CRIMINALIZING LEGISLATIVE IMPAIRMENT

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This Article introduces the concept of legislative impairment. Legislative impairment results when Congress's legislative interests are stifled through a third party's obstruction or interference with the legislative process. In most cases, impairment occurs when the executive branch witnesses refuse testimony requests as part of congressional oversight. Rarer, yet no less prominent, are those cases when, for instance, a third party interferes with Congress's counting of electoral votes or refuses any compliance with congressional investigations, leading to the third party being held in contempt of Congress.

Former President Trump and his advisors Stephen Bannon and Peter Navarro were all alleged to be (or determined to be) criminally liable for obstructing or interfering with the legislative process. Our present jurisprudence supposes that enforcement in these cases by the chief law enforcement agency of the executive branch, the Department of Justice, is de riguer. As a historical matter, however, legislative impairment was not considered a criminal offense despite the recent cases and judgments suggesting otherwise. Complicating the issue is that President Trump, Stephen Bannon, and Peter Navarro were private citizens when they were indicted for legislative impairments where the underlying criminal acts were based upon their time as executive branch officials. This signals an inherent relationship between legislative impairment and congressional oversight of the executive branch. Yet, federal courts view criminal prosecution as appropriate in the context of legislative impairment of congressional functions but not in the context of impairment of the congressional oversight function by government officials.

This Article contends that legislative impairment should primarily be resolved by Congress itself—not the courts. This argument is principally based on the view that congressional inquiries sound in politics, not law. To make this case, this Article shows empirically how the chief legal basis for adjudication of interbranch impairment disputes, known as "the accommodation doctrine," fails to do what it intended: help ripen a political clash into a legal one. Such a finding shows the underenforcement of congressional procedures designed to protect against impairments to the legislative institution. As a result, the courts should place a higher burden on Congress to utilize its

internal enforcement tools before a matter is ripe for prosecution. The Article lays out a framework for courts that limits jurisdiction over legislative impairment cases unless a series of legislative procedures have been exhausted. Given the ever-present constitutional concerns about legislative abdication to the executive branch, this Article presents a jurisprudential approach that can protect the congressional role in resolving its own institutional injuries.

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INTRODUCTION

The Special Counsel's Washington, D.C.-based case against former President Trump is unique for it being the first prosecution of a former President in American history. A less broadcast, yet no less important, reason the Special Counsel case is unique is it develops a criminal theory holding former constitutional officers liable for impairing legislative functions. In the Special Counsel case, former President Trump allegedly interfered with the counting of electoral votes by the House of Representatives, thus impairing a core legislative function. Relatedly, President Trump's second impeachment concerned the January 6, 2021, attack on the U.S. Capitol, leading to the creation of the January 6th Committee. Cases related to the investigations by the January 6 Committee emphasize this theme of the Department of Justice using criminal law to protect the sanctity of the legislative process. The prosecution of former President Trump's advisors, Stephen Bannon[1] and Peter Navarro,[2] was premised on their being held in contempt by Congress for refusing to testify and disclose information regarding communications with the former President. Together with the Special Counsel prosecution of the former President, these cases coalesce under a shared theme: interfering with legislative functioning is a crime. Such a proposition is a novel one in the timeline of American history, but it also has several legal implications. First, the criminalization of legislative impairment suggests that Congress must depend upon the executive branch to remedy injuries to the congressional institution. Second, and related, legislative impairment is a justiciable case appropriate for federal court adjudication. This Article examines the appropriateness and limits of criminalizing legislative impairment and analyzes the constitutional implications of Congress having to rely on the other two branches to protect its institutional interests when impaired.

A rich jurisprudence identifies many civil cases where impairment of the legislative function is nonjusticiable.[3] What makes a criminal case different

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[1] Indictment at 5–9, United States v. Bannon, Crim. No. 21-cr-_ (D.D.C Nov. 12, 2021), https://www.justice.gov/opa/press-release/file/1447811/dl?inline; *accord Stephen K. Bannon Sentenced to Four Months in Prison on Two Counts of Contempt of Congress*, U.S. ATT'Y'S OFFICE, D.C. (Oct. 21, 2022), https://www.justice.gov/usao-dc/pr/stephen-k-bannon-sentenced-four-months-prison-two-counts-contempt-congress [https://perma.cc/SAZ3-HZWP].

[2] Indictment at 5–7, United States v. Navarro, Crim No. 22-cr-_ (D.D.C. June 2, 2022), https://www.justice.gov/usao-dc/press-release/file/1510231/dl; *accord Ex-White House Trade Advisor Peter Navarro Sentenced to Four Months in Prison on Two Counts of Contempt of Congress*, U.S. ATT'Y'S OFFICE, D.C. (Jan. 25, 2024), https://www.justice.gov/usao-dc/pr/ex-white-house-trade-advisor-peter-navarro-sentenced-four-months-prison-two-counts [https://perma.cc/E6X5-TLKW].

[3] Raines v. Byrd, 521 U.S. 811, 818 (1997).

in this regard? Doctrinal and normative issues arise from the proposition that legislative impairment is appropriate for criminal prosecution. As developed in this Article, concepts of exhaustion and ripeness are relevant to legal questions of legislative impairment. The doctrinal rule proposed in this Article states that before a legislative impairment prosecution is ripe against an individual, Congress or the relevant committee must hold that individual in contempt.[4] As I argue, Congress has inherent tools at its disposal that ought to be resolved—exhausted—before intervention by the executive branch and the courts.[5] Normatively, this rule ensures legislative independence as jurisdiction over legislative impairments rests first with Congress, not its coordinate branches.[6]

The puzzle of legislative impairment is further complicated because Congress can (and does) make contempt determinations against individuals and must have some manner to enforce those decisions. Requiring exhaustion via contempt as a doctrinal principle governing pre-legislative contempt prosecutions (i.e., the Special Counsel prosecution of former President Trump) would be insufficient in these cases. This Article contends that the relevant jurisprudence must adhere to the principle that even when legislative contempt occurs (like the prosecutions of Bannon and Navarro), the courts must ensure contempt prosecutions are not politically motivated. Courts are normally thought to be ill-equipped to make such determinations.[7] But, like the case of pre-contempt prosecutions, courts are vigilant about their subject matter jurisdiction and can probe evidence sufficient to show that each respective House exhausted the panoply of its internal enforcement tools before seeking a judicial remedy. For post-contempt impairment cases, the development of standards regarding institutional prerequisites ensures the legislative contempt of individuals does not raise political questions.

Two contentions exist here, both based on Congress's institutional procedures. First, Congress must follow clearly established laws governing the authority of its committees to investigate individuals. Second, Congress must exhaust its internal tools to enforce against impairment of its functions before it relies upon the executive branch to prosecute and the federal courts to convict.

Although the jurisprudence of prosecutions for contempt of Congress is underdeveloped, there is a well-developed jurisprudence involving contempt of government officials which arises in the congressional oversight context.[8] In the oversight context, when government officials impair Congress's ability

[4] *See infra* Part IV.
[5] *See infra* Section III.C.
[6] See *infra* Section IV.B.
[7] Baker v. Carr, 369 U.S. 186, 217 (1962).
[8] Daniel Z. Epstein, *The Illusory Precedent of McGrain v. Daugherty*, 3 UNT L. REV. 1, 2–3 (2021).

to obtain information, impeachment is an obvious non-judicial enforcement power. When it comes to contempt following congressional oversight of executive branch officials, and for the obvious reason that the executive branch does not prosecute itself, Congress does not need to rely on executive branch enforcement.[9] Of course, during the post-Nixon presidency, Congress has increasingly relied on civil suits against executive branch officials to enforce compliance with their subpoenas.[10] Why would Congress have fewer institutional prerogatives when private individuals, rather than executive branch officials, impair oversight or other legislative functions? When Congress investigates former government officials or private individuals, Congress can avoid abdicating enforcement to the executive branch through its own internal remedies, such as its inherent contempt power enforced not by courts but by its authority to call upon each House's Sergeant of Arms to arrest contemptuous witnesses.[11]

The doctrinal principles governing pre-contempt and post-contempt prosecutions of legislative impairment advanced here, not only help the courts avoid unduly interfering with inherently political questions, but also attenuate congressional abdication of constitutional procedures for preventing legislative impairment. Those procedures, just like the final legislation presented by Congress, are crucial for preserving the separation of powers and preventing Congress from delegating its legislative enforcement powers to a coordinate branch.

In Part I, I situate the legislative impairment debate in terms of the law and history of congressional investigations. Interference with legislative voting procedures or committee investigations are issues central to the congressional oversight function. When no exhaustion of legislative remedies occurs in pre- or post-contempt cases, courts risk adjudicating political questions. Highlighting this risk, I provide a background of the political rather than legal nature of congressional oversight to frame how the doctrinal understanding of legislative impairment disputes has changed over time. I show that as the courts have increasingly adjudicated disputes concerning congressional requests for information, expectations of compliance from the executive branch have moved from theories of discretionary duties to near-mandatory ones while, at the same time, interbranch political disputes have become increasingly viewed as justiciable cases or controversies.

Part II helps explain the trends identified in Part I by analyzing the legal history of congressional contempt and showing how norms concerning contempt changed dramatically after the Nixon presidency. The aftermath of

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[9] DANIEL Z. EPSTEIN, THE INVESTIGATIVE STATE 14 (2023) [hereinafter EPSTEIN (2023)].
[10] *Id.* at 51.
[11] *See infra* Part IV and accompanying notes.

the Nixon presidency is characterized by the shifting role of contempt from one where Congress could use politics to induce compliance to one that now risks abdicating political solutions to the courts. For instance, since the post-Nixon era, Congress has never relied on its inherent ability to enforce its contempt powers via arrests from each respective House's Sergeant of Arms.[12] At the same time, the courts developed an exhaustion doctrine where only when interbranch attempts to negotiate information disputes reach an impasse can the courts get involved.

In Part III—and what is crucial to the Article's theory that legislative exhaustion must be defined by the rules and proceedings of each House versus delineated by judicially crafted doctrines—I employ an empirical strategy to test the validity of what has been called the "accommodation doctrine" for resolving interbranch information disputes before a dispute is ripe for adjudication.[13] I find that accommodation is an empty practice where Congress goes through the motions of a give-and-take process simply to justify a ripe suit. The impact of this empirical strategy is it serves to buttress the Article's central claim that rather than courts relying on amorphous concepts like accommodation to convince themselves of jurisdiction to adjudicate a legislative matter, they must take seriously the need for Congress to follow clearly defined rules and procedures before adjudication is appropriate. In the legislative impairment case against former President Trump, this means that no court could adjudicate until former President Trump was held in contempt of Congress. In the cases of Bannon and Navarro, some form of legislative enforcement, like threatened arrests by the Sergeant of Arms, must have taken place before any investigation and subsequent prosecution could be had.

In Part IV, I address problems with how the courts' adjudication of congressional oversight disputes has shaped the judicial examination of legislative impairment. I borrow from the congressional oversight jurisprudence to inform rules governing congressional inquiries of non-governmental individuals. Once the relevant history, practices, jurisprudential shifts, and doctrinal errors are fully introduced, this Part challenges the legal theories surrounding recent legislative impairment cases, ultimately showing why pre-contempt and post-contempt exhaustion rules better preserve Congress's institutional balance with the other branches. I

[12] EPSTEIN (2023), *supra* note 9, at 25, 159.
[13] *See infra* Part III.

then conclude with a doctrinal theory to avoid congressional abdication of legislative impairment enforcement.

I. OVERSIGHT IN THE HISTORICAL CONTEXT

Congressional oversight disputes are today fought out in court. But this phenomenon has not always been the case. Throughout history, Congress has had to threaten legislation, make a clamor in the press, or even charge officials with impeachment to obtain politically useful information. When Congress sought information from the executive branch, the executive could grant or refuse the request. That history is markedly different from the situation today where Congress relies less on political tools (going public, issue claiming, and position-taking through legislative sanctions,[14] or using enforcement processes like impeachment or arrest) and opts for legal remedies. The present image of congressional oversight as a legal process where government agencies and their officials suffer legal consequences for lack of cooperation is a modern one, divorced from Congress's early historical practices since the Founding.

Regarding congressional oversight at the Founding, scholars identify the congressional investigation of the George Washington administration concerning the massacre of St. Clair's expedition in present-day Ohio as a poignant example of congressional oversight.[15] But several factual touchstones distinguish the St. Clair investigation from anything observable today. Whether President Washington accommodated the investigation was wholly within his discretion, and Congress did not presume that it could use compulsory process against the President to obtain information. It would have been unheralded for Congress to have subpoenaed the executive department. Prior to the Nixon presidency, the executive branch responded to congressional demands using a public interest standard. That standard contended that the executive branch had sole discretion as to whether honoring a congressional request would be in the public interest.[16]

That political inquiries by Congress were authorized but not judicially enforceable was the longstanding position of the executive branch from the Founding until after the Nixon presidency.[17] In a 1941 letter by then-Attorney General (and future Supreme Court Justice) Robert Jackson to Representative Carl Vinson, the Chairman of the House Committee on Naval Affairs, Jackson denied the Committee access to reports of the Federal

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[14] ROBERT DAHL, WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN COMMUNITY 113 (1961).

[15] George C. Chalou, *St. Clair's Defeat, 1792*, in CONGRESS INVESTIGATES: A DOCUMENTED HISTORY, 1792–1974 3, 4 (Arthur M. Schlesinger, Jr., ed., 1983).

[16] *See infra* Section II.C.

[17] *See infra* Part II.

Bureau of Investigation. Attorney General Jackson's denial of congressional access to information assessed the information's legislative value, concluding,

> [t]he information here involved was collected, and is chiefly valuable, for use by the executive branch of the Government in the execution of the laws. It can be of little, if any, value in connection with the framing of legislation or the performance of any other constitutional duty of the Congress.[18]

Further, Jackson rehearsed the constitutional zeitgeist of the time that

> "[t]he courts have repeatedly held that they will not and cannot require the executive to produce such papers when in the opinion of the executive their production is contrary to the public interests. The courts have also held that the question whether the production of the papers would be against the public interest is one for the executive and not for the courts to determine."[19]

Jackson's position in 1941 mirrored President Washington's determination in 1792 concerning the House inquiry into General St. Clair's military defeat: provide the House with those papers as the "public good would permit and [] refuse those the disclosure of which would harm the public."[20]

The position that the executive branch must accommodate congressional requests for information and the claim that Congress can enforce against the lack of cooperation with subpoenas is a modern assumption. Notably, no accommodation process has been applied to congressional investigations of individuals or companies. While the notion that Congress can force the executive branch to make concessions through inquiries and subpoenas is constitutionally suspect, Congress has strong constitutional footing to use investigations and subpoenas against individuals.

A. The Scope of Legislative Impairment

Legislative impairment involves interference by a witness with Congress's government functions. This standard is broad, encompassing contempt determinations against executive branch officials and private individuals. The challenge of legislative impairment is determining when

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[18] Position of the Executive Department Regarding Investigative Reports, 40 Op. Att'y Gen. 45, 60 (1941) [hereinafter Jackson Opinion].

[19] EPSTEIN (2023), *supra* note 9, at 27 (citing Jackson Opinion, *supra* note 18, at 49).

[20] *Id.* at 27.

Congress may punish for contempt and when the Department of Justice assumes that task. As shown in this Article,[21] Congress has not generally used its own procedures to enforce contempt in recent decades. Under 2 U.S.C. § 192, a witness who willfully fails to comply with a valid congressional subpoena is subject to a misdemeanor.[22] Liability does not require a decision from both Houses; instead, a failure to respond to a subpoena for either documents or testimony triggers liability. Under federal statute, whenever a witness subject to compulsory process of either House fails to produce documents or testimony, the leader of each respective House is empowered to refer to the "appropriate" United States Attorney who shall impanel a grand jury for potential indictment.[23]

The idea of Congress responding to a contumacious witness by making a criminal referral to the executive branch is a modern notion whose practice arose in the years after the Nixon presidency.[24] These referral statutes, enacted in 1936 (and based upon an initial 1857 law), together with the Administrative Procedure Act (APA), can be interpreted as reflecting Congress's increasing interest in delegating its legislative auxiliary powers to the executive branch.[25] Historically, Congress used its inherent contempt powers to force contumacious private sector witnesses to comply with committee information requests.[26] Inherent contempt, as discussed below, involved using each respective chamber's Sergeant-at-Arms to arrest and detain a witness in the Capitol jail. After the Supreme Court struck down the use of inherent contempt enforcement against executive branch officials,[27] Congress now relies on its ability to make criminal referrals of contempt determinations. While the criminal contempt statute was first adopted in 1857, it was intended to be used against private sector witnesses, not executive branch officials.[28]

As such, and because the Department of Justice (typically under the supervision of a chief executive representing the opposite party of the one in charge of the Congress exercising the contempt referral) has long held that Congress must defer to prosecutorial discretion as to whether a violation of law occurred, contempt prosecutions of executive branch officials was

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[21] *See infra* Section I.B.

[22] 2 U.S.C. § 192.

[23] 2 U.S.C. § 194.

[24] Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. CHIC. L. REV. 1083, 1083–1084 (2009).

[25] Act of July 13, 1936, H.R. 8875, 74th Cong. (1936).

[26] Chafetz, *supra* note 24, at 1089 (citing Letter from Attorney General Michael B. Mukasey to Representative Nancy Pelosi, Speaker of the House 2 (Feb 29, 2008), online at http://judiciary.house.gov/hearings/pdf/ Mukasey080229.pdf (last visited Sept. 1, 2009)).

[27] *See infra* Section II.C.

[28] 2 U.S.C. § 192 (1938) (R.S. § 102 derived from Act of Jan. 24, 1857, ch. 19, § 1, 11 Stat. 155).

nonexistent before 2021.[29] Although the executive branch has traditionally held that assertions of executive privilege for conduct by individuals advising the President immunize those individuals from contempt, the recent cases against President Trump's confidants Bannon and Navarro signify a change in the Department of Justice's legal position.[30]

This process of using a contempt referral to the Department of Justice, even if fruitless from a criminal liability perspective, is necessary to ensure that Congress's seeking a legal remedy to enforce its subpoenas is appropriately ripe for the federal courts. Notably, the longstanding tradition of the Department of Justice has been that Congress lacks constitutional authority to enforce its subpoenas against the executive branch.[31] In the last 30 years, legislative impairment cases against executive branch officials (or individual subpoenas for official executive branch information) have never been criminally prosecuted. This includes the list of individuals held in contempt of Congress: Attorney General Janet Reno, White House Counsel Harriet Miers, White House Chief of Staff Josh Bolten, Attorney General Eric Holder, White House Counsel Don McGahn, Attorney General William Barr, and Attorney General Merrick Garland.[32] Notably, these individuals were subject to subpoenas from standing committees of Congress, not select committees like the January 6 Committee. Before the George W. Bush Administration, the only prior case in which Congress filed for civil enforcement of subpoenas to the executive branch concerned President Nixon's records.[33] And when the Department of Justice prosecuted individuals for violations of congressional subpoenas, those cases involved private citizens who had no connection to executive branch information.[34]

It is necessary to bifurcate these examples of subpoena enforcement against executive branch witnesses for the purpose of oversight from subpoena enforcement against individuals for the purpose of writing bills.[35] One of the challenges with adjudicating legislative impairment is that it supposes that witnesses have duties to comply with legislative demands even when those responsibilities are not the result of bicameral legislation. It raises unique questions, unaddressed by current scholarship, as to how Congress

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[29] Prosecutorial Discretion Regarding Citations for Contempt of Congress, 38 Op. O.L.C. 1, 1 (2014).

[30] *See, e.g.*, Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege, 8 Op. O.L.C. 101, 102 (1984).

[31] *See, e.g.*, Comm. on the Judiciary v. McGahn, 973 F.3d 121 (D.C. Cir. 2020) (vacated pending en banc review; appeal dismissed before rehearing en banc).

[32] *See, e.g.*, Zachary B. Wolf, *Contempt of Congress now feels like an everyday thing. It wasn't always so.*, CNN, (June 26, 2019), https://www.cnn.com/2019/06/26/politics/contempt-of-congress-list/index.html [https://perma.cc/PFG9-23BE].

[33] Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 727 (D.C. Cir. 1974) (footnotes omitted).

[34] United States v. Bryan, 339 U.S. 323, 342–43 (1950).

[35] EPSTEIN (2023), *supra* note 9, at 25 (citing Anderson v. Dunn, 6 Wheat. (19 U.S.) 204, 228 (1821)).

can superintend the executive through pre-legislative acts in its investigative capacity but must use bicameralism and presentment when it comes to legislation.[36]

B. Mistakes in the Legislative Impairment Jurisprudence

Part of the inability of the law to develop a theory of legislative impairment lies in the failure to distinguish between legislative inquiries of individuals and oversight of the executive branch. On May 12, 2020, the Supreme Court heard arguments in the consolidated cases of *Trump v. Mazars LLP* and *Trump v. Deutsche Bank*,[37] which concerned whether standing committees of Congress have constitutional and statutory authority to enforce subpoenas against private corporations in order to obtain non-government records belonging to the President. From the perspectives of the congressional plaintiffs and the respective lower courts agreeing with their arguments, this question is easily answered. In 1927, the Supreme Court held in *McGrain v. Daugherty* that the "Necessary and Proper Clause" of Article I, § 8 empowered Congress, through its committees, to conduct investigations and compel compliance with its subpoenas as a necessary auxiliary of Congress's need for information in order to legislate effectively.2[38] The *Mazars* and *Deutsche Bank* cases were legislative impairment cases in that the information sought was not from the government but from an individual and related corporations.[39] The House Oversight and Reform Committee (*Mazars*) and the House Intelligence and House Financial Services committees (*Deutsche Bank*) sought to enforce subpoenas consistent with their legislative jurisdiction.[40] Even the Office of Legal Counsel at the Department of Justice conceded that *McGrain* empowers duly

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[36] Todd David Peterson, *Contempt of Congress v. Executive Privilege*, 14 J. OF CONST'L L. 77, 78, 155 (2011) (citing Judiciary v. Miers, 558 F. Supp. 2d 53, 64, 108 (D.D.C. 2008); Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 730–32 (D.C. Cir. 1974)).

[37] Trump v. Mazars USA, LLP, 940 F.3d 710, 714 (D.C. Cir. 2019), *vacated and remanded*, 591 U.S. 848 (2020); Trump v. Deutsche Bank AG, 943 F.3d 627 (2d Cir. 2019), *vacated and remanded sub nom.* Trump v. Mazars USA, LLP, 591 U.S. 848 (2020). A related case is *Trump v. Vance*, Case No. 19-635, which concerned the President's immunity from state criminal process. Trump v. Vance, 591 U.S. 786 (2020).

[38] McGrain v. Daugherty, 273 U.S. 135, 174 (1927).

[39] Trump v. Mazars USA, LLP, 940 F.3d 710, 714 (D.C. Cir. 2019), *vacated and remanded*, 591 U.S. 848 (2020); Trump v. Deutsche Bank AG, 943 F.3d 627 (2d Cir. 2019), *vacated and remanded sub nom.* Trump v. Mazars USA, LLP, 591 U.S. 848 (2020). A related case is *Trump v. Vance*, Case No. 19-635, which concerned the President's immunity from state criminal process. Trump v. Vance, 591 U.S. 786 (2020).

[40] *Id.*

authorized congressional committees to enforce their oversight requests so long as those requests are for a legitimate legislative purpose.[41]

Yet a careful reading of the Supreme Court's 1927 decision in *McGrain v. Daugherty* clarifies the sharp distinction between express governmental disputes versus implied ones, which, despite involving a private party, are said to have the United States as the real party in interest.[42] Despite the federal courts' broad jurisprudential strokes on interbranch information disputes over the last half-century, the D.C. Circuit in *House Judiciary Committee v. McGahn* gets it right:

> [t]he Committee's suit asks us to settle a dispute that we have no authority to resolve . . . we lack authority to resolve disputes between the Legislative and Executive Branches until their actions harm an entity 'beyond the Federal Government.' Without such a harm, any dispute remains an intramural disagreement about the 'operations of government' that we lack power to resolve.[43]

McGrain established a few discrete propositions of law: (1) 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"[44]; (2) "the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function"[45]; and (3) it is an implied power of Congress "to make investigations and exact testimony, to the end that it may exercise its legislative function advisedly and effectively."[46] Viewed strictly, *McGrain* was not an oversight case but a case about Congress's investigative and compulsory powers over individuals and corporations.

This position can be further defended through an examination of the facts and reasoning set forth in the Supreme Court's opinion. First, the "Daugherty" in the case caption was not (by that point, former) Attorney General Harry Daugherty, but his brother, Mallory, the president of the bank where Harry Daugherty held accounts.[47] In the lead-up to the case, Congress held robust investigations aimed at Attorney General Harry Daugherty's

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[41] Authority of Individual Members of Congress to Conduct Oversight of the Executive Branch, 41 Op. O.L.C. 76, 76–77 (2017).

[42] United States v. Am. Tel. & Tel. Co., 551 F.2d 384, 388–389 (D.C. Cir. 1976) [hereinafter *AT&T I*] ("Although this suit was brought in the name of the United States against AT&T, AT&T has no interest in this case, except to determine its legal duty.").

[43] Comm. on Judiciary v. McGahn, 951 F.3d 510, 516 (D.C. Cir. 2020), *vacated per curiam*, U.S. House of Representatives v. Mnuchin, No. 19-5176, 2020 WL 1228477 (D.C. Cir. Mar. 13, 2020).

[44] McGrain v. Daugherty, 273 U.S. 135, 175 (1927).

[45] *Id.*

[46] *Id.* at 161.

[47] *Id.* at 152.

failure to prosecute government officials involved in the Teapot Dome Scandal, among other claims of neglect and misfeasance of duty.[48] The Senate Select Committee on Investigation of the Attorney General and the Senate Committee on Public Lands and Surveys conducted lengthy investigations concerning allegations of illegal leasing of oil on naval reserves, which President Warren Harding directed the Department of Justice to examine and appointed a special counsel to investigate,[49] preceding the use of any compulsory process by Congress.[50] After these proceedings, the Senate issued a resolution on January 29, 1924, requesting that Harding's successor, President Calvin Coolidge, request the resignation of Attorney General Daugherty.[51] On March 28, 1924, President Coolidge demanded and received Daugherty's resignation letter. As stated earlier in its opinion, the *McGrain* Court did not view its decision as concerning an interbranch information dispute but simply looked at Congress's power to investigate and compel compliance from "private individual[s]."[52]

Second, the Senate was represented by the Department of Justice in the dispute, which would be an odd posture if there were executive branch interests at stake, even if indirectly via the parties.[53] Third, the briefing by the Department of Justice in the case was framed in terms of judicial review of the congressional "power to conduct an investigation in aid of its legislative functions [and] to compel attendance before it of witnesses and the production of books and papers" and non-structural constitutional "privileges as those against unreasonable searches and seizures, self-incrimination and the like."[54] In *In re Chapman*, Congress passed a statute to justify compulsion against a witness—no such bicameralism and presentment requirement has been required for current interbranch information disputes despite such a requirement being considered a constitutional prerequisite.[55] Even assuming *McGrain* was relevant, our jurisprudence has evolved to conclude that any legislative process that can legally bind the Executive must go through

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[48] *Id.* at 151.

[49] 68 CONG. REC. 1520–22, 1591, 1728, 1974 (1924); ch. 16, 43 Stat. 5 (1924); ch. 39, 43 Stat. 15 (1924); ch. 42, 43 Stat. 16 (1924).

[50] MORTON ROSENBERG, CONG. RSCH. SERV., 95-464a, INVESTIGATIVE OVERSIGHT: AN INTRODUCTION TO THE LAW, PRACTICE, AND PROCEDURE OF CONGRESSIONAL INQUIRY, 3 (1995).

[51] 68 CONG. REC. 1591.

[52] McGrain v. Daugherty, 273 U.S. 135, 154 (1927).

[53] *Id.* at 150–54. The Department of Justice continually relies upon *McGrain* as the basis for congressional superintendence of the Executive even though *McGrain*, on its own terms, dealt with the question of congressional investigative power over a private citizen. *Cf.* Authority of Individual Members of Congress to Conduct Oversight of the Executive Branch, 41 Op. O.L.C. 76 (2017) *with McGrain*, 273 U.S. at 150–54 ("[H]as power, through its own process, to compel a private individual to appear before it or one of its committees.").

[54] *See id.*

[55] *See* INS v. Chadha, 462 U.S. 919, 952 (1983).

bicameralism and presentment—which is never the case for a cameral jurisdictional statement, committee resolution, or chairman's letter.

Fourth, as a result of the Department of Justice's briefing, the *McGrain* Court framed the "principal questions involved" in the case as follows: first,

> whether the Senate—or the House of Representatives, both being on the same plane in this regard—has power, through its own process, to compel a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution.[56]

The second principal question is "whether it sufficiently appears that the process was being employed in this instance to obtain testimony for that purpose."[57]

Lastly, to the extent *McGrain* ever justified congressional oversight of the executive branch under the Necessary and Proper clause, the Legislative Reorganization Act of 1946 overturned that holding by clarifying that the authority for Congress to "exercise continuous watchfulness" over the executive branch is a power held by committees with no explicit judicial remedy.[58] As such, resolutions derived under the Constitution's Rules of Proceedings Clause concerning each House are not enforceable against the executive branch.

McGrain v. Daugherty is not an oversight case—e.g., the theory that the "Necessary and Proper" clause justifies Congress's investigative power to investigate the Executive Branch.[59] The Department of Justice Office of Legal Counsel has relied on *McGrain* as the foundation of congressional oversight authority throughout presidential administrations.[60] Even the U.S. House of Representatives' General Counsel, representing the House congressional committees in *Mazars*, *Deutsche Bank*, *Mnuchin*, *McGahn*, and the suit for access to the Mueller grand jury records, has relied on *McGrain* as support for the proposition that "Article I of the Constitution grants each House of Congress the power to use compulsory process to obtain information from third parties, including Executive Branch officials, that

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[56] *McGrain*, 273 U.S. at 154.

[57] *Id.*

[58] Legislative Reorganization Act of 1946, Pub. L. No. 79-601, § 136, 60 Stat. 812, 832 (1946) (repealed, in part, 1995).

[59] *McGrain*, 273 U.S. at 160.

[60] Requests by Individual Members of Congress for Executive Branch Information, 43 Op. O.L.C. 42, 43–44 (2019) (citing Authority of Individual Members of Congress to Conduct Oversight of the Executive Branch, 41 Op. O.L.C. 76, 77–78 (2017)).

may aid it in carrying out its legislative and oversight responsibilities."[61] If there is no distinction between congressional investigations of the executive branch and those of private individuals, why is criminalizing legislative impairment appropriate in the latter but not the former?

C. Differences Between Standing versus Select Committees

A core theme of this Article is examining legislative impairment in the criminal law context. American jurisprudence has well-established that outside the criminal law context, civil litigation over legislative impairment focuses on a process beginning with requests, then accommodation between the branches, and then, if applicable, a subpoena and contempt resolution before referring a matter to the U.S. Attorney for the District of Columbia.[62] The Supreme Court has defined the congressional oversight power as "the inherent power of each House to 'gather information in aid of its legislative function' by means of compulsion, if necessary."[63] The power of committees to demand, through compulsion, information is limited by law. Section 136 of the Legislative Reorganization Act of 1946 provided that "each standing committee of the Senate and the House of Representatives shall exercise continuous watchfulness of the execution by the administrative agencies concerned of any laws, the subject matter of which is within the jurisdiction of such committee."[64] Only standing committees, not Select Committees, can compel *government* witnesses to produce information. While Select Committees were used to investigate the private sphere for the purpose of developing legislative solutions to problems of national importance,[65] Congress, in passing the Legislative Reorganization Act, established permanent standing committees and limited the scope of compulsory process to those committees.[66]

The Office of Legal Counsel at the Department of Justice has opined that each House's formal power of inquiry, with the process to enforce it, is that House's "oversight" authority.[67] Each House delegates its inherent oversight

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[61] Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment at 35, *Comm. on Ways and Means, U.S. H.R. v. U.S. Dep't of Treasury*, No. 19-01974 (D.D.C. 2021) (citing *McGrain*, 273 U.S. at 175).

[62] 2 U.S.C. § 192 (concerning referrals for contempt).

[63] Requests by Individual Members of Congress for Executive Branch Information, 43 Op. O.L.C. 42, 43 (2019).

[64] Legislative Reorganization Act of 1946, Pub. L. No. 79-601, § 136, 60 Stat. 812, (codified as amended in scattered sections of 2 U.S.C.) (repealed, in part, 1995).

[65] Steven J. Menashi & Daniel Z. Epstein, *Congressional Incentives and the Administrative State*, 17 N.Y.U. J. L. & LIB. 172, 180 (2024).

[66] EPSTEIN (2023), *supra* note 9, at 28.

[67] Requests by Individual Members of Congress for Executive Branch Information, 43 Op. O.L.C. 42, 44 (2019) (citing McGrain, 273 U.S. at 174).

power to its standing committees.[68] Under 2 U.S.C. § 190d(a)(2) and House Rule XI, only standing committees or one of their subcommittees may conduct oversight.[69]

Select committees, like the January 6 Committee, are therefore "not acting pursuant to delegated oversight authority [and] are entitled only to the voluntary cooperation of agency officials or private persons."[70] "[A] letter or inquiry from an individual member or members of Congress is not made 'pursuant to Congress's constitutional authority to conduct oversight and investigations.'"71

The Office of Legal Counsel is, of course, wrong due, in large part, to its failed reading of *McGrain*. While Select Committees lack compulsory power over the executive branch, "oversight" is not what describes investigations of non-governmental individuals. The Department of Justice's conflating of regulatory inquiries (i.e., non-government targets) and executive branch inquiries as "oversight" betrays an agenda to view compulsion as a core executive power inappropriate for Congress to exercise. Notwithstanding this overbreadth, the January 6 Select Committee's subpoenas against Stephen Bannon and Peter Navarro were arguably without legal justification on another ground: they sought official executive branch information from these individuals due to their experience in government—the Select Committee did not seek information about these individuals' private sector activities. As such, the January 6 Select Committee acted as if it were a standing committee without any such authority.

The Special Counsel's case against former President Trump and the prosecutions of Bannon and Navarro criminalized alleged impairments of legislative function. These prosecutions did not in any way operate under a theory that Congress or its committees had to take any steps to formally authorize the prosecution of contemptuous witnesses. The question is whether there are built-in exhaustion rules that not only bind Congress but also the executive branch. Congress may not violate legal rights or ignore its own rules in conducting oversight.[72] It has been long settled that the rules of

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[68] *See* EPSTEIN (2023), *supra* note 9, at 5.

[69] 2 U.S.C. § 190d; 118TH CONG., RULE XI, RULES OF THE U.S. HOUSE OF REPRESENTATIVES 20 (2023).

[70] Requests by Individual Members of Congress for Executive Branch Information, 43 Op. O.L.C. 42, 46 (2019) (citing ALISSA DOLAN ET AL., CONG. RSCH. SERV., CONGRESSIONAL OVERSIGHT MANUAL 65 (2014)).

[71] *Id.* at 47.

[72] *See* Watkins v. United States, 354 U.S. 178, 198–99 (1957); *see also* Nixon v. United States, 506 U.S. 224, 238 (1993); Yellin v. United States, 374 U.S. 109, 114 (1963); United States v. Smith, 286 U.S. 6, 33 (1932).

Congress and its committees are judicially cognizable and that a legislative committee is held to their observance, just as executive agencies have been.[73]

D. The Political Nature of Oversight

Various theories explain why Congress today practices oversight through the courts rather than as a matter solely up to negotiations between the branches or through accommodations to investigative targets. Several arguments, however, suppose a constitutional origin for congressional oversight. These arguments seek to justify contemporary practices as contemplated by constitutional design. The strongest argument holds that Article I's Rules of Proceedings Clause enables Congress to pass rules that authorize its oversight over the executive branch. The ready response to this argument is that nothing Congress commits through its internal regulations can bind the executive branch. Rules of Proceedings justify internal procedures about how Congress works and have no force of law. The response to the counterargument is that the part of the executive branch classifiable as the "bureaucracy" is an agent of Congress and, therefore, internal rules of Congress as implemented by committees bind those agencies that are *de facto* legislative agents of Congress. These arguments reveal a conflict in theories about the nature of the executive branch and the scope of congressional oversight. Political scientists have delineated the debate as a conflict between congressional dominance theory and the theory of congressional abdication.[74]

What may be surprising to administrative law scholars, independent of their separation of powers views, is that congressional dominance advocates understand congressional oversight to constitute "control" of the bureaucracy.[75] Thus, even if the bureaucracy is characterized as part of the executive branch, such an executive nature is beside the point if "congressional control" means that the bureaucracy is an agent of the legislature, not the President. Legal scholars do not typically understand congressional oversight to imply congressional control, but formal models support the notion of oversight as a control relationship between principals and agents.[76] Within these formal models, delegation by Congress is appropriate if it is to a legislative rather than executive agent. Political

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[73] *Yellin*, 374 U.S. at 114 (citations omitted).

[74] *See* Terry Moe, *An Assessment of the Positive Theory of 'Congressional Dominance'*, 12 LEGIS. STUD. Q., 475, 477–479 (1987).

[75] *Id.*

[76] David Epstein & Sharyn O'Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 CARDOZO L. REV. 947, 955–956 (1999) (citing Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 775–800 (1983)).

scientists view the only form of appropriate delegation as between a principal and an agent.[77] Because delegation happens, the agency receiving delegated authority must be an agent of the legislative principal—not an executive one.[78]

In this sense, if all agencies receiving delegated legislative power are subject to a congressional principal, then cameral rules of the legislature should be binding on these agencies. The difficulty with this argument, even if its theoretical underpinnings are sound, is that Congress has decided to establish agency heads as Article II officers. Executive power is always in question whenever Congress seeks to use oversight to constrain an agent supervised by an executive official.

Given these interbranch dynamics, contemporary Congresses have used the oversight process to ripen a dispute for eventual judicial resolution. I contend, however, that oversight of the executive branch is not a legal concept. It is, but rather an entirely partisan process. For instance, it is unmistakable that oversight during unified government never invokes the courts, but during divided government, subpoenas and requests for judicial enforcement thereof reach a fever pitch.79

Consider the following illustration: The House Financial Services Committee and House Permanent Select Committee on Intelligence investigation of Deutsche Bank and the House Oversight and Reform Committee's investigation of Mazars were aimed at, respectively "investigating the questionable financing provided to President Trump and The Trump Organization by banks like Deutsche Bank to finance its real estate properties,"[80] and the President's "financial interests in businesses across the United States and around the world that pose both perceived and actual conflicts of interest."[81] While President Trump, in his personal capacity, argued that these inquiries are aimed at determining whether the President engaged in criminal conduct, which is an impermissible legislative purpose—even crediting the stated congressional interests in financial reform or ensuring compliance with the Ethics in Government Act—the fact that under *McGrain*, the inquiry, as tailored specifically to President Trump, is an auxiliary to legislation means that any resulting legislation would be targeted to President Trump. Any conceivable legislation of the sort would be invalid as an unconstitutional bill of attainder under Article I, § 9. As the Supreme Court has recognized, the Bill of Attainder Clause prohibits any "law that legislatively determines guilt and inflicts punishment upon an identifiable

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[77] *Id.*

[78] *Id.*

[79] JOEL ABERBACH, KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT 19 (1990).

[80] 165 CONG. REC. H2698 (daily ed. Mar. 13, 2019).

[81] H. REP. NO. 116-40, at 156 (2019).

individual without provision of the protections of a judicial trial."[82] It is difficult to conceive of legislative text resulting from these inquiries that do not somehow conclude that President Trump violated a statute, and certainly, legislation cannot serve to impugn the President after the Senate failed to remove him.

The overbreadth in the judicial approach to congressional oversight, when incorporated into the Trump-era separation of powers cases, shows how willingly federal courts will overlook legislative or self-imposed anti-abdication limitations—like constitutional case or controversy requirements, jurisdiction, ripeness, mootness, standing, or "constitutional avoidance"—in order to identify an act in need of interpretation or a source of political friction as providing a "familiar judicial exercise" for purposes of finding jurisdiction, post hoc.[83] What courts in *Committee on the Judiciary v. Miers* or *Trump v. Mazars* have determined is that the civil contempt determination (a resolution) by a House of Congress is judicially reviewable, not the questions of legislative purpose or authority.[84] This question puts the cart before the House: because the court presumes that it has some inherent power to resolve the sorts of matters common law courts often resolve, it concludes that it can resolve a purely interbranch dispute when limited to review of a resolution directing the enforceability of orders. Such presentations may reveal judicially manageable legal issues that do not imply that the federal courts have jurisdiction. If anything, Congress had two bites of the apple in 1946 and later, in 1970, with its Legislative Reorganization Acts—at neither time did it create a judicial review provision.[85] The Supreme Court's 1917 holding that the contempt power cannot bind the Executive should equally apply to the use of compulsory process.[86] *McGrain v. Daugherty* and its oft-cited progeny[87] involved clashes between individuals and Congress versus interbranch disputes, rendering their holdings inapplicable to those cases where Congress seeks to compel information from the executive branch. On February 28, 2020, former Judge Griffith, in his opinion in *U.S. House of Representatives, Committee on the Judiciary v. McGahn*, emphatically clarified that *McGrain* was not a separation of powers case, distinguishing *McGahn*, which involved an interbranch dispute, from *McGrain, Kilbourn v.*

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[82] Selective Serv. Sys. v. Minn. Pub. Interest Research Grp., 468 U.S. 841, 846–47 (1984).

[83] Zitofsky v. Clinton, 566 U.S. 189, 196 (2012).

[84] Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53, 56 (D.D.C. 2008) (citing United States v. Nixon, 418 U.S. 683, 697 (1974)); Trump v. Mazars USA, LLP, 591 U.S. 848 (2020) (citations omitted).

[85] Legislative Reorganization Act of 1946, Pub. L. No. 79-601, 60 Stat. 812 (1946) (repealed, in part, 1995); Legislative Reorganization Act of 1970, Pub. L. No. 91-510, 84 Stat. 1140 (1970).

[86] Marshall v. Gordon, 243 U.S. 521, 536 (1917).

[87] United States v. Rumely, 345 U.S. 41, 46 (1953); Watkins v. United States, 354 U.S. 178, 187 (1957); Tenney v. Brandhove, 341 U.S. 367, 377–78 (1951); Barenblatt v. United States, 360 U.S. 109, 111 (1959); Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 503–07 (1975).

Thompson,[88] and *Mazars*, which did not involve subpoenas to the executive branch.[89]

While Judge Griffith opined that the federal courts have jurisdiction over disputes like *Mazars* due to its involvement of individual rights versus questions committed to the federal political branches, the facts at issue in *McGrain* suggest a desire by Congress to avoid using compulsory process against the executive branch.[90] That the congressional inquiries directed toward the Harding Administration had a political remedy (Attorney General Daugherty's removal) is suggestive of the political nature of congressional oversight over administration.

The D.C. Circuit's October 11, 2019, opinion in *Trump v. Mazars* stated: "[t]he lesson of *McGrain* is that an investigation may properly focus on one individual if that individual's conduct offers a valid point of departure for remedial legislation. Again, such is the case here."[91] As will be further explored in Part II, the framework presented here permits the distinction of *Mazars* from *McGrain* by reintroducing "accommodation" as a test for evaluating the legitimacy of regulatory investigations, particularly those against individuals.

In *McGrain*, the investigative target was the brother of the former Attorney General, and the political remedy—removal of an Attorney General alleged to have engaged in wrongdoing—had already occurred before the case reached any court.[92] None of these circumstances were present in the Supreme Court's *Mazars* case. A political exhaustion requirement for regulatory investigations by Congress ensures clarification of justiciable conflicts between Congress and individual witnesses while averting the need for federal courts to craft political remedies in legal terms.

Raines v. Byrd sought to prevent the judicial superintendence of the legislative branch's own power by placing the courts in the position of determining what constitutes an intrabranch informational injury.[93] Congress has a near-limitless number of institutional remedies to executive branch noncompliance in the form of inherent contempt, impeachment, removal, appropriations, and/or competitive electioneering. But Congress's decision not to engage in political remedies in favor of using its investigative power should not be an opportunity for judicial paternalism as a substitute for

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[88] Kilbourn v. Thompson, 103 U.S. 168 (1880).

[89] Comm. on Judiciary v. McGahn, 951 F.3d 510, 523-24 (D.C. Cir. 2020) (citations omitted), *vacated per curiam*, U.S. House of Representatives v. Mnuchin, No. 19-5176, 2020 WL 1228477 (D.C. Cir. Mar. 13, 2020).

[90] McGrain v. Daugherty, 273 U.S. 135, 151 (1927).

[91] Trump v. Mazars USA, LLP, 940 F.3d 710, 729 (D.C. Cir. 2019), *vacated and remanded*, 591 U.S. 848 (2020).

[92] *McGrain*, 273 U.S. at 150–51.

[93] Raines v. Byrd, 521 U.S. 811, 833 (1997) (citations omitted).

effective politics. Requiring Congress's regulatory inquiries to be free of any nexus to congressional oversight of administration and to be untainted by the inherently political nature of oversight is not simply a means for protecting a fair process—it prevents Congress from abdicating its political responsibility to conduct oversight to thwart noncompliance by the executive branch.

Congressional oversight engenders political disputes with political remedies (impeachment, resignation, reelection) and need not be conditioned by a policy requirement (legislative purpose) rather than a political one. Because interbranch information disputes are not justiciable, Congress may base its oversight on nakedly political purposes.

The other difficulty with examining congressional oversight from the lens of the law is that scholars are unlikely to deem oversight as having any force or effect of law. Unlike final legislation subject to bicameralism and presentment, oversight is pre-lawmaking and not subject to the constitutional requirements normally thought to ensure the binding effects of legislative action. It would be odd to somehow view a congressional inquiry as a complete exercise of legislative power but view a proposed bill as legally distinct. One response is that oversight is not final legislative action; only when the give-and-take between the branches fails to lead to a resolution and Congress resorts to the quasi-legal process of subpoenas, then a contempt vote does oversight rise to the level of finality. But certainly, Congress works out negotiations between the branches when considering legislation—indeed, this is known as "technical assistance." No one would take seriously the prospect that some breakdown in the bill-writing process, such as the failure of the executive branch to provide technical assistance, could lead to any circumstances where judicial review would be ultimately appropriate.

E. Executive Branch Prerogative Over Legislative Impairment

Only a motivated reading of *McGrain* could lead to a conclusion that it applies to congressional investigations of the Executive Branch. The *McGrain* Court viewed its holding as simply applying the Supreme Court's prior decision in *In re Chapman*,[94] thus upholding the precedent that the Necessary and Proper Clause justified Congress's reliance on a statute authorizing the use of compulsory process to summon witnesses for testimony.[95] Had the *McGrain* Court sought to apply such a constitutional

[94] *In re* Chapman, 166 U.S. 661, 671–672 (1897).
[95] *Id.* (citing 11 Stat. 155 (1857)).

justification to executive branch witnesses, it would have had to distinguish *In re Chapman*, which it chose not to do.[96]

But if *McGrain v. Daugherty* presented a parallel issue to *In re Chapman*, the Supreme Court could have resolved *McGrain* in a procedural fashion upon granting certiorari. Only in the Supreme Court's 1946 decision in *Oklahoma Press Publishing v. Walling*, issued in the twilight before President Truman's signature of the Administrative Procedure Act of 1946, can *McGrain* be understood as a presaged justification for presidentially insulated quasi-legislative, quasi-judicial agency investigations.[97] When *McGrain* was decided, it was a year subsequent to the question of the President's power to remove a postmaster official in *Myers v. United States*[98] and subsequent to a number of administrative law challenges filed in the Court of Federal Claims, which heard claims arising under the Constitution or statute that entailed money damages (the constitutional challenge to removal in *Humphrey's Executor* was likewise filed in the Court of Federal Claims).

The Supreme Court's 1940 jurisprudence is directly responsible for the idea that the executive branch can enforce against legislative impairments given its new equities in the policymaking process. *Oklahoma Press Publishing v. Walling* addressed the question of a private target's challenge to an administrative agency subpoena for records and information.[99] For the first time, the Court had to evaluate the question of validity when Congress delegates its investigative powers to a non-law enforcement agency for purposes of investigating conduct covered by statute.[100] In its reference to *McGrain*,[101] the Court analogized an agency investigation as effectively a

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[96] *Id.* ("[T]hat Congress possessed the constitutional power to enact a statute to enforce the attendance of witnesses and to compel them to make disclosure of evidence to enable the respective bodies to discharge their legitimate functions . . . was to effect . . . the act of 1857 . . . .").

[97] Okla. Press Publ'g Co. v. Walling, 327 U.S. 186, 216 (1946).

[98] Myers v. United States, 272 U.S. 52 (1926).

[99] *Okla. Press Publ'g Co.*, 327 U.S. at 189.

[100] *Okla. Press Publ'g Co.*, 327 U.S. at 201 ("[Congress has the] authority to delegate effective power to investigate violations of its own laws, if not perhaps also its own power to make such investigations.").

[101] *Id.* at 216 n.55 (citing McGrain v. Daugherty, 273 U.S. 135, 156–58 (1927)) ("The principle underlying the legislative practice has also been recognized and applied in judicial proceedings. This is illustrated by the settled rulings that courts in dealing with contempts committed in their presence may order commitments without other proof than their own knowledge of the occurrence, and that they may issue attachments, based on their own knowledge of the default, where intended witnesses or jurors fail to appear in obedience to process shown by the officer's return to have been duly served. A further illustration is found in the rulings that grand jurors, acting under the sanction of their oaths as such, may find and return indictments based solely on their own knowledge of the particular offenses, and that warrants may be issued on such indictments without further oath or affirmation; and still another is found in the practice which recognizes that where grand jurors, under their oath as such, report to the court that a witness brought before them has refused to testify, the court may act on that report, although otherwise unsworn, and order the witness brought before it by attachment. We think the legislative practice, fortified as it is by the judicial practice, shows that the report of the committee—which was based on the

delegation of Congress's own inquiries for a legislative purpose ("It is enough that the investigation be for a lawfully authorized purpose, within the power of Congress to command.")[102] In effect, if Congress could validly delegate its investigative powers to committees, certainly, it could delegate such powers to administrative agencies charged with implementing regulatory norms established by Congress.

If *McGrain* is read to govern legislative inquiries of private citizens and Oklahoma Press Publishing applies that principle to regulatory inquiries by agencies created by Congress, then the APA's definition of "rule" as encompassing part of an agency statement designed to implement law[103] and its definition of "rulemaking" as governing the process for formulating such a statement can be understood in a new light. Just as congressional investigations are bound by a rulemaking purpose, so too must agency investigations be considered a process for formulating a rule, i.e., "an agency statement of general or particular applicability and future effect designed to implement . . . or prescribe law or policy . . . ."[104]

By misreading *McGrain*, American public law jurisprudence has not only mistakenly adjudicated intrabranch information disputes but simultaneously failed to treat regulatory (by agencies) investigations as antecedent to rulemaking (the clear holding of *McGrain*). Such inquiries, bound by a regulatory purpose, are ones the APA requires to be disclosed publicly in advance. However, the concept of administrative subpoenas as legislative inquiries is not the received view of the law.[105] By extending *McGrain* to provide judicial review of congressional oversight of administration, our jurisprudence has ignored the extent to which Congress's own delegation of its investigative functions is not subject to due process requirements. In narrowing *McGrain* to its proper holding, the courts may be better positioned to exercise review over the regulatory power of investigation, which, while evolving from congressional oversight, has certainly evaded its contemporary attention.

II. THE NIXON LEGACY AND ACCOMMODATION

The longstanding position of the executive branch, Presidents from George Washington to Lyndon Baines Johnson, was that congressional oversight requests of the executive branch were not legally enforceable. After

committee's own knowledge and made under the sanction of the oath of office of its members—was sufficiently supported by oath to satisfy the constitutional requirement.").

[102] *Id.* at 209.

[103] 5 U.S.C. § 551(4).

[104] *Id.*

[105] *But cf.* Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication, Exec. Order No. 13,892, 84 Fed. Reg. 55239 (Oct. 9, 2019) (rescinded).

President Nixon, this position was viewed as untenable. No constitutional reason justified this position. Instead, the interpretation arose due to the perception that congressional oversight had become more dominant an institution in the wake of the Nixon scandal. A strong argument for examining oversight as having the force of law is that it is not pre-legislative but post-legislative in the sense that it ensures the effective execution of legislative intent. Importantly, this argument would expose the traditional justifications of legislative oversight as unconvincing, namely that oversight must be tailored for a lawmaking purpose (and thus is pre-legislative in nature).

Over a near-forty-year period, the Supreme Court described the "subject matter jurisdiction" of each branch, wherein exhaustion before the legislative branch was required before the prosecution of contempt crimes would be permitted. In *Kilbourn v. Thompson*,[106] the Supreme Court held that the House of Representatives lacked subject matter jurisdiction to prosecute for contempt of Congress. In *In re Chapman*,[107] the Supreme Court extended its concept of subject matter jurisdiction to clarify that there was an implied legislative authority to deal with contempt, which was upheld. *In re Chapman* is analogous to the Special Counsel proceeding because Chapman was indicted in refusing to testify before a Senate proceeding.[108]

A. The Accommodation Doctrine

The accommodation doctrine, first developed in the 1980s in the context of Congress seeking Article III relief for witness refusals to comply with subpoenas, is directly relevant to the January 6 inquiries of Stephen Bannon and Peter Navarro. Consider that on September 23, 2021, Chairman Bennie G. Thompson signed a subpoena for documents and testimony from Stephen Bannon.[109] The subpoena required that Bannon produce responsive documents not later than October 7, 2021, and that Mr. Bannon appear for a deposition on October 14, 2021.[110] But, as the Chairman stated to justify his criminal referral to the U.S. Attorney for the District of Columbia, "[s]ubsequent communications between counsel for Mr. Bannon and Chairman Thompson, however, failed to reach any accommodation for Mr. Bannon's appearance for testimony or production of documents."[111] The accommodation doctrine, therefore, is directly relevant to the question of

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[106] Kilbourn v. Thompson, 103 U.S. 168 (1880).
[107] *In re Chapman*, 166 U.S. at 661.
[108] *Id.* at 664.
[109] H.R. REP. NO. 117-162, at 3 (2021).
[110] *Id.*
[111] *Id.*

legislative impairment of the January 6 committee's investigations. This section explores the origins of this accommodation doctrine.

Since the resignation of President Nixon, the Office of Legal Counsel at the U.S. Department of Justice has taken the position that *McGrain v. Daugherty* establishes Congress's constitutional right to exercise oversight over the executive branch. This broad concession to the oversight power is counterbalanced by various exhaustion doctrines and privilege justifications. The key exhaustion principle is known as the accommodation doctrine.[112] Under this doctrine, before an informational dispute between the branches can ripen into a judicially recognizable dispute, there must be some form of negotiation or give and take between the branches.[113] In practice, this means Congress submits a request for information and records to the executive branch; the executive branch seeks to negotiate a narrowing of the request or otherwise produce records for which it believes are not subject to a constitutional privilege; the parties then determine whether they have reached an impasse as to access to (or refusal to produce) presumptively privileged information.[114] However, at this point, the executive branch does not formally assert privilege. Only if Congress issues a subpoena will the executive branch determine to assert executive privilege.[115] If the executive branch is adamant about a privilege assertion, particularly over requests for close presidential advisors to testify, Congress may respond via a contempt resolution and vote.[116] Upon a floor vote, a referral is made to the U.S. Attorney for the District of Columbia to determine whether to bring a criminal case for contempt of Congress.[117]

In *AT&T I*, the D.C. Circuit crafted a series of procedural scaffolds ("a general and abstract preface")[118] which, once dispensed with, permit the adjudication of interbranch information disputes ("nerve-center constitutional questions").[119] While *AT&T I*, and later *AT&T II*'s, prefacing were unique to the facts at hand—an injunction by the Department of Justice to restrain AT&T from complying with a House subcommittee subpoena—both Congress and the executive branch have applied those cases' reasoning as firmly established positive law in the near-half-century since they were

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[112] United States v. AT&T, 567 F.2d 121, 127 (D.C. Cir. 1977) [hereinafter *AT&T II*] (describing the obligation to negotiate and reach accommodation in interbranch disputes).

[113] Comm. on the Judiciary v. McGahn, 968 F.3d 755, 771 (D.C. Cir. 2020) (discussing requirement for negotiation before judicial intervention).

[114] *Id.* at 761–78 (describing process of negotiation and accommodation).

[115] Comm. on Oversight & Gov't Reform v. Holder, 979 F. Supp. 2d 1, 6 (D.D.C. 2013) (describing process leading to formal assertion of executive privilege).

[116] *Id.* at 6–7 (referencing contempt resolution and vote against Eric Holder).

[117] *Id.* at 7 (describing referral process for criminal contempt of Congress).

[118] *AT&T II*, 567 F.2d at 122.

[119] *AT&T I*, 551 F.2d 384, 394 (D.C. Cir. 1976).

decided.[120] First, *AT&T I* is interpreted to hold that the federal courts will generally have subject matter jurisdiction over interbranch information disputes as federal questions.[121] Second, even when the House of Representatives is involved, the fact that House legislative business does not continue beyond a given session (the House is not "a continuing body"[122]), the legal issues of an interbranch dispute do persist and, therefore, such cases are not mooted by the close of a session of Congress.[123] Third, interbranch conflicts between legislative need and executive privilege are justiciable.[124] Fourth, the "House as a whole has standing to assert its investigatory power,

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[120] *See generally* History of Refusals by Executive Branch Officials to Provide Information Demanded by Congress, Part I—Presidential Invocations of Executive Privilege Vis-à-vis Congress, 6 Op. O.L.C. 751 (1982); History of Refusals by Executive Branch Officials to Provide Information Demanded by Congress, Part II—Invocations of Executive Privilege by Executive Officials, 6 Op. O.L.C. 782 (1982); Memorandum from Ronald Regan, President, to the Heads of Exec. Dep'ts and Agencies, (Nov. 4, 1982) [hereinafter *Reagan Memo*], https://ipmall.law.unh.edu/ sites/default/files/BAYHDOLE/bremmerPDF/Memorandum_to_the_heads_of_executive_departments_and_agencies,_2-18-1983.pdf [https://perma.cc/K83H-R3XM] (regarding "Procedures Governing Responses to Congressional Requests for Information"). The Executive Branch's longstanding policy in response to a properly authorized oversight request has been to engage in the accommodation process by supplying the requested information "to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch." *Id*.; Response to Congressional Requests For Information Regarding Decisions Made Under the Independent Counsel Act*,* 10 Op. O.L.C. 91 (1986); GAO Investigation Concerning Manuel Noriega, 12 Op. O.L.C. 213 (1988); Congressional Requests for Information From Inspectors General Concerning Open Criminal Investigations, 13 Op. O.L.C. 77 (1989); Congressional Requests for Confidential Executive Branch Information, 13 Op. O.L.C. 153 (1989); Authority of Individual Members of Congress to Conduct Oversight of the Executive Branch, 41 Op. O.L.C. 76 (2017); ALISSA DOLAN ET AL., CONG. RSCH. SERV., CONGRESSIONAL OVERSIGHT MANUAL 65 (2014); TODD GARVEY, CONG. RSCH. SERV., PRESIDENTIAL CLAIMS OF EXECUTIVE PRIVILEGE: HISTORY, LAW, PRACTICE, AND RECENT DEVELOPMENTS 6 (2014) [hereinafter *Garvey I*] (footnotes omitted); TODD GARVEY, CONG. RSCH. SERV., CONGRESSIONAL SUBPOENAS: ENFORCING EXECUTIVE BRANCH COMPLIANCE 2 (2019) (footnote omitted); Brief for Elijah E. Cummings, John H. Conyers, Jr. et al. as Amici Curiae in Support of Dismissal, Comm. on Oversight & Gov't Reform v. Holder, 979 F. Supp. 2d 1 (D.D.C. 2013) (arguing "[t]he Constitution obliges the party seeking judicial intervention to first seek resolution through good-faith negotiation and accommodation"); Letter from Pat A. Cipollone, Counsel to the President to Rep. Elijah E. Cummings, Chairman, Comm. on Oversight & Gov't Ref., et al. 3 (Mar. 21, 2019) ("[T]he Constitution requires both the Executive and the Legislative Branch to engage in an accommodation process.").

[121] *AT&T I*, 551 F.2d at 394.

[122] *Id.* at 390.

[123] The logic of *AT&T I* on this point appears to be as follows: because oversight disputes lead to injunctive orders on subpoena compliance, the "question" of "any objection to continuance of the injunction after [the session ends]" could "be maintained by an ongoing party" despite the end of the given session of Congress. *Id.*

[124] Comm. on Judiciary v. McGahn, 951 F.3d 510, 525 (D.C. Cir. 2020), *vacated per curiam*, U.S. House of Representatives v. Mnuchin, No. 19-5176, 2020 WL 1228477 (D.C. Cir. Mar. 13, 2020). ("[T]he Committee's standing claims would have fared better under our case law, but not so today. Beginning in 1974, the D.C. Circuit experimented with an expansive view of legislative standing, permitting even individual Members of Congress to assert institutional injuries against the Executive Branch."). *See, e.g.,* Moore v. U.S. House of Representatives, 733 F.2d 946, 951 (D.C. Cir. 1984) (suit alleging a violation of the Origination Clause); Goldwater v. Carter, 617 F.2d 697, 702 (D.C. Cir. 1979) (en banc) (suit alleging a violation of the Treaty Clause), *vacated*, 444 U.S. 996 (1979); Kennedy v. Sampson, 511 F.2d 430, 435–36 (D.C. Cir. 1974) (suit challenging a pocket veto); *see also* Raines v. Byrd, 521 U.S. 811, 820 n.4 (1997) (collecting cases).

and can designate a member to act on its behalf."[125] Fifth, and lastly, there should be evidence of "compromise rather than . . . confrontation"—in short, settlement negotiations by Congress and the executive branch.[126] The *AT&T I* court's table-setting was instrumental to the substantive decision announced in *AT&T II*.[127]

Because *AT&T I* made short shrift of arguments against congressional subpoena or contempt enforcement on jurisdictional, mootness, or standing grounds,[128] *AT&T II* provides the relevant ripeness standard that has governed the last half-century of interbranch information disputes: a duly authorized congressional information request ("oversight") initiates the "implicit constitutional mandate to seek optimal accommodation . . . of the needs of the conflicting branches."[129] The D.C. Circuit has described this back-and-forth between the branches[130] as a constitutionally mandated process of accommodation by the parties of legislative needs and executive branch confidentiality interests.[131] Accommodation is "mandated" by the branches "on the expectation that where conflicts in scope of authority arose between the coordinate branches, a spirit of dynamic compromise would promote resolution of the dispute in a manner most likely to result in efficient and effective functioning of our governmental system."[132]

The heavy reliance upon the doctrine of accommodation, particularly by the Department of Justice, through its (read: the executive branch's) advisory department (the Office of Legal Counsel) and through its relevant litigating component (the Civil Division), is understandable to the degree that executive power formalists are generally skeptical of judicial review of

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[125] *AT&T I*, 551 F.2d at 391.

[126] *Id*. (citing Nixon v Sirica, 487 F.2d 700 (D.C. Cir. 1973)); *accord AT&T II*, 567 F.2d at 130–31 (describing the "[n]egotiation between the two branches" as "a dynamic process affirmatively furthering the constitutional scheme").

[127] *AT&T II*, 567 F.2d at 130–31.

[128] *AT&T I*, 551 F.2d at 391 ("It is clear that the House as a whole has standing to assert its investigatory power, and can designate a member to act on its behalf."); *accord* U.S. House of Representatives v. U.S. Dep't of Commerce, 11 F. Supp. 2d 76, 86 (D.D.C. 1998) (noting that "it [is] well-established that a legislative body suffers a redressable injury when that body cannot receive information necessary to carry out its constitutional responsibilities").

[129] *AT&T II*, 567 F.2d at 127.

[130] But never the Supreme Court. Note that the D.C. Circuit in *AT&T I* concedes that prior to 1976, "the only previous suit presenting a clash of congressional subpoena power and executive privilege [is] Senate Select Committee on Presidential Campaign Activities v. Nixon, 162 U.S. App. D.C. 183, 498 F.2d 725 (1974)." *AT&T I*, 551 F.2d at 390.

[131] *AT&T I*, 551 F.2d at 385. As the *AT&T I* court explained, because the Justice Department sought an injunction against AT&T's compliance with a House subpoena, the court permitted the House to intervene as "the real defendant in interest." *Id.*

[132] *AT&T II*, 567 F.2d at 127 (quoting Address by Hon. Henry J. Friendly (January 29, 1976) (U.S. Department of Justice Bicentennial Lecture Series)). In *AT&T II*, the D.C. Circuit held, "each branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation."

Executive action.[133] The Department of Justice, perhaps as a result of recent court losses,[134] has generally been willing to concede that certain interbranch information disputes are judicially reviewable, but only after the governmental parties to the dispute have exhausted negotiations and Congress has decided to compel (via a subpoena, contempt, or the judicial enforcement thereof) the Executive to accede to congressional demands.[135]

In illustrating this point, the Office of Legal Counsel in a controversial May 1, 2017 opinion, stated, "[T]he fundamental distinction between constitutionally authorized oversight and other congressional requests for information" depends upon whether the information request is from a committee, acting through its chairman or through committee action, or from an individual member who may not bind the committee as a whole.[136] The identity of the information requestor has legal consequences for the executive branch and "triggers the 'implicit constitutional mandate to seek optimal accommodation . . . of the needs of the conflicting branches.'"[137] Only these requests "are enforceable by the issuance of a subpoena and the potential for contempt-of-Congress proceedings."[138] In this sense, accommodation, by recognizing a legal distinction at the origin of a request, commits itself to judicially recognizable procedures, for "[u]pon receipt of a properly authorized oversight request, the Executive Branch's longstanding policy has been to engage in the accommodation process by supplying the requested information 'to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch.'"[139] Certainly, the Department of Justice recognizes accommodation as its least risky option, for the Department has, to date, been unwilling to file preliminary injunctions as a basis to take up to the Supreme Court its most resolute constitutional positions—the presidential communications privilege[140] or the testimonial

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[133] *See, e.g.*, Andrew Wright, *Constitutional Conflict and Congressional Oversight*, 98 MARQ. L. REV. 881, 889–90 (2014).

[134] Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53, 98 (D.D.C. 2008); Comm. on Oversight & Gov't Reform v. Holder, 979 F. Supp. 2d 1, 26 (D.D.C. 2013). Both *Miers* and *Holder* stand for the proposition that executive branch refusal to comply with a congressional subpoena is a sufficiently concrete individual injury for purposes of Article III standing.

[135] Authority of Individual Members of Congress to Conduct Oversight of the Executive Branch, 41 Op. O.L.C. 76, 78 (2017).

[136] *Id.* at 2–3.

[137] *Id.* at 3 (citing *AT&T II*, 567 F.2d at 127).

[138] *Id.*

[139] *Id.* (citing *Reagan Memo*, *supra* note 120).

[140] United States v. Nixon, 418 U.S. 683, 711–12 (1974); *In re* Sealed Case, 121 F.3d 729, 742 (D.C. Cir. 1997*); but cf. Garvey I*, *supra* note 120, at 1 ("[T]he Supreme Court has never addressed executive privilege in the face of a congressional demand for information.").

immunity of close presidential advisors[141]—at the risk that the Court limits the scope of the privilege.[142]

The position of the Department of Justice is that the presumption of the executive branch's, and particularly the President's, claim of absolute privilege against legislative compulsory process, as articulated in an April 30, 1941 letter from Attorney General Jackson to House Committee on Naval Affairs Chairman Carl Vinson,[143] has been overcome by *United States v. Nixon.*[144] In 1941, Attorney General Jackson, in exercising his discretion not to comply with a congressional request on grounds that disclosure was not in the "public interest" stated, "I am following the conclusions reached by a long line of distinguished predecessors in this office who have uniformly taken the same view."[145]

However, in *Nixon*, the Court rejected the President's counsel's argument against jurisdiction.[146] The Department of Justice's view for why *Nixon* overturns the prior Jackson posture rests on the *Nixon* Court's rejection of the "public interest" argument raised by the President as a basis to "preclude[] judicial review of a President's claim of privilege."[147] In relevant part, the *Nixon* Supreme Court stated,

> [t]o read the Art. II powers of the President as providing an absolute privilege as against a subpoena essential to enforcement of criminal statutes on no more than a generalized claim of the public interest in confidentiality of nonmilitary and nondiplomatic discussions would

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[141] *See, e.g.*, Testimonial Immunity Before Congress of the Former Counsel to the President, 43 Op. O.L.C. 108, 112 (2019).

[142] *AT&T I*, 551 F.2d at 390.

[143] Jackson Opinion, *supra* note 18, at 46–48 ("[T]he public interest does not permit general access to Federal Bureau of Investigation reports for information by the many congressional committees who from time to time ask it . . . .").

[144] *Id.*

[145] *Id.* at 49. Then-Attorney General Jackson also argue that executive branch discretion over disclosure of information is not subject to judicial review: "This discretion in the executive branch has been upheld and respected by the judiciary. The courts have repeatedly held that they will not and cannot require the executive to produce such papers when in the opinion of the executive their production is contrary to the public interests."

[146] *Nixon*, 418 U.S. at 693. President Nixon's counsel analogized intrabranch information disputes "to a dispute between two congressional committees." *Id*.

[147] *Id.* at 703. Note perhaps the most glaringly illogical statement the Supreme Court has ever made: "[s]ince this Court has consistently exercised the power to construe and delineate claims arising under express powers, it must follow that the Court has authority to interpret claims with respect to powers alleged to derive from enumerated powers." *Id.* at 704.

> upset the constitutional balance of "a workable government" and gravely impair the role of the courts under Art. III.[148]

The long-standing Department of Justice position in support of accommodation is curious given that, as a practical matter, it makes substantial concessions to the notion that interbranch information disputes can give rise to judicially-resolvable legal issues.[149] As an institutional matter, the accommodation doctrine reverses, as former Attorney Jackson illustrated, the presumption over several decades that disclosure of information in response to a congressional information request was fully vested within the executive branch's unreviewable determination as to whether disclosure was in "the public interest."[150] Today's executive branch would no longer countenance the idea that "constitutionally authorized oversight"[151] is subjugated to Executive discretion as to what is in the public interest.

The traditional executive branch position was that refusals to comply with congressional information requests should be resolved politically via the various tools available to Congress—impeachment and removal of an intransigent official or the withholding of appropriations—as well as electoral tools, *viz.*, going to the voters with the negative message of a Chief Executive who refused to answer the peoples' representatives. After 1974's *Nixon* decision, the Attorney General Jackson's posture became too extreme given the Supreme Court's rejection of the notion that the President was absolutely immune from inspection and his assertion of privilege unreviewable, and so, with executive privilege being a qualified privilege, and with congressional compulsion serving as a trigger to judicial review, accommodation became the next best hope for keeping interbranch disputes within the realm of government relations, not protracted legal battles with risks to the institutional positions of both the Executive and Congress.

As such, the Department of Justice avoids affirmatively going to court, yet maintains the argument that a given congressional complaint does not vest the court with jurisdiction on grounds that the issues are better resolved through continuing political negotiations rather than litigation. What the executive branch hopes to do is use the accommodation as a sort of bluff—a

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[148] *Id.* at 707.

[149] *See id.* at 712, n.19 ("We are not here concerned with the balance between the President's generalized interest in confidentiality and the need for relevant evidence in civil litigation, nor with that between the confidentiality interest and congressional demands for information, nor with the President's interest in preserving state secrets. We address only the conflict between the President's assertion of a generalized privilege of confidentiality and the constitutional need for relevant evidence in criminal trials.").

[150] Jackson Opinion, *supra* note 18.

[151] Authority of Individual Members of Congress to Conduct Oversight of the Executive Branch, 41 Op. O.L.C. 76, 78 (2017).

signal from one steadfast party to the other that if you go to federal court, you are likely to lose on the grounds that you refused to accommodate *enough*.

B. Accommodation and Legislative Impairment

During the Trump Administration, the D.C. Circuit and the Supreme Court reviewed several disputes between Congress and the executive branch centered on Congress's power to compel documents and testimony from political officials. The longstanding judicial doctrine governing congressional oversight of the Executive is known as the "accommodation doctrine."[152] Accommodation subsumes the constitutional principles implicit in the jurisdiction of federal courts to resolve information disputes as applied to conflicts between the federal branches (politically described as congressional oversight over administration).[153] Given the number of current disputes before the federal courts in the last administration—ranging from the Treasury Secretary's authority to withhold the President's tax returns from Congress, the President's authority to block his close advisers from compelled congressional testimony, and the President's ability to prevent Congress from accessing his private financial records—the accommodation doctrine is crucial to determining when matters of legislative impairment ripen into justiciable disputes.

On February 28, 2020, the D.C. Circuit decided *Committee on the Judiciary of the U.S. House of Representatives v. McGahn* in favor of the theory that the federal courts could not review the President's decision to prevent his close advisor from complying with compelled congressional testimony,[154] only to grant en banc review on March 13, vacating the February 28th judgment.[155] Albeit a pyrrhic victory for the Trump Administration, the initial D.C. Circuit opinion determined that the federal courts did not have the power to resolve an interbranch information dispute, therefore directly contradicting the Circuit's earlier opinion in *Trump v.*

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[152] *See* Daniel Epstein*, Congressional Oversight Disputes as Political Questions, Part I: The Decline of the Interbranch Accommodation Doctrine*, YALE J. OF REG. (June 8, 2020), https://www.yalejreg.com/nc/congressional-oversight-disputes-as-political-questions-part-i-the-decline-of-the-interbranch-accommodation-doctrine-by-daniel-epstein [https://perma.cc/E888-KUZG] ("When a congressional committee makes the decision to conduct an investigation of the Executive branch ('congressional oversight'), that choice commits Congress to obtaining a political, not legal, remedy for noncompliance.").

[153] *Id.*

[154] Comm. on Judiciary v. McGahn, 951 F.3d 510 (D.C. Cir. 2020), *vacated per curiam*, U.S. House of Representatives v. Mnuchin, No. 19-5176, 2020 WL 1228477 (D.C. Cir. Mar. 13, 2020).

[155] U.S. House of Representatives v. Mnuchin, No. 19-5176, 2020 WL 1228477, at *1 (D.C. Cir. Mar. 13, 2020) ("ORDERED. . . that the petition for rehearing en banc filed in *McGahn*, No. 19-5331, be granted and the judgment in that case filed February 28, 2020, be vacated.").

Mazars.[156] The February 28 panel, and the limited scope of the merits issues before the full en banc panel, focus on the question of a congressional committee's *standing* to seek judicial enforcement of contempt against a witness's refusal to testify or provide requested information.[157]

While D.C. Circuit case law governing interbranch information disputes appears at times to merge the doctrines of subject matter jurisdiction, standing, ripeness, and justiciability, such a coalescing is arguably justified in evaluating separation of powers conflicts, i.e., those between Congress and the executive branch.[158] During the Trump Administration, however, the executive branch has stretched,[159] if not argued against,[160] the traditional administrative exhaustion and ripeness threshold known as the accommodation doctrine.[161] Under this doctrine, the standing of a congressional committee to seek judicial enforcement of its compulsory orders against the executive branch is presumed, as is the power of the federal courts to resolve these interbranch controversies.[162] The accommodation doctrine, however, is theorized as a constitutionally required mandate given the federal courts' limited role in mediating disputes between the other two branches and, as such, requires a record of facts reflecting negotiations, as

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[156] Both *Mazars* and *Deutsche Bank* are *McGrain* clones where Congress is trying to obtain indirectly through a private party what it would be prohibited to obtain directly from the executive branch. Both the D.C. Circuit and the Second Circuit rejected the Justice Department's arguments that the relevant congressional committees lacked a "legislative purpose" to their oversight requests. Trump v. Mazars USA, LLP, 940 F.3d 710, 714 (D.C. Cir. 2019), *vacated and remanded*, 591 U.S. 848 (2020) (cert. petition to the Supreme Court granted at 104 S. Ct. 660 (2019)); *see also* Trump v. Deutsche Bank AG, 943 F.3d 627 (2nd Cir. 2019) (cert. petition to the Supreme Court granted at 140 S. Ct. 660 (2019)); McGrain v. Daugherty, 273 U.S. 135 (1927).

[157] *McGahn*, 951 F.3d 510.

[158] *See* Raines v. Byrd, 521 U.S. 811, 833 (1997) (Souter, J. and Ginsburg, J., concurring) ("interests of those[] who serve in the branches of the National Government lies far from the model of the traditional common-law cause of action at the conceptual core of the case-or-controversy requirement . . . .").

[159] Comm. on the Judiciary v. McGahn, 415 F. Supp. 3d 148, 173 (D.D.C. 2019) ("[T]he Court cannot accept DOJ's present reliance on carefully curated rhetoric concerning historical accommodations practices.").

[160] Comm. on Judiciary v. McGahn, 951 F.3d 510, 537 (D.C. Cir. 2020), *vacated per curiam*, U.S. House of Representatives v. Mnuchin, No. 19-5176, 2020 WL 1228477 (D.C. Cir. Mar. 13, 2020) ("In other words, absolute immunity means that McGahn need not honor the subpoena at all. But unlike an assertion of privilege to specific questions, which encourages the parties to use accommodation and other political tools, McGahn's absolutist stance has prevented their use and prematurely involved the courts."); Comm. on Judiciary of U.S. House of Representatives v. McGahn, No. 19-5331, 2019 WL 6999926 (D.C. Cir. Dec. 18, 2019).

[161] *See Raines*, 521 U.S. at 844. Where ripeness can be factually identified in disputes with non-governmental plaintiffs yet is effectively manufactured in the case of interbranch disputes: "[a]nd just as the presence of a party beyond the Government places the Judiciary at some remove from the political forces, the need to await injury to such a plaintiff allows the courts some greater separation in the time between the political resolution and the judicial review." Only in a post-Administrative Procedure Act world implying judicial review of congressional oversight over the executive branch could a doctrine exist that effectively grants jurisdiction to a congressional plaintiff once that plaintiff has exhausted an administrative negotiation process with the executive branch.

[162] *AT&T I*, 551 F.2d 384, 389 (D.C. Cir. 1976). The D.C. Circuit found that it has subject matter jurisdiction to resolve an interbranch information dispute under 28 U.S.C. § 1331.

well as concessions (hence "accommodation") between both branches concerning the balance between the legislative need for information and the executive branch's confidentiality interests.[163]

Under the accommodation doctrine, if the factual record reflects that both sides have inched closer to resolution, but negotiations have nevertheless broken down on legal grounds the parties are unwilling to compromise, then, so states the doctrine, the injury has sufficiently ripened to the level of judicial cognition, and federal courts will address the merits. The D.C. Circuit's current detour away from accommodation to the broader question of standing may simply be an overcorrection of sorts, given the number of separation of powers cases currently before the circuit and the Supreme Court.[164] In other words, the D.C. Circuit may be using a series of cases to justify a doctrinal return to an accommodation-governed jurisprudence.

But perhaps the detour signifies a need for a foundational rethinking of the role of the courts in interbranch information disputes generally, particularly in theorizing about the public law's governing role over politics and, specifically, congressional oversight over administration.

C. Doctrinal Difficulties with the Accommodation Doctrine

Congress's ability to directly investigate an entity is derived from its impeachment power (investigating the president and the administration) or its necessary and proper clause power (investigating the private sphere).[165] The Trump Administration, crisis consumed as it was, provided separation of powers scholars a potpourri of cases for analyzing issues of interbranch information disputes. If there is a judicial decision that reflects the inflection point in the Trump Administration's legal strategy to foreclose the

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[163] *See* Daniel Epstein, *Congressional Oversight Disputes as Political Questions, Part I: The Decline of the Interbranch Accommodation Doctrine*, YALE J. OF REG. (June 8, 2020), https://www.yalejreg.com/nc/congressional-oversight-disputes-as-political-questions-part-i-the-decline-of-the-interbranch-accommodation-doctrine-by-daniel-epstein [https://perma.cc/66GY-RT3H]; Daniel Epstein, *Congressional Oversight Disputes as Political Questions, Part II: Accommodation as an Intrabranch Doctrine Governing Committee Investigations*, YALE J. OF REG. (June 15, 2020), https://www.yalejreg.com/nc/congressional-oversight-disputes-as-political-questions-part-ii-accommodation-as-an-intrabranch-doctrine-governing-committee-investigations-by-daniel-epstein [https://perma.cc/CA84-PYVW].

[164] U.S. House of Representatives v. U.S. Dep't of Justice (*In re* Committee on the Judiciary), 951 F.3d 589, 603 (D.C. Cir. March 10, 2020); Comm. on the Judiciary v. McGahn, 415 F. Supp. 3d 148 (D.D.C. 2019); Trump v. Mazars USA, LLP, 940 F.3d 710 (D.C. Cir. 2019), *vacated and remanded*, 591 U.S. 848 (2020); U.S. House of Representatives v. Mnuchin, Nos. 19-5176, 19-5331, 2020 WL 1228477 (D.C. Cir. 2020) (under D.C. CIRCUIT HANDBOOK OF PRACTICE AND INTERNAL PROCEDURES 60 (2019) en banc was granted prior to the panel decision); Kupperman v. U.S. House of Representatives, 436 F. Supp. 3d 186 (D.D.C. 2019); Trump v. Deutsche Bank AG, 943 F.3d 627 (2nd Cir. 2019) (cert. petition to the Supreme Court granted at 140 S. Ct. 660 (2019)).

[165] Daniel Epstein, *"Drive-by" Jurisdiction: Congressional Oversight in Court*, 48 PEPPERDINE L. REV. 37, 44 (2020) [hereinafter Epstein (2020)].

justiciability of interbranch information disputes, it is Judge Griffith's February 28, 2020 decision in *McGahn* where in response to *AT&T I* and its doctrine of accommodation, he states, "[T]he entire analysis of the House's standing to intervene in *AT&T I* consists of a single sentence, followed by no citations. '[D]rive-by jurisdictional rulings of this sort' typically 'have no precedential effect.'"[166] Judge Griffith's position is that the Supreme Court's decision in *Raines v. Byrd*, a legislative standing case, definitively "compels the conclusion that we lack jurisdiction to consider lawsuits between the Legislative and Executive Branches."[167] Even the *McGahn* District Court, whose decision to enforce the subpoena for the testimony of the President's counsel was reversed by the D.C. Circuit, skeptically received arguments about accommodation, finding, "[T]he Court cannot accept DOJ's present reliance on carefully curated rhetoric concerning historical accommodations practices."[168] And certainly, Judge Griffith, despite his deprecation of the accommodation doctrine as a tool justifying judicial review, noted its "use" in avoiding "premature[] involve[ment]" of "the courts."[169] The *McGahn* decision will likely face reversal en banc, but where does the doctrine of accommodation go from here?

Despite the D.C. Circuit's stated reliance upon the accommodation doctrine—a jurisdictional doctrine—interbranch information disputes are not dismissed *sua sponte* by federal courts for lack of subject matter jurisdiction.[170] Inevitably, the relevant opinions on motions for summary judgment rest on analyses of standing, not the ripeness doctrine of accommodation, as the motivating legal theory underlying interbranch information disputes.[171] Within the context of federal diversity jurisdiction, the distinctions between standing, mootness, and ripeness have analytical value in informing jurisdictional requirements that reference requisite factual conditions. But in the context of federal question cases, particularly the separation of powers cases stemming from interbranch disputes, these

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[166] Comm. on Judiciary v. McGahn, 951 F.3d 510, 525-26 (D.C. Cir. 2020), *vacated per curiam*, U.S. House of Representatives v. Mnuchin, No. 19-5176, 2020 WL 1228477 (D.C. Cir. Mar. 13, 2020) (internal citation omitted).

[167] Raines v. Byrd, 521 U.S. 811, 833 (1997). *Raines* found that "no suit [addressed by the D.C. Circuit] was brought on the basis of claimed injury to official authority or power." *Id.* at 826; *accord McGahn*, 951 F.3d at 526.

[168] Comm. on the Judiciary v. McGahn, 415 F. Supp. 3d 148, 173 (D.D.C. 2019).

[169] *McGahn*, 951 F.3d at at 537.

[170] *See* FED. R. CIV. P. 12(b)(1).

[171] This is a distinction without a difference, for scholars and relevant practitioners would contend that under the accommodation doctrine, so long as non-litigation dispute resolution attempts breakdown, standing of the congressional plaintiff is presumed. However, given this sense of the accommodation doctrine, that standing is often addressed would be suggestive of the courts not relying upon accommodation as the relevant jurisdictional threshold.

doctrinal distinctions tend to be less relevant.[172] Thus, to the extent the D.C. Circuit utilizes the "accommodation doctrine," it should be understood as a catch-all doctrine for the importance of jurisdictional thresholds in evaluating interbranch information disputes.[173]

The executive branch, in its litigating positions, has argued that mootness, lack of standing, and lack of ripeness make a matter non-justiciable and deprive the federal courts of jurisdiction.[174] To illustrate, the Supreme Court has understood mootness as a threshold jurisdictional requirement that must be resolved before proceeding to the merits of a suit—functioning as a basis for granting a motion to dismiss for lack of subject matter jurisdiction.[175] In addressing how a petitioner avoids the mootness bar, the Supreme Court has instructed, "a litigant must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision."[176] Further, the Supreme Court has barred cases on mootness grounds when there is no longer a "concrete injury."[177] This language mirrors the threshold requirements for Article III standing established in *Lujan v. Defenders of Wildlife*, which articulated standing as an "irreducible constitutional minimum": a concrete and particularized and actual or imminent injury in fact which is fairly traceable to the defendant's action and likely redressed by a favorable judicial outcome.[178]

Standing is a "threshold requirement imposed by Article III of the Constitution"[179] which invokes federal court jurisdiction (power) to resolve a case or controversy.[180] Because standing requires that a plaintiff demonstrate a "personal stake in the outcome"[181] of litigation, a merely institutional injury asserted by a congressional committee in seeking to enforce a document or testimony request would be insufficient for

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[172] The D.C. Circuit has merged, in its analysis, jurisdiction, standing, and principles of exhaustion. Comm. on Judiciary v. McGahn, 951 F.3d 510, 526 (D.C. Cir. 2020), *vacated per curiam*, U.S. House of Representatives v. Mnuchin, No. 19-5176, 2020 WL 1228477 (D.C. Cir. Mar. 13, 2020); *id.* at 521–22 (referencing executive branch arguments that "the federal courts lacked jurisdiction to resolve these disputes, arguing that the branches have 'for centuries' followed a 'political accommodation process' to 'resolv[e] inter-branch disputes over requests for information'").

[173] Notionally, the public law jurisprudence in interbranch information disputes yields a distinction between not yet concrete (not ripe), no longer concrete (moot), and ripe, concrete and not moot (standing).

[174] Brief for the United States as Appellee at 16, *Rothe Development Corp. v. U.S. Dep't of Defense*, 543 F.3d 1023 (Fed. Cir. 2008), https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/rothe_fedcir.pdf#page=29 [https://perma.cc/JD5F-7T9V].

[175] *See* Deakins v. Monaghan, 484 U.S. 193, 199 (1988); *see also*, *e.g.*, FED. R. CIV. P. 12(b)(1); *accord* Preiser v. Newkirk, 422 U.S. 395, 401 (1972).

[176] Lewis v. Cont'l Bank Corp., 494 U.S. 472, 477 (1990).

[177] *Preiser*, 422 U.S. at 401.

[178] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).

[179] City of Los Angeles. v. Lyons, 461 U.S. 95, 101 (1983).

[180] *See* Flast v. Cohen, 392 U.S. 83, 94–101 (1968).

[181] Baker v. Carr, 369 U.S. 186, 204 (1962).

constitutional standing purposes.[182] *Lujan* held that an "injury" for purposes of standing is the "invasion of a legally-protected interest."[183]

Similar to how the doctrines of mootness and standing involve interchangeable standards, the Department of Justice has argued that "[t]he gravamen of ripeness is to determine if a suit is sufficiently concrete such that a genuine dispute exists between the parties."[184] Thus, concreteness is a key standard for mootness, standing, and ripeness. But what is the whole Congress's legally protected, concrete interest in an investigative matter by one House, by one committee within that House, based on an information request that was not initiated after a floor vote and certainly not subject to bicameralism?

While an "[a]bstract injury is not enough,"[185] it is often mere speculation[186] that executive branch noncompliance with an information request threatens Congress's ability to legislate for purposes of standing. Congress's need for information necessary to legislate can be remedied by individuals other than close presidential advisors or by seeking information not subject to executive privilege.[187] The President's aides or his internal secrets are less likely to be informative about legislative policy than information sought by the individuals and businesses who are directly affected by government policy.[188]

In the context of separation of powers disputes, the federal courts, and particularly the D.C. Circuit, have never clearly articulated the source of congressional authority to sue the executive branch for failing to comply with an information request. By assuming jurisdiction over interbranch information disputes as an inevitable reality after *Nixon*, accommodation becomes a catch-all for the interrelated legal standards encompassing subject matter jurisdiction, standing, ripeness, and mootness. To be most charitable to the Circuit's jurisprudence, we can conclude that the "accommodation doctrine" *writ large* is a judicial management tool for ensuring that jurisdictional thresholds are part of the diagnostic evaluation of separation of

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[182] Raines v. Byrd, 521 U.S. 811, 826 (1997).

[183] *Lujan*, 504 U.S. at 560–61.

[184] Brief for the United States as Appellee at 37, *Rothe Development Corp. v. U.S. Dep't of Defense*, 543 F.3d 1023 (Fed. Cir. 2008) (citing Abbott Labs v. Gardner, 387 U.S. 136, 148 (1967)), https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/rothe_fedcir.pdf#page=29 [https://perma.cc/JD5F-7T9V].

[185] City of Los Angeles v. Lyons, 461 U.S. 95, 101 (1983).

[186] *See, e.g.*, Eccles v. Peoples Bank, 333 U.S. 426, 431 (1948).

[187] *See* Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc) (requiring a showing that confidential executive branch documents are "demonstrably critical to the responsible fulfillment of the Committee's functions").

[188] *Id.* at 732 ("[L]egislative judgments normally depend more on the predicted consequences of proposed legislative actions and their political acceptability, than on precise reconstruction of past events; Congress frequently legislates on the basis of conflicting information provided in its hearings.").

powers disputes while at the same time granting the justiciability of such suits.[189]

Raines v. Byrd[190] provides the current framework governing legislative standing in interbranch controversies.[191] *Raines* requires that congressional members show they suffer a personal, rather than institutional, injury or that the executive branch's conduct nullifies their votes in order to superintend the executive branch judicially.[192] In its broadest formulation, *Raines* requires at least some injury to the official authority or power of a committee.[193] Under such a framework, commenters have inferred that the current Supreme Court would reject the claim that members of Congress, even acting through duly authorized committees, have standing to civilly enforce subpoenas for documents and testimony against the executive branch.[194] While undoubtedly a minority position, Judge Griffith's position is that *Raines* definitively "compels the conclusion that we lack jurisdiction to consider lawsuits between the Legislative and Executive Branches."[195]

That the accommodation doctrine seeks to force negotiations between the branches prior to providing judicial relief substantially parallels, if not incorporates, the requirement of administrative exhaustion before a regulatory action may be said to be final and, therefore, ripe for judicial review.[196] Accommodation as a ripeness doctrine, and particularly one of administrative exhaustion, makes sense in a post-Attorney General Jackson executive branch which was conceived as a collection of agencies subject to administrative procedures and the "continuous watchfulness" of Congress, rather than a unitary Executive Department acting with unreviewable discretion as to when disclosure of information is in the public interest.[197] The Supreme Court, prior to the Nixon era shift against Executive branch immunity, wrote that administrative exhaustion as a ripeness threshold

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[189] Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53, 68 (D.D.C. 2008) ("The Committee and several supporting amici are correct that *AT&T I* is on point and establishes that the Committee has standing to enforce its duly issued subpoena through a civil suit.").

[190] Raines v. Byrd, 521 U.S. 811 (1997).

[191] As further evidence of the fact that jurisdictional thresholds change meaning when the parties are branches of the United States federal government versus private citizens, see Duke Power Co. v. Carolina Envtl. Study Grp., 438 U.S. 59, 80 (1978) (standing provides an "assurance that the most effective advocate of the rights at issue is present to champion them").

[192] *Raines*, 521 U.S. at 826.

[193] *Id.* (finding that "no suit [addressed by the D.C. Circuit] was brought on the basis of claimed injury to official authority or power"); *accord* Comm. on Judiciary v. McGahn, 951 F.3d 510, 526 (D.C. Cir. 2020), *vacated per curiam*, U.S. House of Representatives v. Mnuchin, No. 19-5176, 2020 WL 1228477 (D.C. Cir. Mar. 13, 2020).

[194] Una Lee, *Reinterpreting Raines: Legislator Standing to Enforce Congressional Subpoenas*, 98 GEO. L.J. 1165, 1169 (2010).

[195] Comm. on Judiciary v. McGahn, 951 F.3d 510, 526 (D.C. Cir. 2020), *vacated per curiam*, U.S. House of Representatives v. Mnuchin, No. 19-5176, 2020 WL 1228477 (D.C. Cir. Mar. 13, 2020).

[196] *See* Abbott Labs v. Gardner, 387 U.S. 136, 148 (1967).

[197] Legislative Reorganization Act of 1946, Pub. L. 79-601, 60 Stat. 812 (codified in various sections of 2 U.S.C) (repealed, in part, 1995); Administrative Procedure Act, 5 U.S.C. §§ 551–559.

prevented federal courts "from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties."[198]

By forcing a congressional petitioner to first exhaust its need for information through a political process of negotiation with the agency, accommodation adopts the exhaustion presumption of administrative law that seeks to eschew judicial interference in policy disputes.[199] Regulatory disputes themselves center on congressional delegation of legislative rulemaking to administrative agencies which forces the judiciary to examine issues arising from a congressional decision to regulate, through the Executive branch, an area of commercial activity.[200] That the D.C. Circuit, the circuit court most familiar with federal administrative law, would aspire to resolve interbranch disputes in a similar fashion to resolving regulatory challenges fits within a framework of political deference. It should be at least plausible, as an argument, that the federal courts rely upon accommodation to avoid counter-majoritarian actions by the courts. Deference in the congressional oversight context parallels deference in the administrative policy context. The APA empowers affected parties to sue agencies upon exhaustion of their administrative remedies.[201] As such, the APA provides a right to judicial review and confers jurisdiction to the courts upon exhaustion and ripeness.[202] The hypothesis, then, is that "accommodation" functions as a sort of APA for congressional information requestors. Under both the APA and "accommodation," Congress has empowered the courts to replace otherwise political processes with the patina of legality. It is axiomatic, in the context of administration, that the replacement of politics in dealing with administrative agencies, viz., petitions by affected parties to Congress for intervention in agency action, has permitted the capture of agencies by special interests. As a conceptual parallel, the accommodation doctrine's delegation of political judgment to the courts in the context of intrabranch information disputes has weakened Congress's own institutional capacity to conduct politics. It is in this sense that the *Raines* Court's rejection of the ability for Congress to obtain standing via an institutional injury helps clarify

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[198] *Abbott Labs*, 387 U.S. at 148–49.

[199] Weinberger v. Salfi, 422 U.S. 749, 765 (1975) ("Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review.").

[200] Citizens for Responsibility & Ethics v. Am. Action Network, 410 F. Supp. 3d 1, 20 (D.D.C. 2019) ("Administrative exhaustion requirements ensure that an agency is able to take a first pass at the facts alleged and to make determinations using its relative expertise. Exhaustion also promotes conciliatory efforts.").

[201] Administrative Procedure Act, 5 U.S.C. §§ 551–559.

[202] *Id.* § 553.

the prior argument. For if Congress suffered an injury to its institutional capacities, then for the courts to provide a remedy would constitute a judicial superintendence of legislative power and would signal prima facie evidence of Congress's abdication of its own institutional remedies of inherent contempt, impeachment, removal, appropriations, and electioneering in favor of judicial paternalism.

That the task of identifying the sort of exhaustion or accommodation necessary to make a dispute ripe for resolution is itself an inexact science may explain the practical reliance by the D.C. Circuit on standing over-ripeness in resolving interbranch disputes. But it may also explain the general lack of judicial clarity on what standards govern public law matters, particularly those raising separation of powers concerns. Whether public law disputes involve challenges to administrative actions or disputes between Congress and the executive branch, the federal courts have used the administrative nature of such disputes to find legal issues capable of resolution without necessarily interrogating where, as a foundational matter, the Constitution justifies congressional supervision of the executive branch through oversight and then congressional delegation of such supervision to private parties through acts like the APA and its amendments.

Given judicial skepticism toward relying on accommodation as a framework for evaluating interbranch information disputes, the federal courts have an opportunity to reevaluate these disputes by grounding them in constitutional and statutory text. As noted above, Congress, in formalizing its committees, based its executive branch review authority as a function of congressional rules. Only in the aftermath of the Nixon presidency was judicial review of congressional oversight even fathomable—as noted below, the Supreme Court, in *Marshall v. Gordon*, while granting review of a dispute between a congressional committee and an executive branch official, determined that a congressional rule, as opposed to a law, cannot bind the Executive.[203] A different history characterizes congressional investigations of non-government persons and the judicial review thereof. Congressional investigations aimed at the development of public-facing regulatory standards were the antecedent to the modern administrative state. Such inquiries, separate from congressional proceedings based in Article I, § 5 (such as impeachment), are grounded in Article I, § 8's Necessary and Proper Clause and first found statutory articulation in "An act more effectually to

[203] Marshall v. Gordon, 243 U.S. 521 (1917).

enforce the attendance of witnesses on the summons of either House of Congress, or to compel them to discover testimony."[204]

As presented before the D.C. Circuit in *Mazars*, the House Oversight Committee subpoena to Mazars cited, as its authority, House Rule X, which authorizes the Committee to "investigate 'any matter at any time.'"[205] Standing committee jurisdictional rules trace back to the Legislative Reorganization Act of 1946.[206] The Legislative Reorganization Act of 1946 grounded congressional authority to "exercise continuous watchfulness" over the executive branch in Article I, § 5, clause 2, the Rules of Proceedings Clause.[207] Section 101 of the Legislative Reorganization Act states that "[t]he following sections of this title are enacted by the Congress [] [a]s an exercise of the rule-making power of the Senate and the House of Representatives[.]"[208] Given this legal context, the Supreme Court has definitively opined that resolutions derived under the Rules of Proceedings Clause are not enforceable against the executive branch.[209] On the two occasions prior to 1974 (when the Supreme Court decided *Nixon*), where Congress held executive branch officials in contempt (George Seward in 1869 and Snowden Marshall in 1916), both were grounded as necessary for the purposes of considering impeachment. Notably, Congress *could have* impeached former President Trump and his advisors Bannon and Navarro—preventing them from ever serving again in the federal government.

But if Congress as executive branch overseer versus Congress as regulator in need of information are distinguishable as a matter of constitutional and legal authority for purposes of judicial review, the accommodation doctrine would lack apparent utility. The problem *Mazars* introduces is that Congress may strategically target an executive branch official through an otherwise garden variety regulatory investigation. The same Oversight Committee that subpoenaed Mazars also filed suit against the General Services Administration for access to Trump Hotel documents,[210] and Oversight Committee members participated as plaintiffs in *Blumenthal v. Trump*,[211] both cases which, like *Mazars*, sought judicial sanction against the President

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[204] 11 Stat. 155, c. 19 (1857) (codified as 2 U.S.C. § 192); McGrain v. Daugherty, 273 U.S. 135, 174 (1927).

[205] Trump v. Mazars USA, LLP, 940 F.3d 710, 716 (D.C. Cir. 2019), *vacated and remanded*, 591 U.S. 848 (2020).

[206] Reorganization Act of 1949, Pub. L. No. 81-109, 63 Stat. 203 (1949).

[207] Legislative Reorganization Act of 1946, Pub. L. 79-601, 60 Stat. 812 (codified in various sections of 2 U.S.C.) (repealed, in part, 1995).

[208] *Id.*

[209] Marshall v. Gordon, 243 U.S. 521 (1917). Albeit largely dismissed by post-*McGrain* courts, Kilbourn v. Thompson, 103 U.S. 168 (1880), explicitly rejected the idea that Congress could judicially enforce its contempt power as a form of punishment against private parties; *accord* Anderson v. Dunn, 19 U.S. 204 (1821) (recognizing Congress's inherent contempt power against recalcitrant witnesses).

[210] Cummings v. Murphy, 321 F. Supp. 3d 92 (D.D.C. 2018).

[211] Blumenthal v. Trump, 335 F. Supp. 3d 45 (D.D.C. 2018), *rev'd*, 949 F.3d 14 (2020).

for alleged constitutional violations. The D.C. Circuit in *Blumenthal* and the D.D.C in *Cummings v. Murphy* rejected the notion that the congressional plaintiffs had standing to sue.[212]

The results of these cases, then, would make it difficult to argue that cases like *Mazars*, a dispute between Congress and a company, raise the sorts of separation of powers concerns that would invoke a bar to standing under *Raines v. Byrd*.[213] But not all federal information disputes raising separation of powers questions involve a live conflict between Congress and the executive branch. Questions about the scope of presidential communications privilege or the Office of the President's immunity from civil discovery[214] have been resolved in the context of citizen suits under information access statutes[215] as well as conflicts between presidentially appointed investigators like Independent Counsels.[216] In the context of congressional oversight hidden within a regulatory investigation, information law disputes between citizens with public rights against the government provide meaningful judicial standards for the significance and vitality of accommodation. Former D.C. Circuit Judge Merrick Garland's decision in Jud*icial Watch, Inc. v. U.S. Secret Service* "barred . . . end runs" to seek "indirectly" from the President information which would involve "separation-of-powers concerns" when sought directly by Congress.[217] As such, Congress should not be permitted to obtain a legal remedy by converting an oversight matter into a regulatory investigation when the evidence reflects a congressional failure to exhaust the political remedies available through the oversight process. An oversight matter like *Mazars* is resolved through either restricting the President's power legislatively (particularly through appropriations), impeaching and removing the President, removing the President through the electoral process, or utilizing public pressure to force the President to resign. When Congress pursues oversight and then seeks to avoid a political remedy by substituting the government target for a non-governmental one, it has failed to effectively depoliticize its regulatory investigation. Politicized regulatory investigations constitute oversight, which is not required to have a legitimate rulemaking purpose.[218]

The accommodation principle that requires the exhaustion of political remedies prior to a legitimate regulatory investigation being ripe for judicial review invokes several federal administrative law doctrines. First, it

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[212] *Id.*; Cummings, 321 F. Supp. 3d 92.
[213] Raines v. Byrd, 521 U.S. 811 (1997).
[214] Cheney v. U.S. Dist. Ct. for D.C., 542 U.S. 367, 370, 385 (2004).
[215] *See, e.g.*, Buzzfeed, Inc. v. FBI, 613 F. Supp. 3d 453 (D.D.C. May 7, 2020).
[216] *In re* Sealed Case, 121 F.3d 729, 734 (D.C. Cir. 1997).
[217] Jud. Watch, Inc. v. U.S. Secret Serv., 726 F.3d 208, 225–226 (D.C. Cir. 2013).
[218] Trump v. Mazars USA, LLP, 940 F.3d 710, 714 (D.C. Cir. 2019), *vacated and remanded*, 591 U.S. 848 (2020).

incorporates a requirement that Congress "exhaust" political remedies in making any initial choice to conduct congressional oversight before Congress can meaningfully pursue the same subject matter through a regulatory investigation.[219] Second, it applies the requirement that regulatory decision-making be free from political taint to Congress's regulatory investigations.[220]

The law of administrative agencies must inform congressional investigations for the argument to be valid. But this move is not difficult once we consider that any legislative power that can be validly delegated to the executive branch is judicially reviewable as ministerial rather than discretionary.[221] The Supreme Court has long sanctioned congressional delegation of its investigative authority to committees as legislative agencies.[222] In 1838, the Supreme Court in *Kendall v. United States* crafted a distinction between congressional regulation of the ministerial responsibilities of executive branch officials and the political duties of such officials which would be immune from congressional inspection.[223] The idea that Congress can assign ministerial duties to executive officers and monitor their compliance with such duties is a central ideology held by congressional oversight principals and good government advocates.[224]

The Supreme Court, the same year that both the Legislative Reorganization Act and the APA became law, held that agency exercises of the "subpoena power for securing evidence" with "the aid of the district court in enforcing it" is an "authority" "clearly to be comprehended in the 'necessary and proper' clause, as incidental to both its general legislative and its investigative powers."[225] Thus, in no uncertain terms, Congress's power

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[219] *See* Abbott Labs v. Gardner, 387 U.S. 136, 148–49 (1967); Weinberger v. Salfi, 422 U.S. 749, 765 (1975) ("Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review."); Citizens for Responsibility & Ethics v. Am. Action Network, 410 F. Supp. 3d 1, 20 (D.D.C. 2019) ("Administrative exhaustion requirements ensure that an agency is able to take a first pass at the facts alleged and to make determinations using its relative expertise. Exhaustion also promotes conciliatory efforts . . . .").

[220] Aera Energy LLC v. Salazar, 642 F.3d 212, 222 (D.C. Cir. 2011) ("[A]n agency must determine, and give effect to, the decision that would have been made had politics not intruded.").

[221] Kendall v. United States, 37 U.S. 524, 614 (1838).

[222] For instance, legislation passed in 1879 permitted Congress to delegate its adjudication of private claims against the United States (traditionally handled by the Committee on Claims) to a federal trial judge. Act of Feb. 3, 1879, ch. 40, 20 Stat. 278 (1879).

[223] *Kendall*, 37 U.S. at 610 ("There are certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the President. But it would be an alarming doctrine, that congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President. And this is emphatically the case, where the duty enjoined is of a mere ministerial character.").

[224] *See* Myers v. United States, 272 U.S. 52, 240 (1926) (Brandeis, J., dissenting).

[225] Okla. Press Publ'g Co. v. Walling, 327 U.S. 186, 214 (1946).

to conduct regulatory investigations can be delegated to quasi-legislative agencies. The theory of accommodation presented here, then, involves the application of administrative law principles to regulatory investigations by Congress to ensure they are not backdoor means of political oversight. Political exhaustion ensures that Congress's regulatory investigation is for a legitimate rulemaking (legislative) purpose.

III. THE MYTH OF ACCOMMODATION

In using a design method called difference-in-difference estimation, I analyze the causal effects of an April 2011 letter from the General Counsel of the Office of Management and Budget on a previously unstudied congressional oversight practice: collapsing traditionally separate panels of government and non-government witnesses into a single panel ("mixed panels"). While judicial review of interbranch information disputes typically conceives of accommodation in terms of the executive branch's liability for failing to fully accommodate congressional information requests, the doctrine contemplates accommodation as a constitutional requirement by both branches. My goal is to ultimately test whether congressional inquiries about executive branch information—even about former officials who are subsequently private citizens—are truly legalistic or simply political and outside the bounds of Article III adjudication.

The empirical design develops a novel causal test for whether Congress accommodates the executive branch in response to a formal request for a separate hearing panel. The empirical results, by controlling for committees both insulated from and exposed to the OMB letter on mixed panels and controlling for effects before and after treatment, show that Congress does not engage in accommodation in the case of an executive branch request, which, when combined with the analysis of recent D.C. Circuit cases and their sidestepping of the accommodation doctrine, leads to the conclusion that interbranch information disputes are by their nature political disputes, inappropriate for judicial resolution. The article, however, concludes that the essence of accommodation—a form of exhaustion and ripeness requirements—is nevertheless a useful doctrinal tool for evaluating appropriate congressional requests for judicial enforcement.

A. Recent Examples of Accommodation in Court

The D.C. Circuit's March 10, 2020 decision in *U.S. House of Representatives v. U.S. Department of Justice* (*In re Committee on the Judiciary*) involved the House Judiciary Committee's seeking access to grand jury materials under Federal Rule of Criminal Procedure 6(e)(3)(E)(i)

on the grounds that an impeachment process is a "judicial proceeding."[226] The District Court for the District of Columbia in this matter granted the House Judiciary Committee's grand jury records application on October 25, 2019, on grounds that "impeachment trials are judicial in nature and constitute judicial proceedings."[227] The D.C. Circuit willingly agreed with this analysis, affirming the district court's views that it was bound by "circuit precedent to conclude that an impeachment trial is a 'judicial proceeding.'"[228] When precedent is so refreshingly clear, the obvious may not be: it is the Senate, not the House, which tries impeachments under the Constitution.[229] And yet, in *In re Committee of the Judiciary*, the plaintiff was the House of Representatives, not the Senate.[230] The D.C. Circuit's reasoning was as follows: premise 1, a Senate impeachment trial is a judicial proceeding; premise 2, "[s]ince Rule 6(e) was enacted, federal courts have authorized the disclosure of grand jury materials to the House for use in impeachment investigations[;]"[231] premise 3, "the district court need only decide if the requested grand jury materials are relevant to the impeachment investigation and authorize disclosure of such materials without commenting on the propriety of that investigation,"[232] therefore, in conclusion, "because a Senate impeachment trial qualifies as a 'judicial proceeding' pursuant to Rule 6(e) and the [House] Committee has established a particularized need for the requested portions of grand jury materials, the district court's Order is affirmed."[233]

As a matter of logic, the Court never addressed how "the Committee's impeachment investigation" is itself a "judicial proceeding." Only in Judge Rao's dissent is the reasoning clarified by citing rule 6(e), to argue that "[a]n impeachment investigation is 'preliminar[y] to or in connection with a judicial proceeding.'"[234] But the investigation was complete before the D.C. Circuit made its decision, and it is puzzling why the D.C. Circuit did not

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[226] U.S. House of Representatives v. U.S. Dep't. of Just. (*In re* Comm. on the Judiciary), 951 F.3d 589, 590 (D.C. Cir. 2020), *vacated and remanded sub nom.* Dep't of Just. v. House Comm. on the Judiciary, 210 L. Ed. 2d 985 (2021).

[227] *In re* Application of Comm. on Judiciary, U.S. House of Representatives, for an Ord. Authorizing Release of Certain Grand Jury Materials, 414 F. Supp. 3d 129, 153 (D.D.C. 2019), *vacated and remanded sub nom.* Dep't of Just. v. House Comm. on the Judiciary, 210 L. Ed. 2d 985 (2021).

[228] *Id.* at 161; *see* McKeever v. Barr, 920 F.3d 842 (D.C. Cir. 2019); *Haldeman v. Sirica*, 501 F.2d 714 (D.C. Cir. 1974) (en banc) (involved a grand jury proceeding while an impeachment investigation was active, unlike *In re* Comm. on the Judiciary, 951 F.3d 589, where both the House investigation and Senate trial were completed prior to the issuance of the decision).

[229] U.S. CONST. art. I, § 3, cl. 6.

[230] U.S. House of Representatives v. U.S. Dep't. of Just. (*In re* Comm. on the Judiciary), 951 F.3d 589, 590 (D.C. Cir. 2020), *vacated and remanded sub nom.* Dep't of Just. v. House Comm. on the Judiciary, 210 L. Ed. 2d 985 (2021).

[231] *Id.* at 596–97.

[232] *Id.* at 597.

[233] *Id.* at 603.

[234] *Id.* at 606 (Rao, J., dissenting) (citing FED. R. CRIM. P. 6(e)(3)(E)(i)) (emphasis in original).

address mootness—instead, in dissent, observing, "[R]emand is necessary for the district court to address whether authorization is still warranted. . . whether such investigations are ongoing."[235] Judge Rao asks, "Why is this controversy not moot?" and responds, "Mootness, however, does not impact the district court's authorization of disclosure because authorization is a discretionary action under Rule 6(e)—it is part of the non-Article III supervisory power of the court over the grand jury."[236]

But the circuit court's supervisory power over the district court is created by law, which gives the D.C. Circuit statutory review over the D.C. district court, and thus, as Judge Rao recognizes, the supervisory power "is invalid if its conflicts with constitutional or statutory provisions."[237] Her view that, beyond authorization, the court's compelling disclosure "is an exercise of the Article III judicial power" means that mootness must be considered on questions regarding the judicial power to order executive branch compliance with a congressional request.[238] By refusing to consider whether the House Judiciary Committee investigation was moot at the time it came before the D.C. Circuit, the Circuit effectively allowed the district court's supervisory power over grand jury proceedings to displace the Constitution[239] and sidestepped the Supreme Court's interpretation of 6(e)'s use of "judicial proceeding" as "pending or anticipated" and "factually likely to emerge."[240]

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[235] *Id.* at 608.

[236] *Id.* at 609. Under this analysis, every request by any person under the Freedom of Information Act (FOIA) is "preliminarily to" a judicial proceeding in the same sense that the 2019 House impeachment investigation was, for a FOIA request *could* lead to a judicial proceeding just as a House investigation *could* lead to a referral to the Senate for trial. Let the hypothetical become granular: the FOIA request is for access to all grand jury material received by the House Judiciary Committee. It is sent to both the District Court for the District of Columbia and the Department of Justice. The court is undoubtedly likely to say it does not have possession or control over these records. But could the district court order the Department of Justice to produce the records via a petition by a FOIA requestor without suffering the administrative exhaustion requirements under 5 U.S.C. § 552? The D.C. Circuit seems to be committed to an answer here in the affirmative.

[237] *Id.* at 610 (quoting Bank of Nova Scotia v. United States, 487 U.S. 250, 254–55 (1988)).

[238] *Id.* at 606. Several circuits have recognized that Rule 6(e)'s disclosure provision is permissive, not mandatory. United States v. Parker, 469 F.2d 884, 888 (10th Cir. 1972); United States v. Sobotka, 623 F.2d 764, 766 (2d. Cir. 1980).

[239] The 2001 amendments to Rule 6(e)(3) read, "Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—(i) when so directed by a court preliminarily to or in connection with a judicial proceeding[.]" FED. R. CRIM. P. 6(e)(3). The "may" provides a basis for arguing that prior to issuing an order as it would apply to the executive branch against Congress, the court must apply the traditional doctrines that apply to resolving interbranch information disputes.

[240] United States v. Baggot, 463 U.S. 476, 480 (1983) ("Thus, it is not enough to show that some litigation may emerge from the matter in which the material is to be used, or even that litigation is factually likely to emerge. The focus is on the actual use to be made of the material. If the primary purpose of disclosure is not to assist in preparation or conduct of a judicial proceeding, disclosure under (C)(i) is not permitted."). The text of 6(e)(3) uses "preliminarily" not "preliminary." "Preliminarily" is only used as an adverb, *Preliminarily*, OXFORD ENG. DICTIONARY (3rd ed. Mar. 2007), https://www-oed-com.proxygw.wrlc.org/view/Entry/150210?redirectedFrom=preliminarily#eid, and means "[i]n a preliminary manner; by way of introduction; to begin with."; *id.* (referencing M. Faraday in *Philos. Trans.* (Royal Soc.) 120, 20 ("All these matters being preliminarily arranged, the final disposition of the tray and

At the time the House Judiciary Committee filed its petition to the court, no Senate impeachment trial was anticipated or likely because no House vote occurred; and, by the time the D.C. Circuit issued its opinion, the likelihood of an anticipated judicial proceeding was zero, for the Senate proceeding had already been completed.

The phantom of accommodation persists in *In re Committee of the Judiciary*. Consider the D.C. Circuit's conclusion that "[a]pplying the particularized need standard in this way in the impeachment context avoids the potentially problematic second-guessing of Congress's need for evidence that is relevant to its impeachment inquiry."[241] By the time the D.C. Circuit's opinion was released on March 10, 2020, the Senate had acquitted the President because the House determined to move to a vote to convict on December 19, 2019, without waiting for the courts to determine whether it could access the Mueller grand jury documents.[242] The Supreme Court has made clear that "Article III of the Constitution limits federal courts to the adjudication of actual, ongoing controversies between litigants. It is not enough that a controversy existed at the time the complaint was filed, and continued to exist when review was obtained in the Court of Appeals."[243] By failing to address mootness—the sort of jurisdictional threshold federal courts are constitutionally mandated to resolve at any point of a proceeding—

its charge is made.")); *accord Preliminary*, OXFORD ENG. DICTIONARY (3rd ed. Mar. 2007) (meaning "preliminarily"). That Congress specifically chose an adverb—a "word or lexical unit that modifies the meaning of a verb, adjective, or another adverb, expressing manner, place, time, or degree[]"—means "a judicial proceeding," as modified by an adverb ("preliminarily" with "to", a preposition), is used as an intransitive verb in prepositional passive whereby it means the "begin[ing] and carry[ing] on a[] [judicial] action or course of [judicial] action[]"; *Proceed*, definition 2. *intransitive* (also in prepositional passive), OXFORD ENG. DICTIONARY (3rd ed. Mar. 2007). Only if "a judicial proceeding" were a noun could it be modified by a separate, prior investigative proceeding; but then that investigation would not be "preliminarily to . . . a judicial proceeding" because adverbs do not generally modify nouns; *Adverb*, THE OXFORD DICTIONARY OF ENG. GRAMMAR (2 ed. 2014). As such, "preliminarily to . . . a judicial proceeding" makes grammatical sense only when "preliminarily to" modifies "a judicial proceeding" that is ongoing or ripe to begin—certainly not in any speculative sense, like an impeachment investigation that may or may not lead to a vote to convict and refer to the Senate for trial; *accord* United States v. Crolich, 101 F. Supp. 782, 784 (S.D. Ala. 1952) ("[P]reliminarily to or in connection with a judicial proceeding" contemplates pending proceeding which would necessitate disclosure).

[241] U.S. House of Representatives v. U.S. Dep't. of Just. (*In re* Comm. on the Judiciary), 951 F.3d 589, 599 (D.C. Cir. 2020), *vacated and remanded sub nom.* Dep't of Just. v. House Comm. on the Judiciary, 210 L. Ed. 2d 985 (2021).

[242] *Compare id.*, *with In re* J. Ray McDemott & Co., 622 F.2d 166 (5th Cir. 1980) (administrative agency not entitled to disclosure of grand jury materials when "no judicial proceeding was then pending and that it was possible that none would result from the investigation . . ."); *accord In re* Grand Jury Proceedings, 309 F.2d 440, 444 (3d Cir. 1962) (same); *In re* Special February 1975 Grand Jury, 662 F.2d 1232, 1239 (7th Cir. 1981) (same).

[243] Deakins v. Monaghan, 484 U.S. 193, 199 (1988) (internal citations omitted).

the D.C. Circuit very much engaged in the "potentially problematic second-guessing of Congress's need for evidence."[244]

B. A Legislative Prophylactic to Impairment: Mixed Hearing Panels

In this section, I develop a unique empirical strategy for testing the validity of the accommodation doctrine by employing original data and a quasi-experimental model of a previously unstudied congressional oversight practice—mixed panels, where committees decide to merge traditionally separate hearing panels for government versus non-government witnesses into a single panel. I then discuss the empirical results, which undermine the validity of the accommodation doctrine, for in the experiment, Congress, before litigation being ripe, ignored a foundational, constitutionally based executive branch position. As an empirical matter, the invalidity of the accommodation doctrine might simply suggest that disputes ripen for purposes of judicial review without evidence of negotiations and concessions. The empirical evidence, combined with the analysis of doctrinal gaps, supports the public law position that interbranch information disputes are non-justiciable and are best resolved through the political process.

In a world where legislation is the principal measure of legislative capacity, congressional enforcement against impairment is an institutional practice that often yields small electoral returns. Scholars, therefore, argue that members of Congress and their committees are strategic in using resources to fulfill their oversight functions.[245] For instance, while the number of congressional oversight hearings has increased substantially over

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[244] U.S. House of Representatives v. U.S. Dep't. of Just. (*In re* Comm. on the Judiciary), 951 F.3d 589, 599 (D.C. Cir. 2020), *vacated and remanded sub nom.* Dep't of Just. v. House Comm. on the Judiciary, 210 L. Ed. 2d 985 (2021); *accord* United States v. Ewart, 259 Fed. App'x. 235, 237 (11th Cir. 2007) (determining, as moot, the question of disclosure when judicial proceedings were no longer pending). The Circuit's decision in *In re Comm. on the Judiciary* is also inconsistent with *Raines* as most recently articulated by the D.D.C. in Cummings v. Murphy, 321 F. Supp. 3d 92, 108 (D.D.C. 2018). In *Murphy*, the D.D.C. cited Raines v. Byrd, 521 U.S. 811, 829 (1997), to argue the "Seven Member Rule" plaintiffs lacked authorization to bring this action. *Murphy*, 321 F. Supp. 3d at 116–17. Judiciary Chairman Nadler lacked authorization to file a petition to compel grand jury disclosure. The D.C. Circuit wholly failed to address this issue. Further, nowhere in the D.C. Circuit's analysis did it address Rule 6(e)(3)(F)'s requirement that "the petitioner must serve the petition on, and the court must afford a reasonable opportunity to appear and be heard to . . . the parties to the judicial proceeding[.]" FED. R. CRIM. P. 6(e)(3)(F)(ii). If the D.C. Circuit is strictly construing Rule 6(e)'s language such that a House investigation is "preliminarily to or in connection with a judicial proceeding" then it must certainly be the case that the actual "party" to that judicial proceeding cannot be the House but the Senate. We can only theorize that the Senate may have negotiated with the House to stay its investigation pending the results of the district court's order—or to instruct the district court that the House's proceeding to a conviction effectively mooted the House's investigation for purposes of the evidence to be considered by the Senate. The Circuit's decision not to read the context of 6(e)(3) to determine the requirements of the district court allowed it to very much second-guess Congress and involve itself in a political dispute.

[245] *See* Jason A. MacDonald & Robert J. McGrath, *Retrospective Congressional Oversight and the Dynamics of Legislative Influence over the Bureaucracy*, 41 LEGIS. STUD. Q. 899, 901, 913, 924 (2016).

time,[246] the amount of time spent per hearing has significantly decreased. Hearings can be used to develop legislative support from interest groups and constituents to increase the electoral value of oversight.[247]

If reducing the time costs of oversight while enhancing the frequency of hearings is a congressional preference, one tactic Congress can use to save time on hearings is having executive branch officials testify on mixed panels: hearings that combine governmental and non-governmental witnesses on the same panel of witnesses. This approach advances members' goals in two ways. First, it reduces the number of panels for a given hearing, saving time spent conducting oversight. Second, it raises the salience of the hearing by exposing regulators and regulated parties to the same congressional panel of members who can more efficiently play one witness's response against another's.

Mixed panels, while preferred by Congress, are not ideal for the executive branch. The Obama administration voiced its objections to mixed panels soon after the Republican party took control of the U.S. House of Representatives on January 5, 2011.[248] On April 1, 2011, newly vested House Oversight and Government Reform chairman, Darrell Issa, and subcommittee chairman, James Lankford, sent a letter to Office of Management and Budget (OMB) Director Danny Werfel seeking clarity on OMB's decision to decline the Committee's invitations for its senior officials to testify on panels with non-governmental witnesses.[249] On April 15, 2011, OMB's General Counsel, Preeta Bansal, responded to chairmen Issa and Lankford, refusing to allow an OMB official to testify on the same panel as a non-government official.[250]

In the letter, Ms. Bansal cited several constitutional principles to justify the administration's position. Specifically, Bansal argued, "It has long been Congress's practice across Presidential administrations to allow Executive Branch officials to testify on a first panel separate from non-governmental witnesses."[251] Bansal defended this practice as a "traditional congressional practice" that protected "important federal interests" and reflected "the appropriate comity for a co-equal branch of government."[252] Further, Bansal argued that the "historical accommodation of all-government panels for Executive Branch witnesses furthers important inter-branch cooperation."[253]

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[246] *See id.* at 902–03; ABERBACH, *supra* note 79, at 35.

[247] MacDonald & McGrath, *supra* note 245, at 901.

[248] *House Takeover: Boehner Elected Speaker of the House*, ABC NEWS (Jan. 4, 2011, 7:36 PM) https://abcnews.go.com/Politics/john-boehner-speaker-republicans-pledge-cut-grow-majority/story?id=12541614 [https://perma.cc/X55T-RB7N].

[249] Letter from Preeta Bansal, General Counsel, Office of Mgmt. and Budget, to Rep. Darrell Issa et al., Chairman, House Comm. on Oversight and Gov't Reform (Apr. 15, 2011) (on file with author).

[250] *Id.*

[251] *Id.*

[252] *Id.*

[253] *Id.*

Bansal argued that the respect Congress gave to its own Members when testifying who "are nearly universally afforded the opportunity to sit on a first panel comprised solely of their colleagues" is a privilege that ought to be "extended to high-ranking executive branch officials."[254]

The force of this letter cannot be understated. First, it represents the executive branch[255] taking a rare, absolute legal position in an interbranch information dispute. Second, the position is justified in constitutional terms[256] and is more aggressive than the positions of the Office of Legal Counsel, which will not contend that a congressional oversight position is invalid until Congress has sought to enforce an information request via compulsion (i.e., a subpoena).[257] Third, the position is justified in the language of "comity" and "accommodation," which has doctrinal significance within the D.C. Circuit, where interbranch information disputes are litigated.[258] Fourth, and perhaps most importantly, the letter has methodological value because it represents evidence of a request for bilateral accommodation from the executive branch to Congress rather than the more common reversal of roles, thus presenting a unique opportunity for measuring the effectiveness of accommodation—a doctrine the courts have considered to be the responsibility of both the executive and legislative branches.

Chairman Issa had the power to subpoena the attendance of the administration witness he sought but refrained. The Bansal letter represented a signal from the executive branch of a policy preference regarding congressional oversight that falls within the traditional accommodation of legislative need and executive branch interests in privilege, whether formal (in the sense of confidentiality) or in the idiomatic sense of being privileged from attendance as a witness in a way that is disrespectful to the office. As

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[254] *Id.*

[255] All executive branch legislative comments and hearing testimony is approved by OMB, so the Bansal Letter has administration-wide effects. *See* OFF. OF MGMT. AND BUDGET, OMB CIRCULAR NO. A-19 4 (1979), https://www.whitehouse.gov/wp-content/uploads/2017/11/Circular-019.pdf [https://perma.cc/R9B5-JKLF].

[256] The position taken by OMB in 2011 that an executive branch official must testify on an all-government panel is substantially similar in nature to arguments about the need for executive branch officials to have agency lawyers present during depositions. *See infra* note 257, as well as arguments concerning testimonial immunity of immediate presidential advisers. Certainly, forcing a regulator to appear before regulated parties also risks exposure of the confidentiality necessary for the effective process of executive branch decision-making.

[257] *See, e.g.*, Attempted Exclusion of Agency Counsel from Congressional Depositions of Agency Employees, 43 Op. O.L.C. 131, 137–43 (2019); Exclusion of Agency Counsel from Congressional Depositions in the Impeachment Context, 43 Op. O.L.C. 286, 286–87 (2019).

[258] TODD GARVEY, CONGRESSIONAL SUBPOENAS: ENFORCING EXECUTIVE BRANCH COMPLIANCE (2019), https://crsreports.congress.gov/product/pdf/R/R45653/1 [https://perma.cc/7FS4-YNK4].

stated in Bansal's letter, this policy was not simply unique to OMB but related to executive-legislative relations and the separation of powers.[259]

The Bansal letter presents a unique opportunity to understand how congressional oversight works in practice. Scholars typically assume congressional oversight is unidirectional; that is, Congress is an oversight principal watching over the executive branch agents in the form of departments and programs.[260] If so, oversight ought to be unaffected by executive branch preferences for how oversight is conducted. Simply because the Executive articulates principles of tradition, respect, and the separation of powers does not require lawmakers to shift their behavior. Mixed panels allow legislators to claim credit for oversight (mainly through the publicity associated with a hearing) without investing substantial time in conducting an oversight hearing. By mixing government and non-government witnesses into a single panel, a committee can increase the sort of interactions likely to generate media attention while reducing the opportunity costs that multiple panels offer members.[261] The practice of mixed panels coheres with the general congressional preference to maximize hearing frequency while minimizing hearing duration.

If we assume that Congress has a strong preference for mixed panels because they i) increase the likelihood of publicity for the Chairman and ii) reduce time costs, then we would hypothesize that the House Oversight Committee's responsiveness to the Bansal letter is statistically negligible. The main hypothesis I, therefore, seek to test is simple: The Bansal letter, which signified executive branch constitutional interests, had no effect on the House Oversight Committee's incentive to conduct mixed panels. The hypothesis that Congress ignores accommodation may have an executive branch-facing equivalent, as with the Bansal Letter, the executive branch took a public, final legal position against a congressional request without Congress threatening compulsory process.[262] When administrations have policies concerning the accommodation of congressional requests, they often implement them via informal politicization of executive branch departments

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[259] Letter from Preeta Bansal, General Counsel, Office of Mgmt. and Budget, to Rep. Darrell Issa et al., Chairman, House Comm. on Oversight and Gov't Reform (Apr. 15, 2011) (on file with author).

[260] MORRIS OGUL, CONGRESS OVERSEES THE BUREAUCRACY 4 (1976).

[261] KEVIN KOSAR ET AL., RESTORING CONGRESS AS THE FIRST BRANCH 1 (2016), https://kevinrkosar.com/wordpress/wp-content/uploads/2023/02/Kosar-et-al-Restoring-Congress-as-the-First-Branch.pdf.

[262] Memorandum from Steven A. Engel, Assistant Attorney General, Office of Legal Counsel, to Pat A. Cipollone, Counsel to the President, at 1–3 (Jan. 19, 2020), https://www.justsecurity.org/wp-content/uploads/2020/01/ukraine-clearinghouse-olc-memo-2020-01-19-house-authority-to-investigate.pdf [https://perma.cc/84FQ-JGYC] (regarding "House Committees' Authority to Investigate for Impeachment").

and agencies,[263] not via a public-facing policy statement. In this sense, because the Obama Administration, independent of compulsory process, made a final legal objection to a congressional request on grounds that Congress refused to accommodate the executive branch position, the letter can be conceived as an exogenous shock to committee behavior. The exogenous nature of the Bansal letter exposure is further supported by two facts: first, the last three decades of interbranch legal challenges have involved congressional plaintiffs, so there is no relevant jurisprudence for Congress to price out any risk of the executive branch as the injured party under the accommodation framework; second, as stated above, OMB reversed the accommodation dynamic by taking an absolute legal position and requesting comity from Congress—a move more typical of initial request letters from Congress to the executive branch.

The White House, which the Office of Management & Budget is a part of, does not generally send letters to Congress stating formal legal positions without review by the Department of Justice Office of Legal Counsel. Congress never sees the advice or revisions the Office of Legal Counsel (OLC) provides, which are protected under attorney-client privilege. Further, because OLC is overwhelmingly an institution of career government lawyers, their advice is always based on the interests of the executive branch as an institution and, in the context of congressional oversight, is aimed at encouraging accommodation and compromise to avoid litigation. When the OLC is involved in a response to Congress, it delays congressional enforcement of an oversight preference through an administrative scheme of negotiation and compromise. Thus, the standard executive branch oversight process of consulting with OLC prior to responding to Congress threatens exogeneity because congressional members can predictably expect that requests for confidential information or requests to the White House will likely never lead to direct compliance or complete denial. However, in the case of the Bansal Letter, the Oversight Committee's response was to simply accommodate and drop its request for a mixed panel. Upon investigation, the Department of Justice OLC disclosed that no responsive records exist of OLC staff consultations with the Office of Management and Budget's Office of General Counsel relating to the congressional request and OMB's responsive

[263] Burgess Everett and Josh Dawsey, *White House orders agencies to ignore Democrats' oversight requests*, POLITICO, (June 2, 2017), https://www.politico.com/story/2017/06/02/federal-agencies-oversight-requests-democrats-white-house-239034.

letter.[264] These facts support the exogenous nature of the Bansal Letter as applied to Congress.

To test this assumption, I introduce the phenomena of mixed panels as a new subject of study in the congressional oversight context. By modeling the effects of the Bansal letter, a formal conclusion of the accommodation process stating a final legal position on the separation of powers prior to any compulsory process on congressional proclivity for reducing hearing duration by consolidating government and non-government witness panels, I have an effective treatment of congressional hearings that allows for the assessment of whether the legal doctrine of accommodation is actually bilateral in that both branches engage in a give and take or whether, for practical purposes, Congress does not actually give anything to accommodate the Executive.[265] My hypothesis is that despite Chairman Issa's decision to cede to the Administration's objection, Congress's contemporary oversight preference—to maximize hearings and reduce their duration—means that when that preference and constitutional comity conflict, the legislative preference wins out. By sampling hearing panel data before and after an exogenous treatment in the form of a legal objection to mixed panels from the Office of Management and Budget to Congress, I can rely on unique conditions to test whether Congress accommodates the executive branch.

I collected data on all Oversight Committee hearings from the second session of the 111th Congress and the first session of the 112th Congress (thus comprising the period of January 3, 2010, to January 3, 2012) (these hearings occurred under both Democratic and Republican chairmen and during unified and divided government). Additionally, I collected all Oversight Committee hearings from the 110th Congress (Democratic Chairman under both divided then unified government) and then added in hearings up through the 114th Congress. I coded each hearing with a dummy variable to signify whether the hearing had any mixed panels. I then added a variable denoting whether the hearing occurred before or after the April 15, 2011, OMB letter. I also collected all hearings from the 111th Congress to the 114th Congress from the Senate Homeland Security and Governmental

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[264] Letter Requesting Information Under the Freedom of Information Act from Daniel Z. Epstein, to U.S. Dep't. of Justice (Mar. 29, 2020) (on file with author), "For records dated or covering the period of April 1, 2011, to April 15, 2011, I request access only to records evidencing the existence of exemption 5-protected communications between the Office of Legal Couns. and the Office of General Couns., Office of Mgmt. and Budget concerning OMB's April 15, 2011 letter to two congressional chairmen. The relevant letter is attached. This is a simple request because a reasonable search parameter would seek e-mails to and from employees of OLC with Preta Bansal (or any omb.eop.gov address) referring or relating to 'Issa' and/or 'hearing' and/or 'panel*'."

[265] *AT&T II*, 567 F.2d 121, 127 (D.C. Cir. 1977) ("[E]ach branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation.").

Affairs Committee as a control (led by a Democratic Chairman until the 114th Congress). Further, I use the Policy Agendas Dataset data on hearing duration, via days, as a control, in addition to using the identification of the party of the President, the party of the House, and the existence of divided government as controls for effects on mixed panel practices other than the Bansal letter. If the Bansal letter was an effective treatment, the likelihood of a mixed panel occurring by the House Oversight Committee would change after April 15, 2011, but the control group of Senate Homeland Security and Governmental Affairs hearings would be unaffected after the treatment. By collecting data from the end of one congressional session and the beginning of another, I am able to collect observations both before and after the letter stimulus. Due to the occurrence of a mixed panel being a binary dependent variable, I first test the relationship using a logistic regression.

TABLE 1: THE EFFECTS OF THE BANSAL LETTER ON THE LIKELIHOOD OF A MIXED PANEL

VARIABLES	(1) Unrestricted Model[266]	(2) Restriction: Removing Pres. Party Id	(3) Log-Odds of (1)	(4) Log-Odds of (1) dropping Div. Govt.
Divided Government	0.848*	-0.00491	1.047*	
	(0.496)	(0.378)	(0.546)	
Treatment	0.773***	1.151**	1.151**	1.151**
	(0.271)	(0.482)	(0.482)	(0.482)
Period	-0.857*	-0.610	-0.610	-0.610
	(0.476)	(0.540)	(0.540)	(0.540)
Days	0.305*	0.313*	0.313*	0.313*
	(0.159)	(0.166)	(0.166)	(0.166)
Party of the President	-0.800		-1.052*	-.00491
	(0.576)		(0.635)	(0.378)
Constant	-2.448***	-2.782***	-2.782***	-2.782***
	(0.349)	(0.509)	(0.509)	(0.509)
Observations	579	579	579	579

Standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1

[266] Model (1) included a variable for the party identification of the U.S. House of Representatives, which was dropped by the model due to its collinearity with the party identification of the President over the relevant time period.

TABLE 1A: LOG-ODDS OF THE EFFECTS OF THE BANSAL LETTER ON THE LIKELIHOOD OF A MIXED PANEL

VARIABLES	Mixed Panel (Calculating Odds Ratio) of Model (1)
Divided Government	2.336*
	(1.159)
Party of the President	.449
	(0.259)
Days	1.36*
	(0.216)
Treatment	2.17***
	(0.588)
Period	-0.424*
	(0.202)
Constant	.086***
	(0.030)
Observations	579

Standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1

The logit model at Table 1 and Table 1a model the effects on the likelihood of a mixed panel occurring as a result of party identification of the President, the existence of divided government, hearing duration, a variable which codes whether the hearing was a House Oversight Committee or Senate Government Affairs hearing (Treatment), and a variable which codes whether the hearing was pre- or post- the Bansal letter (Period). The model shows that over the relevant time period, for every change to a Republican President, the log odds of a mixed panel occurring decreases by 1.54 at the .05 level. When a unified government changes to a divided government, the log odds of a mixed panel occurring increases by 1.03 at the .05 level of statistical significance. Hearing length does not appear to affect the likelihood of a mixed panel. However, changing from an HSGAC to an Oversight Committee hearing increases the log odds of a mixed panel by .81 at a .01 level of statistical significance, and the change from pre-Bansal to post-

Bansal decreases the log odds of a mixed panel by 1.05 at the .05 level of statistical significance.

Restricting the model to only data within the oversight committee does not lead to any findings of statistical significance, whereas restricting the model to just HSGAC hearings leads to statistically significant effects on decreasing the log odds of mixed panels when the party of the President shifts Republican; and, as one changes from pre to post-Bansal while moving from unified to divided government, increases the log odds of a mixed panel. Increases in hearing days increase the log odds of a mixed panel by around .31 at a .1 level of statistical significance.

In order to make causal inferences, I construct a difference-in-difference design that treats the House Oversight Committee hearings from 2008–2015 as the treatment group, the Senate Homeland Security and Governmental Affairs hearings as the control group, and the Bansal letter of April 15, 2011, serving as the treatment which all subsequent hearings are exposed to in the data. Difference-in-difference design is a quasi-experimental design that makes use of the longitudinal hearing data from treatment (the House Oversight Committee) and control (the Senate Homeland Security and Governmental Affairs Committee) groups to obtain an appropriate counterfactual to estimate a causal effect. The design is being used to estimate the effect of the issuance of the Bansal letter by comparing the changes in outcomes over time between the House Oversight Committee, whose activities were directly sanctioned by the Bansal letter and Senate HSGAC, which was not directly placed on notice of an infraction by OMB.

TABLE 2: HOUSE AND SENATE OVERSIGHT COMMITTEE ACCOMMODATION OF ADMINISTRATION MIXED PANELS POLICY

VARIABLES	Model 1	Partisan Model (White House)	Oversight Duration Model	Partisan Model (House of Representatives)
Period	-0.0499	-0.153***	-0.104	-0.104
	(0.0435)	(0.0586)	(0.0797)	(0.0797)
Exposure of the OMB Letter (Treatment)	0.0379	0.0925**	0.149**	0.149**
	(0.0412)	(0.0457)	(0.0580)	(0.0580)
Divided Government		0.171***	0.153*	-0.00375
		(0.0634)	(0.0820)	(0.0582)
Duration			0.0593***	0.0593***

			(0.0229)	(0.0229)
Presidential Partisanship (Republican v. Democrat)		-0.140** (0.0675)	-0.157 (0.0976)	
House Partisanship (Republican v. Democrat)				0.157 (0.0976)
Constant	0.179*** (0.0320)	0.111*** (0.0427)	0.00639 (0.0579)	0.00639 (0.0579)
Observations	678	678	579	579
R-squared	0.007	0.018	0.031	0.031

Standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1

Model 1 shows that before the Bansal letter, 22% of House Oversight Committee hearings had mixed panels whereas 18% of Senate Government Affairs Committee hearings had mixed panels. After the Bansal letter, 19% of Oversight Committee hearings are mixed panels while 13% of Government Affairs hearings use mixed panels. This might lead one to think that given divided government increases the likelihood of mixed panels, the Bansal Letter must have had a behavioral effect. The declines after the treatment and the differences between the houses are not statistically significant, however. When adding the covariate of the identification of the party of the President, we see no difference in the coefficients and no statistical significance.

Substituting the party of the White House for a divided government indicator reflects a decline in mixed panels by both groups (after the treatment, the oversight committee has nearly twice the rate of mixed panels than Senate government affairs) but reveals no significant difference between the treatment and control groups prior to the Bansal letter and those after it. When both the divided government and presidential party variables are used, the declines in mixed panels and the treatment differences are not significant, and the model results do not change as a variable for partisan identification of the U.S. House of Representatives is added or when the presidential party

is excluded from the model. Adding a hearing duration covariate does not lead to statistically significant findings either.

C. The Failure of Judicial, Rather Than Legislative, Rules for Congressional Exhaustion

Using multiple models and empirical strategies, the results show the executive branch's signaling that Congress engaged in a judicially reviewable infraction of the constitutional requirement of accommodation had no effect on congressional oversight behavior. This empirical finding comports with the analysis of the relevant jurisprudence in interbranch information disputes where accommodation is often sidestepped in favor of the substantial likelihood that, e.g., the U.S. District Court for the District of Columbia will find congressional standing. Recent D.C. Circuit decisions have reflected both Congress and the executive branch are increasingly disinclined to wait for the exhaustion of the accommodation process before seeking judicial relief.[267] These findings that accommodation is neither relied upon as a threshold to limit judicial review nor embraced by the interbranch parties as an alternative to litigation should further persuade practitioners and jurists that congressional oversight of the executive branch presents government relations issues, not judicially manageable legal standards capable of resolution.[268] Further, the novel empirical approach tests an aspect of accommodation not tested in the courts: the failure of Congress to accommodate executive branch requests concerning access to information.

Like administrative law under the guise of the APA, the accommodation doctrine provides a legal veneer to an otherwise political process. Accommodation makes the task of political negotiation the province of

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[267] Comm. on Judiciary v. McGahn, 951 F.3d 510, 537 (D.C. Cir. 2020), *vacated per curiam*, U.S. House of Representatives v. Mnuchin, No. 19-5176, 2020 WL 1228477 (D.C. Cir. Mar. 13, 2020) ("In other words, absolute immunity means that McGahn need not honor the subpoena at all. But unlike an assertion of privilege to specific questions, which encourages the parties to use accommodation and other political tools, McGahn's absolutist stance has prevented their use and prematurely involved the courts.").

[268] Archibald Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383, 1427 (1974) (An interbranch information dispute "lends itself better to solutions negotiated through the political process than to an 'either-or' judicial determination."); *accord* Michael Stokes Paulsen, *Nixon Now: The Courts and the Presidency After Twenty-five Years*, 83 MINN. L. REV. 1337, 1341, 1375–78 (1999) (arguing that interbranch disputes should be politically resolved, not through an "ad hoc judicially-created constitutional balancing test"); Todd Peterson, *Prosecuting Executive Branch Officials for Contempt of Congress*, 66 N.Y.U. L. Rev. 563, 626–31 (1991) ("The courts are ill-equipped to resolve executive privilege disputes."); Gary J. Schmitt, *Executive Privilege: Presidential Power to Withhold Information from Congress*, in THE PRESIDENCY IN THE CONSTITUTIONAL ORDER 154, 178–82 (Joseph M. Bessette & Jeffrey Tulis eds., 1981) ("[Such a judicial role] is constitutionally suspect, potentially ineffective, and, in the end, most imprudent."). That congressional oversight practice has become a subdivision of white-collar practices at corporate law firms is telling about the over-legalism of government relations—a fact that has constitutional implications. Certainly, if congressional investigations should be part of government relations versus litigation, the same ought to be true of quasi-judicial, quasi-legislative agency investigations. And yet the latter make up much "white collar" work today.

litigators, not lobbyists, like how the APA made the task of relations with federal agencies a subject of legal practice.[269] That Congress, when given a choice between political action or legal action to enforce compliance with its interests, chooses the latter has immediate implications for the individuals seeking remedies from federal regulatory activities, for Congress's own vigilance at overseeing potential agency abuses is decidedly not the subject of efficient political action but a slow judicial process. It is an American instinct that representation from one's Congress (or protection of the law via the delegation of legislative power to administrative agencies) does not require one to go to court.

There are clear implications here for enforcing against the criminalization of legislative impairment. Federal public law jurisprudence must avoid any reliance on legal standards that displace core functions of the other branches of national government. This dictum, as applied to impairment disputes between Congress and individuals, aims to prevent a readiness, on behalf of Congress, to resolve its political disputes through judicial means. If Congress seeks a remedy to a witness's not fully complying (or complying at all) with a request for information, Congress may utilize its inherent powers of contempt and arrest.

By subjecting congressional inquiries of individuals to legal terms, the courts risk depriving Congress of using precisely those political tools that animate congressional capacity to influence how laws are implemented and enforced. The judicial instinct must not be interested in finding law-like issues in a morass of policy conflict but instead, identify the political remedies that have not been explored as a reminder of what is beyond the power of the courts. Otherwise, federal courts aggrandize their authority over majoritarian institutions. The courts have a responsibility, when finding against jurisdiction, to be transparent about the responsibility of the representative branches to participate fully in politics, no matter how disputatious. Under any alternative, each chief victory in the judicial resolution of interbranch information disputes is not simply an occasion for observing the awkward posture of the courts when actively managing legislative business but instead serves a more permanent, permissive

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[269] Archibald Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383, 1427 (1974) (interbranch information dispute "lends itself better to solutions negotiated through the political process than to an 'either-or' judicial determination"); *accord* Michael Stokes Paulsen, *Nixon Now: The Courts and the Presidency After Twenty-five Years*, 83 MINN. L. REV. 1337, 1341, 1375–78 (1999) (arguing that interbranch disputes should be politically resolved, not through an "ad hoc judicially-created constitutional balancing test"); Todd Peterson, *Prosecuting Executive Branch Officials for Contempt of Congress*, 66 N.Y.U. L. Rev. 563, 626–31 (1991) ("The courts are ill-equipped to resolve executive privilege disputes.").

endorsement of the legislative abdication of its constitutional responsibility to the courts.

IV. THE ROLE OF LEGISLATIVE PROCEDURE AS AN EXHAUSTION DOCTRINE

It is supposed that Article I, § 5 ("[e]ach House may determine the Rules of its Proceedings") provides the legal justification for Congress's power to demand compliance with its subpoenas.[270] In *Marshall v. Gordon*, the Supreme Court definitively opined that compulsory resolutions derived under the Rules of Proceedings Clause are not enforceable against the executive branch even as U.S. Attorney Gordon Marshall was arrested by the House Sergeant of Arms.[271] The Rules of Proceedings Clause presents a basis for congressional enforcement of contempt and on the two occasions prior to 1974 where Congress held executive branch officials in contempt (customs official George Seward in 1869 and U.S. Attorney for the Southern District of New York Snowden Marshall in 1916) both were grounded as necessary for the purposes of considering impeachment.[272] That fact would be enough to remove the matter from the jurisdiction of the federal courts. Had the Supreme Court decided not to gloss over the impeachment root it would be likely that questions of judicial enforcement of congressional subpoenas would be non-justiciable on precisely the ground that the remedy for non-compliance with a subpoena is legislative removal, presidential removal, or electoral removal. That *Marshall v. Gordon* was decided subsequent to *In re Chapman* (relied on by *McGrain* and concerning the use of compulsory process against private citizens for purposes of investigating members of Congress) and prior to *McGrain* reflects the Court's recognition of the distinction between contempt of executive branch officials versus contempt of private citizens and that while the latter were justiciable, the former was not.[273]

The power of congressional oversight over the bureaucracy is separate from the congressional power to investigate the private sphere for the purpose of legislating. The Legislative Reorganization Act of 1946 grounded congressional authority to "exercise continuous watchfulness," i.e., oversight, over the executive branch in Article I, § 5, clause 2: the "Rules of Proceedings Clause."[274] Section 101 of the Legislative Reorganization Act

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[270] Memorandum of Law in Support of Pl.'s Mtn. for Summ. J. at 23 n.63, *Comm. on Ways and Means, U.S. H.R. v. U.S. Dep't of Treasury*, No. 19-01974 (D.D.C. 2021) (citing U.S. CONST. art. 1, § 5; Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 505 (1975)).

[271] Marshall v. Gordon, 243 U.S. 521 (1917).

[272] 3 ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 1699, at 55–59 (1907); Marshall v. Gordon, 243 U.S. 521 (1917).

[273] *Marshall*, 243 U.S. at 536.

[274] Legislative Reorganization Act of 1946, Pub. L. No. 79-601, 60 Stat. 812, 832 (1946) (repealed, in part, 1995)

states that "[t]he following sections of this title are enacted by the Congress [] [a]s an exercise of the rule-making power of the Senate and the House of Representatives[.]"[275] For over a century, the Supreme Court has been bound by the precedent that congressional resolutions derived under the Rules of Proceedings Clause are not enforceable against the executive branch.[276] The weight of scholarly evidence makes it obvious that congressional oversight inquiries, unlike regulatory investigations, primarily serve a partisan and election-oriented purpose.[277] As such, congressional oversight does not require a legislative purpose as it is inherently political. As I have argued elsewhere, the *McGrain v. Daugherty* decision, which is relied upon to support the proposition that congressional oversight requires a valid legislative purpose, was not about congressional oversight at all but rather about legislative regulations of the private sphere.[278]

The lesson from *McGrain* is that courts must layer a set of presumptions on top of any legislative impairment case against a non-government individual: in *McGrain* that was plainly obvious in the form of a resolution voted upon by the full camera of Congress and fully consistent with stated cameral rules. But the most important procedural safeguard in the congressional power to investigate the private sphere, which *McGrain* instructs is grounded in Article I, §8's "Necessary and Proper" clause, is the legislative need to establish a clear legislative purpose for its investigations.[279] Regulatory investigations of the private sphere are clearly justiciable. In the same year that the Legislative Reorganization Act became law, the Supreme Court, relying upon *McGrain*, held that agency exercises of the "subpoena power for securing evidence" with "the aid of the district court in enforcing it" is an "authority" "clearly to be comprehended in the 'necessary and proper' clause, as incidental to both its general legislative and its investigative powers."[280] Such judicial enforcement of regulatory subpoenas was justified as intrinsic to Congress's power to investigate the private sphere: "[T]o deny the validity of the orders would be in effect to deny not only Congress' power to enact the provisions sustaining them, but

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[275] *Id.* at 814.

[276] *See* Marshall v. Gordon, 243 U.S. 521 (1917).

[277] *See* KENNETH LOWANDE & JUSTIN PECK, CONGRESSIONAL INVESTIGATIONS AND THE ELECTORAL CONNECTION 1 (2015), https://www.vanderbilt.edu/csdi/events/LowandePeck_CandH.pdf [https://perma.cc/3TWK-G4XL]; Austin Bussing & Michael Pomirchy, *Congressional Oversight and Electoral Accountability*, 1 (Aug. 9, 2021), https://pomirchy.github.io/files/BussingPomirchyOversightModel210808.pdf [https://perma.cc/ EFN3-PPM7] (finding electoral considerations to be a key driver of variation in oversight activity).

[278] Epstein, *supra* note 8.

[279] *See* 11 Stat. 155, c. 19 (1857) (codified as 2 U.S.C. § 192), https://tile.loc.gov/storage-services/service/ll/llsl/llsl-c34/llsl-c34.pdf#page=177 ("An act more effectually to enforce the attendance of witnesses on the summons of either House of Congress, and to compel them to discover testimony.").

[280] Okla. Press Publ'g Co. v. Walling*,* 327 U.S. 186, 214 (1946).

also its authority to delegate effective power to investigate violations of its own laws, if not perhaps also its own power to make such investigations."[281]

Unlike its post-Trump Administration posture, the U.S. Attorney's Office for the District of Columbia has not traditionally enforced congressional requests for prosecution. The rationale is straightforward: contempt votes tend to happen when the party in control of the relevant House opposes the party in control of the executive branch. The U.S. Attorney, appointed by the executive branch, decides not to bite the hand that feeds him. It should be obvious that the Congress which found Stephen Bannon and Peter Navarro in contempt was controlled by the party opposite to that of the administration in which those two individuals served.

As shown in this Article, no prosecution where the underlying illegal act related to a congressional proceeding should be ripe for Article III adjudication unless and until Congress has made a contempt determination. Congress never held President Trump in contempt for allegedly obstructing or interfering with the certification proceeding. That fact should have been determined by the U.S. District Court for the District of Columbia as a missing prerequisite to Article III adjudication.

Tellingly, both Bannon and Navarro asserted various privileges to justify their non-compliance with the inquiries of the January 6 Select Committee. The privileges asserted were not common law ones that attend private conduct but constitutional ones governing executive branch activities. Ironically, it was now Attorney General Garland, as Judge, who opined that inquiries of individuals could not be end runs to avoid roadblocks for otherwise direct inquiries of the executive branch.[282] The practice of executive branch officials asserting immunity from congressional process, typically the request for testimony, ripens under the law only once Congress has decided to subpoena that official or, when that subpoena is not complied with, held that official in contempt.[283] If the President is presumably immune from congressional testimony without a subpoena or contempt, it logically follows that the President is immune from liability before Congress for crimes against that body when no contempt occurred.

A. Internal Procedures Against Legislative Impairment

Congressional investigations of non-government persons under Congress's authority to regulate intelligibly pursuant to Article I, § 8's Necessary and Proper Clause first found statutory articulation in "an act more

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[281] *Id.* at 201.

[282] Jud. Watch v. U.S. Secret Service, 726 F.3d 208 (D.C. Cir. 2013).

[283] Testimonial Immunity Before Congress of the Former Counsel to the President, 41 Op. O.L.C. 1, 12 (2019).

effectually to enforce the attendance of witnesses on the summons of either House of Congress, and to compel them to discover testimony."[284] However, the legitimacy of compulsory process against individuals must be grounded in an exhaustive procedural purpose. A legalistic understanding of a political process should come as a final determination after a lengthy legislative process—not as a prophylactic remedy. The courts must decline to adjudicate claims it is ill-equipped to hear.[285] This is especially true given the strong empirical evidence outlined in Part III that Congress's investigative motives are universally political.[286] In the cases of Bannon and Navarro (and likely future, former government officials), the concern is that Congress's investigations are simply an "exercise in congressional position taking, one that serves members' electoral interests" *and* influence interbranch relationships and the president's political capital.[287] As political scientists explain, "the individual members who are most active in spearheading an investigation are likely to gain publicity that is often an individual benefit—helping boost their reelection and personal power—even as they contribute to the collective good of congressional power."[288]

B. A Legislative Impairment Exhaustion Doctrine

Regulatory oversight is specific to a policy domain where procedural violations directly and discretely harm a particular interest group and its members.[289] This distinction between political oversight and regulatory oversight is rooted in the law of congressional oversight. When Congress conducts oversight, it can investigate the private sphere or investigate the bureaucracy.[290] The distinction between Congress's political and regulatory oversight conveys the difference in the choice of investigations.[291] This distinction has been used by scholars to describe Congress's options when it chooses to conduct inquiries directly.

The chief doctrinal conclusion from this Article is that even in cases of contempt of private individuals, procedural exhaustion—even if only a threat of referral to the Department of Justice or the threat of arrest by the cameral

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[284] 11 Stat. 155, c. 19 (1857) (codified as 2 U.S.C. § 192).

[285] Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 66 (1975) (Brennan, J., dissenting).

[286] GRAY W. COX AND MATHEW D. MCCUBBINS, LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE U.S. HOUSE OF REPRESENTATIVES (1993); *Congressional Investigations*, U.S. Capitol Visitor Center https://www.visitthecapitol.gov/explore/exhibitions/congressional-investigations [https://perma.cc/2K7A-UC4M].

[287] Douglas L. Kriner & Eric Schickler, *Investigating the President: Committee Probes and Presidential Approval, 1953-2006*, 76 J. OF POL. 521, 521 (2014).

[288] *Id.* at 522.

[289] *See* ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM 10 (2023) (distinguishing between political and legal constitutionalism).

[290] Epstein (2020), *supra* note 165, at 37.

[291] *Id.* at 40–41.

Sergeant of Arms provides certain judicially manageable standards that can alleviate the need for courts to adjudicate procedural violations.[292] The Supreme Court has held that contempt and subsequent prosecution was "*diverso intuit*" and could be separately exercised. This line of cases is finally clarified in *Marshall v. Gordon*,[293] where the Supreme Court dealt directly with the kind of punishment Special Counsel Jack Smith or the U.S. Attorney for the District of Columbia sought against former Trump administration officials: "the right to prevent acts which in and of themselves inherently obstruct or prevent the discharge of legislative duty or the refusal to do that which there is an inherent legislative power to compel in order that legislative functions may be performed."[294]

The *Gordon* Court clarified that this right to prevent legislative obstruction is in the original subject matter jurisdiction of the legislature, not the courts.[295] *Gordon* clarified that the prosecution for contempt was an "implied power to deal with contempt, that is, the accessory power possessed to prevent the right to exert the powers given from being obstructed and virtually destroyed."[296] In short, there may be no prosecution for contempt without Congress first holding an official in contempt.[297] And there is no prosecution for post-contempt legislative impairment without exhausting tools like impeachment proceedings or threatened arrest by Congress.[298]

As a doctrinal matter, there is a problematic legal wrinkle even for those who suppose a former President may be criminally prosecuted for his official acts while President. That wrinkle, it turns out, is particularly clustered in the case of Special Counsel Jack Smith's case against former President Trump in the U.S. District Court for the District of Columbia. The issue complicating the already nuanced question of presidential immunity from prosecution is the fact that the Special Counsel applied all of the crimes referenced in the indictment, 18 U.S.C. § 371; 18 U.S.C. § 1512(k); 18 U.S.C. §§ 1512(c)(2), 2; and 18 U.S.C. § 241 to a congressional proceeding or function where, as a customary matter, those crimes do not ripen unless and until Congress has first found the defendant (in this case, the former President) in contempt of Congress.[299]

Normatively, when Congress must depend upon law enforcement and the courts to remedy harms to its own institutional sanctity, its power and

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[292] *E.g.,* Lujan v. Defenders of Wildlife, 504 U.S. 555, 590 (1992).
[293] Marshall v. Gordon, 243 U.S. 521, 542 (1917).
[294] *Id.*
[295] *Id.* at 538.
[296] *Gordon*, 243 U.S. at 545.
[297] *Id.* at 538.
[298] *Id.* at 547.
[299] Superseding Indictment at 1, No. 1:23-cr-00257 (D.D.C. Aug. 27, 2024) https://www.justice.gov/sco-smith/media/1366521/dl [https://perma.cc/U47S-UEH5].

legitimacy are severely diluted. Legislative oversight is complicated because its law straddles both doctrine and norms. The question presented before the Supreme Court in *Trump v. United States*—"Whether and if so to what extent does a former President enjoy presidential immunity from criminal prosecution for conduct alleged to involve official acts during his tenure in office"—could be answered not by long dissertations into constitutional history but in recognizing the consistent legal practice in the 20th century to require an exhaustion of a legislative oversight process before a referral to the Department of Justice is ripe.[300] As stated in this Article *ad nauseum*, criminal prosecution of any executive branch official for acts allegedly interfering with the legislative process is only appropriate after a defendant has been held in contempt of Congress. There is a rich political and legal tradition in the United States, one embracing the separation of powers that requires Congress to hold an individual in contempt before the Department of Justice may declare that individual broke laws that impeded a function assigned to Congress.[301]

The Special Counsel reasonably believes all the criminal statutes cited in the indictment form a basis to prosecute former President Trump for impeding or obstructing an "official proceeding" of Congress contemplated by the Electoral Count Act of 1887.[302] Questions of obstruction or interference with a congressional proceeding can be thought of as legislative contempt crimes. This Article contends, however, that no prosecution where the underlying illegal act related to a congressional proceeding would be ripe for Article III adjudication unless and until Congress has made a contempt determination. In the case of former President Trump, Congress never held him in contempt for allegedly obstructing or interfering with the certification proceeding. The Special Counsel case in Washington, D.C., is, therefore, premature.

First, legislative contempt and judicial enforcement is the well-followed practice for Congress suing to enforce subpoenas to a (typically) executive branch official after that official has been found in contempt and the Department of Justice has refused to enforce the subpoenas (which is typical in divided government). This practice also ensures that harms within the jurisdiction of a House of Congress are exhausted before that House before the court takes jurisdiction over a criminal prosecution. The practice of executive branch officials asserting immunity from the congressional process, typically the request for testimony, ripens under the law only once Congress has decided to subpoena that official or, when that subpoena is not

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[300] *See* William Baude, *Constitutional Liquidation*, 71 STAN L. REV. 1, 58 (2019).

[301] *See supra* Part II.

[302] Superseding Indictment at 1, No. 1:23-cr-00257 (D.D.C. Aug. 27, 2024) https://www.justice.gov/sco-smith/media/1366521/dl [https://perma.cc/U47S-UEH5]; 3 U.S.C. § 15.

complied with, held that official in contempt.[303] If the President is presumably immune from congressional testimony without a subpoena or contempt, it logically follows that the President is immune from liability before Congress for crimes against that body when no contempt occurred.

Second, over a near-forty-year period, the Supreme Court described the "subject matter jurisdiction" of each branch, wherein exhaustion before the legislative branch was required before the prosecution of contempt crimes would be permitted. In *Kilbourn v. Thompson*,[304] the Supreme Court held that the House of Representatives lacked subject matter jurisdiction to prosecute for contempt of Congress. In *In re* Chapman,[305] the Supreme Court extended its concept of subject matter jurisdiction to clarify that there was an implied legislative authority to deal with contempt, which was upheld. *In re Chapman* is analogous to the Special Counsel proceeding because Chapman was indicted for refusing to testify before a Senate proceeding.[306]

Lastly, it is arguable that the Special Counsel Office's pursuit of 18 U.S.C. § 241 (generally understood as a basis to prosecute individuals who harm others' civil rights) under the theory that President Trump engaged in a conspiracy against the "right to vote and to have one's vote counted" is substantially unrelated to any interference with Congress's official proceedings.[307] One could argue there is no sense in which a legislative process must be exhausted before a civil rights conspiracy claim can ripen. Yet even for those with little sympathy for former President Trump, the plain language of 18 U.S.C. § 241 requires that Trump conspired with others to "injure, oppress, threaten, or intimidate" a person or persons from freely exercising their constitutional rights.[308] Even supposing a colorable argument that Trump's alleged conspiracy to reverse the election impeded the electorate of their right to vote, such harm would not contravene the scope of 18 U.S.C. § 241 unless the former President had acted to instill physical harm or the imminent fear of harm in a voter or voters as contemplated by the terms "injure, oppress, threaten, or intimidate."[309] The Special Counsel's legal theory here is weak. And notwithstanding the merits, the Special Counsel's indictment clearly characterized 18 U.S.C. § 241 as fitting together with laws designed to protect "the federal government function"[310]—i.e., Congress's

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[303] Testimonial Immunity Before Congress of the Former Counsel to the President, 41 Op. O.L.C. 1, 12 (2019).

[304] Kilbourn v. Thompson, 103 U.S. 168 (1880).

[305] *In re* Chapman, 166 U.S. 661 (1897).

[306] *Id.* at 678.

[307] Superseding Indictment at 1, No. 1:23-cr-00257 (D.D.C. Aug. 27, 2024) https://www.justice.gov/sco-smith/media/1366521/dl [https://perma.cc/U47S-UEH5]; 18 U.S.C. § 241.

[308] 18 U.S.C. § 241.

[309] *Id.*

[310] *Id.*

function. As such, there is a gaping hole in the Special Counsel's theory—one only Congress can fill. To date, Congress has chosen not to act.

V. CONCLUSION: CONGRESSIONAL ABDICATION AND THE MODERN OVERSIGHT ERA

The central argument of this Article is when it comes to interbranch information disputes, courts often end up resolving political questions hidden as legal ones. The federal courts, when presented with information access disputes between Congress and the executive branch, do not take hard looks at whether the congressional investigative committee is a select or standing committee. It turns out this distinction is incredibly important for how courts should entertain and ultimately resolve interbranch information disputes. Select investigative committees are nearly 150 years older than the modern congressional standing committee, which most regulatory lawyers know well. There is an obvious reason why select committees are scant: the historic committees that investigated railroad holding companies, public health, labor disputes, and securities fraud were transformed into the first administrative agencies. These initial agencies, with their Adam's Rib taken from Congress's investigative functions, were not the rulemaking agencies currently normalized in the regulatory imagination but agencies that investigated for the purpose of advising Congress on potential legislation. They were literal agencies in the sense of agents of their congressional principal. Rulemaking comes later. Our administrative state began as an investigative state. As is obvious, select committees, like their executive branch grandchildren, subpoenaed for documents and testimony from the private sphere. Thus, they presented clear legal questions to the federal courts tasked with resolving the disputes between Congress and private actors. The history of the select committee is substantively distinct from the contemporary idea of congressional oversight of the executive branch. There is an obvious reason why: before the administrative state, "oversight" tended to be of the President and his close advisors, whereas Congress had impeachment and inherent contempt as hidden muscles from which it could flex its demands. But no one at this stage of history imagined that legislators could enforce these demands in court in large part because that would appear to render its muscular flex as flaccid indifference. Once an administrative state arises, oversight appears in its current form: unlike the select committees, the targets were public agencies, not private actors; the enforcement sounded in rules of procedure, not justiciable subpoena

enforcement or referrals to the Department of Justice; and oversight was motivated by the rough and tumble of politics, not by a need to legislate.

The Department of Justice's Office of Legal Counsel, reacting to a post-Nixon era, OLC's agenda for a unitary executive to include agencies exempt from legislative aggrandizement, and the unfortunate jurisprudence that has resulted from these theories of congressional power, has jumbled otherwise analytically distinct concepts of legislative inquiry. We cannot expect the courts to sort out this mess. But we can expect the courts to resolve questions of law. While this Article makes obvious the sorts of procedures that must apply before an otherwise political dispute arises into a legal one, courts tend to be deferential to the legislative choice of procedures, even when those procedures are violated.

Due process is an often-undersold principle in the realm of witnesses who impair Congress's legislative functions. Few debate that the Bill of Attainder Clause contemplates that punitive acts passed by Congress abuse constitutional guarantees of due process. What our legal theories noticeably fail to address is how to classify legislative activities that occur prior to the establishment of law. Congress can vote, through a unicameral resolution, to hold an individual in contempt but must stop at an order to the respective Sergeant of Arms to hold that individual in detention until she complies with some demand. There can be no order of punishment through a contempt resolution nor inherent contempt. When Congress seeks punishment against an individual who impairs the legislative process, current law requires referral to an Article II prosecutor, which, as this Article raises, presents institutional and political conflicts of interest.

As such, legislation is needed. The codification of procedures that must apply to ripen political fights into justiciable ones would greatly simplify the duties of the courts. It would also preserve due process for those who find themselves targets of congressional investigations by giving them legal notice of the procedures that apply. And procedures help Congress as well. The January 6 Select Committee was obviously aggressive: former President Trump's advisors Stephen Bannon and Peter Navarro went to jail for legislatively impairing the select committee's functions.[311] Substantial evidence, however, reflects that the January 6 Select Committee failed to follow written procedures and confused the laws that apply, for instance, using the "accommodation doctrine" to obtain information.[312] That doctrine is one circumscribed to interbranch information disputes, not those concerning private individuals.

The advantage of legislative reform here also helps solve gaps in the separation of powers jurisprudence attending to interbranch information

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[311] 167 CONG. REC. H5748 (daily ed. Oct. 21, 2021) (statement of Chairman Bennie Thompson).
[312] *See* Epstein, *supra* 152.

disputes. As I have forcefully argued in prior articles, constitutional principles cast substantial doubt on the proposition that Congress has the power to compel, through the compulsory process (i.e., subpoenas), the President or his close advisors to testify or produce documents to a standing (that is, oversight) committee. A statute, however, would mean consent to certain procedures by the President on behalf of the executive department. Scholars can debate the merits of exhaustion, but certainly, the historical record of legislative oversight reveals a shift in legislative enforcement preferences: going public, threatening (or carrying out) impeachment, and doing the same concerning the power of each House's Sergeant of Arms to make arrests have all dissipated in favor of contempt resolutions, subpoena enforcement, and Department of Justice referrals. My argument is not a return to regular order, even if constitutional norms justifiably favor such a return. There is a point of no return when it comes to the congressional desire to use judicially recognized tools of subpoenas and criminal referrals to enforce demands against the executive branch. But these should be counterbalanced by a statutory requirement of exhaustion through Article I remedies before Article III courts need to get involved. Otherwise, the political has not ripened into the legal.

Legislation should also build an intervening step between Congress's use of inherent procedures and the situation where an Article II prosecutor is enforcing the interests of another branch. Article II enforcement of an Article I interest should be a last resort, for it incentivizes congressional abdication of legislative prerogatives and raises the same problems attendant to concerns about the delegation of legislative power to the bureaucracy. Here, I have in mind the power of Congress to appoint its own special counsel to represent Congress's interests. Not so unlike the role of the House or Senate General Counsel to represent Congress's interest in court or the roles of Senate Banking and Currency Committee special counsel, Ferdinand Pecora, or House Ethics Committee special counsel, Leon Jaworski, a legislative special counsel can represent the congressional institution to prosecute legislative impairment cases. Yes, the President under Article II has the power to "take care" that the laws are faithfully executed, but the presumption will be that the legislative impairment prosecutions are not, in fact, enforcement or execution of law—at least as an initial matter.[313] Instead, such prosecutions can be imagined as analogous to Congress's inherent contempt power, which involves neither Article II nor Article III participation, than to 18 U.S.C.

[313] U.S. CONST. art. 2, § 3.

§ 1505 obstruction of Congress prosecutions, which involve participation from both Article II and Article III institutions.[314]

A statute authorizing such an appointment would resolve the institutional conflicts identified in this Article. Certainly, should a legislative special counsel determine that legislative impairment by an individual will not be resolved through the legislative process, referral to Article II prosecutors may be appropriate. And, certainly, at that point, Article III courts could adjudicate the solely legal questions regarding a witness's assertion of privileges, ranging from the 5th Amendment to attorney-client privilege.

Formalists contend that Congress lacks a political remedy when a private individual refuses to comply with an investigative demand related to a legislative purpose. But the courts must go beyond enforcing investigative demands by Congress and ensure that procedural safeguards (fair and open resolutions voted upon the full camera, clearly articulated legislative purposes, threatened contempt, arrest, and impeachment to induce compliance) were fully exhausted before judicial review is ripe. Procedure matters to protecting rights.[315] The January 6 Committee's subpoena authority was limited by sections 3 and 4 of its jurisdiction, which provided no legislative purpose to investigate former White House officials nor set forth any rulemaking purpose of the Select Committee.[316] Instead, the Select Committee was limited to investigating to issue a report with recommendations. The Rules of the 117th Congress, authorized under Congress's Rules of Proceedings Clause, established no jurisdiction for the Select Committee.[317]

Notwithstanding what the House sets forth through rules or resolutions, congressional inquiries are statutorily governed by the Legislative Reorganization Acts of 1946 and 1970.[318] Those laws limit the congressional oversight power only to "standing committee[s]" for the "formulation, consideration, and enactment of such modification of or changes in those laws, and of such additional legislation, as may be necessary or appropriate[.]"[319] With the inquiries of Bannon and Navarro, the Select Committee was arguably not investigating for the purpose of a need to fill a legislative gap but instead to obtain information about alleged improprieties

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[314] 18 U.S.C. § 1505.

[315] Daniel Z. Epstein, *Procedural Pluralism: A Model for Enforcing Internal Administrative Law*, 51 UC L. CONST. Q. 311, 341 (2024).

[316] Select Committee to Investigate the January 6th Attack on the United States Capitol, *About*, HOUSE.GOV, https://webharvest.gov/congress117th/20221224173503/https://january6th.house.gov/about [https://perma.cc/K4SF-CYH3].

[317] 117TH CONG., RULES OF THE U.S. HOUSE OF REPRESENTATIVES 20 (2021) https://www.cov.com/-/media/files/corporate/publications/file_repository/117houserulesclerk.pdf [https://perma.cc/MEW7-RNLJ].

[318] 2 U.S.C. § 190(d).

[319] *Id.*

taken by those individuals *while* government officials. Such a goal is the goal of oversight, not the sort of regulatory investigations delineated by the Supreme Court in *McGrain*. The courts in the D.C. Circuit failed to identify this reality. The January 6 Committee, as a Select Committee with no power to propose legislation, lacked constitutional oversight powers. The fix to the Select Committee's lack of authority was legislation, not judicial review.

The doctrinal principle recommended in this Article is one that requires courts to pierce the veil of supposed regulatory investigations against private citizens to ensure the goal is not political oversight. The judicial strategy is to determine jurisdiction as contingent on a series of procedural steps being taken to attenuate the political nature of an inquiry and ripen it into a legal one. Accommodation—the idea that procedures must be worked out between the investigator and the target—is impractical and a clear abdication of the notion of legislative impairment requiring procedural exhaustion within the congressional institution. The Special Counsel inquiry in Washington, D.C., and the related January 6 prosecutions determined that questions of compliance with legislative procedures are committed to the discretion of the executive branch. Such a result might appease rational political instincts, but it spells the abdication of congressional prerogative and, ultimately, the rule of law.