"*Oversight and Executive Privilege in the Context of Separated Powers*"

U.S. Senate Committee on the Judiciary
Subcommittee on Federal Courts, Oversight, Agency Action, and Federal Rights
Hearing on "Breaking the Logjam: Principles and Practice of Congressional Oversight and Executive Privilege"

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

Thank you for the invitation to appear today to testify regarding the legal principles and practice related to congressional oversight and executive privilege. I am Assistant Professor of Law and Co-Executive Director of the Center for the Study of the Administrative State at George Mason University's Antonin Scalia Law School. Between 2019 and 2021, I served as a Deputy Assistant Attorney General in the Office of Legal Counsel ("OLC") within the U.S. Department of Justice ("DOJ") and as an Associate Deputy Attorney General.

My academic scholarship and areas of instruction include the separation of powers, administrative law, constitutional interpretation, and the federal judiciary. The interbranch dynamics at play in the exercise of oversight and the assertion of privilege stem from the character of separated powers that form the foundation of the federal constitutional structure.[1] Those separation of powers principles in turn constitute a core safeguard of individual liberty within the U.S. system of divided, federalist government.[2]

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[1] *See* Federalist No. 51 (noting that the interior structure of the federal government must be contrived such that "its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places"). *See generally, e.g.*, U.S. Const. art. II, section 1 (executive Vesting Clause); *id.* art. I, section 8 (enumeration of legislative powers); *id.* art. I, section 3, cl. 6 (impeachment).

[2] Federalist No. 51 (noting that the "separate and distinct exercise of the different powers of government . . . to a certain extent is admitted on all hands to be essential to the preservation of liberty").

To assist the subcommittee's examination of oversight and executive privilege, my testimony first addresses constitutional principles underlying long-standing executive branch positions and judicial precedent on the proper relationship between congressional mandates for information and executive branch disclosure. Next the testimony discusses consistencies across presidential administrations in the executive branch approach to congressional subpoenas and information requests and their historical roots. Finally, the testimony briefly describes the accommodation process that the Executive Branch and Congress have used for decades to negotiate settlement of interbranch disputes over disclosure of executive branch documents and testimony. In practice, through this process of negotiation the Executive Branch often provides extensive information to Congress. In conclusion the testimony briefly addresses means by which Congress can exert control in legislation and policy-making over the Executive Branch beyond the modern oversight process.

I. Constitutional Principles Related to Congressional Authority to Require Information and Executive Confidentiality Interests

Analysis of the proper scope of oversight and assertions of executive privilege is necessarily rooted in examination of the constitutional underpinnings of congressional and executive branch authority. The Constitution vests all executive power in the President.[3] And the Constitution imposes on the President the duty to "take Care that the Laws be faithfully executed."[4] As the federal government is one of limited powers, the Constitution provides that Congress has just the legislative authority "herein granted" in Article I.[5]

The Constitution does not explicitly textually provide for any independent congressional oversight or investigative authority. Therefore, congressional requirements for information from the executive must derive from one of Congress's enumerated powers, such as its legislative powers specified in section 8 of Article I or its power of impeachment.[6] If Congress poses an information request without adequate connection to its enumerated constitutional authorities or in an area of exclusive

[3] U.S. Const. art. II, section 1.

[4] *Id.* art. II, section 3.

[5] U.S. Const. art. I, section 1. ("All legislative Powers herein granted shall be vested in a Congress of the United States . . . .").

[6] *Cf.* U.S. Const. art. I, section 8 (listing specific powers and then authorizing Congress to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . ."); *id.* art. I, section 3, cl. 6 (Senate power to try impeachments).

executive responsibility such as the pardon power,[7] then there is no constitutional basis to mandate compliance.[8] In addition, the judiciary and the Executive Branch have recognized that at times certain privileges protect executive branch information from disclosure to a coordinate branch even where a congressional information request was connected to one of Congress's areas of constitutional authority. The question of the proper scope of assertions of executive privilege, however, arises only after the threshold jurisdictional analysis of the connection between the congressional oversight request and its asserted legislative purpose.

In its decision in *Trump v. Mazars* in 2020, the Supreme Court highlighted the long-standing principle that congressional subpoenas must be "'related to, and in furtherance of, a legitimate task of the Congress.'"[9] Therefore, assessment of the proper scope of executive branch disclosure of information must first consider the scope of congressional authority to issue the subpoena or information request incident to Congress's enumerated powers.[10] Only then is it relevant under modern doctrine whether the Executive Branch may or should assert privilege over part or all of requested information.

That said, as a matter of practice, the Executive Branch often provides extensive information to Congress without asserting privilege. And in cases of a dispute over the scope of information disclosure, executive and legislative officials often negotiate resolution through the accommodation process. Although the Executive Branch has recognized and claimed five categories of executive privilege, it also recognizes a number of subject-matter limitations on the scope of those privileges. At bottom, however, interbranch contests over the degree to which Congress has entitlement to executive

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[7] U.S. Const. art. II, section 2 ("[H]e shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in cases of Impeachment.").

[8] *See Trump v. Mazars USA, LLP*, 140 S.Ct. 2019, 2031-32 (2020).

[9] *Id.* at 2031 (quoting *Watkins v. United States*, 354 U.S. 178, 187 (1957)).

[10] *See, e.g.*, *Barenblatt v. United States*, 360 U.S. 109, 111 (1959) (indicating that Congress "may only investigate into those areas in which it may potentially legislate or appropriate"). In addition to Congress having authority to require information from the Executive Branch only when the request is incident to its enumerated powers, Congress also has delegated its formal oversight authority only to certain entities such as congressional committees. *See Congressional Oversight of the White House*, 45 Op. O.L.C. __, at *14 (2021) (explaining the critical threshold requirement of committee jurisdiction to authorize the exacting of testimony and the calling for production of documents). Therefore, although executive officials may and often properly will provide information in response to requests from other congressional entities such as individual members, the Executive Branch applies principles to those requests that are distinct from principles governing the typical oversight process. *See generally Requests by Individual Members of Congress for Executive Branch Information*, 43 Op. O.L.C. __.

branch information stem from the interbranch rivalry and assertion of institutional interests that the constitutional framers intended when devising divided government.

A. Threshold Scope of Congressional Oversight Authority

As the Supreme Court has recognized, congressional power to pose inquiries to the Executive Branch "is an essential and appropriate auxiliary to the legislative function."[11] Without the ability to acquire information from the executive, Congress would be unable to legislate effectively.[12] The power to obtain information thus is "broad and indispensable," according to the Court.[13] Congress can pose inquiries to the executive addressing the administration of already-enacted law, the analysis of proposed law, and the study of shortcomings in the county's political and economic systems for purposes of remedying them through legislation, among other inquiries.[14] But, the Court has noted, congressional power to acquire information is subject to inherent, threshold limitations. The power "is justified solely as an adjunct to the legislative process" or to other constitutional functions of Congress such as the exercise of the impeachment power.[15]

In January 2021 the Executive Branch provided its most recent comprehensive public formal reiteration of long-standing executive views, across administrations, regarding the constitutional contours of congressional oversight authority and executive privilege.[16] That 2021 memo advising the Office of the White House Counsel summarized executive branch positions on oversight and privilege spanning decades. Consistent with the Supreme Court's interpretation, the January 2021 analysis noted the threshold limitations on congressional inquiry powers while also discussing the executive and legislative branch tradition of compromise through the accommodation process that has led to the successful resolution of many oversight disputes.[17] It further described a strong constitutional value of executive branch confidentiality for purposes of candor in advice-giving, but then also explained the limitations on executive branch reliance on privilege.

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[11] *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927).

[12] *Mazars*, 140 S.Ct. at 2031; *McGrain*, 273 U.S. at 175.

[13] *Mazars*, 140 S.Ct. at 2031 (internal quotation omitted).

[14] *Watkins*, 354 U.S. at 187, discussed in *Mazars*, 140 S.Ct. at 2031.

[15] *Watkins*, 354 U.S. at 197; *Mazars*, 140 S.Ct. at 2031 (internal quotation omitted).

[16] *See Congressional Oversight of the White House*, 45 Op. O.L.C. __ (2021).

[17] *See id.* at *49.

The most significant limitations on congressional oversight and investigation authority, however, are not claims of executive privilege despite multiple administrations viewing that privilege as broad and stretching across five categories of protected information. Rather, the most significant constraints on congressional mandates for information from the co-equal Executive Branch are threshold limitations, stemming from the limits on enumerated congressional powers themselves.[18]

Indeed, in a number of recent instances where the Executive Branch declined to provide the full extent of information requested by Congress, executive officials cited the absence of a constitutional or legal basis for the initial information request. In particular, executive officials have declined to comply with congressional information requests where the Executive Branch has concluded Congress did not establish a legislative or otherwise constitutionally grounded basis for the information request.[19]

The Supreme Court has indicated general support for this approach, observing that a congressional subpoena for presidential information must "adequately identif[y] its aims and explain[] why the President's information will advance its consideration of the possible legislation."[20] Otherwise, it is "impossible to conclude that [the] subpoena is designed to advance a valid legislation purpose."[21] For example, in the *Mazars* dispute addressed in 2020 by the Supreme Court, the Court remanded the dispute for an evaluation of whether the contested congressional committee requests for the President's personal financial information were adequately connected to an authorized congressional task.[22] The Court determined that when assessing whether a subpoena for presidential information is "'related to, and in furtherance of, a legitimate task of the

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[18] *See Mazars*, 140 S.Ct. at 2031-32; E*astland v. United States Servicemen's Fund*, 421 U.S. 491 (1975); *Watkins*, 354 U.S. at 187; *Quinn v. United States,* 349 U.S. 155 (1955); *McGrain*, 273 U.S. at 161, 174-77. *Cf.* Saikrishna Bangalore Prakash, *Imperial From the Beginning* 228-34 (2015) (discussing a version of this concept).

[19] *See, e.g.*, *House Committees' Authority to Investigate for Impeachment*, 44 Op. O.L.C. __, *47-49 (Jan. 19, 2020); *Congressional Committee's Request for the President's Tax Returns Under 26 U.S.C. § 6103(f)*, 43 Op. O.L.C. __, *3 (June 13, 2019) ("*President's Tax Returns 2019*"). *See also Congressional Oversight of the White House*, 45 Op. O.L.C. __, at *13-14 (discussing these examples in depth along with the general executive branch approach to assessing the existence of a valid legislative or constitutional basis for a congressional information request).

[20] *See Mazars*, 140 S.Ct. at 2036 (discussing *Watkins*, 354 U.S. at 205-06, 214-15).

[21] *See id.* (internal quotation omitted).

[22] *See id.* at 2035-36 (finding that the courts below did not adequately account for separation of powers concerns because they inadequately assessed whether the requests "advance[d] a valid legislative purpose" or adequately safeguarded against unnecessary intrusion into presidential operations).

Congress,'" courts need to "perform a careful analysis that takes adequate account of the separation of powers principles at stake."[23]

In these cases, executive privilege is not the issue; rather, the Executive Branch and courts are noting that Congress cannot exercise oversight or investigative functions in a vacuum or simply to acquire executive branch confidentialities.[24] Information requests must be toward the end of enacting legislation or exercising another constitutional power.[25] Claims of executive privilege, which all branches agree are not always absolute, become relevant only where Congress has posed a constitutionally grounded information request tailored in scope to its constitutional functions.[26]

Congress can request information from the executive only to the extent that the request relates to its areas of constitutional authority.[27] As Congress lacks general policy-making power, its oversight and investigative requests must stem from one of its enumerated powers.[28]

B. Executive Branch Confidentiality Interests and Assertions of Privilege

Both the courts and the Executive Branch across administrations have described confidentiality within the exercise of executive power as an important constitutional value. For example, the Supreme Court recently noted that all recipients of legislative subpoenas "have long been understood to retain common law and constitutional privileges with respect to certain materials, such as attorney-client communications and

[23] *See id.* at 2035 (quoting *Watkins*, 354 U.S. at 187).

[24] *See id.* at 2032 (noting that Congress lacks "'general' power to inquire into private affairs and compel disclosures" and "there is no congressional power to expose for the sake of exposure").

[25] *See, e.g.*, *Eastland*, 421 U.S. at 506 (observing that congressional inquiries must address "subject[s] on which legislation could be had" (internal quotation omitted)).

[26] *See Watkins*, 354 U.S. at 201, discussed in *Mazars*, 140 S.Ct. at 2036 ("The more detailed and substantial the evidence of Congress's legislative purpose, the better.").

[27] *See, e.g.*, *Watkins*, 354 U.S. at 187 (noting the validity of congressional subpoenas only where they are "related to, and in furtherance of, a legitimate task of the Congress"); *Mazars*, 140 S.Ct. at 2032 (describing the lack of a congressional power of inquiry for mere general law enforcement purposes, which are assigned to other branches of government, and detailing numerous precedential cases explaining that congressional inquiries must be connected to specific constitutional congressional exercises of authority); *Quinn*, 349 U.S. at 161 (describing congressional inquiry power as necessarily related to a "valid legislative purpose").

[28] *See* U.S. Const. art. I, section 1 (vesting in Congress just the legislative powers "herein granted"); *Marbury v. Madison*, 1 Cranch 137, 176 (1803) ("The powers of the legislature are defined, and limited . . . .").

governmental communications protected by executive privilege."[29] Where Congress has requested information adjunct to its constitutional functions, and that information falls within the scope of executive privilege, such information is subject to "the greatest protection consistent with the fair administration of justice."[30]

Executive privilege, where it applies, "safeguards the public interest in candid, confidential deliberations within the Executive Branch."[31] Although the political branches typically resolve their interbranch conflicts over information requests without judicial involvement,[32] the Court has described executive privilege as "fundamental to the operation of Government."[33] The Court has acknowledged in particular the significant "Executive Branch[] interests in maintaining the autonomy of [the President] and safeguarding the confidentiality of [his] communications."[34] Contemporary conceptions of executive privilege date back many decades.[35] As detailed further in Part II of this testimony, administrations of both political parties have repeatedly asserted executive privilege.

The Executive Branch has recognized five, sometimes overlapping, categories of executive privilege: (i) deliberative process, (ii) attorney-client communications and work product, (iii) presidential communications, (iv) national security and foreign affairs, and (v) law enforcement.[36] Several of these categories, or components, of executive privilege are subject to varying degrees of limitations under the executive branch view of their scope.

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[29] *See Mazars*, 140 S.Ct. at 2032 (citing a Congressional Research Service report on congressional investigations, among other sources).

[30] *United States v. Nixon*, 418 U.S. 683, 715 (1974).

[31] *Mazars*, 140 S.Ct. at 2032.

[32] *See, e.g.*, *id.* at 2026 (noting that this case in 2020 was the first time the Court had "addressed a congressional subpoena for the President's information"); *id.* at 2035 ("For more than two centuries, the political branches have resolved information disputes using the wide variety of means that the Constitution puts at their disposal" without judicial enforcement or resolution).

[33] *Nixon,* 418 U.S. at 708.

[34] *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 385 (2004).

[35] *See, e.g.*, *Nixon*, 418 U.S. at 708, 711 (describing a constitutional basis for "a privilege of confidentiality . . . to the extent this interest relates to the effective discharge of a President's powers"); *Congressional Requests for Confidential Executive Branch Information*, 13 Op. O.L.C. 153, 154 (1989). *See also Congressional Oversight of the White House*, 45 Op. O.L.C. __, at *30 (stating that "Presidents have invoked executive privilege since the earliest days of the Republic").

[36] *Congressional Oversight of the White House*, 45 Op. O.L.C. __, at *30.

The deliberative process component of privilege derives from the principle that disclosure of "the 'communications and the ingredients of [a] decisionmaking process" inevitably inhibit "'frank discussion of legal or policy matters.'"[37] This privilege component is critical and core to notions of executive privilege. It extends to "all executive branch documents that reflect advisory opinions, recommendations, and other deliberative communications generated during governmental decision-making."[38] Because it encompasses just predecisional and, therefore, deliberative materials, however, it typically does not protect documents that merely recount facts or explain already-made decisions.[39] Similarly, the attorney-client and work product components of privilege apply only to materials involving "legal analysis, legal advice, and other attorney communications or work product."[40]

The presidential communications aspect of privilege "protects communications made in connection with presidential decision-making," as its title suggests.[41] It is significant for governmental operations, and applies beyond "exchanges directly involving the President" to include presidential adviser communications made in preparation to advise the President.[42] This component of executive privilege is based on the need for the President to have unhindered access to transparent, frank, and informed advice.[43]

Finally, the national security and foreign affairs component of privilege generally "provides *absolute* protection for materials the release of which would jeopardize sensitive diplomatic, national security, or military matters, including classified

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[37] *Id.* at *32-33 (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-51 (1975)).

[38] *See id.* at *32; *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997).

[39] *See Congressional Oversight of the White House*, 45 Op. O.L.C. ___, at *33 (explaining that factual information is protected only to the extent that it is "inextricably intertwined" with decisional deliberations); *Sealed Case*, 121 F.3d at 737.

[40] *Congressional Oversight of the White House*, 45 Op. O.L.C. ___, at *33; *see also Assertion of Executive Privilege Regarding White House Counsel's Office Documents,* 20 Op. O.L.C. 2, 3 (1996) (Reno, Att'y Gen.) (*WHCO Documents*).

[41] *Congressional Oversight of the White House*, 45 Op. O.L.C. ___, at *34.

[42] *Sealed Case*, 121 F.3d at 751-52; *Congressional Oversight of the White House*, 45 Op. O.L.C. ___, at *34.

[43] *Sealed Case*, 121 F.3d at 751-52.

information and diplomatic communications."[44] The law enforcement aspect of executive privilege similarly provides the Executive Branch with "a near-absolute right to withhold from Congress information that would compromise ongoing law enforcement activities."[45]

The five components of executive privilege that the Executive Branch asserts consequently are broad, although they fall within certain defined subject-matter areas. Assertions of executive privilege become relevant only in response to information requests or subpoenas issued incident to an enumerated congressional power.

II. Interbranch Conflict and Accommodation Across Presidential Administrations

Initial conflict between the two political branches over the scope of executive branch responses to congressional information requests is not a new or particularly modern phenomenon. Since the first presidential administration, Congress and the executive have negotiated over the most appropriate resolution of congressional requests for presidential and executive branch information.

Not infrequently, as detailed in part below, the executive has pushed back against initial congressional requests, across presidential administrations. This is not surprising, as the constitutional design involves two political branches precisely for the purpose of divided, restrained government. And information garnered and held by the two political branches in the course of the execution of their constitutional responsibilities is a core component of their distinct sovereignty. In the end, however, prototypes of the contemporary accommodation system have resulted in compromise and the provision of extensive information to Congress in facilitation of its legislative and policymaking role.[46]

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[44] *Congressional Oversight of the White House*, 45 Op. O.L.C. ___, at *31. *See also, e.g.*, *Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988) (explaining that presidential authority to control access to national security information flows primarily from the Commander in Chief authority); *Halkin v. Helms*, 690 F.2d 977, 990 (D.C. Cir. 1982) ("[M]atters the revelation of which reasonably could be seen as a threat to the military or diplomatic interests of the nation . . . are *absolutely privileged* from disclosure in the courts.).

[45] *Congressional Oversight of the White House*, 45 Op. O.L.C. ___, at *31.

[46] *See, e.g.*, *History of Refusals by Executive Branch Officials to Provide Information Demanded by Congress (Part I)*, 6 Op. O.L.C. 751, 751-72 (1982) ("*History of Refusals Part I*") (referring to the "countless examples of full disclosure by the Executive" and the "infrequent" but "by no means unprecedented" instances of "presidentially mandated refusals to disclose information to Congress").

In significant measure, the executive branch approach to providing information in response to congressional subpoenas and other information requests has been remarkably consistent across multiple administrations. Recent administrations of both political parties have repeatedly interposed significant assertions of executive privilege. But executive branch officials and agencies have also provided extensive information to Congress in response to routine requests, as part of the accommodation process, and at times as a matter of comity.

A. Practice Rooted in History

As far back as the Washington Administration, executive officials have imposed limitations on their compliance with congressional demands for information.[47] At times the executive decision to decline full compliance with a request has been based on an assertion that Congress lacks the authority to mandate the information. On other occasions the Executive Branch has asserted that requested information is privileged. But the Executive Branch historically has consistently acknowledged the importance of confidentiality in executive branch deliberations and conducted its own examination of the legal source of authority for the congressional information request.

The Executive Branch has recognized from the time of the First Congress that the legislative branch needs information on executive operations or matters within executive agency expertise in order to carry out its policy-making functions.[48] Congress by statute often mandates that executive branch agencies or officials provide information on a regular basis to assist Congress's legislative functions. But where Congress issues more particular subpoenas for information to conduct oversight or an investigation, long-standing executive practice is to first analyze the legal basis for the request and then whether any privilege applies.

For example, in both the Washington and Jefferson administrations, those Founding-era presidents concluded on separate occasions that aspects of a congressional request for information would not further the public good. And President

[47] *See, e.g.*, *Mazars*, 140 S.Ct. at 2029-30 (describing a 1792 House committee request for documents pertaining to a military campaign in the Northwest Territory that had led to a rout of federal forces, where Washington and his cabinet concluded that the President could exercise discretion over disclosures and refuse to provide any papers that would not further the public good).

[48] *See* Jennifer Mascott, *Early Customs Laws and Delegation*, 87 Geo. Wash. L. Rev. 1388, 1395, 1404, 1443-44 (2019) (detailing congressional solicitations of reports and recommendations from Treasury Secretary Alexander Hamilton for use in crafting legislation).

Washington and Jefferson in both cases decided to provide only a portion of the requested materials.[49]

In 1982, the Executive Branch catalogued numerous instances over time in which the President and Congress had clashed over the scope of disclosure of presidential information.[50] The analysis discussed at least 60 examples spanning twenty-seven administrations from the time of Washington up through the Carter and Reagan presidencies in which a President had claimed executive privilege to decline to provide the full scope of information requested by Congress. These examples were separate and apart from any denials of information by Cabinet or lower-level executive officials. The memo also noted that its analysis excluded numerous instances in which congressional and executive branch engagement in the accommodation process had led to nondisclosure or partial disclosure of information or nonappearance of witnesses.[51]

B. Modern Administrations and Recent Political Winds

Subsequent administrations in the late twentieth and twenty-first centuries by and large have continued the practice of careful examination of executive branch responses to information requests. The Executive Branch has routinely engaged with Congress in the accommodation process to provide extensive information in response to congressional inquiries. But the Executive Branch has also repeatedly asserted its interests as a coequal branch by declining to provide information that it believes would impede on its constitutional independence. The most recent advice by the U.S. Justice Department's Office of Legal Counsel ("OLC"), issued on July 30, 2021, to authorize the release of the personal tax returns of President Joseph Biden's former political opponent, arguably diverges from one aspect of the typically vigorous executive branch defense of its prerogatives.[52] This reversal in position appears to derive from a distinction between the current administration and its most recent predecessors in their conception of aspects of the constitutional separation of powers.

Following are several of the more prominent examples of executive nondisclosure over the past three decades. Attorney General Janet Reno advised President Clinton in 1999 that he could assert executive privilege in response to congressional subpoenas for

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[49] *See Mazars*, 140 S.Ct. at 2029-30. *See also infra* Part III.

[50] *See generally History of Refusals Part I*, 6 Op. O.L.C. at 751.

[51] *Id.* at 751 & 751 n.1.

[52] *Ways and Means Committee's Request for the Former President's Tax Returns and Related Tax Information Pursuant to 26 U.S.C. § 6103(f)(1)*, 45 Op. O.L.C. __, at *1-4 (2021) ("*President's Tax Returns 2021*").

testimony and documents regarding the offer of clemency to sixteen individuals.[53] And in 1996, Attorney General Reno approved the assertion of executive privilege over a portion of White House Counsel's Office ("WHCO") documents involved in a House committee investigation into the White House Travel Office. Attorney General Reno had previously advised that the President could rely on a protective assertion of privilege to temporarily withhold the entire collection of documents while the President evaluated them for purposes of privilege. Some of the permanently withheld documents were connected to an Independent Counsel criminal investigation.

In contrast to OLC's suggestion in its recent July 2021 memo that the Executive Branch should defer to certain congressional assertions of legitimate legislative purposes, Attorney General Janet Reno reasoned in 1996 that congressional committees are "required to demonstrate that the information requested is 'demonstrably critical to the responsible fulfillment of the Committee's functions.'"[54] She based her analysis on the typical, and long-standing, executive branch commitment to ensuring that disclosure of information does not harm the interests of current or future presidents.[55]

In 2007, Acting Attorney General Paul Clement advised that the President could assert executive privilege with respect to documents sought in connection with the dismissal of U.S. attorneys as well as with respect to the testimony of two former White House officials.[56] And in 2012, Attorney General Eric Holder advised President Obama to assert privilege over DOJ documents related to the investigation of Operation Fast and Furious, a law enforcement operation intended to stop the flow of firearms to Mexican drug cartels from the United States.[57]

In addition to assertions of executive privilege, presidential administrations have consistently maintained the long-standing, related position that a President's immediate, senior advisers have immunity from compelled congressional testimony

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[53] *See Assertion of Executive Privilege With Respect to Clemency Decision*, 23 Op. O.L.C. 1, 1 (1999) (Reno, Att'y Gen.) ("Clemency").

[54] *See WHCO Documents*, 20 Op. O.L.C. at 2-3 (quoting *Senate Select Comm, on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc)).

[55] *See id.* at 3.

[56] *Assertion of Executive Privilege Concerning the Dismissal and Replacement of U.S. Attorneys*, 31 Op. O.L.C. 1, 1 (2007).

[57] *See Assertion of Executive Privilege Over Deliberative Materials Generated in Response to Congressional Investigation Into Operation Fast and Furious*, 36 Op. O.L.C. 1, 1 (2012) (Holder, Att'y Gen.)

regarding their official duties.[58] For example, the Justice Department's OLC advised in May 2019 that former Counsel to the President Don McGahn was immune from testimony related to the past performance of his official duties, consistent with 2007 OLC advice and the decision of former President Harry Truman not to appear before the House Committee on Un-American Activities in the 1950s.[59] The 2019 memo on testimonial immunity noted that since the 1970s, OLC had consistently advised that the President and his immediate advisers who customarily meet regularly with him have testimonial immunity before Congress. The Office indicated it had endorsed that principle more than a dozen times over the course of eight presidential administrations.[60]

Consistent with this 2019 determination, Attorney General Reno had advised in 1996 that the executive branch position on testimonial immunity is "constitutionally based." According to her reasoning, "[t]he President is a separate branch of government" and therefore, as "a matter of separation of powers," Congress may not compel the appearance of the President or the close advisers who are "an extension" of him.[61] In 2014, OLC similarly advised that congressional testimonial immunity applied to President Barack Obama's Director of the Office of Political Strategy and Outreach.[62] The Office indicated that immunity for senior advisers was essential for "the President's absolute immunity to be fully meaningful."[63] In addition, the 2014 analysis suggested that separation of powers doctrine "would be shattered" and "the President's independence and autonomy from Congress . . . would be threatened" if the President felt that "his every act might be subject to official inquiry."[64]

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[58] *See, e.g.*, *Testimonial Immunity Before Congress of the Former Counsel*, 43 Op. O.L.C. ___, *1-2 (2019); *Clemency,* 23 Op. O.L.C. at 5 (Reno). *Cf. Gravel v. United States*, 408 U.S. 606 (1972) (concluding that legislative staff share in the Speech or Debate Clause constitutional immunity held by Members of Congress).

[59] *Testimonial Immunity Before Congress of the Former Counsel*, 43 Op. O.L.C. ___, at *1, 15.

[60] *Id.* at *2-3, 7 (noting also that "the White House has opposed sending senior advisers to testify for almost as long as there has been an Executive Office of the President," which was created in 1939, and that Assistant Attorney General William Rehnquist described the immunity's legal basis in a 1971 memorandum).

[61] *Clemency*, 23 Op. O.L.C. at 4 (internal quotation omitted).

[62] *See Immunity of the Director of the Office of Political Strategy and Outreach from Congressional Subpoena*, 38 Op. O.L.C. 5, 5 (2014).

[63] *Id.* at 7.

[64] *Id.* at 6 (internal quotation omitted).

Just this past week, OLC reiterated the long-standing core executive branch understanding that Congress may require information from the Executive Branch only where Congress is acting incident to its constitutional authority such as in furtherance of a "legitimate legislative objective." At the same time the Office flipped its 2019 determination that Congress could not access the tax returns of the current president's political rival, former President Donald Trump. The Office now contends that the Executive Branch should not question Congress's stated assertions of "legitimate legislative purpose" in oversight requests absent "exceptional circumstances," at least with respect to requests for tax returns under the statutory authority of 26 U.S.C. § 6103.[65] Although the practical import of this reversal is significant, it essentially impacts just one substep of executive branch oversight analysis by limiting the evidence that executive officials may examine when assessing the threshold jurisdictional question of whether Congress's request falls within the scope of its constitutional authority.

In particular, the July 30 memo asserts that the Executive Branch should "presume that congressional agents are acting pursuant to their constitutional authority and in good faith when evaluating the constitutionality of committee requests for information." It relies on the conception that courts apply a presumption of regularity to executive and congressional actions, and concludes the Executive Branch should follow suit.[66] But one of the cases it identifies as establishing that courts apply a "strong presumption of good faith" to the other federal branches is *Department of Commerce v. New York*, in which the Supreme Court looked behind the former Commerce Secretary's motives in crafting the census to conclude they were inconsistent with his stated objectives.[67] And in 2017, the Republican-led House Committee on Ways and Means had concluded there was no legitimate legislative justification for the Trump tax return request, in contrast to the 2019 Democrat-led House Ways and Means Committee conclusion that there was.[68]

The conclusion just last week that executive branch officials should presume good faith when responding to section 6103(f) requests appears to stem from a distinct conception of the separation of powers than that held by the prior administration. The 2021 analysis emphasizes "respect and deference due a coordinate branch of

[65] *President's Tax Returns 2021*, 45 Op. O.L.C. __, at *4.

[66] *See id.* at *21-22.

[67] *See* 139 S.Ct. 2551, 2573-76 (2019) "(Several points, taken together, reveal a significant mismatch between the Secretary's decision and the rationale he provided. . . . Our review is deferential, but we are "not required to exhibit a naiveté from which ordinary citizens are free." (internal quotation omitted)).

[68] *President's Tax Returns 2019*, 43 Op. O.L.C. __, at *8-9, 14-15; *see also* H.R. Rep. No. 115-73, at 2-4 (2017 committee report).

government" and "presume[s]" the legislative branch will handle the former President's tax returns with "sensitivity."[69] In contrast, the 2019 OLC reasoned that the Executive Branch must act consistent with its constitutional role as a "politically accountable check on the Legislative Branch."[70] The Executive Branch has independent responsibility for evaluating the constitutionality and lawfulness of exercises of authority, as former OLC head Walter Dellinger detailed in 1996 in an analysis of separation of powers doctrine.[71] And the constitutional separation of powers structure is designed to ensure that the President has "'the means to resist legislative encroachment'" with "'a separate political constituency'" to whom he remains accountable.[72] The 2019 memo further noted that the President's duty to "take Care that the Laws be faithfully executed," U.S. Const. art. II, section 3, requires the Treasury Department to carefully evaluate the lawfulness of instructions to hand over confidential tax information, particularly in light of the statutory criminal penalties for wrongful disclosure, *see* 26 U.S.C. §§ 7213, 7213A.[73]

The Executive Branch has generally maintained over decades the view that interbranch debate and "division of governmental authority is . . . a fundamental means by which the Constitution attempts to ensure free, responsible, and democratic government."[74] The July 2021 opinion changes the category of evidence that executive officials will examine in relation to certain tax return requests, but the specific questions at issue in the opinion regarding release of presidential tax returns are relatively unique. And the present administration has sustained a number of the previous administration's actions to further executive branch institutional interests such as DOJ's continued litigation efforts to maintain the confidentiality of a deliberative Department memo related to the Mueller report.

III. Mechanics of the Accommodation Process

The Executive Branch has a long-standing policy that executive officials should respond to authorized oversight requests in furtherance of legitimate legislative purposes by compliance "to the fullest extent consistent with the constitutional and

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[69] *President's Tax Returns 2021*, 45 Op. O.L.C. ___, at *4, 23, 25, 38-39.

[70] *President's Tax Returns 2019*, 43 Op. O.L.C. ___, at *25.

[71] *Id.* at *25-26 (citing *The Constitutional Separation of Powers,* 20 Op. O.L.C. at 128).

[72] *See id.* at *25 (quoting *Freytag v. Comm'r*, 501 U.S. 868, 906 (1991) (Scalia, J., concurring).

[73] *Id.* at *20-22.

[74] *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 125 (1996) (Assistant Attorney General Walter Dellinger).

statutory obligations of the Executive Branch."[75] The traditional method for working out the specific contours of information provided under this standard and in cases of conflict is the accommodation process.[76]

The two political branches "have an ongoing relationship that the Framers intended to feature both rivalry and reciprocity."[77] Therefore, the executive and Congress properly have competing, and at times conflicting, interests in the back-and-forth over the proper response to congressional inquiries. But the two branches typically reach agreement by recognizing "an implicit constitutional mandate to seek optimal accommodation" and realistically evaluating the needs of the opposing branch.[78]

One early example of reliance on a kind of accommodation process occurred as far back as 1792, when President George Washington objected to aspects of a House committee request for papers related to a surprise rout of the military. After President Washington's cabinet members expressed concern to individual congressmen about the scope of the request, the House narrowed its demand. The Executive Branch then supplied the requested documents.[79] One other historical accommodation example recently detailed by the Supreme Court was President Thomas Jefferson's decision in 1807 not to disclose the complete record of correspondence that the House had requested regarding an alleged conspiracy and foreign affairs. Jefferson expressed privacy concerns related to the request, and sent Congress just a limited set of documents along with a summary of salient events.[80] According to the Supreme Court, the Jefferson and Washington incidents established the ongoing practice, in place since that time, of Congress and the President cooperatively resolving their disputes.[81]

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[75] *See Memorandum for Heads of Executive Departments and Agencies from Ronald Reagan, Re: Procedures Governing Responses to Congressional Requests for Information* at 1 (Nov. 4, 1982), *quoted in Congressional Oversight*, 45 Op. O.L.C. __, at *37.

[76] *See Congressional Oversight*, 45 Op. O.L.C. __, at *37 (noting the Executive Branch position that accommodation is constitutionally required and the Judiciary and Congress's recognition of the propriety of the process).

[77] *Mazars*, 140 S.Ct. at 2026.

[78] *Congressional Oversight of the White House*, 45 Op. O.L.C. __, at *21 (internal quotation omitted) (alteration in the original).

[79] *See Mazars*, 140 S.Ct. at 2029-30.

[80] *See id.*

[81] *See id.*

The Executive Branch summarized and published its position on the proper rules of the road for the accommodation process most recently in January 2021. In advising the White House Counsel, the Department of Justice's Office of Legal Counsel indicated that when placing an information request, Congress "should clearly explain the nature and scope of its request."[82] Where the request "concerns statutory functions, is within . . . delegated oversight authority, and rests on a legitimate legislative purpose," executive officials should consider how to most effectively and appropriately accommodate the request.[83] Much of the work of the accommodation negotiations then consists of a dialogue that helps narrow and defuse potential conflict by ensuring the request is tailored to fit legislative objectives.[84]

Accommodation can involve more than just the bottom-line negotiated decision that the executive will provide a narrower collection of documents than those that Congress initially requested. Accommodation negotiations may address the mechanism for disclosure or the length of time that materials will remain available to the legislative branch. For example, in a dispute involving the Interior Secretary during the Reagan Administration, Congress eventually received access to all requested documents, but only for one day. Executive officials agreed to permit note-taking on the documents but not photocopying.[85] Alternatively, executive and legislative officials might reach agreement that executive officials can satisfy an information request by providing summaries of requested information rather than a collection of underlying documents.[86] As a practical matter, the White House often accommodates congressional requests through substantive summaries and does not ordinarily review and produce underlying emails and documents, most of which generally consist of deliberative communications.[87]

In addition to engaging in the negotiations over the method and extent of disclosure that typically occur during the accommodation process, Congress should also target its requests to entities outside of the Executive Office of the President when

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[82] *Congressional Oversight of the White House*, 45 Op. O.L.C. ___, at *42.

[83] *Id.*

[84] *Cf. McGrain*, 273 U.S. at 161 (noting that the purpose of oversight is to facilitate the legislative function); *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 732 (D.C. Cir. 1974) (noting that legislative determinations rarely depend on "precise reconstruction of past events").

[85] *See History of Refusals Part I*, 6 Op. O.L.C. at 780-81.

[86] *See Congressional Oversight of the White House*, 45 Op. O.L.C. ___, at *37-38.

[87] *See id.* at *42.

possible, to facilitate a fuller and more efficient response. Executive agencies will likely be able to produce information more readily than entities within the Executive Office of the President due to the unique constitutional status of the President. Fewer recognized limitations apply to solicitations of information from executive agencies and departments than from the Office of the President.[88] And the Court has concluded that Congress may acquire information from the President only if other sources cannot reasonably provide it.[89]

The accommodation process typically successfully reconciles congressional information needs with executive confidentiality and deliberative interests.[90] But even where it does not result in agreement between the two branches about the proper scope of information disclosure as efficiently as one branch might prefer, that inefficiency is not necessarily out of step with the proper constitutional order. Inherent to the system of separated powers is a necessary back-and-forth consistent with interbranch rivalry. The existence of multiple branches that must press hard to reach agreement before federal action occurs is a key intended aspect of the original federal constitutional design.

One of the key safeguards "against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."[91] In the context of oversight and investigations, that includes the congressional ability to pose the request for necessary information and the accompanying executive facility to shield information from congressional reach when the executive concludes its release would harm its interests.

IV. Conclusion and the Path Forward

For decades the accommodation process has been the vehicle through which the Executive Branch and Congress have successfully negotiated each branch's interests in the resolution of disputes regarding oversight and executive privilege. The rough and tumble of the political process, even where it might not lead to as efficient a resolution

[88] *See, e.g.*, *Clinton v. United States*, 520 U.S. 698 (referring to the President's "unique position"); 943 F.3d at 662-663 (also describing the role of the President within the constitutional system); *Cf. Cheney v. United States Dist. Court for D.C.*, 542 U.S. 367, 389-90 (2004) (calling for avoidance of conflict between the two political branches whenever possible).

[89] *See Mazars*, 140 S.Ct. at 2035-36.

[90] *See Congressional Oversight of the White House*, 45 Op. O.L.C. ___, at *39.

[91] *See* Federalist No. 51.

of information requests as political actors desire, is an aspect of the intended conflict between the competing branches. To the extent that Congress concludes it is not receiving executive branch information in as timely or complete a manner as necessary, Congress could precisely tailor its information requests to ensure that the legislative objective served by the requested information is facially apparent.[92] But even more fundamentally, Congress could exert greater control over the Executive Branch by precisely and vigorously legislating detailed policy requirements on the front end in contrast to reliance on oversight on the back end.[93] The Supreme Court has to date concluded that the exercise of legislative power requires only the establishment of an "intelligible principle" guiding execution of the law.[94] But several Justices have suggested this standard is too lax and Congress should delegate less broad policymaking authority to executive entities. Whether or not the Court ultimately concludes that the Constitution's vesting of all legislative authority in Congress limits the allocation of policy-making discretion to the Executive Branch, the existence of tailored legislation cabining executive discretion would effect lasting control with certain bite.

[92] *Cf. Mazars*, 140 S.Ct. at 2036 (discussing narrow, tailored requests).

[93] *Cf.* Jennifer Mascott, *Early Customs Laws and Delegation*, 87 Geo. Wash. L. Rev. 1388, 1394 (2019) (contending that a stricter version of "the nondelegation doctrine inheres in both federalism and the overall constitutional structure of separated powers" in addition to the general requirements of the Article I Vesting Clause).

[94] *Gundy v. United States*, 139 S.Ct. 2116, 2123 (2019).