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## THE EXECUTIVE'S PRIVILEGE

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### ABSTRACT

*Both the executive branch and Congress claim the final word in oversight disputes. Congress asserts its subpoenas are legally binding. The executive branch claims the final authority to assert executive privilege and, accordingly, to refuse to comply with a subpoena without consequence. These divergent views stem in large part from the relative absence of any judicial precedent, including not a single Supreme Court decision on the privilege in the context of congressional oversight. In that vacuum—unconstrained by precedent—the executive branch has developed a comprehensive theory of executive privilege to support and implement prophylactic doctrines that render Congress largely powerless in oversight disputes.*

*For the first time, this Article sets out the full extent of the executive branch's doctrine, the various pieces of which have been expressed in OLC opinions, letters to Congress, and court filings. Existing*

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*scholarship largely ignores this doctrine and addresses executive privilege on the basis of two unexamined premises: first, that the privilege is an affirmative constitutional authority belonging to the president, and, second, that the privilege is akin to an evidentiary privilege that protects specified categories of information. Moreover, existing scholarship rarely distinguishes between executive privilege in the context of judicial proceedings and congressional oversight.*

*Rejecting those premises, this Article proposes an understanding of executive privilege specific to congressional oversight that better reflects history and first principles of constitutional interpretation. Executive privilege in the context of congressional oversight is not an affirmative constitutional authority based on specific types of information but a limited presidential immunity from compelled congressional process—the Executive’s privilege. Both Congress’s oversight authority and executive privilege are recognized as implied constitutional authorities. But rather than infer two competing affirmative authorities, this Article proposes to infer a limit—presidential immunity—on the first. Doing so is more consonant with first principles of constitutional interpretation, more consistent with history, and more conducive to the proper balance of power between the branches. The Executive’s privilege, as set out in this Article, is an immunity contingent upon a president’s finding that concrete, identifiable harm would result from the disclosure of specific information to Congress. Understanding executive privilege as a limited immunity—and severing the privilege from the undifferentiated confidentiality interests and broad categories of information with which the executive branch has conflated it—eliminates the prophylactic doctrines on which the executive branch relies to thwart legitimate congressional oversight. Further, this understanding of the privilege provides a theoretical foundation to explain why it does not apply in impeachment, a position consistent with the historical understanding of Congress’s broad powers of inquiry during impeachments and subsequent trials.*

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*[Executive privilege] in its modern form was born of honorable intent, the desire of the Eisenhower administration to protect its officials from the attacks of the late Senator McCarthy. The “cure,” however, has proven to be as deadly as the disease, as executive privilege, both formally and informally invoked, has ripened into a highly effective means of nullifying the investigatory function of Congress. In neither logic, law, or practice can there exist simultaneously an effective power of legislative oversight and an absolute executive discretion to withhold information. Inevitably, one must give way to the other and the only question is which one is to be dispensed with.*

—Senator J. W. Fulbright, 1971<sup>1</sup>

## INTRODUCTION

The “[a]bility to control what information to disclose and when to disclose it is a potent political weapon,” wrote Archibald Cox, the special prosecutor in the Watergate scandal and the victim of the Saturday Night Massacre, in 1974.<sup>2</sup> In the digital age—where fleeting thoughts or statements become “information” that is preserved and searchable—those words have only become more true. When used by the executive branch, this potent political weapon is currently known as executive privilege. The executive branch claims that executive privilege is an affirmative constitutional authority belonging to the president to control the dissemination of certain information.<sup>3</sup> Congress, on the other hand, understands executive privilege to be a limited evidentiary privilege, “a relatively nebulous, constitutional privilege that protects [only] the confidentiality of presidential

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1. *Executive Privilege: The Withholding of Information by the Executive: Hearing on S. 1125 Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 92d Cong. 24 (1971) [hereinafter *Executive Privilege Hearings*] (statement of Sen. J.W. Fulbright).

2. Archibald Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383, 1433 (1974); Evan Andrews, *What Was the Saturday Night Massacre?*, HIST. (Oct. 18, 2019), <https://www.history.com/news/what-was-the-saturday-night-massacre> [<https://perma.cc/3Y7A-EB8N>].

3. *See* Attempted Exclusion of Agency Couns. from Cong. Depositions of Agency Emps., 43 Op. O.L.C., slip op. at 2 (May 23, 2019) [hereinafter *Attempted Exclusion of Agency Couns.*] (suggesting the doctrine of executive privilege includes “the President’s constitutional authority to control the disclosure of privileged information”); Auth. of Agency Offs. To Prohibit Emps. from Providing Info. to Cong., 28 Op. O.L.C. 79, 81 (2004) [hereinafter *Auth. of Agency Offs.*] (recognizing the President’s authority to supervise “the disclosure of any privileged information, be it classified, deliberative process, or other privileged material” and “to supervise and control the dissemination of privileged government information”).

communications.”<sup>4</sup> This longstanding constitutional disagreement has never been resolved by the Supreme Court.

Existing scholarship generally approaches executive privilege as both an affirmative constitutional authority belonging to the president and a type of evidentiary privilege. Mark Rozell, perhaps the preeminent authority on executive privilege, for example, defines it as “the right of the President and high-level executive branch officers to withhold information from Congress, the courts, and ultimately the public.”<sup>5</sup> He notes that the privilege applies only to certain categories of information.<sup>6</sup> Other scholars similarly characterize executive privilege as an affirmative, evidentiary authority belonging to the president that allows him to withhold certain types of information and rarely distinguish between information requests from Congress, the public, and the judicial branch.<sup>7</sup> Rozell, among others, demonstrates how the executive branch has transformed the historically limited concept of executive privilege into a much more significant

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4. TODD GARVEY, CONG. RSCH. SERV., LSB10094, DOES EXECUTIVE PRIVILEGE APPLY TO THE COMMUNICATIONS OF A PRESIDENT-ELECT? 1 (2018); *see also* Andrew McCauley Wright, *Congressional Due Process*, 85 MISS. L.J. 401, 444–45 (2016) (describing Congress’s view that executive is coterminous with the presidential communications privilege).

5. Mark J. Rozell, *Executive Privilege and the Modern Presidents: In Nixon’s Shadow*, 83 MINN. L. REV. 1069, 1069 (1999). *See generally* MARK J. ROZELL, EXECUTIVE PRIVILEGE: PRESIDENTIAL POWER, SECRECY, AND ACCOUNTABILITY (3d ed. 2010) [hereinafter EXECUTIVE PRIVILEGE] (providing an in-depth history and analysis of executive privilege and its relation to the proper scope and limits of presidential power). Rozell’s work began as a response—and counter—to Raoul Berger’s claim that executive privilege is a myth. *See* Rozell, *supra*, at 1071–72 (citing RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 1–2 & n.3 (1974)).

6. Rozell, *supra* note 5, at 1070 (“Executive privilege is an accepted doctrine when appropriately applied to two circumstances: (1) certain national security needs and (2) protecting the privacy of White House deliberations when it is in the public interest to do so.”).

7. *See, e.g.*, Todd David Peterson, *Contempt of Congress v. Executive Privilege*, 14 U. PA. J. CONST. L. 77, 81, 96 (2011) (noting that “documents subject to such a presidential claim of privilege relate to several different categories of executive branch information” and describing executive privilege as “the implied power of the executive branch to maintain the confidentiality of executive branch documents”); Saikrishna Bangalore Prakash, *A Critical Comment on the Constitutionality of Executive Privilege*, 83 MINN. L. REV. 1143, 1143 (1999) (“From the earliest days of the Republic . . . chief executives have precluded Congress and/or the courts from probing particular executive branch conversations and documents on the grounds that the Constitution grants the President an ‘executive privilege’ to suppress at least some communications.” (footnote omitted)); Andrew McCauley Wright, *Constitutional Conflict and Congressional Oversight*, 98 MARQ. L. REV. 881, 948 (2014) [hereinafter *Constitutional Conflict*] (defining executive privilege as “an assertion of presidential authority to withhold information from a judicial or congressional proceeding”).

constitutional authority.<sup>8</sup> But he and others ultimately conclude that resolution of the constitutional dispute between the branches is either impossible or unwise.<sup>9</sup> And scholarly commentary largely analyzes executive privilege as a constitutional doctrine by focusing on formal assertions of privilege, the ensuing litigation, and resulting judicial decisions.<sup>10</sup> Existing scholarship leaves unexamined the manner in which the executive branch's comprehensive doctrine of executive privilege, in practice, can be used to nullify congressional oversight entirely, even without formal assertions of privilege. Indeed, the executive branch's sweeping doctrine of executive privilege is the unspoken foundation on which almost all responses to oversight are based.<sup>11</sup>

This Article sets out for the first time the full extent of the executive branch's constitutional theory of executive privilege and its tremendous consequences for the balance of power between the executive and legislative branches. It does not suggest the development of this theory has necessarily been purposeful or nefarious; much of it

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8. See EXECUTIVE PRIVILEGE, *supra* note 5, at 148–94 (discussing “the major executive privilege controversies” during the George W. Bush and early Barack Obama administrations).

9. See *id.* at 196–208; Neal Devins, *Congressional-Executive Information Access Disputes: A Modest Proposal—Do Nothing*, 48 ADMIN. L. REV. 109, 110 (1996); Peter M. Shane, *Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims Against Congress*, 71 MINN. L. REV. 461, 465–66 (1987).

10. See generally Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489 (2007) [hereinafter *Secrecy and Separated Powers*] (discussing the use of executive privilege during the administration of President George W. Bush and arguing, as a matter of democratic theory, that the executive branch should provide information to Congress); Eric Lane, Frederick A.O. Schwarz, Jr. & Emily Berman, *Too Big a Canon in the President's Arsenal: Another Look at United States v. Nixon*, 17 GEO. MASON L. REV. 737 (2010) (contending that the Supreme Court should not have recognized a presumptive constitutional privilege for the president's internal communications because such secrecy is inconsistent with the Constitution's structural checks); Nelson Lund & Douglas R. Cox, *Executive Power and Governmental Attorney-Client Privilege: The Clinton Legacy*, 17 J.L. & POL. 631 (2001) (arguing that the judicial decisions on privilege during the Clinton administration empowered the executive branch in matters of executive privilege); Peterson, *supra* note 7, at 96 (arguing that calls for reform to the practice of executive privilege after the George W. Bush administration were overreactions); *Constitutional Conflict*, *supra* note 7, at 948 (analyzing the practice of congressional oversight and executive privilege through the lens of President Obama's formal assertion of privilege and subsequent litigation).

11. See e.g., EXECUTIVE PRIVILEGE, *supra* note 5, at 7. Rozell does recognize that “because of the taint of Watergate, some modern presidents have crafted strategies to withhold information without resorting to executive privilege.” *Id.* at 6. But Rozell does not examine the constitutional theory under which they have done so or the ways in which that theory affects Congress's oversight authority. See *id.*

has developed in response to aggressive congressional committees seeking what Cox described as “splendid political ammunition”<sup>12</sup> and “political capital,”<sup>13</sup> rather than seriously pursuing oversight for purposes of legislating. The executive branch’s doctrine has developed, in part, as a means of checking Congress’s increasingly aggressive exercise of its implied constitutional authority to access executive branch information and to probe the internal workings of the executive branch, including the White House itself. But, when understood as a whole, the expansive authority now exercised by the executive branch bears little relation to the narrow, historical privilege the executive branch claims it to be. Instead, the executive branch doctrine has become an absolute prophylactic privilege, designed to protect the asserted absolute authority of the president to control information.

Both the practice of and scholarship on executive privilege today arise out of a shared doctrinal and theoretical foundation that conflates judicial proceedings, congressional oversight, and public disclosure and prioritizes the nature of the information as opposed to the authority of the relevant constitutional actors. This Article resets that theoretical foundation based on first principles of constitutional interpretation and historical practice. It proposes that executive privilege, in the specific context of congressional oversight, is best understood as a presidential immunity from compelled congressional process—the Executive’s privilege. It is not an affirmative power but a lack of congressional power, a presidential immunity or “privilege” in the original sense of the word.<sup>14</sup> But history demonstrates this constitutional immunity is a narrow one.

In other words, Congress lacks the implied authority to compel the president to provide information in the context of oversight. The president enjoys a privilege against such process, but one contingent on an explicit and public presidential determination that the disclosure would cause concrete, identifiable harm to a specific interest of the United States. The Executive’s privilege provides no authority to the president to direct the dissemination of information more broadly. Nor

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12. Cox, *supra* note 2, at 1428.

13. *Id.*

14. See *Doe v. McMillan*, 412 U.S. 306, 307 (1973) (noting that the Speech and Debate Clause, Article I, Section 6, Clause 1 of the Constitution, grants Senators and Representatives an “official immunity in the legislative context” and establishes “congressional immunity”); *Privilege*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining “privilege” as a “special legal right, exemption, or immunity granted to a person or class of persons”).

does it allow for the withholding of information based on generalized confidentiality interests protected by evidentiary privileges applicable to judicial proceedings. And the Executive's privilege, as historically understood, has no applicability to impeachment, which is a separate source of congressional authority to demand information that requires distinct analysis.<sup>15</sup>

This Article unfolds in three parts. Part I details the executive branch's doctrine of executive privilege and illustrates how the evolution of that doctrine has left Congress virtually impotent to enforce its oversight authority. Part II describes how this doctrine, as implemented, has resulted in a new "prophylactic" executive privilege that has largely dispensed with the situational, fact-specific balancing of congressional interests that historically defined executive privilege.<sup>16</sup> Part III proposes the Executive's privilege—a constitutional theory of executive privilege as a presidential immunity from Congress's implied legislative authority that has no application to impeachment.

## I. THE EXECUTIVE BRANCH DOCTRINE

Since Watergate, executive privilege has received scant attention from the judiciary, particularly in the context of disputes between the executive branch and Congress.<sup>17</sup> Consequently, a robust debate over its nature, scope, and even existence has gone largely unaddressed by appellate courts and completely unaddressed by the Supreme Court. Over thirty years ago, Professor Peter Shane outlined the disagreement among the three branches about the doctrine of executive privilege.<sup>18</sup> He recognized that Congress asserted plenary authority to demand information, the executive branch asserted the authority to withhold all information that fell under its doctrine of executive privilege, and

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15. See *infra* Part III.B.

16. See HEIDI KITROSSER, RECLAIMING ACCOUNTABILITY: TRANSPARENCY, EXECUTIVE POWER, AND THE U.S. CONSTITUTION 88–91 (2015) [hereinafter RECLAIMING ACCOUNTABILITY].

17. Appellate courts have addressed a privilege dispute between a congressional committee and the executive branch only twice, in *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 726 (D.C. Cir. 1974) (en banc), and *United States v. AT&T*, 551 F.2d 384, 385 (D.C. Cir. 1976), *appeal after remand*, 567 F.2d 121, 122–23 (D.C. Cir. 1977). Only *Senate Select* resolved the merits of the dispute, and the unique facts of that case are unlikely to ever be repeated. See *Senate Select*, 498 F.2d at 733. 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. *Id.* at 732.

18. Shane, *supra* note 9, at 471–84.



the judiciary, in its limited opportunities, had established a presumptive, qualified privilege that remained ill-defined.<sup>19</sup> Those fundamental disagreements remain true today.

What has changed since Watergate, however, is that the executive branch has developed a comprehensive constitutional theory of executive privilege, laid out in White House statements, Office of Legal Counsel (“OLC”) opinions, letters to Congress, and court filings. At the core of the doctrine is the tenet that executive privilege is not an evidentiary privilege or a presidential authority tied to the potential harm caused by the disclosure of specific information. Instead, executive privilege, in the executive branch’s view, is an affirmative constitutional authority belonging to the president to control the dissemination of particular categories of information.<sup>20</sup>

The constitutional law that currently governs information disputes between the executive branch and Congress, in practice, is the doctrine of executive privilege as developed by the executive branch. As then-Assistant Attorney General William H. Rehnquist recognized in 1971, “the Executive Branch has a headstart in any controversy with the Legislative Branch, since the Legislative Branch wants something the Executive Branch has, and therefore the initiative lies with the former. All the Executive has to do is maintain the status quo, and he prevails.”<sup>21</sup> Given that “headstart,” the executive branch’s law governs unless Congress has some means to counter it. Congress has contested the application of that law in court successfully on occasion.<sup>22</sup> But the judicial process takes too long to be effective in the context of congressional oversight except in limited circumstances and, in practice, the limited judicial successes have never resulted in a final victory for the Congress that *began* the oversight inquiry and filed the litigation, as opposed to a subsequent Congress.

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19. *Id.* at 471, 476, 479–80, 482–83.

20. See Jonathan Shaub, ‘Masters from Two Equal Branches of Government’: Trump and Congress Play Hardball, *LAWFARE* (Apr. 27, 2019, 10:00 AM), <https://www.lawfareblog.com/masters-two-equal-branches-government-trump-and-congress-play-hardball> [<https://perma.cc/2SHD-5Y86>].

21. Memorandum from William H. Rehnquist, Assistant Att’y Gen., Off. of Legal Couns., U.S. Dep’t of Just., to John D. Ehrlichman, Assistant to the President for Domestic Affs., Power of Congressional Committee to Compel Appearance or Testimony of “White House Staff” 6–7 (Feb. 5, 1971) [hereinafter Rehnquist Memorandum] (emphasis omitted), <https://www.justice.gov/olc/page/file/1225961/download> [<https://perma.cc/TX6S-VS56>].

22. See *infra* Part II.B.2.c.

In his foundational article on executive privilege, Cox wrote that “[i]f the Executive Branch were left to itself, the practice [of executive privilege] would surely grow” because “[s]ecrecy, if sanctified by a plausible claim of constitutional privilege, is the easiest solution to a variety of problems.”<sup>23</sup> His words are prescient. In the context of congressional oversight, the executive branch has largely been “left to itself.”<sup>24</sup> And the practice of executive privilege has not only grown, as Cox predicted, it has transformed into an absolute, multifaceted, affirmative presidential authority to control the dissemination of a broad swath of information and to issue directives about the dissemination of that information.

This Section sets out that expansive executive branch doctrine. That doctrine, in practice, grants the executive branch virtually unlimited ability to “maintain the status quo”<sup>25</sup> and retain any information it does not want to provide to Congress. And, conversely, it renders Congress virtually impotent to compel disclosure of such information.<sup>26</sup>

A. *A Single, Constitutional Privilege Composed of Multiple “Components”*

The executive branch view is that the president, and only the president,<sup>27</sup> may assert a qualified executive privilege,<sup>28</sup> and that she may do so over any materials that fall within any one of the recognized “components” of executive privilege.<sup>29</sup> For the executive branch, there

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

24. *See id.*

25. Rehnquist Memorandum, *supra* note 21, at 7 (emphasis omitted).

26. *See infra* Part II.B.

27. Cong. Requests for Confidential Exec. Branch Info., 13 Op. O.L.C. 153, 161 (1989) [hereinafter Barr Memorandum] (“[E]xecutive privilege cannot be asserted without specific authorization by the President . . .” (citing Memorandum from Ronald Reagan to the Heads of Exec. Dep’ts & Agencies, Procedures Governing Responses to Congressional Requests for Information 1 (Nov. 4, 1982) [hereinafter Reagan Memorandum], <https://www.justice.gov/ola/page/file/1090526/download> [<https://perma.cc/FVD7-F827>]); *see* Peterson, *supra* note 7, at 109 (“By requiring that the President himself assert the claim of privilege, it forces the President to be accountable for the decision to withhold documents from Congress and pay the political cost for such a decision.”)).

28. *See* Assertion of Exec. Privilege Over Documents Generated in Response to Cong. Investigation into Operation Fast & Furious, 36 Op. O.L.C., slip op. at 2–3 (June 19, 2012) [hereinafter Fast & Furious Assertion].

29. For example, former George W. Bush White House Counsel Fred Fielding argues, with Heath Tarbert, that the “modern doctrine of executive privilege is best understood as a body of

is a singular executive privilege that includes within it a collection of “components,” which individually track common law privileges and core constitutional functions of the president.<sup>30</sup> These components include (1) presidential communications; (2) national security and foreign affairs information, including classified information and diplomatic communications, also known as state secrets; (3) internal executive branch deliberations; (4) sensitive law enforcement or investigatory information, particularly, but not solely, information from open criminal investigations, and (5) attorney-client and attorney work-product information.

Many of these components reflect an evidentiary privilege applicable in judicial proceedings and is accompanied by a specific balancing test to determine when the privilege is overcome. But the executive branch views these components as part of a singular, qualified privilege to which a single, stringent balancing test applies. Under the executive branch’s view, to overcome a presidential assertion of privilege, Congress must demonstrate that the information it has demanded is “demonstrably critical to the responsible fulfillment of” its constitutional functions.<sup>31</sup>

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several related, yet distinct, components—or individual ‘privileges,’ as the courts have commonly referred to them.” Fred F. Fielding & Heath P. Tarbert, *Principled Accommodation: The Bush Administration’s Approach to Congressional Oversight and Executive Privilege*, 32 J.L. & POL. 95, 101 (2016). For other examples, see *Attempted Exclusion of Agency Couns.*, *supra* note 3, at 8 & n.2 (discussing the president’s authority to control the dissemination of all information protected by executive privilege and listing the components); *Assertion of Exec. Privilege Over Commc’ns Regarding EPA’s Ozone Air Quality Standards & Cal.’s Greenhouse Gas Waiver Request*, 32 Op. O.L.C. 1, 3 (2008) (noting the documents over which the President was asserting privilege implicated “both the presidential communications and deliberative process components”); and Letter from Bradley Weinsheimer, Assoc. Deputy Att’y Gen., U.S. Dep’t of Just., to Robert S. Mueller, III, former Special Couns. 2 (July 22, 2019), <https://s.wsj.net/public/resources/documents/MuellerLetter07222019.pdf> [<https://perma.cc/8Z4A-JGWL>] (informing Mueller that “matters within the scope of [his] investigation were covered by executive privilege, including information protected by law enforcement, deliberative process, attorney work product, and presidential communications privileges”).

30. See, e.g., *Auth. of Agency Offs.*, *supra* note 3, at 82–83 (discussing the presidential communications and deliberative process “components” of executive privilege); *Barr Memorandum*, *supra* note 27, at 154.

31. This is the standard adopted by the D.C. Circuit to determine whether President Nixon had to give the Watergate tapes to a Senate committee investigating Watergate. See *Fast & Furious Assertion*, *supra* note 28, at 5 (emphasis omitted) (quoting Letter from Michael B. Mukasey, Att’y Gen., U.S. Dep’t of Just., to President George W. Bush, *Assertion of Executive Privilege Concerning the Special Counsel’s Interviews of the Vice President and Senior White House Staff 11* (July 15, 2008) (quoting Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc)), <https://www.justice.gov/>

1. *The Emergence of “Components.”* In 1971, then-Assistant Attorney General William H. Rehnquist, who led OLC, explained the doctrine of executive privilege before a congressional subcommittee.<sup>32</sup> He explained that “[t]he doctrine of Executive privilege has historically been pretty well confined” to three main areas: (1) foreign relations and military affairs; (2) pending law enforcement investigations; and (3) “intragovernmental” deliberations.<sup>33</sup> Those areas correspond to the types of information presidents and executive branch officials had withheld from Congress historically.<sup>34</sup>

As Rehnquist and State Department Legal Adviser John R. Stevenson explained in a 1969 memorandum, “national security and foreign relations considerations have been considered the strongest possible basis upon which to invoke the privilege of the executive.”<sup>35</sup> The need for secrecy in such pursuits has ample support in judicial precedent and in historical practice.<sup>36</sup> The Supreme Court has explained that the president’s “authority to classify and control access

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file/482156/download [https://perma.cc/E6W6-QF6G]; Barr Memorandum, *supra* note 27, at 159; Defendant Motion for Summary Judgment at 36–37, House Comm. on Oversight & Gov’t Reform v. Holder, 156 F. Supp. 3d 101 (D.D.C. 2016) (No. 1:12-cv-1332), 2014 WL 298660. The executive branch has also, at times, quoted the standard from *United States v. Nixon*, 418 U.S. 683, 713 (1974), which found that the presumptive privilege for presidential communications had been overcome by the grand jury’s “demonstrated, specific need” for the Watergate tapes. *See* Exec. Order No. 13,233, 66 Fed. Reg. 56,025, 56,026 (Nov. 5, 2001).

32. *Executive Privilege Hearings*, *supra* note 1, at 429–35 (statement of William H. Rehnquist, Assistant Att’y Gen., Office of Legal Counsel, United States Department of Justice).

33. *Id.* at 431.

34. *Id.* at 431–35. *See generally* Hist. of Refusals by Exec. Branch Offs. To Provide Info. Demanded by Cong. (Part I), 6 Op. O.L.C. 751 (1982) [hereinafter Hist. of Refusals I] (describing “incidents in which a President personally directed the withholding of information from Congress”); Hist. of Refusals by Exec. Branch Offs. To Provide Info. Demanded by Cong. (Part II), 6 Op. O.L.C. 782 (1983) [hereinafter Hist. of Refusals II] (describing “refusals by officials within the Executive Branch to disclose information or produce documents requested by Congress”).

35. Memorandum from William H. Rehnquist, Assistant Att’y Gen., Off. of Legal Couns., U.S. Dep’t of Just., & John R. Stevenson, Legal Adviser, U.S. Dep’t of State, The President’s Executive Privilege To Withhold Foreign Policy and National Security Information 7 (Dec. 8, 1969) (on file with the *Duke Law Journal*) [hereinafter Rehnquist & Stevenson Memorandum].

36. *Nixon*, 418 U.S. at 710 (noting the President had “not place[d] his claim of privilege on the ground they [were] military or diplomatic secrets . . . areas of Art[icle] II duties [to which] the courts have traditionally shown the utmost deference to Presidential responsibilities”); *see also* Gen. Dynamics Corp. v. United States, 563 U.S. 478, 484 (2011) (“[P]rotecting our national security sometimes requires keeping information about our military, intelligence, and diplomatic efforts secret.”); *United States v. Reynolds*, 345 U.S. 1, 6–8 (1953) (“[T]he privilege . . . protects military and state secrets . . . .”); *Totten v. United States*, 92 U.S. 105, 106–07 (1875) (preventing an action against the government concerning a secret contract for clandestine wartime service).

to information bearing on national security . . . flows primarily from th[e] constitutional investment of [the Commander-in-Chief] power in the President” and that the “authority to protect such information falls on the President as head of the Executive Branch and as Commander in Chief.”<sup>37</sup> Recognizing these confidentiality interests has led to relatively few controversies between the executive branch and Congress over such information.<sup>38</sup> No president has formally asserted executive privilege since Watergate over national security or military information.<sup>39</sup> The only formal assertions falling into this category involve diplomatic negotiations.<sup>40</sup>

The confidentiality of law enforcement investigations also has a venerable history in the context of congressional oversight,<sup>41</sup> with early

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37. *Dep’t of the Navy v. Egan*, 484 U.S. 518, 527 (1988); *see also* *N.Y. Times Co. v. United States*, 403 U.S. 713, 728–30 (1971) (Stewart, J., concurring) (per curiam) (“[T]he successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy . . . it is the constitutional duty of the Executive . . . to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense.”).

38. Rehnquist & Stevenson Memorandum, *supra* note 35, at 1.

39. *See* TODD GARVEY, CONG. RSCH. SERV., R42670, PRESIDENTIAL CLAIMS OF EXECUTIVE PRIVILEGE: HISTORY, LAW, PRACTICE, AND RECENT DEVELOPMENTS 24–28 (2014) [hereinafter PRESIDENTIAL CLAIMS OF EXECUTIVE PRIVILEGE] (outlining claims of executive privilege from the Kennedy through Obama administrations).

40. *See* Presidential Certification Regarding the Provision of Documents to the House of Representatives Under the Mexican Debt Disclosure Act of 1995, 20 Op. O.L.C. 253, 269 (1996) [hereinafter Mexican Debt Disclosure Act] (“The President’s constitutional authority to control the disclosure of documents and information relating to diplomatic communications has been recognized since the beginning of the Republic.”); Assertion of Exec. Privilege for Documents Concerning Conduct of Foreign Affs. with Respect to Haiti, 20 Op. O.L.C. 5, 6 (1996) (stating that the history of the country “is replete with examples of the Executive’s refusal to produce to Congress diplomatic communications and related documents because of the prejudicial impact such disclosure could have on the President’s ability to conduct foreign relations”).

41. The executive branch’s position on the disclosure of law enforcement information to Congress—and the concerns it raises—are summarized in the “Linder letter,” a letter sent to John Linder, the Chairman of the House Subcommittee on Rules and Organization, in response to hearings the subcommittee held on congressional oversight of the executive branch. *See* Letter from Robert Raben, Assistant Att’y Gen., Off. of Legis. Affs., U.S. Dep’t of Just., to John Linder, Chairman, House Subcomm. on Rules & Org. of the House 3–5 (Jan. 27, 2000) [hereinafter Linder Letter], <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/linder.pdf> [<https://perma.cc/9UD7-XN29>].

historical examples dating back to 1825<sup>42</sup> and 1859.<sup>43</sup> The most frequently cited precedent involving the law enforcement component of executive privilege is Attorney General Robert Jackson's response in 1941 to a congressional committee request for all Federal Bureau of Investigation ("FBI") reports for the prior two years and all future FBI reports concerning investigations into labor disputes involving companies with naval contracts. "[W]ith the approval of and at the direction of" President Roosevelt, Jackson informed the committee of the Justice Department's position "that all investigative reports are confidential documents of the executive department of the Government, to aid in the duty laid upon the President by the Constitution to 'take care that the laws be faithfully executed,' and that congressional or public access to them would not be in the public interest."<sup>44</sup> He stated that

[d]isclosure of the reports could not do otherwise than seriously prejudice law enforcement. Counsel for a defendant or prospective defendant, could have no greater help than to know how much or how little information the Government has, and what witnesses or sources of information it can rely upon. This is exactly what these reports are intended to contain.<sup>45</sup>

By contrast, the "intragovernmental" discussions component has relatively little historical basis, first recognized judicially as a common law privilege in *Kaiser Aluminum & Chemical Corp. v. United States*<sup>46</sup> in an opinion by Justice Reed sitting by designation.<sup>47</sup> Although some

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42. In 1825, President Monroe refused to provide information about particular charges against a naval officer, reasoning that "the publication of those documents might tend to excite prejudices which might operate to the injury" of the ongoing investigations of the charges against the officer. *Hist. of Refusals I*, *supra* note 34, at 755–56.

43. The Senate had requested information about the investigation into a slave ship that had landed off the coast of Georgia. *Id.* at 765. President Buchanan provided a report from the attorney general about his investigation of the offense, but he refused to provide the internal correspondence with the officers because doing so would be "incompatible with the public interest." *Id.* (quoting James Buchanan, To the Senate of the United States (Jan. 11, 1859), in 5 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 534 (James D. Richardson, ed., Washington, Gov't Printing Off. 1897) [hereinafter MESSAGES AND PAPERS OF THE PRESIDENTS]).

44. Position of the Exec. Dep't Regarding Investigative Reps., 40 Op. Att'y Gen. 45, 46 (1941) [hereinafter Jackson Memorandum] (quoting U.S. CONST. art. II, § 3).

45. *Id.*

46. *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958).

47. *Id.* at 940, 945–47.

have traced its origins to English common law,<sup>48</sup> the confidentiality of intergovernmental deliberations, known today as the deliberative process privilege, appears to have been first recognized by President Eisenhower in instructing executive branch officials not to provide information to Senator Joe McCarthy.<sup>49</sup> In fact, the Eisenhower administration is credited with coining the term “executive privilege” to cover these internal deliberations<sup>50</sup> and, until recently, the privilege for those deliberations was thought to be *the* executive privilege.<sup>51</sup>

2. *The Expansion of the Components and Separation of Presidential Communications.* These three types of information— involving national security and foreign affairs, pending law enforcement investigations, or internal deliberations— continued to be the “components” of executive privilege through the Reagan administration.<sup>52</sup> In 1989, for example, only a few days before leaving office, President Reagan issued an executive order implementing the Presidential Records Act which required the Archivist of the United

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48. See Mauro Cappelletti & C.J. Golden, Jr., *Crown Privilege & Executive Privilege: A British Response to an American Controversy*, 25 STAN. L. REV. 836, 836–37 (1973); Russell L. Weaver & James T.R. Jones, *The Deliberative Process Privilege*, 54 MO. L. REV. 279, 283–85 (1989) (tracing the development of the privilege from the “crown privilege” and common law).

49. In the face of the McCarthy inquiries, Eisenhower issued a letter to the secretary of defense stating that

[b]ecause it is essential to efficient and effective administration that employees of the Executive Branch be in a position to be completely candid in advising with each other on official matters, and because it is not in the public interest that any of their conversations or communications, or any documents or reproductions, concerning such advice be disclosed, you will instruct employees of your Department that in all of their appearances before the Subcommittee of the Senate Committee on Government Operations regarding the inquiry now before it they are not to testify to any such conversations or communications or to produce any such documents or reproductions. This principle must be maintained regardless of who would be benefited by such disclosures.

Letter from Dwight D. Eisenhower to the Secretary of Defense Directing Him To Withhold Certain Information from the Senate Committee on Government Operations (May 17, 1954), in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: DWIGHT D. EISENHOWER, 1954, at 483–84 (1960); see also Gerald Wetlauffer, *Justifying Secrecy: An Objection to the General Deliberative Privilege*, 65 IND. L.J. 845, 856–60, 865–68 (1990) (describing the origin and development of the privilege in the United States as a result of President Eisenhower’s legal positions and describing the English law on which the President relied).

50. See BERGER, *supra* note 5, at 1–2 & n.3; EXECUTIVE PRIVILEGE, *supra* note 5, at 40–41.

51. See *Nixon v. Sirica*, 487 F.2d 700, 713–16 (D.C. Cir. 1973) (en banc) (per curiam); *infra* Part I.A.2.

52. See Barr Memorandum, *supra* note 27, at 153–54 (noting that, as of 1989, there were “at least three generally-recognized components of executive privilege: state secrets, law enforcement, and deliberative process”).

States, upon deciding to disclose presidential records, to notify the president and to “identify any specific materials, the disclosure of which he believes may raise a substantial question of Executive privilege.”<sup>53</sup> The order defined a “substantial question of Executive privilege” as existing in the same three scenarios Rehnquist had identified: when disclosure would impair (1) “national security (including the conduct of foreign relations),” (2) law enforcement, or (3) “the deliberative process of the Executive branch.”<sup>54</sup> Although *United States v. Nixon*<sup>55</sup> had recognized that the president’s communications were presumptively privileged,<sup>56</sup> the executive branch did not separate presidential communications from intergovernmental deliberations at this time, probably because no party in *Nixon* had argued the information was not presumptively privileged and both the Supreme Court and the lower courts relied on the general privilege for intergovernmental deliberations.<sup>57</sup> Nor was attorney-client information considered a separate component from deliberative information.<sup>58</sup>

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53. Exec. Order No. 12,667, 54 Fed. Reg. 3403, 3403 (Jan. 18, 1989).

54. *Id.*

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

56. *Id.* at 708.

57. *See id.* (referencing the privilege discussed in the D.C. Circuit’s en banc opinion in *Nixon v. Sirica*, 487 F.2d 700 (1973) (en banc) (per curiam)); *Sirica*, 487 F.2d at 713 (noting the confidentiality interests of the executive branch in “intra-governmental documents reflecting . . . deliberations comprising part of a process by which governmental decisions and policies are formulated” (quoting *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.D.C. 1966))); Brief for the United States at 55–56, 59 & n.41, *Nixon*, 418 U.S. 683 (Nos. 73-1766 & 73-1834), 1974 WL 174854, at \*55–56 (arguing that the nascent privilege for “intra-agency advisory opinions” was a “relatively recently articulated version of ‘executive privilege’” and agreeing that communications were presumptively privileged (quoting *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939, 946 (Ct. Cl. 1958))).

58. For example, in 1986 the Office of Legal Counsel clarified: “The interests implicated under common law by the attorney-client privilege generally are subsumed by the constitutional considerations that shape executive privilege, and therefore it is not usually considered to constitute a separate basis for resisting congressional demands for information.” Response to Cong. Requests for Info. Regarding Decisions Made Under the Indep. Couns. Act, 10 Op. O.L.C. 68, 78 (1986) [hereinafter *Indep. Couns. Act*]; *see also* Cong. Requests for Info. from Inspectors Gen. Concerning Open Criminal Investigations, 13 Op. O.L.C. 77, 80 (1989) (“There are three generally-recognized components of executive privilege: state secrets, law enforcement, and deliberative process.”); Confidentiality of the Att’y Gen.’s Commc’ns in Counseling the President, 6 Op. O.L.C. 481, 490 n.17 (1982) [hereinafter *Confidentiality of the Att’y Gen.’s Commc’ns*] (noting that a past OLC memorandum opined that the “constitutional privilege against the compelled disclosure of executive branch deliberations have special force when legal advice is involved” (quoting Memorandum from John Harmon, Assistant Att’y Gen., Off. of Legal Couns., U.S. Dep’t of Just., to Benjamin Civiletti, Att’y Gen., U.S. Dep’t of Just., The



Over time, however, both presidential communications and attorney-client and attorney work-product information were separated out from the larger category of internal deliberations and considered to be separate components with distinct scopes.<sup>59</sup> That progression is seen, among other places, in President George W. Bush's Executive Order 13233, which updated Reagan's 1989 order and noted its purpose as establishing policies for the release of presidential records with respect to "constitutionally based privileges."<sup>60</sup> The order stated that

[t]he President's constitutionally based privileges subsume privileges for records that reflect: [1] military, diplomatic, or national security secrets (the state secrets privilege); [2] communications of the President or his advisors (the presidential communications privilege); [3] legal advice or legal work (the attorney-client or attorney work product privileges); and [4] the deliberative processes of the President or his advisors (the deliberative process privilege).<sup>61</sup>

The separation of presidential communications from the deliberative process of the president, even with respect solely to presidential records, reflected the severance of the two components within executive branch doctrine. This was likely driven in part by the D.C. Circuit's opinion in *In re Sealed Case (Espy)*,<sup>62</sup> which construed *Nixon* to establish a separate constitutional privilege for presidential communications distinct from the common law privilege for internal governmental deliberations.<sup>63</sup> The order grounded all of these privileges in *Nixon*, equating the presidential communications at issue in *Nixon* with all the other components of executive privilege.<sup>64</sup>

As Rehnquist's testimony and other executive branch writings during the initial post-Watergate period demonstrate, the attorney-client privilege and work-product doctrine were not regarded as

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Constitutional Privilege for Executive Branch Deliberations: The Dispute with a House Subcommittee Over Documents Concerning Gasoline Conservation Fee 26 (Jan. 18, 1981)).

59. See *infra* note 66 and accompanying text.

60. Exec. Order No. 13,233, 66 Fed. Reg. 56,025, 56,025 (Nov. 5, 2001).

61. *Id.*

62. *In re Sealed Case (Espy)*, 121 F.3d 729 (D.C. Cir. 1997) (per curiam).

63. *Id.* at 744–45. Most importantly, the D.C. Circuit determined the presidential communications privilege, unlike the privilege for deliberative information, covered the "entirety" of documents falling within its scope, no matter whether they contained deliberative material or not. *Id.* at 745.

64. Exec. Order No. 13,233, 66 Fed. Reg. 56,025, 56,025–26 (Nov. 5, 2001).

distinct “components” of executive privilege.<sup>65</sup> But gradually, the executive branch came to consider the information protected by these privileges to constitute a separate component of the constitutionally based executive privilege.<sup>66</sup> And, although President Obama revoked Executive Order 13233 on his first day in office and issued a new executive order using the language of Reagan’s original order,<sup>67</sup> his administration regarded the attorney-client privilege and work-product doctrine as distinct categories of confidential information.<sup>68</sup> The Trump administration continued this practice.<sup>69</sup> The executive branch thus currently considers attorney-client privilege and the attorney work-product information to be protected by a distinct component of executive privilege, even if the information they protect would also be protected under the deliberative process privilege.

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65. See Indep. Couns. Act, *supra* note 58, at 78 (“[F]or the purpose of responding to congressional requests, communications between the Attorney General, his staff, and other Executive Branch ‘clients’ that might otherwise fall within the common law attorney-client privilege should be analyzed in the same fashion as any other intra-Executive Branch communications.”).

66. See, e.g., Constitutionality of the OLC Reporting Act of 2008, 32 Op. O.L.C. 14, 16 (2008) [hereinafter Reporting Act of 2008] (listing “the deliberative process, attorney-client, and . . . presidential communications components” as a separate basis for withholding the documents); Assertion of Exec. Privilege Regarding White House Couns.’s Off. Documents, 20 Op. O.L.C. 2, 3 (1996) [hereinafter White House Couns. Assertion] (“Both the attorney-client privilege and the work-product doctrine are subsumed under executive privilege.”).

67. See Exec. Order No. 13,489, 74 Fed. Reg. 4669, 4669 (Jan. 26, 2009).

68. See, e.g., Fast & Furious Assertion, *supra* note 28, at 2–4 (“Congressional oversight of the process by which the Executive Branch responds to congressional oversight inquiries would create a detrimental dynamic that is quite similar to what would occur in litigation if lawyers had to disclose to adversaries their deliberations about the case.”); *Document Product Status Update: Hearing Before the H. Comm. on Oversight & Gov’t Reform*, 114th Cong. 12 (2016) (statement of Peter J. Kadzik, Assistant Att’y Gen., Office of Legal Counsel, United States Department of Justice) (providing categories of confidential information and separating out “attorney-client communications, attorney work product, and internal deliberations”).

69. See, e.g., Letter from Stephen E. Boyd, Assistant Att’y Gen., Off. of Legis. Affairs, U.S. Dep’t of Just., to Elijah E. Cummings, Chairman, House Comm. on Oversight & Gov’t Reform 2 (June 12, 2019) [hereinafter Boyd-Cummings Letter], <https://int.nyt.com/data/documenthelper/1110-2019-6-12-census-documents-not/21a262dafd7e6f6b7f12/optimized/full.pdf#page=1> [<https://perma.cc/WWF3-CVAZ>] (citing the “attorney-client communications [and] attorney work product components of executive privilege” as part of the basis for the president’s assertion of privilege over documents subpoenaed by the committee related to the administration’s plan to include a citizenship question on the census); Letter from William P. Barr, Att’y Gen., U.S. Dep’t of Just., to President Donald J. Trump 3–5 (June 11, 2019) [hereinafter Census Assertion], <https://int.nyt.com/data/documenthelper/1110-2019-6-12-census-documents-not/21a262dafd7e6f6b7f12/optimized/full.pdf#page=1> [<https://perma.cc/WWF3-CVAZ>] (separating attorney-client communications and attorney work-product from deliberative process as a distinct component of executive privilege).

3. *Defining the Scope of the Components.* There is almost no judicial precedent addressing executive privilege, let alone the appropriate scope of the various components developed by the executive branch. Each component, however, is to some degree based on an evidentiary privilege that arises in litigation, particularly in the context of requests under the Freedom of Information Act (“FOIA”).<sup>70</sup> The executive branch defines the scope of each of the components of executive privilege by looking to the judicial doctrine on the evidentiary privilege, as well as historical practice. For example, the scope of the common law deliberative process privilege and the presidential communications privilege have been litigated frequently under FOIA,<sup>71</sup> and the executive branch relies on these decisions to define the scope of those components of executive privilege.<sup>72</sup> Similarly, the parameters of the attorney-client and work-product component are defined by the executive branch through reference to case law.<sup>73</sup> And the executive branch has often pointed to judicial precedents to establish the necessity or scope of the component protecting national security information and diplomatic material.<sup>74</sup>

The law enforcement component is unique, however, because FOIA litigation involving law enforcement information is not readily

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70. See, e.g., *McKinley v. Fed. Hous. Fin. Agency*, 739 F.3d 707, 709–10 (D.C. Cir. 2014); *Jud. Watch, Inc. v. U.S. Secret Serv.*, 726 F.3d 208, 224–26 (D.C. Cir. 2013); *Loving v. Dep’t of Def.*, 550 F.3d 32, 37–38 (D.C. Cir. 2008); *Jud. Watch, Inc. v. Dep’t of Just.*, 365 F.3d 1108, 1109–10 (D.C. Cir. 2004).

71. See, e.g., *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975); *McKinley*, 739 F.3d at 709; *Jud. Watch, Inc. v. U.S. Secret Serv.*, 726 F.3d at 224–26; *Loving*, 550 F.3d at 37–38; *Jud. Watch, Inc. v. Dep’t of Just.*, 365 F.3d at 1109–10; *Landry v. FDIC*, 204 F.3d 1125, 1135–36 (D.C. Cir. 2000); *Dow Jones & Co. v. Dep’t of Just.*, 917 F.2d 571, 573–74 (D.C. Cir. 1990).

72. See *Assertion of Exec. Privilege Concerning the Special Couns.’s Interviews of the Vice President & Senior White House Staff*, 32 Op. O.L.C. 7, 9 n.2 (2008) [hereinafter *Special Couns. Assertion*] (noting the Justice Department’s position on deliberative process “finds strong support in various court decisions recognizing that the deliberative process privilege protects internal governmental deliberations from disclosure in civil litigation”).

73. See *Fast & Furious Assertion*, *supra* note 28, at 4 (relying on the work-product doctrine as described in *Hickman v. Taylor*, 329 U.S. 495, 510–11 (1947)); Confidentiality of the Att’y Gen.’s Commc’ns, *supra* note 58, at 494–97 (relying on *Upjohn Co. v. United States*, 449 U.S. 383 (1981), and others to analyze the attorney-client privilege between the president and attorney general).

74. See *Reporting Act of 2008*, *supra* note 66, at 14–15 (citing *Dep’t of the Navy v. Egan*, 484 U.S. 518, 527 (1988), for the proposition that the President has authority to control the dissemination of classified information); *Whistleblower Prots. for Classified Disclosures*, 22 Op. O.L.C. 92, 94 n.6 (1998) [hereinafter *Whistleblower Prots.*] (collecting cases that establish the president’s power over national security and foreign affairs).

transferrable to the corresponding “component” of executive privilege. A form of common law evidentiary privilege for law enforcement information in civil litigation arose in judicial decisions toward the second half of the twentieth century, about the same time as the recognition of the deliberative process privilege. It appears to have first originated with theories proposed by executive branch officials outside the judicial context.<sup>75</sup> But, whereas the common law deliberative process privilege is simply incorporated wholesale by FOIA under the general exemption for evidentiary privileges recognized in litigation,<sup>76</sup> the exemption for law enforcement information is delineated not by the common law or history but by the statutory language of FOIA itself.<sup>77</sup> Moreover, unlike national security and diplomatic information, there is not a robust body of judicial precedent about the scope of the privilege.<sup>78</sup>

Thus, although the scope of the deliberative process component of executive privilege has been somewhat defined, and circumscribed, by FOIA precedent,<sup>79</sup> the same is not true for the law enforcement component. That component has been largely defined by reference to historical examples of the executive branch resisting congressional attempts to gain access to law enforcement files and first-principles

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75. A general executive evidentiary privilege for law enforcement investigatory files did not exist at common law, only a limited privilege to withhold an informer’s identity. *Roviaro v. United States*, 353 U.S. 53, 59 (1957) (citing *Scher v. United States*, 305 U.S. 251, 254 (1938); *In re Quarles*, 158 U.S. 532, 535–36 (1895); *Vogel v. Gruaz*, 110 U.S. 311, 316 (1884)); Stephen Wm. Smith, *Policing Hoover’s Ghost: The Privilege for Law Enforcement Techniques*, 54 AM. CRIM. L. REV. 233, 243 & n.94 (2017); see also *Scher*, 305 U.S. at 254 (noting that “public policy forbids disclosure of an informer’s identity unless essential to the defense”); William V. Sanford, *Evidentiary Privileges Against the Production of Data Within the Control of Executive Departments*, 3 VAND. L. REV. 73, 75–78 (1949) (discussing the application of informers privilege in civil and criminal cases). FBI Director J. Edgar Hoover advocated for a general privilege, however, see John Edgar Hoover, *The Confidential Nature of FBI Reports*, 8 SYRACUSE L. REV. 2, 2–3 (1956), and Congress adopted a FOIA exemption for investigatory files, Freedom of Information Act, Pub. L. No. 90-23, § (b)(7), 81 Stat. 54, 55 (1967) (codified as amended at 5 U.S.C. § 552(b)(7) (2018)).

76. 5 U.S.C. § 552(b)(5).

77. *Id.* § 552(b)(7); Off. of Info. Pol’y, *FOIA Guide, 2004 Edition: Exemption 7*, U.S. DEP’T OF JUST. (2004), <https://www.justice.gov/oip/foia-guide-2004-edition-exemption-7> [<https://perma.cc/7C4K-5EUN>].

78. Perhaps because criminal law enforcement as a significant federal pursuit arose later in the history of the country, the recognition of a need for confidentiality in law enforcement investigations is a more recent addition to the common law of government privileges that protects national security information and diplomatic material.

79. See *supra* notes 70–72 and accompanying text.

reasoning about the need to restrict access to these documents.<sup>80</sup> One area in which the scope of the doctrine has been controversial is in prosecutorial documents, particularly the determination of whether or not to prosecute individuals,<sup>81</sup> and the executive branch has relied on both the deliberative process and law enforcement component to claim authority to withhold those documents.<sup>82</sup> There has also been substantial controversy over whether the law enforcement component is limited to “pending investigations,” as articulated by Rehnquist,<sup>83</sup> or whether—as the executive branch now contends—it extends equally to closed matters.<sup>84</sup>

#### 4. *Showing of Need Necessary To Overcome Various Components.*

Each of the evidentiary privileges on which the components of executive privilege are based has a distinct balancing test. For example, in the judicial context, the deliberative process privilege is analyzed pursuant to an “ad hoc” balancing test that weighs a number of factors.<sup>85</sup> The privilege is generally not that difficult to overcome.<sup>86</sup> Attorney-client privilege, however, is absolute when it applies and cannot be overcome by any showing of need.<sup>87</sup> Attorney work-product information must be disclosed only if the party seeking the information

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80. See Assertion of Exec. Privilege in Response to Cong. Demands for L. Enf't Files, 6 Op. O.L.C. 31, 32 (1982) (“[I]t has been the policy of the Executive Branch throughout this Nation’s history generally to decline to provide committees of Congress with access to or copies of law enforcement files except in the most extraordinary circumstances.”); Linder Letter, *supra* note 41, at 3–5 (describing the Department’s position on oversight over open law enforcement matters).

81. See Assertion of Exec. Privilege with Respect to Prosecutorial Documents, 25 Op. O.L.C. 1, 1–2 (2001).

82. *Id.* at 2–3.

83. *Executive Privilege Hearings*, *supra* note 1, at 431 (statement of William H. Rehnquist, Assistant Att’y Gen., Office of Legal Counsel, United States Department of Justice); see also Linder Letter, *supra* note 41, at 3–5 (discussing the rationale for protecting information in “open matters”).

84. See Special Couns. Assertion, *supra* note 72, at 10 (“Although the law enforcement component of executive privilege is more commonly implicated when Congress seeks materials about an open criminal investigation, the separation of powers necessity of protecting the integrity and effectiveness of the prosecutorial process continues after an investigation closes.” (citing Indep. Couns. Act, *supra* note 58, at 77)).

85. *In re Sealed Case (Espy)*, 121 F.3d 729, 737–38 (D.C. Cir. 1997) (per curiam).

86. See *Texaco P.R., Inc. v. Dep’t of Consumer Affs.*, 60 F.3d 867, 885 (1st Cir. 1995) (discussing the discretionary nature of the deliberative process privilege).

87. See *Swidler & Berlin v. United States*, 524 U.S. 399, 407–11 (1998) (explaining the importance of attorney-client privilege and declining to narrow its application).

can show “substantial need and inability to obtain the equivalent without undue hardship.”<sup>88</sup> The state secrets privilege has also been described as absolute, no matter the needs of the other side; a litigant who cannot prove a claim without access to classified national security information is simply out of luck.<sup>89</sup>

The executive branch discards these respective balancing tests in the context of executive privilege, however, and asserts that a single balancing test applies to every invocation of executive privilege against Congress no matter the specific component of privilege on which the assertion is based. When the president invokes his constitutionally based executive privilege against a congressional demand, neither the specific component into which the information falls nor the judicial precedent establishing the balancing inquiry matters. The fact that each of the components of executive privilege exists as an independent evidentiary privilege in the context of judicial proceedings is irrelevant. In the executive branch’s view, to overcome an Executive’s assertion of his constitutional privilege, a congressional committee must meet the high standard adopted in *Senate Select Committee on Presidential Campaign Activities v. Nixon*<sup>90</sup> by demonstrating that the documents are “*demonstrably critical* to the responsible fulfillment of the Committee’s functions.”<sup>91</sup>

If the president has determined the information cannot be disclosed without harming the public interest, then that determination carries the same constitutional weight. The relative strength of the interest he is protecting—such as national security versus deliberations over how to respond to a congressional request for information—is irrelevant to the showing necessary to overcome that privilege. For example, the executive order on presidential records issued by President Bush stated that *Nixon* required any party seeking to overcome any of these constitutional privileges to “establish at least a

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88. *Upjohn Co. v. United States*, 449 U.S. 383, 400 (1981).

89. See generally Laura K. Donohue, *The Shadow of State Secrets*, 159 U. PA. L. REV. 77 (2010) (cataloging the development and doctrine of the state secrets privilege and describing it as “cast[ing a] longer and broader” shadow “than previously acknowledged”).

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

91. Special Couns. Assertion, *supra* note 72, at 11–12 (emphasis added) (quoting *Senate Select*, 498 F.2d at 731). The *Senate Select* standard applies to all claims of executive privilege, no matter the specific component implicated. See *id.* at 9–12 (applying the *Senate Select* standard to “presidential communications and deliberative process components of executive privilege” as well as “the law enforcement component of executive privilege”).

‘demonstrated, specific need’” for particular records.<sup>92</sup> And each invocation of executive privilege by Presidents Obama and Trump made the same claim.<sup>93</sup> The standard is a high one, and every assertion of executive privilege has concluded that the relevant congressional committee has not met that standard because the committee could have theoretically performed its legislative task without access to the specific information over which the president had been asserting privilege.<sup>94</sup>

*B. The President’s Sole Prerogative: Asserting Executive Privilege and Controlling Information*

The next doctrinal pillar of the executive branch’s doctrine of executive privilege is the assertion that the president—and the president alone—has inherent constitutional authority to control all information that potentially fits within the scope of these components.<sup>95</sup> Presidential control appears to have originated as a matter of procedure and policy but has since expanded into a claim of absolute constitutional authority. In 1962, President Kennedy provided a letter to a congressional committee stating that “executive privilege can be invoked only by the President and will not be used without specific Presidential approval.”<sup>96</sup> Presidents Johnson and Nixon

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92. Exec. Order No. 13,233, 66 Fed. Reg. 56,025, 56,026 (Nov. 5, 2001) (quoting *United States v. Nixon*, 418 U.S. 683, 713 (1974)).

93. See, e.g., *Fast & Furious Assertion*, *supra* note 28, at 5; *Census Assertion*, *supra* note 69, at 6.

94. See, e.g., *Census Assertion*, *supra* note 69, at 6–7 (finding that the priority documents subpoenaed by the committee related to the decision to include the citizenship question on the census were not “necessary predicates to Congress’s enactment of legislation regarding the census” and thus did not meet the *Senate Select* standard).

95. See *Attempted Exclusion of Agency Couns.*, *supra* note 3, at 2 (“We concluded that Congress may not compel an executive branch witness to appear without agency counsel and thereby compromise the President’s constitutional authority to control the disclosure of privileged information and to supervise the Executive Branch’s communications with congressional entities.”); *Reporting Act of 2008*, *supra* note 66, at 15 (citing *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988), for the proposition that the President has authority to control the dissemination of classified information); *Mexican Debt Disclosure Act*, *supra* note 40, at 269 (“The President’s constitutional authority to control the disclosure of documents and information relating to diplomatic communications has been recognized since the beginning of the Republic.”).

96. See *Executive Privilege Hearings*, *supra* note 1, at 2 (statement of Sen. Sam J. Ervin, Jr., Chairman, S. Subcomm. on Separation of Powers) (quoting Letter from President John F. Kennedy, to John E. Moss, Chairman, Special Gov’t Info. Subcomm. of the Comm. on Gov’t

reaffirmed that policy,<sup>97</sup> and the foundational Reagan memorandum on executive privilege, which has been adopted by each subsequent administration, stipulates that “executive privilege shall not be invoked without specific Presidential authorization.”<sup>98</sup>

Congress has signaled approval of this limitation, as evidenced in proposed legislation that provided: “In no case shall an employee of the executive branch appearing before the Congress . . . assert executive privilege unless the employee present . . . a statement signed personally by the President requiring that the employee assert executive privilege.”<sup>99</sup> That failed legislation sought to ensure that lower executive branch officials did not have the authority to assert privilege to stymie congressional requests for information. Any assertion would have needed to be made by the president and would have required an expenditure of his political capital. The limitation of the privilege to the president has not been the subject of controversy, and congressional committees currently accommodate that limitation by asking witnesses to consult with the White House to see if the president intends to assert privilege before testifying.<sup>100</sup>

As articulated by Rehnquist and in the Reagan memorandum, the modern executive privilege doctrine originally envisioned a screening process during which lower executive branch officials would determine whether certain information potentially warranted an executive privilege claim—that is, whether the information, if disclosed, would cause identifiable harm to a specific national interest. In congressional testimony, Rehnquist explained that the president “expects the responsible heads of the agencies to whom [congressional] requests are addressed to make some sort of a tentative determination as to whether

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Operations (Mar. 7, 1962), [http://www.johnmossfoundation.org/foi/from\\_jfk.htm](http://www.johnmossfoundation.org/foi/from_jfk.htm) [<https://perma.cc/8DYM-MVW9>]).

97. *Id.* at 2–3.

98. Reagan Memorandum, *supra* note 27, at 1.

99. *Executive Privilege Hearings*, *supra* note 1, at 7 (statement of Sen. Sam J. Ervin, Jr., Chairman, S. Subcomm. on Separation of Powers) (omission in original) (quoting S. 1125, 92d Cong. (1971)).

100. *See, e.g.*, Letter from Jerrold Nadler, Chairman, House Comm. on the Judiciary, to Matthew Whitaker, Acting Att’y Gen., U.S. Dep’t of Just. 1 (Jan. 22, 2019) [hereinafter Nadler Letter], <https://judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/1.22.2018%20letter%20to%20whitaker.pdf> [<https://perma.cc/9HD3-898J>] (advising the acting attorney general that the committee would be questioning him about presidential communications in an upcoming hearing and requesting that he notify the committee in advance if the president planned to assert executive privilege).



some of the information requested might warrant a claim of executive privilege.”<sup>101</sup> The Reagan memorandum directs that “[c]ongressional requests for information [] be complied with as promptly and as fully as possible, unless it is determined that compliance raises a substantial question of executive privilege.”<sup>102</sup> Most importantly, it clarifies that a “‘substantial question of executive privilege’ exists if disclosure of the information requested might significantly impair the national security . . . , the deliberative processes of the Executive Branch, or other aspects of the performance of the Executive Branch’s constitutional duties.”<sup>103</sup> Thus, both Rehnquist and Reagan described an initial agency analysis of whether an executive privilege claim may be appropriate based on concrete harm that could result from disclosure. That initial screening remained tied to the understanding of executive privilege as the president’s limited constitutional authority to intervene and forbid disclosure of specific information when concrete, identified harm would result.

The current executive branch doctrine has expanded the underlying constitutional authority significantly, describing it not as the *limited* authority to prevent the disclosure of *specific* information the disclosure of which would cause identifiable harm but as an *affirmative* constitutional authority to control the dissemination of *all* information that potentially implicates one of the “components” of executive privilege.<sup>104</sup> The executive branch has now conflated the broad scope of its various components of executive privilege with the situational “public interest” that historically cabined executive privilege assertions. As a result, its doctrine asserts that the president has the affirmative authority to control the dissemination of all information that potentially falls within the broad scope of these various components. Any attempt to undermine that authority—even if it is a largely benign statutory reporting requirement—is an unconstitutional interference with that affirmative, and absolute, presidential authority. The initial screening by lower executive branch officials looks at whether the subpoenaed information falls within the scope of any of the components of executive privilege, not at the

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101. *Executive Privilege Hearings*, *supra* note 1, at 441 (statement of William H. Rehnquist, Assistant Att’y Gen., Office of Legal Counsel, United States Department of Justice).

102. Reagan Memorandum, *supra* note 27, at 1–2.

103. *Id.*

104. See Attempted Exclusion of Agency Couns., *supra* note 3, at 8 (concluding that the committee’s exclusion of agency counsel “unconstitutionally interferes with the President’s *right to control the disclosure of privileged information*” (emphasis added)).

potential harm caused by disclosure of specific information. In other words, current executive branch doctrine assumes that *any* disclosure of material falling within the scope of the various components would “significantly impair” the national interest. As a result, only the president can determine whether or not it may be disclosed to Congress or to the public.

The theory has never been expounded fully in public documents, but it appears to derive from the executive branch’s view that the president has ultimate control over the dissemination of all national security information. In 1998, then-Deputy Assistant Attorney General at OLC Randolph Moss provided testimony to the House Intelligence Committee that analyzed the historical examples of presidents withholding national security information and concluded that a bill allowing whistleblowers in the intelligence community to provide classified information directly to Congress was unconstitutional.<sup>105</sup> The Moss testimony, in a footnote, also recognized that “other constitutionally-based confidentiality interests can be implicated by employee disclosures to Congress.”<sup>106</sup> In a previous Statement of Administration Policy on that same bill, the Clinton administration asserted that Congress could not “vest lower-ranking personnel in the Executive branch with a ‘right’ to furnish national security *or other privileged information*.”<sup>107</sup>

In 2004, OLC Assistant Attorney General Jack Goldsmith relied on that language, as well as the developing doctrine of executive privilege and the expansion of its components, to conclude that the position that Congress may not vest executive branch employees with a right to provide information to Congress is “not limited to classified information, but extend[s] to all deliberative process or other information protected by executive privilege.”<sup>108</sup> Although these opinions dealt principally with statutory reporting requirements and

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105. Whistleblower Prots., *supra* note 74, at 92, 94–99.

106. *Id.* at 101 n.34.

107. OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY: S. 1668 – DISCLOSURE TO CONGRESS ACT OF 1998 (1998) (emphasis added), <https://clintonwhitehouse3.archives.gov/OMB/legislative/sap/105-2/S1668-s.html> [<https://perma.cc/6T9J-4X4P>]. Statements of Administration Policy or “SAPs” are formal statements of an administration’s position on pending legislation issued by the Office of Management and Budget on behalf of the Executive Office of the President. See generally MEGHAN M. STUESSY, CONG. RSCH. SERV., R44539, STATEMENTS OF ADMINISTRATION POLICY (2016) (explaining the history and evolution of SAPs).

108. Auth. of Agency Offs., *supra* note 3, at 81.

whistleblower rights, they have ultimately formed a cohesive doctrine that the president has the right “to control the disclosure of privileged information.”<sup>109</sup> By “privileged information,” the executive branch means everything that potentially fits within one of the components. The executive branch routinely, in private correspondence, Statements of Administration Policy, and other communications, raises constitutional objections to proposed legislation that attempts to control the dissemination of information potentially protected by executive privilege.<sup>110</sup>

## II. THE PRACTICE OF EXECUTIVE PRIVILEGE: CONGRESSIONAL IMPOTENCE AND THE PROPHYLACTIC EXECUTIVE PRIVILEGE

The executive branch’s doctrine of executive privilege informs every aspect of congressional oversight even if its ubiquity is often unrecognized or unacknowledged. Both congressional oversight authority and executive privilege are implied constitutional authorities, with limited textual mooring and scant precedential definition. The historical interplay of these implicit authorities offers a prime example of the ways in which, in the absence of judicial resolution, the constitutional authorities of one branch evolve to remain an operative check on another branch’s asserted constitutional authority in a never-ending game of one-upmanship. As Thomas Jefferson observed,

The intention of the Constitution, that each branch should be independent of the others, is further manifested by the means it has furnished to each, to protect itself from enterprises of force attempted

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109. Attempted Exclusion of Agency Couns., *supra* note 3, at 9.

110. See, e.g., OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY: H.R. 4909 – NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2017 (2016), <https://www.presidency.ucsb.edu/documents/statement-administration-policy-hr-4909-national-defense-authorization-act-for-fiscal-year> [<https://perma.cc/LK6U-H8X9>] (objecting to a requirement to report certain military information to Congress because it involved “sensitive national security information protected by executive privilege”); OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY: H.R. 2596 – INTELLIGENCE AUTHORIZATION ACT FOR FY 2016 (2015), <https://www.presidency.ucsb.edu/documents/statement-administration-policy-hr-2596-intelligence-authorization-act-for-fy-2016> [<https://perma.cc/R666-5EUT>] (noting that particular reporting requirements “would require burdensome and unnecessary reporting to Congress and could interfere with the President’s authority to protect sensitive national security information”); Presidential Statement on Signing the Fraud Enforcement and Recovery Act of 2009, 1 PUB. PAPERS 689 (May 20, 2009) (noting the administration would construe a requirement that executive branch agencies provide information to a legislative entity “not to abrogate any constitutional privilege”).

on them by the others, and to none has it given more effectual or diversified means than to the executive.<sup>111</sup>

As Part II demonstrates, however, the balance has now shifted definitively to the executive branch's favor, largely because of the doctrine set out in Part I. In practice, the executive branch doctrine has proved a difficult—potentially an impossible—“enterprise of force” for Congress to surmount if the president is willing to play constitutional hardball. The doctrine renders Congress virtually impotent to enforce information requests against the executive branch, despite the theoretical availability of mechanisms to force compliance.

The executive branch doctrine uses an undifferentiated interest in confidentiality across the “components” of executive privilege to provide the executive branch the authority to delay responses and refuse requests for information without ever having to undertake what has historically been the core of the executive privilege inquiry: a determination of whether the disclosure of specific information would harm a specific public interest. Moreover, the executive branch has developed a number of “prophylactic” doctrines to *protect* the president's asserted constitutional authority to control this information. Unlike an assertion of executive privilege itself, prophylactic doctrines are not qualified. No showing of need can overcome them. And any burden that Congress imposes on the president's constitutional authority is per se unconstitutional under these prophylactic doctrines.

The practical result is a new prophylactic executive privilege that provides the executive branch with the authority to ignore and countermand congressional subpoenas without the president ever asserting executive privilege and without any need to undertake the balancing inquiry at the heart of the privilege.

#### A. *The Ubiquity of Executive Privilege in Congressional Oversight*

Executive privilege is rarely mentioned in the course of congressional oversight. But the executive branch's expansive doctrine of the privilege is the ultimate driver underlying almost every exchange between the two branches. Former executive branch and congressional lawyer Andrew McCauley Wright argues “that Congress and the Executive operate with fundamentally different views of the

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111. 10 THE WORKS OF THOMAS JEFFERSON 404 n.1 (Paul Leicester Ford ed., 1905).

Constitution when it comes to congressional oversight.”<sup>112</sup> In his view, Congress relies on a litigation perspective, the hallmarks of which are a sense of hierarchy—with Congress above the executive branch—and entitlement.<sup>113</sup> The executive branch, by contrast, relies on a transactional model, characterized by equality and accommodation.<sup>114</sup> He notes that Congress employs investigative and litigation terms such as “investigation,” “deposition,” “subpoena,” and “contempt,” and ultimately expects that “it is entitled to the same sort of interbranch submission” that the executive branch displays toward the judicial branch in the context of judicial proceedings.<sup>115</sup> The executive branch, on the other hand, approaches oversight as a negotiation between coequal parties, undertaken without a neutral arbiter, and seeking to balance the interests of the two parties.<sup>116</sup> At the core of the executive branch doctrine is the statement in *United States v. AT&T*<sup>117</sup> that each branch has a “constitutional mandate” to accommodate the other branch’s interests.<sup>118</sup>

Wright insightfully describes the two basic approaches to the oversight process. But there is an additional layer to the story that is not immediately apparent. These differing approaches originate in the differing constitutional doctrines of executive privilege. As Wright explains, when oversight disputes escalate—whether for political, institutional, or policy reasons—the language of constitutional conflict emerges and legal positions begin to solidify.<sup>119</sup> But even before that, from the time an initial request arrives with a federal agency, the two

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112. *Constitutional Conflict*, *supra* note 7, at 914.

113. *Id.* at 915–20.

114. *Id.* at 920–24.

115. *Id.* at 915, 918.

116. *Id.* at 921.

117. *United States v. AT&T*, 567 F.2d 121 (D.C. Cir. 1977).

118. *Id.* at 127. This quote from *AT&T* appears repeatedly in executive branch opinions and letters to Congress, including in almost every formal assertion of executive privilege. *See, e.g.*, *Attempted Exclusion of Agency Couns.*, *supra* note 3, at 7 (finding that applying Committee Rule 15(e) to compel executive branch testimony would violate an “implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches” (quoting *AT&T*, 567 F.2d at 127)); *Testimonial Immunity Before Cong. of the Former Couns. to the President*, 43 Op. O.L.C., slip op. at 17 (May 20, 2019) [hereinafter *McGahn Immunity Opinion*] (concluding that applying a waiver of the former counsel’s immunity because of public statements “would severely hinder the ‘spirit of dynamic compromise’ and ‘implicit constitutional mandate to seek optimal accommodation’ that currently facilitates resolution of inter-branch disputes over information” (quoting *AT&T*, 567 F.2d at 127)).

119. *Constitutional Conflict*, *supra* note 7, at 929–30.

competing doctrines of executive privilege are, in reality, the primary impetus for the nature of the response and the differing approaches.

To understand why, it is useful to separate requests sent to an agency or department—such as the Department of Justice or EPA—from a request sent directly to the White House. Typically, a congressional request will seek a broad swath of information—including internal emails, memoranda, and draft documents—about a particular subject. For example, subsequent to a letter seeking similar documents, the Republican chair of the House Committee on Science, Space and Technology sent a subpoena to the National Oceanic and Atmospheric Administration (NOAA) during the Obama administration demanding “[a]ll documents and communications between or among employees” of NOAA “referring or relating to” three different topics relevant to a recent climate change study.<sup>120</sup> One of the initial letters to the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) that represented the beginning of the investigation into Operation Fast & Furious and the death of a ATF border patrol agent<sup>121</sup> sought a wide range of documents and information from ATF.<sup>122</sup> The subsequent request and subpoena to Attorney General Eric Holder set out twenty-two categories of documents, many of which covered “[a]ll documents and communications” involving particular individuals or related to broad subject areas.<sup>123</sup> The requests and subpoenas of the Democratic-controlled House to the Trump administration regarding the inclusion of the citizenship question on the census and the Mueller Report and underlying documents were similarly broad.<sup>124</sup>

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120. Subpoena from Lamar Smith, Chairman, House Comm. on Sci., Space, & Tech., to Kathryn Sullivan, Adm’r, Nat’l Oceanic & Atmospheric Admin. 3 (Oct. 13, 2015), <https://www.documentcloud.org/documents/2488946-10-13-15-subpoena-from-house-science-committee.html> [<https://perma.cc/HQR2-LAE3>].

121. *See* Comm. on Oversight & Gov’t Reform v. Holder, 979 F. Supp. 2d 1, 5–6 (D.D.C. 2013) (providing background on Operation Fast & Furious and the congressional investigation).

122. *See* Letter from Darrell Issa, Chairman, House Comm. on Oversight & Gov’t Reform, to Kenneth E. Melson, Acting Dir. of the Bureau of Alcohol, Tobacco, Firearms, & Explosives 3 (Mar. 16, 2011), <https://republicans-oversight.house.gov/wp-content/uploads/2012/08/March-16-2011-Issa-to-Melson.pdf> [<https://perma.cc/5JZX-UBYN>].

123. *See* H.R. REP. NO. 112-546, at 15–21 (2012) (setting out the subpoena’s document requests).

124. *See, e.g.*, Subpoena from Jerrold Nadler, Chairman, House Comm. on the Judiciary, to William P. Barr, Att’y Gen., U.S. Dep’t of Just., 3 (Apr. 18, 2019), <https://int.nyt.com/data/documenthelper/776-read-the-subpoena-mueller-report/8431536bd6552926c11e/optimized/full.pdf#page=1> [<https://perma.cc/>

The agency oversight personnel, typically composed of members of the General Counsel's Office and legislative affairs personnel, will review the request and determine what the scope of the request actually is in terms of real documents, emails, and information. If the congressional request potentially encompasses deliberative communication, which is almost always the case given the broad scope of the requests, or other confidential information, such as national security, law enforcement, or attorney-client information, the oversight personnel will often consult with OLC and the White House Counsel's Office. They make them aware of the request and its potential to implicate information the executive branch considers to be protected by executive privilege, particularly when the subject area or the documents encompassed by the request are politically sensitive.

The agency's letter back to the committee or subcommittee will acknowledge the request, indicate a willingness to cooperate, and, if the request potentially touches on components of executive privilege, will state that the agency hopes to "accommodate" the oversight interests of the committee or subcommittee in a manner consistent with the executive branch's "confidentiality interests" and the "implicit constitutional mandate" of *AT&T* to negotiate in good faith.<sup>125</sup> Often, the precise language used in the letter has been reviewed or edited by OLC or the White House.

The reason that the two models emerge at this stage is the direct result of the competing doctrines of executive privilege. The executive branch understands the executive to have the constitutional privilege to ultimately decline to produce those documents that implicate "confidentiality interests," a euphemism for privilege—or, more accurately, the components it understands to comprise the doctrine of executive privilege. Thus, the executive branch begins the process by

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NB6D-EAVK] (seeking the complete unredacted Mueller Report, "[a]ll documents referenced in the Report," and "[a]ll documents obtained and investigative materials created by the Special Counsel's Office"); Letter from Elijah E. Cummings, Chairman, House Comm. on Oversight & Gov't Reform, to Wilbur L. Ross, Jr., Sec'y, U.S. Dep't of Com. 2 (Jan. 8, 2019), <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019-01-08.EEC%20to%20Ross-DOC%20re%20Citizenship%20Question.pdf> [<https://perma.cc/LE67-W3JB>] (requesting "[a]ll" documents and communications in six categories related to the inclusion of the citizenship question); see also Jonathan Shaub, *What Is a 'Protective' Assertion of Executive Privilege?*, LAWFARE (May 8, 2019, 8:23 PM) [hereinafter '*Protective' Assertion*], <https://www.lawfareblog.com/what-protective-assertion-executive-privilege> [<https://perma.cc/6LR3-6ZQA>] (describing the broad request for the Mueller Report documents).

125. *United States v. AT&T*, 567 F.2d 121, 127 (D.C. Cir. 1977).

noting the underlying existence of what it understands to be protected by executive privilege, but offers to accommodate Congress's interests, recognizing, of course, that executive privilege is a last resort. This is the "accommodation" process,<sup>126</sup> the "dance that takes place between legislative and executive interests over information access[.]"<sup>127</sup> The "dance" begins with a congressional request that encompasses some information that would fall within the scope of the executive branch's understanding of executive privilege.

Congress, on the other hand, does not recognize any constitutional privilege to withhold that type of information, even if the president himself had already asserted such a privilege. Congress believes itself to be "entitled" to the information, in Wright's words,<sup>128</sup> not because of a model of oversight that places it in a superior constitutional status over the executive branch in information disputes but because of its constitutional doctrine of executive privilege. In its view, a congressional committee sending an oversight request—or demand—is exercising a constitutional authority that takes precedence over common law privileges.<sup>129</sup> And because *all* of the components of executive privilege—aside from the presidential communications privilege—are ultimately grounded in historical practice or common law, Congress's oversight request takes precedence over those components.<sup>130</sup> The hierarchical view that Professor Wright ascribes to Congress is ultimately not about Congress and the executive branch as a whole, but about the distinction between constitutional authority and common law privileges.

That the competing notions of executive privilege ultimately drive the entire oversight process is confirmed by the way in which Congress approaches oversight of the president and the White House. After *Nixon*, Congress recognized that presidential communications enjoy presumptive protection and does not demand them as a right. For

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126. See Barr Memorandum, *supra* note 27, at 157–61; Reagan Memorandum, *supra* note 27, at 1.

127. Devins, *supra* note 9, at 137.

128. *Constitutional Conflict*, *supra* note 7, at 916.

129. See ALISSA M. DOLAN, ELAINE L. HALCHIN, TODD GARVEY, WALTER J. OLESZEK & WENDY R. GINSBERG, CONG. RSCH. SERV., RL30240, CONGRESSIONAL OVERSIGHT MANUAL 45–49 (2014) (discussing the House Committee on Oversight and Government Reform's argument during the Fast and Furious investigation that "common law privilege cannot shield the disclosure of documents that are subject to a constitutionally-rooted subpoena").

130. See *id.* at 45 ("Congress is generally not required to recognize common law privileges.").



example, Trey Gowdy, chairman of the Benghazi Select Committee, not known for its favor toward the Obama administration, noted in an information request that he “was familiar with and would respect the Executive Privilege attached to certain communications with the President.”<sup>131</sup> And the requests to Trump administration officials about presidential communications were similarly respectful of that privilege, even from members of the opposing party.<sup>132</sup> The letters either expressly or implicitly acknowledged that Congress is not automatically “entitled” to presidential communications and must at least provide the executive branch an opportunity to assert executive privilege.

Congress thus adopts the litigation model described by Wright only when it believes executive privilege is not potentially applicable. The executive branch similarly adopts its transactional approach only when it believes that executive privilege could potentially be applicable. But because of the broad scope of the various components, the executive branch understands executive privilege to be potentially applicable to almost *every* request. Accordingly, it almost exclusively employs the transactional model of negotiation. Conversely, because Congress understands executive privilege to apply only to a narrow set of presidential communications and not to other internal executive branch communications,<sup>133</sup> it adopts the hierarchical model in all such interactions. The models are driven by the difference in constitutional doctrine about the scope of executive privilege, not the respective authorities of the two branches over information.

Of course, a committee or subcommittee that makes it a priority to get specific information and responds quickly to letters may

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131. Letter from Trey Gowdy, Chairman, House Select Comm. on Benghazi, to W. Neil Eggleston, White House Couns. 1 (June 7, 2016), <https://archives-benghazi-republicans-oversight.house.gov/sites/republicans.benghazi.house.gov/files/documents/App%20C%20Questions%20to%20POTUS.pdf> [<https://perma.cc/X43K-LZQE>].

132. For example, the newly installed Democratic House Judiciary Chairman wrote to the acting attorney general on January 22, 2019, to advise him that the committee would be questioning him about presidential communications in an upcoming hearing and to request that he notify the committee in advance if the president planned to assert executive privilege. *See* Nadler Letter, *supra* note 100, at 1. The letter acknowledges that some of the “questions may conceivably implicate executive privilege.” *Id.*

133. *See* PRESIDENTIAL CLAIMS OF EXECUTIVE PRIVILEGE, *supra* note 39, at 21–23; *see also* Fast & Furious Assertion, *supra* note 28, at 3–4, 8.

accelerate this process.<sup>134</sup> But that requires knowledge of what documents or information exist as well as the use of political capital and the committee's time. In current practice, the initial stages in all but the most routine oversight ultimately lead to frustration at the delay—particularly in divided government, when a lack of trust makes good-faith negotiations more difficult. Accordingly, Congress has turned to hardball, asserting its legal right to materials. In the current state of affairs, however, it lacks any authority to enforce those demands as both a legal and a practical matter.

### *B. Congressional Impotence*

In the context of congressional requests for information from the executive branch, subpoenas and lawsuits were rare—almost nonexistent. In his 1996 work on congressional–executive information disputes, for example, Professor Neal Devins recognized the “burgeoning of congressional staff and oversight” but noted that “[d]espite th[e] changing culture, however, Congress rarely makes use of its subpoena power.”<sup>135</sup> Today, that is no longer true. Subpoenas are commonplace and, when issued to the executive branch, largely meaningless as a practical matter aside from the rhetorical force of the word “subpoena.”<sup>136</sup> The same could be said of staff depositions, oversight of response to oversight, and civil litigation to enforce oversight requests. All of them were either rare or previously unknown. But each has developed as a mechanism by which Congress attempts to counteract the executive branch's expanding doctrine of executive privilege. Ultimately, however, Congress lacks any real

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134. See *‘Protective’ Assertion*, *supra* note 124 (arguing that the House Judiciary Committee had erred in issuing a subpoena for a broad swath of documents that included law enforcement and classified information and then attempting to force rapid compliance). Congressional committees typically issue extremely broad document requests, however, which leads the executive branch to first provide the “low-hanging” fruit—public documents that are responsive to the subpoena. See H.R. REP. NO. 114-887, at 80 (2016) (noting that the Department of Health & Human Services turned over “several hundred pages of publicly available documents” in response to a subpoena); H.R. REP. NO. 112-546, at 4, 12, 30–31 (2012) (criticizing the Department of Justice for turning over publicly available documents, some of which had already been provided to the committee).

135. Devins, *supra* note 9, at 114 (quoting Shane, *supra* note 9, at 463–64).

136. See Declaration of Paul P. Colborn, Special Counsel, Office of Legal Counsel, United States Department of Justice at 3–4, *Comm. on Oversight & Gov't Reform v. Holder*, 979 F. Supp. 2d 1 (D.D.C. 2013) (No. 1:12-cv-1332) [hereinafter Colborn Declaration] (explaining that the executive branch does not adhere to subpoena return dates but simply continues to negotiate about the information request).

mechanism for enforcing its constitutional oversight authority over the executive branch.

The development of these oversight tools—and accompanying constitutional doctrines about the authority of each branch—have resulted from an increasingly aggressive game of constitutional hardball. Congress, stymied by the executive branch's doctrine of executive privilege, creates or repurposes new tools of enforcement. The executive branch, in turn, develops new constitutional doctrines to counter those tools. As a result, in current practice, the executive branch has essentially unchecked authority to withhold any piece or category of information it chooses from Congress.

1. *Congress's Tools of Inquiry.* Whether through subpoenas or other actions, each house of Congress has long asserted the authority to request or compel the production of documents or testimony necessary to its function. In a series of cases, the Supreme Court has affirmed this implicit authority to demand information as “an indispensable ingredient” of Congress's legislative powers.<sup>137</sup> In *McGrain v. Daugherty*,<sup>138</sup> the Court recognized Congress's authority to conduct oversight and issue subpoenas, so it could efficiently . . . exercise a legislative function belonging to it under the Constitution.”<sup>139</sup> And, in *Barenblatt v. United States*,<sup>140</sup> the Court characterized the authority to compel a response to a congressional information request “as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.”<sup>141</sup> Most recently, in *Trump v. Mazars USA, LLP*,<sup>142</sup> the Supreme Court noted that the “congressional power to obtain information is ‘broad’ and ‘indispensable.’”<sup>143</sup>

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137. *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 505 (1975).

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

139. *Id.* at 160.

140. *Barenblatt v. United States*, 360 U.S. 109 (1959).

141. *Id.* at 111. Similarly, the Court in *Watkins v. United States*, 354 U.S. 178 (1957) stated:

The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.

*Id.* at 187.

142. *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020).

143. *Id.* at 2031 (quoting *Watkins*, 354 U.S. at 187).

Initially, each house typically exercised this authority either by appointing an investigative committee and expressly authorizing it to summon the necessary persons, papers, and records<sup>144</sup> or by passing a resolution—called a resolution of inquiry in the House<sup>145</sup>—that requested information from the president or directed agency heads to provide information.<sup>146</sup> The first House rule that dealt expressly with requesting information from the executive branch was adopted in 1820 and distinguished between information requests to the president and to agency heads.<sup>147</sup> Passed in response to concerns that the House was not giving sufficient consideration to such requests before sending them,<sup>148</sup> it required a one-day delay for any “proposition, requesting information from the President of the United States, or directing it to be furnished by the Secretary of either of the Executive Departments, or the Postmaster General.”<sup>149</sup> Resolutions of inquiry receive privileged attention in the House and, for that reason, are still used today, typically by members of the minority party.<sup>150</sup> The Senate passed a resolution establishing its first legislative inquiry in 1859, creating the Select Committee to Inquire into the Facts of the Recent Invasion and Seizure of the United States Armory at Harper’s Ferry and giving it the authority “to send for persons and papers.”<sup>151</sup>

The early practice was for the body as a whole—either the House or Senate—to call for information directly or to create a temporary

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144. See 3 ANNALS OF CONG. 493 (1792) (approving a resolution that established a committee to “inquire into the causes of the failure of the late expedition under Major General St. Clair” and empowered it “to call for such persons, papers, and records, as may be necessary to assist their inquiries”).

145. See CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., RL31909, HOUSE RESOLUTIONS OF INQUIRY 1–4 (2009) [hereinafter HOUSE RESOLUTIONS OF INQUIRY] (discussing the history of resolutions of inquiry).

146. See 23 ANNALS OF CONG. 370 (1811) (proposing a resolution that requested the President “to cause to be laid before this House, as far as practicable, a list of the whole number of persons impressed, seized, and otherwise unlawfully taken from on board vessels sailing under the United States’ flag on the high seas or rivers”).

147. 37 ANNALS OF CONG. 607–08 (1820).

148. HOUSE RESOLUTIONS OF INQUIRY, *supra* note 145, at 2.

149. 37 ANNALS OF CONG. 607–08 (1820).

150. See, e.g., H.R. Res. 446, 115th Cong. (2017) (proposing a resolution of inquiry introduced by members of the minority party “requesting the President and directing the Attorney General to transmit, respectively, certain documents to the House of Representatives relating to the removal of former Federal Bureau of Investigation Director James Comey”).

151. CONG. GLOBE, 36th Cong., 1st Sess. 141 (1859); *A History of Notable Senate Investigations*, U.S. SENATE, <https://www.senate.gov/artandhistory/history/common/briefing/Investigations.htm> [https://perma.cc/D9Z7-6WDC].

committee to pursue a specific investigation and give that committee the authority to compel production of information. As the New Deal and World War II reshaped the United States and, more pertinently, empowered the executive branch, the dysfunction and relative weakness of Congress became apparent.<sup>152</sup> The American Political Science Association established a Committee on Congress to study the legislative branch and propose reforms. The committee concluded that the decline of Congress was the result of “the technical nature of modern public problems” and identified, among Congress’s handicaps, the lack of ability to conduct oversight of executive administrative action.<sup>153</sup> In 1942, Representative Everett Dirksen asserted in a speech entitled “What is Wrong with Congress?” that the legislative branch’s problem was that it had “failed to” equip itself to cope with “the growing power of the Executive and the growing power of the governmental bureaus.”<sup>154</sup> Dirksen proposed that Congress “provide legislative tools to get the facts, the data, the information, and then control, supervise, and survey the operations of the Government.”<sup>155</sup> Numerous reform proposals emerged, most of which, in some manner, proposed increased legislative oversight of executive branch action.<sup>156</sup>

The result of these reform efforts was the Legislative Reorganization Act of 1946, which, among other things, reduced the number of congressional committees—eliminating jurisdictional overlap and confusion—and also gave each standing Senate committee the authority to issue subpoenas.<sup>157</sup> At that time, only two House committees had such authority—the Government Operations Committee and the Appropriations Committee. Over time, that subpoena authority has been distributed even further, not only to each

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152. See 1 ROBERT C. BYRD, *THE SENATE 1789–1989: ADDRESSES ON THE HISTORY OF THE UNITED STATES SENATE* 537–40 (1988).

153. George B. Galloway, *On Reforming Congress*, in SPECIAL JOINT COMM. ON THE ORG. OF CONG., 79TH CONG., *THE ORGANIZATION OF CONGRESS: SYMPOSIUM BY MEMBERS OF CONGRESS AND OTHERS* 58–59 (Joint Comm. Print 1945).

154. 88 CONG. REC. 7696, 7697–7700 (1942) (statement of Rep. Everett Dirksen).

155. *Id.* at 7700.

156. BYRD, *supra* note 152, at 541.

157. Legislative Reorganization Act of 1946, Pub. L. No. 79-601, §§ 102, 121, 134(a), 60 Stat. 812, 814–20, 822–23, 831 (1946); see also *The Legislative Reorganization Act of 1946*, HIST., ART & ARCHIVES U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/Historical-Highlights/1901-1950/The-Legislative-Reorganization-Act-of-1946> [https://perma.cc/F46X-USMT] (noting that when the legislation went into effect, “the reforms reduced the number of House committees from 48 to 19 and the number of Senate committees from 33 to 15”).

individual congressional committee but ultimately to the chairperson of the committee alone. The Rules of the House of Representatives presently give committees and subcommittees the authority to issue a subpoena for documents or testimony.<sup>158</sup> Although the rules, by default, require the subpoena to be authorized by a majority of the committee or subcommittee, they also allow the delegation of that authority to the chairman.<sup>159</sup> Previously, such delegation to issue a subpoena unilaterally was uncommon and, even where available, not used.<sup>160</sup> But over the past decade, nearly every committee amended its rules to allow a chairperson to issue a subpoena unilaterally, some without requiring notice to the ranking member or minority.<sup>161</sup> Those changes have allowed a chairperson's staff, armed with an autopen of the chairperson's signature, to issue a subpoena for broad swaths of information and documents to any executive branch official.

The authority to issue a subpoena for a staff deposition follows a similar course. Historically, standing committees of the Senate and House have not been thought to have authority to compel someone to sit for a staff deposition,<sup>162</sup> distinguished from an interview most prominently by the fact that it would be compelled, under oath, conducted by an attorney or staff member, and recorded as an official

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158. RULES OF THE HOUSE OF REPRESENTATIVES, 116th Cong., Rule XI, cl. 2 (m)(1)(B) (2019), <https://rules.house.gov/sites/democrats.rules.house.gov/files/documents/116-House-Rules-Clerk.pdf> [<https://perma.cc/YQU2-PJAN>].

159. *Id.* at XI, cl. 2 (m)(3)(A)(i).

160. See Henry A. Waxman, Opinion, *Congressional Chairmen Shouldn't Be Given Free Rein Over Subpoenas*, WASH. POST (Feb. 5, 2015), [https://www.washingtonpost.com/opinions/a-congressional-subpoena-is-too-powerful-to-be-issued-unilaterally/2015/02/05/a9d75160-aca8-11e4-9c91-e9d2f9fde644\\_story.html](https://www.washingtonpost.com/opinions/a-congressional-subpoena-is-too-powerful-to-be-issued-unilaterally/2015/02/05/a9d75160-aca8-11e4-9c91-e9d2f9fde644_story.html) [<https://perma.cc/2F42-R9J2>] (“In the past 60 years, only three chairmen have embraced issuing subpoenas without obtaining bipartisan or committee support: Sen. Joe McCarthy (R-Wis.), Rep. Dan Burton (R-Ind.) and Rep. Darrell Issa (R-Calif.)”).

161. See Andy Wright, *New House Rules Promote Aggressive Congressional Oversight*, JUST SEC. (Jan. 17, 2019), <https://www.justsecurity.org/62269/house-rules-promote-aggressive-congressional-oversight> [<https://perma.cc/HZ5H-GXD5>] (noting that “successive new rules packages have continued to expand the number of committee chairs” who can issue subpoenas unilaterally and that the “trend toward unilateral, partisan subpoena power in the hands of committee chairs has continued its march, mirroring the increasingly polarized political environment”).

162. See JAY R. SHAMPANSKY, CONG. RSCH. SERV., 95-949 A, STAFF DEPOSITIONS IN CONGRESSIONAL INVESTIGATIONS 4-9 (1999) [hereinafter STAFF DEPOSITIONS IN CONGRESSIONAL INVESTIGATIONS] (noting that in 1999, “the Senate and the House . . . [were] of the view that standing committees lack specific authority under the rules of each chamber to compel attendance at staff depositions” (footnotes omitted)).

transcript.<sup>163</sup> Instead, both houses of Congress had authorized various committees to compel staff depositions only in particular situations.<sup>164</sup> In 2007, however, after the Democrats regained control of the House during the Bush administration, they amended its rules to grant what is now the House Oversight and Government Reform Committee standing authority to compel an individual to sit for a deposition “by a member or counsel of the committee.”<sup>165</sup> In 2010, after Republicans regained control of the House during the Obama administration, they temporarily expanded the staff-deposition authority to four additional committees, and then extended that authority to allow those committees to continue their investigations of the Obama administration.<sup>166</sup> The House rules, in 2017, authorized the chair of every standing committee, other than the Administration and Rules committees, to order the taking of depositions even with no member present, if it occurred during a recess and was authorized by the committee.<sup>167</sup> And when Democrats took control of the House in 2019, they continued to allow all committee chairs to issue subpoenas for staff depositions and entirely dispensed with the need to have a member present.<sup>168</sup>

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163. CHRISTOPHER M. DAVIS, WALTER J. OLESZEK, BEN WILHELM, CLINTON T. BRASS, IDA A. BRUDNICK, MAEVE P. CAREY, SARAH J. ECKMAN, WILLIAM T. EGAR, KATHRYN A. FRANCIS, MARK J. OLESZEK, R. ERIC PETERSEN, JACOB R. STRAUS & MEGHAN M. STUESSY, CONG. RSCH. SERV., RL30240, CONGRESSIONAL OVERSIGHT MANUAL 28 (2020); STAFF DEPOSITIONS IN CONGRESSIONAL INVESTIGATIONS, *supra* note 162, at 4–6 & nn.16–17.

164. STAFF DEPOSITIONS IN CONGRESSIONAL INVESTIGATIONS, *supra* note 162, at 8–10; *see, e.g., Inquiry into the Matter of Billy Carter and Libya: Hearings Before the Subcomm. To Investigate the Activities of Individuals Representing the Ints. of Foreign Gov'ts of the S. Comm. on the Judiciary, Volume III*, 96th Cong. 1708–10, 1718–27, 1741–43 (1980) (discussing issues related to Senate resolution authorizing depositions by staff members). After the 2008 election, the House authorized the House Committee on the Judiciary to issue subpoenas for staff depositions to investigate the firing of the U.S. Attorneys. *See* H.R. Res. 5, 111th Cong. § 4(f)(2)(A) (2009). Those subpoenas had been the subject of President Bush's claim of executive privilege and Harriet Miers's claim of absolute immunity. *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 56 (D.D.C. 2008).

165. H.R. Res. 6, 110th Cong. § 502 (2007).

166. H.R. Res. 5, 114th Cong. § 3(b) (2015) (granting staff deposition authority to the House Committees on (1) Energy & Commerce, (2) Financial Services, (3) Science, Space, & Technology, and (4) Ways & Means during the “first session” of the 114th Congress).

167. H.R. Res. 5, 115th Cong. § 3(b) (2017).

168. *See* H.R. Res. 6, 116th Cong. § 103(a)(1) (2019); *see also* JANE A. HUDIBURG, CONG. RSCH. SERV., R45731, HOUSE RULES CHANGES AFFECTING COMMITTEE PROCEDURE IN THE 116TH CONGRESS (2019–2020), at 5 (2019) (“These provisions are identical to those of a separate order adopted in the 115th Congress, except the 116th Congress version does not include the requirement that ‘at least one member of the committee shall be present at each deposition’

It is clear that there are relatively few limits—either external or internal—on the authority of congressional committees to compel individuals to provide information or testimony. So long as the committee’s request relates to an area in which Congress could potentially legislate, is not undertaken purely for harassment, and does not infringe on any constitutional rights, almost all agree that the committee’s authority is, under current doctrine, otherwise unrestricted.<sup>169</sup> But when the executive branch believes a particular exercise of that authority interferes with *its* constitutional authorities, oversight disputes arise. At that point, the branches need some rule or procedure by which to resolve the dispute. Since there is no “law” to which to turn—meaning no precedential judicial decisions to which the branches must adhere—the “resolution” of the dispute turns on which branch has authority to enforce its constitutional doctrine.

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unless the witness or the committee waived the requirement.” (quoting H.R. Res. 5, 115th Cong. § 3(b)(3) (2017)).

169. The scope of Congress’s oversight authority is also contested by the branches. The executive branch has on a number of occasions refused to comply with congressional subpoenas for information on the grounds that the information requests exceed Congress’s oversight authority because they are not in furtherance of any potential legislative function and concern exclusive presidential authorities. *See, e.g.,* Assertion of Exec. Privilege with Respect to Clemency Decision, 23 Op. O.L.C. 1, 2 (1999) [hereinafter Clemency Assertion] (concluding that Congress lacked authority to conduct oversight of President’s Clinton’s pardons because Congress “may only investigate into those areas in which it may potentially legislate or appropriate [and] cannot inquire into matters which are within the exclusive province of one of the other branches of the Government” (quoting *Barenblatt v. United States*, 360 U.S. 109, 111–12 (1959))); *see also* Assertion of Exec. Privilege Concerning the Dismissal & Replacement of U.S. Att’y’s, 31 Op. O.L.C. 1, 3 (2007) (explaining that Congress had no legitimate oversight interest over the removal of U.S. Attorneys because the president had the exclusive constitutional authority to remove officers). The executive branch has also refused to comply with subpoenas on the grounds that the oversight was not “legitimate” either because it believed the legislative justification was a pretext for a political endeavor or because the request would infringe on the separation of powers. *See* Cong. Comm.’s Request for the President’s Tax Returns Under 26 U.S.C. § 6103(f), 43 Op. O.L.C. 1, 1–3 (2019) [hereinafter Request for Tax Returns] (concluding that the request for President Trump’s tax returns was pretextual and not in furtherance of a valid legislative purpose); Fast & Furious Assertion, *supra* note 28, at 3–4 (concluding that the Department of Justice could withhold even documents not covered by the deliberative process component of privilege because congressional oversight into the executive branch’s response to oversight itself was not legitimate); MAJORITY STAFF OF THE H. COMM. ON ENERGY & COMMERCE & MAJORITY STAFF OF THE H. COMM. ON WAYS & MEANS, 114TH CONG., JOINT CONGRESSIONAL INVESTIGATIVE REPORT INTO THE SOURCE OF FUNDING FOR THE ACA’S COST SHARING REDUCTION PROGRAM 94 (Joint Comm. Print 2016) (noting that the executive branch had objected to congressional oversight about the Affordable Care Act’s cost-sharing reduction payments because the House of Representatives had filed suit contesting the legality of those payments and “requesting interviews about agency action” then “raise[d] the appearance of utilizing oversight to accomplish inappropriate litigation objectives”).



2. *Congress's Lack of Enforcement Authority.* Congress's ability to *enforce* its recognized authority to issue compulsory process relies almost wholly on the executive branch in modern practice. Where private individuals are concerned, that typically presents little obstacle. But where the executive branch is the noncompliant subject of Congress's demands, that reliance becomes paramount. And the limitations of Congress's enforcement powers become obvious.

a. *Subpoena Return Dates.* Initially, information disputes between Congress and the executive branch followed a pattern in which the subpoena was the final straw, and, if the executive branch determined it needed to assert executive privilege, it did so before the return date of the subpoena. President Reagan's memorandum on executive privilege, for example, instructed department heads to ask the congressional committee to hold a subpoena in abeyance if it raised a substantial claim of executive privilege so that the president would have time to consider it.<sup>170</sup> When Congress demanded information through compulsory process with a fixed date for compliance, the executive branch either complied, reached some agreement with the committee or subcommittee, or asserted its constitutional privilege by that date. In 1989, Assistant Attorney General William Barr stated that a subpoena would issue only when the accommodation "process breaks down," and "it is necessary to consider asking the President to assert executive privilege" if further negotiation is not productive.<sup>171</sup>

As subpoenas have become commonplace, however, the executive branch has given them less weight. The way the executive branch approaches the process is laid out in declarations filed by career DOJ officials in the *Fast & Furious* litigation,<sup>172</sup> in particular, the declaration of Paul Colborn, who had served for twenty-seven years as the primary attorney at OLC in charge of giving the president and executive branch agencies advice about executive privilege and congressional oversight.<sup>173</sup> As Colborn explained, officials who participate in the accommodation process negotiate with congressional staff "in an attempt to accommodate the proffered legislative interest as fully as possible, consistent with the institutional interests of the Executive,

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170. Reagan Memorandum, *supra* note 27, at 2.

171. Barr Memorandum, *supra* note 27, at 162.

172. *See, e.g.*, Colborn Declaration, *supra* note 136, at 2–4.

173. *Id.* at 1–2.

despite the often adversarial nature of congressional demands for information in the oversight context.”<sup>174</sup> Each branch “leverage[s] its constitutional powers in negotiating with and working to accommodate the other Branch,” and the issuance of the subpoena, in his description, does not really alter that framework.<sup>175</sup> Because subpoenas “are often quite broad and burdensome,” the executive branch is not able to reach a resolution of its potential privilege claims before the return date, nor does it need to assert privilege because the accommodation process continues beyond that date.<sup>176</sup>

In other words, when an agency receives a subpoena with a return date, it continues to engage in the accommodation process in the same way it does when it receives a congressional oversight request. The agency provides some information, but withholds information that is potentially protected by executive privilege—for example, information that might fit within any of the components of privilege. The agency can then wait until the committee forces the issue and schedules a contempt vote. Only at this point does the executive branch decide whether to assert executive privilege.

Subpoenas have thus become just another part of the political theater that is the oversight process—performance rhetoric that does not have any legal effect in practice. When the executive branch claims its confidentiality interests and refuses to comply with an information request, the committee issues a subpoena, accompanied by exhortations about its constitutional authority and the legal requirement that it is imposing on the executive branch. But the

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174. *Id.* at 3.

175. *Id.* at 3–4.

176. *Id.* In full, Colborn’s statement illustrates the executive branch’s view that a congressional subpoena and its return date is largely meaningless. The executive branch simply continues to withhold the information it believes may be privileged and to negotiate with the committee:

Congressional subpoenas typically include a “return date” by which the recipient is instructed to comply with the subpoena. When subpoenas are issued to the Executive Branch, however, the resulting process of negotiation and accommodation described above often continues beyond the subpoena’s return date. Indeed, the constitutionally mandated need to work through the accommodation process with congressional committees, combined with the fact that committee subpoenas . . . are often quite broad and burdensome, generally means that it is not possible for the Branches to reach a resolution by the subpoena’s return date. Because the Executive Branch treats assertions of Executive Privilege as a last resort, to be used only when other options have been exhausted, it will generally not be asserted by the return date but rather after a committee seeks to hold the subpoena recipient in contempt—an indication that Congress believes that the accommodation process has reached an impasse.

*Id.*

executive branch continues on as if nothing has changed. Its “confidentiality interests” remain, undergirded by the possibility of an assertion of privilege, even if remote, and it continues to rely on them to refuse compliance with the subpoena.

*b. Contempt.* Congress attempts to enforce its subpoenas through contempt. The Supreme Court has long held that Congress has implicit constitutional authority to punish nonmembers by contempt.<sup>177</sup> Joseph Story found it “obvious” that “unless such a power, to some extent, exists by implication, it is utterly impossible for either house to perform its constitutional functions.”<sup>178</sup> But the scope of Congress’s authority to act as prosecutor and judge of contempt against it has never been definitively resolved, particularly in the modern era when individual rights have become more prominent.<sup>179</sup> The English precedents support an almost unchecked legislative authority to try individuals for contempt.<sup>180</sup> But it is not clear how much of that English practice is implicit in the Constitution and its specific grants of legislative authority to Congress.<sup>181</sup>

Moreover, the scope of Congress’s inherent contempt authority *against the executive branch* is far from clear.<sup>182</sup> Professor Josh Chafetz highlights three historical examples when the houses of Congress

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177. See *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927) (“Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed.”); *In re Chapman*, 166 U.S. 661, 671–72 (1897) (“We grant that Congress could not divest itself, or either of its Houses, of the essential and inherent power to punish for contempt, in cases to which the power of either House properly extended . . . .”); *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 225–35 (1821). *But see* *Kilbourn v. Thompson*, 103 U.S. 168, 196–98 (1881) (“But we do not concede that the Houses of Congress possess this general power of punishing for contempt. The cases in which they can do this are very limited.”).

178. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 842, at 305 (Bos., Hillard, Gray, & Co., Cambridge, Brown, Shattuck, & Co. 1833).

179. See *Wright*, *supra* note 4, at 449–51, 466–67.

180. See JOSH CHAFETZ, CONGRESS’S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 153–69 (2017) [hereinafter CONGRESS’S CONSTITUTION] (cataloging the English precedents, which included the authority to hold even the monarch in contempt, and the early colonial legislatures’ continuation of that practice).

181. See *id.* at 171 (noting the lack of debate about the congressional house’s power to punish nonmembers at the Constitutional Convention); *id.* at 172 (recognizing that Thomas Jefferson noted constitutional arguments both for and against the power of contempt).

182. See *id.* at 181 (discussing Congress’s contempt authority over executive branch officials and arguing that there is no reason to think that authority is different from Congress’s authority over private nonmembers generally).

threatened or used their inherent contempt authority against executive branch officials.<sup>183</sup> On the basis of English practice, those three examples, and the instances when a house of Congress found the president in breach of privilege for commenting negatively on congressional action, Chafetz concludes that there is no “reason to think that the houses’ general contempt power over outsiders must operate differently when the outsider in question happens to be a member of the executive branch” or “when the defense to the contempt charge is executive privilege, as opposed to something else.”<sup>184</sup> But none of the three examples on which Chafetz relies involves a claim of privilege by the president, a direction to a lower executive branch official not to comply with a congressional information demand, or even acts taken by an executive branch official in his official capacity.<sup>185</sup> Accordingly, the relevance and applicability of these historical examples to claims of executive privilege are far from clear.<sup>186</sup> Therefore, even though the historical English practice

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183. *See id.* at 176–79, 181–94.

184. *Id.* at 181.

185. Chafetz’s first example involves a letter written by an executive branch official alleging that a member of Congress was corrupt, and, in response, the House passing a resolution finding the official guilty of a gross violation of the privilege of the member. *Id.* at 175–76. Congress abolished the office held by that official shortly thereafter. *Id.* at 176. The second example did involve an arrest of an executive branch official, the Minister to China, for contempt. *Id.* at 176–77. However, the official was accused of misappropriating large sums of money and refused to testify or provide documents based on his personal privilege against self-incrimination under the Fifth Amendment. *Id.* The House refused to recognize that privilege. *Id.* But the Supreme Court subsequently made clear that witnesses in congressional proceedings are entitled to invoke their Fifth Amendment rights. *See Quinn v. United States*, 115 U.S. 155, 161 (1955). The third example, which culminated in the Supreme Court’s decision in *Marshall v. Gordon*, 243 U.S. 521 (1917), again involved an executive branch official writing a defamatory letter about a member of Congress. CONGRESS’S CONSTITUTION, *supra* note 180, at 177–78. The executive branch official, a U.S. District Attorney, wrote and published a letter disparaging to members of House and the House as a whole, and the House sent the sergeant-at-arms to take him into custody because the letter violated its privileges, dignity, and honor of the House of Representatives. *Id.* at 178. The Supreme Court ultimately concluded that the House lacked power to arrest individuals for contempt based on “irritating and ill-tempered statements made in [a] letter.” *Id.* at 178–79 (quoting *Gordon*, 243 U.S. at 546). The Court did not address the question of Congress’s authority to exercise inherent contempt against an executive branch official acting pursuant to his official duties. *Id.* The executive branch officials in these examples were not held in contempt for performing their official duties under the direction of the president or superior executive branch officer but in their personal interests.

186. As Professor Todd David Peterson argues, Chafetz’s “contention that there are historical precedents for the use of Congress’s inherent contempt power against officials who assert the President’s claim of executive privilege is incorrect.” Peterson, *supra* note 7, at 80.

allowed parliament to hold monarchs in contempt,<sup>187</sup> the authority of Congress under the U.S. Constitution to punish executive branch officials for withholding executive branch information—particularly officials acting pursuant to directives from the president—has not been addressed by the courts or historical practice.<sup>188</sup>

In practice, however, the question of Congress's inherent contempt authority has been moot. Congress has not used its inherent contempt authority in almost a hundred years.<sup>189</sup> Instead, when faced with recalcitrance, Congress has employed its authority under 2 U.S.C. §§ 192 and 194 to refer individuals for criminal contempt of Congress. Congress enacted these criminal contempt provisions in 1857 to solve the problem of an individual who refused to comply with a demand for information near the end of a congressional session.<sup>190</sup> The prevailing view, largely based on language from *Anderson v. Dunn*,<sup>191</sup> was that a recalcitrant witness could be imprisoned by the House only until the end of the session.<sup>192</sup>

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187. See CONGRESS'S CONSTITUTION, *supra* note 180, at 155, 168–69, 178–79.

188. In *U.S. ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951), the Supreme Court held that a Department of Justice official following an order from the attorney general not to disclose information in response to a judicial subpoena could not be found guilty of contempt because he was, as an inferior official, bound by the attorney general's order and a statute gave the attorney general authority to issue such an order. *Id.* at 468–70. But the *Touhy* case expressly declined to decide whether the attorney general's order itself was valid and declined to address any constitutional issue. *Id.* at 467, 469. And Congress amended the statute at issue in *Touhy*, the Housekeeping Act, as a result of the ruling in *Touhy* to provide that the “section does not authorize withholding information from the public or limiting the availability of records to the public.” See 5 U.S.C. § 301 (2018); Note, *Discovery from the United States in Suits Between Private Litigants—The 1958 Amendment of the Federal Housekeeping Statute*, 69 YALE L.J. 452, 454–56 (1960). Accordingly, *Touhy* could provide a defense to any executive branch official charged with criminal contempt if, in withholding information, the person was following a presidential order. But it does not establish whether the president has authority to issue such an order or whether Congress may use *inherent* contempt to force executive branch compliance. See *id.* at 454–55 & n.21.

189. See TODD GARVEY, CONG. RSCH. SERV., RL34097, CONGRESS'S CONTEMPT POWER AND THE ENFORCEMENT OF CONGRESSIONAL SUBPOENAS: LAW, HISTORY, PRACTICE, AND PROCEDURE 12 (2017) [hereinafter CONGRESS'S CONTEMPT POWER].

190. *Id.* at 19; see also CONG. GLOBE, 34th Cong., 3d Sess. 432 (1857) (statement of Rep. James Lawrence Orr) (noting the limited time remaining in the session and that the proposed legislation would force “recusant witnesses” to “suffer more than mere imprisonment from now to the end of the session”).

191. *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821).

192. CONGRESS'S CONTEMPT POWER, *supra* note 189, at 8, 19.

Chafetz and others discuss inherent contempt and criminal contempt under a single general heading of “contempt.”<sup>193</sup> Both the inherent authority to hold an individual in contempt and the authority to pass a criminal law punishing individuals for noncompliance arise out of the same legislative authority—Congress’s power to require the production of information.<sup>194</sup> The legislative history of the criminal contempt statute also demonstrates Congress’s desire to give itself “additional authority, and to impose additional penalties” on witnesses who refused to appear or answer questions.<sup>195</sup> The two types of contempt are not the same, however.<sup>196</sup> Inherent contempt is primarily coercive and can be remedied at any time by compliance, while criminal contempt is punitive and cannot be remedied.<sup>197</sup>

The most important distinction between the two, for purposes of executive privilege, is their enforcement mechanisms. Because criminal contempt requires prosecution, its enforcement requires the participation of an executive branch official. And the executive branch has interpreted the seemingly mandatory “shall” in the criminal contempt statute—as both a matter of statutory construction and constitutional avoidance—to allow it to decline to prosecute executive

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193. See, e.g., CONGRESS’S CONSTITUTION, *supra* note 180, at 181–95 (discussing contempt of Congress).

194. See, e.g., *In re Chapman*, 166 U.S. 661, 671 (1897) (“The refusal to answer pertinent questions in a matter of inquiry within the jurisdiction of the Senate, constitutes a contempt of that body, and by the statute this is also made an offence against the United States.”); CONG. GLOBE, 34th Cong., 3d Sess. 427 (1857) (statement of Rep. John Wesley Davis) (stating that the criminal contempt provision “increases no power now existing in any committee, and confers no power to be exercised either by the committee or the House” but instead “makes a mere substitution of a judicial proceeding . . . in lieu of the irregular” and “inefficient” remedy of inherent contempt, which “depend[s] entirely on the accidental time of the duration of the Congress at which he may be called upon to testify”); *id.* at 429 (statement of Rep. Alexander Keith Marshall) (“The [criminal contempt] bill proposes to call the judicial arm to the aid of Congress in vindicating its integrity . . . .”); see also *United States v. Rumely*, 345 U.S. 41, 42–43 (1953) (overturning a conviction under § 192 because the committee to whom the defendant had refused to disclose information lacked authorization from the House to demand such information); *United States v. Costello*, 198 F.2d 200, 205 (2d Cir. 1952) (“A certification under [§ 194] means only that the Senate has elected to have the contempt punished as a misdemeanor; this method is but an alternative one for vindicating the authority of Congress.” (citing *Jurney v. MacCracken*, 294 U.S. 125, 151 (1935))).

195. CONG. GLOBE, 34th Cong., 3d Sess. 405 (1857) (statement of Rep. James Lawrence Orr).

196. See *Marshall v. Gordon*, 243 U.S. 521, 542 (1917).

197. See CONGRESS’S CONTEMPT POWER, *supra* note 189, at 4, 8 & n.65, 20 (explaining differences between inherent and criminal contempt).

branch officials who withhold information or refuse to appear under the direction of the president or other executive branch officials.<sup>198</sup>

As subpoenas have become more common, committee letters have begun to cite and reference the contempt of Congress criminal statute as well as the criminal obstruction of justice statute to emphasize the legal compulsion on which the committee is relying.<sup>199</sup> Recognition that the statute is useless against the executive branch has led some to call for Congress to return to its inherent contempt authority as the next step in the arms race.<sup>200</sup> Longtime congressional legal analyst Mort Rosenberg argues that Congress, stymied by the executive branch's refusal to enforce a criminal contempt referral, may use its inherent contempt authority to impose a fine on executive

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198. The Department of Justice's longstanding position is that, once a referral for criminal contempt has been made, the Department may exercise its prosecutorial discretion in determining whether to initiate a prosecution and refer the matter to a grand jury. Prosecution for Contempt of Cong. of an Exec. Branch Off. Who Has Asserted a Claim of Exec. Privilege, 8 Op. O.L.C. 101, 101-02 (1984) [hereinafter Prosecution for Contempt of Cong.]. Despite the statement in § 194 that it "shall" be the duty of the U.S. Attorney "to bring the matter before the grand jury," 2 U.S.C. § 194 (2018), the 1984 opinion concluded that "as a matter of statutory construction strongly reinforced by constitutional separation of powers principles, we believe that the United States Attorney and the Attorney General, to whom the United States Attorney is responsible, retain their discretion not to refer a contempt of Congress citation to a grand jury." Prosecution for Contempt of Cong., *supra*, at 128. That conclusion is consistent with the textual analysis in the D.C. Circuit's opinion in *Wilson v. United States*, 369 F.2d 198 (D.C. Cir. 1966), which concluded that the Speaker of the House retained discretion not to refer a contempt report to the U.S. Attorney despite the same "seemingly mandatory language of § 194." Prosecution for Contempt of Cong., *supra*, at 120-21; *see also Wilson*, 369 F.2d at 203-04.

199. *See Constitutional Conflict*, *supra* note 7, at 888 n.26 (collecting examples); Letter from Sean Duffy, Chairman, Subcomm. on Oversight & Investigations, House Comm. on Fin. Servs., to Jacob Lew, Sec'y, U.S. Dep't of Treasury 2 (Mar. 9, 2016), <https://morningconsult.com/wp-content/uploads/2016/03/2016-03-09-SPD-to-Lew-of-Treasury-re-Criminal-Obstruction-and-Contempt-o....pdf> [<https://perma.cc/4HJR-WVYV>] ("[T]he longstanding and persistent nature of Treasury's refusal to comply with this Committee's constitutionally authorized oversight may constitute contempt of Congress under 2 U.S.C. § 192 and obstruction of Congress under 18 U.S.C. § 1505." (footnote omitted)).

200. *See, e.g.*, John Bresnahan & Kyle Cheney, *Nadler Squeezed with Calls for 'Inherent Contempt'*, POLITICO (May 12, 2019, 6:52 AM), <https://www.politico.com/story/2019/05/12/jerry-nadler-trump-subpeona-1317458> [<https://perma.cc/2F7B-9MA6>] (noting that House Judiciary Committee Chairman Jerry Nadler was facing pressure to use inherent contempt against recalcitrant administration officials); Philip Bump, *The House Could Take Subpoena Enforcement into Its Own Hands. Will It Work?*, WASH. POST (May 13, 2019, 4:46 PM), <https://www.washingtonpost.com/politics/2019/05/13/house-could-take-subpoena-enforcement-into-its-own-hands-will-it-work> [<https://perma.cc/UQ7W-YUP5>] (reporting that Representative Schiff stated the House Intelligence Committee was "looking through the history and studying the law to make sure [it was] on solid ground" in considering imposing a daily \$25,000 fine on an executive branch official until he or she complied with the committee's subpoena).

branch officials and automatically reduce their pay.<sup>201</sup> In response, the executive branch has included a separate section in recent opinions supporting its refusal to turn over information or provide testimony, concluding that its officials cannot be constitutionally subjected to any type of inherent contempt.<sup>202</sup>

Congress, faced with a defiant executive branch, likely does not have any mechanism by which to enforce inherent contempt—whether fine or arrest—even if it had the desire to do so. Every option would appear to require the participation of at least *some* executive branch officials. For example, security personnel would have to allow an executive branch official such as the attorney general or White House counsel to be taken into custody, and treasury officials who would have to participate in the garnishment of wages to pay a fine.<sup>203</sup> Any statutory authority on which the congressional committee or sergeant-at-arms could rely to seek cooperation of executive branch officials would be, in the executive branch’s view, overridden by the attorney general’s constitutional opinion. In other words, if the president and attorney general declared that—as a constitutional matter—an executive branch official defying a congressional subpoena could not legally be arrested or fined, it is unclear whether Congress would have a realistic mechanism for overcoming that declaration and imposing its punishment.

*c. Judicial Resolution.* Another recent development in the arms race has been the House’s attempt to involve the judiciary. Recognizing that the executive branch does not criminally prosecute an executive branch official held in contempt if there has been an executive privilege claim, the House has sought to compel compliance

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201. MORTON ROSENBERG, THE CONSTITUTION PROJECT, WHEN CONGRESS COMES CALLING: A STUDY ON THE PRINCIPLES, PRACTICES, AND PRAGMATICS OF LEGISLATIVE INQUIRY 24–25 (2017).

202. See, e.g., McGahn Immunity Opinion, *supra* note 118, at 20 (“We . . . believe that Congress could not lawfully exercise any inherent contempt authority against Mr. McGahn for asserting immunity.”).

203. Kia Rahnama, for example, proposes in a recent article that Congress use monetary fines and wage garnishments to enforce its subpoenas when faced with executive branch refusals to comply. Kia Rahnama, *Restoring Effective Congressional Oversight: Reform Proposals for the Enforcement of Congressional Subpoenas*, 45 J. LEGIS. 235, 237 (2018). But Rahnama’s analysis is limited to the authority Congress would have to impose the fines. It fails to recognize that the executive branch would regard such attempts as *unconstitutional*, and the White House would instruct executive branch officials to block any efforts to enforce or collect inherent contempt sanctions.



with subpoenas through civil contempt.<sup>204</sup> The first attempt by a single house of Congress to enforce subpoenas issued to executive branch officials through the courts concerned President George W. Bush's assertion of privilege and immunity in the U.S. Attorneys matter.<sup>205</sup> Now, seeking judicial resolution is the usual course. The House authorized a civil suit at the same time it referred Attorney General Holder for criminal contempt in the Fast & Furious matter, recognizing he would not be prosecuted.<sup>206</sup> Recently, the House authorized a committee chairman to proceed directly to the courts to enforce a subpoena without requiring the full body's authorization.<sup>207</sup> Relying on these authorities, congressional committees have filed several suits against Trump administration officials even *without* a full House finding contempt.<sup>208</sup>

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204. CONGRESS'S CONTEMPT POWER, *supra* note 189, at 26–30 (discussing civil enforcement actions in the House).

205. *Id.*; see Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53, 56 (D.D.C. 2008) (“[T]he aspect of this lawsuit that is unprecedented is the notion that Ms. Miers is absolutely immune from compelled congressional process.”).

206. See H.R. Res. 711, 112th Cong. (2012) (referring Attorney General Holder for prosecution for criminal contempt under 2 U.S.C. §§ 192 and 194); H.R. Res. 706, 112th Cong. (2012) (authorizing the Chairman of the House Oversight and Government Reform Committee “to initiate or intervene in judicial proceedings in any Federal court of competent jurisdiction, on behalf of the [c]ommittee . . . to seek declaratory judgments affirming the duty of [Attorney General Holder] to comply with any subpoena” in the Fast & Furious matter).

207. H.R. Res. 430, 116th Cong. (2019) (providing that the chair of the House Judiciary Committee may initiate or intervene in any judicial proceeding to enforce subpoenas and that other committee chairs may do so if authorized by the Bipartisan Legal Advisory Group, whose approval constitutes “the equivalent of a vote of the full House of Representatives”).

208. See, e.g., *In re* Application of Comm. on the Judiciary, 414 F. Supp. 3d 129 (D.D.C. 2019); Complaint for Declaratory and Injunctive Relief, Comm. on Ways & Means, v. U.S. Dep’t of Treasury, No. 19-cv-1974 (D.D.C. July 2, 2019). These steps are significant because now, for the first time, a congressional committee may, without any action by the full house, utilize delegated authority to (1) issue a subpoena, (2) hold a noncompliant executive in contempt, and (3) seek judicial enforcement of the subpoena. In enacting the criminal contempt provision, Congress expressly foreclosed such an option, requiring in the procedures enacted in 2 U.S.C. § 194 that either the full house vote on contempt or, when in recess, the Speaker to consider it. In *Wilson v. United States*, for example, the D.C. Circuit overturned several convictions under § 192 because “the decision by the Committee to cite appellants for contempt was not given the additional consideration within the legislative branch that is contemplated by the governing statute, 2 U.S.C. § 194.” *Wilson v. United States*, 369 F.2d 198, 199 (D.C. Cir. 1966). The individuals had refused to answer questions before the House Committee on Un-American Activities, and the Committee had reported the facts of refusal to the Speaker of the House while Congress was not in session. *Id.* at 199–200. The Speaker then certified the Committee’s report of contempt to the U.S. Attorney after being advised that he had no discretion under § 194 to decide not to do so. *Id.* The court rejected the contention that the Speaker had a mandatory duty to certify the committee’s contempt report to the U.S. Attorney, noting that “[i]t has been the consistent legislative

The executive branch has contested the justiciability of these suits, arguing that the House or a committee of the House lacks standing under the Supreme Court's reasoning in *Raines v. Byrd*.<sup>209</sup> The first three district court judges to address the executive branch's argument rejected it.<sup>210</sup> As a result, those judges adjudicated the merits of the constitutional dispute between Congress and the executive branch. In the first, Judge John Bates rejected White House Counsel Harriet Miers's claim of absolute immunity from congressional testimony.<sup>211</sup> In the second, arising out of the Fast & Furious investigation, Judge Amy Berman Jackson refused to accept the executive branch's broad congressional work-product doctrine but agreed that deliberative process was protected by executive privilege, rejecting the House's assertion that executive privilege was limited to presidential

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course . . . that the committee's report is subject to further consideration on the merits by the House involved." *Id.* at 201. The *Wilson* court collected the historical practice under §§ 192 and 194. It found that "the committee involved is subject to an appropriate legislative surveillance on the merits of contempt citations." and "where alleged contempts are committed while Congress was in session, the Speaker may not certify to the United States Attorney the statements of fact prepared by the Committee until the report of alleged contempt has been acted upon by the House as a whole." *Id.* at 201–02. When Congress is not in session, the Court concluded, the Speaker retained discretion not to certify a committee report of contempt, citing the "time-honored practice, since 1857, under which a 'check' on hasty action by a committee is provided through House or Senate consideration of a resolution authorizing the presiding officer to make the certification set forth in the statute." *Id.* at 203. "The Congressional practice reflects a conclusion that it is inherently unfair to permit the allegedly insulted committee to provide the sole legislative determination whether to initiate proceedings to prosecute for contempt." *Id.* Under the court's construction of §§ 192 and 194,

prosecution would not be begun without the additional scrutiny within the legislative branch, a scrutiny that would at least embrace examining the sufficiency of the statement of facts of alleged contempts, and consideration whether the incident constitutes the kind of willful contumacy contemplated by the statute, or perhaps whether the matter is sufficiently dubious so that no contempt action should be begun in the absence of approval by the entire house.

*Id.* at 204. Because the defendants' committee contempt reports had *not* been given the additional legislative scrutiny contemplated by § 194, the court overturned their convictions under § 192. *Id.* at 205.

209. *Raines v. Byrd*, 521 U.S. 811 (1997); see *Comm. on Oversight & Gov't Reform v. Holder*, No. 12-1332, 2013 WL 11241275, at \*1–2 (D.C. Cir. Nov. 18, 2013) (refusing to certify an interlocutory appeal despite DOJ's reliance on *Raines*); *Comm. on Oversight & Gov't Reform v. Holder*, 979 F. Supp. 2d 1, 12–13 (D.D.C. 2013) (noting DOJ's argument that the executive privilege claim was unreviewable, which "rest[ed] almost entirely on one case: *Raines v. Byrd*"); *Miers*, 558 F. Supp. 2d at 66 (noting DOJ's reliance on *Raines* to argue that the Committee lacked standing).

210. See *Comm. on the Judiciary v. McGahn*, 415 F. Supp. 3d 148, 197–98 (D.D.C. 2019), *aff'd en banc*, No. 19-5331, 2020 WL 4556761 (D.C. Cir. Aug. 7, 2020); *Holder*, 979 F. Supp. 2d at 12–13; *Miers*, 558 F. Supp. 2d at 66.

211. See *Miers*, 558 F. Supp. 2d at 99–107 (discussing the absolute immunity claim).

communications.<sup>212</sup> She concluded, however, that the Department of Justice had to comply with the subpoena because the deliberative process privilege had been overcome.<sup>213</sup> And, most recently, Judge Kentanji Brown Jackson held that former White House counsel Don McGahn was not absolutely immune from compelled testimony, largely echoing Judge Bates's previous opinion.<sup>214</sup>

All of these cases were appealed, but the first two ultimately settled after an election that transferred the presidency from one party to the other.<sup>215</sup> In the third, the initial panel opinion agreed with the executive branch that the court had no jurisdiction to entertain the interbranch dispute.<sup>216</sup> But that decision was subsequently reversed by the D.C. Circuit en banc, which agreed with the district court that congressional suits seeking compliance with a subpoena were justiciable but declined to reach the merits of McGahn's immunity.<sup>217</sup> The McGahn litigation remains pending after almost a year of litigation and may ultimately be rendered moot by the 2020 election.<sup>218</sup>

The central problem with litigation as a mechanism for enforcement is the time involved. The House authorized the Fast & Furious lawsuit on the same day it held Attorney General Holder in contempt, June 28, 2012, and filed a complaint less than two months later, on August 13, 2012.<sup>219</sup> But a final, appealable district court decision was not issued until three and a half years later.<sup>220</sup> The House

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212. *Comm. on Oversight & Gov't Reform v. Lynch*, 156 F. Supp. 3d 101, 109, 119 (D.D.C. 2016).

213. *Id.* at 120–21.

214. *McGahn*, 415 F. Supp. 3d at 214–15.

215. *See* *Comm. on Oversight & Gov't Reform v. Barr*, No. 16-5078, 2019 WL 2158212, at \*1 (D.C. Cir. May 14, 2019) (dismissing appeal after settlement); *Comm. on the Judiciary v. Miers*, No. 08-5357, 2009 WL 3568649, at \*1 (D.C. Cir. Oct. 14, 2009) (same).

216. *See* *Comm. on the Judiciary v. McGahn*, 951 F.3d 510, 522 (D.C. Cir.), *rev'd en banc*, No. 19-5331, 2020 WL 4556761 (D.C. Cir. Aug. 7, 2020).

217. *See McGahn*, 2020 WL 4556761, at \*8.

218. *See, e.g., Comm. on Judiciary v. McGahn*, No. 19-5331, 2019 WL 6999926, at \*1 (D.C. Cir. Dec. 18, 2019) (per curiam) (ordering the parties to file supplemental briefs addressing “whether the articles of impeachment render this case moot and whether expedited consideration remains necessary” and ordering the House committee to address “whether it still seeks to compel [McGahn]’s testimony and, if so, whether it seeks to compel such testimony in furtherance of its impeachment inquiry or as a matter of legislative oversight”).

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

220. *Comm. on Oversight & Gov't Reform v. Lynch*, 156 F. Supp. 3d 101 (D.D.C. 2016). In the Fast & Furious matter, the parties agreed to some delays, and a congressional committee could certainly move with more haste. But a district court would still likely have to resolve

had to pass a resolution after subsequent elections reauthorizing the subpoena and lawsuit.<sup>221</sup> If it had not, the subpoena would have expired, mooting the suit.<sup>222</sup> In the dispute over information related to the firing of the U.S. Attorneys, the House held Miers and White House Chief of Staff Josh Bolten in contempt on February 14, 2008<sup>223</sup> and filed suit on March 10, 2008.<sup>224</sup> The district court decided the question of absolute immunity relatively quickly, issuing an opinion on July 31, 2008, but did not resolve the underlying claim of privilege.<sup>225</sup> And, after a September argument, the D.C. Circuit stayed the district court's decision on immunity on October 6, 2008, and refused to expedite the case or give any opinion on the merits given the pending election and weighty issues involved.<sup>226</sup> Thus, even the threshold question of absolute immunity in *Committee on the Judiciary v. Miers*<sup>227</sup> took a number of months to make it to the appellate court, and the courts never really had time to address the merits of the privilege claim or balance the interests of the two branches.<sup>228</sup> Although the McGahn litigation was expedited, it remains pending over a year after it was initiated and took long enough that the House cited the delay as reason

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threshold issues, such as standing, from which an interlocutory appeal could be certified, as the Justice Department requested in the Fast & Furious matter. *See Holder*, 979 F. Supp. 2d at 12–13 (noting DOJ's argument that the executive privilege claim was unreviewable); *Comm. on Oversight & Gov't Reform v. Holder*, No. 12-1332, 2013 WL 11241275, at \*1–2 (D.D.C. Nov. 18, 2013) (refusing to certify an interlocutory appeal).

221. *See* H.R. Res. 5, 114th Cong. § 3(f)(1) (2015); H.R. Res. 5, 113th Cong. § 4(a)(2) (2013).

222. *See* *Comm. on the Judiciary v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008) (per curiam) (granting a stay pending appeal and noting that “this controversy will not be fully and finally resolved by the Judicial Branch—including resolution by a panel and possible rehearing by this court en banc and by the Supreme Court—before the 110th Congress ends on January 3, 2009” at which time “the 110th House of Representatives will cease to exist as a legal entity, and the subpoenas it has issued will expire”).

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

224. *Id.* at 1, 36.

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

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

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

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

for *not* going to court to force the testimony of a witness who refused to comply with subpoenas during the impeachment inquiry.<sup>229</sup> The House instead passed an additional article of impeachment against Trump for obstruction of its impeachment inquiry.<sup>230</sup>

Each house of Congress has, of course, always wielded other mechanisms of coercing the executive branch to comply with its demands. Most prominently, the Senate can refuse to act on a confirmation until a particular document or set of documents have been disclosed.<sup>231</sup> Or the House can attempt to use its appropriation power to force disclosure.<sup>232</sup> Chafetz, for one, urges Congress to reinvigorate such tools along with its inherent power to arrest individuals and hold them until they comply with the subpoena.<sup>233</sup> In his view, “judicial resolution of these questions is simply not suited to political time frames,” so Congress should stop attempting to use the courts to enforce subpoenas.<sup>234</sup>

Chafetz is correct that judicial resolution takes too long to be an effective means of enforcement. But his optimistic view of Congress’s

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229. H.R. REP. NO. 116-346, at 156 (2019).

230. *Id.* at 132–56.

231. For example, a group of Senators put President Obama’s nomination of David Barron to the First Circuit on hold until the administration agreed to release a 2010 OLC memo authorizing a drone strike of a U.S. citizen. *See* Zeke J. Miller & Massimo Calabresi, *Inside the Obama Administration Fight Over the Drone Memo*, TIME (May 13, 2014, 4:42 PM), <https://time.com/97613/obama-drone-memo-david-barron> [<https://perma.cc/4U9H-JC7E>]; Benjamin Wittes, *David Barron, Targeted Killing, and Rand Paul’s Wrongheaded Oped*, LAWFARE (May 12, 2014, 8:10 AM), <https://www.lawfareblog.com/david-barron-targeted-killing-and-rand-pauls-wrongheaded-oped> [<https://perma.cc/5R4A-LR8G>].

232. For example, § 714 of the Consolidated Appropriations Act, 2010 prohibits “the payment of the salary of any officer or employee of the Federal Government who . . . prohibits or prevents, or attempts or threatens to prohibit or prevent, any other [Federal] officer or employee . . . from having direct oral or written communication or contact with any Member, committee or subcommittee of the Congress.” Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, § 714, 123 Stat. 3034, 3208 (2010); *see also* *Constitutional Conflict*, *supra* note 7, at 931 (“Congress may use legislative authorizations and appropriations as leverage against the Executive Branch to obtain requested information.”). Some have proposed that Congress enact a rider similar to § 714 “disallowing the use of any appropriation to pay the salary of a federal official held in contempt of Congress.” H.R. REP. NO. 114-848, at 402 (2016); *see also* Contempt Act, H.R. 4447, 113th Cong. § 2 (2014) (a bill that would prohibit payment of compensation to an officer or employee of the Federal government who has been held in contempt of Congress by the House or Senate).

233. Josh Chafetz, *Congress Can’t Rely on the Courts To Enforce Its Subpoenas. Don’t Panic.*, WASH. POST (Mar. 2, 2020, 12:08 PM), <https://www.washingtonpost.com/outlook/2020/03/02/congress-cant-rely-courts-enforce-its-subpoenas-dont-panic> [<https://perma.cc/8BW5-ASSF>].

234. *Id.*

other authorities to enforce its subpoenas fails to account for the limits on those authorities and the means by which the executive branch can combat them. Only the Senate has a role in confirmations, and, in recent decades, the most aggressive oversight has been conducted by the House. Further, the use of the appropriations authority requires the buy-in of the entire Congress, not just a single committee, subcommittee, or motivated chairperson pursuing a particular investigation. Moreover, the president retains veto power over any legislative enforcement. Even when Congress succeeds in passing appropriations laws that are contingent on the sharing of information, the executive branch has raised constitutional objections to those laws and indicated it would not comply.<sup>235</sup>

Shutting down the government over what the executive branch would characterize as an assertion of a well-recognized, historically grounded constitutional authority may not, in reality, be a viable option. As Chafetz notes, Congress often suffers the political fallout from a shutdown, and few oversight disputes rise to a level that the House would be willing to risk that political blowback.<sup>236</sup> Similarly, impeachment solely for noncompliance with subpoenas would not only be potentially politically costly, it would be unprecedented. Although an obstruction of a congressional inquiry formed part of the articles of impeachment against Nixon, Clinton, and Trump, that charge was a secondary one, complementing a primary act alleged to be a high crime or misdemeanor.<sup>237</sup> An assertion of executive privilege, standing alone, is highly unlikely to be the principal grounds for impeachment. And, as noted, inherent contempt raises all kinds of practical problems that make it an unrealistic option, as the House acknowledged in the litigation involving McGahn.<sup>238</sup>

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235. See generally Auth. of Agency Offs., *supra* note 3 (advising the Department of Health and Human Services that its officials have authority to prohibit employees from complying with Congressional requests for information).

236. See CONGRESS'S CONSTITUTION, *supra* note 180, at 68–70.

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

238. During oral arguments in the litigation over the subpoena to former White House Counsel Don McGahn, counsel for the House of Representatives rejected the contention that inherent contempt is a practical option, noting that the House “do[es]n’t have the sergeant at arms go out and arrest people, and maybe have a gun battle with [the Attorney General’s] security

In short, the few mechanisms that Congress can use on its own to enforce compliance with a subpoena—principally, refusing to appropriate money without compliance, inherent contempt, or impeachment—are extreme measures that would likely incur substantial political costs and, even then, may not work. Accordingly, though Congress does theoretically have stand-alone powers to fight the executive branch's sweeping doctrine of executive privilege, those powers are, in practice, rarely viable options. They run aground on the reality recognized by Rehnquist: the executive branch has the information and, thus, a “headstart.”<sup>239</sup>

### C. Prophylactic Executive Privilege

The executive branch now uses a variety of procedures and constitutional doctrines to negate congressional demands for information without ever asserting executive privilege or considering any specific, identifiable harm. These procedures and doctrines are justified not by concrete harm from disclosure but by the need to *protect* executive privilege, the president's prerogative to control all information that fits within the components of executive privilege. This Article refers to the use of these procedures and doctrines as the prophylactic executive privilege.<sup>240</sup> And, to the extent one considers executive privilege to mean the president's constitutional authority to withhold information from Congress, the prophylactic executive privilege *is* executive privilege in current practice.

The Reagan memorandum initially advised department heads to request that a congressional committee “hold its request for the information in abeyance” while the president is considering a claim of privilege.<sup>241</sup> But it also clarified that such a request “itself does not

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detail.” Oral Argument at 52:44, *In re Comm. on the Judiciary*, 951 F.3d 589 (D.C. Cir. 2020) (No. 19-5288), [https://www.cadc.uscourts.gov/recordings/recordings2019.nsf/F443323EF0BE1B56852584E40066ECE0/\\$file/19-5288.mp3](https://www.cadc.uscourts.gov/recordings/recordings2019.nsf/F443323EF0BE1B56852584E40066ECE0/$file/19-5288.mp3) [<https://perma.cc/KU55-KT6G>].

239. Rehnquist Memorandum, *supra* note 21, at 6.

240. See generally Jonathan Shaub, *The Prophylactic Executive Privilege*, LAWFARE (June 14, 2019, 5:18 PM) [hereinafter *Prophylactic Executive Privilege*], <https://www.lawfareblog.com/prophylactic-executive-privilege> [<https://perma.cc/PZ9N-ZT6X>] (increasing reliance on protective assertions “either in combination with or instead of formal assertions of executive privilege . . . will establish a prophylactic layer of constitutional protection that extends well beyond the boundaries of executive privilege and dispenses with a core part of the executive privilege analysis—balancing congressional interests”).

241. Reagan Memorandum, *supra* note 27, at 2.

constitute a claim of privilege.”<sup>242</sup> Instead, that request should have been made only when information raised a “substantial question of executive privilege,” a term it defined quite narrowly. The memorandum delegated to agency officials the task of determining whether the release of specific information requested might be harmful to national interests, warranting presidential consideration.<sup>243</sup>

Today, this is no longer true. Lower executive branch officials do not consider identifiable harm that may result from the disclosure of specific information. Rather, they assess only whether the requested information falls within one of the components of executive privilege, relying on the need to protect the president’s prerogative to assert privilege to refuse to provide information. Subtly, the need to protect the president’s prerogative has become privilege itself, the only rationale necessary to refuse to comply with a congressional demand for information.

Lower executive branch officials refuse to disclose information by shielding themselves in the president’s prerogative to make the final privilege decision and the broad scope of the components of privilege.<sup>244</sup> The “scope” of executive privilege is no longer determined by the public interest with respect to a specific piece of information. It is determined by the initial scope, before any balancing occurs, of “components” that protect certain generalized confidentiality interests against undifferentiated institutional harms. But despite the qualified nature of both executive privilege and the common law privileges on which the components are based, the executive branch’s “privilege” of allowing the president to control the dissemination of such information is absolute.

In short, the executive branch’s current use of executive privilege to block congressional inquiry bears little relation to a situational

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242. *Id.*

243. *Id.* at 1–2.

244. Examining unforthcoming congressional testimony by Attorney General Jeff Sessions, Heidi Kitrosser has called this phenomenon the “shadow effect” of executive privilege, defining it as the “impact on oversight of the implicit or explicit threat that [executive privilege] might be invoked at some point.” Heidi Kitrosser, *The Shadow of Executive Privilege*, 15 FORUM 547, 548 (2017). As she notes, declining to provide information to Congress because executive privilege *could* be used to withhold the information “can help to shield the executive from political and legal accountability” and allows the executive branch to “bypass[] both the substantive questions asked [by Congress] as well as any serious engagement with the merits of the executive privilege claim.” *Id.* Kitrosser’s insightful observations recognize that executive privilege can “cast strong shadows” even when there is no formal assertion of privilege or even no mention of the term. *Id.* at 547–48, 551.



balancing of specific harm from disclosure against Congress's need for the information. What was formerly a doctrine about the president's authority to prevent the disclosure of specific pieces of information has become a doctrine almost entirely about prophylaxis. The new prophylactic executive privilege prohibits, as a constitutional matter, the release of *any* information *potentially* covered by the executive branch's view of executive privilege. And the executive branch has added an additional layer of protection for the prophylaxis itself, concluding that the privilege prohibits not just disclosure itself but also any *burden* on the executive branch's authority to monitor the release of such information. Accordingly, executive branch officials claim the authority to direct all current and former employees and officials not to disclose any information in response to a congressional subpoena and, in some circumstances, to refuse to appear altogether in response to a congressional subpoena.

This new concept of executive privilege has three central pillars that the executive branch has used, in combination, to vastly expand its authority vis-à-vis Congress. First, the president has the sole right to assert privilege and will not consider such an assertion until Congress decides to hold an official in contempt. Second, the Constitution gives the president the affirmative power to control the dissemination of all information that fits within any of the components of executive privilege and, accordingly, the authority to issue directives to any current or former member of the executive branch about the disclosure or dissemination of that information. Third, if there is even a chance that information may be disclosed without the president's authorization, the executive branch can utilize a series of prophylactic doctrines to ignore or countermand a congressional subpoena without any need to consider Congress's need for or interest in the information. Each of these pillars, and the doctrines that have arisen from them, are justified—in the executive branch's view—by the same premise: the need to “protect” the president's authority to assert executive privilege. That “protection” has largely become the primary justification for refusing to comply with congressional oversight demands. In other words, the prophylactic executive privilege has, in today's practice, become executive privilege itself.

1. *Protecting the President's Prerogative: Executive Privilege as a “Last Resort.”* The seeds of the prophylactic executive privilege can be found in the Supreme Court's decision in *Cheney v. United States*

*District Court.*<sup>245</sup> In that case, two organizations sued the National Energy Policy Development Group, a group established by President George W. Bush to develop energy policy, and its members, including Vice President Dick Cheney, alleging that the group had failed to comply with the requirements of the Federal Advisory Committee Act.<sup>246</sup> The district court permitted the suit to move forward against Cheney and the other defendants and allowed for limited discovery about the nature of the committee.<sup>247</sup> The executive branch sought mandamus from the court of appeals, asking it to vacate the discovery orders because they implicated material potentially covered by executive privilege, but the court of appeals declined to issue the writ of mandamus.<sup>248</sup> Even though it recognized the discovery requests were overly broad, the court of appeals reasoned that, under *Nixon*, the executive branch had to first *assert* privilege and do so “with particularity” in response to the discovery requests.<sup>249</sup>

The Supreme Court vacated the court of appeals’ decision, however, and held that it had “labored under the mistaken assumption that the assertion of executive privilege is a necessary precondition to the Government’s separation-of-powers objections.”<sup>250</sup> It recognized that *Nixon* had held that the president could not “through the assertion of a ‘broad [and] undifferentiated’ need for confidentiality” withhold information but had to invoke privilege with specificity and particularized objections.<sup>251</sup> But *Cheney* held that principle applied only *after* the party seeking the information had “satisfied his burden of showing the propriety of the requests.”<sup>252</sup> And, in language that would be quoted innumerable times by the executive branch in oversight disputes,<sup>253</sup> the Court characterized executive privilege as “an extraordinary assertion of power ‘not to be lightly invoked,’” and one that sets “coequal branches of the Government . . . on a collision

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245. *Cheney v. U.S. Dist. Court*, 542 U.S. 367 (2004).

246. *Id.* at 373.

247. *Id.* at 376–77.

248. *Id.*

249. *In re Cheney*, 334 F.3d 1096, 1104 (D.C. Cir. 2003), *vacated*, 542 U.S. 367 (2004).

250. *Cheney*, 542 U.S. at 391–92.

251. *Id.* at 388 (quoting *United States v. Nixon*, 418 U.S. 683, 706–07 (1974)).

252. *Id.*

253. *See, e.g.*, Letter from Stephen E. Boyd, Assistant Att’y Gen., Off. of Legis. Affs., U.S. Dep’t of Just., to Jerrold Nadler, Chairman, House Comm. on the Judiciary 3 (Feb. 7, 2019), <https://www.politico.com/f/?id=00000168-c91f-d364-a97d-ef9f540d0001> [https://perma.cc/U75T-4K8S].

course” and “should be avoided whenever possible.”<sup>254</sup> Instead of requiring the executive branch to assert executive privilege with particularity, the district court should have shaped its discovery orders to accommodate the executive branch’s interests that are protected by privilege without requiring the executive branch to assert privilege over any specific piece of information.<sup>255</sup>

In some ways, *Cheney* echoes the longstanding executive branch position that executive privilege “will be asserted only in the most compelling circumstances” and only as a last resort when disclosure disputes cannot be resolved through “good faith negotiations” between the branches.<sup>256</sup> But the premise of that position in *Cheney* is that the party requesting discovery must initially show “the propriety of [its] requests” for the information before the privilege becomes relevant, a step the district court had skipped even though it acknowledged that the requests were “overly broad.”<sup>257</sup> Congress would undoubtedly contend—and there would likely be little disagreement in most circumstances—that its act of issuing a subpoena for information related to a subject on which it could legislate is sufficient to demonstrate the “propriety” of the requests.

The executive branch, however, views a congressional oversight request or subpoena in the same way it—and ultimately the Court—viewed the discovery demands in *Cheney*: as overly broad and potentially, with respect to some information at least, not within Congress’s authority. If a committee requests a large swath of nonpublic documents, including emails, then some of those documents will undoubtedly implicate one of the components of executive privilege. As a result, the executive branch responds by citing its “confidentiality interests” and initiating the constitutionally “mandated” accommodation process. If information is not classified, then the executive branch has no way to prevent Congress from releasing it or even posting it on the internet. As a result, if the information is politically damaging, even if mostly benign, the executive branch will not hand it over initially, whether it falls within one of the components of privilege or not.

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254. *Cheney*, 542 U.S. at 389–90 (quoting *United States v. Reynolds*, 345 U.S. 1, 7 (1953)).

255. *Id.*

256. Reagan Memorandum, *supra* note 27, at 1.

257. *Cheney*, 542 U.S. at 376–77, 388.

The fact that some of the information covered by the subpoena *would* fall within the executive branch's broad scope of privilege is sufficient to initiate the accommodation process. Consider, for example, the subpoenas issued for information related to the Obama administration's decision to fund the cost-sharing reduction payments from a permanent appropriation after Congress did not specifically appropriate money for the payments.<sup>258</sup> Some of the information requested was factual, such as the names of individuals who attended certain meetings or the dates and times of those meetings, and was the type of information that would be disclosed on a privilege log. It is almost certainly not covered by the deliberative process privilege or the presidential communications privilege.<sup>259</sup> But, because some of the information requested did fall within the scope of the deliberative process component, the executive branch engaged in the accommodation process and refused to disclose the names as well as a substantial amount of other information.<sup>260</sup> And the dispute ultimately petered out after the next election when the inquiry was no longer politically salient.

The executive branch uses its doctrine of executive privilege and, in particular, its stringent balancing test, to place Congress in a catch-22. As an oversight dispute develops, the congressional committee uses its tools to attempt to force compliance—subpoenas, depositions, political statements or hearings, contempt threats, contempt votes, impeachment threats, etc. If the committee moves too quickly with respect to a large swath of documents, the executive branch may claim that the committee is not following the “constitutional mandate” of *AT&T*. When there are relatively few specific documents at issue, the executive branch can offer accommodations, such as an oral briefing or an opportunity to review the documents *in camera* but not take possession of them. In this way, the “balancing” always favors the executive branch. If the committee continues to push and the president ultimately makes a formal assertion of privilege, the opinion supporting privilege asserts that those specific documents are not necessary to the committee's legislative function because other information is available and because the relevant executive branch

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258. See H.R. REP. NO. 114-887, at 79 (2016) (describing the oversight dispute).

259. See MAJORITY STAFF OF THE H. COMM. ON ENERGY & COMMERCE & MAJORITY STAFF OF THE H. COMM. ON WAYS & MEANS, 114TH CONG., JOINT CONGRESSIONAL INVESTIGATIVE REPORT INTO THE SOURCE OF FUNDING FOR THE ACA'S COST SHARING REDUCTION PROGRAM 8–9, 12 (Joint Comm. Print 2016).

260. *Id.* at 131–45.

entity has provided—or is willing to provide—information orally or through *in camera* review.

Under the executive branch's doctrine, the only situation where the executive branch could be forced to comply with a congressional oversight subpoena would be if a congressional committee had a legitimate oversight interest, in the executive branch's view, for a specific document or set of documents that do not arguably fall within any of the components of executive privilege. And that circumstance is extremely rare. Usually, the executive branch can either claim that it needs time to review a broad request to consider executive privilege—and chastise the committee for not engaging in a good-faith accommodation process if it attempts to move more quickly—or it can assert that the committee has no need for specific documents that are the subject of a narrow request because other documents exist. The fact that the executive branch *can* play hardball does not mean that it will, particularly if the politics are not favorable. But under current executive branch doctrine, it believes it has the authority to do so.

2. *Protecting the President's Prerogative: Absolute Authority To Control the Dissemination of Information.* The prophylactic executive privilege results from an amalgamation of various broad evidentiary privileges as components of a singular executive privilege and the centralization in the president of control over information. To be sure, each component protects interests in confidentiality that courts and the government have long recognized. They represent longstanding, venerated areas in which presidents have consistently, since the country's founding in some cases, determined that withholding certain information from Congress was necessary to the public interest. But executive privilege historically protected only the precise information selected by the president that would cause identifiable damage to the public interest. And restricting formal assertions of "executive privilege" to the president is largely uncontroversial. But when the doctrine of executive privilege is conflated with the broad scope of its various evidentiary components—not with specific information within those areas that may cause identifiable harm—the resulting doctrine is that only the president may authorize the release of *any* information falling within those broad categories.

The prophylactic executive privilege is thus grounded not in concrete damage that would result from the disclosure of subpoenaed information but in harm to the president's absolute authority to control the dissemination of information. The institutional interests that

evidentiary privileges, such as the attorney-client and the deliberative process privilege, are designed to safeguard could—and should—be protected by those privileges in the oversight process. That is particularly true in an environment in which politics drive most oversight inquiries. Under the executive branch's current doctrine, however, *any* information that falls within the scope of a component of executive privilege threatens *constitutional* harm so grave it can be withheld unless it is critically necessary for Congress to legislate. It is hard to conceive of information that could satisfy that exacting standard.

Unlike any other privilege, the doctrine pairs a vast scope with an almost insurmountable balancing test. The combination of the president's unilateral authority to control information, the expansion of the types of protected information and the undifferentiated confidentiality interests often eliminate the need to assert privilege. Accordingly, the current doctrine often obviates any need to consider Congress's interests at all, let alone balance them against the executive branch's confidentiality interests.

3. *Protecting the President's Prerogative: Prophylactic Doctrines.* Congress has attempted to counteract these protective measures in a number of ways, typically by threatening contempt and attempting to force an actual assertion of privilege or by forcing a lower executive branch official to answer questions on the spot as part of testimony or a deposition. In response, the executive branch has developed additional constitutional doctrines that give the president more authority to countermand or negate congressional subpoenas. These doctrines include (1) the testimonial immunity of senior presidential advisers, (2) the potential for a "protective" assertion of executive privilege, and, most recently, (3) the deposition-counsel requirement. These doctrines are a unique form of prophylactic executive privilege because they assert additional authority to protect against any congressional practice that threatens to prevent the executive branch from protecting the president's prerogative.

*a. Testimonial Immunity.* The first—and original—prophylactic doctrine is the executive branch's constitutional doctrine of testimonial immunity. Developed over the past fifty years, the doctrine holds that the president's senior advisers are absolutely immune from compelled congressional testimony, even absent an assertion of executive

privilege by the president.<sup>261</sup> This privilege is absolute, not subject to balancing of any kind.<sup>262</sup> And it applies to both current and former advisers to the current president.<sup>263</sup> In the past, the Department of Justice has described this immunity as an exercise or a facet of executive privilege. Attorney General Janet Reno advised President Bill Clinton, for example, that he could assert “[e]xecutive privilege . . . in response to a congressional subpoena seeking testimony by the Counsel to the President concerning the performance of official duties on the basis that the Counsel serves as an immediate adviser to the President and is therefore immune from compelled congressional testimony.”<sup>264</sup> An internal 1982 memorandum from the head of OLC to the Associate Attorney General notes that a “congressional demand for testimony from a close adviser to the President directly implicates a basic concern underlying the Executive privilege.”<sup>265</sup> But, in the recent disputes over the testimony of senior advisers that resulted in official claims of immunity—and in the legal opinions justifying those assertions—the doctrine has been described as “distinct from, and broader than, executive privilege.”<sup>266</sup>

The basic rationale for the doctrine is that the president is absolutely immune from a congressional subpoena to testify, and, because compelled testimony of a senior adviser would implicate the same separation of powers concerns as compelled testimony of the president, those advisers share the president’s immunity.<sup>267</sup> Additionally, the compelled testimony of close presidential advisers would involve the core of the presidential communications component of executive privilege and could also force a close presidential aide to spend time preparing for testimony and testifying, thereby interfering with her ability to carry out her duties assisting the president.<sup>268</sup>

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261. See McGahn Immunity Opinion, *supra* note 118, at 7–12 (collecting historical examples).

262. *Id.* at 4–5.

263. *Id.* at 15.

264. Clemency Assertion, *supra* note 169, at 4.

265. Memorandum from Theodore B. Olson, Assistant Att’y Gen., Off. of Legal Couns., U.S. Dep’t of Just., to Rudolph W. Giuliani, Assoc. Att’y Gen., U.S. Dep’t of Just., Congressional Demand for Deposition of Counsel to the President Fred F. Fielding 1 (July 23, 1982), <https://www.justice.gov/olc/page/file/1225996/download> [<https://perma.cc/2Q6N-4FRF>].

266. McGahn Immunity Opinion, *supra* note 118, at 4.

267. *Id.* at 4–7.

268. *Id.*

The doctrine of absolute immunity for senior presidential advisers is the earliest form of prophylaxis, and its development demonstrates the way a policy designed to protect the underlying privilege becomes a stand-alone constitutional doctrine. Originally articulated as a “tentative” and “sketchy” doctrine by then-Assistant Attorney General Rehnquist, testimonial immunity adhered closely to the need to protect the confidentiality of presidential communications.<sup>269</sup> In testimony given the same year he wrote his foundational memorandum on immunity, Rehnquist described the same historical examples addressed in the memorandum as “instances in which Presidential advisers have failed to appear before Congressional committees on the ground that the only information they could furnish resulted from conversations with, or advice given to, the President.” He supported the doctrine by noting that “[s]ubpoenas have been quashed [in judicial proceedings] where it appeared that all the testimony to be elicited from a witness would be privileged.”<sup>270</sup> Rehnquist urged Congress to “distinguish” between senior presidential advisers and agency officials, arguing the “former should not be required to appear at all, since all of their official responsibilities would be subject to a claim of privilege.”<sup>271</sup> In short, because almost all of the information a senior presidential adviser could testify to about his or her official duties would be sensitive information, the adviser would not appear at all to protect that information.

But as Congress has gotten more aggressive in seeking to compel testimony from close presidential advisers—usually for political gain—the executive branch’s theory has grown well beyond a policy designed to protect the confidentiality of presidential communications, and has become an absolute immunity based on the status of the individual and formal separation of powers principles.<sup>272</sup> The executive branch has developed the immunity doctrine into an absolute position that authorizes the president to direct all current and former senior advisers to refuse to comply with a congressional subpoena if the requested testimony relates to the advisers’ “official duties,” even if much of the

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269. Rehnquist Memorandum, *supra* note 21, at 5–7.

270. *Executive Privilege Hearings*, *supra* note 1, at 435, 437 (statement of William H. Rehnquist, Assistant Att’y Gen., Office of Legal Counsel, United States Department of Justice).

271. *Id.* at 437.

272. See McGahn Immunity Opinion, *supra* note 118, at 3–7; 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 1–3 (July 15, 2014).



relevant information has already been made public and the “official duties” are entirely unrelated to advising the president or to presidential communications.<sup>273</sup>

The executive branch’s assertion that the president has the authority to *direct* a former official not to comply with a congressional subpoena based on the doctrine of immunity illuminates its fundamental theoretical understanding of executive privilege as an affirmative constitutional authority. OLC has never publicly provided a rationale to support such an authority over private citizens. It can only be explained as a direct consequence of the executive branch’s doctrine that executive privilege provides the president an affirmative, absolute authority to control the disclosure of information to Congress.<sup>274</sup> And the fact the president has constitutional authority to combat any congressional action threatens that authority.

*b. Protective Assertion of Executive Privilege.* The second prophylactic doctrine is the concept of a “protective” assertion of executive privilege. If a congressional committee insists on a rapid response to an information demand, the president can utilize a “protective assertion” of executive privilege, which allows the executive branch to immunize the official responsible for withholding the information without the need for an actual assertion of executive privilege, any balancing, or review of particular documents.<sup>275</sup> Instead, the executive branch claims that the president has the authority to

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273. See Testimonial Immunity Before Cong. of the Assistant to the President & Senior Couns. to the President, 43 Op. O.L.C., slip op. at 3 (July 12, 2019) (concluding that Kellyanne Conway was immune from a subpoena seeking her testimony about Hatch Act violations reported by the Office of Special Counsel because her public press statements were part of her official duties).

274. See Jonathan Shaub, *The Little-Noticed Way the McGahn Litigation Could Shape Congressional Oversight*, LAWFARE (Aug. 23, 2019, 11:54 AM), <https://www.lawfareblog.com/little-noticed-way-mcgahn-litigation-could-shape-congressional-oversight> [https://perma.cc/EUL7-W2MA]; Jonathan Shaub, *Testimonial Immunity, Executive Privilege and the President’s Authority over Former Officials*, LAWFARE (May 22, 2019, 6:34 PM), <https://www.lawfareblog.com/testimonial-immunity-executive-privilege-and-presidents-authority-over-former-officials> [https://perma.cc/D5MQ-23KL].

275. See White House Couns. Assertion, *supra* note 66, at 1; Letter from William P. Barr, Att’y Gen., U.S. Dep’t of Just., to President Donald J. Trump 2 (May 8, 2019), <https://int.nyt.com/data/documenthelper/819-barr-trump-letter-privilege/fe8c83dc6778bfe4bb74/optimized/full.pdf#page=1> [https://perma.cc/L5DU-UXX3] (requesting that the President make a “preliminary, protective assertion of executive privilege designed to ensure [his] ability to make a final assertion, if necessary, over some or all of the subpoenaed materials”); *Protective Assertion*, *supra* note 124.

make a protective assertion of executive privilege to ensure the executive branch has an opportunity to review the documents to determine if they fit within the scope of executive privilege.

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.<sup>276</sup> The opinion claimed that the protective assertion was necessary because of the "deadline imposed" by the committee and "the volume of documents that must be specifically and individually reviewed for possible assertion of privilege and the need under the directive to consult with the Attorney General."<sup>277</sup> The protective assertion was "designed to ensure [the president's] ability to make a final decision . . . as to which specific documents [were] deserving of a conclusive claim of executive privilege."<sup>278</sup> Clinton's protective assertion was, accordingly, followed by a formal assertion in a matter of weeks. The opinion supporting this assertion undertook a balancing inquiry and ultimately withheld only selected documents.<sup>279</sup>

In response to committees moving more quickly to use contempt to force the president to take the politically accountable step of formally declaring privilege, the executive branch watered down the idea of a protective assertion of privilege.<sup>280</sup> President Trump, relying on the Clinton precedent, made a protective assertion of privilege on two separate occasions. The first assertion was invoked in response to a subpoena for a large set of documents related to the investigation of Special Counsel Robert Mueller.<sup>281</sup> The second assertion was invoked against a much smaller set of documents related to the Commerce Department's decision to include a citizenship question on the U.S.

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276. White House Couns. Assertion, *supra* note 66, at 1; see also *Prophylactic Executive Privilege*, *supra* note 240 ("The first [protective assertion] was by President Clinton.").

277. White House Couns. Assertion, *supra* note 66, at 1.

278. *Id.*

279. See *id.* at 2 (outlining a formal assertion on May 23, 1996 over certain documents out of the set over which President Clinton made a protective assertion on May 8, 1996).

280. See *Prophylactic Executive Privilege*, *supra* note 240.

281. Letter from Stephen E. Boyd, Assistant Att'y Gen., Off. of Legis. Affs., U.S. Dep't of Just., to Jerrold Nadler, Chairman, House Comm. on the Judiciary 1 (May 8, 2019), <https://assets.documentcloud.org/documents/5993527/Chairman-Nadler-Letter-8-May-2019.pdf> [<https://perma.cc/YWU8-M6KU>] (advising the committee "that the President has asserted executive privilege over the entirety of the subpoenaed materials" and the "this protective assertion of executive privilege ensures the President's ability to make a final decision whether to assert privilege following a full review of these materials").

Census.<sup>282</sup> President Trump's protective assertions, however, have not been followed up by formal assertions.<sup>283</sup> Instead, as happened in the evolution of the subpoena, the protective assertions appear to have become simply another phase in the ongoing negotiations. A protective assertion of privilege has become another tool the executive branch may use to assert a prophylactic form of executive privilege and avoid the balancing inquiry that is at the heart of the privilege.<sup>284</sup> The executive branch's noncompliance with the relevant subpoenas was justified solely by the need to protect the president's underlying authority, and that need requires no balancing of congressional interests.

A protective assertion of privilege, like a formal assertion, informs the committee that the executive branch official will not comply with the congressional subpoena—and will not be prosecuted for contempt for that noncompliance—because the president needs more time to review the documents to determine if any of them warrant an *actual* assertion of executive privilege. But, unlike a formal assertion of privilege, a protective assertion dispenses with any need to analyze the specific information or to weigh the executive branch's confidentiality interests against the congressional need for that information.<sup>285</sup> It establishes an absolute shield that prevents the inquiry from even reaching the situational, qualified balancing that applies to a formal assertion of executive privilege. If the congressional subpoena is for only a single document or a small set of documents, or if the committee narrows its subpoena to only require production of a small set of “priority documents,” then a protective assertion is not possible.<sup>286</sup> But, in those cases, the balancing necessary for a formal assertion is much

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282. Boyd-Cummings Letter, *supra* note 69, at 2.

283. President Trump's protective assertion over the census documents was accompanied by a formal assertion over a specific set of “priority” documents that the committee had identified. *See id.*; *see also Prophylactic Executive Privilege*, *supra* note 240. But the protective assertion—which was justified by the need to review the rest of the documents to consider a formal claim of privilege—was never followed by a formal assertion over any subset of those documents. *Prophylactic Executive Privilege*, *supra* note 240.

284. *See* Julie Hirschfeld Davis & Charlie Savage, *Census Fight Grows as House Panel Backs Contempt and Trump Asserts Privilege*, N.Y. TIMES (June 12, 2019), <https://www.nytimes.com/2019/06/12/us/politics/us-census-2020-trump.html> [<https://perma.cc/KY8Q-YHEH>] (describing the ongoing negotiations over documents related to the inclusion of a citizenship question on the 2020 census); Nicholas Fandos, *Accord Opens Up Key Documents in Mueller Files*, N.Y. TIMES, June 11, 2019, at A1 (discussing the negotiations over documents related to the Mueller report).

285. *See Prophylactic Executive Privilege*, *supra* note 240.

286. *See id.* (noting that a protective assertion of executive privilege was not a possibility for the president over the “priority documents” identified and subpoenaed by the committee).

easier. It is almost impossible to establish a “demonstrable need” for a few specific documents, particularly when Congress has no idea what is in those documents.

*c. Deposition-Counsel Requirement.* The third—and most recent—prophylactic doctrine established by the executive branch is the purportedly constitutional requirement that executive branch officials be accompanied by agency counsel at congressional depositions. As the House of Representatives expanded the number of committees able to issue subpoenas for staff depositions, various committees started to use this authority to attempt to question agency officials in person after subpoenas for documents went unanswered. OLC, relying on scattered suggestions in past executive branch writings over the years, issued a formal opinion concluding that executive branch officials have the absolute authority to direct an inferior official not to comply with a congressional subpoena seeking a deposition if agency counsel is excluded, as it would be under the House rules.<sup>287</sup> The opinion rests on the premise that any burden on the president’s authority to control the dissemination of information is unconstitutional—and may be countermanded by a presidential directive, without any need to analyze or balance congressional interest.<sup>288</sup>

Therefore, this prophylactic doctrine, like the others, is *absolute*, despite the fact that the underlying authority the privilege is purportedly necessary to protect—the president’s authority to control the dissemination of information—is qualified. Of course, the lack of agency counsel would not definitively result in the disclosure of any potentially privileged information. OLC had formerly concluded that an agency could pay private counsel to accompany the executive branch employee or official and that private counsel could work with the agency to ensure the individual did not disclose any privileged

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287. See Attempted Exclusion of Agency Couns., *supra* note 3, at 13 (“[We] further advised that the subpoenas that required [executive branch employees] to appear without agency counsel, over the Executive Branch’s objections, exceeded the Committee’s lawful authority and therefore lacked legal effect.”).

288. See *id.* at 2 (concluding that Congress could “not compel an executive branch witness to appear without agency counsel” as it would “compromise the President’s constitutional authority to control the disclosure of privileged information and to supervise the Executive Branch’s communications with congressional entities”).

information.<sup>289</sup> But OLC then went further, concluding that even the *possibility* of an inadvertent disclosure or failure of private counsel to protect anything potentially privileged was an unconstitutional burden on the president's prerogative.<sup>290</sup>

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These prophylactic doctrines are justified by the need to “protect” the president's absolute authority to control the wide swath of information covered by the components of executive privilege. They are absolute. They require no balancing or inquiry into Congress's interests, needs, or constitutional authority. And they cannot be described as policies or practices designed to ensure the president can consider executive privilege when necessary. Rather, these doctrines are, to the executive branch, *constitutional* requirements that Congress cannot countermand by statute or by any other means. The immunity of senior advisers, protective assertions of privilege, and the deposition-counsel requirement shield executive branch officials from any punishment for refusing congressional information demands.

The president retains the authority to formally assert executive privilege over specific documents and information because of the concrete, identifiable harm they may cause to particular interests or even their institutional harm. But he almost never has to take that step. President Trump has asserted boldly that he would “fight ‘all the subpoenas,’” and his administration's refusal to engage in the accommodation process in many instances<sup>291</sup> led to a spate of commentary that the administration was distorting executive privilege or acting unlawfully.<sup>292</sup> And he was impeached for obstructing the House's impeachment inquiry by refusing to comply with the House's

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289. See Auth. of the Dep't of Health & Hum. Servs. To Pay for Priv. Couns. To Represent an Emp. Before Cong. Comms., 41 Op. O.L.C., slip op. at 1 (Jan. 18, 2017) (“An agency may thus retain and pay for such counsel if it has both statutory authority and an available appropriation to do so.”).

290. Attempted Exclusion of Agency Couns., *supra* note 3, at 17–18.

291. See Jeremy Diamond & Allie Malloy, *Trump at War with Democrats: ‘We’re Fighting All the Subpoenas,’* CNN (Apr. 24, 2019, 3:40 PM), <https://www.cnn.com/2019/04/24/politics/donald-trump-fight-subpoenas-don-mcgnahn-ridiculous/index.html> [<https://perma.cc/D4TC-LL8X>].

292. See, e.g., John E. Bies, *Constitutional Hardball and Congress's Oversight Authority*, LAWFARE (Apr. 27, 2019, 10:00 AM), <https://www.lawfareblog.com/constitutional-hardball-and-congress-oversight-authority> [<https://perma.cc/46AV-9HJU>].

subpoenas.<sup>293</sup> Yet he only formally asserted executive privilege once, over a small number of census documents.<sup>294</sup> Similarly, the Republican-controlled House lambasted the Obama administration's failure to comply with its subpoenas.<sup>295</sup> But President Obama only formally asserted the privilege once.<sup>296</sup>

The practices and doctrines on which the executive branch currently relies to fetter congressional oversight are almost wholly prophylactic ones, designed to protect the president's asserted authority to control the dissemination of information. And they are justified, as a matter of constitutional theory, as necessary to protect that affirmative constitutional authority. To the extent "executive privilege" is used to refer to the president's authority to withhold information from Congress, these prophylactic measures *are* executive privilege. And they render Congress unable to conduct oversight and even unable to compel evidence when considering impeachment. The conflation of executive privilege with undifferentiated "components," which encompass an enormous amount of information and the centralization of information control in the president, has led to an imbalance between the branches. Redressing that imbalance requires establishing a theoretical account of executive privilege that recognizes the legitimate confidentiality interests and information needs of the two branches but prevents the executive branch from relying on prophylaxis to render its interests superior. The following section sets out one such theoretical framework, the Executive's privilege.

### III. THE EXECUTIVE'S PRIVILEGE

Current thought accepts the existence "of two implied powers under the Constitution" that serve to counteract each other—

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

294. See Boyd-Cummings Letter, *supra* note 69, at 2 (notifying Chairman Cummings that the president asserted his executive privilege over census documents).

295. See, e.g., Lamar Smith, Ed Royce, Jeff Miller, Trey Gowdy, Jeb Hensarling & Jason Chaffetz, *Mr. Obama, Don't Let Secrecy Be Your Legacy: Republican Chairmen*, USA TODAY (Feb. 9, 2016, 1:05 PM), <https://www.usatoday.com/story/opinion/2016/02/09/obama-administration-least-transparent-epa-state-doj-clinton-benghazi-column/80050428> [<https://perma.cc/ASR9-QEZY>].

296. See PRESIDENTIAL CLAIMS OF EXECUTIVE PRIVILEGE, *supra* note 39, at 27–28; Fast & Furious Assertion, *supra* note 28, at 8 (concluding that the president "may properly assert executive privilege over the documents at issue" and "request[ing] that [he] do so").

congressional oversight and executive privilege.<sup>297</sup> As Rehnquist explained, “The Constitution does not expressly confer upon the executive any such privilege, any more than it expressly confers upon Congress the right to use compulsory process in the aid of its legislative function.”<sup>298</sup> Congress understands executive privilege to extend no further than the facts of *Nixon*, which provided a qualified privilege against only the production of presidential communications, a category that Congress defines narrowly.<sup>299</sup> And it understands its own implied authority to demand information from the executive branch in support of its constitutional functions as virtually unlimited. The executive branch, as described, understands executive privilege as an implied, affirmative constitutional authority that allows the president to control the dissemination of a broad scope of information.<sup>300</sup> Executive privilege, it believes, applies equally to oversight, impeachment, and legislation, a position adopted by OLC in the context of the impeachment of President Trump.<sup>301</sup>

But instead of inferring countervailing constitutional authorities to maintain a particular constitutional balance, the simpler—and more methodologically sound—position is that neither implied authority exists, at least as conceived by each respective branch. That is, Congress lacks the oversight authority to compel the president to disclose information, and the president has no affirmative authority to control the dissemination of information within and outside of the executive branch. Instead, the best understanding of executive privilege is not as an evidentiary privilege or affirmative constitutional authority, but as a true “privilege” in the constitutional sense,<sup>302</sup> a

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297. Peterson, *supra* note 7, at 81.

298. *Executive Privilege Hearings*, *supra* note 1, at 429 (statement of William H. Rehnquist, Assistant Att’y Gen., Office of Legal Counsel, United States Department of Justice).

299. See PRESIDENTIAL CLAIMS OF EXECUTIVE PRIVILEGE, *supra* note 39, at 22; see also Memorandum of Points and Authorities in Support of Plaintiff’s Motion for Summary Judgment at 19–20, *Comm. on Oversight & Gov’t Reform v. Holder*, 979 F. Supp. 2d 1 (D.D.C. 2013) (No. 1:12-cv-1332); Wright, *supra* note 4, at 444.

300. See *supra* Part I.

301. See, e.g., Exclusion of Agency Couns. from Cong. Depositions in the Impeachment Context, 43 Op. O.L.C., slip op. at 2–3 (Nov. 1, 2019) [hereinafter *Depositions in the Impeachment Context*]. In the memorandum, OLC did acknowledge that the showing of need Congress has to make to overcome a privilege assertion may be different in the impeachment context. See *id.* at 3 n.1. But it did not have to address that question because the prophylactic deposition-counsel requirement eliminated the need for any balancing of interests. *Id.*

302. See *supra* note 14 and accompanying text.

presidential immunity from compelled process for purposes of oversight—the Executive’s privilege.

The Executive’s privilege is a limitation on Congress’s implied oversight authority—or more accurately, a refusal to infer congressional oversight authority to issue compelled process to the *president* because of the significant separation of powers concerns that inference would engender. Given the Constitution’s specific checks and balances between the two branches, as well as historical practice dating to George Washington, it would represent a significant, additional interpretive step to infer congressional authority to compel the president to provide information in furtherance of legislative or oversight authority.

The Executive’s privilege, however, applies only to congressional *oversight* authority.<sup>303</sup> History makes clear that there is no such limitation on Congress’s *impeachment* authority. Nor would the Executive’s privilege be relevant to Congress’s express authority to draft and pass legislation that is “necessary and proper” to the fulfillment of its constitutional duties.<sup>304</sup>

Executive privilege is not an affirmative authority to control the dissemination of particular categories of information, as the executive branch currently understands it. It is a lack of congressional oversight authority to compel the president to disclose information. The president must make the factual showing necessary to invoke such a privilege, however. In the words of Rehnquist, executive privilege, as historically understood, requires “a demonstrable justification that executive withholding will further the public interest” and cannot be based solely on undifferentiated confidentiality interests.<sup>305</sup> The current impotence of Congress in oversight disputes results directly from the executive branch’s creation of a freestanding affirmative presidential authority to control information. Eliminating that freestanding constitutional authority would restore some balance to the branches and radically alter the practice of oversight.<sup>306</sup> And it would provide a shared theoretical and constitutional foundation on

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303. See *infra* Part III.B.

304. See U.S. CONST. art. I, § 8.

305. *Executive Privilege Hearings*, *supra* note 1, at 431 (statement of William H. Rehnquist, Assistant Att’y Gen., Office of Legal Counsel, United States Department of Justice).

306. Other reforms, including legislation, could try to balance the legitimate confidentiality interests of the executive branch with the legislative and oversight interests of Congress. Such reforms are only possible, however, if there is a shared constitutional understanding of executive privilege and if the current prophylactic executive privilege is eliminated.



the basis of which individual privilege disputes could be negotiated and litigated instead of each branch retreating to its own, diametrically opposed constitutional theory. Most scholarship on executive privilege ultimately rejects this pursuit and concludes that it is either futile or unwise to attempt to resolve the longstanding constitutional dispute between the branches. Rozell, for example, decides that “[t]here is no need for any precise definition of the constitutional boundaries surrounding executive privilege” and that “[s]uch a power cannot be subject to precise definition.” But the “do nothing” approach is no longer possible given the development of the prophylactic executive privilege, at least if one believes congressional oversight has some inherent value. Although it may not be possible to choose in advance whether the Constitution dictates that the executive branch or Congress should win in any individual dispute, finding a common constitutional ground is possible—and necessary.

A. *The Executive's Privilege as Immunity from Congressional Oversight Process*

Where the president is the subject of congressional oversight and inquiry, executive privilege should not be understood as a doctrine about an affirmative, implied constitutional authority belonging to the president. It is not an affirmative “privilege” that the president may exercise. Instead, it is an immunity belonging to the president, a *limitation* on Congress’s implied constitutional authority. Although Congress may investigate, call for information, and issue compulsory process generally in support of its oversight authority, the president is privileged against such process. Or, in other words, Congress’s general, implied oversight powers of inquiry do not encompass the president.

1. *An Immunity Grounded in Historical Practice.* The comprehensive histories of “executive privilege” that others have undertaken provide substantial support for this view. As just a few early examples illustrate, President George Washington’s Cabinet, which, at the time, included Alexander Hamilton, Henry Knox, Edmund Randolph, and Thomas Jefferson, was “of one mind,” that, although a House investigative committee could call for papers, “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.” Neither a committee nor the House “ha[s] a right to call on the head of a dep[artment], who [and] whose papers were under the

[president] alone, but that the comm[ittee should] instruct their chairman to move the [H]ouse to address the President.”<sup>307</sup>

In 1794, the Senate initially “direct[ed]” Secretary of State Edmund Randolph to disclose diplomatic correspondence, but then amended the motion to address the president and to “request” rather than “direct” that the president disclose the correspondence.<sup>308</sup> House resolutions of inquiry continue to make that distinction today, directing lower executive officials to provide information but merely requesting that the president do so.<sup>309</sup> In response to the Senate’s amended resolution addressing the president in 1794, Attorney General William Bradford concluded it was “the duty of the Executive to withhold such parts of the said correspondence as in the judgment of the Executive shall be deemed unsafe and improper to be disclosed.”<sup>310</sup> The Senate resolution did not include, as others had, an express exception allowing the president to withhold parts of the requested information, but Bradford reasoned that

[e]very call of this nature, where the correspondence is secret and no specific object pointed at, must be presumed to proceed upon the idea that the papers requested are proper to be communicated[;] & it could scarcely be supposed, even if the words were stronger[,] that the Senate intended to include any Letters[,] the disclosure of which might endanger national honour or individual safety.<sup>311</sup>

Similarly, as president, Thomas Jefferson responded to a House resolution requesting information about the conspiracy against the United States involving Vice President Aaron Burr by providing all information relevant to Burr but withholding other names.<sup>312</sup> As Jefferson explained, “[i]n this state of the evidence, delivered sometimes, too, under the restriction of private confidence, neither safety nor justice will permit the exposing names, except that of the

307. Thomas Jefferson, Anas (Apr. 18, 1793), *reprinted in* 1 THE WRITINGS OF THOMAS JEFFERSON 189–90 (Paul Leicester Ford ed., N.Y., G.P. Putnam’s Sons 1892).

308. See Abraham D. Sofaer, *Executive Privilege: An Historical Note*, 75 COLUM. L. REV. 1318, 1319 (1975).

309. See HOUSE RESOLUTIONS OF INQUIRY, *supra* note 145, at 1–2.

310. Sofaer, *supra* note 308, at 1320.

311. Walter Dellinger & H. Jefferson Powell, *The Attorney General’s First Separation of Powers Opinion*, 13 CONST. COMMENT. 309, 316 (1996) (reprinting Bradford’s opinion in full).

312. Hist. of Refusals I, *supra* note 34, at 754–55.

principal actor, whose guilt is placed beyond question.”<sup>313</sup> And President James Monroe refused to provide information about particular charges against a naval officer, reasoning that “the publication of those documents might tend to excite prejudices which might operate to the injury of” the ongoing investigations of the charges against the officer.<sup>314</sup>

President Andrew Jackson, faced with an information request, opined that the

executive is a coordinate and independent branch of the Government equally with the Senate, and I have yet to learn under what constitutional authority that branch of the Legislature has a right to require of me an account of any communication, either verbally or in writing, made to the heads of Departments acting as a Cabinet council.<sup>315</sup>

And after the Senate called for papers from an executive branch official in the Bureau of Corporations relating to President Theodore Roosevelt’s decision not to use the Sherman Act to block an acquisition, the president “ordered [the official] in writing to turn over to [him] all the papers in the case” and informed a senator that “[t]he only way the Senate or the committee can get those papers now is through my impeachment.”<sup>316</sup>

The history of presidents withholding documents from Congress is replete with similar statements and refusals to turn over information, each based on the identified, concrete harm the disclosure of particular information would cause.<sup>317</sup> And even skeptics of executive privilege recognize this history, though they interpret it differently<sup>318</sup> and more narrowly. They construe historical resolutions “requesting,” rather than demanding, information from the president as examples in which Congress did not use its full constitutional authority, rather than historical recognition of the Executive’s privilege against compelled

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313. Thomas Jefferson, Message to the Senate and House of Representatives (Jan. 22, 1807), in 1 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 43, at 400.

314. James Monroe, Message to the House of Representatives (Jan. 10, 1825), in 2 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 43, at 847.

315. Andrew Jackson, Special Recorded Message to Senate (Dec. 12, 1833), in 3 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 43, at 1255.

316. Cox, *supra* note 2, at 1403–04 & n.72.

317. See EXECUTIVE PRIVILEGE, *supra* note 5, at 29–44 (collecting the historical examples).

318. See RECLAIMING ACCOUNTABILITY, *supra* note 16, at 88–91.

congressional process.<sup>319</sup> These historical examples can be—and have been—interpreted in a variety of ways, particularly as to the scope of the president’s authority to withhold information and the types of information over which he may exercise that authority.

But these historical examples establish, quite clearly, that the Framers and subsequent presidents believed—as the executive branch does now—that Congress’s oversight authority to demand information from the president is not unlimited and that the president has some inherent discretion about when to comply with those demands based on identified, concrete harms that disclosure could engender. This historical gloss is particularly vital here because there is no constitutional text to rely on and no Supreme Court precedent addressing executive privilege in the context of congressional oversight.<sup>320</sup> Moreover, each branch uses historical practice as the foundation for making its constitutional arguments and explaining the doctrine of executive privilege.<sup>321</sup> And the Supreme Court has affirmed that “longstanding practice” should be “‘a consideration of great weight’ in cases concerning ‘the allocation of power between [the] two elected branches of Government.’”<sup>322</sup> Understanding the nature of that historical practice is thus paramount in determining the validity of the executive branch’s more recent constitutional doctrine.

Recognizing that the only constitutional “privilege” in the context of congressional oversight is the Executive’s privilege against compelled congressional process is consistent with this historical practice, but also eliminates the affirmative presidential authority that

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319. See, e.g., *id.*; Cox, *supra* note 2, at 1397 (eliminating a number of historical examples from the list of historical claims of privilege “upon the ground that the congressional request explicitly stated that the President should decide whether furnishing the papers would be in the public interest” because, in such situations, “there was no need for a claim of constitutional right”).

320. See *NLRB v. Noel Canning*, 573 U.S. 513, 526 (2014) (“We have not previously interpreted the Clause, and, when doing so for the first time in more than 200 years, we must hesitate to upset the compromises and working arrangements that the elected branches of Government themselves have reached.”); Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 417–18 (2012) (highlighting the significance of gloss for interpreting the separation of powers, a subject on which the Constitution provides little guidance).

321. See Hist. of Refusals I, *supra* note 34, at 751; Hist. of Refusals II, *supra* note 34, at 783, 796; TODD GARVEY & ALISSA M. DOLAN, CONG. RSCH. SERV., R42670, PRESIDENTIAL CLAIMS OF EXECUTIVE PRIVILEGE: HISTORY, LAW, PRACTICE, AND RECENT DEVELOPMENTS 1 (2012) (discussing the various judicial precedents and dating the doctrine to 1792).

322. *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031 (2020) (alteration in original) (quoting *Noel Canning*, 573 U.S. at 524–26).

underlies the executive branch's current prophylactic doctrine. Some scholars would go farther and assert that the president has no constitutional authority to withhold information at all.<sup>323</sup> They argue based on history, theory, and structuralism that the executive privilege is a "myth" and the executive branch must yield to congressional demands.<sup>324</sup> In that conception, this kind of complete congressional access furthers transparency and democracy and is more in line with the Constitution's design and elevation of the people above the monarchy.<sup>325</sup>

But rejecting the existence of executive privilege entirely goes too far. History largely refutes that view,<sup>326</sup> and the Supreme Court recognized the existence of constitutional confidentiality interests in *Nixon*.<sup>327</sup> As a practical matter, in the information age in which so much discussion, debate, and correspondence occurs in archivable, searchable digital files, a constitutional structure that allows a single, politically motivated subcommittee chairman, or even a single house of Congress, to unilaterally require the president to turn over any information is troubling. The deliberations of the Department of Justice over ongoing litigation could be publicly disclosed to the litigation opponent by a single unfriendly legislator. All of the evidence and sources in a criminal investigation could be laid bare before its completion. Preliminary agency deliberations concerning administrative actions that were not favored by a particular committee chairman could be disclosed to members of that industry, spurring market changes, litigation, or political and financial pressure on the agency's decision-making.

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323. See, e.g., *Secrecy and Separated Powers*, *supra* note 10, at 493–96 (“This Article concludes that there is no such thing as a constitutionally based executive privilege, and courts—in the face of executive privilege claims—should order compliance with any statutorily authorized demands for executive branch information.”).

324. See generally BERGER, *supra* note 5 (arguing that the president does not have any constitutional authority to refuse to provide information and that the historical examples on which the executive branch and scholars have relied do not support any such privilege).

325. See Aziz Huq, ‘Executive Privilege’ is a New Concept Built on a Shaky Legal Foundation, WASH. POST (May 10, 2019, 10:07 AM), [https://www.washingtonpost.com/outlook/executive-privilege-is-a-new-concept-built-on-a-shaky-legal-foundation/2019/05/10/fa92b82e-7292-11e9-9eb4-0828f5389013\\_story.html](https://www.washingtonpost.com/outlook/executive-privilege-is-a-new-concept-built-on-a-shaky-legal-foundation/2019/05/10/fa92b82e-7292-11e9-9eb4-0828f5389013_story.html) [<https://perma.cc/HEX2-YYDN>] (arguing that executive privilege “is a late, dubious addition to constitutional law” and that “democracy and the rule of law are ill-served by the concept”).

326. EXECUTIVE PRIVILEGE, *supra* note 5, at 195–208; see also *supra* text accompanying notes 312–26.

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

None of these require bad faith on the part of the committee. Heightened political instincts would suffice, and institutional ignorance may exacerbate the problem. When deciding what to release, members of Congress and their staff may not understand the sensitivity of the information sought or may not trust the executive branch's descriptions of the need to maintain its confidentiality. Possibly, the material could be so politically helpful that the member is willing to accept whatever damage it may cause. Carelessness, of course, can also result in unwarranted disclosure, particularly with so many moving parts and people in the legislative process.

Most people acknowledge the need for *some* secrecy—at least temporarily—in the operation of the executive branch. But the question of how to protect those legitimate confidentiality interests without allowing the executive branch to use them as cover for wrongdoing or for political gain has proven an intractable one. The crux of the disagreement is over what law to apply.

Recognizing the Executive's privilege for what it is, an immunity from compelled congressional oversight process, provides a mechanism for resolving that disagreement. Concluding that Congress lacks absolute authority to compel the president to provide information does not empower the president so long as that recognition is coupled with the historical requirement that executive privilege is a contingent, fact-specific decision. This recognition would prevent the executive branch from employing prophylactic executive privilege without taking Congress's interests into account and would eliminate its ability to rely on broad, undifferentiated confidentiality interests.

2. *A Contingent Immunity.* The Executive's privilege, as historically understood and practiced, is a *contingent* immunity, one dependent on the president's personal decision that the disclosure of the specific information requested—in whatever form that disclosure has been requested and with whatever accompanying limitations on further, or public, disclosure are available—would cause concrete, *identified* harm. As Professor Heidi Kitrosser describes the early historical examples of the Executive's privilege, “each claim was made[,] explained openly . . . [and] defended in a fact-specific manner.”<sup>328</sup> The President would determine that the release of specific

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328. See RECLAIMING ACCOUNTABILITY, *supra* note 16, at 90.

information would cause identifiable damage and explain that decision. The exercise of the Executive's privilege was thus largely a *factual* determination based on the specific information sought.<sup>329</sup>

Early assertions of executive privilege in the post-Watergate era, as the executive branch doctrine began to develop, followed this historical, situational model quite closely. In 1984, for example, OLC concluded that documents could be withheld pursuant to executive privilege because “disclosure of the . . . investigative documents w[ould] substantially interfere with the Department's ongoing criminal investigation in that case.”<sup>330</sup> The opinion discussed the principles that support a general confidentiality interest in open law enforcement files, but also went further to analyze the “[s]pecific [a]pplication” of those principles to the investigation at issue.<sup>331</sup> And it drew from a statement prepared by the lead trial attorney on the investigation that “outline[d] the specific ways in which release of prosecutive or investigative memoranda would interfere with the ongoing investigation.”<sup>332</sup>

Similarly, a 1981 opinion by Attorney General William French Smith supporting an assertion of executive privilege explained that OLC and the attorney general had reviewed the documents and concluded that they “relate[d] to sensitive foreign policy considerations” or were “of a highly deliberative nature and involve[d] an ongoing decisional process of considerable sensitivity” involving Canada.<sup>333</sup> The opinion identified concrete harm as the basis for the assertion:

Because the policy options considered in many of these documents [we]re still under review in the Executive Branch, disclosure to the Subcommittee at th[at] present time could [have] distort[ed] that decisional process by causing the Executive Branch officials to modify

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329. See Rex E. Lee, *Executive Privilege, Congressional Subpoena Power, and Judicial Review: Three Branches, Three Powers, and Some Relationships*, 1978 BYU L. REV. 231, 251 (1978) (“[E]xecutive privilege . . . permit[s] the President to withhold information whose dissemination, in his considered view, would be sufficiently detrimental to the public interest . . .”); Shalev Roisman, *Presidential Factfinding*, 72 VAND. L. REV. 825, 836 (2019).

330. Cong. Subpoenas of Dep't of Just. Investigative Files, 8 Op. O.L.C. 252, 254 (1984).

331. *Id.* at 266.

332. *Id.*

333. Assertion of Exec. Privilege in Response to a Cong. Subpoena, 5 Op. O.L.C. 27–29, 32 (1981).

policy positions they would otherwise espouse because of actual, threatened, or anticipated congressional reaction.<sup>334</sup>

The opinion then continued, citing *Nixon*, to also rely on the damage to “future Executive Branch deliberations” if disclosure were permitted.<sup>335</sup>

The historical emphasis on situational, fact-specific claims of privilege is illustrated by Chief Justice John Marshall’s opinion in the Burr trial, in which he stated that the court would respect a specific presidential determination “that in his judgment the public interest required certain parts of [the subpoenaed letter] to be kept secret” but that it would not simply accept “no reason whatever for withholding the paper” other than an assertion that it was confidential.<sup>336</sup> His opinion, like the early claims of privilege, required a reason *specific to the identified information* to justify withholding it, not a general interest in confidentiality of the *type* of information or a generalized interest in confidentiality itself.<sup>337</sup> The initial writings on privilege in the modern, post-Watergate era reflected this same principle, including Rehnquist’s formulation that there must be a “demonstrable justification” that “the disclosure of particular matters sought would be harmful” to a specific national interest.<sup>338</sup>

Moreover, restoring identified, concrete harm deriving from the disclosure of specific information as *the exclusive* criterion for the invocation of the Executive’s privilege would narrow the scope of information potentially encompassed by the Executive’s privilege and eliminate the implied “constitutionalization” of the oversight process that has rendered Congress virtually impotent. The focus on the effect of disclosure would also restore the inquiry to a situational balancing, weighing potential harm from the disclosure of particular documents against the congressional need for them.

Executive branch agencies would no longer be reviewing subpoenaed information to see if it would potentially fall within a particular component and then claiming that all of that material would have to await a presidential decision on privilege or waiver. Instead,

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334. *Id.* at 29.

335. *Id.*

336. *United States v. Burr*, 25 F. Cas. 187, 192 (C.C. Va. 1807).

337. *Id.*

338. *Executive Privilege Hearings*, *supra* note 1, at 431 (statement of William H. Rehnquist, Assistant Att’y Gen., Office of Legal Counsel, United States Department of Justice).



the review would be for the Executive's privilege, which would entail the identification of specific information the disclosure of which would cause concrete, identified harm. Only that information would necessitate presidential review if the congressional committee continued to push for it. Generalized, undifferentiated interests in potential harm would not be a valid basis for the exercise of—or review of—the Executive's privilege.<sup>339</sup> As Archibald Cox explained, after cataloguing the history of putative privilege assertions, “nothing appears which even approaches a solid historical practice of recognizing claims of executive privilege based upon an undifferentiated need for preserving the secrecy of internal communications within the Executive Branch.”<sup>340</sup>

Separating the Executive's privilege—a constitutional immunity—from the various components and undifferentiated confidentiality interests also more closely aligns the privilege with the needs of the executive branch. There are categories of information that do not have historical analogues and may not be protected by the existing common law privileges on which the components of executive privilege are based. If the Executive's privilege is confined to the recognized components, then such information cannot be protected no matter its potential detrimental impact. For example, the Department of Health and Human Services resisted oversight requests sent to a third-party contractor who had conducted cybersecurity tests of the website [healthcare.gov](http://healthcare.gov). The department was worried that if these reports were turned over to Congress, they could be released publicly or otherwise fall into the wrong hands.<sup>341</sup> The public release of the information would have provided hackers and others a “roadmap” to attack the website, a specific harm that the executive branch had valid

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339. This does not mean that there could not be other mechanisms, including legislation, for recognizing undifferentiated, generalized confidentiality interests in particular information, just as there are such mechanisms in judicial proceedings. The primary point is that those interests should not be *constitutionalized* by subsuming them within the doctrine of executive privilege.

340. Cox, *supra* note 2, at 1404.

341. See Letter from Kathryn H. Ruemmler, Couns. to the President, to John Boehner, Speaker, U.S. House of Representatives 1 (Dec. 15, 2013), <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/migrated/uploads/White%20House%20Counsel%20to%20Boehner%2012-15-13.pdf> [<https://perma.cc/C27M-2T7F>] (“It is the view of cybersecurity experts from across the Administration that these documents, if further disclosed, would provide information to potential hackers that increases the risk they could penetrate [healthcare.gov](http://healthcare.gov), the Federal Data Services Hub, and other Federal IT systems.”).

reasons to guard against.<sup>342</sup> But the subpoenaed information did not fit into any existing “component” of executive privilege.

In another instance, the Department of Treasury initially resisted providing documents to Congress about the executive branch’s contingency plans if Congress failed to raise the debt limit and instructed the Federal Reserve Bank of New York (“FRBNY”), a quasi-public entity, to do the same.<sup>343</sup> The Treasury and FRBNY ultimately turned the documents over, but emphasized that public disclosure could cause “serious harm” because the documents contained “potentially market sensitive and operationally sensitive material,” serious confidentiality interests that do not fit neatly within the components of privilege.<sup>344</sup> Whether these specific claims were valid or not is irrelevant. And these controversies did not escalate to a constitutional confrontation over the information. But federal agencies undoubtedly have information that is not classified and may not fit into the existing components of privilege. The public disclosure of that information could potentially be very harmful, so harmful that the risks of handing it over to a congressional committee may be hard to justify, particularly if the agency can brief the committee privately or allow it to review the documents without taking possession. Although the agency may convey these concerns about disclosure to the congressional committee or subcommittee, there is no guarantee the documents, once handed over, would be kept confidential. The disclosure of such sensitive information—either purposefully, accidentally, or as a result of breaches of information security—would not be surprising.

Today, executive privilege is based upon an absolute, undifferentiated need to preserve and protect the president’s authority to control all information that potentially implicates a range of generalized, undifferentiated confidentiality interests. The situational inquiry that formed the core of the historical Executive’s privilege no

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342. *Id.*

343. See STAFF OF H. COMM. ON FIN. SERVS., SUBCOMM. ON OVERSIGHT & INVESTIGATIONS, 114TH CONG., STAFF REPORT: THE OBAMA ADMINISTRATION’S DEBT CEILING SUBTERFUGE: SUBPOENAED DOCUMENTS REVEAL TREASURY MISLED PUBLIC IN ATTEMPT TO “MAXIMIZE PRESSURE ON CONGRESS,” 19–23 (Feb. 1, 2016), [https://republicans-financialservices.house.gov/uploadedfiles/debt\\_ceiling\\_report\\_final\\_01292015.pdf](https://republicans-financialservices.house.gov/uploadedfiles/debt_ceiling_report_final_01292015.pdf) [https://perma.cc/96Q2-GYJG] (describing the oversight dispute and characterizing the Treasury Department as actively obstructing the committee’s investigation).

344. See *id.* at 293 (quoting a letter from the Treasury Department to the committee regarding its response to the committee’s subpoenas).

longer exists. Recognizing the Executive's privilege as a presidential immunity that may be invoked only where the president identifies specific, concrete harm from the disclosure of specific documents would be both more consistent with historical practice and more reflective of the appropriate constitutional balance between the branches.

### *B. The Executive's Privilege and Impeachment*

Understanding the Executive's privilege as an immunity that limits Congress's implied oversight authority also has other significant consequences for the balance of power between the branches. Importantly, it would eliminate executive privilege from the context of impeachment.<sup>345</sup>

The executive branch concluded otherwise during the House of Representatives' impeachment inquiry into President Trump.<sup>346</sup> President Trump never asserted executive privilege formally during the House impeachment inquiry or the Senate trial, nor did OLC undertake any balancing inquiry or address whether that balancing inquiry is different in impeachment than for traditional oversight.<sup>347</sup> Instead, Trump relied on prophylactic doctrines such as testimonial immunity and the deposition-counsel requirement. On the basis of OLC opinions concluding that these doctrines applied equally to impeachment, Trump directed executive branch officials not to comply with the House's subpoenas.<sup>348</sup> OLC reasoned that because executive

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345. By the same reasoning, understanding the Executive's privilege as a limit on Congress's oversight authority would also have significant implications for the application of executive privilege to legislation, since the power to pass any legislation is an explicit one provided for in the Constitution, not an implied authority. OLC has concluded that the two are identical, reasoning that a statute requiring the executive branch to provide tax returns to a congressional committee must be interpreted as consistent with Congress's implied oversight authority. Request for Tax Returns, *supra* note 169, at 1.

346. See, e.g., Depositions in the Impeachment Context, *supra* note 301, at 2-3 ("We believe that a congressional committee must likewise make a showing of need that is sufficient to overcome the privilege in connection with an impeachment inquiry.").

347. Jonathan Shaub, *Obstruction of Congress, Impeachment and Constitutional Conflict*, LAWFARE (Jan. 10, 2020, 2:56 PM), <https://www.lawfareblog.com/obstruction-congress-impeachment-and-constitutional-conflict> [<https://perma.cc/U6UK-UG5H>].

348. See Depositions in the Impeachment Context, *supra* note 301, at 4-5 (concluding that executive branch officials have the constitutional authority to refuse to comply with deposition subpoenas issued as part of the House's impeachment inquiry if agency counsel is not permitted to attend); Letter from Steven A. Engel, Assistant Att'y Gen., Off. of Legal Couns., U.S. Dep't

privilege still theoretically applies—before undertaking any balancing with respect to the president’s authority to withhold specific information—the prophylactic doctrines designed to protect the president’s affirmative privilege to control information continue to apply as well.<sup>349</sup>

But if understood properly as an immunity from oversight demands, the Executive’s privilege has no application to compulsory process issued pursuant to Congress’s impeachment authority. As Raoul Berger notes, with respect to the English parliamentary practice on which the Framers modeled the House’s impeachment authority, “Just as there exists no executive limit on the parliamentary power to impeach, so there can be no executive limit on the power of Parliament to *inquire* whether executive conduct amounts to impeachable misconduct.”<sup>350</sup>

The constitutional authority of Congress to conduct legislative oversight, whatever its limits, is distinct from the respective constitutional authorities of the House and Senate relative to impeachment.<sup>351</sup> In inferring authority for Congress to pursue oversight, including by compulsory process, the Supreme Court has made clear that the foundation of the authority is legislative.<sup>352</sup> For example, in *Senate Select*, the D.C. Circuit concluded that “[w]hile fact-finding by a legislative committee is undeniably a part of its task, legislative judgments normally depend more on the predicted consequences of proposed legislative actions and their political acceptability, than on precise reconstruction of past events.”<sup>353</sup> And the Supreme Court specified that Congress’s implied oversight authorities

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of Just., to Pat A. Cipollone, White House Couns. 1–2 (Nov. 3, 2019) [hereinafter Eisenberg Immunity Letter], <https://www.justsecurity.org/wp-content/uploads/2020/01/ukraine-Clearinghouse-olc-letter-opinion-immunity-of-deputy-nsa-counsel-2019.11.3.pdf> [<https://perma.cc/UGZ8-39A3>] (advising the White House that presidential advisers who had been subpoenaed to testify as part of the impeachment inquiry were immune from those subpoenas).

349. Depositions in the Impeachment Context, *supra* note 301, at 2–3.

350. BERGER, *supra* note 5, at 26–27.

351. See *Trump v. Mazars USA, LLP*, 940 F.3d 710, 754–67 (D.C. Cir. 2019) (Rao, J., dissenting) (collecting historical examples and discussing the distinction between the two constitutional authorities), *vacated and remanded*, 140 S. Ct. 2019 (2020).

352. See, e.g., *Watkins v. United States*, 354 U.S. 178, 187 (1957) (“The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad.”).

353. *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 732 (D.C. Cir. 1974) (en banc); see also Barr Memorandum, *supra* note 27, at 159 (“Congress will seldom have any legitimate legislative interest in knowing the precise predecisional positions and statements of particular executive branch officials.”).

may be exercised only with respect to a subject “on which legislation could be had”<sup>354</sup> and that “the power to investigate must not be confused with any of the powers of law enforcement.”<sup>355</sup> When exercising its oversight authority, Congress is not “a law enforcement or trial agency.”<sup>356</sup>

But impeachment reflects a separate constitutional authority, a judicial power that represents an exception to the otherwise solely legislative authority granted by the Constitution.<sup>357</sup> The Constitution grants the House of Representatives “the sole [p]ower of [i]mpeachment.”<sup>358</sup> The House acts as “a prosecutorial body in an impeachment context,” similar to the role of a grand jury.<sup>359</sup> And the Senate sits as a court in judgment over the House charges, deciding whether to convict and remove the official from office.<sup>360</sup> Any implied authorities the House and Senate have in fulfillment of those respective prosecutorial and judicial roles in impeachment are thus distinct from the bodies’ implied oversight authorities.<sup>361</sup>

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354. *McGrain v. Daugherty*, 273 U.S. 135, 177 (1927).

355. *Quinn v. United States*, 349 U.S. 155, 161 (1955).

356. *Watkins*, 354 U.S. at 187.

357. *See Kilbourn v. Thompson*, 103 U.S. 168, 190–91 (1880) (noting the importance of having the functions of each branch of government separated and clearly defined, with notable and explicit exceptions including impeachment); *Hayburn’s Case*, 2 U.S. (2 Dall.) 409, 413 (1792) (quoting a 1792 letter from the North Carolina circuit court to the president claiming that “no judicial power of any kind appears to be vested [in the legislature], but the important one relative to impeachments”).

358. U.S. CONST. art. I, § 2, cl. 5.

359. Keith E. Whittington, *Must the House Vote To Authorize an Impeachment Inquiry?*, LAWFARE (Oct. 9, 2019, 3:10 PM), <https://www.lawfareblog.com/must-house-vote-authorize-impeachment-inquiry> [<https://perma.cc/3AKP-DFCM>]; *see also* THE FEDERALIST NO. 65, at 397 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting impeachment transforms the House into a “national inquest”).

360. U.S. CONST. art. I, § 3, cls. 6, 7; *see also* 1 THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE FOR THE USE OF THE SENATE OF THE UNITED STATES § 53.16 (Washington, Gov’t Printing Off. 1993) (1801) (“This [Senate] trial, though it varies in external ceremony, yet differs not in essentials from criminal prosecutions before inferior courts.”).

361. Of course, that leaves open the question of which branch gets to determine whether a demand for information is an oversight demand or an impeachment demand. OLC concluded that subpoenas issued by House committees prior to the full House voting to authorize an impeachment inquiry were not issued pursuant to congressional impeachment authority and need not be complied with. *See* House Comms.’ Auth. To Investigate for Impeachment, 43 Op. O.L.C., slip op. at 2–3 (Jan. 19, 2020) (arguing that House committees have no authority to issue subpoenas in the impeachment context except once a formal impeachment has been approved by the full House). The Trump administration thus adopted a blanket refusal to comply with any information demands from the House of Representatives in part because it questioned whether the inquiries were in fact an impeachment inquiry. *See* Letter from Pat A. Cipollone, Couns. to

Moreover, any *limitations* on that impeachment authority—such as a presidential immunity—must also be inferred from that authority and general principles of separation of powers. Understanding executive privilege as an affirmative presidential authority to control information, as the executive branch does, locates the source of power in Article II of the Constitution and allows the executive to claim that authority no matter what power Congress or one of its houses is exercising. Understanding executive privilege as an immunity specific to Congress’s implied oversight authority, as this Article proposes, locates the privilege in the specific grant of power to Congress in Article I of the Constitution, which prevents the automatic extension of executive privilege to impeachment.

Consistent with the theoretical understanding of the Executive’s privilege as an oversight immunity without application to impeachment, presidents and others have recognized throughout the history of the country that their ability to withhold information from Congress disappears in the context of impeachment. In the same initial debates that occurred regarding Washington’s authority to withhold information requested by Congress, he and his advisers agreed that the president would not have such authority during impeachment.<sup>362</sup> As President James K. Polk put it, acting pursuant to its impeachment authority, the House could “penetrate into the most secret recesses of the Executive Departments[,] . . . command the attendance of any and every agent of the Government, and compel them to produce all papers, public or private, official or unofficial.”<sup>363</sup> President Theodore

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the President, to Nancy Pelosi, Speaker, U.S. House of Representatives 2–3 (Oct. 8, 2019), <https://www.nytimes.com/interactive/2019/10/08/us/politics/white-house-letter-impeachment.html> [<https://perma.cc/CP5V-TJEA>] (noting that the president would not turn over papers under requests for documents by the House in its informal impeachment inquiry).

362. See 4 ANNALS OF CONG. 760–62 (1796) (statement of President George Washington) (noting that the only authority the House had to request a treaty document was through impeachment, “which the resolution ha[d] not expressed”); Jean Galbraith & Michel Paradis, *George Washington’s Advisors Agreed: Impeachment Did Away with Executive Privilege*, JUST SEC. (Oct. 25, 2019), <https://www.justsecurity.org/66713/george-washingtons-advisors-agreed-impeachment-did-away-with-executive-privilege> [<https://perma.cc/36CS-YMKS>] (noting that George Washington’s advisers had expressed opinions that a formal inquiry was required before documents could be subpoenaed by the president); Jean Galbraith & Michel Paradis, *Opinion, Impeachment Trumps Executive Privilege. Ask George Washington*, WALL ST. J. (Oct. 22, 2019, 6:41 PM), <https://www.wsj.com/articles/impeachment-trumps-executive-privilege-ask-george-washington-11571784069> [<https://perma.cc/99QR-HPZR>] (same).

363. James Polk, Message to the House of Representatives (Apr. 20, 1846), in 6 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 43, at 2284.

Roosevelt indicated that the only way Congress would get the papers provided him by the Bureau of Corporations was “through [his] impeachment.”<sup>364</sup> As one of the Framers of the Constitution, James Wilson, described in an essay on the British Parliament, the House of Commons has “the character of grand inquisitors of the realm” and “[t]he proudest ministers of the proudest monarchs have trembled at the[] censures” of the House of Commons and “have appeared at the bar of the house, to give an account of their conduct, and ask pardon for their faults.”<sup>365</sup> A number of other statements by presidents similarly distinguish between Congress’s oversight authority and its impeachment authority, recognizing that there is no executive privilege against demands for information in furtherance of the latter.<sup>366</sup>

Even some of the foundational materials on which the executive branch relies for its doctrine of executive privilege make clear that impeachment is different. Attorney General Jackson’s 1941 memorandum on the confidentiality of law-enforcement files<sup>367</sup> remains<sup>368</sup> the seminal document on which the executive branch

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364. Cox, *supra* note 2, at 1403–04 & n.72.

365. James Wilson, On the Legislative Authority of the British Parliament, in 2 THE WORKS OF JAMES WILSON 520 (James DeWitt Andrews ed., Chi., Callaghan & Co. 1896).

366. President Cleveland, for example, withheld papers from the Senate in 1886 related to his suspension of the U.S. Attorney for Alabama, noting that the Senate had no right to the papers “save through the judicial process of trial on impeachment.” Grover Cleveland, Message to the Senate (Mar. 1, 1886), in 8 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 43, at 378–79. President Jackson similarly opined that “where there is the slightest reason to suspect corruption or abuse of trust, no obstacle which I can remove, shall be interposed to prevent the fullest scrutiny by all legal means. The offices of all the Departments will be opened to you, and every proper facility furnished for this purpose.” Letter from President Andrew Jackson, to Henry A. Wise, Chairman, Select Comm. on Investigations of Abuses & Frauds of the Exec. Dep’ts, House of Representatives (Jan. 26, 1837), [https://www.loc.gov/resource/maj.01097\\_0261\\_0274/?sp=1&st=text](https://www.loc.gov/resource/maj.01097_0261_0274/?sp=1&st=text) [<https://perma.cc/N4AQ-LPH2>]. And President Grant noted the House’s authority to “require as a right in its demand upon the Executive” all information necessary to an impeachment inquiry. Ulysses S. Grant, Message to the House of Representatives (May 4, 1876), in 7 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 43, at 362.

367. See Jackson Memorandum, *supra* note 44, at 46 (“It is the position of this Department, restated now with the approval of and at the direction of the President, that all investigative reports are confidential documents of the executive department of the Government . . .”).

368. See, e.g., Rod J. Rosenstein, Deputy Att’y Gen., U.S. Dep’t of Just., Remarks at the Bar Association of Montgomery County’s Law Day Celebration (May 4, 2008), <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-bar-association-montgomery> [<https://perma.cc/D9C4-ZG53>] (quoting at length from Jackson’s memorandum to support the “bedrock principle . . . that [the Department] do[es] not discuss investigations”).

relies<sup>369</sup> to withhold such information from Congress. But at the end of the analysis, Jackson noted, “where the public interest has seemed to justify it, information as to particular situations has been supplied to congressional committees.”<sup>370</sup> And he then identified one such situation: “[P]ertinent information would be supplied in impeachment proceedings . . . for the good of the administration of justice.”<sup>371</sup>

The only formal assertion of executive privilege in an impeachment inquiry occurred in June 1974, when President Nixon refused to turn over the Watergate tapes to the House during its formal impeachment investigation.<sup>372</sup> Nixon argued that

[i]f the Institution of an impeachment inquiry against a President were permitted to override all restraints of separation of powers, this would spell the end of the doctrine of separation of powers; it would be an open invitation to future Congresses to use an impeachment inquiry, however frivolously, as a device to assert their own supremacy over the executive, and to reduce executive confidentiality to a nullity.<sup>373</sup>

President Trump never formally asserted privilege, either during the House impeachment investigation or his Senate trial. Instead, he relied solely on the *potential* applicability of privilege and asserted prophylactic doctrines—testimonial immunity and the deposition-counsel requirement—to reject demands for information, and he instructed officials not to comply with congressional subpoenas based on his constitutional authority to control information.<sup>374</sup>

Nixon’s assertion in 1974 reflected his administration’s view of executive privilege as an absolute authority to withhold information from Congress, the courts, and the public that is unreviewable in court.<sup>375</sup> That conception of an absolute privilege against Congress and

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369. See Linder Letter, *supra* note 41, at 3–4 (discussing Jackson’s position).

370. Jackson Memorandum, *supra* note 44, at 51.

371. *Id.* (emphasis added).

372. See Philip Shabecoff, *President Defies House Subpoena for More Tapes*, N.Y. TIMES, June 11, 1974, at A1, A30 (noting that Nixon had invoked executive privilege as a defense to releasing the tapes).

373. *Text of Letter to Rodino from President Refusing To Furnish Subpoenaed Evidence*, N.Y. TIMES, June 11, 1974, at A30 [hereinafter Letter to Rodino].

374. See Depositions in the Impeachment Context, *supra* note 301, at 4–5; Eisenberg Immunity Letter, *supra* note 348, at 1–2.

375. As Nixon wrote in his letter, “[t]his is the key issue in my insistence that the executive must remain the final arbiter of demands on its confidentiality, just as the legislative and judicial



the courts was rejected unanimously in *Nixon*, the reasoning of which makes clear that a specific need for information in the course of judicial proceedings overcomes any generalized confidentiality interests.<sup>376</sup> President Nixon's determination that privilege was available in impeachment, supported by the views of Attorney General Kleindienst, is a historical outlier. In an appendix to a lengthy 1974 OLC memorandum on impeachment precedents, the office collected historical statements about Congress's authority to demand information in impeachment.<sup>377</sup> Kleindienst's contention that the privilege applied—and, indeed, remained within the absolute discretion of the president—is an extreme outlier in that collection.<sup>378</sup> No other historical precedent in that collection or elsewhere supports the authority of the president to withhold information that is relevant in an impeachment inquiry, particularly not based on generalized confidentiality interests.

Understanding the Executive's privilege as a limit on oversight authority rather than an affirmative presidential authority or an evidentiary privilege thus accounts for the historical understanding that Congress's demands for information pursuant to its impeachment authority are distinct from its oversight demands. As an 1843 House Report stated, "The House of Representatives has the power of impeachment . . . a power which implies the right of inquiry on the part of the House to the fullest and most unlimited extent."<sup>379</sup> Different

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branches must remain the final arbiters of demands on their confidentiality." Letter to Rodino, *supra* note 373, at A30.

376. *United States v. Nixon*, 418 U.S. 683, 713 (1974).

377. *See generally* OFF. OF LEGAL COUNS., DEP'T OF JUST., LEGAL ASPECTS OF IMPEACHMENT: AN OVERVIEW, app. III (1974) (collecting statements).

378. *Id.* app. III at 10–13.

379. 3 ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES 183 (1907). In the *Mazars* litigation over President Trump's personal financial records, the D.C. Circuit concluded that the House had the power to investigate misconduct pursuant to its legislative authority and to "choose to move from legislative investigation to impeachment" when it wanted to do so. *Trump v. Mazars USA, LLP*, 940 F.3d 710, 737 (D.C. Cir. 2019), *vacated and remanded*, 140 S. Ct. 2019 (2020). In their arguments to the Supreme Court, the House relied solely on its legislative authority, not its impeachment authority. Ultimately, the Court upheld the House's authority to seek the records pursuant to its legislative authority but remanded for the lower courts to apply a heightened scrutiny to the subpoenas since they sought information from the President. *Mazars*, 140 S. Ct. at 2034–36; *id.* at 2037 (Thomas, J., dissenting) (noting the House had not relied on its impeachment authority). However, a subpoena issued by a committee pursuant to a House rule allowing for a subpoena in furtherance of the committee's legislative functions could arguably be considered *not* in furtherance of the House's impeachment authority. The OLC relied on this conclusion to advise the White House that it need not comply with

inferences about Congress's authority to demand information thus arise from its distinct legislative and impeachment authorities.

During the Trump impeachment inquiry, OLC asserted that the testimonial immunity doctrine prohibited a deputy White House counsel from complying with a House subpoena because "the commencement of an impeachment inquiry only heightens the need to safeguard the separation of powers."<sup>380</sup> During the Nixon impeachment inquiry, Berger took the opposite view, arguing that the impeachment power "constitutes a deliberate breach in the doctrine of separation of powers."<sup>381</sup> In his view, that meant that "no arguments drawn from that doctrine (such as executive privilege) may apply to the preliminary inquiry by the House or the subsequent trial by the Senate."<sup>382</sup>

The better argument, however, is that impeachment is not a "deliberate breach" of the separation of powers but a deliberate *exception* to the separation of powers—a separate, purposeful grant of investigative and judicial authority to Congress. That judicial power is not limited by doctrines derived from the separation of powers that limit Congress's *legislative* authority. And the Executive's privilege is best understood—both as a matter of constitutional interpretation and historical practice—as a limit only on Congress's implied authorities in furtherance of its legislative functions. No argument drawn from a limit on oversight should be applied to limit Congress's separate authority to consider and try impeachments. That does not, of course, foreclose arguments that there should be limits on Congress's impeachment authority or procedures established to protect certain information from public disclosure. But those arguments have to begin explicitly with the nature and historical understanding of impeachment. And they have to contend with a wealth of history that suggests that Congress's powers of inquiry are at their zenith in the course of considering or trying impeachment.

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subpoenas from House committees issued prior to the full House vote to authorize an impeachment inquiry and on which a former official relied in a declaration judgment action seeking to determine whether he must comply with a subpoena for testimony issued prior to the full House vote. Complaint at 11–14, *Kupperman v. U.S. House of Representatives*, No. 1:19-cv-3224 (D.D.C. Oct. 25, 2019).

380. Kyle Cheney & Andrew Desiderio, *White House Officials Spurn Demand To Testify in Impeachment Probe*, POLITICO (Nov. 4, 2019, 10:02 AM), <https://www.politico.com/news/2019/11/04/white-house-officials-testify-impeachment-065318> [<https://perma.cc/G3SH-45K3>].

381. Raoul Berger, *Impeachment: An Instrument of Regeneration*, HARPER'S MAG., Jan. 1974, at A14.

382. *Id.*

## CONCLUSION

Congress and the executive branch have long had contrary constitutional understandings of executive privilege. The judiciary has never resolved this dispute. Despite the prevailing view that resolution is neither possible nor advisable, this Article proposes that it is now necessary. The constitutional doctrine that the executive branch has developed allows it to nullify oversight and, as demonstrated by the impeachment proceedings against President Trump, even nullify Congress's authority to gather information when considering impeachment.

Almost every argument about the nature and existence of executive privilege is grounded in and relies on historical practice. This Article is no different. First principles of constitutional interpretation must be paired with that history. Executive privilege is typically described as an implicit constitutional authority, just as the countervailing congressional legislative oversight authority has been described as an implicit constitutional authority by the Supreme Court. Rather than inferring an affirmative constitutional authority belonging to the president that counteracts Congress's implicit authority, the better interpretational practice defines Congress's authority in a manner that accounts for historical practice.

That definition is the Executive's privilege, an immunity from compulsory process issued by Congress in the exercise of its legislative oversight authority. That immunity is contingent, and it applies only where the president both determines the release of that information would cause concrete, identifiable harm to the national interest and explains the basis for that determination. Understanding executive privilege as this narrow immunity accords with history and curbs the prophylactic practices and constitutional doctrines on which the executive branch now relies to thwart congressional demands for information. The definition also makes clear that the doctrine of executive privilege does not apply to impeachment. Establishing this theoretical foundation is both possible and advisable. And it would go a long way toward restoring the constitutional balance between the branches in information disputes.