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## Oversight Riders

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## OVERSIGHT RIDERS

*Kevin M. Stack\* and Michael P. Vandenberg\*\**

*Congress has a constitutionally critical duty to gather information about how the executive branch implements the powers Congress has granted it and the funds Congress has appropriated. Yet in recent years the executive branch has systematically thwarted Congress's powers and duties of oversight. Congressional subpoenas for testimony and documents have met with blanket refusals to comply, frequently backed by advice from the Department of Justice that executive privilege justifies withholding the information. Even when Congress holds an official in contempt for failure to comply with a congressional subpoena, the Department of Justice often does not initiate criminal sanctions. As a result, Congress has resorted to enforcing its subpoenas in civil litigation, with terrible results. Civil enforcement, if any, occurs years after the information was sought, practically eliminating the information's practical and political value. Changes in administrations can be expected to affect the willingness of the executive branch to thwart congressional oversight, but the problem will remain until systemic reforms discourage the most egregious forms of executive evasion. To overcome this reliance on judicial enforcement of its oversight powers, Congress needs to think more creatively and aggressively. One way of doing so, which we defend in this Article, is using Congress's powers of the purse to condition funding to agencies on their compliance with congressional oversight requests, employing what we call oversight riders. By denying funding to executive agencies' resistance to oversight, Congress can create personal legal incentives for executive branch officials to comply. The Article concludes by considering whether other underenforced regimes, including requirements addressing political activity, ethics, and transparency, might also be protected by similar riders.*

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## INTRODUCTION

The executive branch repeatedly thwarts Congress’s efforts to engage in oversight of its administration of the laws. Consider a snapshot from just the past two years:

1. A House oversight committee sought information from the Department of Justice and the Department of Commerce about the citizenship question proposed for the 2020

Census.<sup>1</sup> After the administration declined to permit the testimony,<sup>2</sup> the House held two cabinet officials in contempt,<sup>3</sup> and resorted to civil litigation to enforce their finding of contempt.<sup>4</sup> The enforcement of contempt remained tied up in the D.C. federal courts until after the November 2020 election.<sup>5</sup>

2. A House armed services committee sought the testimony of top civilian and military leaders of the Department of Defense concerning the use of the military in response to nationwide protests, but none were made available to testify.<sup>6</sup>
3. The House subpoenaed Defense Secretary Mark Esper to testify regarding the administration's decision to withhold military aid for Ukraine.<sup>7</sup> Secretary Esper initially promised that the Pentagon would “do everything [it] can to respond to their inquiry,”<sup>8</sup> but he later reneged and did not appear.<sup>9</sup>

Although the level of executive branch resistance to congressional oversight was particularly extreme during the Trump administration,

1 Letter from Elijah E. Cummings, Chairman, House Comm. on Oversight and Reform, to William P. Barr, Att’y Gen., Dep’t of Just. (June 3, 2019), <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019-06-03.EEC%20to%20Barr-DOJ%20re%20Census.pdf> [<https://perma.cc/YDP8-DG4D>].

2 Letter from Stephen E. Boyd, Assistant Att’y Gen., Dep’t of Just., to Elijah E. Cummings, Chairman, House Comm. on Oversight and Reform (June 6, 2019), <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/Letter%20from%20DOJ%20to%20COR%2006-06-19.pdf> [<https://perma.cc/3AVY-MCSJ>].

3 H.R. Res. 497, 116th Cong. (2019).

4 Complaint for Declaratory and Injunctive Relief at 54, Comm. on Oversight & Reform, U.S. House of Representatives v. Barr, No. 19-cv-03557 (D.D.C. Nov. 26, 2019).

5 Minute Order, Comm. on Oversight & Reform, U.S. House of Representatives v. Barr, No. 19-cv-03557 (D.D.C. Oct. 15, 2020).

6 Letter from Adam Smith, Chairman, House Armed Servs. Comm., to Sec’y Mark T. Esper, Sec’y, U.S. Dep’t of Def. (June 10, 2020), [https://armedservices.house.gov/\\_cache/files/f/2/f2c8cc6e-4348-4de0-a9e5-f45367474b2e/0C419C3BA406745F6167BF3372B36122.20200610-smith-letter-to-sec-def-follow-up-to-june-3-letter-vfinal.pdf](https://armedservices.house.gov/_cache/files/f/2/f2c8cc6e-4348-4de0-a9e5-f45367474b2e/0C419C3BA406745F6167BF3372B36122.20200610-smith-letter-to-sec-def-follow-up-to-june-3-letter-vfinal.pdf) [<https://perma.cc/46ST-4X3F>].

7 Letter from Adam B. Schiff, Chairman, House Permanent Select Comm. on Intel., and Eliot L. Engel, Chairman, House Comm. on Foreign Affs., and Elijah E. Cummings, Chairman, House Comm. on Oversight & Reform, to Mark T. Esper, Sec’y, U.S. Dep’t of Def. (Oct. 7, 2019), [https://intelligence.house.gov/uploadedfiles/2019-10-07.eec\\_engel\\_schiff\\_to\\_esper-dod\\_re\\_subpoena.pdf](https://intelligence.house.gov/uploadedfiles/2019-10-07.eec_engel_schiff_to_esper-dod_re_subpoena.pdf) [<https://perma.cc/4Q95-M8W3>].

8 Quint Forgy, *Mark Esper: Pentagon ‘Will Do Everything We Can’ to Respond to Impeachment Subpoena*, POLITICO (Oct. 13, 2019), <https://www.politico.com/news/2019/10/13/mark-esper-trump-impeachment-subpoena-045733> [<https://perma.cc/E6QY-YY56>].

9 Lauren Egan & Courtney Kube, *Defense Secretary Mark Esper Will No Longer Comply with Impeachment Inquiry*, NBC NEWS (Oct. 16, 2019), <https://www.nbcnews.com/politics/trump-impeachment-inquiry/defense-secretary-mark-esper-will-no-longer-comply-impeachment-inquiry-n1067226> [<https://perma.cc/BCS9-YZ3J>].

the basic problem extends well beyond it.<sup>10</sup> The executive branch has long been playing constitutional hardball in response to Congress's efforts at oversight—and winning.

These clashes follow a familiar pattern. A House or Senate committee requests the testimony of an executive official and related documents. Sometimes negotiations ensue over the scope or terms of the testimony and documents to be produced. Sometimes the executive simply stonewalls. After a period of delay, a House or Senate committee then issues a subpoena. The executive official continues to resist, almost always asserting that executive privilege protects the matter from disclosure. With the pressures on Congress, the initial refusal to comply with a congressional subpoena often effectively ends the matter in a stalemate in which Congress has not obtained the information it sought. In highly charged cases, Congress finds the official in contempt. Regardless of whether the official was held in contempt, when the stakes are high enough, the House or Senate resorts to initiating a civil lawsuit to seek an injunction to enforce compliance with its subpoenas. After often lengthy delays common in litigation, the congressional committee's investigation may or may not produce a judicial order requiring executive branch officials to testify or disclose information.

In this predictable back-and-forth, the executive branch has a trump card on disclosure to Congress: the assertion of executive privilege effectively forces the House or Senate into civil litigation. Congress, like any other civil litigant frustrated by its adversary's noncompliance with discovery requests, often backs down. Moreover, for the executive branch, delay in disclosure can be a win. A subpoena only has force for the session of Congress that authorizes it,<sup>11</sup> and absent a sense of urgency among courts, competent counsel can delay the issuance of a final, enforceable order for the year to eighteen months often necessary to avoid compliance. This delay can undermine institutional and direct democratic accountability.<sup>12</sup> A delay beyond the current session of Congress may enable politics in the House or Senate to shift enough to undermine the value of the

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10 See *infra* Section I.D.

11 See *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 231 (1821) (implying that Congress's coercive powers terminate on adjournment).

12 The importance of timely enforcement of congressional subpoenas is reflected in the focus on expedited enforcement in recently proposed legislation. See, e.g., *Protecting Our Democracy Act*, H.R. 8363, 116th Cong. §§ 401–405 (2020) (providing an explicit cause of action for Congress to enforce subpoenas, stating that “it shall be the duty of every court of the United States to expedite to the greatest possible extent the disposition of any such action and appeal,” and stating that “[t]he Supreme Court and the Judicial Conference of the United States shall prescribe rules of procedure to ensure the expeditious treatment of actions described in subsection (a)”) (adding 28 U.S.C. § 1365a).

information in crafting reform legislation or to sideline demands for the requested information altogether. On a more fundamental level, a delay that extends beyond an election undermines voters' ability to hold federal politicians accountable for their actions based on the withheld information.

The motivating concern of this Article is the loss Congress and the public suffer when Congress is not able to obtain subpoenaed documents and testimony in a timely manner. The loss is significant. Congress has broad, constitutionally recognized, statutorily authorized, and practically critical powers to investigate the executive branch's administration of the law.<sup>13</sup> The capacity to effectively investigate plays a critical role in our constitutional scheme. To legislate, to decide how to spend the moneys collected in the Treasury, to decide who should be impeached, Congress needs information. It needs information about what is going right and wrong in our society, economy, and in relation to other nations. It needs information about what existing federal programs and activities are succeeding in accomplishing the mission congressional statutes have set for them, and the causes of failures and setbacks. It needs information about the performance of executive branch officers to ensure public confidence and compliance with federal laws. This simple logic justifies broad powers of congressional investigation, has been endorsed by the Supreme Court,<sup>14</sup> and has been reflected in statutes organizing Congress's oversight powers.<sup>15</sup> Throughout our history, congressional investigations have played a critical role in bringing to light problems in our government and the path forward.<sup>16</sup>

The problem of congressional oversight is a symptom of a larger weakness in our system of separation of powers. As Richard Pildes and Daryl Levinson argue, the interaction between the branches is better described by looking at the separation of parties than the separation of branches.<sup>17</sup> When institutional loyalty is subordinate to party loyalty,

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13 See *infra* Section I.B.

14 See, e.g., *Watkins v. United States*, 354 U.S. 178, 187 (1957) (“The power of the Congress to conduct investigations . . . encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.”); see also *infra* Section I.B (discussing the constitutional authority for congressional investigations).

15 See *infra* Section I.B.

16 See *infra* Section I.D.

17 Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2312–15 (2006). But see David Fontana & Aziz Z. Huq, *Institutional Loyalties in Constitutional Law*, 85 U. CHI. L. REV. 1, 1–10 (2018) (arguing that institutional loyalties play a stronger role than acknowledged in recent scholarship).

enforcement of congressional oversight powers will frequently be a function of whether the President is from the same party as the house of Congress investigating. When government is divided by parties, the executive branch effectively abandons its role in enforcing contempt of congressional subpoenas. Political polarization has exacerbated this dynamic.<sup>18</sup> In response, Congress has therefore turned to the courts, with very poor results.

Congressional oversight need not remain stuck within its current pattern of congressional request–executive branch objections–congressional subpoena–stalemate–executive privilege–civil litigation–mootness arising from delay. Congress can engage in constitutional hardball as well. Indeed, it is time for Congress to be more creative and more aggressive in developing solutions that do not depend upon the courts. “One of Congress’s main tools to push back at such presidential unilateralism,” as Gillian Metzger observes, “is its control of the purse.”<sup>19</sup> In particular, this Article makes the case that Congress can and should use its appropriations power<sup>20</sup> as a tool to force compliance with its request for information from the executive branch. The Article defends doing so by calling attention to a class of appropriations riders that target the executive branch’s obstruction of congressional oversight. We call these *oversight riders*. The basic idea of an oversight rider is to deny the executive branch funding for resistance to congressional subpoenas. Executive branch officials cannot lawfully act inconsistent with a limitation Congress has imposed on their funds,<sup>21</sup> and Congress has the power to deny executive officials’ salaries during the period of their noncompliance. Executive branch officials typically exercise great care not to contravene the limitations Congress has placed on their appropriations. By attaching appropriations consequences for noncompliance with congressional subpoenas, oversight riders give executive branch officials the kind of ex ante legal incentives to comply that they currently lack.

We identify two oversight riders. The first denies appropriations to officials who thwart subordinates from communicating with Congress. This rider, identified as the Section 713 rider,<sup>22</sup> has been

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18 See Eli J. Finkel et al., *Political Sectarianism in America*, 370 SCIENCE 533, 535 (2020).

19 Gillian E. Metzger, *Taking Appropriations Seriously*, 121 COLUM. L. REV. 1075, 1153 (2021).

20 U.S. CONST. art. I, § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . .”).

21 31 U.S.C. § 1341(a)(1) (2018) (prohibitions); § 1350 (penalties).

22 Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. E, tit. VII, § 713, 134 Stat. 1185, 1432–33 (2020). The same provision has previously been with other section numbers, including § 618. See Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, div. F, tit. VI, § 618, 188 Stat. 3, 354 (2004); Consolidated Appropriations Resolution, 2003,

reenacted in appropriations legislation since the late 1990s, but it remains relatively obscure. It is enforced by a member of Congress requesting that the Government Accountability Office (GAO), a part of the legislative branch, conduct an investigation into the alleged violation. After the investigation, if a violation is found, the GAO directs a clawback of the official's salary; for continuing violations, the clawback can match the duration of the violation. In investigating violations of the Section 713 rider, the GAO has acted promptly and found liability on two occasions. Structurally, the Section 713 rider suggests a pathway to overcome the obstacles of Congress's more traditional routes to enforcing its oversight powers. It creates a personal incentive for the official to comply, without requiring the involvement of the Department of Justice or the delay of civil litigation to enforce the subpoena.

The second oversight rider is one we suggest. Modeled on the language of the Section 713 rider, this oversight rider directly targets compliance with subpoenas. In addition to the salary sanction, this subpoena rider adds a prohibition on use of funds for resistance to congressional subpoenas. As a result, the subpoena rider we propose creates not only the prospect of a salary sanction, like the Section 713 rider, but also the prospect of violation of the Antideficiency Act, which prohibits a federal official from spending federal funds that have not been appropriated by Congress.<sup>23</sup> Decisions to resist congressional subpoenas implicate the Antideficiency Act because they are frequently institutional decisions, involving significant internal deliberations and use of government employment time and other resources, not merely the choice of an official acting on his or her own initiative.

Both riders—the existing Section 713 rider and our proposed subpoena rider—would create an *ex ante* incentive for an official to avoid relying on an overly broad assertion of executive privilege (or indeed, any assertion of privilege greater than they would estimate the court would sustain). The subpoena rider in particular forces the official faced with a congressional subpoena to evaluate the reasonableness of the assertion of executive privilege; if, in the official's estimation, it is beyond the scope of what a court would sustain, then the official would face a personal risk of loss of salary plus the legal consequences from violating the Antideficiency Act.

Executive branch officials may decide that the risk of personal consequences is low and continue to reject compliance with

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Pub. L. No. 108-7, div. J, tit. V, § 620, 117 Stat. 11, 468 (2003). The text of the rider is reproduced in the text accompanying note 161 below.

23 31 U.S.C. § 1341(a)(1) (2018); 2 U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-382SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 6-36 (3rd ed. 2006).

congressional subpoena, but oversight riders may be the only practical way to create a genuine personal risk for noncompliance. Oversight riders remove the license of executive branch officials to ignore congressional subpoenas with impunity. Unless the officials estimate that they have a valid claim of executive privilege as judged by the courts, defying a congressional subpoena creates the risk of a clawback of their salaries during the period of their refusal to comply as well as violations of the Antideficiency Act, which creates potential exposure for administrative sanctions,<sup>24</sup> triggers internal executive branch reporting requirements,<sup>25</sup> and carries penalties for willful noncompliance.<sup>26</sup> These salary clawback and appropriations-based liability risks will continue after the session of Congress that issued the subpoena, thus motivating compliance by executive branch officials even if they think they can run out the clock on a congressional session.

This technique of squeezing funding for the executive branch operations as a consequence—and eventually as a deterrent—for noncompliance with congressional requests for information is an instance of constitutional self-help.<sup>27</sup> As David Pozen explicates the concept of constitutional self-help, it involves “the unilateral attempt by a government actor to resolve a perceived wrong by another branch, and thereby to defend a perceived institutional prerogative, through means that are generally impermissible but that are assertedly permitted in context.”<sup>28</sup> Oversight riders fit this pattern. With oversight riders, Congress would have a response to the hardball tactics of the executive branch—repeated, entrenched stonewalling in response to congressional requests for information—and thus a perceived and actual harm. Like many forms of self-help, oversight riders involve tough tactics that ideally would not be necessary. No one nominates appropriations riders as the most deliberate, careful, or public aspect of the legislative process.<sup>29</sup> And no one invites government shutdowns which could result from stalemates over annual appropriations. Reflecting this general reluctance, Congress

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24 31 U.S.C. § 1349(a) (2018) (authorizing administrative discipline for violations of § 1341 and § 1342).

25 31 U.S.C. § 1351 (2018) (specifying reporting requirements).

26 31 U.S.C. § 1350 (2018). Although there do not appear to have been prosecutions for violations of the ADA. See 2 U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 23, at 6-144 (noting that GAO is not aware of prosecutions). Even the prospect of committing a felony has a deterrence effect on executive officials.

27 See David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 12 (2014).

28 *Id.* (italics omitted).

29 See, e.g., Neal E. Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 DUKE L.J. 456, 464–65 (providing concise summary of concerns with use of limitations riders, including that they bypass authorizing committees in Congress and they are given inadequate consideration and study).

has rarely used its appropriations powers to directly strike back against executive branch refusal to cooperate in response to its requests for information.<sup>30</sup> But the oversight function of Congress is particularly important in an era of hyper-partisanship, and thus oversight riders are worth these costs. They are targeted, reciprocal, and proportionate to the harms of the executive branch stonewalling they seek to address.<sup>31</sup>

This Article is organized as follows. Part I explains why oversight is critical to our government and well-grounded in constitutional and statutory law. It then illustrates how frequently the executive branch thwarts congressional oversight. Part II is the heart of the Article. It surveys the tools Congress has primarily relied upon to enforce its oversight powers. It argues that Congress's inherent contempt powers, criminal liability for contempt, civil liability for contempt, and general civil actions to enforce cooperation are all insufficient and have failed. It then introduces the category of oversight riders, first discussing one existing rider and then proposing a rider targeting noncompliance with congressional subpoenas with greater sanctions. It defends the constitutionality of oversight riders and justifies relying upon them in the current climate of constitutional hardball. Part III broadens the Article's lens to consider whether appropriations riders could help to enforce good government norms that currently lack adequate enforcement, ranging from protections against partisan use of federal power and federal ethics laws to laws governing the transparency of government action.

## I. THE CONSTITUTIONALLY CRITICAL ROLE OF CONGRESSIONAL OVERSIGHT

### A. *Why Oversight Is Important*

Oversight is critical to Congress's core functions of legislating, appropriating, and confirming nominations.<sup>32</sup> Oversight allows Congress to learn how the funds it appropriates and the programs it authorizes function. And what it learns can be key to reform or holding individual executive officers to account. Because congressional hearings are one of the nation's most public tribunals, oversight

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30 See SEAN M. STIFF, CONG. RSCH. SERV., R46417, CONGRESS'S POWER OVER APPROPRIATIONS: CONSTITUTIONAL AND STATUTORY PROVISIONS 60–61 (2020). We discuss one example below. See *infra* text accompanying notes 146 to 151 (discussing retaliation in appropriations rider after Lois Lerner's refusal to testify).

31 Cf. Pozen, *supra* note 27, at 64 (arguing constitutional self-help operates in a convention that privileges reciprocal and proportionate countermeasures).

32 Devins, *supra* note 29, at 460 ("Oversight of executive organization and action is a traditional function of Congress." (citing LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT (2d ed. 1985))).

performs a critical political function as well; it provides one of the most important ways for the public to learn about the executive branch's actions at a time when it is salient for holding the President accountable, including at the ballot box. Moreover, the existence of robust congressional oversight also acts as a deterrent to executive branch misconduct.

The logic for broad congressional powers to investigate—including to compel documents and testimony from the executive branch—is hard to assail. Information is necessary for Congress to legislate. As the Supreme Court wrote in 1927 in *McGrain v. Daugherty*,<sup>33</sup> and recently endorsed in *Trump v. Mazars USA, LLP*<sup>34</sup>:

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; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it.<sup>35</sup>

And of course, the same holds true for all of Congress's other powers. To effectively exercise its impeachment power,<sup>36</sup> power to appropriate,<sup>37</sup> power to confirm principal officers,<sup>38</sup> and ratify treaties,<sup>39</sup> Congress must have the power to compel information.<sup>40</sup> As *McGrain* recognizes, “[e]xperience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed.”<sup>41</sup> Moreover, because Congress's power of investigation is necessary for the performance of Congress's other constitutionally vested powers, the oversight power must be understood broadly.<sup>42</sup> As the Supreme Court emphasizes in *Mazars*: “The congressional power to obtain information is ‘broad’ and ‘indispensable.’ . . . It encompasses

33 *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927) (upholding Congress's power to compel the testimony of a private party relevant to its legislation).

34 *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2044–45 (2020).

35 *McGrain*, 273 U.S. at 175; *Mazars*, 140 S. Ct. at 2031 (“Without information, Congress would be shooting in the dark, unable to legislate ‘wisely or effectively.’” (quoting *McGrain*, 273 U.S. at 175)) (upholding Congress's power to compel the testimony of a private party relevant to its legislation).

36 U.S. CONST. art. I, § 2, cl. 5; § 3, cls. 6–7; art. II, § 4.

37 U.S. CONST. art. I, § 9, cl. 7.

38 U.S. CONST. art. II, § 2, cl. 2.

39 U.S. CONST. art. II, § 2, cl. 2.

40 Josh Chafetz, *Congressional Overspeech*, 89 *FORDHAM L. REV.* 529, 541–42 (2020) [hereinafter Chafetz, *Congressional Overspeech*].

41 *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927).

42 See Chafetz, *Congressional Overspeech*, *supra* note 40, at 542.

inquiries into the administration of existing laws, studies of proposed laws, and ‘surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them.’”<sup>43</sup> To exercise its powers, Congress must be able to obtain a sufficiently wide array of information so that it can assess alternatives, understand the full context of past actions, and predict trends, and it must be able to do so in a timely manner.<sup>44</sup>

Congressional oversight serves another critical function as well: it deters executive branch wrongdoing.<sup>45</sup> Appearance in a public hearing before a congressional oversight committee is an experience that most executive branch officials aim to avoid. Congressional oversight hearings expose the official through highly public questioning by the members of Congress and function as the nation’s tribunal for evaluating the activities of the executive, corporate conduct, and much more. Exposure of executive branch ineptitude or wrongdoing can occur through document production, depositions, and testimony before a committee and can lead to embarrassment, firing, or in the worst cases potential criminal exposure.<sup>46</sup> The power of Congress to haul executive branch officials before its investigative committees

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43 *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031 (2020) (quoting *Watkins v. United States*, 354 U.S. 178, 187, 215 (1957)).

44 As to Congress’s ability to compel testimony from executive branch officials, see BEN WILHELM, CONG. RSCH. SERV., R46061, VOLUNTARY TESTIMONY BY EXECUTIVE BRANCH OFFICIALS: AN INTRODUCTION (2019) (concluding that “Congress’s control over appropriations and the organization and operations of the executive branch may encourage agency leaders to accommodate its requests rather than risk adverse actions toward their agencies. In addition, there are incentives for the executive branch to work with Congress in order to increase the likelihood of success for the Administration’s policy agenda and to manage investigations with the potential to damage the Administration’s public standing”); see also OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB CIRCULAR A–11, PREPARATION, SUBMISSION AND EXECUTION OF THE BUDGET (rev. 2021); OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB CIRCULAR A–19, LEGISLATIVE COORDINATION AND CLEARANCE (rev. 1979) (providing guidance for coordinating and controlling agency statements to Congress on budgetary and legislative issues).

45 William P. Marshall, *The Limits on Congress’s Authority to Investigate the President*, 2004 U. ILL. L. REV. 781, 799 (2004); Chafetz, *Congressional Overspeech*, *supra* note 40, at 542–43 n.97 (quoting Marty Lederman: “As virtually anyone who’s worked in the executive branch will attest, the prospect (or threat) of having to explain one’s self . . . to a congressional chair or staff, or in congressional hearings under the harsh glare of network lights, has a significant impact on how one performs her work as an official” (quoting Marty Lederman, *Can Congress Investigate Whether the President Has Conflicts of Interest, Is Compromised by Russia, or Has Violated the Law?*, BALKINIZATION (July 29, 2019), <https://balkin.blogspot.com/2019/07/can-congress-investigate-whether.html> [<https://perma.cc/EGT3-63V2>])).

46 See, e.g., Howard Kurtz, *Lavelle Indicted by Grand Jury on Contempt of Congress Charge*, WASH. POST (May 28, 1983) (reporting indictment of Rita Lavelle, former EPA official, regarding her refusal to testify).

creates powerful incentives to comply with the law and to do so in ways that could be explained to Congress.

Not surprisingly, congressional oversight has been the launching pad for many significant executive branch reforms in the past several decades and before. Post-Watergate reforms of ethics in government and the creation of the independent counsel grew out of Congress's investigations.<sup>47</sup> Post-9/11 reforms in the coordination and mission of our national intelligence agencies built upon both the 9/11 Commission and Congress's own investigation of the failures that led to the 9/11 attack going undetected.<sup>48</sup> And, we anticipate, congressional hearings into the national response to COVID-19 will play a role in both the immediate solution and the creation of longer-term structures to make the country better prepared for pandemics.

Congressional hearings and oversight also play a crucial role in the dynamics of national and state elections. These hearings provide public scrutiny of the choices made by executive branch officials in response to crises—and these hearings create a sense of effectiveness, failure, or evasion that ripples through subsequent political campaigns. President George W. Bush campaigned against Vice President Al Gore in part based on the impression of perfidy produced by President Bill Clinton's impeachment trial.<sup>49</sup> President Barack Obama campaigned against Senator John McCain in part by condemning President Bush's responses to 9/11 and failure to act on the reforms suggested by congressional investigators and the 9/11 Commission.<sup>50</sup> President Donald Trump used Congress's investigation of Benghazi, the bungled rollout of the Affordable Care Act, and policies at the border to campaign against Hillary Clinton.<sup>51</sup>

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47 See Mark Curriden, *The Lawyers of Watergate: How a '3rd-Rate Burglary' Provoked New Standards for Lawyer Ethics*, 98 A.B.A. J. 38, 41–43 (2012); Jim Mokhiber, *A Brief History of the Independent Counsel Law*, FRONTLINE (1998), <https://www.pbs.org/wgbh/pages/frontline/shows/counsel/office/history.html> [<https://perma.cc/5ZVN-F7T8>].

48 See Mark Fenster, *Designing Transparency: The 9/11 Commission and Institutional Form*, 65 WASH. & LEE L. REV. 1239, 1287–92 (2008).

49 Alison Mitchell, *The 2000 Campaign: The Campaign Trail; Bush and His Rivals Touring the Same Highly Contested States*, N.Y. TIMES (July 29, 2000), <https://www.nytimes.com/2000/07/29/us/2000-campaign-campaign-trail-bush-his-rivals-touring-same-highly-contested.html> [<https://perma.cc/4LNJ-MQPJ>].

50 See Democratic Nat'l Comm., *2008 Democratic Party Platform*, AM. PRESIDENCY PROJECT (Aug. 25, 2008), <https://www.presidency.ucsb.edu/documents/2008-democratic-party-platform> [<https://perma.cc/H2N3-MK3T>]; Jay Newton-Small, *Bush Starts a McCain-Obama Brawl*, TIME (May 16, 2008), <http://content.time.com/time/politics/article/0,8599,1807377,00.html> [<https://perma.cc/TJ2F-YU8D>].

51 Aaron Blake, *Donald Trump's Best Speech of the 2016 Campaign, Annotated*, WASH. POST (Aug. 19, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/08/19/donald-trumps-best-speech-of-the-2016-campaign-annotated/> [<https://perma.cc/S55B-NCL7>].

Typically, the timing of oversight is critical to the ability of the public to hold members of Congress and the President to account. Disclosures that are delayed by a year or two can easily enable an administration to avoid scrutiny before the election of a new Congress, with the potential for a change in party majority in either house. Disclosure delayed beyond the next presidential election can make a huge difference in the record the public has to assess the performance of the President and his or her administration.

Not only are broad powers of disclosure critical for Congress to perform its core constitutional functions, but those same powers are also critical to deterring executive branch wrongdoing and exposing that wrongdoing to the public so it can hold the executive branch accountable.

### B. *Congress's Constitutional and Statutory Powers of Oversight*

Although the text of the Constitution does not explicitly grant investigative power to Congress or grant either of its chambers an investigative power,<sup>52</sup> the existence of a broad power to investigate the executive branch is not controversial as a matter of historical practice and has been repeatedly endorsed by the Supreme Court.<sup>53</sup> Congress's earliest formal investigation was an inquest into a failed military endeavor—understood as oversight of the President's expenditure of appropriated funds. In 1792, General Arthur St. Clair lost more than 600 soldiers in a confrontation with Native Americans at the Battle of the Wabash.<sup>54</sup> In response to the outcry over the expedition, the House voted (44 to 10) to appoint a committee to investigate,

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52 See *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927) (noting that “[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; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it”).

53 See, e.g., *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 (1975) (“This Court has often noted that the power to investigate is inherent in the power to make laws . . . . Issuance of subpoenas . . . has long been held to be a legitimate use by Congress of its power to investigate.”); *Watkins v. United States*, 354 U.S. 178, 187 (1957) (“The power of the Congress to conduct investigations is inherent in the legislative process.”); *McGrain*, 273 U.S. at 174 (“We are of opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.”). A complete treatment of the scope of Congress's investigative powers is beyond our scope and aim here. For excellent treatments, see, e.g., Chafetz, *Congressional Overspeech*, *supra* note 40, at 542; Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 126 (2006) (noting Congress's tools of investigation are broad and describing them); Marshall, *supra* note 45, at 781–82.

54 Chafetz, *Congressional Overspeech*, *supra* note 40, at 537 n.45; Marshall, *supra* note 45, at 786.

including the powers “to call for such persons, papers, and records, as may be necessary to assist their inquiries.”<sup>55</sup> The House Committee obtained not only papers from the War Department, but also the testimony of General St. Clair and Secretary of War Henry Knox.<sup>56</sup> In response to objections that the House Committee lacked power to investigate officers under the President’s control, Representative Williamson voiced what would later be embraced as the broad logic for oversight: “[A]n inquiry into the expenditure of all public money was the indispensable duty of this House.”<sup>57</sup>

In response to the House inquiry, President Washington consulted with his cabinet, taking care that his response “‘be rightly conducted’ because it could ‘become a precedent.’”<sup>58</sup> After the cabinet meeting, President Washington called upon Thomas Jefferson to negotiate with the House, which narrowed the requested documents.<sup>59</sup> The House investigative committee ultimately concluded that the unfortunate losses were not attributable to General St. Clair’s leadership, but reflected structural problems in the efficiency and quality of the supplies,<sup>60</sup> a power that Congress immediately reallocated from the War Department to the Department of Treasury.<sup>61</sup>

Other early congressional investigations confirmed that Congress’s power to investigate extends to the full scope of the expenditure of funds it appropriated.<sup>62</sup> In response to allegations that Brigadier General James Wilkinson had received moneys from Spain, for instance, Representative Sheffrey defended the congressional duty of inquiry: “Sir, it is our duty to make this inquiry. . . . We extract money from the pockets of the people to appropriate to these purposes, and it is proper to ascertain that those who reap the earnings of the people are worthy of the public confidence.”<sup>63</sup> Indeed, another

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55 3 ANNALS OF CONG. 490–94 (1792); see James M. Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 HARV. L. REV. 153, 170 (1926).

56 Chafetz, *Congressional Overspeech*, *supra* note 40, at 537.

57 3 ANNALS OF CONG. 491 (1792); see also *id.* at 492 (“Mr. Fitzsimons said, he . . . was in favor of a committee to inquire relative to such objects as come properly under the cognizance of this House, particularly respecting the expenditures of public money . . .”).

58 *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2029 (2020) (quoting 1 THE WRITINGS OF THOMAS JEFFERSON, 1760–1775, at 189 (Paul Leicester Ford ed., New York, G.P. Putnam’s Sons 1892)).

59 *Mazars*, 140 S. Ct. at 2030 (citing 3 ANNALS OF CONG. 536 (1792); TELFORD TAYLOR, *GRAND INQUEST: THE STORY OF CONGRESSIONAL INVESTIGATIONS* 24 (1955)).

60 4 ANNALS OF CONG. 417–18 (1813).

61 Chafetz, *Congressional Overspeech*, *supra* note 40, at 537.

62 See Landis, *supra* note 55, at 173–75 (chronicling several investigations into the expenditure).

63 21 ANNALS OF CONG. 1746 (1810); see also Landis, *supra* note 55, at 174 (discussing the inquiry).

member of the House threatened that if the President did not remove General Wilkinson, “we have the power to say that there shall be no longer an army with a commander at its head”<sup>64</sup>—and the resolution to create an investigative committee carried by a vote of 80 to 29.<sup>65</sup>

Congress actively exercised its powers of oversight throughout the nineteenth century, investigating matters including allegations of misconduct against the Secretary of the Treasury,<sup>66</sup> alleged violations of the charter of the Bank of the United States,<sup>67</sup> future President Jackson’s assumption of powers in the Seminole War (a Senate inquiry),<sup>68</sup> the administration of the Post Office,<sup>69</sup> and investigations into the State Department,<sup>70</sup> Interior Department,<sup>71</sup> and the Smithsonian Institution,<sup>72</sup> among many others.<sup>73</sup>

By 1927, the Supreme Court had embraced a broad understanding of Congress’s oversight functions in *McGrain v. Daugherty*, arising from the Senate inquiry into the Teapot Dome corruption scandal. Attorney General Harry Daugherty came into the national spotlight for his inaction in response to apparent corruption arising from allocation of rights to Teapot Dome.<sup>74</sup> The Senate established an investigative committee to inquire into “the alleged failure of Harry M. Daugherty, Attorney General of the United States, to prosecute properly violators of the Sherman Anti-trust Act,” among other persons and matters.<sup>75</sup> In the course of the Senate committee’s investigation, it subpoenaed Mally Daugherty—the brother of the Attorney General and president of a bank.<sup>76</sup> After Mally Daugherty

64 21 ANNALS OF CONG. 1729 (1810).

65 Landis, *supra* note 55, at 175.

66 See 10 ANNALS OF CONG. 980 (1801) (absolving Secretary of the Treasury Wolcott).

67 S. JOURNAL, 15th Cong., 2d Sess. 265 (1818).

68 33 ANNALS OF CONG. 76 (1818) (adopting resolution in a similar spirit as an earlier resolution to investigate “clerks or other officers in either of the Departments, or in any office at the Seat of the General Government, have conducted improperly in their official duties . . .,” 31 ANNALS OF CONG. 783, 786 (1818)).

69 See H. JOURNAL, 16th Cong., 2d Sess. 80 (1820) (adopting resolution to appoint a committee “to investigate the affairs of the Post Office Department, with power to send for persons and papers”).

70 CONG. GLOBE, 29th Cong., 1st Sess. 733–34 (1846) (inquiring into expenditures by the State Department in negotiating northeastern boundary).

71 CONG. GLOBE, 31st Cong., 1st Sess. 782–83 (1850) (inquiring into Secretary of the Interior Thomas Ewing’s payment of claims after they had been disallowed by accounting officers).

72 CONG. GLOBE, 33d Cong., 2d Sess. 282–83 (1855) (inquiring into whether the “Institution has been managed, and its funds expended, in accordance with the law establishing the institution”).

73 See Landis, *supra* note 55, at 174–94.

74 Marshall, *supra* note 45, at 792.

75 273 U.S. 135, 151 (1927).

76 *Id.* at 152.

twice failed to appear in response to subpoenas, the Senate authorized its Sergeant at Arms to take him into custody,<sup>77</sup> from which Daugherty sought relief. The Supreme Court upheld the Senate committee's power to compel this testimony in broad terms. Surveying past congressional practice, the practice of state legislatures, and its own precedents, the Court cast Congress's power of inquiry as necessary to its power to legislate:

We are of opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function. It was so regarded and employed in American legislatures before the Constitution was framed and ratified. Both houses of Congress took this view of it early in their history . . . and both houses have employed the power accordingly up to the present time. . . . [T]he power of inquiry—with enforcing process—was regarded and employed as a necessary and appropriate attribute of the power to legislate—indeed, was treated as inhering in it. Thus there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised.<sup>78</sup>

Under *McGrain*, the legislative power to investigate extends beyond seeing information directly relevant to the contemplated legislation, but also extends to investigation of executive branch wrongdoing. As William Marshall notes, *McGrain* “allow[s] specific inquir[y] into individual wrongdoing even if that wrongdoing could also be subject to judicial criminal sanction.”<sup>79</sup> In the century since the Court's decision in *McGrain*, it has repeatedly embraced *McGrain*'s broad understanding of Congress's power to investigate,<sup>80</sup> and recently reaffirmed that broad power in *Mazars*.<sup>81</sup>

Based on that understanding, as Josh Chafetz highlights,<sup>82</sup> Congress has enacted legislation that makes it a congressional duty—which falls upon standing committees in both houses—to oversee the executive branch. The 1946 Legislative Reorganization Act obliges each Congress to create standing committees “[t]o assist the Congress

77 *Id.* at 152–54.

78 *Id.* at 174–75.

79 Marshall, *supra* note 45, at 796.

80 *See, e.g.*, *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 (1975) (“This Court has often noted that the power to investigate is inherent in the power to make laws . . . . Issuance of subpoenas . . . has long been held to be a legitimate use by Congress of its power to investigate.”); *Watkins v. United States*, 354 U.S. 178, 187 (1957) (“The power of the Congress to conduct investigations is inherent in the legislative process.”); *see also* Chafetz, *Congressional Overspeech*, *supra* note 40, at 537.

81 *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031 (2020).

82 *See* Chafetz, *Congressional Overspeech*, *supra* note 40; *see also* Beermann, *supra* note 53, at 122–29 (providing account of Congress's oversight institutions and legislation).

in appraising the administration of the laws,” which committees “shall exercise continuous watchfulness of the execution by the administrative agencies concerned of any laws.”<sup>83</sup> The 1970 Legislative Reorganization Act reformulated the duties of standing committees to “review and study, on a continuing basis, the application, administration, and execution of those laws . . . within the jurisdiction of the committee.”<sup>84</sup> These statutes also reorganized the staffing of standing committees to facilitate the professionalization of standing committee staff and required the production of biennial oversight reports on agencies within their jurisdiction.<sup>85</sup> Other statutes emphasize and support Congress’s oversight powers in numerous ways. Statutes protect whistleblowers, create requirements for departments to have inspectors general and chief financial officers,<sup>86</sup> and create the Government Accountability Office (the GAO, formerly the General Accounting Office).<sup>87</sup>

These statutory structures implement the constitutional power of Congress to exercise oversight. They provide a statutory means through which the Congress can remain actively involved in checking and overseeing the activities of the executive branch. In a period of divided government in which the political party of at least one of the houses is different from the President, these statutes institutionalize the power of each house of Congress to conduct its own oversight of the executive branch.

### C. *Executive Privilege*

To say that Congress has broad powers to investigate the executive branch does not imply they are absolute or without limit. From the earliest congressional investigations, the executive branch has asserted some prerogative or privilege against disclosure—which we now call executive privilege. Our focus in this Article is not on resolving any particular issue of executive privilege. For present purposes, it suffices to observe that Congress and the executive branch hold different views of the scope of executive privilege—and both today have come to treat the judiciary as the final arbiter of claims of executive privilege.

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83 Legislative Reorganization Act of 1946, ch. 753, § 136, 60 Stat. 812, 832 (1946) (codified as amended at 2 U.S.C. § 190d(a)); *see also* Chafetz, *Congressional Overspeech*, *supra* note 40, at 543.

84 Legislative Reorganization Act of 1970, Pub. L. No. 91-510, sec. 118(a)(1), § 136(a), 84 Stat. 1140, 1156 (1970) (codified as amended at 2 U.S.C. § 190d(a)).

85 Chafetz, *Congressional Overspeech*, *supra* note 40, at 543; Legislative Reorganization Act of 1970 § 118.

86 *See* Chafetz, *Congressional Overspeech*, *supra* note 40, at 544 (citing Inspector General Act of 1978, Pub. L. No. 95-452, § 5(b), 92 Stat. 1101, 1103 (1978)).

87 *Id.* at 543.

As a matter of congressional practice, Congress has asserted the power to demand any information in connection with a properly authorized oversight hearing.<sup>88</sup> Congress has maintained that documents generated at the staff level may not be subject to any privilege,<sup>89</sup> and that there is no limitation on the subject matter of congressional inquiries, including matters of foreign relations and international negotiations.<sup>90</sup> House oversight committee reports routinely cite the broad language from *McGrain* and *Watkins* noted above that treats congressional investigation powers as broad.<sup>91</sup>

Executive branch officials have typically expressed a much more capacious understanding of the scope of executive privilege, extending to any executive “deliberative communications”<sup>92</sup> that form “part of the decision-making process, or other information important to the discharge of the Executive Branch’s constitutional responsibilities.”<sup>93</sup> The executive branch frequently asserts that any risk of compelled disclosure would discourage robust and candid dialogue among executive branch officials.<sup>94</sup> From the perspective of the executive branch, Congress may compel disclosure and overcome an assertion of executive privilege “only if it establishes that the subpoenaed documents are ‘*demonstrably critical* to the responsible fulfillment of the Committee’s functions.’”<sup>95</sup> The executive also takes a much narrower

88 Peter M. Shane, *Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims Against Congress*, 71 MINN. L. REV. 461, 479 (1987).

89 *Id.* at 480 (citing *Contempt of Congress: Hearings Before the H. Subcomm. on Oversight & Investigations and the H. Comm. On Energy & Com. on the Congressional Proceedings Against Interior Secretary James G. Watt for Withholding Subpoenaed [sic] Documents and for Failure to Answer Questions Relating to Reciprocity Under the Mineral Lands Leasing Act*, 97th Cong. 104 (1981–82) [hereinafter *Watt Contempt*]).

90 See *Watt Contempt*, *supra* note 89, at 116–17; Shane, *supra* note 88, at 480.

91 See, e.g., H.R. REP. NO. 97-898, at 12 (1982); H.R. REP. NO. 105-416, at 29 (1998); H.R. REP. NO. 105-792, at 93 (1998); H.R. REP. NO. 113-415, pt. 1, at 2 (2014).

92 Assertion of Exec. Privilege over Commc’ns Regarding EPA’s Ozone Air Quality Standards & Cal.’s Greenhouse Gas Waiver Request, 32 Op. O.L.C. 1, 1 (2008) [hereinafter *Special Counsel Assertion*]; see also, e.g., Assertion of Exec. Privilege with Respect to Prosecutorial Documents, 25 Op. O.L.C. 1, 2 (2001) [hereinafter *U.S. Attorneys Assertion*]; Assertion of Exec. Privilege with Respect to Clemency Decision, 23 Op. O.L.C. 1, 1–2 (1999) [hereinafter *Clemency Assertion*] (opinion of Att’y Gen. Janet Reno).

93 Memorandum from Ronald Reagan, President of the United States, to the Heads of Exec. Dep’ts & Agencies 1 (Nov. 4, 1982) (on file with author).

94 Assertion of Exec. Privilege Concerning the Special Counsel’s Interviews of the Vice President & Senior White House Staff, 32 Op. O.L.C. 7, 8 (2008) [hereinafter *EPA Assertion*]; U.S. Attorneys Assertion, *supra* note 92, at 2; Clemency Assertion, *supra* note 92, at 1–4; Assertion of Exec. Privilege in Response to a Cong. Subpoena, 5 Op. O.L.C. 27, 29–31 (1981) [hereinafter *1981 Assertion*] (opinion of Attorney General William French Smith).

95 Assertion of Exec. Privilege Over Documents Generated in Response to Cong. Investigation into Operation Fast and Furious, 36 Op. O.L.C. 1, 5 (2012) (quoting Special

view of Congress's oversight functions, as reflected in a 1981 opinion of the Office of Legal Counsel (OLC) within the Department of Justice: "[C]ongressional oversight of Executive Branch actions is justifiable only as a means of facilitating the legislative task of enacting, amending, or repealing laws,"<sup>96</sup> a list that seems to exclude broad oversight of administration, whether to identify simple maladministration or outright corruption. The 1981 opinion also does not expressly mention oversight of the executive's expenditure of appropriated funds—a central element of congressional understanding of its oversight powers since the House investigation of the St. Clair expedition.

When confronted with these conflicting views of executive privilege and its relationship to the scope of legitimate congressional oversight, it is tempting to assume that there is only one correct account and to associate that correct answer with the answer the court gives in any particular case. In this context, however, it is more useful, as Peter Shane observes, to understand each branch as maintaining its own independent doctrine of executive privilege, which deserves co-equal status with those of other branches.<sup>97</sup> As a practical matter, Congress and the President continue to take different positions on the legitimate scope of executive privilege and both generally acquiesce in treating judicial determinations as final. These dueling assertions of executive privilege are one of the most persistent strains of departmentalism between the branches.

For our inquiry, it is not necessary to define or take a position on the precise parameters of executive privilege. All that is necessary is the fact, as illustrated by the examples in the next section, that the executive branch continues to assert executive privilege in ways that are broader than the courts allow. As a result, absent enforceable, timely court orders, the executive has been able to effectively thwart congressional oversight that courts would permit.

#### *D. Executive Branch Resistance to Congressional Oversight*

The executive branch frequently rejects congressional requests for information that are at the center of Congress's oversight authority, and especially so when the information sought might be damaging to the President or other high-level executive branch offices. Of course, that is often the information that is most useful to Congress, whether

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Counsel Assertion, *supra* note 92, at 3–4); *see also, e.g.*, U.S. Attorneys Assertion, *supra* note 92, at 2 (same); Clemency Assertion, *supra* note 92, at 2 (same).

<sup>96</sup> 1981 Assertion, *supra* note 94, at 30; *see also, e.g.*, Special Counsel Assertion, *supra* note 92, at 11; U.S. Attorneys Assertion, *supra* note 92, at 2–3.

<sup>97</sup> *See* Shane, *supra* note 88, at 465.

for enacting timely remedies, discouraging waste or corruption, or exposing the scope and depth of the problem in a way necessary for the public to hold the President or the administration's political party accountable in elections.

The following three examples illustrate how the executive branch is able to evade Congress's request for information, even when formalized in a subpoena and a contempt citation. In each case, Congress either never received full information in response to its request or received that information only years later, when it had lost much of its value for timely reform or accountability. One is from the Democrat-controlled House investigating President Reagan's Environmental Protection Agency (EPA); the second is from a Republican-controlled House investigating President Obama's Department of Justice; and the third is from a Democrat-controlled House investigating President Trump's White House Counsel.

### 1. Reagan Administration EPA and a Democratic House: The Anne Gorsuch Affair

A dispute between the Reagan administration and the House provoked one of the most extensive and consequential oversight battles between the House and the executive branch. The battles were fought over information related to the EPA's handling of Superfund sites, but the conflict ultimately affected not only environmental policymaking, but also Supreme Court jurisprudence.<sup>98</sup> In 1981, President Reagan named Anne Gorsuch, later Anne Burford (and the mother of Justice Neil Gorsuch), as Administrator of the Environmental Protection Agency.<sup>99</sup> Administrator Gorsuch's efforts

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98 OLC has asserted that Congress cannot pursue a criminal contempt of Congress action and/or Congress's inherent contempt powers against an executive branch official who is claiming executive privilege at the written direction of the President. See *Prosecution for Contempt of Cong. of an Exec. Branch Off. Who Has Asserted a Claim of Exec. Privilege*, 8 Op. O.L.C. 101, 137 (1984) ("Congress could obtain a judicial resolution of the underlying privilege claim and vindicate its asserted right to obtain any documents by a civil action for enforcement of a congressional subpoena."); see also *Response to Cong. Requests for Info. Regarding Decisions Made Under the Indep. Couns. Act*, 10 Op. O.L.C. 68, 88 (1986) ("[A]lthough the civil enforcement route has not been tried by the House, it would appear to be a viable option."). This effectively leaves as the only available option pursuit of enforcement via a civil proceeding in district court.

99 For an overview of this dispute, see TODD GARVEY, *CONG. RSCH. SERV.*, RL34097, *CONGRESS'S CONTEMPT POWER AND THE ENFORCEMENT OF CONGRESSIONAL SUBPOENAS: LAW, HISTORY, PRACTICE, AND PROCEDURE* 35 (2017); see also JONATHAN LASH, KATHERINE GILLMAN & DAVID SHERIDAN, *A SEASON OF SPOILS: THE REAGAN ADMINISTRATION'S ATTACK ON THE ENVIRONMENT* (1984); Cally Carswell, *How Reagan's EPA Chief Paved the Way for Trump's Assault on the Agency*, *NEW REPUBLIC* (Mar. 21, 2017), <https://newrepublic.com>

to cut the EPA budget and reduce environmental enforcement provoked oversight activity by the House Public Works and Transportation Committee and the Energy and Commerce Committee, chaired by Rep. John Dingell (D-Michigan).<sup>100</sup> In the fall of 1982, the Committee subpoenaed EPA documents after concerns that the Superfund program, run by Assistant Administrator Rita Lavelle, relied on partisan political considerations in its enforcement, including delaying settlements that might have helped the Democratic Governor of California running for reelection and reaching sweetheart deals in other states.<sup>101</sup> The House also investigated allegations of document destruction, and Lavelle ultimately went to jail for lying to Congress.<sup>102</sup>

In response to the House inquiries, the EPA sought advice from the OLC at the Department of Justice on the scope of its obligations to disclose information to Congress in response to these requests. After negotiations with the House Subcommittees collapsed, the Department of Justice concluded that the EPA could assert executive privilege and withhold documents found in “open investigative files” reflecting “enforcement strategy.”<sup>103</sup> Based on this advice, President Reagan directed Administrator Gorsuch to assert executive privilege in response to the House subpoenas.<sup>104</sup> Administrator Gorsuch followed

/article/141471/reagans-epa-chief-paved-way-trumps-assault-agency [https://perma.cc/ZZ8A-ALZ4].

100 See GARVEY, *supra* note 99, at 35; COMM. ON PUB. WORKS & TRANSP., CONGRESSIONAL PROCEEDINGS AGAINST ANNE M. GORSUCH, ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY, FOR WITHHOLDING SUBPOENAED DOCUMENTS RELATING TO THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980, H.R. REP. NO. 97-968, at 15 (1982) [hereinafter CONGRESSIONAL PROCEEDINGS AGAINST GORSUCH].

101 See INVESTIGATION OF THE ROLE OF THE DEPARTMENT OF JUSTICE IN THE WITHHOLDING OF ENVIRONMENTAL PROTECTION AGENCY DOCUMENTS FROM CONGRESS IN 1982–83, H.R. REP. NO. 99-435, at 44 (1985); CONGRESSIONAL PROCEEDINGS AGAINST GORSUCH, *supra* note 100; see also Lois Romano, *Rita Lavelle, Dumped*, WASH. POST (Mar. 5, 1983), <https://www.washingtonpost.com/archive/lifestyle/1983/03/05/rita-lavelle-dumped/45256854-7ca3-4df4-8031-5a56793be499/> [https://perma.cc/TJ3F-VHKT]

102 See GARVEY, *supra* note 99, at 35; Philip Shabecoff, *Rita Lavelle Gets 6-Month Prison Term and Is Fined \$10,000 for Perjury*, N.Y. TIMES (Jan. 10, 1984), <https://www.nytimes.com/1984/01/10/us/rita-lavelle-gets-6-month-term-and-is-fined-10000-for-perjury.html> [https://perma.cc/8YJZ-L432].

103 Assertion of Executive Privilege in Response to Congressional Demands for Law Enforcement Files, 43 Op. Att’y Gen. 374, 376, 378 (1982) (quoting Memorandum from Thomas E. Kauper, Deputy Assistant Att’y Gen., Off. of Legal Couns., Dep’t of Just., to Edward L. Morgan, Deputy Couns. to the President (Dec. 19, 1969)).

104 See Memorandum from President Reagan, to Anne Burford, Adm’r, Env’t Prot. Agency (Nov. 30, 1982), *reprinted in* H.R. REP. NO. 97-968, at 42. During the course of these events, Administrator Gorsuch was married, and became Anne Burford. Douglas Martin, *Anne Gorsuch Burford, E.P.A. Chief, Dies*, N.Y. TIMES (July 22, 2004), <https://>

President Reagan's directive, and the House of Representatives ended up voting to hold her in contempt for failure to comply with the subpoena.<sup>105</sup> It was an historic first contempt citation for a cabinet-level official. The Department of Justice sought to enjoin the transmission of the citation for contempt to the U.S. Attorney for the District of Columbia,<sup>106</sup> but even though that failed, the U.S. Attorney declined to prosecute Administrator Gorsuch to enforce the subpoena.<sup>107</sup> Gorsuch also filed a civil suit against the House of Representatives seeking a declaration of the validity of her assertion of executive privilege, which the court dismissed on jurisdictional grounds.<sup>108</sup> Soon thereafter her civil suit was dismissed, and officials recognized that documents regarding the use of partisan considerations in Superfund enforcement had been improperly withheld from the House Committees. The ultimate release of those documents prompted further negotiations in which the House agreed to withdraw the contempt citation,<sup>109</sup> Administrator Gorsuch ultimately resigned,<sup>110</sup> and Rita Lavelle was fired and convicted.<sup>111</sup>

The executive branch's broad assertion of executive privilege delayed the House investigation for more than a year—and required

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[www.nytimes.com/2004/07/22/us/anne-gorsuch-burford-62-reagan-epa-chief-dies.html](http://www.nytimes.com/2004/07/22/us/anne-gorsuch-burford-62-reagan-epa-chief-dies.html) [<https://perma.cc/U979-LTH5>]. I refer to her as Anne Gorsuch throughout. See H.R. REP. NO. 97-968, at 42.

105 H.R. Res. 632, 97th Cong., 128 CONG. REC. 31776 (1982); see 2 U.S.C. § 192 (providing that a person subpoenaed who refuses to produce papers upon any matter under inquiry of the House or any of its committees shall be guilty of a misdemeanor); § 194 (providing that following contempt the Speaker of the House is to certify the contempt citation to the U.S. Attorney, who is required to bring the matter to the grand jury).

106 See *United States v. House of Representatives*, 556 F. Supp. 150 (D.D.C. 1983). Despite the mandatory language of 2 U.S.C. § 194, the Office of Legal Counsel has asserted that a U.S. Attorney has the discretion to decline to present a congressional criminal contempt citation to a grand jury. See *Prosecution for Contempt of Cong. of an Exec. Branch Off. Who Has Asserted a Claim of Exec. Privilege*, 8 Op. O.L.C. 101, 137 (1984) ("Congress could obtain a judicial resolution of the underlying privilege claim and vindicate its asserted right to obtain any documents by a civil action for enforcement of a congressional subpoena.").

107 See *Examining and Reviewing the Procedures That Were Taken by the Office of the U.S. Attorney for the District of Columbia in Their Implementation of a Contempt Citation That Was Voted by the Full House of Representatives Against the Then Administrator of the Environmental Protection Agency, Anne Gorsuch Burford: Hearing Before the H. Comm. on Pub. Works & Transp.*, 98th Cong. 30 (1983) (statement of Stanley S. Harris, U.S. Attorney, District of Columbia)

108 Kevin M. Stack, *The Story of Morrison v. Olson: The Independent Counsel and Independent Agencies in Watergate's Wake*, in *PRESIDENTIAL POWER STORIES* 401, 418 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009).

109 GARVEY, *supra* note 99, at 35.

110 See CONGRESSIONAL PROCEEDINGS AGAINST GORSUCH, *supra* note 100; Martin, *supra* note 104.

111 See GARVEY, *supra* note 99, at 35; see also Shabecoff, *supra* note 102.

consuming floor time in the House to hold the Administrator of the EPA in contempt. Ted Olson's own statements to the committee regarding the scope of EPA's disclosures resulted in the appointment of an independent counsel to investigate his conduct, ultimately resulting in the Supreme Court's decision to uphold the Independent Counsel Statute in *Morrison v. Olson*.<sup>112</sup>

## 2. Obama Administration Department of Justice and a Republican House: Fast and Furious

In the summer of 2009, the Obama administration changed its enforcement strategy to stem the illegal flow of weapons from the U.S. to Mexican drug cartels, shifting emphasis from “merely seizing firearms” to identifying and targeting the broader networks involved.<sup>113</sup> A significant focus of the strategy was a Phoenix-based operation called “Operation Fast and Furious,” which was designed to identify gun smuggling networks through the tracking of straw-purchased firearms.<sup>114</sup> The operation involved the Bureau of Alcohol, Tobacco and Firearms (ATF), a law enforcement agency within the DOJ, declining to make isolated arrests of individual gun smugglers to create opportunities to make arrests of central figures that could cripple gun trafficking networks.<sup>115</sup> Because of the inherent risks involved in allowing guns to be carried unlawfully into Mexico, the initiative generated internal concerns as early as December 2009.<sup>116</sup> ATF ended the program in January 2011 after guns traced to the operation were found on the scene of the fatal shooting of U.S. Border Patrol Agent Brian Terry.

Agent Terry's death prompted a congressional investigation by the Republican-controlled House Committee on Oversight and Government Reform.<sup>117</sup> The House investigation became one of the most contentious in the Obama administration. After the Department of Justice refused to turn over some of the documents sought by the Committee, the House issued a subpoena to Attorney General Holder

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112 487 U.S. 654 (1988). For a detailed account of these facts, and the ensuing litigation, see Stack, *supra* note 108, at 401.

113 STAFF OF H. COMM. ON OVERSIGHT & GOV'T REFORM AND S. COMM. ON THE JUDICIARY, 112TH CONG., FAST AND FURIOUS: THE ANATOMY OF A FAILED OPERATION, PART I OF III 6 (Comm. Print 2012) [hereinafter FAST AND FURIOUS, PART I].

114 STAFF OF H. COMM. ON OVERSIGHT & GOV'T REFORM AND S. COMM. ON THE JUDICIARY, 112TH CONG., THE DEPARTMENT OF JUSTICE'S OPERATION FAST AND FURIOUS: FUELING CARTEL VIOLENCE 4 (Comm. Print 2011).

115 See FAST AND FURIOUS, PART I, *supra* note 113, at 16.

116 See *id.* at 15.

117 See *id.* at 5.

on October 11, 2011.<sup>118</sup> Holder partially complied, handing over thousands of documents, internal notes and emails, but still withheld thousands of key documents and requested that President Obama assert executive privilege over all pertinent documents.<sup>119</sup> President Obama asserted the privilege, but the Department of Justice never produced privilege logs. After continued wrangling, in 2012, the House voted to hold Holder in contempt of Congress and authorize a civil suit to enforce its subpoenas.<sup>120</sup> Not until January 19, 2016, did the House obtain a federal court order enforcing the production of documents and a privilege log,<sup>121</sup> giving Congress key information on the role of the Department of Justice in the operation.

The House released reports in July 2012, focusing on the leadership at the ATF and lack of coordination among enforcement agencies,<sup>122</sup> and in October 2012, examining the role the Department of Justice played in the operation, and its culpability for the death of Agent Terry.<sup>123</sup> But the final report was not released until June 2017, after the federal court had ordered disclosures from the Department.<sup>124</sup> The 2017 report reached scathing conclusions about the Department of Justice's resistance to oversight, claiming the DOJ knew about the problems with the program early on, strategically withheld information from Congress, failed to produce many relevant documents requested in subpoenas, and formed a media strategy designed to impede oversight and minimize public scrutiny.<sup>125</sup> By the time of these court-ordered disclosures, the operation had been terminated years before, the central figures involved in managing it were no longer leading the DOJ, and President Trump had taken over the executive branch.

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118 See STAFF OF H. COMM. ON OVERSIGHT & GOV'T REFORM AND S. COMM. ON THE JUDICIARY, 115TH CONG., *FAST AND FURIOUS: OBSTRUCTION OF CONGRESS BY THE DEPARTMENT OF JUSTICE*, PART III 3 (Comm. Print 2017) [hereinafter *FAST AND FURIOUS*, PART III].

119 See *id.* at 4.

120 *Id.*

121 Comm. on Oversight & Gov't Reform, *U.S. House of Representatives v. Lynch*, 156 F. Supp. 3d 101, 120 (D.D.C. 2016) (ordering production of privilege logs among other documents).

122 See *FAST AND FURIOUS*, PART III, *supra* note 118, at 3.

123 *Id.* See generally STAFF OF H. COMM ON OVERSIGHT & GOV'T REFORM AND S. COMM. ON THE JUDICIARY, 112TH CONG., *FAST AND FURIOUS: THE ANATOMY OF A FAILED OPERATION*, PART II OF III 90–104 (Comm. Print 2012) [hereinafter *FAST AND FURIOUS*, PART II] (presenting the connections between Justice Department officials and the death of Agent Terry).

124 See *FAST AND FURIOUS*, PART III, *supra* note 118; *Fast and Furious, Six Years Later: Hearing Before the H. Comm on Oversight & Gov't Reform*, 115th Cong. (2017).

125 *FAST AND FURIOUS*, PART III, *supra* note 118, at 16–22.

### 3. Trump Administration Commerce Secretary and a Democratic House: The Citizenship Question on the Census

On numerous occasions, the Trump administration refused to comply with House subpoenas for documents or testimony or provided false or misleading testimony. The House actions have included demands for many types of documents and testimony, ranging from standard House oversight activities to impeachment proceedings. The administration frequently resisted congressional oversight, including a blanket rejection of the House's authority to investigate the executive branch in connection with the 2019 impeachment inquiry.<sup>126</sup>

Just to pick one example, the House Committee on Oversight and Reform issued a request for documents regarding the Department of Commerce's decision to add a citizenship question to the 2020 Census in February 2019, and it followed that request with a subpoena in April 2019. Although some documents were produced in response to the subpoena, the Department of Justice declined to permit John Gore, the Principal Deputy Assistant Attorney General for Civil Rights, Commerce Secretary Wilbur Ross, and Attorney General William Barr to answer all of the investigation's requests.<sup>127</sup> On July 17, 2019, the House held both Secretary Ross and Attorney General Barr in contempt for failing to comply with the House Oversight Committee's subpoenas to produce documents.<sup>128</sup> The Department of Justice adhered to its practice of not pursuing criminal enforcement of these officials' contempt of Congress,<sup>129</sup> but a judicial challenge to the

<sup>126</sup> Letter from Pat A. Cipollone, Couns. to the President, to Nancy Pelosi, Speaker, House of Representatives, and Adam B. Schiff, Chairman, House Permanent Select Comm. on Intel., and Eliot L. Engel, Chairman, House Foreign Affs. Comm. and Elijah E. Cummings, Chairman, House Comm. on Oversight & Reform 7 (Oct. 8, 2019) [hereinafter Letter from Pat A. Cipollone], <https://www.washingtonpost.com/context/letter-from-white-house-counsel-pat-cipollone-to-house-leaders/0e1845e5-5c19-4e7a-ab4b-9d591a5fda7b/> [<https://perma.cc/AQX6-76AK>] ("Given that your inquiry lacks any legitimate constitutional foundation, any pretense of fairness, or even the most elementary due process protections, the Executive Branch cannot be expected to participate in it."); see also *Donald Trump's Obstruction of Congressional Oversight*, AM. OVERSIGHT, <https://www.americanoversight.org/investigation/donald-trumps-obstruction-of-congressional-oversight> [<https://perma.cc/7FYL-H5GQ>] (last updated July 31, 2020) (cataloging Trump administration resistance to congressional oversight).

<sup>127</sup> Letter from Stephen E. Boyd, Assistant Att'y Gen., Dep't of Just., to Elijah E. Cummings, Chairman, House Comm. Oversight and Reform (Apr. 24, 2019); Letter from Stephen E. Boyd, *supra* note 2; Andrew Desiderio, *DOJ, Commerce Reject Dem Subpoenas for Census Docs*, POLITICO (June 6, 2019), <https://www.politico.com/story/2019/06/06/barr-ross-census-democrats-house-1356569> [<https://perma.cc/4EGR-A5U4>].

<sup>128</sup> H.R. Res. 497, 116th Cong. (2019).

<sup>129</sup> David Shortell, *DOJ Won't Prosecute Contempt Citation Against Barr and Ross*, CNN (July 24, 2021), <https://www.cnn.com/2019/07/24/politics/doj-contempt-wont-prosecute-barr-ross/index.html> [<https://perma.cc/G7BK-62UC>].

decision to add a citizenship question proceeded. On June 27, 2019, the Supreme Court held that the Secretary's decision to include the citizenship question was unlawful because it had been justified on a pretextual ground.<sup>130</sup> In late November 2019, the House Committee filed a federal lawsuit seeking to compel Ross and Barr to produce documents in response to its subpoenas related to the plan to add a citizenship question.<sup>131</sup> This case remained tied up in the D.C. District Court beyond the November 2020 election pending the results of the House's suit against Donald F. McGahn, former White House Counsel.<sup>132</sup>

## II. ENFORCING OVERSIGHT

### A. *Congress's Enforcement Toolkit: A Problem of Incentives*

As the examples just discussed illustrate, Congress's approach to enforcing its subpoena powers is failing. The executive branch routinely thwarts Congress's legitimate interest in information required for oversight. Congress has primarily relied on four tools for enforcing its subpoenas against executive branch officials: inherent contempt, criminal contempt, civil litigation to enforce contempt sanctions, and threats of funding cuts. It is worth considering why these tools have not been successful in overcoming executive branch resistance to subpoenas.<sup>133</sup>

Congress has a long-recognized inherent contempt power, including the power to hold in custody those in contempt, although this power has not been actively invoked in decades. In *Congress's Constitution* and earlier work, Josh Chafetz has unearthed and given prominence to the scope of Congress's use of its inherent contempt power through the nineteenth century and well into the twentieth century.<sup>134</sup> Throughout that period, Congress's inherent contempt power was the primary means by which it would enforce compliance

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130 *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575 (2019).

131 Complaint at 83, *Comm. on Oversight & Reform, U.S. House of Representatives v. Barr*, No. 19-cv-03557 (D.D.C. Nov. 26, 2019).

132 Minute Order, *Comm. on Oversight & Reform, U.S. House of Representatives v. Barr*, No. 19-cv-03557 (D.D.C. Oct. 15, 2020). President Biden has restored the long-standing principle that apportionment includes all persons, not just citizens. See Exec. Order No. 13,986, 86 Fed. Reg. 7015, 7016 (Jan. 20, 2021).

133 Other strategies include not acting on the President's nominations, simply not acting on any of the President's legislative proposals or needs, or reducing an official's salary. See Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. CHI. L. REV. 1083, 1152-53 (2009).

134 JOSH CHAFETZ, *CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS* (2017) [hereinafter CHAFETZ, *CONGRESS'S CONSTITUTION*].

with its subpoenas. As Chafetz explores, Congress used its inherent contempt power to bring into custody members of the executive branch for contempt, including James Fry, the Provost Marshall General of the Army (1866),<sup>135</sup> George Seward, for conduct when he was consul general to Shanghai (1879),<sup>136</sup> and Snowden Marshall, U.S. Attorney for the Southern District of New York (1916).<sup>137</sup> The House detained Seward for failing to produce subpoenaed documents.<sup>138</sup>

Since Watergate, however, Congress has allowed its inherent contempt powers to atrophy. Congress has acquiesced in the idea that directing its Sergeant at Arms to detain an executive branch official would prompt an unseemly constitutional crisis, in which the Sergeant at Arms would be face-to-face with a U.S. Marshal to take custody of an executive official.<sup>139</sup> Nor has the idea that Congress could impose fines on those who fail to appear in response to subpoenas gained much traction, although in principle it could be an effective means of self-help. Without a structure for fines and absent any appetite for using its power to hold executive branch officials in custody, inherent contempt powers are not a viable answer to enforcing Congress's oversight powers.

A second enforcement mechanism—criminal liability for contempt of Congress—fails because it provides no protection when the President is of a different party from the party that controls either the House or the Senate. In 1857, Congress enacted a statute that attached criminal liability to contempt of Congress, and imposed a duty upon the U.S. Attorney for the District of Columbia to bring the matter before a grand jury.<sup>140</sup> The current version of the statute imposes a duty on the U.S. Attorney in any district in which the individual in contempt of a congressional subpoena is located “to bring the matter before the grand jury for its action.”<sup>141</sup> The vulnerabilities of this criminal contempt sanction are well illustrated in the cases discussed above. Although Administrator Gorsuch, Attorney General Holder, Secretary Ross and Attorney General Barr were all held in contempt for failure to testify or cooperate with House oversight, the Department of Justice declined to bring the contempt issue to a grand jury in any of these cases based on its policy that each

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135 *Id.* at 175.

136 *Id.* at 176–77.

137 *Id.* at 177–78.

138 *Id.* at 185.

139 *See, e.g.*, Comm. on the Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53, 83 (D.D.C. 2008); *see also* CHAFETZ, CONGRESS'S CONSTITUTION, *supra* note 134, at 187 (discussing same).

140 *See* Act of Jan. 24, 1857, ch. 19, §§ 1 & 3, 11 Stat. 155, 155–56 (1857) (codified as amended at 2 U.S.C. § 194).

141 2 U.S.C. § 194 (2018).

of them validly invoked executive privilege and therefore noncompliance did not constitute a crime. The Department of Justice reached the same conclusion regarding the House's finding that both former White House Counsel Harriet Miers and Joshua Bolten, White House Chief of Staff to President George W. Bush, were in contempt for failure to disclose information about the firings of U.S. Attorneys. The criminal contempt statute makes the Department of Justice a necessary mover in enforcing congressional subpoenas against executive branch officials. As a practical matter, that makes criminal enforcement of Congress's subpoena powers highly unlikely whenever the President is of a different party than the house of Congress holding the official in contempt.<sup>142</sup>

A third conventional enforcement tool is filing a civil action in federal court to force the executive official to comply, often in a declaratory judgment proceeding. The value of a civil action is that it has the potential to convert a congressional subpoena into a court order, which creates the risk of a contempt of court sanction. Civil litigation has become the nearly exclusive means of enforcement of Congress's oversight powers, but it is also the most recent enforcement mechanism. Interestingly, scholars have found no pre-Watergate case in which a house of Congress became a plaintiff in a court proceeding seeking to enforce a congressional subpoena against an executive branch official.<sup>143</sup> Watergate prompted the courts to adjudicate a claim that an executive official was in contempt of Congress for failure to comply with a subpoena—and that resolution has stuck. Yet, as the examples in the previous part illustrate, seeking judicial enforcement of a subpoena, at least in our current system, works very poorly for Congress.

The most important reasons should be no surprise at this point: judicial enforcement involves a lot of time, and delay thwarts oversight. Congressional subpoenas are only valid for the two-year term of the Congress that issued them,<sup>144</sup> and even the most well-managed Congress will take several months to organize, identify the testimony or documents it needs, receive a rejection to an informal oversight demand, negotiate, and vote to issue a subpoena. After the subpoena

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142 The Department of Justice has recently initiated prosecution of former Trump administration official Steven Bannon for his refusal to comply with a House subpoena regarding the events of January 6, 2020. Press Release, Dep't of Just., Stephen K. Bannon Indicted for Contempt of Congress (Nov. 12, 2021), <https://www.justice.gov/opa/pr/stephen-k-bannon-indicted-contempt-congress> [<https://perma.cc/R34A-PMQD>]. In this case, the House and President are in alignment.

143 CHAFETZ, CONGRESS'S CONSTITUTION, *supra* note 134, at 192.

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

is issued, almost any executive administration worth its salt can engage in eighteen months to two years of litigation.<sup>145</sup> The executive official generally has the benefit of legal representation by the Department of Justice, on whose advice the claim of executive privilege is made.<sup>146</sup> And the hoops and delays to enforcing congressional subpoenas are significant, and they continue to develop. The defendant, through the Department of Justice, can litigate over standing,<sup>147</sup> the political question doctrine,<sup>148</sup> other aspects of federal jurisdiction,<sup>149</sup> the existence of a cause of action,<sup>150</sup> the scope of executive privilege,<sup>151</sup> the scope of the documents or testimony subject to the subpoena, and the officials to whom disclosures should be made. Each round of motions and appeals clicks down the clock, diminishing the value of the information sought to Congress.<sup>152</sup>

Finally, Congress can use its appropriations powers to punish or discipline agencies for failure to comply with its oversight requests through funding sanctions. A 2014 House Oversight and Government

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145 See GARVEY, *supra* note 99, at 53 (concluding that “although it appears that Congress may be able to enforce its own subpoenas through a declaratory civil action, relying on this mechanism to enforce a subpoena directed at an executive official may prove an inadequate means of protecting congressional prerogatives due to the time required to achieve a final, enforceable ruling in the case”). For a 2019 media discussion of Trump-era refusals to testify, see 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/MG3T-4XK5>].

146 See Wolf, *supra* note 145.

147 *Comm. on the Judiciary of the U.S. House of Representatives v. McGahn*, 968 F.3d 755, 760 (D.C. Cir. 2020) (en banc) (holding that the House Judiciary Committee has standing to enforce its own subpoena).

148 See *Nixon v. United States*, 506 U.S. 224, 236 (1993) (holding that “opening the door of judicial review to the procedures used by the Senate in trying impeachments would ‘expose the political life of the country to months, or perhaps years, of chaos.’”) (quoting *Nixon v. United States*, 938 F.2d 239, 246 (D.C. Cir. 1991)).

149 See *Comm. on the Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53, 64 (D.D.C. 2008) (holding that since the subpoena power at bar “derive[d] implicitly from Article I of the Constitution, this case ar[ose] under the Constitution for purposes of § 1331 [subject matter jurisdiction]”).

150 *Comm. on the Judiciary of the U.S. House of Representatives v. McGahn*, 973 F.3d 121, 123 (D.C. Cir. 2020), *vacated pending reh'g en banc*, Per Curiam Order, No. 19-5331 (Oct. 15, 2020) (en banc) (holding the House Committee lacked a cause of action to enforce its subpoena), *dismissed*, Joint Motion to Dismiss Appeal, and Consent Motion to Vacate Panel Opinion, No. 19-5331 (June 10, 2021).

151 See Letter from Stephen E. Boyd, *supra* note 2.

152 See Josh Chafetz, *Nixon/Trump: Strategies of Judicial Aggrandizement*, 110 Geo. L.J. (forthcoming 2021) (manuscript at 22) (on file with authors) (observing that “the judiciary felt none of the urgency to decide the Trump cases that it had felt to decide the Nixon ones” and that “over 450 days elapsed between the issuance of the congressional subpoenas . . . and the Supreme Court’s decision in *Mazars*”); see, e.g., *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020).

Reform Committee investigation into whether the IRS had more intrusively scrutinized the applications for the tax-exempt status of conservative than liberal groups provides a rich example.<sup>153</sup> The Committee subpoenaed Lois G. Lerner, the director of the IRS division on exempt organizations. In lieu of testimony, Ms. Lerner submitted a voluntary statement to the Committee. The Committee later determined that her voluntary statement waived her Fifth Amendment privilege against self-incrimination and continued to insist on her testimony before the Committee. She refused, and the Committee recommended that the House hold her in contempt of Congress,<sup>154</sup> which the House did in May of 2014.<sup>155</sup> The House reported its finding of contempt to the U.S. Attorney for a criminal contempt prosecution, and the Department of Justice declined to prosecute,<sup>156</sup> just as it did with the contempt citation of Attorney General Holder.

As opposed to merely leaving the controversy as a stand-off, the House retaliated, using its appropriations powers. In the 2014 annual appropriations, the House cut the IRS budget by \$345 million<sup>157</sup> and included a limitation rider directly addressing the alleged wrongdoing in the IRS: “None of the funds made available in this Act may be used by the Internal Revenue Service to target groups for regulatory scrutiny based on their ideological beliefs.”<sup>158</sup> The reduction in IRS funding and inclusion of the limitations rider clearly conveyed Congress’s disapproval of the IRS’s handling of conservative groups’ tax-exempt applications and with it, the House’s disapproval of Ms. Lerner’s refusal to comply with its subpoena. The appropriations rider was unsuccessful, however, in forcing additional testimony.

A threat to reduce an agency’s funding may be a good tool for reorienting the agency’s substantive priorities, but it is a very blunt tool

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153 See H.R. REP. NO. 113-415, at 3–7 (2014).

154 *Id.* at 2.

155 H.R. Res. 574, 113th Cong. (2014), 160 CONG. REC. H3902–09, H3919–22 (daily ed. May 7, 2014) (enacted).

156 Letter from Stephen E. Boyd, Assistant Att’y Gen., Dep’t of Just., to Kevin Brady, Chairman, House Comm. on Ways & Means, and Peter J. Roskam, House Subcomm. on Tax Pol’y (Sept. 8, 2017), [https://republicans-waysandmeansforms.house.gov/uploaded\\_files/09.08.17\\_doj\\_response\\_to\\_criminal\\_referral\\_request.pdf](https://republicans-waysandmeansforms.house.gov/uploaded_files/09.08.17_doj_response_to_criminal_referral_request.pdf) [<https://perma.cc/3E2M-N2MT>].

157 Ed O’Keefe, *Congressional Leaders Agree on \$1.01 Trillion Spending Bill*, WASH. POST., Dec. 10, 2014, at A3.

158 Financial Services and General Government Appropriations Act, 2015, Pub. L. No. 113-235, div. E, § 108, 128 Stat. 2332, 2338 (2014); Financial Services and General Government Appropriations Act, 2016, Pub. L. No. 114-113, div. E, § 108, 129 Stat. 2242, 2430 (2015) (codified as amended at 31 U.S.C. § 1341(a)(1)) (stating the general prohibition on unauthorized spending); § 1350 (providing criminal fines and up to two years of imprisonment for violating § 1341(a)).

for enforcing more disclosure.<sup>159</sup> Because the sanction must follow the noncooperation, it arrives too late to increase the incentives for disclosure among executive branch officials. The funding reduction was targeted at the agency, not the individual, and presumably affected the ability of the IRS to do its work. It did not bring Ms. Lerner back to a congressional hearing room. Although officials may have a general sense of loyalty to their agency or office, a funding cut is still impersonal—it may or may not directly affect the individual whose testimony Congress sought.

### B. *Targeting Appropriations Sanctions to Noncooperation: Oversight Riders*

The Lerner-IRS conflict suggests another tool for oversight: the use of appropriations riders specifically targeted to obstruction of Congress's oversight powers—what we call *oversight riders*.

Appropriations riders, also called limitation riders, are provisions in appropriations legislation, framed in the negative, that prohibit or limit agency spending on particular programs or for particular purposes.<sup>160</sup> Riders allow Congress to target particular activities the agencies may otherwise have authority to do and make those agency actions unlawful by denying funding to support those activities or projects. Congress has used riders to prohibit specific agency policies, actions, and projects.<sup>161</sup> Under House and Senate rules, in general, riders may not change the existing law; they may only disallow agency activity within the period of fiscal appropriation.<sup>162</sup>

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159 Cf. MOLLY E. REYNOLDS & PHILIP A. WALLACH, AM. ENTER. INST., DOES THE EXECUTIVE BRANCH CONTROL THE POWER OF THE PURSE? 6–7 (2020) (noting 2006 threat by Senate Appropriations Committee to cut funding for Office of Drug Control Policy based in part on the Office's "lethargy and the inadequate information provided" and noting defunding is a "crude[] means of putting agencies on notice" (quoting S. Rep. No. 109-293, at 189 (2006))).

160 Devins, *supra* note 28, at 461; Metzger, *supra* note 19, at 1093.

161 Jason A. MacDonald, *Limitation Riders and Congressional Influence over Bureaucratic Policy Decisions*, 104 AM. POL. SCI. REV. 766, 769 (2010).

162 House Rule XXI, Clause 2(c) prohibits riders or limitations in appropriations bills, but House Rule XXI, Clause 2(c) prohibits provisions which change the law (called legislative provisions in this context) in appropriations bills. While the House does allow, under the Holman Rule, legislative provisions to be included in appropriations bills if they are germane and reduce expenditures, the basic rule is that riders are allowed if they limit or cap use of funds so long as they do not "chang[e] the existing law." See Jacqueline Lash & Brady Cassis, *The Use and Misuse of Appropriations Riders* 6–9 (Harvard L. Sch. Briefing Papers on Fed. Budget Pol'y, Briefing Paper No. 50) (May 10, 2015). A member may raise a point of order to object to a rider as violating the clause 2(c) prohibition on including legislative provisions, at which point the presiding officer will need to rule on the point of order. See *id.* at 8. See generally Devins, *supra* note 29, at 462.

Many of Congress's most controversial policy positions have been embodied in riders,<sup>163</sup> ranging from limiting the work of the Civil Rights Commission<sup>164</sup> to prohibiting transfers of prisoners from Guantanamo and prohibiting prosecution for marijuana possession in states that legalized it.<sup>165</sup> Although these riders have been attached to appropriations bills since the middle of the nineteenth century,<sup>166</sup> they have been increasingly relied upon since the 1990s.<sup>167</sup> They may appear in the general provisions applicable to an individual title of an appropriations act, in the general provisions applicable to the entire act, or they may be enacted separately.<sup>168</sup> As we explain below, the turn to riders, as opposed to legislation, is a pragmatic one. The pressure to pass appropriations on an annual basis means that riders attached to appropriations have a much greater chance of enactment in our currently polarized Congress than reform legislation.

The basic motivation of an oversight rider is to find a way to increase the pressure on members of the Executive Branch to provide information to Congress. An oversight rider would do so by denying appropriations for activities that obstruct Congress's oversight functions generally and response to congressional subpoenas in particular. We have identified one existing rider that fits this general description, and modelled on it, we propose another oversight rider that specifically targets noncompliance with congressional subpoenas.

## 1. The Section 713 Rider

Since 2003, Congress has repeatedly enacted in appropriations legislation a rider that prohibits use of appropriated funds to pay for the salary of any officer or employee who prevents or threatens to prevent an employee from having any communications, written or oral, with a member of Congress or committee related to the subject matter of the official's employment. The Section 713 rider provides in full:

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163 See Devins, *supra* note 29, at 463.

164 *Id.* at 456–57.

165 See, e.g., Department of Defense Appropriations Act, 2014, Pub. L. No. 113-76, div. C, §§ 8110–11, 128 Stat. 86, 131 (2014) (appropriations rider precluding transfer of detainees from Guantanamo); Commerce, Justice, Science, and Related Agencies Appropriations Act, 2016, Pub. L. No. 114-113, div. B, § 542, 129 Stat. 2286, 2332–33 (2015) (barring the DOJ from prosecuting medical marijuana offences in listed states). See generally Price, *infra* note 216, at 373–78 (discussing these examples).

166 Devins, *supra* note 29, at 462.

167 See Metzger, *supra* note 19, at 1093–94 (documenting increased reliance on appropriations riders); MacDonald, *supra* note 161, at 1 (same); Devins, *supra* note 29, at 462–63 (documenting increase in riders).

168 STIFF, *supra* note 30, at 57.

No part of any appropriation contained in this or any other Act shall be available for the payment of the salary of any officer or employee of the Federal Government, who—

(1) prohibits or prevents, or attempts or threatens to prohibit or prevent, any other officer or employee of the Federal Government from having any direct oral or written communication or contact with any Member, committee, or subcommittee of the Congress in connection with any matter pertaining to the employment of such other officer or employee or pertaining to the department or agency of such other officer or employee in any way, irrespective of whether such communication or contact is at the initiative of such other officer or employee or in response to the request or inquiry of such Member, committee, or subcommittee; or

(2) removes, suspends from duty without pay, demotes, reduces in rank, seniority, status, pay, or performance or efficiency rating, denies promotion to, relocates, reassigns, transfers, disciplines, or discriminates in regard to any employment right, entitlement, or benefit, or any term or condition of employment of, any other officer or employee of the Federal Government, or attempts or threatens to commit any of the foregoing actions with respect to such other officer or employee, by reason of any communication or contact of such other officer or employee with any Member, committee, or subcommittee of the Congress as described in paragraph (1).<sup>169</sup>

The prohibition is strikingly broad. It applies government-wide (funds appropriated “in this or any other Act”), encompasses any efforts by supervisors to thwart their employees or subordinates from communicating freely with Congress, and applies to any employment sanction that might follow from such communications.

Although the roots of the rider could be traced to Congress’s responses to executive orders issued by Presidents Theodore Roosevelt and William Howard Taft imposing restrictions on communications between executive branch officials and Congress,<sup>170</sup> its most immediate antecedent is Congress’s response to a 1970s directive of the Postmaster General ordering that the Post Office’s Congressional

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169 Financial Services and General Government Appropriations Act, 2021, Pub. L. No. 116-260, div. E, § 713, 134 Stat. 1380, 1432–33 (2020).

170 See Letter from Anthony H. Gamboa, Gov’t Accountability Off., to Hon. Frank R. Lautenberg et al., Gov’t Accountability Off. Decision B-30291 at 6–7 (Sept. 7, 2004) [hereinafter GAO 2004 Letter] (discussing President Roosevelt’s Exec. Order No. 1142 (1906) (although appearing to quote a different order, *see, e.g.*, 48 CONG. REC. 5223 (1912) (speech of Rep. John A. Moon)), President Taft’s Exec. Order No. 1514 (1909) (appearing to conflate President Taft’s Executive Order No. 1142 from 1909 and his Executive Order No. 1514 from 1912, 48 CONG. REC. 5223 (1912) (speech of Rep. John A. Moon)) and Congressional response in the Lloyd-La Follette Act, ch. 389, § 6, 37 Stat. 555 (1912) (letter giving a different citation for the legislation)).

Liaison Office be the sole voice of the Post Office in communicating with Congress.<sup>171</sup> Members of Congress objected to the idea that they would be prevented from communicating with lower level officials in the Postal Service.<sup>172</sup> In response, the Senate drafted a rider that applied only to the Postal Service, and the House a version that applied government-wide.<sup>173</sup> In 1997, the conference committee adopted the House version,<sup>174</sup> and the government-wide prohibition has been frequently re-enacted in appropriations bills.<sup>175</sup>

At least in principle, the Section 713 rider has features that help to overcome the structural shortcomings of Congress's conventional arsenal of tools for conducting oversight. First and most obviously, the rider creates a risk of sanction that is personal to the individual: a supervisor who thwarts a subordinate's communications with Congress faces the prospect of a salary reduction. Second, the sanction is public, making it an embarrassing part of the public record for the individual. Third, the sanction does not require any action by the Department of Justice. Rather, a member of Congress may initiate a request to the Government Accountability Office for an investigation.<sup>176</sup> The GAO will then conduct an investigation, and if wrongdoing is found, the GAO will direct the agency to claw back the salary paid during the relevant time period.<sup>177</sup> As a result, Congress can initiate a process that can result in a public sanction for impeding access to lower-level officials without requiring resort to litigation in court or dependance on Department of Justice enforcement. Further, the sanction risk has greater duration. Once the violation occurs, the risk of enforcement

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171 *See id.* at 5 (reported in 117 CONG. REC. 151 (1971))

172 *Id.*

173 *Id.* at 4 (comparing S. 1023, 105th Cong. § 506 (1997), with H.R. 2378, 105th Cong., § 505, 111 Stat. 1272, 1304 (1997), but perhaps meaning § 640, 111 Stat. 1318).

174 Treasury and General Government Appropriations Act, 1998, Pub. L. No. 105-61, § 640, 111 Stat. 1272, 1318 (1997).

175 *See, e.g.*, Financial Services and General Government Appropriations Act, 2021, Pub. L. No. 116-260, div. E, tit. VII, § 713, 134 Stat. 1185, 1432-33 (2020); Financial Services and General Government Appropriations Act, 2020, Pub. L. No. 116-93, div. C, § 713, 133 Stat. 2434, 2487 (2019); Financial Services and General Government Appropriations Act, 2010, Pub. L. No. 111-117, div. C, § 714, 123 Stat. 3159, 3208-09 (2009); Transportation, Treasury, Housing and Urban Development, the Judiciary, and Independent Agencies Appropriations Act, 2006, Pub. L. No. 109-115, div. A, § 818, 119 Stat. 2396, 2500 (2005); Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, app. C, § 620, 114 Stat. 2763, 2763A-160 (2000); H.R. REP. NO. 105-284, at 50, 80 (1997) (Conf. Rep.).

176 U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-767G, GAO'S CONGRESSIONAL PROTOCOLS 3 (2017) (outlining review and investigation process); *see also* Jennifer Shutt, *Democrats Could Tie Paychecks to Testimony in Impeachment Inquiry*, ROLL CALL (Oct. 22, 2019), <https://www.rollcall.com/2019/10/22/democrats-could-tie-paychecks-to-testimony-in-impeachment-inquiry/> [<https://perma.cc/8AR5-B5WY>].

177 Shutt, *supra* note 176.

through a clawback and public disclosure of the action survives beyond the current Congress and the current administration. In practice, future administrations may be reluctant to take clawback actions if there is continuity of party across administrations, but the party control of the next administration may not be clear at the time the official has to decide whether to withhold information, so the risk of personal exposure is likely to be a factor in their decisionmaking.

Despite the structural benefits the Section 713 rider provides Congress, it has remained relatively obscure. In the past twenty-three years, the GAO has only found violations of the rider on two occasions. The first, in 2004, after a six-month investigation, the GAO found that the Administrator for the Centers for Medicare and Medicaid Services had threatened to prevent the agency's chief actuary from providing information to Congress about the implications of upcoming Medicare expansion legislation.<sup>178</sup> The Administrator was recommended to pay back a portion of his salary for violating the rider.<sup>179</sup> The second, in 2016, found that the Housing and Urban Development's (HUD's) Deputy Assistant Secretary and an Associate General Counsel had prevented a HUD regional office employee from communicating with a congressional committee for 15 calendar days.<sup>180</sup> In 2017, HUD ordered its former Deputy Assistant Secretary to repay \$7,176 based on an hourly rate of \$74.75, but it closed the matter as to the Associate General Counsel.<sup>181</sup> The rider has surfaced on other occasions as well. For instance, in the final months of the Trump administration,

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178 GAO 2004 Letter, *supra* note 170, at 9, 13; *Cost and Payment Plans of Medicare Part D: Hearing Before the S. Subcomm. on Fed. Fin. Mgmt., Gov't Info., & Int'l Sec. of the S. Comm. on Homeland Sec. & Governmental Affs.*, 109th Cong. 6 (2005) (statement of Frank Lautenberg, Sen., Congress) ("To make matters worse, when we were considering this bill, the Administration misled Congress about its cost. I am not saying it was intentional, but that was the ultimate outcome. Tom Scully, who is head of the Center for Medicaid and Medicare Services—he was the head at the time—threatened to fire the chief Medicare actuary if he revealed the true cost of this bill to Congress. I asked GAO to investigate the legality of Mr. Scully's action, and GAO found out that Mr. Scully was so far out of line that he should repay part of his salary to the government. That was more than a year ago. We are still waiting for him to pay back the taxpayers.").

179 *Id.*

180 Letter from Susan A. Poling, Gen. Couns., Gov't Accountability Off., to Charles E. Grassley, Chairman, Senate Comm. on the Judiciary, and Jason Chaffetz, Chairman, House Comm. on Oversight & Gov't Reform, and Bob Goodlatte, Chairman, House Comm. on the Judiciary, Gov't Accountability Off. Decision B-325124.2 at 15 (April 5, 2016) [hereinafter GAO 2016 Letter]; *see also* Letter from Aaron Santa Anna, Acting Gen. Deputy Assistant Sec'y for Cong. & Intergovernmental Rels., Dep't of Hous. and Urb. Dev., to Charles E. Grassley, Chairman, Senate Comm. on the Judiciary (June 19, 2017) (documenting debt collection efforts from Elliot Minberg).

181 Letter from Aaron Santa Anna, *supra* note 180 (documenting debt collection efforts from Elliot Minberg).

Representatives in the House argued that by preventing State Department officials from testifying without counsel, Department leadership (possibly including Secretary Pompeo himself) may be in violation of the Section 713 Rider,<sup>182</sup> but it does not appear that the Representatives referred the matters to the GAO for investigation.

The Section 713 rider thus appears to be a mixed bag. On the one hand, the design of the rider combined with the GAO's investigation powers avoid a remedy that is dependent on either the Department of Justice or civil litigation to provide incentives for compliance with Congress's request for information from agencies. And those sanctions have been imposed in a relatively timely manner. On the other hand, Congress does not appear to have invoked the provision frequently—and indeed, it seems to have remained relatively obscure even to Congress.

## 2. Subpoena Rider

The question, then, is whether another oversight rider could capitalize on the basic structure of Section 713 to more effectively target noncompliance with congressional subpoenas. The Section 713 rider has several limitations. First, Section 713 addresses only supervisory action—actions to prevent others from communicating with Congress—and it does not impose an obligation on the individual to respond to Congress. Second, the sanctions triggered by Section 713 violations are limited to salary clawback and associated negative publicity. Third, while the Section 713 rider may arguably cover an official who orders a subordinate not to comply with a congressional subpoena, the rider does not target subpoena compliance directly.<sup>183</sup>

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182 Letter from Eliot L. Engel, Chairman, House Comm. on Foreign Affs., and Adam B. Schiff, Chairman, House Permanent Select Comm. on Intel., and Elijah E. Cummings, Chairman, House Comm. on Oversight & Reform, to John J. Sullivan, Deputy Sec'y of State, Dep't of State at 3 (Oct. 1, 2019); Letter from Mark Pocan, Member, Congress, to Michael R. Pompeo, Sec'y of State, Dep't of State (Oct. 8, 2019) (asking who prevented Ambassador Gordon Sondland from appearing for a scheduled House interview in violation of Section 713).

183 Recent experience includes multiple examples of refusals to produce nonprivileged documentary or testimonial evidence in response to a subpoena issued by a congressional committee. See Press Release, House Comm. on Oversight and Reform, White House Subpoenaed in House Impeachment Inquiry (Oct. 4, 2019), <https://oversight.house.gov/news/press-releases/white-house-subpoenaed-in-house-impeachment-inquiry> [<https://perma.cc/N9MC-JTAA>]; Letter from Pat A. Cipollone, *supra* note 126; *News Roundup: Trump Administration's Defiance of Congressional Subpoenas*, AM. OVERSIGHT (Apr. 26, 2019), <https://www.americanoversight.org/news-roundup-trump-administrations-defiance-of-congressional-subpoenas> [<https://perma.cc/E7CJ-BYKC>]; *House Oversight Votes to Hold William Barr and Wilbur Ross in Contempt*, CBS NEWS (June 12, 2019), <https://www.cbsnews.com/news/house-oversight-committee-votes-on->

The following proposed rider, which we call the subpoena rider, aims to overcome those limitations:

**SEC. YY.** No part of any appropriation contained in this or any other Act shall be available for the payment of the salary of any officer or employee of the Federal Government or used by such an officer or employee to—

- (1) refuse to produce on a timely basis documents or testimony subject to a subpoena issued by a committee of the House or Senate or to facilitate such conduct; or
- (2) plan for, begin, continue, finish, process, or approve the preparation or presentation of false or misleading documents or testimony in response to an information request or subpoena issued by a committee of Congress regarding the actions of employees or officers of government.<sup>184</sup>

This rider aims to provide two different sets of incentives to officials who are named in congressional subpoenas: those related to the official's salary and those related to the Antideficiency Act.

First, like the Section 713 rider, this rider makes the official's salary contingent upon the official's compliance with the congressional subpoena. The salary clawback could commence with the refusal to comply with the congressional subpoena and terminate only at the time of compliance. That construction would be consistent with the GAO's interpretation of the Section 713 rider. In the 2016 enforcement proceeding, the GAO took the position that an employee's salary is not available "while they prevented or attempted to prevent" a subordinate official from being interviewed by members of Congress.<sup>185</sup> Likewise, in the 2004 violation, the GAO reasoned that in light of the "continuing nature" of the Administrator's prohibition on testimony, all salary from the infraction to the official's departure should be treated as improper and subject to clawback.<sup>186</sup> Denying the official's salary from the refusal until compliance would be consistent

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holding-william-barr-and-wilbur-ross-in-contempt/ [https://perma.cc/S28G-6Z87]; Ramsey Touchberry, *William Barr Directs DOJ Official to Defy Congressional Subpoena to Testify About 2020 Census*, NEWSWEEK (Apr. 24, 2019), <https://www.newsweek.com/william-barr-doj-congressional-subpoena-1404879> [https://perma.cc/TAX4-A2WN] (discussing Attorney General Barr's instruction to a Justice Department official to defy a congressional subpoena); Mary Clare Jalonick & Lisa Mascaro, *Ex-White House Lawyer Defies House Subpoena for Mueller Docs*, AP NEWS (May 7, 2019), <https://apnews.com/70a27221ee94cecb5427143bb3eca2a> [https://perma.cc/EF35-QNEJ] (discussing Don McGahn's refusal to provide documents to the House Judiciary Committee).

<sup>184</sup> This rider is modeled on a 2020 abortion rider in the Commerce, Justice, Science, and Related Agencies Appropriations Act, 2020, Pub. L. No. 116-93, div. B, § 202, 133 Stat. 2385, 2412 (2019).

<sup>185</sup> GAO 2016 Letter, *supra* note 180, at 2–3.

<sup>186</sup> GAO 2004 Letter, *supra* note 170, at 12 n.24.

with this understanding of the violation as a continuing one. Viewing the violation as a continuing one would speak directly to that delay: each additional day of noncompliance would be another potential day of salary clawback. The subpoena rider thus creates a new personal incentive for timely compliance with congressional subpoenas.

Moreover, like the Section 713 rider, this subpoena rider creates a sanction that does not depend on the Department of Justice for enforcement or civil enforcement court. A member of Congress could trigger the GAO investigation.<sup>187</sup> The Supreme Court has held that the GAO is part of the legislative branch,<sup>188</sup> and accordingly pursuing the investigation is also not dependent on the executive branch policy. As to timeliness, in both the 2004 and 2016 findings of violations, the GAO reached a conclusion within a year.<sup>189</sup> While still not a matter of months, the relative promptness of the GAO's investigation makes the sanction a meaningful one to address delay tactics in the executive branch. In addition, if the subpoena rider enables or requires the agency to engage in salary clawback, as with the Section 713 rider, it will create a risk to officials that may survive the current administration.

Both the Section 713 and subpoena oversight riders invert the party most likely to seek judicial review, and therefore overcome perennial obstacles to congressional committee suits. Currently, the House and Senate face significant obstacles to obtaining judicial enforcement of their subpoenas, including difficulties demonstrating their standing and other justiciability doctrines.<sup>190</sup> With these oversight riders, officials found in violation by the GAO face an ever-increasing salary clawback. As a result, it is the officials, not the congressional committees, who would be most likely to seek judicial review to challenge the clawback determination. Indeed, given that the officials face loss of salary for as long for the duration of their

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187 See U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 176 (documenting GAO policies and processes in response to requests from Congress).

188 *Bowsher v. Synar*, 478 U.S. 714, 730 (1986).

189 The timing of the 2004 investigation is straightforward. GAO received the request for investigation in mid-March 2004, and reported its results September 7, 2004. See GAO 2004 Letter, *supra* note 170, at 1. The timing of the 2016 is more involved. GAO initially received a request for investigation of 2012 events on August 1, 2013. See Letter from Susan A. Poling, Gen. Couns., Gov't Accountability Off., to Charles E. Grassley, Chairman, Senate Comm. on the Judiciary, and Bob Goodlatte, Chairman, House Comm. on the Judiciary, and Darrell Issa, Chairman, House Comm. on Oversight & Gov't Reform, Gov't Accountability Off. Decision B-325124 (June 19, 2014). The GAO responded in mid-June 2014, finding no violation. See *id.* On April 27, 2015, Senator Grassley and colleagues requested a reconsideration of the GAO's 2015 decision in light of newly obtained information. See GAO 2016 Letter, *supra* note 180, at 2. In light of the new evidence, the GAO found liability in its April 5, 2016 letter. See GAO 2016 Letter, *supra* note 180, at 2-3. The initial GAO investigation took 11 months, the reconsideration took 12 months.

190 See *supra* text accompanying notes 146-150.

refusal to comply with a subpoena, the officials likely would be motivated to seek expedited relief from the courts. In that litigation, the executive officials would easily satisfy standing requirements given their concrete and individual interests, redressable by the courts, and could easily take advantage of the Administrative Procedure Act's provision of a cause of action for suits by persons aggrieved by agency action,<sup>191</sup> all of which have proven more difficult when Congress is the plaintiff.

This subpoena rider also creates an additional layer of incentives beyond those in the Section 713 rider. By prohibiting “the use” of appropriated funds for resistance to congressional subpoenas, the violation of the rider would also violate the Antideficiency Act. The Antideficiency Act, which dates from 1870, was enacted to prevent executive branch officials from spending beyond the moneys appropriated for a fiscal year and later seeking a deficiency appropriation from Congress.<sup>192</sup> The Act makes it unlawful for government officials to “make or authorize”<sup>193</sup> an expenditure that has not been appropriated or to work without an appropriation except in emergencies.<sup>194</sup> The Antideficiency Act thus prohibits any officer or employee from using funds, including funds expended by working on the federal payroll, in a manner other than appropriated.<sup>195</sup> Because appropriations riders, whether in the form of caps on spending or limitations on the purposes for which funds may be expended, define the limits of the funds appropriated, executive branch officials violate the Antideficiency Act if they violate an appropriations rider.<sup>196</sup>

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191 See 5 U.S.C. § 702 (2018); see also *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 157 (1970).

192 Metzger, *supra* note 19, at 1088; see also STIFF, *supra* note 30, at 40.

193 31 U.S.C. § 1341(a)(1)(A) (2018).

194 31 U.S.C. § 1342 (2018); see also *Atlas Brew Works v. Barr*, 391 F. Supp. 3d 6, 9 (D.D.C. 2019), *aff'd*, 820 F. App'x 4 (D.C. Cir. 2020).

195 See 31 U.S.C. § 1341 (2018).

196 STIFF, *supra* note 30, at 40–41 (noting that executive officials violate the Antideficiency Act when they violate a conditional rider, even if the agency has not exceeded its total appropriations). Appropriations riders may be enacted outside of the appropriations process through Congress's general legislation, but the Department of Justice takes the view that Antideficiency Act liability attaches only when the condition or rider is enacted as part of the appropriations legislation, not afterwards. See *Use of Appropriated Funds to Provide Light Refreshments to Non-Federal Participants at EPA Conferences*, 31 Op. O.L.C. 54, 67 (2007) (noting that the agency “must look [only] to the applicable legislative act making the amounts in question available for obligation or expenditure” to identify the cap or limitation, the violation of which leads to Antideficiency Act violations). There are grounds to challenge that narrow reading of the Antideficiency Act, as the GAO does. See GARY L. KEPPLINGER, U.S. GOV'T ACCOUNTABILITY OFF., B-317450, ANTIDEFICIENCY ACT—APPLICABILITY OF STATUTORY PROHIBITIONS ON THE USE OF APPROPRIATIONS 5 (2009) (“If a statute, whether enacted in an appropriation or other law,

Federal employees and officers have strong reasons to avoid violating the Antideficiency Act.<sup>197</sup> The Act requires that violations be reported to “the head of the agency” who then “shall report immediately to the President and Congress.”<sup>198</sup> The report, signed by the agency head, must explain what the violation was, how it occurred, its effects on the agency, and any remedies taken, including disciplinary measures or additional policy safeguards.<sup>199</sup> The Act authorizes administrative discipline, including suspension without pay or removal from office.<sup>200</sup> Unique among budgeting laws, it also includes a provision for criminal penalties for “knowingly and willfully” violating the Act.<sup>201</sup> Even though no prosecution has been brought to date under the Act’s criminal sanctions,<sup>202</sup> the mere existence of criminal penalties on the books is a deterrent to executive branch officials.<sup>203</sup>

Like the Section 713 rider, the Antideficiency Act creates sanctions for violations that are personal to the official—such as administrative discipline ranging from suspension without pay or removal from office.<sup>204</sup> Avoiding those disciplinary measures, much less the embarrassment of prompting a GAO investigation and

prohibits an agency from using any of its appropriations for a particular purpose, the agency does not have ‘an amount available in an appropriation’ for that purpose.” (quoting 31 U.S.C. § 1341(a)(1)(A) (2018)). The most pragmatic approach is simply to include any oversight rider, like the subpoena rider, in the original appropriation act. *See generally* 31 U.S.C. § 1341(a) (2018).

197 *See* Matthew B. Lawrence, *Disappropriation*, 120 COLUM. L. REV. 1, 82–83 (2020) (arguing that the Antideficiency Act gives civil servants strong incentives to comply with appropriations limits); *see also* Metzger, *supra* note 19, at 1153–54 (noting same in context of general discussion of internal checks within the executive branch).

198 31 U.S.C. § 1351 (2018).

199 *See id.*; OFF. OF MGMT. & BUDGET, OMB CIRCULAR A–11, *supra* note 44, § 145.7 (2021).

200 31 U.S.C. § 1349(a) (2018) (authorizing administrative discipline for violations of § 1341 and § 1342). As Metzger notes, courts have construed the Antideficiency Act’s reporting and penalty requirements as precluding a private cause of action. Metzger, *supra* note 19, at 1124 (citing *Feldman v. Bowser*, 315 F. Supp. 3d 299, 305 (D.D.C. 2018)).

201 31 U.S.C. § 1350 (2018) (providing criminal sanctions for knowing and willful violations); *see also* 2 U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 23, at 6-143 (noting that the Antideficiency Act is the only budget law with both administrative and penal sanctions).

202 *See* 2 U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 23, at 6-144 (noting no prosecutions under Antideficiency Act to date).

203 As one IRS employee put it, “when it comes to the Antideficiency Act, which has criminal penalties associated with it, we take it very seriously.” Deposition of David Fisher to the Comm. on Ways & Means, U.S. House of Representatives 34 (May 11, 2016), <https://democrats-waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/documents/HWM132060%5b1%5d.pdf> [<https://perma.cc/WH7C-J4YY>].

204 31 U.S.C. § 1349(a) (2018) (authorizing administrative discipline for violations of §§ 1341 and 1342).

potentially triggering the obligation of the head of the agency to personally report to the President and Congress, provide another layer of strong ex ante incentives for officers and employees to avoid overstepping an appropriations rider.

#### 4. Oversight Riders and Executive Privilege

It is worth spelling out how the subpoena rider would interact with assertions of executive privilege. Many refusals to comply with congressional subpoena invoke executive privilege. The official will be advised by the Justice Department to assert executive privilege. Currently, the executive official will have little financial incentive to know whether the assertion is a valid one. Even if a court orders disclosure or finds that there was no valid basis for withholding the information, there is no personal legal sanction for the official's noncompliance and contempt. Congress must simply endure the delay from even the most aggressive assertions of executive privilege.

The subpoena rider would change that dynamic. The Department of Justice would still serve as counsel to the executive official. But once prompted by a member of Congress, the GAO would also be making an independent determination of the validity of the assertion of the privilege.<sup>205</sup> The GAO is not part of the executive branch, and therefore is not bound by the Office of Legal Counsel's advice.<sup>206</sup> The GAO has demonstrated that independence. For instance, in its 2004 finding of a violation of Section 713, the GAO rejected the Department of Justice's argument regarding Section 713 and its application to the executive's constitutional powers, and found liability. The subpoena rider thus creates an ex ante incentive for the official to know, at the time of resistance to the subpoena, whether the assertion of executive privilege or deliberative process privilege made on his or her behalf is a reasonable one.<sup>207</sup> If it is reasonable advice, the official could have some assurance that the GAO would not find a violation of the oversight rider and, in any event, the official could successfully challenge in court the GAO's determinations to halt the official's salary or any Antideficiency Act violations. However, if the advice is not reasonable advice—as is the case with many blanket or extremely broad refusals to cooperate—the official will know that his

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<sup>205</sup> As noted below, the GAO is not bound by Department of Justice advice.

<sup>206</sup> Whether Appropriations May Be Used for Informational Video News Releases, 29 Op. O.L.C. 74, 74 (2005) (citing *Bowsher v. Synar*, 478 U.S. 714, 727–32) (“Bradbury Memo”).

<sup>207</sup> For an account of the boundaries of reasonable reliance on the constitutional analysis of executive branch lawyers, see Zachary S. Price, *Reliance on Executive Constitutional Interpretation*, 100 B.U. L. REV. 197, 235–37 (2020).

or her actions in resistance contravene congressional appropriations, which creates risks for his or her salary and for Antideficiency Act sanctions.

This oversight rider thus works on the problems of incentives and timing that frequently arise with assertions of executive privilege. The rider makes the decision about whether to comply with the congressional subpoena one that is consequential to the official personally; the possible sanctions run to the individual, in terms of salary, disciplinary reprimands, etc., not just the reduction in the agency's funding (which, in some administrations, might actually be desired). As a result, the subpoena rider creates *ex ante* incentives to evaluate whether the claimed executive privilege is within the scope that a court would likely uphold. Moreover, those personal risks will exist even if the agency conducts a run-out-the-clock strategy. Noncompliance with a congressional request does not merely mean possibly being a named defendant in litigation to enforce the subpoena. Instead, noncompliance immediately raises the prospect of a salary clawback and Antideficiency Act violations, both of which have the potential to extend beyond the current Congress or administration and be enforced by an administration of a different political party.

But does Section 713 or the subpoena rider unduly burden the executive branch's power to assert executive privilege? To begin with, courts could construe the oversight riders narrowly as applied to ensure that they do not unduly trammel on executive powers while still honoring the legislative judgment they embody. Even aside from invoking constitutional avoidance, there is a good argument that oversight riders do not impose too great a burden on the assertion of executive privilege. The executive official may still challenge a salary clawback or Antideficiency Act violation in court. If the court holds the assertion of privilege to be a valid one, then it will deny any salary-based or Antideficiency Act liability. Moreover, as noted above, the official should have an easy time meeting the justiciability requirements for suit under the APA.

Moreover, these riders prompt the GAO to provide its own independent assessment of the validity of an assertion of executive privilege. In most cases, one would hope the GAO and Department of Justice would agree. But the GAO is not part of the executive branch—it is part of the legislative branch. Although in some cases the GAO's decision could burden the assertion of executive privilege, as long as the GAO closely adheres to judicial precedent on the scope of the privilege and gives some measure of deference to the Department of Justice's views, conflict will arise only when the executive branch relies upon an unreasonably broad assertion of privilege. If the assertion of privilege is only burdened when the assertion is unreasonably broad,

it is difficult to see how the rider imposes an unconstitutional burden on assertions of executive privilege. We address other constitutional objections to oversight riders below.

## 5. Effects Across the Agency Hierarchy

Oversight riders could have an uneven impact on officials at different levels in the agency hierarchy. In the first instance, oversight riders—whether the Section 713 rider or the subpoena rider—are more likely to be effective with executive officials lower in the agency hierarchy, who presumably have a stronger interest in avoiding salary reductions and adverse personnel sanctions, and have fewer exit options than those in agency management or political appointees.

No doubt oversight riders would not be a sufficient incentive to create disclosure in all cases. Consider a political appointee who simply says “no” to a congressional subpoena. If the official had financial independence, the salary sanction would be potentially embarrassing but not create a strong incentive to comply with the subpoena. Because simply saying “no” consumes only de minimis government resources, it would not trigger appropriations limitations. Still, most instances of executive branch resistance are coordinated efforts, not matters of a lone wolf refusing to cooperate with Congress. And it is the coordinated resistance, from officials up-and-down an agency or department’s hierarchy, that create the real problems for oversight. That coordination, including strategic steps to furnish minimal, evasive, or under- or over-inclusive responses to congressional subpoenas, involves the expenditure of government time and resources. Even if the pressure of oversight riders is greatest on lower-level employees, their reluctance to violate subpoenas would also create pressure on agency leaders to get ahead of disclosures that could prompt forthcoming testimony of lower-level officials.

The publicity and reporting requirements that attach to both Section 713 and Antideficiency Act violations may be particularly unwelcome to political appointees in agencies who are looking to move into private sector or other organizations with ethical screens for top managers.<sup>208</sup> In the event that an administration began, with proper notice, to enforce the criminal sanctions of the Antideficiency Act, those criminal proceedings would also require disclosure for some employees after they move to the private sector. For instance, the

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208 See, e.g., Ellen M. Gilmer, *Ex-DOJ Official Called ‘Radioactive’ After Alleged Election Plot*, BLOOMBERG L.: ENV’T & ENERGY REP. (Jan. 23, 2021), <https://news.bloomberglaw.com/environment-and-energy/ex-doj-official-called-radioactive-after-alleged-election-plot> [<https://perma.cc/TJ3G-U5P5>] (discussing reluctance of law firms to hire former top DOJ lawyer involved in resistance to 2020 presidential election results).

Securities and Exchange Commission (SEC) requires publicly traded companies to disclose any criminal convictions or pending criminal cases in the last ten years against its directors and executive officers in the annual report the company files with the SEC.<sup>209</sup> The SEC also requires disclosure of the civil violations of directors and executive officers, but civil violations are only required to be disclosed if the violations are related to securities and commodities.<sup>210</sup> The SEC has similar requirements for employees of investment adviser firms.<sup>211</sup>

To be sure, some executive branch officials bent on obstruction may still refuse to comply with a subpoena even if they face loss of salary, personnel or other legal sanctions under the Antideficiency Act. But oversight riders still do something the other tools do not: they enhance the ex ante legal and career incentives for executive branch officials to comply. Moreover, the incentive not to violate the oversight rider applies regardless of whether Congress and the President are from the same party and creates risks that extend beyond the current Congress and President.

### C. *The Constitutionality of Oversight Riders*

Congress's power to tax and authorize spending is one of the more explicit provisions of Article I. It expressly provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."<sup>212</sup> The Constitution provides that no money may "be used in the payment of any thing not thus previously

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209 SEC Regulation S-K, 17 C.F.R. pt. 229 (2020), establishes the specific requirements for companies that are required to report to the SEC. Form 10-K, 17 C.F.R. § 249.310, through Item 10, 17 C.F.R. § 229.10, incorporates 17 C.F.R. § 229.401, which identifies the required disclosures that companies must make about certain personnel, and § 229.401 (f) requires disclosure of involvement in certain legal proceedings by requiring the company to "[d]escribe any of the following events that occurred during the past ten years and that are material to an evaluation of the ability or integrity of any director, person nominated to become a director or executive officer of the registrant . . . ." 17 C.F.R. § 229.401 (f) (2020).

210 See 17 C.F.R. § 229.401 (f) (3)–(8) (2020).

211 When registering as a new firm, the firm must disclose any convictions or felony charges against any of its employees or managers, as well as a variety of investment-related civil actions. FORM ADV: UNFIROM APPLICATION FOR INVESTMENT ADVISER REGISTRATION AND REPORT BY EXEMPT REPORTING ADVISERS, PART 1A, item 11(A), SEC (2019), <https://www.sec.gov/forms>. An investment adviser firm must also disclose any convictions against its managers when distributing a disclosure brochure to a potential new client. *Id.*, PART 2A, item 9(A)(1). An investment firm must also disclose any misdemeanor convictions and pending criminal proceedings for "any fraud, false statements, or omissions, wrongful taking of property, bribery, perjury, forgery, counterfeiting, extortion, or a conspiracy to commit any of these offenses" by any employee when registering and by its managers when distributing a disclosure brochure. *Id.*, PART 1A, item 11(B); see *id.*, PART 2A, item 9(A)(1)–(2).

212 U.S. CONST. art I, § 9, cl. 7.

sanctioned.”<sup>213</sup> The explicit emphasis of the Appropriations Clause is, as Metzger writes, to “ensure[] that the executive branch must continuously secure congressional support for its chosen courses of action.”<sup>214</sup> The appropriations power is a critical, constitutionally created means for Congress to check the executive.<sup>215</sup> Congress has reinforced this constitutional authority with two statutes attaching sanctions for expenditures without appropriations. The Purpose Act specifies that expenditures shall only be for “the objects for which the appropriations were made,”<sup>216</sup> and, as just noted, the Antideficiency Act prohibits officials from expending or committing funds that have not been appropriated.<sup>217</sup>

Oversight riders, however, do not merely implicate Congress’s appropriations power. They also implicate the President’s constitutionally vested powers.<sup>218</sup> The executive branch has long taken the view that Congress cannot use its appropriation powers to impede or frustrate the executive branch’s capacity to perform its own constitutionally assigned powers.<sup>219</sup> The Office of Legal Counsel takes the position, for instance, that Congress cannot achieve indirectly through the denial of funding to the President what it could not accomplish by other means.<sup>220</sup> Although executive privilege is not a duty or power expressly granted by the Constitution, the executive branch takes the view that the President has a constitutional privilege

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213 See *Reeside v. Walker*, 52 U.S. (11 How.) 272, 291 (1850).

214 Metzger, *supra* note 19, at 1140.

215 See *id.*

216 31 U.S.C. § 1301(a); see, e.g., State and Local Deputation of Federal Law Enforcement Officers During Stafford Act Deployments, 36 Op. O.L.C. 77, 78 (2012).

217 See 31 U.S.C. § 1341–42 (2018); see also Zachary S. Price, *Funding Restrictions and Separation of Powers*, 71 VAND. L. REV. 357, 368 (2018).

218 For contending opinions on the constitutionality of Section 713, compare Memorandum from Jack Maskell, Legis. Att’y, American Law Division, to Charles Rangel, House Comm. on Ways & Means (Apr. 26, 2004) (defending the constitutionality of Congress to impose penalties for executive branch officers who impeded Congress’s access to information) with Authority of Agency Officials to Prohibit Employees From Providing Information to Congress, 28 Op. O.L.C. 77 (2004) (arguing that President’s power to supervise includes a power to prohibit nonprivileged information from disclosure).

219 See Metzger, *supra* note 19, at 1143 n.359 (citing *Morrison v. Olson*, 487 U.S. 654, 691 (1988)); STIFF, *supra* note 30, at 58.

220 See Memorial of Captain Meigs, 9 Op. Att’y Gen. 462, 469 (1860) (“If Congress had really intended to make [a military officer] independent of [the President], that purpose could not be accomplished in this indirect manner any more than if it was attempted directly.”); see also Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations, 43 Op. Att’y Gen. 293, 297, 299 (1981) (“Manifestly, Congress could not deprive the President of [a constitutional] power by purporting to deny him the minimum obligatory authority sufficient to carry this power into effect.”); see Metzger, *supra* note 19, at 52.

from disclosure.<sup>221</sup> The GAO and the Supreme Court have taken a narrower view.<sup>222</sup>

Even if it is conceded, as the Department of Justice maintains, that some aspects of the President's functions are not subject to Congress's appropriations power, the kind of testimony and information that Congress routinely seeks through subpoenas falls far from that constitutional line. Zachary Price has recently proposed a particularly persuasive way to draw the line between the President's constitutional powers and Congress's appropriations powers. Price suggests that Congress's appropriations powers do not reach activities the President can perform personally, and thus without the need for additional, congressionally authorized resources—such as the power to veto legislation, nominate officers, remove officers, demand opinions from the heads of departments, and convene or adjourn Congress.<sup>223</sup> In contrast, Price argues, the President is beholden to appropriations limits as to those powers that require resources to exercise—“resource-dependent” powers<sup>224</sup>—such as enforcing the law and making war. Because these powers necessarily require resources, they can be checked through Congress's use of appropriations powers.<sup>225</sup> The lion's share of Congress's subpoenas pertain to the exercise of powers dependent on congressional appropriations and so would easily fall within the scope of what Congress can regulate through appropriations. That is true, for instance, of information sought from the EPA in the Gorsuch affair, from the DOJ regarding the Fast and Furious Operation, and the Department of Defense regarding President Trump's impeachment proceedings. More than isolated presidential judgment, these powers emerge from and are inextricably linked to the ability of the executive branch to expend funds, and as such, may be limited through appropriations.<sup>226</sup> Put another way, so long as Congress seeks information that does not impinge on the President's ability to personally exercise her constitutional functions, it may condition its expenditure on the executive branch not obstructing Congress's investigation.<sup>227</sup>

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221 See *supra* note 92 (listing memoranda on executive privilege).

222 GAO 2004 Letter, *supra* note 170, at 13; *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2032–33 (2020).

223 Price, *supra* note 217, at 389–90.

224 *Id.* at 362, 393.

225 *Id.* at 418.

226 See *id.*

227 A cert. petition challenging *Sierra Club v. Trump*, 929 F.3d 670 (9th Cir. 2019) is pending, but arguments are postponed pending consideration of the Biden administration's request to withdraw the petition. In *Sierra Club*, the Ninth Circuit struck down the Trump administration's decision to reprogram funds for use to construct the border wall.

Recent litigation over the effect of riders on Department of Justice federal prosecutions for marijuana possession nicely illustrates the scope of Congress's power over resource-dependent activities of the executive branch. In the early 2010s, President Obama's Department of Justice continued to pursue federal marijuana charges in states that had laws allowing the use of medical marijuana. In response, Representative Dana Rohrabacher (R-CA), a long-time advocate of medical marijuana legalization, partnered with Representative Sam Farr (D-CA) to introduce the Rohrabacher-Farr amendment in the House.<sup>228</sup> The amendment sought to bar the DOJ from spending funds to enforce the Controlled Substances Act in states with medical marijuana reform laws;<sup>229</sup> a similar amendment had been proposed but gotten nowhere in different iterations throughout the 2000s.<sup>230</sup> By 2014, 32 states and the District of Columbia had passed medical marijuana laws,<sup>231</sup> and the House passed the Rohrabacher-Farr amendment in May of 2014.<sup>232</sup> In the Senate, it gained support from Senators Cory Booker (D-NJ) and Rand Paul (R-KY).<sup>233</sup> Although the rider was

228 Burgess Everett, *Lawmakers Warn DOJ to Back Off Medical Marijuana Prosecutions*, POLITICO (Mar. 9, 2015), <https://www.politico.com/story/2015/04/lawmakers-warn-doj-to-back-off-medical-marijuana-prosecutions-116781> [<https://perma.cc/W9KB-P4EK>]. The exact language of the amendment is nicely laid out in *United States v. McIntosh*, 833 F.3d 1163, 1169 (9th Cir. 2016).

229 The language of the limitation rider is as follows:

None of the funds made available in this Act to the Department of Justice may be used, with respect to the States of Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Washington, and Wisconsin, to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.

Commerce, Justice, Science, and Related Agencies Appropriations Act, 2015, Pub. L. No. 113-235, div. B, § 538, 128 Stat. 2173, 2217 (2014).

230 Bill Piper, *A Decade of Hard Work Turns into Historic Marijuana Victory in Congress*, DRUG POL'Y ALL. (Dec. 14, 2014), <https://www.drugpolicy.org/blog/decade-hard-work-turns-historic-marijuana-victory-congress> [<https://perma.cc/AC6D-X934>].

231 S.V. Dáate, *GOP House Votes to Leave States Alone on Medical Marijuana*, NPR (May 30, 2014), <https://www.npr.org/sections/itsallpolitics/2014/05/30/317427925/gop-house-votes-to-leave-states-alone-on-medical-marijuana> [<https://perma.cc/7YHZ-4M2Y>]; see also PEW RSCH. CTR., MAJORITY NOW SUPPORTS LEGALIZING MARIJUANA 5 (2013).

232 Associated Press, *House Backs State Marijuana Laws*, POLITICO (May 30, 2014), <https://www.politico.com/story/2014/05/gop-house-backs-state-medical-marijuana-laws-107244> [<https://perma.cc/3Q3U-K2CH>].

233 Press Release, Drug Pol'y All., Breaking News: Senators Rand Paul (R-KY) and Cory Booker (D-NJ) to Offer Groundbreaking Medical Marijuana Amendment on Senate Floor (June 18, 2014), <https://www.drugpolicy.org/news/2014/06/breaking-news-senators-rand-paul-r-ky-and-cory-booker-d-nj-offer-groundbreaking-medical> [<https://perma.cc/BN4M-XBJG>].

never separately voted upon,<sup>234</sup> it ended up in the infamous “CRomnibus” bill of 2014: a bill that was part omnibus bill, legislation Congress passes to fund the government when an agreement can be reached, and part continuing resolution or CR, legislation that keeps the lights on when members of Congress cannot reach a deal.<sup>235</sup> Congress passed the CRomnibus bill to avoid a government shutdown; it was laden with amendments and riders, including the Rohrabacher-Farr rider, by the time it reached the President’s desk.<sup>236</sup>

The Department of Justice chose to interpret the Rohrabacher-Farr amendment narrowly, taking the view that it merely prevents the department from “impeding the ability of states to carry out their medical marijuana laws,” but does not prevent them from continuing to prosecute individuals and organizations within states with medical marijuana laws.<sup>237</sup> Dana Rohrabacher and Sam Farr contested this interpretation in a letter to Attorney General Eric Holder, calling it “emphatically wrong.”<sup>238</sup> The Ninth Circuit emphatically sided with Rohrabacher and Farr and against Attorney General Holder in *United States v. McIntosh*.<sup>239</sup> Defendants, owners and operators of dispensaries and growers of marijuana, argued that their prosecutions under the Controlled Substances Act violated the appropriations limits that Congress had established. The Ninth Circuit agreed, holding that the Rohrabacher-Farr rider prevented the DOJ from spending money to prosecute individuals so long as those individuals fully complied with their state medical marijuana laws.<sup>240</sup> The *McIntosh* decision affirms Congress’s power to regulate the President’s resource-dependent powers, even those that implicate the President’s constitutionally vested authority to take care that the laws be faithfully executed.

234 See *Congress Set to Pass Landmark Medical Marijuana Legislation*, AMS. FOR SAFE ACCESS (Dec. 10, 2014), [https://www.safeaccessnow.org/congress\\_set\\_to\\_pass\\_landmark\\_medical\\_marijuana\\_legislation](https://www.safeaccessnow.org/congress_set_to_pass_landmark_medical_marijuana_legislation) [<https://perma.cc/R347-EMVU>].

235 Andrew Prokop, *Why the CRomnibus is Called the CRomnibus*, VOX (Dec 13, 2014), <https://www.vox.com/2014/12/13/7385253/what-is-cromnibus> [<https://perma.cc/NA4R-C3LX>].

236 Ezra Klein, *How to Sound Smart About the 2015 Appropriations Bill*, VOX (Dec 11, 2014), <https://www.vox.com/2014/12/11/7376585/cromnibus-2015-appropriations-details> [<https://perma.cc/J4RF-LV4V>].

237 Timothy M. Phelps, *Justice Department Says It Can Still Prosecute Medical Marijuana Cases*, L.A. TIMES (Apr. 2, 2015), <https://www.latimes.com/nation/nationnow/la-na-nm-medical-marijuana-abusers-20150401-story.html> [<https://perma.cc/7H44-EDGE>] (quoting Department of Justice spokesperson Patrick Rodenbush).

238 Everett, *supra* note 228 (quoting Letter from Dana Rohrabacher, Member, Congress, and Sam Farr, Member, Congress, to Eric Holder, Att’y Gen., Dep’t of Just. (Apr. 8, 2015)).

239 833 F.3d 1163, 1179 (9th Cir. 2016).

240 *Id.* at 1177–79.

*D. Objections: Riders and the Filibuster*

Limitations riders have long been disfavored—and for good reason. Because they are enacted through the yearly appropriations process, limitations riders generally lack review by an authorizing committee with subject matter expertise.<sup>241</sup> As a result, limitations riders typically do not reflect the level of consideration, deliberation, and committee process that ideally attaches to authorizing legislation.<sup>242</sup> Indeed, the growing prevalence of limitations riders is a symptom of larger breakdown of legislative processes in Congress,<sup>243</sup> and Congress's increased reliance on appropriations bills to enact substantive policy.<sup>244</sup>

There are several levels of response to this objection. First and perhaps most importantly, there is nothing unlawful about oversight riders—they are consistent with Congress's established powers of the purse to condition its appropriations on those appropriations being used for some purposes and not others.<sup>245</sup> Second, oversight riders involve less substantive policymaking than standard limitations riders. Unlike standard limitations riders, they do not prohibit spending on broader policies; they do not, for instance, prohibit spending money to close the Guantanamo Bay detention center,<sup>246</sup> or to prosecute drug crime in states that have legalized the use of certain drugs.<sup>247</sup> Oversight riders merely deny funding for resistance of congressional oversight. Although it is always difficult to make a clean distinction between process and substance—and especially so where oversight is most intense and most resisted over controversial substance—there is still a difference between dictating a substantive policy through a rider and creating a limit on the executive branch's power to resist Congress's attempts at oversight.

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241 See Devins, *supra* note 29, at 464–65.

242 See *id.* at 464–65 (noting these and other reasons to be cautious about limitations riders).

243 Abbe R. Gluck, Anne Joseph O'Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1797 n.30 (2015).

244 *Id.* at 1800.

245 Interestingly, the Consolidated Appropriations Act of 2021 includes a long-standing appropriations rider providing that none of the fund appropriated will be available to fund the salary of an official who prevents or threatens to prevent any employee from having any written communications with a member of Congress. See Financial Services and General Government Appropriations Act, 2021, Pub. L. No. 116-260, div. E, § 713, 134 Stat. 1380, 1432–33 (2020).

246 Price, *supra* note 217, at 374 (discussing the Department of Defense Appropriations Act of 2014, Pub. L. No. 113-76, div. C, §§ 8110–11, 128 Stat. 86, 131 (2014), and spending limits expending funds to close Guantanamo).

247 *Id.* at 377.

Third, and at a broader level, oversight riders are a means for Congress to respond to the constitutional hardball of the executive branch. Oversight riders are not useful or designed for Congress-Executive relations when those arrangements are at their best. Their value comes as a response to the very real circumstances of divisive constitutional hardball by the executive branch. Constitutional hardball involves practices or actions that strain constitutional understandings for partisan ends.<sup>248</sup> For instance, democratic filibusters of President George W. Bush's judicial nominations and the Senate refusal to give a hearing to President Obama's nomination of Merrick Garland for a seat on the Supreme Court fall within the category of constitutional hardball—they each breach a historical practice for what appear to be primarily partisan purposes.<sup>249</sup> Likewise, the decisions in the Obama administration to halt deportation and grant work authorization to many immigrants who came into the country as children could be seen as self-help in response to the hardball tactics of Senate Republicans to thwart passage of immigration legislation that had majority support in both houses.<sup>250</sup>

Oversight riders are tools of constitutional self-help in response to executive branch stonewalling.<sup>251</sup> They are a means by which Congress can defend its own institutional prerogatives in response to the perceived wrong of the executive branch failing to disclose information to which it is entitled.<sup>252</sup> Unpacking the concept of constitutional self-help, David Pozen suggests that constitutional self-help is controversial (and gains interest) in part because the means used are generally impermissible or disfavored but asserted to be justified in the context.<sup>253</sup> Oversight riders are controversial too precisely because they involve a hardball response by Congress through the blunt legislative tool of appropriations.

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248 See Joseph Fishkin & David E. Pozen, Essay, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 920–21 (2018); see also Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 523 (2004) (conceptualizing constitutional hardball as practices that are “within the bounds of existing constitutional doctrine” but nonetheless strain “existing *pre*-constitutional understandings”).

249 See Fishkin & Pozen, *supra* note 248.

250 See *id.* 935–36 (offering Obama's deferred action policy in response to the Senate filibuster of the DREAM Act as an example of constitutional self-help in response to hardball).

251 See Pozen, *supra* note 27, at 12; see also Fishkin & Pozen, *supra* note 248, at 934 (noting President Clinton's aggressive assertions of executive privilege were instances of constitutional hardball).

252 See Pozen, *supra* note 27, at 12 (noting self-help involves a branch's unilateral response to a perceived wrong committed by another branch).

253 See *id.*

Although self-help measures risk escalating institutional conflicts in unproductive ways, oversight riders fit within the basic standards or norms of constitutional self-help. First, they address a core and legitimate interest of Congress that has been thwarted by the executive branch. Second, oversight riders are targeted or reciprocal “in the sense that they are closely bound to the motivating wrong.”<sup>254</sup> Congress could use other tools to make life difficult for the President. It could refuse to confirm the President’s appointees, refuse to take up the President’s legislative priorities, decline to act on the President’s requests to ratify treaties, institute impeachment proceedings against recalcitrant executive officials, and use the powers of the purse to reduce the funding, salaries, or discretion of particular executive branch offices that have failed to provide information.<sup>255</sup> Oversight riders are more narrowly targeted than these other countermeasures—even reducing salaries of recalcitrant officials is a broader sanction than directly disqualifying spending in response to resistance to legitimate congressional oversight. Even if use of limitations riders is generally disfavored, they are a justified and proportional response to the executive branch’s obstruction of congressional oversight. Moreover, the fact that oversight riders are reciprocal and proportionate—they are narrowly tailored to respond to the harm of executive stonewalling—also recommends them over other possible countermeasures. Perhaps stronger medicine still is in order. But it is worth trying oversight riders first to see if they effectively increase the costs to executive branch actors of resisting legitimate oversight in such a way that they will help to restore a lost constitutional equilibrium.

It is also worth addressing a further, more practical objection. Appropriations bills are subject to the presidential veto and the filibuster in the Senate like other legislation.<sup>256</sup> Why would the President sign an appropriations law that included oversight riders? Appropriations bills are generally viewed as must-pass and have an annual deadline, and as a result, they have been magnets for riders of various kinds. Occasionally these riders have prompted filibuster in the Senate. For instance, Senate Democrats filibustered the Department of Defense Appropriations Act<sup>257</sup> because the bill provided funds for Iraq and Hurricane Katrina relief,<sup>258</sup> successfully inducing those

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254 *Id.* at 64.

255 These options are carefully considered in CHAFETZ, CONGRESS’S CONSTITUTION, *supra* note 134, at 194.

256 JAMES V. SATURNO, BILL HENIFF JR. & MEGAN S. LYNCH, CONG. RSCH. SERV., R42388, THE CONGRESSIONAL APPROPRIATIONS PROCESS: AN INTRODUCTION 7 (2016).

257 H.R. Res. 2863, 109th Cong., 119 Stat. 2680 (2005).

258 Alex Tausanovitch & Sam Berger, *The Impact of the Filibuster on Federal Policymaking*, CTR. FOR AM. PROGRESS (Dec. 5, 2019), <https://www.americanprogress.org/issues>

provisions to be dropped. Likewise, Senate Republicans filibustered the Department of Defense Appropriations Act<sup>259</sup> because it included the DREAM Act, which would have provided a path to citizenship for qualified undocumented immigrants.<sup>260</sup> Even though there have been occasional, successful efforts by the House or Senate to remove a rider or provision in an annual appropriations measure, these bills continue to include a wide range of riders, including riders to which the executive branch routinely objects.<sup>261</sup> The practical need to pass annual appropriations legislation to avoid a government shutdown makes oversight riders more politically viable than they would be as standalone legislation in periods of divided government.

The attachment of oversight riders to appropriations legislation also has a timing advantage. The federal government requires appropriations, so appropriations bills move through Congress in one form or another even in periods of partisan gridlock.<sup>262</sup> Because the federal fiscal year begins on October 1 of each year, at any given time the pressure arising from an oversight rider attached to an appropriations bill should become effective no more than a year from the date that an appropriations bill will be enacted. Often the time will be much shorter, and the target of the rider will likely be aware of the pending rider while the appropriations process is underway. In addition, the leverage created by the need to fund the federal government and the political fallout of being seen as having shut down the government may enable adoption of these riders, even if independent legislation regarding subpoenas would get bogged down in partisan conflict.

### III. APPROPRIATIONS AND UNDERENFORCED GOOD GOVERNMENT NORMS

Oversight riders highlight how Congress can use its appropriations powers to enforce its own institutional prerogatives to obtain information from the executive branch and compliance with the law.<sup>263</sup> As noted, the virtue of oversight riders is that they create incentives, personal to executive branch officials, to comply with the

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/democracy/reports/2019/12/05/478199/impact-filibuster-federal-policymaking/  
[<https://perma.cc/SQ28-L4JL>].

259 H.R. Res. 3326, 111th Cong., 123 Stat. 3409 (2009).

260 Tausanovitch & Berger, *supra* note 258.

261 *See, e.g.*, Statement on Signing the Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, 2 PUB. PAPERS 1640 (Dec. 19, 2014) (President Obama’s signing statement objecting that the restrictions on spending imposed by the act violated separation of powers).

262 *See* MacDonald, *supra* note 161, at 767.

263 *Cf.* Metzger, *supra* note 19, at 1153 (noting that appropriations powers can be a potent tool to combat presidential unilateralism).

law (or what they believe a fair reading will be by a federal court), and they do so on a timely basis. The question we entertain in this final Part is whether appropriations incentives could make a difference for compliance with a range of other good government legislation that binds the executive branch but has been underenforced in recent years.<sup>264</sup> We consider three sets of good government laws: protections against partisan political activity by federal government employees, compliance with federal ethics laws, and guarantees for transparency and recordkeeping.

### A. *Political Activity*

The Hatch Act is the primary federal legislation that prohibits executive branch officials from using their official authority to engage in campaigning. Specifically, it prohibits any individuals employed by the federal government, other than the President and Vice President, from using their official authority and influence for the purposes of interfering with or affecting election results.<sup>265</sup> The regulations implementing the Hatch Act clarify that using an official title or position while participating in political activities, such as campaigning, fall within the prohibitions of the Act.<sup>266</sup> The penalties for violation of the Hatch Act include disbarment from federal service for up to five years and a fine not to exceed \$1,000.<sup>267</sup>

The Hatch Act is enforced by the Office of Special Counsel (OSC), an independent federal investigative and prosecutorial agency. During the Trump administration, the OSC found that President Trump's advisor, Kellyanne Conway, had violated the Hatch Act on numerous occasions,<sup>268</sup> and Peter Navarro had also violated the Hatch

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264 Our focus is on underenforced good government norms, the requirements that govern the day-to-day activities of government officials, but the concept of underenforced norms has been explored at length regarding constitutional norms. See, e.g., Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213–20 (1978) (noting the role of institutional concerns in leading to underenforcement of constitutional norms); Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1393 (1988) (noting that “[t]he constitutional norms worthy of the attention of scholars and decisionmakers are not limited to those that might be articulated and enforced by the courts”); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 468–69 (1989) (noting that “there is a difference between what the Constitution requires and what the Supreme Court, interpreting the Constitution, is willing to compel” and arguing that the reluctance of courts to invalidate statutes “strengthens judicially underenforced constitutional norms”).

265 See 5 U.S.C. § 7323(a)(1) (2018).

266 5 C.F.R. § 734.302 (2020).

267 5 U.S.C. § 7326 (2018).

268 See U.S. OFF. SPECIAL COUNS., OSC FILE NOS. HA-19-0631 & HA-19-3395, REPORT OF PROHIBITED POLITICAL ACTIVITY UNDER THE HATCH ACT (2019).

Act.<sup>269</sup> Many believe that the OSC did not adequately enforce the Hatch Act, including arguable violations by the appearance of Chad Wolf, at the time Acting Director of the Department of Homeland Security, Secretary of State Mike Pompeo, and Ivanka Trump during the televised 2020 Republican National Convention.<sup>270</sup>

In response to concerns that the Hatch Act was underenforced and does not include adequate penalties, the House of Representatives passed the Protecting Our Democracy Act in 2019, although it stalled in the Senate.<sup>271</sup> The Protecting Our Democracy Act would enhance the penalties for violation of the Hatch Act to up to \$50,000 and grant the OSC more independent prosecutorial authority.<sup>272</sup> The bill would also extend the Hatch Act to the President and Vice President.<sup>273</sup>

Regardless of whether a new version of the Protecting Our Democracy Act is passed, Hatch Act riders modelled on oversight riders could play a useful role in increasing the incentives to comply with the Hatch Act prohibitions. Like an oversight rider, a Hatch Act rider would prohibit federal officials from expending any funds to use their “official authority or influence for the purpose of interfering with or affecting the result of an election”<sup>274</sup> as understood under the Hatch Act. Such a rider would make Hatch Act violations also violations of the Antideficiency Act, triggering an additional set of penalties and possibly also expanding the number of officials with an interest in ensuring compliance. This would increase the fines available and the prominence of the Hatch Act within the set of prohibitions that apply to executive officials.

The difference Hatch Act riders would make is less significant than oversight riders. Oversight riders create ex ante personal incentives to comply with the law that are lacking in the context of congressional subpoena enforcement. Although some penalties are already attached to the Hatch Act—and potentially more will be if the Protecting Our Democracy Act is enacted—the addition of Hatch Act riders could be a step toward further internalizing the Act’s important

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269 U.S. OFF. SPECIAL COUNS., OSC FILE NO. HA-20-000279, REPORT OF PROHIBITED POLITICAL ACTIVITY UNDER THE HATCH ACT (2020).

270 Brian Slodysko, *Watchdog Groups Say Convention Appearances Broke Hatch Act*, AP News (Aug. 27, 2020), <https://apnews.com/a6ea0162c2ea6242cb9c8284c451560f> [<https://perma.cc/XV4Z-FD4M>] (noting numerous arguable Hatch Act violations, including by Chad Wolf and Michael Pompeo, among others); Eliza Relman, *Ivanka Trump Showers Her Father with Praise in a Triumphant Republican Convention Speech from the White House*, BUS. INSIDER (Aug. 27, 2020) <https://www.businessinsider.com/ivanka-trump-rnc-speech-praises-trump-2020-8> [<https://perma.cc/38NE-6P9A>].

271 H.R. 8363, 116th Cong. (2020).

272 *See id.* § 1002(a).

273 *Id.* § 1002(b).

274 5 U.S.C. § 7323(a)(1) (2018).

prohibitions on partisan use of office for high-level executive branch officials.

### B. Ethics

Congress has enacted numerous laws to ensure that government officials comply with basic ethics requirements and remain accountable for their actions. The federal ethics laws include 1962 legislation banning federal employees from switching sides on certain matters<sup>275</sup> and preventing them from “personally and substantially” taking part in activities that could affect their financial interests (including the interests of family members).<sup>276</sup> The 1978 Ethics in Government Act, which was enacted following the Watergate scandal, requires public disclosure of personal financial interests by senior federal executives,<sup>277</sup> and addresses ethics enforcement issues through creation of the Office of Government Ethics and the Office of Senate Legal Counsel, as well as by authorizing the Attorney General to appoint a special counsel to investigate executive branch employees.<sup>278</sup> In addition, in 1995 Congress adopted the Lobbying Disclosure Act, which updated earlier requirements to include a comprehensive registration and disclosure regime for lobbyists.<sup>279</sup> It was updated in 2007 following the Jack Abramoff lobbying scandal.<sup>280</sup>

Despite the reforms following the Watergate and Abramoff scandals, the Trump era exposed additional weaknesses in the federal

<sup>275</sup> See 18 U.S.C. § 207 (Supp. I 1962); 18 U.S.C. § 207(a)(1)(B) (2018) (members of the executive branch are permanently banned from switching sides on any matter that they “personally and substantially” participated in while working for the government). For a discussion of the 1962 legislation, see JACK MASKELL, CONG. RSCH. SERV., R42728, POST-EMPLOYMENT, “REVOLVING DOOR,” LAWS FOR FEDERAL PERSONNEL 3 (2014).

<sup>276</sup> See 18 U.S.C. § 208 (Supp. I 1962); 18 U.S.C. § 208(a) (2018). For an overview of the conflict of interest requirements for federal officials, see OFF. OF GOV’T ETHICS, REPORT TO THE PRESIDENT AND TO CONGRESSIONAL COMMITTEES ON THE CONFLICT OF INTEREST LAWS RELATING TO EXECUTIVE BRANCH EMPLOYMENT (2006).

For a compilation of federal ethics rules, see U.S. OFF. OF GOV’T ETHICS, COMPILATION OF FEDERAL ETHICS LAWS (2021). Several ethics statutes and recent bills are designed to reduce the risks arising from the revolving door between public and private sector employers. For a recent overview, see Michael P. Vandenberg, Jonathan M. Gilligan & Haley Feuerman, *The New Revolving Door*, 70 CASE W. RESV. L. REV. 1121, 1132–35 (2020) (reviewing federal ethics rules adopted in response to the revolving door).

<sup>277</sup> See 28 U.S.C. App. (Supp. II 1979); J. Jackson Walter, *The Ethics in Government Act, Conflict of Interest Laws and Presidential Recruiting*, 41 PUB. ADMIN. REV. 659, 659 (1981).

<sup>278</sup> See Rebecca L. Anderson, *The Rules in the Owners’ Box: Lobbying Regulations in State Legislatures*, 40 URB. LAW. 375, 380 (2008).

<sup>279</sup> See Pub. L. No. 104-65, 109 Stat. 691 (codified as amended at 2 U.S.C. §§ 1601–12 (2018)); see also Anderson, *supra* note 278, at 382.

<sup>280</sup> Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, tit. 2, 121 Stat. 735, 741 (codified at 2 U.S.C. §§ 1601–14 (2018)).

ethics regime. Gaps emerged in both the legal requirements and enforcement of norms regarding ethical behavior, including prohibitions on steering federal contracts to family and friends and requirements to disclose conflicts of interests by nominees in the Senate confirmation process.<sup>281</sup> Other good government ethics practices also have been challenged. Perhaps the best-known example is that President Trump is the first President since Watergate to refuse to release his tax returns, a practice that can identify potential conflicts of interest.<sup>282</sup> In addition, soon after he was confirmed, Attorney General William Barr demonstrated that although a Designated Ethics Official may advise a political appointee to recuse from a matter in which the Attorney General or the President has a personal interest, the appointee can simply ignore that advice without risk of civil or criminal sanctions.<sup>283</sup>

The recent experience has demonstrated the loopholes not only in the ethics requirements, but also in their enforcement. For instance, the experience demonstrated that formal legal enforcement is often not possible at all or not possible on a timely basis, instead demonstrating the extent to which many of the ethics requirements adopted since Watergate “relied more on tradition and shame than on enforceable law.”<sup>284</sup> The reliance on tradition and shame suggests that

281 See, e.g., Russell Spivak, *Purse Strings and Self-Dealings: How Congress Can Use the Budget to Prevent the Executive Branch’s Ethics Violations*, 98 TEX. L. REV. ONLINE 131 (2020) (proposing funding riders to address presidential self-dealing that is not addressed by federal criminal or civil law); Michael Sozan & Will Ragland, *Recent Political Scandals the ‘For the People Act’ Would Prevent From Recurring*, CTR. FOR AM. PROGRESS (Feb. 4, 2019), <https://www.americanprogress.org/issues/democracy/news/2019/02/04/465792/recent-political-scandals-people-act-prevent-recurring/> [<https://perma.cc/9TR4-ADFZ>] (detailing recent ethics issues in the executive, judicial, and legislative branches).

282 See, e.g., Jeff Stein, *The IRS Turned over Nixon’s Tax Returns the Same Day a Congressional Panel Asked for Them*, WASH. POST (July 25, 2019), <https://www.washingtonpost.com/business/2019/07/25/irs-turned-over-nixons-tax-returns-same-day-that-congressional-panel-asked-them/> [<https://perma.cc/47ZV-QJR2>].

283 Matthew Choi, *Key Moments from William Barr’s Confirmation Hearing*, POLITICO (Jan 15, 2019), <https://www.politico.com/story/2019/01/15/key-moments-barr-promises-to-protect-mueller-special-counsel-1101410> [<https://perma.cc/F36D-V262>]; Matt Richardson & Jake Gibson, *AG William Barr Not Recusing Himself from Russia Probe, Official Says*, FOX NEWS (Mar. 4, 2019), <https://www.foxnews.com/politics/ag-bill-barr-not-recusing-himself-from-russia-probe-official-says> [<https://perma.cc/RD8Z-6NJJ>]; Elizabeth Williamson, *Beyond Impeachment, a Push for Ethics Laws That Do Not Depend on Shame*, N.Y. TIMES (Jan. 16, 2021), <https://www.nytimes.com/2021/01/11/us/politics/trump-ethics-democracy-biden.html> [<https://perma.cc/7HZ8-RUEV>] (noting that officials can reject ethics advice without the risk of legal sanction).

284 Williamson, *supra* note 283 (discussing the Protecting Our Democracy Act and noting that the Office of Government Ethics “relies on a president’s desire to avoid scandal and impropriety, and the Senate’s reluctance to schedule confirmation hearings for nominees who have not filed the proper paperwork and committed to divestiture”).

the effects of federal ethics requirements are limited when executive branch employees do not fear social or political sanctions. As Susan Hennessey has noted, “[t]he mechanism that preserved that [post-Watergate] system was the fear of paying a political price . . . . Now we know that if there’s not a credible fear of that, we’re likely to see future presidents attempting to violate these rules or push the boundaries more and more.”<sup>285</sup>

As with the Hatch Act, the weaknesses in federal ethics requirements and enforcement that became apparent during the Trump administration have prompted proposals for new legislation. The first bill introduced in the new House of Representatives, the For the People Act of 2021 (FPA), includes new ethics requirements and enforcement provisions that closely track recent scandals.<sup>286</sup> For example, the FPA would require presidents to disclose their tax returns for the prior decade,<sup>287</sup> limit contracting at businesses owned by certain government employees,<sup>288</sup> and close other loopholes in ethics requirements. The FPA also includes an entire subtitle addressing enforcement, including provisions to reauthorize the Office of Government Ethics, to insulate it from political pressure, and to increase its ability to discipline federal employees.<sup>289</sup>

The FPA is unlikely to be enacted in the form adopted by the House, however, and even if it is gaps will remain. Unethical employees will exploit any remaining weaknesses in the requirements, and enforcement will still rely heavily on the willingness of political appointees at the Department of Justice to enforce its requirements and federal courts to promptly resolve disputes. Appropriations riders could provide a more nimble response regarding ethics requirements than existing laws—they could be developed and adopted quickly as new ethics problems arise. For example, when an extraordinary new situation arises, such as rejection of the recusal recommendation of a Designated Ethics Official, a rider could be adopted in the next appropriations bill to prevent use of federal funds to implement decisions by the official rejecting the recusal recommendation.<sup>290</sup>

Ethics riders could also enhance enforcement by increasing the perceived likelihood and magnitude of the sanction by executive branch officials subject to ethics requirements. For the reasons

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285 *Id.*

286 *See* For the People Act of 2021, H.R. 1, 117th Cong., tit. VIII (2021).

287 *See id.* § 10001.

288 *See id.* §§ 8007, 8014.

289 *Id.*; *see also id.* tit. VIII, subtit. D.

290 Spivak, *supra* note 281, at 131, 133–34 (proposing use of a “funding rider” that would bar transfer of federal funds to companies owned by high-ranking officials and creation of a private right of action to enforce the funding rider).

discussed regarding the Hatch Act-related appropriations riders, ethics appropriations riders would add additional agency-level and individual-level sanctions for noncompliance. The risk to offending employees may be greater than the risks of simply violating ethics rules, since additional Antideficiency Act violations would have occurred on top of ethics violations. The violations would be more likely to be enforced as well because by triggering Antideficiency Act concerns that may extend beyond any one administration, the riders also would increase the risk of enforcement even after the employee leaves the federal government.

### C. Transparency

A core aspect of good governance is transparency, and as with issues concerning political activity and ethics, the last several years have revealed gaps in the scope and enforcement of federal transparency requirements that could be addressed with appropriations riders. Several statutes aim to ensure that public records of the President's actions are created and maintained, as well as to ensure public access more generally to information produced by the executive branch. These statutes include the Presidential Records Act,<sup>291</sup> the Federal Records Act,<sup>292</sup> and the Freedom of Information Act.<sup>293</sup> The obligations these statutes impose on federal agencies play a fundamental role in providing public access to information about the executive branch, but as with the legal requirements addressing political activity and ethics, they include loopholes and are difficult to enforce in a timely manner.

For instance, the Watergate-era Presidential Records Act states that the President has “responsibility for the custody and management” of presidential records and requires presidential materials to be filed with and preserved by the National Archives.<sup>294</sup> Media accounts suggest that the federal records management staff's attempts to ensure compliance with the Presidential Records Act were often thwarted by President Trump.<sup>295</sup> Similarly, media accounts

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291 44 U.S.C. §§ 2201–09 (2018).

292 44 U.S.C. §§ 3101–07 (2018).

293 5 U.S.C. § 552 (2018).

294 See, e.g., Ellen Cranley, *Trump Won't Stop Ripping Up Papers, So Staffers Have to Literally Tape Them Back Together “Like a Jigsaw Puzzle,”* BUS. INSIDER (June 11, 2018) (quoting *Presidential Records Act (PRA) of 1978*, NAT'L ARCHIVES, <https://www.archives.gov/presidential-libraries/laws/1978-act.html> [<https://perma.cc/587P-7P8Y>] (last modified Jan. 13, 2021)), <https://www.businessinsider.com/trump-rips-papers-staffers-tape-together-2018-6> [<https://perma.cc/V8YZ-F4FP>].

295 See David Brennan, *Trump Ate Sensitive Document After Cohen Meeting, Former White House Aide Claims*, NEWSWEEK (Aug. 11, 2018), <https://www.newsweek.com/trump-ate->

suggest that President Trump took the unprecedented step of insisting that White House employees on the federal payroll sign broad nondisclosure agreements that extend beyond national security matters.<sup>296</sup> Whether these nondisclosure agreements impinge on the creation and retention of records subject to the Presidential Records Act is unclear, but they certainly limit the transparency regarding presidential actions that is the underlying objective of the Act.

Media accounts also suggest that agencies managed responses to information requests under the Freedom of Information Act in ways that protected then-current political staff. For instance, these accounts suggest that during the Trump administration EPA staff were prioritizing requests that focus on the prior administration and were deliberately slowing down or not providing requested information that may be politically embarrassing to the Trump administration.<sup>297</sup>

Although the recent proposed legislative reforms—the Protecting Our Democracy Act and For the People Act—may increase government transparency indirectly by facilitating Congressional oversight, they face barriers to passage in the Senate and do not focus on reforms to the core federal transparency statutes. Transparency riders could step in to thwart executive branch efforts to undercut these statutes. For instance, although Congress has little ability to regulate the President’s personal conduct, it can use transparency riders to cut funding for White House offices that fail to develop systems to comply with the Federal Records Act despite the President’s actions. Riders also can be structured to increase the personal liability of individuals who issue or implement illegal directions regarding recordkeeping. To stem the use of nondisclosure agreements, transparency riders can bar payment of a salary to any official who has signed a nondisclosure agreement for any topic other than classified information, and riders can prohibit the use of federal funds to draft,

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sensitive-document-after-cohen-meeting-former-white-house-aide-1069399 [https://perma.cc/VTW5-FNNJ]; Alana Abramson, *Richard Nixon Is the Reason President Trump’s Aides Have to Repair Documents He Rips Up*, TIME (June 11, 2018), https://time.com/5308542/trump-presidential-records-nixon/ [https://perma.cc/76VX-M2Y9].

296 See Kaitlan Collins, *Senior White House Staff Signed Nondisclosure Agreements at Trump’s Request*, CNN (Mar. 21, 2018), https://www.cnn.com/2018/03/21/politics/donald-trump-white-house-nondisclosure-agreements/index.html [https://perma.cc/284D-585P].

297 See *Ex-Aides: Pruitt Ordered EPA to Deliberately Slow Compliance with FOIA Requests*, ENV’T WORKING GRP. (June 11, 2018), https://www.ewg.org/release/ex-aides-pruitt-ordered-epa-deliberately-slow-compliance-foia-requests [https://perma.cc/X8L2-ACL2]. This may have occurred in other agencies, departments, and commissions as well. See Eric Rosenbaum, *Trump’s SEC ‘Determined to Leave Public in the Dark’ on Climate Change*, *Sierra Club Alleges in Lawsuit*, CNBC (Oct. 25, 2019), https://www.cnbc.com/2019/10/24/sierra-club-sues-sec-for-first-time-over-blocked-climate-resolutions.html [https://perma.cc/QK6Q-4ZVZ].

administer or enforce a nondisclosure agreement that is not limited to this information. Similarly, transparency riders can discourage efforts to undermine compliance with the Freedom of Information Act, including by providing automatic funding cuts if agency officials fail to meet disclosure targets.

In short, riders can increase compliance not only with oversight subpoenas, but also with legal requirements regarding the political activities, ethics, and transparency of federal employees. We view the use of riders as a second-best response to the erosion of informal social checks and balances and of institutional, rather than party, loyalty.<sup>298</sup> In the absence of effective alternatives, however, increased use of riders may be necessary to ensure compliance with law and restore some of the informal constraints that affected inter-branch relations in a less partisan era.

### CONCLUSION

Through aggressive assertions of executive privilege and blanket refusals to appear, the executive branch has been able to thwart effective congressional oversight. The Trump administration took a particularly uncooperative stance in relation to congressional oversight, but the problem has much deeper roots and is likely to rise again whenever one house of Congress is controlled by a different political party from the President. The set of tools Congress has come to rely upon—primarily heading to the courts to enforce its own constitutional powers—is not working. The long delay involved in judicial enforcement of congressional subpoenas and civil contempt orders renders those options largely useless against a determined executive branch. This Article outlines an approach that uses the core appropriations powers of Congress to increase the incentives of executive officials to comply with congressional subpoenas. Oversight riders can remedy some of the shortcomings that have emerged from the failures of the oversight process, and they can point the way toward the use of appropriations riders to address many other areas of eroding legal and social norm compliance in the executive branch.

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<sup>298</sup> See Michael P. Vandenberg, *Social Checks and Balances: A Private Fairness Doctrine*, 73 VAND. L. REV. 811 (2020) (discussing the role of polarization in the erosion of the social checks and balances that constrain politicians' behavior); Finkel et al., *supra* note 18, at 534 (discussing the difficulty of policymaking when polarization has worsened to become sectarianism).