Overprivileged

A Closer Look at Congressional Oversight, Executive Privilege, and the Separation of Powers

U.S. Senate Committee on the Judiciary, Subcommittee on Federal Courts, Oversight, Agency Action, and Federal Rights

Senator Sheldon Whitehouse, Chairman | Senator John Kennedy, Ranking Member

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I. Introduction

In August 2021, the Senate Judiciary Committee's Subcommittee on Federal Courts, Oversight, Agency Action, and Federal Rights held a hearing on executive privilege and its role in thwarting congressional oversight.

Members of the Subcommittee heard from experts from across the political spectrum, all of whom agreed that Congress should restore a proper balance between Congress's vital oversight authority and the executive branch's legitimate need for confidentiality. Numerous examples of executive branch obstruction in recent years prove these experts correct.

Seeking the executive branch's perspective on these issues, the Subcommittee spent nearly a year negotiating with the executive branch over the appearance of a witness from the Justice Department's Office of Legal Counsel (OLC), which drives executive branch policy in this area. **In October 2022, the Assistant Attorney General for OLC, Christopher Schroeder, appeared before the Subcommittee at a follow-up hearing. This hearing marked the first appearance before Congress of a sitting, Senate-confirmed OLC head since Jay Bybee in 2002.** Although Assistant Attorney General Schroeder repeatedly acknowledged Congress's interest in exercising its constitutional oversight authority, the hearing revealed several areas unresolved between the two branches regarding the appropriate process for resolving interbranch information disputes.

This report reviews the "accommodation process" that has historically governed information disputes between Congress and the president, summarizes the legal and policy changes within the executive branch that have disrupted that process, and offers proposals for restoring it. Executive branch obstruction is not limited to administrations of one party, and reforms aimed at revitalizing Congress's constitutional authority should enjoy bipartisan support within Congress. As Subcommittee Chairman Sheldon Whitehouse (D-RI) observed at the August 2021 hearing, all members of Congress share a "common interest as legislators in ensuring a healthy process for policing executive privilege assertions."[1]

II. SATISFYING COMPETING CONSTITUTIONAL PREROGATIVES: THE ACCOMMODATION PROCESS

The Constitution grants the three branches of government broad powers to carry out their constitutional duties and to defend against encroachment by the other branches. Two such powers that frequently clash are Congress's authority to conduct oversight and the executive branch's authority to maintain confidentiality of sensitive information. Historically, when these prerogatives conflicted, the branches entered into an "accommodation process" grounded in good faith and with the goal of reaching a compromise.

This tradition dates back to the country's founding and was rooted in mutual recognition that governing in a system of coequal branches requires each branch to acknowledge the legitimate constitutional authorities and needs of the other. The Framers of the Constitution expected that "a spirit of dynamic compromise" in both branches would encourage Congress and the president to settle their disputes "in the manner most likely to result in efficient and effective functioning of our governmental system."[2]

For over 200 years, Congress and the executive branch attempted to work together in this "spirit of dynamic compromise," but that spirit has evaporated in recent years as the accommodation process has broken down.

Congress's Constitutional Oversight Authority

Congress has a well-established prerogative to seek and obtain information necessary to carry out its constitutional functions, including information in the possession of the executive branch. In particular, Congress holds robust oversight and investigative powers in aid of its legislative function.[3] Under Article I of the Constitution, "[a]ll legislative powers . . . shall be vested in a Congress of the United States."[4] But a "legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it."[5] Therefore, courts, Congress, presidential administrations, and scholars alike have long recognized that the "power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function."[6] As President Woodrow Wilson remarked, "[q]uite as important as legislation is vigilant oversight of administration."[7]

Congress's information-gathering powers are "broad" and "indispensable";[8] include the authority to issue subpoenas;[9] and encompass "inquiries into the administration of existing laws, studies of proposed laws, and 'surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them.'"[10] As the Supreme Court has explained,

> It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served.[11]

Congress's oversight authority is not unlimited, however: Information requests must "concern[] a subject on which legislation could be had."[12] Therefore, congressional oversight must "relate[] to an area in which Congress could potentially legislate, [not be] undertaken purely for harassment, . . . not infringe on any constitutional rights,"[13] and not be undertaken "for the purpose of 'law enforcement.'"[14] Thus, when Congress seeks information, it does so with extensive, but bounded, authority.

Congress has exercised this constitutional prerogative countless times to uncover corruption and abuse of power,[15] deception in military and foreign affairs,[16] wasteful wartime spending,[17] unconstitutional and discriminatory practices in law enforcement and the intelligence community,[18] and wartime human rights abuses.[19] **Although the other branches have attempted to derogate these powers in recent years,[20] the Constitution expects Congress's investigatory authority to be vital and robust.**

The President's Right to Confidentiality: Executive Privilege

Article II of the Constitution grants the president implicit, limited powers to protect his or her interest in maintaining confidentiality of certain executive branch information. Although presidents since George Washington have claimed this right,[21] the Supreme Court did not expressly recognize it until 1974 in *United States v. Nixon*.[22]

In *Nixon*, the Court announced a presumptive privilege over "communications 'in performance of [a President's] responsibilities,' 'of his office,' and made 'in the process of shaping policies and making decisions.'"[23] This presidential communications privilege, as it has come to be known, protects "the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking."[24] As the Supreme Court in *Nixon* explained, "[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."[25] This privilege, therefore, is both "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution."[26] At the same time, the Supreme Court made clear that a coequal branch's showing of need can overcome this privilege, specifically rejecting President Nixon's contention that executive privilege should be "absolute [and] unqualified."[27] Thus, "the executive privilege identified in *Nixon* . . . was presumptive and qualified, not absolute,"[28] and "should be exercised rarely and only for the most compelling reasons."[29]

Since the Court's foundational decision in *Nixon*, the executive branch has developed a muscular vision of executive privilege doctrine extending well beyond the presidential communications privilege. Courts have rejected the executive branch's attempt to expand the presidential communications privilege to documents that originate "outside of the White House [and] 'never make their way to the Office of the President.'"[30] But the executive branch has gradually enlarged its own conception of

executive privilege beyond presidential communications to comprise the following categories of information: "national security and foreign affairs information, including classified information and diplomatic communications, also known as state secrets"; "internal executive branch deliberations" that encompass agency deliberations not involving the president; "sensitive law enforcement or investigatory information, particularly, but not solely, information from open criminal investigations"; and "attorney-client and attorney work-product information."[31]

Congress has acknowledged the presidential communications privilege in its dealings with administrations of both parties.[32] But Congress maintains that all other components of executive privilege that the executive branch recognizes—including deliberative process and attorney-client privilege—are not constitutionally grounded and therefore cannot supervene Congress's oversight authority.[33]

Whatever the precise component at issue, "there has never been an expectation that [executive privilege is] absolute and unyielding."[34] Executive privilege—which can be formally invoked by the president and the president alone[35]—can be waived by the "release of a document" or disclosure of information, at least with respect to the "document or information specifically released."[36] The privilege "disappears altogether when there is any reason to believe government misconduct occurred."[37]

Moreover, an assertion of executive privilege pits the executive branch's interest in confidentiality against Congress's interest in the information, so the privilege is qualified, even where it concededly exists—consistent with the Supreme Court's well-established approach to separation-of-powers questions. Under that approach, a balancing test applies: The first question is "the extent to which [the asserted burden] prevents the Executive Branch from accomplishing its constitutionally assigned functions."[38] Second, if the "potential for disruption is present," the question becomes "whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress."[39] Under this test, "claims of Presidential privilege clearly must yield" when "substantial public interests" support Congress's need for the information.[40] Subjecting privilege assertions to such balancing protects each branch from the encroachment of the other, preserving the separation of powers in interbranch information disputes, and serving the public interest in healthy oversight.[41]

This balancing of interests aligns with the Constitution's broader separation of powers. The Constitution "'diffuses power [to] better . . . secure liberty'" and to "guard[] against 'the accumulation of excessive authority in a single Branch.'"[42] That system of separated powers simultaneously "'enjoins upon its branches separateness but interdependence, autonomy but reciprocity'" and "impos[es] on each of the three branches 'a degree of overlapping responsibility, a duty of interdependence as well as independence.'"[43]

The Traditional Accommodation Process and the Reagan Memo

When Congress's oversight responsibility and the executive branch's interest in confidentiality collide, the branches historically have engaged in a process of good-faith negotiations known as the accommodation process. This process, which allows the branches to avert needless disputes, has constitutional roots. Given the separation-of-powers principles at stake, when interbranch information disputes arise, so does "an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation."[44]

This model of interbranch accommodation can be traced back to the first congressional investigation during the George Washington administration. In 1792, the House of Representatives opened an investigation into a failed military campaign by Major General Arthur St. Clair against Native Americans living in the Northwest Territory.[45] The House authorized the investigating committee to "call for such persons, papers and records as may be necessary to assist their inquiries."[46] In response, President Washington consulted his cabinet, which, according to notes taken by Secretary of State Thomas Jefferson, concluded that the executive ought to "communicate such papers as the public good would permit and ought to refuse those the disclosure of which would injure the public."[47] Negotiations between Secretary Jefferson and the House led the House to narrow its request and President Washington to turn over all of the requested documents.[48]

As in 1792, the modern "process of mutual compromise and accommodations" requires that "absolute claims for either access or confidentiality [be] relinquished and replaced by a negotiated resolution acceptable to both branches."[49] That both Congress and the executive branch decline to exercise the full breadth of their perceived constitutional powers is a crucial aspect of the accommodation process. That is, "constitutional principles frequently form the backdrop" in these negotiations, but the accommodation process is "primarily a political process—often involving a series of offers and counteroffers—in which permissible accommodations are abundant."[50] These compromises have included the executive branch providing requested documents, summaries, or briefings to only a subset of members of Congress or staff; Congress narrowing its requests to a "targeted subset of documents"; the executive branch allowing members to view sensitive documents in controlled settings and without relinquishing possession of the documents; and Congress agreeing to alternatives to executive branch officials providing full, public testimony.[51] This process has frequently resolved interbranch disputes, but it requires both mutual good faith and an orderly process.

In 1982, President Ronald Reagan issued a presidential memorandum that "outlines the executive branch's approach to this accommodation process,"[52] enshrining the balanced approach described above. As Assistant Attorney General Schroeder testified before the Subcommittee, the Reagan Memo "directs agencies to . . . mak[e] a good faith attempt to accommodate Congress' requests for information. Likewise, Congress is obliged to make good faith attempts to accommodate the executive branch's confidentiality interests and other interests when requesting that information."[53]

Specifically, the memo makes clear that executive branch policy "is to comply with Congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch."[54] Under this approach, "executive privilege will be asserted only in the most compelling circumstances, and only after careful review demonstrates that assertion of the privilege is necessary."[55] The Reagan Memo "has been adopted by each subsequent administration,"[56] although, as discussed below, the extent to which those administrations have faithfully adhered to that memo has varied.

The Reagan Memo sets forth the following procedure for responding to congressional oversight requests:

1. "*Congressional requests for information shall be complied with as promptly and as fully as possible, unless it is determined that compliance raises a substantial question of executive privilege*. A 'substantial question of executive privilege' exists if disclosure of the information

requested might *significantly impair* the national security (including the conduct of foreign relations), the deliberative processes of the Executive Branch or other aspects of the performance of the Executive Branch's constitutional duties."

2. If a department head believes that compliance with Congress's request raises a substantial question of executive privilege, he or she shall promptly notify and consult with the Attorney General through the Assistant Attorney General for OLC, and shall also promptly notify and consult with White House Counsel.

3. "*Every effort shall be made to comply with the Congressional request . . . consistent with the legitimate needs of the Executive Branch*. The Department Head, the Attorney General and [White House Counsel] may, in the exercise of their discretion in the circumstances, determine that executive privilege shall not be invoked and release the requested information."

4. "If the Department Head, the Attorney General, or [White House Counsel] believes, after consultation, that the circumstances justify invocation of executive privilege, the issue shall be presented to the President by the [White House Counsel], who will advise the Department Head and the Attorney General of the President's decision."

5. "Pending a final Presidential decision on the matter, the Department Head shall request the Congressional body to hold its request for the information in abeyance," making clear "that the request itself does not constitute a claim of privilege."

6. "If the President decides to invoke executive privilege, the Department Head shall advise the requesting Congressional body that the claim of executive privilege is being made with the specific approval of the President."[57]

The four critical elements of this process are (a) a default proposition that the executive branch will comply with congressional information requests; (b) an exemption only where release of the information would "raise[] a substantial question of executive privilege," meaning that compliance "might significantly impair" executive branch functioning; (c) a process requiring a formal assertion of the privilege by the president himself; and (d) a good-faith ombudsman role by the Department of Justice in determining what disclosures are warranted.

To be sure, the Reagan Memo has always been to some extent aspirational. Interbranch information disputes did not end with the issuance of this policy. But one thing is clear: the more the executive branch has departed from the Reagan Memo, the more intractable disputes between Congress and the executive have become.

Interbranch Disputes in the Courts

An honest and robust accommodation process allows Congress and the executive branch to expeditiously resolve interbranch information disputes.[58] Litigation that can drag on for months or years is usually a poor substitute for a flexible good-faith negotiation process, and both branches may prefer to avoid the risk of court decisions that would limit their authority or leverage going forward. Moreover, courts have emphasized their preference for extra-judicial resolution of these disputes, in

many cases relying on threshold doctrines of standing and jurisdiction to avoid ruling on the merits,[59] leaving murky the judiciary's views of the precise contours of each branch's power.[60]

The interbranch information disputes that have been litigated have rarely resulted in a timely resolution or useful precedent. For instance, in June 2012, the House of Representatives voted to hold Attorney General Eric Holder in contempt for his refusal to cooperate with a subpoena from the House Committee on Oversight and Government Reform.[61] The Committee was investigating whether the Department of Justice deliberately obstructed the Committee's investigation into "Operation Fast and Furious," a Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) sting operation. ATF-monitored firearms related to that operation were connected to a shootout in which one U.S. Border Patrol agent was killed.[62] After President Obama asserted executive privilege over the requested documents, the House held Attorney General Holder in contempt and filed suit to enforce its subpoena.[63] The district court did not issue a final opinion until nearly four years later.[64] When the Committee and Justice Department finally settled in 2019, the parties—each dissatisfied with certain aspects of the district court's opinions—agreed "the District Court's holdings should not in any way control the resolution of the same or similar issues should they arise in other litigation between the Committee and the Executive Branch" and "waive[d] any right to argue that the judgment of the District Court or any of the District Court's orders or opinions in this case have any preclusive effect in any other litigation."[65]

Similarly, the House Committee on the Judiciary's litigation to enforce a congressional subpoena for former White House Counsel Don McGahn's testimony lasted more than two years and spawned seven judicial opinions without a final resolution of the merits.[66] In that case, the Committee sought McGahn's testimony for use in an impeachment inquiry involving the president. President Trump sought to block McGahn from testifying, asserting that McGahn enjoyed "absolute immunity" from testifying before Congress. As discussed further below, presidents of both parties have increasingly relied on that doctrine—which is distinct from but related to executive privilege—to thwart congressional information requests. The district court ruled in the Committee's favor on the merits, but that judgment was vacated on appeal.[67] In the proceedings that followed, the D.C. Circuit granted en banc review twice on threshold issues related to standing and the cause of action,[68] but the parties never obtained a final judgment on the merits. Even though a presidential impeachment unquestionably presents a "compelling need . . . for an unswervingly fair inquiry based on all the pertinent information,"[69] the impeachment inquiry ended before the Committee could obtain McGahn's testimony.[70]

The McGahn saga echoed previous protracted litigation over the House Judiciary Committee's subpoena to former White House Counsel Harriet Miers. In that case, the Committee sought Miers's testimony about President George W. Bush's removal of several U.S. Attorneys in 2006.[71] As in *McGahn*, the district court in *Miers* rejected the executive branch's assertion that Miers was absolutely immune from testifying before Congress.[72] But the executive branch appealed, and the court of appeals stayed the district court's order compelling Miers to testify and refused to expedite the appeal.[73] Consequently, the case was stayed for over a year before the parties settled without obtaining a precedential opinion from the appellate court.[74]

As the above examples show, history provides no inspiration for judicial resolution of information-based disputes through ordinary litigation procedures. Because the status quo going into such litigation favors the executive branch, Congress is at a distinct disadvantage in any ordinary lawsuit seeking to vindicate its oversight authority. Lengthy litigation allows the executive branch to frustrate timely disclosure by running out the clock. Former Chief Justice Rehnquist, who served as Assistant Attorney General for

OLC in the Nixon administration, explained, "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."[75] Fifty years later, this assessment has proven accurate. Under ordinary procedures, as former D.C. Circuit Judge (and former Senate Legal Counsel) Thomas Griffith pointed out during the *McGahn* litigation, "Congress has *never* successfully obtained information from an executive-branch official in a lawsuit."[76] The advantage to the executive branch of delay and noncompliance likely encourages such delay and noncompliance.

III. THE MODERN EXECUTIVE BRANCH'S CONSTITUTION AND THE BREAKDOWN OF THE TRADITIONAL ACCOMMODATION PROCESS

The executive branch has gradually developed its own, obstructive view of its obligations in the congressional oversight process. The executive branch's current approach to executive privilege departs drastically from Congress's and the courts' view of executive privilege described above. Over time, the executive branch—through the Justice Department's OLC—has hardened its approach to the separation-of-powers doctrine. As a result, the accommodation process to which past Republican and Democratic administrations adhered has broken down. Partly, this has been because OLC has moved the rules toward executive prerogatives, and partly this has been because the ombudsman role has lapsed in this shift.

A Maximal View of Executive Power

Over the past few decades, the executive branch conception of executive privilege has evolved dramatically. Jonathan Shaub, a professor of law and former OLC Attorney-Adviser, testified before the Subcommittee that the executive branch view of executive privilege is governed "almost wholly" by "internal executive branch doctrine developed by the Department of Justice, particularly OLC."[77] This internal doctrine "has rejected or distinguished contrary district court decisions" and "directly contradicts" Congress's own understanding of executive privilege.[78] In a nutshell, OLC has developed its own jurisprudence to impose across the executive branch.

"The current executive branch doctrine has expanded the underlying constitutional authority significantly,"[79] grafting additional theories of executive privilege onto the constitutionally grounded presidential communications privilege that the Supreme Court announced in *Nixon*.[80] The executive branch now asserts five constitutional "components" of executive privilege, four of which Congress does not acknowledge as having constitutional footing.[81]

As a baseline, the executive branch maintains that the president alone retains plenary "constitutional authority to control the disclosure of privileged information and to supervise the Executive Branch's communications with congressional entities."[82] This view deviates from traditional executive privilege doctrine, under which the president's authority to withhold information was limited in scope. It is also inconsistent with the procedures for invoking privilege set forth in the Reagan Memo.[83] Instead of a "*limited* authority to prevent the disclosure of *specific* information the disclosure of which would cause identifiable harm," administrations of both parties increasingly see the president as having an "*affirmative* constitutional authority to control the dissemination of *all* information that potentially implicates one of the 'components' of executive privilege."[84]

From this expansive view of presidential authority emerges what one scholar termed the "shadow effect" of executive privilege.[85] Lower executive branch officials now decline to disclose information that *might possibly* be covered by one of these "components." Thus, when an executive branch official receives a request for information from Congress, the first step is no longer to consider the "identifiable harm" that might result from disclosure of that information, or whether the president has asserted privilege over the information.[86] Instead, the official determines whether the president could *possibly* assert executive privilege over this information. If the answer is yes, then the official must refuse to disclose the information.[87] This practice appears to be reflected in an April 2009 memorandum from President Obama's White House Counsel, directing executive agencies to "consult with the White House Counsel's Office on all document requests that may involve documents *with White House equities*"—as opposed to triggering White House involvement only when a document "raises a substantial question of executive privilege," which is the Reagan Memo standard.[88]

Consistent with this evolution, executive branch officials now routinely make non-assertion assertions of executive privilege, allowing them to "withhold enormous amount[s] of information . . . without ever considering, let alone asserting, the privilege itself or conducting the balancing of interests it requires."[89] These "prophylactic" or protective assertions are based on the theory that such refusal is necessary to protect the president's prerogative to assert executive privilege at a later time if he so chooses.[90] But such assertions have in recent years rarely resulted in actual assertions by the president, which are now a "last resort" when negotiations break down entirely.[91] According to Assistant Attorney General Schroeder, "the stage at which the president would consider assertion of executive privilege" does not arise until "a subpoena has been issued and a contempt vote scheduled."[92] As a result, presidents have formally asserted executive privilege just twice since 2009.[93]

By removing the assertion of executive privilege to such a late stage in the oversight process, the executive branch necessarily delays resolution of interbranch conflict, and empowers non-assertion assertions of the privilege. Executive privilege scholar Mark Rozell testified before the Subcommittee that these obstructive actions and the ever-expanding theory of executive privilege that undergird them have "stretched the boundaries of executive privilege," threatening to inflict "long-term damage to [our] democratic institutions."[94]

Failure to Balance Congress's Interests

The executive branch has hardened its view of the separation of powers, increasingly embracing an "archaic view of the separation of powers as requiring three airtight departments of government."[95] This aggressive vision of separation-of-powers doctrine tolerates little to no recognition of Congress's interests as a coequal branch in information disputes and exalts executive interests at the expense of Congress.[96] Although Assistant Attorney General Schroeder told the Subcommittee that "there's not an effort in the accommodation process, from [OLC's] perspective, to prioritize executive prerogatives,"[97] this pro-executive view of interbranch relations undergirds particularly aggressive theories that OLC has embraced in recent years.

First, the executive branch, facilitated by OLC, has increasingly employed assertions of "absolute immunity" to block senior presidential advisers from testifying before Congress. These assertions are grounded in "[t]he Executive Branch's longstanding position, reaffirmed by numerous Administrations of both political parties, . . . that the President's immediate advisers are absolutely immune from

congressional testimonial process."[98] This theory is purportedly "rooted in the constitutional separation of powers, and in the immunity of the President himself from congressional compulsion to testify."[99]

This theory enjoys no support in law; it is grounded only in OLC's own self-referential opinions.[100] No court has ever held that the president or his advisers are immune from testifying before Congress, and two district court judges appointed by presidents of different parties have roundly rejected this theory on the merits.[101] As Judge John Bates explained, "[t]he Executive cannot identify a single judicial opinion that recognizes absolute immunity for senior presidential advisors in this or any other context. . . . In fact, there is Supreme Court authority that is all but conclusive on this question and that powerfully suggests that such advisors do not enjoy absolute immunity."[102] Justice Ketanji Brown Jackson also rejected this theory as a district judge, concluding, "absolute testimonial immunity for senior-level White House aides appears to be a fiction that has been fastidiously maintained over time through the force of sheer repetition in OLC opinions."[103] As Assistant Attorney General Schroeder conceded in the Subcommittee's October 2022 hearing, the OLC opinions on this topic have not been updated upon their rejection by Article III courts. The "fiction" has not been responsive to judicial review.

Nor is absolute immunity consistent with Article III separation-of-powers doctrine, or the traditional Reagan Memo accommodation process, both of which are concerned with balancing interests of both branches.[104] An assertion of absolute immunity cannot be overcome by a showing of need; as a consequence, Congress's interest in obtaining the testimony, no matter how compelling, is irrelevant. The absolute nature of this doctrine is also at odds with precedent rejecting executive branch attempts to establish an absolute executive privilege.[105]

This theory has expanded over time based on little but OLC's own precedents—exemplifying what one academic has described as a "ratchet effect in favor of executive power" that relies on "the historical gloss of political branch precedents."[106] The absolute immunity doctrine first emerged in a 1971 memo by then Assistant Attorney General for OLC William Rehnquist. The theory, as described by Rehnquist, first applied only to the president's "immediate advisers . . . who customarily meet with the President on a regular or frequent basis."[107] However, Rehnquist cited no case law, and he acknowledged that the historical examples he offered to justify this theory were "obviously quite inconclusive" and that "[t]o the extent that any generalizations may be drawn" from these examples, "they are necessarily tentative and sketchy."[108] Despite this shaky foundation, subsequent OLC opinions—including opinions recently released as part of litigation—bolstered the theory of absolute testimonial immunity by omitting Rehnquist's caveats.[109] Indeed, an opinion building on the theory only a year after Rehnquist's initial opinion asserted that the theory was "*firmly established*, as a matter of principle and precedents."[110]

What began by OLC's own admission as a "tentative and sketchy" theory that applied only to the president's "immediate advisers . . . who customarily meet with the President on a regular or frequent basis"[111] is now invoked to shield *former* aides no longer working in the White House.[112] As discussed above, this culminated in President Trump's invocation of absolute immunity to block a subpoena compelling his former White House Counsel, Don McGahn, from testifying as part of the House's impeachment inquiry.[113]

Second, OLC relies on an overly aggressive vision of the separation of powers to create procedural obstacles to congressional information requests. Specifically, in 2017, at the request of the White House, OLC produced a new opinion concluding that the executive branch has no legal obligation to turn over information requested by individual members of Congress, including even ranking members of

committees and subcommittees.[114] According to OLC, without a "specific delegation" to an individual member under Senate or House rules, requests by individual members do "*not trigger any obligation to accommodate congressional needs and [are] not legally enforceable through a subpoena or contempt proceedings*."[115] Key to OLC's reasoning is that "individual members, including ranking minority members, generally do not act on behalf of congressional committees" because, "[u]nder existing congressional rules, those members have not been endowed with the full power of the Congress . . . to conduct oversight."[116] A later OLC opinion instructed executive branch departments and agencies to treat requests from individual members of Congress, including ranking members, as ordinary requests under the Freedom of Information Act.[117] In other words, the opinion allows the executive branch to treat congressional requests, until they have gathered the full support of the chamber or committee, no differently than those made by private citizens.

This new policy, on which the Trump administration immediately relied to ignore many inquiries from lawmakers and on which the Biden administration has also relied to deny requests from members of the minority, [118] is fundamentally flawed. As an initial matter, it rests on OLC's interpretation of Senate and House rules. OLC has no special competence in the realm of congressional procedure, and it lacks authority to render binding interpretations of those rules. More fundamentally, these OLC opinions are unmoored from separation-of-powers doctrine and the realities of congressional oversight.[119] The opinions violate the principle that all members of Congress "have a constitutionally recognized status entitling them to share in general congressional powers and responsibilities, many of them requiring access to executive information."[120] And, in taking the extreme position that information requests from individual members trigger no obligation to accommodate at all, it contravenes the core tenet of the accommodation process that both branches must set aside the full breadth of their perceived constitutional powers in an effort to reach a compromise. In particular, this position marks a significant deviation from the long history of cooperation and accommodation between the executive branch and ranking members of committees, who have long undertaken investigations that are essential for serving their constituents and bringing attention to abuse or neglect in the executive branch.[121] Senate Judiciary Committee Ranking Member Chuck Grassley (R-IA) has decried this development as "nonsense,"[122] and members of Congress from both parties have spoken out against it.[123]

Third, on January 8, 2021, OLC issued an opinion entitled "Congressional Oversight of the White House," asserting that Congress has less authority to investigate the president and his close advisers than it does to conduct oversight over the rest of the executive branch.[124] Again relying primarily on OLC precedent as opposed to Article III case law, the opinion concludes that Congress's authority to conduct oversight over the president and his close advisers is limited in ways that no court has specifically condoned. The opinion emphasizes that "the other branches of government must review congressional information requests to ensure that they are not motivated by an illegitimate purpose."[125] According to OLC, "accommodation may not be required where congressional committees' requests appear to fall outside their delegated legislative jurisdiction or lack a legitimate legislative purpose."[126]

OLC further reasons that "[b]ecause congressional requests for information must concern[] a subject on which legislation could be had, Congress may not conduct oversight of the President's discharge of his exclusive constitutional authority."[127] According to OLC, "the President's exclusive powers include the powers to pardon, to sign or veto legislation, to nominate and appoint officers of the United States, and to remove officers and other officials," as well as the president's Article II "powers in the area of diplomacy and national defense," and control of classified information.[128] The oversight-free zone this theory would create has no basis in Article III oversight jurisprudence.

In addition, OLC asserts that "[e]ven when a congressional inquiry advances a legitimate legislative purpose, the separation of powers imposes other constraints on oversight of the White House."[129] Such constraints purportedly include "the Executive Branch's interests in maintaining the autonomy of [the] office [of the President] and safeguarding the confidentiality of its communications."[130] According to OLC, this means that Congress should direct oversight requests to the White House only rarely, and "oversight requests to the White House must be tailored to accommodate the President's need for autonomy and confidentiality."[131]

This opinion suffers from many of the flaws discussed above—it relies on self-referential OLC opinions as opposed to judicial precedent, and it restricts Congress's constitutional oversight authority without taking Congress's coequal interests into account. Moreover, the opinion provides a broad overview of purported limitations on Congress's oversight in seeming conflict with OLC's own statement of its best practices, which provide that, when OLC issues an opinion, "[t]he legal question presented should be focused and concrete; OLC generally avoids providing a general survey of an area of law or issuing broad, abstract legal opinions."[132]

Thwarting Congressional Oversight

This perfect storm—a maximal vision of executive power over executive branch information, a separation-of-powers doctrine that rejects the need for cooperation with members of Congress, and an executive jurisprudence unhinged from actual Article III jurisprudence—has all but undone the accommodation process. **As a result, in recent years, the executive branch has repeatedly thwarted Congress's constitutional power to conduct oversight.**

Most notably, executive officials now frequently employ "prophylactic" or non-assertion assertions of executive privilege.[133] Executive branch officials of both parties have wielded this tool to combat even the most serious congressional inquiries. "President Clinton was the first to use this tactic, making a protective assertion of privilege over a collection of documents from the White House Counsel's Office that had been subpoenaed by a congressional committee" on the ground that he needed more time to consider whether to make a formal assertion of privilege.[134] More recently, Attorney General Jeff Sessions invoked these assertions during a bipartisan investigation into Russian interference in the 2016 election and possible obstruction of justice by President Trump. Sessions stated that he was "not claiming executive privilege, because that's the President's power and I have no power to claim executive privilege."[135] Instead, he explained, he could not answer certain questions "for confidential reasons that really are founded in the coequal branch powers in the Constitution of the United States."[136] He elaborated that it was his "judgment that it would be inappropriate . . . to answer and reveal private conversations with the President when he has not had a full opportunity to review the questions and to make a decision on whether or not to approve such an answer."[137] One Senator responded that "[t]here is no appropriateness" ground upon which to refuse to testify, and that Attorney General Sessions was attempting to "hav[e] it both ways."[138] The core problem is that this period of abeyance often never ends, and there is no process to drive it to a timely decision.

In addition to these prophylactic assertions of privilege, the executive branch and even former presidents have increasingly used other extreme measures to frustrate congressional information requests, including in an impeachment investigation.[139] Such measures include:

- Complete refusals to cooperate with congressional investigations and outright rejection of requests from ranking members;[140]
- Claims of absolute testimonial immunity for all current and former senior advisers to the president when inquiries relate to their "official duties";[141]
- Refusals by executive branch officials to be deposed without agency counsel present, purportedly on the ground that agency counsel is necessary to preserve the president's prerogative to invoke executive privilege in the future;[142] and
- Prophylactic assertions of executive privilege by individuals who were not in the executive branch at the time of the relevant communications.[143]

The executive branch's willingness to employ hardball tactics has rendered the accommodation process virtually unrecognizable from traditional practice or the process the Reagan Memo prescribes. These practices have caused grave constitutional harm, impermissibly encroaching on Congress's constitutional oversight function in violation of the separation of powers.

IV. A PATH FORWARD

When the executive branch flouts the accommodation process, disregards congressional subpoenas, or asserts broad executive privilege claims, it encroaches on Congress's ability to function as the democratic body envisioned by the Framers. Without proper oversight, the executive branch may freely disregard statutory and constitutional requirements, often in secret and without any effective accountability or possibility of legislative redress. As Assistant Attorney General Schroeder told the Subcommittee, "[c]ongressional oversight is vital to our functioning democracy."[144]

As a first step toward restoring balance to this process, OLC should reevaluate its body of opinions related to congressional oversight to ensure that those opinions are firmly grounded in separation-of-powers principles as announced by the federal judiciary. In doing so, OLC should take care that its opinions properly account for Congress's prerogatives as a coequal branch and do not place an undue thumb on the scale in favor of the executive when information disputes arise. This process would necessarily entail reconsidering many of the opinions discussed above, particularly in light of evolving Article III case law. Assistant Attorney General Schroeder, however, told the Subcommittee that he has "no agenda to reconsider prior OLC opinions" and that "unless the president directs us or the attorney general does, [OLC] would not initiate a spontaneous review of any opinion of the office."[145]

Fortunately, Congress has various tools available to combat executive branch obstruction on its own. As outlined below, however, the executive branch has developed strategies for thwarting those as well. Statutory reform is likely necessary to revitalize Congress's oversight function. This section evaluates the leading proposals and offers other approaches to return to an oversight system that appropriately balances legislative interests and executive interests.

Problems with Existing Enforcement Tools

Traditionally, Congress's internal enforcement powers were sufficient to overcome executive branch refusals to accommodate information requests. One such tool is Congress's "power over the purse," which James Madison called "the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people."[146] Scholars and courts frequently cite Congress's control over the government appropriations process as its most powerful method of holding accountable the executive and judicial branches,[147] and it can be used to directly and indirectly pressure the executive branch to return to a mutually respectful approach to the accommodation process. While the "power over the purse" may be a potent force to bring to bear, it is awkward, requires bicameral accordance, and has little application for day-to-day contumacy.

Another powerful constitutional tool is the power of impeachment. Congress's investigatory authorities are at their zenith—and the president's power to resist is at its nadir—when connected to an impeachment investigation or trial.[148] Indeed, there is a substantial constitutional question whether executive privilege is even available to the president in such a circumstance.[149] But this power is reserved for the extreme

cases of "Treason, Bribery, or other high Crimes and Misdemeanors,"[150] and has little utility to combat executive obstruction in all but the most extreme situations.[151]

The Constitution also grants the Senate the duty to provide advice and consent to treaties and nominations by the president, as well as the responsibility of appropriating funds for departments and agencies.[152] Withholding consent for nominations can be an effective short-term tool for individual senators, given the Senate's rules.[153]

Congress may hold executive officials in contempt of Congress and in criminal contempt. Congress's "inherent contempt power is a constitutionally based authority given to each house to unilaterally arrest and detain an individual found to be 'obstruct[ing] the performance of the duties of the legislature.'"[154] This power developed as an essential check against monarchical rule in England and has been deployed numerous times throughout Congress's history.[155] Arguably "the mere threat of arrest and detention by the Sergeant at Arms can be used to encourage compliance with congressional demands"[156] or to bolster Congress's powers of persuasion relative to the noncompliant official,[157] but Congress has not used its inherent contempt authority since the 1930s.[158]

Congress enacted a statute making willful noncompliance with a valid congressional subpoena criminally punishable by fine and up to a year of imprisonment.[159] As with inherent contempt, "the threat of criminal contempt can be used as leverage to encourage compliance with a specific request."[160] However, enforcement of that statute requires the cooperation of the Department of Justice, which will be limited by the OLC opinions with regard to contumacy aligned with its "executive jurisprudence."

In practice these strategies are insufficient to overcome modern executive branch obstruction. The appropriations and impeachment processes require widespread support through one or both chambers of Congress. Continuing resolutions make it more difficult to use the appropriations process for oversight.[161] Some measures are available only to one chamber: House members cannot block nominations. Finally, placing holds on nominations and withholding funds is hostage-taking, which harms people outside the conflict.

Contempt procedures have been particularly ineffective in recent years. OLC recently opined that "Congress could not lawfully exercise *any* inherent contempt authority" against senior presidential advisers like the White House Counsel,[162] likely in response to recent proposals to revive Congress's inherent contempt powers.[163] Criminal contempt encounters similar difficulties. Enforcement requires compliance by the very branch that Congress seeks to hold accountable, and the executive branch has "repeatedly asserted that it retains the discretion to determine whether" to enforce the contempt citation.[164] Regardless, arrests by the Sergeant at Arms to enforce inherent contempt findings, even in the most appropriate circumstances, risks physical confrontation between legislative and executive officials; and Congress has no proper facilities for confinement of contemnors.

Congress should not abandon these tools altogether. They help Congress maintain its position in our constitutional structure, and Congress should not shy away from deploying these powers. If, however, Congress revives its authority to hold the executive branch accountable, it must consider reforms to modernize these powers, as discussed below.

Reinvigorating Congress's Enforcement Tools

Several dedicated scholars, good-government groups, and members of Congress have proposed reforms to strengthen Congress's enforcement tools. Some propose reinvigorating Congress's existing powers in novel ways, such as using inherent contempt to impose fines and making Congress's appropriations power more potent in informational disputes. Others would establish new avenues for protecting Congress's constitutional prerogatives by, for example, creating a congressional equivalent to the executive branch's OLC. **In evaluating these proposals, one consideration should be paramount: whether the reform will steer the executive branch toward a reasonable accommodation process that recognizes Congress's constitutional duties of oversight.**

Some members of Congress have proposed enhancing Congress's power to enforce subpoenas through changes to congressional procedures. For example, in 2021, Representative Ted Lieu (D-CA) reintroduced the Congressional Inherent Contempt Resolution.[165] The Act would update the House rules to codify an accommodation process for interbranch information disputes. If a resolution could not be reached through this process and the House authorized a subpoena, the House could employ its inherent contempt power to impose monetary fines on executive branch officials who do not comply. To enforce this provision, the House would sue to freeze the official's assets at the outset, and then sue again later to extract the penalties. This approach would help reinvigorate Congress's inherent authority while avoiding the political thicket of having the Sergeant at Arms arrest executive branch officials.

This proposal falls well within the scope of Congress's constitutional contempt power.[166] The Supreme Court has made clear that Congress's contempt power includes "the least possible power adequate to the end proposed," which the Court initially defined as the "power of imprisonment."[167] It is well established, however, that "monetary penalties have generally been viewed as less severe than imprisonment,"[168] which the Supreme Court has made clear in more recent decisions.[169] The Supreme Court has also directly analogized Congress's contempt power to the judiciary's own constitutional contempt power,[170] which the Court has held authorizes courts to fine contumacious individuals instead of jailing them.[171]

Senator Kennedy suggests that Congress could establish an analog by allowing for the imposition of fines against contemnors following a formal process. First, the chair of the committee seeking documents or testimony from a non-compliant official could request the formation of a Select Committee of five members to assess whether the non-compliance rises to the level of contempt of Congress. Upon the conclusion of its specific fact-finding investigation, the Committee would then prepare a contempt resolution along with a monetary fine recommendation. This method could incentivize compliance with congressional subpoenas without detaining or prosecuting executive branch officials, avoiding any potential habeas corpus issues.

Others have focused on ways to strengthen Congress's ability to influence executive branch compliance through the power of the purse. One such proposal involves amending chamber rules to "create a point of order against an appropriation to pay the salary of anyone who ha[s] been held in contempt by [that chamber] and whose contempt ha[s] not been purged."[172] Such a rule would "flip the presumption" so that "vigorous use of the power of the purse to enforce information demands" would become the norm, not the exception.[173] Similarly, Senator Richard Blumenthal (D-CT) and professor of law and congressional scholar Josh Chafetz have proposed including an "oversight rider" in appropriations bills

accompanied by a "non-severability clause."[174] These riders would trigger automatic cuts—"either to the underlying appropriation or to the [appropriate] salaries"—when officials fail to turn over information specified in the appropriation bill.[175] The non-severability clause would make it more difficult for the executive branch to ignore the rider, but it could still treat the rider as unconstitutional and simply refuse to comply.[176]

Congress can also create new internal mechanisms for protecting its institutional interests. For example, Congress could create a congressional counterpart to the Department of Justice's OLC to actively develop Congress's own body of constitutional interpretation.[177] The Senate has voted twice to create a joint office to defend Congress's institutional interests and authorities, and the original Ethics in Government Act of 1978 contained such a provision until the House managers objected in conference.[178] A Congressional OLC could better inform congressional oversight inquiries by providing a robust intellectual response to executive branch maximalism grounded in Congress's own institutional interests. A Department of Justice memo written by then-OLC Assistant Attorney General Antonin Scalia argued against the constitutionality of a 1975 proposal to establish a joint congressional OLC, but that memo is not dispositive for several reasons—including that OLC opinions are not binding on Congress; Scalia himself acknowledged the constitutionality of joint offices with purely internal, advisory responsibilities; and, in any event, the Justice Department later supported the establishment of the joint office proposed in the original Ethics in Government Act.[179] Again, however, it will be difficult for better legal analysis alone to overcome deliberate executive contumacy upheld by the Justice Department's OLC.

Improving Judicial Resolutions

Reformers have also proposed ways to improve judicial enforcement of congressional subpoenas. For instance, in 2021, Representative Adam Schiff (D-CA) and other House members reintroduced the Protecting Our Democracy Act,[180] which includes the Subpoena Compliance and Enforcement Act that Representative Darrell Issa (R-CA) introduced in the 115th Congress and Representative Madeleine Dean (D-PA) reintroduced in an expanded form two years later.[181] The Subpoena Compliance and Enforcement Act would clarify existing law by expressly codifying a cause of action for the House of Representatives, the Senate, and their committees to enforce congressional subpoenas, and it would require courts to expedite their consideration of these suits. The chambers or their committees could request a three-judge panel of a district court initially to hear the case, with direct appeal to the U.S. Supreme Court. Before filing such a suit, Congress would be required to file a certification that it first negotiated or attempted to negotiate with the executive branch in good faith. The bill would also empower courts to levy fines on noncompliant executive branch officials unless the president specifically directed those officials not to comply; government agencies would be prohibited from paying those fines. The bill would clarify that subpoenaed officials must produce adequate privilege logs to preserve any relevant privileges, and that the only valid privileges are those guaranteed by the Constitution and federal statute.

To improve Congress's enforcement powers, Congress could also consider shifting the burden onto noncompliant subpoena recipients—instead of Congress—to bring actions challenging a congressional subpoena. Noncompliant officials could be given a set amount of time in which to comply or sue, and exclusive original jurisdiction could be given to a three-judge district court in the District of Columbia under 28 U.S.C. § 2284, which provides that "[a] district court of three judges shall be convened when

otherwise required by Act of Congress." When the default approach is a suit by Congress, the burden is effectively on Congress to prove that its subpoena is valid, not on the official to justify his noncompliance.

Senators Whitehouse and Kennedy also suggest that executive branch officials could be made to reengage in good-faith accommodations by subjecting interbranch information disputes to mediation in District of Columbia federal court. Using settlement conferences with magistrate judges in federal civil cases as a model, this plan would feature a mediator or magistrate who could facilitate negotiations between the branches on behalf of the judicial panel and subject to its ultimate review. The mediator or magistrate could guide the parties toward a resolution or even issue preliminary recommendations on how the dispute should be resolved. If the executive branch refused to budge from its maximalist positions despite the mediator or magistrate's position that Congress is entitled to the requested information, then Congress could file suit and have its case heard by a special three-judge panel using expedited procedures. Such a procedure would provide expert guidance, and ultimately judicial review on a timely schedule, to steer parties toward accommodations. The threat of judicial review, even if rarely exercised, will deter outright executive contumacy.

V. Conclusion

The range of these proposals demonstrates the breadth of the issues that plague the modern accommodation process. The accommodation process developed as a way to balance the competing, legitimate needs of Congress and the executive branch, allowing each to carry out its constitutional responsibilities while respecting those of the other branch.

That process served the country and the American people for more than 200 years, until recent developments disrupted it. The new process, fueled by the executive branch's overreaching interpretations of executive privilege and the separation of powers, serves recalcitrant executive branch officials, not congressional oversight.

The novel powers claimed by the executive dramatically weaken Congress as an institution. Without a robust oversight power, Congress cannot serve the vital function of exposing misconduct and providing accountability that our Constitution and our democracy demand. Accordingly, members of all parties should agree on the urgent need for reforms that would revive Congress's oversight authority and restore Congress's coequal position in the separation of powers.

ENDNOTES

[1] *Breaking the Logjam: Principles and Practice of Congressional Oversight and Executive Privilege: Hearing Before the Subcomm. on Fed. Cts., Oversight, Agency Action, & Fed. Rts. of the S. Comm. on the Judiciary*, 117th Cong. (2021) [hereinafter Hearing on Breaking the Logjam] (statement of Sen. Sheldon Whitehouse, Chairman, Subcomm. on Fed. Cts., Oversight, Agency Action, & Fed. Rts. of the S. Comm. on the Judiciary).

[2] TODD GARVEY, CONG. RSCH. SERV., R45653, CONGRESSIONAL SUBPOENAS: ENFORCING EXECUTIVE BRANCH COMPLIANCE 1, n.7 (Mar. 27, 2019) [hereinafter CONGRESSIONAL SUBPOENAS] (quoting United States v. AT&T Co., 567 F.2d 121, 127 (D.C. Cir. 1977)).

[3] Of course, Congress also has authority to request information in aid of its other constitutional functions, including impeachment and the advice-and-consent power. The Constitution expressly assigns those powers to the House and Senate, respectively, and they are distinct from Congress's oversight authority, which is an implied power derived from the Article I legislative authority. *See* U.S. Const. art. I, § 2; *id.* art. II, § 2. Because different separation-of-powers issues arise when the president's implied executive privilege authority clashes with a textually assigned power of Congress, this Report deals primarily with executive privilege in the context of Congress's general oversight power.

[4] U.S. Const. art. I, §1.

[5] McGrain v. Daugherty, 273 U.S. 135, 175 (1927).

[6] *Id.* at 174; *see also* Quinn v. United States, 349 U.S. 155, 160 (1955) ("This power, deeply rooted in American and English institutions, is indeed co-extensive with the power to legislate."); JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 152 (2017) ("Gathering information is not a peripheral part of Congress's job; it is central to the legislature's identity and function."); WOODROW WILSON, CONGRESSIONAL GOVERNMENT 297 (1885) ("Quite as important as legislation is vigilant oversight of administration."); Neal Devins, *Congressional-Executive Information Access Disputes: A Modest Proposal—Do Nothing*, 48 ADMIN. L. REV. 109, 111 (1996) ("A key element of Congress' ability to carry out this mandate depends on how much information is made available to it as it deliberates and then legislates.").

[7] WILSON, *supra* note 6, at 297.

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

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

[10] *Mazars*, 140 S. Ct. at 2031 (2020) (quoting *Watkins*, 354 U.S. at 187); *see also Eastland*, 421 U.S. at 504; Barenblatt v. United States, 360 U.S. 109, 111 (1959) ("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."); United States v. Bryan, 339 U.S. 323, 331 (1950) ("[T]he great power of testimonial compulsion [is] necessary to the effective functioning of courts and legislatures.").

[11] *Mazars*, 140 S. Ct. at 2033 (quoting United States v. Rumely, 345 U.S. 41, 43 (1953)).

[12] *Eastland*, 421 U.S. at 506 (internal quotation marks omitted).

[13] Jonathan David Shaub, *The Executive's Privilege*, 70 DUKE L.J. 1, 40 (2020); *see also Mazars*, 140 S. Ct. at 2031 (quoting Quinn v. United States, 349 U.S. 155, 161 (1955)); McGrain v. Daugherty, 273 U.S. 135, 177 (1927).

[14] *Mazars*, 140 S. Ct. at 2032 (quoting *Quinn*, 349 U.S. at 161).

[15] *See, e.g.*, *Senate Investigates the "Teapot Dome" Scandal*, U.S. SENATE HISTORICAL OFFICE, https://www.senate.gov/about/powers-procedures/investigations/senate-investigates-the-teapot-dome-scandal.htm (last visited Dec. 13, 2022); *Senate Select Committee on Presidential Campaign Activities (The Watergate Committee)*, U.S. SENATE HISTORICAL OFFICE, https://www.senate.gov/about/resources/pdf/watergate-investigation-citations.pdf (last visited Dec. 13, 2022).

[16] *See, e.g.*, Louis Fisher, *How to Avoid Iran-Contras*, 76 CALIF. L. REV. 939 (1988) (book review).

[17] *See, e.g.*, *Special Committee to Investigate the National Defense Program (The Truman Committee)*, U.S. SENATE HISTORICAL OFFICE, https://www.senate.gov/about/powers-procedures/investigations/truman.htm (last visited Dec. 13, 2022).

[18] *See, e.g.*, *Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (The Church Committee)*, U.S. SENATE HISTORICAL OFFICE, https://www.senate.gov/about/powers-procedures/investigations/church-committee.htm (last visited Dec. 13, 2022).

[19] *See, e.g.*, COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY'S DETENTION AND INTERROGATION PROGRAM, S. REP. NO. 113-288 (2014).

[20] *See* Josh Chafetz, *Nixon/Trump: Strategies of Judicial Aggrandizement*, 110 GEO. L.J. 125 (2021),; Ashwin Phatak & Todd Ruger, *Trump-Era Court Battles Weaken Congressional Power*, CONSTITUTIONAL ACCOUNTABILITY CTR. (Dec. 1, 2020), https://www.theusconstitution.org/news/trump-era-court-battles-weaken-congressional-power/.

[21] *See* Archibald Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383, 1395-1405 (1974); MARK J. ROZELL, EXECUTIVE PRIVILEGE: PRESIDENTIAL POWER, SECRECY, AND ACCOUNTABILITY (2002).

[22] United States v. Nixon, 418 U.S. 683, 708 (1974).
[23] Nixon v. Administrator of Gen. Servs. (GSA), 433 U.S. 425, 449 (1977) (quoting *Nixon*, 418 U.S. at 711, 713, 708) (internal citations omitted).
[24] *Nixon*, 418 U.S. at 708.
[25] *Id.*
[26] *Id.*
[27] *Id.* at 706-07.
[28] *Hearing on Breaking the Logjam* at 2 (testimony of Kate Shaw, Professor of L., Benjamin N. Cardozo Sch. of L.) [hereinafter Shaw Testimony].
[29] *Id*. at 14 (testimony of Mark Rozell, Ruth D. & John T. Hazel Faculty Chair in Pub. Pol'y, George Mason Univ.) [hereinafter Rozell Testimony].
[30] Shaw Testimony, *supra* note 28, at 3 (quoting Jud. Watch, Inc. v. Dep't of Just., 365 F.3d 1108, 1112 (D.C. Cir. 2004).
[31] *Hearing on Breaking the Logjam* at 4 (testimony of Jonathan David Shaub, Assistant Professor of L., Univ. of Kentucky J. David Rosenberg Sch. of L.) [hereinafter Shaub Testimony]; *see also* Heidi Kitrosser, *The Shadow of Executive Privilege*, 15 THE FORUM 547, 555 (2017).
[32] *See* Shaub, *supra* note 13, at 32-33.
[33] *Id.* at 32; *see generally* MORTON ROSENBERG, CONG. RSCH. SERV., R95-464, INVESTIGATIVE OVERSIGHT: AN INTRODUCTION TO THE LAW, PRACTICE, AND PROCEDURE OF CONGRESSIONAL INQUIRY (1995); MORTON ROSENBERG, *Chapter 6: Common Law Privileges in Court Do Not Shield Witnesses from Complying with Committee Information Demands*, *in* WHEN CONGRESS COMES CALLING: A STUDY ON THE PRINCIPLES, PRACTICES, AND PRAGMATICS OF LEGISLATIVE INQUIRY (2017), https://goodgovernmentnow.org/wp-content/uploads/2018/09/rosenberg-when-congress-comes-calling-rosenberg-2017.pdf. *But see* Comm. on Oversight & Gov't Reform v. Holder, No. 12-1332 (ABJ), 2014 WL 12662665, at *1-*2 (D.D.C. Aug. 20, 2014), *modified*, No. 12-1332 (ABJ), 2014 WL 12662666 (D.D.C. Sept. 9, 2014) (stating in dicta that "[s]ome aspects of the [deliberative process] privilege . . . have roots in the constitutional separation of powers," but noting that, at any rate, deliberative process poses "a lower threshold to overcome than the privilege that covers Presidential communications").
[34] Nixon v. Administrator of Gen. Servs. (GSA), 433 U.S. 425, 450 (1977).
[35] Shaub Testimony, *supra* note 31, at 3.
[36] *In re* Sealed Case (Espy), 121 F.3d 729, 741 (D.C. Cir. 1997); *see also* Mobil Oil Corp. v. EPA, 879 F.2d 698, 700-03 (9th Cir. 1989).
[37] *In re* Sealed Case (Espy), 121 F.3d at 746.
[38] *GSA*, 433 U.S. at 443.
[39] *Id.*; *compare* United States v. Nixon, 418 U.S. 683, 706-07 (1974) (balancing interests of the judicial and executive branches in weighing President Nixon's executive privilege assertion).
[40] *GSA*, 433 U.S. at 454, 453.
[41] Courts have refined the standard Congress must meet to overcome the president's interest in confidentiality a handful of times to account for sui generis factual situations. However, the special tests the courts announced in these cases are unlikely to apply to garden-variety interbranch information disputes, which remain subject to the balancing of interests described above. *See GSA*, 433 U.S. at 443. The U.S. Court of Appeals for the D.C. Circuit in *Senate Select Committee on Presidential Campaign Activities v. Nixon* held that, to overcome President Nixon's executive privilege assertion, the Senate Select Committee seeking to enforce a subpoena for the Watergate tapes was required to show that "the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the Committee's functions." Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 731 (D.C. Cir. 1974). However, "the unique facts of that case are unlikely to ever be repeated[:] An impeachment inquiry into President Nixon had begun in the House, and the Senate Select Committee was seeking tapes that had already been turned over to the House." Shaub, *supra* note 13, at 8 n.17. Accordingly, the standard the court applied in *Senate Select*—which the Supreme Court has never adopted—was designed to account for the duplicative nature of the request in the special context of that case. More recently, the Supreme Court in *Trump v. Mazars* applied a four-factor test to balance the "special concerns regarding the separation of powers" that exist when Congress subpoenas a sitting president's personal financial records—an inquiry that arises much less frequently than congressional requests for official papers. Trump v. Mazars, 140 S. Ct. 2019, 2036 (2020).
[42] The Constitutional Separation of Powers Between the President and Cong., 20 Op. O.L.C. 124, 126-27 (1996) (quoting Mistretta v. United States, 488 U.S. 361, 381 (1989)), https://www.justice.gov/file/20061/download.
[43] *Id.* at 127 (quoting *Mistretta*, 488 U.S. at 381); *see also* Clinton v. Jones, 520 U.S. 681, 703 (1997) ("As Madison explained, separation of powers does not mean that the branches 'ought to have no *partial agency* in, or no *controul* over the acts of each other.'" (quoting THE FEDERALIST No. 47, at 325-26 (James Madison) (Jacob E. Cooke ed., 1961)).
[44] United States v. AT&T Co., 567 F.2d 121, 127 (D.C. Cir. 1977).
[45] *See* 3 ANNALS OF CONG. 490-94 (1792).
[46] TELEFORD TAYLOR, GRAND INQUEST: THE STORY OF CONGRESSIONAL INVESTIGATIONS 22 (1974).
[47] 1 THE WRITINGS OF THOMAS JEFFERSON 303-05 (Richard H. Johnston et al. eds., 1903).

[48] *See* Trump v. Mazars, 140 S. Ct. 2019, 2029-30 (2020); *see also* Todd David Peterson, *Contempt of Congress v. Executive Privilege*, 14 J. CONST. L. 77, 131 (2011).
[49] Memorandum from Todd Garvey, Legislative Att'y, Cong. Rsch. Serv. to Subcomm. on Fed. Courts, Oversight, Agency Action and Fed. Rights of the S. Comm. on the Judiciary 1-2 (July 28, 2021) (on file with Committee).
[50] *Id.* at 3.
[51] *Id.* at 3-4; *see also* Cong. Requests for Confidential Exec. Branch Info., 13 Op. O.L.C. 153, 157-58 (1989), https://www.justice.gov/file/24236/download; Annie L. Owens, *Thwarting the Separation of Powers in Interbranch Information Disputes*, 130 YALE L.J.F. 494 (2021).
[52] *Breaking the Logjam Part 2: The Office of Legal Counsel's Role in Shaping Executive Privilege Doctrine: Hearing Before the Subcomm. on Fed. Cts., Oversight, Agency Action, & Fed. Rts. of the S. Comm. on the Judiciary*, 117th Cong. 5 (2022) [hereinafter *Hearing on Breaking the Logjam Part 2*] (testimony of Assistant Att'y Gen. Schroeder, Off. of Legal Couns.) [hereinafter Schroeder Testimony].
[53] *Id.*
[54] Memorandum from President Ronald Reagan to the Heads of Exec. Dep'ts & Agencies re: Procedures Governing Responses to Congressional Requests for Information 1 (Nov. 4, 1982), https://www.justice.gov/ola/page/file/1090526/download [hereinafter Reagan Memorandum].
[55] *Id.*
[56] Shaub Testimony, *supra* note 31, at 4; *see, e.g.*, Memorandum from Gregory Craig, Couns. to the President, to All Executive Dep't & Agency Heads re: Congressional Requests for Information (July 30, 2009) ("This Administration will follow the longstanding policy of the Executive Branch, as set forth in the November 4, 1982 memorandum from President Reagan to the heads of departments and agencies."); Memorandum from Dana A. Remus, Couns. to the President, to All Executive Dep't & Agency Heads re: Congressional Requests for Information (July 9, 2021) (same).
[57] Reagan Memorandum, *supra* note 54, at 1-3 (emphases added).
[58] *See* Trump v. Mazars, 140 S. Ct. 2019, 2029 (2020) ("Historically, disputes over congressional demands for presidential documents have not ended up in court. Instead, they have been hashed out in the 'hurly-burly, the give-and-take of the political process between the legislative and the executive.'" (quoting *Hearings on S. 2170 et al. Before the Subcomm. on Intergovernmental Relations of the S. Comm. on Government Operations*, 94th Cong. 87 (1975) (statement of Antonin Scalia, Assistant Att'y Gen., Off. of Legal Couns.)).
[59] *See, e.g.*, Comm. on the Judiciary of the U.S. House of Representatives v. McGahn, 951 F.3d 510, 516, 531 (D.C. Cir. 2020) (holding Committee had no Article III standing in decision that was subsequently reversed by the en banc court); Comm. on the Judiciary of the U.S. House of Representatives v. McGahn, 973 F.3d 121, 123 (D.C. Cir. 2020) (holding Committee had no cause of action in decision that was subsequently vacated).
[60] *See* Shaub, *supra* note 13, at 8 n.17 (noting that "[a]ppellate courts have addressed a privilege dispute between a congressional committee and the executive branch only twice," with only one reaching the merits); Chafetz, *supra* note 20, at 149 (describing courts' use of a "combination of 'shadow docket' techniques . . . and 'passive virtue' techniques" to delay cases involving congressional informational requests) (citations omitted).
[61] Ed O'Keefe & Sari Horwitz, *House Votes to Hold Attorney General Eric Holder in Contempt*, WASH. POST (June 28, 2012), https://www.washingtonpost.com/politics/fast-and-furious-house-plans-vote-on-holding-eric-holder-in-contempt/2012/06/28/gJQAznlG9V_story.html.
[62] *Id.*
[63] *Id.*
[64] *Comm. on Oversight & Gov't Reform v. Lynch*, 156 F. Supp. 3d 101 (D.D.C. 2016).
[65] Josh Gerstein, *Subpoena Fight over Operation Fast and Furious Documents Finally Settled*, POLITICO (May 9, 2019), https://www.politico.com/story/2019/05/09/fast-and-furious-documents-holder-1313120.
[66] *See* Jonathan Shaub, *Why the McGahn Agreement Is a Devastating Loss for Congress*, LAWFARE (May 19, 2021), [hereinafter *McGahn Agreement*], https://www.lawfareblog.com/why-mcgahn-agreement-devastating-loss-congress.
[67] Comm. on the Judiciary, U.S. House of Representatives v. McGahn, 415 F. Supp. 3d 148 (D.D.C. 2019), *vacated and remanded*, 951 F.3d 510 (D.C. Cir. 2020), *aff'd in part, remanded in part*, 968 F.3d 755 (D.C. Cir. 2020) (en banc), *rev'd and remanded*, 973 F.3d 121 (D.C. Cir. 2020), *reh'g en banc granted, judgment vacated* (Oct. 15, 2020).
[68] *See McGahn*, 968 F.3d (en banc) (holding Committee had Article III standing); *McGahn*, 973 F.3d, *reh'g en banc granted, judgment vacated* (Oct. 15, 2020) (granting rehearing en banc on whether Committee had cause of action).
[69] *In re* Rep. & Recommendation of June 5, 1972 Grand Jury Concerning Transmission of Evidence to House of Representatives, 370 F. Supp. 1219, 1230 (D.D.C. 1974).
[70] Shaub, *McGahn Agreement*, *supra* note 66.
[71] Comm. on Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53, 55 (D.D.C. 2008).
[72] *Id.* at 99-107.
[73] Comm. on Judiciary of U.S. House of Representatives v. Miers, 542 F.3d 909, 911 (D.C. Cir. 2008).
[74] Comm. on Judiciary of U.S. House of Representatives v. Miers, No. 08-5357, 2009 WL 3568649, at *1 (D.C. Cir. Oct. 14, 2009) (order dismissing case).

[75] Memorandum from William H. Rehnquist, Assistant Att'y Gen., Off. of Legal Couns., U.S. Dep't of Justice, to John D. Ehrlichman, Assistant to the President for Domestic Affs., re: Power of Congressional Committee to Compel Appearance or Testimony of "White House Staff" 6-7 (Feb. 5, 1971), https://www.justice.gov/olc/page/file/1225961/download [hereinafter Rehnquist Memo] (emphasis omitted).
[76] Comm. on the Judiciary of the U.S. House of Representatives v. McGahn, 968 F.3d 755, 792 (D.C. Cir. 2020) (en banc) (Griffith, J., dissenting).
[77] Shaub Testimony, *supra* note 31, at 3; *see also* Kitrosser, *supra* note 31, at 555.
[78] *See* Shaub Testimony, *supra* note 31, at 3; *see also* Kitrosser, *supra* note 31, at 553-54 (describing "[m]itigating [f]eatures" of existing case law).
[79] Shaub, *supra* note 13, at 25.
[80] *See supra* notes 23-31 and accompanying text; Shaub, *supra* note 13, at 32-33.
[81] Shaub, *supra* note 13, at 11, 32-33.
[82] *See* Attempted Exclusion of Agency Couns. from Cong. Depositions of Agency Emps., 43 Op. O.L.C. __, slip op. at 2 (May 23, 2019), https://www.justice.gov/olc/file/1215056/download [hereinafter Attempted Exclusion of Agency Couns.]; *see also* Shaub, *supra* note 13, at 24-27.
[83] *See* Shaub, *supra* note 13, at 24-25.
[84] *Id.* at 25; *see also* Attempted Exclusion of Agency Couns., *supra* note 82, at 8.
[85] Kitrosser, *supra* note 31, at 548.
[86] Shaub, *supra* note 13, at 25-26, 55-62.
[87] *Id.*
[88] Memorandum from Gregory Craig, Couns. to the President, to All Exec. Dep'ts. and Agency Gen. Counsels re: Reminder Regarding Document Requests, (Apr. 15, 2009), https://www.justice.gov/oip/guidance/craig_memoranda_4-15-2009.pdf/download. As noted above, the Reagan Memo has been adopted by all subsequent administrations, including the Obama administration, *see supra* note 56 and accompanying text. But the April 2009 memo shows that, in practice, the executive branch's adherence to the Reagan Memo standards has diminished.
[89] Shaub Testimony, *supra* note 31, at 7.
[90] Jonathan Shaub, *The Prophylactic Executive Privilege*, LAWFARE (June 14, 2019) [hereinafter *Prophylactic Executive Privilege*], https://www.lawfareblog.com/prophylactic-executive-privilege.
[91] Shaub Testimony, *supra* note 31, at 3, 7.
[92] Schroeder Testimony, *supra* note 52, at 17-18.
[93] *Hearing on Breaking the Logjam Part 2*, *supra* note 52, at 12 (statement of Sen. Sheldon Whitehouse, Chairman, Subcomm. on Fed. Cts., Oversight, Agency Action, & Fed. Rts. of the S. Comm. on the Judiciary).
[94] Rozell Testimony, *supra* note 29, at 4-5.
[95] Nixon v. Administrator of Gen. Servs. (GSA), 433 U.S. 425, 443 (1977).
[96] *See* Shaub, *supra* note 13, at 28.
[97] Schroeder Testimony, *supra* note 52, at 7.
[98] Immunity of the Assistant to the President and Director of the Office of Political Strategy and Outreach from Congressional Subpoena, 38 Op. O.L.C. 5 (2014), https://www.justice.gov/file/30896/download.
[99] *Id*. at 6.
[100] *See id*. at 6-7 (citing only OLC opinions in support of OLC's absolute immunity theory).
[101] *See* Comm. on the Judiciary, U.S. House of Representatives v. McGahn, 415 F. Supp. 3d 148 (D.D.C. 2019); Comm. on Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53 (D.D.C. 2008).
[102] *Miers*, 558 F. Supp. 2d at 99.
[103] *McGahn*, 415 F. Supp. 3d at 214.
[104] *See supra* notes 44-57 and accompanying text.
[105] *See, e.g.*, United States v. Burr, 25 F. Cas. 187, 191-92 (C.C.D. Va. 1807) (Marshall, J., sitting as a circuit justice) (explaining it was "not controverted" "[t]hat the president of the United States may be subpoenaed, and examined as a witness, and required to produce any paper in his possession," but that "the occasion for demanding" sensitive information from the president must be "very strong"); Nixon v. Sirica, 487 F.2d 700, 715 (D.C. Cir. 1973) (en banc) (recognizing an absolute, as opposed to qualified, executive privilege would impermissibly "deny access to all documents in all the Executive departments to all citizens and their representatives, including Congress"); United States v. Nixon, 418 U.S. 683, 713 (1974) (noting that a presumption that presidential communications are privileged "must yield to the demonstrated, specific need for evidence in a pending criminal trial"); Dellums v. Powell, 561 F.2d 242, 246 (D.C. Cir. 1977) (explaining that executive "privilege rooted in confidential communications with the President is constitutionally based, and entitled to great weight, but it has been consistently viewed as presumptive only" (internal citation omitted)).
[106] Heidi Kitrosser, *Like "Nobody Has Ever Seen Before": Precedent and Privilege in the Trump Era*, 95 CHI.-KENT L. REV. 519, 526 (2021).
[107] Rehnquist Memo, *supra* note 75, at 7.
[108] *Id.* at 6-7.

[109] Jonathan Shaub, *Previously Undisclosed OLC Opinions Illuminate the Growth of Executive Power*, LAWFARE (Sept. 23, 2022), https://www.lawfareblog.com/previously-undisclosed-olc-opinions-illuminate-growth-executive-power.
[110] *Id.*
[111] Rehnquist Memo, *supra* note 75, at 7.
[112] *See, e.g.*, Immunity of the Former Counsel to the President from Compelled Congressional Testimony, 31 Op. O.L.C. 191, 192 (2007), https://www.justice.gov/file/451566/download.
[113] *See* Comm. on the Judiciary, U.S. House of Representatives v. McGahn, 415 F. Supp. 3d 148 (D.D.C. 2019).
[114] Auth. of Individual Members of Cong. to Conduct Oversight of the Exec. Branch, 41 Op. O.L.C. __, slip op. at 1 (May 1, 2017), https://www.justice.gov/olc/file/1085571/download.
[115] *Id.* at 1, 3 (emphasis added).
[116] *Id*. at 2 (internal citations and quotation marks omitted).
[117] Requests by Individual Members of Congress for Executive Branch Information, 43 O.L.C. __ (Feb. 13, 2019), https://www.justice.gov/olc/file/1356251/download.
[118] Burgess Everett & Josh Dawsey, *White House Orders Agencies to Ignore Democrats' Oversight Requests*, POLITICO (June 2, 2017),https://www.politico.com/story/2017/06/02/federal-agencies-oversight-requests-democrats-white-house-239034; Letter from Peggy E. Gustafson, Inspector Gen., U.S. Dep't of Com., to Sen. Roger Wicker, Ranking Member, Com. Comm. (May 27, 2021),https://www.commerce.senate.gov/services/files/2F09349F-6461-4185-A7C6-EC77ABE1BB2D; Letter from Sen. Roger Wicker, Ranking Member, Com. Comm., to Hon. Peggy E. Gustafson, Inspector Gen., U.S. Dep't of Com. (May 17, 2021),https://www.commerce.senate.gov/services/files/2F09349F-6461-4185-A7C6-EC77ABE1BB2D; Letter from Wade Green, Jr., Counsel to Inspector General, U.S. Dep't of Com., to Sen. Roger Wicker, Ranking Member, Com. Comm. (March 19, 2021),https://www.commerce.senate.gov/services/files/2F09349F-6461-4185-A7C6-EC77ABE1BB2D.
[119] *See* Letter from S. Comm. Ranking Members to Hon. Merrick Garland, Att'y Gen. (Sept. 24, 2021), https://www.commerce.senate.gov/services/files/CB506190-F57A-4026-A799-616F00475DE0 [hereinafter Ranking Members Letter].
[120] *Murphy v. Dep't of the Army*, 613 F.2d 1151, 1157 (D.C. Cir. 1979); *see also* Owens, *supra* note 51, at 502 ("Indeed, although oversight investigations are typically run through the committees of jurisdiction, individual members of Congress have a constitutional duty to cast informed votes and hold accountable executive branch agencies, which are funded by congressional appropriations. Moreover, other constitutional functions that require information . . . are ultimately carried out through the votes of individual legislators.").
[121] *See* Owens, *supra* note 51, at 502-03 ("[O]versight conducted by ranking members can be a vital means of checking the executive branch and ensuring transparency" and "accommodating [these] requests . . . helps to maintain a smooth-functioning relationship" between the branches.).
[122] Letter from Sen. Charles E. Grassley, Chairman, Jud. Comm., to Donald J. Trump, President of the United States (June 7, 2017), https://www.judiciary.senate.gov/imo/media/doc/2017-06-07%20CEG%20to%20DJT%20(oversight%20requests).pdf [hereinafter Grassley Letter].
[123] *See* Ranking Members Letter, *supra* note 119; Grassley Letter, *supra* note 122; Letter from Sen. Pat Roberts, Chairman, Ag. Comm., and Sen. Debbie Stabenow, Ranking Member, Ag. Comm., to Sonny Perdue, Sec'y Dep't of Ag. (May 19, 2017); Laura Jarrett, *DOJ Opens Door for Executive Branch to Ignore Dems' Requests*, CNN (June 2, 2017), https://www.cnn.com/2017/06/02/politics/olc-memo-congressional-oversight-requests/index.html (quoting Rep. Nancy Pelosi, Speaker, H.R., and Rep. Elijah Cummings, Chair, H. Comm. on Oversight, describing OLC's opinion as a "gag order" and "unprecedented").
[124] Congressional Oversight of the White House, 45 Op. O.L.C. __ (Jan. 8, 2021), https://www.justice.gov/olc/file/1355831/download.
[125] *Id*., slip op. at 11.
[126] *Id.* at 13.
[127] *Id.* at 16 (internal citation and quotation marks omitted).
[128] *Id.* at 18-21.
[129] *Id.* at 21.
[130] *Id.* at 22 (internal citation and quotation marks omitted).
[131] *Id.* at 22.
[132] Memorandum from David J. Barron, Acting Assistant Att'y Gen., to Attorneys of the Office re: Best Practices for OLC Legal Advice and Written Opinions 3 (July 16, 2010), https://www.justice.gov/olc/page/file/1511836/download.
[133] Shaub, *supra* note 13, at 55; *see generally* Shaub, *Prophylactic Executive Privilege*, *supra* note 90.
[134] Shaub, *supra* note 13, at 66.
[135] *Open Hearing with Attorney General of the United States, Jeff Sessions: Hearing Before the S. Select Comm. on Intel.*, 115th Cong. (2017) (statement of Jeff Sessions, Att'y Gen.).
[136] *Id.*
[137] *Id.*
[138] *Id*. (statement of Sen. Martin Heinrich).

[139] *See* Shaub, supra note 13, at 71 n.301.
[140] *See* Owens, *supra* note 51, at 500; Shaw Testimony, *supra* note 28, at 9-10. Even legislative agencies with statutory authority to seek information from the executive branch are thwarted by this obstruction. In 2021, members of the Senate Judiciary Committee asked the Government Accountability Office (GAO) to investigate the Department of Justice's near total refusal to cooperate with information requests in recent years. After months of attempting to secure basic information about the DOJ's policies for processing congressional requests, the GAO reported to the Committee that the DOJ's "failure to provide requested information . . . left [the GAO] unable to make progress on [its] review." Letter from Charles M. Johnson Jr., Managing Dir., Gov't Accountability Off. Homeland Sec. & Just., to Sen. Dick Durbin, Chairman, Comm. on Judiciary, and Sen. Sheldon Whitehouse (Nov. 4, 2021) (on file with Committee).
[141] Shaub, *supra* note 13, at 62-65; *see also* Immunity of the Assistant to the President & Dir. of the Off. of Pol. Strategy & Outreach from Cong. Subpoena, 38 Op. O.L.C. __, slip op. at 9 (July 15, 2014), https://www.justice.gov/file/30896/download ("respectfully disagree[ing] with the *Miers* court's analysis" regarding testimonial immunity for senior presidential advisers).
[142] Shaub, *supra* note 13, at 68-69.
[143] John Santucci, Katherine Faulders & Olivia Rubin, *White House Pushes for Release of Jan. 6 Documents as Trump, Bannon Rebuff Committee*, ABC NEWS (Oct. 13, 2021), https://abcnews.go.com/US/white-house-pushes-release-jan-documents-trump-bannon/story?id=80568817.
[144] *Hearing on Breaking the Logjam Part 2*, *supra* note 52, at 1 (prepared remarks of Assistant Att'y Gen. Schroeder, Off. of Legal Couns.).
[145] Schroeder Testimony, *supra* note 52, at 9.
[146] THE FEDERALIST NO. 58 (James Madison).
[147] *See, e.g*, Rep. John Yarmuth, *Protecting Congress' Power of the Purse and the Rule of Law* (Apr. 1, 2020), https://budget.house.gov/sites/democrats.budget.house.gov/files/documents/Budget%20Committee%20Purse%20Hearing%20Recap.pdf.
[148] *See* TODD GARVEY, CONG. RSCH. SERV., R45983, CONGRESSIONAL ACCESS TO INFORMATION IN AN IMPEACHMENT INVESTIGATION 22-23 (Oct. 25, 2019).
[149] *See* Jonathan Shaub, *Can a Former President Assert Executive Privilege in an Impeachment Trial?*, LAWFARE (Jan. 29, 2021), https://www.lawfareblog.com/can-former-president-assert-executive-privilege-impeachment-trial.
[150] U.S. CONST., art. II, § 4.
[151] *See* Articles of Impeachment Against Donald John Trump, H.R. Res. 755, 116th Cong. (2019) (including in Article II obstruction of Congress for "direct[ing] the unprecedented, categorical, and indiscriminate defiance of subpoenas issued by the House of Representatives pursuant to its 'sole Power of Impeachment'"); IMPEACHMENT OF RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, HOUSE COMM. ON THE JUDICIARY, H.R. REP. NO. 93-1305, at 24 (Aug. 20, 1974) (including in draft Articles of Impeachment against President Nixon that he "failed without lawful cause or excuse to produce papers and things as directed by duly authorized subpoenas issued by the Committee on the Judiciary of the House of Representatives").
[152] U.S. CONST., art. II, §2: *id*. art. I, § 9, cl. 7.
[153] Senate rules and traditions empower individual senators to stall or thwart particular nominations, such as by placing "holds" on a nominee, filibustering a nomination on the floor, and home state senators refusing to return "blue slips" for circuit and district court nominees. *See generally*, ELIZABETH RYBICKI, CONG. RSCH. SERV., RL31980, SENATE CONSIDERATION OF PRESIDENTIAL NOMINATIONS: COMMITTEE AND FLOOR PROCEDURE (May 13, 2021); BARRY J. MCMILLION, CONG. RSCH. SERV., R44975, THE BLUE SLIP PROCESS FOR U.S. CIRCUIT AND DISTRICT COURT NOMINATIONS: FREQUENTLY ASKED QUESTIONS (Oct. 2, 2017).
[154] CONGRESSIONAL SUBPOENAS, *supra* note 2, at 13 (quoting Jurney v. MacCracken, 294 U.S. 125, 147-48 (1935)).
[155] *See generally* CHAFETZ, *Chapter 5: Contempt of Congress*, *in* CONGRESS'S CONSTITUTION, *supra* note 6.
[156] CONGRESSIONAL SUBPOENAS, *supra* note 2, at 16.
[157] *See* CHAFETZ, *supra* note 6, at 188-90.
[158] CONGRESSIONAL QUARTERLY'S GUIDE TO CONGRESS 163 (3d ed. 1982).
[159] 2 U.S.C. § 192.
[160] *See* CONGRESSIONAL SUBPOENAS, *supra* note 2, at 5.
[161] *See* Molly E. Reynolds, *Reforming Congress's Power of the Purse*, LAWFARE (May 10, 2021), https://www.lawfareblog.com/reforming-congresss-power-purse ("Relying on continuing resolutions and large omnibus bills breeds brinkmanship, where inaction means shutting down wide swaths of federal operations. Because the cost to Congress—and its constituents—of government shutdowns is so high, legislators cannot credibly threaten to withhold funding from a specific executive branch priority or activity because the president or an agency has chosen to stray from congressional intent.").
[162] Testimonial Immunity Before Congress of the Former Counsel to the President, 43 Op. O.L.C. __, slip op. at 20 (May 20, 2019) (emphasis added), https://www.justice.gov/olc/opinion/file/1215066/download.
[163] *See* Shaub Testimony, *supra* note 31, at 8 ("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 [former White House Counsel Don] McGahn and other Trump administration officials to comply with its subpoenas.").
[164] CONGRESSIONAL SUBPOENAS, *supra* note 2, at 4; *see also* Letter from Ronald C. Machen Jr., U.S. Att'y, U.S. Dep't of Justice, to John A. Boehner, Speaker, U.S. House of Representatives (Mar. 31, 2015).

[165] H. Res. 406, 117th Cong. (2021).
[166] *See* William J. Murphy & Mort Rosenberg, *Why Congress Can Impose Fines for Contempt*, GOOD GOV'T NOW (Aug. 5, 2018), https://goodgovernmentnow.org/wp-content/uploads/2018/09/why-congress-can-impose-fines-v3.pdf; Kia Rahnama, *Can Congress Fine Federal Officials Under Its Contempt Power?*, LAWFARE (June 11, 2019), https://www.lawfareblog.com/can-congress-fine-federal-officials-under-its-contempt-power; Grant Tudor, *Avoiding Another McGahn: Options to Modernize Congress's Subpoena Compliance Tools*, LAWFARE (Oct. 16, 2020), https://www.lawfareblog.com/avoiding-another-mcgahn-options-modernize-congresss-subpoena-compliance-tools.
[167] Anderson v. Dunn, 19 U.S. 204, 231 (1821) (quotation marks and emphasis omitted).
[168] CONGRESSIONAL SUBPOENAS, *supra* note 2, at 35.
[169] *See* Hutto v. Finney, 437 U.S. 678, 691 (1978) (describing the fines as "less intrusive" than imprisonment); Solem v. Helm, 463 U.S. 277, 289 (1983) (describing fines as a "lesser punishment" than the "intermediate punishment of imprisonment"). *But see* Marshall v. Gordon, 243 U.S. 521, 542 (1917) (stating that *Anderson* held that contempt "is limited to imprisonment").
[170] *Anderson*, 19 U.S. at 217, 219 ("The rights of Congress on the subject of contempts, have been considered similar, and equal to those of the federal Courts . . . . Each branch of the Legislature has certain powers of judicature under the constitution . . . .").
[171] *Hutto*, 437 U.S. at 691 ("The principles of federalism that inform Eleventh Amendment doctrine surely do not require federal courts to enforce their decrees only by sending high state officials to jail. *The less intrusive power to impose a fine is properly treated as ancillary to the federal court's power to impose injunctive relief.*") (emphasis added); *Anderson*, 19 U.S. at 227 ("It is true, that the Courts of justice of the United States are vested, by express statute provision, with power to fine and imprison for contempts; but it does not follow . . . that they would not have exercised that power without the aid of the statute . . . ; on the contrary, it is a legislative assertion of this right, as incidental to a grant of judicial power.").
[172] *Article One: Strengthening Congressional Oversight Capacity: Hearing Before the H. Select Comm. on Modernization of Cong.*, 117th Cong. 9 (2021) (testimony of Josh Chafetz, Professor of L., Georgetown Univ. L. Ctr.) [hereinafter Chafetz Testimony].
[173] *Id.*
[174] *Id.*; Richard Blumenthal & Josh Chafetz, *Trump Is Already Trying to Get Around CARES Act Oversight*, SLATE (Apr. 16, 2020), https://slate.com/news-and-politics/2020/04/richard-blumenthal-trump-cares-act-oversight.html.
[175] Chafetz Testimony, *supra* note 172, at 9.
[176] *Id.*
[177] *See, e.g.*, Sen. Vance Hartke, *Proposed: A Legal Counsel for the Congress of the United States*, 20 ADMIN. L. REV. 341 (1968); *Article One: Strengthening Congressional Oversight Capacity: Hearing Before the H. Select Comm. on Modernization of Cong.*, 117th Cong. 2-3 (2021) (testimony of Elise J. Bean, Wash. Dir. of the Levin Ctr. At Wayne State Univ. L. School) (arguing for the establishment of a "System to Issue Congressional Legal Opinions"); *id.* at 11-14 (testimony of Anne Tindall, Couns. at Protect Democracy).
[178] H.R. REP. NO. 95-1756, at 80 (1978).
[179] Memorandum from Antonin Scalia, Assistant Att'y Gen., Off. of Legal Couns., to Rex E. Lee, Assistant Att'y Gen., Civil Div., 388-89 (Feb. 13, 1976), https://www.justice.gov/sites/default/files/olc/opinions/1976/02/31/op-olc-supp-v001-p0384_0.pdf; S. REP. NO. 95-170, at 8 (1977), https://www.ojp.gov/pdffiles1/Digitization/63796NCJRS.pdf ("The Justice Department supports the establishment of such an office and the bill has been modified in certain respects to meet all objections raised by the Department.").
[180] H.R. 5314, 117th Cong. (2021).
[181] Congressional Subpoena Compliance and Enforcement Act of 2017, H.R. 4010, 115th Cong. (2017); Congressional Subpoena Compliance and Enforcement Act of 2019, H.R. 3732, 116th Cong. (2019).