

## ARBITRATING EXECUTIVE PRIVILEGE

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*This Article addresses the dramatic collapse in effective congressional oversight that took place during the Trump Administration. For decades, persistent congressional committees had been able to pry documents and testimony from a recalcitrant executive branch despite the absence of legally enforceable remedies. The media typically regarded executive-privilege claims as attempts to cover up executive wrongdoing, which prompted voter suspicion that damaged the President's approval ratings. Eventually, the political cost of asserting executive privilege would become so high that the Department of Justice would work out a negotiated settlement, which allowed Congress to obtain most of the documents and testimony it was seeking.*

*Congress's political edge in executive-privilege disputes seemingly vanished at the beginning of the Trump Administration when President Trump successfully resisted congressional requests for executive branch documents and testimony, first in response to minority requests in the 115th Congress and then in response to congressional subpoenas when Democrats took control of the House in 2019. Polarized national media served a polarized electorate, which negated the traditional role that the media had played in promoting voter suspicion of executive-privilege claims. As a result, President Trump's approval ratings did not suffer because he stonewalled congressional oversight.*

*This Article offers a novel approach that would allow Congress to utilize civil enforcement actions to obtain the documents and testimony necessary for effective oversight of the executive branch now that Congress has lost the political edge necessary to achieve effective oversight of the executive branch. First, Congress must pursue a civil enforcement action all the way to the Supreme Court to resolve the preliminary procedural issues (such as standing and the right of Congress to file a civil enforcement action) that should be easily resolved, but wind up delaying civil litigation so much that civil enforcement actions are not*

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*effective mechanisms for supporting Congress's legitimate oversight of the executive branch.*

*Second, Congress must address the more difficult problem to solve, whether civil enforcement actions create a nonjusticiable political question because a federal court has no way of assessing how to create an appropriate remedy given the infinite variety of terms and conditions that might accommodate both branches' legitimate needs. The difficulty of fashioning a remedy makes for a compelling reason to avoid judicial resolution because of the absence of judicially manageable standards to develop an appropriate remedy. District courts have the power to resolve this justiciability problem by adopting an arbitration approach to resolving executive-privilege disputes. Specifically, courts should adopt an arbitration format known as "high-low arbitration" or "final offer arbitration." Using this format, most famously used in baseball salary arbitration, a district court could require the parties to submit detailed proposals for how to resolve the dispute and then would select whichever proposal more fairly balances the competing interests of the executive and legislative branches, without the option of creating a different, compromise remedy.*

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## INTRODUCTION

Constitutional issues involving the separation of powers have always been closely tied to separation-of-powers politics. Nowhere is that truer than in matters relating to executive privilege assertions in response to congressional subpoenas. For decades, persistent congressional committees were able to pry documents and testimony from a recalcitrant executive branch despite the absence of legally enforceable remedies.<sup>1</sup> The political cost of asserting executive privilege would eventually become so high that the Department of Justice (DOJ) would work out a negotiated settlement that would allow

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1. See Todd David Peterson, *Contempt of Congress v. Executive Privilege*, 14 U. PA. J. CONST. L. 77, 82 (2011) [hereinafter Peterson, *Contempt of Congress*] (asserting that Congress has used its implied power to investigate to engage in oversight of the executive branch).

Congress to obtain most of what it was seeking.<sup>2</sup> This negotiation-accommodation process balanced the interests of the branches and resulted in complicated settlements that would have been difficult for a court to create in a subpoena-enforcement action. The effectiveness of the negotiation-accommodation process led many scholars to oppose judicial resolution of executive-privilege disputes with Congress because judicial resolution would circumvent and weaken the tradition of negotiated settlements.<sup>3</sup>

Congress's political edge in executive-privilege disputes seemingly vanished at the beginning of the Trump Administration when President Trump successfully resisted congressional requests for executive branch documents and testimony, first in response to minority requests in the 115th Congress and then in response to congressional subpoenas when Democrats took control of the House in 2019.<sup>4</sup> The failure of effective oversight during the final years of the Trump Administration, when there was a Democratic majority in the House, prompted scholarly analyses of the problem, proposals for legislative solutions, and criticisms of the DOJ's Office of Legal Counsel (OLC) for enabling and empowering the Trump Administration's defiance of congressional oversight demands.<sup>5</sup>

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2. See *id.* at 102–03 (referring to an instance in which the DOJ opted to negotiate a compromise to allow the subcommittee to obtain necessary documents without compromising national security instead of responding to a House subcommittee subpoena).

3. See Dawn E. Johnsen, *Executive Privilege Since United States v. Nixon: Issues of Motivation and Accommodation*, 83 MINN. L. REV. 1127, 1138–39 (1999) (arguing the accommodation process is a valuable practice based on respect for Congress as a coordinate branch of government with legitimate needs for information that sometimes conflicts with the executive branch's need for confidentiality).

4. COEQUAL, TRUMP ADMINISTRATION OVERSIGHT PRECEDENTS 9–21 (2022), [https://assets.website-files.com/5ccc693637a19d0db9dcba92/63a26e109eb881a0f082d450\\_Trump%20oversight%20precedents%20report\\_final%2012.20.22.pdf](https://assets.website-files.com/5ccc693637a19d0db9dcba92/63a26e109eb881a0f082d450_Trump%20oversight%20precedents%20report_final%2012.20.22.pdf) [<https://perma.cc/2NTS-PJYV>] (describing over two dozen different tactics and rationales used by the Trump Administration to withhold information from Congress, from ignoring requests and producing irrelevant materials to defying subpoenas and filing lawsuits).

5. See Emily Berman, *Weaponizing the Office of Legal Counsel*, 62 B.C. L. REV. 515, 515–17 (2021) [hereinafter Berman, *Weaponizing the OLC*] (noting that in spite of the legislative branch's universally recognized oversight and impeachment authority, Trump Administration officials denied the legislative branch access to testimony related to the President's relations with Ukraine, his tax returns, and reports on Russian interference with the 2016 election); Michael D. Bopp, Thomas G. Hungar &

Given the collapse of the negotiation-accommodation process during the Trump Administration, it is now important to address whether civil enforcement actions brought by Congress can become effective mechanisms for supporting Congress's legitimate oversight of the executive branch. Until now, such lawsuits have been of little use to Congress for a variety of reasons, most of which are linked to the long delay between the time a suit is filed and the resolution of the conflict between the legislative and executive branches. The DOJ now routinely responds to suits for congressional enforcement of subpoenas by raising a host of procedural issues, including arguments that Congress lacks standing to sue, that Congress lacks a cause of action to enforce its subpoenas in court, and that executive privilege disputes with Congress are nonjusticiable political questions.<sup>6</sup> For

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Chantalle Carles Schropp, *How President Trump's Tangles with Committees Have Weakened Congress's Investigative Powers*, 37 J.L. & POLS. 1, 2 (2021) ("The tense political battles between former President Donald J. Trump and the . . . House. . . under Democratic leadership renewed debates over . . . Congress's authority to investigate and conduct oversight of the Executive Branch."); J. Richard Broughton, *The Second Article and Congressional Self-Defense*, 59 HOUS. L. REV. 259, 261 (2021) (referring to the Second Article of impeachment which alleged obstruction of Congress based on the President's refusal to comply with congressional inquiry and investigation into executive affairs); Case Comment, *Separation of Powers—Congressional Oversight—Presidential Subpoenas—Trump v. Mazars USA, LLP*, 134 HARV. L. REV. 540, 540 (2020) [hereinafter *Presidential Subpoenas*] (explaining how the Supreme Court departed from its own past practice of looking to history as a substantive interpretive aid, rather than a general practice manual, in its separation of powers jurisprudence); Reid Coleman, *Separation of Powers Faux Pas: The McGahn Litigation and Congress's Efforts to Utilize the Courts to Resolve Interbranch Information Disputes*, 87 U. CHI. L. REV. ONLINE 1, 1 (2020) (criticizing the D.C. Circuit for holding that a statute could surmount the jurisdictional barriers to an interbranch information dispute); Lewis A. Davis, *Congress' Contempt Power over Executive Branch Recalcitrance—A Bark with No Bite: A Proposed Solution to Give the Dog Teeth*, 53 U. PAC. L. REV. 129, 131 (2021) (proposing that Congress pass a statute enabling non-profit organizations to challenge the executive branch once Congress has adopted a contempt resolution and the executive branch has asserted executive privilege); Jonathan H. Adler, *All the President's Papers*, 2019–2020 CATO SUP. CT. REV. 31, 33 (2020); cf. Kimberly Breedon & A. Christopher Bryant, *Executive Privilege in a Hyper-Partisan Era*, 64 WAYNE L. REV. 65, 93 (2018) ("Time and again, Presidents or their subordinates have withdrawn or compromised executive privilege claims made in the context of congressional investigations with demonstrable support from both major political parties.").

6. See *Comm. on Judiciary v. McGahn*, 951 F.3d 510, 516 (D.C. Cir. 2020), *aff'd in part, remanded*, 968 F.3d 755, 760 (D.C. Cir. 2020), *rev'd en banc*, 973 F.3d 121 (D.C. Cir. 2020) (holding that the case be dismissed for lack of standing); *Comm. on Judiciary v. McGahn*, 973 F.3d 121, 125–26 (D.C. Cir. 2020) (en banc) (holding that

example, litigation to enforce Congress's subpoena to former White House counsel, Don McGahn, dragged on for over two years just on the first two of these issues and never reached a definitive conclusion by the time the case settled during the Biden Administration.<sup>7</sup>

The standing and cause-of-action issues will not be resolved until the Supreme Court definitively rules (as it should) that Congress has both standing and the right to sue in federal court to seek civil enforcement of its subpoenas. Until then, the DOJ will continue to raise these issues and delay civil enforcement to such an extent that it will make the civil enforcement option unworkable as a means to force compliance with congressional subpoenas. However, Congress can eliminate these issues only if it pursues a civil enforcement case all the way to the Supreme Court where the Court would have the opportunity to address whether to eliminate the obstacles for Congress to execute a subpoena.

The political question issue is more difficult because of the remedial complexity of congressional subpoena cases. The traditional negotiation-accommodation process can be resolved in an almost infinite variety of ways. Among the many variables are at least the following factors: (1) How many documents will be produced? (2) To whom will the documents be produced? The entire committee, only the Chair and the ranking minority member, to staff? And if so, how many staff? (3) Where will the documents be produced, to the committee in Congress, at the DOJ, some other location? (4) Will Congress be allowed to retain the documents or will they be limited to taking notes, and if the latter, what kind of notes will be permitted? These details are typically negotiated between Congress and the DOJ and the permutations and combinations relating to the document production are the result of each party's assessment of its own needs and the political environment in which the document production takes place.

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the lawsuit must be dismissed for lack of standing because the congressional committee did not have a cause of action to sue for civil enforcement of the subpoena).

7. See Ann E. Marimow, *Biden Administration and Pelosi Lawyers at Odds in Don McGahn Subpoena Lawsuit*, WASH. POST (Feb. 18, 2021, 10:07 AM), [https://www.washingtonpost.com/local/legal-issues/don-mcghahn-subpoena-lawsuit-in-limbo/2021/02/18/d63b6a06-709d-11eb-85fa-e0ccb3660358\\_story.html](https://www.washingtonpost.com/local/legal-issues/don-mcghahn-subpoena-lawsuit-in-limbo/2021/02/18/d63b6a06-709d-11eb-85fa-e0ccb3660358_story.html) [https://perma.cc/RA73-HH-RD] (discussing the Biden administration's efforts to end the extensive litigation surrounding the subpoena of McGahn and resolve the overarching question that remains regarding whether key Presidential advisers are immune from compelled congressional testimony).

A federal judge has no basis to determine how these many variables should be arranged. There are no judicially manageable standards to determine how, when, and to whom documents should be disclosed. Even if a judge can determine the merits of an executive privilege claim against Congress, the judge has no basis upon which to create a complicated remedy that best accommodates the needs of both parties. That makes for a compelling reason to avoid judicial resolution because of the absence of judicially manageable standards to develop an appropriate remedy.<sup>8</sup>

District courts have the power to resolve the justiciability problem by adopting an arbitration format known as “high-low arbitration” or “final offer arbitration.”<sup>9</sup> Using this format, most famously used in baseball salary arbitration, a district court could require the parties to submit detailed proposals for how to resolve the dispute and then would select whichever proposal most fairly balances the competing interests of the executive and legislative branches without the option of creating a different, compromise remedy.<sup>10</sup> The benefit of this format is twofold. First, it solves the political question problem by having the parties themselves develop the details of the remedy, and it leaves the court with the more manageable job of selecting one of the proposals. Second, it encourages the parties to compromise their differences by bringing their offers closer together and avoiding the tendency to take extreme positions on the assumption that the judge would reach a compromise somewhere in the middle.<sup>11</sup> This arbitration model can resolve cases quickly and efficiently, which would make the civil enforcement of congressional subpoenas an effective method of safeguarding congressional oversight of the executive branch, while still encouraging the more optimal negotiation-accommodation process.

This Article examines these issues in five parts. In Part I, the Article lays the foundation by exploring the implied constitutional right of Congress to subpoena documents and testimony and the President’s right to protect the confidentiality of certain executive-branch

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8. *Id.*

9. *See, e.g.*, Jeff Monhait, *Baseball Arbitration: An ADR Success*, 4 HARV. J. SPORTS & ENT. L. 105, 112 (2013) (explaining that Major League Baseball commonly uses “high-low arbitration” or “final offer arbitration” wherein the player and team each submit a single number to the arbitrator and, after listening to presentations by both sides, the arbitrator selects one of the two numbers).

10. *Id.*

11. *Id.* at 132, 133.

documents by asserting executive privilege. In Part II, the Article discusses the potential conflicts between Congress's subpoena power and the President's right to assert executive privilege. Part II describes the negotiation-accommodation process that has traditionally resolved information disputes between the President and Congress. In Part III, the Article discusses the collapse of the negotiation-accommodation process during the Trump Administration and its impact on Congress's power to effectively oversee the executive branch. In Part IV, the Article describes solutions that have been suggested for the problem of ensuring Congress's right to conduct effective oversight and concludes that none of the proposals are workable. Part V offers a two-step solution to the problem of revitalizing the civil enforcement option. First, Congress must litigate to a definitive conclusion the procedural issues such as standing and the existence of a right to sue, that have delayed past civil actions. Second, Congress should propose, and courts should adopt, an arbitration model entailing fast-track litigation and the requirement that a district judge select one of the competing proposals for accommodation offered by Congress and the DOJ without the option of adopting some other remedy. This arbitration model solves the most difficult justiciability problem associated with civil litigation and encourages the parties to reach a negotiated settlement of their dispute.

#### I. THE IMPLIED, BUT NOT ABSOLUTE, POWERS OF CONGRESS AND THE PRESIDENT

This Part lays the foundation for the discussion by exploring the implied powers of each branch in judicial resolution of executive-privilege disputes: first, Congress's implied authority to obtain documents and testimony when it investigates matters within its legislative power and second, the President's implied authority to preserve the confidentiality of executive branch documents if disclosure of the documents would damage the President's ability to carry out his constitutionally assigned functions.<sup>12</sup> This review establishes three important foundational principles: (1) each power has a well-established constitutional history which dates to the eighteenth century; (2) the Supreme Court has recognized that both powers flow from the Constitution; and (3) neither power is absolute; in certain circumstances, each power must yield to the conflicting

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12. *See, e.g.,* *McGrain v. Daugherty*, 273 U.S. 135, 150, 180 (1927) (holding that Congress has the authority to hold individuals in contempt of Congress).



needs of the other branch. These principles mean that, when there is a conflict between the branches' constitutional powers, compromise is necessary, and the courts should step in to prevent one branch from totally frustrating the legitimate needs of the other branch.

A. *Congress's Investigative and Contempt Powers*

The Supreme Court has held that Congress has the power to investigate and the power to enforce investigative demands through civil and criminal contempt of Congress.<sup>13</sup> This Section will first address the scope of Congress's investigative power and then discuss Congress's right to initiate civil and criminal contempt of Congress when its subpoenas are ignored.

1. *The scope of Congress's power to investigate*

No language in the Constitution expressly authorizes congressional investigations or grants Congress the power to subpoena documents and witnesses. Congress's investigative authority derives from the grant of legislative power in Article I, Section 1 of the Constitution: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives."<sup>14</sup> For Congress to exercise this power, it must have the right to compel witnesses to testify and produce documents that pertain to the areas Congress seeks to regulate.<sup>15</sup> Since the 1970s, Congress has exercised this authority to conduct investigations related to possible legislation, including investigations of executive-branch actions and policies.<sup>16</sup>

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13. *Id.*

14. U.S. CONST. art. I, § 1. *See generally* CONGRESS INVESTIGATES: A DOCUMENTED HISTORY 1792–1974 (Arthur M. Schlesinger, Jr. & Roger Bruns eds., 1975) [hereinafter CONGRESS INVESTIGATES] (setting forth a detailed history of congressional investigations); ERNEST J. EBERLING, CONGRESSIONAL INVESTIGATIONS: A STUDY OF THE ORIGIN AND DEVELOPMENT OF THE POWER OF CONGRESS TO INVESTIGATE AND PUNISH FOR CONTEMPT (1973) (discussing Congress's power to investigate in connection with the Teapot Dome Scandal); JOHN C. GRABOW, CONGRESSIONAL INVESTIGATIONS: LAW AND PRACTICE (1988) (describing Congress's power to investigate).

15. *See* LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 184 (4th ed. 1997) (highlighting that Congress, for example, is not entitled to preparatory materials that led to Camp David accords, to drafts proposing sales of military aircraft to Saudi Arabia, or to efforts to draft a Bosnia plan).

16. *See generally* CONGRESS INVESTIGATES, *supra* note 14 (analyzing tensions between executive and legislative branches of government from Constitutional Convention to the beginning of the Bush administration).

The Supreme Court expressly recognized Congress's authority to compel production of documents and testimony in the 1927 case of *McGrain v. Daugherty*,<sup>17</sup> which arose out of Congress's investigation of the Teapot Dome scandal involving alleged corruption in the leasing of oil fields.<sup>18</sup> After lengthy Senate investigations in 1922 and 1923, the Senate began to investigate Attorney General Harry Daugherty's failure to prosecute those whose corruption had been revealed in the Senate investigations.<sup>19</sup> The Committee issued subpoenas to several witnesses including Mally Daugherty, the brother of the Attorney General.<sup>20</sup> When Mally Daugherty twice refused to testify in response to Senate subpoenas, he was arrested by John McGrain, one of the Senate's Deputy Sergeants at Arms.<sup>21</sup>

Daugherty argued to the Supreme Court that the Constitution did not authorize Congress to issue subpoenas to a private person to respond under penalty of contempt of Congress.<sup>22</sup> The Supreme Court disagreed, however, and ruled that both houses of Congress "possess not only such powers as are expressly granted to them by the Constitution, but such auxiliary powers as are necessary and appropriate to make the express powers effective."<sup>23</sup> The Court looked to the extensive history of legislative investigations in both England and the United States and concluded that, "[i]n actual legislative practice power to secure needed information by such means has long been treated as an attribute of the power to legislate."<sup>24</sup> Notwithstanding the absence of an express constitutional clause authorizing subpoenas, the Court held that "the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function."<sup>25</sup> In this particular instance, although the resolution authorizing the Senate investigation did not expressly state that it was in aid of the

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17. 273 U.S. 135 (1927).

18. *Id.* at 180; see EBERLING, *supra* note 14, at 379 (explaining Harry Sinclair's corrupt agreement with Secretary Fall for the leasing of oil fields and the subsequent Congressional investigation).

19. William P. Marshall, *The Limits on Congress's Authority to Investigate the President*, 2004 U. ILL. L. REV. 781, 794 (2004).

20. *Id.*

21. *McGrain*, 273 U.S. at 152–54.

22. *Id.* at 154.

23. *Id.* at 173.

24. *Id.* at 161.

25. *Id.* at 174.

legislation, it was appropriate to infer a legislative purpose to the investigation:

The only legitimate object the Senate could have in ordering the investigation was to aid it in legislating; and we think the subject-matter was such that the presumption should be indulged that this was the real object. An express avowal of the object would have been better; but in view of the particular subject matter was not indispensable.<sup>26</sup>

Congress's investigative power is not boundless. The Supreme Court emphasized Congress's need to link the investigative power to a particular legislative inquiry in *Watkins v. United States*,<sup>27</sup> in which it reviewed a contempt of Congress conviction by a labor official who refused to testify before the House Committee on Un-American Activities concerning the identity of persons who were previously associated with the Communist Party.<sup>28</sup> The Court summarized the scope of the investigative power as follows:

The power of Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.<sup>29</sup>

In reversing the defendant's conviction for contempt of Congress, however, the Court ruled that Congress must connect the investigative power to a specific subject of potential legislative action:

But, broad as is this power of inquiry, it is not unlimited. There is no general authority to expose private affairs of individuals without justification in terms of the functions of their Congress. . . . Nor is the Congress a law enforcement or trial agency. These are functions of the executive and judicial departments of government. No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress. Investigations conducted solely for the personal aggrandizement of the investigators or to "punish" those investigated are indefensible.<sup>30</sup>

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26. *Id.* at 178.

27. 354 U.S. 178 (1957).

28. *Id.* at 185–86.

29. *Id.* at 187.

30. *Id.*

The Court recently elaborated on the scope of Congress's investigative power in a case in which President Trump sued to block a House committee's effort to obtain his tax records from his accounting firm and banks.<sup>31</sup> Writing for the majority, Chief Justice Roberts acknowledged Congress's investigative authority, but he emphasized that the power was limited to legitimate inquiries grounded in potential legislation.<sup>32</sup> Although the Chief Justice warned that courts should not "needlessly disturb" the compromises reached by the President and Congress,<sup>33</sup> the Court concluded that "[w]ithout limits on its subpoena powers, Congress could . . . aggrandize itself at the President's expense . . ."<sup>34</sup> As a result, the Court remanded the case to give the lower court an opportunity to apply a stricter standard than would apply to a case that did not involve the President's personal financial information.<sup>35</sup> If Congress seeks to obtain personal information from the President, the separation of powers requires that courts examine whether a congressional demand pertains to a permissible legislative purpose. The Court provided a list of factors for the lower court to consider on remand: (1) "whether the asserted legislative purpose warrants the significant step of involving the President and his papers," (2) whether the subpoena is "broader than reasonably necessary to support Congress's legislative objective," (3) the extent to which the subpoenas advanced a legitimate legislative aim, and (4) the burdens the subpoena imposed on the President.<sup>36</sup>

## 2. *Congress's methods for enforcing compliance with its subpoenas*

Congress can enforce subpoenas for testimony and documents in several ways. First, Congress has inherent civil contempt power under Article I, which permits the Sergeant at Arms to arrest the someone who flouts a congressional subpoena and keep the person in congressional custody until the person complies with the

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31. See *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2036 (2020) (finding that Congress must limit subpoenas in scope so that they are no broader than reasonably necessary to support a particular legislative objective); see also *Presidential Subpoenas*, *supra* note 5, at 540 (asserting that the Court invoked past practice of political branches to find that congressional subpoenas of the President's private papers may raise separation of powers concerns).

32. *Trump*, 140 S. Ct. at 2036.

33. *Id.* at 2031.

34. *Id.* at 2034.

35. *Id.* at 2036.

36. *Id.* at 2035–36.

congressional subpoena.<sup>37</sup> Second, the criminal contempt of Congress statute authorizes each House to cite a person for contempt of Congress and to refer the citation to the U.S. Attorney who may bring a criminal prosecution for contempt of Congress, with penalties that include incarceration in a federal prison.<sup>38</sup>

*a. Congress's inherent contempt power*

Congress's inherent contempt power allows for a civil-contempt sanction against witnesses who refuse to comply with a congressional subpoena.<sup>39</sup> If a House votes to find a person in contempt, this inherent power allows the Sergeant at Arms to arrest the contumacious witness and bring that person into congressional custody,<sup>40</sup> where the witness can be kept in a congressional cell<sup>41</sup> until the person complies with the subpoena.<sup>42</sup> Before a House may impose sanctions, a witness has a right to at least some form of hearing,<sup>43</sup> and the witness is entitled to claim any defenses to the subpoena, either before the committee or

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37. See CARL BECK, CONTEMPT OF CONGRESS: A STUDY OF THE PROSECUTIONS INITIATED BY THE COMMITTEE ON UN-AMERICAN ACTIVITIES, 1945–1957 3 (1959) (describing the first contempt case to arise out of a congressional investigation, which resulted in the Sergeant at Arms, as ordered by the House, arresting the subject of the investigation).

38. 2 U.S.C. § 194.

39. See *Marshall v. Gordon*, 243 U.S. 521, 541 (1917) (holding the congressional contempt power “rests solely upon the right of self-preservation to enable the public powers given to be exerted”).

40. See BECK, *supra* note 37, at 3 (describing the first contempt case wherein the House authorized the Sergeant at Arms to arrest the subject of a congressional investigation into bribery); cf. RONALD L. GOLDFARB, THE CONTEMPT POWER 10–11 (1963) (comparing the modern day congressional power to fine or imprison a person charged with contempt to the power of courts in feudal England to punish those who disrupted the King's peace because “disobedience of [court] orders was a contempt of the King himself whose ministers [courts] were”).

41. See CONGRESSIONAL QUARTERLY'S GUIDE TO CONGRESS 163 (Michael D. Wormser ed., 3d ed. 1982) [hereinafter CONGRESSIONAL QUARTERLY GUIDE] (“[T]he full chamber may adopt a resolution ordering the confinement of the witness or his discharge . . .”).

42. See *Marshall*, 243 U.S. at 544 (“Thus we have been able to discover no single instance where in the exertion of the power to compel testimony restraint was ever made to extend beyond the time when the witness should signify his willingness to testify . . .”).

43. See *Groppi v. Leslie*, 404 U.S. 496, 507 (1972) (holding the Wisconsin Assembly violated a contemnor's due process rights when it denied him notice or chance to respond).

the full House, or in a habeas corpus proceeding in court.<sup>44</sup> Neither house has utilized its inherent contempt power since 1932.<sup>45</sup>

*b. The criminal contempt of Congress statute*

Congress enacted the criminal contempt statute in 1857,<sup>46</sup> to authorize either house to refer a contempt citation to the U.S. Attorney, who may bring the citation before a grand jury and eventually prosecute the case as a misdemeanor.<sup>47</sup> At trial, the witness may defend the case by asserting applicable privileges, including executive privilege, but if the judge rejects the defenses, the defendant can be convicted of a misdemeanor offense, which has a maximum penalty of one year in jail and a fine of not more than \$1,000.<sup>48</sup>

There are several important distinctions between Congress's inherent contempt power and its authority under the criminal contempt of Congress statute. First, a witness may immediately contest incarceration under Congress's inherent contempt power by filing a petition for habeas corpus.<sup>49</sup> Moreover, even if the habeas petition is denied, a witness may prevent further incarceration by complying with the subpoena.<sup>50</sup> A witness may not, however, be purged of criminal contempt because when a witness fails to comply with a lawful subpoena, the witness has committed a crime and may be subject to

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44. See BECK, *supra* note 37, at 6–7 (describing the procedure for prosecuting an individual for contempt: first the individual cited for contempt is brought before a grand jury for possible indictment, then the individual is tried by a federal court); GOLDFARB, *supra* note 40, at 68 (discussing the due process rights of an individual charged with contempt and finding the individual is entitled to due notice of proceedings against him, to be represented by counsel, to request a jury trial, and to testify and cross-examine witnesses).

45. CONGRESSIONAL QUARTERLY GUIDE, *supra* note 41, at 163.

46. Act of January 24, 1857, ch. 19, 11 stat. 155 (codified as amended at 2 U.S.C. §§ 192, 194).

47. 2 U.S.C. §§ 192, 194.

48. 2 U.S.C. § 192; see GOLDFARB, *supra* note 40, at 40–41 (describing the customarily followed procedure for when witnesses before congressional committees refuse to comply).

49. See, e.g., *Marshall v. Gordon*, 243 U.S. 521, 548 (1917) (holding that the lower court erred in refusing to grant the petitioner's writ of habeas corpus on the contempt of Congress charge); see also Peterson, *Contempt of Congress*, *supra* note 1, at 88 (explaining that a witness charged with contempt has a right to assert defense to the allegations before sanctions are imposed, which includes during a habeas corpus proceeding).

50. See *Marshall*, 243 U.S. at 544 (holding that a witness may not be restrained beyond the point when they signify their willingness to testify).

criminal penalties.<sup>51</sup> The significance of this distinction between civil and criminal contempt is magnified in the context of congressional hearings because courts do not permit persons to contest a subpoena before actual prosecution.<sup>52</sup> Thus, a witness who wants to assert privilege is at risk of criminal contempt penalties that may not be purged by later complying with the subpoena.

### *B. The President's Right to Claim Executive Privilege*

This Section first addresses the scope of the President's privilege to protect the confidentiality of executive-branch documents. It then discusses the procedures for asserting the privilege, which are designed to ensure that the President is accountable for any decision to withhold documents that have been subpoenaed by Congress.

#### *1. The source of executive privilege*

Although the scope of executive privilege remains hotly debated, Presidents have asserted the right to protect the secrecy of certain executive branch documents since the end of the eighteenth century.<sup>53</sup>

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51. See, e.g., *United States v. Brewster*, 154 F. Supp. 126, 136 (D.D.C. 1957) (“[W]hile purgation by compliance relieves from a ‘civil’ contempt, it is no longer a defense to a ‘criminal’ contempt charge.”), *rev'd on other grounds*, 255 F.2d 899, 902 (D.C. Cir. 1958) (holding that the subject matter investigated by the committee was within its jurisdiction); see also *United States v. Costello*, 198 F.2d 200, 204 (2d Cir. 1952) (“Certainly the refusal to testify was an act in contempt of the Committee for which the defendant was subject to the punishment prescribed by the statute.”).

52. See, e.g., *Sanders v. McClellan*, 463 F.2d 894, 902–03 (D.C. Cir. 1972) (finding that the court must not intervene prematurely or unnecessarily and so, where no case is made for the court to exercise its equity power to excuse the defendant from testifying, the defendant must appear in response to the subpoena); *Ansara v. Eastland*, 442 F.2d 751, 753–54 (D.C. Cir. 1971) (per curiam) (holding that in the absence of a congressionally established procedure for advanced judicial consideration of the case, courts cannot interject themselves to grant emergency relief).

53. See, e.g., MARK J. ROZELL & MITCHEL A. SOLLENBERGER, *EXECUTIVE PRIVILEGE: PRESIDENTIAL POWER, SECRECY, AND ACCOUNTABILITY* 3–4 (4th ed. 2020) (asserting that history is full of examples of presidents who acted beyond the strict letter of the law as they often find that, to achieve their goals through the use of prerogative powers, they are in conflict with legislators and legal restrictions on presidential authority); Annie L. Owens, *Thwarting the Separation of Powers in Interbranch Information Disputes*, 130 *YALE L.J.F.* 494, 494–95 (2021) (discussing how clashes between Congress and the President over requests for executive branch documents has been a “feature of the constitutional checks and balances with a long historical pedigree”); Jonathan David Shaub, *The Executive's Privilege*, 70 *DUKE L.J.* 1, 4 (2020) [hereinafter Shaub, *Executive Privilege*]

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(describing executive privilege as a “potent political weapon” used to control the dissemination of certain information); Raoul Berger, *Congressional Subpoenas to Executive Officials*, 75 COLUM. L. REV. 865, 866 (1975) (“For the first ninety years of our history, the courts acknowledged the immunity of congressional investigations from curtailment by judicial intervention.”); Jeffrey L. Bleich & Eric B. Wolff, *Executive Privilege and Immunity: The Questionable Role of the Independent Counsel and the Courts*, 14 ST. JOHN’S J. LEGAL COMMENT. 15, 24–25 (1999) (asserting that while the privileges of executive officials are “no stranger to the courtroom,” presidential privilege and immunity is not adjudicated often; however, when it is, proceedings are often tipped in the President’s favor); Archibald Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383, 1383 (1974) (affirming that, historically, there was uncertainty about the nature and extent of executive privilege and yet, occasionally, Presidents asserted the right to withhold information on behalf of themselves or their subordinates); Rex E. Lee, *Executive Privilege, Congressional Subpoena Power, and Judicial Review: Three Branches, Three Powers, and Some Relationships*, 1978 BYU L. REV. 231, 231 (1978) (citing the United States Supreme Court’s recognition of the President’s right to withhold certain kinds of information from the other branches of government based on separation of powers, while also noting the Court’s enforcement of congressional subpoenas to gather information from the executive as protected under the speech and debate clause); Randall K. Miller, *Congressional Inquests: Suffocating the Constitutional Prerogative of Executive Privilege*, 81 MINN. L. REV. 631, 632 (1997) (“Over the past two decades, Congress and the President have engaged in increasingly bitter constitutional warfare over access to information.”); 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, 462 (1987) (asserting the Reagan Administration’s assertions of executive privileges highlighted the lack of well-ordered legal processes for resolving inter-branch disputes over important information); Peter M. Shane, *Negotiating for Knowledge: Administrative Responses to Congressional Demands for Information*, 44 ADMIN. L. REV. 197, 197 (1992) (holding that, for the most part, congressional requests for executive agency information are routine and uncontroversial; however, sometimes the executive branch is adamant that an agency’s ability to control information is critical to its function); Abraham D. Sofaer, *Executive Power and the Control of Information: Practice Under the Framers*, 1977 DUKE L.J. 1, 4–5 (1977) (“[F]rom the very beginning, presidents withheld certain types of information from their unsolicited transmittals to Congress.”); Iain R. McPhie, Symposium, *Executive Privilege and the Clinton Presidency*, 8 WM. & MARY BILL RTS. J. 535, 535 (2000) (“The lack of an explicit provision of constitutional authority for executive privilege has led to controversy over whether such a privilege even exists.”); Philip Allen Lacovara, *United States v. Nixon: The Prelude*, 83 MINN. L. REV. 1061, 1067 (1999) (“[E]ven though the forced disclosure of the . . . tape compelled President Nixon to resign two weeks later, he won on a major constitutional issue. The Court ruled that executive privilege does exist.”); Joel D. Bush, Note, *Congressional-Executive Access Disputes: Legal Standards and Political Settlements*, 9 J.L. & POL. 719, 719 (1993) (“Congressional efforts to obtain information have met executive resistance throughout American history. Presidents frequently deny congressional information requests by asserting a need to protect national security . . . [or] to preserve the confidentiality of the executive’s decision-making process.”).



In *United States v. Nixon*,<sup>54</sup> the Supreme Court expressly acknowledged that the President had a constitutionally based prerogative to protect the confidentiality of certain kinds of executive branch documents.<sup>55</sup> In *Nixon*, the Court stated that a President's claim of privilege over White House documents is entitled to a presumption of validity and that the privilege is "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution."<sup>56</sup>

Executive privilege encompasses several categories of documents. First, the courts have given the broadest protection to documents related to state secrets and national security. Second, the Nixon Court recognized a privilege based upon the President's need to have private discussions with his advisors. This privilege is based upon:

the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision-making process.<sup>57</sup>

The Court stated that this privilege could be inferred from the language and structure of the Constitution:

Whatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Art[icle] II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of presidential communications has similar constitutional underpinnings.<sup>58</sup>

Third, although not discussed in *United States v. Nixon*, the Executive Branch has also asserted the right to protect the confidentiality of open criminal investigative files<sup>59</sup> on the grounds that the release of such

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54. 418 U.S. 683 (1974).

55. *Id.* at 708.

56. *Id.*

57. *Id.* at 705.

58. *Id.* at 705–06 (footnote omitted).

59. See Fisher, *supra* note 15, at 183 (explaining that in 1996, President Clinton asserted executive privilege to withhold documents related to 1993 White House travel

files could give too much information to defense counsel and might prejudice innocent individuals who were identified in the files.<sup>60</sup> A later memorandum from OLC raised the danger of disclosure of such files to Congress by arguing that the “[e]xecutive cannot effectively investigate if Congress is, in a sense, a partner in the investigation.”<sup>61</sup> “If a congressional committee is fully apprised of all details of an investigation as the investigation proceeds, there is a substantial danger that congressional pressures will influence the course of the investigation.”<sup>62</sup>

With the exception of military and diplomatic secrets, the courts have not recognized the President’s confidentiality claims as an absolute privilege.<sup>63</sup> Because the President’s constitutional interests may conflict with the constitutional prerogatives of the other branches, the Court has used a balancing test to determine which branch’s interest prevails in a particular case. For example, in *United States v. Nixon*, although the Court recognized the President’s confidentiality interest in pre-decisional deliberations, which justified “a presumptive privilege for Presidential communications,” the privilege had to yield in that case to the “demonstrated, specific need for evidence in a pending criminal trial.”<sup>64</sup>

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office controversy from Congress); Peterson, *Contempt of Congress*, *supra* note 1, at 77 (noting that the George W. Bush Administration made an effort to strengthen the President’s power to withhold documents from Congress and courts under executive privilege).

60. See Congressional Subpoenas of Department of Justice Investigative Files, 8 Op. O.L.C. 262 (1984) (noting that Assistant Attorney General Stephen Trott stated premature public disclosure could prejudice an investigation’s interests).

61. Memorandum from Thomas E. Kauper, Deputy Assistant Attorney General, Office of Legal Counsel, to Edward L. Morgan, Deputy Counsel to the President, 2 (Dec. 19, 1969), *cited in* 8 Op. O.L.C. 262, 263 (1984).

62. *Id.* OLC reaffirmed this conclusion in a 1986 opinion for the Attorney General concerning congressional demands for information from investigations and pursuant to the Independent Counsel Act, which concluded that “[t]he policy of the Executive Branch throughout our Nation’s history has generally been to decline to provide committees of Congress with access to, or copies of, open law enforcement files except in extraordinary circumstances.” Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act, 10 Op. O.L.C. 68, 76 (1986).

63. In *United States v. Nixon*, 418 U.S. 683 (1974), *superseded by statute on other grounds*, FED. R. EVID. 104(a), *as recognized in* *Bourjaily v. United States*, 483 U.S. 171, 177–79 (1987), the Court indicated that information relating to “military or diplomatic secrets” might be absolutely privileged. *Id.* at 710.

64. *Id.* at 708, 713.

The Supreme Court also utilized a balancing test in *Nixon v. Administrator of General Services*,<sup>65</sup> in which the Court rejected former President Nixon's constitutional challenge to the statute that transferred authority over his presidential records to the National Archives for review and possible disclosure to the public.<sup>66</sup> The Court stated that to determine whether the statute

disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.<sup>67</sup>

In later cases, the D.C. Circuit utilized the balancing approach of *United States v. Nixon* to resolve interbranch information disputes.<sup>68</sup> For example, the court reviewed an executive privilege claim in response to an independent counsel's subpoena for documents in the investigation of Secretary of Agriculture Michael Espy.<sup>69</sup> In that case, the court evaluated the executive's need for confidentiality by distinguishing between a general deliberative process privilege that applied throughout the executive branch and a narrower presidential communications privilege that applied to the President and his close advisors, which required a more compelling showing of need to overcome the latter privilege.<sup>70</sup> The court ruled that the judicial branch prevail over the confidentiality of presidential communications only if the party seeking documents could prove "first, that each

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65. 433 U.S. 425 (1977).

66. *Id.* at 429.

67. *Id.* at 443 (citation omitted). In later cases, the D.C. Circuit utilized the balancing approach of *United States v. Nixon* to resolve interbranch information disputes. *In re Sealed Case*, 121 F.3d 729, 729 (D.C. Cir. 1997). For example, the court reviewed an executive privilege claim in response to an independent counsel's subpoena for documents in the investigation of Secretary of Agriculture Michael Espy. *Id.* In that case, the court evaluated the executive's need for confidentiality by distinguishing between a general deliberative process privilege that applied throughout the executive branch and a narrower presidential communications privilege that applied to the President and his close advisors, and it required a more compelling showing of need to overcome the latter privilege. *Id.*

68. See *In re Sealed Case*, 121 F.3d 729, 743–46 (D.C. Cir. 1997) (detailing how the White House resisted a motion to compel production by arguing that the withheld documents came within the privilege for presidential communications).

69. *Id.*

70. *Id.* at 739–40.

discrete group of the subpoenaed materials likely contains important evidence; and second, that this evidence is not available with due diligence elsewhere.”<sup>71</sup> The court added that “the factors of importance and unavailability are also used by courts in determining whether a sufficient showing of need has been demonstrated to overcome other qualified executive privileges, such as the deliberative process privilege or the law-enforcement investigatory privilege.”<sup>72</sup>

## 2. *The procedures for asserting executive privilege*

Before the Trump Administration, the procedures for asserting executive privilege operated as a significant check on excessive claims of privilege. President Nixon signed the first executive order on privilege claims,<sup>73</sup> and President Reagan signed an amended version of President Nixon’s order that established a structure that provided a foundation for subsequent Presidents to follow.<sup>74</sup> President Reagan’s executive order acknowledged that “good faith negotiations between Congress and the Executive Branch have minimized the need for invoking executive privilege, and this tradition of accommodation should continue as the primary means of resolving conflicts between the [b]ranches.”<sup>75</sup> Most importantly, the Reagan executive order required that “the executive privilege shall not be invoked without specific presidential authorization” to “ensure that every reasonable accommodation is made to the needs of Congress.”<sup>76</sup> The requirement that the President must be accountable for asserting a claim of executive privilege over documents subpoenaed by Congress ensured

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71. *Id.* at 754.

72. *Id.* at 755. The D.C. Circuit utilized a similar balancing approach in assessing an executive privilege claim in response to a subpoena from independent counsel Kenneth Starr in connection with the Monica Lewinsky investigation. *In re Lindsey*, 158 F.3d 1263, 1266 (D.C. Cir. 1998).

73. See Memorandum from Richard Nixon, President of the United States, for the Heads of Executive Departments and Agencies on Establishing a Procedure to Govern Compliance with Congressional Demands for Information (Mar. 24, 1969), reprinted in H.R. REP. NO. 99-435, pt. 2, at 807 (1986) (noting that executive privilege would not be used without specific Presidential approval).

74. See Memorandum from Ronald Reagan, President of the United States, for the Heads of Executive Departments and Agencies on Procedures Governing Responses to Congressional Requests for Information (Nov. 4, 1982), reprinted in H.R. REP. NO. 99-435, pt. 2, at 1106 (1986) (arguing that the “tradition of accommodation should continue as the primary means of resolving conflicts between the Branches”).

75. *Id.*

76. *Id.*

that the political process would operate as a significant check on assertions of privilege and that the executive branch would be motivated to engage in the negotiation-accommodation process.<sup>77</sup>

## II. CONFLICTS BETWEEN CONGRESS'S SUBPOENA POWER AND THE PRESIDENT'S RIGHT TO ASSERT EXECUTIVE PRIVILEGE

Inevitably, there are times when Congress's constitutionally based right to obtain documents and testimony conflicts with the President's constitutionally based right to assert executive privilege. At that point, the question is whose right should prevail and in what forum should the conflict be resolved.<sup>78</sup> The dispute could be fought in a proceeding involving a citation for contempt of Congress.<sup>79</sup> Alternatively, Congress could file a case in federal district court to seek civil enforcement of the subpoena.<sup>80</sup> Finally, the dispute could be resolved by a compromise agreement reached through the negotiation-accommodation process. Each of these possibilities is discussed below to determine which most effectively accommodates the needs of both branches.

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77. During the Clinton Administration, White House Counsel Lloyd N. Cutler supplemented the earlier Reagan memorandum. Cutler's memorandum counseled, however, that "[i]n circumstances involving communications relating to investigations of personal wrongdoing by government officials, it is our practice not to assert executive privilege, either in judicial proceedings or in congressional investigations and hearings." Memorandum from Lloyd N. Cutler, Special Counsel to the President, to All Executive Department and Agency General Counsels on Congressional Requests to Departments and Agencies for Documents Protected by Executive Privilege (Sept. 28, 1994), *reprinted in* MORTON ROSENBERG, CONG. RESEARCH SERV., CONGRESS'S CONTEMPT POWER: LAW, HISTORY, PRACTICE, AND PROCEDURE 13–14 (2008).

78. See JENNIFER K. ELSEA, CONG. RSCH. SERV., RS21900, THE PROTECTION OF CLASSIFIED INFORMATION: THE LEGAL FRAMEWORK 1–3 (2023) (describing whether Congress or the executive branch has more power is often in dispute because the Supreme Court has not ruled directly on the issue); TODD GARVEY, CONG. RSCH. SERV., R45653, CONGRESSIONAL SUBPOENAS: ENFORCING EXECUTIVE BRANCH COMPLIANCE 20 (2019) [hereinafter GARVEY, CONGRESSIONAL SUBPOENAS] (describing how Congress's contempt procedures may conflict with the President's powers to protect his confidential communications with executive privilege).

79. See TODD GARVEY, CONG. RSCH. SERV., LSB10974, CRIMINAL CONTEMPT OF CONGRESS: FREQUENTLY ASKED QUESTIONS (2023) (describing both chambers of Congress utilizing criminal contempt as the principal method for subpoena enforcement).

80. See GARVEY, CONGRESSIONAL SUBPOENAS, *supra* note 78, at 2 (outlining Congress's ability to enforce a subpoena through seeking a civil judgment).

### A. *Contempt of Congress*

Congress did not utilize contempt of Congress citation until 1982, when it cited EPA Director Anne Gorsuch for obeying President Reagan's directive to assert executive privilege in response to a House subpoena for Superfund Act-related documents.<sup>81</sup> Although the U.S. Attorney ultimately declined to proceed with prosecution of the citation,<sup>82</sup> the DOJ decided that it needed a general policy to govern contempt citations for asserting the President's claim of privilege. Subsequently, Ted Olson signed an OLC opinion ("the Olson opinion"), which concluded that prosecuting an executive official for asserting privilege would be such a significant burden on the President's ability to assert a privilege claim that it would be unconstitutional in those circumstances to proceed with a contempt prosecution.<sup>83</sup> Several years later, Charles Cooper signed another OLC opinion ("the Cooper opinion"), which, based upon the Olson Opinion, established an official DOJ practice to decline to prosecute any contempt citation for asserting the President's claim of privilege.<sup>84</sup> These two opinions had the effect of removing contempt of Congress as a method of resolving executive-privilege disputes, although that did not prevent Congress from using contempt citations as a method creating additional political pressure on the President to reach a compromise settlement.

### B. *Enforcement of a Congressional Subpoena Through a Civil Judicial Proceeding*

Given the effective elimination of criminal contempt of Congress as a mechanism for resolving executive-privilege disputes, Congress has

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81. See H.R. REP. NO. 97-968, at 15 (1982) (noting that Gorsuch asserted executive privilege under the guidance of President Reagan's directive).

82. See *Examining and Reviewing the Procedures That Were Taken by the Office of the U.S. Attorney for the District of Columbia in Their Implementation of a Contempt Citation That Was Voted by the Full House of Representatives Against the Then Administrator of the Environmental Protection Agency, Anne Gorsuch Burford: Hearing Before the H. Comm. on Public Works and Transportation, 98th Cong.* 29-30 (1984) (explaining that the EPA documents had already been released to Congress, so the case was effectively moot).

83. See *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 102 (1984) [hereinafter *Olson Opinion*] (describing this burden as "intolerable" and that the burden would have the effect of nullifying the president's exercise of privilege).

84. *Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act*, 10 Op. O.L.C. 68, 85 (1986).

occasionally resorted to filing civil enforcement cases in federal court to seek a judicial order that the executive branch comply with a legislative subpoena.<sup>85</sup> The problem with this forum is that courts have, as a prudential matter, preferred to defer to the political process and send the parties back to the negotiating table to work out a compromise.<sup>86</sup> In addition, as discussed below, there are substantial issues about whether judicial resolution of these disputes, particularly the formulation of a detailed remedial plan, is a non-justiciable political question.<sup>87</sup>

For example, in *United States v. American Telephone & Telegraph Co.*,<sup>88</sup> the DOJ sued in federal court to prevent AT&T from producing documents in response to a House subpoena for DOJ letters relating to national security wiretaps.<sup>89</sup> The D.C. Circuit directed the parties to return to their negotiations to resolve the dispute.<sup>90</sup> After these negotiations again proved fruitless, the court, although not ruling out an eventual judicial decision, again ordered the parties to return to the negotiating table:

Given our perception that it was a deliberate feature of the constitutional scheme to leave the allocation of powers unclear in certain situations, the resolution of conflict between the coordinate branches in these situations must be regarded as an opportunity for a constructive *modus vivendi*, which positively promotes the functioning of our system. The Constitution contemplates such accommodation. Negotiation between the two branches should thus be viewed as a dynamic process affirmatively furthering the constitutional scheme.<sup>91</sup>

The court proposed a possible framework for resolution of the dispute, and it ordered that DOJ and Congress consider an accommodation based upon the courts' suggestion.<sup>92</sup> Ultimately the parties reached an accommodation, and the court dismissed the

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85. GARVEY, CONGRESSIONAL SUBPOENAS, *supra* note 78, at 2.

86. *Id.*

87. See discussion *infra* Sections V.A.2–B (suggesting the adoption of an arbitration model for executive privilege disputes to account for the remedial conundrum the political question doctrine creates).

88. 567 F.2d 121 (D.C. Cir. 1977).

89. *Id.* at 122–23.

90. *Id.*; see also *United States v. Am. Tel. & Tel. Co.* 551 F.2d 384, 395 n.18 (D.C. Cir. 1976) (describing a possible settlement agreement among the parties).

91. *Am. Tel. & Tel. Co.*, 567 F.2d at 130 (footnote omitted).

92. *Id.* at 131–33.

lawsuit.<sup>93</sup> A federal district court similarly declined to intervene in the Gorsuch executive privilege dispute<sup>94</sup> and told the parties: “The difficulties apparent in prosecuting Administrator Gorsuch for contempt of Congress should encourage the two branches to settle their differences without further judicial involvement.”<sup>95</sup>

Thus, the courts have generally not used civil suits to resolve executive-privilege disputes between the President and Congress. The courts have strongly preferred that the parties use the negotiation-accommodation process to work out a settlement that accommodates the needs of both branches in a way that would be difficult for a court to do with a judicially imposed order. As we will see below, only where one party has blocked the negotiation-accommodation process by asserting unsupportable claims of absolute rights not subject to the competing claims of the other branch have the courts stepped in to answer those legal arguments. Even then, once the claims of absolute prerogative have been rejected, the courts have sent the parties back to the negotiating table.

### C. *The Negotiation-Accommodation Process*

As a practical matter, prior to the Trump Administration, most disputes over congressional subpoenas to the executive branch have been resolved through the negotiation-accommodation process.<sup>96</sup> Executive officials usually complied with congressional document requests because executive agencies did not want to antagonize committees that had either a budget or oversight responsibility for the executive branch agency.<sup>97</sup>

In the relatively rare instances in which executive officials believed that releasing documents would adversely impact the agency’s ability to function effectively (for example, by releasing documents containing pre-decisional deliberations or documents from open criminal investigations), would an executive department decline a

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93. See ROZELL & SOLLENBERGER, *supra* note 53, at 82–83 (noting that “[i]n this dispute over information, the judicial branch served as a facilitator of negotiations between the political branches”).

94. *United States v. House of Representatives*, 556 F. Supp. 150, 153 (D.D.C. 1983).

95. *Id.*

96. See Peterson, *Contempt of Congress*, *supra* note 1, at 79–80 (discussing the benefits and negatives of resolving executive privilege disputes through negotiations rather than through a judicial mechanism).

97. *Id.* at 121 (explaining how Congress has historically used “political weapons” to obtain information without the need for judicial interference).



congressional information request.<sup>98</sup> In most of those rare cases, the parties would begin to negotiate terms of disclosure, and the parties would reach a compromise agreement that would accommodate the prerogatives of each branch.<sup>99</sup>

Only if the agency officials responsible for producing the information believed that disclosure would seriously harm the ability of the agency to perform its job (such as by disclosing information revealing the pre-decisional deliberative process or information from open investigative files), would the agency decline to produce the requested information from Congress.<sup>100</sup> At that point, negotiations would begin to resolve the impasse, and typically, the parties would work out a compromise that accommodated the needs of each branch.<sup>101</sup>

If the congressional request remained unsatisfied, the committee could issue a subpoena for production of the documents.<sup>102</sup> Although Congress once limited subpoena power to specific investigations,<sup>103</sup> in 1946 the Senate granted all of its standing committees the authority to issue subpoenas,<sup>104</sup> and the House did the same in 1975.<sup>105</sup> Quickly thereafter, the House authorized subcommittees and full committees to issue subpoenas,<sup>106</sup> and then it authorized committee chairs to issue subpoenas on their own authority.<sup>107</sup> Because committee chairs have the power to issue subpoenas, “the decisions to confront the Executive

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98. *Id.* at 99–100.

99. *See id.* at 131 (using a compromise between President Washington and Thomas Jefferson as an example in which Congress would preserve the executive’s prerogative by refusing documents based on their secret nature).

100. *Id.*

101. *See id.* at 156 (describing the negotiation-accommodation process as likely to result in a “constitutionally acceptable resolution”).

102. *Id.* at 106.

103. *See* Marshall, *supra* note 19, at 804 (describing the House of Representatives and Senate exercising its investigative powers through individual resolutions).

104. Legislative Reorganization Act of 1946, ch. 753, § 134(a), 60 Stat. 812, 831–32 (1946). This authority was later repealed after the subpoena power was incorporated into the standing rules of the Senate. STAFF OF S. COMM. ON RULES & ADMIN., 113TH CONG., 1ST SESS., STANDING RULES OF THE SENATE 31 (Comm. Print. 2013).

105. H.R. Res. 988, 93d Cong. (1974) (effective Jan. 3, 1975).

106. H.R. Res. 5, 95th Cong. (1977). The current grant of power is recorded in STAFF OF CLERK OF H.R., 117TH CONG., RULES OF THE HOUSE OF REPRESENTATIVES 20 (Comm. Print. 2022).

107. H.R. Res. 5, 95th Cong. § 25 (1977); *see* Marshall, *supra* note 19, at 805 (describing the House’s decision to broaden subpoena power to subcommittees and full committees).

over particular matters is done in the relative shadow of committee meetings—if not by the committee chair acting alone.”<sup>108</sup>

The negotiations between the executive and legislative branches inevitably involved the balancing of needs and interests that courts have suggested as the proper method for accommodating the needs of each branch in executive-privilege disputes.<sup>109</sup> As the information dispute escalated, each branch must determine whether its interests are sufficiently strong to warrant escalation to a higher level.<sup>110</sup> The negotiation-accommodation process handled most conflicts between the branches and balanced the institutional interests of each branch.<sup>111</sup> Only in the rare cases where Congress decided to issue subpoena to an executive official did the conflict escalate to a more protracted negotiation process.<sup>112</sup>

Even before the Trump Administration, some congressional advocates doubted the efficacy of the negotiation-accommodation process.<sup>113</sup> Josh Chafetz argued that “in order for this oversight power to be effective in rooting out executive branch malevolence and incompetence, Congress must have access to precisely that information that the executive does not wish to turn over—that is, it must have the power to hold executive branch officials in contempt.”<sup>114</sup>

Most observers of the process did not share this pessimistic view of Congress’s ability to enforce its information requests to executive agencies. Congress’s most respected constitutional advocate, Louis Fisher of the Congressional Research Service, comprehensively

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108. Marshall, *supra* note 19, at 805.

109. See Peterson, *Contempt of Congress*, *supra* note 1, at 157 (arguing the judiciary’s role in executive privilege disputes is a limited one, only to redirect the parties back to the negotiation-accommodation process).

110. See Marshall, *supra* note 19, at 807 (explaining how the negotiation process may be mutually beneficial for both the Executive Branch of Congress, even if the negotiations escalate or fail).

111. See Todd D. Peterson, *Prosecuting Executive Branch Officials for Contempt of Congress*, 66 N.Y.U. L. REV. 563, 625 (1991) [hereinafter Peterson, *Prosecuting Executive Officials*] (noting that for almost 200 years the political process has naturally diffused privilege disputes without the threat of criminal sanctions).

112. *Id.* at 627–28 (explaining that an executive branch agency must comply with the subpoena unless the President asserts a claim of privilege).

113. See GARVEY, CONGRESSIONAL SUBPOENAS, *supra* note 78, at 1–3, 11–12 (citing an article written by political scientist, James Burnham, highlighting the inefficiencies of Congress’s subpoena enforcement options in 1959).

114. Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. CHI. L. REV. 1083, 1145 (2009).

reviewed the history of information disputes between the branches and concluded that “Congress can win most of the time – if it has the will[.]”<sup>115</sup> In fact, Congress has such a successful record of obtaining compliance with its information requests that some scholars have examined whether the President must have additional protections from congressional overreaching.<sup>116</sup> In 1997, for example, Randall Miller argued that:

A fair assessment of the battles between Congress and the executive branch over access to documents, however, reveals that, without access to a civil proceeding, the President cannot effectively assert executive privilege to resist disclosure once a dispute with Congress escalates beyond the subpoena stage.<sup>117</sup>

Miller argued that courts should hear executive-privilege disputes to protect presidential authority.<sup>118</sup> William Marshall later argued,

[a]n unconstrained congressional investigative power, like an unchecked Executive, generates its own abuses. Unfortunately, the practices currently governing Congress’s use of this power have evolved to the point where there are few effective constraints on its exercise; highly partisan committees, for example, can initiate and pursue investigations of the President without so much as a debate. The invitation for congressional abuse is therefore apparent.<sup>119</sup>

To solve these issues, Professor Marshall suggested additional procedural limitations on Congress’s investigative power to avoid Congress’s tendency to abuse its authority and to protect core presidential power.<sup>120</sup>

Numerous executive privilege disputes prior to the Trump Administration demonstrate that a motivated congressional committee could overcome executive-branch resistance and obtain documents for its oversight investigations of the executive branch.<sup>121</sup> The Gorsuch

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115. Louis Fisher, *Congressional Access to Information: Using Legislative Will and Leverage*, 52 DUKE L.J. 323, 325 (2000) [hereinafter Fisher, *Congressional Access to Information*]. See generally Fisher, *supra* note 15 (identifying areas of constitutional tension between the President and Congress today by examining historical disputes between the branches).

116. See Miller, *supra* note 53, at 670, 679 (arguing for judicial participation in document disputes between Congress and the Executive to protect executive branch functions).

117. *Id.* at 670.

118. *Id.* at 679.

119. Marshall, *supra* note 19, at 784 (footnote omitted).

120. *Id.* at 820.

121. GARVEY, CONGRESSIONAL SUBPOENAS, *supra* note 78, at 1.

case shows why Congress regularly prevailed in executive privilege conflicts even without resort to contempt prosecutions. Congress obtained all subpoenaed documents, even without judicial help.<sup>122</sup> President Reagan recognized that the political pressure Congress was able to generate with the help of sympathetic press coverage gave him no alternative to releasing the documents to Congress:

[I]t is now clear that prolonging this legal debate can only result in a slowing down of the release of information to Congress, therefore fostering suspicion in the public mind that, somehow, the important doctrine of executive privilege is being used to shield possible wrongdoing.<sup>123</sup>

Stanley Brand, counsel to the Clerk of the House of Representatives, characterized the executive's release of the documents as a "total capitulation."<sup>124</sup>

Not only did the House force disclosure of the requested documents, but it also effectively punished the executive branch for asserting the privilege claim in the first place. The House Judiciary Committee investigated the DOJ's involvement in the Gorsuch dispute and its request that President Reagan assert executive privilege.<sup>125</sup> The Judiciary Committee compelled the DOJ to produce internal documents relating to the privilege assertion, and it required those who participated in the assertion of privilege to testify under oath.<sup>126</sup> The Judiciary Committee eventually accused Assistant Attorney General Theodore B. Olson of perjury,<sup>127</sup> which led to an independent counsel-investigation of Olson, who was exonerated only after a protracted three-year investigation.<sup>128</sup> As Randall Miller later noted, the Judiciary Committee investigation

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122. Leslie Maitland, *House Unit to Get Subpoenaed Data*, N.Y. TIMES (Feb. 17, 1983), <https://www.nytimes.com/1983/02/17/us/house-unit-to-get-subpoenaed-data.html> [<https://perma.cc/94AN-QFFG>].

123. Philip Shabecoff, *Mrs. Burford Quits at EPA; Reagan Announces Accord Giving Congress All Papers*, N.Y. TIMES (Mar. 10, 1983), <https://www.nytimes.com/1983/03/10/us/mrs-burford-quits-at-epa-reagan-announces-accord-giving-congress-all-papers.html> [<https://perma.cc/E8GP-KHJZ>].

124. *Id.*

125. H.R. REP. NO. 99-435, at 612-40 (1985).

126. *Id.* at 605-10.

127. *Id.* at 617.

128. See Ronald J. Ostrow, *Independent Counsel Explains Why She Didn't Prosecute Figure in '83 EPA Probe*, L.A. TIMES (Mar. 21, 1989, 12:00 AM), <https://www.latimes.com/arch>

promised to cause future executive branch attorneys to think twice about recommending that a president assert executive privilege. The Olson investigation suggests that a sufficiently motivated faction in Congress can effectively punish executive officers for an assertion of executive privilege by launching an investigation into the propriety of the assertion of the privilege itself.<sup>129</sup>

President Reagan was no more successful in asserting executive privilege when he nominated William Rehnquist to be Chief Justice of the Supreme Court. During Rehnquist's confirmation hearings, the Senate Judiciary Committee insisted that the DOJ produce opinions that Rehnquist had signed Assistant Attorney General in charge of the OLC at the beginning of the Nixon Administration.<sup>130</sup> President Reagan claimed executive privilege because OLC documents at issue contained Rehnquist's confidential legal advice to the White House.<sup>131</sup> The Judiciary Committee declined to advance Rehnquist's nomination unless the Department produced the documents and, less than five

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ives/la-xpm-1989-03-21-mn-147-story.html [<https://perma.cc/H9L4-5FPX>] (detailing the independent counsel's report which concluded that Olson's testimony was true, although "not always forthcoming").

129. Miller, *supra* note 53, at 660. The *in terrorem* effect of the Olson investigation was made explicit by the comments of one former White House official who spoke at a symposium on congressional oversight:

When I was working at the White House, I recall a situation where I was discussing with members of a congressional investigative staff the niceties of legal questions involving whether they were entitled to see certain predecisional draft documents; and the staffers said to me, 'The last person who talked to us like this and who raised questions like this was Ted Olson.'

That does get your attention . . . .

Symposium: Panel Two, *Reforming Government Through Oversight: A Good or Bad Idea?*, 13 J.L. & POL. 557, 574 (1997).

130. See Howard Kurtz & Ruth Marcus, *Democrats Seek to Subpoena Papers*, WASH. POST (Aug. 2, 1986), <https://www.washingtonpost.com/archive/politics/1986/08/02/democrats-seek-to-subpoena-papers/be6afcc1-c26b-4945-ac97-f5234b15199e> [<https://perma.cc/2QYH-NMNC>] (describing the Committee's discussions on narrowing the scope of requested documents regarding Rehnquist's papers in an effort obtain a majority support to issue a subpoena).

131. See Stanley I. Kutler, *Executive Privilege Redux: It's a Tricky Business*, CHRISTIAN SCI. MONITOR (Sept. 22, 1986), <https://www.csmonitor.com/1986/0922/epriv-f.html> [<https://perma.cc/5HVM-KRHR>] (suggesting that Reagan tried to invoke executive privilege for Nixon to establish a precedent that would allow Reagan to exercise control over his own records after leaving office).

days after President Reagan asserted privilege, the Committee obtained the documents.<sup>132</sup>

President Clinton was equally unsuccessful in asserting executive privilege.<sup>133</sup> He failed in high-profile litigation to obtain judicially recognized temporary immunity to civil suit,<sup>134</sup> a “protective function privilege” for secret service agents,<sup>135</sup> and an attorney-client privilege for legal advice provided by White House lawyers.<sup>136</sup>

President Clinton lost numerous executive privilege conflicts with Congress. For example, in 1996, the House Government Reform and Oversight Committee investigated allegations that the White House had fired Travel Office personnel for political reasons.<sup>137</sup> After the committee subpoenaed documents from the White House, the White House produced over 40,000 pages of documents, but refused to disclose approximately 3,000 pages of documents to the Committee based upon a claim of executive privilege.<sup>138</sup> Eventually, the White House averted a contempt of Congress against White House counsel

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132. Ronald J. Ostrow & David Savage, *Senate Panel to Receive Rehnquist Documents: Administration Ends Impasse on Memos Written as Legal Adviser to Nixon; Scalia Hearings Open*, L.A. TIMES (Aug. 6, 1986), <https://www.latimes.com/archives/la-xpm-1986-08-06-mn-1439-story.html> [<https://perma.cc/3ZWL-99NY>].

133. Neil Kinkopf, *Executive Privilege: The Clinton Administration in the Courts*, 8 WM. & MARY BILL RTS. J. 631, 632 (2000). For accounts highlighting the various episodes in which Congress muscled the Clinton Administration, see generally Fisher, *Congressional Access to Information*, *supra* note 115, at 335, 345–57, 396–97.

134. *Clinton v. Jones*, 520 U.S. 681, 692 (1997) (“[The President’s argument]—that ‘in all but the most exceptional cases,’ . . . the Constitution affords the President temporary immunity from civil damages litigation arising out of events that occurred before he took office—cannot be sustained on the basis of precedent.”).

135. *In re Sealed Case*, 148 F.3d 1073, 1079 (D.C. Cir. 1998) (per curiam) (“The Secret Service has failed to carry its heavy burden . . . of establishing the need for the protective function privilege [to prevent compelled testimony from agents who are in close proximity to the President] it sought to assert in this case.”).

136. *In re Grand Jury Proceedings*, 5 F. Supp. 2d 21, 38 (D.D.C. 1998) (denying Deputy Counsel to the President Bruce Lindsey the right to assert the attorney-client privilege in connection with advice given to the President), *aff’d in part, rev’d in part sub-nom.*, *In re Lindsey*, 158 F.3d 1263, 1266 (D.C. Cir. 1998).

137. David Johnston, *Subpoena Issued in Travel Office Inquiry*, N.Y. TIMES (Jan. 6, 1996), <https://www.nytimes.com/1996/01/06/us/subpoena-issued-in-travel-office-inquiry.html> [<https://perma.cc/99S3-V5RT>].

138. *Id.*; see David Johnston, *Panel Acts to Gain Travel Office Papers*, N.Y. TIMES (May 10, 1996), <https://www.nytimes.com/1996/05/10/us/panel-acts-to-gain-travel-office-papers.html> [<https://perma.cc/ZP6Q-3JH3>] (explaining the categories of documents the White House continued to withhold under a claim of executive privilege after already turning over more than 40,000 pages).

Jack Quinn by disclosing more than 1,000 additional pages of documents and also proving a privilege log with an index to the remaining documents.<sup>139</sup> Eventually the political pressure forced the White House to produce the remaining documents. The only concession Congress made was to agree to take notes on the documents but not to copy them unless they related to improper contacts with the FBI.<sup>140</sup>

In the early days of the George W. Bush Administration, the President had only limited success when he claimed executive privilege, even though the Republicans had a majority in Congress.<sup>141</sup> In 2001, when the House Committee on Government Reform began to investigate allegations of corruption in the FBI's Boston office,<sup>142</sup> the Committee, chaired by Republican Dan Burton, insisted that the FBI produce ten documents that pertained to the potential corruption.<sup>143</sup> Although President Bush asserted executive privilege over the ten documents,<sup>144</sup> he eventually agreed to allow the House committee to review six of the ten documents.<sup>145</sup> Even when dealing with a presumably sympathetic Congress, the President had to concede and produce most of the disputed documents.

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139. See Eric Schmitt, *POLITICS: THE TRAVEL OFFICE; White House Gives Committee More Papers in Dismissal Case*, N.Y. TIMES (May 31, 1996), <https://www.nytimes.com/1996/05/31/us/politics-travel-office-white-house-gives-committee-more-papers-dismissal-case.html> [<https://perma.cc/XQ54-K4HM>] (reporting that the White House turned over the additional pages and the index just hours before Congress was scheduled to vote on whether to hold the White House in criminal contempt).

140. See *id.* (pointing out that the House Government Reform and Oversight Committee had the option to review privileged documents if investigators agreed to “not make copies”).

141. Mark J. Rozell & Mitchel A. Sollenberger, *Executive Privilege and the Bush Administration*, 24 J.L. & POL. 1, 6 (2008) [hereinafter Rozell & Sollenberger, *Bush Administration*].

142. See *Investigation into Allegations of Justice Department Misconduct in New England, Vol. 1: Hearings Before the H. Comm. on Gov't Reform*, 107th Cong. 1 (2001) (statement of Hon. Dan Burton, Chairman, H. Comm. on Gov't Reform) (announcing the start of the first hearing on May 3, 2001, discussing how the Federal Bureau of Investigation allegedly mishandled Joseph Salvati's case).

143. Rozell & Sollenberger, *Bush Administration*, *supra* note 141, at 6.

144. See Neil A. Lewis, *Bush Claims Executive Privilege in Response to House Inquiry*, N.Y. TIMES (Dec. 14, 2001), <https://www.nytimes.com/2001/12/14/us/bush-claims-executive-privilege-in-response-to-house-inquiry.html> [<https://perma.cc/Y76J-HAFW>] (discussing the Bush Administration's first invocation of executive privilege and the reactions to it).

145. Rozell & Sollenberger, *Bush Administration*, *supra* note 141, at 7.

Because Congress typically had such a political advantage in executive-privilege disputes, it did not need to utilize contempt prosecutions to obtain needed documents from the executive branch. Congressional Research Service expert, Louis Fisher, has observed that Congress did not need any judicial intervention because “of [the] superior political muscle by a Congress determined to exercise the many coercive tools available to it.”<sup>146</sup> Among Congress’s many weapons are its authority over appropriations,<sup>147</sup> the power to impeach executive officials,<sup>148</sup> the authority to reject presidential nominees,<sup>149</sup> and the political pressure created by congressional investigations and subpoenas.<sup>150</sup> Thus, even a strong congressional advocate like Fisher concluded that “Congress has the theoretical edge because of the more than adequate tools at its disposal. What it needs primarily is motivation, the staying power to cope with a long and frustrating battle, and an abiding commitment to honor its constitutional purpose.”<sup>151</sup>

In addition, Congress typically has received major political support from the media, which has tended to be suspicious of presidential privilege claims. Professor William Marshall argues:

Congress also has an institutional ally assisting it in its oversight requests—the media. This is critically important because, in a political battle, public opinion is often the referee and the media is the vehicle through which public opinion will be informed. That the media will generally be on the side of disclosure is, of course, not surprising, because the business of the media is to seek information and, as such, is institutionally disposed to favor disclosure in any given case.<sup>152</sup>

Professor Richard Leon observed that

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146. Fisher, *Congressional Access to Information*, *supra* note 115, at 323.

147. *Id.* at 326–33.

148. *Id.* at 333–35.

149. *Id.* at 336–39.

150. *Id.* at 339–59.

151. *Id.* at 401.

152. Marshall, *supra* note 19, at 810; *see also* Peterson, *Prosecuting Executive Officials*, *supra* note 111, at 628–29 (“Once a dispute reaches the subpoena level, the press becomes a major factor in the political conflict. Past experience suggests that Congress can use the press as a substantial weapon to obtain requested documents. As long as the need to uncover information within the executive branch has appeared legitimate, the press has been sympathetic to Congress’s interests and quite skeptical of claims of executive privilege.”).



“[t]his scandal obsessed industry, whether it is on radio, TV, or in the print media, generates tremendous pressure on the congressional investigatory system: (1) to identify potential scandals; (2) to commence investigations of them; (3) to appoint the ‘right people’ to run those investigations; and (4) to leak information regarding the investigative process.”<sup>153</sup>

As a result:

[B]ecause of the media, the purported trump card in the President’s hand, the claim of executive privilege, is actually a joker. Because the press (and to a lesser extent, the Congress) equates a claim of executive privilege with that of a cover-up, the result is that the claim of executive privilege has become a political liability to the President who invokes it.<sup>154</sup>

When the press compares privilege assertions to Watergate<sup>155</sup> and editorials oppose the President’s efforts to claim privilege,<sup>156</sup> political pressure increases, which prompts the President to negotiate the privilege dispute.

#### *D. Signs of Weakness in the Negotiation-Accommodation Process*

The first significant example of an executive privilege claim that frustrated congressional oversight demonstrated the potential weakness of the negotiation-accommodation process. President George W. Bush asserted executive privilege at the end of his second term to prevent disclosure of documents to a congressional committee investigating President Bush’s decision to fire several United States Attorneys.<sup>157</sup> In that case, the political cost of stonewalling the

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153. Richard J. Leon, *Congressional Investigations: Are Partisan Politics Undermining Our Vital Institutions?*, 31 SUFFOLK U. L. REV. 825, 830 (1998).

154. Marshall, *supra* note 19, at 811 (footnotes omitted).

155. See Miller, *supra* note 53, at 673 (explaining how “[m]embers of Congress will frequently allude to Watergate” whenever there is an assertion of executive privilege).

156. *Id.* at 671–73.

157. See MORTON ROSENBERG & TODD B. TATELMAN, CONG. RSCH. SERV., RL34097, CONGRESS’S CONTEMPT POWER: LAW, HISTORY, PRACTICE, AND PROCEDURE 65–67 (2008) (noting the “first civil lawsuit filed by a House of Congress in an attempt to enforce its prerogatives”); John McKay, *Train Wreck at the Justice Department: An Eyewitness Account*, 31 SEATTLE U. L. REV. 265, 265–92 (2008) (discussing the firing of the U.S. Attorneys and analyzing the issues relating to politically motivated dismissals of prosecutors); Rozell & Sollenberger, *Bush Administration*, *supra* note 141, at 32–35 (recapping the series of events from President Bush’s reelection, to the replacement of seven U.S. attorneys generals, to congressional investigations); Mark J. Rozell & Mitchel A. Sollenberger, *Executive Privilege and the U.S. Attorneys Firings*, 38 PRES. STUD. Q. 315, 319–

congressional investigation simply did not matter to a President at the end of his second term and whose approval rating was already at an historic low.<sup>158</sup>

The events giving rise to the investigation began in January 2006, when D. Kyle Sampson, Chief of Staff for Attorney General Alberto Gonzales, recommended to White House Counsel Harriet Miers that the President authorize the removal of several U.S. Attorneys based upon a list that Sampson had previously sent to the White House.<sup>159</sup> As the District Judge John Bates later noted,

[t]he circumstances surrounding these forced resignations aroused almost immediate suspicion. Few of the U.S. Attorneys, for instance, were given any explanation for the sudden request for their resignations. Many had no reason to suspect that their superiors were dissatisfied with their professional performance; to the contrary, most had received favorable performance reviews.

Additional revelations further fueled speculation that improper criteria had motivated the dismissals.<sup>160</sup>

When the House commenced a hearing to investigate the dismissals,<sup>161</sup> officials at the DOJ told inconsistent stories about Attorney General Gonzales's responsibility for firing the U.S. Attorneys.<sup>162</sup> As a result, the House Judiciary Committee subpoenaed

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24 (2008) (summarizing the plan to replace the U.S. Attorneys and the fall out); David C. Weiss, Note, *Nothing Improper? Examining Constitutional Limits, Congressional Action, Partisan Motivation, and Pretextual Justification in the U. S. Attorney Removals*, 107 MICH. L. REV. 317, 322-27 (2008) (analyzing the U. S. Attorney firings and arguing for statutory reform to prevent politically motivated firings of prosecutors).

158. See McKay, *supra* note 157, at 295 (discussing the political motivations behind preserving "loyal Bushie[s]").

159. David Johnston & Eric Lipton, *'Loyalty' to Bush and Gonzales Was Factor in Prosecutors' Firings, E-mail Shows*, N.Y. TIMES (Mar. 14, 2007), <https://www.nytimes.com/2007/03/14/washington/14justice.html> [https://perma.cc/7CRR-DMX5]. The DOJ requested and received resignations from the following U.S. Attorneys: Daniel Bogden (D. Nev.), Paul K. Charlton (D. Ariz.), Margaret Chiara (W.D. Mich.), David E. Iglesias (D.N.M.), Carole Lam (S.D. Cal.), John McKay (W.D. Wash.), and Kevin Ryan (N.D. Cal.). See Comm. on Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53, 57 (D.D.C. 2008).

160. *Miers*, 558 F. Supp. 2d at 57.

161. *Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2007).

162. See Dan Eggen & Paul Kane, *Ex-Aide Contradicts Gonzales on Firings*, WASH. POST (Mar. 30, 2007), <https://www.washingtonpost.com/wp-dyn/content/article/2007/>

Attorney General Gonzales<sup>163</sup> and later subpoenaed former White House Counsel, Harriet Miers, and White House Chief of Staff Joshua Bolten's documents.<sup>164</sup> In response to the subpoenas, the President asserted a claim of executive privilege.<sup>165</sup>

After the full House voted to cite both Joshua Bolten and Harriet Miers for contempt of Congress,<sup>166</sup> the DOJ refused to refer the contempt citations for prosecution, and the House Judiciary Committee filed a civil lawsuit against Miers and Bolten to obtain judicial enforcement of the subpoenas.<sup>167</sup> The DOJ in a reversal of the civil action option recommended in the Olson opinion, "moved to dismiss th[e] action in its entirety on the grounds that the Committee lack[ed] standing and a proper cause of action, that disputes of this kind are non-justiciable, and that the Court should exercise its discretion to decline jurisdiction."<sup>168</sup> Additionally, the DOJ argued that "sound principles of separation of powers and presidential autonomy dictate that the President's closest advisors must be absolutely immune from compelled testimony before Congress, and that the Committee has no authority to demand a privilege log from the White House."<sup>169</sup> The Committee cross-moved for partial summary judgment.<sup>170</sup> The court's order denied the defendants' motion and partially granted plaintiff's motion by declaring: "Harriet Miers is not immune from compelled congressional process; she is legally required to testify pursuant to a duly issued congressional subpoena from plaintiff; and Ms. Miers may invoke executive privilege in response to specific questions as appropriate . . . ."<sup>171</sup> Moreover, the district judge ordered

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03/29/AR2007032900352.html [https://perma.cc/57TX-HH9Y] (highlighting, for example, how U.S. Attorney Patrick Fitzgerald was characterized by the DOJ as "undistinguished" and was listed for firing, despite being considered one of the top prosecutors in the country).

163. Dan Eggen, *House Panel Issues First Subpoena over Firings*, WASH. POST (Apr. 11, 2007), <https://www.washingtonpost.com/wp-dyn/content/article/2007/04/10/AR2007041000839.html> [https://perma.cc/AB58-D5RP].

164. *Miers*, 558 F. Supp. 2d at 61.

165. *Id.*

166. Philip Shenon, *House Votes to Issue Contempt Citations*, N.Y. TIMES (Feb. 15, 2008), <https://www.nytimes.com/2008/02/15/washington/15contempt.html> [https://perma.cc/Y4BD-L5LZ].

167. H.R. Res. 980, 110th Cong. (Feb. 14, 2008).

168. *Miers*, 558 F. Supp. 2d at 55–56.

169. *Id.* at 56.

170. *Id.* at 108.

171. *Id.*

that: “Joshua Bolten and Ms. Miers shall produce all non-privileged documents requested by the applicable subpoenas and shall provide to plaintiff a specific description of any documents withheld from production on the basis of executive privilege . . . .”<sup>172</sup>

The court expressly rejected the DOJ’s justiciability arguments on the question of absolute privilege,<sup>173</sup> but it did not impose a resolution of the dispute on the parties, and instead urged them to continue the negotiation-accommodation process under the conditions set forth in its opinion.<sup>174</sup>

Miers and Bolten appealed the district court decision and moved for a stay pending appeal and for expedited review.<sup>175</sup> The D.C. Circuit granted the motion for a stay, but it rejected the motion for expedited review on the ground that:

even if expedited, this controversy will not be fully and finally resolved by the Judicial Branch—including resolution by a panel and possible rehearing by this court en banc and by the Supreme Court—before the 110th Congress ends on January 3, 2009. At that time, the 110th House of Representatives will cease to exist as a legal entity, and the subpoenas it has issued will expire.<sup>176</sup>

The House Committee eventually received much of the information, but only after President Bush left office and President Obama assumed the presidency.<sup>177</sup> The House Judiciary Committee Chair John Conyers claimed victory: “We have finally broken through the Bush Administration’s claim of absolute immunity . . . . This is a victory for the separation of powers and congressional oversight.”<sup>178</sup> Greg Craig, a White House lawyer for President Barack Obama, said that the negotiated solution “will allow the Committee to complete its investigation into the U.S. Attorneys matter” while still accommodating the executive branch.<sup>179</sup>

A fairer assessment of the conflict would have to rate it as a significant loss for congressional oversight. A lame-duck President,

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172. *Id.*

173. *Id.* at 66.

174. *Id.* at 56–57.

175. *Comm. on the Judiciary of U.S. House of Representatives v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008) (per curiam).

176. *Id.*

177. Josh Gerstein, *Rove, Miers to testify*, POLITICO (Mar. 4, 2009, 06:48 PM), <https://www.politico.com/story/2009/03/rove-miers-to-testify-019631> [<https://perma.cc/65JR-PVfy>].

178. *Id.*

179. *Id.*

who cared little about the political cost of maintaining his claim of privilege, was able to block congressional access to important information until after his term had expired. Professor Chafetz correctly diagnosed the potential weakness of congressional oversight, at least in circumstances where the President is unconcerned about the political cost of persisting with a privilege claim:

Although a settlement was eventually reached, the Congress that originally issued the subpoenas had ended, as had the administration that the subpoenas were intended to help Congress oversee. To the extent that enforcement of congressional subpoenas is left to the courts, future administrations now know that they can delay compliance for years.<sup>180</sup>

The resolution of the case so long after Congress had subpoenaed the information was, in retrospect, a sign that the negotiation-accommodation process might be breaking down, but we did not see any signs of that during President Obama's two terms in office.<sup>181</sup> The negotiation-accommodation process continued as it had in the past, and there was only one highly visible executive privilege battle. That conflict arose in connection with congressional hearings over Operation Fast and Furious, a failed Bureau of Alcohol, Tobacco, Firearms and Explosives gun-trafficking operation.<sup>182</sup> The House found Attorney General Eric Holder in contempt of Congress,<sup>183</sup> and later filed a civil lawsuit seeking enforcement of its subpoenas to the

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180. Chafetz, *supra* note 114, at 1154 (footnote omitted).

181. GARVEY, CONGRESSIONAL SUBPOENAS, *supra* note 78, at 11–12.

182. See Charlie Savage, *Guns Inquiry Urges Action Against 14 in Justice Dept.*, N.Y. TIMES (Sept. 19, 2012), <https://www.nytimes.com/2012/09/20/us/report-places-blame-in-operation-fast-and-furious.html> [<https://perma.cc/HUF4-R53Q>] (“The long-running controversy over Operation Fast and Furious, which ran from late 2009 to early 2011, stemmed from the fact that the A.T.F. officials directing it did not act swiftly to seize illegal weapons . . . .”); see also Charlie Savage, *Further Pressure on Holder over Failed Gun Operation*, N.Y. TIMES (Feb. 2, 2012), <https://www.nytimes.com/2012/02/03/us/politics/republicans-press-holder-further-over-botched-gun-operation.html> [<https://perma.cc/SCU9-HB9N>] (explaining the conflict that arose during Operation Fast and Furious); U.S. DEP’T JUST. OFF. INSPECTOR GEN., A REVIEW OF ATF’S OPERATION FAST AND FURIOUS AND RELATED MATTERS (2012), <https://oig.justice.gov/reports/2012/s1209.pdf> [<https://perma.cc/2F94-3XM8>] (providing background information and summarizing the DOJ’s assessment of conduct in connection with Operation Fast and Furious).

183. Jonathan Weisman and Charlie Savage, *House Finds Holder in Contempt over Inquiry on Guns*, N.Y. TIMES (June 28, 2012), <https://www.nytimes.com/2012/06/29/us/politics/fast-and-furious-holder-contempt-citation-battle.html> [<https://perma.cc/MEH3-SJKS>].

DOJ.<sup>184</sup> District Judge Amy Berman Jackson issued an order requiring the DOJ to provide Congress with a privilege log two years into the lawsuit,<sup>185</sup> and ultimately, four years later, ruled first that: “in the unique situation presented here, the Court can decide this issue based on undisputed facts, without intruding upon legislative or executive prerogatives and without engaging in what could otherwise become a troubling assessment of the relative merit and weight of the interests being asserted by [] either party.”<sup>186</sup> Given the extensive disclosures made by the DOJ Inspector General’s report,<sup>187</sup> the court ruled that the records must be produced because “the qualified privilege invoked to shield material that the Department has already disclosed has been outweighed by a legitimate need that the Department does not dispute, and therefore, the records must be produced.”<sup>188</sup> This case was eventually settled before the D.C. Circuit could rule on the parties’ appeals.<sup>189</sup> Ultimately, the record of congressional oversight during the Obama administration was encouraging for advocates of the negotiation-accommodation process but discouraging for those who

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184. See Comm. on Oversight and Gov’t Reform, *U.S. House of Representatives v. Lynch*, 156 F. Supp. 3d 101, 103 (D.D.C., 2016) (detailing how the motion was an “order compelling the production of certain documents responsive to an October 11, 2011 subpoena issued by the Committee to the Attorney General for records related to Operation Fast and Furious.”); John H. Cushman, Jr., *Justice Department Seeks to Dismiss Lawsuit over Operation Fast and Furious*, N.Y. TIMES (Oct. 16, 2012), <https://archive.nytimes.com/thecaucus.blogs.nytimes.com/2012/10/16/justice-department-seeks-to-dismiss-lawsuit-over-operation-fast-and-furious> [https://perma.cc/9SAQ-NJA2] (noting that the DOJ opposed intervention by the courts in this dispute as a separation of powers concern).

185. Pete Yost, *Judge: Justice Dept. Must Provide List of Fast and Furious’ Documents*, WASH. POST, (Aug. 20, 2014), [https://www.washingtonpost.com/politics/judge-justice-dept-must-provide-list-of-fast-and-furious-documents/2014/08/20/92c88e20-28d8-11e4-8593-da634b334390\\_story.html](https://www.washingtonpost.com/politics/judge-justice-dept-must-provide-list-of-fast-and-furious-documents/2014/08/20/92c88e20-28d8-11e4-8593-da634b334390_story.html) [https://perma.cc/BD7N-A28E].

186. See *Lynch*, 156 F. Supp. 3d at 113 (observing the caution typically observed by the judiciary in litigating separation of powers disputes).

187. See U.S. DEP’T JUST. OFF. INSPECTOR GEN., *A REVIEW OF ATF’S OPERATION FAST AND FURIOUS AND RELATED MATTERS* (2012), <https://oig.justice.gov/reports/2012/s1209.pdf> [https://perma.cc/F7US-8XPK] (evaluating the missteps by the DOJ in Operation Fast and Furious and recommending oversight and law enforcement improvements in this 514 page report).

188. *Lynch*, 156 F. Supp. 3d at 115.

189. Motion for Voluntary Dismissal with Prejudice, *Comm. on Oversight & Gov’t Reform v. Barr*, No. 16-5078 (D.D.C. May 8, 2019); Order Granting Motion for Voluntary Dismissal, *Comm. on Oversight & Gov’t Reform v. Barr*, No. 16-5078 (D.D.C. June 5, 2022).

had hopes for rapid civil litigation enforcement of congressional subpoenas.<sup>190</sup>

### III. THE FAILURE OF CONGRESSIONAL OVERSIGHT DURING THE TRUMP ADMINISTRATION

President Trump very quickly demonstrated his opposition to accommodating congressional requests for information.<sup>191</sup> Traditionally, executive agencies responded to requests for information from individual members of Congress, even those in the congressional minority.<sup>192</sup> Agencies typically were especially solicitous to requests from ranking minority members of congressional committees.<sup>193</sup> The Trump White House, however, instructed executive agencies not to respond to information requests from congressional Democrats and only to respond to requests from committee chairs, all of whom were Republicans during the first two years of the Trump Administration.<sup>194</sup> The absolute prohibition against responding to Congressional Democrats was an unprecedented departure from prior administrations' more cooperative approach to congressional

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190. Civil litigation to enforce congressional subpoenas during the Trump Administration is discussed below. I have omitted any discussion of civil litigation arising out of Congress's January 6 investigation because the argument for executive privilege when asserted by a former President is so much weaker than when it is asserted by a sitting President. *E.g.*, *Trump v. Thompson*, 20 F.4th 10, 25–26 (D.C. Cir. 2021) (“The executive privilege is . . . ‘not for the benefit of the president as an individual, but for the benefit of the Republic.’ . . . The privilege, like all other Article II powers, resides with the sitting President.” (citation omitted)).

191. See John Wagner, *‘Unlimited Presidential Harassment’: Trump Lashes out Again at Democrats for Stepped-Up Oversight*, WASH. POST (Feb. 7, 2019, 1:52 PM), [https://www.washingtonpost.com/politics/unlimited-presidential-harassment-trump-lashes-out-again-at-democrats-for-stepped-up-oversight/2019/02/07/b6c5bfc4-2ac6-11e9-984d-9b8fba003e81\\_story.html](https://www.washingtonpost.com/politics/unlimited-presidential-harassment-trump-lashes-out-again-at-democrats-for-stepped-up-oversight/2019/02/07/b6c5bfc4-2ac6-11e9-984d-9b8fba003e81_story.html) [<https://perma.cc/K6P9-CLVS>] (referencing tweets where Trump demonstrated opposition).

192. See Burgess Everett & Josh Dawsey, *White House Orders Agencies to Ignore Democrats’ Oversight Requests*, POLITICO (June 2, 2017, 05:11 AM), <https://www.politico.com/story/2017/06/02/federal-agencies-oversight-requests-democrats-white-house-239034> [<https://perma.cc/RQZ4-VU2L>] (“Multiple agencies have, in fact, responded to minority member requests.”).

193. *Id.*

194. *Id.*

oversight.<sup>195</sup> OLC even issued a legal opinion justifying the refusal to accommodate the Democrats' information requests.<sup>196</sup>

On June 7, 2017, in the first year of the Trump Administration, Senate Democrats catalogued over 100 oversight information requests that had received no answer at all from Trump Administration agencies.<sup>197</sup> In May 2018, Democrats on the House Judiciary Committee documented over seventy requests for information from executive-branch agencies that had failed to receive any response.<sup>198</sup>

After the 2018 election when Democrats won control of the House, subpoena authority passed to the new Democratic House majority. House Democrats made it clear that they intended to use their subpoena authority to conduct multiple oversight investigations of the Trump executive branch.<sup>199</sup> Democratic committee chairs promised to

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195. Burgess Everett & Josh Dawsey, *White House Orders Agencies to Ignore Democrats' Oversight Requests*, POLITICO (June 2, 2017, 5:11 AM), <https://www.politico.com/story/2017/06/02/federal-agencies-oversight-requests-democrats-white-house-239034> [https://perma.cc/MYH6-43C3].

196. See Authority of Individual Members of Congress to Conduct Oversight of the Executive Branch, 41 Op. O.L.C. 1, 1–4 (2017) (explaining that “[i]n general, agencies have provided information only when doing so would not be overly burdensome and would not interfere with their ability to respond in a timely manner to duly authorized oversight requests”).

197. *Senate Democrats Release New Compilation of over 100 Oversight Letters President Trump Refuses to Answer*, ED MARKEY U.S. SENATOR FOR MASS. (June 7, 2017), <https://www.markey.senate.gov/news/press-releases/senate-democrats-release-new-compilation-of-over-100-oversight-letters-president-trump-refuses-to-answer> [https://perma.cc/F87B-N3NE].

198. See COEQUAL, TRUMP ADMINISTRATION OVERSIGHT PRECEDENTS 6 (2022), [https://assets.website-files.com/5ccc693637a19d0db9dcb92/63a26e109eb881a0f082d450\\_Trump%20oversight%20precedents%20report\\_final%2012.20.22.pdf](https://assets.website-files.com/5ccc693637a19d0db9dcb92/63a26e109eb881a0f082d450_Trump%20oversight%20precedents%20report_final%2012.20.22.pdf) [https://perma.cc/88KY-L69B] (concluding that these efforts were “often successful in frustrating congressional oversight”).

199. Colby Itkowitz, *Democrats Prepare to Investigate Trump from Every Angle*, WASH. POST (Dec. 21, 2018, 2:00 PM), <https://www.washingtonpost.com/politics/2018/12/21/democrats-prepare-investigate-trump-every-angle> [https://perma.cc/Q4T4-25AG].



conduct sweeping investigations of issues ranging from Trump's ties to Russia<sup>200</sup> to Trump's personal income taxes.<sup>201</sup>

Given the stated rationale for not responding to information requests that did not come from committee chairs, one might have expected that the Trump Administration would begin to cooperate with the new Democratic House committee chairs. President Trump's truculent approach to the opposition, however, led many to doubt whether such cooperation would be forthcoming,<sup>202</sup> and President Trump himself warned that he would not cooperate with House oversight requests.<sup>203</sup> Once the oversight requests started to arrive,

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200. See Karoun Demirjian, *Democrats Set to Begin Oversight of Trump, with Moves Centered Around Alleged Russia Ties*, WASH. POST (Feb. 5, 2019, 7:20 PM), [https://www.washingtonpost.com/powerpost/democrats-set-to-begin-oversight-of-trump-with-moves-centered-around-alleged-russia-ties/2019/02/05/f7d34c5e-297f-11e9-b011-d8500644dc98\\_story.html](https://www.washingtonpost.com/powerpost/democrats-set-to-begin-oversight-of-trump-with-moves-centered-around-alleged-russia-ties/2019/02/05/f7d34c5e-297f-11e9-b011-d8500644dc98_story.html) [<https://perma.cc/7YRF-TKJF>] (discussing oversight of President Trump regarding alleged ties with Russia).

201. See Nicholas Fandos, *House Democrats Begin Push to Secure Trump's Tax Returns*, N.Y. TIMES (Feb. 7, 2019), <https://www.nytimes.com/2019/02/07/us/politics/democrats-trump-tax-returns.html> [<https://perma.cc/7CUY-ND7U>] (discussing the first steps in the Democrats' "quest to obtain President Trump's long-hidden tax returns").

202. See Harry Litman, Opinion, *Congress Can Issue Subpoenas. Will They Matter?*, N.Y. TIMES (Nov. 8, 2018), <https://www.nytimes.com/2018/11/08/opinion/congress-democrats-subpoenas-trump.html?action=click&module=RelatedLinks&pgtype=Article> [<https://perma.cc/TR9D-6ZBN>] (hypothesizing that the large quantity of subpoenas will be met with resistance, delays, and "only partial success"); Steve Vladeck, Perspective, *What Would Happen if Trump Resists an Investigation by the Democratic House?*, WASH. POST (Nov. 7, 2018, 3:26 PM), <https://www.washingtonpost.com/outlook/2018/11/07/what-would-happen-if-trump-resists-an-investigation-by-democratic-house> [<https://perma.cc/58Y8-TGDG>] (explaining the likelihood of the Trump administration to defy subpoenas).

203. Peter Baker & Michael D. Shear, *Trump Vows 'Warlike Posture' if Democrats Investigate Him*, N.Y. TIMES (Nov. 7, 2018), <https://www.nytimes.com/2018/11/07/us/politics/trump-midterms-house-senate.html> [<https://perma.cc/8NRE-NMGE>]; Erica Werner & Damian Paletta, *Trump Defiant as Democrats Prep Push for His Tax Returns*, WASH. POST (Nov. 7, 2018, 6:52 PM), [https://www.washingtonpost.com/business/economy/trump-suggests-he-wont-turn-over-tax-returns-even-if-democrats-demand-the-m/2018/11/07/396ae650-e2ad-11e8-ab2c-b31dcd53ca6b\\_story.html](https://www.washingtonpost.com/business/economy/trump-suggests-he-wont-turn-over-tax-returns-even-if-democrats-demand-the-m/2018/11/07/396ae650-e2ad-11e8-ab2c-b31dcd53ca6b_story.html) [<https://perma.cc/WJ83-S23J>]; Aaron Blake, *Trump Warned Democrats Not to Investigate Him. Instead, They're Playing Hardball*, WASH. POST (Feb. 6, 2019, 2:49 PM), <https://www.washingtonpost.com/politics/2019/02/06/trump-warned-democrats-not-investigate-him-theyre-playing-hardball-instead> [<https://perma.cc/72HP-QBQS>].

President Trump lashed out against the House's efforts to investigate the executive branch.<sup>204</sup>

President Trump's continued opposition to congressional oversight proved even more determined than expected, and the House's ability to acquire executive-branch cooperation with oversight requests was far less than they had hoped for.<sup>205</sup> President Trump vowed not to comply with House subpoenas, and he effectively blocked any efforts by House committees to conduct oversight of his administration's actions and policies in an unprecedented and controversial way.<sup>206</sup> In the following paragraphs, this Article will lay out several of the most significant and long-running disputes between President Trump and

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204. David Nakamura, Josh Dawsey & John Wagner, *As Democrats Deepen Probes, Trump Accuses Them of Being 'Totally out of Control'*, WASH. POST (June 12, 2019, 7:04 PM), [https://www.washingtonpost.com/powerpost/trump-asserts-executive-privilege-to-shield-documents-on-census-citizenship-question/2019/06/12/971263c8-8d11-11e9-adf3-f70f78c156e8\\_story.html](https://www.washingtonpost.com/powerpost/trump-asserts-executive-privilege-to-shield-documents-on-census-citizenship-question/2019/06/12/971263c8-8d11-11e9-adf3-f70f78c156e8_story.html) [https://perma.cc/2QTQ-LSS3].

205. Carol D. Leonnig, *A Beefed-Up White House Legal Team Prepares Aggressive Defense of Trump's Executive Privilege as Investigations Loom Large*, WASH. POST (Jan. 9, 2019, 6:44 PM), [https://www.washingtonpost.com/politics/a-beefed-up-white-house-legal-team-prepares-aggressive-defense-of-trumps-executive-privilege-as-investigations-loom-large/2019/01/09/066b8618-1045-11e9-84fc-d58c33d6c8c7\\_story.html](https://www.washingtonpost.com/politics/a-beefed-up-white-house-legal-team-prepares-aggressive-defense-of-trumps-executive-privilege-as-investigations-loom-large/2019/01/09/066b8618-1045-11e9-84fc-d58c33d6c8c7_story.html) [https://perma.cc/TK6E-GFJJ]; Fred Barbash, *Congress's Subpoena Power is Not What it Used to Be*, WASH. POST (Apr. 3, 2019, 6:58 PM), [https://www.washingtonpost.com/world/national-security/congresss-subpoena-power-is-not-what-it-used-to-be/2019/04/03/cf32e1de-5638-11e9-8ef3-fbd41a2ce4d5\\_story.html](https://www.washingtonpost.com/world/national-security/congresss-subpoena-power-is-not-what-it-used-to-be/2019/04/03/cf32e1de-5638-11e9-8ef3-fbd41a2ce4d5_story.html) [https://perma.cc/YD9X-5W5W].

206. See Adam Liptak, *Clash Between Trump and House Democrats Poses Threat to Constitutional Order*, N.Y. TIMES (May 7, 2019), <https://www.nytimes.com/2019/05/07/us/politics/trump-democrats.html> [https://perma.cc/7GNL-SRS6] ("Earlier administrations fought isolated skirmishes over congressional subpoenas. Mr. Trump, by contrast, has declared an all-out war on efforts by House Democrats to look into his official conduct and business dealings."); Amber Phillips, *A Reader's Guide to all of Congress's Fights with Trump*, WASH. POST (July 2, 2019, 2:46 PM), <https://www.washingtonpost.com/politics/2019/04/24/readers-guide-all-trumps-fights-with-congress> [https://perma.cc/SF78-M3FK] (demonstrating instances where President Trump systematically tried to block and undercut twenty investigations related to him); Rachael Bade & Seung Min Kim, *A Guide to 20 Inquiries Trump and His Allies are Working to Impede*, WASH. POST (May 11, 2019, 8:11 PM), [https://www.washingtonpost.com/politics/a-guide-to-20-inquiries-trump-and-his-allies-are-working-to-impede/2019/05/11/83114574-733a-11e9-9eb4-0828f5389013\\_story.html](https://www.washingtonpost.com/politics/a-guide-to-20-inquiries-trump-and-his-allies-are-working-to-impede/2019/05/11/83114574-733a-11e9-9eb4-0828f5389013_story.html) [https://perma.cc/S7VG-FJAW] (listing the twenty different inquiries individually); Dylan Scott, *Trump's High-Stakes Subpoena Battle with House Democrats, Explained*, VOX (May 9, 2019, 4:45 PM) <https://www.vox.com/policy-and-politics/2019/4/25/18514161/president-trump-sues-congress-subpoena-don-mcgnahn-carl-kline> [https://perma.cc/VN64-3GJQ] (explaining that Trump has "defied a remarkable number of congressional subpoenas and requests").

House committees during the final two years of President Trump's term.

A. *President Trump's Tax Records*

The longest running dispute involved the efforts of the House Ways and Means Committee to obtain President Trump's tax returns. Even before the election, observers speculated that Trump's tax returns would be the target of House oversight.<sup>207</sup> Unlike all presidential candidates in the previous four decades, Trump refused to release his tax returns as a candidate and continued to do so as president.<sup>208</sup> But after the Democrats took control of the House, the President seemed to be in a particularly vulnerable position because a federal statute provided that the Internal Revenue Service (IRS) must turn over any tax returns upon written request of the chair of the House Committee on Ways and Means.<sup>209</sup> After the election, the incoming Ways and Means Committee chair, Rep. Richard E. Neal, stated that, if President Trump did not voluntarily turn over his tax returns, he would file a legal request to the Treasury Secretary to release the returns.<sup>210</sup> President Trump stated he would resist disclosure on the ground that they were then under audit—a claim now known to be false.<sup>211</sup>

On April 3, 2019, Rep. Neal wrote to the IRS Commissioner with a formal request, pursuant to 26 U.S.C. § 6103(f), for President Trump's

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207. See Nicholas Fandos, *With a House Takeover, Democrats Could Get Trump's Tax Returns. Would They?*, N.Y. TIMES (Oct. 18, 2018), <https://www.nytimes.com/2018/10/16/us/politics/trump-tax-returns-democrats.html> [<https://perma.cc/UG2Y-CB29>] (explaining the Democrats could use an old provision in federal tax code to potentially get access to Trump's tax returns).

208. Michelle Lee, *Fact Check: IRS Audit Doesn't Prohibit Trump from Releasing Taxes*, WASH. POST (Oct. 9, 2016, 8:07 PM), <https://www.washingtonpost.com/politics/2016/live-updates/general-election/real-time-fact-checking-and-analysis-of-the-2nd-2016-p-residential-debate/fact-check-irs-audit-doesnt-prohibit-trump-from-releasing-taxes> [<https://perma.cc/T3VB-B7SV>] (rebutting then-candidate Trump's claim that a tax audit prohibited him from releasing his tax returns during the 2016 election).

209. 26 U.S.C. § 6103(f)(1).

210. Erica Werner & Damian Paletta, *Trump Defiant as Democrats Prep Push for His Tax Returns*, WASH. POST (Nov. 7, 2018, 6:52 PM), [https://www.washingtonpost.com/business/economy/trump-suggests-he-wont-turn-over-tax-returns-even-if-democrats-demand-them/2018/11/07/396ae650-e2ad-11e8-ab2c-b31dcd53ca6b\\_story.html](https://www.washingtonpost.com/business/economy/trump-suggests-he-wont-turn-over-tax-returns-even-if-democrats-demand-them/2018/11/07/396ae650-e2ad-11e8-ab2c-b31dcd53ca6b_story.html) [<https://perma.cc/74M5-DH7B>].

211. *Id.*; Dustin Jones, *The IRS Did Not Audit Trump During His Presidency's First 2 Years*, NPR (Dec. 21, 2022, 1:20 PM), <https://www.npr.org/2022/12/20/1144472882/a-house-panel-voted-to-publicly-release-a-report-on-trumps-tax-returns> [<https://perma.cc/SGM6-Q2LW>].

tax records.<sup>212</sup> On April 10, Treasury Secretary Steven Mnuchin responded to the request by stating that because Treasury was consulting with the DOJ to determine the proper response to the request, the IRS would not produce the returns by the requested date.<sup>213</sup> In response, the Committee decided to subpoena the President's accounting firm (Mazars, USA) for the records.<sup>214</sup> Lawyers for President Trump urged Mazars not to produce the tax records in response to the subpoena,<sup>215</sup> and Trump's lawyers subsequently sued

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212. Letter from Richard E. Neal, Chairman, H. Comm. on Ways and Means, to Charles P. Rettig, Comm'r, Internal Revenue Serv. (Apr. 3, 2019); see Nicholas Fandos, *House Democrat Demands Six Years of Trump Tax Returns from I.R.S.*, N.Y. TIMES (Apr. 3, 2019), <https://www.nytimes.com/2019/04/03/us/politics/mueller-report-subpoena-house.html> [<https://perma.cc/BU89-9LY3>] (explaining Rep. Neal's request that the IRS hand over six years of President Trump's tax records); Erica Werner, Damian Paletta & Josh Dawsey, *House Democrats Seek 6 Years of Trump's Personal and Business Tax Returns*, WASH. POST (Apr. 3, 2019, 8:45 PM), [https://www.washingtonpost.com/business/economy/house-democrats-seek-six-years-of-trumps-personal-and-business-tax-returns/2019/04/03/7a864eda-565d-11e9-8ef3-fbd41a2ce4d5\\_story.html](https://www.washingtonpost.com/business/economy/house-democrats-seek-six-years-of-trumps-personal-and-business-tax-returns/2019/04/03/7a864eda-565d-11e9-8ef3-fbd41a2ce4d5_story.html) [<https://perma.cc/67RY-EDPD>] (discussing the House Ways and Means Committee's request for President Trump's personal and business tax returns).

213. See Letter from Steven T. Mnuchin, Sec'y of the Treasury, to Richard E. Neal, Chairman, H. Comm. on Ways & Means (Apr. 10, 2019) ("Given the seriousness of these issues, which bear no connection to ordinary tax administration, we have begun consultations with the DOJ to ensure that our response is fully consistent with the law and the Constitution."); Alan Rappeport, *Treasury Dept. Declines House Request for Trump's Tax Returns*, N.Y. TIMES (Apr. 10, 2019), <https://www.nytimes.com/2019/04/10/us/politics/trump-tax-returns-treasury.html> [<https://perma.cc/N9VV-TVHP>] (explaining Mnuchin expressed concerns over the lawfulness of the request, violations of taxpayer privacy, and constitutional authority); Jeff Stein & Damian Paletta, *Treasury Says it Will Miss Democrats' Deadline for Turning over Trump Tax Returns, Casts Skepticism over Request*, WASH. POST (Apr. 10, 2019, 6:57 PM), [https://www.washingtonpost.com/business/economy/treasury-says-it-will-miss-democrats-deadline-for-turning-over-trump-tax-returns/2019/04/10/14319f9c-5bce-11e9-842d-7d3ed7eb3957\\_story.html](https://www.washingtonpost.com/business/economy/treasury-says-it-will-miss-democrats-deadline-for-turning-over-trump-tax-returns/2019/04/10/14319f9c-5bce-11e9-842d-7d3ed7eb3957_story.html) [<https://perma.cc/YK67-D7PQ>] ("He did not flatly reject the notion that he might ultimately comply, but his letter to the House Ways and Means Committee suggested that Mnuchin would not hold himself to any timeline.").

214. Rachael Bade, *House Democrats to Subpoena Accounting Firm for Trump's Financial Records*, WASH. POST (Apr. 12, 2019, 5:34 PM), [https://www.washingtonpost.com/politics/house-democrats-to-subpoena-accounting-firm-for-trumps-financial-records/2019/04/12/c1213550-5d5e-11e9-b8e3-b03311fbbbf\\_story.html](https://www.washingtonpost.com/politics/house-democrats-to-subpoena-accounting-firm-for-trumps-financial-records/2019/04/12/c1213550-5d5e-11e9-b8e3-b03311fbbbf_story.html) [<https://perma.cc/F3RW-UGCA>].

215. Tom Hamburger, *Lawyers for Trump Urge President's Accounting Firm Not to Comply with House Subpoena*, WASH. POST (Apr. 15, 2019, 3:52 PM), [https://www.washingtonpost.com/politics/lawyers-for-trump-urge-presidents-accounting-firm-not-to-comply-with-house-request/2019/04/15/d58b792c-5f95-11e9-9412-daf3d2e67c6d\\_story.html](https://www.washingtonpost.com/politics/lawyers-for-trump-urge-presidents-accounting-firm-not-to-comply-with-house-request/2019/04/15/d58b792c-5f95-11e9-9412-daf3d2e67c6d_story.html) [<https://perma.cc/UKV3-92DN>].

Mazars and two other companies subpoenaed by the Committee to block the release of the returns,<sup>216</sup> a case that eventually resulted in the Supreme Court decision previously discussed.<sup>217</sup> On May 6, 2019, Secretary Mnuchin told Representative Neal that the IRS would not disclose the returns.<sup>218</sup> Mnuchin's letter did not assert executive privilege, but instead resisted disclosure on the ground that the House Committee's "request lacks a legitimate legislative purpose,"<sup>219</sup> a response that met with serious skepticism.<sup>220</sup> The Committee

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216. See Isaac Stanley-Becker & David A. Fahrenthold, *Trump Organization and Family Sue Deutsche Bank and Capital One to Block Congressional Subpoenas*, WASH. POST (Apr. 30, 2019, 1:45 AM), <https://www.washingtonpost.com/nation/2019/04/30/trump-organization-family-sue-deutsche-bank-capital-one-block-congressional-subpoenas> [https://perma.cc/PUJ3-LHU4] (Deutsche Bank and Capital One); Spencer S. Hsu, *House Democrats Denounce Trump Suit to Block Subpoena of Financial Records as Threat to Congressional Oversight*, WASH. POST (May 1, 2019, 8:56 PM), [https://www.washingtonpost.com/local/legal-issues/house-democrats-denounce-trump-suit-to-block-subpoena-of-financial-records-as-threat-to-congressional-oversight/2019/05/01/57a842e8-6c5a-11e9-be3a-33217240a539\\_story.html](https://www.washingtonpost.com/local/legal-issues/house-democrats-denounce-trump-suit-to-block-subpoena-of-financial-records-as-threat-to-congressional-oversight/2019/05/01/57a842e8-6c5a-11e9-be3a-33217240a539_story.html) [https://perma.cc/ZR9W-DWUU] (Mazars).

217. See *supra* notes 31–34 and accompanying text (discussing the Court's holding in *Trump v. Mazars USA, LLP*, that Congress must limit the scope of subpoenas to include only necessary information).

218. Letter from Steven T. Mnuchin, Sec'y of the Treasury, to Richard E. Neal, Chairman, H. Comm. on Ways and Means (May 6, 2019); see Damian Paletta & Jeff Stein, *Mnuchin Rejects Democrats' Demand to Hand over Trump's Tax Returns, All but Ensuring Legal Battle*, WASH. POST (May 6, 2019, 8:38 PM), [https://www.washingtonpost.com/business/economy/mnuchin-rejects-democrats-demand-to-hand-over-trumps-tax-returns-all-but-ensuring-legal-battle/2019/05/06/5483f8ac-7022-11e9-9eb4-0828f5389013\\_story.html](https://www.washingtonpost.com/business/economy/mnuchin-rejects-democrats-demand-to-hand-over-trumps-tax-returns-all-but-ensuring-legal-battle/2019/05/06/5483f8ac-7022-11e9-9eb4-0828f5389013_story.html) [https://perma.cc/J8BB-Y95P] (explaining the letter); Alan Rappeport, *Steven Mnuchin Refuses to Release Trump's Tax Documents to Congress*, N.Y. TIMES (May 6, 2019), <https://www.nytimes.com/2019/05/06/us/politics/trump-tax-returns-mnuchin.html> [https://perma.cc/9XDP-WA28] (same).

219. Letter from Steven T. Mnuchin, Sec'y of the Treasury, to Richard E. Neal, Chairman, H. Comm. on Ways and Means (May 6, 2019).

220. See Amber Phillips, Analysis, *The Legal Argument Behind Mnuchin's Refusal to Give Congress Trump's Tax Returns*, WASH. POST (May 7, 2019, 12:13 PM), <https://www.washingtonpost.com/politics/2019/05/07/legal-argument-behind-mnuchin-refusing-give-congress-trumps-tax-returns> [https://perma.cc/SC8H-CFPQ] (describing uncertainty as to Mnuchin's letter and the lack of legislative purpose); Daniel Hemel, Perspective, *Trump Just Gave the House a Very Good Reason to Look at his Tax Returns*, WASH. POST (May 9, 2019, 8:36 AM), <https://www.washingtonpost.com/outlook/2019/05/09/trump-just-gave-house-very-good-reason-look-his-tax-returns> [https://perma.cc/P7ZA-F7GT] (describing Mnuchin's claim regarding legislative purpose as "puerile").

responded by issuing a subpoena to Mnuchin for the tax records,<sup>221</sup> in response to which Mnuchin reiterated that the Committee “lacks a legitimate legislative purpose” for obtaining the records.<sup>222</sup> The battle over the Trump tax records lasted over three years, and it was not until November 2022, well into the Biden Administration, that the House Committee received the tax records they had subpoenaed in 2019.<sup>223</sup>

### B. *Donald McGahn Testimony About Mueller Investigation*

In April 2019, the House Judiciary Committee issued a subpoena to Donald McGahn, the former White House Counsel for President Trump.<sup>224</sup> The subpoena sought records and testimony relating to information McGahn disclosed to the Mueller investigation about possible obstruction of justice by President Trump.<sup>225</sup> According to the portion of the Mueller report that had been released to the public, McGahn had reported numerous instances in which President Trump had pushed him to interfere with the Mueller investigation, including

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221. Nicholas Fandos, *House Ways and Means Chairman Subpoenas Trump Tax Returns*, N.Y. TIMES (May 10, 2019), <https://www.nytimes.com/2019/05/10/us/politics/trump-tax-returns-subpoena.html> [<https://perma.cc/PHV8-CV9Y>].

222. Letter from Steven T. Mnuchin, Sec’y of the Treasury, to Richard E. Neal, Chairman, H. Comm. on Ways & Means (May 17, 2019); see Jeff Stein, *Mnuchin Rejects Democrats’ Subpoena for President Trump’s Tax Returns*, WASH. POST (May 17, 2019, 5:40 PM), <https://www.washingtonpost.com/business/2019/05/17/mnuchin-rejects-democrats-subpoena-president-trumps-tax-returns/> [<https://perma.cc/3AU2-23WX>] (“Mnuchin said the House Ways and Means Committee’s request ‘lacks a legitimate legislative purpose,’ citing the legal advice of the Justice Department in denying the demand.”); Alan Rappeport & Nicholas Fandos, *Steven Mnuchin Refuses to Comply with Subpoena for Trump’s Tax Returns*, N.Y. TIMES (May 17, 2019), <https://www.nytimes.com/2019/05/17/us/politics/mnuchin-trump-tax-returns-subpoena.html> [<https://perma.cc/XK84-DSAK>] (discussing Mnuchin’s position on the subpoenas).

223. See Dan Mangan & Christina Wilkie, *IRS Gives Trump Tax Records to House Committee After 3-Year Legal Battle*, CNBC (Nov. 30, 2022, 6:39 PM) <https://www.cnbc.com/2022/11/30/irs-gives-trump-tax-returns-to-house-committee-after-3-year-legal-battle.html> [<https://perma.cc/H78U-K3MF>] (explaining that on Nov. 22, 2019, the Supreme Court, without any dissents, rejected Trump’s emergency order blocking the committee from getting returns).

224. See Karoun Demirjian, *House Democrats Issue Subpoena for Former White House Lawyer McGahn*, WASH. POST (Apr. 22, 2019, 6:07 PM), [https://www.washingtonpost.com/powerpost/house-democrats-issue-subpoena-for-former-white-house-lawyer-mcga-hn/2019/04/22/e84f9d24-6542-11e9-8985-4cf30147bdca\\_story.html](https://www.washingtonpost.com/powerpost/house-democrats-issue-subpoena-for-former-white-house-lawyer-mcga-hn/2019/04/22/e84f9d24-6542-11e9-8985-4cf30147bdca_story.html) [<https://perma.cc/95QV-LVUU>] (explaining the subpoena ordering former White House counsel Donald McGahn to testify).

225. *Id.*

the firing of Mueller himself.<sup>226</sup> In response to the subpoena, President Trump asserted executive privilege over the documents and McGahn's testimony and ordered McGahn not to comply with the subpoena.<sup>227</sup> In response, the House voted to hold McGahn in civil contempt of Congress and authorized the Judiciary Committee to seek judicial enforcement of the subpoena.<sup>228</sup> The tale of the prolonged litigation that followed is found below. Ultimately, after President Biden's inauguration, the House and DOJ reached a compromise that allowed McGahn to testify in a limited manner that appeared to be a defeat for the House committee.<sup>229</sup> Professor Jonathan Schaub argued, "the

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226. Michael S. Schmidt, *As McGahn Emerges as Chief Witness in the Mueller Report, Trump and Allies Ramp up Attacks*, N.Y. TIMES (Apr. 22, 2019), <https://www.nytimes.com/2019/04/22/us/politics/mcgahn-trump-attacks.html> [https://perma.cc/9JQH-92EA].

227. Letter from Pat A. Cipollone, Couns. to the President, to William A. Burck, Couns. for Donald F. McGahn (May 7, 2019); see Josh Dawsey, Robert Costa & Rosalind S. Helderman, *White House Plans To Fight House Subpoena of Former Counsel Donald McGahn for Testimony on Mueller Report*, WASH. POST (Apr. 23, 2019, 5:18 PM), [https://www.washingtonpost.com/politics/white-house-plans-to-fight-house-subpoena-of-former-counsel-donald-mcgahn-for-testimony-on-mueller-report/2019/04/23/2d48732a-65f1-11e9-83df-04f4d124151f\\_story.html](https://www.washingtonpost.com/politics/white-house-plans-to-fight-house-subpoena-of-former-counsel-donald-mcgahn-for-testimony-on-mueller-report/2019/04/23/2d48732a-65f1-11e9-83df-04f4d124151f_story.html) [https://perma.cc/5HRV-HLGB] (describing President Trump's move as setting up another showdown between the Trump administration and congressional Democrats in the aftermath of the special counsel report); Peter Baker, Annie Karni & Alan Rappeport, *Democrats Ask and Trump Says No, Signaling a Bitter Fight Ahead*, N.Y. TIMES (Apr. 23, 2019), <https://www.nytimes.com/2019/04/23/us/politics/trump-democrats.html> [https://perma.cc/4CAJ-83N9] (describing the Trump administration's effort to thwart investigations with Congress as "trench warfare").

228. See Jeremy Herb, *House Approves Resolution to Enforce McGahn, Barr Subpoenas in Court*, CNN (June 11, 2019, 6:22 PM), <https://www.cnn.com/2019/06/11/politics/house-subpoenas-vote-court/index.html> [https://perma.cc/RG9K-6X4J] (emphasizing the resolution only focused on civil contempt rather than criminal contempt); Jeremy Silk Smith, *House Votes to Hold AG Barr, Don McGahn in Civil Contempt of Congress*, LAW & CRIME (June 11, 2019, 6:25 PM), <https://lawandcrime.com/high-profile/house-votes-to-hold-barr-mcgahn-in-contempt-of-congress> [https://perma.cc/KQ38-2TF5] (explaining that the vote will offer the House Democrats another avenue to compel testimony if the Trump administration continues to stonewall giving the House access to documents).

229. See Jonathan Schaub, *Why the McGahn Agreement is a Devastating Loss for Congress*, LAWFARE (May 19, 2021, 11:47 AM) [hereinafter Schaub, *McGahn Agreement*], <https://www.lawfareblog.com/why-mcgahn-agreement-devastating-loss-congress> [https://perma.cc/4DC2-DW4Z] ("After this agreement, Congress still lacks the authority to compel McGahn's testimony or the testimony of any presidential adviser. It has relinquished any claim to authority to question McGahn about anything beyond

agreement appears designed to allow the House Judiciary Committee to claim victory—as Nadler did—without offering it anything of substance. And the narrow scope of the testimony appears carefully crafted to placate the executive branch and ensure no executive privilege controversies arise.”<sup>230</sup>

*C. Investigation of the Plan to Include a Citizenship Question in the 2020 Census*

Another dispute with the Trump Administration involved a request from the House Committee on Oversight and Reform for documents and testimony relating to the Administration’s plan to add a citizenship question to the 2020 Decennial Census.<sup>231</sup> The Committee was investigating allegations that “the question was crafted specifically to give an electoral advantage to Republicans and whites.”<sup>232</sup> The allegations were supported by evidence found on a computer belonging to Republican redistricting strategist Thomas Hofeller after

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information that has already been made public. It has lost any opportunity to challenge the executive branch’s view of privilege or testimonial immunity in court. And it has acknowledged the continued ability of the current Justice Department to assert privilege over this information.”).

230. *Id.*

231. See Letter from Elijah E. Cummings, Chairman, H. Comm. on Oversight & Reform, to Matthew G. Whitaker, Acting Att’y Gen. (Feb. 12, 2019) (requesting that the DOJ comply with previous requests for documents related to the decision to add a citizenship question to the 2020 Decennial Census); Letter from Elijah E. Cummings, Chairman, H. Comm. on Oversight & Reform, to John Gore, Principal Deputy Assistant Att’y Gen. (Feb. 14, 2019) (requesting that Mr. Gore appear for an interview addressing the DOJ’s request to add a citizenship question to the 2020 Decennial Census).

232. Tara Bahrapour & Robert Barnes, *Despite Trump Administration Denials, New Evidence Suggests Census Citizenship Question Was Crafted to Benefit White Republicans*, WASH. POST (May 30, 2019, 9:07 PM), [https://www.washingtonpost.com/local/social-issues/despite-trump-administration-denials-new-evidence-suggests-census-citizenship-question-was-crafted-to-benefit-white-republicans/2019/05/30/ca188dea-82eb-11e9-933d-7501070ee669\\_story.html](https://www.washingtonpost.com/local/social-issues/despite-trump-administration-denials-new-evidence-suggests-census-citizenship-question-was-crafted-to-benefit-white-republicans/2019/05/30/ca188dea-82eb-11e9-933d-7501070ee669_story.html) [<https://perma.cc/6L5A-XKFX>]; see Letter from Elijah E. Cummings, Chairman, H. Comm. on Oversight and Reform, to William P. Barr, Att’y Gen. (June 3, 2019) (“[L]ast week, new documents were unearthed that suggest that the real reason the Trump Administration sought to add the citizenship question was not to help enforce the Voting Rights Act at all, but rather to gerrymander congressional districts in overtly racist, partisan, and unconstitutional ways.”).



his death.<sup>233</sup> Despite numerous letters from Committee Chair Elijah Cummings, the Committee's document demands were met with resistance from the Department of Commerce and the DOJ.<sup>234</sup> In particular, the DOJ resisted the Committee's subpoena for the deposition of DOJ official, John Gore, on the ground that Committee rules did not permit the attendance of agency counsel at the deposition, a long-standing point of controversy between the two branches.<sup>235</sup> Eventually, the Committee threatened to hold the Attorney General and the Secretary of Commerce in contempt of Congress.<sup>236</sup> After further negotiations failed, the full House voted to

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233. See Letter from Elijah E. Cummings, Chairman, H. Comm. on Oversight and Reform, to William P. Barr, Att'y Gen. (June 3, 2019) (suggesting a link between Hofeller's study, which indicated that counting citizens rather than "all persons" would advantage Republicans, and DOJ actions).

234. See Letter from Elijah E. Cummings, Chairman, H. Comm. on Oversight & Reform, to Wilbur L. Ross, Sec'y of Com. (Mar. 29, 2019) (addressing the DOJ's refusal to release key documents regarding its decision to add a citizenship question to the 2020 Census); Letter from Elijah E. Cummings, Chairman, H. Comm. on Oversight & Reform, to Stephen E. Boyd, Assistant Att'y Gen. (Apr. 2, 2019) (outlining inaccuracies in a March 25, 2019 letter raising concerns about the DOJ's refusal to answer questions and produce key documents); Letter from Elijah E. Cummings, Chairman, H. Comm. on Oversight & Reform, & Jamie Raskin, Chairman, Subcomm. on C.R. & C.L., H. Comm. on Oversight & Reform (May 7, 2019) (outlining various ways the DOJ failed to cooperate in the Committee's investigation).

235. See Letter from Elijah E. Cummings, Chairman, H. Comm. on Oversight & Reform, to William P. Barr, Att'y Gen. (Apr. 10, 2019) (citing Rules of the H. Comm. on Oversight & Reform, 116th Cong., Rule 15(e) (Comm. Print 2019)); Shaub, *Executive Privilege*, *supra* note 53, at 68 (detailing the "deposition-counsel requirement" for which the Executive Branch has purported, in recent years, to be constitutionally required).

236. See Letter from Elijah E. Cummings, Chairman, H. Comm. on Oversight and Reform, to William P. Barr, Att'y Gen. (June 3, 2019) (writing to inform Mr. Barr of the scheduled vote to hold him in contempt of Congress for failure to comply with a bipartisan subpoena); Felicia Sonmez, Tara Bahramour & Rachael Bade, *House Committee to Vote on Holding Barr and Ross in Contempt for Failing to Provide Documents Related to 2020 Census Citizenship Question*, WASH. POST (June 3, 2019, 8:08 PM), [https://www.washingtonpost.com/politics/house-committee-to-vote-on-holding-barr-and-ross-in-contempt-for-failing-to-provide-documents-related-to-2020-census-citizenship-question/2019/06/03/9269a0e6-863d-11e9-a870-b9c411dc4312\\_story.html](https://www.washingtonpost.com/politics/house-committee-to-vote-on-holding-barr-and-ross-in-contempt-for-failing-to-provide-documents-related-to-2020-census-citizenship-question/2019/06/03/9269a0e6-863d-11e9-a870-b9c411dc4312_story.html) [http://perma.cc/8SYT-6XG7] (outlining letter from Cummings to Ross regarding vote to hold Mr. Ross in contempt of Congress for failing to provide documents related to 2020 Census citizenship questions); Colby Itkowitz, *House Likely to Hold William Barr, Wilbur Ross in Contempt After Subpoena Demands Are Rejected*, WASH. POST (June 6, 2019, 10:22 PM), <https://www.washingtonpost.com/politics/house-democrats-likely-to-ho>

cite both the Attorney General and the Secretary of Commerce in contempt of Congress.<sup>237</sup> Prior to the actual vote, the Attorney General requested the President to assert executive privilege,<sup>238</sup> and President Trump issued such an order and complained that the House Democrats were “totally out of control.”<sup>239</sup>

Although the plan to include a citizenship question was abandoned, the House Committee never obtained the documents and testimony it needed to determine the basis for the plan.<sup>240</sup> The dismal result of this investigative effort stands in stark contrast to earlier congressional investigations of executive misconduct, such as the Anne Gorsuch investigation.<sup>241</sup>

Like the other investigations discussed above, the allegations under investigation by the House committee were precisely the kind of allegations that typically become too politically costly to stonewall.

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ld-william-barr-wilbur-ross-in-contempt-after-subpoena-demands-are-rejected/2019/06/06/c879e7de-88b0-11e9-98c1-e945ae5db8fb\_story.html [https://perma.cc/2AJ6-LZNT] (“The Justice and Commerce departments denied an order from a House committee for more documents about the decision to add a citizenship question to the 2020 Census, all but ensuring that the house will hold Attorney General William P. Barr and Commerce Secretary Wilbur Ross in contempt of Congress.”).

237. Mike DeBonis, *Stepping up Trump Clash, House Votes to Enforce Barr and McGahn Subpoenas*, WASH. POST (June 11, 2019, 4:56 PM), [https://www.washingtonpost.com/politics/stepping-up-trump-clash-house-to-vote-to-enforce-barr-and-mcgahn-subpoenas/2019/06/11/a1343cea-8c4f-11e9-b6f4-033356502dce\\_story.html](https://www.washingtonpost.com/politics/stepping-up-trump-clash-house-to-vote-to-enforce-barr-and-mcgahn-subpoenas/2019/06/11/a1343cea-8c4f-11e9-b6f4-033356502dce_story.html) [https://perma.cc/US3D-A5F3].

238. Letter from William P. Barr, Att’y Gen., to Donald J. Trump, President of the U.S. (June 11, 2019).

239. Nakamura et al., *supra* note 204; *see* Letter from Stephen E. Boyd, Assistant Att’y Gen., to Elijah E. Cummings, Chairman, H. Comm. on Oversight & Reform (June 12, 2019) (informing Mr. Cummings that President Trump asserted executive privilege).

240. *See* Letter from Elijah E. Cummings, Chairman, H. Comm. on Oversight & Reform, to John Gore (Sept. 20, 2019) (writing to inquire whether Mr. Gore would comply given he no longer worked for the DOJ and the Supreme Court was no longer considering the case); Letter from John D. Adams, Couns. for John Gore, to Elijah E. Cummings, Chairman, H. Comm. on Oversight & Reform (Sept. 27, 2019) (correcting a point made in the previous correspondence where Mr. Cummings asserts that Mr. Gore is no longer a federal employee, insisting that Mr. Gore is still an employee of the DOJ).

241. *See* Peterson, *Prosecuting Executive Officials*, *supra* note 111 at 625 (“At no time prior to the Watergate era had Congress threatened to seek criminal prosecution of an executive branch official for asserting executive privilege . . . as it ultimately did in the Gorsuch case.”).

*D. Other Investigations Blocked by the Trump Administration*

Of course, these investigations were not the only ones frustrated by the Trump Administration's refusal to engage in the negotiation-accommodation process as prior administrations had. Other investigations where the House was unsuccessful in obtaining needed documents and testimony included: the investigations related to the Mueller report;<sup>242</sup> the investigation of plans to relocate the headquarters of the Bureau of Land Management;<sup>243</sup> the investigation of the Trump Administration's refusal to defend the Affordable Care Act in court;<sup>244</sup> the investigation of the use of military appropriations to fund the border wall;<sup>245</sup> the investigation of Kellyanne Conway's alleged failure to comply with ethics laws and the Hatch Act;<sup>246</sup> and the

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242. See Letter from Stephen E. Boyd, Assistant Att'y Gen., to Jerrold Nadler, Chair, Comm. on the Judiciary (May 7, 2019) (requesting that the Committee hold the subpoena regarding the Mueller investigation in abeyance).

243. See Letter from Raúl M. Grijalva, Chair, H. Comm. on Nat. Res., to David Bernhardt, Sec'y of the Interior (Mar. 9, 2020) (final request for related documents).

244. See Letter from Elijah E. Cummings, Chairman, H. Comm. on Oversight & Reform, to Russell Vought, Acting Dir., Off. of Mgmt. & Budget (June 26, 2019) (requesting Mr. Vought testify regarding his role in the Administration's decision to reverse its previous legal position and the ACA).

245. See Letter from Adam Smith, Chairman, H. Comm. on Armed Servs., Nita M. Lowey, Chairwoman, H. Appropriations Comm., John Garamendi, Chairman, H. Armed Serv. Comm., Peter J. Visclosky, Chairman, H. Appropriations Comm., & Debbie Wasserman Schultz, Chairwoman, H. Appropriations Comm., to Patrick Shanahan, Acting Sec'y of Def. (Mar. 7, 2019) (voicing frustrations by lack of transparency regarding the use of section 2808 authority to construct a border wall).

246. See Letter from Elijah E. Cummings, Chairman, H. Comm. on Oversight & Reform, & Gerald E. Connolly, Chairman, Subcomm. on Gov't Operations, to Kellyanne Conway, Couns. to the President (June 13, 2019) (requesting testimony for failure to comply with federal laws); Letter from Pat A. Cipollone, Couns. to the President, to Elijah E. Cummings, Chairman, H. Comm. on Oversight & Reform (July 15, 2019) ("Because of this constitutional immunity, and in order to protect the prerogatives of the Office of the President, the President has directed Ms. Conway not to appear at the Committee's scheduled hearing . . ."); John Wagner, Rachael Bade & Josh Dawsey, *White House Moves to Bar Counselor Kellyanne Conway from Testifying to Congress About Alleged Violations of Hatch Act*, WASH. POST (June 24, 2019, 7:51 PM), [https://www.washingtonpost.com/politics/kellyanne-conway-says-democrats-seeking-testimony-on-hatch-act-violations-are-retaliating-against-her-politically/2019/06/24/9398d3ea-9689-11e9-830a-21b9b36b64ad\\_story.html](https://www.washingtonpost.com/politics/kellyanne-conway-says-democrats-seeking-testimony-on-hatch-act-violations-are-retaliating-against-her-politically/2019/06/24/9398d3ea-9689-11e9-830a-21b9b36b64ad_story.html) [https://perma.cc/C4B3-M77L] (reporting on the letters and the Hatch Act); Annie Karni, *White House Directs Kellyanne Conway Not to Testify Before House Panel*, N.Y. TIMES (June 24, 2019), <https://www.nytimes.com/2019/06/24/us/politics/kellyanne-conway-oversight-testimony.html> [https://

investigation into the Trump International Hotel's lease of the Old Post Office Building.<sup>247</sup>

*E. The Reasons for the Trump Administration's Ability to Frustrate House Investigations*

Several different factors contributed to the Trump Administration's ability to resist persistent House investigative requests when, in prior administrations, persistent congressional investigations usually got what they needed from the executive branch. First, changes in Congress's use of the subpoena power helped the President avoid the need to make a formal assertion of executive privilege. Under the procedures outlined in the Reagan memorandum on executive privilege,<sup>248</sup> executive officials were forbidden from refusing to respond to a congressional subpoena.<sup>249</sup> The rationale behind this requirement was that the President should assume personal responsibility for asserting executive privilege and suffer the consequences if the public suspected a coverup of unlawful activity.<sup>250</sup>

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/perma.cc/WAB6-V5AR] (reporting on the letters and the Hatch Act); Rachel Bade, *Trump Tells White House Counselor Kellyanne Conway to Ignore Congressional Subpoena*, WASH. POST (July 15, 2019, 4:47 PM), [https://www.washingtonpost.com/politics/white-house-counselor-kellyanne-conway-will-ignore-congressional-subpoena/2019/07/15/8a0fa160-a718-11e9-86dd-d7f0e60391e9\\_story.html](https://www.washingtonpost.com/politics/white-house-counselor-kellyanne-conway-will-ignore-congressional-subpoena/2019/07/15/8a0fa160-a718-11e9-86dd-d7f0e60391e9_story.html) [https://perma.cc/F8X6-872T] (reporting on the letters and the Hatch Act); Catie Edmondson, *White House Directs Kellyanne Conway to Defy House Subpoena*, N.Y. TIMES (July 15, 2019), <https://www.nytimes.com/2019/07/15/us/politics/kellyanne-conway-hatch-act.html> [https://perma.cc/N2ZZ-CPUJ] (reporting on Conway's defiance of the subpoena at the instruction of the White House and implication of the Hatch Act).

247. See Letter from Peter A. DeFazio, Chair, H. Comm. on Transp. & Infrastructure, & Dina Titus, Chair, Subcomm. on Econ. Dev., Pub. Bldgs., & Emergency Mgmt. of the H. Comm. on Transp. & Infrastructure, to Emily W. Murphy, Adm'r, U.S. Gen. Servs. Admin. (Dec. 20, 2019) (urging the General Services Administration to comply with the subpoena).

248. See Memorandum from President Ronald Reagan for the Heads of Executive Departments and Agencies on Procedures Governing Responses to Congressional Requests for Information (Nov. 4, 1982), *reprinted in* H.R. REP. NO. 99-435, pt. 2, at 1106-08 (1986) (listing six procedures).

249. *Id.* at 1106-07.

250. See TODD GARVEY, CONG. RSCH. SERV., R47102, EXECUTIVE PRIVILEGE AND PRESIDENTIAL COMMUNICATIONS: JUDICIAL PRINCIPLES 12 (2022) (discussing the Watergate Committee's discussion of its "oversight function," through which it argued that the tapes were "necessary to 'oversee the operations of the executive branch, to investigate instances of possible corruption and malfeasance in office, and to expose the results of its investigations to public view.'" (quoting Senate Select Comm. On Presidential Campaign Activities v. Nixon, 498 F.2d 725, 731 (D.C. Cir. 1974))).

Over the course of the late 1990s and the first decade of the twenty-first century, congressional committees began to issue subpoenas much earlier in the negotiation process.<sup>251</sup> As a result, executive officials began to complain that they did not have sufficient time to evaluate whether there was a sufficient basis for asking the President to assert executive privilege.<sup>252</sup> Consequently, to protect the ability of the President to claim privilege if the circumstances turned out to warrant such a claim, the DOJ began to authorize the assertion of a “protective” privilege that was not itself a claim of executive privilege, but rather a claim that they were obliged to miss the subpoena return date to properly evaluate the potential privilege claim.<sup>253</sup> Thus, the President was absolved of the responsibility to assert executive privilege as long as the protective privilege justified the refusal to respond to the congressional subpoena. As a result, the President was shielded from the political consequences of asserting the privilege himself.

Some observers have argued that President Trump’s ability to thwart legislative oversight was enabled and advanced through aggressive use of OLC opinions justifying unreasonable and unsupported assertions of executive power—what one scholar called “weaponizing the Office of Legal Counsel.”<sup>254</sup> There is no doubt that OLC opinions defended more aggressive use of executive privilege during the Trump Administration than they had before,<sup>255</sup> but OLC opinions had not helped previous Presidents win prolonged executive privilege battles. Few people were persuaded by OLC’s opinions defending the executive privilege claims made during the Reagan Administration.<sup>256</sup> In other words, prior to the Trump Administration, in executive

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251. See Shaub, *Executive Privilege*, *supra* note 53, at 65–67 (starting with the Clinton Administration).

252. *Id.* (noting President Clinton was the first to make a “protective” assertion of executive privilege to ensure the executive branch has adequate time to evaluate whether the requested materials fall within the scope of the privilege).

253. *Id.*

254. Berman, *Weaponizing the OLC*, *supra* note 5; see Owens, *supra* note 53, at 500 (“Taking OLC’s views to an extreme, the [Trump] Administration began forgoing the traditional accommodation process for a policy that approached outright refusal.”).

255. See Berman, *Weaponizing the OLC*, *supra* note 5, at 25 (discussing the unusual use of executive privilege by the Trump Administration as compared to previous administrations); Owens, *supra* note 53 (same).

256. See generally Peterson, *Contempt of Congress*, *supra* note 1 (discussing various situations in which the Reagan Administration made executive privilege claims with OLC support).

privilege disputes, OLC opinions were useless weapons against legislative persistence and political pressure.

The most that could be said for OLC's work during the Trump Administration is that the Office did nothing to reign in President Trump's reflexive resistance to compliance with congressional subpoenas. When OLC backs the President, it has little power to persuade the public that the President is correct because the public suspects that the opinions are written to support the President's chosen course of action, particularly in information disputes with Congress. But OLC does have the power to say no to the President.<sup>257</sup> Clearly OLC was not telling President Trump "no" with respect to his noncompliance with congressional subpoenas. So, "weaponizing" seems to be the wrong metaphor, while "enabling" fits the actual role and power of OLC much better.

The cause of Congress's oversight failures during the Trump Administration must instead be found in the demise of the political pressures that rewarded congressional persistence in previous administrations. Back in the days when the country had a more unified media market, the electorate learned about executive privilege disputes from a press corps that was suspicious of presidential power and anxious to expose instances of executive misconduct.<sup>258</sup> As a result, Congress's usual political weapons were amplified by the media, which was generally hostile to presidential invocations of executive privilege, and which effectively kept the issue of presidential opposition to a congressional investigation in the public eye. Professor William Marshall argued:

Congress also has an institutional ally assisting it in its oversight requests—the media. This is critically important because, in a political battle, public opinion is often the referee and the media is the vehicle through which public opinion will be informed. That the media will generally be on the side of disclosure is, of course, not

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257. See Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 728 (2005) (discussing how the Court's precedents give the OLC the ability to tell the President "no"); Dawn Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1582–83 (2007) (noting the ability to say "no" to the President is "essential" for OLC).

258. See Peterson, *Contempt of Congress*, *supra* note 1, at 145–46 (discussing the media's hostility towards invocations of executive privilege and the media's increasing focus on "scandal journalism," through which it exposes corruption and coverups and often can turn the tide in pressuring the President to renounce his invocation of executive privilege).

surprising, because the business of the media is to seek information and, as such, it is institutionally disposed to favor disclosure in any given case.<sup>259</sup>

In the post-Watergate era, when the press focused on “scandal journalism,” it had an institutional predisposition to focus on allegations of corruption and efforts to thwart disclosure of misconduct. Professor Richard Leon suggested that:

This scandal obsessed industry, whether it is on radio, TV, or in the print media, generates tremendous pressure on the congressional investigatory system: (1) to identify potential scandals; (2) to commence investigations of them; (3) to appoint the ‘right people’ to run those investigations; and (4) to leak information regarding the investigative process.<sup>260</sup>

This media environment gave a huge edge to Congress, as Professor William Marshall (a former White House lawyer himself) noted:

[B]ecause of the media, the purported trump card in the President’s hand, the claim of executive privilege, is actually a joker. Because the press (and to a lesser extent, the Congress) equates a claim of executive privilege with that of a cover-up, the result is that the claim of executive privilege has become a political liability to the President who invokes it.<sup>261</sup>

The relatively recent experience with the Watergate scandal and frequent press criticism of executive privilege claims multiplied the political pressure on the President to cede victory to Congress in disputes over his claims of executive privilege.<sup>262</sup>

The role of the press had changed entirely by the time President Trump took office. The media market had become fragmented along political lines so that President Trump’s supporters were watching and listening to press reports that were entirely different from those heard

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259. Marshall, *supra* note 19, at 810; *see also* Peterson, *Prosecuting Executive Officials*, *supra* note 111, at 628–29 (“Once a dispute reaches the subpoena level, the press becomes a major factor in the political conflict. Past experience suggests that Congress can use the press as a substantial weapon to obtain requested documents. As long as the need to uncover information within the executive branch has appeared legitimate, the press has been sympathetic to Congress’s interests and quite skeptical of claims of executive privilege.”).

260. Leon, *supra* note 153, at 830.

261. Marshall, *supra* note 19, at 811 (footnote omitted).

262. *See* Miller, *supra* note 53, at 671–73 (discussing the press’s common criticism of executive privilege as a “tool to conceal wrongdoing”).

by the rest of the country.<sup>263</sup> As a result, President Trump's supporters were not hearing negative press reports on his stonewalling of congressional oversight, and his polling numbers did not suffer because of his intransigence.<sup>264</sup> In particular, Fox News was reporting

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263. See, e.g., Alex Thompson, *Journalists and Trump Voters Live in Separate Online Bubbles, MIT Analysis Shows*, VICE (Dec. 8, 2016, 6:11 AM), <https://www.vice.com/en/article/d3xamx/journalists-and-trump-voters-live-in-separate-online-bubbles-mit-analysis-shows> [<https://perma.cc/ARK9-Q3BX>] (discussing MIT's Electome Analysis wherein the results revealed the polarizing data relied upon by Trump and Clinton supporters, as well as their segregation into groups of like-minded individuals); Jeffrey Gottfried, Michael Barthel & Amy Mitchell, *Trump, Clinton Voters Divided in Their Main Source for Election News*, PEW RSCH. CTR. (Jan. 18, 2017), <https://www.pewresearch.org/journalism/2017/01/18/trump-clinton-voters-divided-in-their-main-source-for-election-news> [<https://perma.cc/8YHT-SH3J>] (noting that 19% of all voters, and 40% of Trump voters relied on *Fox News* for election information); Kelsey Sutton, *Pew Study: Fox News Was No. 1 News Source—for Trump Voters*, POLITICO (Jan. 18, 2017, 2:00 PM), <https://www.politico.com/blogs/on-media/2017/01/study-fox-news-is-no-1-news-source-for-trump-voters-233773> [<https://perma.cc/5NW3-S7DX>] (discussing the partisan divide in election news consumption between Trump and Clinton supporters, wherein “[40%] of Americans who said they voted for Donald Trump said they relied on *Fox News* as their main source” and only 3% of Clinton voters relied on cable news); Berny Belvedere, *The Media Habits of Trump and Clinton Voters*, ARC DIGIT. (Jan. 30, 2017), <https://medium.com/arc-digital/the-media-habits-of-trump-and-clinton-voters-1f2db1a78eae> (relying on Pew Research Center's study which showed that Trump voters mostly relied on *Fox News* for election information, as compared to Clinton voters who cited a larger variety of sources); Mark Jurkowitz, Amy Mitchell, Elisa Shearer & Mason Walker, *U.S. Media Polarization and the 2020 Election: A Nation Divided*, PEW RSCH. CTR. (Jan. 24, 2020), <https://www.pewresearch.org/journalism/2020/01/24/u-s-media-polarization-and-the-2020-election-a-nation-divided> [<https://perma.cc/XC3A-YEQH>] (noting that Democrats and Republicans “place their trust in two nearly inverse news media environments.”); Linley Sanders, *The Difference Between Which News Outlets Republicans and Democrats Trust*, YOU GOV AM. (June 18, 2020, 2:30 PM), <https://today.yougov.com/topics/entertainment/articles-reports/2020/06/18/trust-news-republican-democrat-poll> [<https://perma.cc/N3UW-B8QA>] (discussing the differences in media sources that Democrats and Republicans trust; for example, most Democrats trust *The Washington Post*, *CNN*, *The New York Times*, and *MSNBC*, whereas Republicans trust *One America News* more so than any of these sources); Amy Mitchell, Mark Jurkowitz, J. Baxter Oliphant & Elia Shearer, *How Americans Navigated the News in 2020: A Tumultuous Year in Review*, PEW RSCH. CTR. (Feb. 22, 2021), <https://www.pewresearch.org/journalism/2021/02/22/how-americans-navigated-the-news-in-2020-a-tumultuous-year-in-review> [<https://perma.cc/FG7T-9G8N>] (noting the “dramatic divides” in which media outlets different groups of Americans rely on for world news, namely in deciding what is considered misinformation).

264. See, e.g., Brian Resnick, *Trump Is a Real-World Political Science Experiment*, VOX (July 19, 2018, 11:27 AM), <https://www.vox.com/science-and-health/2017/10/11/16>



only positive news about President Trump.<sup>265</sup> In fact, recent documents uncovered in the Dominion Voting System's libel suit against Fox News revealed a shift in their reporting. As Fox News faced declining viewership due to their factual election coverage, they abruptly changed course and began knowingly promoting false election conspiracies. As the New York Times reported:

Fox News stunned the Trump campaign on election night by becoming the first news outlet to declare Joseph R. Biden Jr. the winner of Arizona — effectively projecting that he would become the next president. Then, as Fox's ratings fell sharply after the election and the president refused to concede, many of the network's most popular hosts and shows began promoting outlandish claims of a far-reaching voter fraud conspiracy involving Dominion machines to deny Mr. Trump a second term.<sup>266</sup>

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288690/trump-political-science-psychology-follow-the-leader [https://perma.cc/8AQG-2CZD] (discussing Trump supporters' allegiance to his actions, relying on an *Axios*/SurveyMonkey poll finding that “79% of Republicans approved of Trump's press conference with Putin” regardless of the negative press and criticisms by well-respected GOP members, including Senator John McCain); David Lauter, *Why Nothing Matters to Trump Voters*, L.A. TIMES (Sept. 11, 2020, 8:46 AM), https://www.latimes.com/politics/newsletter/2020-09-11/why-nothing-matters-essential-politics [https://perma.cc/ZQ3A-5T2D] (noting that the deep partisan divisions in the United States existed long before Trump's election and that his actions may have worsened the divide); *How Popular is Donald Trump?*, FIVETHIRTYEIGHT, https://projects.fivethirtyeight.com/trump-approval-ratings/?cid=rrpromo [https://perma.cc/JG9X-CCGK] (last updated, Jan. 20, 2021, 11:57 AM) (including polls from various sources which compare Trump's approval ratings to the last twelve U.S. presidents); Susan Page & Sarah Elbeshbishi, *Exclusive: Defeated and Impeached, Trump Still Commands the Loyalty of the GOP's Voters*, USA TODAY (Feb. 22, 2021, 12:00 PM), https://www.usatoday.com/story/news/politics/2021/02/21/exclusive-trump-party-he-still-holds-loyalty-gop-voters/6765406002 [https://perma.cc/YC92-4ZEJ] (noting that a Suffolk University/USA TODAY poll finding that Trump's support was largely unaffected after his second impeachment trial); Ruth Igielnik, *Trump Support Remains Unmoved by Investigations, Poll Finds*, N.Y. TIMES (Sept. 22, 2022), https://www.nytimes.com/2022/09/22/upshot/donald-trump-approval-poll.html [https://perma.cc/L99F-S97N] (discussing a 2022 poll by *The New York Times* and Sienna College, wherein “[v]oters held nearly identical views from those earlier in the summer on whether they had a favorable view of Mr. Trump, whether they thought he had committed serious federal crimes, and whom they would support in a hypothetical 2024 Trump-Biden matchup).

265. Sean Illing, *How Fox News Evolved into a Propaganda Operation*, VOX (Mar. 22, 2019, 11:20 AM), https://www.vox.com/2019/3/22/18275835/fox-news-trump-propaganda-tom-rosenstiel [https://perma.cc/44H5-CREZ].

266. Jeremy W. Peters & Katie Robertson, *Fox Stars Privately Expressed Disbelief About Election Fraud Claims. ‘Crazy Stuff.’*, N.Y. TIMES (Apr. 24, 2023), https://www.nytimes.co

Thus, it's hardly surprising that, in this new media environment, the previous political edge enjoyed by Congress in executive privilege disputes vanished, leaving them powerless to enforce their oversight demands.

#### IV. SOLUTIONS TO THE COLLAPSE OF EFFECTIVE CONGRESSIONAL OVERSIGHT

Before this Article turns to a novel proposal for solving the oversight problem, it is worth reviewing the solutions that others have proposed to revitalize Congress's oversight of the executive branch.

##### A. *Contempt of Congress*

As already discussed, the contempt of Congress statute depends on the U.S. Attorney for the District of Columbia to bring a prosecution once a House of Congress has adopted a contempt resolution.<sup>267</sup> The Olson and Cooper memoranda established that the DOJ would not prosecute an executive official who refuses to comply with a congressional subpoena because the President had asserted executive privilege.<sup>268</sup> Based on those OLC memoranda, the DOJ has consistently declined to prosecute anyone who asserts executive privilege on behalf of the President. Accordingly, criminal contempt of Congress resolutions serve only a symbolic role in executive privilege disputes.

Congress retains its inherent constitutional power to cite subpoena scofflaws for civil contempt and imprison them until they comply with the subpoena. As previously noted, some have argued that Congress should make use of this inherent contempt power in executive privilege cases.<sup>269</sup> Most notably, Professor Josh Chafetz has argued for reinvigoration of Congress's inherent contempt power in executive privilege confrontations:

[T]he houses of Congress have the authority to hold executive branch officials in contempt, and that defiance of a congressional subpoena qualifies as contempt. Most notably, . . . each house is properly understood as the final arbiter of disputes arising out of its

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m/2023/02/16/business/media/fox-dominion-lawsuit.html?searchResultPosition=3 [https://perma.cc/JF7R-BLV9].

267. See *supra* Section II.A (discussing the process for prosecution after a contempt resolution has been adopted and the political pressures this creates on the President).

268. See *supra* text accompanying notes 83–84 (discussing the Olson and Cooper memoranda's development of the DOJ's approach to prosecutive executive officials when asserting executive privilege).

269. Chafetz, *supra* note 114, at 1091.

contempt power—that is, when an executive branch official raises executive privilege as a defense justifying her defiance of a congressional subpoena, the house of Congress is the proper tribunal to determine whether the invocation of executive privilege was appropriate. This means that legislative-executive disputes over the contempt power should be understood to be nonjusticiable.<sup>270</sup>

Yet another congressional advocate has argued that Congress should delegate authority “to a specialized internal body that would adjudicate contempt citations and forward its findings and recommendations to the full chamber for final disposition.”<sup>271</sup>

How would the application of Congress’s use of its inherent contempt power work in executive privilege disputes? Those who favor this solution argue that “each house has a sergeant-at-arms, and the Capitol building has its own jail. The sergeant can be sent to arrest contemnors and, if necessary, hold them in his custody until either their contempt is purged or the congressional session ends.”<sup>272</sup>

It is hard to imagine how this use of the inherent contempt power would work against an executive official who asserted the President’s claim of executive privilege. The executive branch has a very substantial internal security apparatus, and those security officials are unlikely to permit a congressional sergeant-at-arms to arrest an executive official. As a result, the use of the inherent contempt power against the executive branch seems futile, at best, and dangerously confrontational at worst. Moreover, inherent contempt authority is no more consistent with the right of the President to make an executive privilege claim than is the application of the criminal contempt statute. Neither branch has unilateral authority to impose its will on the other branch in executive privilege disputes where each side has clear constitutional prerogatives.

*B. Using Congress’s Other Constitutional Powers Such as the Appropriations Power*

Of course, contempt of Congress is not the only weapon at Congress’s disposal for inducing compliance with subpoenas to the executive branch. Professor Chafetz has urged Congress to utilize its

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270. *Id.* at 1085–86.

271. Michael A. Zuckerman, *The Court of Congressional Contempt*, 25 J.L. & POL. 41, 75 (2009).

272. Chafetz, *supra* note 114, at 1152.

appropriations authority to enforce congressional subpoenas to the executive branch:

There is nothing stopping the House from putting a provision in the next funding bill that zeros out funding for the White House Counsel's Office. House leadership could announce that, so long as the counsel's office is producing bad legal argumentation designed for no purpose other than protecting the president from constitutional checks, the American people should not have to pay for it. Of course, the Senate could try to strip that rider, or President Trump could veto the bill, but if the House held firm, the administration's choice would be to mollify the House by turning over subpoenaed information, accept the defunding of the counsel's office, or accept the partial government shutdown that would come with failure to pass the appropriations bill.<sup>273</sup>

Congress certainly has substantial power to punish the President by using its appropriations power, but it never has done so in the context of an executive privilege dispute, even when both houses were controlled by the party opposing the President.<sup>274</sup> Any appropriations cuts would have to be passed by both houses with a sufficient majority to overcome the inevitable presidential veto. Of course, Congress could, as Professor Chafetz suggests, place the appropriations rider in a bill so important to the President that it might escape a presidential veto,<sup>275</sup> such as a bill funding a substantial part of the federal government, but Congress has had bad political luck when it has forced governmental shutdowns.<sup>276</sup> Inevitably, the public blames

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273. Josh Chafetz, *The House Can Play Hardball, Too. It Can Arrest Giuliani.*, N.Y. TIMES (Oct. 10, 2019), <https://www.nytimes.com/2019/10/10/opinion/impeachment-contempt-congress.html> [<https://perma.cc/TSS7-7XEG>].

274. See Josh Chafetz, *Congress Can't Rely on the Courts to Enforce its Subpoenas. Don't Panic.*, WASH. POST (Mar. 2, 2020, 12:08 PM), <https://www.washingtonpost.com/outlook/2020/03/02/congress-cant-rely-courts-enforce-its-subpoenas-dont-panic> [<https://perma.cc/9VC9-FGWM>] (discussing the use of such a rider in an appropriations bill as a hypothetical yet to be attempted by Congress).

275. See *id.* (suggesting placing the rider in an appropriations bill that, if not passed, would shut down a substantial portion of the government).

276. See, e.g., Jennifer Agiesta & Grace Sparks, *Polls Agree: Americans Don't Like Shutdowns and They Blame Trump*, CNN (Jan. 18, 2019, 3:14 PM), <https://www.cnn.com/2019/01/18/politics/polling-roundup-shutdown/index.html> [<https://perma.cc/XBD7-HNHQ>] (discussing the government shut down in early 2019 and the public's overwhelming blame of Trump for the shutdown); Nathaniel Rakich, *Who Americans Usually Blame After Shutdowns over Federal Spending*, FIFTYTHREE (Feb. 8, 2023, 6:00 AM), <https://fivethirtyeight.com/features/government-shutdown-polls> [<https://per>

Congress and not the President, and Congress has had to back off. Thus, although the appropriations power is a constitutionally permissible way to pressure the President, Congress's failure to use it during any executive privilege dispute suggests that it may not be a practical weapon in a congressional subpoena battle.

Professors Kevin Stack and Michael Vandenberg have proposed a novel use of the appropriations power by arguing that Congress should use appropriations riders in two different ways to encourage executive branch compliance with subpoenas.<sup>277</sup> The first proposal would deny “appropriations to officials who thwart subordinates from communicating with Congress.”<sup>278</sup> This type of appropriations rider faces several significant obstacles. First, denying funds to pay specific individuals may well be an unconstitutional bill of attainder. In *United States v. Lovett*,<sup>279</sup> the Supreme Court ruled that such an appropriations rider, when directed at the salaries of three State Department employees whom Congress deemed to be Communist sympathizers, was a bill of attainder.<sup>280</sup> Any legislatively imposed punishment upon specific individuals is likely to run afoul of this prohibition. Moreover, even if it were not deemed to be a bill of attainder, the OLC would likely determine that it was an unconstitutional limitation on the President's power to assert executive privilege under the same rationale that supported the conclusion that criminal contempt of Congress was an unconstitutional restriction on the President's power to assert privilege.<sup>281</sup> If salaries were denied to anyone who complied with the President's assertion of privilege (even if the assertion was constitutionally supported), then the President would never be able to assert his constitutionally based claim.

Stack and Vandenberg propose a second oversight rider which

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ma.cc/TBR5-P32L] (noting that since 2010, the public has consistently blamed the GOP more than democrats for government shutdowns and by the end of the shutdown 77% of the public polled disapproved of the GOP's handling of it).

277. Kevin Stack & Michael Vandenberg, *Oversight Riders*, 97 NOTRE DAME L. REV. 127, 132 (2021).

278. *Id.*

279. 328 U.S. 303 (1946).

280. *Id.* at 315–16.

281. See Olson Opinion, *supra* note 83, at 102 (noting in a Memorandum Opinion for the Attorney General that “as a matter of statutory interpretation and the constitutional separation of powers, we believe that the contempt of Congress statute was not intended to apply and could not constitutionally be applied to an Executive Branch official who asserts the President's claim of executive privilege in this context”).

directly targets compliance with subpoenas. In addition to the salary sanction, this subpoena rider adds a prohibition on use of funds for resistance to congressional subpoenas. As a result, the subpoena rider we propose creates not only the prospect of a salary sanction, like the Section 713 rider, but also the prospect of violation of the Antideficiency Act, which prohibits a federal official from spending federal funds that have not been appropriated by Congress.<sup>282</sup>

This proposal faces a similar practical obstacle, which is the likely determination by OLC that such a rider would impermissibly burden the President's assertion of his constitutionally protected privilege and would instruct the executive official to ignore the appropriations rider. The authors' response is that the Government Accountability Office (GAO) could force compliance because "once prompted by a member of Congress, the GAO would also be making an independent determination of the validity of the assertion of the privilege . . . . The GAO is not part of the executive branch, and therefore is not bound by the [OLC]'s advice."<sup>283</sup> The GAO could then order that the salary be returned to the government. This suggestion, however, ignores the fact that GAO, as an arm of the legislative branch, may not order an executive official to take any action, including repayment of salary. In *Bowsher v. Synar*,<sup>284</sup> the Supreme Court ruled that the Comptroller General (as head of the GAO) was a congressional officer who could not constitutionally order an executive official to make certain budget cuts required by the Deficit Reduction Act.<sup>285</sup> Thus, the GAO would be powerless to force executive branch compliance with an appropriations rider deemed unconstitutional by OLC.<sup>286</sup>

#### V. HOW CONGRESS CAN REINVIGORATE THE CIVIL ENFORCEMENT ACTION

Given the problems with Congress's other options, it is necessary to rethink the use of civil litigation to enforce congressional subpoenas in an era in which neither political pressure nor contempt of Congress

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282. Stack & Vandenberg, *supra* note 277, at 133.

283. *Id.* at 167.

284. 478 U.S. 714 (1986).

285. *Id.* at 732, 736.

286. See Olson Opinion, *supra* note 83, at 102 (noting the inability to constitutionally apply the contempt of Congress statute to any Executive Branch official who asserts executive privilege). The same would be true of any effort to employ the sanctions of the Antideficiency Act, which can only be enforced by the executive branch. 18 U.S.C. § 1341.

nor Congress's other constitutional powers provides an effective mechanism to allow Congress to conduct effective oversight of the executive branch. There are two significant problems that must be addressed.

The first issue is the problem of delay that has made civil enforcement of congressional subpoenas so impractical. These issues include justiciability issues and claims of absolute privilege that typically bog down civil enforcement actions.<sup>287</sup> To resolve this problem Congress would have to litigate a civil enforcement case all the way to the Supreme Court to obtain the Court's resolution of these questions. For most of these questions, Congress should prevail easily, at least based on existing precedent.

The second issue is how to resolve the much trickier question of how a court will be able to formulate a remedy given the innumerable ways that oversight subpoena disputes can be resolved. Fortunately, that problem (and any political question concerns that may arise from it) can be solved by adopting an arbitration format known as "high-low" arbitration or "final offer arbitration," in which the judge must select, without modification, one of the proposed compromises offered by the parties. As detailed below, by adopting such an arbitration format, the court would solve the remedial issue and encourage the parties to settle the dispute out of court.

*A. Eliminating Procedural Roadblocks to Civil Enforcement of Congressional Subpoenas*

The procedural and substantive objections routinely raised by the DOJ in response to civil enforcement actions delay civil enforcement actions so much that they have been an ineffective method of enforcing legitimate oversight subpoenas. In the *Miers/Bolton* litigation, the parties filed lengthy briefs on numerous justiciability issues and the question of absolute immunity.<sup>288</sup> Judge Bates's decision on these issues took well over 100 pages to dismiss the justiciability and absolute privilege questions before sending the parties back to the

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287. See David Rapallo, *House Rules: Congress and the Attorney-Client Privilege*, 100 WASH. U. L. REV. 455, 490 (2022) (discussing the lengthy undertaking of filing a lawsuit and litigating an issue in the courts).

288. See Comm. on Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53, 55–56 (D.D.C. 2008) (arguing the case should be dismissed because presidential autonomy grants the President's closest advisors absolute immunity).

negotiating table.<sup>289</sup> In the *McGahn* litigation, after the district court decided in favor of the House committee, the case went up to the D.C. Circuit which first ruled that the House committee lacked standing, a ruling that was reversed by the D.C. Circuit sitting en banc.<sup>290</sup> Then on remand, the original panel ruled that the House committee lacked a cause of action that permitted them to sue.<sup>291</sup> That ruling was on appeal to the court en banc when the case was settled by the Biden Administration.<sup>292</sup> This litigation dragged on for over two years and still never reached the merits of Congress's right to obtain McGahn's testimony.<sup>293</sup> Obviously, these procedural issues would have to be definitively resolved by the Supreme Court before civil enforcement would become a practical solution to Congress's oversight problem. As Jonathan Shaub has persuasively argued, Congress can make that happen by adopting a litigation strategy designed to seek a Supreme Court ruling that would lay the foundation for a more productive negotiating environment.<sup>294</sup>

1. *Standing and the existence of a civil cause of action*

As previously noted, OLC has reversed course on the availability of a civil action to enforce a congressional subpoena.<sup>295</sup> In the Olson opinion, OLC determined that, if all else failed Congress, civil litigation was an alternative means to enforce the right to executive documents and testimony.<sup>296</sup> In 2008, however, the DOJ argued that a civil suit brought by Congress to enforce its subpoena was non-justiciable, reversing its previous position set forth in the Olson

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289. *Id.* at 57.

290. *Comm. on the Judiciary v. McGahn*, 951 F.3d 510, 516 (D.C. Cir. 2020), *rev'd*, 968 F.3d 755 (D.C. Cir. 2020) (en banc).

291. *Comm. on the Judiciary v. McGahn*, 973 F.3d 121, 123 (D.C. Cir. 2020).

292. Shaub, *McGahn Agreement*, *supra* note 229.

293. *Id.*

294. *Id.*

295. *See supra* text accompanying notes 164, 166, 171–72 (discussing the *Miers* case and the House Judiciary Committee's civil suit against Miers to obtain judicial enforcement of the subpoenas).

296. *See Olson Opinion*, *supra* note 83, at 131–32, 137 (noting that during an 1886 debate regarding President Cleveland's refusal to produce documents to Congress, senators acknowledged that there was no remedy if the president refused production of such documents, and noting that today, Congress may "obtain a judicial resolution of the underlying privilege claim and vindicate its asserted right to obtain any documents by a civil action for enforcement of a congressional subpoena") (emphasis added).



Opinion.<sup>297</sup> Eventually, the DOJ argued that the House's effort to enforce its subpoena to Donald McGahn should be dismissed because the House lacked standing and a cause of action to enforce its subpoena in court.<sup>298</sup>

Of course, the issues of standing and right to sue could be resolved by statute. Professor Emily Berman proposed such a statute in 2010.<sup>299</sup> The draft bill expressly granted each house standing to sue and resolved any issues over Congress's right to sue and federal subject-matter jurisdiction.<sup>300</sup> As discussed below with respect to a possible final-offer arbitration statute, a legislative solution would have to overcome a likely presidential veto given the current opposition of the DOJ to civil enforcement of congressional subpoenas.<sup>301</sup>

It should not be necessary, however, to enact a statute to solve the standing and right to sue issues. The original panel decision rejecting House standing to sue was overturned by the D.C. Circuit Court sitting en banc.<sup>302</sup> The en banc decision persuasively concludes that Congress suing to enforce its right to obtain documents is distinguishable from the congressional standing rejected by the Supreme Court in *Raines v. Byrd*.<sup>303</sup> Jonathan Schaub recently published a persuasive analysis of the standing issue that supports the en banc decision of the D.C. Circuit.<sup>304</sup> Between the en banc decision and Professor Schaub's excellent

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297. See *Comm. On the Judiciary v. Miers*, 558 F. Supp. 2d 53, 55–56 (D.D.C. 2008) (wherein “the Executive” argued that the DOJ lacked standing and a proper cause of action because this kind of dispute was not justiciable).

298. *Comm. on the Judiciary v. McGahn*, 951 F.3d 510, 513 (D.C. Cir. 2020), *rev'd*, 968 F.3d 755 (D.C. Cir. 2020) (en banc).

299. See Emily Berman, *Executive Privilege Disputes Between Congress and the President: A Legislative Proposal*, 3 ALBANY GOV'T L. REV. 741, 789 (2010) [hereinafter Berman, *Executive Privilege*] (noting that “[s]ection 105 makes plain that when a majority of a House of Congress intends to allow either itself or one of its committees or subcommittees to bring a suit under this Act, that the House or committee or subcommittee has ‘standing’ to challenge in the courts a claim of executive privilege”).

300. *Id.* at 789–90.

301. See *infra* text accompanying notes 336–37 (discussing multiple instances of clear DOJ opposition to the litigation of executive privilege disputes including two OLC Opinions).

302. *Comm. on the Judiciary v. McGahn*, 968 F.3d 755, 778 (D.C. Cir. 2020) (en banc).

303. 521 U.S. 811, 813 (1997).

304. Jonathan David Schaub, *Interbranch Equity*, 25 U. PA. J. CONST. L. (forthcoming 2023) (manuscript at 36) [hereinafter Schaub, *Interbranch Equity*], [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4224894](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4224894).

analysis of the issue, the argument for congressional standing is made persuasively enough to obviate the need for further analysis.<sup>305</sup>

The issue of a congressional cause of action is slightly more complicated. After the en banc decision, the *McGahn* case was remanded to the original panel, which then held that the House did not have a cause of action to bring the case in federal court.<sup>306</sup> This panel decision was also appealed to the full D.C. Circuit Court,<sup>307</sup> but the House and the Biden Administration settled the dispute and mooted further consideration of the House lawsuit.<sup>308</sup> As suggested by Jonathan Shaub, Judge Griffith's opinion for the majority on remand "focused not on the nature of the cause of action itself—a subpoena enforcement action—but the fact that it involved an interbranch dispute."<sup>309</sup> The fact that it was an interbranch dispute, however, makes no difference with respect to the existence of a cause of action to enforce a subpoena. Indeed, the Supreme Court approached President Trump's challenge to the enforcement of a subpoena for his tax records as an interbranch dispute.<sup>310</sup> Nonetheless, no one questioned whether President Trump had a right to sue to prevent the firm from complying with the House subpoena.<sup>311</sup> Given the participation by the DOJ on behalf of President Trump in opposing the House, the *Mazars* case, is, for this purpose, indistinguishable from a congressional action for subpoena enforcement.

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305. The Supreme Court may resolve some of these issues when it decides the related issue in the case involving the Rule of Seven—a federal law which permits seven minority members to obtain documents from the executive branch. See *Maloney v. Murphy*, 984 F.3d 50, 54 (D.C. Cir. 2020), *vacated sub nom.*, *Carnahan v. Maloney*, 143 S. Ct. 2653 (2023) (mem.). The future of these issues remains an open question.

306. *Comm. on the Judiciary v. McGahn*, 973 F.3d 121, 125–26 (D.C. Cir. 2020) (en banc).

307. *Comm. on the Judiciary v. McGahn*, No. 19-5331, 2020 U.S. App. LEXIS 32573, at \*1 (D.C. Cir. Oct. 15, 2020) (granting the House Judiciary Committee's appeal for a rehearing en banc).

308. See Shaub, *McGahn Agreement*, *supra* note 229 (critiquing the settlement agreement between the House Judiciary Committee and McGahn as a missed opportunity to resolve a constitutional question of executive authority).

309. Shaub, *Interbranch Equity*, *supra* note 304, at 48.

310. See *Trump v. Mazars USA LLP*, 140 S. Ct. 2019, 2035 (2020) (“[S]eparation of powers concerns are no less palpable here simply because the subpoenas were issued to third parties. Congressional demands for the President’s information present an interbranch conflict no matter where the information is held—it is, after all, the President’s information.”).

311. *Id.*

For civil enforcement of congressional subpoenas to work properly, the Supreme Court would have to resolve the standing issue, establish Congress's right to sue for civil enforcement, and resolve any remaining questions under the political question doctrine. In addition, the Court would have to resolve any substantive issues involving claims of absolute privilege or immunity from congressional subpoena. Without final action by the Court, the DOJ will continue to assert these defenses and delay the resolution of privilege disputes so significantly as to make civil enforcement an impractical method of dispute resolution. Professor Schaub has pointedly lamented the House's decision to settle the *McGahn* case on the ground (among others) that it prevented the en banc court from reversing the panel decision and perhaps foreclosed Supreme Court consideration of several disputed issues in a manner that might have enabled more effective compromise between the branches.<sup>312</sup>

The standing and right-to-sue issues should be easily resolved in favor of Congress. Similarly, the Court should easily dispose of the claims of absolute privilege or immunity, which are inconsistent with the equal status and parallel constitutional rights of the two branches. Once these issues are resolved, the district court need not spend time on hearing lengthy procedural challenges. Indeed, the district court can instruct each party to brief only the issue of which proposal more carefully balances the constitutional rights of the respective parties.

## 2. *The political question doctrine*

At this point, I must acknowledge that, more than a decade ago, I argued that courts should not dictate the terms under which executive-branch documents would be disclosed to Congress.<sup>313</sup> The reasoning is as follows: Although it is somewhat difficult to assess the relative weight to be assigned to each branch's claim, it is far more difficult for a court to design an appropriate remedy for such a case. This is in large part because Congressional access to executive branch documents involves

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312. See Schaub, *McGahn Agreement*, *supra* note 229 (arguing that the *McGahn* case was Congress's best opportunity since Watergate to restrain the executive branch's ability to exercise privilege over information).

313. See Peterson, *Contempt of Congress*, *supra* note 1, at 154 (arguing that negotiation and accommodation between branches is preferable to judicial enforcement because the complexity of executive privilege disputes allows for a high variety of outcomes which in turn frustrates effective judicial management).

innumerable variables.<sup>314</sup> This variability, while a hindrance to courts, has traditionally been useful in negotiations between branches. In most disputes over executive privilege assertions, neither party is totally recalcitrant, rather Congress and the executive administration work out a compromise which usually includes many conditions on the access given to Congress.<sup>315</sup> In most disputes over executive privilege assertions, Congress and the executive branch work out a compromise, and that compromise usually includes many conditions on the access given to Congress.<sup>316</sup> The conditions typically include which Congressional officials may see the documents, where the documents may be reviewed, whether Congress will get to keep any of the documents or merely be able to take notes, the length of time for document review, whether the documents will be redacted before congressional review, and whether the documents may ever be released outside of Congress.<sup>317</sup> Depending upon the needs of each party and the political setting in which the negotiation takes place, the details of these agreements may vary widely. When Congress is in a stronger bargaining position, they might obtain disclosure in the form of a delivery of documents to a full committee and staff. In a case where Congress has a lesser interest and less bargaining power, disclosure might be limited to review by the committee chair and ranking minority member at the DOJ with no copying permitted, but with the right to take notes on the documents. It is not hard to see that there is a wide variety of permutations and combinations in the conditions of disclosure. All these details are the result of extensive negotiation

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314. See Johnsen, *supra* note 3, at 1139 (detailing the traditional negotiation-accommodation process in executive privilege disputes).

315. *Id.*

316. Indeed, Emily Berman's proposed civil enforcement statute, would grant huge remedial discretion to the district court. See Berman, *Executive Privilege*, *supra* note 299, at 800 ("The court shall exercise discretion to determine and craft appropriate remedies in any given case based on equitable and prudential concerns. Remedies may include, but are not limited to, an order requiring—(a) full disclosure; (b) partial disclosure; (c) no disclosure; (d) disclosure of redacted information; (e) disclosure of substitute summaries; (f) disclosure under a protective order that bars the information from being disclosed beyond Congress; (g) oral briefings; (h) continued negotiations under the court's supervision; (i) other measures which the court finds suitable given the information in question and the congressional need.").

317. The information discussed in Section V.A.2 is based upon first-hand knowledge I gained while working for the OLC, first as a staff attorney from 1982–1985 and then as a Deputy Assistant Attorney General from 1997–1999. During the latter service, my portfolio included negotiating executive privilege disputes with Congress.

between Congress and the DOJ, and the eventual compromise is highly influenced by the creativity of the negotiators.

A federal court has no judicially manageable standards to determine which conditions to impose on the parties when resolving an executive privilege dispute. Indeed, the reason for the traditional success of the negotiation-accommodation process is that the parties in the best position to assess the impact of each condition of a disclosure agreement can optimize the agreement to balance the most useful conditions for congressional access against the most useful protections for executive confidentiality based upon the particulars of an individual case. It is difficult to imagine a situation less suited to judicial resolution than the construction of a disclosure agreement that involves an almost infinite combination of disclosure conditions.

The remedial intricacy involved in judicial imposition of a disclosure agreement makes it a uniquely problematic application of judicial power, and it has traditionally encouraged courts to leave it to the parties to negotiate a solution to executive privilege disputes. Any attempt to revitalize civil enforcement of congressional subpoenas to the executive branch must deal with this remedial conundrum. The proposal I set forth below is my effort to do just that.

#### *B. Adopting an Arbitration Model for Executive Privilege Disputes*

Congress can solve the perplexing remedial problem and, at the same time, promote the negotiation-accommodation process by urging the district court to adopt an arbitration model in civil enforcement cases. What does it mean for a district court to adopt an arbitration model for executive privilege disputes? Such a model would involve three core principles: First, encouraging the parties to resolve their dispute through the negotiation/accommodation process before stepping in to dictate a result in favor of one of the parties. Second, requesting the parties to submit detailed proposals for how to resolve the dispute if they are unable to resolve the dispute themselves. Then choosing whichever proposal most fairly balances the competing interests of the executive and legislative branches without the option of creating a different, compromise remedy—an arbitration format known as “high-low” arbitration or “final offer arbitration.”<sup>318</sup> Third, setting an expedited schedule for resolution of the case to ensure that Congress can obtain readily available information in a timely manner.

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318. See Monhait, *supra* note 9, at 112 (describing final offer arbitration methods in the context of player-salary negotiation in Major League Baseball).

If this technique sounds familiar, it is likely because it is identical to the method used by Major League Baseball to resolve salary arbitrations.<sup>319</sup> In the baseball setting, arbitration is an option that the players' union negotiated to give players some leverage to obtain a higher salary before they are eligible for free agency.<sup>320</sup> Players who have from three-to-six years' service in the major league can opt to bring their case for a salary boost before a three-person arbitral panel, which operates under an expedited schedule.<sup>321</sup> At the arbitration hearing, each party is given one hour to present their cases—first the player, then the team—with a fifteen-minute break between each presentation.<sup>322</sup> After a thirty-minute break to give the parties a chance to prepare rebuttals, each party has thirty minutes to present final arguments.<sup>323</sup> The arbitral panel then has a day or two to reach a decision. Importantly, the panel must choose either the player's proposal or the team's proposal, it cannot create a compromise decision.<sup>324</sup>

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319. See MAJOR LEAGUE BASEBALL PLAYERS ASS'N, 2017–2021 BASIC AGREEMENT art. VI.E (2016) [hereinafter MLBPA CBA], [https://www.mlbplayers.com/\\_files/ugd/b0a4c2\\_95883690627349e0a5203f61b93715b5.pdf](https://www.mlbplayers.com/_files/ugd/b0a4c2_95883690627349e0a5203f61b93715b5.pdf) [<https://perma.cc/N5RA-ZSNQ>] (providing for players' conditional rights to salary arbitration).

320. See Jeff Passan, *Passan: Inside the Wild, Wonky World of MLB Salary Arbitration*, ESPN (Jan. 10, 2019, 9:00 AM), [https://www.espn.com/mlb/story/\\_/id/25722707/jeff-passan-wild-wonky-world-mlb-salary-arbitration](https://www.espn.com/mlb/story/_/id/25722707/jeff-passan-wild-wonky-world-mlb-salary-arbitration) [<https://perma.cc/CH9W-9RSL>] (“[A]rbitration is among the last avenues for players to seek salary gains amid the sport's financial correction.”); Joe Rivera, *What Is MLB Arbitration? Explaining the Rules, Eligibility & How the Process Works*, THE SPORTING NEWS (Jan. 13, 2020), <https://www.sportingnews.com/us/mlb/news/what-is-arbitration-mlb-what-does-it-mean-baseball-eligibility-process/1atg6pymf69o1x5yy2v31o03w> [<https://perma.cc/9HQU-W86G>] (outlining the basic process of salary arbitration and asserting that “[a]rbitration-eligible players are more fairly paid”); Jeff Tracy, *How MLB Salary Arbitration Works*, AXIOS (Feb. 23, 2021), <https://www.axios.com/2021/02/23/major-league-baseball-salary-arbitration> (comparing the outcomes between player-won arbitration, team-won arbitration, and negotiations that avoided settlement in 2021).

321. Monhait, *supra* note 9, at 107, 117.

322. *Id.*

323. Passan, *supra* note 320.

324. See Monhait, *supra* note 9, at 112 (explaining that in Major League Baseball salary arbitration, the arbitrator must choose between the player's and team's salary offers); Matt Mullarkey, Note, *For the Love of the Game: A Historical Analysis and Defense of Final Offer Arbitration in Major League Baseball*, 9 VA. SPORTS & ENT. L.J. 234, 238 (2009) (stating that Major League Baseball salary arbitration is “unlike other systems” because the arbitrator cannot find a compromise); Edward Silverman, *Dick Woodson's Revenge: The Evolution of Salary Arbitration in Major League Baseball*, 41 PEPP. L. REV. 21, 32 (2013)

Commentators agree, this procedure is efficient and successful at quickly resolving salary disputes.<sup>325</sup> The entire process takes place between mid-January and March 15 each year.<sup>326</sup> This encourages resolution of the dispute before each playing season begins.<sup>327</sup> Moreover, by forcing the arbitral panel to choose one of the two proposals without the option of a compromise in the middle, the parties are encouraged to move their proposals closer to a compromise agreement. When an arbitrator is allowed to pick any salary number, parties are motivated to take extreme positions in the hope that the arbitrator will split the difference between the proposals.<sup>328</sup> Forcing the arbitrator to select one of the proposals has the opposite effect.

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(discussing how Major League Baseball salary arbitrators must decide between the two offers but are not required to write out or rationalize decision); Dustin Dorsino, Note, *Arbitration on Ice: How MLB Can Solve the Issues with Its Salary Arbitration Process by Borrowing Practices from the NHL & Implementing Pre-Arbitration Mediation*, 71 SYRACUSE L. REV. 1455, 1466 (2021) (outlining what parties in Major League Baseball salary arbitration are allowed to present to the arbitrator prior to the arbitrators' decision between the two offers).

325. See Monhait, *supra* note 9 at 131, 137 (arguing that the pre-season arbitration deadline reduces the cost of salary-dispute resolution and citing high pre-arbitration settlement rates as evidence of the method's success); Ben Einbinder, *What FINRA Can Learn from Major League Baseball*, 12 PEPP. DISP. RESOL. L.J. 333, 344–45 (2012) (advocating for the use of final offer arbitration by the Financial Industry Regulatory Authority and noting that proponents emphasize the quick and fair nature of the process while opponents cannot refute high rates of pre-arbitration settlements).

326. See MLBPA CBA, *supra* note 319, at art. VI.E.13 (providing that the initial exchange of salary figures will take place in January, that the final date for arbitration hearings is February 20, that arbitrators “shall make every effort to [render a decision] not later than 24 hours following the close of the hearing,” and that specific panel votes will be disclosed to the parties on March 15).

327. While there is no strict provision for the scheduling of opening day, the playing season typically begins in the first two weeks of April or the last week of March. See generally *New York Yankees Opening Day History*, BASEBALL ALMANAC, [https://www.baseball-almanac.com/opening\\_day/odschedule.php?t=NYA](https://www.baseball-almanac.com/opening_day/odschedule.php?t=NYA) [<https://perma.cc/5PUR-F4CV>] (listing the win-loss record of the New York Yankees on each opening day since 1901).

328. Monhait, *supra* note 9, at 132–33 (“Contrasting this system to one where the arbitrator can select a compromise between the submitted figures illustrates the strengths of the MLB system. Under a compromising system, parties are more likely to submit aspirational numbers than reasonable figures. In MLB’s system, however, ‘the best final position is the more reasonable one’ . . . Therefore, the system forces the parties to commit to a position that must be reasonable to have any chance of winning, and then gives them time to bargain between those reasonable positions.” (footnotes omitted)).

This is how one scholar described the effect of the baseball arbitration system:

Baseball arbitration's all-or-nothing system is designed to not only persuade parties to settle their disputes to avoid unpredictable and uncompromising hearings, but also to submit reasonable proposals before the hearing. The uncertainty of a different salary than the party had intended on paying or being paid will encourage parties to propose more moderate or reasonable salaries and settle their differences in order to keep from going into arbitration. One could argue that arbitration would encourage parties to propose reasonable salaries, knowing that they have to make a strong case to the panel not only that it should side with that party, but also that the figure proposed is a reasonable one in consideration of all the evidence. One must remember that even if all the evidence shows that the player is right in demanding more than the club is willing to offer, if the amount the player proposes exceeds what the panel thinks is reasonable for his worth, then it will inevitably side with the franchise.<sup>329</sup>

Jeff Monhait performed a more sophisticated analysis of the baseball arbitration system using a general structural assessment model of dispute resolution.<sup>330</sup> Among his findings included the following: (1) "the system lowers the costs of resolving salary disputes and avoids holdouts, comporting with cost-benefit analysis"; (2) "in accordance with cost-benefit analysis, the system lowers costs by encouraging the parties to negotiate reasonably, and it incentivizes settlement prior to a hearing"; and (3) "the outcomes demonstrate the system's success at producing settlement prior to a hearing."<sup>331</sup> The data on the arbitration process shows that "the system effectively encourages teams and players to resolve these disputes amongst themselves while providing a backup option to ensure the dispute's resolution prior to spring training."<sup>332</sup>

Baseball arbitration is not without its critics.<sup>333</sup> The two principal criticisms of the baseball arbitration process, however, are unique to

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329. Mullarkey, *supra* note 324, at 245.

330. See Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute Systems Design*, 14 HARV. NEGOT. L. REV. 123, 127, 128 (2009) (proposing that the level of success regarding dispute systems involves analyzing a variety of criteria).

331. Monhait, *supra* note 9, at 131.

332. *Id.* at 139.

333. See Dorsino, *supra* note 324 at 1465–75 (arguing that Major League Baseball salary arbitration encourages arbitration ineligible players to sign bad contracts,



baseball and would not be an issue in the resolution of executive privilege disputes. First, Major League Baseball has far greater resources than individual players, so the teams can do the number crunching necessary to make a persuasive case much more efficiently.<sup>334</sup> Second, when teams make their case for a lower salary by denigrating the ability and performance of their own player, they can wind up alienating the player and poisoning the relationship between the player and the team.<sup>335</sup> In the case of executive privilege disputes, both parties can be represented by equally capable counsel, and the arbitration process could only improve their relationship when compared with the consequences of the recent intransigence of the executive branch.

Congress could mandate this process for the resolution of suits for civil enforcement of congressional subpoenas. A statute would be the ideal solution because it could set forth all the details with respect to how a district court should handle such cases, including a mandate for an expedited schedule. It would also ensure that there would be consistency in how the cases were handled. Such a statute could also require that any appeal to the D.C. Circuit be resolved on an expedited schedule as well, with the court of appeals limited to the same two choices as the district court.

Of course, the principal obstacle to such a proposed statute would be the likely opposition of the President and his veto of any bill adopted by Congress. The DOJ opposed making executive privilege disputes subject to the statutory authority the Senate has for civil enforcement of subpoenas.<sup>336</sup> The Department has also opposed litigating these executive privilege disputes, notwithstanding its own attempt to bring such a case in the *Anne Gorsuch* privilege

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promotes unreasonable offers and enables uncertainty, and harms player-team relations, among other things).

334. See Passan, *supra* note 320 (discussing the Major League Baseball's coordination of team arbitration targets, the teams' unique access to resources such as supercomputers, analysts, and a large labor relations department, and alternatively, the risk analysis of player-representation agencies considering arbitration trials).

335. See Monhait, *supra* note 9, at 140–41 (responding to the argument that final offer arbitration damages player-team relationships by noting arbitration hearings “serve[] as a backstop in case negotiations fail”).

336. As noted earlier, the Senate expressly disclaimed any intent to prohibit such civil enforcement cases even though they acceded to the President's request that such cases be excluded from the statute. See *supra* text accompanying notes 102–08.

controversy.<sup>337</sup> One might wish that Congress had the institutional ambition to override the President's veto to establish a better method for preserving its oversight authority, but there is little hope that such optimism would be rewarded with a showing of unity across party lines.<sup>338</sup>

Congress's failure to adopt such a proposal would not be an insuperable obstacle to implementing the proposed arbitration principles in resolving executive privilege disputes between the President and Congress. District courts already have the power to adopt an arbitration model for handling executive privilege disputes. District courts have discretion to manage the pretrial process in the manner that best suits the needs of the particular case.<sup>339</sup> This discretion includes the power to expedite the process of briefing summary judgment motions and the terms on which it will issue a decision on the merits of the case.

Using this pretrial authority, a district court can avoid the two main stumbling blocks to civil actions to enforce congressional subpoenas. First, assuming the proper foundation has been laid by the Supreme Court (as discussed above), the process avoids the lengthy delays that make civil enforcement an impractical solution to the problem of executive intransigence in the face of a congressional subpoena. Second, by requiring the parties themselves to assemble final proposals, a court would avoid the justiciability issues associated with

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337. See *supra* notes 81–84 and accompanying text (discussing two opinions written by the OLC in the wake of the Anne Gorsuch controversy which effectively foreclose litigation of contempt-of-Congress citations).

338. See Berman, *Weaponizing the OLC*, *supra* note 5, at 562–66 (arguing that OLC opinions give the executive branch a structural advantage in executive privilege disputes and proposing reforms which include the establishment of an Office of Congressional Council to counterbalance the OLC); Bopp et al., *supra* note 5, at 43–52 (analyzing the effects of *Mazars* and *McGahn* on Congressional oversight of the Executive Branch and concluding that each case presents obstacles to proper performance of Congressional duties); Kimberly Breedon & A. Christopher Bryant, *Executive Privilege in a Hyper-Partisan Era*, 64 WAYNE L. REV. 63, 92 (2018) (“[A]n administration faced with a congressional inquiry lacking in indicia of bipartisanship can always seek to discredit it, or rely on allies to discredit it, by characterizing the investigations as an abuse of the oversight function driven by an improper desire for short-term political injury to the administration and corresponding gain for the opposing political party.”).

339. See generally Payvand Ahdout, *Enforcement Lawmaking and Judicial Review*, 135 HARV. L. REV. 937 (2022) (analyzing the impact of judicial oversight in disputes regarding Executive power and asserting that courts exercise strong managerial and doctrinal checks capable of restraining Executive “enforcement lawmaking”).

having to craft a remedy that involves countless variables that would be difficult, if not impossible, for a court to assess. Instead, the parties adjust the variables, and the judge is required only to determine which solution presents the fairer balance of the conflicting constitutional interests of the branches. Each of these points will be considered in detail below.

The political question doctrine is the most difficult problem to solve in civil enforcement cases brought against the executive branch. Traditionally, there has been a strong case for regarding congressional subpoena disputes with the President as non-justiciable political questions. As discussed earlier, a court would be hard pressed to select all the elements that could go into a compromise between the two branches; there are simply too many variables, and a court would have no way of assessing which would most effectively protect the interests of the parties. As a result, the courts have been reluctant to impose a settlement on the parties, which, in the current political environment, makes it easier for the executive branch to stonewall Congress.

The beauty of adopting the Major League Baseball arbitration model is that it not only encourages both parties to reach a negotiated solution to their dispute, but it also solves the difficulties entailed in judicial creation of a remedy that accommodates the constitutional interests of both branches. A court would have far less difficulty in selecting one of the two proposals submitted by the parties.

The last issue to discuss is the normative argument that, even if civil enforcement cases are technically justiciable, it would be a bad idea for courts to resolve such cases because it would encourage Congress to run to the courts whenever they encounter any executive-branch resistance to a congressional subpoena instead of attempting to reach a negotiated settlement. This argument certainly has some force, and it has been a good reason to stay out of such disputes when the negotiation-accommodation process was working in the traditional fashion and Congress was able to obtain the necessary documents and testimony if it was sufficiently persistent. In the present political climate, however, judicial intervention is necessary to prevent the executive branch from refusing to cooperate with any oversight investigations. We are at the point where it is worth seeing how judicial intervention to resolve these disputes works. Courts can then adjust if it turns out that Congress is overly aggressive in litigating subpoena disputes. It seems more likely that, once the executive branch realizes that stonewalling is no longer an effective tactic, negotiated settlements will once again become the norm.

## CONCLUSION

The Trump Administration changed the political dynamic of executive privilege. The previous political costs of asserting the privilege, which gave Congress the edge in negotiating subpoena disputes, disappeared, and the President was able to ignore congressional subpoenas with impunity. Reestablishing the negotiation-accommodation process requires judicial intervention, but Congress and the Supreme Court must take steps to make civil enforcement of congressional subpoenas a practical method of enforcing Congress's legitimate oversight demands.

First, Congress must pursue civil litigation up to the Supreme Court to get definitive resolution of both procedural and substantive issues. On the procedural side, the Court must establish that Congress has both standing and a cause of action allowing it to seek judicial enforcement of its subpoenas. On the substantive side, the Court must balance the constitutional prerogatives by ruling that neither Congress's subpoena authority nor executive privilege or testimonial immunity is absolute.

Second, when district courts take up civil enforcement actions, they should adopt an arbitral model that pushes the parties toward compromising their differences and solves the remedial problems associated with privilege disputes. If the Supreme Court resolves the preliminary issues as discussed above, there is no need for a district court to entertain lengthy briefs on the general issue of each branch's constitutional prerogatives. Instead, a court may ask the parties to present their final offers on how to resolve the dispute and tell the parties that it will select the one that more effectively balances the needs of each branch. That arbitral model can proceed relatively quickly to solve both the practical problem of timely resolution of the dispute and the legal problem of how to determine a workable remedy.