

## Oversight & Separation of Powers Briefing Series

*Session 1: Congressional Oversight, the Accommodation Process, and Executive Privilege*

**Broad framework for approaching oversight:** (1) *Threshold scope of congressional authority—relevant legislative purpose or other Article I basis* → (2) *Executive Branch confidentiality claims?* → (3) *The “accommodation process” is an iterative process in which these interests are evaluated & contested, if needed, in pursuit of a compromise.* (4) *Political levers for compliance* (5) *Enforcement Powers, available, but typically a last resort.*

### I. Threshold Scope of Oversight Authority

- Congress has constitutional authority to request all information **“related to, and in furtherance of, a legitimate task of the Congress.”** *Trump v. Mazars*, 140 S. Ct. 2019, 2031 (2020).
- *Article I Powers:* Typically the pursuit of information for legislative objectives implicating Congress’s enumerated powers, but also other congressional tasks including advice and consent for nominees, Senate concurrence with treaties, and impeachment.
- *Impeachment:* Congress has authority to seek information related to suspected wrongdoing where the House and Senate have authorized impeachment or conviction proceedings.
- *Executive Branch Objections to Requests as Ultra Vires*
  - Supreme Court cases has said that *legislative* oversight does not include a generalized power to investigate or disclose for disclosure’s sake, or to exercise the authorities of the executive or

the judicial branches. Those categories are frequently contested.

- *Exclusively Executive Power*: The Executive Branch might object to requests related to plenary powers of the President such as pardon and clemency authority, the executive role in nominating or terminating senior appointees, and diplomatic efforts to the extent that shared congressional power in regulation of international commerce, foreign affairs, and national security are not also in play.
- *Shared Powers*: In closely shared areas of power such as national security and foreign affairs duties, Congress can push back against executive claims of exclusive authority that Congress believes to be overbroad. Congress can pose info requests related to its powers in these areas.

## **II. Executive Claims of Privilege: Five Categories**

- (1) National security/foreign affairs—absolute protection for certain sensitive or classified information
- (2) Law enforcement—near-absolute claim to withhold info related to *ongoing* investigations
- (3) Presidential Communications—in connection with presidential decision-making; includes communications between key presidential advisers made in preparation to advise the President
- (4) Deliberative process—does not extend to documents recounting facts or describing past decisions
- (5) Attorney-client Communications & Work Product

## **III. Who Does Oversight?**

- Original oversight done through resolutions of inquiry. In modern times, oversight principally done through committees, which are authorized by Senate & House rules to pursue oversight and issue subpoenas.
- Individual Senator/Member Requests: Individual members may make requests, which in the interests of comity are given “due weight and sympathetic consideration,” but the absence of subpoena authority is a practical barrier. Individual Members may rely on political levers.

#### **IV. Accommodation Process**

- Executive Branch policy has been to respond to information requests, without the need for a subpoena, “to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch.”
- There can be substantial delays in responses depending upon the source of the request, its scope, and the nature of the information.
- Committees typically ratchet up the pressure. Begin with oral and written requests, move forward with subpoenas and demands for compliance
- Where there are disputes, the historical practice has been for the Executive Branch and Congress to reach some kind of compromise agreement on the requested information. The use of enforcement mechanisms like subpoenas is relatively rare.

#### **V. If Accommodation Fails**

- Subpoena power—civil enforcement. Committees’ authority to sue is contested by the Executive Branch and can be slow and protracted
- Statutory Criminal Contempt Power, 2 U.S.C. §§ 192, 194: these congressional charges require prosecution by the executive branch &

adjudication in the federal courts so Congress needs aid & agreement of other branches

- Inherent, Constitutional Congressional Contempt Power: Dormant, rarely used—would involve the House or Senate Sergeant-At-Arms or deputy holding the violator in custody for congressional proceedings

## **VI. Political Levers for Compliance**

- appropriations funding; legislative compromise; nominations holds; media publicity re noncompliance or publicizing the fact of the information request