will look and kind of see what's there. If there are items that are deliberative or law enforcement related, then a letter goes back to the committee that says, you know, in some timeframe, there are certain confidentiality interests here. That's it. Unless the committee follow—follows up on that or presses, there probably won't be any more communication or any more even look at the documents.

It's only when there's a press that it goes up to sort of OLC, and they start to look and say, "Are these within the components?" The inquiry is now sort of, "Are they within the components? Can we withhold it?" As opposed to, "Is this very specific information that's going to cause some harm to the national interest?" It's sort of categories of undifferentiated confidentiality interests, as opposed to, sort of, problems from specific information.

Executive privilege is never even considered or discussed within the executive branch, until the committee says or schedules a contempt vote. It's not—executive branch policy is not to assert privilege until immediately before a contempt vote has been scheduled, so it's way down the road, and everything before that is just consideration of "Is this permissibly withheld? We'll decide whether to withhold it or not if they schedule a contempt vote."

Chair WHITEHOUSE. We have, I think, room for considerable improvement in the way in which these conflicts are managed. I, for one, hope to find a way to make some improvements in a bipartisan fashion, perhaps by starting with a Committee report that all the Members of the Committee could get behind, that lays out some of the ideas. I hope you don't mind if we stay in touch with you as we continue to develop that. You've been a very helpful panel, and I'm grateful to you all for being here.

If you could take under advisement my notion—I don't want to even call it anything more than that—that, if there were a calendar over at the District Court, and if a dispute got to a certain stage, and we'd have to figure out what the trigger was, it was allowed to go on that calendar. When it got on the calendar, there would have to be some regular meetings of some kind, not to settle the law or make final dispositive determinations, but to say, "How are you guys doing at your process of accommodation?", and to give each party a chance to blow foul on—"Well, we haven't even had an answer, and this seems pretty obvious. It's actually public information somewhere, I think"—you know, I think that could move things along.

Again, my history here is that status conferences work pretty well at rattling the cages of parties and cut through tons of the discovery disputes in real litigation. I mean, you really don't want to

annoy a judge by having to have them constantly rule on discovery disputes, and in a lot of status conferences, there is no formal ruling. The judge or the magistrate just says, "Are you out of your mind? Do you really want to bring that notion to me, formally? How do you think that's going to turn out? Have you read this case?"

Then the lawyer kind of gets abashed and says, "All right, well"—goes back to the client and says, "All right, we probably have to give up this document." It all happens again in an accommodations process, but it's a guided accommodations process, so nobody has the unilateral ability to bring it to an end in bad faith without recourse. That's where I think we are.

Thank you all very much, and what do we—a week to get—would a week be okay, to get your answers in? Two weeks? What would you prefer?

Mr. ROZELL. That is fine.

Chair WHITEHOUSE. Week's fine? We'll do a week.

Thank you all.

Mr. ROZELL. Thank you.

Chair WHITEHOUSE. Hearing adjourned.

[Whereupon, at 3:45 p.m., the hearing was adjourned.]

[Additional material submitted for the record follows.]

Witness List
Hearing before the
Senate Committee on the Judiciary
Subcommittee on Federal Courts, Oversight, Agency Action and Federal Rights

"Breaking the Logjam: Principles and Practice of Congressional Oversight and Executive Privilege"

Tuesday, August 3, 2021
Dirksen Senate Office Building Room 226
2:30 p.m.

Professor Kate Shaw
Yeshiva University
New York City, NY

Professor Jonathan Shaub
University Of Kentucky
Lexington, KY

Dean Mark Rozell
Schar School of Policy and Government
George Mason University
Arlington, VA

Professor Jennifer Mascott
Antonin Scalia Law School
George Mason University
Arlington, VA

***"Oversight and Executive Privilege in the Context of Separated Powers"***

**U.S. Senate Committee on the Judiciary**
Subcommittee on Federal Courts, Oversight, Agency Action, and Federal Rights
Hearing on "Breaking the Logjam: Principles and Practice of Congressional Oversight and Executive Privilege"

**August 3, 2021**

**Testimony of Jennifer L. Mascott**
Assistant Professor of Law & Co-Executive Director of the C. Boyden Gray Center for the Study of the Administrative State, George Mason University's Antonin Scalia Law School

Dear Chairman Whitehouse, Ranking Member Kennedy, and Members of the Subcommittee,

Thank you for the invitation to appear today to testify regarding the legal principles and practice related to congressional oversight and executive privilege. I am Assistant Professor of Law and Co-Executive Director of the Center for the Study of the Administrative State at George Mason University's Antonin Scalia Law School. Between 2019 and 2021, I served as a Deputy Assistant Attorney General in the Office of Legal Counsel ("OLC") within the U.S. Department of Justice ("DOJ") and as an Associate Deputy Attorney General.

My academic scholarship and areas of instruction include the separation of powers, administrative law, constitutional interpretation, and the federal judiciary. The interbranch dynamics at play in the exercise of oversight and the assertion of privilege stem from the character of separated powers that form the foundation of the federal constitutional structure.[1] Those separation of powers principles in turn constitute a core safeguard of individual liberty within the U.S. system of divided, federalist government.[2]

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[1] *See* Federalist No. 51 (noting that the interior structure of the federal government must be contrived such that "its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places"). *See generally, e.g.*, U.S. Const. art. II, section 1 (executive Vesting Clause); *id.* art. I, section 8 (enumeration of legislative powers); *id.* art. I, section 3, cl. 6 (impeachment).

[2] Federalist No. 51 (noting that the "separate and distinct exercise of the different powers of government . . . to a certain extent is admitted on all hands to be essential to the preservation of liberty").

To assist the subcommittee's examination of oversight and executive privilege, my testimony first addresses constitutional principles underlying long-standing executive branch positions and judicial precedent on the proper relationship between congressional mandates for information and executive branch disclosure. Next the testimony discusses consistencies across presidential administrations in the executive branch approach to congressional subpoenas and information requests and their historical roots. Finally, the testimony briefly describes the accommodation process that the Executive Branch and Congress have used for decades to negotiate settlement of interbranch disputes over disclosure of executive branch documents and testimony. In practice, through this process of negotiation the Executive Branch often provides extensive information to Congress. In conclusion the testimony briefly addresses means by which Congress can exert control in legislation and policy-making over the Executive Branch beyond the modern oversight process.

## I. Constitutional Principles Related to Congressional Authority to Require Information and Executive Confidentiality Interests

Analysis of the proper scope of oversight and assertions of executive privilege is necessarily rooted in examination of the constitutional underpinnings of congressional and executive branch authority. The Constitution vests all executive power in the President.[3] And the Constitution imposes on the President the duty to "take Care that the Laws be faithfully executed."[4] As the federal government is one of limited powers, the Constitution provides that Congress has just the legislative authority "herein granted" in Article I.[5]

The Constitution does not explicitly textually provide for any independent congressional oversight or investigative authority. Therefore, congressional requirements for information from the executive must derive from one of Congress's enumerated powers, such as its legislative powers specified in section 8 of Article I or its power of impeachment.[6] If Congress poses an information request without adequate connection to its enumerated constitutional authorities or in an area of exclusive

[3] U.S. Const. art. II, section 1.

[4] *Id.* art. II, section 3.

[5] U.S. Const. art. I, section 1. ("All legislative Powers herein granted shall be vested in a Congress of the United States . . . .").

[6] *Cf.* U.S. Const. art. I, section 8 (listing specific powers and then authorizing Congress to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . ."); *id.* art. I, section 3, cl. 6 (Senate power to try impeachments).

executive responsibility such as the pardon power,[7] then there is no constitutional basis to mandate compliance.[8] In addition, the judiciary and the Executive Branch have recognized that at times certain privileges protect executive branch information from disclosure to a coordinate branch even where a congressional information request was connected to one of Congress's areas of constitutional authority. The question of the proper scope of assertions of executive privilege, however, arises only after the threshold jurisdictional analysis of the connection between the congressional oversight request and its asserted legislative purpose.

In its decision in *Trump v. Mazars* in 2020, the Supreme Court highlighted the long-standing principle that congressional subpoenas must be "'related to, and in furtherance of, a legitimate task of the Congress.'"[9] Therefore, assessment of the proper scope of executive branch disclosure of information must first consider the scope of congressional authority to issue the subpoena or information request incident to Congress's enumerated powers.[10] Only then is it relevant under modern doctrine whether the Executive Branch may or should assert privilege over part or all of requested information.

That said, as a matter of practice, the Executive Branch often provides extensive information to Congress without asserting privilege. And in cases of a dispute over the scope of information disclosure, executive and legislative officials often negotiate resolution through the accommodation process. Although the Executive Branch has recognized and claimed five categories of executive privilege, it also recognizes a number of subject-matter limitations on the scope of those privileges. At bottom, however, interbranch contests over the degree to which Congress has entitlement to executive

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[7] U.S. Const. art. II, section 2 ("[H]e shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in cases of Impeachment.").

[8] *See Trump v. Mazars USA, LLP*, 140 S.Ct. 2019, 2031-32 (2020).

[9] *Id.* at 2031 (quoting *Watkins v. United States*, 354 U.S. 178, 187 (1957)).

[10] *See, e.g., Barenblatt v. United States*, 360 U.S. 109, 111 (1959) (indicating that Congress "may only investigate into those areas in which it may potentially legislate or appropriate"). In addition to Congress having authority to require information from the Executive Branch only when the request is incident to its enumerated powers, Congress also has delegated its formal oversight authority only to certain entities such as congressional committees. *See Congressional Oversight of the White House*, 45 Op. O.L.C. ___, at *14 (2021) (explaining the critical threshold requirement of committee jurisdiction to authorize the exacting of testimony and the calling for production of documents). Therefore, although executive officials may and often properly will provide information in response to requests from other congressional entities such as individual members, the Executive Branch applies principles to those requests that are distinct from principles governing the typical oversight process. *See generally Requests by Individual Members of Congress for Executive Branch Information*, 43 Op. O.L.C. ___.

branch information stem from the interbranch rivalry and assertion of institutional interests that the constitutional framers intended when devising divided government.

A. Threshold Scope of Congressional Oversight Authority

As the Supreme Court has recognized, congressional power to pose inquiries to the Executive Branch "is an essential and appropriate auxiliary to the legislative function."[11] Without the ability to acquire information from the executive, Congress would be unable to legislate effectively.[12] The power to obtain information thus is "broad and indispensable," according to the Court.[13] Congress can pose inquiries to the executive addressing the administration of already-enacted law, the analysis of proposed law, and the study of shortcomings in the county's political and economic systems for purposes of remedying them through legislation, among other inquiries.[14] But, the Court has noted, congressional power to acquire information is subject to inherent, threshold limitations. The power "is justified solely as an adjunct to the legislative process" or to other constitutional functions of Congress such as the exercise of the impeachment power.[15]

In January 2021 the Executive Branch provided its most recent comprehensive public formal reiteration of long-standing executive views, across administrations, regarding the constitutional contours of congressional oversight authority and executive privilege.[16] That 2021 memo advising the Office of the White House Counsel summarized executive branch positions on oversight and privilege spanning decades. Consistent with the Supreme Court's interpretation, the January 2021 analysis noted the threshold limitations on congressional inquiry powers while also discussing the executive and legislative branch tradition of compromise through the accommodation process that has led to the successful resolution of many oversight disputes.[17] It further described a strong constitutional value of executive branch confidentiality for purposes of candor in advice-giving, but then also explained the limitations on executive branch reliance on privilege.

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[11] *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927).

[12] *Mazars*, 140 S.Ct. at 2031; *McGrain*, 273 U.S. at 175.

[13] *Mazars*, 140 S.Ct. at 2031 (internal quotation omitted).

[14] *Watkins*, 354 U.S. at 187, discussed in *Mazars*, 140 S.Ct. at 2031.

[15] *Watkins*, 354 U.S. at 197; *Mazars*, 140 S.Ct. at 2031 (internal quotation omitted).

[16] *See Congressional Oversight of the White House*, 45 Op. O.L.C. ___ (2021).

[17] *See id.* at *49.

The most significant limitations on congressional oversight and investigation authority, however, are not claims of executive privilege despite multiple administrations viewing that privilege as broad and stretching across five categories of protected information. Rather, the most significant constraints on congressional mandates for information from the co-equal Executive Branch are threshold limitations, stemming from the limits on enumerated congressional powers themselves.[18]

Indeed, in a number of recent instances where the Executive Branch declined to provide the full extent of information requested by Congress, executive officials cited the absence of a constitutional or legal basis for the initial information request. In particular, executive officials have declined to comply with congressional information requests where the Executive Branch has concluded Congress did not establish a legislative or otherwise constitutionally grounded basis for the information request.[19]

The Supreme Court has indicated general support for this approach, observing that a congressional subpoena for presidential information must "adequately identif[y] its aims and explain[] why the President's information will advance its consideration of the possible legislation."[20] Otherwise, it is "impossible to conclude that [the] subpoena is designed to advance a valid legislation purpose."[21] For example, in the *Mazars* dispute addressed in 2020 by the Supreme Court, the Court remanded the dispute for an evaluation of whether the contested congressional committee requests for the President's personal financial information were adequately connected to an authorized congressional task.[22] The Court determined that when assessing whether a subpoena for presidential information is "'related to, and in furtherance of, a legitimate task of the

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[18] *See Mazars*, 140 S.Ct. at 2031-32; *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975); *Watkins*, 354 U.S. at 187; *Quinn v. United States*, 349 U.S. 155 (1955); *McGrain*, 273 U.S. at 161, 174-77. *Cf.* Saikrishna Bangalore Prakash, *Imperial From the Beginning* 228-34 (2015) (discussing a version of this concept).

[19] *See, e.g.*, *House Committees' Authority to Investigate for Impeachment*, 44 Op. O.L.C. ___, *47-49 (Jan. 19, 2020); *Congressional Committee's Request for the President's Tax Returns Under 26 U.S.C. § 6103(f)*, 43 Op. O.L.C. ___, *3 (June 13, 2019) ("*President's Tax Returns 2019*"). *See also Congressional Oversight of the White House*, 45 Op. O.L.C. ___, at *13-14 (discussing these examples in depth along with the general executive branch approach to assessing the existence of a valid legislative or constitutional basis for a congressional information request).

[20] *See Mazars*, 140 S.Ct. at 2036 (discussing *Watkins*, 354 U.S. at 205-06, 214-15).

[21] *See id.* (internal quotation omitted).

[22] *See id.* at 2035-36 (finding that the courts below did not adequately account for separation of powers concerns because they inadequately assessed whether the requests "advance[d] a valid legislative purpose" or adequately safeguarded against unnecessary intrusion into presidential operations).

Congress,'" courts need to "perform a careful analysis that takes adequate account of the separation of powers principles at stake."[23]

In these cases, executive privilege is not the issue; rather, the Executive Branch and courts are noting that Congress cannot exercise oversight or investigative functions in a vacuum or simply to acquire executive branch confidentialities.[24] Information requests must be toward the end of enacting legislation or exercising another constitutional power.[25] Claims of executive privilege, which all branches agree are not always absolute, become relevant only where Congress has posed a constitutionally grounded information request tailored in scope to its constitutional functions.[26]

Congress can request information from the executive only to the extent that the request relates to its areas of constitutional authority.[27] As Congress lacks general policy-making power, its oversight and investigative requests must stem from one of its enumerated powers.[28]

B. Executive Branch Confidentiality Interests and Assertions of Privilege

Both the courts and the Executive Branch across administrations have described confidentiality within the exercise of executive power as an important constitutional value. For example, the Supreme Court recently noted that all recipients of legislative subpoenas "have long been understood to retain common law and constitutional privileges with respect to certain materials, such as attorney-client communications and

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[23] *See id.* at 2035 (quoting *Watkins*, 354 U.S. at 187).

[24] *See id.* at 2032 (noting that Congress lacks "'general' power to inquire into private affairs and compel disclosures" and "there is no congressional power to expose for the sake of exposure").

[25] *See, e.g.*, *Eastland*, 421 U.S. at 506 (observing that congressional inquiries must address "subject[s] on which legislation could be had" (internal quotation omitted)).

[26] *See Watkins*, 354 U.S. at 201, discussed in *Mazars*, 140 S.Ct. at 2036 ("The more detailed and substantial the evidence of Congress's legislative purpose, the better.").

[27] *See, e.g.*, *Watkins*, 354 U.S. at 187 (noting the validity of congressional subpoenas only where they are "related to, and in furtherance of, a legitimate task of the Congress"); *Mazars*, 140 S.Ct. at 2032 (describing the lack of a congressional power of inquiry for mere general law enforcement purposes, which are assigned to other branches of government, and detailing numerous precedential cases explaining that congressional inquiries must be connected to specific constitutional congressional exercises of authority); *Quinn*, 349 U.S. at 161 (describing congressional inquiry power as necessarily related to a "valid legislative purpose").

[28] *See* U.S. Const. art. I, section 1 (vesting in Congress just the legislative powers "herein granted"); *Marbury v. Madison*, 1 Cranch 137, 176 (1803) ("The powers of the legislature are defined, and limited . . . .").

governmental communications protected by executive privilege."[29] Where Congress has requested information adjunct to its constitutional functions, and that information falls within the scope of executive privilege, such information is subject to "the greatest protection consistent with the fair administration of justice."[30]

Executive privilege, where it applies, "safeguards the public interest in candid, confidential deliberations within the Executive Branch."[31] Although the political branches typically resolve their interbranch conflicts over information requests without judicial involvement,[32] the Court has described executive privilege as "fundamental to the operation of Government."[33] The Court has acknowledged in particular the significant "Executive Branch[] interests in maintaining the autonomy of [the President] and safeguarding the confidentiality of [his] communications."[34] Contemporary conceptions of executive privilege date back many decades.[35] As detailed further in Part II of this testimony, administrations of both political parties have repeatedly asserted executive privilege.

The Executive Branch has recognized five, sometimes overlapping, categories of executive privilege: (i) deliberative process, (ii) attorney-client communications and work product, (iii) presidential communications, (iv) national security and foreign affairs, and (v) law enforcement.[36] Several of these categories, or components, of executive privilege are subject to varying degrees of limitations under the executive branch view of their scope.

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[29] *See Mazars*, 140 S.Ct. at 2032 (citing a Congressional Research Service report on congressional investigations, among other sources).

[30] *United States v. Nixon*, 418 U.S. 683, 715 (1974).

[31] *Mazars*, 140 S.Ct. at 2032.

[32] *See, e.g., id.* at 2026 (noting that this case in 2020 was the first time the Court had "addressed a congressional subpoena for the President's information"); *id.* at 2035 ("For more than two centuries, the political branches have resolved information disputes using the wide variety of means that the Constitution puts at their disposal" without judicial enforcement or resolution).

[33] *Nixon*, 418 U.S. at 708.

[34] *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 385 (2004).

[35] *See, e.g., Nixon*, 418 U.S. at 708, 711 (describing a constitutional basis for "a privilege of confidentiality . . . to the extent this interest relates to the effective discharge of a President's powers"); *Congressional Requests for Confidential Executive Branch Information*, 13 Op. O.L.C. 153, 154 (1989). *See also Congressional Oversight of the White House*, 45 Op. O.L.C. ___, at *30 (stating that "Presidents have invoked executive privilege since the earliest days of the Republic").

[36] *Congressional Oversight of the White House*, 45 Op. O.L.C. ___, at *30.

The deliberative process component of privilege derives from the principle that disclosure of "the 'communications and the ingredients of [a] decisionmaking process" inevitably inhibit "'frank discussion of legal or policy matters.'"[37] This privilege component is critical and core to notions of executive privilege. It extends to "all executive branch documents that reflect advisory opinions, recommendations, and other deliberative communications generated during governmental decision-making."[38] Because it encompasses just predecisional and, therefore, deliberative materials, however, it typically does not protect documents that merely recount facts or explain already-made decisions.[39] Similarly, the attorney-client and work product components of privilege apply only to materials involving "legal analysis, legal advice, and other attorney communications or work product."[40]

The presidential communications aspect of privilege "protects communications made in connection with presidential decision-making," as its title suggests.[41] It is significant for governmental operations, and applies beyond "exchanges directly involving the President" to include presidential adviser communications made in preparation to advise the President.[42] This component of executive privilege is based on the need for the President to have unhindered access to transparent, frank, and informed advice.[43]

Finally, the national security and foreign affairs component of privilege generally "provides *absolute* protection for materials the release of which would jeopardize sensitive diplomatic, national security, or military matters, including classified

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[37] *Id.* at *32-33 (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-51 (1975)).

[38] *See id.* at *32; *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997).

[39] *See Congressional Oversight of the White House*, 45 Op. O.L.C. ___, at *33 (explaining that factual information is protected only to the extent that it is "inextricably intertwined" with decisional deliberations); *Sealed Case*, 121 F.3d at 737.

[40] *Congressional Oversight of the White House*, 45 Op. O.L.C. ___, at *33; *see also Assertion of Executive Privilege Regarding White House Counsel's Office Documents*, 20 Op. O.L.C. 2, 3 (1996) (Reno, Att'y Gen.) (*WHCO Documents*).

[41] *Congressional Oversight of the White House*, 45 Op. O.L.C. ___, at *34.

[42] *Sealed Case*, 121 F.3d at 751-52; *Congressional Oversight of the White House*, 45 Op. O.L.C. ___, at *34.

[43] *Sealed Case*, 121 F.3d at 751-52.

information and diplomatic communications."[44] The law enforcement aspect of executive privilege similarly provides the Executive Branch with "a near-absolute right to withhold from Congress information that would compromise ongoing law enforcement activities."[45]

The five components of executive privilege that the Executive Branch asserts consequently are broad, although they fall within certain defined subject-matter areas. Assertions of executive privilege become relevant only in response to information requests or subpoenas issued incident to an enumerated congressional power.

## II. Interbranch Conflict and Accommodation Across Presidential Administrations

Initial conflict between the two political branches over the scope of executive branch responses to congressional information requests is not a new or particularly modern phenomenon. Since the first presidential administration, Congress and the executive have negotiated over the most appropriate resolution of congressional requests for presidential and executive branch information.

Not infrequently, as detailed in part below, the executive has pushed back against initial congressional requests, across presidential administrations. This is not surprising, as the constitutional design involves two political branches precisely for the purpose of divided, restrained government. And information garnered and held by the two political branches in the course of the execution of their constitutional responsibilities is a core component of their distinct sovereignty. In the end, however, prototypes of the contemporary accommodation system have resulted in compromise and the provision of extensive information to Congress in facilitation of its legislative and policymaking role.[46]

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[44] *Congressional Oversight of the White House*, 45 Op. O.L.C. ___, at *31. *See also, e.g., Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988) (explaining that presidential authority to control access to national security information flows primarily from the Commander in Chief authority); *Halkin v. Helms*, 690 F.2d 977, 990 (D.C. Cir. 1982) ("[M]atters the revelation of which reasonably could be seen as a threat to the military or diplomatic interests of the nation . . . are *absolutely privileged* from disclosure in the courts.).

[45] *Congressional Oversight of the White House*, 45 Op. O.L.C. ___, at *31.

[46] *See, e.g., History of Refusals by Executive Branch Officials to Provide Information Demanded by Congress (Part I)*, 6 Op. O.L.C. 751, 751-72 (1982) (*"History of Refusals Part I"*) (referring to the "countless examples of full disclosure by the Executive" and the "infrequent" but "by no means unprecedented" instances of "presidentially mandated refusals to disclose information to Congress").

In significant measure, the executive branch approach to providing information in response to congressional subpoenas and other information requests has been remarkably consistent across multiple administrations. Recent administrations of both political parties have repeatedly interposed significant assertions of executive privilege. But executive branch officials and agencies have also provided extensive information to Congress in response to routine requests, as part of the accommodation process, and at times as a matter of comity.

A. Practice Rooted in History

As far back as the Washington Administration, executive officials have imposed limitations on their compliance with congressional demands for information.[47] At times the executive decision to decline full compliance with a request has been based on an assertion that Congress lacks the authority to mandate the information. On other occasions the Executive Branch has asserted that requested information is privileged. But the Executive Branch historically has consistently acknowledged the importance of confidentiality in executive branch deliberations and conducted its own examination of the legal source of authority for the congressional information request.

The Executive Branch has recognized from the time of the First Congress that the legislative branch needs information on executive operations or matters within executive agency expertise in order to carry out its policy-making functions.[48] Congress by statute often mandates that executive branch agencies or officials provide information on a regular basis to assist Congress's legislative functions. But where Congress issues more particular subpoenas for information to conduct oversight or an investigation, long-standing executive practice is to first analyze the legal basis for the request and then whether any privilege applies.

For example, in both the Washington and Jefferson administrations, those Founding-era presidents concluded on separate occasions that aspects of a congressional request for information would not further the public good. And President

[47] *See, e.g.*, *Mazars*, 140 S.Ct. at 2029-30 (describing a 1792 House committee request for documents pertaining to a military campaign in the Northwest Territory that had led to a rout of federal forces, where Washington and his cabinet concluded that the President could exercise discretion over disclosures and refuse to provide any papers that would not further the public good).

[48] *See* Jennifer Mascott, *Early Customs Laws and Delegation*, 87 Geo. Wash. L. Rev. 1388, 1395, 1404, 1443-44 (2019) (detailing congressional solicitations of reports and recommendations from Treasury Secretary Alexander Hamilton for use in crafting legislation).

Washington and Jefferson in both cases decided to provide only a portion of the requested materials.[49]

In 1982, the Executive Branch catalogued numerous instances over time in which the President and Congress had clashed over the scope of disclosure of presidential information.[50] The analysis discussed at least 60 examples spanning twenty-seven administrations from the time of Washington up through the Carter and Reagan presidencies in which a President had claimed executive privilege to decline to provide the full scope of information requested by Congress. These examples were separate and apart from any denials of information by Cabinet or lower-level executive officials. The memo also noted that its analysis excluded numerous instances in which congressional and executive branch engagement in the accommodation process had led to nondisclosure or partial disclosure of information or nonappearance of witnesses.[51]

B. Modern Administrations and Recent Political Winds

Subsequent administrations in the late twentieth and twenty-first centuries by and large have continued the practice of careful examination of executive branch responses to information requests. The Executive Branch has routinely engaged with Congress in the accommodation process to provide extensive information in response to congressional inquiries. But the Executive Branch has also repeatedly asserted its interests as a coequal branch by declining to provide information that it believes would impede on its constitutional independence. The most recent advice by the U.S. Justice Department's Office of Legal Counsel ("OLC"), issued on July 30, 2021, to authorize the release of the personal tax returns of President Joseph Biden's former political opponent, arguably diverges from one aspect of the typically vigorous executive branch defense of its prerogatives.[52] This reversal in position appears to derive from a distinction between the current administration and its most recent predecessors in their conception of aspects of the constitutional separation of powers.

Following are several of the more prominent examples of executive nondisclosure over the past three decades. Attorney General Janet Reno advised President Clinton in 1999 that he could assert executive privilege in response to congressional subpoenas for

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[49] *See Mazars*, 140 S.Ct. at 2029-30. *See also infra* Part III.

[50] *See generally History of Refusals Part I*, 6 Op. O.L.C. at 751.

[51] *Id.* at 751 & 751 n.1.

[52] *Ways and Means Committee's Request for the Former President's Tax Returns and Related Tax Information Pursuant to 26 U.S.C. § 6103(f)(1)*, 45 Op. O.L.C. __, at *1-4 (2021) ("*President's Tax Returns 2021*").

testimony and documents regarding the offer of clemency to sixteen individuals.[53] And in 1996, Attorney General Reno approved the assertion of executive privilege over a portion of White House Counsel's Office ("WHCO") documents involved in a House committee investigation into the White House Travel Office. Attorney General Reno had previously advised that the President could rely on a protective assertion of privilege to temporarily withhold the entire collection of documents while the President evaluated them for purposes of privilege. Some of the permanently withheld documents were connected to an Independent Counsel criminal investigation.

In contrast to OLC's suggestion in its recent July 2021 memo that the Executive Branch should defer to certain congressional assertions of legitimate legislative purposes, Attorney General Janet Reno reasoned in 1996 that congressional committees are "required to demonstrate that the information requested is 'demonstrably critical to the responsible fulfillment of the Committee's functions.'"[54] She based her analysis on the typical, and long-standing, executive branch commitment to ensuring that disclosure of information does not harm the interests of current or future presidents.[55]

In 2007, Acting Attorney General Paul Clement advised that the President could assert executive privilege with respect to documents sought in connection with the dismissal of U.S. attorneys as well as with respect to the testimony of two former White House officials.[56] And in 2012, Attorney General Eric Holder advised President Obama to assert privilege over DOJ documents related to the investigation of Operation Fast and Furious, a law enforcement operation intended to stop the flow of firearms to Mexican drug cartels from the United States.[57]

In addition to assertions of executive privilege, presidential administrations have consistently maintained the long-standing, related position that a President's immediate, senior advisers have immunity from compelled congressional testimony

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[53] *See Assertion of Executive Privilege With Respect to Clemency Decision*, 23 Op. O.L.C. 1, 1 (1999) (Reno, Att'y Gen.) ("Clemency").

[54] *See WHCO Documents*, 20 Op. O.L.C. at 2-3 (quoting *Senate Select Comm, on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc)).

[55] *See id.* at 3.

[56] *Assertion of Executive Privilege Concerning the Dismissal and Replacement of U.S. Attorneys*, 31 Op. O.L.C. 1, 1 (2007).

[57] *See Assertion of Executive Privilege Over Deliberative Materials Generated in Response to Congressional Investigation Into Operation Fast and Furious*, 36 Op. O.L.C. 1, 1 (2012) (Holder, Att'y Gen.)

regarding their official duties.[58] For example, the Justice Department's OLC advised in May 2019 that former Counsel to the President Don McGahn was immune from testimony related to the past performance of his official duties, consistent with 2007 OLC advice and the decision of former President Harry Truman not to appear before the House Committee on Un-American Activities in the 1950s.[59] The 2019 memo on testimonial immunity noted that since the 1970s, OLC had consistently advised that the President and his immediate advisers who customarily meet regularly with him have testimonial immunity before Congress. The Office indicated it had endorsed that principle more than a dozen times over the course of eight presidential administrations.[60]

Consistent with this 2019 determination, Attorney General Reno had advised in 1996 that the executive branch position on testimonial immunity is "constitutionally based." According to her reasoning, "[t]he President is a separate branch of government" and therefore, as "a matter of separation of powers," Congress may not compel the appearance of the President or the close advisers who are "an extension" of him.[61] In 2014, OLC similarly advised that congressional testimonial immunity applied to President Barack Obama's Director of the Office of Political Strategy and Outreach.[62] The Office indicated that immunity for senior advisers was essential for "the President's absolute immunity to be fully meaningful."[63] In addition, the 2014 analysis suggested that separation of powers doctrine "would be shattered" and "the President's independence and autonomy from Congress . . . would be threatened" if the President felt that "his every act might be subject to official inquiry."[64]

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[58] *See, e.g., Testimonial Immunity Before Congress of the Former Counsel*, 43 Op. O.L.C. ___, *1-2 (2019); *Clemency*, 23 Op. O.L.C. at 5 (Reno). *Cf. Gravel v. United States*, 408 U.S. 606 (1972) (concluding that legislative staff share in the Speech or Debate Clause constitutional immunity held by Members of Congress).

[59] *Testimonial Immunity Before Congress of the Former Counsel*, 43 Op. O.L.C. ___, at *1, 15.

[60] *Id.* at *2-3, 7 (noting also that "the White House has opposed sending senior advisers to testify for almost as long as there has been an Executive Office of the President," which was created in 1939, and that Assistant Attorney General William Rehnquist described the immunity's legal basis in a 1971 memorandum).

[61] *Clemency*, 23 Op. O.L.C. at 4 (internal quotation omitted).

[62] *See Immunity of the Director of the Office of Political Strategy and Outreach from Congressional Subpoena*, 38 Op. O.L.C. 5, 5 (2014).

[63] *Id.* at 7.

[64] *Id.* at 6 (internal quotation omitted).

Just this past week, OLC reiterated the long-standing core executive branch understanding that Congress may require information from the Executive Branch only where Congress is acting incident to its constitutional authority such as in furtherance of a "legitimate legislative objective." At the same time the Office flipped its 2019 determination that Congress could not access the tax returns of the current president's political rival, former President Donald Trump. The Office now contends that the Executive Branch should not question Congress's stated assertions of "legitimate legislative purpose" in oversight requests absent "exceptional circumstances," at least with respect to requests for tax returns under the statutory authority of 26 U.S.C. § 6103.[65] Although the practical import of this reversal is significant, it essentially impacts just one substep of executive branch oversight analysis by limiting the evidence that executive officials may examine when assessing the threshold jurisdictional question of whether Congress's request falls within the scope of its constitutional authority.

In particular, the July 30 memo asserts that the Executive Branch should "presume that congressional agents are acting pursuant to their constitutional authority and in good faith when evaluating the constitutionality of committee requests for information." It relies on the conception that courts apply a presumption of regularity to executive and congressional actions, and concludes the Executive Branch should follow suit.[66] But one of the cases it identifies as establishing that courts apply a "strong presumption of good faith" to the other federal branches is *Department of Commerce v. New York*, in which the Supreme Court looked behind the former Commerce Secretary's motives in crafting the census to conclude they were inconsistent with his stated objectives.[67] And in 2017, the Republican-led House Committee on Ways and Means had concluded there was no legitimate legislative justification for the Trump tax return request, in contrast to the 2019 Democrat-led House Ways and Means Committee conclusion that there was.[68]

The conclusion just last week that executive branch officials should presume good faith when responding to section 6103(f) requests appears to stem from a distinct conception of the separation of powers than that held by the prior administration. The 2021 analysis emphasizes "respect and deference due a coordinate branch of

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[65] *President's Tax Returns 2021*, 45 Op. O.L.C. ___, at *4.

[66] *See id.* at *21-22.

[67] *See* 139 S.Ct. 2551, 2573-76 (2019) "(Several points, taken together, reveal a significant mismatch between the Secretary's decision and the rationale he provided. . . . Our review is deferential, but we are "not required to exhibit a naiveté from which ordinary citizens are free." (internal quotation omitted)).

[68] *President's Tax Returns 2019*, 43 Op. O.L.C. ___, at *8-9, 14-15; *see also* H.R. Rep. No. 115-73, at 2-4 (2017 committee report).

government" and "presume[s]" the legislative branch will handle the former President's tax returns with "sensitivity."[69] In contrast, the 2019 OLC reasoned that the Executive Branch must act consistent with its constitutional role as a "politically accountable check on the Legislative Branch."[70] The Executive Branch has independent responsibility for evaluating the constitutionality and lawfulness of exercises of authority, as former OLC head Walter Dellinger detailed in 1996 in an analysis of separation of powers doctrine.[71] And the constitutional separation of powers structure is designed to ensure that the President has "'the means to resist legislative encroachment'" with "'a separate political constituency'" to whom he remains accountable.[72] The 2019 memo further noted that the President's duty to "take Care that the Laws be faithfully executed," U.S. Const. art. II, section 3, requires the Treasury Department to carefully evaluate the lawfulness of instructions to hand over confidential tax information, particularly in light of the statutory criminal penalties for wrongful disclosure, *see* 26 U.S.C. §§ 7213, 7213A.[73]

The Executive Branch has generally maintained over decades the view that interbranch debate and "division of governmental authority is . . . a fundamental means by which the Constitution attempts to ensure free, responsible, and democratic government."[74] The July 2021 opinion changes the category of evidence that executive officials will examine in relation to certain tax return requests, but the specific questions at issue in the opinion regarding release of presidential tax returns are relatively unique. And the present administration has sustained a number of the previous administration's actions to further executive branch institutional interests such as DOJ's continued litigation efforts to maintain the confidentiality of a deliberative Department memo related to the Mueller report.

### III. Mechanics of the Accommodation Process

The Executive Branch has a long-standing policy that executive officials should respond to authorized oversight requests in furtherance of legitimate legislative purposes by compliance "to the fullest extent consistent with the constitutional and

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[69] *President's Tax Returns 2021*, 45 Op. O.L.C. ___, at *4, 23, 25, 38-39.

[70] *President's Tax Returns 2019*, 43 Op. O.L.C. ___, at *25.

[71] *Id.* at *25-26 (citing *The Constitutional Separation of Powers*, 20 Op. O.L.C. at 128).

[72] *See id.* at *25 (quoting *Freytag v. Comm'r*, 501 U.S. 868, 906 (1991) (Scalia, J., concurring).

[73] *Id.* at *20-22.

[74] *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 125 (1996) (Assistant Attorney General Walter Dellinger).

statutory obligations of the Executive Branch."[75] The traditional method for working out the specific contours of information provided under this standard and in cases of conflict is the accommodation process.[76]

The two political branches "have an ongoing relationship that the Framers intended to feature both rivalry and reciprocity."[77] Therefore, the executive and Congress properly have competing, and at times conflicting, interests in the back-and-forth over the proper response to congressional inquiries. But the two branches typically reach agreement by recognizing "an implicit constitutional mandate to seek optimal accommodation" and realistically evaluating the needs of the opposing branch.[78]

One early example of reliance on a kind of accommodation process occurred as far back as 1792, when President George Washington objected to aspects of a House committee request for papers related to a surprise rout of the military. After President Washington's cabinet members expressed concern to individual congressmen about the scope of the request, the House narrowed its demand. The Executive Branch then supplied the requested documents.[79] One other historical accommodation example recently detailed by the Supreme Court was President Thomas Jefferson's decision in 1807 not to disclose the complete record of correspondence that the House had requested regarding an alleged conspiracy and foreign affairs. Jefferson expressed privacy concerns related to the request, and sent Congress just a limited set of documents along with a summary of salient events.[80] According to the Supreme Court, the Jefferson and Washington incidents established the ongoing practice, in place since that time, of Congress and the President cooperatively resolving their disputes.[81]

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[75] *See Memorandum for Heads of Executive Departments and Agencies from Ronald Reagan, Re: Procedures Governing Responses to Congressional Requests for Information* at 1 (Nov. 4, 1982), *quoted in Congressional Oversight*, 45 Op. O.L.C. ___, at *37.

[76] *See Congressional Oversight*, 45 Op. O.L.C. ___, at *37 (noting the Executive Branch position that accommodation is constitutionally required and the Judiciary and Congress's recognition of the propriety of the process).

[77] *Mazars*, 140 S.Ct. at 2026.

[78] *Congressional Oversight of the White House*, 45 Op. O.L.C. ___, at *21 (internal quotation omitted) (alteration in the original).

[79] *See Mazars*, 140 S.Ct. at 2029-30.

[80] *See id.*

[81] *See id.*

The Executive Branch summarized and published its position on the proper rules of the road for the accommodation process most recently in January 2021. In advising the White House Counsel, the Department of Justice's Office of Legal Counsel indicated that when placing an information request, Congress "should clearly explain the nature and scope of its request."[82] Where the request "concerns statutory functions, is within . . . delegated oversight authority, and rests on a legitimate legislative purpose," executive officials should consider how to most effectively and appropriately accommodate the request.[83] Much of the work of the accommodation negotiations then consists of a dialogue that helps narrow and defuse potential conflict by ensuring the request is tailored to fit legislative objectives.[84]

Accommodation can involve more than just the bottom-line negotiated decision that the executive will provide a narrower collection of documents than those that Congress initially requested. Accommodation negotiations may address the mechanism for disclosure or the length of time that materials will remain available to the legislative branch. For example, in a dispute involving the Interior Secretary during the Reagan Administration, Congress eventually received access to all requested documents, but only for one day. Executive officials agreed to permit note-taking on the documents but not photocopying.[85] Alternatively, executive and legislative officials might reach agreement that executive officials can satisfy an information request by providing summaries of requested information rather than a collection of underlying documents.[86] As a practical matter, the White House often accommodates congressional requests through substantive summaries and does not ordinarily review and produce underlying emails and documents, most of which generally consist of deliberative communications.[87]

In addition to engaging in the negotiations over the method and extent of disclosure that typically occur during the accommodation process, Congress should also target its requests to entities outside of the Executive Office of the President when

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[82] *Congressional Oversight of the White House*, 45 Op. O.L.C. ___, at *42.

[83] *Id.*

[84] *Cf. McGrain*, 273 U.S. at 161 (noting that the purpose of oversight is to facilitate the legislative function); *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 732 (D.C. Cir. 1974) (noting that legislative determinations rarely depend on "precise reconstruction of past events").

[85] *See History of Refusals Part I*, 6 Op. O.L.C. at 780-81.

[86] *See Congressional Oversight of the White House*, 45 Op. O.L.C. ___, at *37-38.

[87] *See id.* at *42.

possible, to facilitate a fuller and more efficient response. Executive agencies will likely be able to produce information more readily than entities within the Executive Office of the President due to the unique constitutional status of the President. Fewer recognized limitations apply to solicitations of information from executive agencies and departments than from the Office of the President.[88] And the Court has concluded that Congress may acquire information from the President only if other sources cannot reasonably provide it.[89]

The accommodation process typically successfully reconciles congressional information needs with executive confidentiality and deliberative interests.[90] But even where it does not result in agreement between the two branches about the proper scope of information disclosure as efficiently as one branch might prefer, that inefficiency is not necessarily out of step with the proper constitutional order. Inherent to the system of separated powers is a necessary back-and-forth consistent with interbranch rivalry. The existence of multiple branches that must press hard to reach agreement before federal action occurs is a key intended aspect of the original federal constitutional design.

One of the key safeguards "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."[91] In the context of oversight and investigations, that includes the congressional ability to pose the request for necessary information and the accompanying executive facility to shield information from congressional reach when the executive concludes its release would harm its interests.

## IV. Conclusion and the Path Forward

For decades the accommodation process has been the vehicle through which the Executive Branch and Congress have successfully negotiated each branch's interests in the resolution of disputes regarding oversight and executive privilege. The rough and tumble of the political process, even where it might not lead to as efficient a resolution

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[88] *See, e.g.*, *Clinton v. United States*, 520 U.S. 698 (referring to the President's "unique position"); 943 F.3d at 662-663 (also describing the role of the President within the constitutional system); *Cf. Cheney v. United States Dist. Court for D.C.*, 542 U.S. 367, 389-90 (2004) (calling for avoidance of conflict between the two political branches whenever possible).

[89] *See Mazars*, 140 S.Ct. at 2035-36.

[90] *See Congressional Oversight of the White House*, 45 Op. O.L.C. ___, at *39.

[91] *See* Federalist No. 51.

of information requests as political actors desire, is an aspect of the intended conflict between the competing branches. To the extent that Congress concludes it is not receiving executive branch information in as timely or complete a manner as necessary, Congress could precisely tailor its information requests to ensure that the legislative objective served by the requested information is facially apparent.[92] But even more fundamentally, Congress could exert greater control over the Executive Branch by precisely and vigorously legislating detailed policy requirements on the front end in contrast to reliance on oversight on the back end.[93] The Supreme Court has to date concluded that the exercise of legislative power requires only the establishment of an "intelligible principle" guiding execution of the law.[94] But several Justices have suggested this standard is too lax and Congress should delegate less broad policymaking authority to executive entities. Whether or not the Court ultimately concludes that the Constitution's vesting of all legislative authority in Congress limits the allocation of policy-making discretion to the Executive Branch, the existence of tailored legislation cabining executive discretion would effect lasting control with certain bite.

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[92] *Cf. Mazars*, 140 S.Ct. at 2036 (discussing narrow, tailored requests).

[93] *Cf.* Jennifer Mascott, *Early Customs Laws and Delegation*, 87 Geo. Wash. L. Rev. 1388, 1394 (2019) (contending that a stricter version of "the nondelegation doctrine inheres in both federalism and the overall constitutional structure of separated powers" in addition to the general requirements of the Article I Vesting Clause).

[94] *Gundy v. United States*, 139 S.Ct. 2116, 2123 (2019).

"Executive Privilege: Separation of Powers and the Accommodation Process"

Mark J. Rozell*

Testimony Before the Senate Judiciary Committee

Subcommittee on Federal Courts, Oversight, Agency Action, and Federal Rights**

"Breaking the Logjam: Principles and Practices of Congressional Oversight and Executive Privilege"

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Executive privilege is the right of the president and high-level White House officials to withhold information from Congress, the judiciary, and ultimately the public. Customarily presidents invoke executive privilege, or they direct members of their cabinet and staff to do so. As an Article II-based power, only the president possesses this authority. Most claims of executive privilege fall into three categories: (1) protecting the national security under certain circumstances; (2) protecting the candor of White House deliberations; (3) and protecting the confidentiality of ongoing investigations in the executive branch.

Controversies over executive privilege date back to the earliest years of the Republic. Although no presidential administration until the 1950s invoked the term "executive privilege" as the underlying principle for withholding documents or testimony, almost every president has exercised some form of this presidential power.

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** Much of the material presented here draws from my book *Executive Privilege: Presidential Power, Secrecy, and Accountability*. Lawrence, Kansas: University Press of Kansas, 2020 (4th edition).

Executive privilege is controversial because it is nowhere mentioned in the Constitution. That fact has led some observers to suggest that executive privilege does not exist and that the congressional power of inquiry is absolute.[1] This view is mistaken.[2] Executive privilege is an implied presidential power and is sometimes necessary to the proper functioning of the executive branch. Presidents and their staffs must be able to deliberate without fear that their every utterance may be made public. Although in a democratic-republic the presumption is in favor of transparency in government, there are occasions when the national interest is best served by secrecy. Executive privilege is firmly established in law and longstanding practice. Contemporary debates about executive privilege center on its scope and limits, and not whether it is a legitimate presidential power. To varying degrees, presidents of both political parties have exercised this power.

The power of executive privilege is not absolute. Like other constitutionally-based powers, it is subject to a balancing test. Presidents and their advisers may require confidentiality, but Congress needs access to information from the executive branch to carry out its lawmaking, oversight, and investigative functions. Any claim of executive privilege must be weighed against Congress's legitimate need for information to carry out its own constitutional role. Independent counsels and special prosecutors also have wielded the power of inquiry and challenged presidential claims of secrecy. Nevertheless, the power of inquiry also

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[1] Raoul Berger, *Executive Privilege: A Constitutional Myth* (Cambridge, Harvard University Press, 1974); Saikrishna Prakash, "A Critical Comment on the Constitutionality of Executive Privilege", *Minnesota Law Review*, Vol. 83, No. 5 (1999), pp, 1143-1190.

[2] Mark J. Rozell, "Restoring Balance to the Debate Over Executive Privilege: Time to Move Beyond Berger", *William and Mary Bill of Rights Journal*, Vol. 8, No. 3 (April 2000), pp. 541-582.

is not absolute, whether it is wielded by Congress or by prosecutors. On occasion, the judicial branch has taken the lead in resolving executive privilege conflicts, although it is preferable that an accommodation between disputing parties resolves these issues instead of a court doing so.

Not all presidents have exercised executive privilege judiciously. Some have used it to cover up embarrassing or politically inconvenient information, or even outright wrongdoing. As it is with all other grants of authority, the power to do good things is also the power to do bad things. The only way to avoid the latter is to strip away the authority altogether and thereby eliminate the ability to do the former. Eliminating executive privilege would hamper the ability of presidents to discharge their constitutional duties effectively and to protect the public interest.

Modern presidential history unfortunately has witnessed a number of occasions of abuse of this authority, which has made almost all executive privilege claims immediately controversial. Most prominently, President Richard M. Nixon invoked executive privilege in an effort to block the release of the transcripts of the White House tapes that revealed the evidence of the president's own participation in a cover-up of criminal activity. In so doing, the president effectively gave executive privilege a bad name, driving it underground for a period of time.[3]

Due to its association with Nixonian abuses of power, Presidents Gerald R. Ford and Jimmy Carter avoided the use of the term executive privilege as much as possible. President

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[3] Mark J. Rozell, "Executive Privilege and the Modern Presidents: In Nixon's Shadow", *Minnesota Law Review*, Vol. 83, No. 5 (May 1999), pp. 1069-1126.

Ronald Reagan backed off each of his several claims of that power, and President George H. W. Bush largely concealed its exercise to avoid controversy while still protecting secrecy. Of the post-Watergate presidents, it is President Bill Clinton who most often claimed executive privilege and any embarrassment associated with its exercise has since largely disappeared. Like Clinton, President George W. Bush made some executive privilege claims that stretched the credible limits of that power.[4] President Barack Obama exercised that power much less often than his predecessors, but when he did, his actions were quite similar in adopting an expansive definition of the president's authority. President Donald J. Trump further stretched the boundaries of executive privilege when he claimed a kind of "protective" privilege that allows a president effectively to prevent any White House aide from testifying before Congress on the basis that a witness might reveal privileged information.[5] President Trump used executive privilege several times to try to block testimony by current and former officials as well as access to documents that were germane to legislative and special counsel investigations.

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[4] Mark J. Rozell, "Executive Privilege Revived: Secrecy and Conflict in the Bush Presidency", *Duke Law Journal*, Vol. 52, No. 2 (November 2002), pp. 403-421.

[5] See Mark J. Rozell, *Executive Privilege: Presidential Power, Secrecy, and Accountability*. Lawrence, Kansas: University Press of Kansas, 2020 (4th edition), pp. 198-205. Trump's assertion of a "protective" executive privilege is somewhat similar, but broader in scope, to a 1996 legal opinion by Attorney General Janet Reno that maintained that White House Counsel's Office documents have such broad protection from disclosure. See "Protective Assertion of Executive Privilege Regarding White House Counsel's Office Documents", 20 Op. O.L.C., 1996 (https://www.justice.gov/file/20031/download (accessed July 27, 2021). The Clinton White House also created a category of documents that it considered "subject to a claim of executive privilege", in order to withhold those documents without the president actually invoking a privilege claim (Rozell, 2020: pp. 124-147).

The temporary advantages that presidents might obtain from exercising executive privilege outside of its customary boundaries are far outweighed by the long-term damage to democratic institutions, especially when such practices become established precedents that appear to justify similar actions in the future. Presidents rarely scale back powers once established and the common pattern is for chief executives to push the limits of their powers even further than before.[6] There is no discernible partisan pattern found in my analyses of presidential overreaches in use of executive privilege other than presidents of both political parties have tested the limits of this power.

## Justifications for Executive Privilege

A review of past practices and of evolving constitutional interpretation reveals common justifications and parameters for the proper exercise of executive privilege. After describing the justifications, I offer recommendations for reestablishing the proper parameters of executive privilege and the important role that Congress must play to hold presidents accountable for any of their actions that violate constitutional limits on executive branch secrecy.

### *The Need for Candid Advice*

The constitutional duties of presidents require that they be able to consult with advisers without fear that the advice will be made public. If the president's aides believe that their confidential advice could be disclosed, the quality of that advice might be seriously damaged. Advisers cannot be completely honest and frank in their discussions if they know that their

[6] Jeffrey Crouch, Mark J. Rozell, and Mitchel A. Sollenberger, *The Unitary Executive: A Danger to Constitutional Government*. Lawrence, Kansas: University Press of Kansas, 2020.

every word might be disclosed to partisan opponents or to the public. The principle of protecting candor has been at the heart of many controversies in which presidents have attempted to stop White House aides from testifying on Capitol Hill. President Dwight D. Eisenhower felt so strongly about this principle that at one point he stated "any man who testifies as to the advice he gave me won't be working for me that night".[7]

A key event in the development of executive privilege was Eisenhower's letter of May 17, 1954 to the secretary of defense instructing department employees not to comply with a congressional request to testify about confidential matters in the Army-McCarthy hearings. Eisenhower articulated the principle that candid advice was essential to the proper functioning of the executive branch and that limiting candor would ultimately harm "the public interest".[8]

Protecting the public interest is the major rationale for determining whether a president has cause to prohibit testimony, or the release of documents as well. Executive privilege does not exist to protect the political interests of the president, or to conceal information that might lead to evidence of possible wrongdoing.

In *United States v. Nixon* (1974), the U.S. Supreme Court recognized that the need for candid interchange is an important basis for executive privilege: *"The valid need for protection of communications between high government officials and those who advise and assist them in the performance of their manifold duties is too plain to require further discussion. Human*

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[7] Fred Greenstein, *The Hidden-Hand Presidency: Eisenhower as Leader*. New York: Basic Books, 1982, p, 205.

[8] *Public Papers of the Presidents: Dwight D. Eisenhower, 1954*: Washington, DC: Government Printing Office, pp. 483-4.

*experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision-making process. The confidentiality of presidential communications….has constitutional underpinnings… The privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution".*[9]

That basis for an executive privilege claim would become known as the presidential communications privilege. It is considered to be the strongest area in which to make such a claim, as it is constitutionally based. However, like all other constitutional powers, it is limited, as our governing system is designed to permit each branch to check the other. The contours of its scope have been shaped not only by the Supreme Court but the lower courts. The D.C. Circuit Court has explained that presidential communications apply to a president's decision making when carrying out a "quintessential and non-delegable Presidential power" such as the nomination or pardon powers.[10] Such a privilege claim will cover all documents, whether pre-decisional or post-decisional. The claim is not expansive as it only protects the communications of those who are personally advising, or preparing to advise, the president (i.e., White House staff). Congress can overcome this privilege with a showing of need and by providing evidence that the information sought cannot be found elsewhere. In addition, the courts have recognized "where there is reason to believe the documents sought may shed light on government misconduct, the privilege is routinely denied on the grounds that shielding internal government

[9] *United States v. Nixon*, 483 U.S. 683, 705-706, 708 (1974).

[10] *In re Sealed Case*, 121 F.3d 230, 729, 752 (1997).

deliberations in this context does not serve 'the public interest in honest, effective government'".[11]

Another variant is the deliberative process privilege that has a much lower threshold to overcome, partially because it is a common law privilege.[12] All executive branch officials are protected generally; however, only pre-decisional documents are covered and not those that state a policy decision or only contain factual information.[13] The privilege claim can be overcome by a "sufficient showing of need"[14] with there being a presumption for disclosure when Congress is seeking information. In addition, like the presidential communications privilege, a showing of corruption or other wrongdoing will wipe away any protection that results from a claim of deliberative process privilege.

Finally, there are variants of executive privilege that often go overlooked as presidents and their administrations rely on the underlining privilege rationale and do not necessarily resort to an explicit executive privilege claim. Such privileges range from an ongoing criminal investigation to national security/state secrets, as some court decisions have acknowledged as separate fields for the protection of executive branch information.[15]

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[11] Ibid., 737-738.

[12] Ibid., 746.

[13] Ibid., 737.

[14] Ibid., 738.

[15] *U.S. v. Nixon*, 706 (1974); *Harlow v. Fitzgerald* 457 U.S. 800, 812 (1982); *Committee on Judiciary v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008).

***Limits on Congressional Inquiry***

Although Congress needs access to information from the executive branch to carry out its lawmaking, oversight, and investigative duties, it does not follow that Congress must have full access to the details of every executive branch communication. Congressional inquiry, like executive privilege, has limits. That is not to suggest that presidents can claim the need for candid advice to restrict any and all information. The president must demonstrate a need for secrecy in order to trump Congress's power of inquiry.

Congress's power of inquiry, though broad, is not unlimited.[16] A distinction must be drawn between sources of information generally and those necessary to Congress's ability to perform its legislative, oversight, and investigative functions.[17] There is a strong presumption of validity to a congressional request for information relevant to these critical functions. The presumption weakens in the case of a congressional "fishing expedition" - a broad, sweeping quest for any and all executive branch information that might be of interest to Congress for one reason or another. Indeed, Congress itself has recognized that there are limits on its power of inquiry. For example, in 1879 the House Judiciary Committee issued a report stating that neither the legislative nor the executive branch had absolute compulsory power over the records of the other. Congress gave the executive branch the statutory authority to withhold

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16. *Watkins v. United States, 354 U.S. 178 (1957); Wilkinson v. United States*, 365 U.S. 399 (1961).

17. *Senate Select Committee v. Nixon*, 498 F.2d 725 (1974) at 731.

information when it enacted the “sources and methods proviso” of the 1947 National Security Act, the implementation provision of the 1949 CIA Act, and the 1966 Freedom of Information Act.

Nevertheless, some critics of executive privilege argue that Congress has an absolute, unlimited power to compel disclosure of all executive branch information. In 1982, Rep. John Dingell, D-Mich., for example, said that members of Congress "have the power under the law to receive each and every item in the hands of the government."[18] But this expansive view of congressional inquiry is as wrong as the belief that the president has the unlimited power to withhold all information from Congress. The legitimacy of the congressional power of inquiry does not confer an absolute and unlimited right to all information. The debates at the 1787 Constitutional Convention and at the subsequent ratifying conventions provide little evidence that the framers intended to confer such authority on Congress. There are inherent constitutional limits on the powers of the respective governmental branches. The common standard for legislative inquiry is whether the requested information is vital to the Congress's lawmaking, oversight, and investigative functions.

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[18.] Quoted in House Committee on Public Works and Transportation, *Contempt of Congress*, 97th Cong., 2d sess., December 15, 1982, 83n. A classic study of secrecy and legislative inquiry is Irving Younger, "Congressional Investigations and Executive Secrecy: A Study in the Separation of Powers," *University of Pittsburgh Law Review* 20 (1959): 755-784.

***The Other Branches and Confidentiality***

Executive privilege can also be defended on the basis of accepted practices of secrecy in the other branches of government. In the legislative branch, members of Congress receive candid, confidential advice from committee staff and legislative assistants.[19] Meanwhile, congressional committees meet on occasion in closed session to mark-up legislation. Congress is not obligated to disclose information to another branch. A court subpoena will not be honored except by a vote of the legislative chamber concerned. Members of Congress enjoy a constitutional form of privilege that absolves them from having to account for certain official behavior, particularly speech, anywhere but in Congress. But as with the executive, this protection does not extend into the realm of criminal conduct or credible allegations of wrongdoing.

Secrecy is found as well in the judicial branch. It is difficult to imagine more secretive deliberations than those that take place in Supreme Court conferences. Court observer David M. O'Brien referred to secrecy as one of the "basic institutional norms" of the Supreme Court. "Isolation from the Capitol and the close proximity of the justices' chambers within the Court promote secrecy, to a degree that is remarkable.... The norm of secrecy conditions the employment of the justices' staff and has become more important as the number of employees increases".[20] Members of the judiciary claim immunity from having to respond to congressional

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19. *Gravel v. United States*, 408 U.S. 606 (1972).

20. David M. O'Brien, *Storm Center: The Supreme Court in American Politics*, 2d ed. (New York: Norton, 1990), pp. 150-151.

subpoenas. The norm of judicial privilege also protects judges from having to testify about their professional conduct. It is thus inconceivable that secrecy, so common to the legislative and judicial branches, would be uniquely excluded from the executive.[21] Indeed, the executive branch regularly engages in activities that are secret in nature.

Legislative, judicial, and executive branch secrecy serves a common purpose: under certain circumstances, decisionmakers can arrive at more prudent policy decisions than those that would be made through an open process. And in each case, the end result is subject to scrutiny.

Resolving the Dilemma of Executive Privilege

The dilemma of executive privilege is how to permit governmental secrecy while maintaining accountability. On the surface, the dilemma is a difficult one to resolve: how can democratically elected leaders be held accountable when they are able to deliberate in secret or to make secretive decisions?

The post-Watergate period witnessed a breakdown in the proper exercise of executive privilege. Because of former president Richard Nixon's abuses, Presidents Gerald R. Ford and Jimmy Carter avoided using executive privilege as much as possible. Ford and Carter still sought to preserve presidential secrecy, but they relied on other constitutional and statutory means to achieve that goal. President Ronald Reagan tried to restore executive privilege as a presidential prerogative, but he ultimately retreated when congressional committees threatened

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21. *Souicie v. David*, 448 F.2d 1067, 1080 (D.C.C. 1971).

administration officials with contempt citations and adopted other retaliatory actions to compel disclosure. President George H.W. Bush, like Ford and Carter before him, avoided executive privilege whenever possible and used other strategies to preserve secrecy. President Bill Clinton exercised executive privilege more often than all of the other post-Watergate presidents combined, but often improperly, such as in the investigation into his sexual relationship with a White House intern. President George W. Bush exercised the privilege somewhat more sparingly than his predecessor, but he also exercised this power in some questionable circumstances, such as his attempt to deny Congress access to decades-old Department of Justice documents.[22] President Barack Obama made few claims of executive privilege, but he framed those actions around broad interpretations of presidential powers, similar to the positions adopted by his immediate predecessor. President Donald J. Trump claimed an expansive "protective" executive privilege that recognized no countervailing or balancing powers against those of the executive branch.

Thus, in the post-Watergate era, either presidents have avoided uttering the words "executive privilege" and protected secrecy through other sources of authority (Ford, Carter, George H.W. Bush, Obama), or they have tried to restore, and in some cases expand, executive privilege with very mixed outcomes (Reagan, Clinton, George W. Bush, Trump). Clinton's aggressive use of executive privilege in the scandal that led to his impeachment served to

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[22] In 2001-2002 a congressional committee requested Justice Department documents from the 1960s and 1970s that were germane to an investigation of corruption in the FBI's Boston office in its handling of organized crime. See Statement of Mark J. Rozell, in Committee on Government Reform, House of Representatives, 107th Congress. *Investigation into Allegations of Justice Department Misconduct in New England – Volume 1*. Washington, D.C.: Government Printing Office, 2002, pp. 513-519.

revive the national debate over this presidential power and the more recent actions by the Trump administration reignited the debate even more. It is therefore an appropriate time to discuss how to restore a sense of balance to the executive privilege debate.

First, it needs to be recognized that executive privilege is a legitimate constitutional power - not a "constitutional myth". Consequently, presidents should not be devising schemes for achieving the ends of executive privilege while avoiding any mention of this principle. Furthermore, Congress (and the courts) must recognize that the executive branch - like the legislative and judicial branches - has a legitimate need under certain circumstances to deliberate in secret and that every assertion of executive privilege is not a devious attempt to conceal wrongdoing.

Second, executive privilege is not an unlimited, unfettered presidential power. It should be exercised rarely and only for the most compelling reasons. Congress has the right - and often the duty - to challenge presidential assertions of executive privilege.

Third, there are no clear, precise constitutional boundaries that determine, *a priori*, whether any particular claim of executive privilege is legitimate. The resolution to the dilemma of executive privilege is found in the political ebb and flow of the separation of powers system. Indeed, there is no need for any precise definition of the constitutional boundaries surrounding executive privilege. Such a power cannot be subject to precise definition, because it is impossible to determine in advance all of the circumstances under which presidents may have to exercise that power. The separation of powers created by the framers provides the appropriate resolution of the dilemma of executive privilege and democratic accountability.

Congress already has the institutional capability to challenge claims of executive

privilege by means other than eliminating the right to withhold information or attaching statutory restrictions on the exercise of that power. For example, if members of Congress are not satisfied with the response to their demands for information, they have the option of withholding support for the president's agenda or for the president's nominees for executive branch and judicial positions. In one case during the Nixon years, the Senate Judiciary Committee threatened not to confirm Richard Kleindienst as Attorney General until the president dropped an executive privilege claim to prevent White House staff from testifying before Congress. Senator Sam Ervin even threatened to filibuster the nomination if it cleared the Senate: He added: "If the president wants to make his nominee for Attorney General a sacrificial lamb on the altar of executive privilege, that will be his responsibility and not mine".[23] The Senate's pressure resulted in President Nixon withdrawing his privilege claim and allowing a White House aid to testify in person and to answer additional written questions from the committee.[24]

Similarly, members of the Senate Judiciary Committee in 1986 threatened not to confirm the nomination of William Rehnquist as chief justice of the U.S. Supreme Court until President Reagan dropped an executive privilege claim over documents from Rehnquist's tenure in the Nixon Administration Department of Justice. A bipartisan majority of the committee supported a subpoena of key documents, leading the president to compromise and agree to allow committee access to selected categories of documents. Under the compromise,

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[23] Sanford G. Ungar, "GOP Move Imperils Kleindienst", *Washington Post*, April 13, 1972, p. A24.

[24] Howard Kurtz and Al Kamen, "Rehnquist Not in Danger Over Papers", *Washington Post*, August 7, 1986, pp. A1, 14.

six senators and six staff members received access to the documents. The committee, and then the Senate, proceeded to confirm Rehnquist.

If information can be withheld only for the most compelling reasons, it is not unreasonable for Congress to try to force the president's hand by making him weigh the importance of withholding the information against that of moving forward a nomination or piece of legislation. Presumably, information being withheld for purposes of vital national security or constitutional concerns would take precedence over pending legislation or a presidential appointment. If not, then there appears to be little justification in the first place for withholding the information.

Congress possesses numerous other means by which to compel presidential compliance with requests for information. One of those is the control Congress maintains of the government's purse-strings, which means that it holds formidable power over the executive branch. In addition, Congress often relies on the subpoena power and the contempt of Congress charge to compel release of withheld information. It is not merely the exercise of these powers that matters, but the threat that Congress may resort to such powers. Congress has successfully elicited information from the executive branch using both powers. During the Reagan years, for example, in several executive privilege disputes Congress prevailed and received all the information it had requested from the administration - but only after it issued subpoenas and threatened to hold certain administration officials in contempt. The Reagan White House simply decided it was not worth the political cost to continue such battles with Congress. In these cases, the system worked as it is supposed to. Had the information in dispute been critical to national security or preserving White House candor, certainly Reagan would

have taken a stronger stand to protect documents or prohibit testimony.

In an ideal world, all such issues would be resolved only on the objective merits of the positions of the executive and legislative branches. In reality, political considerations and public opinion play important, often determinative, roles, as in most interbranch disputes and negotiations. In 1987, when the Iran-Contra scandal threatened to derail the Reagan presidency and there even was serious discussion about possible impeachment and removal of the president, President Reagan cooperated with the congressional investigation by waiving executive privilege for the administration officials called to testify, and he allowed Congress to review relevant documents from the White House, Department of Defense, Department of Justice, Department of State, and the Central Intelligence Agency. When Chief of Staff Donald Regan revealed before the Senate Select Committee on Intelligence that the president kept a personal diary, members of Congress demanded access in the case that Reagan had written any recollections relevant to Iran-Contra. Initially the White House resisted disclosure of the diary, but eventually the president made the political calculation that transparency best served his interests in the proceedings and he waived executive privilege.

In 1991, the Subcommittee on Legislation and National Security of the House Committee on Government Operations voted to subpoena Secretary of Defense Richard Cheney for a document regarding cost overruns on a navy aircraft program. President George H.W. Bush claimed executive privilege and he instructed Cheney not to release the document, citing the need to protect "confidential communications among senior Department officials"

and the "candor necessary to the effectiveness of the deliberative process".[25] The subcommittee backed down after it became clear that there was not bipartisan support to challenge the president's executive privilege claim, and that there was little support in the House of Representatives generally to hold Cheney – a respected former member of the Chamber - in contempt.

Congress has the responsibility to consider the president's reasoning for an executive privilege claim. There are occasions when after doing so, Congress has either given deference to the president's position, or decided that the stakes involved were not worth an interbranch fight. In 1996 the House Committee on International Relations subpoenaed 47 Clinton White House and State Department documents concerning U.S. policy toward Haiti. The House requested these materials in light of accusations that U.S. trained security forces of the Haitian regime were involved in political assassinations and that efforts to stop drug trafficking from Haiti to the U.S. were a failure. White House counsel Jack Quinn notified the committee that the president claimed executive privilege over the documents on national security grounds. In this case the House committee had pushed for memoranda from the National Security Adviser to the president, and for some documents that potentially would reveal White House discussions with foreign leaders, thus lending credibility to President Clinton's position that releasing the documents might compromise national security. The House committee ultimately did not fight the president's claim of privilege.

In the extreme case, Congress also has the power of impeachment and removal from

[25] Memorandum from President George Bush to Secretary of Defense Richard Cheney, "RE: Congressional Subpoena for an Executive Branch Document", August 8, 1991.

office - the ultimate weapon with which to threaten the executive. Clearly, this congressional power cannot be routinely exercised as a means of compelling disclosure of information, and thus it will not constitute a real threat in commonplace information disputes. Nevertheless, when a major scandal emerges, and all other remedies have failed, Congress can threaten to exercise its ultimate power over the president.

In the vast majority of cases - and history verifies this point - it can be expected that the president will comply with requests for information rather than withstand retaliation from Congress. Presidential history is replete with examples of chief executives who tried to invoke privilege or threatened to do so, only to back down in the face of congressional challenges.

If members of Congress believe that a particular exercise of executive privilege poses a threat to the constitutional balance of power, the answer resides not in crippling presidential authority, but in exercising to full effect the vast array of tools already at Congress's disposal. Nonetheless, most of the time resolving executive privilege disputes does not result from such escalating of conflict between the branches.

Over the course of U.S. history, the process of accommodation and compromise between presidents and Congresses has resolved most executive privilege controversies. Oftentimes, the president claims some vital national interest in prohibiting the release of requested documents, members of Congress push back and eventually a compromise is reached that allows access to certain categories of documents to be released publicly while others are subject to private review by legislators and their staffs. Both sides claim victory – the president for protecting the prerogatives of the executive branch, members of Congress for getting access to exactly the documents they most needed. The accommodation process, when

it works as it is supposed to, enables both branches to protect their respective institutional interests, while allowing the business of governing to move forward.

The process is not perfect because it is the consequence of a constitutional system of separated powers that operates within spheres of authority that are not defined with legalistic precision. Resolving executive privilege disputes through the ebb and flow of separation of powers, however imperfect a resolution, is far preferable to constraining that power through a statutory definition, as some have suggested.[26] It is preferable to giving up on the accommodation process because in some past occasions the process has broke down and no resolution could be achieved. There is a long history of the system working effectively. It is incumbent upon political leaders to restore the comity and cooperation that are the hallmarks of the accommodation process.

[26] Emily Berman, "Executive Privilege: A Legislative Solution", Brennan Center for Justice, at https://www.brennancenter.org/sites/default/files/2019-08/Report_Executive-Privilege-A-Legislative-Remedy.pdf (accessed July 30, 2021).

**"Breaking the Logjam: Principles and Practice of Congressional Oversight and Executive Privilege"**

**Senate Committee on the Judiciary**
**Subcommittee on Federal Courts, Oversight, Agency Action, and Federal Rights**

**August 3, 2021**

**Testimony of Jonathan David Shaub**
**Assistant Professor of Law, University of Kentucky J. David Rosenberg School of Law**

Chairman Whitehouse, Ranking Member Kennedy, and Members of the Subcommittee,

Thank you for the invitation to appear today to discuss congressional oversight and executive privilege. My name is Jonathan Shaub, and I am an Assistant Professor of Law at the University of Kentucky J. David Rosenberg School of Law. My current research focuses on executive privilege, interbranch disputes, and the extrajudicial development of constitutional law. From 2014 until 2017, I served as an Attorney-Adviser in the Office of Legal Counsel (OLC), in which capacity I worked primarily on matters involving executive privilege and congressional oversight.

As I understand it, today's hearing focuses on defining and evaluating the constitutional, statutory, and normative principles and practices governing congressional oversight. I understand the subcommittee is interested in better understanding the difficulties of conducting effective congressional oversight that have become increasingly apparent over the past 20 to 30 years and the role that executive privilege plays in shaping the executive branch's responses to congressional requests and subpoenas for information and testimony.

In my view, understanding the development of the internal, executive branch doctrine governing executive privilege is crucial to understanding the current imbalance in oversight—the executive branch's current ability to thwart virtually any congressional inquiry with which it does not wish to comply. Accordingly, my testimony today will start by describing the legal principles that the executive branch follows in approaching congressional oversight—principles that I helped put into practice while working at OLC. I have since studied and written about these principles and their historical development. My testimony explains how the accommodation process works today from the perspective of the executive branch and why it depends almost wholly on the executive branch's willingness to respond to a congressional request or subpoena for information. Normative practice has long undergirded much of the accommodation process. But normative practice can be dispensed with easily in the course of the intense partisan battles that have lately come to characterize oversight. My testimony concludes by illustrating the limitations and, ultimately, the impotence, of Congress's current mechanisms for attempting to enforce its information demands. And I explain briefly why judicial consideration and resolution of some of the fundamental constitutional disagreements between the executive branch and Congress is the best—and perhaps only—route to alter the current imbalance between the branches.

I would also like to note at the outset that I believe the fundamental disagreements between the branches that have led to the current state of oversight are *institutional* disagreements, not

necessarily partisan ones. My tenure at OLC occurred mostly during the Obama Administration, but I also worked in the office during the first six months of the Trump Administration. In both administrations, we worked very closely with the White House Counsel's Office, and almost all of my work was under the supervision of long-serving, career DOJ officials who have been working on oversight matters since the Reagan Administration. Although oversight disputes often become embroiled in partisan politics—oversight related to Operation Fast & Furious and the Mueller Report are two recent examples—the foundations of the doctrine on which the executive branch relies to withhold information and testimony are bipartisan in both their creation and execution. That is not to say that all oversight disputes are equal; some past presidential claims of privilege or related doctrines such as immunity are more extreme and have substantially less historical support than others and, as a result, warrant criticism and controversy. But they share a common wellspring—a comprehensive constitutional doctrine developed almost wholly within the executive branch that has equipped the executive branch with the tools necessary to stymie congressional oversight when it so chooses.

**The Law Governing Executive Privilege**[1]

It is impossible to understand the current state of congressional oversight without understanding the constitutional doctrines on which the executive branch's responses are ultimately grounded. There are, of course, scattered judicial opinions that address or are relevant to executive privilege and congressional oversight. The Supreme Court's decision in *United States v. Nixon* directing the president to turn over the Watergate tapes in response to a grand jury subpoena is the paramount case in the area.[2] In its opinion, the Supreme Court recognized the existence of a constitutionally based privilege that protected the president's official communications but rejected Nixon's argument that the privilege was absolute.[3] Instead, the Court held that the privilege was qualified and ordered Nixon to turn over the tapes in light of the grand jury's compelling need for them.[4]

Several other judicial opinions often arise in oversight negotiations between the two branches. Most relevant to today's discussion are (1) the D.C. Circuit's opinion in *United States v. AT&T*, which exhorted the branches to negotiate and compromise in information disputes, directing that "each branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation";[5] and (2) the D.C. Circuit's opinion in *Senate Select Committee on Presidential Campaign Activities v. Nixon*, which refused to order Nixon to turn over Watergate tapes to the Senate Select Committee because the committee had not shown sufficient need to overcome the privilege.[6] The Supreme Court's recent decision in *Trump v. Mazars* will also likely become a key precedent in oversight disputes. OLC has

1 Much of my testimony is drawn from my recent article *The Executive's Privilege*, which was published in the *Duke Law Journal* in 2020. I began working on the article after I left the Office of Legal Counsel to address what I saw as a hole in the scholarly discussion of executive privilege, and I continued to update the work throughout the Trump administration before publishing it. Many of the opinions, examples, and arguments presented here are presented in greater detail and context in that paper. *See* Jonathan David Shaub, *The Executive's Privilege*, 70 DUKE L.J. 1 (2020).

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

3 *Id.* at 705–06 (1974).

4 *Id.* at 712-14.

5 United States v. Am. Tel. & Tel. Co., 567 F.2d 121, 127 (D.C. Cir. 1977).

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

already cited *Mazars* extensively in explaining principles governing congressional oversight and the accommodation process that takes place between the branches in information disputes.[7]

Although these judicial opinions are relevant and delimit important parameters for executive privilege and congressional oversight, they are also quite limited in their direct application. The Supreme Court has never addressed an oversight dispute between the two branches, and no appellate court has ever addressed the merits of the constitutional doctrine of executive privilege developed by the executive branch after Watergate. As a result, the "law" that governs congressional oversight—i.e., the law followed by the executive branch—is almost wholly internal executive branch doctrine developed by the Department of Justice, particularly OLC. In its opinions, OLC has rejected or distinguished contrary district court decisions,[8] and the cases that have made it before the judiciary have become moot or settled before a precedential appellate decision has been issued. Accordingly, the executive branch has remained free to implement its own constitutional doctrine when responding to congressional requests for information or testimony. To be sure, normative practice and policies—not necessarily legal obligations—shape a great deal of congressional oversight. But the constitutional foundation on which these norms rest is the basis for the entire process of responding to congressional oversight within the executive branch. Unsurprisingly, the executive branch's doctrine of executive privilege directly contradicts Congress's much more limited view.

**The Executive Branch's Doctrine of Executive Privilege**

The executive branch doctrine and practice of executive privilege has three key pillars: 1) Executive privilege is a singular, qualified privilege composed of a number of "components." 2) Executive privilege can be asserted (or waived) only by the president. 3) Executive privilege is a last resort that should not be considered until negotiations between the branches have broken down entirely. The executive branch view is thus that the president, and only the president,[9] may—as a "last resort"—assert the qualified executive privilege over any materials that fall within any one of the recognized "components" of executive privilege.[10] The combination of these three pillars has resulted in an accommodation process in which the executive branch has the tools—if it chooses to use them—to delay, withhold, and obstruct in response to congressional inquiries without ever actually asserting executive privilege and, in most cases, without ever having to balance the congressional need for the information.

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7 *See* Ways and Means Committee's Request for the Former President's Tax Returns and Related Tax Information Pursuant to 26 U.S.C. § 6103(f)(1), 45 Op. O.L.C. ___ (July 30, 2021); Congressional Oversight of the White House, 45 Op. O.L.C. ___ (Jan. 8, 2021).

8 *See, e.g.*, Immunity of the Assistant to the President & Dir. of the Off. of Pol. Strategy & Outreach from Cong. Subpoena, 38 Op. O.L.C. 5, 15-16 (2014) ("We therefore respectfully disagree with the [district] court's analysis and conclusion, and adhere to the Executive Branch's longstanding view that the President's immediate advisers have absolute immunity from congressional compulsion to testify.").

9.Cong. Requests for Confidential Exec. Branch Info., 13 Op. O.L.C. 153, 161 (1989) ("[E]xecutive privilege cannot be asserted without specific authorization by the President."); *see* Todd David Peterson, *Contempt of Congress v. Executive Privilege*, 14 U. Pa. J. Const. L. 77, 81, 109 (2011) ("[R]equiring that the President himself assert … privilege … forces the him to be accountable for the decision to withhold documents … and pay the political cost for [the] decision.").

10. Fred F. Fielding & Heath P. Tarbert, *Principled Accommodation: The Bush Administration's Approach to Congressional Oversight and Executive Privilege*, 32 J.L. & POL. 95, 101 (2016); Attempted Exclusion of Agency Couns. from Cong. Depositions of Agency Emps., 43 Op. O.L.C. __, slip op. at 8 & n.2 (May 23, 2019); Letter from Bradley Weinsheimer, Assoc. Deputy Att'y Gen., U.S. Dep't of Just., to Robert S. Mueller, III, former Special Couns. 2 (July 22, 2019), https://s.wsj.net/public/resources/documents/MuellerLetter07222019.pdf (informing Mueller that "matters within the scope of [his] investigation were covered by executive privilege, including information protected by law enforcement, deliberative process, attorney work product, and presidential communications privileges").

As to the first pillar, the executive branch doctrine is that there is a singular executive privilege that includes within it a collection of "components," which individually track common law privileges and core constitutional functions of the president.[11] These components include (1) presidential communications; (2) national security and foreign affairs information, including classified information and diplomatic communications, also known as state secrets; (3) internal executive branch deliberations; (4) sensitive law enforcement or investigatory information, particularly, but not solely, information from open criminal investigations, and (5) attorney-client and attorney work-product information.[12] Neither the presidential communications component nor the attorney-client privilege and work-product component were initially considered distinct components of executive privilege.[13] But gradually, the executive branch came to consider the information protected by these privileges to constitute separate components of the singular, constitutionally based executive privilege.[14]

The next doctrinal pillar of the executive branch's doctrine of executive privilege is the assertion that the president—and the president alone—has inherent constitutional authority to control all information that potentially fits within the scope of these components.[15] Presidential control appears to have originated as a matter of procedure and policy but has since expanded into a claim of absolute constitutional authority. In 1962, President Kennedy provided a letter to a congressional committee stating that "executive privilege can be invoked only by the President and will not be used without specific Presidential approval."[16] Presidents Johnson and Nixon reaffirmed that policy,[17] and the foundational Reagan memorandum on executive privilege, which has been adopted by each subsequent administration, stipulates that "executive privilege shall not be invoked without specific Presidential authorization."[18] In the past, some members of Congress have expressed support for this limitation which—in theory—would seem to prevent lower executive branch officials from citing

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11. *See, e.g.*, Auth. of Agency Offs. To Prohibit Emps. from Providing Info. to Cong., 28 Op. O.L.C. 79, 82-83 (2004) (discussing the presidential communications and deliberative process "components" of executive privilege); Cong. Requests for Confidential Exec. Branch Info., 13 Op. O.L.C. 153, 154 (1989).

12. The concept of a singular "privilege" with numerous components appears to have emerged at the beginning of the Nixon Administration. In 1971, then-Assistant Attorney General (and later Chief Justice) William H. Rehnquist explained that "[t]he doctrine of Executive privilege has historically been pretty well confined" to three main areas: (1) foreign relations and military affairs; (2) pending law enforcement investigations; and (3) "intragovernmental" deliberations." *Executive Privilege: The Withholding of Information by the Executive: Hearing on S. 1125 Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 92d Cong. 429-35 (1971) ("*Executive Privilege Hearings*").

13. *See* Response to Cong. Requests for Info. Regarding Decisions Made Under the Indep. Couns. Act, 10 Op. O.L.C. 68, 78 (1986) ("[F]or the purpose of responding to congressional requests, communications between the Attorney General, his staff, and other Executive Branch 'clients' that might otherwise fall within the common law attorney-client privilege should be analyzed in the same fashion as any other intra-Executive Branch communications."); Exec. Order No. 12,667, 54 Fed. Reg. 3403, 3403 (Jan. 18, 1989) (defining a "substantial question of Executive privilege" as existing only in the same three areas Rehnquist had identified: when disclosure would impair (1) "national security (including the conduct of foreign relations)," (2) law enforcement, or (3) "the deliberative process of the Executive branch").

14. *See* Jonathan David Shaub, *The Executive's Privilege*, 70 DUKE L.J. 1, 17-18 (2020) (describing this evolution).

15. *See* Attempted Exclusion of Agency Couns. from Cong. Depositions of Agency Emps., 43 Op. O.L.C. __, slip op. at 2 (May 23, 2019) (emphasizing the "President's constitutional authority to control the disclosure of privileged information and to supervise the Executive Branch's communications with congressional entities").

16. *See Executive Privilege Hearings* at 2 (statement of Sen. Sam J. Ervin, Jr., Chairman, S. Subcomm. on Separation of Powers) (quoting Letter from President John F. Kennedy, to John E. Moss, Chairman, Special Gov't Info. Subcomm. of the Comm. on Gov't Operations (Mar. 7, 1962)).

17. *Id.* at 2–3.

18. Memorandum from Ronald Reagan to the Heads of Exec. Dep'ts & Agencies, Procedures Governing Responses to Congressional Requests for Information 1 (Nov. 4, 1982), https://www.justice.gov/ola/page/file/1090526/download ("Reagan Memorandum").

privilege to withhold information or testimony absent a formal assertion by the President.[19] But that theory has not proven accurate.

Like the pillar of presidential control, the third doctrinal pillar—that the president will assert executive privilege only as a "last resort"—appears on its face to be a limitation on executive privilege. The Reagan memorandum states that executive privilege "will be asserted only in the most compelling circumstances" and only as a last resort when disclosure disputes cannot be resolved through "good faith negotiations" between the branches.[20] In articulating this aspect of executive privilege, though, the executive branch relies heavily on the Supreme Court's decision in *Cheney v. United States District Court*.[21] In that case, two organizations sued claiming that the National Energy Policy Development Group established by President George W. Bush, which included Vice President Cheney, failed to comply with the requirements of the Federal Advisory Committee Act.[22] The district court permitted the suit to move forward against Cheney and the other defendants and allowed for limited discovery about the nature of the committee.[23] But the Supreme Court exercised the extraordinary remedy of mandamus to correct the lower court, writing that it had "labored under the mistaken assumption that the assertion of executive privilege is a necessary precondition to the Government's separation-of-powers objections."[24] The Court's opinion recognized that *Nixon* had held that the president could not "through the assertion of a 'broad [and] undifferentiated' need for confidentiality" withhold information but instead had to invoke privilege with specific objections.[25] But *Cheney* held that principle applied only *after* the party seeking the information had "satisfied his burden of showing the propriety of the requests."[26] And, in language that would be quoted innumerable times by the executive branch in oversight disputes,[27] the Court characterized executive privilege as "an extraordinary assertion of power 'not to be lightly invoked,'" and one that sets "coequal branches of the Government . . . on a collision course" and "should be avoided whenever possible."[28]

**Doctrine in Practice: The Accommodation Process**

The three pillars of the executive branch doctrine are all discussed in the foundational Reagan memorandum, the centerpiece of any discussion of the so-called "accommodation process" or "dance" that occurs when there is a dispute over congressional oversight requests. Each subsequent administration has adopted the Reagan memorandum and relied on it to support its actions. But I would suggest that the process described in the Reagan Memorandum is radically different from the one that currently takes place within the executive branch. That transformation is largely the result of a move from evaluating the sensitivity of and specific confidentiality interests in a particular piece of information to instead considering only whether information implicates the general, undifferentiated confidentiality interests that define the scope of the various components of executive privilege. In other words, instead of asking whether specific information *needs* to be protected by an assertion of

19. *See Executive Privilege Hearings* at 7 (statement of Sen. Sam J. Ervin, Jr.).
20. Reagan Memorandum at 1.
21. Cheney v. U.S. Dist. Court, 542 U.S. 367 (2004).
22. *Id.* at 373.
23. *Id.* at 376–77.
24. *Id.* at 391–92.
25. *Id.* at 388 (quoting United States v. Nixon, 418 U.S. 683, 706–07 (1974)).
26. *Id.*
27. *See, e.g.*, Letter from Stephen E. Boyd, Assistant Att'y Gen., Off. of Legis. Affs., U.S. Dep't of Just., to Jerrold Nadler, Chairman, House Comm. on the Judiciary 3 (Feb. 7, 2019), https://www.politico.com/f/?id=00000168-c91f-d364-a97d-ef9f540d0001.
28. *Cheney*, 542 U.S. at 389–90 (quoting United States v. Reynolds, 345 U.S. 1, 7 (1953)).

executive privilege, the current process asks whether the specific information *could* be protected, i.e., whether it potentially fits within one of the components of privilege.

Moreover, if the information could *potentially* be protected, then the executive branch considers it constitutionally permissible to rebuff all congressional demands for the information absolutely, without any consideration of congressional need. The procedures and doctrines on which the executive branch relies to do so—such as testimonial immunity, the requirement that agency counsel be allowed to attend a deposition, or a "protective" assertion of executive privilege—are justified not by concrete harm from the disclosure of the information itself but solely by the need to *protect* the president's prerogative to control all information that fits within the components of executive privilege. I have described this practice as a kind of "prophylactic executive privilege,"[29] and, to the extent one considers executive privilege to mean the executive branch's authority to withhold information from Congress, the prophylactic executive privilege *is* executive privilege in current practice. That transformation is evident when one considers that—despite all of the various oversight disputes over the past two administrations, first between the Republican-led House and the Obama administration and then between the Democratic-led House and the Trump administration, there has been only one actual assertion of executive privilege in the past nine years and only two since 2009.[30]

The current executive branch process never considers the central question of executive privilege—whether disclosure of specific information will damage the national interest—until a congressional committee considers voting on whether to hold an executive branch official in contempt of Congress. By contrast, the traditional model of the accommodation process contemplates that central question would be considered at the outset, by the agency head. As articulated by Rehnquist and in the Reagan memorandum, the executive branch process originally envisioned a screening process during which lower executive branch officials would determine whether certain information potentially warranted an executive privilege claim—that is, whether the information, if disclosed, would cause identifiable harm to a specific national interest.

In congressional testimony, Rehnquist explained that the president "expects the responsible heads of the agencies to whom [congressional] requests are addressed to make some sort of a tentative determination as to whether some of the information requested might warrant a claim of executive privilege."[31] The Reagan memorandum directs that "[c]ongressional requests for information [] be complied with as promptly and as fully as possible, unless it is determined that compliance raises a substantial question of executive privilege."[32] Most importantly, it clarifies that a "'substantial question of executive privilege' exists if disclosure of the information requested might significantly impair the national security . . . , the deliberative processes of the Executive Branch, or other aspects of the performance of the Executive Branch's constitutional duties."[33] Thus, both Rehnquist and Reagan described an initial agency analysis of whether an executive privilege claim may be appropriate based on concrete harm that could result from disclosure. That initial screening remained tied to the

29 *See* Jonathan David Shaub, *The Executive's Privilege*, 70 DUKE L.J. 1, 55-70 (2020).

30. President Trump formally asserted executive privilege only one time, over a small set of "priority documents" related to the administration's decision to include a citizenship question on the 2020 Census. *See* Assertion of Executive Privilege over Deliberative Materials Regarding the Inclusion of the Citizenship Question on the 2020 Census Questionnaire, 43 Op. O.L.C. __ (June 11, 2019). President Obama also formally asserted executive privilege only once, in the Fast & Furious matter. *See* Assertion of Executive Privilege over Deliberative Materials Generated in Response to Congressional Investigation in Operation Fast and Furious, 36 Op. O.L.C. 1 (2012).

31.*Executive Privilege Hearings* at 441.

32.Reagan Memorandum at 1–2.

33. *Id.*

understanding of executive privilege as the president's limited constitutional authority to intervene and forbid disclosure of specific information when concrete, identified harm would result.

The Reagan memorandum advises department heads to request that a congressional committee "hold its request for the information in abeyance" while the president is considering a claim of privilege.[34] But it also clarifies that such a request "itself does not constitute a claim of privilege."[35] Instead, that request should have been made only when information raised a "substantial question of executive privilege," a term it defined quite narrowly. The memorandum delegated to agency officials the task of determining whether the release of specific information requested might be harmful to national interests, warranting presidential consideration.[36] Today, this is no longer true. Lower executive branch officials do not consider identifiable harm that may result from the disclosure of specific information. Rather, they assess only whether the requested information falls within one of the components of executive privilege. Lower executive branch officials then often refuse to disclose information by shielding themselves in the president's prerogative to make the final privilege decision and the broad scope of the components of privilege.[37]

The current executive branch doctrine has thus expanded substantially the underlying constitutional authority known as executive privilege, describing it not as the limited authority to prevent the disclosure of specific information but as an affirmative constitutional authority to control the dissemination of *all* information that potentially implicates one of the "components" of executive privilege.[38] Under this view, any attempt to undermine that authority—even a largely benign statutory reporting requirement—is an unconstitutional interference with that affirmative, and absolute, presidential authority. In this manner, the combination of the executive branch's three doctrinal pillars—broad, undifferentiated "components" of a singular constitutional privilege; the president's exclusive authority to assert the privilege; and the concept of executive privilege as a last resort—has evolved to the point that the executive branch can withhold enormous amount of information on the basis of its doctrine of executive privilege without ever considering, let alone asserting, the privilege itself or conducting the balancing of interests it requires.

**Congress's Limited Authority to Combat Executive Branch Recalcitrance**

The executive branch's doctrine and practice of executive privilege has led to an imbalance in congressional oversight. As Rehnquist once stated, "the Executive Branch has a headstart in any controversy with the Legislative Branch, since the Legislative Branch wants something the Executive Branch has, and therefore the initiative lies with the former. All the Executive has to do is maintain the status quo, and he prevails."[39] Given that "headstart," the executive branch's law governs unless

34. *Id.* at 2.
35. *Id.*
36. *Id.* at 1–2.
37. Examining unforthcoming congressional testimony by Attorney General Jeff Sessions, Professor Heidi Kitrosser has called this phenomenon the "shadow effect" of executive privilege, defining it as the "impact on oversight of the implicit or explicit threat that [executive privilege] might be invoked at some point." Heidi Kitrosser, *The Shadow of Executive Privilege*, 15 FORUM 547, 548 (2017). As she notes, declining to provide information to Congress because executive privilege *could* be used to withhold the information "can help to shield the executive from political and legal accountability" and allows the executive branch to "bypass[] both the substantive questions asked [by Congress] as well as any serious engagement with the merits of the executive privilege claim." *Id.*
38. *See* Attempted Exclusion of Agency Couns. from Cong. Depositions of Agency Emps., 43 Op. O.L.C. __, slip op. at 8 (May 23, 2019) (concluding that the committee's exclusion of agency counsel "unconstitutionally interferes with the President's *right to control the disclosure of privileged information*" (emphasis added)).
39. Memorandum from William H. Rehnquist, Assistant Att'y Gen., Off. of Legal Couns., U.S. Dep't of Just., to John D. Ehrlichman, Assistant to the President for Domestic Affs., Power of Congressional Committee to Compel Appearance

Congress has some means to counter it. Scholars and commentators have called on Congress to act aggressively and wield various constitutional tools to alter the status quo and force the executive branch's hand. My view, however, is that none of Congress's current tools are effective if the executive branch decides to play constitutional hardball.[40] In current practice, the executive branch has essentially unchecked authority to withhold any piece of information it chooses from Congress.

The two houses of Congress theoretically have both internal and external enforcement mechanisms to combat executive branch assertions of confidentiality. The most commonly mentioned internal enforcement mechanisms are inherent contempt, appropriations, appointments, and impeachment. The most commonly discussed external enforcement mechanisms are criminal contempt prosecutions and civil subpoena enforcement suits. None of these are sufficient to force the executive branch's hand, however.

Congress's ability to self-enforce its demands is limited because, in reality, the available tools either require executive branch participation and are thus not wholly internal or are practically and politically unrealistic options for any but the most exceptional circumstances. If the president and attorney general declared that—as a constitutional matter—an executive branch official defying a congressional subpoena could not legally be arrested or fined, it is unclear whether Congress would have a realistic mechanism for overcoming that declaration and imposing its punishment. Reinvigorating inherent contempt—either by utilizing imprisonment as was historically the practice or adopting new procedures for imposing fines as punishment for non-compliance—has become a popular solution to the executive branch's refusal to turn over information.[41] But I am deeply skeptical that such proposals would be effective. Every option would appear to require the participation of at least *some* executive branch officials. For example, security personnel—who are part of the executive branch—would have to allow an executive branch official such as the attorney general or White House counsel to be taken into custody, and Treasury officials would have to participate in the garnishment of wages to pay a fine. Any statutory authority on which the congressional committee or sergeant-at-arms could rely to seek cooperation of executive branch officials would be, in the executive branch's view, overridden by the attorney general's constitutional opinion. Indeed, in the dispute over former White House Counsel Don McGahn's testimony, OLC opined explicitly that "Congress could not lawfully exercise any inherent contempt authority" against McGahn.[42] OLC had not included that statement in past oversight opinions, but it seems to have done so because of the suggestions that the House reinvigorate its inherent contempt power to force McGahn and other Trump administration officials to comply with its subpoenas.

Other internal enforcement mechanisms are similarly ineffective. The Senate can refuse to act on a confirmation until a particular document or set of documents have been disclosed.[43] But that power belongs solely to the Senate, and the House has often been at the forefront of congressional

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or Testimony of "White House Staff" 6–7 (Feb. 5, 1971) (emphasis omitted), https://www.justice.gov/olc/page/file/1225961/download.

40. *See* Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523 (2004).

41. *See, e.g.*, MORTON ROSENBERG, THE CONSTITUTION PROJECT, WHEN CONGRESS COMES CALLING: A STUDY ON THE PRINCIPLES, PRACTICES, AND PRAGMATICS OF LEGISLATIVE INQUIRY 24–25 (2017); Kia Rahnama, *Restoring Effective Congressional Oversight: Reform Proposals for the Enforcement of Congressional Subpoenas*, 45 J. LEGIS. 235, 237 (2018).

42. Testimonial Immunity Before Congress of the Former Counsel to the President, 43 Op. O.L.C. __, slip op. at 20.

43. For example, a group of Senators put President Obama's nomination of David Barron to the First Circuit on hold until the administration agreed to release a 2010 OLC memo authorizing a drone strike of a U.S. citizen. *See* Zeke J. Miller & Massimo Calabresi, *Inside the Obama Administration Fight Over the Drone Memo*, TIME (May 13, 2014, 4:42 PM), https://time.com/97613/obama-drone-memo-david-barron.

oversight. Moreover, presidents are often able to evade the Senate's role in confirmations by utilizing "acting" officials.[44]

The House can attempt to use its appropriation power to force disclosure.[45] But appropriations laws ultimately require the signature of the president. And even when the president has signed laws imposing conditions related to the disclosure of information, the president and Department of Justice—through signing statements and internal constitutional comments—repeatedly make it clear that the executive branch will disregard as unconstitutional any spending conditions that would interfere with the executive branch's conception of executive privilege. Congress's appropriations *statutes* cannot override the constitutional foundation on which the executive branch has built its doctrine. Moreover, most appropriations are passed in omnibus spending bills, and Congress is unlikely to refuse to fund the government due to an information dispute in all but the most extreme situations.

Similarly, impeachment is an extreme remedy that not a viable solution to oversight in all but the most exceptional cases. Impeachment solely for noncompliance with subpoenas would not only be potentially politically costly, it would also be unprecedented. Although an obstruction of a congressional inquiry formed part of the impeachment proceedings against Nixon, Clinton, and Trump, that charge was a secondary one in each instance, complementing a primary act alleged to be a high crime or misdemeanor.[46] An assertion of executive privilege, standing alone, is highly unlikely to be the principal grounds for impeachment.

Congress's external enforcement mechanisms fare no better. External enforcement that requires the executive branch's participation—such as criminal prosecution for contempt of Congress—is not a viable option, particularly given the increasing acceptance of the unitary executive theory and presidential control of the entire executive branch. OLC has repeatedly opined that executive branch officials who withhold information pursuant to the president's direction will not be prosecuted for criminal contempt.[47]

The central problem with civil litigation as a mechanism for enforcement is the time involved. Recent practice has shown repeatedly that the judicial process is too slow, at least under present procedures, to resolve any individual oversight dispute before it becomes moot due to an election or changed circumstances. For example, the House authorized the Fast & Furious lawsuit on the same

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44. *See* Nina A. Mendelson, *The Permissibility of Acting Officials: May the President Work Around Senate Confirmation?*, 72 ADMIN. L. REV. 533 (2020) (describing the practice of presidents relying on acting officials to bypass Senate confirmation).

45. Section 714 of the Consolidated Appropriations Act, 2010 prohibits "the payment of the salary of any officer or employee of the Federal Government who . . . prohibits or prevents, or attempts or threatens to prohibit or prevent, any other [Federal] officer or employee . . . from having direct oral or written communication or contact with any Member, committee or subcommittee of the Congress." Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, § 714, 123 Stat. 3034, 3208 (2010). Some have advocated legislation similar to § 714 "disallowing the use of any appropriation to pay the salary of a federal official held in contempt of Congress." H.R. REP. NO. 114-848, at 402 (2016); *see also* Contempt Act, H.R. 4447, 113th Cong. § 2 (2014) (bill that would prohibit payment of compensation to an officer or employee of the Federal government who has been held in contempt of Congress by the House or Senate). But because these statutory provisions cannot override the executive branch's constitutional doctrine, the executive branch would not enforce them. *See* Auth. of Agency Offs. To Prohibit Emps. from Providing Info. to Cong., 28 Op. O.L.C. 79 (2004).

46. *See* H.R. Res. 755, 116th Cong. (2019) (impeaching President Trump for Abuse of Power and Obstruction of Congress); H.R. REP. NO. 105-830, pt. 1, at 2–5 (1998) (announcing articles of impeachment against President Clinton for perjury, obstruction of justice, and abuse of power); H.R. Rep. No. 93-1305, at 1–4 (1974) (announcing articles of impeachment against President Nixon for obstruction of justice, abuse of power, and contempt of Congress).

47. Prosecution for Contempt of Cong. of an Exec. Branch Off. Who Has Asserted a Claim of Exec. Privilege, 8 Op. O.L.C. 101, 101–02 (1984).

day it held Attorney General Holder in contempt, June 28, 2012, and filed a complaint less than two months later, on August 13, 2012.[48] But a final, appealable district court decision was not issued until three and a half years later.[49] In the dispute over information related to the firing of the U.S. Attorneys, the House held Miers and White House Chief of Staff Josh Bolten in contempt on February 14, 2008[50] and filed suit on March 10, 2008.[51] The district court decided the question of absolute immunity relatively quickly, issuing an opinion on July 31, 2008, but did not resolve the underlying claim of privilege.[52] And, after a September argument, the D.C. Circuit stayed the district court's decision on immunity on October 6, 2008, and refused to expedite the case or give any opinion on the merits given the pending election and weighty issues involved.[53] Thus, even the threshold question of absolute immunity in *Committee on the Judiciary v. Miers*[54] took a number of months to make it to the appellate court, and the courts never really had time to address the merits of the privilege claim or balance the interests of the two branches.[55] Although the McGahn litigation was expedited, the appellate court had not yet addressed the merits of his claim of testimonial immunity two years into the suit. And like the other cases, it ultimately settled after an election without any resolution of the underlying constitutional claims.

**Route to Reform?**

Given the current imbalance in oversight and Congress's inability to overcome that imbalance in the course of individual oversight disputes, either through its own institutional authority or by utilizing external enforcement mechanisms, I see only one route to reform. Although the courts have proven ineffective at resolving individual oversight disputes, they represent the only means by which to alter the constitutional doctrines on which the executive branch relies. It is of course possible that the executive branch would unilaterally "disarm" and cut back on some of the existing doctrine. But it is much more likely that the executive branch will—as it has recently done—reiterate its foundational doctrine so that it retains the institutional authority it has accumulated but make exceptions for "extraordinary" circumstances in particular cases.[56]

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48. Complaint at 11, 41, Comm. on Oversight & Gov't Reform v. Holder, 979 F. Supp. 2d 1 (D.D.C. 2013) (No. 1:12-cv-1332), 2012 WL 3264300.

49. Comm. on Oversight & Gov't Reform v. Lynch, 156 F. Supp. 3d 101 (D.D.C. 2016). In the Fast & Furious matter, the parties agreed to some delays, and a congressional committee could certainly move with more haste. But a district court would still likely have to resolve threshold issues, such as standing, from which an interlocutory appeal could be certified, as the Justice Department requested in the Fast & Furious matter. *See Holder*, 979 F. Supp. 2d at 12–13 (noting DOJ's argument that the executive privilege claim was unreviewable); Comm. on Oversight & Gov't Reform v. Holder, No. 12-1332, 2013 WL 11241275, at *1–2 (D.D.C. Nov. 18, 2013) (refusing to certify an interlocutory appeal).

50. Complaint for Declaratory and Injunctive Relief at 22–23, Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53 (D.D.C. 2008) (No. 1:08-cv-409), 2008 WL 2150290.

51. *Id.* at 1, 36.

52. *Miers*, 558 F. Supp. 2d at 53, 107.

53. *Miers*, 542 F.3d at 909; Docket Sheet, *Miers*, 542 F.3d 909 (No. 08-5357).

54. Comm. on the Judiciary v. Miers, 542 F.3d 909, 911 (D.C. Cir. 2008) (per curiam).

55. Courts may also be hesitant to wade into the controversy. The D.C. Circuit twice abstained in AT&T litigation, urging the parties to reach a settlement, *see* United States v. AT&T, 567 F.2d 121, 130–33 (1977); United States v. AT&T, 551 F.2d 384, 394–95 (1976), and denied a motion to expedite the appeal in the *Miers* litigation, *see Miers*, 542 F.3d at 911. In the *Miers* case, the D.C. Circuit reasoned that "even if expedited, this controversy will not be fully and finally resolved by the Judicial Branch—including resolution by a panel and possible rehearing by this court en banc and by the Supreme Court—before the 110th Congress ends." *Miers*, 542 F.3d at 911.

56 *See, e.g.*, Letter to Jeffrey A. Rosen, from Bradley Weinsheimer, Associate Deputy Attorney General (July 26, 2021) (authorizing the former Deputy Attorney General and Acting Attorney General to disclose information protected by executive privilege related to the events of January 6 because of the Department's conclusion that "[t]he extraordinary events in this matter constitute exceptional circumstances warranting an accommodation to Congress" and because "Congress has articulated compelling legislative interests in the matters being investigated").

Congress's best path to reform may be to continue to litigate controversies that arise, even after a subsequent election has largely mooted the issues, in order to procure a precedential opinion on the underlying constitutional issues. For this reason, I believe that the House's decision to settle the *McGahn* case represented an enormous lost opportunity for Congress.[57] By settling the *McGahn* case, the House forfeited what was, as a matter of history, its most advanced and most favorable opportunity since Watergate to cut back on broad assertions of presidential prerogatives over information. The en banc U.S. Court of Appeals for the D.C. Circuit appeared likely to rule that the House had a cause of action to bring the suit, and even Judge Henderson—who voted in the executive branch's favor on justiciability grounds in the initial two panel decisions—had expressed serious doubts about the merits of doctrine of testimonial immunity on which McGahn relied.[58]

District court decisions have little influence on executive branch practice. Although a number of district court judges have issued opinions in recent years rejecting the broad assertions of authority claimed by the executive branch in oversight disputes, those opinions are not precedential. OLC has acknowledged those contrary judicial opinions, but then rejected their reasoning and continued to follow its own doctrine.[59] Only a precedential opinion issued by an appellate court on the underlying constitutional dispute would force the executive branch to reconsider it. But the executive branch has—successfully—gone to great pains to prevent that from happening in the decade and a half that Congress has pursued civil judicial enforcement of its subpoenas.

As a result, the most effective way for Congress to reform the oversight process may be to reform the judicial process for oversight litigation and press for resolution of the fundamental constitutional disagreements between the branches. As noted, statutory oversight provisions or exercises of institutional authority are unlikely to alter the current status because the executive branch counters with its doctrine rooted in the Constitution. The Constitution takes precedence. But Congress has almost plenary control over the procedures and jurisdiction of the courts. Legislation could moot or eliminate some of the preliminary issues that have bogged these cases down by, for example, providing a specific jurisdictional statute and cause of action for subpoena enforcement actions. Such reforms could also establish an expedited procedure for resolution or provide a direct appeal to the Supreme Court.[60] Indeed, part of the reason the Supreme Court was able to opine on the Watergate tapes as quickly as it did in *Nixon* is that it decided to take the case directly from the district court rather than wait for an intermediate appellate decision.[61] Such expedited procedures might result in the resolution of a particular privilege claim or they might not. Courts may feel ill-equipped to balance the need for confidentiality against congressional need for information. But even if courts decline to undertake that ultimate balancing test, they would have to first do what they are well equipped to do—address the foundational constitutional nature of executive privilege and congressional oversight.

Judicial resolution of such questions is, in my opinion, the only way in which the fundamental divide between the two branches can be broached—and the only way the current stalemate will find

57. *See* Jonathan Shaub, *Why the McGahn Agreement is a Devastating Loss for Congress*, LAWFARE (May 19, 2021, 11:47 AM), https://www.lawfareblog.com/why-mcgahn-agreement-devastating-loss-congress.
58. *See* Comm. on the Judiciary v. McGahn, 951 F.3d 510, 522 (D.C. Cir.), *rev'd*, 968 F.3d 755, 778 (D.C. Cir. 2020) (en banc).
59. *See, e.g.*, Immunity of the Assistant to the President & Dir. of the Off. of Pol. Strategy & Outreach from Cong. Subpoena, 38 Op. O.L.C. 5, 15-16 (2014).
60. *See* Todd Garvey, Cong. Res. Serv., *Congressional Subpoenas: Enforcing Executive Branch Compliance* 29 (March 27, 2019), https://crsreports.congress.gov/product/pdf/R/R45653/3 (detailing legislative proposals along these lines).
61. United States v. Nixon, 418 U.S. 683, 687 (1974).

resolution. Ironically, the best evidence for this claim is the *AT&T* litigation. The Congressional Research Service, the executive branch, and scholars point to the D.C. Circuit's opinion in *AT&T* as establishing the foundation for the *extrajudicial* accommodation process—the proposition that the two branches should negotiate a compromise in good faith rather than seek judicial resolution of information disputes. But that characterization, though accurate, is incomplete and overlooks the initial history of the case. The executive branch claimed an absolute right to withhold the national security information at issue in *AT&T*, and Congress claimed its subpoena power was absolutely immune from challenge by the executive branch, raising what the D.C. Circuit called a "clash of absolutes" the first time it addressed the dispute.[62] The D.C. Circuit's exhortations about compromise and negotiation only became possible *after* the court had rejected each branch's absolute constitutional claim.[63] The D.C. Circuit recognized explicitly that—before the two branches could engage in the accommodation process the opinion sets out—it was first "necessary for th[e] *Court* to consider the conflicting claims of the parties to absolute [constitutional] authority."[64]

Today, underlying almost every oversight inquiry, are the two branches' "conflicting claims" to absolute constitutional entitlement. Compromise, accommodation, and negotiation do occur at times, of course, and both branches continue to purport to follow the accommodation process extolled in *AT&T*. But in times of divided government when oversight becomes a weapon in the partisan clashes that characterize the current political environment, each branch can—and often does—retreat to its absolute constitutional position. In such situations, as in *AT&T*, it is "necessary" to resolve—and reject—the absolute constitutional positions before negotiation and accommodation can truly become a mandate. And the only real mechanism for that resolution is the same as it was in *AT&T*—a precedential judicial opinion rejecting extreme claims of constitutional right.

62. United States v. Am. Tel. & Tel. Co., 551 F.2d 384, 391 (D.C. Cir. 1976).
63. United States v. Am. Tel. & Tel. Co., 567 F.2d 121, 128 (D.C. Cir. 1977).
64. *Id.* (emphasis added).

**"Breaking the Logjam: Principles and Practice of Congressional Oversight and Executive Privilege"**

**Senate Committee on the Judiciary**
**Subcommittee on Federal Courts, Oversight, Agency Action, and Federal Rights**

**August 3, 2021**

**Testimony of Kate Shaw**
**Professor of Law, Benjamin N. Cardozo School of Law**

Chairman Whitehouse, Ranking Member Kennedy, and Distinguished Members of the Subcommittee:

Thank you for the invitation to testify today. My name is Kate Shaw, and I am a Professor of Law at Cardozo Law School, where my work focuses, among other things, on executive power and questions of constitutionalism outside the courts. Before I entered law teaching, I worked as an Associate Counsel in the White House Counsel's Office, from 2009–2011.

I understand that the purpose of today's hearing is to evaluate recent breakdowns in the process for resolving conflicts between executive privilege and congressional oversight. My testimony will therefore offer some brief background on executive privilege, both generally and in the context of Congress's exercise of its oversight authority. It will then address recent developments—in Congress, the executive branch, and the courts—surrounding the interaction between executive privilege and congressional oversight. As my testimony will explain, long-standing norms of inter-branch cooperation and accommodation have come under serious strain in recent years, and the process is clearly in need of reform. I'll therefore conclude with some thoughts about possible paths forward.

This statement draws on legal authority from both courts and the political branches. But judicial authority in this area is limited: historically, most disputes between Congress and the executive branch over access to information have been resolved within the political branches, not in the courts. So, while I will address the handful of court cases that grapple with the contours of executive privilege, equally or more important here are the principles and practices that for decades have guided the political branches in their approach to executive privilege, and that in recent years have largely collapsed.

## THE NATURE & SCOPE OF EXECUTIVE PRIVILEGE[1]

The term "executive privilege" does not appear in the Constitution. But the power to withhold certain information from the courts, Congress, and the public has long been understood as an important, if bounded, privilege enjoyed by the president.

### Judicial Authority

The Supreme Court confirmed the existence of a constitutionally grounded executive privilege in *United States v. Nixon*.[2] The *Nixon* Court found that some form of executive privilege was both "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution."[3] But the *Nixon* Court also held that "neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications" could "sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances."[4]

The executive privilege identified in *Nixon*, then, was presumptive and qualified, not absolute. And the Court went on to reject President Nixon's assertion that the privilege shielded him from compelled production of tapes and documents sought by the Watergate Special Prosecutor.[5]

*Nixon* remains the single most important case on the nature and scope of executive privilege, but it left many questions unanswered. In the years since *Nixon*, the D.C. Circuit has decided several significant cases involving claims of executive privilege. First, in *In re Sealed Case (Espy)*,[6] a case involving an Office of Independent Counsel investigation into Agriculture Secretary Mike Espy, the D.C. Circuit identified several distinct strains of executive privilege: first, a deliberative process privilege; and second, a privilege that attached to presidential communications. As to both, the court

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[1] The discussion in this section draws heavily on testimony I presented to the House Judiciary Committee in May 2019. *Executive Privilege and Congressional Oversight*: Hearing Before the H.R. Comm. on the Judiciary. 116th Cong. (2019) (statement of Kate Shaw, Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University).

[2] United States v. Nixon, 418 U.S. 683, 708 (1974). Although the first formal judicial recognition of executive privilege did not appear until 1974, presidents since Washington have asserted the prerogative to withhold communications from both Congress and the courts. Some suggest that judicial recognition of executive privilege is traceable to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803), where in addition to announcing the power of judicial review, Chief Justice Marshall also suggested a need for courts to avoid "intrud[ing] into the cabinet, and intermeddl[ing] with the prerogatives of the executive." *See also* MARK J. ROZELL, EXECUTIVE PRIVILEGE: THE DILEMMA OF SECRECY AND DEMOCRATIC ACCOUNTABILITY 37–38 (1994) (discussing President Jefferson's attempts to keep from Congress certain documents related to Aaron Burr's involvement in a secessionist conspiracy). And soon after *United States v. Nixon*, the Supreme Court confirmed that "the privilege is necessary to provide the confidentiality required for the President's conduct of office. . . . the privilege is not for the benefit of the President as an individual, but for the benefit of the Republic." Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 448–49 (1977).

[3] United States v. Nixon, 418 U.S. 683, 708 (1974).

[4] *Id.* at 706.

[5] *Id.* at 713.

[6] In re Sealed Case (*Espy*), 121 F.3d 729 (D.C. Cir. 1997).

held that when evaluating a claim of privilege, "courts must balance the public interests at stake in determining whether the privilege should yield in a particular case, and must specifically consider the need of the party seeking privileged evidence."[7] Applying that balancing, the court found that the Independent Counsel had made out a sufficiently strong showing to overcome the presidential communications privilege as to some of the requested documents.[8]

In 2004, the D.C. Circuit decided *Judicial Watch v. Department of Justice*, a case involving a FOIA request for Justice Department documents. Describing the case as "call[ing] upon the court to strike a balance between the twin values of transparency and accountability of the executive branch on the one hand, and on the other hand, protection of the confidentiality of Presidential decision-making and the President's ability to obtain candid, informed advice,"[9] the court rejected the invitation to extend the presidential communications privilege identified in *Espy* to encompass documents created outside of the White House that "never make their way to the Office of the President."[10] In both of these D.C. Circuit cases, then, presidents have been unsuccessful in their attempts to expand the scope of the judicially recognized privilege for presidential communications.

The Supreme Court returned to the issue of executive privilege in the 2004 case *Cheney v. District Court*, in which a number of groups challenged the Bush Administration's energy policy task force's compliance with the Federal Advisory Committee Act. The case's procedural posture meant that the Court did not directly opine on the existence of the privilege, but it did note in passing the importance of "a coequal branch of Government 'afford[ing] Presidential confidentiality the greatest protection consistent with the fair administration of justice.'"[11]

**Executive Privilege and Congressional Oversight**

*Nixon* involved a grand jury subpoena, and much of the Court's discussion was grounded in, and at times expressly limited to, the criminal context. *Cheney* involved litigation under the Federal Advisory Committee Act; *Espy* arose in the context of an Independent Counsel investigation; and *Judicial Watch* involved FOIA litigation. So none of these cases addressed clashes between claims of executive privilege and requests for information in the context of congressional oversight.[12]

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[7] *Id.* at 746.

[8] *Id.* at 761–62.

[9] Jud. Watch, Inc. v. Dep't of Just., 365 F.3d 1108, 1112 (D.C. Cir. 2004).

[10] *Id.* at 1116–17.

[11] Cheney v. U.S. Dist. Ct. for D.C., 542 U.S. 367, 382 (2004).

[12] *See* United States v. Nixon, 418 U.S. 683, 712 n.19 (1974) ("We are not here concerned with the balance between the President's generalized interest in confidentiality and . . . congressional demands for information.").

Like executive privilege, Congress's oversight power is nowhere to be found in the text of the Constitution.[13] But like executive privilege, its existence today is beyond serious dispute—an accepted extension of, and incident to, Congress's enumerated powers. The Supreme Court made explicit in the 1927 case *McGrain v. Daugherty* that the "power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function."[14] The *McGrain* Court continued: "the houses of Congress have the power, through their own processes, to compel a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the constitution."[15] Later cases have elaborated on the mechanics of this function, explaining that the "[i]ssuance of subpoenas" is "a legitimate use by Congress of its power to investigate."[16] Just last year, the Supreme Court reiterated that "The congressional power to obtain information is 'broad' and 'indispensable.'"[17]

The Court has identified prerequisites to the exercise of Congress's power of inquiry, explaining that congressional investigation must be "related to, and in furtherance of, a legitimate task of the Congress."[18] But once these prerequisites are satisfied, the power of inquiry is expansive: "The scope of the power of inquiry, in short, is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."[19]

Only a handful of cases directly address congressional requests for executive-branch information. In *Senate Select Committee on Presidential Campaign Activities v. Nixon*, the D.C. Circuit declined to enforce a Senate committee subpoena for the tapes that would eventually be obtained by the Watergate Special Prosecutor. Pointing to the House Judiciary Committee's presidential impeachment inquiry, the court held that "the Select Committee's immediate oversight need for the subpoenaed tapes is, from a congressional perspective, merely cumulative. Against the claim of privilege, the only oversight interest that the Select Committee can currently assert is that of having these particular conversations scrutinized simultaneously by two committees."[20]

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[13] In keeping with the title of the hearing, I mostly refer here to "congressional oversight." But the discussion above applies to congressional information-gathering for purposes of informing possible legislation, evaluating nominees, or any other legislative purpose, in addition to "oversight" as traditionally conceived—that is, the "review, monitoring, and supervision of the executive and the implementation of public policy," CRS Report RL30240, *Congressional Oversight Manual*, coordinated by Christopher M. Davis, Todd Garvey, and Ben Wilhelm, at 1. *See generally* JOSH CHAFETZ, CONGRESS'S CONSTITUTION 152 (2017) ("Gathering information is not a peripheral part of Congress's job; it is central to the legislature's identity and function.").

[14] McGrain v. Daugherty, 273 U.S. 135, 174 (1927). As with *Nixon* and executive privilege, *McGrain* in many ways merely represented judicial confirmation of a practice the political branches had long understood to have constitutional foundations.

[15] *Id.* at 160.

[16] Eastland v. U. S. Servicemen's Fund, 421 U.S. 491, 504 (1975).

[17] Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2031 (2020) (quoting Watkins v. United States, 354 U.S. 178, 187, 215 (1957)).

[18] *Id.* (quoting Watkins v. United States, 354 U.S. 178, 187 (1957)).

[19] Barenblatt v. United States, 360 U.S. 109, 111 (1959).

[20] S. Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 732 (D.C. Cir. 1974).

Two more recent district court opinions address congressional demands for information and executive resistance to those demands. In *Committee on Judiciary v. Miers*, a case involving a subpoena for testimony from White House officials in conjunction with an investigation into the firing of nine U.S. Attorneys, the district court "reject[ed] the Executive's claim of absolute immunity for senior presidential aides."[21] And *Committee on Oversight and Government Reform v. Holder*, while not addressing the merits of the dispute over access to documents sought as part of a committee investigation into the "Fast and Furious" firearm purchase and transfer operation, firmly rejected the Department of Justice's argument that "because the executive is seeking to shield records from the legislature, another co-equal political body, the law forbids the Court from getting involved."[22]

A still more recent series of cases grew out of the House Judiciary Committee's attempts to secure the testimony of former White House Counsel Don McGahn. The Committee initially requested and then subpoenaed McGahn's testimony regarding some of the episodes detailed in Special Counsel Robert Mueller's Report.[23] Both McGahn and the White House informed the Committee that because the Committee's request "implicated significant Executive Branch confidentiality interests and executive privilege,"[24] McGahn would not comply with the subpoena. The Committee filed suit to enforce its subpoena, and the D.C. District Court reiterated the *Miers* court's holding that "senior-level presidential aides…., are legally required to respond to a subpoena that a committee of Congress has issued, by appearing before the committee for testimony."[25] Four subsequent opinions out of the D.C. Circuit have addressed aspects of standing and justiciability, but without reaching the merits of McGahn's absolute testimonial immunity argument.[26] An agreement for voluntary closed-door testimony earlier this summer foreclosed the possibility of any additional appellate rulings,[27] but the en banc court did observe that "the ordinary and effective functioning of the Legislative Branch critically depends on the legislative prerogative to obtain information."[28]

Finally, in June 2020, the Supreme Court decided *Trump v. Mazars*, a case involving congressional subpoenas to third parties for financial records involving the President. While the case did not involve any assertions of executive privilege, the Court rejected President Trump's attorneys' request for a rule that would have required congressional committees seeking presidential records to establish a "demonstrated, specific need" for information that is "demonstrably critical" to a valid legislative purpose.[29] But the Court also concluded that the lower courts had not been sufficiently

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[21] Comm. on Judiciary v. Miers, 558 F. Supp. 2d 53, 99 (D.D.C. 2008).
[22] Comm. on Oversight & Gov't Reform v. Holder, 979 F. Supp. 2d 1, 12 (D.D.C. 2013).
[23] SPECIAL COUNS. ROBERT S. MUELLER, III, 1 REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION (2019).
[24] Letter from Pat A. Cipollone, Counsel to the President, to Chairman Nadler, Comm. on Judiciary (May 7, 2019), *available at* http://cdn.cnn.com/cnn/2019/images/05/07/pacletter05.07.2019.pdf.
[25] Comm. on Judiciary of United States House of Representatives v. McGahn, 415 F. Supp. 3d 148, 155 (D.D.C. 2019).
[26] Comm. on Judiciary of United States House of Representatives v. McGahn, 968 F.3d 755, 778 (D.C. Cir. 2020) (en banc).
[27] Charlie Savage, *House Democrats and White House Reach Deal Over Testimony by Ex-Trump Aide,* N.Y. TIMES (May 11, 2021), *available at* https://www.nytimes.com/2021/05/11/us/politics/mcgahn-testimony.html.
[28] Comm. on Judiciary of United States House of Representatives v. McGahn, 968 F.3d 755, 761 (D.C. Cir. 2020).
[29] Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2032, (2020).

attentive to the separation-of-powers concerns raised by requests for the President's financial records, and so remanded for an appropriate consideration of those concerns. Still, one clear take-away was that as a general matter, the president was not outside the reach of Congress's oversight authority.

On the substance, then, the judicial authority is largely on the side of Congress. But in each of these disputes, the timeline of litigation meant that the favorable rulings came too late for the relevant committees to genuinely benefit. In general, the typical litigation timeline confers an enormous advantage on executive-branch officials determined to resist congressional oversight efforts.[30]

### POLITICAL-BRANCH PRACTICE AND AUTHORITY

The cases discussed above represent the key judicial authority on executive privilege and its interaction with congressional oversight. But this limited judicial authority is only one part of the story.[31]

Indeed, an extensive body of executive-branch legal authority, recently catalogued by Professor Jonathan Shaub, articulates the general principles that have long guided the executive branch's approach to congressional requests for information. That authority asserts a strong executive power to protect information from disclosure, but has also long accepted the legitimacy of Congress's constitutional entitlement to access some executive-branch information. These executive-branch writings reflect a largely cooperative vision of information exchange in which both the executive and legislative branches have important and constitutionally grounded interests, and in which those interests "must be resolved on the basis of the force of reason and bargaining leverage."[32]

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[30] Josh Chafetz, *Nixon/Trump: Strategies of Judicial Aggrandizement*, 110 GEO. L.J. __ (forthcoming 2021), *available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3788366*.

[31] Courts routinely express their preference for extra-judicial resolution of information clashes between the executive and Congress. The Supreme Court itself has noted, though in the context of private-party pursuit of executive-branch information, that the "'occasion[s] for constitutional confrontation between the two branches' should be avoided whenever possible." Cheney v. U.S. Dist. Ct. for D.C., 542 U.S. 367, 389–90 (2004).And the D.C. Circuit has counseled that in such disputes "each branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation." United States v. Am. Tel. & Tel. Co., 567 F.2d 121, 127 (D.C. Cir. 1977) ("The framers, rather than attempting to define and allocate all governmental power in minute detail, relied, we believe, on the expectation that where conflicts in scope of authority arose between the coordinate branches, a spirit of dynamic compromise would promote resolution of the dispute in the manner most likely to result in efficient and effective functioning of our governmental system."). *See also* Todd David Peterson, *Contempt of Congress v. Executive Privilege*, 14 U. PA. J. CONST. L. 77, 158 (2011) ("the negotiation-accommodation process . . . works creatively to fashion compromise agreements that involve far more creative and useful terms and conditions than a court could ever come up with on a principled basis if it were to attempt to adjudicate a congressional-executive information dispute.").

[32] Andrew McCanse Wright, *Constitutional Conflict and Congressional Oversight*, 98 MARQ. L. REV. 881, 920 (2014).

Numerous memoranda from the Office of Legal Counsel and opinions or letters by senior executive-branch officials describe a strong executive privilege rooted in Article II of the Constitution. A 1989 opinion by then-Assistant Attorney General William Barr, for example, describes executive privilege as "a necessary corollary of the executive function vested in the President by Article II of the Constitution."[33] A 1982 opinion by then-Assistant Attorney General Ted Olson explains that "[t]he necessity for confidentiality in the advisory relationships between Cabinet advisers and the President, and their respective aides, is of both constitutional and practical significance."[34] The executive branch's description of the contours of executive privilege has evolved somewhat in recent decades, and it is today frequently described as including at least five components: presidential communications; information related to national security, diplomatic communications, and foreign affairs; internal executive-branch deliberations; information related to law enforcement investigations; and communications subject to the attorney-client privilege.[35] These different strains of executive privilege may implicate distinct constitutional interests.

Executive-branch writings also appear to acknowledge that under some circumstances, Congress has a legitimate entitlement to executive-branch information. As Attorney General William French Smith wrote in 1981, "In cases in which the Congress has a legitimate need for information that will help it legislate and the Executive Branch has a legitimate, constitutionally recognized need to keep information confidential, the courts have referred to the obligation of each Branch to accommodate the legitimate needs of the other . . . The accommodation required is not simply an exchange of concessions or a test of political strength. It is an obligation of each Branch to make a principled effort to acknowledge, and if possible to meet, the legitimate needs of the other Branch."[36] A Memorandum issued by President Ronald Reagan explained that "[t]he policy of this Administration is to comply with Congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the executive branch….executive privilege will be asserted only in the most compelling circumstances, and only after careful review demonstrates that the assertion of privilege is necessary."[37] In 2000, OLA head Robert Raben reiterated that basic position: "In implementing the longstanding policy of the Executive Branch to comply with Congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch, the Department's goal in all cases is to satisfy legitimate

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[33] Cong. Requests for Confidential Exec. Branch Info., 13 U.S. Op. Off. Legal Counsel 153, 154 (1989). *See also* Memorandum for the Attorney General Re: Confidentiality of the Attorney General's Communications in Counseling the President, 6 Op. O.L.C. 481, 484-90 (1982).

[34] *See also* Memorandum for the Attorney General Re: Confidentiality of the Attorney General's Communications in Counseling the President, 6 Op. O.L.C. 481, 484-90 (1982).

[35] Jonathan David Shaub, *The Executive's Privilege*, 70 DUKE L.J. 1, 11 (2020).

[36] 43 U.S. Op. Atty. Gen. 327, 332 (1981).

[37] Memorandum from President Ronald Reagan for the Heads of Executive Departments and Agencies, *Re: Procedures Governing Responses to Congressional Requests for Information* (Nov. 4, 1982), https://www.documentcloud.org/documents/3864882-1982-Reagan-Memo-re-procedures-governing.html.

legislative interests while protecting Executive Branch confidentiality interests."[38] And just last month, the Office of Legal Counsel described the interplay of oversight and executive privilege as a "dynamic process," in which "each branch is subject to 'an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation.'"[39]

Authority from Congress, not surprisingly, takes a strong view of congressional prerogatives and entitlement to information from the executive branch; but it too recognizes the legitimacy of some form of executive privilege.[40] An oversight manual produced by the Congressional Research Service, for example, explains that "while the congressional power of inquiry is broad, it is not unlimited. . . . the power to investigate may be exercised only 'in aid of the legislative function' and cannot be used to expose for the sake of exposure alone."[41] The same report acknowledges that executive privilege is "a doctrine which, like Congress' powers to investigate and cite for contempt, has constitutional roots."[42] Another CRS report approvingly cites a judicial statement that "the Framers 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.'"[43]

Beyond these written statements, a body of norms, conventions, and practices have developed to implement these commitments. These practices structure and order the legal obligations by which actors within the political branches understand themselves to be bound, and they constitute an important part of the law of executive privilege and congressional oversight.

What forms have these methods of compromise and accommodation taken over the years? Ordinarily, a congressional committee initiates what has been described as a "dance"[44] with a broad request for information or testimony. The relevant executive-branch officials typically next seek to narrow the request, and the executive branch may then provide documents pursuant to more narrowly drawn requests, or may give access to sensitive documents to a subset of committee

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[38] Letter from Robert Raben, Assistant Att'y Gen., to John Linder, House Subcomm. on Rules & Org. of the House 2–3 (Jan. 27, 2000). *See also* Andrew McCanse Wright, *Constitutional Conflict and Congressional Oversight,* 98 MARQ. L. REV. 881, 922–23 (2014).

[39] Ways and Means Comm.'s Request for the Former President's Tax Returns and Related Tax Information Pursuant to 26 U.S.C. § 6103(f)(1), 45 Op. O.L.C. at 23 (July 30, 2021) *available at* https://www.justice.gov/olc/file/1419111/download.
United States v. Am. Tel. & Tel. Co., 567 F.2d 121, 127, 130 (D.C. Cir. 1977).

[40] MORTON ROSENBERG CONG. RESEARCH SERV., INVESTIGATIVE OVERSIGHT: AN INTRODUCTION TO THE LAW, PRACTICE AND PROCEDURE OF CONGRESSIONAL INQUIRY (1995).

[41] *Id.* at 2 (quoting Kilbourn v. Thompson, 103 U.S. 168, 204 (1880)).

[42] *Id.* at 14.

[43] CONG. RESEARCH SERV., CONGRESSIONAL SUBPOENAS: ENFORCING EXECUTIVE-BRANCH COMPLIANCE 1 n. 7 (Mar. 27, 2019) (quoting United States v. AT&T Co., 567 F.2d 121, 127 (D.C. Cir. 1977)).

[44] Neal Devins, *Congressional-Executive Information Access Disputes: A Modest Proposal--Do Nothing,* 48 ADMIN. L. REV. 109, 137 (1996). Peter M. Shane, *Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims Against Congress,* 71 MINN. L. REV. 461, 515 (1987).

members and staff, or provide summaries rather than documents themselves, or grant "read-only" access to documents that remain in the custody of the executive branch. If the executive branch continues to resist, the committee may issue a subpoena or subpoenas, take a contempt vote or votes, and, in recent years, turn to courts to compel compliance. In general, executive privilege assertions are rare, carefully considered, and made only after genuine attempts at pursuing available alternatives.

This history of compromise and mutual accommodation is relevant in itself; it is additionally relevant because courts are particularly attentive to past practice when they render decisions in separation-of-powers disputes. Justice Frankfurter's famous concurring opinion in *Youngstown* explained that "[i]t is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them,"[45] and courts today routinely invoke practice between and within the political branches, in particular in cases implicating the separation of powers.[46]

## RECENT PROCESS BREAKDOWNS

For many years and across administrations of both parties, officials in both the executive branch and Congress followed the basic script above. But the four years of the Trump Administration saw the emergence of several novel executive-branch practices around executive privilege, which Professor Jonathan Shaub has described as "prophylactic" uses of executive privilege.[47] Some of these practices are genuinely new; others build on trends already underway. But taken together, they represent a troubling set of developments that have worked to undermine the viability of congressional oversight, with implications for executive-branch accountability and core separation-of-powers principles.

The first of these developments is the routine use of broad, blanket, so-called "protective" assertions of executive privilege, in which witnesses and administration lawyers withhold testimony or documents on the grounds that information they contain *might* be subject to a later privilege assertion. At times this prophylactic approach has involved witnesses appearing to testify before congressional committees but refusing to answer specific questions on the basis of potential future privilege invocations, as then-Attorney General Jeff Sessions did in his testimony before the Senate

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[45] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (Frankfurter, J., concurring).

[46] *See, e.g.*, NLRB v. Noel Canning, 573 U.S. 513, 524 (2014) (explaining that because the Recess Appointments Clause concerns the separation of elected powers, "in interpreting the Clause, we put significant weight upon historical practice" (emphasis omitted)). *See generally* Katherine Shaw, *Conventions in the Trenches*, CAL. L. REV. 2020 (discussing political-branch conventions).

[47] *See* Jonathan David Shaub, *The Executive's Privilege*, 70 DUKE L.J. 1, 61 (2020) ("The prophylactic executive privilege is . . . grounded not in concrete damage that would result from the disclosure of subpoenaed information but in harm to the president's absolute authority to control the dissemination of information.").

Judiciary Committee in June 2017.[48] On other occasions this approach has resulted in the refusal to produce any documents or witnesses on the basis of broad and underspecified concerns about privilege or confidentiality.[49]

The second novel development, closely related to the first, is the outright refusal to cooperate in any way in particular investigations,[50] like the inquiry into Russian interference in the 2016 election. As early as 2017, the Senate sent dozens of bipartisan requests for information related to its investigation of that interference;[51] later, in 2019, the House committees empowered under the House's impeachment resolution issued many additional requests for documents and testimony.[52] In each instance, the administration flatly refused to make any witnesses or documents available.[53] The latter refusal formed the basis of one of the two articles approved by the House of Representatives in President Trump's first impeachment.[54]

The third development is rooted in the long-standing executive-branch position that close presidential advisors enjoy absolute immunity from compelled testimony. But the most recent administration took a far broader view of that immunity than any recent administration. In Shaub's description, the Trump administration transformed that long-standing immunity principle "into an absolute position that authorizes the president to direct all current and former senior advisers to refuse to comply with a congressional subpoena if the requested testimony relates to the advisers' 'official duties,' even if much of the relevant information has already been made public and the 'official duties' are entirely unrelated to advising the president or to presidential communications."[55]

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[48] *See* Charlie Savage, *Explaining Executive Privilege and Sessions's Refusal to Answer Questions*, N.Y. TIMES (June 15, 2017), *available at* https://www.nytimes.com/2017/06/15/us/politics/executive-privilege-sessions-trump.html (quoting Sessions's refusal to answer questions, on the grounds that "I'm protecting the president's constitutional right by not giving it away before he has a chance to view it and weigh it").

[49] *See, e.g.*, Letter from Stephen E. Boyd, Assistant Att'y Gen., to Jerrold Nadler, Chairman of the House Comm. on the Judiciary, 116th Cong. (May 8, 2019), https://assets.documentcloud.org/documents/5993531/5-8-19-Boyd-Letter-Nadler.pdf.

[50] Annie L. Owens, *Thwarting the Separation of Powers in Interbranch Information Disputes*, 130 YALE L.J. FORUM 494, 500 (2021) (starting in 2017, "the Administration began forgoing the traditional accommodation process for a policy that approached outright refusal.").

[51] *Senate Judiciary Committee Minority Report*, at 17. Owens, *supra*, at 505 (discussing Senate requests).

[52] H.R. 116-346, Impeachment of Donald J. Trump, President of the United States ("the Administration refused—and continues to refuse—to produce any documents subpoenaed by the Investigating Committees as part of the impeachment inquiry, and nine current or former Administration officials remain in defiance of subpoenas for their testimony.")

[53] In addition, administration officials who did comply with subpoenas and participate in congressional proceedings faced a range of reprisals.

[54] H.R. Res. 766, 116th Cong. art. II (2019) (charging that "Donald J. Trump has directed the unprecedented, categorical, and indiscriminate defiance of subpoenas issued by the House of Representatives pursuant to its 'sole Power of Impeachment.").

[55] Jonathan David Shaub, *The Executive's Privilege*, 70 DUKE L.J. 1, 64–65 (2020).

## POSSIBLE PATHS FORWARD

The end of the Trump Administration, and the conclusion of many of the episodes discussed above, presents an important opportunity to rethink the practices of each branch of government when it comes to the interaction of oversight and privilege. I sketch out below a number of possible reforms.

### *Internal executive-branch reforms*

*Transparency and specificity*

First, the executive branch's increasing tendency to invoke broad "confidentiality" interests to pretermit inter-branch negotiation should yield to a requirement that assertions of executive privilege be made only upon a detailed description of the specific executive-branch interests that would be threatened by the production of documents or testimony. To paraphrase Professor Shaub, the executive branch's privilege against the compelled production of documents or testimony should be invoked sparingly, and only when accompanied by "an explicit and public presidential determination that the disclosure would cause concrete, identifiable harm to a specific interest of the United States."[56]

*Responding to wrongdoing*

Second, the executive branch could refine its approach to documents or testimony that contain evidence of wrongdoing or misconduct. This could be done by formalizing the long-standing executive-branch principle that executive privilege may not be used to conceal evidence of wrongdoing.

As a general matter, lawyers within the executive branch, at least post-Watergate,[57] have generally adhered to a strong norm under which documents or testimony that would reveal wrongdoing or misconduct are not viewed as candidates for a potential assertion of executive privilege.[58] But it is

[56] *Id.* at 7.
[57] *See* Archibald Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383, 1433 (1974) ("The evidence finally released by President Nixon just prior to his resignation made it abundantly clear that executive privilege had been used not to protect the Presidency, but to hide the misconduct of the President himself.").
[58] *See, e.g.*, Dawn Johnsen, *Executive Privilege Since* United States v. Nixon*: Issues of Motivation and Accommodation*, 83 MINN. L. REV. 1127, 1133 (1999) ("Where a President asserts executive privilege in order to hide evidence of illegal acts or other wrongdoing by high level executive officials, the assertion is illegitimate.").

not clear that this general principle has held in recent years. The practice should therefore be strengthened and formalized.[59]

Formalizing this principle would bring internal executive-branch practice more firmly into line with judicial authority holding that allegations of misconduct erode if not vitiate at least some forms of executive privilege. The *Espy* court directly addressed this issue, holding that the deliberative process privilege "disappears altogether when there is any reason to believe government misconduct occurred."[60] The court found that the presidential communications privilege did not similarly disappear on a suggestion of official misconduct, but that a "party seeking to overcome the presidential privilege seemingly must always provide a focused demonstration of need, even when there are allegations of misconduct by high-level officials …"[61] Presumably, however, in the face of such a showing of need, allegations of misconduct would tilt the balance strongly in favor of disclosure.[62]

Several district court cases have also addressed issues of privilege and misconduct. One held that "if there is 'any reason' to believe the information sought may shed light on government misconduct, public policy (as embodied by the law) demands that the misconduct not be shielded merely because it happens to be predecisional and deliberative."[63] Another found that the deliberative process privilege did not apply to memoranda showing that the Nixon White House considered using the IRS "in a selective and discriminatory fashion," reasoning that the memoranda were "no more part of the legitimate governmental process intended to be protected . . . than would be memoranda discussing the possibility of using a government agency to deliberately harass an opposition political party."[64]

The still-ongoing saga over access to information regarding the Trump Administration's efforts to add a citizenship questions to the 2020 Census would seem to present an opportunity for the Department of Justice to reconsider this issue—if, as seems likely from both the Supreme Court's

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[59] DAVID MAYHEW, DIVIDED WE GOVERN 8 (1991) ("Beyond making laws, Congress probably does nothing more consequential than investigate alleged misbehavior in the executive branch."); DOUGLAS L. KRINER & ERIC SCHICKLER, INVESTIGATING THE PRESIDENT (2016).

[60] In re Sealed Case (*Espy*), 121 F.3d 729, 746 (D.C. Cir. 1997).

[61] *Id.*

[62] *See also* Mobil Oil Corp. v. Dep't of Energy, 520 F. Supp. 414, 419 (N.D.N.Y. 1981) (in case involving subpoena issued in civil litigation, describing the "duty of a court …to balance the competing interests of the parties with respect to the release of the disputed information," and identifying "the public interest in the proper functioning of its governmental agencies" in a case in which "the DOE has been accused … of mismanaging a billion dollar governmental program that has far-reaching effects on the American public.").

[63] Alexander v. FBI, 186 F.R.D. 154, 164 (D.D.C. 1999).

[64] Tax Reform Research Group v. IRS, 419 F. Supp. 415, 426 (D.D.C. 1976).

2019 decision[65] and the results of a recent Inspector General investigation[66]—the records at issue contain evidence of misconduct.

*Enforcement of contempt citations*

Finally, the Department of Justice might reconsider the specifics of its current practice regarding the enforcement of contempt citations against current or former executive-branch officials. In 1984, the Office of Legal Counsel first advised that the Department of Justice was not required by the criminal contempt of Congress statute to either prosecute, or refer to a grand jury, an executive-branch official whom Congress had referred for prosecution, at least where the President had asserted executive privilege. The opinion went on to advise that the Constitution barred the statute's application to executive-branch officials under such circumstances.[67] Subsequent sdministrations have adhered to that position, and in recent conflicts, Congress has not even sought to have the Department of Justice enforce contempt citations.

Even if the Department of Justice retains the general practice of *not* initiating such prosecutions, it may warrant revisiting the reasoning of the original 1984 opinion, or it may be possible to create new procedures to ensure that the criteria set forth in 1984 (and a subsequent 1986 memo[68]) are satisfied—that is, a proper assertion of executive privilege, made personally by the president—before the Department concludes that it will not prosecute.

***Congressional practice***

Congressional committees engaging in oversight should work to ensure that their requests for information or testimony are reasonable and not overbroad; in addition, committees should work to minimize the extent to which their requests overlap with or duplicate requests issued by other committees. This is for at least two reasons. First, excessively broad or unduly burdensome initial requests may lead the executive branch to respond in a similar spirit. Second, entering negotiations with manageable, relatively narrow, and non-duplicative requests will place Congress in a stronger bargaining position vis-à-vis the executive if such disputes ultimately end up in court.

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[65] *See* Dep't of Com. v. New York, 139 S. Ct. 2551, 2575 (2019) ("Altogether, the evidence tells a story that does not match the explanation the Secretary gave for his decision.").
[66] Letter from Commerce Department Inspector General Peggy Gustafson, July 15, 2021, *available at* https://www.oig.doc.gov/OIGPublications/Inspector-General-Letter-to-Majority-Leader-Charles-Schumer-and-Chairwoman-Carolyn-Maloney-re-OIG-Case-No-19-0728.pdf.
[67] Prosecution of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege, 8 Op. O.L.C. 101, (May 30, 1984).
[68] Response to Cong. Requests for Information Regarding Decisions Made Under the Independent Counsel Act, 10 Op. O.L.C. 68 (April 28, 1986).

Congress could also make more active use of the political tools that were once understood to give it a comparative advantage in privilege disputes with the executive branch.[69] These include using the Senate's power to withhold its consent to executive-branch nominees, using the appropriations power to withhold funds, and deploying public-facing rhetoric to criticize and galvanize public opinion against executive-branch overreach.[70]

Some have argued that Congress should consider reviving a form of inherent contempt. This seems in principle to be worth considering, though much turns on the details. I would not, for example, support an attempt to return to a regime in which the sergeant-at-arms actually seeks to arrest non-compliant parties. But a scheme involving actual penalties in the form of fines, required submission of reports to Congress, reduced or withheld funds, or similar sanctions may well be worth considering in extreme cases of failure to cooperate or engage with oversight efforts.

***Expediting judicial process***

Over the last two decades, clashes between Congress and the executive branch have been increasingly fought in the courts, with both congressional committees and executive-branch officials invoking the jurisdiction of the federal courts in disputes over documents or testimony.

Whatever the merits of this development—and it has fierce critics[71]—one important lesson of recent court fights is the incompatibility of judicial timelines with most congressional oversight efforts. In virtually every executive privilege dispute, the information or testimony sought is by definition in the possession of the executive branch; and in essentially all recent high-stakes disputes, the executive branch has been able to run out the clock until the end of the Congress that initiated the oversight effort, or of the administration Congress sought to investigate.

It is certainly *possible* for courts to move quickly to resolve disputes involving executive privilege. The *Nixon* tapes opinion famously issued three weeks after the oral argument, and just two months after

[69] Louis Fisher, *Congressional Access to Information: Using Legislative Will and Leverage*, 52 DUKE L.J. 323, 325 (2002) (in oversight disputes, "Congress can win most of the time—if it has the will—because its political tools are formidable.").
[70] Josh Chafetz, *Congressional Overspeech*, 89 FORDHAM L. REV. 529, 536 (2020) (describing "the use of oversight mechanisms to communicate with the broader public"); Katherine Shaw, *Impeachable Speech*, 70 EMORY L.J. 1, 40 (2020) (arguing that "in impeachment, as elsewhere in law and politics, failure and success may not stand in a relationship of strict opposition," and that even impeachments that do not result in conviction and removal may serve broader purposes); Deborah Pearlstein, *The Executive Branch Anticanon*, 89 FORDHAM L. REV. 597, 600 (2020) (hypothesizing the existence of an executive branch "anticanon," composed of presidential conduct "that has come to be widely recognized as so unacceptable in character, it has not produced any of the 'precedential' effects" ordinary presidential conduct does).
[71] *See, e.g.*, Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. CHI. L. REV. 1083, 1155–56 (2009) ("As the executive continues to make expansive claims for its powers and privileges, and as courts continue to position themselves as the "ultimate arbiters" of inter-branch conflicts, Congress has ceded ground to both.").

the issuance of the grand jury subpoenas at issue.[72] The Second Circuit decided *Trump v. Vance* (a case involving a state grand jury, rather than congressional, subpoenas) in under two weeks.[73] But courts have largely not moved this quickly, instead adhering to ordinary litigation timelines that have meant that subpoenas have expired, impeachment trials have run their course, or other exigencies have evaporated without these disputes ever reaching judicial resolution.

Accordingly, so long as courts continue to play in important role in mediating disputes between Congress and the executive branch, it is well worth considering legislation that would create an expedited judicial process for the resolution of oversight disputes. A number of rounds of legislation have been introduced to create versions of this sort of process. The 115th Congress's H.R. 4010, for example, would have provided that "it shall be the duty" of the federal courts to "advance on the docket and to expedite to the greatest possible extent the disposition" of any civil enforcement lawsuit, in addition to creating the possibility of a three-judge panel with a direct appeal to the Supreme Court.[74]

In the absence of such legislation, courts concerned with safeguarding core separation-of-powers principles could adopt formal processes to expedite resolution of these disputes.

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[72] Josh Chafetz, *Nixon/Trump: Strategies of Judicial Aggrandizement*, 110 GEO. L.J. ___ (forthcoming 2021), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3788366, at 14.
[73] Trump v. Vance, 941 F.3d 631 (2d Cir.), cert. granted, 140 S. Ct. 659 (2019), aff'd and remanded, 140 S. Ct. 2412, 207 L. Ed. 2d 907 (2020).
[74] *See* Todd Garvey, Cong. Res. Serv., *Congressional Subpoenas: Enforcing Executive Branch Compliance* (March 27, 2019), at 29 https://crsreports.congress.gov/product/pdf/R/R45653/3 (discussing legislation).



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