NOTES

Minority Party Need Not Inquire: Revisiting the Executive Duty to Respond to Congressional Oversight Authority

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ABSTRACT

Ranking members of committees hold unique and important roles in government and congressional leadership, as well as the general oversight structure. However, in 2017, the Department of Justice's Office of Legal Counsel issued a guidance memorandum stating that there are only three entities to which the Executive Branch has the duty to reply: a House of Congress in its entirety, a committee or subcommittee of jurisdiction, or an aforementioned committee or subcommittee's chair. Under this guidance, then, the ranking member of a committee of jurisdiction holds the same authority to investigate and oversee Executive Branch agencies as general members of Congress: none.

This Note proposes an alternative standard under what I have termed the "demand-request distinction:" that the Executive Branch should recognize and respond to inquiries from ranking members in the same way it does demands from committee chairs. This standard preserves the prioritization of inquiries which serve a broader body of Congress and ensures that the requirements of Watkins v. United States *are satisfied. It also reflects the historical intent of constitutional separation of powers and the history and precedent of actions taken by each branch of government when determining questions related to congressional oversight.*

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I. INTRODUCTION AND BACKGROUND

In 2017, the Trump Administration's Office of Legal Counsel (OLC) at the Department of Justice (DOJ) issued a guidance memorandum to agencies regarding the Executive Branch's duties to respond to and comply with congressional oversight and investigative inquiries, whether accompanied by a subpoena or not.[1] One might think, given that the President was a Republican and he was facing a bicameral Republican majority in Congress at the time, that the guidance would have favored glass door policies and open communication in favor of truly "draining the swamp." Instead, the guidance stated that there are only three entities to which the Executive Branch has the duty to reply: a House of Congress in its entirety, a committee or subcommittee of jurisdiction, or an aforementioned committee or subcommittee's chair.[2]

According to the OLC in this memorandum, the constitutional authority to oversee the Executive Branch can only be conducted officially "by each house of Congress or, under existing delegations, by committees and subcommittees (or their chairmen)."[3] Thus, an investigative inquiry from any individual member of Congress other than a committee or subcommittee chair, regardless of his or her political weight, seniority, or caucus leadership "is not properly considered an 'oversight' request" as "[i]ndividual members of Congress . . . do not have the authority to conduct oversight in the absence of a specific delegation by a full

1. *Authority of Individual Members of Congress to Conduct Oversight of the Executive Branch*, 41 Op. O.L.C. 1 (2017) ("Oversight by Individual Members"), https://www.justice.gov/olc/file/1085571/download [https://perma.cc/LTS3-QR4Y] [hereinafter *2017 OLC opinion*]. This opinion was further elaborated upon by OLC in 2019. *Requests by Individual Members of Congress for Executive Branch Information*, 43 Op. O.L.C. __ (Feb. 13, 2019) (slip opinion), https://www.justice.gov/olc/file/1356251/download [https://perma.cc/3ABG-FTY4] [hereinafter *2019 OLC opinion*].

2. *2017 OLC opinion*, *supra* note 1, at *1.

3. *Id.*

house, committee, or subcommittee."[4] Only those who speak or "act on behalf of congressional committees" may conduct official oversight.[5] Because there is no delegation of authority to an individual member, the OLC reasons, his or her inquiry "does not trigger any obligation to accommodate congressional needs," especially since it "is not legally enforceable through a subpoena or contempt proceedings."[6] Therefore, only those congressional inquiries which are accompanied by a subpoena—or supported by the threat thereof—are owed a response. All other responses, the OLC opinion says, are left to the discretion of the agency.

In fact, the OLC opinion goes so far as to label oversight inquiries by individual members of Congress "non-oversight."[7] This label is farcically wrong. Labeling all inquiries by individual members of Congress about Executive Branch programs or activities as "non-oversight" is overbroad. The OLC puts inquiries for the purposes of "legislation, constituent service, or other legitimate purposes (such as Senators' role in providing advice and consent for presidential appointments)" in this same "non-oversight" bucket.[8] Some inquiries may be appropriately labeled as "non-oversight," like purely politically motivated inquiries to which the member of Congress either knows the answer or knows there is not one. But many members of Congress and their constituents would label as "oversight" inquiries for the purposes of legislating, providing constituent services, and advising and consenting to presidential appointments.

Under this guidance, then, the ranking member[9] of a committee of jurisdiction, general members of a committee of jurisdiction, and general members of Congress alike hold the same authority to investigate and oversee Executive Branch agencies: none. The OLC did acknowledge that requests from members of Congress who were not chairs of a committee should not "be treated the same as a Freedom of Information Act request or a request from a member of the general public,"[10] but this is hardly a concession. At the time of the 2017 OLC opinion's publication, the Chairman of the Senate Committee on the Judiciary, Senator Chuck Grassley, called the opinion "nonsense" and argued vigorously

4. *Id.* at *1–3.

5. *Id.* at *2 (citing *Application of Privacy Act Congressional-Disclosure Exceptions to Disclosures to Ranking Minority Members*, 25 OP. O.L.C. 289, 289 (2001)).

6. *Id.* at *3 (internal citations omitted).

7. *Id.*

8. *Id.*

9. The ranking member of a committee is the leader chosen by that house of Congress's minority party, whereas the chair is selected by the majority party. Throughout this Note, I use the customary labels "majority party" and "minority party" to identify the majority or minority party of either house of Congress. This label does not reflect which party controls the Executive Branch. I also use the terms "minority party" and "ranking member" somewhat interchangeably to reflect the same side of an issue.

10. *2019 OLC opinion*, *supra* note 1, at *2.

for a lower standard for compulsory process by the Executive Branch.[11] As recently as September 2021, nineteen Senators, all Ranking Members or Vice Chairs in the 117th Congress, asked Attorney General Merrick Garland to revisit this policy.[12]

Congress is "virtually impotent to enforce information requests against the executive branch, despite the theoretical availability of mechanisms to force compliance."[13] This is because Congress relies on interbranch cooperation with the executive to enforce compliance. So, an imbalanced oversight structure is more than a political frustration. It endangers Congress's proper role and function as a check on the Executive Branch. Adding to this paradoxical unbalancing of the scales is the fact that those in the Executive Branch refusing the oversight inquiries of members of Congress elected by the people to constitutionally created positions are unelected officials themselves.

This is not just a purely academic inquiry or intellectual pursuit. This issue is pertinent and relevant today. The OLC opinion is the most recent occurrence in a long line of frustrated congressional oversight efforts and Executive Branch stonewalling. Clinton had Whitewater; Bush had September 11; Obama had Fast & Furious. While this OLC opinion was released at the beginning of the Trump Administration, it remains in effect as the OLC policy even now, as Democrats in both the House of Representatives and the Senate seek information about January 6, Trump's tax returns, and more. Ensuring the establishment of the proper relationship between congressional inquiry and executive response could potentially alleviate some of the strain placed on both branches during oversight investigations.

That the Executive Branch must respond to proper congressional inquiries is an independent inquiry from *what* the Executive Branch must say in response. Invoking executive privilege can be an appropriate response to congressional inquiry, should the Executive Branch choose to respond with that instead of an informational response. However, further exploration of the doctrine of executive privilege is beyond the scope of this Note.

What, then, is the Executive Branch's duty to respond to congressional inquiries for information?[14] When Congress asks the Executive Branch for information, when *must* the Executive Branch respond, either with an answer or with an

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11. Letter from Charles E. Grassley, Chairman, U.S. S. Comm. on the Judiciary, to Donald J. Trump, President of the U.S. *2 (Jun. 7, 2017), https://www.judiciary.senate.gov/imo/media/doc/2017-06-07%20CEG%20to%20DJT%20(oversight%20requests).pdf [https://perma.cc/DJ9N-BQ3A] [hereinafter Grassley 2017 Letter].

12. Letter from Roger Wicker, Ranking Member, U.S. S. Comm. on Com., Charles E. Grassley, Ranking Member, U.S. S. Comm. on the Judiciary, et. al., to Merrick Garland, Att'y Gen. of the U.S. (Sept. 24, 2021), https://www.commerce.senate.gov/services/files/CB506190-F57A-4026-A799-616F00475DE0 [https://perma.cc/M5DL-8MBV].

13. Jonathan David Shaub, *The Executive's Privilege*, 70 DUKE L.J. 1, 28 (2020).

14. This Note only discusses the standard which applies to agencies and other bodies of the Executive Branch. It does not include any standard for evaluating congressional investigations of individuals. The Supreme Court has clearly reserved for itself and the Judiciary the ability to evaluate whether a congressional investigation improperly impinges individual rights. *See* Kilbourn v. Thompson, 103 U.S. 168 (1880); Powell v. McCormack, 395 U.S. 486 (1969).

appropriate assertion of privilege? The continuum of potential answers spans from "every member, every time" on one end to the OLC's position—that the obligation begins and ends with official action by a committee acting through its designated leader—on the other. This Note, however, proposes something slightly more inclusive than the OLC's position without reaching the other extreme: the Executive Branch should recognize and respond to inquiries from ranking members in the same way it does demands from committee chairs.

Ranking members of committees hold unique, important roles in government and congressional leadership, as well as the general oversight structure. Using the oversight and compulsion authority of chairs may have been a helpful guide for the OLC in constructing its response framework. However, equating the authority of the ranking member of a committee of jurisdiction with any general member of Congress is not an appropriate guide for executive responses to congressional inquiries.

Below is a visual representation of the Executive Branch response standard proposed in this Note. It lays out how the Executive Branch should view inquiries, or what I have termed the "demand-request distinction." Inquiries which are demands require a response; those which are requests allow an agency discretion in responding.

PROPOSED EXECUTIVE BRANCH RESPONSE MATRIX: THE "DEMAND-REQUEST DISTINCTION"

Member Position/Authority	**Inquiry Related to Committee Business**	**Inquiry Not Related to Committee Business**
Chair of (Sub)Committee of Jurisdiction	Response Required (Demand)	Response Discretionary (Request)
Ranking Member of (Sub) Committee of Jurisdiction	Response Required (Demand)	Response Discretionary (Request)
General Member of (Sub) Committee of Jurisdiction; Includes Political Leadership	Response Discretionary (Request)	N/A
Not General Member of (Sub) Committee of Jurisdiction; Includes Political Leadership	N/A	Response Discretionary (Request)

Maintaining the distinction between inquiries related to the business of a committee of jurisdiction on which the member sits and inquiries related to anything else preserves the prioritization of inquiries which serve a broader body of Congress. It also ensures the satisfaction of the requirement in *Watkins v. United States* (discussed further *infra* Part III.A) that Congressional investigations be "related to, and in furtherance of, a legitimate task of the Congress."[15] Maintaining the distinction between inquiries made by those selected by their

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

respective parties to lead a committee's efforts and inquiries made by those who are political leaders, general members of a committee, or general members of a house of Congress preserves the prioritization of inquiries made by those who have been selected to lead legislative efforts and oversight of a particular area of government and society. This framework also rejects congressional subpoena authority as the sole prerequisite for compulsion or a demand.

This proposed standard reflects the historical intent of the Founders in writing the separation of powers and checks and balances into the Constitution. It also aligns with the historical, precedential actions of each branch of government when determining questions related to congressional oversight. Normatively speaking, this standard would be in alignment with current Executive Branch procedures for responding to inquiries and so would result in no real change in agency actions. And, practically speaking, such a lowered standard for compulsory process would decrease the polarization of executive-congressional relations and party-based political battles. It would also be minimally disruptive, as it would simply recognize long-standing Executive Branch practice in this area.

II. HISTORY AND CONTEXT

A. The Founding

The history and context of the Constitution's oversight framework, including the issues within the British government to which the Founders were responding, are helpful guides to the issues of congressional oversight and Executive Branch duties in response.

English legal and political history both provide little-to-no information or context about how the Framers viewed this issue. As the Supreme Court noted in *Fleming v. Page*,[16] "there is such a wide difference between the power[s]" of the President and the English crown "that it would be altogether unsafe to reason from any supposed resemblance between them" that the duties and authorities were similar.[17] The best information which we can draw from this period reveals that the authorities of the American executive were purposefully crafted to be more limited and more overseen by the legislature than were those of the English Crown.

The closest relevant analogy to the United States's oversight structure and the presence of ranking members may be the shadow government found in the United Kingdom's Parliament. Shadow ministers are members of an opposition party who provide important oversight of the government's leadership. These

16. Fleming v. Page, 50 U.S. 603 (1850).
17. *Id.* at 618.

shadow government officials have no additional authority derived from their shadow government role.[18] Though an interesting comparator, unfortunately, this shadow government structure is sufficiently distinct from the creation and evolution of the United States legislative branch that it prevents a fulsome and meaningful comparison or guide to how the Executive Branch should view minority party oversight in the United States.

Examining the Founders' understandings of and expectations for congressional oversight can provide some clues. The Founders, for the most part, did not want absolute independence between the branches.[19] This is evidenced by their creation of overlapping duties among the branches as checks and balances so that "[a]mbition [could] be made to counteract ambition."[20]

The congressional authority to conduct oversight of the Executive Branch is an implied one. While not expressly set forth in the Constitution's language, a power "which [is] reasonably appropriate and relevant to the exercise of a granted power [is] to be considered as accompanying the grant."[21] The granted power is the power to legislate in accordance with the Constitution;[22] the implied power is to oversee and investigate in relation to legislating. The House of Representatives first used the congressional authority to oversee and investigate the Executive Branch in 1792. The House invoked its oversight authority to investigate the embarrassing defeat of General St. Clair and his forces in the Northwest Indian War.[23] It called for "such persons, papers, and records, as may be necessary to assist their inquiries."[24]

This implicit investigation authority is in accordance with the understanding of this principle during the Founding Era, too. Madison believed "[n]o axiom is more clearly established in law" than that "every particular power necessary for

18. *Ministers and Shadow Ministers*, PARLIAMENTARY EDUC. OFF., https://peo.gov.au/understand-our-parliament/parliament-and-its-people/people-in-parliament/ministers-and-shadow-ministers/ (last visited Feb. 11, 2022).

19. The notable exception was Thomas Jefferson. *See* 10 THE WORKS OF THOMAS JEFFERSON 404 n.1 (Paul Leicester Ford ed., 1905) ("The intention of the Constitution, that each branch should be independent of the others, is further manifested by the means it has furnished to each, to protect itself from enterprises of force attempted on them by the others, and to none has it given more effectual or diversified means than to the executive.").

20. *See* THE FEDERALIST NO. 51 (James Madison), https://avalon.law.yale.edu/18th_century/fed51.asp.

21. United States v. Nixon, 418 U.S. 683, 705 n.16 (1974) (citing Marshall v. Gordon, 243 U.S. 521, 537 (1917)).

22. U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . . .").

23. *See* LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 1–21 (6th ed. 2014). General St. Clair suffered 900 casualties to his force of nearly 1,400 men. Colin G. Calloway, *The Biggest Forgotten American Indian Victory*, SMITHSONIAN (Jun. 9, 2015), https://www.whatitmeanstobeamerican.org/ideas/the-biggest-forgotten-american-indian-victory/ [https://perma.cc/Q5QC-E8PB].

24. 3 ANNALS OF CONG. 490–94 (1792); *see also* 3 A. HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES 1725 (1907).

doing [that which is explicitly authorized] is included."[25] In *McGrain v. Daugherty*,[26] the Supreme Court affirmed this implicit power. The Court held that the legislative branch "cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change."[27] The Supreme Court also supported the implied subpoena authority to access such information, since "the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function."[28]

However, looking to the Founding Era for context and insight is less helpful in informing this issue because of today's party-based system. The Founders did not foresee the party-based government structure in which we operate. President George Washington famously warned against them in his Farewell Address.[29] However, this backdrop to all government actions affects oversight and inter-branch conflicts to a degree and in a manner not predicted or bargained for by those drafting the Constitution.[30]

B. Modern Considerations

Empirical evidence reveals that the minority party in Congress tends to conduct oversight to a greater extent than the majority party.[31] However, the majority party can more easily amend legislation to fix issues which are discovered through agency oversight or hold accountable those responsible.[32] This tension between, on one hand, the desire for oversight and, on the other, the means to create meaningful and effective change, is highlighted when the President's party is also the majority party in one or both houses of Congress. In such a scenario, committee majorities will likely avoid rigorous oversight of the executive. That job will be left to committee minorities, the members of which are already facing an antagonistic Executive Branch based on party identity alone.

The Executive Branch does, notably, have the authority to resist Congress in some circumstances. The Executive Branch has the affirmative duty to protect

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25. THE FEDERALIST NO. 44 (James Madison), https://avalon.law.yale.edu/18th_century/fed51.asp.

26. 273 U.S. 135 (1927).

27. *Id.* at 175.

28. *Id.* at 174.

29. George Washington, *Farewell Address* (Sept. 17, 1796), https://www.ourdocuments.gov/doc.php?flash=false&doc=15&page=transcript [https://perma.cc/2FH4-ZEGY] ("However [political parties] may now and then answer popular ends, they are likely in the course of time and things, to become potent engines, by which cunning, ambitious, and unprincipled men will be enabled to subvert the power of the people and to usurp for themselves the reins of government, destroying afterwards the very engines which have lifted them to unjust dominion.").

30. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 at 654 (1952) (Jackson, J., concurring) ("Party loyalties and interests, sometimes more binding than law, extend [the President's] effective control into branches of government other than his own and he often may win, as a political leader, what he cannot command under the Constitution."). *See also* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2329 (2006) (arguing that divisions among party lines have replaced the separation of powers between branches as conceived by the Framers).

31. JOEL D. ABERBACH, KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT 162–83 (1990).

32. *Id.*

the balance of government against congressional overreach or abuse of authority. In fact, a lack of resistance against Congress could be a dereliction of the executive's own duty to retain the separation of powers.

Views on the issue of executive duty to respond will necessarily be predicated on which theory of "branch equality" is believed. The dominant theory is that the branches of the federal government are co-equal. A less popular view is that Congress is superior to the Executive Branch.[33] If the branches are co-equal, then the Executive Branch's duty to respond to Congress is equally counterbalanced by its duty to push back against Congress to establish acceptable boundaries of oversight and independence. But, if Congress is "greater" than the Executive Branch, then the Executive Branch must submit more broadly to oversight inquiries from Congress and will have a narrower duty or ability to reject such inquiries.[34]

Regardless, the Executive Branch should maintain this dutiful separation while supporting the maximum possible amount of disclosure to Congress. This is the best approach to maintain a sturdy separation of powers. In a contest between implied powers, the Executive Branch should err on the side of greater disclosure to Congress. In Founding Era debates between Madison and Hamilton, the latter argued in favor of granting or interpreting greater powers for the Executive Branch. But Madison argued that allowing the Executive Branch to have such expansive implied powers was dangerous.[35] Since the executive is more able or more likely to abuse or expand its implied powers, it should face more restrictions from the beginning.

III. PRECEDENTIAL ACTIONS OF THE BRANCHES

The past actions of the courts, Congress, and even the Executive Branch itself support a lower standard for compulsory process which includes responsiveness to requests by the ranking members of committees.

A. The Judiciary

Unfortunately, we cannot turn to the nation's highest court for a perfectly clear answer and an appropriate standard of process, as the Supreme Court has not ruled directly on this issue. Any available cases on executive-legislative interbranch communication conflicts, either from the Supreme Court or various Circuit Courts of Appeals, should be viewed with slight skepticism. Cases on

33. This theory cites Madison's statement in *Federalist No. 51* that "[i]n republican government, the legislative authority necessarily predominates" and Congress's place as the first branch of government given authority in the Constitution as evidence that Congress is the "first among equals." Jamie Raskin, *Congress Isn't Just a Co-Equal Branch. We're First Among Equals.*, WASH. POST (May 10, 2019), https://www.washingtonpost.com/outlook/congress-isnt-just-a-co-equal-branch-were-first-among-equals/2019/05/09/e3caa552-7206-11e9-9eb4-0828f5389013_story.html [https://perma.cc/NR96-M294].

34. No theory of which I am aware claims the Executive Branch was built in the Constitution as a superior branch to the Legislative.

35. FISHER, *supra* note 23, at 1–21.

information conflicts are often not representative of information conflicts generally because litigation is reserved for the extremes and most information conflicts are settled between the parties.[36]

However, the courts have provided some guidance on this issue that supports a lower standard for compulsory process. The executive's duty to respond generally is perhaps best addressed in *Watkins v. United States*.[37] As the leading Supreme Court case on congressional investigations, *Watkins* does not stratify or differentiate the duty of the Executive Branch to respond to congressional inquiries based upon *which* member of Congress makes any given oversight inquiry. Instead, the Court calls Congress's power of investigation (and, therefore, inquiry) "broad" but limits it only to those investigations which: 1) do not "expose the private affairs of individuals without justification" under the functions of Congress; 2) are not akin to law enforcement or a trial; and 3) are "related to, and in furtherance of, a legitimate task of the Congress."[38] Labeling Congress's investigative authority as a broad power certainly favors increasing the Executive Branch's duty to respond by decreasing the standard for compulsory process.

However, the third prong of *Watkins*, which limits congressional oversight authority to matters related to and in furtherance of a legitimate congressional task, provides significant support for narrowing the executive's duty to respond, or at least increasing its discretion in choosing whether to respond. The phrase "legitimate task" or the phrase "of the Congress" may provide limitations on the scope of the duty to respond. A legitimate task would not include frivolous inquiries or partisan political stunts. As the Executive Branch is first given the ability to determine whether the task to which an inquiry is related is "legitimate," it has considerable discretion to choose whether responding is appropriate. For example, an agency could view an inquiry regarding the Internal Revenue Service's targeting of conservative organizations as a purely political, and thus illegitimate, task. A task "of the Congress" could be reasonably interpreted as a task authorized or supported by a congressional majority, a reading which supports the OLC's house-dependent and chair-dependent reasoning.

The primary scenario in which the Executive Branch can legitimately ignore an oversight request in its entirety is mentioned by the Court in *Barenblatt v. United States*.[39] The Court plainly stated that Congress "cannot inquire into matters which are within the exclusive province of one of the other branches of the Government."[40] Since Congress cannot rightfully inquire into such matters, an agency is permitted to simply ignore such an oversight request. Of course, it would behoove the Executive Branch to reply with an explanation as to why it is

36. *Id.* at 176–214.
37. Watkins v. United States, 354 U.S. 178 (1957).
38. *Id.* at 187.
39. Barenblatt v. United States, 360 U.S. 109 (1959).
40. *Id.* at 112.

refusing information in an effort to maintain productive and cooperative inter-branch relationships. However, a response would not be required.

In addition, the courts have provided clearer guidance on how to view individual members of Congress based on their authority. These cases support the idea that, while congressional self-organization must guide the Executive Branch if it chooses to distinguish member inquiries based on committee authority, general members of Congress are not to be held in the same regard as committee chairs.

In *Murphy v. Department of the Army*,[41] the appellant tried to distinguish between giving information to Congress in its entirety and giving information to a portion of Congress (such as a committee) or a single member.[42] The court held that:

> It would be an inappropriate intrusion into the legislative sphere for the courts to decide without congressional direction that, for example, only the chairman of a committee shall be regarded as the official voice of the Congress for purposes of receiving such information, as distinguished from its ranking minority member, other committee members, or other members of the Congress.[43]

According to the courts, Congress gets to decide these issues—not the executive.

However, it is important to note here that the courts have been fairly clear about the investigation authority of individual members and, therefore, the Executive Branch's duty to respond to requests by individual members. Although all Members "have a constitutionally recognized status entitling them to share in general congressional powers and responsibilities, many of them requiring access to executive information,"[44] the courts have repeatedly limited the executive's duty to respond to not include requests from individual members.

In *Gojack v. United States*,[45] a subcommittee of the House Un-American Activities Committee (HUAC) investigated appellant Gojack. However, the subcommittee conducted the investigation without specific authorization by HUAC and in contravention of the Committee's own rules. Thus, the members' actions were akin to individual members of Congress joining together to conduct oversight without an authorization from Congress or a subdivision thereof. The court

41. 613 F.2d 1151 (D.C. Cir. 1979).

42. The appellant was a private citizen, not an Executive Branch agency, and the case involved the statutory interpretation of the Freedom of Information Act. Regardless of these distinguishing factors, the D.C. Circuit Court of Appeals's reasoning is relevant to this Note's inquiry.

43. *Murphy*, 613 F.2d at 1157.

44. *Id.*; *see also* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 803 (1995) (quoting 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 627, at 462 (Melville M. Bigelow ed., 5th ed. 1891)) ("[E]ach Member of Congress is 'an officer of the union, deriving his powers and qualifications from the constitution.'").

45. 384 U.S. 702 (1966).

stated that no individual member of Congress is free on his or her own to conduct investigations without congressional authorization.[46]

In *Exxon Corp. v. Federal Trade Commission*,[47] the D.C. Circuit Court of Appeals examined the rules of the House of Representatives in the context of congressional subpoenas to agencies for information. In reading these rules, the court held that the "disclosure of information can only be compelled by authority of Congress, its committees or subcommittees, not solely by individual members."[48] Individual members alone lack the authority to compel the response of the executive.

In *Lee v. Kelley*,[49] a Senator requested access to information the court had required be held under seal. His reason for requiring access to the materials was seemingly legitimate—there was an upcoming vote in the Senate for which there had not been much public investigation or information. The court denied the Senator access to sealed materials because he "appear[ed] as an individual Senator, without Senate authorization" in the context of an investigation, despite his lawful purposes.[50] Again, individual members cannot access the benefits of the full investigative authority of Congress even though they have an individual investigative duty themselves.

As detailed above, the rulings of the Supreme Court and lower courts, mostly the D.C. Circuit Court of Appeals, support a broader duty to respond while limiting the authority of individual members. This precedent aligns with a lower standard for compulsory process for the Executive Branch which would expand the executive duty to respond to include requests by ranking members, as well as their chair counterparts. This precedent also supports limiting this expansion to just ranking members and not every single member of Congress, since individual members simply do not possess the same investigative authority as whole subentities of Congress.

B. The Legislature

The OLC justifies its reasoning for a more limited executive duty to respond by using Congress's internal structure and rules and several Congressional Research Service (CRS) publications. It attempts to appeal to the limitations that Congress imposed on itself as authoritative actions favoring decreased congressional authority. However, the history and context surrounding congressional reorganization reforms and other legislative reforms since the mid-1940s actually evidence the desire of Congress to increase the equality and access of those in the minority party. These reform trends extend to the ability of members to conduct oversight of the Executive Branch.

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46. *Id.* at 716.
47. 589 F.2d 582 (D.C. Cir. 1978).
48. *Id.* at 593.
49. 99 F.R.D. 340 (D.D.C. 1983).
50. *Id.* at 342 n.2.

The first Legislative Reorganization Act (LRA) was in 1946 and "made an array of significant institutional changes to the House and Senate."[51] The second LRA was in 1970. One of the three main goals of this second large-scale reform effort was to rebalance the rights and authorities of those in both the majority and minority parties. The 1970 LRA granted each committee's minority a set allocation of investigative funds, gave the minority party in each committee one day per hearing to call their own witnesses, banned general proxy voting (which had until then considerably increased a chair's power), and guaranteed an even split of floor debate time for conference reports between the majority and minority parties.[52]

Later reforms show a shift from an emphasis on committee authority (such as chairs and ranking members) to party authority (such as the majority and minority leaders).[53] This shift in Congress's internal prioritization and reorganization demonstrates further why committee authority alone is an insufficient basis upon which to analyze a congressional request for information and the executive duty to respond. "[T]he House's shift from the 'committee-centric' model of decision-making to today's 'party-centric' form of governance" was "a fundamental transformation in the dynamics of congressional power."[54] Speaker of the House Newt Gingrich was largely responsible for this shift, strengthening political leadership's authority at the expense of that of committee chairs.[55] Some of his reforms were intended to make "committee chairs recognize that they [were] not independent actors .... but dependent on the majority leadership for their positions."[56] Congress's own emphasis on shifting power from committees to parties weakens the OLC's focus and emphasis on committee authority. This emphasis, instead, supports a broader executive duty to respond and a lower standard for compulsory process for the Executive Branch.

The evolution of congressional rules also demonstrates that Congress has been trying to increase members' access to information, irrespective of party, by broadening the executive duty to disclose. For example, in 1977, the House of Representatives changed the rule regarding committee subpoenas to only require "a majority of the members voting, a majority being present" to authorize a subpoena instead of requiring the majority of the committee in its entirety.[57] Even though this rule operated within the context of the subpoena authority, it reflects a desire to broaden which members are owed responses by the Executive Branch, thus implementing a lower standard for compulsory process.

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51. WALTER J. OLESZEK, CONG. RSCH. SERV., R46933, CONGRESSIONAL REFORM: A PERSPECTIVE 6 (2021).

52. *Id.* at 14.

53. *Id.* at 3 ("A committee-centric era (roughly the 1920s into the 1970s) gradually gave way to today's party-centric, partisan polarized period.").

54. *Id.* at 18.

55. *See id.*

56. *Id.*

57. 589 F.2d 582, 592 n.19 (D.C. Cir. 1978).

Additionally, Congress presupposes that, unless Committee or house rules actually prevent the ranking member from conducting oversight within the committee's jurisdiction, then responses from agencies to congressional inquiries from the ranking member are in order.[58] This view is a bipartisan understanding in Congress of its own powers and the broad executive duty to respond.

Currently, the rules of the House of Representatives give both full committees and subcommittees the authority to issue subpoenas for documents or testimony.[59] A subpoena must be authorized by a majority of the members of a committee or subcommittee. Notably, this permission does not require the agreement or action of the majority party or even the chair. If all of the minority party members of a committee and then a *quantum sufficit* of majority party defectors, perhaps only two or three members, voted for a committee-issued subpoena, then a subpoena would necessarily be issued. In such a scenario, a chair could vote against the subpoena but still be on the losing side of the vote. Therefore, the ranking member would represent a majority of the committee or subcommittee in this scenario. And while this rule is, again, in the context of the official subpoena authority, this hypothetical shows that a broader understanding of the executive duty to respond more accurately encompasses all of the authority figures on a committee.

Finally, the rules of the House of Representatives have expanded to allow greater powers of deposition to committee staff.[60] Such expansion of congressional investigations, regardless of its constitutionality,[61] can be interpreted as an implicit desire by members of Congress that they, and even their staff, want to strengthen and increase their investigative authority. If Congress wants to grant its staff increased investigative authorities, then it almost certainly wants its ranking members to have more investigative authorities, too.

However, recent congressional action may also provide a contrasting interpretation of congressional intent, indicative of a system favoring a power concentration to committee chairs. A detailed look at committee rules and authorities noted that "over the past decade, nearly every committee amended its rules to allow a chairperson to issue a subpoena unilaterally."[62] This is strong evidence that chairs continue to be seen by Congress as a committee's ultimate authority, regardless of whether a majority of the committee supports the chair's actions. This

58. *See* Letter from Pat Roberts, Chairman, U.S. S. Comm. on Agric., and Debbie Stabenow, Ranking Member, U.S. S. Comm. on Agric., to Sonny Perdue, Sec'y of Agric. (May 19, 2017), https://www.commerce.senate.gov/services/files/519358B5-44F2-45A7-ADBD-CA1F3F895AD7 [https://perma.cc/ATW5-6MB4]; *see also* Grassley 2017 Letter, *supra* note 11.

59. Rules of the House of Representatives, 116th Cong., Rule XI, cl. 2 (m)(1)(B) and cl. 2 (m)(3)(A)(i) (2019).

60. *See* Shaub, *supra* note 13, at 39.

61. Granting professional committee staff greater investigation and oversight authorities may be an unconstitutional expansion of Congress's investigative authority and may lead to a perceived dilution of the power of congressional investigations. However, a further discussion on this topic is beyond the scope of this Note.

62. Shaub, *supra* note 13, at 38.

interpretation is especially true in some cases where committee rules have allowed chairs to issue subpoenas "without requiring notice to the ranking member or minority."[63] But, while these rule changes certainly reflect a chair's authority as the head of any given committee, they do not indicate that the investigative purposes or responsibilities of the ranking member are any less valuable. An emphatic delegation of additional authorities and power to one does not automatically result in the removal of power from another.

Contrary to how the OLC has interpreted congressional actions, Congress does not intend to limit its own authority to its committee chairs. This makes intuitive sense—Congress would work over time to increase its authority over the Executive Branch, not abdicate it. Therefore, lowering the standard for compulsory process for the executive to include ranking members aligns with congressional intent and understanding of the oversight and investigative authorities of Congress.

C. The Executive

Past Executive Branch actions and precedent on executive privilege and oversight reflect a posture of cooperation with Congress. Such a standard reflects the view that the Executive Branch itself supports a lower standard for compulsory process and understands that it should be more responsive to congressional inquiries. This view is important, as past administrations' views on executive powers inform the modern understanding of separation of powers.

The Reagan Administration standard was to only invoke executive privilege "in the most compelling circumstances."[64] Such a high bar for the exercise of executive privilege indicates the expectation of general responsiveness was even higher. A Clinton Administration memorandum states that "[i]n circumstances involving communications relating to investigations of personal wrongdoing by government officials, it is our practice not to assert executive privilege."[65] A response, however, would come—even for such investigations prone to severe politicization. During the Bush Administration, the House of Representatives investigated the Administration's knowledge of or involvement in the criminal prosecution of former Alabama Governor Don Siegelman. Karl Rove, an advisor to President Bush, resisted testifying before Congress, invoking executive privilege. However, he ultimately provided written answers to questions *posed by the committee's ranking member*.[66] This is telling precedent.

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63. *Id.*

64. Memorandum from Ronald Reagan, President, U.S., to the Heads of Exec. Dep'ts & Agencies 1 (Nov. 4, 1982), https://www.justice.gov/ola/page/file/1090526/download [https://perma.cc/KRN8-B5PQ].

65. Memorandum from Lloyd N. Cutler, Special Counsel to the President, to All Exec. Dep't and Agency Gen. Counsels (Sept. 28, 1994), *reprinted in* CONG. RESEARCH SERV., RL30240, CONGRESSIONAL OVERSIGHT MANUAL 119–21 (Jan. 16, 2020).

66. *See* Fred F. Fielding & Heath P. Tarbert, *Principled Accommodation: The Bush Administration's Approach to Congressional Oversight and Executive Privilege*, 32 J. L. & POL. 95, 119 n.106 (2016).

IV. THE OLC OPINION REVISITED

Given the history and precedent discussed above, it is clear that the OLC opinion is wrongly reasoned in several respects. The first is that the opinion fails to give agencies a framework through which to evaluate whether to provide members of Congress with answers for inquiries not accompanied by a subpoena. While no party disputes that the Executive Branch must respond to lawful congressional oversight inquiries, the OLC opinion improperly limits the scope of executive duty to respond to that which can be compelled, or that which is accompanied by a subpoena (or can be). All other inquiries, according to the OLC, are mere requests. This interpretation both is improperly narrow and offends Congress's independent authority.

Congressional oversight includes, *but is not limited to*, the power to subpoena documents and testimony. Even the nominee for OLC's assistant attorney general at the time of the opinion's initial controversial moment, Steven Engel, reaffirmed that "the Executive Branch's cooperation should not be simply what could be judicially mandated."[67] The OLC's standard cannot be so high that agencies will simply ignore any inquiries for information not accompanied by a subpoena.

Further, the Executive Branch cannot tell another branch which of its information-gathering activities is "authorized."[68] And, in *United States v. Nixon*, the Supreme Court stated that branches should be given deference to the interpretations of their own powers.[69] The opinion did not say that branches should be given deference to interpret the powers of other branches. The OLC's decision to effectively label certain congressional inquiries as legitimate and others as illegitimate (and, thus, not worthy of a response) offends the principles of separation of powers at the most basic level.

Another aspect of improper reasoning in the OLC's opinion is that it exclusively appropriates congressional power and authority to committee chairs. Perhaps the OLC's goal in drafting this opinion was not to diminish the importance of minority party oversight or pick a fight with Congress; perhaps its goal was to give due respect to only those with whom their respective house of Congress has entrusted with leadership. If so, this understanding of influence, power, and spokesmanship within Congress is misplaced. The most dramatic example, perhaps, is that the leaders of a party—those with the greatest influence—do not warrant a response under OLC's logic. Both the Majority and Minority Leaders of the Senate, Senators Chuck Schumer and Mitch McConnell respectively, are not the chairs of the various committees on which they sit. The leader of the House of Representatives, Speaker Pelosi, does not even serve on a

67. Press Release, U.S. S. Comm. on the Judiciary, Grassley Wins Commitments of Cooperation from Administration on Oversight Requests (Jul. 28, 2017), https://www.judiciary.senate.gov/press/rep/releases/grassley-wins-commitments-of-cooperation-from-administration-on-oversight-requests- [https://perma.cc/5DDW-HLPR].

68. Grassley 2017 Letter, *supra* note 11.

69. *See* United States v. Nixon, 418 U.S. 683, 704–05 (1974).

committee. But all three of these members of Congress are the most authoritative sources of majoritarian wishes by members in both houses of Congress. The OLC's framework, as applied here, makes no sense.

Additionally, the OLC opinion is weakly and improperly based entirely upon internal Congressional structure and committee rules. Theoretically, Congressional structure demonstrates the priorities of "We the People" and Congress and to where both Congress and citizens have chosen to delegate authority. So, while the OLC was perhaps not wrong in using congressional structure as mere context in its analysis of the duty to respond, reading too much into congressional structure ignores the fact that the Executive Branch has a duty to respond to valid inquiries that operates outside of the formal structure of Congress. The manner in which Congress chooses to organize itself cannot change the *constitutional* duty of the Executive Branch to subject itself to Congressional oversight authority. That responsibility will exist regardless of the internal organizational structure of either Congress or the Executive Branch.

Furthermore, basing the logical reasoning of this constitutional interpretation on something as ephemeral and unplanned by the Founders as committee and internal congressional structure weakens the legitimacy of any such interpretation. Doing so leaves the opinion, and any resulting Executive Branch actions, vulnerable to simple changes in internal congressional policy and structure, rendering it unhelpful as guidance. While the Executive Branch can give advice to agencies based on the current structure of Congress and the roles of each house's committees, this opinion leaves agencies vulnerable to changes in committee authorizations and procedural rules.

Finally, in order for committee membership or a leadership position to be a legitimate basis for completely withholding information, Congress would need to explicitly authorize such action by the executive.[70] Using committee membership or a leadership position to *prioritize* a response to an investigative inquiry, however, would be proper. This prioritization aligns with this argument for ranking members to have access to the same information at the same time as chairs. An inquiry by a ranking member of any given committee may, then, be properly placed in line behind an inquiry of the chair of that same committee. But the Executive Branch cannot *withhold* information from the ranking member. The Ranking Member requires a response.

V. PROPOSED SOLUTIONS IN CURRENT LITERATURE AND LEGAL THOUGHT

The various approaches and solutions proposed by others in current legal and political thought are too all-or-nothing—dramatically favoring either the Executive or Legislative Branch—or fail to consider the full impact of the political realities of American government today.

70. *See* Grassley 2017 Letter, *supra* note 11.

In *United States v. Nixon*,[71] the Court established a two-step balancing test to weigh executive-legislative conflicts. First, the Court analyzed the "extent to which the congressional request prevents the Executive Branch from accomplishing its constitutionally assigned functions."[72] Then, it analyzed "whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress."[73] However, applying the *Nixon* test to congressional informational inquiries and the executive duty to respond (irrespective of privilege) will not work. The Executive Branch will claim it is overburdened by a congressional inquiry every time, unless forced to act by a subpoena (or enforceable threat thereof). And the courts are loath to intervene in these matters, so the executive can abuse its ability to cry "uncle" at nearly every inquiry.

Some advocate for the wholesale equal treatment of all members regardless of house, leadership rank, or committee membership.[74] Individual members, regardless of committee status, have a constitutional obligation to make informed votes and oversee Executive Branch agencies through their votes. All congressional actions are ultimately completed by the votes of individual legislators. And, each Member of Congress has one vote, regardless of seniority or leadership position. So, the argument follows, all congressional inquiries should be treated equally.

While this is a noble goal, it is not sufficiently narrowly tailored. Such a broad policy does not allow Executive Branch agencies to respond to requests in order of importance, recognize house or party seniority, or acknowledge the weight of a committee leadership position. Though all oversight requests from all members should be reviewed, some are objectively more important than others. Compare a freshman in the House of Representatives asking an agency about a rumor regarding the proposal of an obscure regulation and the Senate Majority Leader asking the Department of Energy about allegations of serious corruption, bribery, or treasonous behavior by the Secretary. The importance and weight of these questions and their askers are not the same, nor should they be treated as such. Additionally, agencies could abuse a reply-to-everyone standard as an excuse to delay more significant and important oversight requests.

Another proposed course of action is that Congress could amend its rules and oversight legislation to clarify its oversight intentions and requirements. Agencies interpret certain statutes, like 44 U.S.C. § 2205(2)(C),[75] as not giving ranking members the same oversight authority as chairs because ranking members are not representative of their respective committees. If that is the case,

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71. 418 U.S. 683 (1977).

72. Annie L. Owens, *Thwarting the Separation of Powers in Interbranch Information Disputes*, 130 YALE L.J. F. 494, 497 (2021).

73. *Id*. at 497–98.

74. Grassley 2017 Letter, *supra* note 11 ("I respectfully request that the White House rescind this OLC opinion and any policy of ignoring oversight requests from non-Chairmen.").

75. "Presidential records shall be made available . . . to *either House of Congress*, or, to the extent of matter within its jurisdiction, to *any committee or subcommittee thereof* if such records contain information that is needed for the conduct of its business and that is not otherwise available . . . ." (emphasis added) (governing exceptions to restricted access of presidential documents).

Congress would do well to provide specific guidance and authorization in a revision of that statute to correct misinterpretation. For example, 5 U.S.C. § 552, part of the Freedom of Information Act, explicitly commands that "[t]his section is not authority to withhold information from Congress."[76] Clear congressional guidance could alleviate some executive-legislative information disputes.

Congress could also amend its various house rules to authorize explicitly as "official" the oversight demands made by both chairs and ranking members.[77] It could also extend this rule to certain high-ranking minority party members.[78] Congress could amend legislation to grant ranking members access to specific information under certain conditions or narrow, specified circumstances.[79] It could also do so for specific members of Congress. While these suggestions would help solve parts of this issue, they are not a silver bullet. Specific authorizations may limit unspecified members too greatly and actually result in less Executive Branch cooperation with members lacking rules-based authorization. Further, passing or amending oversight legislation would require significant political capital and organization, as "[r]eforms that redistribute power are among the most difficult to enact."[80] Once that political capital has been expended, the President could still veto such a legislative change (which would be in his or her interest as the chief executive officer). However, amending House and Senate rules could be a more suitable and flexible option forward.

VI. A NEW STANDARD

If the Executive Branch cannot constitutionally and appropriately distinguish congressional inquiries by whether or not they are subpoena-able, the next questions become: Which inquiries are demands, and thus warrant a response? And is this distinction based on *who* is asking, or *what* they are asking for?

Instead of OLC's "if subpoenaed, then respond" standard, the Executive Branch should adopt a lower standard for compulsory process by responding to all inquiries from both chairs and ranking members, as though they are demands. The OLC opinion is correct to prioritize response efforts to members with the most authority or with the ability to issue subpoenas, like chairs. This can also help avoid unnecessary legal battles. However, the Executive Branch cannot limit its duty to respond to exclusively committee chairs. Ranking members and other members with significant authority, like party leadership or relevant caucus leadership, should be considered legitimate requestors.

This is a broader duty to respond than is currently recognized by the Executive Branch. However, it is still less cumbersome than an "every Member, every time" standard, which is difficult to maintain in the long run. This test works

76. 5 U.S.C. § 552(d).

77. *See* Owens, *supra* note 72, at 513.

78. *See id.*

79. *See id.* (suggesting changes to the Presidential Records Act in the case of presidential nominations requiring Senate advice and consent).

80. OLESZEK, *supra* note 51, at 3.

regardless of internal congressional structure. And it also preserves the need for the legitimate exercise of executive privilege and push-back by the Executive Branch against Congress.

First, such a policy fits within the history of congressional oversight. To prevent abuse by the executive, encourage checks and balances, and allow ambition to truly counter ambition, a strong congressional ability to oversee the Executive Branch must be affirmed. This is especially true where the Executive Branch was constructed by men wishing to eschew a monarchy. To them, oversight and accountability were key. Today, expanding the ability of Congress to oversee the executive furthers that goal.

Second, this proposed policy aligns with the past actions of all three branches in the context of congressional oversight authority. Congress has wanted greater oversight access; the Executive has permitted, even welcomed, this; and the Judiciary supports allowing Congress to actively exercise its oversight authority so long as every member acting outside of a committee is not required equal access.

Third, this policy would be easy to implement, as it simply recognizes long-standing Executive Branch practice in this area. Announcing an internal policy or procedure as official standard operating procedure should be non-controversial. The fact that internal Executive Branch policy is broader than that which was announced in 2017 makes the 2017 policy opinion unnecessary. On a normative level, the OLP should just acknowledge what it already does by internal policy and procedure rather than setting aside for itself more discretion than the Executive Branch needs, will use, or is constitutionally due.

Finally, a lower standard for compulsory process would decrease the ever-growing polarization of Executive-Congressional relations in the United States. To prevent or slow such polarization requires active cooperation between the branches and increasing the access of the overseers, in this case by extending the number of Members of Congress owed a response.

VII. CONCLUSION

Both parties and the three branches of government "agree[] that some compulsory process is essential to support the also essential legislative power of inquiry."[81] The executive duty to respond to congressional inquiries, while not inclusive of every member of Congress, should be broader than the OLC 2017 opinion purports it to be. The Executive Branch should be responsive to both chairs and ranking members, as such responsiveness fits within the history of the congressional oversight authority and precedential decisions and actions of the

81. *Breaking the Logjam: Principles and Practice of Congressional Oversight and Executive Privilege: Hearing Before the Subcomm. on Federal Courts, Oversight, Agency Action and Federal Rights*, 117th Cong., at 20:15 (2021) (opening statement of Chair Sheldon Whitehouse), https://www.judiciary.senate.gov/meetings/breaking-the-logjam-principles-and-practice-of-congressional-oversight-and-executive-privilege [https://perma.cc/TXX6-6CC8].

three branches in the context of congressional oversight authority. Additionally, it would be easy to implement and would be a step toward depolarizing today's political climate. The executive can still choose to respond with an invocation of privilege where appropriate, but it must still respond. This preserves the separation of powers on both sides while maintaining the checks and balances called for in the Constitution. With time, the application of these principles may even lessen executive-legislative investigative conflicts and restore the purposes of oversight.