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## FEATURE

# *The Law: “If Men Were Angels”*: The Legal Dynamics of Overseeing the Executive Branch

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One of the fundamental principles of American governance is that each branch of government has the necessary constitutional means and motives to resist the encroachment of the other branches. Oversight is an important part of this system. In this article, we identify the legal principles that govern legislative and judicial oversight of the executive branch. These legal parameters of oversight influence informal negotiations between the branches over executive information and have important consequences for the exercise of executive power. Legislative investigations in which sitting or former presidents have been subpoenaed or voluntarily produced evidence to the other branches of government span the course of two centuries and include at least 14 different presidential administrations (Rosenberg 2017).<sup>1</sup> Yet, popular discourse suggests that investigations of the executive seem different in the modern era. In contemporary politics, oversight of the executive branch can have the feel of a theater production, following a pattern of media revelation and legislative inquiry ensued by a flurry of legal proceedings (Geddes 2020a; Ginsberg and Shefter 1990; Wald and Siegel 2002).

However, in actuality, information disputes between Congress and the executive rarely make it to court (Gerhardt 2009; Kitrosser 2007). In fact, from 1789 to 2017, the two branches only litigated five cases in federal court involving a president’s refusal to provide information in response to a congressional subpoena (Carlson 2019). As put by the United States Supreme Court in 2020, “Congress and the Executive have ... managed for over two centuries to resolve [information] disputes among themselves without the benefit of guidance from us” (*Trump v. Mazars* 2020, 2031).

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1. Thomas Jefferson, James Monroe, John Quincy Adams, John Tyler, Abraham Lincoln, Ulysses Grant, Theodore Roosevelt, Richard Nixon, Jimmy Carter, Gerald Ford, Ronald Reagan, William Clinton, Barack Obama, and Donald Trump.

This does not mean that the law is an unimportant consideration in the dynamics between the branches. Congressional investigations are equal parts politics and procedure, following very explicit constitutional rules and processes (Hamilton, Muse, and Amer 2008). Despite the equal importance of politics and process, scholarly consideration of these investigations in social science tends to focus on the former. Important work on legislative investigations has examined when and why oversight occurs (e.g., Aberbach 1990; 2002; Johnson, Gelles, and Kuzenski 1992; Kriner and Schickler 2016; 2018; Kriner and Schwartz 2008; Lowande and Peck 2017; MacDonald and McGrath 2016; Mayhew 1991; McGrath 2013; Parker and Dull 2009). However, much of this work sidesteps the important legal principles that guide the process of congressional inquiry.

We draw attention to these principles and propose that they influence the dynamics between Congress and the executive branch in important ways. While Congress has broad authority to inquire into the workings of the executive branch, there are underappreciated legal and practical limitations to such inquiry. Restrictions on the enforcement of congressional requests for information combined with executive privilege protections affect oversight. Notably, these legal rules influence informal negotiations between the two branches over information and have implications for scholarly observation of oversight through techniques such as letters of inquiry or hearings.

Our purpose is to provide a descriptive account that sheds light on the legal dynamics that shape oversight of the executive branch. An account of this legal framework can provide a fresh perspective on empirical patterns observed by scholars, prompt more nuanced theoretical development, and help further scholarly understanding of how the branches interact in contemporary government. We first identify the constitutional foundations for legislative inquiry of the executive branch and the enforcement mechanisms available to compel compliance with congressional requests for executive information. We then discuss the legal opportunities for the executive branch to refuse to disclose information. Next, we illustrate how these constitutional principles operated in the Trump administration and raise important legal questions about oversight of the executive branch. Finally, we discuss how these questions influence the political dynamics of legislative investigations of the executive branch.

## **The Historical and Legal Foundations of Congressional Inquiry of the Executive Branch**

Legislative inquiry of the executive evolved out of an early understanding that the congressional power of appropriation included a right to supervise how those funds are spent (Landis 1926). Indeed, the first investigations in each chamber of Congress involved an inquiry into the use of public funds by a military official. In 1792, the House of Representatives authorized a committee to investigate General Arthur St. Clair's defeat in the Battle of the Wabash. Then, in 1818, the Senate appointed a select committee to investigate reports of General Andrew Jackson's actions in the Seminole War, including his violent invasion of major Seminole and Maroon villages in Florida and conduct of

dubious military tribunals. Each of these first investigations involved an authorization of a committee to collect such persons, papers, and records as may be necessary to assist the inquiry (Landis 1926). Overall, Congress was able to acquire the information it needed, and these early investigations concluded to the legislature's satisfaction.

In this regard, little has changed over the past two centuries. Not only is Congress regularly able to obtain the information it needs to conclude investigations, but the executive branch often voluntarily complies with the information requests that further these investigations (e.g., Bopp, Eyster, and Richardson 2015; Devins 1996; Fisher 2002; Iraola 2002; Tiefer 1998). Congress relies heavily on staff-level communication between the branches and "informal" methods of acquiring information like document requests, informal briefings, and interviews (Aberbach 1990; CRS 2020). In part, cooperation between the branches over information is a result of the very powers that served as the historical basis for congressional investigation; given the regularity of budget negotiations and authorizations, the executive branch has a strong incentive to work with the legislature (Acs 2019; Fisher 2000; 2002; OLC 1983; Wright 2014).

However, over the last few decades, there has been a marked increase in the volume and variety of congressional requests for executive information (Wald and Siegel 2002). These requests have been accompanied by public rhetoric, suggesting a tendency of the president and his appointees to stonewall Congress. Recent clashes between the two branches include investigations into the firing of U.S. attorneys in the Bush administration, Operation Fast and Furious in the Obama administration, and Russian interference in the 2016 presidential election. Discussion of executive reticence to disclose information reached a fever pitch in the Trump administration, with "almost every blog, newspaper, and magazine" publishing an explainer on the issue (Shaub 2019). While President Trump's term in office may have been unique in a variety of ways, presidentially mandated refusals to disclose information to Congress span every administration (Fisher 2002; OLC 1982; Rozell 1999). In fact, because of their ubiquity, there is no comprehensive listing of every executive refusal to disclose information to Congress (OLC 1983).

This brief historical review suggests a tension in congressional oversight of the executive branch. Moreover, Congress regularly acquires information on the executive branch. On the other hand, the executive branch regularly refuses to disclose specific information to the legislature. In order to understand how and when the executive branch is likely to decline to provide information to Congress, one must first understand the legal backdrop under which the branches operate. These legal principles represent underappreciated controls that shape the dynamics between Congress and the presidency.

## Investigative and Subpoena Powers

Congressional authority depends solely upon the express or implied powers of the Constitution (*Anderson v. Dunn* 1821; *Kilbourn v. Thompson* 1880). In order to gather information about the executive branch, Congress uses two separate, but closely related constitutional powers: (1) the authority to investigate and (2) the ability to compel witnesses through the issuance of a subpoena.

While there is no constitutional provision that explicitly invests Congress with the authority to investigate, the legislature's ability to acquire information through investigation is an established part of representative government (*Tenney v. Brandhove* 1951). Congress's investigative power is implied by our constitutional democracy. In order to legislate wisely and to represent constituents effectively, Congress must have knowledge of the wide-ranging circumstances and conditions that affect individuals and the United States government itself (*Barenblatt v. United States* 1959; *Eastland v. U.S. Servicemen's Fund* 1975; *McGrain v. Daugherty* 1927).

Yet, the legislature's powers are not all-encompassing and must relate to some constitutionally legitimate legislative function (*Gravel v. United States* 1972; *McGrain v. Daugherty* 1927). In the context of legislative inquiry, the Supreme Court has defined "legislative function" to include congressional consideration of needed or proposed statutes as well as the administration of existing laws (*Watkins v. United States* 1957). Such consideration can include explorations of defects in the nation's social, economic, or political system and probes into the functions, powers, and duties of executive officials (*McGrain v. Daugherty* 1927; *Watkins v. United States* 1957). Furthermore, the political motives of the legislature and the end result of the investigation do not determine the constitutional legitimacy of congressional action (*Barenblatt v. United States* 1959; *Eastland v. U.S. Servicemen's Fund* 1975). It is the nature of our constitutional system that congressional investigations may result in some nonproductive enterprises and that, in "times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed" (*Eastland v. U.S. Servicemen's Fund* 1975, 509 [citing *Tenney v. Brandhove* 1951, 378]).

Because mere requests for information can be insufficient, the legislature's inherent constitutional authority includes a power to compel compliance through subpoena (*In re Chapman* 1897; *McGrain v. Daugherty* 1927).<sup>2</sup> While the Supreme Court has recognized the subpoena as an indispensable part of Congress's investigative function (*Eastland v. U.S. Servicemen's Fund* 1975), the subpoena power would be meaningless without an enforcement mechanism.

### Forms of Contempt

If the target of a congressional investigation refuses to comply with a subpoena or otherwise obstructs an investigation, Congress may hold the individual in contempt. There are three forms of contempt, each of which relies on a different branch of government for enforcement (Garvey 2017). While all three forms theoretically are available in legislative investigations of the executive, not all are equally likely to be employed in contemporary politics.

The first form of contempt originates from the Constitution itself. Like the power to investigate, the Supreme Court considers the ability of Congress to enforce its

2. The standing rules of the House and Senate specifically provide for congressional committees to issue subpoenas. 116th Congress. Standing Rules of the Senate, Rule VVVI(1); Rules of the House of Representatives, Rule XI(2)(m)(1).

subpoenas through contempt a necessary extension of its legislative authority (*Anderson v. Dunn* 1821). If Congress chooses to employ this inherent power, the legislature must conduct a trial, find the individual in contempt, and then may even imprison the individual to coerce compliance (*Jurney v. MacCracken* 1935; *McGrain v. Daugherty* 1927).<sup>3</sup> Between 1795 and 1934, Congress used its inherent contempt authority over 85 times (CRS 2020). However, the legislature has not asserted this power since 1934, as the required process is generally considered cumbersome, time-consuming, and inefficient in contemporary legislative governance (Bopp, Eyler, and Richardson 2015; Garvey 2017).

The second form of contempt relies on statutory law. In 1857, Congress supplemented its inherent contempt power with a criminal statute. Originally intended as an alternative (as opposed to a substitute) to inherent contempt (Garvey 2017), criminal contempt requires a congressional committee and its corresponding chamber of Congress to cite an individual in contempt of Congress. Upon such a citation, the matter gets referred to the executive branch and it becomes the “duty” of U.S. attorneys to bring the matter before a grand jury.<sup>4</sup> While both branches have benefited from this process as an investigatory tool to gather information from private citizens, criminal contempt is less successful in compelling information from the president, his advisors, and the executive branch as a whole (Bopp, Eyler, and Richardson 2015; Devins 1996). The language of the statute does not expressly require that U.S. attorneys bring a contempt prosecution or sign an indictment. Thus, the Department of Justice [DOJ] traditionally has asserted that, as a general matter, whether to pursue criminal contempt citations falls within the realm of prosecutorial discretion (Peterson 2020). More specifically, DOJ has taken the unsurprising position of refusing to pursue criminal prosecution when the president directs or endorses noncompliance (Garvey 2017).

As a result, prior to Watergate, Congress had never cited an executive branch official for criminal contempt (CRS 2020). While Congress has cited 15 cabinet-level or senior executive officials for criminal contempt since 1975 (CRS 2020), because of DOJ’s refusal to prosecute, these citations were largely political moves designed to put public pressure on the presidency. In some instances, the citations led to the subsequent disclosure of information even when the U.S. Attorney’s Office failed to submit the issue to a grand jury. For example, after a congressional vote to hold Environmental Protection Agency Administrator Anne Gorsuch Burford in contempt in 1982, Congress received access to the documents in question before the issue was litigated (CRS 2020).

Finally, rather than employ inherent or criminal contempt proceedings, Congress may petition the courts to compel compliance with a subpoena. This is known as civil contempt. While statutory law only provides for civil contempt in the Senate and does not apply to a subpoena issued to any federal employees acting in an official capacity,<sup>5</sup> the full House of Representatives may adopt a resolution finding an individual in contempt

3. However, punishment may not extend beyond the session of Congress during which the individual was found in contempt (Garvey 2017).

4. Similar procedures exist for obstruction of congressional proceedings, which also rely on the executive branch for prosecution. 18 U.S.C. § 15050 (2020).

5. 28 U.S.C. § 1365 (2020).

and authorizing a committee or the chamber's general counsel to pursue a civil action requesting declaratory and/or injunctive relief in federal court (*Committee on Oversight and Government Reform v. Holder* 2013; *Committee on the Judiciary, U.S. House of Representatives v. Miers* 2008; CRS 2020).<sup>6</sup> The Senate has used its civil contempt power at least six times (none against an executive official), and the House has used its power only in the last three presidential administrations (George W. Bush, Barack Obama, and Donald Trump).<sup>7</sup> While laborious and slow-moving, these suits can have real consequences. For example, Attorney General Eric Holder was held in civil contempt in 2012 for withholding information relating to Operation Fast and Furious—which allowed illegal gun sales in order to track Mexican drug cartels. The citation drew intense interest from key congressional constituencies. While legal resolution resulted in the release of executive information nearly 4 years after contempt citation, the public scrutiny on Holder was more immediate and he resigned from his post in 2014. Although Holder maintains he did not resign as a result of contempt citation, the incident undoubtedly affected his future actions in office and became a part of his public career.

## Contesting Congressional Inquiry of the Executive Branch

The underlying threat of a subpoena or enforcement action combined with traditional legislative tools of control such as appropriations usually is enough for Congress to obtain requested information from the executive branch. Yet, as previously noted, presidents and executive officials can and do refuse to cooperate with congressional investigations. In doing so, members of the executive branch must assert that the legislative request is invalid. These assertions traditionally have fallen into two categories: that the request constitutes a violation of an individual's constitutional rights or is an encroachment on the duties of the executive branch.

### Refusing to Disclose Information

In its search for information, Congress cannot violate the constitutional provisions designed to protect individual citizens from government intrusion (*Barenblatt v. United States* 1959; *Quinn v. United States* 1955; *United States v. Rumely* 1953). These constitutional protections extend to all public officials, including presidents (*Nixon v. Administrator of General Services* 1977). When considering the validity of a congressional request for information, courts generally balance the legislature's need for the particular information against the individual's rights, including the right to privacy (*Hutcheson v. United States*,

6. Standing to sue in this regard originates from the congressional subpoena power and the legal injury of loss of information and institutional authority (*Committee on the Judiciary, U.S. House of Representatives v. Miers* 2008).

7. Civil contempt power was used against former White House Counsel Harriet Miers and White House Chief of Staff Josh Bolton (2008), Attorney General Eric Holder (2012), and Attorney General William Barr and former White House Counsel Donald McGahn (2019).

1962; *Watkins v. United States*, 1957). However, a consistent theme across litigation involving these types of disputes is that an assertion of private rights cannot serve to insulate the president or other executive officials from accountability for their public actions (Berger 1975; Marshall 2004).

Thus, while protection of individual rights is an important constitutional principle, the limitation on congressional authority that most often serves as the backdrop for disputes over congressional access to information is that the legislature cannot encroach on the duties of another branch. Courts, like scholars, have long recognized that the U.S. government functions as a system of shared powers and that the Constitution does not contemplate a complete division of authority between the branches (e.g., *Anderson v. Dunn*, 1821; Fisher 1998; Neustadt 1960; *Nixon v. Administrator of General Services*, 1977; Wilson 1885). Because of this system of shared authority, efforts of one branch that exceed the outer limits of its authority or undermine the powers of another branch—even to accomplish widely accepted objectives—are constitutionally suspect (*Bowsher v. Synar* 1986; *Immigration and Naturalization Service v. Chadha* 1983; *Loving v. United States* 1996; *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise* 1991; *Morrison v. Olson* 1988). In its investigations, Congress cannot encroach on the duties of another branch (e.g., *Anderson v. Dunn* 1821; *Barenblatt v. United States* 1959; *Bowsher v. Synar* 1986; *Clinton v. Jones* 1997; *Kilbourn v. Thompson* 1880; *Loving v. United States* 1996; *Morrison v. Olson* 1988; *Quinn v. United States* 1955; *Springer v. Government of the Philippine Islands* 1928).

Since the Washington administration, executive officials have claimed a variety of privileges that enable them to withhold documents and other materials that are fundamental to the operation of government (*Espy* 1997; *United States v. Nixon* 1974). Grounded in the separation of powers, executive privilege reflects the notion that other branches should not intrude upon the execution of the laws (see *Ziglar v. Abbasi* 2017). Yet, like the legislature's powers of inquiry and subpoena, executive privilege is an implied power (Devins 1996). It was not until the Nixon administration that the courts formally recognized the existence of privilege as a necessary derivative of presidential authority, and the Supreme Court has not addressed definitively the concept in the face of a congressional demand for information (Garvey 2014).

In its most basic form, privilege enables the president and executive officials to withhold documents that would reveal the pre-decisional and deliberative opinions, recommendations, and conversations upon which governmental decisions and policies are formulated (*Espy* 1997). The president can invoke this privilege in order to encourage candor among advisors by preserving the confidentiality of their communications (*Espy* 1997; *United States v. Nixon* 1974). While the judiciary has not elaborated upon the parameters of executive privilege since Watergate, the executive branch has developed a comprehensive constitutional theory based on historical practice, common law, and

Freedom of Information Act litigation (Schaub 2020). This theory asserts privilege over presidential communications, national security and foreign affairs information (state secrets), internal executive branch deliberations, law enforcement or investigatory information, and attorney–client or attorney work–product information (Schaub 2020). With respect to challenges that a legislative inquiry encroaches upon presidential power,<sup>8</sup> the executive branch most often claims that information requests infringe upon the president’s ability to receive candid advice or to protect national security (*Espy* 1997; Kitrosser 2007).<sup>9</sup>

Despite the executive branch’s expansive legal interpretation, executive privilege is qualified (*Espy* 1997; *Nixon v. Administrator of General Services* 1977; *United States v. ATT&T* 1977; *United States v. Nixon* 1974). Courts generally impose a balancing test that weighs the legislature’s need for information against the executive’s prerogatives (*Cheney v. U.S. District Court for the District of Columbia* 2004). In doing so, courts distinguish between a broad executive interest in confidentiality and particularized, specific needs to protect sensitive materials (see *Espy* 1997; *Nixon v. Administrator of General Services* 1977; *United States v. AT&T* 1976, *United States v. ATT&T* 1977). Yet, there has been a lack of clarity as to what constitutes a particularized need or how Congress can overcome executive claims of privilege during the investigative process (see Garvey 2014).

Finally, a far less frequently asserted but still potent defense against congressional inquiry is presidential immunity. Like considerations of privilege, the concept of immunity is rooted in the notion of the separation of powers and designed to protect against intrusion on the functions of the executive branch. Executive officials must be able to perform their jobs without fear of liability for official acts (*Clinton v. Jones* 1997; *Nixon v. Fitzgerald* 1982). However, immunity is grounded in the office (not the individual) and therefore only extends to official conduct or matters of national security or foreign affairs (*Clinton v. Jones* 1997; *Committee on the Judiciary, U.S. House of Representatives v. Miers* 2008).

### Availability of Judicial Review

In order to contest a congressional request, an executive official generally must first refuse to provide the information and then provide a defense (Bopp, Eyler, and Richardson 2015). If the two branches cannot come to an agreement and the legislature decides to pursue criminal or (more likely) civil contempt, then the dispute ends up in court. Such litigation raises constitutional concerns. The judiciary oscillates in its responses to the separation of powers disputes, at times serving as an umpire between the two political

8. When considering the parameters of presidential power, courts generally refer to the tripartite framework laid out in *Youngstown*—executive authority is greatest when the president acts pursuant to express or implied congressional authorization; most limited when the president takes measures incompatible with such authorization; and middling in the absence of either a congressional grant or denial of authority (“zone of twilight”) (*Youngstown Sheet and Tube Co v. Sawyer* 1952; *Zivotofsky ex rel Zivotofsky v. Kerry* 2015).

9. This article focuses primarily on assertions of presidential privilege that does not result from national security concerns, as the executive branch’s claims of legal authority to withhold national security information are judged under a supplemental set of legal rules. Scholars would benefit from future research on the legal parameters of and long-standing executive branch positions on information disclosure in this area.

branches and at times refusing to get involved (Entin 1991; O’Neil 2007; Wald and Siegel 2002). In clashes over legislative access to information, the judiciary trends toward the latter. The courts discourage litigation—which can place the judiciary in an awkward position with respect to the other branches—and recognize that judicial resolution is inefficient and not particularly expedient (*Cheney v. U.S. District Court for the District of Columbia* 2004; *Committee on the Judiciary, U.S. House of Representatives v. Miers* 2008; *United States v. ATT&T* 1977).

That said, the courts will intervene when necessary. Political negotiations are one thing, intransigence is another. The judiciary views its role in information disputes to prevent the executive branch from having the final word and thus from being elevated above the other branches in our separation of powers system (*Committee on Oversight and Government Reform v. Holder* 2013). This is particularly true when the president refuses to comply with congressional information requests that could implicate misconduct or criminal activity (see *Clinton v. Jones* 1997; *Espy* 1997).

It is this specter of intervention that helps ensure the political branches negotiate over information in good faith (*Committee on the Judiciary, U.S. House of Representatives v. Miers* 2008). For the most part, the threat of judicial resolution has been enough to encourage negotiation and “resort to litigation [has been] perceived as an act of desperation, rather than a legitimate means of vindicating a legal prerogative” (O’Neill 2007, 1087).

## Legal Developments in the Trump Era

However, litigation over information felt like the hallmark of the Trump administration. While the political dynamics of the relationship between the president and Congress is a crucial component of inquiry, recent disputes between the two branches highlight unanswered legal questions that have important implications for future legislative oversight of the executive branch.

### Who within Congress Can Request Information?

As the government has become increasingly polarized, the ability of minority party members of Congress to obtain information about the executive branch is more limited. The Constitution grants subpoena and contempt powers to Congress, which may delegate its authority to committees or subcommittees for investigations under their respective jurisdictions. Thus, the congressional power to investigate is composed of two elements—authorization and pertinency—and the ability to enforce that power through subpoena or contempt is an institutional interest reserved to a chamber or its duly authorized committees (*Exxon Corp. v. Federal Trade Commission* 1978; *Gojack v. U.S.* 1966; Rotunda and Nowak 2020; *United States v. Lamont* 1956; *Waxman v. Thompson* 2006).

Importantly, this means that information requests backed by the enforcement power of contempt filter through the chambers of Congress or to a committee operating within its delegated authority—not to individual members. No court has recognized the right

of an individual member of Congress, even if she has ranking member status on a committee, to pair information requests with enforcement (Rosenberg 2017). Furthermore, the judiciary has refused to recognize the legal standing of individual members to sue for information from the executive branch. Because legislative requests are *institutional* prerogatives, members *as individuals* are unable to show that the injuries resulting from the deprivation of information are judicially recognizable (see *Raines v. Byrd* 1997; *Waxman v. Thompson* 2006). It is this legal fact that exacerbates tensions in partisan investigations. While bipartisan inquiries involve joint information requests from both the chairperson and ranking member, partisan inquiries involve requests issued solely by the chairperson (Levin and Bean 2018). As a constitutional matter, the minority party has no legal rights to information.

These tensions were on full display in the Trump administration. In response to repeated requests for information from individual members of Congress, in 2017, the Department of Justice's Office of Legal Counsel (OLC) clarified its policy on legislative inquiries into the executive branch.<sup>10</sup> OLC explicitly stated that individual members, including ranking minority party members, do not have the authority to make official legislative inquiries or investigations (OLC 2017). The office reasoned that such inquiries do not trigger the accommodation process required by the Constitution and that any provision of information to individual members is at the executive's discretion.

OLC's statement on the matter reinforced the executive branch's long-standing policy of only providing individual members with documents that (a) are already publicly accessible or (b) would be available through Freedom of Information Act (FOIA) requests. This policy traces to the Reagan administration. In 1984, the Department of Justice specified that executive officials would treat congressional requests for information as FOIA requests unless they are made by a committee or subcommittee chairperson (Office of Information Policy 1984). In response, all executive agencies adopted regulations that mandate agencies treat inquiries from individual members as equivalent to FOIA requests made by private citizens (Rosenberg 2017).

Litigation arose during recent presidential administrations as a result of a conflict between this policy and statutory law. Federal statute provides that an executive agency must comply with a legislative request for information made by any seven members of the House Committee on Oversight and Reform or any five members of the Senate Committee on Homeland Security and Governmental Affairs, as long as the request relates to the committees' respective jurisdictions.<sup>11</sup> Known as the "Seven Member Rule," Congress enacted the law in 1928 in order to provide the committees with the authority to request information that had been available previously in agency reports (Fisher 2004).

While Congress historically avoided relying on the statute in high-profile investigations, the Seven Member Rule received much attention in the Bush administration when Rep. Henry Waxman (D-CA) along with 16 other Democrats and one independent attempted to use the rule in two separate information requests. The first sought data

10. Given the lack of judicial precedent on the separation of powers issues, the "OLC's view on certain issues will therefore be the only 'legal opinion' ever produced" (Berman 2021, 6).

11. 5 U.S.C. § 2954 (2020).

produced by the Census Bureau as part of the 2000 Census, and the second pursued actuarial information from the Department of Health and Human Services relating to the Medicare and Prescription Drug and Modernization Act (see *Waxman v. Evans* 2002; *Waxman v. Thompson* 2006). Both requests resulted in a lack of judicial enforcement and raised questions regarding the members' standing to sue.

These questions arose again in 2017 in the context of requests by Rep. Elijah Cummings (D-MD), then ranking member, and 10 members of the House Oversight Committee to obtain information from the General Services Administration (GSA) relating to lease agreements granting Trump Old Post Office LLC (owned by President Trump, Ivanka Trump, Donald Trump Jr., and Eric Trump) the rights to develop and convert the Old Post Office building in Washington, DC, into Trump International Hotel. While GSA produced some documents to the legislature prior to President Trump's inauguration, the agency stopped cooperating with Congress after Trump took office. In a letter dated July 17, 2017, GSA flatly denied the members' requests and cited the 2017 OLC memo regarding the executive accommodation of legislative inquiries by individual members of Congress. The agency walked back its denial three days later but subsequently decided to treat the inquiries as FOIA requests.

The members initiated litigation over the matter, and the D.C. District Court ruled in 2018. Similar to the litigation in the *Waxman* cases, the arguments between the branches centered around standing. While the district court recognized that the Seven Member Rule bestows upon members of the House Oversight Committee a greater institutional interest than in other circumstances,<sup>12</sup> the court held the members did not have standing to compel executive disclosure of information (*Cummings v. Murphy* 2018). In addition to an absence of historical precedent for the judicial enforcement of the Seven Member Rule, the court cited a lack of authorization from the House to bring suit and noted that the judiciary tends only to intervene in informational disputes between the legislative and executive branches in the context of subpoena enforcement.

Subpoena enforcement then became an issue in House investigations leading up to the first impeachment proceedings against President Trump. Following the publication of the Mueller Report, the House Committee on the Judiciary requested documents and testimony relating to the president's alleged obstruction of the Mueller investigation. After repeated attempts to secure the testimony of former White House Counsel Donald McGahn, the committee filed suit to enforce its subpoena under its civil contempt authority. Legal standing to sue was among the many issues that arose in the course of this litigation. In its 2020 decision, the D.C. Circuit Court held that the committee had standing as a result of its delegated authority and constitutional interest in subpoena enforcement (*Committee on the Judiciary, U.S. House of Representatives v. McGahn* 2020). The D.C. Circuit Court reasoned that the committee had a concrete and particularized injury as a result of the executive's denial to produce subpoenaed information necessary to the

12. See, for instance, *Raines v. Byrd* (1997) and *Waxman v. Thompson* (2006) (reasoning that failure to produce information is an injury that runs through members' seats, not members as individuals, and that a claim of diminution of legislative power is not a particularized injury).

legislative, oversight, and impeachment functions of the House of Representatives. The decision further cemented the difference between committee and member requests.

While the Trump cases involved comparatively high-profile investigations, the legal principles involved help explain empirical patterns found by scholars who study legislative oversight of the executive branch. Individual members of Congress routinely submit direct requests for information to the executive branch, and these contacts tend to be more frequent from those in the majority party and committee leadership (Lowande 2018; 2019; Ritchie 2018). There is a scholarly assumption that executive officials may be more responsive to these requests due to the members' connection to the legislative process (Lowande 2019). Yet, it also may be that executive officials respond at higher rates because these members have the backing of subpoena and enforcement powers. This also explains why scholars do not observe the same patterns when it comes to lobbying by legislators (e.g., Mills, Kalaf-Huhes, and MacDonald 2016; Ritchie and You 2019). Whereas agencies face legal and political sanctioning mechanisms for failure to disclose information, the dynamics of the policy process provide more leeway for the executive branch to fail to respond to a signal of political interest from an individual member sent through legislative lobbying.

The legal rules that structure executive-legislative information disputes may also have implications for the information asymmetries and power dynamics between party leaders and rank-and-file members of Congress. Not only can legislative leaders capitalize on knowledge and expertise to shape the legislative process (e.g., Curry 2015; 2019), but the law shapes executive incentives in a way that prioritizes leaders in the oversight process. Legislative leaders have both legal and political sanctioning mechanisms for noncompliance.

### What Constitutes a Valid Legislative Purpose?

In addition to who may request information, the issue of what constitutes a constitutionally recognized legislative function was the repeated subject of litigation in the Trump era. In April 2019, the House Committees on Financial Services, Intelligence, and Oversight and Reform issued a series of four subpoenas requesting information from three private companies regarding the finances of President Trump, his children, and their affiliated businesses. While the information requested by the committees overlapped, each committee provided a different justification for the requests. The Financial Services Committee issued two subpoenas under its jurisdiction to oversee banking regulation and cited an effort to close legal loopholes related to money laundering, corruption, and terrorism. The Intelligence Committee's subpoena, which was identical to the one issued by Financial Services, was part of an investigation into foreign interference in the political process of the United States. Finally, the Oversight and Reform Committee stated its subpoena was part of a broad investigation into potential illegal conduct and malfeasance by the president.

President Trump challenged these subpoenas and, notably, did not assert that the requested records were protected by executive privilege. Instead, he argued the subpoenas

lacked a legitimate legislative purpose and were an attempt by the committees to expose personal matters and to encroach upon executive authority. The absence of a privilege claim made the issue in the case a relatively pure one. In its decision, the Supreme Court addressed the lack of legal clarity with respect to what constitutes a legislative purpose (*Trump v. Mazars* 2020). Given the legislature’s jurisdiction to explore social, economic, and political problems, to propose legislation to address those issues, and to conduct oversight of the duties of executive officials, questions arose at oral argument regarding whether the concept of legislative purpose was so broad as to be all-encompassing. Indeed, “the House was unable to identify *any* type of information that lacks some relation to potential legislation” (*Trump v. Mazars* 2020, 2034).

Ultimately, the Court remanded the case and proposed the judiciary consider a balancing approach regarding legislative purpose. In determining whether a congressional subpoena furthers a constitutional end, courts should weigh the breadth of a subpoena, the evidence offered by Congress to establish purpose, the burdens the subpoena on the president’s time and attention, and whether other sources aside from the president’s personal papers would provide the same information (*Trump v. Mazars* 2020).

### How Far Does Privilege Extend?

In recognizing that the Trump administration did not claim privilege, the Court distinguished between nonprivileged, private information requests and those made involving official presidential papers. While placing a blanket on all subpoenas of presidential information would inhibit Congress’s investigative authority, the close connection between the institutional need of the Office of the President and the interests of its occupant necessitates careful consideration of privilege (*Trump v. Mazars* 2020). Much of the litigation concerning requests of government records in the Trump era touched on this issue. Indeed, by our count, at least 84 federal cases decided during the Trump administration involved assertions of executive privilege. This litigation, initiated by Congress, nonprofits, and private entities, raised important questions about how far executive privilege extends and the standards under which it is judged.

In response to the congressional subpoenas of Donald McGahn and Kellyanne Conway, respectively, former and current senior aides to the president at the time,<sup>13</sup> the Trump administration asserted the immunity of the president’s immediate advisors from testimony. Building upon the judicially recognized idea that communications between the president and his senior-level aides are privileged (*Espy* 1997; *Loving v. Department of Defense* 2008), the Office of Legal Counsel issued two memos claiming that the executive’s interests in confidentiality and the president’s need for candor necessitated testimonial immunity (OLC 2019a; 2019c). Furthermore, OLC argued that this immunity is “distinct from, and broader than, executive privilege,” continues after an individual leaves the

13. The Conway subpoena, issued by the House Oversight and Reform Committee, related to potential violations of the Hatch Act.

White House, and is required to prevent the president from becoming subordinate to Congress (OLC 2019a, 4).

This position pushed established precedent to the extreme. Privilege and absolute immunity are not the same. In fact, in 2008, the Bush administration tried to claim absolute immunity in litigation over whether former White House Counsel Harriet Miers was required to comply with a subpoena to testify in a House Judiciary Committee investigation into the forced resignation of nine United States attorneys. In that case, the D.C. District Court rejected the notion of absolute immunity of senior presidential aides from the congressional process (*Committee on the Judiciary, U.S. House of Representatives v. Miers* 2008). The district court again had the chance to rule on the issue in the context of the Trump administration's claims regarding McGahn. Unsurprisingly, that decision—which the D.C. Circuit reviewed on standing and remanded on the merits—pointed to the resolution of the Miers case and rejected the notion of absolute immunity for presidential advisors (*Committee on the Judiciary, U.S. House of Representatives v. McGahn* 2019).

While it seems relatively clear that Congress may compel testimony from senior White House advisors, there are still unanswered questions regarding how far and in what circumstances executive privilege extends. For example, a presidential administration may assert the privilege both to protect communications that occur among the president and his advisors and to protect the communications they received from others (*Espy* 1997; *Judicial Watch, Inc. v. Department of Justice* 2004). Yet, it is unclear whether the president actually has to have been familiar with the communications or for how long privilege extends beyond the president's term of office (Garvey 2014; *Nixon v. Administrator of General Services* 1977).

In summary, legislative requests for executive information and presidentially mandated refusals to provide such information are subject to a complex set of legal rules. Litigation that arose over these matters in the Trump administration helped clarify who within the legislature has a constitutionally recognized right to enforce information requests, the legislative purposes required to establish investigative authority, and the conditions under which the executive branch may claim privilege. Recognition of this legal background can help inform scholars' consideration of congressional oversight of the executive branch.

## Obtaining Information from the Executive Branch

Important work on the legislature has examined when investigations of the executive branch are likely to occur, finding that there are institutional, individual, policy-, and partisan-based incentives motivating congressional inquiry (e.g., Aberbach 1990; 2002; Johnson, Gelles, and Kuzenski 1992; Kriner and Schickler 2016; 2018; Kriner and Schwartz 2008; Lowande and Peck 2017; MacDonald and McGrath 2016; Mayhew 1991; McGrath 2013; Parker and Dull 2009). However, by largely focusing on the initiation of hearings or high-profile investigations, scholars have missed key components of oversight of the executive.

## Bargaining for Information

Congressional requests for information are routine. Indeed, about 66% of committee correspondence with the executive branch in the 116th House of Representatives was intended to further oversight and often targeted multiple officials with knowledge of administrative activities (Reynolds and Gode 2020a). When considering congressional information requests, it is important to acknowledge that such requests are part of a two-stage process—the legislature’s decision to request information from the executive branch and the executive’s decision to release said information. In this sense, any information negotiation between the branches is an iterative game in which each player anticipates and shapes the reactions of the other (Acs 2019; Berman 2021).

Negotiation over access to information is an important step in the legislative investigation process. Because of their differing institutional and political interests, the two branches often come to the negotiating table from different perspectives. Representatives from each branch tend to view their institution as having the primary right to access—the executive believes it has the constitutional authority to control disclosure, while the legislature believes it has the right to access in all but the most limited of circumstances (Schaub 2020). As a result, negotiations can have a push and pull feel as the two branches bargain over the quantity, nature, and stakes of information release (Devins 1996; O’Neil 2007; Wright 2014).

The result of this bargaining process is in large part dependent upon the players’ will and skill. The parameters of information release most often result from the staunchness of each branch’s advocacy (Rosenberg 2017). If one branch’s interests are more concentrated than the other, then that branch is more likely to succeed at the negotiating table (see Iraola 2002). If, as is the case in “ordinary” everyday oversight, both branches have equally concentrated interests, then the terms of the agreement may be designed to enable each branch to claim victory (Devins 1996). For example, negotiations may end with the executive agreeing to disclosure, but only under a confidentiality agreement.

While the modal response in legislative inquiry is a mutually agreed-upon negotiation over information release, the existence of the executive’s legal power to claim privilege creates the potential for and perception of abuse of that power (Prakash 1999). Modern presidents have had to contend with the legacy of the Nixon administration (Rozell 1999). Watergate not only raised the stakes and complexity of negotiations, but also opened the door to the court system as a mediator of disputes that traditionally the two branches would have resolved on their own (Devins 1996; Wald and Siegel 2002).

The judicialization of these disputes means that negotiations have become dependent upon the skills of the negotiators (Devins 1996; Rosenberg 2017). Since Watergate, both houses of Congress have invested in legal offices that represent each chamber’s institutional interests (Tiefer 1998). The Office of Senate Legal Counsel was established in

1978 as part of the Ethics in Government Act<sup>14</sup> and in 1979, House Speaker Tip O’Neill first appointed a House General Counsel.<sup>15</sup>

While highly skilled lawyers staff these offices and represent their respective chambers in litigation, it may be that the executive branch has an advantage when it comes to routine information negotiations and disputes. There is no centralized congressional authority concerned with the development of an institutional body of consistent precedent. Congressional general counsels’ offices tend to offer opinions on the separation of powers disputes to committees on an ad hoc basis and suffer from real resource constraints (Ahearn et al. 2020; Berman 2021). To complicate matters, Congress historically has become reliant on lawyers in the executive branch to enforce subpoenas in the private sector (Bopp, Eylar, and Richardson 2015). This practice has resulted in executive—rather than legislative—development of extensive experience with congressional subpoena enforcement.

In addition, the Office of Legal Counsel may offer the executive branch additional advantages. OLC exists to provide legal advice to the president and all executive agencies. Such advice is binding on the executive branch unless overridden by the president or Attorney General. Furthermore, previous OLC opinions operate as binding precedent on the office itself and are overturned only in rare circumstances. While traditionally considered apolitical when compared to other agencies within the executive departments, the OLC tends to interpret the law in ways that increase executive power vis-à-vis Congress and can be a powerful weapon in information disputes (Berman 2021; Morrison 2010). OLC is cognizant of the fact that, in many cases, the courts are unlikely to review its opinions (OLC 2004). As a result, OLC policy is to interpret the separation of powers issues in a way that reflects the interests of the executive (OLC 2004; 2010). The powers of OLC to shape the legal parameters of negotiations are not lost on Congress. For example, in response to the importance of OLC opinions generally and the Trump administration’s use of the OLC specifically, Senator Tammy Duckworth (D-IL) proposed the Demanding Oversight and Justification Over Legal Conclusions Transparency Act in 2020 in order to promote more transparency regarding executive information disclosure.

And of course, partisan dynamics can exacerbate tensions. A lack of trust between the players in eras of divided government may make good faith negotiations less likely (see Edwards 2016; Schaub 2020). There can be electoral benefits to creating confrontation with a president of the opposite party in order to further a narrative of executive corruption, government waste, or policy failure (Lowande and Peck 2017; Parker and Dull 2009; Wright 2014). As a result, the internal and political dynamics of legislative committees during oversight are complex, theatrical, and not entirely driven by evidence

14. Pub. L. No. 95-521 (1978). The president pro tempore of the Senate appoints the counsel and deputy counsel, and such appointment is made effective by a resolution of the Senate. 2 U.S.C. § 288(a) (2020).

15. Prior to this time, a lawyer in the Office of the Clerk of House of Representatives performed this function. The House formally created the General Counsel’s Office in 1991. H.R. 423, 102nd Cong. (1991). Under current practice, the Speaker of the House appoints the General Counsel. Rules of the House of Representatives, Rule II, § 8.

(Geddes 2020a; 2020b). Partisan polarization can make scandal production and information suppression more likely (see Dziuda and Howell 2021).

Furthermore, initial negotiations over congressional inquiry may result in increased claims to a legal flaw with information requests. When conflicting parties seek to transform debate into controversy, they may point to legal interpretations to add intellectual weight to their opposing viewpoints. Elected officials respond to public perceptions of the relationship between the branches, and legal arguments can help shape opinion because of their salience with the media and opinion elites (Berman 2021; Edwards and Wood 1999). For example, in both litigation and in OLC memoranda, the Trump administration relied heavily on claims of invalid legislative purpose.<sup>16</sup> In response to the House Committee on Ways and Means requests for Trump's individual tax returns, the administration noted discrepancies in the public record regarding the reason for the requests and ultimately argued that the sole purpose of the inquiry was to put the president's personal papers in the public record (OLC 2019b).

Distinguishing between partisan and institutional claims in the legal context can be difficult, as a polarized government makes it more likely that each side will attribute partisan motivations to the other (Tiefer 1998). Legally, while Congress's efforts to inform itself are part of the legislative function, making those efforts public are not (see *Hutchinson v. Proxmire* 1979; Wilson 1885). That said, particularly for a minority party in Congress, engaging the media and general public in efforts to obtain executive information can be an effective legislative strategy (Rosenberg 2017; Stern 2017). Information requests can influence the president's job approval ratings and damage public perceptions of the president's party (Kriner and Schickler 2016). In addition, public discourse may influence judicial considerations of executive privilege. Not only does the executive's interest in confidentiality decrease when there is widespread knowledge of the contents of requested materials (*In re Committee on Judiciary* 2020), but also public opinion and political ideology influence judicial decision making in the separation of powers cases (e.g., Clark 2009; Segal, Westerland, and Lindquist 2011).

Consideration of the branches' bargaining strategies over executive information suggests that differential patterns across and within the chambers of Congress (e.g., Kriner and Schickler 2018; MacDonald and McGrath 2016) may be the result of variation in negotiating skills and enforcement mechanisms. Some committees have more experienced staff, stronger policy connections, and more resources than others. Such committees may be more likely to obtain information informally without having to begin a formal investigation. Not only does increased capacity level the playing field when it comes to knowledge of the legal parameters of oversight, but it can also make threats of enforcement more credible and create incentives for both branches to come to an agreement.

16. While the executive branch has refused to release information to Congress without formally claiming privilege since at least 1846 (OLC 1983), the Trump strategy represents a comparatively new development. The bulk of legislative purpose litigation has arisen within the context of the Speech or Debate Clause (e.g., *Barenblatt v. United States* 1959; *Eastland v. U.S. Servicemen's Fund* 1975; *Gravel v. United States* 1972; *Kilbourn v. Thompson* 1880; *Quinn v. United States* 1955; *Tenney v. Brandhove* 1951; *United States v. Rumely* 1953; *Watkins v. United States* 1957).

In addition to the varying skills of committees across and within chambers, it is important to recognize the variation in the availability of enforcement mechanisms. Not only does the law create differential legal standards for House and Senate information requests, providing the House with more stringent forms of legal sanction for noncompliance than the Senate, but there are also different standards depending upon policy area. For example, Schlesinger famously warned that foreign affairs pose a perennial threat to the separation of powers (Schlesinger 1973). Declining congressional capacity in this area raises questions about legislative oversight (Goldgeier and Saunders 2018). Indeed, less than 10% of the formal investigative letters and hearings the House sent to the executive branch in the 116th Congress related to defense or foreign affairs (Reynolds and Gode 2020b). Whatever asymmetries Congress may face with respect to expertise, it is worth considering that different legal rules govern information disclosure in domestic and foreign affairs. Executive privilege extends much further in the latter, making formal legislative inquiries in foreign policy less likely to be fruitful endeavors. As a result, the legislature is far more likely to “lose” in public battles over information regarding state secrets and may not engage in this form of oversight.

### Alternative Strategies for Access

In 1971, then Assistant Attorney General William Rehnquist noted the executive branch has a “headstart in any controversy with the Legislative Branch.... All the Executive has to do is maintain the status quo, and he prevails” (Rehnquist 1971, 6–7). The empirical validity of this claim remains largely untested. However, two recent developments in litigation over executive information suggest that alternative venues may shape negotiations between the branches and make the legislature more likely to obtain information.

First, there has been an increase in state oversight of federal executive action. In addition to being able to demonstrate injury akin to private citizens, the states also have sovereign and quasi-sovereign interests that can support standing to sue even when they do not suffer an injury in fact (*Maine v. Taylor* 1986; *Massachusetts v. EPA* 2007; *Snapp and Son, Inc. v. Puerto Rice exrel. Barez* 1982). Based on this constitutional principle, both the Obama and Trump administrations saw an increase in state attorneys general filing legal actions against the executive branch (Hessick and Marshall 2018). States have served to provide a check on the executive that Congress sometimes has been unable to provide (Bulman-Pozen 2012).

The most notable of such suits involved New York District Attorney Cy Vance’s 2019 subpoena of President Trump’s personal accounting firm for information relating to President Trump’s tax returns. As the parties involved agreed the papers at issue belonged to the president and that the accounting firm was merely the custodian of the papers, this appeared to be the first state criminal subpoena issued to a president of the United States (*Trump v. Vance* 2020). The president contested the subpoena as unenforceable while he was in office because the subpoena would divert him from his duties as chief executive, undermine his leadership in domestic and foreign affairs, and set a precedent for

politically motivated state investigations.<sup>17</sup> The case made its way to the United States Supreme Court, which held that the president was not absolutely immune from such a subpoena and remanded the case to the lower courts for further argument and analysis (*Trump v. Vance* 2020).

Like the legal aspects of such subpoenas, the political implications of state requests for the information of the president and executive branch have remained largely unexplored. State attorneys general often pursue these actions for political reasons (Hessick and Marshall 2018). While inquiry at the state level may exacerbate partisan tensions between the branches at the federal level, they also serve as an alternative mechanism for making information public and represent unique strategies of sidestepping objections to the legislative purpose or executive assertions of privilege (see Epstein 2020; Mastrogiacomo 2010).

Second, as suggested in the previous sections, Freedom of Information Act litigation has important implications for the availability of executive information. In fiscal years 2010 through 2019, federal agencies claimed privilege and denied disclosure of information under FOIA more than 525,000 times (Government Accountability Office 2021). Despite the fact that Congress explicitly provided in the statute that FOIA exemptions do not constitute authority to withhold information from Congress,<sup>18</sup> the executive has used FOIA litigation to develop its theories of executive privilege. Put another way, executive legal strategy regarding information released to the public has shaped executive legal strategy on legislative requests. This is particularly striking given recent findings that courts are likely to defer to executive claims of privilege in FOIA litigation (Johnson 2019). The combination of this development with the limited enforcement power for individual Congress members' inquiries means that FOIA policy has underappreciated consequences for executive transparency and accountability.

## Conclusion

Negotiations over executive information have existed since the enactment of the Constitution. Indeed, in response to President Washington's early assertions that it may be prudent to prevent disclosure of some executive papers, Benjamin Franklin noted in 1793 that he "was struck dumb with astonishment at the sentiments ... [t]hat the executive alone shall have the right of judging what shall be kept secret, and what shall be made public, and that the representatives of a free people, are incompetent to determine on the interests of those who delegated them" (Kitrosser 2007, 491).

One of the fundamental principles of the American constitutional system is that each branch of government has the necessary constitutional means and motives to resist

17. In this case, the Solicitor General argued in the alternative that, given the unique position of the president in our constitutional system, such subpoenas must satisfy a heightened standard of need. The Court also rejected this argument (*Trump v. Vance* 2020).

18. 5 U.S.C. § 552(d) (2020). In addition, precedent suggests that the release of information to Congress does not constitute "public disclosure" (*Asbland Oil, Inc. v. Federal Trade Commission* 1976; *Exxon Corp. v. Federal Trade Commission* 1978).

the encroachment of the other branches. Yet the ability of Congress and the courts to effectively oversee the executive requires that the two branches be able to obtain information on executive action and to respond to that information in ways that hold the executive accountable.

As discussed, the Trump administration pushed the boundaries of the law in order to block information and skirt accountability. However, the administration built upon long-standing legal ambiguities regarding information disclosure. These ambiguities shape informal negotiations between Congress and the executive branch and leave open questions regarding how future presidential administrations will interpret the legal restrictions on legislative inquiry or the protections associated with executive privilege.

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