

Constitutional Conflict and Congressional Oversight

Andrew McCanse Wright

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CONSTITUTIONAL CONFLICT AND CONGRESSIONAL OVERSIGHT

ANDREW MCCANSE WRIGHT*

In matters of oversight, Congress and the President have fundamentally incompatible views of their institutional roles within the constitutional structure. This Article offers an explanation of divergent branch behavior and legal doctrine. Congress, much like a party to litigation, views itself as having fixed substantive rights to obtain desired information from the Executive and private parties. In contrast, the Executive views itself like a party to a business transaction, in which congressional oversight requests are the opening salvo in an iterative negotiation process to resolve competing interests between co-equal branches. In general, legislators want to litigate and executive officers want to negotiate.

Among the formal and informal remedies to enforce its oversight prerogatives, Congress prefers contempt. However, contempt is problematic when the resisting party is an executive branch official following executive branch policy. Because the constitutional scheme places a premium on good-faith negotiation between Congress and the Executive, congressional self-help is generally more appropriate than

* Associate Professor, Savannah Law School. J.D., University of Virginia; B.A., Washington & Lee University. Prior to my academic appointment, I served in numerous positions at the White House and in Congress involved in separation-of-powers conflict, including Associate Counsel to President Barack Obama, Assistant Counsel to Vice President Al Gore, and Staff Director of the National Security Subcommittee of the House Committee on Oversight and Government Reform. I worked on a number of the oversight matters referenced in this Article. While professional experience informs my perspective, the Article relies solely on factual information contained in the public domain. Further, the viewpoint expressed is mine and does not represent the position of any component of Congress or the Executive.

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litigation for interbranch oversight disputes. While abstention and restraint should be the hallmark of Article III courts presented with bickering political branches, there is an important role for the judiciary. As such, this Article offers principles that guide courts to facilitate, or approximate, accommodation and compromise.

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I. INTRODUCTION

Practical, day-to-day congressional oversight disputes¹ betray a deep canyon between Congress and the President that cuts to the very

1. Oversight disputes play out in a variety of circumstances, such as exchanging letters prompted by a congressional committee request for documents, requesting staff- or member-level briefings, debating the scheduling and scope of hearings or briefings, haggling over the availability and appropriateness of hearing witnesses, and negotiating security protocols for sensitive documents. *See, e.g.*, Letter from Darrell Issa, Chairman, & Elijah Cummings, Ranking Member, House Comm. on Oversight & Gov't Reform, to Mark J. Sullivan, Dir., U.S. Secret Serv. (Apr. 18, 2012) [hereinafter Comm. Letter to Dir. Sullivan]. Congressional

foundations of our constitutional structure. The Legislative and Executive Branches live with wholly different, and largely incompatible, perspectives of the constitutional scheme.

The respective behaviors of Congress and the Executive on matters of congressional oversight can be best explained through the analogies of litigation and transactions. Congress largely adopts the model of litigation and, at times, criminal investigations.² The Executive, in contrast, adopts a model of negotiated transactions.³ Each branch believes its model is firmly grounded in its role within the constitutional scheme. There are also perfectly rational, self-interested reasons the political branches choose to adopt these different perspectives.

Legislators view the congressional oversight function as a constitutional mandate to use litigation-like tools for a variety of oversight goals, mostly focused on the conduct of the Executive.⁴ In the eyes of Congress, there are congressional rules that must be followed, document requests that should be answered, subpoenas that must be satisfied, and witnesses that must appear. As such, executive targets of congressional oversight requests face the binary status of compliance or noncompliance. To Congress, noncompliance by executive officials eventually amounts to the crime of contempt.

This perspective ultimately explains the views of House Counsel and the U.S. Government Accountability Office (GAO)⁵ that Congress has a presumptive right to obtain any information subject only to the narrowest of exceptions, and then only when contained in a valid, formal assertion of executive privilege. Additionally, the litigation model contemplates a role for Article III courts as a routine instrument of congressional subpoena enforcement.

committee chairs can escalate by issuing subpoenas or making phone calls to senior administration officials. *See, e.g.,* *United States v. Am. Tel. & Tel. Co.*, 567 F.2d 121, 122 (D.C. Cir. 1977) (“In the course of the investigation, the Subcommittee issued a subpoena for certain documents in the hands of the American Telephone and Telegraph Co. . . .”). Eventually, the President might assert executive privilege in the face of a congressional move to hold an executive branch official in contempt. *See, e.g.,* *Assertion of Exec. Privilege in Response to a Cong. Subpoena*, 5 Op. O.L.C. 27, 27–28 (1981). All of these disputes have the feel of tug-of-war over practical line drawing about the quantity and nature of information to be provided to Congress.

2. *See infra* Part III.A. For purposes of economy, references to the “litigation model” will include the concepts of civil litigation and criminal investigations.

3. *See infra* Part III.B.

4. Some congressional oversight efforts are targeted at other actors, including the judiciary, state or local governments, international organizations, and private entities.

5. GAO is a congressional, Article I entity and not a part of the Executive.

In contrast, the Executive envisions itself as a party to an arm's length business transaction in which both parties negotiate appropriate price and terms based on their respective bargaining power. As such, the Executive's transactional model lends itself to the principles articulated by the Office of Legal Counsel across administrations of different political parties: Congress has legitimate information interests, but those interests must be balanced against important executive branch interests in confidentiality. The Executive is also the beneficiary of inaction. Therefore, the Executive resists a judicial enforcement role, preferring that outcomes be primarily defined by the relative leverage allotted to each political branch in a given situation.

*Committee on Oversight and Government Reform v. Holder*⁶ is a paradigmatic example of the chasm between Congress and the Executive, and it could prompt the most significant judicial decision in an interbranch dispute since Watergate. *Holder* arises out of a document dispute related to a congressional investigation of "Operation Fast and Furious."⁷ Fast and Furious was a multi-agency investigation led by the U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF).⁸ The core allegation prompting congressional inquiry is that ATF investigative practices allowed assault weapons that should have been seized or otherwise controlled into the stream of commerce.⁹ Further, there is evidence that a number of weapons at issue have been used in violent crimes on both sides of the U.S.–Mexico border, including the murder of a U.S. Customs and Border Patrol Agent named Brian Terry.¹⁰

Representative Darrell Issa (R-CA), in his capacity as Chairman of the Committee on Oversight and Government Reform, led the congressional investigation into Fast and Furious.¹¹ Notwithstanding

6. 979 F. Supp. 2d 1 (D.D.C. 2013).

7. Hereafter, I refer to the operation as "Fast and Furious."

8. *Holder*, 979 F. Supp. 2d at 3.

9. *Id.*

10. *Id.* at 5.

11. Hereafter, I refer to the Committee on Oversight and Government Reform of the U.S. House of Representatives as the "Oversight Committee." While all committees in the House have oversight authority related to matters within their jurisdiction, the Oversight Committee has a much broader investigative mandate that includes "the operation of Government activities at all levels." COMM. ON RULES, 111TH CONG., RULES ADOPTED BY THE COMMITTEES OF THE HOUSE OF REPRESENTATIVES 394 (Comm. Print 2009) [hereinafter HOUSE COMM. ON RULES, RULES ADOPTED] (Rule X, cl. 3(i)). The U.S. Senate committee with the closest approximation of the Oversight Committee's mandate is

evidence of problematic ATF tactics, the congressional investigation quickly took on a partisan tone.¹² Congressional investigators took dozens of transcribed interviews, reviewed thousands of pages of executive branch documents, and obtained other information through in camera access agreements with the Executive. The remaining information sought by the House largely consists of information about how the Executive responded to congressional inquiry rather than the underlying ATF activities.¹³ Eventually, the House threatened to hold Attorney General Holder in contempt of Congress if he did not produce the subpoenaed material.¹⁴ That threat provoked President Obama to assert executive privilege.¹⁵ Thereafter, the House cited the Attorney General for contempt and filed suit to enforce its subpoena.¹⁶ For those following the investigation, it has stoked partisan passion and criticism across the political spectrum.¹⁷

That said, the subject matter of congressional–executive disputes often possesses a partisan character.¹⁸ In fact, as many scholars have noted, disputes between Congress and the President over documents and witnesses tend to be more frequent and more pronounced during periods of divided government.¹⁹ After the Republicans won the House

the Senate Homeland Security and Government Affairs Committee, although it has primary jurisdiction over the Department of Homeland Security in addition to its broader oversight authority. COMM. ON RULES AND ADMIN., 112TH CONG., SENATE MANUAL CONTAINING THE STANDING RULES, ORDERS, LAWS, AND RESOLUTIONS AFFECTING THE BUSINESS OF THE UNITED STATES SENATE, S. DOC. NO. 112-1, at 98 (2011) [hereinafter SENATE COMM. ON RULES, SENATE MANUAL]. In the House, that function was assigned to the Committee on Homeland Security rather than the Oversight Committee. HOUSE COMM. ON RULES, RULES ADOPTED, *supra*, at 393 (Rule X, cl. 3(g)(1)).

12. See, e.g., Letter from Darrell Issa, Chairman, House Comm. on Oversight & Gov't Reform, to President Barack Obama 5 (June 25, 2012) [hereinafter Comm. Letter to President Obama] (outlining the inconsistent responses the Oversight Committee received from the White House).

13. *Holder*, 979 F. Supp. 2d at 5–6.

14. *Id.* at 6.

15. *Id.*

16. *Id.* at 7.

17. See, e.g., Johnathan Weisman & Charlie Savage, *House Cites Holder for Contempt in Gun Inquiry*, N.Y. TIMES, June 29, 2012, at A3; see also Sari Horwitz, *A Gunrunning Sting Gone Fatally Wrong*, WASH. POST, July 26, 2011, at A1.

18. See William P. Marshall, *The Limits on Congress's Authority to Investigate the President*, 2004 U. ILL. L. REV. 781, 782 (“Congressional investigations . . . provide a President’s opponents with a considerable opportunity to engage in political mischief.”).

19. There is conclusive, and unsurprising, evidence in the political science literature that the intensity of congressional oversight of the Executive spikes during periods of divided government. See Douglas L. Kriner & Eric Schickler, *Investigating the President: Committee*

in the 2010 midterm elections, the Committee on Oversight and Government Reform developed strongly partisan themes towards the Obama administration, alleging and investigating political interference,²⁰ financial mismanagement,²¹ policy failure,²² security incompetence,²³

Probes and Presidential Approval, 1953–2006, 76 J. POL. 521, 521 (2014) (“Marshaling an original data set of more than 3,500 investigative hearings and over 50 years of public opinion data, we show that increased investigative activity in the hearing room significantly decreases the president’s job approval rating.”); David C.W. Parker & Matthew Dull, *Divided We Quarrel: The Politics of Congressional Investigations, 1947–2004*, 34 LEGIS. STUD. Q. 319, 321–22 (2009) (finding “congressional investigations activity increases during periods of divided government” and noting that “[d]ivided government is clearly related to an increase in the number and intensity of congressional investigations in the House of Representatives, but evidence of this relationship is much weaker in the Senate”); see also DAVID R. MAYHEW, *DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946–2002*, at 3 (2d ed. 2005) (noting the theory that “Congress acting as an investigative body will give more trouble to the executive branch when a president of the opposite party holds power”); Douglas Kriner & Liam Schwartz, *Divided Government and Congressional Investigations*, 33 LEGIS. STUD. Q. 295, 298 (2008) (“[T]he willingness of Congress to exercise its oversight powers to constrain the executive is conditional on whether or not investigations serve the electoral interests of the majority party.”); Robert J. McGrath, *Congressional Oversight Hearings and Policy Control*, 38 LEGIS. STUD. Q. 349, 362 (2013) (concluding that “there are significantly more oversight hearing days for committees controlled by the presidential out-party than for those controlled by the party of the president”). *But see* MAYHEW, *supra*, at 3 (arguing that congressional oversight activity does not materially increase in intensity during periods of divided government). To be sure, Congress still exercises its oversight function when one party controls both a congressional chamber and the White House, but it tends to take on a different character.

20. See Letter from Darrell Issa, Chairman, House Comm. on Oversight & Gov’t Reform, & Jim Jordan, Chairman, House Subcomm. on Regulatory Affairs, Stimulus Oversight & Gov’t Spending, to Lois G. Lerner, Dir., Exempt Orgs. Div., IRS (Mar. 27, 2012) (requesting documents related to IRS questionnaires allegedly targeting conservative political organizations for review of their tax exempt status).

21. For example, in April 2012, Chairman Issa sent letters to twenty-three executive branch departments and agencies seeking information on the costs of conferences sponsored by the federal government that mushroomed into a spending scandal focused primarily on the General Services Administration. See, e.g., Letter from Darrell Issa, Chairman, House Comm. on Oversight & Gov’t Reform, to Attorney Gen. Eric Holder, U.S. Dep’t of Justice (Apr. 10, 2012) (a representative document request letter in the Oversight Committee’s conference spending investigation that characterizes such conference expenditures as “frivolous”).

22. STAFF OF HOUSE COMM. ON OVERSIGHT & GOV’T REFORM, 112TH CONG., THE DEPARTMENT OF ENERGY’S DISASTROUS MANAGEMENT OF LOAN GUARANTEE PROGRAMS 2 (Comm. Print 2012) (asserting that taxpayer losses related to the bankruptcy of Solyndra, which had government-backed loans, were the result of mismanagement by political appointees at the Department of Energy and represented “just the beginning” of such losses in the relevant loan program).

23. See STAFF OF HOUSE COMM. ON OVERSIGHT & GOV’T REFORM, 113TH CONG., BENGHAZI ATTACKS: INVESTIGATIVE UPDATE—INTERIM REPORT ON THE

sexual misconduct,²⁴ criminal conduct,²⁵ and obstruction of congressional inquiry.²⁶ Other committees have also pursued such investigations within their spheres of jurisdiction.²⁷ While less frequent and intense, the Democrat-controlled Senate also engaged in significant oversight activity of the Obama Administration.²⁸ However, the intensity of divided government oversight will likely resume in light of the Republican takeover of the Senate in 2015.

Likewise, when the Democrats controlled the House and President George W. Bush occupied the White House, Representative Henry

ACCOUNTABILITY REVIEW BOARD 9 (Comm. Print 2013) (criticizing the Obama Administration for the “unnecessary loss of American life” in Benghazi, Libya).

24. See Comm. Letter to Dir. Sullivan, *supra* note 1 (seeking documents and information related to solicitation of prostitutes by U.S. Secret Service agents and military personnel in Colombia in advance of a presidential trip). Ranking Member Cummings joined this request in a rare show of bipartisanship on the Oversight Committee during Chairman Issa’s tenure.

25. See Letter from Darrell Issa, Chairman, House Comm. on Oversight & Gov’t Reform, to Kathryn Ruemmler, Counsel to the President (July 11, 2011) (alleging “blatant and potentially illegal use of the White House and other official government resources for fundraising purposes” in connection with a Democratic National Committee event in the Blue Room of the White House).

26. See, e.g., Comm. Letter to President Obama, *supra* note 12, at 2 (alleging the Oversight Committee had “been stonewalled for months by the Attorney General and his senior staff” in the Fast and Furious investigation); Letter from Darrell Issa, Chairman, House Comm. on Oversight & Gov’t Reform, to Sec’y Kathleen Sebelius, U.S. Dep’t of Health & Human Servs., at 1 (Dec. 11, 2013) (noting that, in connection with the investigation of problems with the healthcare.gov website, “[t]he Department’s most recent effort to stonewall . . . has morphed from mere obstinacy into criminal obstruction of a congressional investigation”); Letter from Darrell Issa, Chairman, House Comm. on Oversight & Gov’t Reform, & Jim Jordan, Chairman, House Subcomm. on Econ. Growth, Job Creation & Regulatory Affairs, to Attorney Gen. Eric H. Holder, Jr., U.S. Dep’t of Justice, at 1 (Jan. 8, 2014) (asserting that “the FBI’s blatant lack of cooperation with the Committee may rise to the level of criminal obstruction of a congressional investigation” into alleged IRS targeting of conservative organizations).

27. See, e.g., MAJORITY STAFF OF HOUSE COMM. ON ENERGY AND COMMERCE, 112TH CONG., THE SOLYNDRA FAILURE (Comm. Print 2012) (outlining Republican staff perspectives on U.S.-backed energy loans to Solyndra and other green technology companies); Memorandum from the Majority Staff to the Republican Members of the Energy & Commerce Comm. (May 31, 2012) (presenting Republican members of the committee with allegations of congressional exclusion from Obama Administration negotiations with private health care industry stakeholders); Memorandum from the Majority Staff to Republican Members of the Energy & Commerce Comm. (June 8, 2012) (elaborating further on the status of the investigation).

28. See, e.g., U.S. SENATE SELECT COMM. ON INTELLIGENCE, REVIEW OF THE TERRORIST ATTACKS ON U.S. FACILITIES IN BENGHAZI, LIBYA, SEPTEMBER 11–12, 2012, S. REP. NO. 113-134 (2014) (criticizing the Executive for failing to prevent the Benghazi attacks).

Waxman (D-CA) used his chairmanship of the Oversight Committee to investigate a wide variety of issues that took on a partisan tone.²⁹ In fact, it was during that era, albeit involving a different committee, that the district court decided *Committee on the Judiciary v. Miers*,³⁰ foreshadowing the early rulings in *Holder*.

Such situational partisan disputes play out against the backdrop of remarkably stable, but conflicting, institutional perspectives of Capitol Hill and the White House. Most of the time, congressional oversight operates under the radar. Often it involves informal, staff-to-staff communication between agencies and their committees of jurisdiction. As repeat players on budget negotiations and authorizations, the staffs of the committees and the agencies within their jurisdiction have strong incentives to resolve information disputes informally. In other instances, institutional conflict is real, but Congress lacks political will to escalate, or the issues involved have not caught the public imagination beyond the small Washington news outlets that effectively serve as trade publications for political professionals. They are more brush fire than blaze. However, as with *Miers* and *Holder*, congressional oversight disputes can rapidly reach full-blown constitutional conflagration.

This Article argues that the constitutional scheme places a premium on good faith negotiation between Congress and the Executive backstopped by rare instances of judicial resolution. Both branches' models have functional advantages but also claim too much in that the Executive categorically rejects justiciability while Congress rejects the

29. See HOUSE COMM. ON OVERSIGHT & GOV'T REFORM, 110TH CONG., ACTIVITIES OF THE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM, H.R. REP. NO. 110-930, at 1 (2008) (chronicling over 200 oversight hearings and identifying major investigations examining "waste, fraud, and abuse in Iraq reconstruction and other government contracting; the activities of Blackwater and other private security contractors; the politicization of science in federal agencies; White House mismanagement of federal records; . . . formaldehyde levels in FEMA trailers; the treatment of wounded returning soldiers at Walter Reed Army Medical Center; and misleading veterans' charities" as well as "[o]ther investigations examin[ing] the disclosure of CIA agent Valerie Plame Wilson's identity . . . [and] the fratricide of Army Ranger Patrick Tillman").

30. 558 F. Supp. 2d 53 (D.D.C. 2008). The dispute in *Miers* related to the House Committee on the Judiciary (Judiciary Committee) investigation of the abrupt termination of nine presidentially appointed, Senate-confirmed U.S. Attorneys. *Id.* at 57–58. In the course of the investigation, the Judiciary Committee sought documents from the White House and testimony from senior White House aides. *Id.* at 58. Pursuant to an assertion of executive privilege by President George W. Bush, former White House Counsel Harriet Miers resisted a subpoena commanding her appearance as a witness at a congressional hearing. *Id.* at 62. Under the same assertion of executive privilege, White House Chief of Staff Joshua Bolten resisted production of documents or a log of withheld documents. *Id.*

merits of executive privilege. A litigation model mitigates unchecked executive power, especially when there is the specter of judicial enforcement of oversight requests where congressional self-help fails. A transactional model recognizes legitimate competing institutional interests, especially when there is no meaningful due process or other procedural constraint on politically motivated, non-germane, and unduly burdensome requests.

In cases of impasse, Congress primarily enforces its requests through political self-help remedies rather than outsourcing enforcement to the courts. When Congress does seek judicial enforcement, restraint is generally the hallmark of Article III tribunals presented with bickering political branches.³¹ However, in order to preserve the constitutional scheme and provide a deterrent to executive intransigence, the judiciary reserves the power to intervene in the event of a constitutional crisis.³² As discussed below, the initial two rulings in *Holder*—one finding the matter justiciable and the other requiring the production of an executive privilege log—signal the court’s sensitivity to the delicate separation-of-powers issues at stake.³³

In order to bring these arguments to the fore, the Article addresses the oversight function, the respective branch views, potential remedies for oversight frustration, and the role of the judiciary. Part II outlines the constitutional basis for the oversight function. It also addresses the scope and some limitations of that function. Part III sets forth the fundamentally different, and inconsistent, constitutional visions held by Congress and the Executive. Part IV analyzes the various remedies Congress has used to enforce its oversight prerogatives. It also describes the problematic issue of judicial involvement in congressional–executive disputes. Part V examines the *Holder* litigation as an illustration of the political branches’ competing views and of the thorny issues the litigation presents to the court called in to resolve the dispute.

This Article begins a body of work designed to construct conceptual frameworks that explain congressional oversight confrontations. Legal academic research on congressional oversight tends to focus on formal

31. See, e.g., *In re Grand Jury Investigation of Ven-Fuel*, 441 F. Supp. 1299, 1307 (M.D. Fla. 1977) (“Disputes and confrontations between those branches always present the kinds of stress and tension that threaten to separate and divide those lines into chasms, ultimately collapsing our constitutionally created form of government. Hence, to avert and minimize such tensions is always the proper and prudent course of action.”).

32. See, e.g., *United States v. Nixon*, 418 U.S. 683, 703–04 (1974).

33. See *infra* Part V.B.

processes rather than the divergent constitutional perspectives that drive interbranch conflict.³⁴ This Article offers an explanation of divergent branch behavior and legal doctrine. In sum, this Article envisions a unified theory of congressional oversight that recognizes enduring conflict, tension, and disagreement between the political branches.

II. THE CONSTITUTIONAL BASIS AND SCOPE OF CONGRESSIONAL OVERSIGHT

A. *A Preliminary Note on Constitutional Analysis of Separation of Powers*

One of the challenges associated with analyzing the constitutional authority for the congressional oversight function is that all three branches of the federal government have their own perspective on the question. Legal scholars traditionally look to the Supreme Court for definitive pronouncements about the scope and meaning of constitutional issues. However, with respect to the delineation of powers in the separation of powers scheme, the views and historical practices of a branch as to its own power vis-à-vis coordinate branches have independent constitutional significance.³⁵

In *United States v. Nixon*,³⁶ the Supreme Court offered a classic formulation of separation of powers: “In designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence.”³⁷ Separation of powers is the structural division of state sovereignty into three

34. As will be discussed, the weight of legal research on congressional oversight focuses on congressional subpoenas, assertions of executive privilege, and academic lamentation of ineffective oversight efforts. Political science research also addresses these topics, and it provides further insight into the frequency of oversight activity, especially as a function of divided government. See *infra* note 105 and accompanying text. This Article contributes context to the informal oversight motivations, interactions, and perspectives that create the context in which formal interbranch conflict occurs.

35. See generally 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, 471–84 (1987) (arguing that each branch has a separate legal doctrine of executive privilege).

36. 418 U.S. 683 (1974).

37. *Id.* at 707.

functional institutions.³⁸ These branches are characterized by co-equality, and the separation between them relates to functions of governance. The *Nixon* court also recognized that the powers are not self-contained and hermetically sealed.³⁹ Instead, at the edges, powers may bleed and powers may blend. Thus, Justice Jackson observed in *Youngstown Sheet & Tube Co. v. Sawyer*⁴⁰ that there exists a “zone of twilight in which [the President] and Congress may have concurrent authority, or in which its distribution is uncertain.”⁴¹ Such indeterminacy may also exist with respect to executive–judicial or congressional–judicial allocations.

This structure has consequences for constitutional analyses that are unique to the separation of powers context. In *Nixon*, the Supreme Court recognized the legitimacy of its sister branches in constitutional analysis:

In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others. . . . Many decisions of this Court, however, have unequivocally reaffirmed the holding of *Marbury v. Madison*, that “[i]t is emphatically the province and duty of the judicial department to say what the law is.”⁴²

As such, the *Nixon* formulation recognizes that each branch has a role in constitutional interpretation, in which the Supreme Court is first among equals rather than the exclusive arbiter of power allocation.⁴³ However, as “first” branch, the Constitution reserves to the Supreme Court the final word in matters of formal constitutional interpretation.⁴⁴

These structural considerations have implications for purposes of this Article. First, the structure enhances the constitutional significance of non-judicial-branch views on allocation of power. Second, because oversight interactions between Congress and the Executive almost universally occur without any judicial involvement, as a functional

38. State sovereignty is further divided by those powers reserved to the states as a matter of federalism and those rights granted to citizens as the Constitution was amended.

39. See *Nixon*, 418 U.S. at 707.

40. 343 U.S. 579 (1952).

41. *Id.* at 637 (Jackson, J., concurring).

42. *Nixon*, 418 U.S. at 703 (alteration in original) (citation omitted) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

43. *Id.*

44. *Id.* at 703–04.

matter, the likelihood of judicial involvement is remote. Third, as discussed more fully below, judicial review of inter branch oversight disputes is problematic because, under certain circumstances, review itself could disturb allocation of power between Congress and the Executive in unhealthy ways.

B. The Constitutional Basis of Congressional Oversight

A threshold question arises as to the basis of congressional authority to conduct oversight. While the Constitution invests Congress with “[a]ll legislative Powers,”⁴⁵ it is silent as to inquiry power. The Supreme Court recognizes “there is no provision expressly investing either house with power to make investigations and exact testimony to the end that it may exercise its legislative function advisedly and effectively.”⁴⁶ Rather, the power is incidental to the legislative power itself and supported by the historical practice of English and American legislative institutions.⁴⁷ It is firmly settled that the congressional oversight function is grounded in the legislative powers granted to Congress in Article I.⁴⁸ On this point, all three branches of government are in basic agreement.

1. Congress

Congress itself routinely cites the constitutional imprimatur of its oversight function. According to a congressional oversight manual published by a component of the Library of Congress, “The Constitution grants Congress extensive authority to oversee and investigate executive branch activities.”⁴⁹ During the 111th Congress, the Republican staff of the House Oversight Committee issued a report

45. U.S. CONST. art. I, § 1.

46. *McGrain v. Daugherty*, 273 U.S. 135, 161 (1927).

47. *Id.*

48. *Id.*

49. FREDERICK M. KAISER, WALTER J. OLESZEK & TODD B. TATELMAN, CONG. RESEARCH SERV., CONGRESSIONAL OVERSIGHT MANUAL 4 (2011), available at <http://www.fas.org/sgp/crs/misc/RL30240.pdf>, archived at <http://perma.cc/7ZB8-LZ7C>; see also ALISSA M. DOLAN & TODD GARVEY, CONG. RESEARCH SERV., CONGRESSIONAL INVESTIGATIONS OF THE DEPARTMENT OF JUSTICE, 1920–2012: HISTORY, LAW, AND PRACTICE 3 (2012) (“While there is no express provision of the Constitution or specific statute authorizing the conduct of congressional oversight or investigations, the Supreme Court has firmly established that such power is essential to the legislative function as to be implied from the general vesting of legislative powers in Congress.”).

entitled, “A Constitutional Obligation: Congressional Oversight of the Executive Branch.”⁵⁰

There are also a number of scholarly sources upon which Congress relies to assert the constitutional basis of its oversight power. For example, Congress regularly quotes Woodrow Wilson: “Quite as important as legislation is vigilant oversight of administration.”⁵¹ Further, congressional sources credit Arthur M. Schlesinger, Jr. for his introductory comments to the multi-volume work, *Congress Investigates*, that

no provision of the American Constitution gave Congress express authority to conduct investigations and compel testimony. But it was not considered necessary to make an explicit grant of such authority. The power to make laws implied the power to see whether they were faithfully executed. The right to secure needed information had long been deemed by both the British Parliament and the colonial assemblies as a necessary and appropriate attribute of the power to legislate.⁵²

Congress will also, of course, rely on the Supreme Court’s recognition of the implied constitutional basis of its oversight authority.⁵³ In addition, Congress codified its oversight responsibility for “continuous watchfulness” over executive agencies in the Legislative Reorganization Act of 1946.⁵⁴

2. The Supreme Court

The Supreme Court has noted that “[t]here can be no doubt as to the power of Congress, by itself or through its committees, to investigate

50. STAFF OF HOUSE COMM. ON OVERSIGHT & GOV’T REFORM, 111TH CONG., A CONSTITUTIONAL OBLIGATION: CONGRESSIONAL OVERSIGHT OF THE EXECUTIVE BRANCH (Comm. Print 2010) [hereinafter A CONSTITUTIONAL OBLIGATION].

51. WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 297 (1885). For examples of congressional reliance on this quotation, see, for example, A CONSTITUTIONAL OBLIGATION, *supra* note 50, at 3; JOINT COMM. ON THE ORGANIZATION OF THE CONGRESS, FINAL REPORT OF THE JOINT COMMITTEE ON THE ORGANIZATION OF CONGRESS, H.R. REP. NO. 103-413, vol. II, S. REP. NO. 103-215, vol. II, at 150 (1993) [hereinafter FINAL REPORT]; KAISER ET AL., *supra* note 49, at 4.

52. 1 CONGRESS INVESTIGATES: A DOCUMENTED HISTORY 1792–1974, at xix (Arthur M. Schlesinger, Jr. & Roger Bruns eds., 1975). For examples of congressional citation to this work, see, for example, A CONSTITUTIONAL OBLIGATION, *supra* note 50, at 3; FINAL REPORT, *supra* note 51, at 151.

53. KAISER ET AL., *supra* note 49, at 5.

54. Legislative Reorganization Act of 1946, Pub. L. No. 79-601, § 136, 60 Stat. 812, 832.

matters and conditions related to contemplated legislation.”⁵⁵ Early in the Republic, the Supreme Court affirmed Congress’s power to hold citizens in contempt in *Anderson v. Dunn*.⁵⁶ There, the Court dismissed a trespass action by a plaintiff, who had been held in contempt for attempting to bribe a member of Congress, on the basis that congressional contempt power was valid.⁵⁷ A lower federal court next addressed contempt ten years after the Civil War in *Stewart v. Blaine*,⁵⁸ where the contempt finding was grounded in a refusal to cooperate with a congressional inquiry. The court did not specifically address congressional power to conduct the inquiry but rather relied on *Anderson*, applying stare decisis principles as a basis to dismiss a tort action.⁵⁹ Over the next several decades, parties litigated contempt in both oversight and non-oversight contexts, but none of them specifically addressed congressional power to investigate.⁶⁰

The Supreme Court finally articulated the constitutional basis for congressional oversight in *McGrain v. Daugherty*,⁶¹ nearly 150 years after the Founding. There, the Court was squarely presented with the question of whether “power to make investigations and exact testimony . . . is so far incidental to the legislative function as to be implied.”⁶² The Court noted that legislative practice after and predating the American Revolution had involved a power to secure needed information.⁶³ It surveyed a number of state court opinions that recognized the power of legislative inquiry.⁶⁴ The Court then reviewed contempt cases, construing them to mean (1) both chambers of Congress have “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

55. *Quinn v. United States*, 349 U.S. 155, 160 (1955).

56. 19 U.S. (6 Wheat.) 204, 234 (1821).

57. *Id.*

58. 8 D.C. (1 MacArth.) 453 (1874).

59. *Id.* at 458.

60. Some cases bore on the question of congressional oversight power by implication. For example, in *Kilbourn v. Thompson*, 103 U.S. 168 (1880), the Court held that Congress’s contempt finding was improper because the underlying investigation amounted to congressional usurpation of a judicial function. 103 U.S. at 192–93. So, while silent as to congressional power to investigate, it clearly delineated, by negative inference, a zone of inquiry that was beyond any such power.

61. 273 U.S. 135 (1927).

62. *Id.* at 161.

63. *Id.*

64. *Id.* at 165–66 (citing opinions in Massachusetts, New York, Wisconsin, West Virginia, Missouri, and South Carolina).

express powers effective,”⁶⁵ and (2) neither chamber is “invested with ‘general’ power to inquire into private affairs and compel disclosures, but only with such limited power of inquiry” as is necessary to support its express and implied powers.⁶⁶

Ultimately, the Court held that “the power of inquiry – with process to enforce it – is an essential and appropriate auxiliary to the legislative function.”⁶⁷ The Court further articulated:

A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed. All this was true before and when the Constitution was framed and adopted. . . . Thus there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised.⁶⁸

In the Court’s view, Congress cannot legislate without information, and therefore congressional power to inform must derive from the constitutional structure.⁶⁹ Thereafter, Supreme Court recognition of congressional oversight power solidified. As Chief Justice Warren noted in *Quinn v. United States*,

There can be no doubt as to the power of Congress, by itself or through its committees, to investigate matters and conditions relating to contemplated legislation. This power, deeply rooted in American and English institutions, is indeed co-extensive with the power to legislate. Without the power to investigate – including of course the authority to compel testimony either through its own processes or through judicial trial – Congress could be seriously handicapped in its efforts to exercise its constitutional functions wisely and effectively.⁷⁰

65. *Id.* at 173.

66. *Id.* at 173–74.

67. *Id.* at 174.

68. *Id.* at 175.

69. *Id.*

70. 349 U.S. 155, 160–61 (1955) (footnotes omitted).

Recognizing congressional oversight's important function in the American governmental structure, the Supreme Court confirmed oversight is grounded in the Constitution.

3. The Executive

Even the Executive, which most often falls under the unpleasant scrutiny of congressional investigators, acknowledges the constitutionality, if not the constitutional basis, of the exercise. The Office of Legal Counsel advised President Reagan's Attorney General that

[i]t is beyond dispute that Congress may conduct investigations in order to obtain facts pertinent to possible legislation and in order to evaluate the effectiveness of current laws. . . . Although the Constitution does not explicitly grant any power of inquiry to Congress, Congress asserted such a right shortly after the adoption of the Constitution.⁷¹

Similarly, a Clinton Administration communication to Congress recognized that "[t]he oversight process is, of course, an important underpinning of the legislative process."⁷² Thus, the Executive acknowledges Congress's legitimate authority to conduct oversight but resists affirmatively conceding that such authority flows directly from the Constitution.

C. The Scope and Limitations of Congressional Oversight

While the constitutional authority to conduct congressional oversight is well established, the scope of that authority is a much more complicated subject. Scope and limitation of congressional oversight are borne of conflict and thus intersect with the subject matter of this Article. Sources of limitation on congressional authority may derive from judicial opinions, subject resistance, investigative jurisdiction, congressional self-regulation, and interbranch dispute. Limitation on oversight authority, especially involving interbranch conflict, is in dispute and largely unsettled. The following subsections chart the discernable scope and limits in this amorphous area.

71. Scope of Cong. Oversight and Investigative Power With Respect to the Exec. Branch, 9 Op. O.L.C. 60 (1985) (footnote omitted).

72. Letter from Robert Raben, Assistant Att'y Gen., to John Linder, Chairman, House Subcomm. on Rules & Org. of the House 1 (Jan. 27, 2000) [hereinafter Assistant Att'y Gen. Raben Letter to Chairman Linder].

1. Limited Paths to Judicial Resolution

While courts have had occasion to consider interbranch congressional oversight disputes, the case law is sparse and unsettled. A paucity of definitive case law is understandable considering that such disputes rarely move into litigation. Even when congressional oversight disputes reach the courts, the judiciary confronts traditional reluctance to insert itself into disputes between the political branches.

Professor Paul Freund cautioned that “[i]n the eighteenth-century Newtonian universe that is the Constitution, an excessive force in one direction is apt to produce a corresponding counterforce.”⁷³ However, in the modern universe of quantum theory, a more apt analogy for the courts in the congressional oversight context is the Heisenberg Uncertainty Principle⁷⁴: the act of court review itself—its mere gaze—could have unintended and damaging consequences to the constitutional scheme.⁷⁵

There are several routes through which congressional oversight disputes have reached Article III courts. The most common has been in the context of a criminal prosecution for contempt of Congress.⁷⁶ There

73. Paul A. Freund, *The Supreme Court, 1973 Term—Foreword: On Presidential Privilege*, 88 HARV. L. REV. 13, 20 (1974).

74. In 1927, at a research institute in Copenhagen, Denmark, physicist Werner Heisenberg had an epiphany about the nature and limits of physical knowledge. Specifically, at the subatomic level, the act of observing alters the reality being observed. For example, if one tries to view an electron, one needs a measuring device such as light or radiation. However, the energy emitted from the chosen device will alter the course of the electron itself. See Jan Hilgevoord & Jos Uffink, *The Uncertainty Principle*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Oct. 8, 2001), <http://plato.stanford.edu/entries/qt-uncertainty/> (last updated July 3, 2006), archived at <http://perma.cc/3UB-F57Q>.

75. See Memorandum in Support of Defendant’s Motion to Dismiss at 20, Comm. on Oversight & Gov’t Reform v. Holder, 979 F. Supp. 2d 1 (D.D.C. 2013) (No. 12-cv-01332-ABJ) [hereinafter Mem. in Supp. of Def.’s Mot. to Dismiss], ECF No. 13-1 (urging the court not to reach the merits of the interbranch dispute over executive branch materials subpoenaed by Congress and subject to an assertion of executive privilege by President Obama because “[a]n assumption of jurisdiction here would . . . threaten to alter permanently the relationship among the Branches”).

76. See, e.g., *Yellin v. United States*, 374 U.S. 109, 110 (1963) (considering an appeal by a private citizen following his conviction for contempt of Congress for failure to answer questions posed by a subcommittee of the House Committee on Un-American Activities); *Hutcheson v. United States*, 369 U.S. 599, 607 (1962) (affirming a conviction for criminal contempt of Congress where refusal to answer questions implicated self-incrimination in a state court prosecution); *McPhaul v. United States*, 364 U.S. 372, 382–83 (1960) (affirming a conviction for criminal contempt in the face of, *inter alia*, a Fourth Amendment challenge to the underlying subpoena’s breadth); *Barenblatt v. United States*, 360 U.S. 109, 134 (1959) (affirming a conviction for criminal contempt of Congress in the face of a First Amendment

are some cases that arise out of criminal prosecution for crimes against Congress,⁷⁷ and others brought by parties seeking to enjoin or quash congressional subpoenas.⁷⁸ More rarely, courts have had occasion to consider a writ of habeas corpus against the appropriate agent of Congress itself.⁷⁹ The Supreme Court has heard tort actions against the Sergeant-at-Arms of the U.S. House of Representatives⁸⁰ and against

challenge); *Watkins v. United States*, 354 U.S. 178, 215 (1957) (reversing a criminal contempt conviction based on a violation of the due process clause in light of committee's questioning that had little nexus to the matter under inquiry); *Quinn v. United States*, 349 U.S. 155, 165 (1955) (ordering entry of a judgment of acquittal where a defendant appealed his criminal contempt conviction on the grounds that he had invoked the Fifth Amendment privilege against self-incrimination); *United States v. Rumely*, 345 U.S. 41, 48 (1953) (affirming the reversal of a contempt conviction because the committee exceeded its authority); *Sinclair v. United States*, 279 U.S. 263, 284, 288, 299 (1929) (affirming a conviction for contempt in connection with the Teapot Dome scandal); *In re Chapman*, 166 U.S. 661, 672 (1897) (upholding the constitutionality of the criminal contempt of Congress statute in the context of an appeal from conviction); *United States v. Fort*, 443 F.2d 670, 675 (D.C. Cir. 1970) (reviewing a street gang member's conviction for contempt of Congress for failure to testify, while under congressional subpoena, before a Senate subcommittee); *Tobin v. United States*, 306 F.2d 270, 271, 275–76 (D.C. Cir. 1962) (reversing a contempt conviction of the Executive Director of the New York Port Authority by finding the committee's request exceeded its mandate); *Fields v. United States*, 164 F.2d 97, 97–98, 101 (D.C. Cir. 1947) (affirming conviction for contempt of Congress).

77. See, e.g., *United States v. Poindexter*, 727 F. Supp. 1501, 1502 (D.D.C. 1989) (addressing a subpoena of presidential records in a prosecution for false statements to, and obstruction of, Congress); *United States v. North*, 713 F. Supp. 1448, 1449–50 (D.D.C. 1989) (quashing a subpoena of former President Ronald Reagan to appear in a criminal prosecution for perjury before Congress).

78. *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 492–93 (1975) (reviewing an appeal brought by organization bank depositor seeking to enjoin the implementation of a congressional subpoena for organization's records directed to the bank).

79. In such cases, Congress is the detaining authority because it has exercised inherent contempt power and detained an uncooperative target by means of the Sergeant-at-Arms of one of either the House or Senate. See, e.g., *Jurney v. MacCracken*, 294 U.S. 125, 151–52 (1935) (reversing the appellate court's grant of relief on a writ of habeas corpus, finding that Congress has the power to punish a completed act by means of inherent contempt power); *McGrain v. Daugherty*, 273 U.S. 135, 180 (1927) (reversing a district court order discharging a Senate witness from custody because the investigation of corruption aided the legislative function); *Marshall v. Gordon*, 243 U.S. 521, 530–32, 548 (1917) (granting relief on a writ of habeas corpus filed by a New York district attorney who was arrested for contempt by the U.S. House of Representatives).

80. See *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 204–06 (1821) (affirming a demurrer judgment entered for the defendant Sergeant-at-Arms that barred an action in trespass for false imprisonment, assault, and battery by a person held in contempt of Congress for an attempt to bribe a member).

the Speaker of the House.⁸¹

One district court considered oversight power in the context of a motion by a congressional subcommittee chair to obtain grand jury material.⁸² More recently, Congress, as a body and through subcomponent parties, has sought enforcement of its subpoenas against the Executive Branch in civil court proceedings.⁸³ In addition, a congressional component sought to vindicate statutory investigative power against Vice President Richard Cheney.⁸⁴ In one notable case, the D.C. Circuit had occasion to address an action brought by the U.S. Department of Justice seeking to enjoin a private party from complying with a congressional subpoena.⁸⁵

2. Legal Precedent on Congressional Oversight

The Supreme Court has repeatedly recognized an extremely broad congressional mandate to conduct oversight. In *Barenblatt v. United States*,⁸⁶ the Court suggested the “scope of the power of inquiry . . . is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.”⁸⁷ In another case, the Court described the power as “broad.”⁸⁸ As such, the courts are predisposed to give Congress wide latitude in terms of legitimate jurisdictional

81. *Stewart v. Blaine*, 8 D.C. (1 MacArth.) 453, 457 (1874) (shielding the Speaker from liability for executing an inherent contempt order because it would be “monstrous . . . to hold him liable . . . for merely obeying an order of the House”).

82. *In re Grand Jury Investigation of Ven-Fuel*, 441 F. Supp. 1299, 1302, 1304–05 (M.D. Fla. 1977) (granting a motion by a congressional subcommittee chairman for copies of documents related to a grand jury proceeding once the jury had been discharged, subject to issuance of a congressional subpoena to the relevant U.S. Attorney).

83. *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 726–27 (D.C. Cir. 1974) (considering a Senate committee challenge to an assertion of executive privilege by President Nixon as a basis for withholding information sought by a subpoena); *Comm. on Oversight & Gov’t Reform v. Holder*, 979 F. Supp. 2d 1, 2–3 (D.D.C. 2013); *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 55 (D.D.C. 2008).

84. *See Walker v. Cheney*, 230 F. Supp. 2d 51, 53, 74 (D.D.C. 2002) (finding the dispute nonjusticiable given the absence of a congressional subpoena).

85. *United States v. Am. Tel. & Tel. Co.*, 567 F.2d 121, 122–23 (D.C. Cir. 1977) (addressing an action brought by the Department of Justice against a telephone carrier seeking to enjoin its compliance with a subpoena issued by the House of Representatives in connection with a congressional investigation into warrantless national security wiretaps).

86. 360 U.S. 109 (1959).

87. *Id.* at 111.

88. *Watkins v. United States*, 354 U.S. 178, 187 (1957).

interests in oversight matters. However, as discussed more fully below, this formulation is not without limits.⁸⁹

A number of cases recognize the subject-matter breadth of congressional investigative power. First, Congress may investigate subjects relevant to its consideration of prospective legislation.⁹⁰ This rationale hews closest to the constitutional theory animating oversight power: that the power to investigate is incident to legislative power.⁹¹ For example, in *Quinn v. United States*, the Supreme Court observed that “[t]here can be no doubt as to the power of Congress . . . to investigate matters and conditions relating to contemplated legislation.”⁹² This is a temporally prospective endeavor, meaning present inquiry will inform future policy judgments.

Second, the Supreme Court recognizes congressional power to investigate the administration of existing laws. In *Watkins v. United States*,⁹³ Chief Justice Warren observed that congressional oversight power “encompasses inquiries concerning the administration of existing laws” in addition to contemplated legislation.⁹⁴ Here, Congress is interested in whether its enactments and policy preferences are being followed.⁹⁵ This present tense rationale also more closely implicates the activities of the other branches of the federal government, in which the judiciary is reviewing and construing existing law while the Executive is assisting the President with the obligation to “take Care that the Laws be faithfully executed.”⁹⁶ As such, the stage begins to set for interbranch conflict over matters of congressional oversight.

A logical corollary to a power to investigate the administration of the laws is a power that “comprehends probes into departments of the

89. *See id.* (observing that, “broad as is this power of inquiry, it is not unlimited”).

90. *See, e.g., Barenblatt*, 360 U.S. at 111–12 (“Congress may only investigate into those areas in which it may potentially legislate . . .”).

91. *See id.*

92. 349 U.S. 155, 160 (1955); *see also Watkins*, 354 U.S. at 187 (acknowledging congressional power to conduct “inquiries concerning . . . proposed or possibly needed statutes”).

93. 354 U.S. 178 (1957).

94. *Id.* at 187.

95. *See* Charles M. Cameron & B. Peter Rosendorff, *A Signaling Theory of Congressional Oversight*, 5 *GAMES & ECON. BEHAVIOR* 44, 46 (1993) (observing that oversight may constitute a “credible signal about the committee’s resoluteness . . . and may have dramatic effects on its behavior” with respect to policy choices).

96. U.S. CONST. art. II, § 3.

Federal Government to expose corruption, inefficiency or waste.”⁹⁷ Such investigations have rationales rooted in the present and the future. Private parties, especially contractors and grantees of the federal government, may be swept within the ambit of these government malfeasance investigations. However, in inquiries motivated by this rationale, the Executive Branch will be in the crosshairs as a regular matter. The Supreme Court has even recognized that “[v]igilant oversight by Congress also may serve to deter Presidential abuses of office, as well as to make credible the threat of impeachment.”⁹⁸ With a power, or perhaps obligation, to investigate the activities of coordinate branches of government, the die is cast for constitutional conflict.

As such, there are three principal legal rationales for congressional investigative power: prospective legislation, present execution of law, and government misconduct. However, as a functional matter in the real world of politics, there are somewhat different incentives that shape oversight conduct by Congress and its members.

3. Functional Congressional Oversight Goals

Oversight disputes play out in a variety of circumstances, such as exchanging letters prompted by a congressional committee request for documents, requesting staff- or member-level briefings, debating the scheduling and scope of hearings or briefings, haggling over the availability and appropriateness of hearing witnesses, and negotiating security protocols for sensitive documents. Congressional committee chairs can escalate a dispute by issuing subpoenas or making phone calls to senior administration officials. If things have really gone off the rails, the White House might assert executive privilege in the face of a congressional move to hold an executive branch official in contempt.⁹⁹ All of these disputes have the feel of tug-of-war over practical line-drawing about the quantity and nature of information to which Congress is entitled.

In practice, there are complex and dynamic motivations for congressional oversight. The *Congressional Oversight Manual* lists a

97. *Watkins*, 354 U.S. at 187.

98. *Nixon v. Fitzgerald*, 457 U.S. 731, 757 (1982). *Nixon* addressed presidential immunity from suit and was not a case evaluating the constitutional bases of oversight, so this quotation is more functional observation than sanction. *Id.* at 733.

99. *See, e.g.*, Assertion of Exec. Privilege in Response to a Cong. Subpoena, 5 Op. O.L.C. 27, 27–28 (1981) (advising the President that his executive privilege applied to documents requested by the House Committee on Energy and Commerce).

ranging set of purposes: ensuring executive compliance with legislative intent, improving the efficiency and effectiveness of governmental operations, evaluating program performance, preventing executive encroachment on legislative functions, investigating misconduct and waste, assessing agency and executive officer performance, establishing federal financial priorities, ensuring that executive policies reflect the public interest, and protecting individual rights and liberties.¹⁰⁰ Members and committees of Congress may also employ oversight as a means of promoting or enforcing policy preferences¹⁰¹ and encouraging government transparency.¹⁰² Congress's self-conception of the goals of oversight transcends the case law to date.

One undeniable incentive for congressional oversight is partisanship. When the President is from one political party and the other party controls either the House or Senate, or both,¹⁰³ there is a strong incentive to use congressional oversight as a partisan bludgeon.¹⁰⁴ There is a wealth of political science research that demonstrates the correlation between divided government and increased volume and intensity of congressional oversight.¹⁰⁵ During these times, congressional committees can develop salient political themes of corruption, incompetence, and policy failure.¹⁰⁶ In addition, sometimes there are political benefits to picking a process fight over documents or testimony

100. KAISER ET AL., *supra* note 49, at 1–3.

101. *See, e.g.*, McGrath, *supra* note 19, at 369–70 (“The research presented in this article underscores the importance of legislative competence to oversee the administration of popularly promulgated policies. Without the threat of oversight hearings, the ‘inner check’ is hardly likely to maintain the balance between bureaucracy and democracy.”).

102. According to Representative Darrell Issa, “transparency and real effectiveness of government requires . . . the vigorous oversight and demanding of transparency by the committees.” *Campbell Brown* (CNN television broadcast Feb. 3, 2010), *transcript available at* <http://transcripts.cnn.com/TRANSCRIPTS/1002/03/ec.01.html>, *archived at* <http://perma.cc/K4YC-A9TV>.

103. In line with political science lexicon, I refer to this phenomenon as “divided government.”

104. *See* Kriner & Schickler, *supra* note 19, at 521 (“Marshaling an original data set of more than 3,500 investigative hearings and over 50 years of public opinion data, we show that increased investigative activity in the hearing room significantly decreases the president’s job approval rating.”).

105. *See supra* note 19.

106. *See* Marshall, *supra* note 18, at 782.

as a means, in itself, of generating confrontation with a president from the opposite party.¹⁰⁷

Occasionally, congressional oversight efforts appear to be designed to influence an ongoing adjudication.¹⁰⁸ This can be particularly problematic from the executive branch perspective because Congress risks corrupting an adjudicative process in which parties have fixed due process rights.¹⁰⁹ In a similar vein, congressional actors sometimes employ oversight as a means of influencing an ongoing executive branch rulemaking process in an effort to supplement the notice-and-comment process, among other formal means for Congress's input.¹¹⁰

Members of Congress have more personal, political, and institutional incentives to engage in congressional oversight. Committee chairs may be able to use oversight as a platform to make a name for themselves in chambers teeming with members trying to distinguish themselves.¹¹¹

107. *Id.* at 809 (“Regardless of whether he chooses to comply with a document request or to fight it, the President incurs serious political risks in responding to a congressional investigation.”).

108. A good example of this type of oversight is the Oversight Committee's focus on the National Labor Relations Board (NLRB) during the 112th Congress. On April 20, 2011, the NLRB filed an unfair labor practices complaint against the Boeing Company (Boeing) related to allegations by the International Association of Machinists and Aerospace Workers. One month later, Chairman Issa and two subcommittee chairs sent a document request letter declaring that the Oversight Committee was “conducting oversight of recent legal actions” taken by the NLRB's Office of General Counsel. Letter from Darrell Issa, Chairman, House Comm. on Oversight & Gov't Reform, Trey Gowdy, Chairman, House Subcomm. on Health Care, D.C., Census and the Nat'l Archives, & Dennis Ross, Chairman, House Subcomm. on Fed. Workforce, U.S. Postal Serv., and Labor Policy, to Lafe E. Solomon, Acting Gen. Counsel, Nat'l Labor Relations Board (May 12, 2011). During the ensuing dispute, which included a congressional subpoena, the NLRB took the position that the congressional requests would undermine important confidentiality interests designed to protect the integrity of an open enforcement action, that premature disclosure of such information would “seriously compromise the litigation,” and that such disclosure would “give one litigant an unfair advantage over another.” *See, e.g.*, Letter from Celeste J. Mattina, Acting Deputy Gen. Counsel, Nat'l Labor Relations Board, to Darrell Issa, Chairman, House Comm. on Oversight & Gov't Reform, Trey Gowdy, Chairman, House Subcomm. on Health Care, D.C., Census and the Nat'l Archives, & Dennis Ross, Chairman, House Subcomm. on Fed. Workforce, U.S. Postal Serv., and Labor Policy 2 (May 27, 2011); Letter from Lafe E. Solomon, Acting Gen. Counsel, Nat'l Labor Relations Board, to Darrell Issa, Chairman, House Comm. on Oversight & Gov't Reform (July 26, 2011).

109. *See* *Watkins v. United States*, 354 U.S. 178, 188 (1957).

110. *See* *Scope of Cong. Oversight and Investigative Power With Respect to the Exec. Branch*, 9 Op. O.L.C. 60, 60–61 (1985).

111. Matthew Dull & David C.W. Parker, *Congressional Oversight: Overlooked or Unhinged?*, LEGIS. STUD. SEC. NEWSL.: EXTENSION OF REMARKS, July 2012, at 2 (Am. Political Sci. Ass'n, Norman, Okla.) (discussing a body of political science scholarship finding that “committee hearings offer members and parties prominent venues for building

Historians largely credit wartime oversight efforts with Harry Truman's ascent to Vice President and ultimately President.¹¹² Congressional oversight represents an opportunity for a symbiotic relationship with a press corps that has incentives to write stories about scandal. The press can bring Congress oversight leads or expose issues worthy of congressional attention, and Congress can provide the press with documents and testimony that drive stories.¹¹³

In addition, unique congressional district considerations can fuel oversight efforts. For example, Representative Michael Turner (R-OH) became engaged in efforts to reform the U.S. military's sexual assault prevention and response efforts due to a grisly homicide of a Marine whose family resides in his district.¹¹⁴ Part of his reform efforts included exacting oversight of ongoing military sexual assault prevention activities.¹¹⁵ Similarly, interest groups may be the primary advocates for certain oversight priorities that eventually find a congressional patron.

Finally, a congressional committee or actor may engage in punitive oversight. A committee may seek retribution for some act by an executive branch entity or official by means of its oversight power.¹¹⁶ Thus, the oversight enterprise would be designed to punish, as either a deterrence or retributive matter, rather than inform a legislative judgment. While punishment may be a true animating force in a given oversight action, it is hard to establish as an isolated factual matter.

reputations, contrasting government incompetence with their own commitment to good government").

112. See ROBERT DALLECK, HARRY S. TRUMAN 12 (2008); see also DAVID MCCULLOUGH, TRUMAN 285–87 (1992).

113. For a story that reveals a colorful version of this symbiotic relationship between journalists and oversight activities, see Mark Leibovich, *How to Win in Washington*, N.Y. TIMES MAG., July 7, 2013, at 18, 22.

114. See *Congressman Turner Leads Efforts to Protect Sexual Assault Survivors in Military Justice System*, TURNER.HOUSE.GOV (Nov. 6, 2013), <http://turner.house.gov/media-center/press-releases/congressman-turner-leads-efforts-to-protect-sexual-assault-survivors-in>, archived at <http://perma.cc/NT86-XJE2>. See also his campaign website article, *Combating Sexual Assault in Our Military*, MIKETURNER.COM (Apr. 17, 2011), <http://www.miketurner.com/blog/2011/04/17/combating-sexual-assault-in-our-military/>, archived at <http://perma.cc/3L85-CPCF>, in which he discusses the sexual assault and murder of Lance Corporal Maria Lauterbach by a senior enlisted member of her unit. She grew up in Dayton, Ohio. *Id.*

115. See *Combating Sexual Assault in Our Military*, *supra* note 114.

116. *Marshall v. Gordon*, 243 U.S. 521, 545–46 (1917). *But see* *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 228–29 (1821) (recognizing a limited punitive power for the House of Representatives to punish a non-member on facts implicating the constitutional provision allowing Congress to punish its own membership).

Human motivations are dynamic, complex, and sometimes self-contradictory; Congress's motivations are no different.

One can debate whether these incentives translate into appropriate levels, and types, of oversight activities. Social science literature and public policy commentary are rife with lamentations that Congress has abdicated its oversight responsibilities¹¹⁷ to the benefit of a growing and unchecked Executive Branch.¹¹⁸ Some commentators suggest that there are significant disincentives to conducting robust oversight.¹¹⁹ It can be an unpleasant experience.¹²⁰ Others take the view that congressional structure and incentives lead to emphasis on less meaningful oversight.¹²¹ There is also a camp that believes congressional oversight is on the upswing since Watergate¹²² or the New Deal.¹²³

117. See, e.g., MORRIS P. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT 67–70 (1977); John F. Bibby, *Congress' Neglected Function*, in REPUBLICAN PAPERS 477 (Melvin R. Laird ed., 1968); Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 165 (1984) (“Scholars often complain that Congress has neglected its oversight responsibility: despite a large and growing executive branch, Congress has done little or nothing to oversee administrative compliance with legislative goals.”); Morris S. Ogul, *Congressional Oversight: Structures and Incentives*, in CONGRESS RECONSIDERED 207, 207–21 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 1977); James B. Pearson, *Oversight: A Vital Yet Neglected Congressional Function*, 23 U. KAN. L. REV. 277, 281 (1975) (“Paradoxically, despite its importance, congressional oversight remains basically weak and ineffective.”).

118. See generally PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY (2009).

119. See Ogul, *supra* note 117, at 209.

120. Indeed, some materials describe congressional staffers who feel demoralized by executive branch intransigence. See, e.g., PROJECT ON GOV'T OVERSIGHT, THE ART OF CONGRESSIONAL OVERSIGHT: A USER'S GUIDE TO DOING IT RIGHT 9 (2009) (noting that “[m]eaningful congressional oversight is hard work” and warning congressional investigators to “expect personal attacks” (title case removed)); MORTON ROSENBERG, THE CONSTITUTION PROJECT, WHEN CONGRESS COMES CALLING: A PRIMER ON THE PRINCIPLES, PRACTICES AND PRAGMATICS OF LEGISLATIVE INQUIRY 65 (2009), available at <http://www.constitutionproject.org/manage/file/175.pdf>, archived at <http://perma.cc/4PYV-2LQ6> (noting that due to “a lengthy period of legislative passivity in the face of serious executive challenges . . . there remains in Congress a palpable sense of loss of institutional regard, loyalty, and self-respect”).

121. See McCubbins & Schwartz, *supra* note 117, at 165 (arguing that congressional incentive structure leads to “preference for one form of oversight over another, less-effective form”).

122. See JOEL D. ABERBACH, KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT, at ix (1990) (“Congressional oversight activity has increased dramatically since the early 1970s.”).

123. See Joel D. Aberbach, *Changes in Congressional Oversight*, 22 AM. BEHAV. SCIENTIST 493, 493 (1979) (“Congress has shown increasing concern about oversight as the

Understanding the complex motivations for congressional oversight is important when one is negotiating or litigating with Congress. Most of these functional rationales and incentives can be tethered to the formal legal rationales: prospective legislation, present execution of law, and government misconduct.¹²⁴ However, some of them—like transparency, adjudication interference, and rulemaking influence—are harder to square with the Supreme Court’s vision of the constitutional basis for oversight. As such, the next section addresses legal precedent on the limits of congressional oversight.

4. Limits on Congressional Oversight

While Congress’s power to investigate is broad, it “is not unlimited.”¹²⁵ First, an oversight inquiry must be grounded in a congressional effort to exercise its legislative function.¹²⁶ The Court has noted that “[n]o inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress.”¹²⁷

Based on the legal precedents, two types of potential limitations emerge: *jurisdictional* and *relative*. A jurisdictional limitation suggests that the purpose of the inquiry itself either lacks proper congressional authority or a valid constitutional rationale. Congressional oversight power is “limited to inquiries relating to matters of which the particular house ‘has jurisdiction’ and in respect of which it rightfully may take other action.”¹²⁸ For example, as noted in *Watkins v. United States*,¹²⁹ Congress does not have “general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress.”¹³⁰

In contrast, a relative limitation occurs when the purpose or subject matter of the congressional inquiry is jurisdictionally sound but the congressional need is insufficient to overcome countervailing interests in

federal bureaucracy has expanded in size and program initiation has passed to the executive branch.”).

124. See *supra* Part II.B.2.

125. *Watkins v. United States*, 354 U.S. 178, 187 (1957).

126. See *McGrain v. Daugherty*, 273 U.S. 135, 176–77 (1927) (upholding investigation where “the object of the investigation and of the effort to secure the witness’s testimony was to obtain information for legislative purposes”).

127. *Watkins*, 354 U.S. at 187.

128. *McGrain*, 273 U.S. at 170 (characterizing, with approval, the holding in *Kilbourn v. Thompson*, 103 U.S. 168 (1880)).

129. 354 U.S. 178 (1957).

130. *Id.* at 187.

confidentiality or other competing values. Relative limitations are analytically messy. They involve weighing competing, often legitimate, claims by Congress and the subject of its investigative request. They also represent the vast majority of interbranch oversight disputes. Of course, Congress's litigation model envisions very little limitation on oversight power, whereas everything—outside of a jurisdictional bar to oversight—is subject to discussion and limitation in the executive branch transactional model.¹³¹

a. Jurisdictional Limitations on Oversight

Jurisdictional limitations focus on the motives of Congress as they relate to the powers granted to the three branches by the Constitution. Could Congress investigate a function firmly committed to the judiciary or Executive such that it had no plenary ability to legislate in that area? Some precedent suggests the answer is no. For example, in *Barenblatt v. United States*,¹³² the Court held:

Since Congress may only investigate into those areas in which it may potentially legislate or appropriate, it cannot inquire into matters which are within the exclusive province of one of the other branches of the Government. Lacking the judicial power given to the Judiciary, it cannot inquire into matters that are exclusively the concern of the Judiciary. Neither can it supplant the Executive in what exclusively belongs to the Executive.¹³³

Thus, *Barenblatt* suggests that congressional oversight, like the broader legislative power, is limited in areas committed to the other branches by the Constitution.

Some of the old oversight cases enforced such jurisdictional limitations. In *Kilbourn v. Thompson*,¹³⁴ the Supreme Court held that Congress exceeded its authority when it directed a committee to investigate a matter that was inherently judicial.¹³⁵ Similarly, in *Marshall v. Gordon*,¹³⁶ the Supreme Court granted habeas relief for the district attorney for the Southern District of New York (the forerunner to U.S. attorney) because detention for contempt on the basis of an intemperate

131. See *infra* Parts III.A–B.

132. 360 U.S. 109 (1959).

133. *Id.* at 111–12.

134. 103 U.S. 168 (1880).

135. *Id.* at 192–93.

136. 243 U.S. 521 (1917).

letter transcended the implied right to preserve the legislative process and crossed into the judicial role of enforcement of general criminal laws.¹³⁷

However, as previously noted, oversight disputes routinely occur in the absence of judicial involvement and are resolved informally.¹³⁸ Jurisdictional arguments, even if conceptually sound, are nearly impossible to enforce at the investigative initiation phase.¹³⁹ Congress does not have meaningful self-regulation, and unless things escalate to the point of a criminal or civil contempt proceeding or a constitutional crisis, it is unlikely that there will be any judicial involvement in a jurisdictional determination. Therefore, as a practical matter, jurisdictional limitations are brought to bear on Congress in the same manner as relative limitations: as a function of the resolve and leverage of the resisting party.

For its part, the Executive seeks to enforce jurisdictional limits on the scope of congressional oversight with only marginal results. For example, one dispute related to a congressional request for documents related to Supreme Court Justice Elena Kagan's service in the Executive in an effort to ascertain whether she should recuse herself from decisions on pending or potential litigation related to the Patient Protection and Affordable Care Act, commonly known as Obamacare.¹⁴⁰ In response, the Department of Justice expressed "serious separation-of-powers concerns regarding this congressional inquiry" because it could encroach on the Judicial Branch and its "purpose . . . falls outside the scope of Congress's oversight authority."¹⁴¹

While the Justice Kagan documents implicate judicial interests, the Executive also believes Congress has no jurisdictional power to

137. *Id.* at 530–32, 543–44 (reviewing historical instances of exercise of inherent congressional contempt power and noting that in several instances "it would seem that the difference between the legislative and the judicial power was also sometimes forgotten").

138. *See supra* Part II.C.1.

139. In the judicial context, procedures exist to resolve jurisdictional issues at the initiation phases of litigation. No such procedures exist in the congressional investigation context, so an inquiry undertaken without constitutional power to do so will proceed unchecked until it meets resistance by the Executive or, perhaps at a later crisis stage, the judiciary.

140. *See* Letter from Ronald Weich, Assistant Att'y Gen., to Lamar S. Smith, Chairman, House Comm. on the Judiciary (Jan. 6, 2012).

141. *Id.* at 1.

encroach on executive functions.¹⁴² According to the Reagan-era Office of Legal Counsel, “Congress may not conduct investigative or oversight inquiries for the purpose of managing executive branch agencies or for directing the manner in which the Executive Branch interprets and executes the law.”¹⁴³

This perspective is hard to reconcile with the pronouncement in *Watkins v. United States*¹⁴⁴ that congressional oversight power “encompasses inquiries concerning the administration of existing laws.”¹⁴⁵ Further, it becomes readily apparent that the categorical declaration by the Executive Branch relies on lines of demarcation that are impossible to decipher with clarity. If a committee’s oversight effort in a given case is designed to affect a particular policy, how can the Executive Branch enforce whether the questions are designed to influence executive branch behavior or inform other congressional actors about policy choices? These are the type of political questions that bedevil courts as they search for judicially manageable standards. The epistemology of congressional oversight motivation, and its expression, is amorphous.

Moreover, the *Barenblatt* formulation on exclusivity¹⁴⁶ is easier to recite than to apply due to the power-blending among the three branches incident to the constitutional design. The Constitution does not offer “a complete division of authority between the three branches.”¹⁴⁷ As Justice Jackson famously noted, the Constitution “enjoins upon its branches separateness but interdependence, autonomy but reciprocity.”¹⁴⁸ Therefore, it can be analytically challenging to find powers that can be properly characterized as “exclusive” to one branch.

One notable modern-era dispute between Congress and the White House brings to light the challenges facing the Executive in raising jurisdictional arguments.¹⁴⁹ During President George W. Bush’s

142. See Scope of Cong. Oversight and Investigative Power With Respect to the Exec. Branch, 9 Op. O.L.C. 60, 60 (1985).

143. *Id.*

144. 354 U.S. 178 (1957).

145. *Id.* at 187.

146. See *Barenblatt v. United States*, 360 U.S. 109, 111–12 (1959).

147. *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 443 (1977).

148. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

149. See Assertion of Exec. Privilege Concerning the Dismissal and Replacement of U.S. Att’ys, 31 Op. O.L.C., slip op. at 2–3 (June 27, 2007) (Opinion of Paul D. Clement, Solicitor General and Acting Attorney General).

Administration, the House Committee on the Judiciary investigated the forced resignation of nine U.S. Attorneys in late 2006.¹⁵⁰ At the time, Democratic Representative John Conyers chaired the committee.¹⁵¹

The matter involved the dismissal and replacement of several U.S. Attorneys under the well-recognized presidential powers grounded in the Appointments Clause.¹⁵² Under that Clause, subject to Senate advice and consent, the President appoints U.S. Attorneys and has independent power to remove them.¹⁵³ There is no appreciable constitutional role for the House in the appointment and removal of U.S. Attorneys.¹⁵⁴ The Executive asserted substantial *Barenblatt* exclusivity arguments that failed to provide relief to the White House.¹⁵⁵

As such, the Bush Administration challenged the committee's jurisdiction to peer into deliberations of an exclusive, core presidential function.¹⁵⁶ In recommending President Bush's assertion of executive privilege, Acting Attorney General Paul Clement argued that the President's power to remove presidentially appointed U.S. Attorneys was exclusive to the President:

The Senate has the authority to approve or reject the appointment of officers whose appointment by law requires the advice and consent of the Senate (which has been the case for U.S. Attorneys since the founding of the Republic), but it is for the President to decide whom to nominate to such positions and whether to remove such officers once appointed. . . . Consequently, there is reason to question whether Congress has oversight authority to investigate deliberations by White House officials concerning proposals to dismiss and replace U.S. Attorneys, because such deliberations necessarily relate to the potential exercise by the President of an authority assigned to him alone.¹⁵⁷

150. *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 55 (D.D.C. 2008).

151. *Id.* at 61.

152. *Dismissal and Replacement*, 31 Op. O.L.C., slip op. at 2.

153. U.S. CONST. art. II, § 2, cl. 2; *see also* *Myers v. United States*, 272 U.S. 52 (1926) (holding that appointee removal power, outside of impeachment proceedings, is the exclusive province of the President).

154. Impeachment power could be implicated but would not be a bar to a presidential decision to remove U.S. Attorneys.

155. *Dismissal and Replacement*, 31 Op. O.L.C., slip op. at 2–3.

156. *See Miers*, 558 F. Supp. 2d at 55.

157. *Dismissal and Replacement*, 31 Op. O.L.C., slip op. at 2–3.

The executive branch jurisdictional argument was rejected by the district court in the resulting civil contempt litigation, *Committee on the Judiciary v. Miers*.¹⁵⁸ On interlocutory appeal, the D.C. Circuit granted a stay, and the parties eventually settled the resulting civil contempt litigation after the election of President Barack Obama.¹⁵⁹ As a result, no appellate court reviewed the district court's rejection of a jurisdictional challenge to the committee's investigation.¹⁶⁰

Courts may be predisposed to side with congressional advocates on jurisdictional arguments because the concept of legislative purpose is expansive. In a seminal work, James M. Landis argued: "It is true that . . . a committee must proceed with a legislative aim in mind, but, in determining whether it has so proceeded, inadequate conceptions of legislative purposes may unduly limit the field of inquiry."¹⁶¹ Further, courts are generally inclined to defer to Congress as to its own motivations.¹⁶²

158. 558 F. Supp. 2d at 77 (suggesting that the Executive characterized the scope of the investigation "far too narrowly" because it was "not merely an investigation into the Executive's use of his removal power but rather a broader inquiry into whether improper partisan considerations have influenced prosecutorial discretion"). Broadening the justifying investigative rationale to include prosecutorial discretion probably further disturbed an Executive that believes such discretion, like removal power, is within its exclusive province.

159. See Agreement Concerning Accommodation, Comm. on the Judiciary v. Miers, No. 08-cv-00409-JDB (D.D.C. dismissed Oct. 23, 2009).

160. A previous congressional investigation into certain clemency decisions provides another example of a jurisdictional argument advanced by the Executive. Attorney General Janet Reno advised President Clinton that "it appears that Congress' oversight authority does not extend to the process employed in connection with a particular clemency decision, to the materials generated or the discussions that took place as part of that process, or to the advice or views the President received in connection with a clemency decision" because it is an exclusively presidential power. Assertion of Exec. Privilege With Respect to Clemency Decision, 23 Op. O.L.C. 1, 3-4 (1999) (Opinion of Attorney General Janet Reno). That dispute never reached the courts.

161. James M. Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 HARV. L. REV. 153, 194 (1926). The title is somewhat ironic in that Professor Landis does not see much conceptual room for limits. *Id.* at 220. The thrust of his argument is that *Kilbourn v. Thompson* was wrongly decided due to a superficially narrow view of legislative power. See *id.* 214-20. Aside from acknowledging that there must be some regulation external to Congress beyond "self-limitations inherent in the legislative process," see *id.* at 220, he contemplates neither potential scenarios in which jurisdiction could be challenged successfully nor legitimate countervailing executive branch interests.

162. See *id.* at 218-19.

b. Relative Limitations on Oversight

Most oversight disputes involve competing legitimate interests and thus implicate relative, rather than jurisdictional, limitations on Congress's power of inquiry. The paradigmatic dispute over relative limitation of oversight power occurs when Congress seeks information that would reveal executive branch deliberative processes, but such disputes may also arise if oversight activities affect other functions such as adjudications, prosecutions, diplomatic communiqués, pardons, or national security information. Presidential assertions of executive privilege in the face of contempt citations capture the concept of competing interests at the ultimate stage of conflict escalation.¹⁶³

For example, in 2012, Chairman Issa requested documents from the U.S. Department of the Treasury and Internal Revenue Service seeking information about certain regulations implementing the Patient Protection and Affordable Care Act, including predecisional legal analysis of the proposed rules.¹⁶⁴ In response, the Assistant Secretary of Treasury for Legislative Affairs wrote:

In particular, you seek internal legal analysis and any other related documents that predate the proposed rule. These materials implicate longstanding Executive Branch confidentiality interests. It is well-established that agency staff and counsel must have the ability to . . . fulfill their statutory responsibilities.

. . . .

. . . Nonetheless, we recognize the important oversight role of Congress, and we are committed to working with the Committee to provide the information you need to fulfill that role. Accordingly, we are prepared to meet with your staff to discuss your particular oversight interests in this matter and to explore ways that we can accommodate those interests, while still protecting the important institutional interests described above.¹⁶⁵

163. The President may assert executive privilege on jurisdictional grounds, but the vast majority of executive branch objections raise countervailing confidentiality concerns rather than challenge congressional power to investigate a topic. Part V.A, *infra*, addresses law of executive privilege.

164. See Letter from Alastair M. Fitzpayne, Assistant Sec'y of Legal Affairs, U.S. Dep't of Treasury, to Darrell Issa, Chairman, House Comm. on Oversight & Gov't Reform 1 (Oct. 25, 2012).

165. *Id.* at 2.

There is no real question that the Oversight Committee has jurisdiction to evaluate tax regulations, so the Treasury Department raised no jurisdictional objection.¹⁶⁶ Rather, it raised the concern that compliance with the request would undermine executive branch policy formulation policies.¹⁶⁷ As discussed more fully in Part V, Congress does not believe that deliberative process privilege is applicable to oversight. Furthermore, as discussed in the following section, the Treasury letter is a classic expression of the executive branch transactional model of oversight.

In practice, both jurisdictional and relative limitations are almost always functional rather than legal. Given the absence of pretrial screening or discovery management in the judicial context, jurisdictional and relative limitations take the form of arguments advanced by a party resisting oversight. Moreover, the competing perspectives on the Constitution—the congressional litigation model and the executive transactional model—lead to vastly different conclusions as to whether oversight power must yield to objections.

III. COMPETING CONSTITUTIONAL VIEWS

This Article argues that Congress and the Executive operate with fundamentally different views of the Constitution when it comes to congressional oversight. *Hierarchy* and *entitlement* are the hallmarks of the congressional litigation perspective.¹⁶⁸ In contrast, *equality* and *accommodation* characterize the Executive's transactional model.¹⁶⁹ This section provides a detailed description of each branch's views.¹⁷⁰ It

166. *See id.*

167. *Id.*

168. *See infra* Part III.A.

169. *See infra* Part III.B.

170. When reviewing an early draft of this Article, Professor Christopher Green observed a logical link between the competing models presented here and the models outlined in Professors Robert H. Mnookin and Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979). In particular, they describe two approaches to settlement negotiations: a "Strategic Model," which is a "relatively norm-free process centered on the transmutation of underlying bargaining strength into agreement by the exercise of power, horse-trading, and bluff," and a "Norm-Centered Model" which focuses on "elements normally associated with adjudication—the parties and their representatives would invoke rules, cite precedents, and engage in reasoned elaboration." *Id.* at 973 (quoting Melvin Aron Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 638 (1976) (internal quotation mark omitted)). Their models roughly track the ones described in this Article, where the Norm-Centered Model tracks Congress's litigation model and the Strategic Model tracks the

also includes congressional and executive authorities that betray the respective litigation and transactional sensibilities that lead to ships passing—or rather colliding—in the night.

A. *The Congressional Litigation Model*

Congress has adopted the language of criminal investigations and civil litigation. It initiates “investigations,”¹⁷¹ sends “document requests,”¹⁷² issues “subpoenas,”¹⁷³ conducts “depositions,”¹⁷⁴ holds “hearings,”¹⁷⁵ and finds “contempt.”¹⁷⁶ Of late, some congressional committees have sent “preservation letters”¹⁷⁷ to executive branch entities seeking to command them to preserve evidence notwithstanding

Executive’s transactional model. Their article also provides great insight into bargaining in a legal regime with uncertain outcomes. *See also* Robert Cooter & Stephen Marks with Robert Mnookin, *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982) (explaining trials as settlement bargaining failure and the relative parties’ approach to risks that drive such failure).

171. *See* SENATE COMM. ON RULES, SENATE MANUAL, *supra* note 11, at 41 (“Each . . . committee may make investigations into any matter within its jurisdiction . . .”); HOUSE COMM. ON RULES, RULES ADOPTED, *supra* note 11, at 415 (“Each committee may conduct at any time such investigations and studies as it considers necessary or appropriate in the exercise of its responsibilities . . .”).

172. *See* SENATE COMM. ON RULES, SENATE MANUAL, *supra* note 11, at 41; HOUSE COMM. ON RULES, RULES ADOPTED, *supra* note 11, at 423.

173. *See* SENATE COMM. ON RULES, SENATE MANUAL, *supra* note 11, at 41 (“Each standing committee . . . is authorized . . . to require by subpoena or otherwise the attendance of . . . witnesses and the production of . . . correspondence, books, papers, and documents . . .”); HOUSE COMM. ON RULES, RULES ADOPTED, *supra* note 11, at 423 (“For the purpose of carrying out any of its functions and duties . . . a committee or subcommittee is authorized . . . to require, by subpoena or otherwise, the attendance and testimony of such witnesses and the production of such books, records, correspondence, memoranda, papers, and documents as it considers necessary.”).

174. *See, e.g.*, SENATE COMM. ON RULES, SENATE MANUAL, *supra* note 11, at 162–63 (authorizing the Special Committee on Aging “to take depositions and other testimony”); HOUSE COMM. ON RULES, RULES ADOPTED, *supra* note 11, at 397 (“The Committee on Oversight and Government Reform may adopt a rule authorizing and regulating the taking of depositions by a member or counsel of the committee, including pursuant to subpoena under clause 2(m) of rule XI . . .”).

175. *See* HOUSE COMM. ON RULES, RULES ADOPTED, *supra* note 11, at 422 (establishing “[h]earing procedures”).

176. *See id.* (“The chair may punish breaches of order and decorum, and of professional ethics on the part of counsel, by censure and exclusion from the hearings; and the committee may cite the offender to the House for contempt.”).

177. *See, e.g.*, Letter from Darrell Issa, Chairman, House Comm. on Oversight & Gov’t Reform, to John Koskinen, Comm’r, IRS (June 16, 2014).

an existing statutory scheme of records preservation obligations under the Federal Records Act¹⁷⁸ and Presidential Records Act.¹⁷⁹

Advocates of Congress begin with a premise of near unfettered congressional power in this sphere, subject only to the narrowest of exceptions. During his distinguished tenure with the Congressional Research Service, Morton Rosenberg offered the quintessential congressional formulation of oversight power:

Numerous Supreme Court precedents establish and support a broad and encompassing power in the Congress to engage in oversight and investigation that reaches all sources of information that enable it to carry out its legislative function. In the absence of a countervailing constitutional privilege or a self-imposed statutory restriction upon its authority, Congress and its committees, have virtually, plenary power to compel information needed to discharge its legislative function from executive agencies, private persons and organizations, and within certain constraints, the information so obtained may be made public.¹⁸⁰

Thus, Congress starts from the premise that, as a function of its position above the Executive in the oversight hierarchy, it is entitled to any and all information. In the face of an objection, Congress will consider whether a narrow exception, one recognized by Congress, applies.

1. Hierarchy

Hierarchy characterizes Congress's perspective on congressional oversight. Congress believes, not unreasonably, that it has a supervisory role over the Executive when exercising its oversight function.¹⁸¹

178. 44 U.S.C. §§ 3101–3107 (2012).

179. *Id.* §§ 2201–2207 (2012).

180. MORTON ROSENBERG, CONG. RESEARCH SERV., INVESTIGATIVE OVERSIGHT: AN INTRODUCTION TO THE LAW, PRACTICE AND PROCEDURE OF CONGRESSIONAL INQUIRY 1 (1995).

181. *See, e.g.*, Plaintiff's Consolidated (I) Reply to Defendant's Opposition to Plaintiff's Motion for Summary Judgment, and (II) Opposition to Defendant's Cross-Motion For Summary Judgment, Comm. on Oversight & Gov't Reform v. Holder at 20, No. 12-cv-01332-ABJ (D.D.C. Feb. 14, 2014), ECF No. 69 (asserting that congressional authority "to oversee the Executive Branch generally . . . is firmly rooted in Article I" of the U.S. Constitution). The concept of such hierarchical superiority, i.e., "over," is embedded in the term "oversight" itself. ROSENBERG, *supra* note 120, at 3 ("Experience has shown that in order to engage in successful oversight, committees must establish their credibility with the executive departments and agencies they oversee early, often, consistently, and in a manner that evokes respect, if not fear."). Congress could also point to the reverse asymmetry associated with

Congressional advocates note that “Congress’ right of access to executive branch information has been recognized by innumerable Supreme Court and lower federal court decisions.”¹⁸² In a typical assertion, one House committee chairman suggested that Congress’s broad investigative mandate renders it “necessary . . . to have unfettered access to executive branch information in order to be able to make sound legislative judgments.”¹⁸³

From the congressional perspective, top-line equality of the three branches of the federal government does not equate to equality in every interaction. Courts, like Congress, have inherent authority to supervise their own proceedings,¹⁸⁴ as well as to enforce their rules and orders.¹⁸⁵ A litigation model presumes a hierarchy in which Congress is above the Executive and in which the Executive is obligated to submit to congressional investigative authority.¹⁸⁶ The Executive would generally concede that both congressional and executive officers must respect the presiding authority of a federal judge in a criminal or civil case. For purposes of a criminal proceeding, even though an Assistant United States Attorney is an executive official representing executive branch interests, the judge stands in a supervisory—and inherently

executive branch processes, such as criminal investigations or prosecutions of members of Congress or agency hearings or other regulatory actions in which Congress seeks to participate. *But see id.* at 65 (“The Executive Branch and Congress must seek to work together as *co-equal branches of government*, and Congress must exercise its oversight function even when its leadership comes from the same political party as the President.” (emphasis added)).

182. ROSENBERG, *supra* note 120, at 2.

183. H.R. REP. NO. 106-130, pt. 1, at 40 (1999) (expressing the additional views of Chairman Porter J. Goss, Permanent Select Committee on Intelligence, U.S. House of Representatives, on the Intelligence Authorization Act for Fiscal Year 2000).

184. *See, e.g.*, *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43–45 (1991) (affirming inherent power of federal courts to manage their own proceedings and to control the conduct of those who appear before them); *United States v. Lopez*, 765 F. Supp. 1433, 1459 (N.D. Cal. 1991) (“The court’s supervisory power . . . exists principally to allow the court to protect the integrity of the judicial process and to deter government misconduct.”), *overruled on other grounds*, 4 F.3d 1455 (9th Cir. 1993).

185. *See Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 796 (1987) (“The ability to punish disobedience to judicial orders is regarded as essential to ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on other Branches.”).

186. In litigation, adversaries share baseline equality, but both submit to the hierarchical authority of the judge. Congress sees its own role as presiding forum for oversight proceedings in the mode of a judge.

hierarchical—role with respect to the judicial proceeding.¹⁸⁷ That judge expects an executive official to abide by court rules and orders.¹⁸⁸ A judge could sanction a federal prosecutor¹⁸⁹ or executive branch party litigant¹⁹⁰ for obstruction, delay, or misconduct, including a finding of criminal contempt.¹⁹¹

Congress believes it is entitled to the same sort of interbranch submission to congressional authority in its oversight proceedings.¹⁹² Congress sees it as an affront that the Executive would micromanage congressional proceedings by attempting to substitute alternative witnesses, sources of information, scopes of request, or forms of

187. Some courts characterize regulation of federal prosecutors in criminal proceedings as grounded in their capacity as officers of the court. *See Lopez*, 765 F. Supp. at 1453–54 (“When a court regulates a prosecutor’s ethical conduct, it regulates the prosecutor in his capacity as an officer of the court and thus there is no threat to the principle of separation of powers.”). From this perspective, they are regulated in a judicial, Article III role rather than their status as executive officers, and thornier separation of powers questions may be sidestepped. *Cf. Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988) (“[A] federal court ‘may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress.’ Nevertheless, it is well established that ‘[e]ven a sensible and efficient use of the supervisory power . . . is invalid if it conflicts with constitutional or statutory provisions.’” (second and third alterations in original) (citations omitted) (quoting *United States v. Hasting*, 461 U.S. 499, 505 (1983); *Thomas v. Arn*, 474 U.S. 140, 148 (1985))). However, courts also expect executive branch clients to submit to judicial power to regulate Article III proceedings.

188. *See Lopez*, 765 F. Supp. at 1455 (holding that the U.S. Attorney General’s argument that federal prosecutors are exempt from local federal rules governing ethical conduct would arrogate essential judicial power and, as such, violate separation of powers).

189. *See Bank of Nova Scotia*, 487 U.S. at 262–63 (discussing sanctions available to federal courts to address misconduct by federal prosecutors, including an order to a prosecutor to show cause why she should not be disciplined, referral to a bar or the U.S. Department of Justice for investigation, or a finding of contempt of court for a Federal Rule of Criminal Procedure Rule 6 violation of grand jury secrecy); *see also United States v. Lopez*, 4 F.3d 1455, 1463 (9th Cir. 1993) (“We have recognized that exercise of supervisory powers is an appropriate means of policing ethical misconduct by prosecutors.” (citations omitted)); *United States v. Vetere*, 663 F. Supp. 381, 386 (S.D.N.Y. 1987) (“Under some circumstances, it may be appropriate to hold an Assistant [United States Attorney] in contempt of court.”).

190. *See Cobell v. Norton*, 334 F.3d 1128, 1149 (D.C. Cir. 2003) (reversing, on the merits, findings of contempt against senior executive officials in the Department of the Interior, including the Secretary, for alleged misconduct as party litigants, but assuming that such a finding could be proper if warranted).

191. *See Fed. R. Crim. P.* 42(a) (setting forth the procedures for criminal contempt); *see also Lopez*, 4 F.3d at 1464 (“[H]olding the prosecutor in contempt . . . can be adequate to discipline and punish government attorneys who attempt to circumvent the standards of their profession.”).

192. *See, e.g., Comm. Letter to President Obama*, *supra* note 12, at 1.

production based on executive branch presumptions about Congress's legitimate interests.¹⁹³

2. Entitlement

Entitlement in a litigation model captures the concept of fixed rights to information. Congress believes it is entitled to virtually any executive branch information, on Congress's timetable, absent a valid, formal assertion of executive privilege.¹⁹⁴ A recent formulation of the congressional view can be found in Chairman Issa's response to President Obama's assertion of executive privilege in the Fast and Furious investigation:

Courts have consistently held that the assertion of the constitutionally-based executive privilege—the only privilege that ever can justify the withholding of documents from a congressional committee by the Executive Branch—is only applicable with respect to documents and communications that implicate the confidentiality of the President's decision-making process, defined as those documents and communications to and from the President and his most senior advisors. Even then, it is a qualified privilege that is overcome by a showing of the committee's need for the documents.¹⁹⁵

Congressional advocates also categorically reject many objections raised about oversight information requests on the grounds that they fall outside such narrow exceptions.¹⁹⁶

The role of precedent also tends to take on more importance in a litigation model. If one's view of congressional oversight power is that of an immutable and inherent entitlement to executive branch information, establishing a precedent of action demonstrates a tangible example of such entitlement that should govern prospective interactions. For example, Congress obtained access to one of the President's daily intelligence briefings (PDB)¹⁹⁷ in connection with the 9/11 Commission,¹⁹⁸ creating a sense of entitlement to any subsequent

193. *See, e.g., id.* at 1, 6.

194. *See, e.g., id.* at 1.

195. *Id.*

196. *See, e.g., id.* at 4.

197. The President's morning intelligence products usually come in the form of a PDB document.

198. The National Commission on Terrorist Attacks Upon the United States, commonly referred to as the 9/11 Commission, was a congressional, Article I, entity; its

PDB. Congressional actors believe the Executive expects them to assume the role of the modern-day Sisyphus, pushing today's boulder of oversight requests up (from) the Hill only to have it roll back down to be repeated tomorrow in a perpetual spirit-crushing exercise.

In the eyes of Congress, there are congressional rules that must be followed, document requests that should be answered, subpoenas that must be satisfied, and witnesses that must appear. As such, executive targets of congressional oversight requests face the binary status of compliance or noncompliance. To Congress, noncompliance by executive officials eventually amounts to the crime of contempt.

B. The Executive Branch Transactional Model

The Executive's transactional model envisions oversight as a negotiation process between two interested parties with compelling sets of interests that, when in conflict, must be resolved on the basis of the force of reason and bargaining leverage. Transactional models reject the binary in-compliance/out-of-compliance perspective Congress brings to its information requests. Rather, the Executive believes that congressional information needs must be weighed against executive confidentiality interests. From the perspective of the White House, congressional information needs can often be satisfied in a number of ways. Given the equality of the parties and the legitimate concerns implicated by certain requests, the Executive Branch sees no presumptive congressional right to define the manner, form, quantity, or messenger of the information to be provided.

To the Executive, the role of precedent is persuasive rather than determinative, much as it is in a business transaction. For example, the price a purchasing company pays for assets valued at \$*x* of a debt-ridden party yesterday would likely be quite different than the purchase of the same assets, still valued at \$*x*, owned by a target company with no pressing need or inclination to sell.

information requests of the Executive were therefore congressional oversight requests from an analytical, separation of powers perspective. See Daniel Marcus, *The 9/11 Commission and the White House: Issues of Executive Privilege and Separation of Powers*, 1 AM. U. NAT'L SECURITY L. BRIEF 19, 19–21 (2011). In the highly politically charged aftermath of the 9/11 attacks, the White House acquiesced to 9/11 Commission requests for PDB material. See, e.g., NAT'L COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 261 (2004) (discussing relevant PDB materials provided to the Commission).

The transactional model also does not contemplate a neutral third party as the arbiter of the price and terms of the interaction. There is a premium on leverage and self-help within the negotiation process—a process the Executive believes the Constitution requires. A court ruling could short-circuit a present negotiation and may also establish fixed rights for future interactions, which the Executive believes could do violence to separation of powers.

One of the most influential recitations of the transactional perspective held by the Executive Branch was set forth in President Ronald Reagan's November 4, 1982, memorandum issuing guidance about congressional oversight requests:

The policy of this Administration is to comply with Congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch. . . . [E]xecutive privilege will be asserted only in the most compelling circumstances, and only after careful review demonstrates that assertion of the privilege is necessary. *Historically, 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 Branches.*¹⁹⁹

As such, in stark contrast to the binary congressional perspective, the Executive views negotiation between co-equals and accommodation among those parties as the mother's milk of congressional oversight. As articulated by President Reagan's Attorney General William French Smith, "The accommodation required is not simply an exchange of concessions or a test of political strength. It is an obligation of each branch to make a principled effort to acknowledge, and if possible to meet, the legitimate needs of the other branch."²⁰⁰

1. Equality

The Executive does not accept the premise that it is a subordinate party in matters of congressional oversight. Rather, like a business transaction, the Executive views the parties as normative equals at arm's

199. Memorandum from President Ronald Reagan for the Heads of Executive Departments and Agencies on Procedures Governing Responses to Congressional Requests for Information 1 (Nov. 4, 1982) (emphasis added).

200. Assertion of Exec. Privilege in Response to a Cong. Subpoena, 5 Op. O.L.C. 27, 31 (1981).

length. Accordingly, executive oversight responses often emphasize the “co-equality” of the branches in order to establish the legitimacy of resistance.²⁰¹

From an executive perspective, the equality principle also embeds a concept of branch autonomy articulated in *Nixon v. Fitzgerald*²⁰²: “The essential purpose of the separation of powers is to allow for independent functioning of each coequal branch of government within its assigned sphere of responsibility, free from risk of control, interference, or intimidation by other branches.”²⁰³ Thus, congressional pretention to unfettered access to executive information, as well as dictation of terms of such access, amounts to undue interference by a peer.

2. Accommodation

Accommodation in a transactional model relates to the method of outcome determination, but it flows from a view of constitutional design.²⁰⁴ Whereas Congress seeks to enforce a rule of entitlement, the Executive believes both branches share competing, legitimate interests.²⁰⁵ Thus, oversight dispute outcomes, like transactions, are primarily defined by the relative leverage possessed by each party in a given situation. As a result, the parties’ interaction consists primarily of negotiation.

In 2000, the U.S. Department of Justice communicated formal views on its obligations with respect to congressional oversight in connection with a House subcommittee hearing.²⁰⁶ In that letter, Assistant Attorney General Robert Raben explained the Executive’s protective goals: “In implementing the longstanding policy of the Executive Branch to *comply* with Congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations

201. Of course, Congress also invokes its “coequal” status when it believes it is being stonewalled by the Executive.

202. 457 U.S. 731 (1982).

203. *Id.* at 760–61 (Burger, C.J., concurring).

204. See Neal Devins, *Congressional–Executive Information Access Disputes: A Modest Proposal—Do Nothing*, 48 ADMIN. L. REV. 109, 111–16 (1996) (a section titled “The Competing Interests of Congress and the Executive”).

205. *Id.* at 113–14; see also Assertion of Exec. Privilege Over Commc’ns Regarding EPA’s Ozone Air Quality Standards and Cal.’s Greenhouse Gas Waiver Request, 32 Op. Att’y Gen., slip op. at 3–5 (June 19, 2008) (opinion of Att’y Gen. Michael Mukasey) (assessing if the Committee’s need for the subpoenaed documents overcomes the executive privilege).

206. See Assistant Att’y Gen. Raben Letter to Chairman Linder, *supra* note 72, at 2–3.

of the Executive Branch, the Department's goal in all cases is to satisfy legitimate legislative *interests* while protecting Executive Branch confidentiality *interests*."²⁰⁷ As noted, the letter is consistent with executive branch policy in administrations of both political parties dating back at least as far as President Reagan.²⁰⁸

The Department's rhetorical use of "interests" is a form of resistance to a notion of congressional entitlement. A concept of competing interests flows from the equality principle and embeds within it the legitimacy of executive branch concerns. In stark contrast to a Congress entitled to almost anything subject only to the narrowest of exceptions, the Executive envisions the Constitution as requiring the balancing of interests. Under this view, the Constitution requires the Executive to provide sufficient information to Congress for legislative purposes, subject to executive branch interests in confidentiality or other processes that may determine the time, manner, and scope of information provided.

Furthermore, an accommodation process requires weighing competing interests and relative merits, and thus requires an assessment not just of executive branch interests but also of their merit vis-à-vis congressional need for the information. A number of factors naturally come into play:

- the legitimacy and gravity of congressional need for the requested information;
- whether the request for the information is tailored to that need;
- the legitimacy and gravity of executive branch confidentiality interests implicated by the request;
- the ability to satisfy legitimate congressional needs with refined or narrowed requests;
- the availability of alternative sources of the requested information;
- historical practice, by both branches, with respect to similar requests; and
- the respective political will and leverage of the branches to pursue their positions.

207. *Id.* at 2 (emphasis added).

208. *See supra* note 199 and accompanying text.

This list is descriptive in that it resembles executive branch analysis in practice. It also has normative value. Sensitive consideration of these factors should result in optimal congressional oversight activity while protecting executive branch interests. However, who evaluates these factors, and by what mechanism, remains problematic in terms of separation of powers. The question is whether this is a matter for the political processes, the courts, or both.

C. The Two Models: Self-Serving and Inapt

Congress and the Executive derive great benefits that flow naturally from their respective models of choice. Both models, however, fall short of their adopted analogy—whether litigation or transactional negotiation—in material respects. Specifically, Congress, in acting as both an adversarial party and the arbiter in its own investigations, has failed to adopt procedural safeguards that are present in court, such as supervised discovery and protection of otherwise confidential information. In contrast, the Executive transactional model provides for no arbiter at all, allowing the Executive to entrench itself when it holds the information Congress seeks.

1. Litigation Model Benefits to Congress and Analogy Weaknesses

Politically, Congress derives great benefit from its association with litigation by framing disputes with private parties and the Executive in the language of “compliance” or “non-compliance.” By the time the Executive raises an objection to a congressional request, the press invariably frames the resulting stories the way Congress would like: as a “failure to comply” with a congressional request, or, even worse, a subpoena.²⁰⁹ Thus, from the first sign that the Executive may have objections to the scope or nature of the inquiry, whether legitimate or meritless, it is cast in a light that suggests lawlessness and wrongdoing.²¹⁰ The resulting political pressure caused by this negative frame also assists Congress in dislodging information from an Executive that benefits from inaction.²¹¹

However, while Congress cloaks itself in the language of litigation and investigations, it has little respect for the procedural safeguards that

209. See Marshall, *supra* note 18, at 809–10.

210. *Id.*

211. *Id.*

courts have developed over centuries to bolster legitimacy.²¹² In fact, it has failed to create procedural opportunities to obtain relief for unduly burdensome requests, failed to establish meaningful privacy and non-disclosure principles, and demonstrated hostility to common law privileges. Moreover, Congress has failed to create any internal process for a neutral, or at least removed, arbiter to review objections raised by its discovery targets. Instead, the chair of the relevant congressional committee rules on motions, notwithstanding the fact that the chair is often in a fundamentally adversarial posture to a witness or agency.

Some procedural disparities derive from the fact that a legislative inquiry has a purpose other than the resolution of a case or controversy. The courts are quite clear that congressional investigations are not the same as criminal adjudications.²¹³ However, interests in reputation,²¹⁴ procedural fairness,²¹⁵ and public legitimacy²¹⁶ apply in full force. Thus, while Congress's information gathering threatens concrete harms to individuals and entities, they are not entitled to "the full panoply" of procedural protections.²¹⁷

The congressional litigation model also differs from real litigation in that it lacks any meaningful supervision of the discovery process. The American civil litigation discovery process already honors incredibly intrusive requests and costly information production.²¹⁸ In fact, most countries with civil law traditions look upon our system of civil discovery with contempt due to what they see as litigation run amok.²¹⁹

212. I address Congress's lack of procedural safeguards and offer potential reform principles designed to bolster congressional oversight legitimacy in a subsequent draft article entitled *Congressional Due Process*. As discussed there, both government officials and private parties confront spartan procedural protections in congressional investigations. For purposes of this Article, it is important to note that at the time of requested enforcement, a congressional subpoena or contempt finding has not likely undergone any meaningful pre-enforcement supervision or review.

213. See, e.g., *United States v. Fort*, 443 F.2d 670, 679 (D.C. Cir. 1970) (noting that a congressional inquiry is "an investigative proceeding and not a criminal proceeding").

214. See *Yellin v. United States*, 374 U.S. 109, 118 (1963) (recognizing reputational interests in connection with a congressional hearing by the House Committee on Un-American Activities).

215. See, e.g., *Watkins v. United States*, 354 U.S. 178, 188 (1957).

216. See, e.g., *Scope of Cong. Oversight and Investigative Power With Respect to the Exec. Branch*, 9 Op. O.L.C. 60, 61 (1985).

217. *Hannah v. Larche*, 363 U.S. 420, 442 (1960).

218. See FED. R. CIV. P. 26.

219. See, e.g., Gary B. Born, *The Hague Evidence Convention Revisited: Reflections on Its Role in U.S. Civil Procedure*, 57 LAW & CONTEMP. PROBS. 77, 77 (1994) ("Foreign courts usually regard U.S. discovery requests as impermissibly broad and . . . refuse to execute such

As a result, many of them fail to honor our transnational discovery requests.²²⁰ By comparison, congressional discovery is vastly more unregulated and sprawling than even the civil litigation discovery process.

In traditional civil litigation, the parties have numerous opportunities to register their objections to discovery requests.²²¹ More importantly, they have procedures in place for review. Under certain circumstances, civil litigants may seek interlocutory appeal in an effort to shield especially sensitive information from disclosure in the discovery context.²²² Similarly, discovery is regulated in federal criminal investigations by means of various constitutional safeguards related to search and seizure, interrogations and confessions, and the Federal Rules of Criminal Procedure.²²³

In addition to an unsupervised discovery process, congressional investigations also offer little meaningful privacy or non-disclosure protections for those from whom it seeks information. While there is a general presumption of a public right to observe court proceedings,²²⁴ civil litigation includes procedural opportunities for litigants to seek protection from public disclosure for certain cognizable protected interests.²²⁵ Congress, however, does not offer enforceable protections for trade secrets or otherwise confidential information taken into its custody.

Putting aside whether procedural safeguards or substantive privileges are available, if Congress refuses to yield, the issues are not going to be resolved until well after a party resisting oversight is in

requests.” (footnote omitted)); Marat A. Massen, Note, *Discovery for Foreign Proceedings After Intel v. Advanced Micro Devices: A Critical Analysis of 28 U.S.C. § 1782 Jurisprudence*, 83 S. CAL. L. REV. 875, 877 (2010) (observing that “many civil law nations find America’s discovery system to be intrusive and fundamentally inconsistent with their own”).

220. See, e.g., Born, *supra* note 219, at 77.

221. See, e.g., FED. R. CIV. P. 33(b)(4).

222. See *Perlman v. United States*, 247 U.S. 7, 12–13 (1918) (holding that a subpoenaed party may obtain an interlocutory appeal on refusal based on a claim of privilege if she stipulates she will comply with the court order upon a final adjudication).

223. See FED. R. CRIM. P. 16, 41.

224. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980).

225. For example, the Federal Rules of Civil Procedure create a presumption against including Social Security numbers, birth dates, taxpayer identification numbers, minors’ names, or a financial account number in any filing. See FED. R. CIV. P. 5.2(a) (“Privacy Protection for Filings Made with the Court”). It also authorizes a court, “for good cause,” to enforce a protective order requiring redactions or limiting a nonparty’s access to information. FED. R. CIV. P. 5.2(e) (“Protective Orders”).

serious legal jeopardy. In a congressional investigation, objections related to discovery, protection of confidential information, and production of privileged information will not get reviewed by a neutral party *until they are raised as a defense to a criminal contempt prosecution, a defense to civil contempt litigation, or on a writ of habeas corpus following an inherent contempt finding.*

The Speech and Debate Clause²²⁶ presents one of the principal complicating factors for subjects of congressional oversight. Specifically, it grants absolute immunity to congressional actors whose conduct is undertaken in furtherance of legislative functions.²²⁷ As evidenced by the Supreme Court's ruling in *Eastland v. U.S. Servicemen's Fund*,²²⁸ immunity frustrates any judicial regulation of congressional discovery process either by means of a suit to enjoin or other litigation platform designed to quash a congressional subpoena.²²⁹

The D.C. Circuit commented on the lack of discovery management in congressional investigations some fifty years ago in *Tobin v. United States*.²³⁰ The dispute involved the withholding of documents by the Executive Director of the Port of New York Authority, at the direction of the Governors of New York and New Jersey, on grounds that the scope of the congressional subpoena was overbroad.²³¹ The court lamented that this discovery issue had to be resolved in the context of a criminal contempt prosecution.²³² The court's concern stemmed from the fact that a witness cannot receive a determination of his constitutional rights until he is subjected to criminal prosecution. As such, the *Tobin* court recommended Congress create a method for allowing these determinations to be made prior to contempt by way of declaratory judgment. Because no such method has been adopted,

226. U.S. CONST. art. I, § 6, cl. 1.

227. *Id.*

228. 421 U.S. 491 (1975).

229. *Id.* at 511.

230. 306 F.2d 270, 275–76 (D.C. Cir. 1962).

231. *Id.* at 271.

232. *Id.* at 276 (“Although this question is not before the Court, it does feel that if contempt is, indeed, the only existing method, Congress should consider creating a method of allowing these issues to be settled by declaratory judgment. Even though it may be constitutional to put a man to guessing how a court will rule on difficult questions like those raised in good faith in this suit, what is constitutional is not necessarily most desirable. Especially where the contest is between different governmental units, the representative of one unit in conflict with another should not have to risk jail to vindicate his constituency's rights.” (quoting *United States v. Tobin*, 195 F. Supp. 588, 617 (D.D.C. 1961))).

however, contempt proceedings remain the sole process to secure a determination by a neutral arbiter. Though the *Tobin* court ultimately reversed the judgment of conviction,²³³ relief is rare for a person who decides to risk the consequences of noncompliance.²³⁴

Lack of management of congressional discovery represents obvious criminal peril for a private individual or non-federal entity. In interbranch disputes, unbridled discovery takes on a separation of powers dimension. The Supreme Court recognized, in *Cheney v. U.S. District Court for the District of Columbia*,²³⁵ a nexus between the crafting of discovery requests and separation of powers.²³⁶ Specifically, in *Cheney*, the Court compared “overly broad discovery requests” in civil litigation to the “narrow subpoena orders” in *United States v. Nixon*.²³⁷ It noted that, in *Nixon*, the “very specificity of the subpoena requests serve[d] as an important safeguard against unnecessary intrusion into the operation of the Office of the President.”²³⁸ While the calculus of sufficient showings may be different in the congressional oversight context, the scope of a discovery request clearly relates to the relative burden on the Executive.

Finally, it bears mention that not all congressional actors share a sincere belief in the litigation model. Congress is defined by its multipolarity. Some congressional actors adopt the litigation model as a negotiating tactic. In other words, they use the language of litigation, authority, entitlement, and outrage in order to increase the political pressure on the other side of the constitutional negotiation.

2. Transactional Model Benefits to the Executive and Analogy Weaknesses

The Executive Branch benefits from adopting the transactional model in a number of important respects. First, the party with the advantage in the *status quo ante* will prevail in the event of inaction. In the congressional oversight and investigations context, the Executive

233. *Id.*

234. *Yellin v. United States* is another such scarce example in which the Court offered a defendant rare relief by excusing the failure to answer questions on the grounds that the congressional subcommittee at issue failed to follow its own rules on executive session. 374 U.S. 109, 122 (1963).

235. 542 U.S. 367 (2004).

236. *See id.* at 387.

237. *Id.* at 386.

238. *Id.* at 387.

Branch resisting production of information will prevail when there is stalemate. A transactional model inherently challenges congressional authority by means of its claim of equality and functionally limits the scope of congressional oversight by framing conflicts as competing, legitimate interests. By rejecting an imperative obligation to comply with congressional subpoenas, the Executive Branch favors inaction and delay such that a subpoena becomes a form of constitutional negotiation rather than a categorical imperative. In this way, everything is up for discussion.

The executive branch transactional model breaks down in that it does not contemplate any role for judicial review. A pure transactional model does not provide sufficient incentive for the Executive to cooperate with politically embarrassing or functionally burdensome oversight requests that are nevertheless legitimate. Moreover, executive branch intransigence, whether principled or not, incurs costs to public confidence in the government.

While judicial involvement is rare and problematic, it is an ever-present possibility should the Executive overplay its hand—or perhaps even if it does not. Furthermore, the courts are likely to be much less skeptical of congressional authority than the Executive. Without a judicial Sword of Damocles overhead, there might not be enough incentive to negotiate in good faith as the Executive would like to suggest.

3. Escalation into Constitutional Conflict

In practice, oversight disputes are initially raised informally by means of conference calls and letter exchanges. Generally, during such a conversation, an executive branch representative may raise confidentiality interests that could be damaged by the nature or scope of a congressional oversight request. From its own perspective, “Executive Branch confidentiality interests” is shorthand for a position that (a) has likely been vetted through the Office of Legal Counsel as an Executive Branch-wide position and (b) could be grounds for an assertion of executive privilege. Executive branch officials are sensitive to the fact that assertion of executive privilege is a power that belongs to the President alone.²³⁹ However, many congressional staffers are either unaware of, or find it tactically advantageous to ignore, that fact.

239. See, e.g., Assertion of Executive Privilege with Respect to Prosecutorial Documents, 25 Op. Att’y Gen., slip op. at 2 (Dec. 10, 2001).

In turn, congressional staff will usually ask questions designed to pin down the executive branch position as a flat refusal. The following are cross-examination-style questions of the kind typical in oversight disputes:

“Does that mean the Department is refusing the Chairman’s request?”

“Will the Department honor the Chairman’s subpoena?”

“Is the Administrator aware that it is a crime to be held in contempt of Congress?”

“Is the Administration asserting Executive Privilege?”

For the executive branch representative, these questions are traps. If the answer is “yes” to executive privilege, then the official has usurped a presidential prerogative. If the answer is “no,” it will provide Congress with an opportunity to view the dispute as ripe for escalation to the next relevant formal step: from document request, to subpoena threat, to subpoena issuance, to contempt threat, to contempt hearing, and, finally, to contempt vote. As the holder of the status quo, the Executive Branch does not benefit from rapid escalation. Correspondence and communication regularly starts from the premise of meeting Congress’s legitimate information needs but with counterproposals that are acceptable to the Executive.

From the congressional side, members of Congress are trying to get the answers and information they want. Depending on the circumstances, the congressional committee may see benefits in a public process fight with the Executive Branch in terms of publicity, interest group perception, or political advantage. Congressional staff members tend to frame questions that call for “yes” or “no” answers in cross-examination style. That the Executive wants to provide nuance belies the divergent views of the branches.

Given the vast chasm between the branches in the nature of their constitutional roles, the salient question then becomes: In the event of impasse, how should such issues be resolved? The next section of the Article addresses Congress’s potential remedies to vindicate its oversight interests.

IV. CONGRESSIONAL OVERSIGHT DISPUTES: REMEDIAL ANALYSIS

Professor Caprice Roberts, a remedies and federal courts scholar, frequently invokes the maxim that remedies shape substantive rights.²⁴⁰ Remedies used to resolve interbranch oversight disputes not only favor one of the competing models—congressional litigation or executive transactional—but also shape branch relations in the constitutional scheme. Therefore, appropriate remedial schemes must be very carefully applied so as to create the right incentives and outcomes over time. This section considers a number of formal and informal potential congressional oversight enforcement remedies.

A. Potential Oversight Remedial Schemes

Congress has a range of potential remedies it can seek to enforce its oversight prerogatives. The first set of remedial schemes to consider is contempt, which comes in three varieties: inherent contempt power, criminal contempt prosecutions, and civil contempt actions. Contempt is defined as “willful disobedience to or open disrespect of a court, judge, or legislative body.”²⁴¹ The contempt approach is germane in that the enforcement effort implicates the substance or process of the congressional investigation itself.²⁴² In the early days of the Republic, the Supreme Court recognized contempt power as necessary to shield Congress from being “exposed to every indignity and interruption that rudeness, caprice, or even conspiracy, may mediate against it.”²⁴³

The second set of remedial schemes available to Congress is use of its other constitutional and functional powers to vindicate its oversight interests. Congress may use legislative authorizations and appropriations as leverage against the Executive Branch to obtain requested information. The Senate may use its advice and consent power to hold up executive nominations to departments or agencies that are resisting congressional oversight requests. Ultimately, Congress could invoke its impeachment power to enforce its oversight prerogatives. Such congressional self-help remedies have the benefit of being within the control of Congress itself. However, such actions have

240. Caprice L. Roberts, *Teaching Remedies from Theory to Practice*, 57 ST. LOUIS U. L.J. 713, 722 (2013).

241. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 269 (11th ed. 2011).

242. As will be seen below, some other potential remedial schemes are *non-germane*. See *infra* Part IV.

243. *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 228 (1821).

a weaker nexus to the oversight process in dispute, and that lack of germaneness tends to increase the political costs to Congress because other policy priorities are obstructed in the name of a congressional investigation.

Contempt and congressional self-help remedies serve valid purposes; however, there is a critical, and often overlooked, distinction between congressional oversight activities directed at the Executive and activities directed at private parties.²⁴⁴ Though inherent and criminal contempt may be appropriate for recalcitrant private parties, the nature of separation of powers suggests that contempt and self-help remedies be used to address interbranch disputes. The following sections analyze the appropriateness of contempt and self-help remedies in such disputes.

1. Contempt

One method by which Congress can regulate its own proceedings is through the use of its contempt power. Contempt comes in three forms: inherent, criminal, and civil. One important distinction between the various types to keep in mind is the level of participation required by other branches for Congress to exercise its contempt power.

a. Inherent Contempt

Inherent contempt only requires action on the part of Congress itself.²⁴⁵ Under this approach, Congress directs the Sergeant-at-Arms to bring a person before the Senate or House for trial.²⁴⁶ If convicted, Congress can impose a prison sentence for coercive²⁴⁷ or punitive²⁴⁸ purposes. A person imprisoned by Congress may still avail herself of a writ of habeas corpus to challenge the validity of the detention in court.²⁴⁹

As late as 1977, one court noted that inherent contempt power has the benefit of avoiding the type of dilemma Congress faces when

244. There are other entities that could fall within the oversight gaze, including state and local governments, the judiciary, or international organizations subsidized by the United States.

245. See ROSENBERG, *supra* note 120, at 15 (“Unlike criminal and civil contempt proceedings, Congress’ inherent contempt power may be used without the cooperation or assistance of either the executive or judicial branches.”).

246. *Id.* at 14.

247. See *McGrain v. Daugherty*, 273 U.S. 135, 162 (1927).

248. See *Jurney v. MacCracken*, 294 U.S. 125, 147–48 (1935).

249. 28 U.S.C. § 2241 (2012).

seeking executive participation in prosecuting executive branch officials.²⁵⁰ Inherent contempt allows Congress to retain control of the entire enforcement process.²⁵¹

The House of Representatives . . . retains its inherent power to enforce its own subpoena duces tecum against any resistance or reluctance to comply with it, by means of civil contempt proceedings and remedies within its own forum. Such a procedure might relieve the judiciary from any further involvement in this matter. That procedure might also avoid potential conflicts between the legislative and executive branches, and within the executive branch itself, that would result from a prosecution by the executive branch, of an executive branch official, for conduct in accordance with executive branch policy which the House of Representatives might deem contempt of its legislative prerogative and authority.²⁵²

While the D.C. District Court does a nice job of articulating congressional–executive awkwardness presented by the use of criminal contempt in an interbranch dispute,²⁵³ it fails to recognize the specter of interbranch violence.

To say the least, it would be impractical and unwise for congressional security forces to attempt to detain executive branch officials and haul them off to the congressional brig,²⁵⁴ although commentators occasionally call for it.²⁵⁵ One can see the momentary attraction to inherent contempt from the vantage point of a frustrated congressional stakeholder who, in the face of perceived non-compliance with legitimate congressional requests, encounters an Executive Branch

250. *In re Grand Jury Investigation of Ven-Fuel*, 441 F. Supp. 1299, 1308 (M.D. Fla. 1977).

251. *Id.*

252. *Id.*

253. *See, e.g., Tobin v. United States*, 306 F.2d 270, 276 (D.C. Cir. 1962).

254. *See* Adam Cohen, Op-Ed., *Congress Has a Way of Making Witnesses Speak: Its Own Jail*, N.Y. TIMES, Dec. 4, 2007, at A34 (discussing the Capitol Jail facility).

255. *See* Jon Ponder, *Jail Cells in U.S. Capitol Building Could be Reopened for Rove, Miers and Bolten*, PENSITO REV. (July 26, 2007), <http://www.pensitoreview.com/2007/07/26/jail-cells-in-us-capitol-building-available-for-rove-miers/>, archived at <http://perma.cc/W5JE-EBGP> (“Perhaps it is time for Congress to dust off its rusty inherent contempt power, reopen the Capitol hoosegow, get some of the Capitol Police’s finest, and put a couple of people behind bars for a few days.” (quoting congressional scholar Norm Ornstein) (internal quotation marks omitted)).

that refuses to prosecute its own under the congressional contempt statute, and federal courts that resist judicial enforcement.

However, as a practical matter, it is hard to imagine the Executive Branch standing idly by as congressional security forces seek forcible detention of a cabinet official. The Executive Branch has more guns. It would be incredibly damaging to the constitutional scheme if we incentivized even the specter of violence between the political branches. But inherent contempt would require that we jump to such vulgar considerations almost immediately. Any constitutional avoidance doctrine that contemplates police power that is divided by branch, at cross-purposes, is therefore of little value.

Such considerations likely led the court in *Miers* to suggest that the congressional arrest of a senior presidential advisor would be particularly inappropriate.²⁵⁶ In contrast, while it has fallen out of Congress's favor,²⁵⁷ use of inherent contempt procedure against a private party raises no such concerns because the federal government's monopoly — and unity — of police power is not threatened.

b. Criminal Contempt

Criminal contempt actions require the participation of all three branches of government. Under this approach, Congress formally finds an individual in contempt of Congress. Then, Congress refers the person to the U.S. Attorney for the District of Columbia for criminal prosecution under the criminal contempt statute.²⁵⁸ At that point, the resulting proceeding takes on the character of any criminal prosecution conducted in Article III courts.

While this is a perfectly workable regime when the individual held in contempt is a non-federal party, it is problematic as applied to interbranch oversight disputes. Congress believes that the criminal contempt remedy is wholly applicable in this context. In fact, since Watergate, a component of Congress²⁵⁹ has cited thirteen senior executive branch officials for contempt under a threat of criminal

256. See *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 92 (D.D.C. 2008).

257. See S. REP. NO. 95-170, at 97 (1977) (describing Congress's inherent contempt remedy as "time consuming and not very effective").

258. 2 U.S.C. §§ 192, 194 (2012) (imposing a "duty" on the U.S. Attorney to "bring the matter before the grand jury for its action").

259. "Component" means a subcommittee, full committee, or an entire chamber.

sanction.²⁶⁰ Accordingly, Congress expects the U.S. Attorney for the District of Columbia to initiate prosecutions against other executive branch officials held in contempt even though that prosecutor is a subordinate of the President and even when the President asserted executive privilege.²⁶¹

Nevertheless, the Executive will not prosecute an executive branch official acting pursuant to an assertion of executive privilege.²⁶² The Department of Justice, which has taken this position since at least 1956,²⁶³ has two principal reasons. First, according to the Department, the executive branch official has not committed a crime if acting pursuant to the assertion of privilege.²⁶⁴ Second, Congress may not command an exercise of prosecutorial discretion, which is an executive branch function.²⁶⁵ In line with this position, the Department of Justice declined to prosecute executive branch officials subject to privilege assertions who were held in contempt findings under President George

260. The officials are Secretary of State Henry Kissinger (1975); Secretary of Commerce Rogers C.B. Morton (1975); Secretary of Health, Education, and Welfare Joseph A. Califano, Jr. (1978); Secretary of Energy Charles Duncan (1980); Secretary of Energy James B. Edwards (1981); Secretary of the Interior James Watt (1982); Environmental Protection Agency Administrator Anne Gorsuch Burford (1983); Attorney General William French Smith (1983); White House Counsel John M. Quinn (1996); Attorney General Janet Reno (1998); White House Counsel Harriet Miers (2008); White House Chief of Staff Joshua Bolten (2008); and Attorney General Eric H. Holder, Jr. (2012). KAISER ET AL., *supra* note 49, at 34 n.57 (noting the first twelve contempt citations). The *Holder* civil litigation is parallel to a criminal contempt referral, and Attorney General Holder was the thirteenth executive branch official cited for congressional contempt.

261. See, e.g., Letter from Kerry W. Kircher, Gen. Counsel, U.S. House of Representatives, to Ronald C. Machen, Jr., U.S. Att’y for the District of Columbia (July 26, 2012) (questioning whether Mr. Machen will “proceed as required by Section 194” to bring Attorney General Holder’s contempt of Congress before the grand jury).

262. See, e.g., Prosecution for Contempt of Cong. of an Exec. Branch Official Who Has Asserted a Claim of Exec. Privilege, 8 Op. O.L.C. 101, 140 (1984).

263. See *Availability of Information from Federal Departments and Agencies: Hearings Before a Subcomm. of the House Comm. on Gov’t Operations*, 84th Cong. 2933 (1956) (in which Deputy Attorney General William P. Rogers testified that where a President asserted privilege, the contempt of Congress statute was “inapplicable to the executive departments”).

264. See *Prosecution for Contempt*, 8 Op. O.L.C. at 140.

265. For a fulsome academic treatment that leads to the Department’s position, see Todd D. Peterson, *Prosecuting Executive Branch Officials for Contempt of Congress*, 66 N.Y.U. L. REV. 563 (1991) (arguing that Congress cannot mandate prosecutions and that criminal contempt prosecutions of executive branch officials would unconstitutionally impede executive branch functions).

W. Bush²⁶⁶ and President Barack Obama.²⁶⁷ Due to this legal impasse, which is another expression of the incompatible oversight models, criminal contempt is not a means by which Congress can vindicate its oversight interests vis-à-vis the Executive Branch.²⁶⁸

c. Civil Contempt

Civil contempt actions require the participation of two branches of the federal government: Congress and the judiciary. In light of problems applying inherent and criminal contempt to interbranch disputes, over the last decade Congress has turned to civil contempt procedures in an effort to obtain judicial enforcement of its subpoenas against the Executive.

The Senate and House have separate civil contempt procedures. The Senate has a statute conferring authority on the federal courts to issue an order commanding a person to comply with a Senate subpoena.²⁶⁹ The procedure thereby allows the Senate to hold persons in contempt, utilizing Article III court proceedings as the means of enforcement. Since 1979, the Senate has authorized Senate Legal Counsel to seek judicial enforcement of a document subpoena six times, none of which have been directed against executive branch officials.²⁷⁰

In the House, civil contempt must be authorized by a resolution formalizing a contempt citation and authorizing a congressional component or House General Counsel to initiate civil litigation.²⁷¹ The civil actions involving Joshua Bolten and Harriet Miers (*Miers*)²⁷² and Eric Holder (*Holder*)²⁷³ are the only examples of civil enforcement by the House. Given the effectiveness of inherent and criminal contempt

266. See Letter from Michael B. Mukasey, Att’y Gen., to Nancy Pelosi, Speaker, U.S. House of Representatives (Feb. 29, 2008) (explaining the Department’s refusal to prosecute White House Chief of Staff Joshua Bolten and former White House Counsel Harriet Miers).

267. See Letter from James M. Cole, Deputy Att’y Gen., to John A. Boehner, Speaker, U.S. House of Representatives (June 28, 2012) (explaining the Department’s refusal to prosecute Attorney General Eric Holder).

268. In light of this reality, two commentators argue for court-appointed special prosecutors anytime Congress holds an executive branch official in contempt. See Stanley M. Brand & Sean Connelly, *Constitutional Confrontations: Preserving a Prompt and Orderly Means by Which Congress May Enforce Investigative Demands Against Executive Branch Officials*, 36 CATH. U. L. REV. 71 (1986).

269. See 2 U.S.C. § 288d (2012).

270. KAISER ET AL., *supra* note 49, at 34.

271. See *id.* at 34–35.

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

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

remedies against non-federal oversight targets, it is not surprising that to date the House has sought civil contempt remedies only against executive branch officials.

As will be discussed in Part V, the Executive continues to vigorously contest the justiciability of civil contempt actions brought against executive branch officials who are resisting congressional oversight pursuant to a presidential assertion of executive privilege.

2. Congressional Self-Help Remedies

In addition to its contempt power, Congress has numerous formal and informal self-help remedies at its disposal. Congress may use its legislative authorization power as leverage against executive officials or agencies to obtain oversight materials. It may similarly employ its control over the nation's purse against resistant executive branch entities. Further, the Senate can threaten to hold up executive nominees with its advice and consent power or try impeachments approved by the House. Finally, Congress can use the media to push its own agenda by placing unwanted attention on the Executive Branch.

a. Legislative Authorizations

Congress may use legislative authorizations as a means of enforcing its oversight prerogatives. As the *Congressional Oversight Manual* notes, “[t]hrough its authorization power, Congress exercises significant control over any government agency.”²⁷⁴ According to a leading expert on congressional procedure, the “authorization process is an important oversight tool.”²⁷⁵ For example, Congress could eliminate, or threaten to eliminate, a position of a recalcitrant witness. It could assign a function to a different agency or end a program of interest to the Executive. Further, Congress could withhold reauthorization for a program or other executive branch priority as leverage to obtain requested oversight materials.²⁷⁶

274. KAISER ET AL., *supra* note 49, at 17.

275. WALTER J. OLESZEK, *CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS* 297 (6th ed. 2004).

276. See KAISER ET AL., *supra* note 49, at 18 (“Expiration of an agency’s program provides an excellent chance for in-depth oversight . . .”).

b. Appropriations Power

Congress views the appropriations process as one of its “most important forms of oversight.”²⁷⁷ But in addition to the process itself, it can serve as a remedial tool. Congress has employed the “power of the purse” to enforce its oversight interests.²⁷⁸ If an executive branch entity is resisting congressional oversight requests, “the appropriations for the agency or department involved can be cut off or reduced when requested information is not supplied.”²⁷⁹

c. Senate Advice and Consent

The Senate may use its power of advice and consent in the executive nominations process as leverage to obtain documents or secure witness testimony from the Executive.²⁸⁰ It is a common practice.²⁸¹ The Senate’s leverage may be more pronounced in periods of divided

277. *Id.*

278. *Id.* at 4.

279. ROSENBERG, *supra* note 120, at 18.

280. *See id.* (noting that “a hold can be placed by a senator on agency nominees until the information is released”).

281. *See, e.g.,* Bradley Graham, *Senator May Block Successor to Defense Policy Chief Feith*, WASH. POST, June 23, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/06/22/AR2005062201989.html>, *archived at* <http://perma.cc/DK5T-ALWW> (describing efforts by Senator Carl M. Levin to obtain documents related to an investigation as to how Assistant Secretary of Defense for Policy, Douglas Feith, “shaped the administration’s view of the relationship between Iraq and al Qaeda before the U.S. invaded Iraq”); Pauline Jelinek, *Graham Says He’ll Block Nominations over Benghazi*, ASSOCIATED PRESS (Oct. 28, 2013, 6:03 PM), <http://bigstory.ap.org/article/graham-says-hell-block-nominations-over-benghazi>, *archived at* <http://perma.cc/3DQK-CM3R> (discussing Senator Lindsay Graham’s use of holds to gain congressional access to all survivors of the September 11–12, 2011, attack on U.S. diplomatic facilities in Benghazi, Libya); Jason Miller, *Sen. Coburn to Put Hold on OPM Director Nominee*, FED. NEWS RADIO (July. 31, 2013, 1:47 PM), <http://www.federalnewsradio.com/520/3406794/Sen-Coburn-to-put-hold-on-OPM-director-nominee>, *archived at* <http://perma.cc/JZU2-7DHW> (relating Senator Tom Coburn’s willingness to use a hold to procure an answer from the White House and Office of Personnel Management about how the Affordable Care Act applies to lawmakers and their staff); Brendan Sasso, *Grassley to Hold up Obama’s Nominees to FCC over LightSquared Documents*, THE HILL (Nov. 3, 2011, 5:31 PM), <http://thehill.com/blogs/hillicon-valley/technology/191639-grassley-to-hold-up-fcc-nominees-over-lightsquared-documents>, *archived at* <http://perma.cc/PDR9-7KH2> (reporting Senator Chuck Grassley’s use of holds while seeking access related to a satellite-based broadband service that allegedly interferes with Global Positioning Systems (GPS)); Jordy Yager, *Grassley Threatens to Hold up ATF Nominee over Separate Dispute*, THE HILL (Jan. 31, 2013, 9:44 PM), <http://thehill.com/homenews/senate/280447-grassley-threatens-to-hold-up-atf-nominee-over-separate-dispute>, *archived at* <http://perma.cc/STU2-MY6X> (discussing Senator Grassley’s use of a hold while seeking “access to 1,200 documents” related to a congressional investigation of a False Claims Act settlement with the city of St. Paul).

government; however, the Senate's countermajoritarian procedures—including the practice of “holds” by one member alone²⁸²—render it an effective method of self-help. The Senate is often successful at obtaining disputed information from the Executive by means of the confirmation process.²⁸³ This remedy comes at a political cost to Congress, however, because it puts Congress in the position of *obstructing* the nominations process where the germaneness to the oversight dispute is attenuated.

d. Impeachment

The Constitution also grants Congress power to remove the President and certain other executive branch officials by means of impeachment.²⁸⁴ It provides:

The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.²⁸⁵

The House of Representatives has the “sole Power of Impeachment.”²⁸⁶ The Senate has the “sole Power to try all Impeachments” and may convict upon a two-thirds vote.²⁸⁷

282. See Robert F. Turner, *Constitutional Implications of Senate “Holds” on Treaties and Diplomatic Nominations*, 11 TEX. REV. L. & POL. 175, 184–85 (2006) (criticizing Senate ‘hold’ procedures as unconstitutional and noting that they are “sometimes used to pressure the President or an executive department to turn over documents”).

283. See, e.g., 157 CONG. REC. S4139–44 (daily ed. June 28, 2011) (Senator Grassley: “I also understand that Senator Chambliss has reached an agreement . . . [with the Justice Department that] he has sought on behalf of the Intelligence Committee. Accordingly, I now lift my opposition to the Senate holding a vote on [Deputy Attorney General nominee James] Cole’s nomination.”); Tony Bertuca, *Senator Lifts Hold On Shyu’s Nomination; DOD To Audit Russian Helo Deal*, INSIDE THE ARMY (Sept. 24, 2012), available at 2012 WLNR 20303203; Cheryl K. Chumley, *EPA Hands Over Documents to Advance McCarthy Nomination*, HEARTLAND (June 6, 2013), <http://news.heartland.org/newspaper-article/2013/06/06/epa-hands-over-documents-advance-mccarthy-nomination>, archived at <http://perma.cc/HN6J-3VJD>; Kimberley Dozier, *White House to Give Benghazi Documents to Senators*, HUFFINGTON POST (Feb. 22, 2013, 5:45 PM), http://www.huffingtonpost.com/2013/02/22/white-house-benghazi-documents_n_2744980.html, archived at <http://perma.cc/3JAF-YZ2W>; Sean Reilly, *Hold Lifted on Senate Confirmation of OPM Director*, FED. TIMES (Aug. 7, 2013, 6:00 AM), available at <http://www.federaltimes.com/article/20130807/PERSONNEL01/308070004/Hold-lifted-Senate-confirmation-OPM-director>, archived at <http://perma.cc/F9JB-8VCJ>.

284. U.S. CONST. art I, § 2, cl. 5; *id.* § 3, cl. 6.

285. *Id.* art. II, § 4.

286. *Id.* art. I, § 2, cl. 5.

287. *Id.* § 3, cl. 6.

There is a longstanding debate about whether the phrase “high Crimes and Misdemeanors” has substantive content or is merely a reflection of the political determination of Congress.²⁸⁸ There is a related question as to whether an executive official could be convicted by means of impeachment for obstruction of a congressional investigation.

Congress, unsurprisingly, takes the view that oversight disputes may serve as the basis for impeachment.²⁸⁹ As a stark example: the third Article of Impeachment of President Nixon was predicated on his failure to comply with congressional subpoenas issued by the House Judiciary Committee.²⁹⁰ Specifically, the Committee alleged that

Richard M. Nixon, substituting his judgment as to what materials were necessary for the inquiry, interposed the powers of the Presidency against the lawful subpoenas of the House of Representatives, thereby assuming to himself functions and judgments necessary to the exercise of the sole power of impeachment vested by the Constitution in the House of Representatives.²⁹¹

288. See ELIZABETH B. BAZAN, CONG. RESEARCH SERV., IMPEACHMENT: AN OVERVIEW OF CONSTITUTIONAL PROVISIONS, PROCEDURE, AND PRACTICE 22 (2010) (“Thus treason and bribery may be fairly clear as to their meanings, but the remainder of the language has been the subject of considerable debate.”); see also Neal Kumar Katyal, *Impeachment as Congressional Constitutional Interpretation*, 63 LAW & CONTEMP. PROBS. 169, 169–70 (2000) (discussing Congress as the venue for constitutional interpretation of the phrase “high Crimes and Misdemeanors”); Alex Simpson Jr., *Federal Impeachments*, 64 U. PA. L. REV. 651, 676–95 (1916) (arguing there was confusion as to the meaning of the phrase “high Crimes and Misdemeanors” at the Constitutional Convention). For more on impeachment, see generally BRIAN C. KALT, CONSTITUTIONAL CLIFFHANGERS (2012); WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON (1992); Michael J. Klarman, *Constitutional Fetishism and the Clinton Impeachment Debate*, 85 VA. L. REV. 631 (1999).

289. ROSENBERG, *supra* note 120, at 19 (suggesting that, “in an exceptional case, the official might be impeached”).

290. H.R. REP. NO. 93-1305, at 4 (1974).

291. *Id.* At the time, William Van Alstyne argued that article III of the Nixon impeachment represented bootstrapping by Congress because it sought to enforce views of its own powers without seeking a court to sustain its views. See William Van Alstyne, *The Third Impeachment Article: Congressional Bootstrapping*, 60 A.B.A. J. 1199, 1201–02 (1974). While I do not agree that court review is a condition precedent to impeachment, there is a bootstrapping problem related to use of contempt or impeachment power as an independent basis to justify congressional investigative action.

Because President Nixon resigned from office, the House did not vote on the resolution.²⁹² Therefore, the obstruction of Congress ground for impeachment was not put to further test.

Impeachment is an extraordinary remedy. When leveled against an executive official, it supplants the President's removal power. When invoked against a President or Vice President, it overturns an election. Impeachment exacts tremendous political costs on Congress and the political system overall. It remains, however, the most powerful tool of self-help at Congress's disposal.

e. Political Campaign and Press Narratives

Informally, Congress may take its case to the public through the media and political campaigns. Political pressure, if sufficient, can be an effective motivator for the Executive to relent to congressional demands.²⁹³ This informal remedy benefits our constitutional scheme. Political pressure is often a good barometer for the two most relevant factors in an interbranch clash: the level of congressional need and the significance of the executive branch interests informing resistance. As noted previously, the 9/11 Commission obtained the President's intelligence briefing materials largely due to the political intensity following the catastrophic terrorist attacks on the United States.²⁹⁴ In most other contexts—even those implicating potential executive branch misconduct—the executive branch interests in confidentiality and candor of advice would likely protect similar intelligence products from congressional production.

In practice, both Congress and the Executive seek to shape the political environment in which their oversight disputes play out. Depending on the nature of the inquiry, Congress can develop substantive themes about misconduct, maladministration, and corruption in the Executive.²⁹⁵ Congress can also promote procedural

292. See H.R. Res. 803, 93d Cong., 120 CONG. REC. 2349–50 (1974); H.R. REP. NO. 93-1305 (1974) (House Judiciary Committee report recommending President Nixon's impeachment).

293. See PROJECT ON GOV'T OVERSIGHT, *supra* note 120, at 43 (“It’s newsworthy when the executive branch doesn’t comply with the legislative branch’s duty to conduct oversight. Attention garnered from news coverage can lead to pressure from the top that shakes down the information needed.”).

294. See *supra* note 198 and accompanying text.

295. See, e.g., Letter from Darrell Issa, Chairman, House Comm. on Oversight & Gov’t Reform, Jim Jordan, Chairman, House Subcomm. on Regulatory Affairs, Stimulus Oversight

arguments about the executive branch resistance to oversight, including charges of delay, irresponsibility, stonewalling, lawlessness, and obstruction.²⁹⁶ Again, depending on the credibility and gravity of the inquiry, such arguments could eventually flare into an inferno like Watergate, but most trundle along as slow-burn partisan controversies like Solyndra.²⁹⁷

For its part, the Executive has a slightly different set of incentives as to political narratives. Depending on the nature of the congressional inquiry, the Executive may defend itself on substantive, procedural, or ad hominem grounds. Put another way, the Executive could deny the allegations, bemoan congressional investigative tactics, or attack the credibility of the particular congressional investigator. As the beneficiary of the status quo, no news is literally good news. Therefore, the fewer press stories and political rhetoric about oversight disputes, the better for the Executive. As a result, much of the Executive's work on political environment shaping takes place behind the scenes. By means of research, documents, and argument, the Executive will often seek to dissuade reporters from reporting on stories where it believes there is a trumped up or non-credible congressional allegation. If a reporter is determined to write a negative story, the Executive will often try to soften the coverage by pointing to mitigating facts.

Congress has advantages in the political framing of oversight disputes because the Executive is in the position of resisting a congressional investigative process. In addition, the media has an institutional interest in greater disclosure and therefore tends to tilt coverage in favor of Congress. There is another point that is difficult to navigate for the Executive in the political arena: often an important executive confidentiality interest has nothing to do with the substance of the congressional investigation. This phenomenon creates tension within the Executive and puts agencies resisting oversight in an adverse political posture vis-à-vis Congress.

Imagine that Congress is investigating wrongdoing at an agency and writes its document requests in a manner that calls for a large tranche of material that does not raise any executive branch hackles but also would cover tangential deliberations related to presidential appointments and

& Gov't Spending, & Trey Gowdy, Chairman, House Subcomm. on Health Care, D.C., Census, & the Nat'l Archives, to Steven Chu, Sec'y, U.S. Dep't of Energy 4 (Aug. 14, 2014).

296. See, e.g., *id.*

297. See, e.g., *id.* at 1.

pending agency adjudications. Also assume, for a moment, that the Executive believes that its conduct is entirely defensible. The executive branch agency head will have an incentive to produce all the requested materials in an effort to end the scrutiny, but the Office of Legal Counsel and the White House may want the agency to continue principled objections to the requests that implicate broader executive branch interests. Thereafter, the agency is left open to charges of stonewalling that congressional actors may then promote as evidence that the substantive allegations are true. The Executive as a whole must weigh this political cost to the agency with all its various oversight interactions across the federal government.

Neither Congress nor the Executive looks good when they are in conflict, and purely political remedies can sometimes be obtained by heat rather than light. However, political pressure is generally good at balancing congressional need with executive branch interests. Further, a thoroughly political mechanism is especially appropriate for resolution of disputes between the political branches.

Upon scrutiny, it becomes clear that the vast majority of self-help remedial schemes available to Congress in the separation of powers context are unavailable in the context of enforcement action against a private party. As such, where private parties frustrate Congress's compulsory processes, criminal contempt reveals itself as the appropriate, and often only, formal remedy.

In contrast, self-help remedies are available to Congress in disputes with the Executive. They also allow political will and leverage to resolve inherently political disputes without calling on the judiciary to intervene. Congress, in fact, regularly employs self-help remedies on oversight matters. However, consistent with its litigation perspective, the House has initiated civil contempt litigation in the two highest profile interbranch matters over the last decade: *Miers* and *Holder*.²⁹⁸

B. Congressional Litigation Perspective on Remedies

Congress believes its subpoenas should be enforceable against the Executive through all three types of contempt. As noted above, there are functional impediments to inherent and criminal contempt remedies in interbranch disputes.²⁹⁹ As such, Congress has turned to civil

298. See *Comm. on Oversight & Gov't Reform v. Holder*, 979 F. Supp. 2d 1 (D.D.C. 2013); *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008).

299. See *supra* Part IV.A.1.a–b.

contempt remedies as the primary method for vindicating oversight interests resisted at the other end of Pennsylvania Avenue. To Congress, such matters are justiciable. Furthermore, Congress would like to see routine judicial enforcement of congressional subpoenas.³⁰⁰

Congress derives significant political cost savings by means of a litigation enforcement model. While Congress bears some political costs for initiating litigation against the Executive, the primary costs are paid during the contempt proceeding antecedent to the litigation. Once it is in the courts, Congress externalizes the enforcement costs by outsourcing them to the judiciary. Aside from briefs and the ultimate decision, there is little further political capital expended during the pendency of the litigation.

In contrast, self-help remedies require Congress to internalize their enforcement costs. If the Senate holds up an executive nomination over a document dispute, the Senators will have to face the ire of interest groups and other stakeholders to that nomination. The same is true with analogous uses of authorization or appropriations remedies. As such, even though Congress uses them as a matter of course, self-help remedies are not preferable to Congress as an alternative to a judicial enforcement mechanism.

Instead, Congress's desired result is a definitive ruling from a court, with binding precedent, enforcing Congress's entitlement to executive branch information.³⁰¹ The precedential effect of Congress's desired litigation remedy also would serve as a deterrent to the Executive in future information access disputes. Having adopted a litigation model, of course Congress prefers a litigation remedy.

C. *Executive Transactional Perspective on Remedies*

Consistent with its transactional perspective on the nature of congressional oversight, the Executive takes the position that congressional subpoena enforcement actions are nonjusticiable in interbranch disputes. For example, in *Holder*, the Executive argued: "This case is not a case or controversy under Article III: it is a quintessentially political dispute between the Branches over the scope

300. See generally Plaintiff's Opposition to Defendant's Motion to Dismiss, Comm. on Oversight & Gov't Reform v. Holder, 979 F. Supp. 2d 1 (D.D.C. 2013) (No. 12-cv-01332-ABJ) [hereinafter Pl.'s Opp'n to Def.'s Mot. to Dismiss], ECF No. 17.

301. Of course, Congress could have a different perspective in the event of an adverse ruling in *Holder*.

of their respective constitutional powers. The Constitution itself, and not the Federal Rules of Civil Procedure, provides the mechanism for resolving such contests.”³⁰²

Putting aside the strength or weakness of the Department’s political question and judicial abstention argument, it is clear that the Executive views this type of dispute as inappropriate for, if not incapable of, judicial resolution on the merits. Rather, the Executive believes the appropriate remedial scheme for Congress to enforce its prerogatives is found in Article I, not Article III. Again, in *Holder*, the Executive argued:

The Founders carefully set out the tools by which Congress may protect its institutional interests, and they are substantial. Among other powers, Congress can withhold funds from the Executive Branch, override vetoes, decline to enact legislation, refuse to act on nominations, and adjourn. If Congress is dissatisfied with the President’s response to a congressional investigation, it is free to employ these or any other means of self-help within its constitutional authority to reach a political accommodation—but only if it is willing to incur the associated political costs. *Cf. The Federalist* No. 51 (Madison) (“Ambition must be made to counteract ambition.”). The Executive Branch must similarly weigh the harm from congressional incursion into its institutional prerogatives against the costs that may flow from resistance. That is how the political Branches have traditionally resolved such conflicts.³⁰³

Put another way, Congress should engage in self-help rather than seeking judicial enforcement. To the Executive, political disputes call for political remedies. Negotiation and leverage, not judicial resolution creating legal entitlements, is the proper path. While the Supreme Court has not passed on the question, the Executive has lost on the justiciability issue in lower courts in both *Miers*³⁰⁴ and *Holder*.³⁰⁵

302. Mem. in Supp. of Def.’s Mot. to Dismiss, *supra* note 75, at 19.

303. *Id.* at 19–20.

304. 558 F. Supp. 2d 53, 98 (D.D.C. 2008).

305. 979 F. Supp. 2d 1, 26 (D.D.C. 2013).

V. CONSTITUTIONAL CONFLICT IN ACTION:

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM V. HOLDER

The Supreme Court has never ruled on a constitutional collision between Congress and the Executive arising from a congressional subpoena frustrated by the President's assertion of executive privilege. In the absence of Supreme Court pronouncements, the political branches feel legally unconstrained to adhere to their incompatible constitutional perspectives.³⁰⁶ *Oversight Committee v. Holder*³⁰⁷ squarely presents these irreconcilable theories to the courts. For the reasons set forth below, court resolution of this matter should endeavor to preserve a healthy level of interbranch tension created by such incongruity. The court should rely heavily on the Executive model—incentivizing resolution through accommodation and compromise while safeguarding the legitimate functional interests of Congress and the Executive—but also needs to reserve a role for the judiciary. Choosing one of the competing models wholesale would be a grave mistake.

With respect to judicial involvement in interbranch congressional oversight disputes, the two political branches are at extreme odds. The Executive continues to argue that such disputes are categorically nonjusticiable. This viewpoint fails to adequately deter the Executive from asserting meritless confidentiality arguments. It also fails to recognize the Court's need to preserve its ability to restore and preserve constitutional order in the event of a genuine separation of powers crisis. For its part, Congress's belief that the courts should enforce Article I interests as a pro forma matter is also a bridge too far. It fails to account for Congress's lack of meaningful discovery regulation, and it is too dismissive of legitimate confidentiality interests that inform assertions of executive privilege.

As discussed below, executive privilege is a presidential assertion of executive branch confidentiality interests that has constitutional dimension. *Holder* represents a collision of the two vehicles of the political branches' constitutional prerogatives: congressional subpoenas and executive privilege.

306. See Chad T. Marriott, Comment, *A Four-Step Inquiry to Guide Judicial Review of Executive Privilege Disputes Between the Political Branches*, 87 OR. L. REV. 259, 274 (2008) ("Avoiding the issue has left Congress and the President free from constraint in their negotiations over the release of information.").

307. 979 F. Supp. 2d 1 (D.D.C. 2013).

A number of principles should guide the courts as they address the arguments in *Holder*. First, accommodation and compromise between the political branches, without judicial involvement, is the healthiest outcome for the constitutional structure. Second, courts have jurisdiction to decide such a dispute but should only exercise that jurisdiction as a matter of last resort. Third, when a court accepts jurisdiction, its first role should be that of a mediator rather than an implement of enforcement. Fourth, if the mediation approach fails, the court will be required to get into the messy business balancing of congressional need with executive confidentiality interests. This should be a particularized, rather than categorical, analysis. It should also require congressional requests that are narrowly tailored to Congress's needs so as to minimize executive branch disruption. Finally, the courts need to be more solicitous of executive branch confidentiality interests than the lower courts have been over the last twenty-five years.³⁰⁸ There are a number of important executive branch functions that would be degraded if disclosed to Congress, especially on the basis of untailed assertions of need. Congress requires information from the Executive to perform its legislative function, but where such information requests conflict with executive branch functions, they need to exact minimal necessary burden.

Holder ripens this discussion. The litigation has already produced important district court precedent finding the dispute justiciable.³⁰⁹ The parties' pending summary judgment motions, absent settlement, call on the district court to decide whether the deliberative process privilege that serves as a basis of President Obama's assertion of executive privilege will shield withheld documents from production to Congress in its investigation of Operation Fast and Furious. In order to reach that decision, the courts will have to navigate both the litigation and transactional models of oversight.

A. *Executive Privilege: A Contested Doctrine*

As noted in Part II.C.1 above, litigation platforms for congressional oversight disputes are scant. Further, consistent with this Article's

308. See, e.g., *Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1119 (D.C. Cir. 2004) (refusing to extend the presidential privilege to documents prepared for the Deputy Attorney General).

309. *Holder*, 979 F. Supp. 2d at 26 (concluding that "neither legal nor prudential considerations support the dismissal").

proposed course, courts have been loath to insert themselves into interbranch discovery disputes. Legal precedent evaluating presidential assertions of executive privilege to date has come in the context of criminal investigations and civil litigation involving private parties, especially litigation arising under the Freedom of Information Act (FOIA).³¹⁰ Executive privilege is an assertion of presidential authority to withhold information from a judicial or congressional proceeding.³¹¹

No legal doctrine is more emblematic of the vast chasm separating the political branches over congressional oversight than assertions of the “deliberative process” privilege. Several factors lead to this impasse. The privilege protects the decision-making process of government agencies. It is designed to encourage frank discussions on matters of policy within the Executive, protect against premature disclosure of policies before they have been adopted, and minimize public confusion that might result from disclosure of discarded policy options and rationales.³¹² Whether it can ever shield disclosure of information requested by Congress is at the heart of the *Holder* litigation.³¹³

While it has a pedigree dating back to the principles of the English “crown privilege,”³¹⁴ most recent legal precedent on the deliberative process privilege develops in the context of litigation under FOIA. Specifically, Exemption 5 protects from disclosure “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.”³¹⁵ Courts have construed this language to “exempt those documents [that

310. See *infra* Part V.A.1.b.

311. Archibald Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383, 1383 (1974). Executive privilege may be asserted in a criminal matter or in litigation involving private parties. See, e.g., *United States v. Nixon*, 418 U.S. 683 (1974); Senate Select Comm. on Presidential Campaign Activities v. *Nixon*, 498 F.2d 725, 726–27 (D.C. Cir. 1974). Thus, it is a doctrine that is broader than the executive–congressional conflict that is the subject of this Article.

312. U.S. DEP’T OF JUSTICE, GUIDE TO THE FREEDOM OF INFORMATION ACT 366 (2009).

313. 979 F. Supp. 2d at 16 n.7. The court adopted the Oversight Committee’s articulation of the question presented: “[C]an the executive properly assert executive privilege to shield an agency’s deliberative processes when the records in dispute do not reveal advice provided to the President himself or address his core constitutional functions?” *Id.*

314. See Russell L. Weaver & James T.R. Jones, *The Deliberative Process Privilege*, 54 MO. L. REV. 279, 283 (1989) (citing, among others, JOHN HUXLEY BUZZARD, RICHARD MAY & M. N. HOWARD, PHIPSON ON EVIDENCE § 14-04 (13th ed. 1982)).

315. 5 U.S.C. § 552(b)(5) (2012).

are] . . . normally privileged in the civil discovery context.”³¹⁶ According to the Department of Justice, the deliberative process is the most commonly invoked privilege by the Executive in FOIA matters.³¹⁷ However, by its own legislative terms, FOIA, and therefore Exemption 5, is inapplicable to congressional requests.³¹⁸

Legal precedent on the deliberative process privilege is unresolved as to its applicability in the congressional context. But even if the deliberative process privilege applies to congressional requests, there is ample court opinion language to suggest that it is a heavily qualified privilege.

1. Executive Privilege: Background and Legal Precedent

Information access disputes between Congress and the President date back to the Washington Administration.³¹⁹ Many presidents have refused to produce information requested by Congress based on an assertion of privilege,³²⁰ over time formalizing the Executive’s process for assertions of executive privilege.³²¹ However, due in large part to the political branches’ competing visions of constitutional interplay,³²² the doctrine remains highly controversial and unsettled.

316. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); *see also* *FTC v. Grolier, Inc.*, 462 U.S. 19, 26 (1983); *Martin v. Office of Special Counsel*, 819 F.2d 1181, 1184 (D.C. Cir. 1987).

317. *See* U.S. DEPT OF JUSTICE, *supra* note 312, at 366.

318. *See* 5 U.S.C. § 552(d) (2012) (“This section is not authority to withhold information from Congress.”).

319. *See, e.g.*, *Weaver & Jones*, *supra* note 314, at 284 (noting President Washington’s assertion of privilege against congressional inquiries into the St. Clair military expedition and Jay Treaty negotiations); *Devins*, *supra* note 204, at 109 & n.1 (noting that, in the case of the Jay Treaty request, President Washington provided the information to the House notwithstanding his objections).

320. *See* *Cox*, *supra* note 311, at 1395–1405 (outlining the historical episodes of presidential refusal to provide requested information to Congress that could be characterized as executive privilege). *See generally* MORTON ROSENBERG, CONG. RESEARCH SERV., PRESIDENTIAL CLAIMS OF EXECUTIVE PRIVILEGE: HISTORY, LAW, PRACTICE AND RECENT DEVELOPMENTS (2008).

321. *See* ROSENBERG, *supra* note 320, at 14–15.

322. At least one commentator called the privilege itself a “myth.” RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH (1974); *see also* Raoul Berger, *Congressional Subpoenas to Executive Officials*, 75 COLUM. L. REV. 865, 887 (1975) (“History in short, demonstrates that Congress was designed to exercise the inquisitorial power exercised by Parliament, that this power was unqualified, that no member of the English executive had claimed to be exempt from this power, and that no member of the several Conventions had claimed for the President any exemption from this power of the Grand Inquest of the Nation.”).

The Supreme Court addressed executive privilege in *United States v. Nixon*.³²³ President Nixon asserted executive privilege in order to deny production of documents and tape recordings subpoenaed by the Watergate Special Prosecutor.³²⁴ That case involved a criminal investigation, representing an intrabranched dispute between the President and a subordinate prosecutor³²⁵ rather than an oversight dispute between political branches. Still, it implicated interbranch friction between the Executive and the judiciary.³²⁶

In rejecting the President's assertion of an absolute privilege, the Supreme Court described its duty "to resolve . . . competing interests in a manner that preserves the essential functions of each branch."³²⁷ The Court recognized the constitutional foundations of executive privilege:

A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.³²⁸

Thereafter the Court applied a balancing test, weighing "historic commitment to the rule of law" against the President's interests in confidentiality.³²⁹

Nixon specifically declined to opine on the balance between a President's "confidentiality interest and congressional demands for information."³³⁰ It is unclear what effect, if any, a shift in context from criminal prosecution to congressional proceeding would have on the Court's analysis. The Court suggested that presidential advisors would

323. 418 U.S. 683 (1974).

324. *See id.* at 688.

325. *Id.* at 692 (noting the President's argument that the matter was "an intra-branch dispute between a subordinate and superior officer of the Executive Branch").

326. *Id.* at 707 (noting the obstruction that an "unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions").

327. *Id.*

328. *Id.* at 708.

329. *Id.*

330. *Id.* at 712 n.19.

not “temper the candor of their remarks by the infrequent occasions of disclosure . . . in the context of a criminal prosecution.”³³¹

Congressional requests for information, by contrast, are legion. In addition, Congress contains a President’s political adversaries, whereas the judiciary, while by no means free of its own brand of politics, is guided by generally neutral principles. Furthermore, prosecutors and courts do not have access to Congress’s non-judicial remedies to vindicate their interests. These points militate in favor of a stronger executive privilege vis-à-vis Congress than the courts.

On the other hand, the legislative function is critical to the constitutional scheme. Generally, congressional need for information is strong, and the Court would likely be well outside its comfort zone deciding about the needs of its coordinate branch. Such arguments suggest the Court might favor congressional interests or see the criminal–congressional distinction as one without a difference.

a. Executive Privilege Cases Involving Congressional Subpoenas

Including *Holder*, there are only five court cases addressing congressional–executive information disputes involving congressional subpoenas in conflict with a presidential assertion of executive privilege.³³² While significant in many respects, *Miers*, *AT&T*, and *U.S. House of Representatives* all address jurisdictional and justiciability issues, and none reach the merits.³³³

Only one case, *Senate Select Committee on Presidential Campaign Activities v. Nixon*,³³⁴ reaches the merits of a clash between congressional oversight needs and executive confidentiality interests. There, the Senate had established a select committee to “investigate ‘illegal, improper or unethical activities’” related to the 1972 presidential election.³³⁵ The committee subpoenaed President Nixon to obtain tape recordings and documents related to alleged criminal activity and

331. *Id.* at 712.

332. See *United States v. Am. Tel. & Tel. Co.*, 567 F.2d 121 (D.C. Cir. 1977); *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974); *Comm. on Oversight & Gov’t Reform v. Holder*, 979 F. Supp. 2d 1 (D.D.C. 2013); *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008); *United States v. House of Representatives*, 556 F. Supp. 150 (D.D.C. 1983).

333. See *Am. Tel. & Tel. Co.*, 567 F.2d at 134; *Miers*, 558 F. Supp. 2d at 98; *House of Representatives*, 556 F. Supp. at 153.

334. 498 F.2d 725 (D.C. Cir. 1974).

335. *Id.* at 726 (quoting S. Res. 60, 93d Cong., 119 CONG. REC. 3849 (1973)).

government misconduct.³³⁶ In response, President Nixon asserted executive privilege.³³⁷

The court balanced congressional need with executive confidentiality interests in holding that “the sufficiency of the Committee’s showing must depend solely on whether the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the Committee’s functions.”³³⁸ Thereafter, it assessed subsequent, overlapping activity by the House Judiciary Committee as a factor weakening the Senate committee’s claim.³³⁹ The standard it then erected for the committee was “whether the subpoenaed materials are critical to the performance of its legislative functions.”³⁴⁰

Senate Select Committee is significant to the competing oversight models because it engaged in a searching, interest-balancing exercise and an exacting inquiry into congressional need. As such, even though it represents a judicial resolution disfavored by the Executive,³⁴¹ this case reflects an executive sensibility about the nature of interbranch conflict. However, although it does not analytically conflict with *Nixon*’s reasoning, it predates the Supreme Court’s pronouncements on executive privilege. Unlike *Holder*, the subpoenaed materials implicated direct presidential communications.³⁴² It also predates D.C. Circuit precedent that has disfavored executive privilege in non-oversight contexts.

b. Other Significant Executive Privilege Precedent

In the period since Watergate, lower courts have been less than solicitous of executive privilege, albeit in non-oversight contexts. While there have been a number of decisions evaluating privilege claims, two D.C. Circuit cases stand out for purposes of this Article: *In re Sealed Case (Espy)*³⁴³ in the criminal context and *Judicial Watch, Inc. v.*

336. *Id.* at 726–27.

337. *Id.* at 727.

338. *Id.* at 731; see also Marshall, *supra* note 18, at 803–08 (arguing that congressional need is often questionable because there are few political costs due to, and negligible process constraints on, initiation of an investigation).

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

340. *Id.*

341. Judge Wilkey argued, in a concurrence, that the “constitutional principle of separation of powers ma[de] the issue . . . a political question and therefore not justiciable.” *Id.* at 734 (Wilkey, J., concurring).

342. *Id.* at 726 (majority opinion).

343. 121 F.3d 729 (D.C. Cir. 1997).

*Department of Justice*³⁴⁴ in the FOIA context. Both cases suggest that the D.C. Circuit, which is often the final arbiter in separation of powers litigation, is not inclined to accept the transactional model worldview.

In *Espy*, the court held that President Clinton's assertion of executive privilege over eighty-four documents—related to the 1994 resignation of Agriculture Secretary Mike Espy—could not defeat a grand jury subpoena.³⁴⁵ The court discussed the distinction between presidential communications and deliberative process rationales for assertions of executive privilege.³⁴⁶ According to the court, presidential communications privilege has a constitutional basis,³⁴⁷ but deliberative process privilege is primarily derived from common law.³⁴⁸ The court also noted that deliberative process privilege “disappears altogether when there is any reason to believe government misconduct occurred.”³⁴⁹ It then declined to apply deliberative process privilege analysis because it found that the presidential communications privilege is stronger and yet insufficient to defeat production.³⁵⁰

The reasoning in *Espy* is particularly troubling to the Executive due to its very narrow conception of executive privilege.³⁵¹ As an initial matter, it appeared to confine a constitutional rationale for executive privilege to decisions made by the President personally and to cover only those people and decisions in his immediate proximity.³⁵² Therefore, deliberative processes at the departments and agencies are likely to receive far less protection. In addition, the court's suggestion that deliberative process privilege dissolves when there is “any reason to believe government misconduct occurred” is very cold comfort when transposed from the criminal context to a partisan Congress.

In the *Judicial Watch* FOIA litigation, a public interest group sought to compel production of materials related to President Clinton's exercise of pardon power.³⁵³ The White House is not subject to FOIA, but the Act covers records in the Office of the Pardon Attorney at the

344. 365 F.3d 1108 (D.C. Cir. 2004).

345. *Espy*, 121 F.3d at 762.

346. *Id.* at 745.

347. *Id.*

348. *Id.*

349. *Id.* at 746.

350. *Id.* at 758.

351. *Id.* at 749, 752.

352. *Id.* at 752.

353. *Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1110 (D.C. Cir. 2004).

Department of Justice.³⁵⁴ Holding true to *Espy*, in *Judicial Watch*, the D.C. Circuit rejected the Department's argument that the Pardon Attorney was a presidential advisor as a functional matter, especially with respect to internal Department documents that the Department never transmitted to the White House.³⁵⁵ The Executive believes the Pardon Attorney supports an exclusive presidential function and does not believe the proximity and formalism associated with an institutional location should have decided *Judicial Watch*.

The D.C. Circuit's refusal to recognize an evidentiary privilege for secret service agents designed to promote presidential safety provides further evidence of skepticism of executive confidentiality interests.³⁵⁶ Based on *Cheney*, the Supreme Court may be a more hospitable venue to executive arguments, but the consequences of an adverse ruling by the highest Court should give executive branch litigants pause.

2. Congress: Executive Privilege Is Narrow and Heavily Qualified

Consistent with its procedural litigation view, according to Congress, executive privilege may only be validly asserted on presidential communications privilege. Congress believes that the presidential communications privilege is the only constitutionally based privilege rationale. Congress further believes that even that privilege is heavily qualified and should regularly yield to congressional need. It views most assertions of executive privilege as frivolous.³⁵⁷ Further, after serving as Watergate Special Prosecutor, Archibald Cox argued:

Ideally, I think, the legislative right should prevail in every case in which either the Senate or House of Representatives votes to override the Executive's objections, provided that the information is relevant to a matter which is under inquiry and

354. *Id.* at 1119.

355. *Id.*; see Marriott, *supra* note 306, at 285–86 (noting that the *Judicial Watch* decision turned more on organizational structure than functional role).

356. See *In re Sealed Case*, 148 F.3d 1073 (D.C. Cir. 1998), *cert. denied*, *Rubin v. United States*, 525 U.S. 990 (1998).

357. See, e.g., *The History of Congressional Access to Deliberative Justice Department Documents, Hearing Before the House Comm. on Gov't Reform*, 107th Cong. (2002) (report by Charles Tiefer on *Executive Privilege Overclaiming at the Justice Department*). Before his move to academia, Professor Tiefer served as Solicitor and Deputy General Counsel of the U.S. House of Representatives.

within the jurisdiction of the body issuing the subpoena, including its constitutional jurisdiction.³⁵⁸

In other words, Cox argues the courts should routinely enforce congressional prerogatives even in the face of an assertion of executive privilege.

Congress takes an especially dim view of the deliberative process component of executive privilege doctrine, which it views as wholly inapplicable to congressional oversight of the Executive. In the Fast and Furious investigation, Chairman Issa cites *In re Sealed Case (Espy)*³⁵⁹ for the proposition that the documents in dispute

are at best deliberative documents between and among Department [of Justice] personnel who lack the requisite “operational proximity” to the President. As such, they cannot be withheld pursuant to the constitutionally-based executive privilege. . . . Both, the *Espy* court observed, are executive privileges designed to protect the confidentiality of Executive Branch decision-making. The deliberative-process privilege, however, which applies to executive branch officials generally, is a common law privilege that requires a lower threshold of need to be overcome, and “disappears altogether when there is any reason to believe government misconduct has occurred.”³⁶⁰

Chairman Issa’s argument is consistent with the view expressed in the *Congressional Oversight Manual* published by the Congressional Research Service³⁶¹ and is a centerpiece of the House’s summary judgment brief in *Holder*.³⁶²

358. Cox, *supra* note 311, at 1434.

359. 121 F.3d 729 (D.C. Cir. 1997).

360. Comm. Letter to President Obama, *supra* note 12, at 4 (quoting ROSENBERG, *supra* note 320, at 17–18 (quoting *Espy*, 121 F.3d at 746)). *Espy* dealt with a grand jury subpoena in a criminal investigation and not a congressional subpoena. *Espy*, 121 F.3d at 735–36. One can debate whether that distinction is material in a separation of powers dispute. Moreover, the *Espy* court did not reach the question of whether the documents at issue were subject to the deliberative process privilege. *Id.* at 758.

361. KAISER ET AL., *supra* note 49, at 45–46 (characterizing deliberative process privilege as a “common law privilege . . . that is easily overcome by a showing of need by an investigatory body” and noting that “congressional practice has been to treat . . . acceptance [of deliberative process privilege] as discretionary with the committee”).

362. Memorandum of Points and Authorities in Support of Plaintiff’s Motion for Summary Judgment at 25–33, Comm. on Oversight & Gov’t Reform v. Holder, No. 12-cv-01332-ABJ (D.D.C. Dec. 16, 2013) [hereinafter Mem. of P.&A. in Supp. of Pl.’s Mot. for Summ. J.], ECF No. 61 (making the argument under the heading “Deliberative Process Does Not Excuse the Attorney General’s Non-Compliance Because the Privilege Does Not Apply

Aside from the question of whether the doctrine is applicable to congressional requests, Congress also views executive branch deliberative information as highly probative to its legislative inquiries. As Chairman Goss argued,

It is exactly the “uncoordinated,” “deliberative,” “internal,” and “pre-decisional” documents of an agency that Congress needs in most cases. These documents can provide unique insight into the full spectrum of thought on any given issue pending before an agency and Congress. Without access to such documents, Congress would be left only with the “spin” the executive branch agency opted to provide to the legislative branch. This result, without question, would only serve to undermine the legitimate authority of Congress to conduct independent oversight. Therefore, I would expect the committee to reject all efforts to extend the FOIA Exemption 5 to congressional requests for information.³⁶³

Chairman Goss articulates an important element of Congress’s perspective on the trenchant interbranch conflict related to deliberative process privilege. First, he suggests that access to executive branch deliberations, at least as to policy formulation, would help inform the congressional legislative process.³⁶⁴ Such legislative deliberation is the touchstone of congressional oversight authority.

In addition, Chairman Goss suggests that failure to provide Congress with such materials would significantly hamper the congressional oversight function itself because it would only receive access to post-decisional information.³⁶⁵ His concern contemplates a significant and legitimate concern about an unlimited deliberative process privilege. It would simply shield too much information and would have no internal limitations beyond the character of information as predecisional and related to policy formulation. Such concerns are especially valid in the context of an investigation into executive branch wrongdoing rather than a policy formulation inquiry. To accept categorical application of deliberative process privilege as a bar to congressional requests would be a principle struggling to find cognizable limits.

to Congressional Subpoenas”).

363. H.R. REP. NO. 106-130, pt. 1, at 40 (1999).

364. *Id.*

365. *Id.*

Ironically, congressional deliberations are not available to the other branches or the public without the express consent of Congress as a result of the Speech or Debate Clause.³⁶⁶ As with the Executive, Congress desires to protect against the chilling of open and honest deliberations that would accompany exposing representatives' statements to the public. Information protected under the Speech or Debate Clause is that of legitimate "legislative acts,"³⁶⁷ and a reviewing court must interpret that protection broadly to protect the free expression of ideas among legislators who would otherwise fear political backlash in raising concerns.³⁶⁸ This broad interpretation ensures the independent operation of Congress.³⁶⁹ Accordingly, Congress clearly appreciates the values undergirding a deliberative process privilege and other similar confidentiality interests, but it does not think such assertions have merit when made by the Executive in the context of congressional oversight requests.

3. Executive: Privilege Has Many Viable Oversight Components

In contrast with Congress's view of the limited role executive privilege plays relating to oversight requests, the Executive believes that the term "executive privilege" refers to a bundle of components, all of which may be validly asserted against congressional requests. These

366. U.S. CONST., art. I, § 6, cl. 1 ("[F]or any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place."); see also CONSTITUTION, JEFFERSON'S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 111-157, at 405-07 (2011) ("Response to Subpoenas . . . Under no circumstances may minutes or transcripts of executive sessions, or evidence of witnesses in respect thereto, be disclosed or copied.").

367. In *Gravel v. United States*, 408 U.S. 606 (1972), the Supreme Court defined legislative acts as those that are "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." 408 U.S. at 625

368. See, e.g., *United States v. Johnson*, 383 U.S. 169, 180 (1966) (establishing that the Speech or Debate Clause is to be "read broadly to effectuate its purposes"); *Coffin v. Coffin*, 4 Mass. (3 Tyng) 1, 27 (1808) (expanding upon appropriate legislative acts protected by a similar clause in a state constitution) ("I therefore think that the article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate; but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature, and in the execution, of the office . . .").

369. *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 501-02 (1975) (relying on the reasoning of *Kilbourn v. Thompson*, 103 U.S. 168 (1881), and *Tenney v. Brandhove*, 341 U.S. 367 (1951)).

components cover a number of different types of executive branch confidentiality interests,³⁷⁰ including the deliberative process privilege that is front and center in *Holder*.³⁷¹

The Executive has substantive interests in the applicability of the deliberative process component of executive privilege in congressional oversight matters. First, the Executive has long maintained the need for its officials to be able to contribute to policy formulation and other decisions without undue fear of retribution. As the Supreme Court noted in *United States v. Nixon*, “[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.”³⁷² An expectation of routine disclosure of deliberative material to congressional actors would significantly chill the candor necessary to provide the best possible range of options available to executive branch decision makers.³⁷³

The Executive seeks to distinguish and confine *Espy* and *Judicial Watch* in the congressional context. First, as it argues in *Holder*, the Executive believes deliberative process privilege takes on a constitutional character when formally asserted vis-à-vis Congress.³⁷⁴ The D.C. Circuit noted that the “deliberative process privilege is

370. See, e.g., Assertion of Exec. Privilege over Commc’ns Regarding EPA’s Ozone Air Quality Standards and Cal.’s Greenhouse Gas Waiver Request, 32 Op. Att’y Gen., slip op. at 3 (June 19, 2008) (discussing “presidential communications and deliberative process ‘components’ of executive privilege”).

371. See Assertion of Exec. Privilege over Documents Generated in Response to Cong. Investigation into Operation Fast and Furious, 36 Op. O.L.C., slip op. at 2 (June 19, 2012) (Opinion of Attorney General Eric Holder).

372. 418 U.S. 683, 705 (1974); see also Assertion of Executive Privilege with Respect to Prosecutorial Documents, 25 Op. Att’y Gen., slip op. at 2 (Dec. 10, 2001) (“If these deliberative documents are subject to congressional scrutiny, we will face the grave danger that prosecutors will be chilled from providing the candid and independent analysis essential to the sound exercise of prosecutorial discretion and to the fairness and integrity of federal law enforcement.”).

373. As noted in the preceding section, while Congress believes deliberative process rationale must yield to congressional oversight interests, it recognizes the value of the rationale when shielding its own deliberative material from disclosure in the context of the Speech and Debate Clause.

374. See Memorandum in Support of Defendant’s Motion for Summary Judgment and in Opposition to Plaintiff’s Motion for Summary Judgment at 20–22, Comm. on Oversight & Gov’t Reform v. Holder, No. 12-cv-01332-ABJ (D.D.C. Jan. 21, 2014) [hereinafter Mem. in Supp. of Def.’s Mot. for Summ. J. and in Opp’n to Pl.’s Motion for Summ. J.], ECF No. 64.

primarily a common law privilege.”³⁷⁵ Moreover, both *Espy* and *Judicial Watch* require a comparison of congressional needs to executive grounds.³⁷⁶ Finally, while the Executive respects the authority of lower courts, it will likely maintain its views in the absence of a Supreme Court ruling foreclosing them.³⁷⁷

B. A Recommended Approach to Holder

In *Cheney v. U.S. District Court for the District of Columbia*,³⁷⁸ the Supreme Court observed that the “occasion[s] for constitutional confrontation between the two branches’ should be avoided whenever possible.”³⁷⁹ However, it acknowledged: “Once executive privilege is asserted, coequal branches of the Government are set on a collision course.”³⁸⁰ *Holder* is a three-branch collision.

This section offers an approach to the *Holder* litigation designed to preserve important ambiguities and tension in the scheme of separation of powers. Both branches will have to give ground. The Executive is wrong to adopt a categorical view on justiciability, and Congress is wrong to adopt a categorical view on the merits. The proper result requires nuance, particularity, and restraint. So far, Judge Amy Berman Jackson appears to be following such a path.³⁸¹

1. Justiciability

Due to the nature of our constitutional structure, it is preferable to have interbranch constitutional conflicts resolved by a process of accommodation and compromise. As one district court noted, the stakes in such confrontations are always high:

There is a sense in which the powers and operations of the coequal, but interdependent, branches of the federal government

375. *In re Sealed Case (Espy)*, 121 F.3d 729, 745 (D.C. Cir. 1997) (emphasis added) (citing *Nixon v. Fitzgerald*, 457 U.S. 731, 753 n. 35 (1982)).

376. *See Espy*, 121 F.3d at 754–55 (assessing investigative need against the presumptive privilege); *Judicial Watch, Inc. v. Dep’t of Justice*, 365 F.3d 1108, 1112 (D.C. Cir. 2004) (same).

377. This fact can actually motivate the Executive Branch to settle or absorb an adverse lower court ruling to avoid a definitive ruling by the Supreme Court.

378. 542 U.S. 367 (2004).

379. *Id.* at 389–90 (alteration in original) (quoting *United States v. Nixon*, 418 U.S. 683, 692 (1974)).

380. *Id.* at 389.

381. Judge Jackson wrote the order in *Committee on Oversight and Government Reform v. Holder*, 979 F. Supp. 2d 1 (D.D.C. 2013).

are constitutionally established over theoretical fault lines. Disputes and confrontations between those branches always present the kinds of stress and tension that threaten to separate and divide those lines into chasms, ultimately collapsing our constitutionally created form of government. Hence, to avert and minimize such tensions is always the proper and prudent course of action.³⁸²

*Goldwater v. Carter*³⁸³ also provides some instructive language, albeit in a different context. There, several members of Congress filed suit alleging that President Carter's termination of a treaty with Taiwan deprived them of their constitutional legislative role.³⁸⁴ Justice Powell filed a concurrence in which he argued that the complaint should have been dismissed as unripe for judicial review:

Prudential considerations persuade me that a dispute between Congress and the President is not ready for judicial review unless and until each branch has taken action asserting its constitutional authority. Differences between the President and the Congress are commonplace under our system. The differences should, and almost invariably do, turn on political rather than legal considerations. The Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse. Otherwise, we would encourage small groups or even individual Members of Congress to seek judicial resolution of issues before the normal political process has the opportunity to resolve the conflict.³⁸⁵

Justice Powell suggests that political remedies should be exhausted before the courts step in to resolve disputes between the other two branches. His reasoning in that context has salience for congressional oversight conflict as well.

From one perspective, a case like *Holder* does involve political processes—congressional contempt and executive privilege—suggestive of a ripened constitutional conflict. On the other hand, the civil remedy Congress prefers bypasses its inherently political remedies like appropriations and Senate advice and consent. In that sense, there is a

382. *In re Grand Jury Investigation of Ven-Fuel*, 441 F. Supp. 1299, 1307 (M.D. Fla. 1977).

383. *Goldwater v. Carter*, 444 U.S. 996 (1979).

384. *Id.* at 997–98 (Powell, J., concurring in the judgment).

385. *Id.* at 997.

question under Powell's reasoning as to whether Congress has exhaustively taken action asserting its constitutional authority. Unlike *Goldwater*, which involved only a sub-cameral group of plaintiffs, *Holder* involves action by the entire House of Representatives.³⁸⁶ In this way, judicial action is more appropriate in *Holder* than in *Goldwater*.

*United States v. American Telephone & Telegraph Co.*³⁸⁷ reflects a transactional sensibility in relation to congressional oversight disputes that is backstopped by judicial review. In seeking to avoid assumption of jurisdiction over the interbranch dispute, the D.C. Circuit described the branches as having areas of blended power.³⁸⁸ Under such a view of the constitutional framework, the separation of powers at the margins is indeterminate by design,³⁸⁹ and as such, the branches need to work out their respective scopes of authority on a case-by-case basis. The Court observed:

The framers, rather than attempting to define and allocate all governmental power in minute detail, relied, we believe, on the expectation that where conflicts in scope of authority arose between the coordinate branches, a spirit of dynamic compromise would promote resolution of the dispute in the manner most likely to result in efficient and effective functioning of our governmental system. Under this view, the coordinate branches . . . should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation.³⁹⁰

Though the court strongly encouraged the political branches to resolve disputes on their own, it still acknowledged the justiciability of the case. The court held that the political question doctrine would not bar judicial review, noting that the "simple fact of a conflict between the legislative

386. *Id.* at 997–98.

387. 567 F.2d 121 (D.C. Cir. 1977).

388. *Id.* at 128.

389. Such a view is evocative of Justice Jackson's famous concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, in which he recognized a "zone of twilight" occupying the uncertain territory where Congress and the President share authority or the branch with superior authority is ambiguous. 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

390. *Am. Tel. & Tel. Co.*, 567 F.2d at 127 (footnote omitted).

and executive branches over a congressional subpoena does not preclude judicial resolution.”³⁹¹

Furthermore, the *AT&T* court’s view seems attuned to the Heisenberg Principle problem that counsels court reticence to interfere in such disputes between the political branches, but in a manner that still reserves the right to involve itself in cases of extraordinary constitutional strain. Another court within the D.C. Circuit echoed the importance of judicial avoidance under these circumstances: “When constitutional disputes arise concerning the respective powers of the Legislative and Executive Branches, judicial intervention should be delayed until all possibilities for settlement have been exhausted.”³⁹² As these two opinions demonstrate, the few cases that present a concrete interbranch oversight dispute tend to take place within the D.C. Circuit, which has generally demonstrated sensitivity to the separation of powers.³⁹³

Political question doctrine services the policy need to let political branches sort out political fights. However, it does so in a way that says “never,” and interbranch disputes about oversight really call for a doctrine of severe avoidance—one that says “very rarely”—rather than a doctrine of absolute jurisdictional limitation. As Professor Peter Shane argued in the wake of the Gorsuch controversy,

When an impasse is so great that no such strategy is workable, that impasse may signal an occasion for the laws of executive privilege to be recrystallized. Then, and only then, should it be necessary for a court to step in and substitute a unitary judicial understanding for the contending positions of the political branches.³⁹⁴

This approach is wise because it respects the role of other branches in delimiting their own constitutional functions and allows for each to energetically pursue the exercise, or protection, of those functions.

391. *Id.* at 126–27 (citing Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974)).

392. *United States v. House of Representatives*, 556 F. Supp. 150, 152 (D.D.C. 1983).

393. See Patricia M. Wald & Jonathan R. Siegel, *The D.C. Circuit and the Struggle for Control of Presidential Information*, 90 GEO. L.J. 737, 737 (2002) (noting a “special role the D.C. Circuit plays in upholding the rule of law by enforcing legal constraints on the behavior of the President” but also “the court’s recognition of the importance of preserving the freedom and flexibility that the President needs to do his job”).

394. Shane, *supra* note 35, at 542.

It is also certainly worthy to note that the Executive lost the justiciability argument in *Miers*³⁹⁵ and again in *Holder*.³⁹⁶ In fact, the district court in *Holder* was quite dismissive of the Executive Branch's arguments that the court did not have the power to decide the case.³⁹⁷

2. Merits

Each of the parties in *Holder* calls on the courts to adopt its own constitutional vision to the exclusion of the other. However, if the court adopts the *AT&T* court's sensible approach, then accommodation and compromise becomes the touchstone in disputes between Congress and the Executive.³⁹⁸ Each side raises legitimate concerns about wholesale adoption of the opposing branch position.

Congress remains concerned that, in the absence of accessible judicial enforcement, the Executive will act with impunity.³⁹⁹ As a result, Congress worries that significant waste, fraud, and abuse will go undetected and that legislative judgments by Congress will be adversely affected.⁴⁰⁰ Of course, executive branch intransigence is not an unjustified concern. Executive agencies need a distant threat of judicial resolution; otherwise there is no incentive for those agencies to give effect to executive policy statements recognizing the need to honor congressional oversight interests.

The Executive remains steadfast in its concern about the damaging effects, wrought by politicized oversight, on internal deliberative processes. This is not, by any measure, an unjustified concern.⁴⁰¹ Congress has repeatedly elevated obscure public officials to the klieg lights of national scrutiny for alleged wrongdoing or as symbols of a disfavored policy choice. While there are certainly acts worthy of scrutiny and policies worthy of debate, the partisan nature of

395. *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 98 (D.D.C. 2008).

396. *Comm. on Oversight & Gov't Reform v. Holder*, 979 F. Supp. 2d 1, 16 (D.D.C. 2013).

397. *Id.*

398. *See, e.g.*, Yaron Z. Reich, Comment, *United States v. AT&T: Judicially Supervised Negotiation and Political Questions*, 77 COLUM. L. REV. 466, 467 (1977) (articulating justifications for, and advantages of, negotiated or judicially imposed settlements of interbranch oversight disputes).

399. *See* Marshall, *supra* note 18, at 798–800 (arguing that there are strong policy justifications for congressional oversight as a check on executive power).

400. *See id.* at 799.

401. *See id.* at 813–14 (describing costs of chilled deliberations resulting from congressional investigations).

congressional oversight proceedings, coupled with frequent assertions of unsubstantiated allegations as established facts and abusive treatment of witnesses, threatens to chill legitimate executive branch conduct and deliberations.

Moreover, not all deliberative processes are created equal. It is important to protect all sorts of executive branch deliberations, including policy formulation, personnel action, adjudicative proceedings, litigation positions, prosecutorial decisions, contract awards, pardon decisions, presidential appointments, presidential communications, and onward. However, because many of these deliberations must yield to congressional oversight interests, especially after a policy is enacted, the need for deliberative space is attenuated.⁴⁰² Some, though, like pardon decisions, have independent constitutional significance as core presidential functions. Still others take on constitutional significance due to the facts of the particular deliberation coupled with a determination by the President that they are worthy of the imprimatur of executive privilege.

Of particular note, some congressional requests seek deliberative information that would undermine the *separation* in separation of powers. For example, Chairman Issa's letter responding to President Obama's assertion of executive privilege concluded with a request that the White House "identify any communications, meetings, and teleconferences between the White House and the Justice Department between February 4, 2011," the date the Justice Department first responded to a congressional inquiry, "and June 18, 2012, the day before . . . [the assertion of] privilege."⁴⁰³ Chairman Issa, in effect, asked the President to disclose to Congress all of the executive branch deliberations about how to respond to a ranging and partisan congressional investigation. In fact, it is this very tactic on the part of the Oversight Committee—seeking to peer into the internal executive branch responses to Oversight Committee stimuli—that serves as the basis for much of President Obama's assertion of privilege.⁴⁰⁴

402. Order at 2, Comm. on Oversight & Gov't Reform Holder, No. 12-cv-01332-ABJ (D.D.C. Aug. 20, 2014), ECF No. 81 (order denying both parties' motions for summary judgment) ("[T]here are two essential requirements for application of the deliberative process privilege: the material covered by the privilege must be predecisional, and it must be deliberative." (citing *In re Sealed Case (Espy)*, 121 F.3d 729, 737 (D.C. Cir. 1997))).

403. Comm. Letter to President Obama, *supra* note 12, at 7.

404. See Mem. in Supp. of Def.'s Mot. for Summ. J. and in Opp'n to Pl.'s Motion for Summ. J., *supra* note 374, at 20–22.

There were troubling implications of the district court's justiciability opinion in *Oversight Committee v. Holder*. After establishing jurisdiction, the district court nevertheless categorized essential separation of powers questions on the merits of the dispute as potentially nonjusticiable questions.⁴⁰⁵ Specifically, the court suggested that questions of congressional "need for the material," the "merits of the grounds for withholding" by the Executive, and the adequacy of the Attorney General's offers of accommodation would "put the Court squarely in the position of second guessing political decisions and take it well outside of its comfortable role of resolving legal questions that are amenable to judicial determination."⁴⁰⁶

If a court is going to resolve an important dispute between Congress and the President, congressional need, withholding grounds, and accommodation alternatives are the essential inquiry. Otherwise, the exercise could be almost clerical in that the court could simply offer a binary ruling: deliberative process privilege is available or not. Then, the court would basically assess whether the committee had jurisdiction over the matter, whether the subpoena was duly executed, and whether the documents in dispute were responsive. Swept away would be any particularized analysis of the executive branch confidentiality interests in a categorical exercise. Such a ruling would adopt the congressional litigation model nearly wholesale, to the detriment of the constitutional structure. The court had adopted the Oversight Committee's frame of the question presented: "[C]an the executive properly assert executive privilege to shield an agency's deliberative processes when the records in dispute do not reveal advice provided to the President himself or address his core constitutional functions?"⁴⁰⁷

A categorical ruling about the availability of deliberative process privilege would provide no check against unscrupulous or unskillfully drafted discovery requests. In the context of a congressional subpoena challenged by an individual as overbroad on Fourth Amendment grounds, the Supreme Court has observed: "[A]dequacy or excess in the breadth of the subpoena are matters variable in relation to the nature,

405. *Comm. on Oversight & Gov't Reform v. Holder*, 979 F. Supp. 2d 1, 24–25 (D.D.C. 2013).

406. *Id.* at 25.

407. *Id.* at 17 n.7.

purposes and scope of the inquiry.”⁴⁰⁸ Moreover, as expressed in *Cheney*, the Supreme Court views tailored discovery as an essential safeguard for separation of powers.⁴⁰⁹ For the *Holder* court to issue a binary ruling as to the deliberative process privilege, rather than engaging in particularized analysis of the scope of the inquiry, would be incongruent with the Supreme Court precedent related to tailored discovery.

It would also render irrelevant a demonstration of congressional need in relation to the documents sought. The need and grounds dichotomy is especially integral to the dispute in *Holder*. The district court acknowledges that the documents at this point do not address the problematic ATF tactics involved in Fast and Furious: “The facts have been uncovered; the risks inherent in the operation—risks that were tragically realized in the death of a federal law enforcement officer—have been exposed; and the Department has issued clear directives prohibiting similar conduct in the future.”⁴¹⁰ The notion that the underlying facts about controversial ATF investigative tactics have come to light and been remedied should bear on the analysis of Congress’s need to further intrude on executive branch deliberations.

This observation raises another sensitivity in the *Holder* opinion. What is largely at issue now is Congress’s desire to conduct an “obstruction” investigation related to a February 4, 2011, letter⁴¹¹ to Senator Charles Grassley (R-IA) that contained inaccurate information in response to his inquiry about initial Operation Fast and Furious allegations.⁴¹² The Department later indicated it lacked confidence in the letter, which it ultimately withdrew.⁴¹³ In fact, Congress received a

408. *McPhaul v. United States*, 364 U.S. 372, 382 (1960) (alteration in original) (quoting *Okla. Press Publ’g Co. v. Walling*, 327 U.S. 186, 209 (1946)) (internal quotation marks omitted).

409. *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 386–87 (2004).

410. *Holder*, 979 F. Supp. 2d at 3.

411. Letter from Ronald Weich, Assistant Att’y Gen., to Charles Grassley, Ranking Minority Member, Senate Comm. on the Judiciary (Feb. 4, 2011).

412. *Holder*, 979 F. Supp. 2d at 3–4. Congress calls this letter a “lie” in its brief. *See Pl.’s Opp’n to Def.’s Mot. to Dismiss*, *supra* note 300, at 3. This assertion is contested by the Executive Branch and Democrats, who cite an evidentiary record indicating that the author of the letter provided the inaccurate information based on representations made by other components in the field. *See, e.g., Mem. in Supp. of Def.’s Mot. to Dismiss*, *supra* note 75, at 9–10.

413. *Holder*, 979 F. Supp. 2d at 3.

fulsome factual airing on how it was drafted.⁴¹⁴ Such disclosure was a significant accommodation by the Executive to allow a window into its deliberative processes vis-à-vis Congress, but one that was warranted under the circumstances of the inaccurate representation.

As noted above, however, the congressional subpoena calls for vastly broader and more intrusive information. It seeks to peer into deliberations within the Executive about how to deal with Congress itself, which has no bearing on the investigation of the Operation in question. What is troubling, however, is how dismissive the district court was of the special nature of the deliberations involved, at least in the context of rejecting the Attorney General's framing of the question presented by the litigation.⁴¹⁵

A categorical ruling denying the applicability of deliberative process privilege to congressional subpoenas would then leave viable only presidential communications privilege. That would unduly confine legitimate confidentiality interests to those in personal proximity to the President rather than recognizing the multiplicity of functions, informed by deliberations of varying importance, across the Executive Branch. It would favor form over function and vindicate the congressional litigation model to the exclusion of competing values.

While the courts have a role to play as final arbiter, the currency of congressional-executive relations should be accommodation and compromise. Therefore, the task for the judiciary in *Holder* is to try to preserve that delicate balance in our constitutional scheme. It is a balance that provides Congress with a robust investigative power, encourages executive branch responsibility, preserves executive functions, incentivizes informal conflict resolution, and minimizes judicial involvement. The court should ensure that its ruling promotes these constitutional values.

First, as the beneficiary of the *status quo ante*, the Executive must believe it could be forced by a court to comply with a subpoena. While there are routine incentives to resolve oversight conflicts, as well as congressional self-help remedies, there are cases from time to time that seem incapable of resolution. Such cases, if left without any resolution,

414. See Jonathan Strong, *Justice Department Reveals Origins of False Gun Letter to Grassley*, ROLL CALL (Dec. 2, 2011), http://www.rollcall.com/news/justice_department_reveals_origins_of_false_gun_letter_to_grassley-210742-1.html, archived at <http://perma.cc/8YCJ-NREM>.

415. *Holder*, 979 F. Supp. 2d at 16–17 n.7.

could unduly tip the overall scheme in favor of unscrupulous executive activity. Therefore, there needs to be a threat of judicial involvement, albeit remote, encouraging the White House to compromise.

Second, there must be uncertainty about the outcome in a given case. If the courts merely decide, wholesale, whether certain privileges are available to the Executive vis-à-vis Congress, then the courts will have done significant violence to the structural separation of powers. If the courts adopt the congressional reading of *Espy* that would render deliberative process privilege, no matter the specific factual application, to be a mere common law — and hence inapplicable — privilege, it would undermine important executive branch functions. State secrets doctrine and presidential communications privilege do not cover the range of legitimate executive branch concerns. Congress's discovery excesses, like those in *Holder*, would also be left unchecked. Alternatively, if the courts hold the deliberative process privilege available to the Executive without regard to Congress's legitimate oversight interests, it would serve to eliminate the threat of judicial involvement, and again, the Executive would lack proper incentive to comply with congressional information requests.

Third, when called into the fray, the courts need to adopt the role of mediator in the first instance, which will hopefully promote settlement by means of facilitated accommodation. Failing that, the courts need to get into the muck and mire of document-by-document *in camera* review. Such a process should be governed by legal standards that give due regard to the multiplicity of context-specific outcomes. Each investigative dispute will involve a unique equation of congressional needs and executive confidentiality grounds.

Neither branch will be wholly comfortable with this approach to resolving congressional-executive oversight disputes. While generally adopting the competing interests concept of the executive branch transactional model, this approach rejects the Executive's nonjusticiability arguments. On the other hand, Congress will not be pleased with the idea of a searching court review of investigative needs and discovery tradecraft. Congress, and its advocates, will also likely be concerned about any expansion (in its view) of executive privilege doctrine. Neither branch will enjoy searching inquiry by the judiciary. However, this approach allows for judicial resolution of irreconcilable

interbranch oversight disputes of sufficient import that they lead to contempt citation and executive privilege assertion.

The court's first ruling in the merits phase of *Holder*, however, signaled its sensitivity to these concerns.⁴¹⁶ The court ordered the Department of Justice to produce an executive privilege log analogous to an attorney–client privilege log in regular civil litigation. The court's Solomonic reasoning surely caused consternation at both ends of Pennsylvania Avenue.

Relying on *Espy*, the court observed that “precedent binding on this Court establishes the existence of a deliberative process privilege as a form of executive privilege, but it also sets forth the prerequisites that must be established before that privilege can be recognized.”⁴¹⁷ Recognizing the value of interbranch-accommodated dispute resolution, the court had referred the parties to a judicial mediator, to no avail by the time of the privilege log ruling opinion. The opinion continues on that path by narrowing, and delaying, the dispute by means of the privilege log on a path toward judicially facilitated accommodation.

Production of a privilege log to Congress presents a political problem for the Executive that is not present in normal litigation. Disclosure of the participants to conversations but not the substance is the traditional format of attorney–client privilege logs, but one can readily imagine the coming congressional characterization of entries in the privilege log reflecting innocuous but potentially privileged communications between Department and White House officials. Such disclosures, and the politicized characterization of them, will add pressure to the Executive to reach a compromise.

On the other hand, Congress lost its most prized legal—litigation model—argument. Congress had advanced a long-held institutional view that the deliberative process privilege was categorically unavailable to the Executive as a defense against a congressional subpoena.⁴¹⁸ As noted above, Congress argued that deliberative process privilege is derived from the common law and, unlike presidential communications privilege, does not enjoy constitutional status.⁴¹⁹ Thus, deliberative

416. Order, *supra* note 402, at 1.

417. *Id.*

418. The House brief included a section titled, “Deliberative Process Privilege . . . Does Not Apply to Congressional Subpoenas.” Mem. of P.&A. in Supp. of Pl.’s Mot. for Summ. J., *supra* note 362, at 25–33.

419. *Id.* at 27.

process privilege is akin to attorney–client privilege, which Congress may choose to honor or disregard on a case-by-case basis.⁴²⁰ The Executive advanced an equally deeply held view to the contrary, that the deliberative process privilege is one constitutionally grounded component of an umbrella doctrine of executive privilege.⁴²¹ The court rejected Congress’s “suggestion that the only privilege the executive can invoke in response to a subpoena is the Presidential communications privilege.”⁴²²

Judicial resolution of categorical questions such as the availability, or not, of deliberative process privilege could alter the separation of powers. Congress and the Executive have tended to state their positions in categorical terms. In this case, the Executive lost its chief categorical argument against the justiciability of the dispute, and Congress lost on its article of faith that deliberative process privilege held mere common law status.

Once the privilege log is produced, and barring a settlement by the branches, it will be interesting to see how the court weighs congressional need for information against executive confidentiality interests. Both of those calculations, while essential to the dispute, are inherently political. Questions of justiciability and privilege availability decided, the *Holder* court will continue to contend with litigation and transactional models at the document-level privilege analysis.

VI. CONCLUSION

This Article demonstrates that Congress and the Executive have fundamentally divergent views of the nature of constitutional structure. Congress’s investigative model of oversight seeks to establish its superior position in a hierarchy and its entitlement to nearly all executive branch materials. In contrast, the Executive focuses on its branch equality and views these interactions as transactional rather than procedural. More than a constitutional theory, these divergent views explain branch behavior, in practice, at every stage of oversight interaction: document requests, phone calls, briefings, letter exchanges, subpoenas, contempt votes, executive privilege assertions, and contempt litigation briefs.

420. *Id.* at 30.

421. *See* Mem. in Supp. of Def.’s Mot. for Summ. J. and in Opp’n to Pl.’s Motion for Summ. J., *supra* note 374, at 20–21.

422. Order, *supra* note 402, at 2.

Holder focuses on whether deliberative process privilege is a valid basis for President Obama's assertion of executive privilege over the remaining documents sought by Congress in connection with Fast and Furious. However, it raises far more profound issues about the nature of interbranch relations because it invites the courts to choose one of the two models. The courts should decline the invitation, and thus far the district court appears to be proceeding with a negotiated, or perhaps imposed, settlement in mind. Both branches claim too much, but their models also serve constitutional values. Importantly, the congressional litigation model contemplates judicial imposition where executive recalcitrance borders on lawlessness. And the transactional model's central premise—that Congress and the Executive have competing legitimate interests—is a better reflection of a healthy constitutional scheme than one in which the Executive is a regulated entity and Congress is the regulator. Both branches claim interests that are compelling and raise valid concerns about the other branch's perspective.

There should be a strong presumption against judicial resolution of congressional oversight disputes in categorical terms. The Executive is correct that routine judicial involvement in such disputes gives rise to real danger along the lines of the Heisenberg Principle. While all three branches have a role in interpreting their own roles in the constitutional scheme, the judiciary is the first among equals. As such, it has jurisdiction to decide interbranch oversight dispute cases in order to preserve order. Article III tribunals need to use the scalpel rather than meat axe when presented with bickering political branches.

As litigation proceeds to the merits in *Holder*, the court appears to appreciate that congressional need and confidentiality grounds are the essential elements of inquiry in any effort to resolve this dispute. Further, the court should evaluate these needs and grounds against the backdrop of other political remedies available to Congress. It should give due focus on mediation principles that facilitate accommodation and compromise rather than establishing categorical congressional entitlements or presidential prerogatives. It needs to be solicitous of executive branch concerns while facilitating congressional needs in a particularized fashion. To do otherwise could do violence to structural separation of powers.