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LIKE “NOBODY HAS EVER SEEN BEFORE”: PRECEDENT AND PRIVILEGE IN THE TRUMP ERA

HEIDI KITROSSER*

INTRODUCTION

President Trump is fond of citing the breadth of his powers and privileges. He has explained, for example, that there is “a thing called Article II” of the Constitution that “gives me all of these rights at a level that nobody has ever seen before.”¹ Elsewhere, he has elaborated that “Article II allows me to do whatever I want.”² These statements have been roundly criticized, with commentators comparing them to Richard Nixon’s infamous assertion that, “when the President does it, that means it is not illegal.”³ As with Nixon’s words, however, Trump’s conception of Article II is grounded in something more than one man’s grandiose delusions. Rather, Trump’s assertions of power and privilege are symptomatic of a long trend toward presidential imperialism. At the same time, they are especially brazen and dangerous manifestations of the same.

Trump’s efforts to stymie the congressional inquiries that led to his impeachment encapsulate his dual role as both symptom and agent of excessive presidential power. His actions reflect and further threaten to exacerbate the President’s alarmingly broad capacity to control the information that Congress and the people are able to learn about his activities. Yet neither Trump’s behavior, nor the Senate’s failure to convict him on either of the two articles of impeachment passed by the House—including the second article, for “Obstruction of Congress”⁴—must, inevitably, enhance presidential

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1. President Donald Trump, Remarks Before Marine One Departure, (July 12, 2019).

2. Christina Zhao, ‘Article 2’ Trends After Trump Falsely Claims it Gives Him Unlimited Powers as President: I Can ‘Do Whatever I Want’, NEWSWEEK (July 23, 2019), <https://www.newsweek.com/article-2-trends-after-trump-falsely-claims-it-grants-him-unlimited-powers-president-i-can-do-1450798> [<https://perma.cc/2DFH-K382>].

3. See Colleen Long & Michael Warren, *Trump’s Idea of Executive Power is Also Impeachment Defense*, ASSOCIATED PRESS (Jan. 25, 2020), <https://apnews.com/b2d16168986dd61accd475143c544665> [<https://perma.cc/U6KW-AJWJ>] (“Not since Richard Nixon[’s statement] has a president come close to making an assertion of power as sweeping as Trump’s.”).

4. See *Impeaching Donald John Trump, President of the United States, for High Crimes and Misdemeanors (“Articles of Impeachment”)*, H.R. Res. 755, 116th Cong. (2019). See also *Trump*

power going forward. Whether the Trump era normalizes ever bolder assertions of power, or whether it has quite a different effect—for instance, causing a backlash against such assertions—remains to be seen. As legal historian Mary Dudziak observed in the wake of the Senate’s vote to acquit Trump on both articles of impeachment: “past practice has not bound the present [Political branch] precedent is just a form of contemporary political argument.”⁵ The longer-term implications of Trump’s actions and the House and Senate impeachment proceedings, in short, are up to the actions and arguments of our own and of future generations.

In this Essay, I take both a wide and a long view of President Trump’s refusal to comply with any congressional information requests relating to his impeachment.⁶ That is, I consider how his intransigence reflects and thus far, has exacerbated judicial and political branch trends favoring presidential power. Looking to the future, I acknowledge that executive aggrandizement episodes tend to build on themselves, contributing to a ratchet effect that enhances presidential power. I argue, however, that this one-way trajectory is not inevitable.

In Part I, I look to judicial precedent involving executive privilege. Although few inter-branch disputes over information reach the courts, judicial precedent helps to shape the parameters within which political branch approaches to these disputes take place. On the whole, courts have been fairly sensitive to the interests of Congress and others in obtaining presidential information.⁷ Yet they also have armed Presidents with legal arguments and tools that enhance their already significant advantages in inter-political-branch tussles. In Part II, I consider these advantages, including a formidable executive branch legal infrastructure adept at turning past acts of presidential secret-keeping into “historical gloss” to justify yet more extreme secrecy. In Part III, I situate President Trump’s uses of executive privilege and its shadow within the broader contexts explored in the preceding sections. Trump’s actions rely on longstanding tools and trends but employ them in ways more extreme—and more threatening to inter-branch checks and balances—than we have seen in the past. President Trump’s categorical refusal

Impeachment Results: How Democrats and Republicans Voted, N.Y. TIMES (Feb. 5, 2020), <https://www.nytimes.com/interactive/2020/02/05/us/politics/impeachment-vote-results.html> [<https://perma.cc/PSJ9-N6SB>]; Joanna Walters, *What Are the Articles of Impeachment Against Donald Trump?*, THE GUARDIAN (Jan. 20, 2020), <https://www.theguardian.com/us-news/2020/jan/20/what-are-trump-articles-of-impeachment> [<https://perma.cc/MR3P-LD7G>].

5. Professor Mary Dudziak (@marydudziak), TWITTER (Jan. 31, 2020, 2:53 PM), <https://twitter.com/marydudziak/status/1223348502757019652> [<https://perma.cc/TNS2-TAY4>].

6. See *infra* Part III.

7. See *infra* Part I.

to cooperate with the House impeachment proceedings, his directive to others in his Administration to do the same, and his efforts to punish and intimidate those officials who did cooperate with the House, take defiance of oversight to new heights.⁸ In this Essay's conclusion, I consider the bearing that these events might have on future Presidents, congresses, and courts. Although presidential power often serves as a one-way ratchet, there are exceptions to this rule. Indeed, some presidential abuses become anti-canonical and spark a backlash against future such actions.⁹ President Trump's obstruction deserves to meet this fate.

I. EXECUTIVE PRIVILEGE AND TESTIMONIAL IMMUNITY IN THE COURTS

Executive privilege—and here I focus solely on that subset of the privilege involving presidential communications¹⁰—is the doctrine sometimes invoked by Presidents as a basis to decline to provide requested information to members of Congress, to courts, or to the public. At the heart of the privilege is the notion that forced information disclosures can undermine the President's ability to exercise his Article II powers and duties.¹¹

The trajectory of executive privilege's breadth is not perfectly linear. For example, President Nixon's failed assertion of an absolute privilege against disclosing his oval office tapes, along with the scandals that engulfed his Administration more broadly, inspired some reticence to invoke the privilege on the parts of subsequent Presidents.¹² Nonetheless, a number of factors have tended, overall, to give executive privilege a ratchet effect, expanding its reach and emboldening those who wield it over time. This is especially true with respect to disputes between the political branches, most of which never reach the courts.¹³

To understand how executive privilege tends to expand outside of the courts, it is helpful to begin, paradoxically, by looking to the judiciary. The paucity of judicial opinions on the privilege give the handful that exist a good

8. See *infra* Part III.

9. Deborah Pearlstein suggests as much in a new article, explaining that executive branch precedent can become anti-canonical under some conditions. Deborah Pearlstein, *The Executive Branch Anticanon*, 89 FORDHAM L. REV. (forthcoming 2020).

10. The other subcategory is the common law "deliberative process" privilege. See Heidi Kitrosser, *The Shadow of Executive Privilege*, 15 THE FORUM 547, 550 n.12 (2017) (citing *In re Sealed Case*, 121 F.3d 729, 737, 745 (D.C. Cir. 1997)).

11. See, e.g., MARK J. ROZELL, EXECUTIVE PRIVILEGE: PRESIDENTIAL POWER, SECRECY, AND ACCOUNTABILITY 44–49 (3d ed. 2010); Mark J. Rozell & Mitchel A. Sollenberger, *Executive Privilege and the U.S. Attorney Firings*, 38 PRESIDENTIAL STUD. Q. 315, 316 (2008).

12. See ROZELL, *supra* note 11, at 73.

13. See Kitrosser, *supra* note 10, at 550–51.

deal of influence over the arguments that are made or considered by participants in information-sharing disputes between the political branches. Overall, courts have built a doctrine that is rife with tools for the executive to wield in inter-branch disputes, even as they have pushed back against some of the most extreme invocations of the privilege.

Most notably, in *United States v. Nixon*, the Supreme Court recognized the privilege for the first time and also deemed it one that presumptively favors the executive.¹⁴ More so, the *U.S. v. Nixon* Court embraced the “candor rationale,” or the chilling effect that disclosure might have on Presidents’ abilities to obtain candid advice, as one justification for the privilege.¹⁵ Although the Court cautioned that the presumption might readily be overcome when its assertion “depends solely on the broad, undifferentiated claim of public interest in the confidentiality of [high-level] conversations”¹⁶—indeed, the Court characterized Nixon’s own claims as such and found them outweighed by countervailing interests¹⁷—the candor rationale is intrinsically expansive. The rationale’s nearly limitless potential is captured by an early usage of it in the Obama Administration. In the wake of a controversy over security at a state dinner—one sparked by a reality television star’s gaining entrance to said dinner without an invitation—the White House explained that its “social secretary is immune from testifying before Congress ‘[b]ased on the separation of powers’ and the need for ‘the White House staff to provide advice to the [P]resident confidentially.’”¹⁸ Beyond this striking example, administrations of both parties have cited the candor rationale many times since *U.S. v. Nixon*, both in opposing information requests and in objecting to proposed statutory information-sharing requirements.¹⁹

The *U.S. v. Nixon* Court also suggested that a much stronger presumption would apply to a privilege claim grounded in national security.²⁰ Just two years later, the United States Court of Appeals for the D.C. Circuit admonished a district court for deferring too strongly to a national security-based executive privilege claim raised in response to a congressional

14. 418 U.S. 683, 707–08. (1974).

15. *Id.* at 705–09. For in-depth analysis and critique of the candor rationale, see Gia B. Lee, *The President’s Secrets*, 76 GEO. WASH. L. REV. 197, 204–05 (2008).

16. *Nixon*, 418 U.S. at 706.

17. *Id.* at 713–14.

18. Michael D. Shear, *Government Openness is Tested by Salahi Case*, WASH. POST, Dec. 4, 2009, at C7 (quoted in Heidi Kitrosser, *The Shadow of Executive Privilege*, 15 THE FORUM 547, 551 (2017)). See also Helene Cooper & Rachel L. Swarns, *At Obama’s First State Dinner, the First Crashers*, N.Y. TIMES (Nov. 25, 2009), <https://www.nytimes.com/2009/11/26/us/politics/26crashers.html> [<https://perma.cc/3CH2-G3EC>].

19. See examples cited in Kitrosser, *supra* note 10, at 551 n.18.

20. *Nixon*, 418 U.S. at 710–11.

subpoena.²¹ Nonetheless, administrations have repeatedly cited the national security rationale in objecting to information requests or proposed statutory requirements.²²

Administrations also routinely cite the opinion of the U.S. Court of Appeals for the D.C. Circuit in *Senate Select Committee on Presidential Campaign Activities v. Nixon*,²³ a case that preceded *U.S. v. Nixon* by two months. Whereas *U.S. v. Nixon* involved a subpoena issued by a district court in the context of a criminal prosecution, *Senate Select Committee* concerned the Nixon Administration's refusal to turn over information to a congressional committee.²⁴ The D.C. Circuit validated the Administration's demurral, concluding that the committee had not overcome a presumption in favor of executive privilege.²⁵ To overcome the presumption, a committee must show that the information it seeks is "demonstrably critical to the responsible fulfillment of the Committee's functions."²⁶ Administrations regularly invoke that standard to support refusals to disclose information in a range of settings.²⁷

Courts also have given fuel to administrations seeking to minimize the procedural steps that they must take before they can benefit from executive privilege. In *Cheney v. United States* in 2004, the Supreme Court held that Vice President Cheney did not need to invoke executive privilege or identify parts of a discovery request that infringed the privilege; rather, he could object to the entire request on the basis that parts of it might trigger the privilege.²⁸ Although *Cheney* can be construed quite narrowly—indeed, the District Court for the District of Columbia refused to interpret *Cheney* to encompass absolute testimonial immunity for high-level advisors in 2008 in *House Judiciary Committee v. Miers*²⁹—*Cheney* offers a tantalizing tool for

21. *United States v. AT&T*, 551 F.2d 384, 385–86, 392 (D.C. Cir. 1976). The appeals court encouraged the branches to resolve the matter through negotiations, but stressed that the negotiations should be informed by assumptions of shared congressional and executive responsibility for foreign affairs, rather than executive supremacy. Kitrosser, *supra* note 10, at 553 (citing *United States v. AT&T*, 551 F.2d at 390–95).

22. See examples cited in Kitrosser, *supra* note 10, at 552 n.21–22.

23. 498 F.2d 725, 731 (D.C. Cir. 1974).

24. *Id.*

25. *Id.* at 731–33.

26. *Id.* at 731.

27. See Jonathan David Shaub, *The Executive's Privilege*, DUKE L.J. (forthcoming 2020) (manuscript at 10) (explaining that "the executive branch view is that the only applicable balancing test to an assertion of executive privilege against Congress is the [D.C. Circuit's] 'demonstrably critical' test"). See also examples cited in Kitrosser, *supra* note 10 at 552 n.24.

28. 542 U.S. at 375, 388–90 (2004). See also *In re Cheney*, 406 F.3d 723, 725, 727, 731 (D.C. Cir. 2005) (discussing separation of powers issues, ordering case dismissed on remand).

29. 558 F. Supp. 2d 53, 106 n.8 (D.D.C. 2008)). The Court instead required such advisors to appear, at which point they could object to particular questions. *Id.* at 102–03.

administrations nonetheless. The appeal of gaining executive privilege's benefits without incurring the potential political, legal, or practical hassles of actually invoking it is self-evident.³⁰

Finally, in *House Committee on the Judiciary v. McGahn*, a panel of the D.C. Circuit recently strengthened the White House's hand in information-sharing disputes with Congress. As this Article was in its final editing stages, the D.C. Circuit agreed to rehear the case *en banc*. The rehearing order vacates the panel decision, and the case remains pending as this Article goes to press.³¹ I review the panel opinion, as well as the concurring and dissenting opinions, nonetheless. I do so both to preview whatever will follow from the full court, and because the opinions are striking in their own rights.

The *McGahn* panel refused to enforce a subpoena issued by the House Judiciary Committee for testimony by President Trump's former White House Counsel Don McGahn.³² Two of the three judges on the panel (Judge Henderson, who wrote separately but concurred in the opinion of the Court, and Judge Rogers, who dissented) rejected McGahn's claim to absolute immunity.³³ Like the district court judge in *Miers* (and the district court judge from whose opinion McGahn had appealed), Henderson and Rogers concluded that McGahn should appear before the committee, at which point he could object to particular requests on executive privilege or other grounds.³⁴ However, two of the three panel judges (Judge Griffith, who wrote for the Court and Judge Henderson) held that the Committee lacked standing to seek judicial enforcement of the subpoena.³⁵ Although the panel left open the prospect of congressional standing under narrow circumstances in future cases,³⁶ the decision, for the most part, rejects congressional committee access to courts to enforce subpoenas to current or former Presidential advisors.

30. See, e.g., Shaub, *supra* note 27, at 40, 44 (identifying the "seeds of the prophylactic executive privilege" in *Cheney* and noting that "a protective assertion" made to stave off more specific claims of privilege "dispenses with any need to analyze the specific information" and congressional needs for the same).

31. See Charlotte Butash & Margaret Taylor, *Oral Arguments in the D.C. Circuit En Banc Consideration of Committee on the Judiciary v. McGahn and U.S. House of Representatives Mnuchin*, LAWFAREBLOG.COM (Apr. 29, 2020), [<https://perma.cc/WR5D-TK3L>].

32. Comm. on the Judiciary of the U. S. House of Representatives v. McGahn, No. 19-5331 at 37 (D.C. Cir. Feb. 28, 2020).

33. See *infra* note 34.

34. *McGahn*, No. 19-5331 at 38, 48–50, 53–57 (Henderson, J., concurring); *id.* at 72–74 (Rogers, J., dissenting).

35. *Id.* at 7–12, 37.

36. Specifically, the majority declined to decide whether standing would exist should a Committee have statutory authorization, rather than rely solely on internal congressional rules, to issue subpoenas. *Id.* at 35–36.

In his opinion for the panel, Judge Griffith stressed that Congress has other means available to it to obtain information that concerns the President: “Congress (or one of its chambers) may hold officers in contempt, withhold appropriations, refuse to confirm the President’s nominees, harness public opinion, delay or derail the President’s legislative agenda, or impeach recalcitrant officers.”³⁷ Congress can do these things, he added, “without dragging judges into the fray.”³⁸ As Judge Rogers pointed out in her dissent, however, there are serious practical limits on Congress’ ability to bring contempt proceedings, including a longstanding Justice Department policy against prosecuting criminal contempt actions against executive branch officials who refuse to testify for executive privilege based reasons.³⁹ Impeachment also is more intertwined with judicial enforcement than Judge Griffith suggests, as I discuss in Part III. Most fundamentally, Judge Griffith overlooks the reality that information disputes between Congress and the White House take place in the shadow of judicial enforcement, even in the bulk of cases that never make their way to a courthouse. As Judge Rogers writes, “[a]t least since the 1970s, the political Branches have negotiated their informational disputes against the backdrop of possible resort to the courts. By foreclosing that possibility going forward, the panel would diminish the incentive the executive branch might have to reach an accommodation.”⁴⁰

II. HISTORY’S GLOSS AND THE EXECUTIVE’S OTHER TOOLS

Judicial precedents thus contain ample ammunition for administrations to use in fighting with Congress over information. The ammunition’s power is compounded by several other advantages. First, administrations benefit greatly from being the parties who possess the sought-after information. As such, the status quo intrinsically favors them.⁴¹ In recognizing a constitutional executive privilege, let alone a presumptive one with broadly articulated bases, courts give Presidents a valuable means to prolong the status quo. The most obvious way for administrations to achieve this is by formally citing the privilege and triggering litigation, beginning a drawn-out process of inter-branch negotiation, or leading legislators simply to abandon their quest for information. Administrations can achieve similar ends—the latter

37. *Id.* at 13.

38. *Id.*

39. *Id.* at 69–71 (Rogers, J., dissenting).

40. *Id.* at 81 (Rogers, J., dissenting).

41. See Shaub, *supra* note 27, at 9 (quoting Memorandum for John D. Ehrlichman, Assistant to the President for Domestic Affairs, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: Power of Congressional Committee to Compel Appearance or Testimony of “White House Staff,”* at 6–7 (Feb. 5, 1971)).

two being especially important in light of litigation's infrequency and the hurdles to initiating it—without formally citing the privilege. Instead, they might simply allude to separation of powers concerns or suggest that they wish to preserve the option of invoking the privilege at a later date.

Second, the executive branch has a formidable legal infrastructure at its disposal, one unmatched by any congressional equivalent.⁴² In particular, the executive can call upon the resources of the Department of Justice and its Office of Legal Counsel (“OLC”).⁴³ OLC’s legal opinions are enormously influential, in part because they fill the void caused by the relative rarity of judicial interference in executive power disputes.⁴⁴ OLC is well equipped to draw on the handful of existing judicial opinions on executive privilege, which themselves tilt in favor of executive power on the whole.⁴⁵ Subsequent OLC opinions can and do, of course, draw on past OLC opinions, contributing to a ratchet effect in favor of executive power.⁴⁶

More so, OLC—as well as those engaged in informal inter-branch negotiations or litigation—frequently draw upon “the historical gloss of political branch precedents to support present-day executive actions. The supported actions themselves can become precedent for future administrations to cite, contributing to a one-way ratchet toward enhanced presidential power and secrecy.”⁴⁷ Modern presidential administrations have invoked executive privilege precedent in ways that keenly reflect this phenomenon. For example, President Eisenhower’s Administration was the first to coin the term “executive privilege” and the first to invoke the candor rationale to support it.⁴⁸ It also took the view that “the President and the heads of departments have an uncontrolled discretion to withhold . . . information and

42. Kitrosser, *supra* note 10, at 557–58. Indeed, the mismatch between executive and congressional legal resources “has been exacerbated over the past couple of decades. In this timeframe, Congress has—for reasons themselves attributed by observers to a party-over-institution ethic—taken a hatchet to its own internal sources of expertise.” *Id.* at 558.

43. See, e.g., Trevor Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1451 (2010) (describing OLC’s role and importance).

44. Kitrosser, *supra* note 10, at 557 (citing JACK GOLDSMITH, *THE TERROR PRESIDENCY* 32, 96–97 (2007)); Morrison, *supra* note 43, at 1451. See also Shaub, *supra* note 27, at 9 (explaining that, “since Watergate,” the executive branch has “honed and developed” a “comprehensive doctrine of executive privilege . . . in White House statements, OLC opinions, letters to Congress, and court filings.”).

45. See *infra* Part I. For discussions of OLC’s own institutional bias toward executive power, see, for example, Morrison, *supra* note 43, at 1455, 1501–02; William P. Marshall, *Eleven Reasons Why Presidential Power Expands and Why it Matters*, 88 B.U. L. REV. 505, 511–12 (2008).

46. See, e.g., Dawn E. Johnsen, *What’s a President to Do? Interpreting the Constitution in the Wake of Bush Administration Abuses*, 88 B.U. L. REV. 395, 398 (2008); Marshall, *supra* note 45, at 511.

47. Kitrosser, *supra* note 10, at 558. See Marshall, *supra* note 45, at 510–14.

48. See ROZELL, *supra* note 11, at 40; Archibald Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383, 1433 (1974).

papers in the public interest.”⁴⁹ To support these sweeping claims, Eisenhower’s Deputy Attorney General, William Rogers, submitted a memorandum (“the Rogers memorandum”) to a Senate subcommittee, reciting purportedly analogous historical precedents.⁵⁰

The Rogers memorandum and its influence illustrate one problem with the use of historical gloss. That is, the tendency of those invoking it to cite relatively mild past exertions of power to support bolder, present-day actions.⁵¹ In the case of the Rogers memorandum, the cited examples do not bear the weight placed on them. For example, historian J.R. Wiggins observed in 1963 that, of the two episodes that Rogers cited from the Washington Administration: “‘The first . . . turns out to be a case wherein the President, without any objection, furnished all the papers which the Congress requested,’ while the second ‘did not involve at all the President’s broad powers to withhold, but related to the treaty powers of the House.’”⁵² Other scholars have pointed out the inadequacy of Roger’s examples.⁵³ “Nonetheless, the Rogers memorandum was treated as a ‘bible for the executive branch’ for years, and modern administrations continue to trace the notion of a sweeping executive privilege back to the Washington Administration.”⁵⁴

Relatedly, insofar as historical gloss arguments rely on the notion that past congresses acquiesced in the executive branch’s actions,⁵⁵ they ignore the “reality of how the political branches actually interact.”⁵⁶ They assume a Madisonian model, whereby each political branch is motivated to guard its institutional prerogatives and to check encroachments by the other.⁵⁷ The well-documented reality, however, is quite the opposite. Due to the structural differences between the branches and other factors including partisanship,

49. *Texts of Eisenhower Letter and Brownell Memorandum on Testimony in Senate Inquiry*, N.Y. TIMES, May 17, 1954, at 24.

50. Kitrosser, *supra* note 10, at 555 (citing William P. Rogers, *Constitutional Law: The Papers of the Executive Branch*, 44 A.B.A. J. 941 (1958)).

51. See Heidi Kitrosser, *It Came From Beneath the Twilight Zone: Wiretapping and Article II Imperialism*, 88 TEX. L. REV. 1401, 1405, 1409–14, 1421–24 (2010) (explaining that defenders of a presidential power to circumvent statutory limits draw misleadingly from historical episodes that did not entail such radical claims).

52. J.R. Wiggins, *Lawyers as Judges of History*, 75 PROCEEDINGS OF THE MASS. HISTORICAL SOC’Y 84, 103 (1963) (cited in Kitrosser, *supra* note 10, at 555).

53. See sources cited in Kitrosser, *supra* note 10, at 556 n.42.

54. RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 164 (1974) (cited in Kitrosser, *supra* note 10, at 556).

55. Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 432 (2012) (explaining that commentators frequently treat historical gloss as constitutionally significant “only if [one] branch can be deemed to have acquiesced in the practice [of the other branch] over time.”).

56. *Id.* at 414.

57. *Id.* at 438–40.

Congresspersons by and large are not consistently driven by a desire to protect their institution. Presidents, on the other hand, generally are so motivated.⁵⁸ This political asymmetry is compounded by structural imbalances, including the President's possession of the relevant secrets in the first place and his access to a vast and protective infrastructure, including OLC.⁵⁹

Historical gloss is invoked by courts, as well as the executive branch. Indeed, the two uses can intertwine, with courts adopting arguments made by the executive in litigation, and the latter informed by OLC opinions.⁶⁰ The panel decision in *McGahn* exemplifies this phenomenon. Judge Griffith dismissed *Senate Select Committee* and a few other cases in which "courts in [the D.C.] circuit . . . agreed to resolve . . . interbranch information disputes" as "innovations of the 1970s."⁶¹ The longer and more important history, he said, was the nearly two centuries prior to the 1970s, when "interbranch information disputes" took place but "neither branch thought to submit [them] to the courts."⁶² To support his point, Griffith cites one of the Washington Administration episodes recounted in the Rogers memorandum.⁶³ He also references episodes collected in a 1982 OLC memorandum.⁶⁴

Judge Griffith's reasoning illustrates the potential pitfalls of historical gloss and the tendency of such errors to favor the executive. First, many of the executive branch precedents recounted in the 1982 OLC memorandum bear little resemblance to the Trump Administration's blanket claim of testimonial immunity. For example, the episodes cited from the first three presidential administrations amount, at most, to reasoned explanations by Presidents regarding their decisions to withhold specific documents or pieces of information.⁶⁵ In some cases, the requesting congressional body itself invited the President to withhold such parts as he deemed appropriate.⁶⁶ More broadly, Judge Griffith ignores the historical evolution of executive privilege disputes from case-by-case, fact-driven negotiations over particular items of information, to categorical refusals to turn over entire classes of

58. *Id.*

59. *See supra* notes 41–46 and accompanying text.

60. *See supra* notes 44–45 and accompanying text.

61. *Comm. on the Judiciary of the U. S. House of Representatives v. McGahn*, No. 19-5331 at 14 (D.C. Cir. Feb. 28, 2020).

62. *Id.* at 12–13 (citation omitted).

63. *Id.* at 17 (citing the same incident as recounted in a different document, this one a 1982 opinion by OLC: *History of Refusals by Executive Branch Officials to Provide Information Demanded by Congress*, 6 Op. O.L.C. 751, 752–53 (1982)).

64. *Id.* at 17 (referencing other examples from Memorandum from the Office of Legal Counsel to the Attorney General, *infra* note 65).

65. Memorandum from the Office of Legal Counsel to the Attorney General 752–55 (Dec. 14, 1982).

66. *Id.* at 752, 754.

information.⁶⁷ Indeed, the dawn of an era of modern, categorical conceptions of executive privilege is epitomized by the coining of the privilege's name and the development of the sweeping candor rationale in the Eisenhower Administration.⁶⁸ When considered in light of this historical trajectory, the case law of the 1970s appears to be an unsurprising response to new developments rather than a kooky experiment of the times. Finally, the *McGahn* majority overlooks practical asymmetries between the executive and the legislature that make difficult and unlikely the defensive legislative maneuvers suggested by Judge Griffith.⁶⁹

III. TRUMP: BUILDING ON THE (PRECEDENTIAL) INHERITANCE

President Trump thus is hardly the first to use executive privilege aggressively. The candor rationale, for example, was developed well before the Trump Administration. This Administration also was not the first to claim full testimonial immunity for high-level advisors, to urge courts to stay out of executive privilege disputes, or to attempt to reap the privilege's benefits without formally claiming it.

The Trump Administration has, however, combined some newly aggressive uses of the privilege with a broader campaign against accountability that seeks effectively to immunize the President from meaningful congressional oversight.⁷⁰ As for executive privilege, President Trump has broken new ground in two main respects. First, his Administration has made regular and especially bold use of a prophylactic privilege⁷¹—that is, of the mere possibility that Trump might one day wish to invoke the privilege—as a basis for refusing to disclose information. Second, combining multiple bases for non-cooperation, including testimonial immunity and a type of prophylactic privilege,⁷² Trump issued a sweeping directive to his entire Administration forbidding cooperation with any congressional requests for information

67. Schaub, *supra* note 27 (discussing this evolution); HEIDI KITROSSER, RECLAIMING ACCOUNTABILITY 88–94 (2015).

68. See *Texts of Eisenhower Letter and Brownell Memorandum on Testimony in Senate Inquiry*, *supra* note 49.

69. See *supra* note 28 and accompanying text.

70. See Schaub, *supra* note 27, at 39 (drawing a similar conclusion: “[T]he Trump Administration’s positions reflect the extremity of the executive branch doctrine that has been developing for some time. Although some positions are undoubtedly new – and extreme – they are grounded in the same theoretical construct” as previous assertions).

71. Schaub does a very impressive deep dive into the concept and history of a prophylactic executive privilege in Schaub, *supra* note 27.

72. See *infra* notes 86–90 and accompanying text.

relating to the recent impeachment proceedings.⁷³ More so, all of this has taken place against a backdrop in which the President has repeatedly sought to stifle unwelcome information and opinions in other ways, including openly retaliating against members of his Administration who did testify in the impeachment proceedings and threatening the whistleblower who first raised an alarm over the events that led to those proceedings.⁷⁴

The Trump Administration invoked a prophylactic privilege in newly expansive ways well before the events that precipitated impeachment took place. Indeed, over a few weeks in the summer of 2017 alone, several Administration officials refused to answer any congressional questions involving their conversations with the President or with other high-level officials, purportedly to preserve the President's ability to assert executive privilege at some point regarding such conversations.⁷⁵ The news media reported on these events, particularly after then-Attorney General Jeff Sessions used the prophylactic privilege (or the "non-privileged privilege," as law professor Stephen Vladeck called it during a radio program discussion about Sessions' testimony).⁷⁶ In response to this attention, the Administration turned to history's gloss. Among other things, the Justice Department circulated two 1982 memoranda: an OLC opinion discussing the nature and scope of executive privilege for communications between the Attorney General and the President, and a memorandum from President Ronald Reagan to the heads

73. Letter from Pat A. Cipollone, Counsel for President Trump, to Nancy Pelosi, House Speaker; Eliot L. Engel, Chairman of Foreign Affairs Comm.; Adam B. Schiff, Chairman of Permanent Select Comm. on Intelligence; and Elijah E. Cummings, Chairman of Comm. on Oversight and Reform 7 (Oct. 8, 2019) [hereinafter Cipollone Letter] ("President Trump cannot permit his Administration to participate in this partisan inquiry under these circumstances"); *id.* at 8 ("the President cannot allow your constitutionally illegitimate proceedings to distract him and those in the Executive Branch from their work on behalf of the American people."). See also Michael Stern, *Why Officials Keep Testifying Despite White House Counsel's Letter on Impeachment Inquiry*, JUST SECURITY (Oct. 28, 2019), <https://www.justsecurity.org/66742/why-officials-keep-testifying-despite-white-house-counsels-letter-on-impeachment-inquiry/> [<https://perma.cc/2SJ7-9Z23>] (explaining that Cipollone undoubtedly expected that his letter "would be understood as a directive that [current executive branch] employees should not testify before Congress in connection with the impeachment inquiry," and citing a federal judge's understanding that "the White House has flatly stated that the Administration will not cooperate with congressional requests for information.").

74. I described some of the President's earliest threats against the whistleblower in Heidi Kitrosser, *Don't Forget the Cover-Up(s): On Trump's Abuse of the Executive's Secret-Keeping Powers*, ACS (Sept. 30, 2019), <https://www.aclaw.org/expertforum/dont-forget-the-cover-ups-on-trumps-abuse-of-the-executives-secret-keeping-powers/> [<https://perma.cc/4TH6-L8RH>]. For discussion of the President's retaliatory actions during and following the impeachment proceedings, see, for example, Maggie Haberman et al., *Trump to Fire Intelligence Watchdog Who Had Key Role in Ukraine Complaint*, N.Y. TIMES (Apr. 3, 2020), <https://www.nytimes.com/2020/04/03/us/trump-inspector-general-intelligence-fired.html> [<https://perma.cc/V7HA-6NNB>].

75. I discuss the summer 2017 events in detail in Kitrosser, *supra* note 10.

76. *Id.* at 547 n.6 (quoting *All Things Considered: In Refusal to Answer Questions, Sessions Denies Claiming Executive Privilege*, NATIONAL PUBLIC RADIO (June 13, 2017)).

of executive departments and agencies, entitled “Procedures Governing Responses to Congressional Requests for Information.”⁷⁷ As I have detailed elsewhere, however, the Trump Administration acted far more aggressively than either memorandum prescribed or purported to authorize. For example, the Reagan memorandum stressed that “executive privilege will be asserted only in the most compelling circumstances,” and only as a last resort when “good faith negotiations” fail.⁷⁸ The same memorandum also instructed that, in the rare cases in which “it is determined that compliance [with a congressional request] raises a substantial question of executive privilege,” Congress should be asked to hold its request in abeyance while the Administration determines whether to comply or to invoke executive privilege.⁷⁹ Neither Sessions nor the other Trump Administration officials invoking the prophylactic privilege, however, followed up after refusing to answer questions.⁸⁰ Nor, to their discredit, did the congressional committees that sought the information in the first place.⁸¹

The Trump Administration upped the ante further after the House of Representatives initiated impeachment inquiries in the fall of 2019. On October 8th, Pat Cipollone, the counsel to the President, sent a scathing letter to Speaker of the House Nancy Pelosi and three House committee chairs, decrying the impeachment process as a “naked political strategy” being “used by a political party that fear[s] for its prospects against the sitting President in the next election.”⁸² Cipollone also accused the House Democrats of relying on unfair procedures because they “know that a fair process would expose the lack of any basis for [their] inquiry.”⁸³ Given these objections, Cipollone announced that “President Trump cannot permit his Administration to participate in this partisan inquiry under these circumstances.”⁸⁴

As Cipollone’s letter promised, the White House refused to cooperate with any of the House’s requests for information and urged all administration officials to follow suit.⁸⁵ Ultimately, the Administration broke its justifications for this position into three main categories: testimonial immunity; the notion that House committees had no legitimate legislative or oversight

77. See Kitrosser, *supra* note 10, at 562–64.

78. Memorandum from President Ronald Reagan to the Heads of Executive Departments and Agencies 1 (Nov. 4, 1982).

79. *Id.* at 2.

80. Kitrosser, *supra* note 10, at 561.

81. *Id.*

82. Cipollone Letter, *supra* note 73, at 5.

83. *Id.* at 6.

84. *Id.* at 7.

85. See *supra* note 73.

reasons to request information until the House formally voted to initiate impeachment proceedings in late October; and the fact that agency counsel (but not outside counsel) were barred from participating in depositions of agency officials.⁸⁶ To support these rationales, the President relied heavily on OLC opinions, including several solicited by the Administration in the course of the impeachment proceedings.⁸⁷ For example, the administration explained that it concluded, “only after securing advice from” OLC, that “all subpoenas issued before the adoption of” the House impeachment resolution “were unauthorized and invalid” and remained so even after the resolution was adopted.⁸⁸ Although the OLC opinion that it cited to this effect was dated January 19, 2020—one day before the Administration filed its impeachment trial memorandum making this argument and several months after the subpoenas were issued⁸⁹—it explained that OLC had provided this advice orally and then “memorialized” it in its written opinion of January 19th.⁹⁰

The Administration’s blanket rejection of any and all impeachment-related congressional information requests marks a dangerous apotheosis in the history of executive privilege thus far—more precisely, in the history of executive privilege and its shadow effect, since the Trump Administration did not formally invoke executive privilege in the impeachment proceedings.⁹¹ As we have seen, executive privilege for decades has been invoked (or alluded to without formal invocation) in service of increasingly broad, even categorical refusals to produce entire categories of witnesses or documentary information.⁹² In this case, the President cobbled together three rationales—each tenuous in its own right—to justify a complete, non-negotiable rejection of any and all congressional information requests relating to impeachment. Apart from this refusal’s sheer breadth, it is alarming that it was tendered in the face of a presidential impeachment investigation. With the possible exception of a single re-election opportunity, impeachment is the most significant means by which a coordinate political branch, and through it American voters, may investigate and check presidential abuses of power. Indeed, impeachment offers a considerably more focused opportunity for oversight and accountability than does re-election. In a presidential

86. Trial Memorandum of President Donald J. Trump (for Senate Impeachment Proceedings) at 2–3, 35–46.

87. *Id.*

88. *Id.* at 37 n.2.

89. *Id.* at 37 n.253.

90. *Id.* at 2 n.11.

91. See Shaub, *supra* note 27, at 58 (explaining that the Trump Administration did not formally invoke executive privilege in the House or Senate impeachment proceedings).

92. See *supra* Part I.

election, each voter has but a single vote in which to channel all of their concerns about a plethora of matters including domestic policy, foreign policy, personal fitness, and corruption. An impeachment process, in contrast, hones in on identified, alleged abuses of power. It also serves as a potential curative for abuses that themselves taint elections, including presidential efforts to shield politically damaging information from public view.

The House conveyed its own concern about these developments in its second article of impeachment.⁹³ The first article charged President Trump with “abuse of power” for attempting to condition U.S. aid to Ukraine on Ukraine’s investigating Trump’s domestic political rival.⁹⁴ The second article charged Trump with “obstruction of Congress.”⁹⁵ The House did not base the second article on any particular refusal to produce information. Rather, it emphasized the totality of the Administration’s intransigence, charging that the President “sought to arrogate to himself the right to determine the propriety, scope, and nature of an impeachment inquiry into his own conduct, as well as the unilateral prerogative to deny any and all information to the House of Representatives in the exercise of its ‘sole Power of Impeachment.’”⁹⁶ In its trial brief to the Senate, the House observed as well that the President attempted “to penalize and intimidate” those Administration members who defied him and cooperated with the House.⁹⁷ “These efforts included President Trump’s sustained attacks on the anonymous whistleblower, and his public statements designed to discourage witnesses from coming forward and to embarrass those who did testify.”⁹⁸

The President argued, of course, that both Articles of Impeachment should be rejected. With respect to the second article, he emphasized that he had merely sought to protect the constitutional prerogatives of his office in refusing to comply with subpoenas.⁹⁹ Indeed, he warned that the House itself endangered the separation of powers by seeking to impeach him for exercising those prerogatives.¹⁰⁰ The President also insisted that the House had available to it and should have used other means short of impeachment to

93. Articles of Impeachment Against Donald J. Trump, Article II: Obstruction of Congress.

94. Articles of Impeachment Against Donald J. Trump, Article I: Abuse of Power.

95. Articles of Impeachment Against Donald J. Trump, Article II: Obstruction of Congress.

96. *Id.* In their trial brief to the Senate, the House Impeachment Managers elaborated that “President Trump is an aberration among Presidents in refusing any and all cooperation in a House impeachment investigation,” recounting that “even President Nixon produced numerous documents in response to Congressional subpoenas” and instructed White House staff members to testify under oath when requested by the House. House Impeachment Brief in the Impeachment of Donald J. Trump, at 33.

97. House Impeachment Brief in the Impeachment of Donald J. Trump, at 35.

98. *Id.*

99. Trump Impeachment Brief in the Impeachment of Donald J. Trump, at 2–4, 35–36, 47–50.

100. *Id.*

enforce its subpoenas, including turning to the courts for relief.¹⁰¹ By bypassing these other avenues, Trump concluded, the House had declared itself “supreme not only over the Executive Branch, but also over the Judicial Branch.”¹⁰² At the same time that the President made these arguments to the Senate, however, the Department of Justice argued in *McGahn* and in another impeachment subpoena case that “Congressional Committees cannot sue the Executive Branch to enforce their subpoenas.”¹⁰³ As we have seen, this argument prevailed before a panel of the D.C. Circuit in *McGahn*.¹⁰⁴ For its part, the *McGahn* panel observed that, among the House’s alternatives to seeking judicial relief is its ability to “pass[] articles of impeachment.”¹⁰⁵

CONCLUSION: THE TRUMP ERA AND THE GLOSS OF HISTORY

On February 5, 2020, the Senate voted to acquit President Trump on both counts of impeachment.¹⁰⁶ On the first count, for abuse of power, one Senator—Republican Mitt Romney of Utah—became the first ever to vote to convict a President of his own party in an impeachment trial.¹⁰⁷ Romney joined all other Senate Republicans by voting to acquit on the second count, for obstruction of Congress.¹⁰⁸ With respect to the second count, Romney “acknowledged that Trump threw up ‘a barrage of efforts’ to keep the House from receiving documents or testimony from key Administration officials with firsthand knowledge.”¹⁰⁹ He concluded, however, that Trump ““did

101. *Id.* at 49–50.

102. *Id.* at 50. Similarly, the Senate Majority Leader, Republican Mitch McConnell of Kentucky, maintained that the House was required to turn to the courts to enforce its subpoenas. Bob Bauer, *The Trump Impeachment and the Question of Precedent*, LAWFARE (Jan. 16, 2020), <https://www.lawfare-blog.com/trump-impeachment-and-question-precedent> [<https://perma.cc/NT2J-BURE>].

103. House Impeachment Brief in the Impeachment of Donald J. Trump, at 39 n.228 (citing Brief for Def-Appellant at 2, 32–33; Committee on the Judiciary v. McGahn, No. 19-5331 (D.C. Cir. Dec. 9, 2019); Def.’s Mot. To Dismiss or in the Alternative, for Summ. J. at 19–20; Kupperman v. U.S. House of Representatives, No. 19-3224 (D.D.C. Nov. 14, 2019)). See also Kyle Cheney, *House Withdraws Subpoena for Top Bolton Aide*, POLITICO (Nov. 6, 2019), <https://www.politico.com/news/2019/11/06/house-withdraws-bolton-aide-subpoena-066941> [<https://perma.cc/ZN69-SPQY>] (discussing withdrawal of Kupperman subpoena).

104. See *supra* Part I.

105. *McGahn*, No. 19-5331 at 14.

106. Nicholas Fandos, *Trump Acquitted of Two Impeachment Charges in Near Party-Line Vote*, N.Y. TIMES (Feb. 5, 2020), <https://www.nytimes.com/2020/02/05/us/politics/trump-acquitted-impeachment.html> [<https://perma.cc/627T-SQDP>].

107. *Id.*

108. *Id.*

109. Dan Balz & Robert Costa, *Romney Votes to Convict Trump on Charge of Abuse of Power, becoming the Lone Republican to Break Ranks*, WASH. POST (Feb. 5, 2020), https://www.washingtonpost.com/politics/with-his-vote-to-convict-trump-on-abuse-of-power-romney-will-break-with-his-party—and-awaits-the-consequences/2020/02/05/a76dce74-4841-11ea-ab15-b5df3261b710_story.html [<https://perma.cc/R7XK-GKYK>].

follow the law, and the House did not take the time to go to the courts as . . . they should have.”¹¹⁰

Some commentators have lamented that the acquittal vote sets a damaging precedent. They express fear that future Presidents will refuse to cooperate with congressional impeachment investigations, pointing to Trump’s example to legitimate their intransigence.¹¹¹ Such concerns are heightened by the fact that President Trump not only refused to cooperate; he also sought repeatedly to intimidate the anonymous whistleblower who precipitated the proceedings.¹¹² Indeed, one Senator—Republican Rand Paul of Kentucky—attempted several times to “out” the whistleblower’s identity, an effort applauded by President Trump and several other congressional Republicans.¹¹³

There are, of course, valid bases to fear the precedent-setting effect of these events. As we have seen, presidential power tends to expand over time. More so, historical gloss is among the agents of its progress. Yet not every step forward for presidential power augers additional movements in the same direction. Occasionally, missteps are identified as such, and course corrections are made.

Indeed, scholars increasingly take a nuanced look at presidential precedent, examining the circumstances under which it warrants (or does not warrant) adherence—and under which it is likely to gain (or not to gain) as much—in future administrations. For example, Deborah Pearlstein considers in a new paper how presidential actions sometimes come to be treated, in time, as anti-canonical.¹¹⁴ And Josh Chafetz and David Pozen recently crafted a taxonomy of ways in which constitutional norms break down.¹¹⁵

110. *Id.*

111. *See, e.g.,* Bauer, *supra* note 102; Harry Litman, *Will Acquittal Kill the Impeachment Clause? The Voters Get the Final Say*, WASH. POST (Feb. 5, 2020, 6:00 AM), <https://www.washingtonpost.com/opinions/2020/02/05/will-acquittal-kill-impeachment-clause-voters-get-final-say/> [<https://perma.cc/68L6-ERA8>]; Donna Brazile, *Trump’s Politically-Driven Acquittal Sets Horrible Precedent, Weakens Rule of Law*, FOX NEWS (Feb. 5, 2020), <https://www.foxnews.com/opinion/donna-brazile-trump-after-sharing-name-on-twitter-of-alleged-whistleblower> [<https://perma.cc/BCR4-YB6E>].

112. *See* Kitrosser, *supra* note 74.

113. *See, e.g.,* Kyle Cheney & Burgess Everett, *Rand Paul Reads Alleged Whistleblower’s Name and Republicans ‘Fine’ With It*, POLITICO (Feb. 4, 2020), <https://www.politico.com/news/2020/02/04/rand-paul-reads-alleged-whistleblowers-name-senate-floor-110684> [<https://perma.cc/7MTT-YV3Z>]; Bobby Allyn, *Trump is Criticized After Sharing Name of Alleged Whistleblower on Twitter*, NPR (Dec. 29, 2019), <https://www.npr.org/2019/12/29/792222297/trump-comes-under-fire-after-sharing-name-on-twitter-of-alleged-whistleblower> [<https://perma.cc/W3EX-K3QJ>]; Adam Gopnik, *Why is Trump Obsessed with Outing the Whistle-Blower?*, NEW YORKER (Nov. 7, 2019), <https://www.newyorker.com/news/daily-comment/why-is-trump-obsessed-with-outing-the-whistleblower> [<https://perma.cc/6NDG-S97C>].

114. *See* Pearlstein, *supra* note 9.

115. Josh Chafetz & David Pozen, *How Constitutional Norms Break Down*, 65 UCLA L. REV. 1430, 1435–36 (2018).

They suggest, among other things, that brazen and abrupt course deviations are more likely to engender backlash than are incremental shifts over time.¹¹⁶

As for Donald Trump's intransigence toward congressional oversight, its legacy is yet unwritten. At least two aspects of it could, indeed, lend themselves to a ratchet effect. First, Trump's behavior can be linked to a historical trajectory of expanded executive power, enabling his Administration—and future Presidents and their allies—to treat it as relatively unremarkable in nature. Second, the sheer amount of norm-flouting in the Trump Administration¹¹⁷ makes it difficult for the public, the media, and political opponents to sustain a focus on any one example. Trump may shift the ground beneath us partly by exhausting us.¹¹⁸

On the other hand, the volume and magnitude of Trump's eyebrow-raising behavior—including his scorched earth approach to defying an impeachment investigation—might have quite the opposite effect. That is, they might lead legal elites, politicians, and the public to look closely at the broader historical trajectory in which Trump seeks to place himself. Perhaps Trump's actions will—like those of Richard Nixon years earlier—generate a broader rethinking of this arc, with its expansive conceptions and uses of executive privilege. Neither course is inevitable. The path or paths taken will depend, quite simply, on our arguments and actions today, and those of future generations tomorrow.

116. *Id.* at 1435.

117. Chafetz and Pozen allude to some notable examples from the Trump administration. As they put it:

[W]e think we can safely say that it is bad for a president or presidential candidate to: lie constantly, deny the validity of fairly administered elections, threaten to jail political opponents, maintain business interests while in public office in a manner that invites foreign governments and political allies to funnel money toward those interests, make racist remarks and wink at white supremacists, strive to delegitimize the press, invite a foreign government to interfere in American electoral processes, appoint unqualified friends and family members to important government positions, and so on.

Id. at 1451.

118. Many political commentators have referred to the phenomenon of “Trump fatigue.” See, e.g., Jack Shafer, *Trump Fatigue? Spare Me*, POLITICO (Dec. 17, 2019), <https://www.politico.com/news/magazine/2019/12/17/spare-me-your-trump-exhaustion-086597> [<https://perma.cc/8DF7-SCW8>] (citing several examples of such commentary).