

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

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

August 3, 2021

**Testimony of Kate Shaw
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Chairman Whitehouse, Ranking Member Kennedy, and Distinguished Members of the Subcommittee:

Thank you for the invitation to testify today. My name is Kate Shaw, and I am a Professor of Law at Cardozo Law School, where my work focuses, among other things, on executive power and questions of constitutionalism outside the courts. Before I entered law teaching, I worked as an Associate Counsel in the White House Counsel’s Office, from 2009–2011.

I understand that the purpose of today’s hearing is to evaluate recent breakdowns in the process for resolving conflicts between executive privilege and congressional oversight. My testimony will therefore offer some brief background on executive privilege, both generally and in the context of Congress’s exercise of its oversight authority. It will then address recent developments—in Congress, the executive branch, and the courts—surrounding the interaction between executive privilege and congressional oversight. As my testimony will explain, long-standing norms of inter-branch cooperation and accommodation have come under serious strain in recent years, and the process is clearly in need of reform. I’ll therefore conclude with some thoughts about possible paths forward.

This statement draws on legal authority from both courts and the political branches. But judicial authority in this area is limited: historically, most disputes between Congress and the executive branch over access to information have been resolved within the political branches, not in the courts. So, while I will address the handful of court cases that grapple with the contours of executive privilege, equally or more important here are the principles and practices that for decades have guided the political branches in their approach to executive privilege, and that in recent years have largely collapsed.

THE NATURE & SCOPE OF EXECUTIVE PRIVILEGE¹

The term “executive privilege” does not appear in the Constitution. But the power to withhold certain information from the courts, Congress, and the public has long been understood as an important, if bounded, privilege enjoyed by the president.

Judicial Authority

The Supreme Court confirmed the existence of a constitutionally grounded executive privilege in *United States v. Nixon*.² The *Nixon* Court found that some form of executive privilege was both “fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.”³ But the *Nixon* Court also held that “neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications” could “sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances.”⁴

The executive privilege identified in *Nixon*, then, was presumptive and qualified, not absolute. And the Court went on to reject President Nixon’s assertion that the privilege shielded him from compelled production of tapes and documents sought by the Watergate Special Prosecutor.⁵

Nixon remains the single most important case on the nature and scope of executive privilege, but it left many questions unanswered. In the years since *Nixon*, the D.C. Circuit has decided several significant cases involving claims of executive privilege. First, in *In re Sealed Case (Espy)*,⁶ a case involving an Office of Independent Counsel investigation into Agriculture Secretary Mike Espy, the D.C. Circuit identified several distinct strains of executive privilege: first, a deliberative process privilege; and second, a privilege that attached to presidential communications. As to both, the court

¹ The discussion in this section draws heavily on testimony I presented to the House Judiciary Committee in May 2019. *Executive Privilege and Congressional Oversight*: Hearing Before the H.R. Comm. on the Judiciary. 116th Cong. (2019) (statement of Kate Shaw, Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University).

² *United States v. Nixon*, 418 U.S. 683, 708 (1974). Although the first formal judicial recognition of executive privilege did not appear until 1974, presidents since Washington have asserted the prerogative to withhold communications from both Congress and the courts. Some suggest that judicial recognition of executive privilege is traceable to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803), where in addition to announcing the power of judicial review, Chief Justice Marshall also suggested a need for courts to avoid “intrud[ing] into the cabinet, and intermeddl[ing] with the prerogatives of the executive.” See also MARK J. ROZELL, EXECUTIVE PRIVILEGE: THE DILEMMA OF SECRECY AND DEMOCRATIC ACCOUNTABILITY 37–38 (1994) (discussing President Jefferson’s attempts to keep from Congress certain documents related to Aaron Burr’s involvement in a secessionist conspiracy). And soon after *United States v. Nixon*, the Supreme Court confirmed that “the privilege is necessary to provide the confidentiality required for the President’s conduct of office. . . . the privilege is not for the benefit of the President as an individual, but for the benefit of the Republic.” *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 448–49 (1977).

³ *United States v. Nixon*, 418 U.S. 683, 708 (1974).

⁴ *Id.* at 706.

⁵ *Id.* at 713.

⁶ *In re Sealed Case (Espy)*, 121 F.3d 729 (D.C. Cir. 1997).

held that when evaluating a claim of privilege, “courts must balance the public interests at stake in determining whether the privilege should yield in a particular case, and must specifically consider the need of the party seeking privileged evidence.”⁷ Applying that balancing, the court found that the Independent Counsel had made out a sufficiently strong showing to overcome the presidential communications privilege as to some of the requested documents.⁸

In 2004, the D.C. Circuit decided *Judicial Watch v. Department of Justice*, a case involving a FOIA request for Justice Department documents. Describing the case as “call[ing] upon the court to strike a balance between the twin values of transparency and accountability of the executive branch on the one hand, and on the other hand, protection of the confidentiality of Presidential decision-making and the President’s ability to obtain candid, informed advice,”⁹ the court rejected the invitation to extend the presidential communications privilege identified in *Espy* to encompass documents created outside of the White House that “never make their way to the Office of the President.”¹⁰ In both of these D.C. Circuit cases, then, presidents have been unsuccessful in their attempts to expand the scope of the judicially recognized privilege for presidential communications.

The Supreme Court returned to the issue of executive privilege in the 2004 case *Cheney v. District Court*, in which a number of groups challenged the Bush Administration’s energy policy task force’s compliance with the Federal Advisory Committee Act. The case’s procedural posture meant that the Court did not directly opine on the existence of the privilege, but it did note in passing the importance of “a coequal branch of Government ‘afford[ing] Presidential confidentiality the greatest protection consistent with the fair administration of justice.’”¹¹

Executive Privilege and Congressional Oversight

Nixon involved a grand jury subpoena, and much of the Court’s discussion was grounded in, and at times expressly limited to, the criminal context. *Cheney* involved litigation under the Federal Advisory Committee Act; *Espy* arose in the context of an Independent Counsel investigation; and *Judicial Watch* involved FOIA litigation. So none of these cases addressed clashes between claims of executive privilege and requests for information in the context of congressional oversight.¹²

⁷ *Id.* at 746.

⁸ *Id.* at 761–62.

⁹ *Jud. Watch, Inc. v. Dep’t of Just.*, 365 F.3d 1108, 1112 (D.C. Cir. 2004).

¹⁰ *Id.* at 1116–17.

¹¹ *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 382 (2004).

¹² *See United States v. Nixon*, 418 U.S. 683, 712 n.19 (1974) (“We are not here concerned with the balance between the President’s generalized interest in confidentiality and . . . congressional demands for information.”).

Like executive privilege, Congress’s oversight power is nowhere to be found in the text of the Constitution.¹³ But like executive privilege, its existence today is beyond serious dispute—an accepted extension of, and incident to, Congress’s enumerated powers. The Supreme Court made explicit in the 1927 case *McGrain v. Daugherty* that the “power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.”¹⁴ The *McGrain* Court continued: “the houses of Congress have the power, through their own processes, to compel a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the constitution.”¹⁵ Later cases have elaborated on the mechanics of this function, explaining that the “[i]ssuance of subpoenas” is “a legitimate use by Congress of its power to investigate.”¹⁶ Just last year, the Supreme Court reiterated that “The congressional power to obtain information is ‘broad’ and ‘indispensable.’”¹⁷

The Court has identified prerequisites to the exercise of Congress’s power of inquiry, explaining that congressional investigation must be “related to, and in furtherance of, a legitimate task of the Congress.”¹⁸ But once these prerequisites are satisfied, the power of inquiry is expansive: “The scope of the power of inquiry, in short, is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.”¹⁹

Only a handful of cases directly address congressional requests for executive-branch information. In *Senate Select Committee on Presidential Campaign Activities v. Nixon*, the D.C. Circuit declined to enforce a Senate committee subpoena for the tapes that would eventually be obtained by the Watergate Special Prosecutor. Pointing to the House Judiciary Committee’s presidential impeachment inquiry, the court held that “the Select Committee’s immediate oversight need for the subpoenaed tapes is, from a congressional perspective, merely cumulative. Against the claim of privilege, the only oversight interest that the Select Committee can currently assert is that of having these particular conversations scrutinized simultaneously by two committees.”²⁰

¹³ In keeping with the title of the hearing, I mostly refer here to “congressional oversight.” But the discussion above applies to congressional information-gathering for purposes of informing possible legislation, evaluating nominees, or any other legislative purpose, in addition to “oversight” as traditionally conceived—that is, the “review, monitoring, and supervision of the executive and the implementation of public policy,” CRS Report RL30240, *Congressional Oversight Manual*, coordinated by Christopher M. Davis, Todd Garvey, and Ben Wilhelm, at 1. See generally JOSH CHAFETZ, CONGRESS’S CONSTITUTION 152 (2017) (“Gathering information is not a peripheral part of Congress’s job; it is central to the legislature’s identity and function.”).

¹⁴ *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927). As with *Nixon* and executive privilege, *McGrain* in many ways merely represented judicial confirmation of a practice the political branches had long understood to have constitutional foundations.

¹⁵ *Id.* at 160.

¹⁶ *Eastland v. U. S. Servicemen’s Fund*, 421 U.S. 491, 504 (1975).

¹⁷ *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031 (2020) (quoting *Watkins v. United States*, 354 U.S. 178, 187, 215 (1957)).

¹⁸ *Id.* (quoting *Watkins v. United States*, 354 U.S. 178, 187 (1957)).

¹⁹ *Barenblatt v. United States*, 360 U.S. 109, 111 (1959).

²⁰ *S. Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 732 (D.C. Cir. 1974).

Two more recent district court opinions address congressional demands for information and executive resistance to those demands. In *Committee on Judiciary v. Miers*, a case involving a subpoena for testimony from White House officials in conjunction with an investigation into the firing of nine U.S. Attorneys, the district court “reject[ed] the Executive’s claim of absolute immunity for senior presidential aides.”²¹ And *Committee on Oversight and Government Reform v. Holder*, while not addressing the merits of the dispute over access to documents sought as part of a committee investigation into the “Fast and Furious” firearm purchase and transfer operation, firmly rejected the Department of Justice’s argument that “because the executive is seeking to shield records from the legislature, another co-equal political body, the law forbids the Court from getting involved.”²²

A still more recent series of cases grew out of the House Judiciary Committee’s attempts to secure the testimony of former White House Counsel Don McGahn. The Committee initially requested and then subpoenaed McGahn’s testimony regarding some of the episodes detailed in Special Counsel Robert Mueller’s Report.²³ Both McGahn and the White House informed the Committee that because the Committee’s request “implicated significant Executive Branch confidentiality interests and executive privilege,”²⁴ McGahn would not comply with the subpoena. The Committee filed suit to enforce its subpoena, and the D.C. District Court reiterated the *Miers* court’s holding that “senior-level presidential aides . . . , are legally required to respond to a subpoena that a committee of Congress has issued, by appearing before the committee for testimony.”²⁵ Four subsequent opinions out of the D.C. Circuit have addressed aspects of standing and justiciability, but without reaching the merits of McGahn’s absolute testimonial immunity argument.²⁶ An agreement for voluntary closed-door testimony earlier this summer foreclosed the possibility of any additional appellate rulings,²⁷ but the en banc court did observe that “the ordinary and effective functioning of the Legislative Branch critically depends on the legislative prerogative to obtain information.”²⁸

Finally, in June 2020, the Supreme Court decided *Trump v. Mazars*, a case involving congressional subpoenas to third parties for financial records involving the President. While the case did not involve any assertions of executive privilege, the Court rejected President Trump’s attorneys’ request for a rule that would have required congressional committees seeking presidential records to establish a “demonstrated, specific need” for information that is “demonstrably critical” to a valid legislative purpose.²⁹ But the Court also concluded that the lower courts had not been sufficiently

²¹ Comm. on Judiciary v. Miers, 558 F. Supp. 2d 53, 99 (D.D.C. 2008).

²² Comm. on Oversight & Gov’t Reform v. Holder, 979 F. Supp. 2d 1, 12 (D.D.C. 2013).

²³ SPECIAL COUNS. ROBERT S. MUELLER, III, 1 REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION (2019).

²⁴ Letter from Pat A. Cipollone, Counsel to the President, to Chairman Nadler, Comm. on Judiciary (May 7, 2019), available at <http://cdn.cnn.com/cnn/2019/images/05/07/pacletter05.07.2019.pdf>.

²⁵ Comm. on Judiciary of United States House of Representatives v. McGahn, 415 F. Supp. 3d 148, 155 (D.D.C. 2019).

²⁶ Comm. on Judiciary of United States House of Representatives v. McGahn, 968 F.3d 755, 778 (D.C. Cir. 2020) (en banc).

²⁷ Charlie Savage, *House Democrats and White House Reach Deal Over Testimony by Ex-Trump Aide*, N.Y. TIMES (May 11, 2021), available at <https://www.nytimes.com/2021/05/11/us/politics/mcghahn-testimony.html>.

²⁸ Comm. on Judiciary of United States House of Representatives v. McGahn, 968 F.3d 755, 761 (D.C. Cir. 2020).

²⁹ *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2032, (2020).

attentive to the separation-of-powers concerns raised by requests for the President's financial records, and so remanded for an appropriate consideration of those concerns. Still, one clear take-away was that as a general matter, the president was not outside the reach of Congress's oversight authority.

On the substance, then, the judicial authority is largely on the side of Congress. But in each of these disputes, the timeline of litigation meant that the favorable rulings came too late for the relevant committees to genuinely benefit. In general, the typical litigation timeline confers an enormous advantage on executive-branch officials determined to resist congressional oversight efforts.³⁰

POLITICAL-BRANCH PRACTICE AND AUTHORITY

The cases discussed above represent the key judicial authority on executive privilege and its interaction with congressional oversight. But this limited judicial authority is only one part of the story.³¹

Indeed, an extensive body of executive-branch legal authority, recently catalogued by Professor Jonathan Shaub, articulates the general principles that have long guided the executive branch's approach to congressional requests for information. That authority asserts a strong executive power to protect information from disclosure, but has also long accepted the legitimacy of Congress's constitutional entitlement to access some executive-branch information. These executive-branch writings reflect a largely cooperative vision of information exchange in which both the executive and legislative branches have important and constitutionally grounded interests, and in which those interests "must be resolved on the basis of the force of reason and bargaining leverage."³²

³⁰ Josh Chafetz, *Nixon/Trump: Strategies of Judicial Aggrandizement*, 110 GEO. L.J. ___ (forthcoming 2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3788366.

³¹ Courts routinely express their preference for extra-judicial resolution of information clashes between the executive and Congress. The Supreme Court itself has noted, though in the context of private-party pursuit of executive-branch information, that the "occasion[s] for constitutional confrontation between the two branches' should be avoided whenever possible." *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 389–90 (2004). And the D.C. Circuit has counseled that in such disputes "each branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation." *United States v. Am. Tel. & Tel. Co.*, 567 F.2d 121, 127 (D.C. Cir. 1977) ("The framers, rather than attempting to define and allocate all governmental power in minute detail, relied, we believe, on the expectation that where conflicts in scope of authority arose between the coordinate branches, a spirit of dynamic compromise would promote resolution of the dispute in the manner most likely to result in efficient and effective functioning of our governmental system."). See also Todd David Peterson, *Contempt of Congress v. Executive Privilege*, 14 U. PA. J. CONST. L. 77, 158 (2011) ("the negotiation-accommodation process . . . works creatively to fashion compromise agreements that involve far more creative and useful terms and conditions than a court could ever come up with on a principled basis if it were to attempt to adjudicate a congressional-executive information dispute.").

³² Andrew McCauley Wright, *Constitutional Conflict and Congressional Oversight*, 98 MARQ. L. REV. 881, 920 (2014).

Numerous memoranda from the Office of Legal Counsel and opinions or letters by senior executive-branch officials describe a strong executive privilege rooted in Article II of the Constitution. A 1989 opinion by then-Assistant Attorney General William Barr, for example, describes executive privilege as “a necessary corollary of the executive function vested in the President by Article II of the Constitution.”³³ A 1982 opinion by then-Assistant Attorney General Ted Olson explains that “[t]he necessity for confidentiality in the advisory relationships between Cabinet advisers and the President, and their respective aides, is of both constitutional and practical significance.”³⁴ The executive branch’s description of the contours of executive privilege has evolved somewhat in recent decades, and it is today frequently described as including at least five components: presidential communications; information related to national security, diplomatic communications, and foreign affairs; internal executive-branch deliberations; information related to law enforcement investigations; and communications subject to the attorney-client privilege.³⁵ These different strains of executive privilege may implicate distinct constitutional interests.

Executive-branch writings also appear to acknowledge that under some circumstances, Congress has a legitimate entitlement to executive-branch information. As Attorney General William French Smith wrote in 1981, “In cases in which the Congress has a legitimate need for information that will help it legislate and the Executive Branch has a legitimate, constitutionally recognized need to keep information confidential, the courts have referred to the obligation of each Branch to accommodate the legitimate needs of the other . . . The accommodation required is not simply an exchange of concessions or a test of political strength. It is an obligation of each Branch to make a principled effort to acknowledge, and if possible to meet, the legitimate needs of the other Branch.”³⁶ A Memorandum issued by President Ronald Reagan explained that “[t]he policy of this Administration is to comply with Congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the executive branch. . . . executive privilege will be asserted only in the most compelling circumstances, and only after careful review demonstrates that the assertion of privilege is necessary.”³⁷ In 2000, OLA head Robert Raben reiterated that basic position: “In implementing the longstanding policy of the Executive Branch to comply with Congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch, the Department’s goal in all cases is to satisfy legitimate

³³ Cong. Requests for Confidential Exec. Branch Info., 13 U.S. Op. Off. Legal Counsel 153, 154 (1989). *See also* Memorandum for the Attorney General Re: Confidentiality of the Attorney General’s Communications in Counseling the President, 6 Op. O.L.C. 481, 484-90 (1982).

³⁴ *See also* Memorandum for the Attorney General Re: Confidentiality of the Attorney General’s Communications in Counseling the President, 6 Op. O.L.C. 481, 484-90 (1982).

³⁵ Jonathan David Shaub, *The Executive’s Privilege*, 70 DUKE L.J. 1, 11 (2020).

³⁶ 43 U.S. Op. Atty. Gen. 327, 332 (1981).

³⁷ Memorandum from President Ronald Reagan for the Heads of Executive Departments and Agencies, *Re: Procedures Governing Responses to Congressional Requests for Information* (Nov. 4, 1982), <https://www.documentcloud.org/documents/3864882-1982-Reagan-Memo-re-procedures-governing.html>.

legislative interests while protecting Executive Branch confidentiality interests.”³⁸ And just last month, the Office of Legal Counsel described the interplay of oversight and executive privilege as a “dynamic process,” in which “each branch is subject to ‘an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation.’”³⁹

Authority from Congress, not surprisingly, takes a strong view of congressional prerogatives and entitlement to information from the executive branch; but it too recognizes the legitimacy of some form of executive privilege.⁴⁰ An oversight manual produced by the Congressional Research Service, for example, explains that “while the congressional power of inquiry is broad, it is not unlimited. . . . the power to investigate may be exercised only ‘in aid of the legislative function’ and cannot be used to expose for the sake of exposure alone.”⁴¹ The same report acknowledges that executive privilege is “a doctrine which, like Congress’ powers to investigate and cite for contempt, has constitutional roots.”⁴² Another CRS report approvingly cites a judicial statement that “the Framers relied ‘on the expectation that where conflicts in scope of authority arose between the coordinate branches, a spirit of dynamic compromise would promote resolution of the dispute in the manner most likely to result in efficient and effective functioning of our governmental system.’”⁴³

Beyond these written statements, a body of norms, conventions, and practices have developed to implement these commitments. These practices structure and order the legal obligations by which actors within the political branches understand themselves to be bound, and they constitute an important part of the law of executive privilege and congressional oversight.

What forms have these methods of compromise and accommodation taken over the years? Ordinarily, a congressional committee initiates what has been described as a “dance”⁴⁴ with a broad request for information or testimony. The relevant executive-branch officials typically next seek to narrow the request, and the executive branch may then provide documents pursuant to more narrowly drawn requests, or may give access to sensitive documents to a subset of committee

³⁸ Letter from Robert Raben, Assistant Att’y Gen., to John Linder, House Subcomm. on Rules & Org. of the House 2–3 (Jan. 27, 2000). *See also* Andrew McCause Wright, *Constitutional Conflict and Congressional Oversight*, 98 MARQ. L. REV. 881, 922–23 (2014).

³⁹ Ways and Means Comm.’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 23 (July 30, 2021) *available at* <https://www.justice.gov/olc/file/1419111/download>.

United States v. Am. Tel. & Tel. Co., 567 F.2d 121, 127, 130 (D.C. Cir. 1977).

⁴⁰ MORTON ROSENBERG CONG. RESEARCH SERV., INVESTIGATIVE OVERSIGHT: AN INTRODUCTION TO THE LAW, PRACTICE AND PROCEDURE OF CONGRESSIONAL INQUIRY (1995).

⁴¹ *Id.* at 2 (quoting *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880)).

⁴² *Id.* at 14.

⁴³ CONG. RESEARCH SERV., CONGRESSIONAL SUBPOENAS: ENFORCING EXECUTIVE-BRANCH COMPLIANCE 1 n. 7 (Mar. 27, 2019) (quoting *United States v. AT&T Co.*, 567 F.2d 121, 127 (D.C. Cir. 1977)).

⁴⁴ Neal Devins, *Congressional-Executive Information Access Disputes: A Modest Proposal--Do Nothing*, 48 ADMIN. L. REV. 109, 137 (1996). Peter M. Shane, *Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims Against Congress*, 71 MINN. L. REV. 461, 515 (1987).

members and staff, or provide summaries rather than documents themselves, or grant “read-only” access to documents that remain in the custody of the executive branch. If the executive branch continues to resist, the committee may issue a subpoena or subpoenas, take a contempt vote or votes, and, in recent years, turn to courts to compel compliance. In general, executive privilege assertions are rare, carefully considered, and made only after genuine attempts at pursuing available alternatives.

This history of compromise and mutual accommodation is relevant in itself; it is additionally relevant because courts are particularly attentive to past practice when they render decisions in separation-of-powers disputes. Justice Frankfurter’s famous concurring opinion in *Youngstown* explained that “[i]t is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them,”⁴⁵ and courts today routinely invoke practice between and within the political branches, in particular in cases implicating the separation of powers.⁴⁶

RECENT PROCESS BREAKDOWNS

For many years and across administrations of both parties, officials in both the executive branch and Congress followed the basic script above. But the four years of the Trump Administration saw the emergence of several novel executive-branch practices around executive privilege, which Professor Jonathan Shaub has described as “prophylactic” uses of executive privilege.⁴⁷ Some of these practices are genuinely new; others build on trends already underway. But taken together, they represent a troubling set of developments that have worked to undermine the viability of congressional oversight, with implications for executive-branch accountability and core separation-of-powers principles.

The first of these developments is the routine use of broad, blanket, so-called “protective” assertions of executive privilege, in which witnesses and administration lawyers withhold testimony or documents on the grounds that information they contain *might* be subject to a later privilege assertion. At times this prophylactic approach has involved witnesses appearing to testify before congressional committees but refusing to answer specific questions on the basis of potential future privilege invocations, as then-Attorney General Jeff Sessions did in his testimony before the Senate

⁴⁵ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (Frankfurter, J., concurring).

⁴⁶ See, e.g., *NLRB v. Noel Canning*, 573 U.S. 513, 524 (2014) (explaining that because the Recess Appointments Clause concerns the separation of elected powers, “in interpreting the Clause, we put significant weight upon historical practice” (emphasis omitted)). See generally Katherine Shaw, *Conventions in the Trenches*, CAL. L. REV. 2020 (discussing political-branch conventions).

⁴⁷ See Jonathan David Shaub, *The Executive's Privilege*, 70 DUKE L.J. 1, 61 (2020) (“The prophylactic executive privilege is . . . grounded not in concrete damage that would result from the disclosure of subpoenaed information but in harm to the president’s absolute authority to control the dissemination of information.”).

Judiciary Committee in June 2017.⁴⁸ On other occasions this approach has resulted in the refusal to produce any documents or witnesses on the basis of broad and underspecified concerns about privilege or confidentiality.⁴⁹

The second novel development, closely related to the first, is the outright refusal to cooperate in any way in particular investigations,⁵⁰ like the inquiry into Russian interference in the 2016 election. As early as 2017, the Senate sent dozens of bipartisan requests for information related to its investigation of that interference;⁵¹ later, in 2019, the House committees empowered under the House's impeachment resolution issued many additional requests for documents and testimony.⁵² In each instance, the administration flatly refused to make any witnesses or documents available.⁵³ The latter refusal formed the basis of one of the two articles approved by the House of Representatives in President Trump's first impeachment.⁵⁴

The third development is rooted in the long-standing executive-branch position that close presidential advisors enjoy absolute immunity from compelled testimony. But the most recent administration took a far broader view of that immunity than any recent administration. In Shaub's description, the Trump administration transformed that long-standing immunity principle "into an absolute position that authorizes the president to direct all current and former senior advisers to refuse to comply with a congressional subpoena if the requested testimony relates to the advisers' 'official duties,' even if much of the relevant information has already been made public and the 'official duties' are entirely unrelated to advising the president or to presidential communications."⁵⁵

⁴⁸ See Charlie Savage, *Explaining Executive Privilege and Sessions's Refusal to Answer Questions*, N.Y. TIMES (June 15, 2017), available at <https://www.nytimes.com/2017/06/15/us/politics/executive-privilege-sessions-trump.html> (quoting Sessions's refusal to answer questions, on the grounds that "I'm protecting the president's constitutional right by not giving it away before he has a chance to view it and weigh it").

⁴⁹ See, e.g., Letter from Stephen E. Boyd, Assistant Att'y Gen., to Jerrold Nadler, Chairman of the House Comm. on the Judiciary, 116th Cong. (May 8, 2019), <https://assets.documentcloud.org/documents/5993531/5-8-19-Boyd-Letter-Nadler.pdf>.

⁵⁰ Annie L. Owens, *Thwarting the Separation of Powers in Interbranch Information Disputes*, 130 YALE L.J. FORUM 494, 500 (2021) (starting in 2017, "the Administration began forgoing the traditional accommodation process for a policy that approached outright refusal").

⁵¹ *Senate Judiciary Committee Minority Report*, at 17. Owens, *supra*, at 505 (discussing Senate requests).

⁵² H.R. 116-346, Impeachment of Donald J. Trump, President of the United States ("the Administration refused—and continues to refuse—to produce any documents subpoenaed by the Investigating Committees as part of the impeachment inquiry, and nine current or former Administration officials remain in defiance of subpoenas for their testimony.")

⁵³ In addition, administration officials who did comply with subpoenas and participate in congressional proceedings faced a range of reprisals.

⁵⁴ H.R. Res. 766, 116th Cong. art. II (2019) (charging that "Donald J. Trump has directed the unprecedented, categorical, and indiscriminate defiance of subpoenas issued by the House of Representatives pursuant to its 'sole Power of Impeachment.'")

⁵⁵ Jonathan David Shaub, *The Executive's Privilege*, 70 DUKE L.J. 1, 64–65 (2020).

POSSIBLE PATHS FORWARD

The end of the Trump Administration, and the conclusion of many of the episodes discussed above, presents an important opportunity to rethink the practices of each branch of government when it comes to the interaction of oversight and privilege. I sketch out below a number of possible reforms.

Internal executive-branch reforms

Transparency and specificity

First, the executive branch's increasing tendency to invoke broad "confidentiality" interests to pretermit inter-branch negotiation should yield to a requirement that assertions of executive privilege be made only upon a detailed description of the specific executive-branch interests that would be threatened by the production of documents or testimony. To paraphrase Professor Shaub, the executive branch's privilege against the compelled production of documents or testimony should be invoked sparingly, and only when accompanied by "an explicit and public presidential determination that the disclosure would cause concrete, identifiable harm to a specific interest of the United States."⁵⁶

Responding to wrongdoing

Second, the executive branch could refine its approach to documents or testimony that contain evidence of wrongdoing or misconduct. This could be done by formalizing the long-standing executive-branch principle that executive privilege may not be used to conceal evidence of wrongdoing.

As a general matter, lawyers within the executive branch, at least post-Watergate,⁵⁷ have generally adhered to a strong norm under which documents or testimony that would reveal wrongdoing or misconduct are not viewed as candidates for a potential assertion of executive privilege.⁵⁸ But it is

⁵⁶ *Id.* at 7.

⁵⁷ See Archibald Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383, 1433 (1974) ("The evidence finally released by President Nixon just prior to his resignation made it abundantly clear that executive privilege had been used not to protect the Presidency, but to hide the misconduct of the President himself.").

⁵⁸ See, e.g., Dawn Johnsen, *Executive Privilege Since United States v. Nixon: Issues of Motivation and Accommodation*, 83 MINN. L. REV. 1127, 1133 (1999) ("Where a President asserts executive privilege in order to hide evidence of illegal acts or other wrongdoing by high level executive officials, the assertion is illegitimate.").

not clear that this general principle has held in recent years. The practice should therefore be strengthened and formalized.⁵⁹

Formalizing this principle would bring internal executive-branch practice more firmly into line with judicial authority holding that allegations of misconduct erode if not vitiate at least some forms of executive privilege. The *Espy* court directly addressed this issue, holding that the deliberative process privilege “disappears altogether when there is any reason to believe government misconduct occurred.”⁶⁰ The court found that the presidential communications privilege did not similarly disappear on a suggestion of official misconduct, but that a “party seeking to overcome the presidential privilege seemingly must always provide a focused demonstration of need, even when there are allegations of misconduct by high-level officials . . .”⁶¹ Presumably, however, in the face of such a showing of need, allegations of misconduct would tilt the balance strongly in favor of disclosure.⁶²

Several district court cases have also addressed issues of privilege and misconduct. One held that “if there is ‘any reason’ to believe the information sought may shed light on government misconduct, public policy (as embodied by the law) demands that the misconduct not be shielded merely because it happens to be predecisional and deliberative.”⁶³ Another found that the deliberative process privilege did not apply to memoranda showing that the Nixon White House considered using the IRS “in a selective and discriminatory fashion,” reasoning that the memoranda were “no more part of the legitimate governmental process intended to be protected . . . than would be memoranda discussing the possibility of using a government agency to deliberately harass an opposition political party.”⁶⁴

The still-ongoing saga over access to information regarding the Trump Administration’s efforts to add a citizenship questions to the 2020 Census would seem to present an opportunity for the Department of Justice to reconsider this issue—if, as seems likely from both the Supreme Court’s

⁵⁹ DAVID MAYHEW, *DIVIDED WE GOVERN* 8 (1991) (“Beyond making laws, Congress probably does nothing more consequential than investigate alleged misbehavior in the executive branch.”); DOUGLAS L. KRINER & ERIC SCHICKLER, *INVESTIGATING THE PRESIDENT* (2016).

⁶⁰ *In re Sealed Case (Espy)*, 121 F.3d 729, 746 (D.C. Cir. 1997).

⁶¹ *Id.*

⁶² *See also Mobil Oil Corp. v. Dep’t of Energy*, 520 F. Supp. 414, 419 (N.D.N.Y. 1981) (in case involving subpoena issued in civil litigation, describing the “duty of a court . . . to balance the competing interests of the parties with respect to the release of the disputed information,” and identifying “the public interest in the proper functioning of its governmental agencies” in a case in which “the DOE has been accused . . . of mismanaging a billion dollar governmental program that has far-reaching effects on the American public.”).

⁶³ *Alexander v. FBI*, 186 F.R.D. 154, 164 (D.D.C. 1999).

⁶⁴ *Tax Reform Research Group v. IRS*, 419 F. Supp. 415, 426 (D.D.C. 1976).

2019 decision⁶⁵ and the results of a recent Inspector General investigation⁶⁶—the records at issue contain evidence of misconduct.

Enforcement of contempt citations

Finally, the Department of Justice might reconsider the specifics of its current practice regarding the enforcement of contempt citations against current or former executive-branch officials. In 1984, the Office of Legal Counsel first advised that the Department of Justice was not required by the criminal contempt of Congress statute to either prosecute, or refer to a grand jury, an executive-branch official whom Congress had referred for prosecution, at least where the President had asserted executive privilege. The opinion went on to advise that the Constitution barred the statute's application to executive-branch officials under such circumstances.⁶⁷ Subsequent administrations have adhered to that position, and in recent conflicts, Congress has not even sought to have the Department of Justice enforce contempt citations.

Even if the Department of Justice retains the general practice of *not* initiating such prosecutions, it may warrant revisiting the reasoning of the original 1984 opinion, or it may be possible to create new procedures to ensure that the criteria set forth in 1984 (and a subsequent 1986 memo⁶⁸) are satisfied—that is, a proper assertion of executive privilege, made personally by the president—before the Department concludes that it will not prosecute.

Congressional practice

Congressional committees engaging in oversight should work to ensure that their requests for information or testimony are reasonable and not overbroad; in addition, committees should work to minimize the extent to which their requests overlap with or duplicate requests issued by other committees. This is for at least two reasons. First, excessively broad or unduly burdensome initial requests may lead the executive branch to respond in a similar spirit. Second, entering negotiations with manageable, relatively narrow, and non-duplicative requests will place Congress in a stronger bargaining position vis-à-vis the executive if such disputes ultimately end up in court.

⁶⁵ See *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575 (2019) (“Altogether, the evidence tells a story that does not match the explanation the Secretary gave for his decision.”).

⁶⁶ Letter from Commerce Department Inspector General Peggy Gustafson, July 15, 2021, *available at* <https://www.oig.doc.gov/OIGPublications/Inspector-General-Letter-to-Majority-Leader-Charles-Schumer-and-Chairwoman-Carolyn-Maloney-re-OIG-Case-No-19-0728.pdf>.

⁶⁷ *Prosecution of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, (May 30, 1984).

⁶⁸ *Response to Cong. Requests for Information Regarding Decisions Made Under the Independent Counsel Act*, 10 Op. O.L.C. 68 (April 28, 1986).

Congress could also make more active use of the political tools that were once understood to give it a comparative advantage in privilege disputes with the executive branch.⁶⁹ These include using the Senate’s power to withhold its consent to executive-branch nominees, using the appropriations power to withhold funds, and deploying public-facing rhetoric to criticize and galvanize public opinion against executive-branch overreach.⁷⁰

Some have argued that Congress should consider reviving a form of inherent contempt. This seems in principle to be worth considering, though much turns on the details. I would not, for example, support an attempt to return to a regime in which the sergeant-at-arms actually seeks to arrest non-compliant parties. But a scheme involving actual penalties in the form of fines, required submission of reports to Congress, reduced or withheld funds, or similar sanctions may well be worth considering in extreme cases of failure to cooperate or engage with oversight efforts.

Expediting judicial process

Over the last two decades, clashes between Congress and the executive branch have been increasingly fought in the courts, with both congressional committees and executive-branch officials invoking the jurisdiction of the federal courts in disputes over documents or testimony.

Whatever the merits of this development—and it has fierce critics⁷¹—one important lesson of recent court fights is the incompatibility of judicial timelines with most congressional oversight efforts. In virtually every executive privilege dispute, the information or testimony sought is by definition in the possession of the executive branch; and in essentially all recent high-stakes disputes, the executive branch has been able to run out the clock until the end of the Congress that initiated the oversight effort, or of the administration Congress sought to investigate.

It is certainly *possible* for courts to move quickly to resolve disputes involving executive privilege. The *Nixon* tapes opinion famously issued three weeks after the oral argument, and just two months after

⁶⁹ Louis Fisher, *Congressional Access to Information: Using Legislative Will and Leverage*, 52 DUKE L.J. 323, 325 (2002) (in oversight disputes, “Congress can win most of the time—if it has the will—because its political tools are formidable.”).

⁷⁰ Josh Chafetz, *Congressional Overspeech*, 89 FORDHAM L. REV. 529, 536 (2020) (describing “the use of oversight mechanisms to communicate with the broader public”); Katherine Shaw, *Impeachable Speech*, 70 EMORY L.J. 1, 40 (2020) (arguing that “in impeachment, as elsewhere in law and politics, failure and success may not stand in a relationship of strict opposition,” and that even impeachments that do not result in conviction and removal may serve broader purposes); Deborah Pearlstein, *The Executive Branch Anticanon*, 89 FORDHAM L. REV. 597, 600 (2020) (hypothesizing the existence of an executive branch “anticanon,” composed of presidential conduct “that has come to be widely recognized as so unacceptable in character, it has not produced any of the ‘precedential’ effects” ordinary presidential conduct does).

⁷¹ See, e.g., Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. CHI. L. REV. 1083, 1155–56 (2009) (“As the executive continues to make expansive claims for its powers and privileges, and as courts continue to position themselves as the “ultimate arbiters” of inter-branch conflicts, Congress has ceded ground to both.”).

the issuance of the grand jury subpoenas at issue.⁷² The Second Circuit decided *Trump v. Vance* (a case involving a state grand jury, rather than congressional, subpoenas) in under two weeks.⁷³ But courts have largely not moved this quickly, instead adhering to ordinary litigation timelines that have meant that subpoenas have expired, impeachment trials have run their course, or other exigencies have evaporated without these disputes ever reaching judicial resolution.

Accordingly, so long as courts continue to play an important role in mediating disputes between Congress and the executive branch, it is well worth considering legislation that would create an expedited judicial process for the resolution of oversight disputes. A number of rounds of legislation have been introduced to create versions of this sort of process. The 115th Congress's H.R. 4010, for example, would have provided that "it shall be the duty" of the federal courts to "advance on the docket and to expedite to the greatest possible extent the disposition" of any civil enforcement lawsuit, in addition to creating the possibility of a three-judge panel with a direct appeal to the Supreme Court.⁷⁴

In the absence of such legislation, courts concerned with safeguarding core separation-of-powers principles could adopt formal processes to expedite resolution of these disputes.

⁷² Josh Chafetz, *Nixon/Trump: Strategies of Judicial Aggrandizement*, 110 GEO. L.J. ___ (forthcoming 2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3788366, at 14.

⁷³ *Trump v. Vance*, 941 F.3d 631 (2d Cir.), cert. granted, 140 S. Ct. 659 (2019), aff'd and remanded, 140 S. Ct. 2412, 207 L. Ed. 2d 907 (2020).

⁷⁴ See Todd Garvey, Cong. Res. Serv., *Congressional Subpoenas: Enforcing Executive Branch Compliance* (March 27, 2019), at 29 <https://crsreports.congress.gov/product/pdf/R/R45653/3> (discussing legislation).