

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

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

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

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

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

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

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

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

### **The Law Governing Executive Privilege<sup>1</sup>**

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

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

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

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

3 *Id.* at 705–06 (1974).

4 *Id.* at 712-14.

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

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

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

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

### **The Executive Branch’s Doctrine of Executive Privilege**

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

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

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

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

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

As to the first pillar, the executive branch doctrine is that there is a singular executive privilege that includes within it a collection of “components,” which individually track common law privileges and core constitutional functions of the president.<sup>11</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.<sup>12</sup> Neither the presidential communications component nor the attorney-client privilege and work-product component were initially considered distinct components of executive privilege.<sup>13</sup> But gradually, the executive branch came to consider the information protected by these privileges to constitute separate components of the singular, constitutionally based executive privilege.<sup>14</sup>

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>15</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>16</sup> Presidents Johnson and Nixon reaffirmed that policy,<sup>17</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>18</sup> In the past, some members of Congress have expressed support for this limitation which—in theory—would seem to prevent lower executive branch officials from citing

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

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

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

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

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

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

17. *Id.* at 2–3.

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

privilege to withhold information or testimony absent a formal assertion by the President.<sup>19</sup> But that theory has not proven accurate.

Like the pillar of presidential control, the third doctrinal pillar—that the president will assert executive privilege only as a “last resort”—appears on its face to be a limitation on executive privilege. The Reagan memorandum states that executive privilege “will be asserted only in the most compelling circumstances” and only as a last resort when disclosure disputes cannot be resolved through “good faith negotiations” between the branches.<sup>20</sup> In articulating this aspect of executive privilege, though, the executive branch relies heavily on the Supreme Court’s decision in *Cheney v. United States District Court*.<sup>21</sup> In that case, two organizations sued claiming that the National Energy Policy Development Group established by President George W. Bush, which included Vice President Cheney, failed to comply with the requirements of the Federal Advisory Committee Act.<sup>22</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>23</sup> But the Supreme Court exercised the extraordinary remedy of mandamus to correct the lower court, writing that it had “labored under the mistaken assumption that the assertion of executive privilege is a necessary precondition to the Government’s separation-of-powers objections.”<sup>24</sup> The Court’s opinion recognized that *Nixon* had held that the president could not “through the assertion of a ‘broad [and] undifferentiated’ need for confidentiality” withhold information but instead had to invoke privilege with specific objections.<sup>25</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>26</sup> And, in language that would be quoted innumerable times by the executive branch in oversight disputes,<sup>27</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 course” and “should be avoided whenever possible.”<sup>28</sup>

### Doctrine in Practice: The Accommodation Process

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

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19. See *Executive Privilege Hearings* at 7 (statement of Sen. Sam J. Ervin, Jr.).

20. Reagan Memorandum at 1.

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

22. *Id.* at 373.

23. *Id.* at 376–77.

24. *Id.* at 391–92.

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

26. *Id.*

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

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

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

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

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

In congressional testimony, Rehnquist explained that the president “expects the responsible heads of the agencies to whom [congressional] requests are addressed to make some sort of a tentative determination as to whether some of the information requested might warrant a claim of executive privilege.”<sup>31</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>32</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>33</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

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

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

31. *Executive Privilege Hearings* at 441.

32. Reagan Memorandum at 1–2.

33. *Id.*

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

The Reagan memorandum advises department heads to request that a congressional committee “hold its request for the information in abeyance” while the president is considering a claim of privilege.<sup>34</sup> But it also clarifies that such a request “itself does not constitute a claim of privilege.”<sup>35</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>36</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. Lower executive branch officials then often refuse to disclose information by shielding themselves in the president's prerogative to make the final privilege decision and the broad scope of the components of privilege.<sup>37</sup>

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

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

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

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34. *Id.* at 2.

35. *Id.*

36. *Id.* at 1–2.

37. Examining unforthcoming congressional testimony by Attorney General Jeff Sessions, Professor Heidi Kitrosser has called this phenomenon the “shadow effect” of executive privilege, defining it as the “impact on oversight of the implicit or explicit threat that [executive privilege] might be invoked at some point.” Heidi Kitrosser, *The Shadow of Executive Privilege*, 15 FORUM 547, 548 (2017). As she notes, declining to provide information to Congress because executive privilege *could* be used to withhold the information “can help to shield the executive from political and legal accountability” and allows the executive branch to “bypass[] both the substantive questions asked [by Congress] as well as any serious engagement with the merits of the executive privilege claim.” *Id.*

38. *See* Attempted Exclusion of Agency Couns. from Cong. Depositions of Agency Emps., 43 Op. O.L.C. \_\_\_, slip op. at 8 (May 23, 2019) (concluding that the committee's exclusion of agency counsel “unconstitutionally interferes with the President's right to control the disclosure of privileged information” (emphasis added)).

39. Memorandum from William H. Rehnquist, Assistant Att'y Gen., Off. of Legal Couns., U.S. Dep't of Just., to John D. Ehrlichman, Assistant to the President for Domestic Affs., Power of Congressional Committee to Compel Appearance

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

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

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

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

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

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

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

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

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

oversight. Moreover, presidents are often able to evade the Senate’s role in confirmations by utilizing “acting” officials.<sup>44</sup>

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

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

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

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

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

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

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

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

day it held Attorney General Holder in contempt, June 28, 2012, and filed a complaint less than two months later, on August 13, 2012.<sup>48</sup> But a final, appealable district court decision was not issued until three and a half years later.<sup>49</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>50</sup> and filed suit on March 10, 2008.<sup>51</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>52</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>53</sup> Thus, even the threshold question of absolute immunity in *Committee on the Judiciary v. Miers*<sup>54</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>55</sup> Although the McGahn litigation was expedited, the appellate court had not yet addressed the merits of his claim of testimonial immunity two years into the suit. And like the other cases, it ultimately settled after an election without any resolution of the underlying constitutional claims.

### Route to Reform?

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

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

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

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

51. *Id.* at 1, 36.

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

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

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

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

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

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

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

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

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

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57. See Jonathan Shaub, *Why the McGahn Agreement is a Devastating Loss for Congress*, LAWFARE (May 19, 2021, 11:47 AM), <https://www.lawfareblog.com/why-mcgahn-agreement-devastating-loss-congress>.

58. See Comm. on the Judiciary v. McGahn, 951 F.3d 510, 522 (D.C. Cir.), *rev'd*, 968 F.3d 755, 778 (D.C. Cir. 2020) (en banc).

59. See, e.g., Immunity of the Assistant to the President & Dir. of the Off. of Pol. Strategy & Outreach from Cong. Subpoena, 38 Op. O.L.C. 5, 15-16 (2014).

60. See Todd Garvey, Cong. Res. Serv., *Congressional Subpoenas: Enforcing Executive Branch Compliance* 29 (March 27, 2019), <https://crsreports.congress.gov/product/pdf/R/R45653/3> (detailing legislative proposals along these lines).

61. *United States v. Nixon*, 418 U.S. 683, 687 (1974).

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

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

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62. *United States v. Am. Tel. & Tel. Co.*, 551 F.2d 384, 391 (D.C. Cir. 1976).

63. *United States v. Am. Tel. & Tel. Co.*, 567 F.2d 121, 128 (D.C. Cir. 1977).

64. *Id.* (emphasis added).