# RECALIBRATING INTERBRANCH BARGAINING

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ABSTRACT

*To fulfill its constitutional functions, Congress must have access to information from within the executive branch. Whether it is assessing the need to amend the authorities of administrative agencies, determining whether to fund executive branch programs, or investigating allegations of waste, fraud, and abuse, Congress can act responsibly only if it is able to compile an accurate picture of executive branch activities. When executive branch officials resist these requests—for either legitimate or problematic reasons—the resulting conflict is traditionally resolved amicably through inter-branch negotiations, not inter-branch litigation. Indeed, courts heard a total of four congressional-executive information disputes in the nation's first two hundred and forty years. Depending on how you count, however, the Trump administration alone generated at least five.*

*This Article argues that Congress's recent litigiousness is the culmination of a long-term trend. Over the past half-century, the executive branch has unilaterally developed numerous legal doctrines that aggrandize its own bargaining power at Congress's expense, enable it to circumvent the checks and balances established by the Constitution, and justify rebuffing valid congressional information requests. The Article uses the Trump-era cases to explore this evolution, and its consequences, in the context of executive branch doctrine surrounding three issues—the claim that presidential*

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*advisors are absolutely immune from testifying before Congress, the claim that Congress must clear a high bar to request information from the executive branch, and the claim that congressional lawsuits to enforce subpoenas are not justiciable in federal court. It demonstrates the extravagance of the executive branch's claims and explores the significance of the courts' nearly universal rejection of them in the Trump-era suits. It concludes that the cases' impact will not be as significant as the courts' decisive rejections of the executive's theories might suggest, and that both Congress and the courts must act more aggressively to recalibrate the branches' bargaining power to bring the executive back to the bargaining table, where such disputes should be resolved.*

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## INTRODUCTION

For Congress to fulfill its constitutional functions, it needs to gather information. Indeed, almost one hundred years ago, the Supreme Court declared that "the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function."[1] After all, the Court continued, "[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change."[2]

These principles are no less true when the relevant information resides within the executive branch. Whether it is assessing the need to amend the authorities of administrative agencies, determining whether to fund executive branch programs, or investigating allegations of waste, fraud, or abuse, Congress can act responsibly only if it is able to compile an accurate picture of executive branch activities. Moreover, history demonstrates that such congressional investigations at times provide a necessary check on executive excesses.[3] There are times, however, when executive branch officials resist Congress's requests for information. This resistance might be for legitimate reasons—perhaps the information would reveal confidential communications either within the executive or with foreign governments. Or it might be due to inappropriate motives—if the information would expose an embarrassing policy decision, for example, or reveal executive branch misconduct.

Regardless of the executive's motives, conflicts over congressional information requests have traditionally been resolved amicably through inter-branch negotiations, not inter-branch litigation. As Chief Justice Roberts recently put it, such disputes are inherently political conflicts and are nearly always settled "in the 'hurly-burly, the give-and-take of the political process between the legislative and

1. McGrain v. Daugherty, 273 U.S. 135, 174 (1927).

2. *Id.* at 175.

3. Consider, for example, the Watergate Committee's revelations of illegal political tactics or the Church Committee's documentation of intelligence-community violations of Americans' civil liberties. *See* Eric Lane, Frederick A.O. Schwarz, Jr. & Emily Berman, *Too Big a Canon in the President's Arsenal: Another Look at* United States v. Nixon, 17 GEO. MASON L. REV. 737, 765, 774 (2010).

the executive'" branches.[4] This is true, at least in part, because all three branches have pragmatic reasons to avoid litigation. Courts are reluctant to serve as referee in inter-branch wrangling.[5] The executive branch eschews definitive judicial resolutions both in order to preserve flexibility for future disputes[6] and to ensure that it, not the courts, retains the final word regarding what information it discloses.[7] And Congress disfavors litigation due to its inherent delay[8]—the pace of typical litigation is inconsistent with the needs of members of Congress, particularly those in the House of Representatives, whose two-year countdown clock begins to tick on their first day in office.

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4. Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2029 (2020) (quoting Hearings on S. 2170 et al. Before the Subcomm. on Intergovernmental Rels. of the S. Comm. on Gov't Operations, 94th Cong. 87 (1975) (statement of Antonin Scalia, Assistant Att'y Gen., Office of Legal Counsel)); *see also, e.g.*, Neal Devins, *Congressional-Executive Information Access Disputes: A Modest Proposal—Do Nothing*, 48 ADMIN. L. REV. 109, 126 (1996) ("[N]egotiations ... are ... dependent on the skills of the negotiators and the political climate."); Louis Fisher, *Congressional Access to Information: Using Legislative Will and Leverage*, 52 DUKE L.J. 323, 324 (2002) ("[B]oth branches are at the mercy of political developments that can ... tilt the advantage decisively to one side."). Negotiation to reach mutually acceptable agreements actually embodies a constitutional obligation. *See* United States v. Am. Tel. & Tel. Co. (*AT&T*), 567 F.2d 121, 127 (D.C. Cir. 1977).

5. *See, e.g.*, Comm. on the Judiciary, U.S. House of Representatives v. Miers, 542 F.3d 909, 911 (D.C. Cir. 2008) (per curiam) (declining to expedite briefing and argument because the imminent end of the 110th Congress would moot the case, and delay "has the additional benefit of permitting the new President and the new House an opportunity to express their views"); *AT&T*, 567 F.2d at 133 (requiring parties to return to the negotiating table); Devins, *supra* note 4, at 131 ("For better or worse, the courts are extremely hesitant to play a leading role in defining executive-legislative relations.").

6. Andrew McCanse Wright, *Constitutional Conflict and Congressional Oversight*, 98 MARQ. L. REV. 881, 921 (2014) (noting that the executive branch prefers negotiations to judicial decisions); Devins, *supra* note 4, at 132 (seeking to avoid replacing negotiations with "contentious winner-take-all battles").

7. *See* Jonathan David Shaub, *Interbranch Equity*, 25 U. PA. J. CONST. L. 780, 785 (2023).

8. *See, e.g.*, Stanley M. Brand & Sean Connelly, *Constitutional Confrontations: Preserving a Prompt and Orderly Means by Which Congress May Enforce Investigative Demands Against Executive Branch Officials*, 36 CATH. U. L. REV. 71, 84 (1986) ("[U]nacceptable delays are inherent in the civil process."); Devins, *supra* note 4, at 131 ("Congressional committees are not well served by time-consuming and often ineffective court proceedings."); Rishika Dugyala, *Schiff Says House Did Its Best to Get Trump Witnesses*, POLITICO: CONGRESS (Jan. 19, 2020), https://www.politico.com/news/2020/01/19/schiff-house-trump-witnesses-impeachment-100935 [https://perma.cc/J7KX-9XYG] (statement of Rep. Adam Schiff) (arguing that employing "endless months or even years of litigation" to enforce congressional subpoenas would abrogate Congress's oversight powers).

Until recently, the result has been minimal judicial involvement in these disputes. This track record, however, changed during the Trump administration. In the nation's first two hundred and forty years, the courts heard a total of four cases pitting the executive against the legislative branch over information disputes.[9] The four years of the Trump administration, however, depending on how you count, generated at least five.[10]

This Article argues that this surge in litigation is the culmination of a long-term trend. It will show how, over the past fifty years, the executive has deployed increasingly robust assertions of executive branch control over information to amass more and more bargaining chips in its negotiations with Congress, facilitating executive stonewalling and making it increasingly difficult for Congress to successfully fulfill its information needs through negotiation.[11] The executive has thus left Congress with little choice of late *but* to turn to the courts.[12]

Commentators have long debated the role that courts should play in resolving congressional-executive information disputes.[13] This

9. *See generally* Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974); *AT&T*, 567 F.2d 121; *Miers*, 542 F.3d 909; Comm. on Oversight & Gov't Reform v. Lynch, 156 F. Supp. 3d 101 (D.D.C. 2016).

10. This Article focuses on judicial opinions in *Committee on the Judiciary of the United States House of Representatives v. McGahn*, 968 F.3d 755 (D.C. Cir 2020); *Committee on Ways & Means v. United States Department of Treasury*, 45 F.4th 324 (D.C. Cir. 2022); *Trump v. Thompson*, 142 S. Ct. 680 (2022); and *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020). *See infra* Part II.

11. Jonathan David Shaub, *The Executive's Privilege*, 70 DUKE L.J. 1, 28 (2020) ("[Executive branch] doctrine renders Congress virtually impotent to enforce information requests against the executive branch."); *id.* at 35 ("[I]n current practice, the executive branch has essentially unchecked authority to withhold any piece or category of information it chooses from Congress."). Commentators have lamented the ineffectiveness of Congress's oversight efforts during the Trump years. *See, e.g.*, Todd David Peterson, *Arbitrating Executive Privilege*, 73 AM. U. L. REV. 217, 220-23 (2023) (advocating resolving executive privilege disputes using the arbitration method employed in baseball salary arbitration); Lewis A. Davis, *Congress' Contempt Power Over Executive Branch Recalcitrance—A Bark with No Bite: A Proposed Solution to Give the Dog Teeth*, 53 U. PAC. L. REV. 129, 130-31 (2021) (suggesting a statute authorizing non-profit organizations' claims of executive privilege).

12. *See* Shaub, *supra* note 11, at 34 (stating that Congress has turned to "hardball" tactics in response to its frustration at delay and the absence of good-faith negotiations); *id.* at 62 ("[T]he current doctrine often obviates any need to consider Congress's interests at all, let alone balance them against the executive branch's confidentiality interests.").

13. Some argue for judicial resolution of such disputes. *See, e.g.*, Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991, 993 (2008); Emily Berman, *Weaponizing the Office of Legal Counsel*, 62 B.C. L. REV. 515, 567-68 (2021); Shaub, *supra*

Article contends that courts should intervene in ways that will incentivize both Congress and the executive to return to their traditional situs of dispute resolution: the negotiating table.[14] The Trump-era cases provided an opportunity for the courts to recalibrate the balance of inter-branch power to further this goal. This Article explores the extent to which they succeeded by focusing on three particularly problematic executive branch doctrines—the claim that high-level presidential advisors enjoy absolute immunity from congressional subpoenas,[15] the executive's attempts to define Congress's legitimate information needs narrowly,[16] and the argument that suits brought by Congress to enforce its subpoenas in Article III courts are non-justiciable.[17]

This Article makes both descriptive and analytical contributions. Descriptively, Part I analyzes the decades-long development of

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note 11, at 91. For commentators opposed to judicial involvement, see MARK J. ROZELL, EXECUTIVE PRIVILEGE: PRESIDENTIAL POWER, SECRECY, AND ACCOUNTABILITY 7 (2d ed. 2002); Devins, *supra* note 4, at 110; Wright, *supra* note 6, at 943; Dawn Johnsen, *Executive Privilege Since* United States v. Nixon*: Issues of Motivation and Accommodation*, 83 MINN. L. REV. 1127, 1139 (1999). These commentators argue that each branch has sufficient tools at its disposal to pursue its own institutional and political interests. *See, e.g.*, Frederick M. Kaiser, *Congressional Oversight of the Presidency*, 499 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 75, 79 (1998) (noting the President's "prestige and perquisites," "unequaled public visibility," and "unparalleled ability to influence public opinion, to mobilize public support, and to set the policy agenda"); George C. Edwards III, *The President and Congress: The Inevitability of Conflict*, 8 PRES. STUD. Q. 245, 250 (1978) (noting the structural advantage of the executive's hierarchical organization). Congresspersons, by contrast, can make floor statements, introduce bills, hold oversight hearings, issue contempt citations, initiate impeachment proceedings, withhold consent to presidential appointments and treaties, and strategically deploy the appropriations power. *See, e.g.*, Fisher, *supra* note 4, at 325 ("Congress can win most of the time—if it has the will—because its political tools are formidable."); Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 446 (2012) (pointing to "oversight hearings, nonbinding resolutions, the threat of contempt proceedings, and public disclosure of information" as tools for monitoring and resisting the executive branch).

14. *See* Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2035 (2020) (neither Congress nor President Trump's solutions sufficiently accounted for the interests of the other and therefore either of them would "erod[e] a '[d]eeply embedded traditional way'" the political branches resolved information disputes "[f]or more than two centuries" (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring))); *AT&T*, 567 F.2d at 127 (the political branches' responsibility to seek mutually acceptable resolutions through "a spirit of dynamic compromise" is a constitutional obligation).

15. *See infra* Part I.A.

16. *See infra* Part I.B.

17. *See infra* Part I.C.

executive legal doctrines by the powerful Office of Legal Counsel (OLC) within the Justice Department. Led by a presidentially appointed assistant attorney general, OLC issues opinions on questions of law facing the executive branch that are binding on executive officials unless overruled by the Attorney General or the President.[18] This analysis demonstrates how OLC developed and expanded doctrines claiming immunity from congressional testimony for presidential advisors, limiting Congress's need for information, and contesting the justiciability of congressional subpoena-enforcement actions. This Part will argue that these doctrines have exploited the infrequency of judicial review to adopt legal positions that overread historical precedents in the executive's favor, disregard both judicial and historical adverse precedents, and read precedents in Congress's favor exceedingly narrowly. These trends culminated in the Trump administration's particularly aggressive deployment of these doctrines.

Analytically, Part II first examines the courts' nearly universal rejection of the doctrines set out in Part I as inconsistent with existing law and insufficiently solicitous of Congress's constitutional authority to conduct investigations. It then considers why the Trump administration broke with historical precedent by exposing these theories to judicial review and, as a result, incurred numerous adverse judicial decisions for the executive branch.[19]

Finally, Part III turns to an assessment of the extent to which the judicial decisions discussed in Part II succeeded in recalibrating the balance of power in ways that will encourage negotiated resolutions

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18. *See* Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1305 (2000); *Office of Legal Counsel*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/olc [https://perma.cc/23BP-TYK5] (noting that OLC provides legal advice regarding "legal issues of particular complexity and importance or those about which two or more agencies are in disagreement," as well as reviewing and commenting on the constitutionality of pending legislation, executive orders and proclamations; reviewing proposed orders and regulations; and performing "a variety of special assignments referred by the Attorney General or the Deputy Attorney General."); *see also* Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1709 (2011) ("OLC's core function is to provide formal legal advice through written opinions.").

19. Trump won two victories—both by the same D.C. Circuit panel, and both of which were vacated by the full court. *See* Comm. on the Judiciary, U.S. House of Representatives v. McGahn, 951 F.3d 510, *vacated en banc*, 968 F.3d 755 (D.C. Cir. 2020); Comm. on the Judiciary, U.S. House of Representatives v. McGahn, 973 F.3d 121, *vacated en banc*, Order, No. 19-5331 (D.C. Cir. Oct. 15, 2020).

to congressional-executive information disputes. I conclude that in decisively rejecting some of the executive's theories, these decisions are a step in the right direction. Structural forces, however, have preserved much of the executive's advantages despite its serial losses in the courts. To effectively promote a return to the bargaining table, both Congress and the courts must do more.

## I. THE EVOLUTION OF EXECUTIVE BRANCH BARGAINING POWER

The executive has always had an advantage when it comes to bargaining power. As then-Assistant Attorney General William Rehnquist observed, "the Executive Branch has a headstart in any controversy with the Legislative Branch, since the Legislative Branch wants something the Executive Branch has .... [a]ll the Executive has to do is maintain the *status quo* and [it] prevails."[20] As I have argued elsewhere, starting with a legal memo penned by Rehnquist in the early 1970s—and continuing under Democratic and Republican administrations alike for the next five decades—OLC has exploited this and other structural advantages to strategically strengthen the executive's bargaining position through increasingly expansive claims.[21]

A close examination of the origins, theoretical underpinnings, and evolution of the executive doctrines providing testimonial immunity for presidential advisors, constraining when Congress may acquire information from the executive branch, and claiming nonjusticiability of congressional subpoena-enforcement actions reveals two mutually reinforcing means of expanding executive branch bargaining power. First, the executive has manufactured doctrinal

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20. Comm. on the Judiciary, U.S. House of Representatives v. McGahn, 415 F. Supp. 3d 148, 205 (D.D.C. 2019) (citing Mem. from William H. Rehnquist, Assistant Att'y Gen., Office of Legal Counsel, to John D. Ehrlichman, Assistant to the President for Domestic Affairs, *Power of Congressional Committee to Compel Appearance or Testimony of "White House Staff"* (Feb. 5, 1971) [hereinafter Rehnquist 1971 Memo]). Or, as President Trump put it, "[W]e have all the material. They don't." Peter Wade, *Trump Brags About Concealing Impeachment Evidence: 'We Have All the Material, They Don't*,' ROLLING STONE (Jan. 22, 2020), https://www.rollingstone.com/politics/politics-news/trump-impeachment-evidence-we-have-all-the-material-they-dont-941140/ [https://perma.cc/WL6Q-UJGA].

21. *See* Berman, *supra* note 13, at 538-59 (describing how OLC provides a first-mover advantage, an illusion of legal impartiality, historical narratives that favor the executive, and political cover for refusing information requests).

obstacles that serve to delay or avoid entirely consideration of the question at the heart of any information dispute—whether Congress should have access to the information it seeks.[22] These *preliminary* or *antecedent* questions include, for example, whether the legislators filing suit have standing or whether the court has jurisdiction over the case. Inserting these preliminary questions into a dispute strengthens the executive's hand by providing excuses to defy any or all congressional subpoenas, while signaling that any effort to enforce those subpoenas in court is guaranteed to involve months or even years of litigation.[23] Knowing it can put off a resolution into the distant future, the executive has little incentive to negotiate. It also centers the conflict on technical questions, rendering Congress's demands for information less likely to be politically salient than questions about, for example, whether the president should divulge information relevant to an ongoing scandal. The result is to hamstring Congress's efforts to generate pressure for disclosure through public opinion.

Second, OLC and the executive branch have exploited the infrequency of judicial review to adopt incredibly executive-friendly—some might say implausibly executive-friendly— interpretations of relevant judicial precedents (a tendency that should not be surprising, given OLC's incentives to interpret executive prerogatives broadly).[24] This Part will detail these developments in OLC's doctrines of testimonial immunity, Congress's need for

22. *See* Shaub, *supra* note 11, at 70 (noting "an imbalance between the branches").

23. *See id.* at 9 (explaining that the Congress that began the oversight inquiry and filed the litigation has never achieved a final victory). Don McGahn, former White House Counsel, who was subpoenaed to testify before Congress in President Trump's first impeachment, did not actually testify until over two years after he was subpoenaed and months after Trump lost re-election. *See* Josh Chafetz, *Nixon / Trump: Strategies of Judicial Aggrandizement*, 110 GEO. L.J. 125, 148 (2021). A House suit brought during the George W. Bush administration seeking documents and testimony from presidential advisors was filed in March 2008, yet remained unresolved when a new administration took office in January 2009. *See* Shaub, *supra* note 11, at 52 n.222. And a suit filed against Attorney General Eric Holder to acquire information about an investigation into gun-running extended for more than three and a half years. *Id.* at 51.

24. *See* Berman, *supra* note 13, at 532-38; Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1501-02 (2010); Moss, *supra* note 18, at 1329-30. The debate over the proper role of OLC within the executive branch is outside the scope of this Article. *See, e.g.*, Berman, *supra* note 13, at 560-68; Morrison, *supra* note 24, at 1502, 1512; Moss, *supra* note 18, at 1305-06; Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1580 (2007).

information, and non-justiciability of congressional subpoena enforcement actions.

### *A. A Prophylactic Rule: Testimonial Immunity*

Since the 1980s, the Justice Department and the White House have sought ever-greater centralized control over executive branch information. This long-term project has resulted in the development of numerous measures that Professor Jonathan Shaub has labeled "prophylactic" executive privilege doctrines.[25] These doctrines confer on the White House complete control over access to executive branch information in the name of withholding information protected by executive privilege, without requiring the executive to officially assert a privilege claim.[26] The view that presidential advisors are absolutely immune from compelled testimony before Congress is one such doctrine. This Section will briefly explain the significance of the rise of prophylactic executive privilege doctrines generally before going on to detail the development and evolution of the testimonial immunity doctrine in particular.

#### *1. The Rise of Prophylactic Executive Privilege Doctrines*

Presidents have claimed the prerogative of executive privilege—the idea that the executive branch may choose not to disclose certain information to Congress,[27] to prosecutors and grand juries,[28] or to private litigants[29]—since the days of the Washington administration.[30] Today, the term "executive privilege"[31] means different

25. *See* Shaub, *supra* note 11, at 57 ("[T]he prophylactic executive privilege has, in today's practice, become executive privilege itself.").

26. *See id.*

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

28. *See, e.g.*, United States v. Nixon, 418 U.S. 683 (1974); *In re* Sealed Case, 121 F.3d 729 (D.C. Cir. 1997).

29. Cheney v. U.S. Dist. Ct., 542 U.S. 367 (2004).

30. *E.g.*, LOUIS FISHER, THE POLITICS OF EXECUTIVE PRIVILEGE 10-11 (2004).

31. Executive privilege was given that label in the 1950s. *See* Shaub, *supra* note 11, at 4, 15 n.49; *see also* Letter from President Dwight D. Eisenhower to Sec'y of Def., Charles Erwin Wilson (May 17, 1954).

things to different people,[32] but it is most commonly used to refer to the presidential communications privilege, the only form of executive privilege that the Supreme Court has recognized as constitutionally required.[33] This privilege, which protects the confidentiality of communications between the president and those advising her, is the subject of the seminal 1974 case *United States v. Nixon*.[34] That case considered whether President Nixon was obligated to comply with the Watergate grand jury's subpoena for tapes of certain Oval Office conversations.[35] A unanimous Supreme Court held that the presidential communications privilege was constitutionally grounded,[36] that presidential communications are *presumptively*—but not *absolutely*—privileged,[37] and that the party seeking the communications (in *Nixon* itself, the grand jury) can overcome the privilege by showing a "demonstrated, specific need" for the information.[38] That standard was met in *Nixon*, the Court held, because the president's generalized interest in confidentiality was outweighed by "the fundamental demands of due process of law in the fair administration of criminal justice."[39]

The *Nixon* Court justified the presidential communications privilege through what is known as "the candor rationale."[40] According to *Nixon*, "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests

32. OLC views "executive privilege" as an umbrella concept encompassing presidential communications, national security and foreign affairs information, law enforcement information, pre-decisional deliberative materials, and attorney-client or attorney-work-product information. *See* Congressional Oversight of the White House, 45 Op. O.L.C. ___ (Jan. 8, 2021) [hereinafter Trump OLC 2021 Memo]; Shaub, *supra* note 11, at 11 (noting that the executive views these categories as part "of a singular, qualified privilege" to which a single, stringent balancing test applies). This view allows the executive to invoke *United States v. Nixon*'s constitutional protections to shield categories of information never afforded those protections by any court.

33. The executive branch has an absolute privilege over state secrets in civil litigation. United States v. Reynolds, 345 U.S. 1, 10-11 (1953). The Court has not considered how that rule would apply in criminal or congressional investigations.

34. *See* 418 U.S. 683 (1974).

35. *See id.* at 686.

36. *Id.* at 713.

37. *See id.* at 706.

38. *Id.* at 713.

39. *Id.*

40. *E.g.*, Gia B. Lee, *The President's Secrets*, 76 GEO. WASH. L. REV. 197, 206 (2008).

to the detriment of the decisionmaking process."[41] The privilege is therefore necessary to ensure that those who advise and assist the president feel free to provide her with "candid, objective, and even blunt or harsh opinions."[42]

The seeds of prophylactic executive privilege theories were planted during the Reagan administration, during which executive privilege policy served as one facet of a larger effort to reassert executive prerogatives—including executive privilege—that they viewed prior administrations as having ceded unnecessarily.[43] The response to executive branch concerns that the balance of negotiating power over claims of executive privilege had tipped too far in Congress's favor[44] was to centralize decisionmaking in the White

41. 418 U.S. at 705.

42. *Id.* at 708.

43. *See* Memorandum from Theodore B. Olson, Assistant Att'y Gen., Office of Legal Counsel, to Fred Fielding, Counsel to the President, on Executive Privilege 9 (Apr. 6, 1982) [hereinafter Olson Memo] (opining that honoring congressional requests for communications between agencies and the White House could undermine the President's "entire program for regulatory relief"); Jonathan Shaub, *Previously Undisclosed OLC Opinions Illuminate the Growth of Executive Power*, LAWFARE (Sept. 23, 2022, 8:01 AM), https://www.lawfaremedia.org/article/previously-undisclosed-olc-opinions-illuminate-growth-executive-power [https://perma.cc/KSR3-7J8Q] ("[M]emorandum to be issued to agencies, highlight[s] a new administration intent on establishing White House and OLC control of information."). Prior to President Reagan, the discretion of agency staff to assert executive privilege varied. President Nixon seemed to settle the question when he issued the first executive order governing executive privilege policy, officially limiting the authority to assert the privilege to the president himself. *See* Presidential Statement About Executive Privilege, 1 PUB. PAPERS 184 (Mar. 12, 1973). Scandals such as Watergate, however, led subsequent administrations to shy away from making claims of executive privilege. Memorandum from John M. Harmon, Acting Assistant Att'y Gen., Office of Legal Counsel, for Robert Lipshutz, Counsel to the President, on Executive Privilege 6 (June 8, 1977) (adopting "a policy of cooperation and maximum disclosure" and declining to assert executive privilege unless it was "absolutely necessary"); *see also* Memorandum from John H. Harmon, Acting Assistant Att'y Gen., Office of Legal Counsel, to All Heads of Offices, Divisions, Bureaus and Boards of the Dep't of Just., on Executive Privilege 5 (May 23, 1977) (preferring compromise to constitutional confrontation). Executive agencies rarely resisted congressional information demands. *See* Olson Memo, *supra*, at 10.

44. *See* Olson Memo, *supra* note 43, at 13 (noting that Congress had used Watergate-era distrust of the executive to "place the Executive Branch on the defensive in executive privilege matters"); *see also id.* ("Congress has been able to set the parameters of debate in the executive privilege area.").

House,[45] leaving the decision whether to claim executive privilege in the hands of the president.[46]

The centralized control pioneered in the Reagan Justice Department gradually morphed into "an absolute prophylactic privilege, designed to protect the asserted absolute authority of the president to control information."[47] Prophylactic executive privilege doctrines are theories that justify withholding information because the president *might* want to assert privilege over *some* of it at *some* point in the future. The hallmark of these doctrines is that they "negate congressional demands for information without ever asserting executive privilege .... [They] are justified not by concrete harm from disclosure but by the need to *protect* ... the president's prerogative to control all information" that the executive considers privileged.[48] This means that they can be asserted in response to any congressional information request without regard to the question whether Congress's need for the information outweighs the privilege.[49] This allows the executive both to delay matters and to deny information to Congress without incurring the political consequences of claiming executive privilege. The most powerful of these doctrines is testimonial immunity.[50]

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45. *See id.* at 10. OLC offered an alternative position that a "claim of executive privilege is a legitimate, constitutionally based prerogative of the Executive Branch, for which there need be no further justification or excuse." *Id.* at 4. This approach, OLC advised, might "dramatically reverse" the perceived congressional-executive imbalance, but also alienate both members of Congress and the public. *Id.* at 15. According to Shaub, over time OLC's views have evolved such that its current practices more closely resemble the "firm" approach than the "conciliatory" one. Shaub, *supra* note 43.

46. *See* Memorandum from President Ronald Reagan for the Heads of Executive Departments and Agencies on Procedures Governing Responses to Congressional Requests for Information 1 (Nov. 4, 1981) ("[G]ood faith negotiations between Congress and the Executive should continue as the primary means of resolving conflicts between the Branches.").

47. Shaub, *supra* note 11, at 7; *see also id.* at 10 ("In the context of congressional oversight ... the practice of executive privilege ... has transformed into an absolute, multifaceted, affirmative presidential authority to control the dissemination of a broad swath of information.").

48. *Id.* at 55.

49. *See id.* at 57 ("[T]he prophylactic executive privilege has, in today's practice, become executive privilege itself.").

50. Other doctrines include "protective assertions" of executive privilege. *See id.* at 62, 69; *see, e.g.*, Olson Memo, *supra* note 43, at 11; Protective Assertion of Executive Privilege Regarding White House Counsel's Office Documents, 20 Op. O.L.C. 1 (1996); 1 Protective Assertion of Executive Privilege Over Unredacted Mueller Report and Related Investigative

*2. Absolute Testimonial Immunity for Presidential Advisors*

OLC's doctrine of absolute testimonial immunity is both simple and remarkably sweeping. In short, it posits that current and former high-level presidential advisors are absolutely immune from congressional subpoenas seeking their testimony. Note that the claim is not that advisors cannot be compelled to testify *about privileged communications*, but that they cannot be obligated to testify *at all*. This doctrine is thus a powerful means of executive delay because it forces Congress to negotiate access to relevant witnesses irrespective of the type of information it seeks to elicit from them.

The doctrine developed entirely inside the executive branch—with no judicial scrutiny—from a modest legal claim into an absolute rejection of congressional authority that is inconsistent with relevant precedent. The theory was first articulated in a memo by then-Assistant Attorney General William H. Rehnquist in 1971 in which he relied on just five historical instances of individuals asserting testimonial immunity, two of whom ultimately ended up testifying—a record of past executive branch practice that Rehnquist conceded was "erratic."[51] "[O]bviously," Rehnquist concluded, these precedents were "quite inconclusive"[52] and "[t]o the extent that any generalizations may be drawn from [them], they are necessarily tentative and sketchy."[53] The tentative and sketchy generalization that Rehnquist drew was that "[t]he President and his immediate advisors—that is, those who customarily meet with the President on a regular or frequent basis—should be deemed absolutely immune from testimonial compulsion by a congressional committee."[54]

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Files, 43 Op. O.L.C. __, 1 (May 8, 2019) (claiming that the executive can unilaterally determine that a congressional inquiry lacks a legitimate legislative purpose—a claim rejected in *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031 (2020)). The Trump administration determined in 2019 that "a congressional committee may not constitutionally compel an executive branch witness to testify about potentially privileged matters" without an agency counsel present. *See* Attempted Exclusion of Agency Counsel from Congressional Depositions of Agency Employees, 43 Op. O.L.C. ___, 1 (May 23, 2019).

51. *See* Rehnquist 1971 Memo, *supra* note 20, at 4-6.

52. *Id.* at 6.

53. *Id.* at 7.

54. *Id.*

OLC has relied on the precedents Rehnquist identified and the generalization he drew from them to transform testimonial immunity into an absolute article of faith within the Department of Justice (DOJ). What subsequent memos omit is any acknowledgement of the "necessarily tentative and sketchy" nature of Rehnquist's conclusion.[55] Just six years after the Rehnquist memo, OLC asserted in the passive voice and without citation, that "there is general recognition that a Presidential assistant need not appear in response to an invitation or subpoena from a Congressional committee."[56] By the 1990s, despite never having been considered by a court, the idea of testimonial immunity had taken on the status of a venerable, well-established, bipartisan consensus within OLC[57] that applied not only to White House advisors but to *former* White House advisors as well.[58]

OLC repeatedly refused to amend its testimonial immunity doctrine in response to relevant judicial decisions. Initially, OLC considered immunity for presidential advisors as inherent in the

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55. *See* Memorandum from Ralph E. Erickson, Assistant Att'y Gen., Office of Legal Counsel, for Hon. John W. Dean III, Counsel to the President on Power of Congressional Committee to Compel Appearance or Testimony of Presidential Assistant 3 (Apr. 10, 1972) [hereinafter Erickson Memo] (concluding that, "[t]o the extent that any generalizations may be drawn" from the same precedents Rehnquist had considered, "it can be said that as a matter of principle a high level Presidential Assistant should be regarded as absolutely immune from testimonial compulsion"); *see also* Memorandum from Office of Legal Counsel, Dep't of Just., Immunity of Presidential Assistants from Being Required to Testify Before Congressional Committees 1 (Mar. 15, 1972) (asserting in an unsigned, two-page memo that "[i]t has been firmly established, as a matter of principle and precedents, that members of the President's immediate staff shall not appear before a congressional committee").

56. *See* Memorandum from John M. Harmon, Assistant Att'y Gen., Office of Legal Counsel, for Margaret McKenna, Deputy Counsel to the President, Dual-purpose Presidential Advisers app. at 1 (Aug. 11, 1977) [hereinafter Harmon Memo].

57. Assertion of Executive Privilege With Respect to Clemency Decision, 23 Op. O.L.C. 1, 4 (1999). The George W. Bush-era Justice Department burnished the doctrine's bona fides by dating it back not to the 1971 Rehnquist memo, but to "at least the 1940s," presumably referring to Truman-era precedents Rehnquist had cited. Immunity of the Former Counsel to the President From Compelled Congressional Testimony, 31 Op. O.L.C. 191, 191 (2007).

58. *E.g.*, Immunity of the Former Counsel to the President From Compelled Congressional Testimony, 31 Op. O.L.C. 191, 192 (2007); Testimonial Immunity Before Congress of the Former Counsel to the President, 43 Op. O.L.C. ___, 2 (May 20, 2019). Initially, OLC had questioned whether the immunity should extend to former advisors. Memorandum from Roger C. Cramton, Assistant Att'y Gen., Office of Legal Counsel, for Hon. John W. Dean III, Counsel to the President, Availability of Executive Privilege Where Congressional Committee Seeks Testimony of Former White House Official on Advice Given President on Official Matters 6-7 (Dec. 21, 1972).

idea of executive privilege and justified it using the "candor rationale" advanced in *United States v. Nixon*.[59] But after the Supreme Court held in *Nixon* that the candor rationale supported a *qualified*, rather than *absolute*, executive privilege,[60] that justification could no longer support executive branch claims of *absolute* testimonial immunity.[61] Rather than adjusting the scope of its testimonial immunity doctrine to conform to *Nixon*'s holding, however, OLC simply articulated in a 1977 memo a new set of justifications for the same doctrine. First, it argued that testimonial immunity is a "corollary of" executive privilege's candor rationale.[62] This corollary, "*based more on policy than on constitutional law*, is that Presidential assistants need not appear ... because all of their official responsibilities are subject to a claim of privilege."[63] This argument ignores, of course, the possibility that some testimony might not be privileged, that the president might decide not to assert executive privilege over certain subjects, or that Congress's need for the information might be sufficiently compelling to pierce executive privilege.

In an argument closely akin to this "corollary" argument, the memo also justified absolute testimonial immunity as a means of *protecting* executive privilege, even if it is not actually *part* of executive privilege—in other words it is a prophylactic measure.[64] Because so much of what Congress might ask high-level presidential advisors is properly considered privileged, the argument goes, requiring them to testify would "erode a central foundation of Executive privilege and severely chill internal deliberations among Executive Branch advisers in the future."[65] In other words, the candor rationale still supports absolute testimonial immunity, even if it does not support absolute privilege for presidential communications.

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59. *See* Erickson Memo, *supra* note 55, at 3.

60. United States v. Nixon, 418 U.S. 683, 706 (1974).

61. *See* Harmon Memo, *supra* note 56, app. at 2 (the candor rationale, "standing alone, does not appear to excuse Presidential assistants from appearing" before Congress).

62. *Id.*

63. *Id.* (emphasis added).

64. *See id.*

65. Memorandum from Theodore B. Olson, Assistant Att'y Gen., Office of Legal Counsel, to Rudolph W. Giuliani, Assoc. Att'y Gen., Congressional Demand for Deposition of Counsel to the President Fred F. Fielding 1 (July 23, 1982).

Finally, the memo advanced a newly articulated rationale based on the doctrine of separation of powers: "[A] personal assistant to the President generally acts as an agent of the President .... He therefore functions as the President's alter-ego," so forcing presidential aides to testify is tantamount to subjecting the president himself to testimonial compulsion—the impermissibility of which the memo takes as a given.[66]

The Reagan administration's desire to reestablish executive control over information further entrenched the doctrine of testimonial immunity.[67] A 1982 memo by then-Assistant Attorney General Ted Olson offers numerous additional policy reasons to adhere to the doctrine.[68] One is the circular argument that presidents need to assert absolute testimonial immunity for their advisors so as not to create a precedent that courts might interpret as executive acquiescence in Congress's subpoena power.[69] In other words, the executive needs to assert testimonial immunity to preserve its authority to assert testimonial immunity. Similarly, agreeing to allow presidential advisors to testify gives Congress the idea that "such testimony is a matter of legislative right, not executive grace," which will only encourage more demands for testimony.[70] And finally, because other presidents resisted allowing their advisors to testify, any capitulation to legislative demands would be seen as "weakness."[71]

Over thirty years after the doctrine's inception and *Nixon*'s rejection of its original rationale, another judicial intervention again sent OLC looking for new ways to justify the testimonial immunity doctrine. *Committee on the Judiciary, U.S. House of Representatives v. Miers*[72] marked the first time a court expressly considered the "longstanding" immunity doctrine. It did not go well for the executive. In a thorough opinion, the D.C. District Court determined

66. Harmon Memo, *supra* note 56, app. at 2.

67. A similar shift took place in OLC's views on executive privilege. *See infra* notes 107-10 and accompanying text.

68. *See* Memorandum from Theodore B. Olson, Assistant Att'y Gen., Office of Legal Counsel, to Edward C. Schmults, Deputy Att'y Gen. 2-3 (July 29, 1982).

69. *Id.*

70. *Id.* at 2.

71. *Id.* at 3.

72. 558 F. Supp. 2d 53 (D.D.C. 2008).

that the very idea of absolute testimonial immunity was inconsistent with existing Supreme Court case law.[73]

The case law to which the court referred was not only *United States v. Nixon*[74] but also *Harlow v. Fitzgerald*[75] and *Clinton v. Jones*.[76] As for *Nixon*, even OLC had acknowledged that it affords only qualified privilege over a president's communications with her advisors.[77] If the candor rationale does not lead to absolute executive privilege in that context, the district court concluded, it does not support absolute testimonial immunity for advisors here.[78] But subsequent Supreme Court case law had further undermined OLC's arguments in ways the office had not acknowledged. *Harlow* held that senior White House aides are entitled to qualified, not absolute, immunity for damages suits arising out of their official actions.[79] That case rejected the defendant's argument that presidential advisors are analogous to legislative aides, who enjoy absolute immunity based on their bosses' immunity under the Speech or Debate Clause.[80] The *Miers* court reasoned that if the Supreme Court had rejected that analogy and the absolute immunity that came with it in the context of damages actions, then absolute immunity from congressional subpoenas must fail as well.[81] And finally, to the extent that immunity rests on the need for presidential advisors to be available to the president 24/7,[82] *Clinton v. Jones*, which held that even a sitting president must find time to comply with subpoenas in a civil suit, forecloses that argument.[83] If the president must comply with a civil litigant's subpoena, the *Miers* court reasoned, surely the president's advisors must comply with one from Congress.[84] In the end, *Miers* pointed out, "the only

73. *See id.* at 99 (arguing that "there is Supreme Court authority that is all but conclusive" in rejecting the concept of testimonial immunity).

74. 418 U.S. 683 (1974).

75. 457 U.S. 800 (1982).

76. 520 U.S. 681 (1997).

77. *See Nixon*, 418 U.S. at 708 (concluding that the needs of other branches might outweigh the presidential communications privilege).

78. *Miers*, 558 F. Supp. 2d at 106.

79. *Harlow*, 457 U.S. at 807, 809.

80. *Miers*, 558 F. Supp. 2d at 100-01 (citing *Harlow*, 457 U.S. at 812).

81. *Id.* at 101.

82. *See infra* notes 190-91 and accompanying text.

83. 520 U.S. 681, 705-06 (1997).

84. *Miers*, 558 F. Supp. 2d at 105.

authority that the Executive can muster in support of its absolute immunity assertion" are OLC opinions, which the district judge found unpersuasive.[85]

OLC declined to update its views on advisor immunity in light of *Miers*, instead arguing that the case was wrongly decided and doubling down on the arguments that the *Miers* court rejected. A 2014 memo, for example, argues first that separation of powers would be violated if presidential advisors were not afforded the same immunity as the president against congressional process—essentially a restatement of the rejected alter ego theory. It justifies the theory, however, with the new argument[86] that denying aides immunity would threaten the President's "independence and autonomy from Congress" and allow the legislature to "supervise the President's actions, or to harass those advisers in an effort to influence their conduct, retaliate for actions the committee disliked, or embarrass and weaken the President for partisan gain."[87] By compromising the executive's autonomy and independence from Congress, the argument goes, denying presidential advisors testimonial immunity would create the impression that the president is subordinate to Congress.[88]

This version of the alter ego theory is drawn from a pre-*Miers* Supreme Court case called *Cheney v. U.S. District Court for the District of Columbia*.[89] That case held that an overbroad discovery order issued in a suit brought by private litigants for information related to the work of an executive-branch task force could implicate the separation of powers, because it might interfere with executive officials' ability to discharge their duties and impinge upon the President's constitutional prerogatives.[90] In relying on *Cheney*, however, OLC fails to grapple with the distinction between the separation of powers issues raised by an overbroad discovery order in civil litigation and those that are implicated in congressional

85. *Id.* at 104.

86. The idea that presidential advisors must be available 24/7 was no longer tenable, so OLC had to devise a new rationale. *See Jones*, 520 U.S. at 705-06.

87. Immunity of the Director of the Office of Political Strategy and Outreach from Congressional Subpoena, 38 Op. O.L.C. 5, 8 (2014) (internal quotations omitted).

88. *See id.* at 8.

89. 542 U.S. 367, 385 (2004).

90. *Id.* at 372-73.

investigations. Unlike private litigants, Congress's power to investigate is constitutionally grounded, and it includes authority to oversee the executive branch, rendering challenges to requests for information like those that prevailed in *Cheney* inapposite.[91] As for *Miers*'s invocation of *Harlow* to reject the alter ego theory, OLC simply asserts that the district court was wrong, reiterating the analogy to legislative aides' absolute immunity, and asserting that the rules from *Harlow* and *Nixon*—which rejected claims of absolute executive authority over information in the context of civil damages and grand jury subpoenas, respectively—should not apply to the congressional testimony context.[92]

The 2014 memo also advances the explicitly prophylactic justification for testimonial immunity, arguing that presidential aides' ability to assert executive privilege in response to particular questions from legislators during testimony is not sufficiently protective of the confidentiality of presidential communications.[93] In the bright lights of a congressional hearing, the memo contends, aides could mistakenly reveal confidential communications, or might be reluctant to invoke executive privilege for fear of political repercussions.[94] Thus Congress can be denied access to information not because the information is privileged, or because Congress's need for the information is insufficiently weighty, but because it *might* be privileged, and unsupervised executive employees *might* inadvertently disclose it.

So while the doctrine itself originated as an offshoot of executive privilege in 1971, the theory of absolute testimonial immunity incubated within OLC for over thirty years before being presented to a court in 2007. All that time, it either ignored or sidestepped contrary judicial precedent (for example, *Nixon*, *Harlow*, and *Jones*)—finding new arguments to justify its views and continuing

91. *See infra* notes 97-102 and accompanying text.

92. *See* Immunity of the Director of the Office of Political Strategy and Outreach from Congressional Subpoena, 88 Op. O.L.C. 5, 10-14 (2014) (opining that separation of powers issues are not present in *Harlow*, the criminal justice interests at issue in *Nixon* are not present here, and the judiciary is available to resolve disputes over privilege claims in civil litigation). That same 2014 memo offers for the first time an argument in the alternative—if presidential advisors do not enjoy testimonial immunity, they have a qualified immunity that should be difficult for Congress to overcome. *See id.* at 17-18.

93. *See id.* at 8-9.

94. *Id.*

to cite to previous opinions on the matter as if the courts had never spoken. Conversely, it embraced arguably irrelevant precedent such as *Cheney*. The idea was so entrenched in OLC by 2007 that a direct judicial rejection of the principle in *Miers* (albeit by a district court) failed to sway its views. To the contrary, as we will see in Part II, ten years later the Trump administration doubled down on the doctrine. Thus, the tentative and sketchy generalization based on five inconsistent historical precedents became OLC dogma, seemingly by sheer repetition and irrespective of any intervening judicial developments.

The effect of all of this is to provide the executive branch an independent basis for refusing to share information with Congress—the holder of that information simply cannot be compelled to testify. The merits question—whether the information is privileged and, if so, whether Congress can overcome that privilege—never even arises unless and until Congress succeeds in securing the advisor's testimony in the first place. In other words, the testimonial immunity theory provides the executive with an extra bargaining chip.

### *B. Congress's Need for Information*

A second way the executive has added to its bargaining power is by adopting a narrow view of when Congress is entitled to access information. Over time, OLC has erected at least four self-serving hurdles to congressional information requests aimed at the executive branch: asserting that Congress's oversight power provides a weaker justification than its legislative power to obtain information; dismissing Congress's right to gather information to inform the public about executive branch actions; professing that to overcome executive privilege, Congress must pass a test more demanding than the test for prosecutors; and refusing to provide any information at all until Congress proves to the satisfaction of the executive branch that its investigation has a valid legislative purpose.

The Supreme Court has held that Congress's right to access information is constitutionally based, and it is expansive. The seminal case of *McGrain v. Daugherty* unequivocally explained that

Congress's investigative power—including the power to issue subpoenas—is inherent in the legislative process.[95] Subsequent cases confirmed that this power reaches "inquiries concerning the administration of existing laws, as well as proposed or possibly needed statutes," "surveys of defects in our social, economic or political system," and "probes into departments of the Federal Government to expose corruption, inefficiency or waste."[96] The Supreme Court has also upheld the right of Congress to obtain information to inform the American public about actions taken by the government, stating, "[I]t is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees."[97] And while this power is not boundless,[98] it is capacious, as even the executive branch itself has recognized,[99] encompassing all inquiries "related to, and in furtherance of, a legitimate legislative task of the Congress."[100]

Despite these precedents' strong support of Congress's right to information, OLC seized on language in one particular D.C. Circuit Court decision to fashion a series of severe constrictions on Congress's authority to request executive branch information. In *Senate Select Committee on Presidential Campaign Activities v. Nixon*, the D.C. Circuit declined to order then-President Nixon to comply with the Senate Watergate Committee's subpoena of the same Oval Office tapes at issue in *United States v. Nixon*.[101] It reasoned that

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95. 273 U.S. 135, 175 (1927); *see also id.* at 174 ("[T]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.").

96. Watkins v. United States, 354 U.S. 178, 187 (1957); *see also McGrain*, 273 U.S. at 177-78 (noting Congress's investigative authority facilitates legislating and assessing whether executive branch agencies are performing their duties).

97. Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2033 (2020) (quoting United States v. Rumely, 345 U.S. 41, 43 (1953)).

98. *See, e.g.*, *Watkins*, 354 U.S. at 187, 200 (stating that Congress may not investigate "solely for the personal aggrandizement of the investigators," to "'punish' those investigated," or "to expose for the sake of exposure"); Kilbourn v. Thompson, 103 U.S. 168, 190 (1880) ("[N]either [the House nor the Senate] possesses the general power of making inquiry into the private affairs of the citizen.").

99. Assertion of Exec. Privilege in Response to a Cong. Subpoena, 5 Op. O.L.C. 27, 30 (1981) (acknowledging Congress's legitimate interest in obtaining information for legislating as well as safeguarding against executive overreach or abuse).

100. *Mazars*, 140 S. Ct. at 2031 (quoting *Watkins*, 354 U.S. at 187); *see also* Barenblatt v. United States, 360 U.S. 109, 111 (1959) ("[Congress's investigative power] is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.").

101. 498 F.2d 725 (D.C. Cir. 1974).

the tapes were presumptively privileged as presidential communications, and Congress was unable to show a sufficient need for the tapes to overcome that presumption.[102] The court held that the committee could not do so pursuant to its oversight authority, at least in part, because another congressional committee was already in possession of the tapes and the request for oversight purposes was therefore "merely cumulative."[103] And the court ruled that the committee failed to overcome the privilege using its legislative authority because it "points to no specific legislative decisions that cannot responsibly be made without access" to the materials.[104]

OLC's interpretation of *Senate Select Committee*—which was not presented to the courts until decades after it was developed—has three elements. The first comes in the context of the court's distinction between Congress's legislative role and its oversight role. The court explicitly declined to opine on the "lawful reach" of Congress's "general oversight power," because "the only *oversight* interest that the Select Committee can [assert in this case] is that of having these particular conversations scrutinized simultaneously by two committees," and there was no indication "that Congress itself attaches any particular value to this interest."[105] It then went on to discuss Congress's potential interest in the tapes under its legislative power.[106]

The Reagan-era OLC seized on this distinction between Congress's oversight and its legislative power to undermine Congress's authority to obtain information when engaged in oversight.[107]

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102. *Id.* at 726.

103. *Id.* at 732.

104. *Id.* at 733.

105. *Id.* at 732 (emphasis added).

106. *Id.* at 732-33.

107. Memorandum from Theodore B. Olson, Assistant Att'y Gen., Office of Legal Counsel, to Att'y Gen., on Executive Privilege 8-9, 14 (Oct. 9, 1981) [hereinafter Olson Memo to AG] (noting the need to disabuse legislators of the belief that they were "entitled to any and all information from the Executive Branch"). Both Attorney General William French Smith and Assistant Attorney General Ted Olson rejected the idea that Congress has any "right and ... responsibility to exercise 'oversight'" except as a means of facilitating the legislative task of enacting, amending, or repealing laws. *Id.* at 8-9; *see also id.* at 8 ("It seems to be an article of faith among many congressmen—Republicans as well as Democrats—that congressional committees are entitled to any and all information from the Executive Branch."). Such a theory, Olson argued, was "contrary to the principle of separation of powers and must be vigorously resisted." *Id.* at 13 ("The congressional oversight theory, as a logical matter, entails

Attorney General William French Smith cited *Senate Select Committee* for the proposition that "the interest of Congress in obtaining information for oversight purposes is ... *considerably weaker* than its interest when specific legislative proposals are in question."[108] In memo after memo from the 1980s onward, OLC rejects Congress's need for information due to the weakness of its oversight interest, citing to *Senate Select Committee* in support of that proposition.[109] Nowhere does OLC acknowledge that *Senate Select Committee* explicitly reserved the question of "the lawful reach of ... [Congress's general oversight] power."[110]

The second self-serving OLC interpretation of *Senate Select Committee* rests on the court's conclusion that Congress's legislative power fails to provide a need for the tapes or the transcripts of their contents because "legislative judgments normally depend more on the predicted consequences of proposed legislative actions and their political acceptability, than on precise reconstruction of past events."[111] In OLC's view, this judicial observation means that "Congress's legislative function does not imply a freestanding authority to gather information for the sole purpose of informing 'the American people.'"[112] Ultimately, OLC adopted the view that

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a right to examine into the most intimate decision processes of government without any legislative justification."); *id.* at 8-9 ("[A] congressional subcommittee appeared to rely solely on its oversight function as a justification for obtaining information."). The memo viewed both congressional oversight investigations and the legislative veto as ways that "Congress sometimes seeks power to function as a supervisor and overseer of Executive Branch actions." *Id.* at 8 n.3.

108. Assertion of Executive Privilege in Response to a Congressional Subpoena Op., 5 O.L.C. 27, 30 (1981) (emphasis added). Smith's rationale was that Congress's requests for information in the oversight context are broad and backed by vague justifications. *Id.* By contrast, "the information which Congress needs to enable it to legislate effectively" is more specific. *Id.*

109. *See, e.g.*, Assertion of Executive Privilege for Memorandum to the President Concerning Efforts to Combat Drug Trafficking 20 Op. O.L.C. 8, 9 (1996) (rejecting a congressional request because the "only justification ... provided for access to this document is its oversight interest regarding counternarcotics policy").

110. *Senate Select Comm.*, 498 F.2d at 732.

111. *Id.* ("The sufficiency of the Committee's showing of need has come to depend ... on whether the subpoenaed materials are critical to the performance of its legislative functions.").

112. Assertion of Executive Privilege Over Deliberative Materials Generated in Response to Congressional Investigation Into Operation Fast and Furious, 36 Op. O.L.C. 1, 11 (2012) (citing *Special Counsel Assertion*, 32 Op. O.L.C. at 13); *see also* Congressional Requests for Confidential Executive Branch Information, 13 Op. O.L.C. 153, 159-60 (1989); Memorandum

Congress *never* needs to learn specific facts or see specific communications when Congress's goal is simply to inform the public about actions taken by its government;[113] in so doing, OLC sought to limit congressional information requests to those that Congress could prove it needed to develop specific legislation.[114]

The third principle OLC extracted from *Senate Select Committee* to narrow Congress's access to information was a heightened standard of review that Congress must meet in order to overcome a legitimate claim of executive privilege. *Nixon* had held that to overcome the presidential communications privilege, the party seeking access must show a "demonstrated, specific need" for the information.[115] After initially conceding the possibility that the executive could *not* assert executive privilege in response to congressional requests for information,[116] OLC subsequently raised the bar, arguing that executive privilege should be *more* difficult for Congress than for prosecutors to overcome.[117] Its rationale was that "[c]ongressional investigations are far more common than criminal trials," congressional investigations tend to sweep more broadly, and Congress can be adversarial to the executive in ways that

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from J. Michael Luttig, Principal Deputy Assistant Att'y Gen., Office of Legal Counsel, for C. Boyden Gray, Counsel to the President, Congressional Access to Presidential Communications 17-18 (Dec. 12, 1989) ("[T]he grand jury['s] need for the most precise evidence ... is undeniable. We see no comparable need in the legislative process." (first alteration in original)).

113. Assertion of Executive Privilege Over Deliberative Materials Generated in Response to Congressional Investigation Into Operation Fast and Furious, 36 Op. O.L.C. 1, 10-11 (2012).

114. *See* Memorandum from John M. Harmon, Assistant Att'y Gen., Office of Legal Counsel to the Att'y Gen., The Constitutional Privilege for Executive Branch Deliberations 25-26 (Jan. 13, 1981) [hereinafter Harmon to AG] (rejecting the committee's request because it identified no "specific legislative decisions that cannot responsibly be made without access" to the information (citing *Senate Select Comm.*, 498 F.2d at 733)). The Trump OLC went so far as to suggest that because Congress was limited to considering legislation for statutory programs, its oversight activity extended only to executive agencies, rendering it "generally unnecessary" for Congress to request information from the White House itself. Trump OLC 2021 Memo, *supra* note 32, at 26-27.

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

116. Memorandum from John M. Harmon, Acting Assistant Att'y Gen., Office of Legal Counsel for Robert Lipshitz, Counsel to the President, Executive Privilege 7-8 (June 8, 1977).

117. Congressional Requests for Confidential Executive Branch Information, 13 Op. O.L.C. 153, 156-57 (1989) ("[T]he constitutional privilege that protects executive branch deliberations against judicial subpoenas must also apply, perhaps even with greater force, to Congress' demands for information.").

prosecutors are not.[118] Pointing to *Senate Select Committee*'s statement that the Committee "point[ed] to no specific legislative decisions that cannot responsibly be made without" the presumptively privileged materials at issue,[119] OLC opined that to overcome a claim of executive privilege, Congress must identify the exact legislative decision for which it needs the presumptively privileged material and explain why that material is necessary for the decision.[120] OLC, having reasoned that it *should* be harder for Congress to overcome a privilege claim than a grand jury, simply declared it to be so.[121]

Yet another effort to reject Congress's stated need for information—this one largely an innovation of the Trump administration—is OLC's claim that the executive can unilaterally determine that a congressional inquiry lacks a legitimate legislative purpose. To be sure, the case law is clear that Congress must have a "valid legislative purpose" supporting any investigation.[122] But as noted above, the Supreme Court has recognized the breadth of Congress's potential legitimate purposes,[123] and OLC has acknowledged that courts are unlikely to presume the legitimacy of Congress's stated

118. Harmon to AG, *supra* note 114, at 11; Congressional Requests for Confidential Executive Branch Information, 13 Op. O.L.C. 153, 156-57 (1989) (arguing that the possibility of disclosure to Congress is more likely to chill internal debate, that congressional requests for executive branch information are much more frequent than criminal investigations, and that they are also often broad and unconstrained by the rules of evidence).

119. Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 733 (D.C. Cir. 1974) (en banc).

120. *E.g.*, Harmon to AG, *supra* note 114, at 20; Assertion of Executive Privilege Concerning the Dismissal and Replacement of U.S. Attorneys, 31 Op. O.L.C. 1, 4 (2007); 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).

121. Shaub, *supra* note 11, at 23 ("The standard is a high one, and every assertion of executive privilege has concluded that the relevant congressional committee has not met that standard.").

122. *E.g.*, Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2031 (2020) (stating that subpoenas seeking a president's private information must be "related to, and in furtherance of, a legitimate task of the Congress").

123. *See supra* notes 97-102 and accompanying text.

investigative purposes.[124] As a result, prior to the Trump administration, the executive rarely challenged the legitimacy of Congress's purpose as a defense to information requests.[125]

To be sure, OLC has maintained since at least 1989 that the executive need not assert executive privilege until after "it is established that Congress has a legitimate legislative purpose for its oversight inquiry."[126] Prior to the Trump administration, however, this argument was confined to contexts in which Congress sought information about an exclusive executive power, such as the president's pardon power.[127] President Trump's OLC went further, however, claiming for the executive the right to independently confirm "the legitimacy of an investigative request" regardless of the context,[128] a view the Supreme Court arguably rejected in *Trump v. Mazars USA, LLP*.[129] The Trump OLC, in effect, attempted to reverse the default rule that has governed the legitimate legislative purpose inquiry—instead of presuming the existence of a legitimate legislative purpose, it would have allowed the executive to deny Congress access to any information (both privileged *and* unprivileged) until it convinces executive branch officials that its

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124. Response to Congressional Requests for Information Regarding Decisions made Under the Independent Counsel Act, 10 Op. O.L.C. 68, 74 (1986); *see also* TODD GARVEY, CONG. RSCH. SERV., LSB10301, LEGISLATIVE PURPOSE AND ADVISER IMMUNITY IN CONGRESSIONAL INVESTIGATIONS 2-3 (2019) (discussing courts' presumption that congressional committees act with a legislative purpose); Hutcheson v. United States, 369 U.S. 599, 622 (1962) (emphasizing that the courts should "not lightly interfer[e]" with Congress's exercise of its investigative powers); *In re* Chapman, 166 U.S. 661, 670 (1897) (stating that Congress need not "declare in advance" the legislative purpose or ultimate goal of an investigation).

125. *But see, e.g.*, Assertion of Executive Privilege With Respect to Clemency Decision, 23 Op. O.L.C. 1, 2-3 (1999) (determining that Congress had no oversight authority over the president's exercise of her exclusive Article II powers).

126. Congressional Requests for Confidential Executive Branch Information, 13 Op. O.L.C. 153, 154 (1989).

127. *See* Assertion of Executive Privilege With Respect to Clemency Decision, 23 Op. O.L.C. 1, (1999) (concluding that the president may assert executive privilege in response to a congressional subpoena seeking information about deliberations regarding an offer of clemency).

128. Congressional Committee's Request for the President's Tax Returns Under 26 U.S.C. § 6103(f), 43 Op. O.L.C. ___, 20-25 (2019); *id.* at 14 ("The Secretary had concluded that the Committee's proffered reason was pretextual [and] fell outside Congress's constitutional power of inquiry."); Shaub, *supra* note 43 ("OLC has concluded that it can ... reject congressional interests in oversight as illegitimate.").

129. *See* 140 S. Ct. 2019, 2033 (2020); *infra* note 218 and accompanying text.

inquiry is legitimate.[130] This argument erects yet another preliminary hurdle for Congress to surmount, further delaying the question whether the information is privileged and, if so, whether Congress is nevertheless entitled to it.

### *C. Justiciability*

A third area in which OLC's doctrines have added to executive bargaining power over time—and particularly in recent years—is the question of the justiciability of legislative-executive information disputes. Specifically, the executive branch has questioned whether Congress has standing to bring those cases, whether there is a valid cause of action for them, and, during the Trump administration, whether the courts have subject-matter jurisdiction over such cases.[131] As with arguments for testimonial immunity and prophylactic protections of the presidential communications privilege, these serve to impose limits on congressional enforcement power having nothing to do with the merits of Congress's information request. As such, they have been integral to executive branch efforts to interject preliminary questions that deter congressional information requests and delay resolution of these disputes.[132]

Also notable is that these theories, unlike testimonial immunity, are of relatively recent vintage. Up through the 1980s, OLC explicitly accepted that such disputes were amenable to judicial resolution.[133] These early memos recognized that the courts might

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130. Trump OLC 2021 Memo, *supra* note 32, at 13 (advising that executive branch officials "must 'examine the objective fit between [the committee's proffered] purpose and the information sought, as well as any other evidence that may bear upon the Committee's true objective'").

131. Trump OLC 2021 Memo, *supra* note 32, at 45, 48; Comm. on the Judiciary, U.S. House of Representatives v. McGahn, 415 F. Supp. 3d 148, 171-72, 193 (D.D.C. 2019).

132. *See supra* note 47 and accompanying text.

133. Erickson Memo, *supra* note 55, at 6 (observing that one way to determine whether Congress had the authority to subpoena presidential assistants was "to seek a judicial resolution of the constitutional issue" through a civil action). Alternatively, OLC asserted, executive officials could raise as a defense to congressional contempt proceedings the argument that the separation of powers renders presidential assistants "absolutely immune," and raise that issue as a defense. *Id.* In 1981, the Department of Justice again considered suing, this time to enjoin a congressional committee from issuing or enforcing a subpoena, at which point OLC concluded that the courts likely would not hear a case brought to enjoin Congress from actually issuing a subpoena. Memorandum from John M. Harmon, Assistant

decline to take jurisdiction over such suits, but it never argued that courts lacked the *power* to do so.[134] Indeed, in 1982, the Justice Department itself invoked the federal courts' jurisdiction over an executive-legislative information dispute when it sought a declaratory judgment that an agency official who refused, on executive privilege grounds, to comply with a House committee's subpoena for documents had acted lawfully.[135] In addition, when the Reagan administration was formulating its executive privilege policy, OLC noted that a potential cost of simply refusing to comply with congressional information requests[136] was that "[a] court suit might eventuate which, if the facts were unfavorable, could generate an undesirable judicial precedent."[137] Subsequent opinions continued to envision the possibility of judicial resolution to disputes over congressional subpoenas, pointing to numerous examples of such disputes.[138]

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Att'y Gen., Office of Legal Counsel, to the Att'y Gen., on Suing to Enjoin the Enforcement of a Senate Committee's Subpoena 10 (Jan. 16, 1981) [hereinafter Harmon Memo to AG]. The conflict was resolved, however, before a suit became necessary. *Id.* at 1.

134. Erickson Memo, *supra* note 55, at 6; Harmon Memo to AG, *supra* note 133, at 10-11.

135. United States v. House of Representatives of U.S., 556 F. Supp. 150, 150-51 (D.D.C. 1983). The court dismissed the suit as unripe since "[j]udicial resolution of this constitutional claim" would not "become necessary unless" Congress took legal action against the target of the subpoena. *Id.* at 153. Trivia question: Who was this executive branch official who had been held in contempt of Congress for failing to provide the House with the desired documents? Anne Gorsuch, then-Director of the EPA and mother of current Supreme Court Justice Neil Gorsuch. *Id.* at 150-51.

136. *See supra* note 49.

137. Olson Memo to AG, *supra* note 107, at 15.

138. Harmon Memo to AG, *supra* note 133, at 5 n.4 (citing United States v. Am. Tel. & Tel. Co. *(AT&T)*, 551 F.2d 384 (D.C. Cir. 1976)). As that suit was against a private actor, rather than Congress, OLC did not view it as controlling precedent. *See id.*; Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege, 8 Op. O.L.C. 101, 109 (1984); Response to Congressional Requests for Information Regarding Decisions made Under the Independent Counsel Act, 10 Op. O.L.C. 68, 87 (1986) ("The [*Senate Select Committee*] district court found that the $10,000 jurisdictional amount in controversy requirement was not met .... The court did not ... suggest that there was any other basis for denying federal question jurisdiction." (citing Senate Select Comm. on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51, 59-61 (D.D.C. 1973))). The Senate subsequently enacted legislation to authorize jurisdiction over that particular suit. *Id.* (citing Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 727 (D.C. Cir. 1974)); Congressional Requests for Confidential Executive Branch Information, 13 Op. O.L.C. 153, 162 (1989).

Beginning in the 1990s, however, the Justice Department began to change its tune.[139] First, it adopted an expansive interpretation of the Supreme Court's decision in *Raines v. Byrd*[140] to argue that congressional committees lack standing to sue to enforce their subpoenas because they do not suffer the requisite injury when the executive branch fails to comply.[141] In *Raines*, six individual members of Congress challenged the constitutionality of the Line Item Veto Act, arguing that the Act's provision allowing the president to excise individual budget lines from appropriations bills diluted the power of their votes on those bills.[142] The Supreme Court, in an opinion by Chief Justice Rehnquist, explained that the legislators lacked standing because their power to vote on legislation was "given full effect. They simply lost [the vote to pass the Line Item Veto Act]."[143] Importantly, the Court "attach[ed] some importance" to the fact that *Raines* was a suit brought on behalf of individual legislators, not on behalf of a congressional committee or House of Congress acting in its official capacity,[144] as well as the fact that "both Houses actively oppose[d] their suit."[145] In other words, *Raines v. Byrd* did nothing to disturb the preexisting understanding that Congress could bring subpoena enforcement suits pursuant to its Article I power to investigate.

As is its wont, however, the executive read the holding in *Raines* broadly. Thus, in a motion to dismiss in the House Judiciary Committee's suit to enforce its subpoena in *Miers*, the Justice Department argued that *Raines v. Byrd* precluded congressional subpoena enforcement suits.[146] What DOJ's view of *Raines* ignored, however, was existing precedent that *Raines* did not overrule. The

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139. Trump OLC 2021 Memo, *supra* note 32, at 48 (pointing out that previous OLC statements on the jurisdiction of the federal courts in these cases preceded both *Raines v. Byrd* and amendments to 28 U.S.C. § 1365(a) that can be read to confirm Congress's intent to bar inter-branch informational disputes from federal court).

140. 521 U.S. 811 (1997).

141. Trump OLC 2021 Memo, *supra* note 32, at 45, 48.

142. *Raines*, 521 U.S. at 817.

143. *Id.* at 824.

144. *Id.* at 829.

145. *Id.*

146. Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss at 23, Comm. on the Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53 (D.D.C. 2008) (No. 1:08-cv-00409 (JDB)) [hereinafter Memorandum of Points and Authorities].

D.C. Circuit stated in *United States v. AT&T* that "the House as a whole has standing to assert its investigatory power, and can designate a member to act on its behalf," which it does when it empowers committees to file suits.[147] Moreover, the Committee's standing was never contested in *Senate Select Committee*. According to OLC, however, *AT&T* does not control because that suit was against a private actor, rather than an executive official,[148] and neither *AT&T* nor *Senate Select Committee* provide a basis for standing because they predate *Raines* and lack meaningful analysis of the plaintiff's Article III standing.[149] The absence of analysis, however, is likely a result of the fact that the Justice Department did not contest congressional standing in those cases. Moreover, *Raines* itself expressly disclaimed its applicability in cases brought by congressional committees. As a result, *Miers* rejected DOJ's argument, finding that *AT&T* "establishe[d] that the Committee has standing to enforce its duly issued subpoena through a civil suit."[150] OLC responded in the same way it responded to *Miers'* rejection of testimonial immunity doctrine: it continued to assert its view that *Raines* entirely precludes congressional standing.[151]

*Miers* itself seems to represent the first time that the Executive argued that the Committee could not bring suit because it lacked a statutory cause of action.[152] While it conceded that 28 U.S.C. § 1331 provided the courts with subject-matter jurisdiction over such suits, DOJ argued that neither that statute nor the Declaratory Judgment Act (DJA)[153] provided the necessary cause of action.[154] It also raised for the first time the argument that 2 U.S.C. § 288d(a), a 1978 statute that authorizes the Office of Senate Legal Counsel to "bring a civil action ... to enforce ... any subpoena [sic] or order issued by

147. 551 F.2d 384, 391 (D.C. Cir. 1976).

148. Harmon Memo to AG, *supra* note 133, at 5 n.4.

149. Memorandum of Points and Authorities, *supra* note 146, at 23.

150. Comm. on the Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53, 68 (D.D.C. 2008).

151. Trump OLC 2021 Memo, *supra* note 32, at 45.

152. *See Miers*, 558 F. Supp. 2d at 85 n.23 ("[T]here is no suggestion whatsoever in *AT&T* [or OLC's earlier memos] that the lack of any independent cause of action would be an impediment to a suit by Congress."). The *Senate Select Committee* court identified the cause of action as the Declaratory Judgment Act. *Id.* at 87.

153. 28 U.S.C. § 2201.

154. *Cf.* Memorandum of Points and Authorities, *supra* note 146, at 23.

the Senate" or one of its committees,[155] supported its position. DOJ argued that the creation of an express cause of action for the Senate "foreclose[s] any contention that *House* committees may bring such actions."[156] *Miers* disagreed, pointing out that

> the fact that § 288d may create an independent cause of action for the Senate does not establish that the Senate (or the House) could not proceed under the DJA. Section 288d can simply be viewed as a more specific application of the general relief made available by the DJA.[157]

Ultimately, *Miers* held that Congress's Article I right to issue and enforce subpoenas allowed the Committee both to invoke the DJA as a basis for the cause of action, and to rely on an implied cause of action directly under the Constitution.[158]

Again, despite *Miers*'s holding to the contrary, OLC has continued to argue that a lack of a statutory cause of action means that "Congress may not properly seek to enforce its subpoenas in federal court against executive branch officials."[159] As Part II will demonstrate, OLC added yet another justiciability argument—that the courts lack jurisdiction over these cases—during the Trump administration.

So as with immunity and Congress's right to request executive branch information, OLC's position that lawsuits to enforce congressional subpoenas are nonjusticiable has evolved over time. And as with the claim to absolute immunity for senior presidential advisors, the D.C. District Court's rejection of these arguments in *Miers* failed to spur any modification of the doctrine within OLC.

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155. 2 U.S.C. § 228d(a).

156. *Cf.* Memorandum of Points and Authorities, *supra* note 146, at 40 (emphasis in original).

157. *Miers*, 558 F. Supp. 2d at 86.

158. *Id.* at 88, 94.

159. Trump OLC 2021 Memo, *supra* note 32, at 48. OLC tries to reconcile that position with then-President Trump's suit to enjoin his accounting firm from complying with congressional subpoenas on the grounds that the latter was justiciable only because the President acted in his personal capacity. Moreover, OLC pointed out, that case was the first such dispute over a congressional subpoena for the president's records to reach the Supreme Court in the country's history. *Id.* at 45.

* * *

The dearth of judicial precedent in congressional-executive information disputes left OLC free to determine its own answers to a vast swath of open questions. It has filled this gap with pro-executive doctrines by adopting expansive interpretations of existing decisions and disregarding or distinguishing any judicial pronouncements rejecting its positions. As a result, the executive branch has aggressively interpreted existing case law to justify its creation of additional doctrinal barriers to providing information to Congress, further eroding Congress's bargaining power and extending the timeframe of litigation. The next Part turns to the questions of how former President Trump employed and built upon the theories laid out above, how these theories fared in the courts (spoiler alert: badly), and why the Trump administration risked adding adverse opinions to the Federal Reporters by subjecting these theories to judicial scrutiny.

## II. EXECUTIVE BRANCH DOCTRINES' RECEPTION IN THE COURTS

Before turning to the courts' consideration of the doctrines discussed above, I note that these cases present a preliminary puzzle—why did so many of them end up in the courts after decades of congressional-executive information conflicts were resolved almost exclusively through negotiations? In considering this question, it is helpful to look at how the doctrines discussed in Part I manifested in the Trump-era litigation. Thus, Part II.A will discuss the results of the Trump-era litigation with a focus on two things. First, it will highlight the ways in which the arguments described above led inevitably to significant delays in Congress's access to information. Second, it will note the numerous instances in which the Trump administration built upon OLC's existing arguments, making even more aggressively pro-executive claims. This combination meant that Congress had little to lose, and much to gain, by turning to the courts. As we will see, the courts were entirely unpersuaded by many of the executive branch's views. Part II.B will then explore why President Trump might have been more

willing to risk establishing judicial precedent adverse to the executive's position than prior executives, most of whom had shielded these doctrines from judicial review. We will then consider in Part III the impact these judicial decisions will have on future congressional-executive disputes.

### *A. The Trump-Era Cases*

This Section will examine how the executive branch's theories discussed in Part I played out in the Trump-era litigation. Four of these cases are particularly relevant:

> *Committee on the Judiciary of the United States House of Representatives v. McGahn*, which sought to enforce the House Judiciary Committee's subpoena for the testimony of former White House Counsel Don McGahn regarding alleged acts of obstruction of justice by President Trump;[160]
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> *Committee on Ways & Means v. United States Department of the Treasury*, which sought President Trump's tax returns;[161]
>
> *Trump v. Thompson*, which was an effort by then-former President Donald Trump to assert executive privilege over White House records sought by the United States House Select Committee to Investigate the January 6th Attack on the United States Capitol (the January 6 Committee);[162] and
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> *Trump v. Mazars USA, LLP*, which sought accounting records from President Trump's private accountants.[163]

#### *1. Theories of Testimonial Immunity*

Testimonial immunity has been one of the executive branch's most effective means of avoiding the need either to assert executive privilege or resolve disputes about the merits of Congress's information claims. The most consequential assertion of testimonial

160. 968 F.3d 755 (D.C. Cir. 2020) (en banc).
161. 45 F.4th 324 (D.C. Cir. 2022).
162. 142 S. Ct. 680 (2022).
163. 140 S. Ct. 2019 (2020).

immunity during the Trump administration came in the context of the House Judiciary Committee's first impeachment investigation of President Trump, in which it subpoenaed President Trump's former White House Counsel, Donald F. McGahn, to testify.[164] McGahn had featured prominently in Special Counsel Robert Mueller's report regarding possible Russian interference in the 2016 presidential election as someone who had witnessed President Trump engage in numerous acts of possible obstruction of justice.[165] When McGahn informed the Committee that he would not appear, the Committee sued in federal district court, seeking to enforce its subpoena.[166]

In his defense, McGahn asserted the boilerplate language seen in so many OLC memos describing the "longstanding view of the Executive Branch, reaffirmed by administrations of both political parties for nearly five decades,"[167] that "the President's [current and former] immediate advisors are absolutely immune from compelled testimony before committees of Congress."[168] And while DOJ acknowledged in *McGahn* that the D.C. District Court in *Miers* had squarely rejected this position, it relied on the very same testimonial immunity arguments that had failed in that case.[169]

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164. Comm. on the Judiciary, U.S. House of Representatives v. McGahn, 973 F.3d 510, 514, *vacated en banc*, 2020 WL1228477 (D.C. Cir. Mar. 13, 2020).

165. *Id.*; *see* ROBERT S. MUELLER, III, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION, vol. II 77-90 (2019).

166. *McGahn*, 951 F.3d at 514.

167. Combined Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment at 47, Comm. on the Judiciary, U.S. House of Representatives v. McGahn, 415 F. Supp. 3d 148 (D.D.C. 2019) (No. 1:19-cv-2379 (KBJ)) [hereinafter Combined Memorandum of Points and Authorities].

168. *Id.* This position was supported by a 2019 memo adhering to OLC's long-term position regarding testimonial immunity. Testimonial Immunity Before Congress of the Former Counsel to the President, 43 Op. O.L.C. ___, 1 (May 20, 2019). The memo described the doctrine of advisor immunity as both "distinct from, and broader than, ... executive privilege," and justified it by the concern that compelled testimony creates a "substantial risk of inadvertent or coerced disclosure," the need to protect against Congress's use of subpoenas for testimony to harass or embarrass the executive branch, and the fact that "[c]oercing senior presidential advisers into situations where they must repeatedly decline to provide answers, citing executive privilege, would be inefficient and contrary to good-faith governance." *Id.* at 4, 12.

169. *See* Combined Memorandum of Points and Authorities, *supra* note 167, at 27-28, 30-32.

When then-District Judge Ketanji Brown Jackson examined the theory in 2019 in *McGahn*, she reached the same conclusion that *Miers* had reached in 2007. Indeed, she noted that "DOJ's best chance of persuading this Court to rule differently [than *Miers*] was to ... [provide] a skillful play-by-play of *Miers'* alleged analytical flaws" but that instead it had "presented essentially the same ... arguments that *Miers*'s rejected."[170] Jackson both embraced and expanded upon *Miers*'s analysis to conclude unequivocally that OLC's theory of absolute testimonial immunity is invalid as a matter of law: "To make the point as plain as possible, it is clear to this Court ... that, with respect to senior level presidential aides, absolute immunity from compelled congressional process simply does not exist."[171]

The *McGahn* court's rejection of testimonial immunity was based in doctrine, in theory, and in pragmatic considerations. Doctrinally, then-District Judge Jackson fully adopted *Miers*'s conclusion that *Nixon*, *Harlow*, and *Clinton v. Jones* "all but conclusive[ly]" answer the question and "powerfully suggest[ ] that such advisors do not enjoy absolute immunity."[172] The government argued, however, that *Miers*—as the sole judicial challenge to absolute testimonial immunity—represented the exception, not the rule.[173] Jackson determined, however, that the dearth of precedent actually pushes in Congress's *favor* for two reasons. The first is that the executive branch has historically recognized Congress's broad, constitutionally-based authority to gather information. More venerable even than DOJ's absolute immunity doctrine, she implied, are all of the pre-1971 (the year in which OLC first articulated the doctrine) instances in which executive branch officials did, in fact, share information with Congress.[174] Thus there are few judicial opinions on the books because Congress has rarely needed to resort to the courts to vindicate its right to access executive branch information. Second, she pointed out, the executive can insulate its views from

170. *McGahn*, 415 F. Supp. 3d at 203.
171. *Id.* at 214.
172. *Id.* at 201.
173. *Id.* at 203.
174. *See id.* at 201 ("Congress' clear constitutional prerogative to compel information in furtherance of its legislative and oversight functions has been historically recognized and is typically widely respected." (citing Watkins v. United States, 354 U.S. 178, 187-88 (1957))).

judicial scrutiny by merely reaching an accommodation with congressional investigators—as it did in each past assertion of asserted testimonial immunity with the exception of *Miers*—obviating the need for litigation.[175] "Surely," she argued, "DOJ cannot both act to keep the immunity issue away from the courts and also be heard to suggest that the paucity of precedent is itself sufficient proof that the law must countenance the concept."[176]

With respect to the longstanding nature of OLC's internal doctrinal position, she was similarly unpersuaded. Tracing OLC's argument back to the 1971 Rehnquist memo, she pointed out that it "does not cite to a single case that stands for the asserted proposition,"[177] is based on "a handful of historical examples"[178] that "are obviously quite inconclusive,"[179] and rested on conclusions that are "tentative and sketchy."[180] Yet OLC's subsequent statements on the subject, "each of which references the 1971 Memorandum" but cited to no judicial authority,[181] failed to "specifically acknowledge[ ] that the initial basis for this conclusion was seemingly formed out of

175. *Id.* at 170.

176. *Id.* at 204; *see id.* at 203 ("DOJ itself controls whether more courts will have the opportunity to rule on the issue."); *id.* at 181 (noting that the legislature's failure "'to invoke the power of the Judiciary to decide which side should prevail in a political battle with the Executive' concerning congressional requests for information" might not be because, as DOJ implies, courts had the view that they lacked power to adjudicate legal disputes between the branches); *id.* at 182 ("[T]he fact that past Congresses never resorted to the courts to resolve to [sic] inter-branch disputes concerning congressional requests for information merely means that, unlike the Judiciary Committee of today, they did not *have* to, because instead of reaching an impasse over the Executive branch's rank refusal to cooperate with congressional investigations, the Executive branch's concerns about the scope and intrusiveness of Congress' requests for information were resolved through 'the centuries-old process of political negotiation.'") (citations omitted)).

177. *Id.* at 204.

178. *Id.* at 205.

179. *Id.* (quoting Rehnquist 1971 Memo, *supra* note 20, at 7).

180. *Id.* (quoting Comm. on the Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53, 104 (D.D.C. 2008)).

181. *Id.* at 202 ("Ultimately, *Miers* determined that the opinions were not persuasive, largely because '[n]either cites to a single judicial opinion recognizing the asserted absolute immunity' [and one of them] was hastily issued on the same day that the President instructed Ms. Miers to invoke absolute immunity" and "relies almost exclusively upon" two previous OLC memos (first alteration in original) (citing *Miers*, 558 F. Supp. 2d at 104)).

nothing."[182] "[L]ongevity alone," the court concluded, "does not transform an unsupported notion into law."[183]

Nor did OLC's theoretical justifications for immunity persuade the court. First, it addressed the justifications based in the separation of powers—absolute immunity of presidential advisors based on their status as presidential alter egos, potential harassment of aides, concern about disclosure of privileged information, and the danger of creating the perception that the executive branch is subordinate to the Congress.[184] With respect to the alter ego rationale—the idea that absolute immunity is essential because the president's senior advisors are "presumptively available to the President 24 hours a day"[185]—Jackson pointed out that such a justification could neither withstand the holding that even a sitting president must make time to respond to litigation, nor explain why a *former* presidential advisor should enjoy immunity.[186] In addition, "Congress has long demanded information from high-level members of the Executive branch," and she saw no evidence that this has impaired executive functions, been used to harass executive aides, or impaired aides' ability to offer candid advice.[187] And as for the concern about creating a perception of executive subservience to Congress, according to the court, subservience is not the implication of having executive branch officials testify before Congress.[188] Congress's job is to conduct inquiries; empowering Congress to include executive officials in that process does not make them subservient.[189]

Finally, as a pragmatic matter, Jackson argued that immunity makes no sense. The court posits a hypothetical congressional inquiry into changes to the White House's décor.[190] When it comes to that issue, senior advisors would be in the same situation as

182. *Id.* at 205; *see also id.* at 204 ("[T]he ten-plus subsequent publicly available statements by OLC ... in support of this immunity simply reference back to the 1971 Memorandum without providing any court authority.").

183. *Id.* at 204.

184. *Id.* at 206.

185. *Id.* (citing Rehnquist 1971 Memo, *supra* note 20, at 7).

186. *Id.* at 206, 210.

187. *Id.* at 211-12.

188. *Id.* at 212.

189. *Id.*

190. *Id.* at 209.

anyone else who works in the White House, undermining any argument that senior aides should have special immunity.[191] If, however, the investigation concerns a more sensitive topic, aides at any level may always assert executive privilege in response to specific questions.[192] As a result, Jackson concluded, "it appears that absolute testimonial immunity serves only the indefensible purpose of blocking testimony about *non*-protected subjects that are relevant to a congressional investigation."[193]

In sum, the district court concluded, "absolute testimonial immunity for senior-level White House aides appears to be a fiction that has been fastidiously maintained over time through the force of sheer repetition in OLC opinions, and through accommodations that have permitted its proponents to avoid having the proposition tested in the crucible of litigation."[194] The D.C. Circuit did not reach this issue on appeal, in part because it arises only after the issues of justiciability discussed below are fully litigated, and because the congressional term (and Trump's presidency) ended before those issues were fully resolved. Which is, of course, the type of delay that preliminary questions are designed to generate.

For the purposes of the current discussion, however, note that the D.C. District Court rejected the theory out of hand as inconsistent with existing Supreme Court precedent, as it had done once before in *Miers*.[195] Nevertheless, the invocation of this preliminary issue resulted in meaningful delay. The congressional session ended before the circuit court could consider the issue. Congress ultimately heard McGahn's testimony, after reaching a deal with the Biden administration, sixteen months after Trump was acquitted in the Senate impeachment trial for which McGahn's testimony had originally been subpoenaed.[196]

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191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.* at 214.

195. *Id.* at 153 (first citing Comm. on the Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53, 99, 106-07 (D.D.C. 2008); and then Comm. on Oversight and Gov't Reform v. Holder, 979 F. Supp. 2d 1, 10–11 (D.D.C. 2013)).

196. President Trump was acquitted by the Senate on February 5, 2020. Nicholas Fandos, *Trump Acquitted of Two Impeachment Charges in Near Party-Line Vote*, N.Y. TIMES (Feb. 5, 2020), https://www.nytimes.com/2020/02/05/us/politics/trump-acquitted-impeachment.html [https://perma.cc/8Z9U-84T9]. McGahn testified on June 4, 2021. Charlie Savage & Nicholas

*2. Theories About Congress's Need for Information*

The most consequential of the Trump-era cases for OLC's legal views on Congress's authority to access Executive information was undoubtedly *Trump v. Thompson*,[197] a case that arrived in the courts as an atypical executive privilege battle. The January 6 Committee invoked a provision of the Presidential Records Act of 1978 (PRA)[198] providing that "Presidential records shall be made available ... to any committee or subcommittee [of Congress] if such records contain information that is needed for the conduct of its business and that is not otherwise available."[199] The Committee asked the National Archives and Records Administration (NARA), the repository for presidential records, to provide records relating to events surrounding the 2020 election and the Trump-Biden transition.[200] NARA, as required by regulation,[201] notified former President Trump of its intention to provide responsive documents to the Committee[202] after President Biden declined to assert executive privilege over them.[203] Former President Trump filed suit seeking to enjoin NARA from doing so.[204]

In this effort by a *former* president to override a *sitting* president's decision *not* to assert executive privilege, former President Trump asserted that Congress's need for the information it sought was insufficient to outweigh Trump's own assertion of executive privilege.[205] These arguments gave the *Trump v. Thompson* courts

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Fandos, *McGahn Breaks Little New Ground in Closed-Door Testimony*, N.Y. TIMES (June 13, 2021), https://www.nytimes.com/2021/06/04/us/politics/mcgahn-trump-russia-testimony.html [https://perma.cc/2A63-HN5S].

197. 20 F.4th 10 (D.C. Cir. 2021), *stay pending appeal denied*, 142 S. Ct. 680 (2022), *cert. denied*, 142 S. Ct. 1350 (2022).

198. Presidential Records Act of 1978, 44 U.S.C. §§ 2201-09.

199. *Id.* § 2205(2)(C).

200. *Thompson*, 20 F.4th at 19-20.

201. 36 C.F.R. § 1270.44(c) (2021).

202. *Thompson*, 20 F.4th at 22.

203. *Id.* at 20 (noting that President Biden "determined that an assertion of executive privilege [was] not in the best interests of the United States" because "Congress ha[d] a compelling need in service of its legislative functions to understand the circumstances that led to th[e] horrific events" of January 6 (quoting Letter from Dana A. Remus, Counsel to the President, to David Ferriero, Archivist of the United States (Oct. 8, 2021 [hereinafter Remus Letter]))).

204. *Id.* at 22.

205. *Id.*

occasion to consider several of OLC's views on the meaning of *Senate Select Committee*.[206] The courts in *Trump v. Mazars USA, LLP*[207] and *McGahn*[208] also weighed in on some of these arguments. None upheld the Trump position.[209]

As an initial matter, these decisions call into question OLC's view that Congress's need for information in oversight cases is less compelling than its need when contemplating legislation. Both the district and circuit courts in *Trump v. Thompson* took pains to emphasize the breadth of Congress's investigative authority that the Supreme Court has recognized.[210] The Supreme Court's admonition that the scope of Congress's power of inquiry "is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution" figures prominently in these analyses.[211] The D.C. Circuit in *Thompson* also invoked the Supreme Court's more recent endorsement of this principle in *Trump v. Mazars*, where it said that Congress's "power to obtain information is broad and indispensable" and "encompasses inquiries into the administration of existing laws, studies of proposed laws, and surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them."[212] *Mazars* confirmed that this authority extends, contrary to OLC's view,[213] to inquiries regarding the actions of the president.[214] And the district court in *McGahn* expressly noted

206. *See id.* at 44.

207. *See* 140 S. Ct. 2019, 2032-33 (2020).

208. Comm. on the Judiciary, U.S. House of Representatives v. McGahn, 415 F. Supp. 3d 145, 175 (D.D.C. 2019).

209. *Mazars*, 140 S. Ct. at 2033; *Thompson*, 20 F.4th at 44; *McGahn*, 415 F. Supp. 3d at 175.

210. *E.g.*, *Thompson*, 20 F.4th at 24 ("Congress possesses 'the power of inquiry' as 'an essential and appropriate auxiliary to the legislative function.'" (quoting McGrain v. Daugherty, 273 U.S. 135, 175 (1927))); Trump v. Thompson, 573 F. Supp. 3d 1, 20 (D.D.C. 2021) (Congress's "power to obtain information is necessarily broad and indispensable." (quoting *Mazars*, 140 S. Ct. at 2031) (internal quotation marks omitted)); *McGahn*, 415 F. Supp. at 207 n.30 ("DOJ's emphasis on the fact that what is at issue here is a *legislative* subpoena undercuts its argument, given the Supreme Court's longheld reverence for Congress' broad investigative authority.").

211. *E.g.*, *Thompson*, 573 F. Supp. 3d at 20 (quoting Barenblatt v. United States, 360 U.S. 109, 111 (1959)).

212. *Mazars*, 140 S. Ct. at 2031 (internal quotation marks omitted) (quoting Watkins v. United States, 354 U.S. 178, 187 (1957)).

213. *See supra* note 118 and accompanying text.

214. *See Mazars*, 140 S. Ct. at 2033 (noting that "Congress's responsibilities extend to

Congress's oversight authority in recognizing that "Congress' clear constitutional prerogative to compel information in furtherance of its legislative and oversight functions has been historically recognized and is typically widely respected."[215] These capacious descriptions of Congress's investigative powers—especially when coupled with the courts' determination that the executive lacks unilateral authority to assess the legitimacy of Congress's purposes[216]—undermine the argument that Congress's oversight authority is any less robust than its legislative authority.

The Supreme Court in *Mazars* and the D.C. Circuit in *Thompson* also rejected OLC's view that *Senate Select Committee* precludes Congress from engaging in fact-finding. Rather, Congress

> is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress [has] and use[s] every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served.[217]

Contrary to OLC's views, Congress's power of inquiry must, in fact, allow it to function as a fact-finder for the American people.[218] This

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'every affair of government,'" and its "inquiries might involve the President in appropriate cases"); *McGahn*, 415 F. Supp. 3d at 173 ("[T]he Constitution vests the Legislature with the power to investigate potential abuses of official authority—when necessary to hold government officials (up to, and including, the President) accountable, as representatives of the People of the United States.").

215. 415 F. Supp. 3d at 201 (citing *Watkins*, 354 U.S. at 187-88); *see also id.* at 211 ("Congress brings in witnesses ... to provide the Legislature with the information that it needs to perform its critical legislative and oversight functions." (first citing *Watkins*, 354 U.S. at 187; and then *McGrain*, 273 U.S. at 175)); *id.* at 212 (noting that completely insulating the executive from congressional scrutiny "would eviscerate Congress'[ ] historical oversight function" (alteration in original) (citing Comm. on the Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53, 103 (D.D.C. 2008))).

216. *See infra* note 231.

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

218. *See Watkins*, 354 U.S. at 200 n.33 ("From the earliest times in its history, the Congress has assiduously performed an 'informing function.'" (quoting James M. Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 HARV. L. REV. 153, 168-94 (1926))); Trump v. Thompson, 573 F. Supp. 3d 1, 20 (D.D.C. 2021) ("It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees." (quoting *Rumely*, 345 U.S. at 43)); Trump v. Thompson, 20 F.4th 10, 20-21 (D.C. Cir. 2021) ("The Documents ... bear on the Select Committee's need to understand the facts underlying the most serious attack on the operations of the Federal

is particularly true, the Supreme Court has instructed, in the wake of high-level government officials' controversial or scandalous activities: "Congress's 'desire to restore public confidence in our political processes' by 'facilitating a full airing of the events leading to' such political crises constitutes a 'substantial public interest[.]'"[219] And as both the Biden White House and the D.C. Circuit in *Trump v. Thompson* noted, events like January 6, the subject of the inquiry being considered in *Trump v. Thompson*, are exactly the kinds of incidents most in need of a full airing.[220] Thus OLC's view that Congress never needs to reconstruct particular factual circumstances was soundly rejected.

In addition, the D.C. Circuit held that the standard for Congress to overcome a claim of executive privilege is no more stringent than the one that applies to a prosecutor.[221] In fact, the court's analysis relatively breezily rejects OLC's long-time views. Rather than agreeing with OLC that *Senate Select Committee* established a heightened standard for congressional information requests directed to the executive branch, the D.C. Circuit essentially dismissed that case as irrelevant because Trump did not show that "the records at issue here [were] already within the possession of another committee of the House or Senate."[222] As a result, the January 6 Committee's "access to the requested documents would not be 'merely

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Government since the Civil War." (quoting Remus Letter, *supra* note 203)).

219. *Thompson*, 20 F.4th at 48 (alteration in original) (quoting Nixon v. Adm'r of Gen. Servs. (*GSA*), 433 U.S. 425, 453 (1977)). In this way, the D.C. Circuit echoed the Supreme Court's earlier sentiment that "the needs of the present" alone should not truncate "the American people's ability to reconstruct and come to terms" with their history. *Nixon*, 433 U.S. at 452-53.

220. *Thompson*, 20 F.4th at 16 (discussing President Biden's desire for Congress to investigate "an unprecedented effort to obstruct the peaceful transfer of power" (quoting Remus Letter, *supra* note 203)). The Biden administration declined to invoke privilege because it believed that "the insurrection that took place on January 6, and the extraordinary events surrounding it, must be subject to a full accounting to ensure nothing similar ever happens again." Remus Letter, *supra* note 203.

221. *Thompson*, 20 F.4th at 48. The D.C. Circuit recognized that the standard of review applicable to a claim of executive privilege by a *former* president was unclear. *Id.* at 33. It therefore determined that it would reach the same outcome even if President Trump had remained the incumbent. *Id.* ("Under any of the tests advocated by former President Trump, the profound interests in disclosure advanced by President Biden and the January 6th Committee far exceed his generalized concerns for Executive Branch confidentiality.").

222. *Id.* at 44.

cumulative.'"[223] Thus, while OLC has long maintained that the Senate lost in *Senate Select Committee* because it failed to identify a specific aspect of a particular legislative proposal that justified its information request,[224] the D.C. Circuit essentially reduced the relevance of *Senate Select Committee* to instances in which the evidence a congressional committee seeks is already available at another committee.

Instead, the court determined that the same standard applies to Congress as applies to a prosecutor seeking privileged material: "whether a sufficient showing of need for disclosure has been made so that the claim of presidential privilege 'must yield.'"[225] *Nixon* established that a president's "generalized assertion of privilege" was overcome when a prosecutor "demonstrated[ ] specific need for evidence in a pending criminal trial."[226] In *Trump v. Thompson*, the D.C. Circuit concluded that the January 6 Committee had "demonstrated a specific and compelling need for these presidential records because they provide a unique and critically important window into the events of January 6 that the Committee cannot obtain elsewhere."[227] Thus, OLC's long-standing argument that it should be more difficult for Congress than for a prosecutor to overcome an executive privilege claim was rejected. And while the Supreme Court did not weigh in explicitly on the meaning of *Senate Select Committee*, it did endorse the D.C. Circuit's ruling insofar as it held that Trump would have lost the case even if he were an incumbent president.[228] In other words, the Court did not dispute any of the lower court's reasoning, though it did render all of what the D.C. Circuit said about the nature of a *former* president's executive privilege claim dicta.[229]

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223. *Id.*

224. *See supra* notes 119-24 and accompanying text.

225. *Thompson*, 20 F.4th at 32 (quoting Nixon v. Adm'r of Gen. Servs. (*GSA*), 433 U.S. 425, 454 (1977); United States v. Nixon, 418 U.S. 683, 713 (1974)).

226. *Nixon*, 418 U.S. at 713.

227. 20 F.4th at 44-45; *see also* Trump v. Thompson, 573 F. Supp. 3d 1, 22 (D.D.C.), *aff'd*, 20 F.4th 10 (D.C. Cir. 2021) ("Congress need not (and usually does not) identify specific legislation within the context of a request for documents or testimony.").

228. Trump v. Thompson, 142 S. Ct. 680, 680 (2022) (mem.).

229. *Id.* ("Because the Court of Appeals concluded that President Trump's claims would have failed even if he were the incumbent, his status as a former President necessarily made no difference to the court's decision.").

The courts also weighed in on another question relating to Congress's need for information, here rejecting OLC's assertion that the executive branch may refuse to provide requested information if it is not satisfied with Congress's proffered legitimate legislative purpose. The executive branch raised this claim in *Trump v. Mazars*, *Trump v. Thompson*, and *Committee on Ways & Means*, and in each instance, the claim was rejected. *Mazars* held, for example, that courts should "be attentive to the nature of the evidence offered by Congress to establish that a subpoena advances a valid legislative purpose," and disagreed with Trump that the committee had failed to provide sufficient evidence to establish that purpose.[230] In *Trump v. Thompson*, the D.C. Circuit noted that the former president's unilateral judgment that "Congress and the Committee have no legitimate legislative interest in an attack on the Capitol" fell "far short" of meeting the burden necessary to show that the Committee's legislative purpose was impermissible.[231] So long as an investigation's subject is one on which Congress could take action, the court held, that is all that has historically been required.[232] Similarly, in *Committee on Ways & Means*, both the circuit and district courts stressed the "formidable bar" faced by parties seeking to impeach Congress's purpose.[233]

It is possible that Trump never expected to prevail by attacking Congress's purpose for requesting executive branch information; his real objective may have been to delay the judicial process, and it

230. Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2036 (2020).

231. 20 F.4th at 38. Elsewhere, the D.C. District Court has expressly recognized "that the legitimate legislative purpose bar is a low one, and the purpose need not be clearly articulated." Comm. on Ways & Means, U.S. House of Representatives v. U.S. Dep't of Treasury, 575 F. Supp. 3d 53, 64 (D.D.C. 2021).

232. *See* Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 508 (1975) ("Our cases make clear that in determining the legitimacy of a congressional act we do not look to the motives alleged to have prompted it." (first citing Watkins v. United States 345 U.S. 178, 200 (1957); and then Hutcheson v. United States, 369 U.S. 599, 614 (1962))).

233. 575 F. Supp. 3d at 65. During *Committee on Ways & Means*'s appeal, the D.C. Circuit noted that "it is not [its] place to delve deeper" once "[t]he Chairman has identified a legitimate legislative purpose that it requires information to accomplish." 45 F.4th 324, 333 (D.C. Cir. 2023). The circuit then recognized both that the Speech and Debate Clause "protects against inquiry into the motives" of Congress and that political motives alone would not render invalid a congressional investigation "if that assembly's legislative purpose is being served." *Id.* at 331 (quoting *Watkins*, 354 U.S. at 200) (internal quotations omitted). After all, "it is likely rare that an individual member of Congress would work for a legislative purpose without considering the political implications." *Id.* at 333.

worked. In combination with the issue of immunity, Trump's challenges to the legitimacy of Congress's requests extended the litigation's timeline before ultimately being rejected. In *Trump v. Mazars*, for example, the House Oversight Committee issued its subpoena for the former president's accounting records in April 2019. The parties settled the case on August 30, 2022, and the Committee began receiving the relevant records in September 2022—nearly two years after Trump had left office.[234]

*3. Theories of Justiciability*

In several cases, including *McGahn* and *Barr*, the executive branch slowed the pace of litigation and avoided confronting the merits of its information dispute with Congress by seeking to have cases dismissed on the pleadings. It used this tactic even when doing so required arguments that contradicted existing case law and even, in some circumstances, prior OLC views.[235] The Trump Justice Department made three justiciability arguments—that executive-branch defiance of congressional subpoenas does not inflict an injury sufficient to satisfy Article III standing requirements,[236] that House committees lack a cause of action under which to sue for subpoena enforcement,[237] and that courts lack subject-matter jurisdiction over subpoena-related disputes between Congress and the executive.[238]

234. *E.g.*, Kevin Freking, *House Committee Reaches Deal to Get Trump Financial Records*, AP (Sept. 1, 2022, 2:07 PM), https://apnews.com/article/donald-trump-personal-taxes-subpoenas-investigations-962ba3fef1ae51133a53005a289b675c [https://perma.cc/QM3S-5DCB]; Luke Broadwater, *Trump's Former Accounting Firm Begins Turning Over Documents to Congress*, N.Y. TIMES (Sept. 17, 2022), https://www.nytimes.com/2022/09/17/us/politics/mazars-accounting-trump-documents.html [https://perma.cc/GB9J-BWCP].

235. *See, e.g.*, Defendants' Motion to Dismiss at 1-2, Comm. on Oversight and Gov't Reform v. Barr, No. 19-cv-3557M (D.D.C. Jan. 14, 2020).

236. Comm. on the Judiciary, U.S. House of Representatives v. McGahn, 415 F. Supp. 3d 148, 188 (D.D.C. 2019); *see also* Comm. on Oversight and Gov't Reform, U.S. House of Representatives v. Holder, 979 F. Supp. 2d 1, 20-22 (D.D.C. 2013) (endorsing *Miers*'s analysis of legislative standing).

237. *McGahn*, 415 F. Supp. 3d at 193.

238. *Id.* at 172.

*a. Standing*

In *McGahn*, while Trump won before a panel of three D.C. Circuit judges, he lost before the D.C. Circuit sitting en banc when a majority of the judges explicitly rejected all of OLC's arguments that the House Judiciary Committee lacked standing to enforce its subpoena.[239] The full appeals court concluded that the Committee had suffered an injury that is sufficiently concrete, because Congress "cannot fully inform itself without the power to compel the testimony of those who possess relevant or necessary information" and that "[b]y refusing to testify in response to the Committee's concededly valid subpoena, McGahn has denied the Committee something to which it alleges it is entitled by law."[240] The court explained that *Raines v. Byrd* and its progeny did not dictate a contrary result, because that case addressed "obstacles to suits by individual legislators," not a congressional committee.[241] Moreover, the court noted that the Committee was authorized by a full House of Congress to initiate the litigation, a factor that *Raines* itself identified as potentially outcome-determinative.[242]

Ultimately, the en banc court recognized that accepting the view that Congress lacks the power to enlist the courts in its efforts to enforce subpoenas would shift the balance of power in the executive's favor by eliminating Congress's negotiating power and leave the executive with no incentive to compromise.[243] After a year of litigation, the standing issue was resolved, but the en banc court chose not to address the cause-of-action or jurisdictional questions, instead remanding the matter back to the three-judge appeals panel that it had just reversed.[244]

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239. Comm. on the Judiciary, U.S. House of Representatives v. McGahn, 968 F.3d 755, 760-61 (D.C. Cir. 2020) (en banc). Judge Henderson dissented. *Id.* at 778-93 (Henderson, J., dissenting).

240. *Id.* at 765.

241. *Id.* at 770; *see also id.* at 774 ("The Supreme Court has given clear direction that *Raines* is a narrow case about the standing only of individual legislators.").

242. *Id.* at 775-76.

243. *Id.* at 771. As the court points out, OLC's earlier position was that civil enforcement is the *only* way that a House of Congress could enforce a subpoena against the executive. *Id.* at 776.

244. *Id.* at 778.

*b. Cause of Action*

The *McGahn* district court agreed with the *Miers* court that Congress had a sufficient cause of action to sustain its lawsuit. In *Miers*, the judge found two available causes of action.[245] The first was under the Declaratory Judgment Act which provides, in relevant part, that "any court of the United States ... may declare the rights and other legal relations of any interested party seeking such declaration."[246] The other was an implied cause of action, derived from the House's Article I legislative functions.[247] The *McGahn* district court issued a similar ruling.[248]

Upon remand from the en banc court's standing decision, however, the appellate panel of three judges, in a 2-1 decision, overturned the district court and ruled that the Committee lacked a sufficient cause of action.[249] The decision would have upheld at least one of the OLC arguments, but near the end of 2020, that opinion was vacated when the en banc court agreed to rehear the case *again*, this time to consider the cause of action question.[250] The full D.C. Circuit never issued a decision on that issue, however, because when President Trump left office, the Biden administration negotiated a settlement agreement with the Committee, mooting the case.[251] So while the district court opinion repudiated the OLC position, if history is any guide OLC is unlikely to make any policy changes in response, especially considering the fact that a circuit court panel agreed with its position.

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245. Comm. on the Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53, 82, 88 (D.D.C. 2008).

246. 28 U.S.C. § 2201(a); Comm. on the Judiciary, U.S. House of Representatives v. McGahn, 415 F. Supp. 3d 148, 161 (D.D.C. 2019) (citing *Miers*, 558 F. Supp. 2d at 75).

247. 415 F. Supp. 3d at 161 (quoting *Miers*, 558 F. Supp. 2d at 95).

248. *Id.* at 154, 195.

249. *McGahn*, 973 F.3d at 123, 125.

250. Order, Comm. on the Judiciary, U.S. House of Representatives v. McGahn, 973 F.3d 121 (D.C. Cir. 2020) No. 1:19-cv-02379 (vacating the panel decision and agreeing to rehear the case en banc).

251. *See* Charlie Savage, *House Democrats and White House Reach Deal Over Testimony by Ex-Trump Aide*, N.Y. TIMES (June 4, 2021), https://www.nytimes.com/2021/05/11/us/politics/mcgahn-testimony.html [https://perma.cc/394X-6BUK].

*c. Jurisdiction*

In addition to the standing and cause-of-action arguments, President Trump's OLC claimed the courts lacked subject-matter jurisdiction to hear these cases. In previous cases pitting Congress's interests in information against the executive—three involving congressional committees seeking information in the possession of the executive branch,[252] and the fourth, a DOJ action seeking to enjoin AT&T from complying with a congressional subpoena[253]—courts found subject-matter jurisdiction under the general federal question statute, 28 U.S.C. § 1331. Moreover, the Justice Department had *agreed* with those conclusions at the time.[254] In 1986, OLC went so far as to argue that "[a]ny notion that the courts may not or should not review such disputes is dispelled by *United States v. Nixon*."[255] Even as late as 2007, the Justice Department in *Miers* agreed with the court that § 1331 provided subject-matter jurisdiction for such cases.[256]

252. Comm. on Oversight & Gov't Reform v. Holder, 979 F. Supp. 2d 1, 17 (D.D.C. 2013); *Miers*, 558 F. Supp. 2d at 55; Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 727 (D.C. Cir 1974). Note that a jurisdiction question arose in *Senate Select Committee* solely related to the amount in controversy requirement, not with respect to the federal question requirement.

253. United States v. Am. Tel. & Tel. Co. (*AT&T*), 567 F.2d 121, 122 (D.C. Cir. 1977). In a fifth, *Mazars*, in which Congress subpoenaed the executive's personal financial information from his accountant and President Trump himself initiated the litigation to quash the subpoena, he never contested the courts' jurisdiction. Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2026 (2020).

254. Response to Congressional Requests for Information Regarding Decisions made Under the Independent Counsel Act, 10 Op. O.L.C. 68, 87 (1986) ("The Department took the position [that the 1982 declaratory injunction suit] arose under the Constitution and laws of the United States, because resolution 'depend[ed] directly on construction of the Constitution [and the] Court has consistently held such suits are authorized by [section 1331].'" (alteration in original) (quoting Powell v. McCormack, 395 U.S. 486, 516 (1969))); *see id.* at 87-88 ("Relying upon the decision in [*United States v. AT&T Co.*, 551 F.2d 384 (D.C. Cir. 1976)], which held that an action brought by the United States to block a response by a third party to a congressional subpoena met the threshold jurisdictional requirements of section 1331, the Department argued that subject matter jurisdiction similarly exists in a suit to halt enforcement of a subpoena addressed directly to the Executive Branch.").

255. *Id.* at 88 n.3 (citing United States v. Nixon, 418 U.S. 683, 703-05 (1974)).

256. *Miers*, 558 F.3d at 64-65 (finding subject matter jurisdiction compelled by *AT&T*, 551 F.2d at 388-89).

In contesting the courts' jurisdiction in subpoena enforcement suits, the executive branch repudiated its earlier position, disregarded the court's determination in *Miers*, and argued that 28 U.S.C. § 1365 affirmatively denies courts jurisdiction over House subpoena enforcement cases.[257] That statute establishes federal court jurisdiction over subpoena-enforcement actions brought by the Senate, but it does not mention the House.[258] Because the law omits any mention of the House, DOJ argued it should be interpreted as denying jurisdiction to subpoena enforcement suits brought by the House.[259] But that argument had been analyzed and expressly rejected by a 1986 OLC opinion, which warned—based upon the statute's explicit legislative history—that § 1365 should *not* be read to imply that federal courts did not have the authority to hear House subpoena-enforcement suits.[260]

As with the standing and cause-of-action arguments, the district court in *McGahn* rejected OLC's position that the courts lack subject-matter jurisdiction over suits to enforce congressional subpoenas. The court again invoked the reasoning in *Miers*—reasoning with which DOJ had *agreed* in *Miers*[261]—that the case arose under Article I of the Constitution, thus presenting a clear federal question.[262] Moreover, the district court viewed the statutory jurisdiction question as controlled by *AT&T*,[263] in which the D.C. Circuit found that § 1331 supplied jurisdiction.[264] McGahn's

257. Trump OLC 2021 Memo, *supra* note 32, at 47.

258. 28 U.S.C. § 1365(a).

259. Comm. on the Judiciary, U.S. House of Representatives v. McGahn, 415 F. Supp. 3d 148, 175 (D.D.C. 2019).

260. Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act, 10 Op. O.L.C. 68, 87 n.31 (1986). The relevant Senate committee report cautioned that the authorization of Senate subpoena-enforcement suits did not mean that federal courts did not already have jurisdiction over such suits under other statutory provisions. It stated that the new statute "is not intended to be a Congressional finding that the Federal courts do not now have the authority to hear a civil action to enforce a subp[o]ena against an officer or employee of the Federal Government." S. REP. NO. 95-170, at 91-92 (1978).

261. *See supra* notes 256-60 and accompanying text.

262. 415 F. Supp. 3d at 174-75.

263. *Id.* at 179 n.14 ("*AT&T*'s jurisdictional and justiciability pronouncements are not drive-by rulings by any stretch of the imagination; indeed, the D.C. Circuit sua sponte raised the issue of jurisdiction under section 1331.... Thus, unless and until that case is overturned, it is binding precedent.").

264. *Id.* at 174 (citing *AT&T*, 551 F.2d at 389).

argument that 28 U.S.C. § 1365 precludes subject-matter jurisdiction over subpoena enforcement claims fared no better. Again, after calling attention to OLC's historical rejection of this argument,[265] the court noted that an earlier district court had rejected this argument in a case involving a House committee's effort to enforce a subpoena against then-Attorney General Eric Holder.[266] According to that court, the provision was enacted to eliminate the jurisdictional bar to subpoena-enforcement suits posed by amount-in-controversy requirements that no longer exist.[267] Judge Jackson therefore concluded that the text of § 1331, as well as existing precedents, made plain that the court had jurisdiction over McGahn's case.[268]

After the district court ruled, this issue took a similar path as the cause-of-action question. The en banc D.C. Circuit Court remanded the case back to the three-judge appellate panel that it had just reversed on standing.[269] The appellate panel then overruled the district court and agreed with McGahn that federal courts had no jurisdiction to hear the congressional subpoena lawsuit.[270] That appellate panel's decision was vacated when the D.C. Circuit decided for a second time to review the panel's determination en banc.[271] That issue, too, was eventually mooted by the parties' settlement.

The end result was that both the en banc D.C. Circuit Court and the district court decisively rejected OLC's theories on why House committees' suits to enforce subpoenas were non-justiciable.[272]

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265. *Id.* at 175.

266. Comm. on Oversight and Gov't Reform v. Holder, 979 F. Supp. 2d 1, 18 (D.D.C. 2013) ("[S]ection 1365 specifically states that it does not have anything to do with cases involving a legislative effort to enforce a subpoena against an official of the executive branch withholding records on the grounds of a governmental privilege.").

267. *Id.*

268. 415 F. Supp. 3d at 175.

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

270. Comm. on the Judiciary, U.S. House of Representatives v. McGahn, 951 F.3d 510, 522 (D.C. Cir. 2020).

271. *McGahn*, 968 F.3d at 769.

272. *See McGahn*, 415 F. Supp. 3d 148, 199 (D.D.C. 2019) (pointing out that even the Supreme Court seems to have assumed that such cases were justiciable when it wrote that "[w]ithout the power to investigate—including of course the authority to compel testimony, *either through its own processes or through judicial trial*—Congress could be seriously

Nevertheless, only the standing question was definitively settled by the Circuit Court because the legal wrangling over justiciability extended the litigation long enough to outlast the Trump administration.

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In sum, numerous OLC theories erecting obstacles to Congress's information requests have been rejected by federal courts, while others have remained unresolved due to the protracted length of litigation. The former category includes OLC's claims of absolute immunity for presidential advisors and its interpretations of *Senate Select Committee* that discounted Congress's right to obtain information for oversight purposes, Congress's right to reconstruct specific facts to inform the public about government actions, and Congress's being held to a more stringent standard than prosecutors to overcome a claim of executive privilege. The former category also includes each of the OLC's arguments against justiciability. Importantly, however, most of those issues were decided only by a district court, and thus not generating binding precedent.

### *B. The Trump-Era Surge of Congressional-Executive Litigation*

One premise of this Article is that the executive branch succeeded in developing its extravagant legal views regarding its authority to circumvent congressional information requests, in part by avoiding, for many years, subjecting its practices to judicial scrutiny. Plainly, that changed during the Trump administration.

This Section contends that the surfeit of litigation in the Trump era is attributable to the confluence of several factors. First, President Trump's unprecedented behavior sparked numerous significant congressional investigations, including impeachment investigations for just the fourth time in U.S. presidential history.[273]

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handicapped in its efforts to exercise its constitutional function wisely and effectively." (quoting Quinn v. United States, 349 U.S. 155, 161 (1955))).

273. *See* Jonathan H. Adler, *All the President's Papers*, CATO SUP. CT. REV. 31, 31 (2020) (noting that Donald Trump is unique because "[n]o president's financial holdings have spurred as many accusations of malfeasance or provoked the same degree of hostile congressional oversight and investigation" and "[n]o president has so thoroughly resisted transparency and

Despite his global financial entanglements, President Trump refused to make his tax returns public, making it impossible to judge whether his official acts as president furthered his and his family's personal pecuniary interests, or the interests of the nation as a whole. President Trump solicited the assistance of foreign leaders—once in public, once in an official phone call—in undermining his political opponents in the 2016 and 2020 election campaigns. And he embarked on a multi-pronged effort to reject the results of his 2020 election loss in a series of acts that culminated in his supporters violently invading the Capitol, disrupting congressional proceedings, and vandalizing the seat of American government. Considering the gravity of the concerns these behaviors raised, Congress may have felt bound to pursue investigations, even when they required litigation.

Second, President Trump is the first president to declare that his administration would neither negotiate with Congress nor comply with any congressional subpoenas.[274] In essence, Congress's *only* option to pursue investigations into troubling executive branch behavior was to seek judicial enforcement of its subpoenas.

Third, Congress's need to investigate ran headlong into the arguments laid out in Part I. Over time, the executive branch had adopted more and more aggressive views regarding its authority to deny Congress access to executive branch information. Frustrated by what it saw as executive stonewalling, Congress has recently been more willing to turn to the courts. In fact, one could argue that the Trump era was the culmination of a recent trend. From the administration of George Washington to that of Bill Clinton, Congress and the executive took their information disputes to court just twice.[275] But versions of some of the arguments described above were litigated in both the George W. Bush and Barack Obama administrations as well, suggesting that Congress had determined

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disentanglement with potential conflicts of interest" (footnote omitted)).

274. *See, e.g.*, Charlie Savage, *Trump Vows Stonewall of 'All' House Subpoenas, Setting Up Fight Over Powers*, N.Y. TIMES (Apr. 24, 2019), https://www.nytimes.com/2019/04/24/us/politics/donald-trump-subpoenas.html [https://perma.cc/669V-PTDQ] ("Mr. Trump has ... abandon[ed] even the pretense of trying to negotiate accommodations and compromise.").

275. *See* Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.3d 725, 726 (D.C. Cir. 1974); United States v. Am. Tel. & Tel. Co. (*AT&T*), 567 F.2d 121, 122 (D.C. Cir. 1977).

in the twenty-first century that it was time to push back.[276] When Trump rejected the possibility of compromise and advanced particularly extreme versions of OLC doctrines limiting congressional access, that rendered litigation a more appealing path—both because the legal arguments may have represented executive overreach and because negotiations were plainly futile.[277]

Why then was President Trump, unlike the vast majority of his predecessors, willing to refuse to compromise when the consequences were to facilitate numerous judicial decisions adverse to the executive's arguments? The answer is likely that President Trump's incentives differed from those of prior presidents. The executive branch doctrines described in Part I are crafted in large part to defend the prerogatives of the presidency, not to benefit the president.[278] Indeed, there are times when OLC has advised against compromises that might have been politically beneficial to the incumbent because it would set bad historical precedent for future administrations.[279] And recall former Assistant Attorney General Ted Olson's objection to allowing presidential aides to testify because doing so might create the impression that Congress was entitled to such testimony.[280] So while OLC had used its structural advantages over the years to strategically expand the executive's bargaining power through increasingly expansive claims of executive authority over information, it had also reached strategic compromises with Congress to avoid judicial testing—or judicial testing that might lead to binding opinions—of its more extravagant claims.

President Trump, however, seems to have prioritized his individual interests over that of the institution of the executive branch. It was in his interest to avoid disclosing any information for as long as possible. He therefore pressed maximalist litigation positions even

276. *See* Comm. on the Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53 (D.D.C. 2008); Comm. on Oversight & Gov't Reform v. Holder, 979 F. Supp. 2d 1 (D.D.C. 2016).

277. *See supra* Part II.B.

278. *See generally* Daphna Renan, *The President's Two Bodies*, 120 COLUM. L. REV. 1119 (2020) (exploring the distinctions between the person of the president and the office of the presidency).

279. *See* Berman, *supra* note 13, at 557.

280. *See supra* note 71 and accompanying text.

in circumstances where he was likely to lose. Unsurprisingly, those positions were largely rejected by the courts. Although President Trump lost many of the battles, in the end he may have won his personal war by ensuring sufficient delay to stave off any political repercussions from the many investigations. The bargaining advantage cultivated by OLC, on the other hand, took some hits. The next question becomes just how much impact will the executive branch losses discussed in Part II.A have on congressional-executive bargaining going forward? In other words, did Trump's judicial losses damage the institution of the presidency and the executive branch, or did it instead convey the lesson to future presidents that there is very little political cost to simply refusing to bargain with Congress even if the courts rule against you? Part III turns to considerations of how these cases might impact congressional-executive information disputes going forward.

## III. RECALIBRATING THE INTER-BRANCH BALANCE OF POWERS

In *Mazars*, the Supreme Court recognized that if it endorsed an unlimited subpoena power for Congress, it "could simply walk away from the bargaining table and compel compliance in court."[281] Similarly, allowing complete executive branch control over information "[would give] short shrift to Congress's important interests in conducting [effective investigations]."[282] Therefore, the Court concluded, the proper role of judicial review of congressional-executive information disputes is to strike a balance[283] that preserves the two-centuries-old practice of interbranch negotiation and compromise.[284] In other words, the optimal equilibrium is a balance of power where neither side is assured of a complete victory and therefore both sides are willing to compromise.

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281. Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2034 (2020); *see id.* ("Congress could 'exert an imperious controul' over the Executive Branch and aggrandize itself at the President's expense." (quoting THE FEDERALIST NO. 71, at 484 (Alexander Hamilton))).

282. *Id.* at 2033.

283. *Id.* at 2035.

284. *Id.* (arguing that it would transform the "nature of such interactions ... eroding a '[d]eeply embedded traditional way[ ] of conducting government'" (alteration in original) (citing Youngstown Sheet & Tube Co., 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring))).

This Article has argued that the precedential vacuum regarding OLC's theories on congressional oversight had allowed the executive to develop numerous challenges to congressional access at preliminary stages of disputes over information. These challenges have provided the executive with increasingly strong initial bargaining positions, substantial negotiating leverage over Congress, and powerful tools to delay resolution of any litigation that Congress ultimately brought. Part III.A explores the extent to which the cases discussed in Part II succeeded in recalibrating the branches' powers to create a more balanced equilibrium. It concludes that judicial resolution of some of the preliminary hurdles erected by the executive have improved Congress's position. However, a significant number of them remain unresolved, leaving a great deal of power in the executive's hands. Moreover, the executive is able to ensure that these issues *remain* unresolved through strategic embrace of negotiated resolutions. As a result, the executive as an institution seems to have paid a fairly low price for President Trump's unusually antagonistic relationship with Congress. Part III.B then turns to what Congress and the courts could do going forward to advance that goal.

### *A. The New Legal Landscape of Congressional Oversight*

This Section looks at the practical impact of the judicial decisions discussed in Part II on the executive branch doctrines of testimonial immunity, Congress's information needs, and justiciability.

#### *1. Absolute Testimonial Immunity*

One of the most striking instances in which a court definitively repudiated OLC's arguments is *McGahn*'s reaffirmation of *Miers*'s holding from 2007 that the absolute testimonial immunity theory for presidential advisors is essentially built on sand.[285] Indeed, it is hard to imagine a more complete rejection of the idea than then-Judge Jackson's 2019 district court opinion.[286]

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285. *See* Comm. on the Judiciary, U.S. House of Representatives v. McGahn, 415 F.3d 148, 153 (D.D.C. 2019).

286. *See id.*

Yet the executive refuses to concede the point. When asked by the court for its perspective in a case in which former Trump chief of staff Mark Meadows challenged a January 6 Committee's subpoena for his testimony, the Biden administration "acknowledge[d] that some judges have disagreed with" the executive branch's absolute immunity argument, but because "neither the Supreme Court nor the D.C. Circuit has addressed the question" and because "the Executive Branch's longstanding position is firmly grounded in separation-of-powers principles," the Justice Department would stay the course when it comes to immunity of presidential advisors.[287] It therefore seems that the executive will continue to assert absolute testimonial immunity for an incumbent president's current and former advisors. Indeed, because the executive can always avoid establishing an adverse precedent by negotiating a compromise (so long as Congress agrees), it has nothing to lose by asserting immunity for presidential advisors as a means of delaying either negotiations or litigation. When it comes to presidential advisors to *former* presidents (such as Meadows), however, DOJ conceded that a qualified, not absolute, testimonial immunity should apply.[288]

Nevertheless, two well-respected district judges—one appointed to the district court by President George W. Bush, the other by President Barack Obama—have now issued lengthy opinions rejecting the theory.[289] These opinions, moreover, are not off-the-cuff. They are thoroughly reasoned, taking account of historical practice, existing precedent, constitutional structure, and logic to reach their conclusions. By contrast, there is no judicial opinion at any level endorsing the idea. So, while the district court opinions might not

287. Statement of Interest of the U.S. at 7, Meadows v. Pelosi, No. 21-cv-3217 (D.D.C. July 15, 2022).

288. *Id.* at 2. When Congress demands testimony from a former president's advisor, DOJ argued, "the relevant constitutional concerns are lessened" because the testimony cannot impact their official conduct. *Id.* at 2, 8. However, because the interest in preserving the confidentiality of presidential communications continues, qualified immunity is appropriate. *Id.* at 2-3 (citing *Mazars*, 140 S. Ct. at 2035); *see* Katelyn Polantz, *DOJ Says Advisers to Ex-Presidents May Have Some Immunity from Congressional Subpoenas but not in Jan. 6 Probe*, CNN (July 15, 2022, 9:40 PM), https://www.cnn.com/2022/07/15/politics/mark-meadows-immunity-subpoenas-january-6-committee/index.html [https://perma.cc/2P8F-B9S6].

289. Comm. on the Judiciary, U.S. House of Representatives v. McGahn, 968 F.3d 755 (D.C. Cir. 2020 (en banc)); Comm. on the Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53, 56 (D.D.C. 2008).

be binding, they may say something about the strength of the executive branch's argument, potentially rendering it a less effective bargaining tool.

*2. Congress's Right to Executive Branch Information*

*Trump v. Thompson*'s repudiation of several of OLC's long-standing interpretations of *Senate Select Committee*[290] seems to have strengthened Congress's hand significantly by rejecting OLC's long-standing constructions of *Senate Select Committee*. First, the argument that congressional oversight investigations carry less weight than investigations that rest on the legislative power has been called into question.[291] The Supreme Court in *Mazars* as well as both the D.C. Circuit and the district court in *McGahn* reemphasized the breadth of Congress's investigative powers,[292] including fact-finding investigations into potential abuses of official authority necessary to hold government officials (including the president) accountable.[293] Second, the D.C. Circuit's *Trump v. Thompson* opinion debunked the interpretation of *Senate Select Committee* that denied Congress's need, at times, to reconstruct the facts of past events in order to inform the public about actions taken by the government.[294] And third, the Supreme Court affirmed the D.C. Circuit's view that the standard Congress must meet to overcome the presidential communications privilege is no different from, and therefore no more demanding than, the one articulated in *United States v. Nixon*—whether the party seeking privileged information showed

290. *See supra* notes 109-25 and accompanying text.

291. Comm. on the Judiciary, U.S. House of Representatives v. McGahn, 415 F. Supp. 3d 148, 201 (D.D.C. 2019) ("Congress' clear constitutional prerogative to compel information in furtherance of its legislative and oversight functions has been historically recognized and is typically widely respected." (citing Watkins v. United States, 354 U.S. 178, 187-88 (1957))); *id.* at 211 ("Congress brings in witnesses ... to provide the Legislature with the information that it needs to perform its critical *legislative and oversight* functions." (emphasis added) (first citing *Watkins*, 354 U.S. at 187; and then McGrain v. Daugherty, 273 U.S. 135, 175 (1927))).

292. *See, e.g.*, *id.* at 181; Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2031 (2020).

293. *See McGahn*, 415 F. Supp. 3d at 173; *id.* at 180 ("[T]he danger to effective and honest conduct of the Government if the legislature's power to probe corruption in the executive branch were unduly hampered." (quoting *Watkins*, 354 U.S. at 194-95)).

294. *See supra* notes 221-24 and accompanying text.

a "demonstrated, specific need"[295] for the information.[296] Indeed, the D.C. Circuit seemed to reduce the relevance of *Senate Select Committee* to the unsurprising holding that Congress's need to overcome executive privilege to access information that is already in the possession of one of its committees is not particularly compelling.[297]

We can, of course, expect OLC to adopt the most pro-executive reading of these cases as possible, and there are plausible interpretations of the new decisions that could minimize their impact. For example, no opinion *explicitly* rejects the idea that Congress's needs in the legislative context are weightier than in the oversight context. As late as January 2021, OLC continued to disavow any congressional "authority to 'oversee' or direct" the executive branch's exercise of its Article II powers.[298] When it comes to the applicable standard of review, OLC's task is more difficult—there can be no dispute that the *Nixon* standard applies. Nevertheless, the executive's view of what it means for Congress to establish a "demonstrated, specific need" for particular information might significantly differ from Congress's views on that question. And the question whether Congress's need for information outweighs any harm of disclosing privileged communications is a highly fact-specific determination that will always require extensive negotiation or litigation.

Yet even though *Trump v. Thompson*'s analysis of *Senate Select Committee* will not neatly resolve any particular dispute, it still could strengthen Congress's hand at the bargaining table. Because even though courts rarely adjudicate the merits of congressional-executive information disputes, there is always lurking in the background the possibility that they could. And if they were to reach the merits of such a case, *Trump v. Thompson* indicates that the courts would require that Congress meet a much lower bar to overcome a claim of executive privilege than OLC has maintained. This judicial signal might render a negotiated resolution more

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

296. *See* Trump v. Thompson, 142 S. Ct. 680, 680 (2022) (per curiam). While the precise standard of review to be used when a *former* president invokes executive privilege is not clear, the Supreme Court endorsed the D.C. Circuit's analysis of the standard that applies to incumbent presidents. *Id.*

297. *See supra* notes 225-28 and accompanying text.

298. Trump OLC 2021 Memo, *supra* note 32, at 10.

appealing to the executive branch. Because of the fact-specific nature of these merits questions, neither party can confidently predict what a court would do. Yet the more forgiving standard for congressional access that *Trump v. Thompson* seems to contemplate makes the possibility of loss more immediate for the executive. This prospect might restore the parties' traditional reluctance to litigate—the executive to avoid adverse decisions and maintain flexibility, and Congress to avoid delay.

At the same time, even if the executive recognizes the possibility of an eventual loss, the parties' differing time horizons might mitigate the executive's willingness to settle the matter without protracted litigation. Recall that delay favors the executive branch.[299] It is for this reason that Congress generally prefers *not* to litigate. Indeed, there are likely information requests Congress does not make or accommodations Congress accepts, for the simple fact that litigating disputes often drags them out beyond the window where the information is useful. In addition to the litigation discussed in Part II, consider the timeline of other, similar suits. The suit seeking documents and testimony from Harriet Miers was filed March 10, 2008, and although the district court's opinion rejecting absolute immunity came after just about four months, the D.C. Circuit still had not issued its decision when January 2009 rolled around.[300] Barack Obama then took office and his administration reached a compromise with the House committee.[301] In the House's litigation against Attorney General Eric Holder regarding information about an ill-fated investigation into gun-running, the suit was filed in June 2012, but the district court did not issue an opinion until three-and-one-half years later.[302] And as noted above, McGahn's closed-door testimony came over two years after he was subpoenaed and months after the president, in whose impeachment inquiry his testimony was sought, had lost his re-election bid.[303]

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299. *See supra* note 24 and accompanying text.

300. *See* Shaub, *supra* note 11, at 52.

301. David Johnston, *Top Bush Aides to Testify in Attorneys' Firings*, N.Y. TIMES (Mar. 4, 2009), https://www.nytimes.com/2009/03/05/us/politics/05rove.html [https://perma.cc/9TEJ-JX9B].

302. *See* Shaub, *supra* note 11, at 51.

303. *See* Chafetz, *supra* note 23, at 148.

Even in the face of unfavorable precedent, the executive can manufacture delay. So long as the executive branch is able to negotiate a compromise before the D.C. Circuit issues a ruling on the merits, it has very little to lose by stonewalling up to that point. To be sure, that strategy could backfire—if Congress is confident that ultimately it will prevail in the courts, it may reject the executive's eleventh-hour efforts to compromise. But even if Congress has the advantage, it may prefer a partial victory more quickly over a complete victory at the end of months or years of litigation. In other words, the very pace of litigation (slow) could serve to undermine any strategic advantage Congress might get from doctrinal victories. This is especially true so long as the preliminary questions, such as immunity and justiciability, remain unanswered.

At least one Trump-era development actually encourages additional delay. *Mazars* muddied the waters regarding what Congress must do to establish that it has a legitimate legislative purpose. This essentially guarantees the need to negotiate or litigate the issue in every congressional investigation. In particular, the *Mazars* multi-factor balancing test includes a prong instructing judges to "be attentive to the nature of the evidence offered by Congress to establish that a subpoena advances a valid legislative purpose."[304] At the same time, the Supreme Court reaffirmed that "it 'unquestionably' remains 'the duty of *all* citizens to cooperate'" if Congress seeks information "needed for intelligent legislative action."[305] The case did not set any particular standard that Congress must meet to establish the legitimacy of its purpose, nor did its assertion that detailed evidence of Congress's purpose is preferable to vague evidence—a preference drawn directly from *Watkins*[306]—provide much guidance.

As a result, both sides have declared victory, with Congress citing to *Mazars*'s reaffirmation of its broad investigative power, and those resisting congressional subpoenas pointing to the more active role for courts in policing congressional purpose that *Mazars* seems to

304. Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2036 (2020). This standard, moreover, seemingly applies to both the president's *personal* papers and his *official* papers. *Id.* at 2034-35.

305. *Id.* at 2036 (quoting Watkins v. United States, 354 U.S. 178, 187 (1957)).

306. *Watkins*, 354 U.S. at 201.

contemplate.[307] Indeed, OLC is sure to set a high bar for Congress to clear in "establish[ing] that a subpoena advances a valid legislative purpose."[308] Moreover, executive branch officials are sure to highlight the opinion's recognition that congressional investigations can be used to "harass" the president or "'exert an imperious controul' over the Executive branch ... at the President's expense."[309] In addition, numerous litigants seeking to avoid compliance with congressional subpoenas have invoked *Mazars*, even when the separation of powers concerns seemingly animating *Mazars* are not present. For example, witnesses subpoenaed by the January 6 Committee who did not even serve in the executive branch at the time of the attack on the Capitol—Michael Flynn, Alex Jones, and John Eastman, among others—have argued that *Mazars* applies "more loosely—as a signal that the judiciary is open to keeping at least those congressional investigations with some connection to the president on a shorter leash."[310] To date, the lower courts do not seem to have imposed dramatic new evidentiary requirements on Congress before deeming its subpoenas enforceable.[311]

Nevertheless, even if it remains a relatively low bar for Congress to hurdle, the executive has succeeded in preserving this antecedent question. Moreover, OLC asserts that "the case for closely scrutinizing [congressional] requests is even stronger where it is not, as in *Mazars*, a court that is evaluating the request, but instead the Executive Branch" as part of negotiations with Congress.[312] Thus in direct interbranch negotiations, OLC has reserved for the executive

307. *See* Quinta Jurecic & Molly Reynolds, *Mazars Creep and the Jan. 6 Committee*, LAWFARE (Feb. 24, 2022, 8:01 AM), https://www.lawfaremedia.org/article/mazars-creep-and-jan-6-committee [https://perma.cc/L42V-R282].

308. *Mazars*, 140 S. Ct. at 2036.

309. *Id.* at 2034 (quoting THE FEDERALIST NO. 71, at 484 (Alexander Hamilton)).

310. *See* Jurecic & Reynolds, *supra* note 307.

311. In *Trump v. Thompson*, for example, the D.C. Circuit said that, even assuming the *Mazars* test applied there, "the January 6th Committee plainly has a 'valid legislative purpose' and its inquiry 'concern[s] a subject on which legislation could be had.'" 20 F.4th 10, 25 (2021) (alteration in original) (quoting *Mazars*, 140 S. Ct. at 2031-32). The court ultimately did not apply the *Mazars* test because it decided that test is inapplicable to instances in which Congress and the executive agree on disclosure. *Id.* at 41, 47-48. And in *Committee on Ways & Means, U.S. House of Representatives v. United States Department of Treasury*, the court determined without difficulty that the *Mazars* factors were satisfied. 45 F.4th 324, 338-39 (D.C. Cir. 2022) (noting that the *Mazars* factors all favor Congress).

312. Trump OLC 2021 Memo, *supra* note 32, at 15.

the right to closely scrutinize Congress's asserted investigative purpose, a position that does not differ substantially from the one advanced before these cases were litigated.[313] Rejecting Congress's legitimate legislative purpose thus remains a viable bargaining chip for the executive, delaying any meaningful negotiation over the merits of the disputes and signaling that any litigated resolution would be delayed by judicial consideration of the issue.

*3. Justiciability*

The preliminary questions of justiciability have been an important vector of delay, and for the Trump administration, they largely served their purpose—protracted litigation over standing, jurisdiction, and cause of action (along with claims of absolute immunity) meant, for example, that Congress did not secure McGahn's testimony prior to President Trump's first impeachment,[314] and the House Ways & Means Committee did not receive Trump's tax returns until after he had left office.[315]

Going forward, however, the en banc D.C. Circuit's standing decision in *McGahn* should accrue to Congress's benefit. It explicitly held that OLC's interpretation of *Raines v. Byrd* to preclude legislators' ability to satisfy the Article III requirement of injury in fact is incorrect.[316] Future committees should not have to re-litigate the question of whether congressional committees have standing to bring subpoena enforcement actions at the district or circuit court level. With that hurdle eliminated, one of the executive branch's means of delay has been taken away. To be sure, DOJ might appeal the issue to the Supreme Court, which would engender significant

313. *Id.* at 15-16 ("The White House may fairly expect that the committee will provide a statement that 'adequately identifies its aims and explains why the President's information will advance its consideration of the possible legislation' ... [and] may take into account all relevant facts and circumstances in ensuring that the congressional request serves a legitimate legislative purpose." (quoting *Mazars*, 140 S. Ct. at 2036 )).

314. *See supra* note 200 and accompanying text.

315. *See* Dareh Gregorian, Laura Strickler & Ryan Nobles, *Trump's Tax Returns Released by House Committee Show He Paid Little in Taxes*, NBC NEWS (Dec. 30, 2022, 10:24 AM), https://www.nbcnews.com/politics/donald-trump/trumps-tax-returns-released-house-committee-years-legal-battles-rcna62408) [https://perma.cc/HBB2-MNVF] (indicating the Committee received the tax returns in November 2022).

316. *See supra* notes 244-48 and accompanying text.

delay in that particular dispute. But it would finally provide a definitive answer to the question of congressional standing. A Supreme Court decision favoring Congress would eliminate the standing argument altogether, whereas a decision favoring the executive would render all other issues moot, because there will be no vehicle for seeking judicial review of subpoenas.

At the same time, we can expect OLC's jurisdictional and cause-of-action arguments to continue to engender significant delay even at the district court level since they remain unsettled by the appeals court. Like the repeated losses on the immunity question, however, the district court's decisions might give the executive pause with respect to its prospects should it go to court, thereby encouraging negotiations. And unlike immunity, justiciability questions will be the first addressed by the courts, increasing the likelihood of a binding decision and potentially decreasing their value as bargaining chips.

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The Trump-era cases delivered a mixed result when it comes to the numerous questions that the executive has placed in the path of legislators seeking executive privilege information. They did move the needle in Congress's direction—significantly when it comes to legislative standing.[317] In the context of other arguments— testimonial immunity, lack of jurisdiction and cause of action, and the proper interpretation of *Senate Select Committee*—OLC's views were not delivered knock-out punches, but they were weakened to the extent that the opinions rejecting them are persuasive or that they seem to augur unfavorable results for the executive in the future.[318] And while OLC will not change its positions where it is not required to, it will be interesting to observe the extent to which these opinions present the prospect of a reinvigorated practice of reaching bilateral resolutions of congressional-executive information disputes. The limited evidence from the Biden administration is inconclusive. The Republican takeover of the House majority ushered in

317. *See supra* Part II.A.1.a.

318. *See supra* Parts III.A.1, II.A.3.b & c, and III.A.2, respectively.

a new era of divided government.[319] And while there have been some public battles over access to executive branch information in which House committees have issued subpoenas and threatened to hold executive branch officials in contempt for non-compliance—Secretary of State Anthony Blinken[320] and FBI Director Christopher Wray[321] specifically—these have been resolved without resort to the courts.

### *B. The Path Forward*

If the serial losses that the executive branch suffered during the Trump era cannot succeed in leveling the playing field between Congress and the executive, what can? This Section sketches out a potential path forward.

Recall that delay favors the executive branch.[322] The most effective way of recalibrating the balance of power is to eliminate the executive's ability to rely on the preliminary issues it has developed to drag out each conflict. Eliminating the uncertainty created by those preliminary questions would bring the *merits* of the underlying dispute—whether, for example, Congress's need for a particular communication between the president and her advisors is sufficiently weighty that it can overcome a claim of executive privilege—to the fore.[323] At that point, the historical grounds for avoiding litigation—the executive's desire to preserve flexibility and a congressional aversion to delay—should prompt a return to the

319. Deirdre Walsh, *Republicans Turn to 2023 with Narrow House Majority* (Dec. 31, 2022, 7:58 AM), https://www.npr.org/2022/12/31/1146453695/republicans-turn-to-2023-with-narrow-house-majority [https://perma.cc/KPC8-D7UF] (discussing a House Republican majority's effect on President Biden's Democratic administration).

320. *See* Courtney Kube, Abigail Williams & Rose Horowitch, *House Committee Will Hold Blinken in Contempt of Congress Over Afghan Withdrawal Info, Says Official*, NBC NEWS (May 12, 2023, 11:06 AM), https://www.nbcnews.com/politics/congress/blinken-gets-contempt-congress-threat-afghan-withdrawal-rcna83310 [https://perma.cc/E5XH-DS9V].

321. *See* Jacqueline Alemany & Perry Stein, *FBI Director Chris Wray to Face Contempt of Congress Vote, Comer Says*, WASH. POST (May 31, 2023, 7:12 PM), https://www.washingtonpost.com/politics/2023/05/31/wray-comer-contempt-biden/ [https://perma.cc/3CUP-Y8Q8].

322. *See supra* notes 24-26 and accompanying text.

323. *See* Shaub, *supra* note 11, at 7 (distinguishing between absolute authority to control information and a rule requiring the president to publicly justify withholding information from Congress).

negotiating table. Thus, wiping away the executive's manufactured preliminary questions could encourage negotiated resolutions.[324]

There are two ways to settle the preliminary questions that the executive has raised—through litigation or legislation. One more round of litigation over congressional standing could result in a definitive answer on that question from the Supreme Court. Any future litigation would require courts at all levels to address the questions of whether Congress has a valid cause of action and whether the court has jurisdiction. If Congress wants to strengthen its hand, it should aggressively litigate those issues, as well as the issue of advisor immunity. Indeed, given that doctrine's ignominious reception by the courts (twice), Congress should relish an opportunity to seek a definitive judicial pronouncement on the immunity issue.

Litigating aggressively means filing suit as soon as it becomes clear that negotiations are unreasonably extending the conflict. It means asking the courts to expedite consideration of the cases. It means declining to settle with the executive when it offers to do so before a ruling by the circuit court. And it might even mean the majority party in Congress authorizing a suit against an executive led by a president of the same party. Only by forcing the executive to place its arguments before the courts and continuing litigation until a binding precedent emerges can Congress reclaim these bargaining chips from the executive through the courts. Whether it is realistic to expect Congress to do so, however, is a different question. While the executive branch is motivated by institutional interests, legislators are less committed to pursuing the interests of Congress as an institution. Instead, they are driven by their own political fortunes and their party's interest.[325] When an election puts one party in control of both the executive and a House of Congress,

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324. A court can even explicitly provide such encouragement, as the D.C. Circuit did in *United States v. Am. Tel. & Tel. Co. (AT&T)*, in which the Justice Department sued to enjoin AT&T from complying with a House subpoena seeking information regarding warrantless "national security" wiretaps. 551 F.2d 384, 385 (D.C. Cir. 1976). The D.C. Circuit therefore *twice* remanded the case without a final decision, instead suggesting procedures through which the parties might reach a settlement. *Id.* at 385; United States v. Am. Tel. & Tel. Co. (*AT&T*), 567 F.2d 121, 123 (D.C. Cir. 1977) (declining to rule on the merits and instead suggesting a compromise procedure).

325. *See* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006).

for example, legislators' appetite for litigation to establish congressional prerogatives tends to evaporate.[326]

Courts, for their part, should facilitate the ultimate resolution of these preliminary questions by moving such litigation expeditiously. The Trump-era cases provide hints that courts might be willing to play a role—not necessarily in resolving the merits of an information dispute, but in recalibrating the balance of power. Indeed, *Mazars* was not the only Trump-era case that was sensitive to the need to maintain a balance of power between the branches. Several judges took pains to point out the breadth of Congress's investigative power as articulated by the Supreme Court and to embrace a more robust investigative role for Congress than OLC has been willing to acknowledge.[327] Those judges emphasized the holdings in *McGrain*, *Eastland*, and *Watkins*, which clearly envision a capacious congressional investigative power.[328] The same is true in *Mazars*, even though the case arguably imposes new constraints on the scope of Congress's investigations. The *Mazars* opinion specifically quotes *Watkins*'s statements that Congress's investigative power is "broad" and "indispensable," and that "[i]t encompasses inquiries into the administration of existing laws, studies of proposed laws, and 'surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them.'"[329] In other words, just as a matter of atmospherics, the justices and judges confronted with OLC's attempts to limit the scope of Congress's investigative power rejected the executive's myriad claims that together amounted to an assertion of absolute control over executive branch information, sending a positive signal regarding future litigation.

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326. *See* Jonathan Shaub, *Why the* McGahn *Agreement Is a Devastating Loss for Congress*, LAWFARE (May 19, 2021, 11:47 AM), https://www.lawfaremedia.org/article/why-mcgahn-agreement-devastating-loss-congress) [https://perma.cc/MD92-U9EF] (arguing that Congress's decision to settle the *McGahn* case when the Biden administration took office was a lost opportunity to challenge the executive branch's view of the limits of litigation).

327. *See, e.g.*, Comm. on the Judiciary, U.S. House of Representatives v. McGahn, 415 F. Supp. 3d 148, 191 (2019) (defiance of "Congress' centuries-old power to compel the performance of witnesses" is "an affront to the mechanism for curbing abuses of power").

328. *See supra* notes 99-102 and accompanying text.

329. Trump v. Mazars, 140 S. Ct. 2019, 2031 (2020) (quoting Watkins v. United States, 354 U.S. 178, 187 (1957)).

Some of the lower courts went even further, expressing the view—sometimes implicitly, sometimes explicitly—that executive branch doctrines on congressional oversight had overreached and failed to adequately account for Congress's investigative interests. Then-Judge Jackson's opinion in *McGahn* is the most explicit on this point, arguing that the aggressiveness of the executive branch arguments presented in that case are symptomatic of a larger trend. In her view,

> [W]e are at a point in history in which the Executive branch appears to be categorically rejecting once-accepted and standard applications of Legislative and Judicial branch authority; therefore, federal courts are being called upon to evaluate novel exercises of Executive power that allegedly threaten the prerogatives of the other branches of government in unique ways.[330]

She wrote further that the Trump-era departure from the norm of non-judicial resolution of inter-branch disputes "actually says more about the unprecedented nature of the challenged actions and legal positions of the Executive branch than it does about the nature of [Congress's] claim or harm."[331]

Whether the judicial solicitude for Congress's investigative authority exhibited in the Trump-era cases will continue to prevail will likely depend on what kinds of arguments future executives put forward as well as what interests of its own Congress seeks to vindicate. If the executive branch continues to pursue arguments that the courts perceive as insufficiently accommodating of Congress's prerogatives, the executive branch's track record in the courts could remain unenviable. If, however, the executive reads the room and adjusts its arguments accordingly—or if Congress engages in what courts view as overreach—the cases favoring Congress over the executive branch might simply be a blip on the radar.[332]

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330. *McGahn*, 415 F. Supp. 3d at 199 (citing cases challenging the lawfulness of agency action, the scope of the appropriations power, and the reach of the spending power).

331. *Id.*

332. There are few data points indicating how the Biden administration will approach these issues. While his first two years in office saw numerous settlements with congressional committees that granted broad access to executive branch information, President Biden enjoyed a Congress with Democratic majorities in both Houses, and most of the investigations were targeted at his predecessor. Nicholas Wu, Kyle Cheney, Betsy Woodruff Swan &

Congress could also take another tack—bypassing all of the challenges of litigation by enacting statutory provisions explicitly providing both jurisdiction and a cause of action for suits brought by its committees. Legislation that passed the House in 2021, which included such provisions but was never taken up by the Senate,[333] was just the latest call for statutory means of expediting effective review of congressional subpoena enforcement cases by the judiciary.[334]

A legislative solution likely does not apply, unfortunately, to testimonial immunity. The executive branch infers this immunity from the separation of powers and would argue that any statute purporting to abrogate the immunity is unconstitutional. Legislation, therefore, is no magic bullet.

### *C. The Role of Partisanship*

*Trump v. Thompson* points to another practical consideration that emerges from the Trump-era cases: the critical role that partisanship plays. Much of Congress's eventual success in accessing Trump-era information is attributable, at least in part, to the fact that a Democratic administration took office while many of these litigation efforts were ongoing.[335] For example, delay was not an issue in

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Meredith McGraw, *Biden White House Waives Executive Privilege for Initial Set of Trump-Era Documents Sought by Jan. 6 Panel*, POLITICO (Oct. 8, 2021, 4:47 PM), https://www.politico.com/news/2021/10/08/bannon-jan-6-subpoena-515681 [https://perma.cc/YHH9-BVMH]; Molly E. Reynolds & Naomi Maehr, *How Partisan and Policy Dynamics Shape Congressional Oversight in Post-Trump Era*, BROOKINGS (July 31, 2023), https://www.brookings.edu/articles/how-partisan-and-policy-dynamics-shape-congressional-oversight-in-the-post-trump-era/ [https://perma.cc/TJ5D-EY3Z]. And while the tenor of disputes changed markedly when Republicans took over the majority in the House of Representatives in 2023, no Biden-era dispute over information has yet reached the courts. TODD GARVEY, CONG. RSCH. SERV., LSB11172, THE HUR TAPES AND THE PRESIDENT'S CLAIM OF EXECUTIVE PRIVILEGE, CONG. RSCH. SERV. (2024).

333. H.R. 5314, 117th Cong., § 403 (2021) (creating a cause of action, establishing jurisdiction, and calling for expedited review of congressional actions to enforce subpoenas).

334. Such calls have come from both previous Congresses and commentators. *See, e.g.*, H.R. 4010, 115th Cong., § 2 (2017); Jonathan Shaub, *Executive Privilege is Lawless*, THE ATLANTIC (Jan. 20, 2022), https://www.theatlantic.com/ideas/archive/2022/01/executive-privilege-does-not-have-to-be-lawless/621315/ [https://perma.cc/26W5-8HGP]; EMILY BERMAN, EXECUTIVE PRIVILEGE, A LEGISLATIVE REMEDY (2009).

335. *See* Jonathan David Shaub, *The Mixed Legacy of the January 6 Investigation for Executive Privilege and Congressional Oversight*, 37 CONST. COMMENT. 421, 448 (2022) ("[T]he

*Trump v. Thompson*, where the NARA swiftly provided information to Congress when the courts declined to enjoin it.[336] Biden administration officials quickly settled numerous cases when they came into office by providing Congress with much of the information it sought.[337] A second Trump administration would not have done the same. Similarly, the Biden administration's decision to prosecute both Steve Bannon and Peter Navarro for contempt of Congress for failing to comply with subpoenas to testify likely encouraged many former Trump administration officials with evidence relevant to the January 6 committee to cooperate with that investigation.[338] Had President Trump been reelected, those prosecutions would not have proceeded.

Going forward, decisions over whether to prosecute contempt of Congress, whether to assert executive privilege over what documents, and the degree to which the executive will provide information without a fight all remain entirely in the hands of the executive branch. Moreover, even with a cooperative White House, several key January 6 witnesses—including President Trump

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effectiveness of congressional oversight depends almost entirely on the cooperation of the executive branch.").

336. *See* Jacqueline Alemany, Josh Dawsey, Amy Gardner & Tom Hamburger, *Some Records Sent to Jan. 6 Committee Were Torn Up, Taped Back Together—Mirroring a Trump Habit*, WASH. POST (Jan. 31, 2022, 7:00 PM), https://www.washingtonpost.com/nation/2022/01/31/trump-ripped-up-documents/ [https://perma.cc/JQ8F-4NKG].

337. *See, e.g.*, Savage, *supra* note 251; BRENNAN CTR. FOR JUST., U.S. House of Reps. Comm. on Oversight & Reform v. Garland (Apr. 20, 2021), https://www.brennancenter.org/our-work/court-cases/us-house-representatives-committee-oversight-and-reform-v-garland [https://perma.cc/R9SC-24LZ].

338. As part of the January 6 Committee's investigation, the Justice Department did for the first time bring criminal contempt of Congress charges against two former Trump administration officials for their defiance of subpoenas issued by the January 6 Committee. Former White House advisors Steve Bannon and Peter Navarro were each sentenced to four months in prison for contempt of Congress. Press Release, Dep't of Justice, Stephen K. Bannon Sentenced to Four Months in Prison on Two Counts of Contempt of Congress (Oct. 21, 2022); Zach Montague, *Navarro Is Sentenced to 4 Months in Prison for Stonewalling Congress*, N.Y. TIMES (Jan. 25, 2024), https://www.nytimes.com/2024/01/25/us/politics/peter-navarro-sentence-contempt-congress.html [https://perma.cc/YS6F-WQX4]. At the same time, it declined to bring charges against two other White House aides, despite congressional referrals for contempt. *See* Rohini Kurup & Jonathan Shaub, *Dissecting the Justice Department's Prosecutorial Decisions on Navarro, Meadows, and Scavino*, LAWFARE (July 20, 2022, 9:12 AM), https://www.lawfaremedia.org/article/dissecting-justice-departments-prosecutorial-decisions-navarro-meadows-and-scavino-0 [https://perma.cc/X9DF-PLFR].

himself[339]—ignored congressional subpoenas with essentially no consequences.[340] It is nothing new that congressional oversight efforts are more contentious in times of divided government, but it remains to be seen how useful the Trump-era precedents are to Congress when the party in the majority does not also control the White House.

## CONCLUSION

This Article contends that the balance of power between Congress and the executive is out of whack. More, the imbalance is hindering Congress's investigative capacity, undermining its ability to effectively perform its constitutional functions. The source of much of this imbalance is a series of legal doctrines developed by the executive branch that impose preliminary obstacles to resolving inter-branch information disputes and ensure protracted litigation when inter-branch negotiations break down. Those doctrines, however, push overly limited views of Congress's right to executive branch information and overly expansive views of executive control over information. As a result, when subjected to judicial review in the context of the Trump administration's resistance to congressional oversight, the doctrines in question were almost universally rejected. Their rejection by the judiciary have augmented Congress's bargaining power in some ways, but the executive branch's structural advantages are still difficult to overcome. To truly level the playing field, Congress and the courts need to do more.

339. *See* Luke Broadwater, *Jan. 6 Committee Weighs Further Actions as Trump Refuses to Testify*, N.Y. TIMES (Nov. 14, 2022), https://www.nytimes.com/2022/11/14/us/politics/jan-6-committee-trump-testify.html [https://perma.cc/RJS6-9KKC].

340. *See* Bart Jansen, *Jan. 6 Committee Never Got McCarthy, Key Trump Aides to Testify. Here's Who They Are.*, USA TODAY (Jan. 7, 2023, 5:00 AM), https://www.usatoday.com/story/news/politics/2023/01/07/january-6-witnesses-refused-testify/10984248002/ [https://perma.cc/KN8A-WYA2] ("[D]ozens of key figures [including Rudy Guiliani, several Republican members of Congress, Mark Meadows, and Dan Scavino] either defied subpoenas or refused to answer questions.").