

## Thwarting the Separation of Powers in Interbranch Information Disputes

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**ABSTRACT.** The Justice Department's Office of Legal Counsel (OLC) has often played a crucial role in preserving the constitutional separation of powers. In information disputes with Congress, the executive branch has long relied on OLC's advice on how to protect executive branch prerogatives while accommodating Congress's coequal interests. But under the Trump Administration, OLC has hardened its position on separation-of-powers issues. And with cooperation from congressional Republicans, the Administration has affirmatively used OLC's advice as a tool to deny Congress the information it needs to fulfill its constitutional functions. This perfect storm of OLC's increasingly extreme approach to separation-of-powers doctrine, the Trump Administration's use of OLC opinions to resist congressional requests for information, and congressional acquiescence threatens the separation of powers by exalting the executive branch at the expense of Congress.

### INTRODUCTION

Recent high-profile clashes between the Trump Administration and Congress over congressional requests for executive branch information have received significant attention.<sup>1</sup> As a general matter, however, disputes between the political branches over control of and access to executive branch information are

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1. See, e.g., *Where Trump and Congress Tussle over Information Requests*, ASSOCIATED PRESS (Sept. 27, 2019), <https://apnews.com/13a70237dcco42d2bace3615be360152> [<https://perma.cc/7GQY-N78M>]; Richard Wolf, 'Obstruction of Congress: Trump's Stonewalling Becomes Basis for Impeachment', USA TODAY (Dec. 11, 2019, 11:29 AM ET), <https://www.usatoday.com/story/news/politics/2019/12/10/impeachment-obstructing-congress-hard-trump-rebut/4385667002> [<https://perma.cc/ME75-88HS>].

nothing new. Exemplifying what the Federalist Papers described as “[a]mbition . . . counteract[ing] ambition,”<sup>2</sup> they are a feature of the constitutional checks and balances with a long historical pedigree.<sup>3</sup> These disagreements present, at bottom, a quintessential separation-of-powers question, pitting the Executive’s interest in confidentiality and control of its internal information against Congress’s need for the requested materials to inform legislation, conduct oversight, and provide advice and consent on presidential nominations, among other constitutional duties.

The Justice Department’s Office of Legal Counsel (OLC) has long played a quiet yet critical role in shaping the Executive’s position when conflicts over congressional access to executive branch information arise. OLC is the Justice Department component charged with providing legal advice to the President and executive branch agencies. As such, OLC frequently advises on separation-of-powers issues, including on when the President may withhold information from Congress to protect executive branch prerogatives and when, as is usually the case, Congress’s request should be satisfied through interbranch negotiations. In doing so, the Office plays a special role in preserving the separation of powers by defending executive branch prerogatives when appropriate while recognizing and respecting the interests of the coequal branches. As an OLC Attorney-Adviser from 2013 to 2017, and then as a counsel to the Ranking Member of the Senate Judiciary Committee from 2017 to mid-2019, I witnessed disputes over executive branch information from both sides and across two administrations.

By the time I joined the staff of the Senate Judiciary Committee, it became increasingly clear that at least one aspect of these power struggles *was* new. In 2017, OLC began to harden its position on separation-of-powers questions, including interbranch information disputes. At the same time, the Trump Administration increasingly sought to use that position as a tool to exalt the executive branch at the expense of Congress – often with the cooperation of members of Congress from the President’s party. This perfect storm of OLC’s increasingly aggressive approach to separation of powers, the Trump Administration’s use of OLC opinions to stonewall congressional requests for information, and congressional Republican acquiescence has had significant practical ramifications. In particular, it has threatened to upend the Constitution’s careful balance between the branches by all but thwarting Congress’s performance of its constitutional functions in some instances.

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2. THE FEDERALIST NO. 51, at 120 (James Madison or Alexander Hamilton).

3. See, e.g., History of Refusals by Exec. Branch Officials to Provide Info. Demanded by Cong., 6 Op. O.L.C. 782 (1983); LOUIS FISHER, CONG. RESEARCH SERV., RL30966, CONGRESSIONAL ACCESS TO EXECUTIVE BRANCH INFORMATION: LEGISLATIVE TOOLS, at CRS-2 to CRS-4 (2001).

Part I of this Essay explains the traditional method of resolving interbranch information disputes through the accommodation process, which reflects a proper conception of the separation of powers by taking into account and attempting to satisfy the competing interests of both the executive branch and Congress. Part II discusses how the Trump Administration has used OLC's advice to circumvent the accommodation process and withhold information from Congress, often with the acquiescence of Republican members. It then explains how this approach harms the separation of powers in a concrete way by frustrating Congress's ability to perform its constitutionally assigned functions, using examples from my work on the Senate Judiciary Committee's investigation into Russian interference in the 2016 election and on the nomination of Brett Kavanaugh to be an Associate Justice of the Supreme Court.

### I. THE ACCOMMODATION PROCESS

OLC interprets Article II of the Constitution to grant the President authority to control the use and dissemination of executive branch information. This power, although not explicitly mentioned in the Constitution, "is a necessary corollary of the executive function vested in the President by Article II," including the Vesting and Take Care Clauses.<sup>4</sup> Under well-established OLC precedent, "the executive branch's authority to control the disclosure of information when necessary to preserve the Executive's ability to perform its constitutional responsibilities" extends both to classified and national security information, as well as to "all deliberative process or other information protected by executive privilege."<sup>5</sup> OLC therefore historically has objected to legislative provisions that mandate the disclosure of executive branch information without expressly recognizing the President's discretion to withhold that information on a case-by-case basis when necessary to protect executive branch interests.<sup>6</sup> It also has developed over time a robust body of doctrine to facilitate the withholding of executive

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4. Cong. Requests for Confidential Exec. Branch Info., 13 Op. O.L.C. 153, 154 & n.1 (1989) (citing U.S. CONST. art. II, § 1, cl. 1; *id.* art. II, § 3).

5. Constitutionality of Direct Reporting Requirement in Section 802(e)(1) of the Implementing Recommendations of the 9/11 Comm'n Act of 2007, 32 Op. O.L.C. 27, 44 (2008) (internal quotation marks omitted).

6. See, e.g., Whistleblower Protections for Classified Disclosures, 22 Op. O.L.C. 92 (1998) (statement of Randolph D. Moss, Deputy Assistant Att'y Gen., Office of Legal Counsel, before the H. Permanent Select Comm. on Intelligence).

branch information from Congress even in situations that stop short of a formal invocation of executive privilege.<sup>7</sup>

At the same time, for decades, OLC, and the executive branch more generally, understood that Congress, as a coequal branch of government, has a legitimate interest in carrying out its constitutionally assigned functions.<sup>8</sup> To perform many of those core functions, including legislating, conducting oversight, and providing advice and consent on presidential nominations, Congress requires information. As the Supreme Court has recognized, “[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;”<sup>9</sup> therefore, “[t]he power of the Congress to conduct investigations is inherent in the legislative process.”<sup>10</sup> Because, among other things, this broad oversight power “comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste,”<sup>11</sup> Congress at times requires information that is in the sole possession of the executive branch.

Any congressional claim of entitlement to information the Executive claims is privileged therefore poses a classic separation-of-powers issue, setting up a clash of competing prerogatives. Because “the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties,”<sup>12</sup> ordinary separation-of-powers principles apply in when interbranch information disputes arise. At the core of modern separation-of-powers doctrine is a weighing of the branches’ conflicting interests, which the Supreme Court has articulated as a two-part balancing test. The first part “focuses on the extent to which [the congressional request] prevents the Executive Branch from accomplishing its constitutionally assigned functions.”<sup>13</sup> Then, if “the potential for disruption is present,” the question becomes “whether that impact is justified by an

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7. Jonathan David Shaub, *The Executive’s Privilege*, 70 DUKE L.J. 1, 28 (2020) (explaining that OLC’s doctrine has evolved to rely on “an undifferentiated interest in confidentiality across the ‘components’ of executive privilege to provide the executive branch the authority to delay responses and refuse requests for information without ever having to” invoke executive privilege formally).
  8. *E.g.*, Whistleblower Protections for Classified Disclosures, 22 Op. O.L.C. at 99 (“[W]e take as a given that Congress has important oversight responsibilities and a corollary interest in receiving information that enables it to carry out those responsibilities.”).
  9. *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927).
  10. *Watkins v. United States*, 354 U.S. 178, 187 (1957).
  11. *Id.*
  12. *Clinton v. Jones*, 520 U.S. 681, 701 (1997) (internal quotation marks omitted) (quoting *Loving v. United States*, 517 U.S. 748, 757 (1996)).
  13. *Nixon v. Admin’r of Gen. Servs.*, 433 U.S. 425, 443 (1977) (citing *United States v. Nixon*, 418 U.S. 683, 711-12 (1974)).

overriding need to promote objectives within the constitutional authority of Congress.”<sup>14</sup>

In light of these principles, OLC’s usual view regarding congressional requests for information—including when I was in the Office—encompasses the notion that “there exists ‘an implicit constitutional mandate to seek optimal accommodation [between the branches] through a realistic evaluation of the needs of the conflicting branches in the particular fact situation.’”<sup>15</sup> This “accommodation process” generally entails a back-and-forth negotiation between the two branches and good-faith efforts on both sides “to accommodate the legitimate needs of the other.”<sup>16</sup> Such negotiations might end in each side making concessions to the other; for example, the executive branch might agree to turn over information implicating confidentiality interests in exchange for Congress’s agreement to narrow the scope or type of information requested. As OLC has explained, “the validity of a claim of privilege for documents demanded by Congress in the performance of its legitimate legislating functions, including the ‘oversight’ function, can only be determined by balancing the particular interests of the Legislative and Executive Branches against each other in each case, in light of the possibility of accommodation.”<sup>17</sup>

Accordingly, when Congress requests information, the longstanding executive branch policy across administrations has been “to comply with Congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch.”<sup>18</sup> While acknowledging that the executive branch “has an obligation to protect the confidentiality of some communications,” a 1982 memorandum from President Reagan spelling out this policy makes clear that “executive privilege will be asserted only in the most compelling circumstances” and, in light of Congress’s countervailing interests, only when absolutely necessary to protect against encroachment on executive authority.<sup>19</sup> As President Reagan explained, “[h]istorically, good faith negotiations between Congress and the Executive Branch have

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14. *Id.*

15. Whistleblower Protections for Classified Disclosures, 22 Op. O.L.C. 92, 101 (1998) (alteration in original) (emphasis omitted) (quoting *United States v. Am. Tel. & Tel. Co.*, 567 F.2d 121, 127 (D.C. Cir. 1977)).

16. Cong. Requests for Confidential Exec. Branch Info., 13 Op. O.L.C. 153, 157-58 (1989).

17. Confidentiality of the Att’y Gen.’s Commc’ns in Counseling the President, 6 Op. O.L.C. 481, 488 (1982).

18. Memorandum from Ronald Reagan, President, United States, to the Heads of Exec. Dep’ts & Agencies 1 (Nov. 4, 1982), <https://www.documentcloud.org/documents/3864882-1982-Reagan-Memo-re-procedures-governing.html> [<https://perma.cc/RQ6U-8Q5L>].

19. *Id.*

minimized the need for invoking executive privilege, and this tradition of accommodation should continue as the primary means of resolving conflicts between the Branches.”<sup>20</sup> Subsequent guidance from the Clinton Administration echoes the Reagan memorandum, underscoring the principle that “[e]xecutive privilege must always be weighed against other competing governmental interests, including . . . the congressional need to make factual findings for legislative and oversight purposes.”<sup>21</sup> For that reason, among others, the Clinton memorandum goes on to state that “[i]n circumstances involving communications relating to investigations of personal wrongdoing by government officials, it is our practice not to assert executive privilege.”<sup>22</sup>

To be sure, on occasion, the accommodation process will result in a stalemate, leading to the formal invocation of executive privilege or even a lawsuit.<sup>23</sup> But by and large, including when I served in OLC, accommodation has been the primary method of satisfying the hundreds of oversight requests the executive branch receives from Congress each year—and the president has invoked executive privilege only as a last resort, upon a good-faith belief that the executive branch’s interest in confidentiality outweighs Congress’s need for the information.<sup>24</sup>

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20. *Id.*

21. Memorandum from Lloyd N. Cutler, Special Counsel to the President, to All Exec. Dep’t and Agency Gen. Counsels, (Sept. 28, 1994), *reprinted in* CONG. RESEARCH SERV., RL30240, CONGRESSIONAL OVERSIGHT MANUAL 97 (Jan. 16, 2020).

22. *Id.*

23. One relatively recent example of such an impasse is President Obama’s assertion of executive privilege in response to a congressional subpoena for documents related to the Fast and Furious investigation. In that case, President Obama asserted executive privilege after the accommodation process failed to yield an adequate compromise. *See* Comm. on Oversight & Gov’t Reform v. Holder, 979 F. Supp. 2d 1, 6 (D.D.C. 2013). The Obama Administration eventually produced the requested documents, but only after a federal district court largely rejected the executive privilege assertion on the ground that Congress’s need for the documents outweighed the Executive’s interest in confidentiality. *See* Comm. on Oversight & Gov’t Reform v. Lynch, 156 F. Supp. 3d 101, 112-15 (D.D.C. 2016); *see also* Josh Gerstein, *Obama Relents in Fight over Fast and Furious Documents*, POLITICO (Apr. 8, 2016, 4:59 PM EDT), <https://www.politico.com/story/2016/04/obama-relents-in-fight-over-fast-and-furious-documents-221741> [<https://perma.cc/4HSH-7K2L>] (“[A] federal district court judge rejected Obama’s executive privilege claim over records detailing the Justice Department and White House’s response to Operation Fast and Furious.”).

24. Gerstein, *supra* note 23 (“The June 2012 claim in the Fast and Furious case was the only formal assertion of executive privilege by Obama to try to defeat a congressional demand for records or testimony, though the administration has raised executive privilege concerns when declining to comply with other congressional inquiries. Most of those were resolved through negotiations.”).

## II. THE TRUMP ADMINISTRATION AND THE AFFIRMATIVE USE OF OLC OPINIONS TO CIRCUMVENT THE ACCOMMODATION PROCESS

In 2017, this well-established approach began to change. Without question, OLC had long taken expansive positions on the President's control of executive branch information even before the Trump Administration.<sup>25</sup> But, for the most part, OLC had not suggested that such theories were a *substitute* for the constitutional obligation to engage in good-faith accommodation, nor had past administrations wielded OLC's opinions in service of such a purpose. But the Trump Administration ushered in a hardening of OLC's position on separation-of-powers questions, evincing a diminished concern for the constitutional prerogatives of the coequal branches. And the Administration, often facilitated by congressional Republicans, increasingly sought to use OLC's position as a cudgel when it came to congressional requests for information in particular. Taking OLC's views to an extreme, the Administration began forgoing the traditional accommodation process for a policy that approached outright refusal.

As a counsel to the Ranking Member of the Senate Judiciary Committee during this time, I saw firsthand that this shift was not merely an abstract disagreement over constitutional doctrine. Rather, it thwarted longstanding separation-of-powers principles in a concrete way by frustrating Congress's ability to carry out its core constitutional functions. For example, the Executive's newly hardline position, with acquiescence from the Committee majority, prevented the Senate Judiciary Committee from conducting thorough and complete oversight, including into Russian interference in the 2016 election. And the Administration's refusal to release thousands of pages of relevant White House documents, with the cooperation of Senate Republicans, substantially hindered the Senate in fulfilling its advice-and-consent function with respect to Brett Kavanaugh's Supreme Court nomination.

### *A. In 2017, OLC Began to Harden Its Position on Separation of Powers and the Scope of the Executive's Obligation to Engage in the Accommodation Process*

The Administration's increased willingness to use OLC opinions as an affirmative weapon to block congressional information requests became manifest in May 2017, when OLC issued an opinion concluding that executive branch agencies are not legally obligated to provide information in response to requests

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25. See Shaub, *supra* note 7.

from ranking members of congressional committees.<sup>26</sup> Responding to an inquiry from the White House Counsel, OLC explained, “[t]he constitutional authority to conduct oversight – that is, the authority to make official inquiries into and to conduct investigations of executive branch programs and activities – may be exercised only by each house of Congress or, under existing delegations, by committees and subcommittees (or their chairmen).”<sup>27</sup> Because “[i]ndividual members of Congress, including ranking minority members, do not have the authority to conduct oversight in the absence of a specific delegation,” a request from such a member “does not trigger any obligation to accommodate congressional needs and is not legally enforceable through a subpoena or contempt proceedings.”<sup>28</sup>

As OLC’s opinion made clear, in many ways, the core of this advice did not stray far from OLC’s earlier views on the authority of individual members of Congress to compel the production of information.<sup>29</sup> The opinion’s reasoning, however, deviated from an appropriate conception of the separation of powers in several respects. Most fundamentally, as OLC previously recognized, the Supreme Court has made clear that the Constitution does not “contemplate[] total separation of [the] three essential branches of Government.”<sup>30</sup> Rather, “[w]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.”<sup>31</sup> Therefore, as OLC has explained in the past, “the Constitution . . . guards against ‘the accumulation of excessive authority in a single Branch’ not by providing mutually exclusive lists of executive, legislative, and judicial powers, but by imposing on each of the three branches ‘a degree of overlapping responsibility, a duty of interdependence as well as independence.”<sup>32</sup>

OLC’s May 2017 opinion departed from these well-established principles by adopting a hardened view of the separation of powers, largely ignoring the com-

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26. Auth. of Individual Members of Cong. to Conduct Oversight of the Exec. Branch, 41 Op. O.L.C., slip op. at 1 (May 1, 2017), <https://www.justice.gov/olc/file/1085571/download> [<https://perma.cc/LY9Y-SAEJ>].

27. *Id.* at 1.

28. *Id.* at 1, 3.

29. *Id.* at 2-3.

30. The Constitutional Separation of Powers Between the President and Cong., 20 Op. O.L.C. 124, 126 (1996) (quoting *Buckley v. Valeo*, 424 U.S. 1, 121 (1976) (per curiam)).

31. *Id.* at 126-27 (internal quotation marks omitted) (quoting *Mistretta v. United States*, 488 U.S. 361, 381 (1989) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring))).

32. *Id.* at 127 (quoting *Mistretta*, 488 U.S. at 381).



peting constitutional interests of a coequal branch. In determining that individual members of Congress may not conduct oversight at all—and that the executive branch does not have a constitutional obligation to accommodate reasonable requests from them—OLC failed to acknowledge that, as the D.C. Circuit has recognized, all members of Congress “have a constitutionally recognized status entitling them to share in general congressional powers and responsibilities, many of them requiring access to executive information.”<sup>33</sup> Indeed, although oversight investigations are typically run through the committees of jurisdiction, individual members of Congress have a constitutional duty to cast informed votes and hold accountable executive branch agencies, which are funded by congressional appropriations. Moreover, other constitutional functions that require information—including providing advice and consent on presidential nominations—are ultimately carried out through the votes of individual legislators. OLC’s disregard for these interests initially prompted an angry letter from then-Chairman of the Senate Judiciary Committee Chuck Grassley to the White House, emphasizing that “[v]oluntary requests for information from the Executive Branch by members or groups of members without regard to committee chairmanship or membership have occurred and have been accommodated regularly since the beginning of the Republic.”<sup>34</sup>

To be sure, as a practical matter, recognizing an absolute obligation to respond to information requests from all 535 members of Congress would likely be so burdensome as to impair the functioning of the executive branch. But OLC’s overly formalist position disregarded the long history of executive branch oversight conducted by individual members,<sup>35</sup> as well as the detrimental consequences that a wholesale policy of ignoring requests from the minority party in Congress would have for the effective functioning of government. Indeed, oversight conducted by ranking members can be a vital means of checking the executive branch and ensuring transparency. This is particularly so when the congressional majority may be reluctant to conduct rigorous oversight of a president

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33. *Murphy v. Dep’t of the Army*, 613 F.2d 1151, 1157 (D.C. Cir. 1979); *see also* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 803 (1995) (“[E]ach Member of Congress is ‘an officer of the union, deriving his powers and qualifications from the constitution.’” (quoting 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 627, at 462 (Melville M. Bigelow, ed., 5th ed. 1891))).

34. Letter from Charles E. Grassley, Chairman, U.S. Senate Judiciary Comm., to President Donald J. Trump (June 7, 2017), [https://www.judiciary.senate.gov/imo/media/doc/2017-06-07%20CEG%20to%20DJT%20\(oversight%20requests\).pdf](https://www.judiciary.senate.gov/imo/media/doc/2017-06-07%20CEG%20to%20DJT%20(oversight%20requests).pdf) [<https://perma.cc/EBY6-8BPS>].

35. *See* CONG. RESEARCH SERV., *supra* note 21, at 51-52 (noting that “[i]ndividual Members and Members of the minority party may conduct investigatory oversight on their own initiative” and discussing various “tool[s] for minority participation in oversight”).

from the same party.<sup>36</sup> Furthermore, accommodating requests for information from ranking members and individual members of Congress when possible serves important instrumental goals for the executive branch. It helps to maintain a smooth-functioning relationship with members of a coequal branch who, in the future, may become members of the majority. All of these considerations are examples of how, over time, “practice [has] integrate[d] the dispersed powers [of the branches] into a workable government,”<sup>37</sup> yet OLC addressed none of them in its May 2017 opinion.

But perhaps even more alarming than the shortcomings in OLC’s analysis was the fact that the White House requested an opinion on this topic in the first place – as well as the Trump Administration’s subsequent use of the opinion to thwart congressional inquiries (sometimes with the consent of the congressional majority). Often in the separation-of-powers context, a zone of uncertainty surrounding the scope of each branch’s authority and obligations facilitates, rather than hinders, the effective functioning of government. In this case, the accommodation process had been functioning for decades without an express pronouncement from the executive branch on the precise scope of its duty to negotiate with Congress; such uncertainty arguably encouraged both sides to cooperate when disagreements over congressional requests for information arose. OLC’s rigid opinion, however, provided express support for the upending of this longstanding and beneficial tradition of respect between the branches. Indeed, with OLC’s opinion as ammunition, the Trump Administration quickly doubled down on a policy of resisting oversight requests from Democratic members of Congress, who were in the minority in both the House and the Senate at the time. According to media reports, in the spring of 2017, “a White House lawyer[] told agencies not to cooperate with such requests from Democrats, . . . a formalization of a practice that had already taken hold, as Democrats have complained that their oversight letters requesting information from agencies have gone unanswered since January.”<sup>38</sup>

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36. As Justice Jackson recognized in his *Youngstown* concurrence, the modern two-party system has rebalanced the separation of powers as envisioned by the Founders in significant ways: “Party loyalties and interests, sometimes more binding than law, extend [the President’s] effective control into branches of government other than his own and he often may win, as a political leader, what he cannot command under the Constitution.” *Youngstown*, 343 U.S. at 654 (Jackson, J., concurring). See generally Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2329 (2006) (arguing that the Framers’ conception of the separation of powers between branches has been supplanted by division among party lines).

37. *Mistretta*, 488 U.S. at 381 (quoting *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring)).

38. Burgess Everett & Josh Dawsey, *White House Orders Agencies to Ignore Democrats’ Oversight Requests*, POLITICO (June 2, 2017, 5:11 AM EDT), <https://www.politico.com/story/2017/06>

*B. Shortly Thereafter, the Trump Administration Began to Use OLC's Advice to Refuse Congressional Requests for Information, Hindering the Senate's Ability to Carry Out Its Constitutional Functions*

In practice, the Administration's new policy of refusing to respond to congressional requests for information was not limited to requests from minority members; it expanded to include any requests that the Administration deemed potentially harmful. With a pliant majority often unwilling to challenge (and sometimes enabling) the White House, and a minority unable to obtain executive branch information on its own, Congress in many ways ceased being a check on the executive branch. This confluence of events has undermined the constitutional scheme of separation of powers, exalting the executive branch at the expense of Congress and rendering Congress unable meaningfully to perform many of its constitutional functions. Indeed, while I was working for the Ranking Member of the Senate Judiciary Committee, I witnessed how this new practice of more aggressively withholding information from Congress frustrated the members' ability to discharge their constitutional functions in two crucial areas.

*1. The Administration Refused to Cooperate with the Senate Judiciary Committee's Russia Investigation*

First, the Trump Administration's refusal to provide crucial information impaired the Committee's Article I oversight function by substantially hindering the Committee's investigation into Russian interference in the 2016 presidential election.

In early 2017, the Intelligence Community assessed that "Russian President Vladimir Putin ordered an influence campaign in 2016 aimed at the US presidential election," actively working "to help . . . [Donald] Trump's election chances when possible by discrediting Secretary [Hillary] Clinton and publicly contrasting her unfavorably to him."<sup>39</sup> In February 2017, after reports surfaced that National Security Advisor Michael Flynn had lied to the FBI about his communication with the Russian ambassador, the Senate Judiciary Committee began investigating Russian interference in the election, as well as the extent of the Trump campaign's possible coordination with Russia and subsequent attempts

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/02/federal-agencies-oversight-requests-democrats-white-house-239034 [https://perma.cc/TX2A-K34M].

39. OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, ICA 2017-01D, ASSESSING RUSSIAN ACTIVITIES AND INTENTIONS IN RECENT US ELECTIONS, at ii (Jan. 6, 2017), [https://www.dni.gov/files/documents/ICA\\_2017\\_01.pdf](https://www.dni.gov/files/documents/ICA_2017_01.pdf) [https://perma.cc/XN7F-EPA8].

by the President to cover it up.<sup>40</sup> As Ranking Member Dianne Feinstein explained, “[t]he fact that a top Trump campaign adviser had communicated with Russia about U.S. policy and then lied about it raised questions about the extent of possible coordination between the Trump campaign and Russia and implicated matters that fall squarely within this Committee’s jurisdiction.”<sup>41</sup>

In connection with this investigation, the Committee issued dozens of requests for interviews and documents, some bipartisan and some sent by the Ranking Member unilaterally.<sup>42</sup> Many of these requests were sent to White House or executive branch officials.<sup>43</sup> In total, on the topic of Russian interference alone (not including obstruction of justice), the Committee “sent 32 bipartisan letters requesting documents and interviews” and Ranking Member Feinstein “sent an additional 56 letters related to Russian interference, including requests for witness interviews and documents.”<sup>44</sup>

Rather than engage in the traditional accommodation process, the executive branch largely ignored these requests, as did many private individuals affiliated with the President’s campaign or business enterprise, following the Administration’s lead. Although a handful of private individuals agreed to be interviewed, no executive branch officials did, and even the vast majority of bipartisan document requests went unanswered or answered only in part.<sup>45</sup> And “[w]hile some

40. Letter from Charles E. Grassley, Chairman, U.S. Senate Comm. on the Judiciary, and Dianne Feinstein, Ranking Member, Senate Comm. on the Judiciary, to Jeff Sessions, Att’y Gen., and James B. Comey, Dir., Fed. Bureau of Investigation (Feb. 15, 2017), [https://www.feinstein.senate.gov/public/\\_cache/files/e/b/ebe1adec-26f3-4468-a1e4-1157561ead4f/19C669F0054CBB2A01E679C5BAE48019.grassley-feinstein-letter-on-flynn-briefing.pdf](https://www.feinstein.senate.gov/public/_cache/files/e/b/ebe1adec-26f3-4468-a1e4-1157561ead4f/19C669F0054CBB2A01E679C5BAE48019.grassley-feinstein-letter-on-flynn-briefing.pdf) [<https://perma.cc/547S-LVG6>].

41. *Preliminary Findings About Trump Campaign’s Effort to Obtain Incriminating Information on Secretary Clinton from Russia at Trump Tower Meeting*, DEMOCRATIC MEMBERS SENATE JUDICIARY COMM. 14 (May 16, 2018) [hereinafter *Senate Judiciary Committee Minority Report*], [https://www.feinstein.senate.gov/public/\\_cache/files/b/3/b3e29bc4-8afd-4145-85d9-618dcad4a133/Do69EF11DC3784A6Do73Bo97E720572E.2018.05.15-transcript-release-findings-9-am.pdf](https://www.feinstein.senate.gov/public/_cache/files/b/3/b3e29bc4-8afd-4145-85d9-618dcad4a133/Do69EF11DC3784A6Do73Bo97E720572E.2018.05.15-transcript-release-findings-9-am.pdf) [<https://perma.cc/CU2J-WZ6J>]; see also Press Release, Sen. Dianne Feinstein, *Preliminary Findings About Trump Campaign’s Effort to Obtain Incriminating Information on Secretary Clinton from Russia at Trump Tower Meeting* (May 16, 2018), <https://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=C8EACEDF-48F4-4783-B42B-6685F12C94FE> [<https://perma.cc/6R35-HLTE>] (giving background to the Judiciary Democrats’ report).

42. *Senate Judiciary Committee Minority Report*, *supra* note 41, at 17.

43. *Id.*; see also *Senate Judiciary Committee Minority Report* app., [https://www.feinstein.senate.gov/public/\\_cache/files/2/9/29c00671-4f1d-49b4-9a0d-9091945f2fe5/5DD9BC5D687F967BA65646165BC31031.2018.05.16-pending-requests.pdf](https://www.feinstein.senate.gov/public/_cache/files/2/9/29c00671-4f1d-49b4-9a0d-9091945f2fe5/5DD9BC5D687F967BA65646165BC31031.2018.05.16-pending-requests.pdf) [<https://perma.cc/54RZ-APU9>] (listing the recipients of letters that the chairman and ranking member sent during the Committee’s investigation into Russian interference and obstruction of justice).

44. *Senate Judiciary Committee Minority Report*, *supra* note 41, at 17.

45. *Id.*

witnesses . . . responded to the Ranking Member's requests, 26 witnesses . . . refused to cooperate altogether,"<sup>46</sup> some expressly citing her status as Ranking Member (rather than Chairman) as a reason not to provide the requested information.

Instead of defending the Committee's institutional interests in receiving all information necessary to conduct oversight into possible misconduct by the President, the Chairman defended the White House. He refused to issue subpoenas or otherwise insist on answers to most of the outstanding requests described above, and, as time went on, he stopped seeking information related to the Trump campaign's role in Russia's election interference efforts altogether.<sup>47</sup> Instead, over the objections of the Committee minority,<sup>48</sup> the majority's focus shifted to investigating the origins of the FBI's and Special Counsel Mueller's investigations into Russian interference—and specifically, in Chairman Grassley's words, "to finally and fully understanding what happened during the Obama Administration's fabricated investigation into Trump."<sup>49</sup> Whereas the Chairman seemed reluctant to pursue answers to the Committee's initial questions about the extent of the Trump campaign's coordination with Russia and subsequent obstruction, he vigorously pursued answers to the majority's requests for FBI investigative materials, including classified information, which he believed would exonerate the President.<sup>50</sup>

The Administration's refusal to engage in a meaningful negotiation to attempt to accommodate the Senate Judiciary Committee's legitimate interests in investigating whether the President had coordinated with Russia during the 2016 election and then sought to cover it up—combined with the majority's refusal to pressure the Trump Administration to comply with the Committee's requests—ultimately stymied the Committee's investigation into those issues.<sup>51</sup> As

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46. *Id.*

47. *See, e.g., id.* at 17.

48. *See, e.g., Senate Judiciary Committee to Hear Testimony About IG Report*, NPR MORNING EDITION (June 18, 2018, 7:52 AM EDT), <https://www.npr.org/2018/06/18/620968268/senate-judiciary-committee-to-hear-testimony-about-ig-report> [<https://perma.cc/SY8L-MWEC>] (quoting Senator Richard Blumenthal, who commented that Senate Republicans "are seeking to distort and discredit the special counsel investigation by in effect weaponizing [the Justice Department Inspector General's June 2018] report unfairly and inaccurately").

49. 165 CONG. REC. S6,941-43 (daily ed. Dec. 10, 2019) (statement of Sen. Grassley).

50. *See id.*

51. To be sure, during this same time frame, the Senate Select Committee on Intelligence conducted its own investigation into Russian interference in the 2016 election. This investigation resulted in a multivolume report summarizing its conclusions, which were backed by a substantial number of witness interviews and documents. *See S. SELECT COMM. ON INTELLIGENCE, 116TH CONG., REP. ON RUSSIAN ACTIVE MEASURES CAMPAIGNS AND INTERFERENCE IN*

Ranking Member Feinstein reported in May 2018, “[a] number of key questions” related to Russian interference in the 2016 election and subsequent efforts by the Trump Administration to obstruct justice “remain unanswered,” and the Committee’s investigation “remains inadequate and incomplete.”<sup>52</sup>

2. *The White House Withheld from the Senate Key Information About Brett Kavanaugh’s Supreme Court Nomination*

Second, the Administration’s reliance on OLC advice to withhold key documents relating to Brett Kavanaugh’s past service in the White House, abetted by the Senate majority, hindered Senators’ ability to provide fully informed advice and consent on Kavanaugh’s Supreme Court nomination as required under Article II, Section 2 of the Constitution.

Well before Dr. Christine Blasey Ford’s allegations of sexual assault against Kavanaugh became public,<sup>53</sup> the Senate Judiciary Committee was embroiled in a dispute with the Trump Administration over a different type of information. To fulfill their advice-and-consent function, Committee Democrats sought a complete picture of Kavanaugh’s past public service, including relevant docu-

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THE 2016 U.S. ELECTION (2020), <https://www.intelligence.senate.gov/publications/report-select-committee-intelligence-united-states-senate-russian-active-measures> [<https://perma.cc/U2ZK-W7DH>]. The Intelligence Committee’s investigation differed in several respects from the Senate Judiciary Committee’s investigation, however. As an initial matter, the Intelligence Committee’s investigation was bipartisan, with requests for information consistently backed by both the Chairman and Vice Chairman. See Nicholas Fandos & Julian E. Barnes, *Republican-Led Review Backs Intelligence Findings on Russian Interference*, N.Y. TIMES (Apr. 21, 2020), <https://www.nytimes.com/2020/04/21/us/politics/russian-interference-senate-intelligence-report.html> [<https://perma.cc/NTN6-J8ED>]. Moreover, the investigation’s public focus was on “a bipartisan inquiry of the intelligence reporting behind the Intelligence Community assessments from January 6, 2017” regarding Russia’s efforts to interfere in the election, as opposed to wrongdoing by the Trump campaign or the President. Press Release, Richard Burr, Chairman, Senate Select Comm. on Intelligence, and Mark Warner, Vice Chairman, Senate Select Comm. on Intelligence, Joint Statement on Committee Inquiry into Russian Intelligence Activities (Jan. 13, 2017), <https://www.intelligence.senate.gov/press/joint-statement-committee-inquiry-russian-intelligence-activities> [<https://perma.cc/24PS-F3BP>].

52. *Senate Judiciary Committee Minority Report*, *supra* note 41, at 14, 19. The Senate Judiciary Committee Minority Report details the ways in which the Russia investigation remains unfinished and how key witnesses refused to cooperate. See *id.* at 14-22.

53. See Maeve Reston, *‘I Will Never Forget:’ Christine Blasey Ford Recounts Her Trauma in Raw Testimony*, CNN (Sept. 27, 2018, 7:06 PM EDT), <https://www.cnn.com/2018/09/27/politics/christine-blasey-ford-raw-testimony/index.html> [<https://perma.cc/MN6Z-AZMJ>].

ments from his time in the White House Counsel's Office and as Staff Secretary.<sup>54</sup> Among other things, some Senators had reason to believe that Kavanaugh's White House documents would shed light on the accuracy of portions of Kavanaugh's previous sworn testimony in his judicial confirmation hearings before the Committee in 2004 and 2006.<sup>55</sup> Moreover, as Staff Secretary, Kavanaugh exerted tremendous influence over the daily operations of the White House: He directly controlled the flow of documents and information to the President, responsibilities that Kavanaugh himself described as "the most interesting and, in many ways, among the most instructive" to his work as a judge.<sup>56</sup>

Because these documents were presidential records, the procedures prescribed in the Presidential Records Act of 1978 governed requests for, and disclosure of, the material, which was held by the National Archives and Records Administration (NARA), an executive branch agency.<sup>57</sup> The Presidential Records Act normally provides that congressional requests be made to, and processed by, nonpartisan career archivists at NARA, who determine which documents may be released and by statute must work with the President to resolve any potential claims of executive privilege.<sup>58</sup> Chairman Grassley initially requested from NARA a subset of Kavanaugh's White House Counsel documents,

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54. See Letter from Democratic Members of the U.S. Senate Judiciary Committee to Patrick X. Mordente, Dir., George W. Bush Presidential Library and Museum (July 31, 2018), <https://www.archives.gov/files/foia/7-31-18-request-to-bush-library-for-kavanaugh-documents.pdf> [<https://perma.cc/7Z2H-VJ3L>].
55. See Adam Liptak, Sheryl Gay Stolberg, Charlie Savage & Michael D. Shear, *Day 2 of the Kavanaugh Confirmation Hearings: Leahy Brings up Bush-Era Scandal*, N.Y. TIMES (Sept. 5, 2018), <https://www.nytimes.com/2018/09/05/us/politics/brett-kavanaugh-hearing-live-updates.html> [<https://perma.cc/CQ5Z-JGLS>] ("Senator Patrick J. Leahy, Democrat of Vermont, raised two Bush-era scandals with Judge Kavanaugh, and he suggested that Bush White House emails in the Judiciary Committee's possession may contradict testimony the nominee made more than a decade ago—if only they could be released publicly.").
56. Jessica Gresko, *Senators Spar on Access to Kavanaugh's Staff Secretary Work*, ASSOCIATED PRESS (July 27, 2018), <https://apnews.com/4e272e40fe914e19a1d67212bae99056> [<https://perma.cc/6ZKJ-UA3C>].
57. 44 U.S.C. §§ 2201-2209 (2018).
58. See *id.* § 2205(2)(C) (placing restrictions on access to certain presidential records, but providing an exception for disclosure "to either House of Congress, or, to the extent of matter within its jurisdiction, to any committee or subcommittee thereof if such records contain information that is needed for the conduct of its business and that is not otherwise available"); *id.* § 2208 (describing the Archivist's role in assessing claims of constitutionally based privilege from disclosure).

but none of Kavanaugh's Staff Secretary records.<sup>59</sup> However, because Kavanaugh's record was voluminous, the NARA process would take months.<sup>60</sup>

In an effort to accelerate Kavanaugh's confirmation, Judiciary Committee Republicans, collaborating with the White House, did not follow the Presidential Records Act's normal disclosure procedures. Specifically, they relied on a different section of the Act that makes the records of a former President "available to such former President or the former President's designated representative."<sup>61</sup> Invoking that provision, former President George W. Bush's personal lawyer Bill Burck requested a copy of Bush's records from Kavanaugh's time in the White House Counsel's office.<sup>62</sup> Burck, and not NARA, reviewed those documents for responsiveness to Chairman Grassley's request and determined which documents to produce to the Committee and which to withhold.<sup>63</sup> At the majority's direction, he did not request any of Kavanaugh's Staff Secretary documents, which totaled close to one million records.<sup>64</sup>

Objecting to this unprecedented process and the exclusion of the Staff Secretary documents, Committee Democrats filed their own Presidential Records Act request with NARA,<sup>65</sup> which had released documents in response to a similar

59. Letter from Chuck Grassley, Chairman, U.S. Senate Comm. on the Judiciary, to Patrick X. Mordente, Dir., George W. Bush Presidential Library and Museum (July 27, 2018), <https://www.archives.gov/files/foia/07.27.2018-grassley-to-bush-library-re-kavanaugh.pdf> [<https://perma.cc/9CKR-KYCS>].

60. See National Archives News Staff, *National Archives Works to Release Records Related to Judge Kavanaugh*, NAT'L ARCHIVES (Aug. 15, 2018), <https://www.archives.gov/news/articles/archives-staff-release-records-related-to-judge-kavanaugh> [<https://perma.cc/Z48F-ZUQA>].

61. 44 U.S.C. § 2205(3) (2018).

62. See Letter from William A. Burck, Brigham Q. Cannon & Evan A. Young, to Charles Grassley, Chairman, U.S. Senate Comm. on the Judiciary (Aug. 31, 2018), <https://www.judiciary.senate.gov/imo/media/doc/2018-08-31%20Burck%20to%20Grassley%20-%20Accounting%20of%20Kavanaugh%20WHCO%20Records.pdf> [<https://perma.cc/WDJ7-X6SB>].

63. *Id.* As previously mentioned, Chairman Grassley also made an identical request directly to NARA, but did not wait for NARA to produce any documents before holding Kavanaugh's hearing; instead, the only documents provided to the Committee in time for the hearing came from the parallel process run by Burck. See National Archives News Staff, *supra* note 60. The selection of Burck to conduct the parallel review raised additional questions about the impartiality of the process, given that Burck had served as Kavanaugh's deputy in the Staff Secretary's Office during the Bush Administration. See Lisa Mascaro, *GOP Lawyer Caught in Crossfire on Kavanaugh, Russia Probe*, ASSOCIATED PRESS (Sept. 2, 2018), <https://apnews.com/4ede873a4ef64c2395c8a15bbddedd71> [<https://perma.cc/RC54-S74E>].

64. *Opening Statement at the U.S. Supreme Court Nomination Hearing of Judge Brett Kavanaugh*, OFF. U.S. SENATOR PATRICK LEAHY (Sept. 4, 2018) [hereinafter *Leahy Statement*], <https://www.leahy.senate.gov/press/090418kavanaughopeningstatement> [<https://perma.cc/F2UP-WXS2>].

65. Letter from Democratic Members of the Senate Judiciary Committee, *supra* note 54.



bipartisan request for Elena Kagan’s White House records in 2010.<sup>66</sup> This time, however, because the request came only from the Ranking Member, NARA refused to release the records, explaining that the Presidential Records Act allows NARA to release records only upon the request of a “committee or subcommittee” of Congress.<sup>67</sup> Citing OLC advice, NARA stated, “We have always understood that such authority [to act on behalf of a committee] rests only with the chair of the committee (or the committee itself), unless it has been specifically delegated to the ranking minority member.”<sup>68</sup> When asked to reconsider, NARA made clear, “we sought further legal guidance on this issue from the Department of Justice, and DOJ confirmed our legal interpretation.”<sup>69</sup> Accordingly, the executive branch’s legal position, coupled with the Chairman’s refusal to support any portion of the minority’s request, prevented the minority from obtaining any documents directly from NARA through the statutorily prescribed process, leaving the minority totally reliant on the politically charged process run by Burck.<sup>70</sup>

On the eve of Kavanaugh’s hearing, Burck informed the Committee that roughly 102,000 pages of the White House Counsel documents were being withheld on unspecified “constitutional privilege” grounds.<sup>71</sup> President Trump did

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66. Letter from Charles E. Schumer, Senate Minority Leader, to President George W. Bush (July 26, 2018), <https://www.democrats.senate.gov/imo/media/doc/Bush%20Letter.pdf> [<https://perma.cc/BU2X-4M2A>].
67. Letter from David S. Ferriero, Archivist of the United States, to Dianne Feinstein, Ranking Member, U.S. Senate Judiciary Comm. (July 26, 2018), <https://www.archives.gov/files/foia/letter-to-hon.-dianne-feinstein-kavanaugh-records-2018.07.26.pdf> [<https://perma.cc/4285-KH9H>].
68. Letter from David S. Ferriero, Archivist of the United States, to Charles E. Schumer, Senate Minority Leader (Aug. 2, 2018), <https://www.archives.gov/files/foia/aotus-to-minority-leader-schumer-8-2-18.pdf> [<https://perma.cc/9ZLL-NUPZ>].
69. Letter from David S. Ferriero, Archivist of the United States, to Dianne Feinstein, Ranking Member, U.S. Senate Comm. on the Judiciary (Aug. 10, 2018), <https://www.archives.gov/files/foia/letter-to-hon.-dianne-feinstein-kavanaugh-records-8-13-18.pdf> [<https://perma.cc/FY8Z-5CXG>].
70. Explaining that “[w]e need these documents to do our job,” some Committee Democrats resorted to filing a request for Kavanaugh’s records under the Freedom of Information Act, which NARA is still processing to this day. Press Release, Sen. Richard Blumenthal, Blumenthal & Senate Judiciary Committee Democrats File Freedom of Information Act Request to Compel Release of Kavanaugh Documents (Aug. 8, 2018), <https://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-and-senate-judiciary-committee-democrats-file-freedom-of-information-act-request-to-compel-release-of-kavanaugh-documents> [<https://perma.cc/8NQR-BGFU>]; see *National Archives Records Related to Judge Brett M. Kavanaugh*, NAT’L ARCHIVES (July 2, 2020), <https://www.archives.gov/news/topics/kavanaugh-records> [<https://perma.cc/VQ2Z-NWLN>].
71. Letter from William A. Burck, Brigham Q. Cannon & Evan A. Young, *supra* note 62, at 4-5.

not personally invoke executive privilege as the Presidential Records Act requires.<sup>72</sup> Nonetheless, Burck explained,

the Department of Justice and the White House have identified certain documents traditionally protected by constitutional privilege that have not been included in our productions to the Committee on that basis. Accordingly, the White House, after consultation with the Department of Justice, has directed that we not provide these documents.<sup>73</sup>

Not only did this determination break with the Presidential Records Act, but also it departed from a long tradition of presidents accommodating Senate requests for documents necessary to discharge the constitutional advice-and-consent function: Never before had such documents been withheld on privilege grounds. Indeed, during the Senate's consideration of John Roberts's 2005 nomination to be Chief Justice, the George W. Bush Administration made clear that, "[a]lthough Constitutionally-based privilege may be asserted to protect records reflecting deliberative processes, we have determined that as a general matter records will not be withheld on that basis."<sup>74</sup> In 2010, President Obama similarly determined that he would not assert executive privilege over Kagan's materials.<sup>75</sup> And when President Reagan indicated he would withhold White House documents necessary to the Senate's consideration of William Rehnquist's nomination to be Chief Justice in 1986, Committee Republicans joined with Democrats to threaten to subpoena the records; President Reagan relented and allowed the Committee to review the documents in camera.<sup>76</sup>

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72. See 44 U.S.C. § 2208 (2018); Exec. Order No. 13489, 74 Fed. Reg. 4667 (Jan. 26, 2009); Chris Geidner, *Republicans Are Fighting to Keep Brett Kavanaugh's Documents from Holding up His Supreme Court Nomination*, BUZZFEED NEWS (Sept. 2, 2018, 11:39 PM ET), <https://www.buzzfeednews.com/article/chrisgeidner/brett-kavanaugh-document-fight-executive-privilege> [<https://perma.cc/F7J7-THML>] (“[T]he Trump administration told Bush’s lawyers that they would assert executive privilege over those documents if legally necessary to do so to block disclosure. Because of the process being used to provide the documents to the committee, however, that was not needed. Instead, Bush’s lawyers just held back those documents from senators.”).

73. Letter from William A. Burck, Brigham Q. Cannon & Evan A. Young, *supra* note 62, at 4.

74. Letter from Harriet Miers, Counsel to the President, to Patrick Leahy, Chairman, U.S. Senate Comm. on the Judiciary (Aug. 11, 2005), <https://www.documentcloud.org/documents/4815092-081105-White-House-Letter-to-Leahy.html> [<https://perma.cc/AN9R-4VBG>].

75. Letter from David S. Ferriero, Archivist of the United States, to Patrick J. Leahy, Chairman, U.S. Senate Comm. on the Judiciary, and Jeff Sessions, Ranking Member, Senate Comm. on the Judiciary (May 21, 2010), <https://www.documentcloud.org/documents/4815091-052110-Archives-Letter-to-Leahy-and-Sessions.html> [<https://perma.cc/7FWM-XLFW>].

76. See Mark J. Rozell, *Executive Privilege in the Reagan Administration: Diluting a Constitutional Doctrine*, 27 PRESIDENTIAL STUD. Q. 760, 768-69 (Fall 1997).

No similar executive branch accommodation occurred here; nor did the Committee majority partner with the minority to protect the Senate's institutional interests in obtaining information necessary to provide fully informed advice and consent on a Supreme Court nomination. Consequently, the Senate ended up considering Kavanaugh's nomination – and confirming him on a 50-48 vote – based on less than seven percent<sup>77</sup> of his White House record.

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The above examples from my time working for the Senate Judiciary Committee are just two of the many instances in which the Trump Administration has affirmatively used OLC's advice to circumvent the accommodation process and frustrate Congress's ability to obtain information members need to carry out their constitutional functions. This phenomenon only accelerated and expanded after I left the Senate in mid-2019, with the Trump White House relying on OLC opinions to justify denying requests even from the House *majority* for information crucial to impeachment and other investigations into executive branch misconduct.<sup>78</sup> If not corrected, this overly aggressive approach will continue to have significant detrimental consequences for separation-of-powers principles as well as for the effective functioning of the government as a whole.

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77. *Leahy Statement*, *supra* note 64.

78. See, e.g., House Comms.' Auth. to Investigate for Impeachment, 44 Op. O.L.C. (Jan. 19, 2020), <https://www.justice.gov/olc/file/1236346/download> [<https://perma.cc/5DRP-B9KF>]; Exclusion of Agency Counsel from Cong. Depositions in the Impeachment Context, 43 Op. O.L.C. (Nov. 1, 2019), <https://www.justice.gov/olc/file/1214996/download> [<https://perma.cc/6GRP-M6XG>]; "Urgent Concern" Determination by the Inspector Gen. of the Intelligence Cmty., 43 Op. O.L.C. (Sept. 3, 2019), <https://www.justice.gov/olc/opinion/file/1205711/download> [<https://perma.cc/VJE4-6KM9>]; Testimonial Immunity Before Cong. of the Assistant to the President and Senior Counselor to the President, 43 Op. O.L.C. (July 12, 2019), <https://www.justice.gov/olc/file/1183271/download> [<https://perma.cc/9AEF-H5N8>]; Cong. Comm.'s Request for the President's Tax Returns Under 26 U.S.C. § 6103(f), 43 Op. O.L.C. (June 13, 2019), <https://www.justice.gov/olc/file/1173756/download> [<https://perma.cc/5ZNN-JK5K>]; Attempted Exclusion of Agency Counsel from Cong. Depositions of Agency Emps., 43 Op. O.L.C. (May 23, 2019), <https://www.justice.gov/olc/file/1215056/download> [<https://perma.cc/Ry3V-FFSj>]; Testimonial Immunity Before Cong. of the Former Counsel to the President, 43 Op. O.L.C. (May 20, 2019), <https://www.justice.gov/olc/opinion/file/1215066/download> [<https://perma.cc/X3RU-SD93>].

## CONCLUSION

At its best, OLC serves as the “constitutional conscience” of the executive branch,<sup>79</sup> playing a vital role in preserving the rule of law and facilitating the President’s duty to take care that the laws be faithfully executed. Indeed, OLC has long performed a singularly important function in maintaining the separation of powers by appropriately safeguarding executive branch interests from encroachment when necessary. But when OLC’s advice does not adequately take into account the competing prerogatives of a coequal branch, and the executive branch uses OLC’s positions as a cudgel to impede Congress’s functions, such conduct diminishes OLC’s legitimacy and undermines the constitutional design.

Going forward, OLC would be well advised to recommit to best practices that reaffirm “its core tradition of providing independent legal advice that offers its attorneys’ best view of the law to the president and executive branch actors.”<sup>80</sup> To be clear, OLC is staffed by many career professionals of the highest integrity who already value and adhere to such principles across administrations. But a recommitment to these ideals by OLC’s politically appointed leadership would send a clear message to the rest of the executive branch, as well as to the public, that OLC’s advice is not to be used as a tool for political gain. Relatedly, the Office may wish to take a hard look at its own body of separation-of-powers advice to ensure that it reflects an appropriate conception of the doctrine that takes into account Congress’s legitimate interests, rather than advancing what the Supreme Court has deemed an “archaic view of the separation of powers as requiring three airtight departments of government.”<sup>81</sup> As a group of OLC alumni and other legal experts recently made clear, such a recommitment to “a less combative, more

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79. Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 685 (2005).

80. *Statement: The Office of Legal Counsel and the Rule of Law*, AM. CONST. SOC’Y, at 8 (Oct. 2020), <https://www.acslaw.org/wp-content/uploads/2020/10/OLC-ROL-Doc-103020.pdf> [<https://perma.cc/628M-WS3R>]; see also Annie L. Owens, *Reforming the Office of Legal Counsel: Living up to Its Best Practices*, AM. CONST. SOC’Y, at 14 (Oct. 2020), <https://www.acslaw.org/wp-content/uploads/2020/12/Owens-Reforming-OLC-Final.pdf> [<https://perma.cc/QJ5T-HA2P>].

81. *Nixon v. Admin’r of Gen. Servs.*, 433 U.S. 425, 443 (1977) (quoting *Nixon v. Admin’r of Gen. Servs.*, 408 F. Supp. 321, 346 (D.D.C. 1976)); see *Statement: The Office of Legal Counsel and the Rule of Law*, *supra* note 80, at 6-7. There is reason to believe OLC has applied this rigid approach to separation-of-powers questions in contexts beyond information disputes with Congress. In 1996, OLC issued a memorandum containing the Office’s definitive views on separation-of-powers principles. See *The Constitutional Separation of Powers Between the President and Cong.*, 20 Op. O.L.C. 124, 126 (1996). Superseding an earlier memorandum by then-Assistant Attorney General William Barr, this memorandum expressly recognized that the Constitution does not “contemplate[] total separation of [the] three essential branches of

functional and consistent separation of powers demands that OLC take a step back from ongoing disputes or tensions between the branches to take stock of the many dimensions of the separation of powers as they have developed over the last quarter century.”<sup>82</sup>

For its part, Congress should stop acquiescing when the executive branch attempts to withhold information that Congress needs to perform its constitutionally assigned functions. Members of Congress from both parties would benefit from more actively protecting congressional prerogatives against executive branch encroachment, in line with the Founders’ conception that “each department should have a will of its own.”<sup>83</sup> Each House of Congress could, for example, consider amendments to its rules that would authorize certain minority members, in narrow circumstances, to make official requests for information with a limited power of process. Similarly, Congress might consider amendments to the Presidential Records Act granting express authorization for ranking members to request presidential records from NARA in specified circumstances, such as when necessary to provide advice and consent on a presidential nominee.

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Government” and instead envisions a balancing of interests among the branches. *Id.* at 126-27 (internal quotation marks omitted) (quoting *Buckley v. Valeo*, 424 U.S. 1, 12 (1976) (per curiam)). During the Trump Administration, however, OLC appears to have resumed citing the superseded Barr memorandum, which advances a far more rigid view of separation-of-powers doctrine under which many of Congress’s efforts to perform its constitutional functions impermissibly encroach on executive branch prerogatives. *See* Common Legislative Encroachments on Exec. Branch Auth., 13 Op. O.L.C. 248 (1989). This citation of the superseded Barr memorandum – in Justice Department letters addressed to Congress – is a troubling sign that the Trump Administration’s OLC has once again adopted the archaic view of the separation of powers that the Supreme Court warned against. *See, e.g.*, Letter from Prim F. Escalona, Principal Deputy Assistant Att’y Gen., Dep’t of Justice Office of Legislative Affairs, to Marco Rubio, Chairman, U.S. Senate Comm. on Small Bus. & Enter., at 2 (July 24, 2019), <https://www.justice.gov/ola/page/file/1186836/download> [<https://perma.cc/SWT9-WBHA>]; Letter from Prim F. Escalona, Principal Deputy Assistant Att’y Gen., Dep’t of Justice Office of Legislative Affairs, to Trey Gowdy, Chairman, U.S. House Comm. on Oversight & Gov’t Reform, at 6, 8 (Nov. 13, 2018), <https://www.justice.gov/ola/page/file/1159466/download> [<https://perma.cc/MC3Q-RS87>]; Letter from Prim F. Escalona, Principal Deputy Assistant Att’y Gen., Dep’t of Justice Office of Legislative Affairs, to Bob Corker, Chairman, U.S. Senate Comm. on Foreign Relations, at 1 (Aug. 29, 2018); Letter from Prim F. Escalona, Principal Deputy Assistant Att’y Gen., Dep’t of Justice Office of Legislative Affairs, to Bob Corker, Chairman, U.S. Senate Comm. on Foreign Relations, at 1 (Aug. 17, 2018), <https://www.justice.gov/ola/page/file/1162811/download> [<https://perma.cc/77E4-FRYV>]; Letter from Stephen E. Boyd, Assistant Att’y Gen., Dep’t of Justice Office of Legislative Affairs, to Ed Royce, Chairman, U.S. House Comm. on Foreign Affairs, at 3 (Jan. 9, 2018), <https://www.justice.gov/ola/page/file/1027496/download> [<https://perma.cc/9L8R-FV5X>].

82. *Statement: The Office of Legal Counsel and the Rule of Law*, *supra* note 80, at 7.

83. THE FEDERALIST NO. 51, *supra* note 2, at 120.

The Constitution envisions “separateness but interdependence, autonomy but reciprocity” among the branches.<sup>84</sup> Living up to these principles – which have animated the accommodation process since the beginning of our country – will help restore the balance of powers under the Constitution and result in a more functional, accountable government better suited to meet the needs of its people.

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