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TESTIMONY

Statement of

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"Breaking the Logjam Part 3: Restoring Transparency and Accountability in the Accommodation Process"

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

My name is Sean Stiff, and I am a legislative attorney in the American Law Division of the Congressional Research Service. I am honored to testify today in the Subcommittee's hearing on executive privilege, testimonial immunities, and the accommodations process.

As the Supreme Court has explained, Congress's ability to legislate "wisely" and "effectively" depends on information access.[1] Each year the House and the Senate seek and receive large amounts of information from the executive branch, in written or oral form. This information helps Congress assess the efficiency and effectiveness of existing laws, as well as the need for new laws. Sometimes, though, "mere requests" for information are not enough; compulsion is needed.[2] A committee letter requesting certain information can lead to more formal methods of obtaining it, including subpoenas and contempt votes. Whether formal or informal, congressional information requests can implicate executive branch interests in confidentiality or presidential autonomy and thus lead to assertions of executive privilege or testimonial immunity.[3]

Stalemate can ensue. Though interbranch information disputes have occurred since the earliest days of the Republic, they have rarely resulted in interbranch litigation.[4] For nearly 185 years, until 1973, the political branches resolved their disputes through the accommodations process without involving the federal courts.[5] Rarer still are judicial rulings in an interbranch dispute on the merits of an executive privilege or testimonial immunity claim.

These merits rulings provide some insight on how courts might resolve executive privilege assertions and absolute testimonial immunity claims.[6] The experience of interbranch litigation also contains lessons on the practical utility of litigation. These lessons are mixed. Congress has won favorable rulings through litigation, but it has suffered losses as well and encountered delay.[7] Delay arguably favors the executive branch's desire in information stalemates to maintain the status quo.[8] Much more commonly, disputes are resolved through the accommodations process. Whether litigation and the accommodations process are adequate to the task of allowing Congress to effectively legislate is open to debate and can vary across disputes, but as described below, Congress has tools to facilitate information access.[9]

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

[2] *Id*.

[3] *See infra* "Constitutional Principles: The Power of Inquiry and Executive Privilege" and "Testimonial Immunity."

[4] Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2031 (2020) ("Congress and the Executive have . . . managed for over two centuries to resolve such disputes among themselves without the benefit of guidance from us.").

[5] *In re* Sealed Case, 121 F.3d 729, 739 n.10 (D.C. Cir. 1997) (per curiam) (citing Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974), as the first judicial involvement in "executive-congressional disputes over access to information"); *see also* Senate Select Comm. on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51, 61 (D.D.C. 1973) (dismissing subpoena enforcement action for lack of jurisdiction). In a 1928 decision, members of a Senate special investigative committee brought suit to obtain documents associated with a disputed Senate election, but that claim was dismissed on jurisdictional grounds due to a lack of Senate authorization for the suit. Reed v. Delaware Cty. Comm., 277 U.S. 376, 389 (1928) (concluding that "the Senate did not intend to authorize the committee, or anticipate that there might be need, to invoke the power of the Judicial Department").

[6] *See infra "*Judicial Involvement in Interbranch Executive Privilege Disputes."

[7] *See infra* "Assessing Litigation Outcomes."

[8] *See, e.g.*, Andrew McCanse Wright, *Constitutional Conflict and Congressional Oversight*, 98 MARQ. L. REV. 881, 928 (2014).

[9] *See infra* "Congress's Options to Facilitate Information Access."

Constitutional Principles: The Power of Inquiry and Executive Privilege

Under Article I of the Constitution, Congress is vested with enumerated legislative powers.[10] These enumerated powers do not include an explicit power to "conduct investigations or issue subpoenas."[11] Yet the Supreme Court has characterized this power of inquiry as "inherent in the legislative process."[12] Without access to information, "Congress would be shooting in the dark, unable to legislate" intelligently.[13] Congress's implied power of inquiry is "broad,"[14] addressing any subject "on which legislation could be had."[15]

Congressional requests sometimes come into conflict with what is known as *executive privilege*. As with the power of inquiry, there is no explicit reference in the Constitution to "a privilege of confidentiality" for the President.[16] The Supreme Court recognized in its landmark decision in *United States v. Nixon*, though, that to the extent an interest in confidentiality "relates to the effective discharge of a President's powers, it is constitutionally based."[17]

Executive privilege is not a single type of privilege. Instead, it consists of several component privileges.[18] The political branches have adopted different views on how these privileges apply, if at all, in interbranch disputes. Congress has generally interpreted executive privilege narrowly, limiting its scope to the types of national security and diplomatic information referenced in *Nixon*, as well as presidential communications.[19] The executive branch has viewed executive privilege more broadly, extending confidentiality further to what is assertedly needed for the effective execution of the law.[20] Under the executive branch's view, the component privileges include:

- the *state secrets privilege*, which protects certain military, diplomatic, and national security information;[21]
- the *presidential communications privilege*, which generally protects confidential communications between the President and his advisors that relate to presidential

[10] *See* U.S. CONST. art I, §§ 1, 8.

[11] Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2031 (2020); *see also* Eastland v. U. S. Servicemen's Fund, 421 U.S. 491, 504 (1975) ("Issuance of subpoenas such as the one in question here has long been held to be a legitimate use by Congress of its power to investigate.").

[12] Watkins v. United States, 354 U.S. 178, 187 (1957).

[13] *Mazars*, 140 S. Ct. at 2031.

[14] *Watkins*, 354 U.S. at 187.

[15] McGrain v. Daugherty, 273 U.S. 135, 177-78 (1927); *but see Mazars*, 140 S. Ct. at 2032 (explaining that there is no "power to expose for the sake of exposure" or to "try" someone for "wrongdoing" (internal quotation marks omitted)).

[16] United States v. Nixon, 418 U.S. 683, 711 (1974).

[17] *Id*.

[18] *In re* Sealed Case, 121 F.3d 729, 736 (D.C. Cir. 1997) (per curiam) ("executive officials have claimed a variety of privileges to resist disclosure of information").

[19] *See, e.g.*, Br. for Appellant Comm. on Oversight & Gov't Reform at 26-27, Comm. on Oversight & Gov't Reform v. Lynch, No. 16-5078 (D.C. Cir. Oct. 6, 2016) (arguing that the district court erred in deciding that the deliberative-process privilege, a common-law privilege, allows the executive branch to withhold information sought by a congressional subpoena); H. COMM. ON OVERSIGHT AND GOV'T REFORM, 110TH CONG., REP. ON PRESIDENT BUSH'S ASSERTION OF EXECUTIVE PRIVILEGE IN RESPONSE TO THE COMMITTEE SUBPOENA TO ATTORNEY GENERAL MICHAEL B. MUKASEY 8 (Comm. Print 2008) ("The Attorney General's argument that the subpoena implicates the 'law enforcement component' of executive privilege is equally flawed. There is no basis to support the proposition that a law enforcement privilege, particularly one applied to closed investigations, can shield from congressional scrutiny information that is important for addressing congressional oversight concerns. The Attorney General did not cite a single judicial decision recognizing this alleged privilege.").

[20] *See Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 116 (1984).

[21] *See Congressional Requests for Confidential Executive Branch Information*, 13 Op. O.L.C. 153, 154 (1989).

decisionmaking, as well as a subset of communications not involving the President but made to advise the President;[22]

- the *deliberative process privilege*, which protects predecisional and deliberative communications within executive branch agencies;[23] and
- the *law enforcement privilege*, which protects the contents of open (and sometimes closed) law enforcement files, including communications related to investigative and prosecutorial decisionmaking.[24]

Though the executive branch might assert confidentiality for one of these reasons or another, it might generally invoke "executive privilege" when doing so.[25] However, these asserted privileges are properly examined separately. They derive from different sources of law with different justifications, and courts have weighed them against Congress's power of inquiry differently.[26] In *Nixon*, for example, the Supreme Court wrote that its prior cases showed a "high degree of deference" to the President's interest in maintaining "military or diplomatic secrets."[27] Less deference was owed, the Court explained, to the President's more generalized interest in maintaining the confidentiality of his other communications in the face of a criminal trial subpoena.[28]

Testimonial Immunity

Executive privilege might be invoked to shield a particular document from a congressional committee or to justify a witness's refusal to answer particular questions. However, the executive branch has sometimes interposed a distinct objection to congressional inquiries: the doctrine of testimonial immunity.[29]

The doctrine of absolute testimonial immunity purports to prevent "Congress from compelling even the appearance of a senior presidential adviser—as a function of the independence and autonomy of the President himself."[30] Current and former senior advisors to the incumbent President are, in the view of the Department of Justice (DOJ) Office of Legal Counsel (OLC), "an extension of the President."[31] OLC argues that these advisors' compelled testimony about their "official duties" would violate the separation of powers by infringing on the President's autonomy and ability to receive candid advice.[32]

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[22] *See Assertion of Exec. Privilege Regarding White House Couns.'s Off. Documents*, 20 Op. O.L.C. 2 (1996).

[23] *See Assertion of Executive Privilege Over Documents Generated in Response to Congressional Investigation into Operation Fast and Furious*, 36 Op. Att'y Gen. 1 (2012).

[24] *See Protective Assertion of Exec. Privilege over Unredacted Mueller Report and Related Investigative Files*, 43 Op. O.L.C. 374 (1982).

[25] *See, e.g.*, *Response to Cong. Requests for Info. Regarding Decisions Made Under the Independent Couns. Act*, 10 Op. O.L.C. 68, 75 (1986).

[26] *See infra* "Judicial Involvement in Interbranch Executive Privilege Disputes."

[27] United States v. Nixon, 418 U.S. 683, 710-11 (1974).

[28] *Id*.

[29] *See Breaking the Logjam Part 2: The Office of Legal Counsel's Role in Shaping Executive Privilege Doctrine: Hearing Before the Subcomm. on Federal Courts, Oversight, Agency Action, and Federal Rights*, 117th Cong. (characterizing the testimonial immunity doctrine as "discrete" from executive privilege) (statement of Christopher Schroeder, Assistant Att'y Gen., Off. of Legal Counsel).

[30] *Testimonial Immunity Before Cong. of the Former Couns. to the President*, 2019 WL 2315338, at *2 (May 20, 2019); Comm. on Judiciary v. Miers, 558 F. Supp. 2d 53, 100 (D.D.C. 2008) (summarizing the executive branch's argument) ("forcing close presidential advisors to testify before Congress would be tantamount to compelling the President himself to do so").

[31] *Testimonial Immunity Before Cong. of the Former Couns. to the President*, 2019 WL 2315338, at *3, 11 ("[W]e find no material distinction between the compelled congressional testimony of current and former senior advisers to the President.").

[32] *Id*. at *3-4.

On this theory, senior advisors are constitutionally distinct from other executive branch officers who "can and do testify before Congress," including those who hold statutory office, are appointed with Senate advice and consent, and are tasked with administering statutes.[33] Congress has rejected this theory.[34]

DOJ has articulated a different standard of testimonial immunity for an immediate advisor of a former President.[35] Advisors to a former President, DOJ argues, possess only "a form of qualified immunity."[36] Under this claimed immunity, Congress cannot compel such an advisor to testify about their official duties if that testimony "is not necessary to the exercise of Congress's investigative authority."[37]

Judicial Involvement in Interbranch Executive Privilege Disputes

How a court would address the merits of an interbranch information dispute would depend on the privilege or immunity asserted. Much would depend, as well, on how the political branches articulate their interests in accessing or shielding information in cases involving a qualified privilege, such as the presidential communications privilege.[38] The court's analysis in an interbranch dispute would not necessarily be governed by executive privilege decisions that do not involve a congressional subpoena, such as cases involving grand jury subpoenas for assertedly privilege material.[39] Interbranch disputes pose unique separation of powers questions not present in these other cases, such as how to weigh the competing constitutional interests of the political branches in particular information.[40] The few interbranch disputes that addressed the merits of an executive privilege claim are thus the best judicial guidance available.[41] These cases concern the presidential communications privilege, the deliberative process privilege, and claims of absolute testimonial immunity.[42]

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[33] *Id*. at *2.

[34] *See, e.g*., Letter from Jerrold Nadler, Chairman, H. Comm. on the Judiciary, to Donald F. McGahn II, at 1 (May 20, 2019) (stating that although DOJ's Office of Legal Counsel "has produced an opinion purporting to excuse you from testifying" on the basis of testimonial immunity, "that opinion has no support in relevant case law, and its arguments have been flatly rejected by the courts").

[35] Statement of Interest of the United States 2, Meadows v. Pelosi, No. 21-cv-3217 (D.D.C. filed July 15, 2022).

[36] *Id*. at 2.

[37] *Id*. at 9.

[38] *See, e.g.*, Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 731 (D.C. Cir. 1974) (assessing a select committee's claim that tape recordings of presidential communications "could help engender the public support needed for basic reforms in our electoral system" (internal quotation marks omitted)).

[39] *In re* Sealed Case, 121 F.3d 729, 753 (D.C. Cir. 1997) (per curiam) ("Our determination of how far down into the executive branch the presidential communications privilege goes is limited to the context before us, namely where information generated by close presidential advisers is sought for use in a judicial proceeding, and we take no position on how the institutional needs of Congress and the President should be balanced.").

[40] *See, e.g*., United States v. AT&T, 551 F.2d 384, 394 (D.C. Cir. 1976) (noting the challenges for a court weighing Congress's need for information to "assure that appropriated funds are not being used for illegal warrantless domestic electronic surveillance" against the effect that public disclosure of national security information might have on intelligence activities or diplomatic relations).

[41] The Court's decision in *Trump v. Mazars USA, LLP*, concerned three congressional subpoenas concerning President Donald Trump, but the subpoenas concerned "nonprivileged, private information," which the Supreme Court said "by definition does not implicate sensitive Executive Branch deliberations." 140 S. Ct. 2019, 2022, 2033 (2020) (addressing only whether the subpoenas fell within Congress's power of inquiry).

[42] No court hearing an interbranch dispute appears to have reached the merits of a state secrets privilege or an asserted law enforcement privilege. While *United States v. AT&T* featured a congressional subpoena for certain national security information, the court twice opted to encourage accommodation rather than rule on the merits of disclosure. 551 F.2d 384 (D.C. Cir. 1976) (*AT&T I*), *appeal after remand* 567 F.2d 121 (D.C. Cir. 1977) (*AT&T II*) (per curiam). Two cases included executive branch withholding of law enforcement information, but the courts in both cases likewise did not resolve those disputes. *See* Comm. on (continued...)

The first judicial decision on the merits in an interbranch dispute involved the presidential communications privilege.[43] In *Senate Select Committee on Presidential Campaign Activities v. Nixon*, the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) applied a "staged decisional structure" to a subpoena for recorded conversations between President Richard Nixon and White House Counsel John Dean.[44] Communications involving the President himself were "presumptively privileged" from even *in camera* review by a court.[45] To overcome this presumption, the court required the Senate Select Committee to make a "strong showing of need" for the materials such that access to the records was necessary to responsibly fulfill its duties.[46] The D.C. Circuit concluded that the Committee failed to carry that burden based on the particular oversight[47] and legislative justifications[48] it had offered. Among other unique facts present in the case, the House Judiciary Committee had already obtained copies of the tapes from a grand jury as part of its impeachment investigation.[49] In the D.C. Circuit's view, the Senate Select Committee's "immediate oversight need for the subpoenaed tapes" was "merely cumulative."[50] The court said that if the Committee had made the requisite strong showing, President Nixon would then have been directed to submit the tapes for *in camera* review, "together with particularized claims" of privilege.[51] The court would then have weighed those claims against "whatever public interests disclosure might serve."[52]

A court has also ruled on an interbranch dispute involving the deliberative process privilege. In *Committee on Oversight & Government Reform v. Lynch*, a House committee subpoenaed information related to Operation Fast & Furious and the DOJ's retraction of certain inaccurate assurances it had made

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Oversight & Gov't Reform v. Lynch, 156 F. Supp. 3d 101, 119-20 (D.D.C. 2016) (deciding that DOJ's withholding of information as "law enforcement sensitive material" was "best left to the process of negotiation and accommodation" (internal quotation marks omitted)); United States v. House of Representatives, 556 F. Supp. 150, 153 (D.D.C. 1983) (declining to exercise declaratory judgment jurisdiction over an executive branch complaint that asked the court to declare that an executive privilege claim over "open law enforcement files" was valid, reasoning that a declaration was not warranted because the same privilege could be raised as a defense to any subsequent contempt proceedings against the official responsible for the withholding). A district court has also dismissed on standing grounds a suit brought by a legislative branch agent, the Comptroller General, for access to executive branch information. Walker v. Cheney, 230 F. Supp. 2d 51, 74 (D.D.C. 2002). Finally, courts have considered privilege claims by former presidents. *See* CRS Report R47102, *Executive Privilege and Presidential Communications: Judicial Principles*, by Todd Garvey, at 27-29.

[43] *See supra* note 5.

[44] Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 730 (D.C. Cir. 1974).

[45] *Id*. When a court engages in *in camera* review of particular information, the party who possesses the information submits it to the court *ex parte*—that is, without disclosing it to the other party who seeks its production. *See, e.g.*, BLACK'S LAW DICT. (in camera) ("In the judge's private chambers."). The court then reviews the material to decide whether under the governing legal standard the court should order its production. *See, e.g.*, Nixon v. Sirica, 487 F.2d 700, 714 (D.C. Cir. 1973) (en banc) (per curiam) (explaining that courts frequently order "*in camera* inspection of documents for which a privilege was asserted in order to determine the privilege's applicability"). The term *in camera* review is also use in the accommodations process to generally describe instances in which the executive branch allows congressional actors to review, but not retain, executive branch information. *See* Agreement Concerning Accommodation, Comm. on Oversight and Reform, U.S. House of Representatives v. Barr, No. 19-cv-03557 (D.D.C. Aug. 30, 2021) (describing *in camera* document review procedures for Committee members and staff).

[46] *Senate Select Comm. on Presidential Campaign Activities*, 498 F.2d at 730.

[47] *Id.* at 732.

[48] *Id*. (reasoning that the select committee's legislative need was insufficient because "legislative judgments" allegedly "depend more on the predicted consequences of proposed legislative actions" rather than on a reconstruction of past events and that the select committee purportedly could make such legislative judgments using partial transcripts of the tapes that had been released).

[49] *Id*.

[50] *Id*. The D.C. Circuit also reasoned that public release of tape transcripts, with partial deletions, weighed against the committee's need for copies of the tapes. *See id*. at 732-33.

[51] *Id*. at 731.

[52] *Id*.

about the operation.[53] The executive branch withheld information that postdated the inaccurate DOJ assurance, citing the deliberative process privilege.[54] The district court followed a two-step analysis to resolve the privilege claim. First, the district court considered whether certain documents fell within the scope of the privilege by being *predecisional* (i.e., information that did not "simply state or explain a decision" already reached) and *deliberative* (i.e., information that was not "purely factual").[55] The district court found that DOJ's "internal deliberations about how to respond to press and Congressional inquiries" met both criteria, triggering the privilege.[56] Second, the district court considered whether the committee's showing of need for the information overcame the privilege. The district court weighed the political branches' competing interests by considering the information's relevance, the seriousness of the investigation, the harm that could result from disclosure, and other factors.[57] The district court held that these factors favored disclosure and ordered the documents produced.[58]

Finally, district courts have twice rejected claims of absolute testimonial immunity, both times in suits brought by the House Judiciary Committee. In 2008, a district court ordered former White House Counsel Harriet Miers to appear for testimony on the removal of certain U.S. Attorneys, holding that absolute immunity was "virtually foreclosed" by a Supreme Court decision that senior White House aides possess only qualified immunity to civil damages suits.[59] In 2019, future Supreme Court Justice Ketanji Brown Jackson applied the same reasoning when ordering former White House Counsel Donald McGahn's compliance with a subpoena for his testimony.[60] Both decisions affirmed the witnesses' ability to assert other applicable privileges during committee questioning.[61]

Assessing Litigation Outcomes

Resort to litigation to resolve interbranch disputes has yielded mixed results for Congress. The Senate Select Committee's resort to judicial enforcement of its subpoena failed to gain the Committee access to

[53] Comm. on Oversight & Gov't Reform v. Lynch, 156 F. Supp. 3d 101, 107 (D.D.C. 2016). The suit was first filed against then-Attorney General Eric Holder, so earlier filings identify him as the defendant. *See* Compl., Comm. on Oversight & Gov't Reform v. Holder, No. 1:12cv1332 (D.D.C. Aug. 13, 2012).

[54] *Lynch*, 156 F. Supp. 3d at 107.

[55] Comm. on Oversight & Gov't Reform v. Holder, 2014 WL 12662665, at *2 (D.D.C. Aug. 20, 2014), *modified*, 2014 WL 12662666 (D.D.C. Sept. 9, 2014) (internal quotation marks omitted).

[56] *Lynch*, 156 F. Supp. 3d at 112.

[57] *Id*. as 112-13 (listing, among other additional relevant factors, the availability of other evidence).

[58] *Id*. at 114 (explaining that "whatever incremental harm that could flow from providing the Committee with the records that have already been publicly disclosed" by quotations in a publicly released Inspector General report was "outweighed by the unchallenged need for the material").

[59] Comm. on Judiciary v. Miers, 558 F. Supp. 2d 53, 100, 108 (D.D.C. 2008).

[60] Comm. on Judiciary v. McGahn, 415 F. Supp. 3d 148, 202 (D.D.C. 2019) (Jackson, J.), *vacated and remanded*, 951 F.3d 510 (D.C. Cir. 2020) (concluding the Committee lacked Article III standing to bring suit), *reh'g en banc granted, opinion vacated sub nom*. U.S. House of Representatives v. Mnuchin, 2020 WL 1228477 (D.C. Cir. Mar. 13, 2020), *and aff'd in part, remanded in part*, Comm. on Judiciary of U.S. House of Representatives v. McGahn, 968 F.3d 755 (D.C. Cir. 2020) (concluding that the Committee had Article III standing to enforce its subpoena and remanding to the three-judge panel remaining questions), *and rev'd and remanded*, 973 F.3d 121 (D.C. Cir. 2020) (concluding the Committee lacked a cause of action to bring the suit), *reh'g en banc granted, judgment vacated* (Oct. 15, 2020), dismissed by Order, Comm. on Judiciary of U.S. House of Representatives v. McGahn, No. 19-5331 (D.C. Cir. July 13, 2021) (granting the parties' request for voluntary dismissal and vacatur of the second panel opinion).

[61] *See McGahn*, 415 F. Supp. 3d at 214 (explaining that though recipients of a valid congressional subpoena must appear for testimony, they "are free to assert any legally applicable privilege in response to the questions asked of them, where appropriate"); *Miers*, 558 F. Supp. 3d at 106 ("Ms. Miers may assert executive privilege in response to any specific questions posed by the Committee. The Court does not at this time pass judgment on any specific assertion of executive privilege."). Both decisions were appealed and the disputes over witness testimony were then settled. *See infra* notes 70- 72 and 76-79 and accompanying text.

the Nixon tapes and prompted a D.C. Circuit opinion with language that partially discounted Congress's need for information concerning past facts to legislate for the future.[62] While the House Committee on Oversight and Government Reform secured a ruling compelling the production of Operation Fast & Furious documents that were withheld on deliberative process grounds,[63] that was only after the district court held that the privilege could be asserted in response a congressional subpoena.[64] The Committee did not persuade the court that the privilege originated in the common law and thus could not frustrate a constitutional power of inquiry.[65] Favorable rulings from district courts on testimonial immunity have not caused the executive branch to change its view that the doctrine is "firmly grounded in separation-of-powers principles" because those district court decisions would not directly bind in future litigation over other subpoenas.[66]

Aside from receiving unfavorable substantive rulings, Congress has also faced delay in seeking judicial resolution of interbranch executive privilege and testimonial immunity disputes. The time that a congressional committee spent in litigation to enforce its subpoena has varied.[67]

- The Senate Select Committee originally filed suit to enforce its subpoena for the Nixon tapes in August 1973.[68] The D.C. Circuit's decision sustaining President Nixon's privilege assertion came in May 1974.[69]
- The House Judiciary Committee began proceedings in *Miers* in March 2008.[70] Four months later, the district court ordered Miers to appear before the Committee.[71] Miers' appeal remained pending until its voluntary dismissal in October 2009.[72]
- The House Committee on Oversight and Government Reform began the Operation Fast & Furious litigation in August 2012.[73] The district court overruled DOJ's deliberative-

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

[63] Comm. on Oversight & Gov't Reform v. Lynch, 156 F. Supp. 3d 101, 115 (D.D.C. 2016).

[64] Comm. on Oversight & Gov't Reform v. Holder, 2014 WL 12662665, at *1 (D.D.C. Aug. 20, 2014) ("[T]he Court rejects the Committee's suggestion that the only privilege the executive can invoke in response to a subpoena is the Presidential communications privilege.").

[65] *See id.* In subsequent interbranch disputes, committees have continued to argue that common-law-derived privileges cannot excuse compliance with congressional subpoenas. *See* Plf's Memo. in Supp. of its Mot. for Expedited Summ. J., Comm. on Oversight and Reform v. Barr 46, No. 1:19-cv-03557 (D.D.C. Dec. 17, 2019).

[66] Statement of Interest of the United States, *supra* note 35, at 7 (emphasizing the claimed lack of appellate rulings on the doctrine's merits); *see also Cong. Oversight of the White House*, 2021 WL 222744, at *36 (O.L.C. Jan. 8, 2021) (same); *Immunity of the Assistant to the President & Dir. of the Off. of Pol. Strategy & Outreach from Cong. Subpoena*, 2014 WL 10788678, at *7 (O.L.C. July 15, 2014) (same).

[67] The time between a subpoena's return date and congressional committees' commencement of litigation has also varied. For example, the Senate Select Committee began litigation two weeks after its subpoena's return date. Compl. 2, 5, Senate Select Comm. on Presidential Campaign Activities v. Nixon, No. 1593-73 (D.D.C. Aug. 9, 1973), *reprinted in* Hearings of the S. Select Comm. on Presidential Campaign Activities, 93rd Cong. app. at 544, 547 (1974). In contrast, the House Judiciary Committee in *Miers* resorted to legal process eight months after its subpoena came due. *See* Compl. ¶ 42, Comm. on the Judiciary v. Miers, No. 1:08-cv-00409 (D.D.C. Mar. 10, 2008) (noting Miers' subpoena was returnable on July 12, 2007).

[68] *See* Senate Select Committee Compl., *supra* note 67, at 2.

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

[70] Compl., Comm. on the Judiciary v. Miers, No. 1:08-cv-00409 (D.D.C. Mar. 10, 2008).

[71] Comm. on Judiciary v. Miers, 558 F. Supp. 2d 53, 100, 108 (D.D.C. 2008).

[72] Order, Comm. on Judiciary v. Miers, No. 08-5357 (D.C. Cir. Oct. 14, 2009).

[73] Compl., Comm. on Oversight & Gov't Reform v. Holder, No. 1:12cv1332 (D.D.C. Aug. 13, 2012).

process privilege claims in January 2016.[74] The Committee appealed other aspects of the district court's rulings, and that appeal remained pending until its May 2019 voluntary dismissal.[75]

- District court proceedings in *McGahn* began in May 2019.[76] Then-Judge Jackson issued her order requiring McGahn's testimony in November 2019.[77] Extensive appellate proceedings followed, including two orders granting en banc review of D.C. Circuit panel opinions that ruled against the House Judiciary Committee on nonmerits issues.[78] The parties voluntarily dismissed the appeal in July 2021 before the second en banc proceedings ended.[79]
- The House Committee on Oversight and Reform filed suit in November 2019 to enforce a subpoena for documents related to the 2020 Census following a privilege assertion.[80] In August 2021, before the district court entered a decision on the merits of the privilege claim, the parties reached an accommodation.[81] By January 2022, according to the parties the executive branch had completed producing documents as called for in the agreement, and they jointly dismissed the suit.[82]

Favorable rulings arguably have not led to prompt subpoena compliance. For example, the D.C. Circuit stayed the orders compelling Miers' and McGahn's testimony while their appeals were pending.[83] The political branches ultimately resolved both disputes through the accommodations process while the stays were in place.[84] These agreements allowed the House Judiciary Committee to question the witnesses, though in both cases questioning occurred roughly two years after the witness's original subpoena return date and not in a public hearing.[85] Delay of this type can potentially undermine the timeliness and effectiveness of congressional oversight.[86] The D.C. Circuit has also suggested that delay could have legal

[74] Comm. on Oversight & Gov't Reform v. Lynch, 156 F. Supp. 3d 101, 115 (D.D.C. 2016). The district court's opinion explains that, before issuing its decision, it had twice referred the parties to another district judge to aid a negotiated resolution. *Id*.

[75] *See* Order, Comm. Oversight & Gov't Reform v. Barr, No. 16-5078 (D.C. Cir. May 14, 2019).

[76] Compl., Comm. on the Judiciary v. McGahn, No. 1:19-cv-2379 (D.D.C. Aug. 7, 2019).

[77] Comm. on Judiciary v. McGahn, 415 F. Supp. 3d 148, 214-15 (D.D.C. 2019).

[78] *See* Order, Comm. on Judiciary v. McGahn, No. 19-5331 (D.C. Cir. Oct. 15, 2020) (en banc) (vacating August 31, 2020 judgment); Order, U.S. House of Representatives v. Mnuchin, No. 19-5176, and Comm. on Judiciary v. McGahn, No. 19-5331 (D.C. Cir. Mar. 13, 2020) (en banc) (vacating February 28, 2020 judgment).

[79] Order, Comm. on Judiciary of U.S. House of Representatives v. McGahn, No. 19-5331 (D.C. Cir. July 13, 2021).

[80] *See* Compl., Comm. on Oversight and Reform, U.S. House of Representatives v. Barr, No. 19-cv-03557 (D.D.C. Nov. 26, 2019).

[81] Agreement Concerning Accommodation, Comm. on Oversight and Reform, U.S. House of Representatives v. Barr, No. 19-cv-03557 (D.D.C. Aug. 30, 2021) (delineating procedures for *in camera* review by committee staff of subpoenaed documents about the 2020 Census).

[82] Jt. Status Rep., Comm. on Oversight and Reform, U.S. House of Representatives v. Barr, No. 19-cv-03557 (D.D.C. Jan. 7, 2022); Jt. Stip. of Dismissal, Comm. on Oversight and Reform, U.S. House of Representatives v. Barr, No. 19-cv-03557 (D.D.C. Jan. 7, 2022).

[83] *See* Order, Comm. on the Judiciary v. McGahn, No. 19-5331 (D.C. Cir. Nov. 27, 2019); Comm. on Judiciary of U.S. House of Representatives v. Miers, 542 F.3d 909, 911 (D.C. Cir. 2008).

[84] *See* Agreement Concerning Accommodation, Comm. on the Judiciary v. McGahn, No. 19-5331 (D.C. Cir. May 12, 2021); Unopposed Mot. for Voluntary Dismissal at 2, Comm. on the Judiciary v. Miers, No. 08-5357 (D.C. Cir. Oct. 8, 2009) (reciting that under the parties' agreement documents had been provided and Miers had been interviewed).

[85] *Compare* Interview by H. Comm. on the Judiciary with Donald McGahn, in Washington, D.C. (June 4, 2021), *with* Compl. ¶ 72, Comm. on the Judiciary v. McGahn, No. 1:19-cv-2379 (D.D.C. Aug. 7, 2019) (reciting the original subpoena's May 21, 2019 return date), *and* H.R. REP. NO. 111-712, at 17 (2011) (discussing Mier's June 15, 2009 deposition), *with* Compl. ¶ 42, Comm. on the Judiciary v. Miers, No. 1:08-cv-00409 (D.D.C. Mar. 10, 2008) (noting Miers' subpoena was returnable on July 12, 2007).

[86] CRS Report R45653, *Congressional Subpoenas: Enforcing Executive Branch Compliance*, by Todd Garvey, at 12.

consequences for House committees.[87] If there is a change in control of the House while a subpoena enforcement suit is pending, the new majority might decline to continue its predecessor's litigation.[88]

Subpoena enforcement actions have, however, sometimes resulted in decisions and outcomes that favored Congress. The D.C. Circuit's en banc decision in *McGahn* recognizes that a congressional committee has Article III standing "to seek enforcement in federal court of its duly issued subpoena in the performance of constitutional responsibilities."[89] This holding undermines a common executive branch defense to subpoena enforcement actions, that House committees lack Article III standing to bring such suits.[90] Moreover, though the district court decisions on absolute testimonial immunity are not themselves binding precedent for future district court litigation, then-Judge Jackson's rejection of the doctrine may have persuasive value.[91]

The Accommodation Process

It is much more common for interbranch disputes to be finally resolved through the *accommodations process*. This term generally refers to the political branches' negotiated resolution of disputes over congressional requests for information that, in the executive branch's view, implicate executive privilege or other executive branch confidentiality interests.[92] When accommodation is effective, the branches reach a compromise solution acceptable to both. The Executive might disclose what it believes it could otherwise withhold and Congress might narrow its request to exclude what it believes it could otherwise

[87] *See* Comm. on Judiciary of U.S. House of Representatives v. Miers, 542 F.3d 909, 911 (D.C. Cir. 2008) (raising the prospect that with the start of a new Congress, the prior House of Representatives that issued the subpoena at issue in the appeal "will cease to exist as a legal entity, and the subpoenas it has issued will expire"); United States v. AT&T, 551 F.2d 384, 390 (D.C. Cir. 1976) (raising but not resolving mootness question and noting that unlike "the Senate which is a continuing body, this House ends with its adjournment on January 3, 1977," and that "[t]hereupon the subpoena here at issue expires" (citation omitted)).

[88] When control of the House has not changed following a general election, suits have continued. The House rules or a separate order in the House rules package have invested committee chairs with authority to continue litigation. *See* RULES OF THE HOUSE OF REPRESENTATIVES OF THE 118TH CONGRESS Rule II, cl. 8 (2023) (House rule that has stated, since the 115th Congress, that committees and committees chairs are successors in interest to their predecessors for pending litigation); H.Res. 5, 113th Cong. § 4(a)(2)(A) (example of continuing litigation authority provided by separate order in the House rules package for the Operation Fast & Furious litigation). In some recent cases, committee chairs have reissued subpoenas. *See, e.g.*, Notice, Comm. on Oversight and Reform, U.S. House of Representatives v. Barr, No. 19-cv-03557 (D.D.C. Feb. 26, 2021) (advising the district court of the Jan 13, 2021 reissuance of a committee subpoena seeking 2020 Census records); Subpoena to Donald F. McGahn, II, from Jerrold Nadler, Chair, House Comm. on the Judiciary (Jan. 11, 2021) (subpoena reissued at the start of the 117th Congress); Subpoena to the Eric H. Holder, Jr., Att'y Gen. of the U.S., from Jason Chaffetz, Chair, House Comm. on Oversight & Gov't Reform (Jan. 6. 2015) (subpoena reissued at the start of the 114th Congress); Subpoena to the Eric H. Holder, Jr., Att'y Gen. of the U.S., from Darrell Issa, Chair, House Comm. on Oversight & Gov't Reform (Jan 3. 2013) (subpoena reissued at the start of the 113th Congress).

[89] Comm. on Judiciary of U.S. House of Representatives v. McGahn, 968 F.3d 755, 778 (D.C. Cir. 2020) (en banc).

[90] *See, e.g.*, Memo. of P&A in Supp. of Defs' Mot. to Dismiss and in Oppo. to Pl'f's Mot. for Partial Summ. J. on Counts I and II 23, Comm. on the Judiciary v. Miers, No. 1:08-cv-00409 (D.D.C. May 9, 2008) (urging dismissal for lack of Article III standing).

[91] *See, e.g.*, Comm. on Judiciary v. McGahn, 951 F.3d 510, 541 (D.C. Cir. 2020) (Henderson, J., concurring) (agreeing with the majority's holding that the court lacked jurisdiction but writing separately to critique claims of absolute testimonial immunity) ("[A] qualified—rather than absolute—privilege can still adequately protect the undeniably important Executive Branch interests at stake when the Congress attempts to pry open the lid of presidential confidentiality" (citing Comm. on Judiciary v. Miers, 558 F. Supp. 2d 53, 100, 102 (D.D.C. 2008)), *reh'g en banc granted, opinion vacated sub nom*. U.S. House of Representatives v. Mnuchin, 2020 WL 1228477 (D.C. Cir. Mar. 13, 2020).

[92] *See* Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2029 (2020) (noting that interbranch oversight disputes "have been hashed out in the hurly-burly, the give-and-take of the political process between the legislative and the executive" (internal quotation marks omitted)).

obtain. Thus, while Congress might wish to obtain copies of executive branch documents, an accommodation might see committee staff able to review but not retain the documents.[93]

While the accommodations process is an informal dispute resolution method, it appears to have at least two key characteristics. First, it is a flexible process, rather than a rigid, rules-based procedure. There appear to be few if any restraints on the type of agreement that the branches can reach.[94] Second, the accommodations process has no clear end point. It can continue after an interbranch dispute has progressed from an informal request for information to more formal methods of accessing or shielding information, such as subpoena issuance,[95] a formal assertion of executive privilege,[96] contempt votes,[97] or litigation.[98] For example, by engaging in the accommodations process, a House committee recently obtained access to State Department dissent cables after issuing a subpoena for the information but before marking up a related contempt resolution.[99]

Courts have recognized the fluid, continuing nature of the accommodations process and in some cases have deferred deciding at once all the issues presented in a case so that the accommodations process could unfold after the court's partial rulings.[100] In some cases, a court has stayed its hand for generally stated "prudential" reasons.[101] The D.C. Circuit has suggested that delay might be warranted given the potential "implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches."[102]

In *United States v. AT&T*, the executive branch won an injunction barring AT&T from complying with a subcommittee subpoena for asserted national security information. The chair of the subcommittee, who had intervened in the district court, appealed the injunction.[103] After remanding an earlier appeal so that

[93] Agreement Concerning Accommodation, Comm. on Oversight and Reform, U.S. House of Representatives v. Barr, No. 19-cv-03557 (D.D.C. Aug. 30, 2021) (allowing for initial *in camera* review and notetaking by committee members and staff but not retention of document copies).

[94] *See* Peter M. Shane, *Legal Disagreement and Negotiation in A Government of Laws: The Case of Executive Privilege Claims Against Congress*, 71 MINN. L. REV. 461, 515 (1987) (explaining that negotiations during the accommodations process can involve "not just one issue, disclosure, but several issues[,] namely, the timing, form and conditions of disclosure").

[95] H. REP. NO. 108-414, at 131-35 (describing negotiation and production for staff review of certain subpoenaed documents, previously withheld, related to the Federal Bureau of Investigation's use of informants).

[96] *See* Agreement Concerning Accommodation, Comm. on Oversight and Reform, U.S. House of Representatives v. Barr, No. 19-cv-03557 (D.D.C. Aug. 30, 2021) (delineating procedures for *in camera* review by committee staff of subpoenaed documents about the 2020 Census); Letter from Stephen E. Boyd, Ass't Att'y Gen., Off. of Leg. Affairs, U.S. Dep't of Justice, to Elijah E. Cummings, Chair, House Committee on Oversight and Reform, U.S House of Representatives 2 (June 12, 2019) (advising that President Trump had invoked executive privilege for certain 2020 Census-related documents).

[97] *See* Shane, *supra* note 94, at 512-13(discussing a 1983 compromise allowing access to Environmental Protection Agency records after its Administrator had been held in contempt by the House for not producing those records in response to an earlier subpoena); Mark J. Rozzell, *Executive Privilege in the Ford Administration: Prudence in the Exercise of Presidential Power*, 28 PRES. STUD. Q. 286, 293 (1998) (chronicling an episode in 1975 in which an agency's withholding of export reports on statutory grounds resulted in a subpoena and subcommittee contempt vote before being resolved by a negotiated agreement under which the reports were shown to the subcommittee chair).

[98] *See supra* note 84 (referencing accommodations reached while appellate proceedings were ongoing).

[99] *See* CRS Insight IN12184, *Accommodation and Contempt of Congress: Two Oversight Case Studies*, by Ben Wilhelm.

[100] *See* Comm. on Oversight & Gov't Reform v. Lynch, 156 F. Supp. 3d 101, 119 (D.D.C. 2016) (characterizing its opinion as resolving the "legal issue that posed the primary impediment to a negotiated solution," deliberative process privilege assertions, and deferring rulings on other executive branch confidentiality claims so that the "process of negotiation and accommodation" could continue "with respect to any of the other issues").

[101] *Id.* at 120.

[102] *AT&T II*, 567 F.2d 121, 127 (D.C. Cir. 1977) (internal quotation marks omitted).

[103] *Id*. at 123-24.

the political branches could pursue accommodations,[104] the D.C. Circuit ruled on a threshold question of justiciability but again directed the parties to explore settlement.[105]

In the court's view, the Framers did not draft the Constitution to "define and allocate all governmental power in minute detail," instead expecting "a spirit of dynamic compromise" among the branches that "would promote resolution of" disputes and an efficient, effective government.[106] In view of this expectation of "dynamic compromise" where neither of the "political branches has a clear and unequivocal" constitutional right, the court viewed the chance for further negotiations as "an opportunity for a constructive modus vivendi, which positively promotes the functioning of our system."[107] The court wrote that the "Constitution contemplates" accommodation and described efforts at compromise as a "dynamic process" that "affirmatively further[s] the constitutional scheme."[108] If a court judgment could reflect a negotiated resolution, that would mark "an allocation of powers" that furthers "the constitutional process."[109]

The accommodations process also arguably dovetails with at least some of the privilege standards that courts have applied. For example, in the Operation Fast & Furious litigation, one factor the court weighed when deciding whether the House committee had overcome the executive branch's privilege assertion was "the availability of other evidence."[110] The executive branch has pointed to material it produced in the accommodations process to argue that a committee had not made the requisite showing of need to also receive the material that was not disclosed.[111]

Because the accommodations process is not rules-based, the political branches need not follow any particular framework in their efforts to reach a negotiated resolution. The executive branch has, however, adopted procedures that structure its internal deliberations of privilege matters. As Assistant Attorney General Christopher Schroeder informed this Subcommittee last year, the "accommodation process is the subject of President Reagan's 1982 memorandum to the heads of executive agencies."[112] The 1982 memorandum adopts the policy of complying with "Congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch."[113] It dictates that executive privilege will be invoked "only in the most compelling circumstances" and only with "specific Presidential authorization."[114] The memorandum also sets forth a procedure for invoking

[104] *AT&T I*, 551 F.2d 384, 394 (D.C. Cir. 1976) ("Before moving on to a decision of such nerve-center constitutional questions" as the compelled production of national security information, "we pause to allow for further efforts at a settlement.").

[105] *AT&T II*, 567 F.2d at 123, 130.

[106] *Id*. at 127 (internal quotation marks omitted).

[107] *Id*. at 127, 130 (internal quotation marks omitted).

[108] *Id*. at 130.

[109] *Id*. The parties achieved a negotiated resolution to their dispute, so the D.C. Circuit did not rule on the merits questions left open by its second opinion, such as how, as a legal matter, to weigh the branches' competing interests in the subpoenaed information. *See* Rozzell, *supra* note 97, at 294-95.

[110] Comm. on Oversight & Gov't Reform, U.S. House of Representatives v. Lynch, 156 F. Supp. 3d 101, 112 (D.D.C. 2016); *cf. supra* notes 47- 50 and accompanying text.

[111] *See Assertion of Executive Privilege Concerning the Special Counsel's Interviews of the Vice President and Senior White House Staff*, 32 Op. O.L.C. 7, 12 (2008) (arguing that DOJ "has produced or made available for the Committee's review dozens of FBI reports of interviews with senior White House staff and State Department and Central Intelligence Agency officials").

[112] *Breaking the Logjam Part 2*, *supra* note 29 (statement of Christopher Schroeder); *see also* Letter from William P. Barr, U.S. Att'y Gen., to President Donald J. Trump 6 (June 11, 2019) (advising President Trump to make protective executive privilege assertions as to certain 2020 Census-related documents and citing the 1982 Reagan Memorandum).

[113] Memorandum From Ronald Reagan, President of the United States, for the Heads of Executive Dep'ts & Agencies: Procedures Governing Responses to Congressional Information 1 (Nov. 4, 1982).

[114] *Id*.

executive privilege.[115] This process starts from the presumption that congressional requests will be fulfilled "promptly and as fully as possible" but then provides for consideration within the executive branch of requests that are found to pose a "substantial question of executive privilege."[116] This process may result in formal assertions of executive privilege with the President's specific approval.[117] Other decisions from OLC also guide executive branch processing of congressional information requests.[118] No comparable procedures appear to exist for Congress's engagement in the accommodations process, which seems to permit committee and Member discretion in how to pursue information.

Congress's Options to Facilitate Information Access

Congress has several options for facilitating access to information in the executive branch's possession. First, it can leverage its constitutional powers to break logjams that it perceives to have developed with information requests. A bill or joint resolution cannot become law without its bicameral passage, so either chamber can withhold its support of a President's legislative priorities to pressure release of requested information.[119] Relatedly, under the Appropriations Clause,[120] the President cannot "touch moneys in the treasury of the United States, except [as] expressly authorized by act of Congress,"[121] so either chamber can withhold its consent to appropriations. The Senate can employ its advice and consent powers for nominations and treaties[122] to press for information access.[123] The House has also used its impeachment power[124] when in its view a President directed defiance of House committee subpoenas.[125]

Second, Congress can seek to employ the criminal contempt of Congress statute to obtain compliance with its subpoenas.[126] Those efforts "will likely prove unavailing" if the person held in contempt resisted complying with congressional demands at the direction or with the endorsement of the President.[127] The statute tasks the "appropriate United States Attorney" with presenting the matter to a grand jury,[128] but DOJ is unlikely to take that step as to a person whose privilege or immunity assertion the sitting President directed or endorsed.[129]

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[115] *Id*.

[116] *Id*.

[117] *Id*. at 1-2. While the executive branch considers whether to formally assert executive privilege, the memorandum instructs that the Department Head shall request the congressional requester to hold the matter in abeyance and "expressly indicate that the purpose of this request is to protect the privilege pending a Presidential decision." *Id*. The request to hold the matter in abeyance "does not constitute a claim of privilege." *Id*.

[118] *See, e.g.*, *Cong. Oversight of the White House*, 2021 WL 222744, at *18 (O.L.C. Jan. 8, 2021) ("Because congressional oversight needs generally may be satisfied through requests to the departments and agencies" that administer most programs, "requests for information about programs administered outside the White House should be directed there in the first instance.").

[119] U.S. CONST. art. I, § 7, cls. 2-3.

[120] *Id*. art. I, § 9, cl. 7.

[121] Knote v. United States, 95 U.S. 149, 154 (1877).

[122] U.S. CONST. art. II, § 2.

[123] *Nomination Hearings of the 114th Congress Before the S. Comm. on Foreign Relations*, 114th Cong. 490 (2017) (statement of Sen. Robert Corker, Chair, S. Comm. on Foreign Relations) (publicly pressing the State Department, during a nomination hearing, for release of certain information requested during a prior close-door meeting).

[124] U.S. CONST. art. I, § 2, cl. 5.

[125] H.Res. 755, 116th Cong. art. II (2019) (Obstruction of Congress).

[126] 2 U.S.C. §§ 192, 194.

[127] Garvey, *Congressional Subpoenas*, *supra* note 86, at 11.

[128] 2 U.S.C. § 194.

[129] *Whether the Dep't of Just. May Prosecute White House Offs. for Contempt of Cong.*, 32 Op. O.L.C. 65, 66 (2008) ("The Department of Justice has long taken the position, during administrations of both political parties, that the criminal contempt of (continued...)

Third, the Supreme Court has stated that Congress possesses an inherent constitutional power to punish contempts.[130] Under this inherent contempt power, a chamber's Sergeant-at-Arms detains an allegedly contumacious individual and the chamber (or a committee) considers the alleged contempt at a hearing before deciding (or for a committee, reporting to the chamber) whether to detain or imprison the individual until the obstruction to its legislative power is removed.[131] The chambers do not appear to have used this power since the 1930s.[132]

Finally, as previously discussed, Congress may attempt to enforce its demands in court, and in recent Congresses the House has passed legislation to specify procedure for such suits. During the 117th and 115th Congresses, the House passed legislation that would have created special procedures for a civil action brought to enforce a congressional subpoena by the House, the Senate, or a committee.[133] Among other provisions, the bills would have directed the federal courts "to expedite to the greatest possible extent the disposition of any such action and appeal."[134] The bills also would have given the congressional plaintiff the option of having the action first heard by a three-judge panel, whose final decision would then be directly appealable to the Supreme Court.[135]

Procedures of this type appear to be within Congress's constitutional authority to regulate procedure in the federal courts.[136] Similar provisions appear in statute in other contexts.[137] Language expediting judicial consideration of Senate subpoena enforcement actions once appeared in statute.[138] Such expediting language also appears consistent with the flexible approach courts have taken to managing interbranch disputes. The expediting language would underscore Congress's desire for expeditious resolution but would not impose a date-certain deadline for decision. Thus, if a court were to conclude that it has jurisdiction over a dispute but that prudential or constitutional considerations justify the court temporarily staying its hand to allow the parties to focus on the accommodations process,[139] this judicial method would appear consistent with the expediting language.

Congress statute does not apply to the President or presidential subordinates who assert executive privilege." (internal quotation marks omitted)).

[130] Jurney v. MacCracken, 294 U.S. 125, 150 (1935) (stating that "the power to punish for a past contempt is an appropriate means" to vindicate the essential "congressional privilege" of "requiring the production of evidence").

[131] Garvey, *Congressional Subpoenas*, *supra* note 86, at 13-14.

[132] Garvey, *Congressional Subpoenas*, *supra* note 86, at 16; *see also id*. at 17-27 (discussing separation-of-powers issues).

[133] H.R. 5314, 117th Cong. § 403 (2021); H.R. 4010, 115th Cong. § 2(a) (2017).

[134] H.R. 5314, 117th Cong. § 403 (2021); H.R. 4010, 115th Cong. § 2(a) (2017).

[135] H.R. 5314, 117th Cong. § 403 (2021); H.R. 4010, 115th Cong. § 2(a) (2017).

[136] *See* Wayman v. Southard, 23 U.S. 1, 4 (1825) (stating that it was "completely self-evident" that Congress "has the power to regulate the proceedings of the Federal Courts" because the ability to provide "all the needful and usual incidents to Courts" is implied from the power to establish courts).

[137] *See, e.g.*, 48 U.S.C. § 2126(d) (directing expedited consideration of any action or appeal brought under the Puerto Rico Oversight, Management, and Economic Stability Act); 52 U.S.C. § 10101(g) (provision for three-judge panel and expedited consideration in certain voting matters).

[138] In particular, prior to 1986 when the provision was repealed, Senate subpoena-enforcement actions were to be set for hearing at the "earliest practicable date" and "in every way to be expedited." Ethics in Government Act of 1987, Pub. L. No. 95-421, § 705(f)(1), 92 Stat. 1824, 1879 (1978) (28 U.S.C. § 1364(c)); Pub. L. No. 98-620, § 402(29)(D), 98 Stat. 3335, 3359 (1986) (repealing former subsection (c) of 28 U.S.C. § 1364).

[139] *See supra* notes 100-109 and accompanying text.