

# NOTE

## EXECUTIVE PRIVILEGE—WITH A CATCH: HOW A CRIME-FRAUD EXCEPTION TO EXECUTIVE PRIVILEGE WOULD FACILITATE CONGRESSIONAL OVERSIGHT OF EXECUTIVE BRANCH MALFEASANCE IN ACCORDANCE WITH THE CONSTITUTION'S SEPARATION OF POWERS

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### INTRODUCTION

The principle of executive privilege<sup>1</sup> is nearly as old as the United States itself. First invoked by George Washington in

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<sup>1</sup> There is no definition of “executive privilege” in the Constitution or any seminal document. Consequently, this Note will adhere to Mark Rozell’s definition: “the right of the President and high-level executive branch officers to withhold information from Congress, the courts, and ultimately the public.” Mark J. Rozell, *Executive Privilege and the Modern Presidents: In Nixon’s Shadow*, 83 MINN. L. REV. 1069, 1069 (1999). Furthermore, later case law distinguishes between a presidential communications privilege and a deliberative process privilege. See In

1792,<sup>2</sup> numerous presidents since have asserted the privilege in order to conceal information related to themselves and executive branch officials under their charge.<sup>3</sup> Though executive privilege is not expressly articulated in the Constitution or any other founding document,<sup>4</sup> the Supreme Court nevertheless breathed life into the doctrine in 1974 with its decision in *United States v. Nixon*.<sup>5</sup> Ever since then, executive privilege has been a regular feature in Office of Legal Counsel (OLC)<sup>6</sup> opinions defending executive branch confidentiality interests<sup>7</sup> and has seeped into popular political discourse. Although *Nixon* stands as only one of two Supreme Court decisions on the topic, a handful of other court cases, largely coming out of

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re Sealed Case, 121 F.3d 729, 737–40 (D.C. Cir. 1997). “[T]he deliberative process privilege, which applies to executive branch officials generally, is a common law privilege which requires a lower threshold of need to be overcome, and ‘disappears altogether when there is any reason to believe government misconduct has occurred.’” TODD GARVEY, CONG. RES. SERV., R42670, PRESIDENTIAL CLAIMS OF EXECUTIVE PRIVILEGE: HISTORY, LAW, PRACTICE, AND RECENT DEVELOPMENTS 8–9 (2014); see also *Loving v. Dep’t of Def.*, 550 F.3d 32, 40 (D.C. Cir. 2008) (emphasizing the distinction between the presidential communications privilege and the deliberative process privilege). The proposed crime-fraud exception would apply only to the presidential communications privilege, and any mention of executive privilege in this Note is in reference to the presidential communications privilege.

<sup>2</sup> See Rozell, *supra* note 1, at 1070; see also Archibald Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383, 1391–92 (1974) (discussing Washington’s Cabinet members’ view that he had the right to withhold documents under the purview of executive privilege).

<sup>3</sup> In addition to Washington, presidents who have attempted to withhold information from Congress and the courts include Thomas Jefferson, Andrew Jackson, Grover Cleveland, Theodore Roosevelt, Dwight Eisenhower, Richard Nixon, Ronald Reagan, George H.W. Bush, Bill Clinton, George W. Bush, Barack Obama, and Donald Trump. See, e.g., Sarah Childress, *When Presidents Invoke Executive Privilege*, PBS (June 20, 2012), <https://www.pbs.org/wgbh/frontline/article/when-presidents-invoke-executive-privilege/> [<https://perma.cc/H6ZW-YX7Q>] (discussing President Obama’s first time invoking executive privilege and analyzing instances in which previous presidents invoked executive privilege); Ronald G. Shafer, *‘Not Above the Law’: Executive Privilege’s Contentious History from Washington to Trump*, WASH. POST (June 12, 2019), <https://www.washingtonpost.com/history/2019/06/12/not-above-law-executive-privileges-contentious-history-washington-trump/> [<https://perma.cc/4HXJ-ZKPF>] (discussing the use of executive privilege by past presidents).

<sup>4</sup> See, e.g., U.S. CONST. art. II §§ 1–2 (containing no reference to executive privilege); THE DECLARATION OF INDEPENDENCE (U.S. 1776) (same).

<sup>5</sup> *United States v. Nixon*, 418 U.S. 683, 713 (1974).

<sup>6</sup> “The OLC, located within the Department of Justice, provides legal advice to the President and to the Executive Branch agencies.” Adoree Kim, *The Partiality Norm: Systematic Deference in the Office of Legal Counsel*, 103 CORNELL L. REV. 757, 758 (2018).

<sup>7</sup> There are approximately thirty-five Office of Legal Counsel opinions regarding executive privilege. See *U.S. Department of Justice Office of Legal Counsel Opinions*, U.S. DEP’T OF JUST., [https://www.justice.gov/olc/opinions?keys=executiveprivilege&items\\_per\\_page=40](https://www.justice.gov/olc/opinions?keys=executiveprivilege&items_per_page=40) [<https://perma.cc/S3W8-NU8W>] (last visited Oct. 7, 2019).

the District of Columbia District Court and Court of Appeals, have broadened the privilege in some areas and trimmed it in others, resulting in the modern-day iteration of the privilege.<sup>8</sup>

An interesting feature of recent American politics is that where executive branch controversy arises, executive privilege often follows in its wake.<sup>9</sup> Perhaps no episode in American history is more illustrative of this tendency than the Watergate scandal.<sup>10</sup> In 1974, President Richard Nixon invoked executive privilege in order to prevent the Watergate Special Prosecutor from accessing recordings of his conversations in the Oval Office.<sup>11</sup> Unbeknownst to many beyond the President's legal team, the recordings contained evidence of Nixon obstructing justice by participating in a cover-up of the 1972 burglary into Democratic National Committee headquarters.<sup>12</sup> In order to sustain his assertion of executive privilege, Nixon argued before the Supreme Court that the president has a generalized interest in confidentiality that renders his communications ab-

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<sup>8</sup> See, e.g., *Loving v. Dep't of Def.*, 550 F.3d 32, 39–40 (D.C. Cir. 2008) (holding that executive privilege protected memoranda to the president from Army and Defense Secretaries, as well as a Judge Advocate General's recommendation); *Judicial Watch, Inc. v. Dep't of Just.*, 365 F.3d 1108, 1114 (D.C. Cir. 2004) (holding that executive privilege extends to "documents 'solicited and received' by the President or his immediate White House advisers"); *In re Sealed Case*, 121 F.3d 729, 762 (D.C. Cir. 1997) (holding that executive privilege extends to communications by presidential advisers and that there must be a demonstrated need to overcome this privilege); *United States v. AT&T*, 567 F.2d 121, 133 (D.C. Cir. 1977) (sustaining an injunction against AT&T due to possible national security issues until the procedure set forth by the court was attempted); *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 732 (D.C. Cir. 1974) (broadening executive privilege by holding that a Congressional Committee's subpoena should not be enforced unless the "subpoenaed materials are critical to the performance of [the Committee's] legislative functions"); *Comm. on Oversight and Gov't Reform v. Holder*, 979 F. Supp. 2d 1, 9–10 (D.D.C. 2013) (denying the defendant's motion to dismiss on the basis of the political question doctrine because the documents were protected by executive privilege); *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 105–06 (D.D.C. 2008) (holding that the White House counsel did not have absolute or qualified immunity and had to comply with a subpoena from the House committee); *United States v. House of Representatives*, 556 F. Supp. 150, 153 (D.D.C. 1983) (granting the defendant's motion to dismiss because the court found that deciding whether an invocation of executive privilege was warranted would be an improper exercise of discretion).

<sup>9</sup> See Childress, *supra* note 3; Shafer, *supra* note 3.

<sup>10</sup> See generally FRED EMERY, WATERGATE: THE CORRUPTION OF AMERICAN POLITICS AND THE FALL OF RICHARD NIXON (1994) (detailing the entirety of the Watergate Scandal).

<sup>11</sup> See *Looking Back: The Supreme Court Decision That Ended Nixon's Presidency*, NAT'L CONST. CTR. (July 24, 2019), <https://constitutioncenter.org/blog/anniversary-of-united-states-v-nixon> [<https://perma.cc/4BLV-TQJ9>].

<sup>12</sup> See *Smoking Gun*, U. VA. MILLER CTR., <https://millercenter.org/the-presidency/secret-white-house-tapes/smoking-gun> [<https://perma.cc/UHM2-AL9G>] (last visited Oct. 7, 2019).

solutely protected from compelled production.<sup>13</sup> However, the Court did not find this reasoning persuasive. It rebuked Nixon in a unanimous decision that held that his assertion of executive privilege failed under the circumstances<sup>14</sup> and ordered him to deliver the recordings to the district court.<sup>15</sup> Within sixteen days of the opinion, Nixon's political position became untenable, and he was forced to resign the presidency.<sup>16</sup>

Executive privilege once again featured prominently in American politics during the presidency of Bill Clinton.<sup>17</sup> In 1998, Clinton was under close scrutiny by Independent Counsel Kenneth Starr, who had been appointed to investigate the various scandals enveloping Clinton's presidency.<sup>18</sup> In a series of unfortunate events for Clinton, Starr caught wind that a former White House intern, Monica Lewinsky, was preparing to perjure herself in the *Jones v. Clinton*<sup>19</sup> case then unfolding in federal court in Arkansas.<sup>20</sup> Using Linda Tripp's recordings<sup>21</sup>

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<sup>13</sup> President Nixon's attorney, James D. St. Clair, asserted before the District Court: "The President wants me to argue that he is as powerful a monarch as Louis XIV, only four years at a time, and is not subject to the processes of any court in the land except the court of impeachment." *July 24, 1974: Supreme Court Decides* United States v. Nixon, DAILY DOSE (July 24, 2014), <http://www.awb.com/dailydose/?p=297> [<https://perma.cc/482P-7DW5>].

<sup>14</sup> See United States v. Nixon, 418 U.S. 683, 713 (1974).

<sup>15</sup> See *id.* at 714.

<sup>16</sup> *Richard Nixon: Key Events*, U. VA. MILLER CTR., <https://millercenter.org/president/richard-nixon/key-events> [<https://perma.cc/Q9LE-MPUS>] (last visited Oct. 7, 2019).

<sup>17</sup> Clinton asserted executive privilege fourteen times during his presidency, by far the most of any president to date. See *Assertions of Executive Privilege from Kennedy to Obama*, REPORTERS COMM., <https://www.rcfp.org/journals/assertions-executive-privilege/> [<https://perma.cc/HAA8-NQ8G>] (last visited Oct. 7, 2019); see also Neal K. Katyal, *Trump's Abuse of Executive Privilege is More Than A Present Danger*, N.Y. TIMES (June 17, 2019), <https://www.nytimes.com/2019/06/17/opinion/trump-executive-privilege.html> [<https://perma.cc/VAZ8-9WVZ>] (noting how President Trump's use of executive privilege is similar to that of Presidents Nixon and Clinton).

<sup>18</sup> *Kenn Starr*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/Kenneth-W-Starr> [<https://perma.cc/M9MM-HLNG>] (last visited Oct. 7, 2019).

<sup>19</sup> *Jones v. Clinton*, 990 F. Supp. 657 (E.D. Ark. 1998). This case arose in the District Court following the Supreme Court's affirmation of the Court of Appeal's prior denial of Clinton's motion to dismiss, which he had moved for on the grounds of temporary presidential immunity from civil damages litigation stemming from events that took place before he assumed the presidency. *Clinton v. Jones*, 520 U.S. 681, 686-88, 710 (1997).

<sup>20</sup> See KENNETH W. STARR, REFERRAL FROM INDEPENDENT COUNSEL KENNETH W. STARR IN CONFORMITY WITH THE REQUIREMENTS OF TITLE 28, UNITED STATES CODE, SECTION 595(C), H.R. DOC. NO. 105-310, at 7 (1998), <https://www.govinfo.gov/content/pkg/CDOC-105hdoc310/pdf/CDOC-105hdoc310.pdf> [<https://perma.cc/P9QJ-8NCK>].

<sup>21</sup> See *id.* at 13.

of her conversations with Lewinsky, in which Lewinsky confirmed a relationship with the president, Starr expanded the Independent Counsel investigation and maneuvered to enmesh Clinton in a web of potential perjury and subornation of perjury charges.<sup>22</sup> Shortly thereafter, Starr summoned Clinton before a grand jury.<sup>23</sup> After attempting, and failing, to invoke executive privilege to prevent close aides from testifying,<sup>24</sup> Clinton agreed to appear under stringent conditions for testimony to clarify his relationship with Lewinsky.<sup>25</sup> Based partly on his statements to the grand jury, particularly those concerning Clinton's deposition in the *Jones* case in January of that year,<sup>26</sup> the Independent Counsel recommended impeachment of the president.<sup>27</sup> On October 8, 1998, that recommendation became reality, and the House of Representatives voted to begin impeachment proceedings against Clinton.<sup>28</sup>

These events, as well as many others, have set the stage for the latest episode in executive privilege. On one side is President Donald Trump, the embattled Chief Executive whose conduct in office has diminished his popularity and placed him in political and legal peril.<sup>29</sup> Opposing him is a zealous Democratic House of Representatives which, provoked by the excesses of the Trump era and paced by its Progressive wing,<sup>30</sup> is hot on the President's trail via investigations by the House

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<sup>22</sup> See Stuart Taylor, Jr., *How Clinton Trashed the Constitution to Save It*, ATLANTIC (Feb. 1, 2001), <https://www.theatlantic.com/politics/archive/2001/02/how-clinton-trashed-the-constitution-to-save-it/377990/> [<https://perma.cc/M8VK-CM47>].

<sup>23</sup> See Peter Baker, *When the President Testified: People in the Room Recall Clinton's 1998 Interrogation*, N.Y. TIMES (May 29, 2018), <https://www.nytimes.com/2018/05/29/us/politics/clinton-testimony-grand-jury.html> [<https://perma.cc/D7UU-6MFT>].

<sup>24</sup> See Peter Baker & Susan Schmidt, *President Is Denied Executive Privilege*, WASH. POST (May 6, 1998), <https://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/starr050698.htm> [<https://perma.cc/NS2B-3TM4>].

<sup>25</sup> Baker, *supra* note 22 ("The session was to take place in the White House, not at the courthouse. Prosecutors would have no more than four hours to ask their questions. And the president's White House and personal lawyers could be in the room, unlike in normal grand jury proceedings.")

<sup>26</sup> See STARR, *supra* note 20, at 132–33.

<sup>27</sup> See *id.* at 210.

<sup>28</sup> See Patrick Barkham, *Clinton Impeachment Timeline*, GUARDIAN (Nov. 18, 1998, 9:26 AM), <https://www.theguardian.com/world/1998/nov/18/clinton.usa> [<https://perma.cc/7DZ2-KD6U>].

<sup>29</sup> See *Presidential Approval Ratings: Donald Trump*, GALLUP, <https://news.gallup.com/poll/203198/presidential-approval-ratings-donald-trump.aspx> [<https://perma.cc/U7DZ-M2ZY>] (last visited Mar. 10, 2020).

<sup>30</sup> Peter Wehner, *The Democratic Party Is Radicalizing*, ATLANTIC (Apr. 3, 2019), <https://www.theatlantic.com/ideas/archive/2019/04/progressivism-making-democrats/586372/> [<https://perma.cc/88QZ-ZJKA>].

Judiciary, Intelligence, Oversight, Ways and Means, Financial Services, Transportation and Infrastructure, and Foreign Affairs Committees.<sup>31</sup> The most significant of these investigations is the House Judiciary Committee's inquiry into Russian interference in the 2016 election.<sup>32</sup> As part of its investigation, the Committee has subpoenaed the unredacted Mueller Report<sup>33</sup> and the evidence underlying it.<sup>34</sup> In order to stonewall their efforts, President Trump has asserted executive privilege over the materials in question to prevent their disclosure to the Committee.<sup>35</sup> The Judiciary Committee has responded to this intransigence by seeking recourse through the courts to enforce its subpoena.<sup>36</sup> As of this writing, the House of Representatives has also subpoenaed numerous high-level White House advisors, including former White House Counsel Donald McGahn,<sup>37</sup> the president's son-in-law and advisor Jared

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<sup>31</sup> Maureen Linke & Danny Dougherty, *Inside the House Committees Investigating Trump*, WALL ST. J. (May 3, 2019, 5:30 AM), <https://www.wsj.com/articles/heading-for-a-clash-house-democrats-vs-trump-11556875801> [https://perma.cc/K79U-2SDU].

<sup>32</sup> Rebecca Ballhaus, *House Panel Requests Documents from Associates of Trump*, WALL ST. J. (Mar. 5, 2019, 9:10 AM), [https://www.wsj.com/articles/house-panel-requests-documents-from-associates-of-trump-11551719609?mod=article\\_inline](https://www.wsj.com/articles/house-panel-requests-documents-from-associates-of-trump-11551719609?mod=article_inline) [https://perma.cc/NY9K-V99U].

<sup>33</sup> ROBERT S. MUELLER, U.S. DEP'T JUST., REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 1–3 (2019) (reporting the findings of the Special Counsel's investigation into Russian interference in the 2016 United States presidential election).

<sup>34</sup> See Nicholas Fandos, *House Democrats Subpoena Full Mueller Report, and the Underlying Evidence*, N.Y. TIMES (Apr. 19, 2019), <https://www.nytimes.com/2019/04/19/us/politics/Mueller-subpoena.html> [https://perma.cc/3CT8-UU9D].

<sup>35</sup> See Stephen Collinson, Laura Jarrett & Veronica Stracqualursi, *Trump Invokes Executive Privilege Over Mueller Report*, CNN (May 8, 2019, 6:10 PM), <https://www.cnn.com/2019/05/08/politics/trump-mueller-report-executive-privilege/index.html> [https://perma.cc/9L73-MFHJ].

<sup>36</sup> See Cheyenne Haslett & Benjamin Siegel, *Subpoena for 'Unredacted' Mueller Report Issued by House Judiciary Committee Chair Jerry Nadler*, ABC NEWS (Apr. 19, 2019, 9:48 AM), <https://abcnews.go.com/Politics/subpoena-unredacted-mueller-report-issued-house-judiciary-committee/story?id=62506957> [https://perma.cc/2SSL-SJZB].

<sup>37</sup> See Andrew Desiderio, *House Judiciary Committee Slaps Don McGahn with Lawsuit to Enforce Subpoena*, POLITICO (Aug. 7, 2019, 5:59 PM), <https://www.politico.com/story/2019/08/07/house-judiciary-don-mcgahn-subpoena-1452257> [https://perma.cc/C3CU-FLNP]. On November 25, 2019, Judge Jackson of the D.C. District Court rendered a decision holding that McGahn must appear before the House Judiciary Committee's investigation into Russian interference in the 2016 United States presidential election pursuant to a subpoena. See *Comm. on Judiciary v. McGahn*, 415 F. Supp. 3d 148, 154–55 (D.D.C. 2019). This decision, which was reversed by a panel of the D.C. Circuit Court of Appeals but is currently being reheard by the Circuit en banc, would significantly impact the relationship between the legislative and executive branches when the former investigates the latter by stripping White House aides (and potentially other exec-

Kushner,<sup>38</sup> and former Director of Communications Hope Hicks,<sup>39</sup> among others.<sup>40</sup> As both sides gird themselves for this game of constitutional chicken, the stakes could not be higher: the impeachment of the President of the United States for only the fourth time in the history of the country.<sup>41</sup>

Because the Constitution is silent on executive privilege, the judiciary has taken the lead in fleshing out the doctrine's parameters and application.<sup>42</sup> However, despite numerous opportunities to intervene, courts have been hesitant to directly

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utive branch officials) of the bargaining chip of a claim of absolute immunity from congressional subpoenas for testimony in negotiating an accommodation with Congress. See Comm. on Judiciary v. McGahn, No. 19-5331, 2020 U.S. App. LEXIS 6379, at \*3 (D.C. Cir. Feb. 28, 2020) (granting leave to petition for rehearing); Josh Gerstein, *Full Appeals Court to Hear McGahn, Border Wall Cases*, POLITICO (Mar. 13, 2020, 6:40 PM), <https://www.politico.com/news/2020/03/13/appeals-court-don-mcgahn-border-wall-cases-128914> [<https://perma.cc/ESU8-AKHL>] (reporting on D.C. Circuit Court of Appeal's decision to rehear the case en banc); Bob Bauer, *The Limits and Implications of the McGahn Case on White House Aide Immunity*, LAWFARE (Dec. 4, 2019, 8:06 AM), <https://www.lawfareblog.com/limits-and-implications-mcgahn-case-white-house-aide-immunity> [<https://perma.cc/L7AF-9GHT>] (discussing the potential implications of this case).

<sup>38</sup> See Jeremy Herb, *House Panel Authorizes Subpoenas for Jared Kushner and Trump Officials*, CNN (July 11, 2019, 5:08 PM), <https://www.cnn.com/2019/07/11/politics/jared-kushner-subpoena/index.html> [<https://perma.cc/Y8WE-3D8X>].

<sup>39</sup> See Jeremy Herb & Manu Raju, *House Panel Issues Subpoenas for Hope Hicks, Annie Donaldson*, CNN (May 22, 2019, 11:52 AM), <https://www.cnn.com/2019/05/21/politics/hope-hicks-annie-donaldson-subpoenas/index.html> [<https://perma.cc/4L6P-YJ4F>].

<sup>40</sup> See Herb, *supra* note 38.

<sup>41</sup> See Tara Law, *What to Know About the U.S. Presidents Who've Been Impeached*, TIME (Feb. 5, 2020, 5:55 PM), <https://time.com/5552679/impeached-presidents/> [<https://perma.cc/S5B7-VMTZ>] (noting that Presidents Andrew Johnson and Bill Clinton were the only presidents ever to have been impeached prior to the current administration). On December 18, 2019, the House of Representatives impeached President Trump for allegedly conditioning a grant of military aid to Ukraine on the Ukrainian government's investigation of corruption. Such an inquiry would have included a probe of Democratic presidential candidate and potential general election opponent Joseph Biden and his son, Hunter Biden. On February 5, 2020, the Senate acquitted President Trump on all counts of impeachment. See 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/TCE6-UG2U>] (reporting on President Trump's trial and acquittal). Concurrent with this impeachment, House Democrats suggested that former White House Counsel Donald McGahn's testimony on alleged impeachable conduct, the disclosure of which is the subject of litigation, could serve as the basis for a second impeachment of the President. See Josh Gerstein & Kyle Cheney, *House Counsel Suggests Trump Could Be Impeached Again*, POLITICO (Dec. 23, 2019, 11:56 AM), <https://www.politico.com/news/2019/12/23/doj-impeachment-vote-undercut-house-mcgahn-testimony-089604> [<https://perma.cc/E96P-LGHF>]; discussion and cases cited *supra* note 37.

<sup>42</sup> See *supra* note 8 and accompanying text.

insert themselves into such conflicts.<sup>43</sup> Instead, when disputes involving executive privilege have come before courts, they have often sought procedural outs to avoid reaching the merits of a case and simultaneously directed the disputing parties to negotiate an accommodation.<sup>44</sup> When courts have issued substantive decisions, the results have usually been narrow rulings lacking applicability beyond the cases at hand.<sup>45</sup> Consequently, the law surrounding executive privilege is fragmented and disjointed, and in some areas largely devoid of judicial guidance.<sup>46</sup>

One such area is in the assertion of executive privilege in response to congressional subpoenas for materials and testimony. Making matters worse, what little case law there is in this arena is characterized by a high bar for overcoming executive privilege, stymying Congress's ability to carry out its oversight prerogative.<sup>47</sup> Moreover, the broader institutional decline of Congress relative to the executive branch over the last century has constrained Congress's ability to investigate executive branch malfeasance. Under the current state of affairs, in which the legislature has ceded tremendous ground to the ex-

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<sup>43</sup> The House of Representatives and the Senate can both bring actions in court to enforce subpoenas of executive branch officials. See *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 68 (D.D.C. 2008) (holding that the House Judiciary Committee has standing to bring an action against an executive branch official to compel testimony despite an assertion of executive privilege); see also 28 U.S.C. § 1365(a) (2018) (providing the Senate with a jurisdictional basis for civil enforcement of a subpoena). However, this grant of jurisdiction to the Senate is inapplicable when an executive branch official acting in his or her official capacity has asserted a governmental privilege. See *id.* At least one court has suggested that the Declaratory Judgment Act, 28 U.S.C. § 2201 (2018), would enable the Senate to enforce a subpoena under such circumstances. See *Miers*, 558 F. Supp. 2d at 86–87.

<sup>44</sup> See, e.g., *United States v. House of Representatives*, 556 F. Supp. 150, 153 (D.D.C. 1983) (“The difficulties apparent in prosecuting Administrator Gorsuch for contempt of Congress should encourage the two branches to settle their differences without further judicial involvement. Compromise and cooperation, rather than confrontation, should be the aim of the parties.”). The judicial practice of advocating compromise and the exhaustion of all negotiations between Congress and the executive branch before ruling on the merits of a claim of executive privilege was established in *United States v. AT&T*, 551 F.2d 384, 385 (D.C. Cir. 1976).

<sup>45</sup> See *Miers*, 558 F. Supp. 2d at 56 (“It is important to note that the decision today is very limited. . . . [O]n the merits of the Committee’s present claims the Court only resolves, and again rejects, the claim by the Executive to absolute immunity from compelled congressional process for senior presidential aides.”).

<sup>46</sup> See Emily Berman, *Executive Privilege: A Legislative Remedy*, BRENNAN CTR. FOR JUST. 3 (2009), [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_Executive-Privilege-A-Legislative-Remedy.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_Executive-Privilege-A-Legislative-Remedy.pdf) [<https://perma.cc/AP2J-L2ZW>] (noting that “no clear guidelines govern executive privilege”).

<sup>47</sup> See discussion *infra* pp. 117–18.



ecutive,<sup>48</sup> Congress can neither fully exercise the investigatory prerogatives accorded it via the Constitution's separation of powers nor adequately serve as a check and balance in cases of executive branch misconduct.<sup>49</sup> Furthermore, developments beyond the direct control of Congress and the executive branch, such as the proliferation of hyperpartisanship, have exacerbated the legislature's impotence in serving as a coequal partner to the executive branch by diminishing its capacity to thoroughly investigate unlawful executive branch activity.<sup>50</sup> Fortunately, there exists a solution to these issues that would enable Congress to more effectively oversee the executive branch without encroaching on the executive branch's spheres of operation and privacy.

This Note is a separation of powers and checks and balances-based argument for a crime-fraud exception to assertions of executive privilege in response to congressional subpoenas. The judiciary would already be familiar with such an exception, as the crime-fraud exception here would function similarly to the crime-fraud exception to attorney-client privilege outlined in *United States v. Zolin*: litigating Congressional Committees would be required to make a "showing of a factual basis adequate to support a good faith belief by a reasonable person, that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies."<sup>51</sup> When invoked, the crime-fraud exception would cause the current regime for overcoming assertions of executive privilege in response to congressional subpoenas to collapse into the relatively lenient *Zolin* standard,<sup>52</sup> lowering the bar for disclosure and thereby effecting an increase in Congress's investigatory power and institutional strength relative to the executive branch in situations involving executive branch malfeasance.

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<sup>48</sup> See SCHLESINGER, *infra* note 111.

<sup>49</sup> See *infra* Part II.

<sup>50</sup> See, e.g., Douglas Kriner, *Can Enhanced Oversight Repair "the Broken Branch"?*, 89 B.U. L. REV. 765, 783 (2009) ("All too often, partisan incentives to support a President of the same party trump institutional incentives to defend Congress's institutional prerogatives by vigorously overseeing the actions of the executive branch.").

<sup>51</sup> *United States v. Zolin*, 491 U.S. 554, 572 (1989) (citation omitted).

<sup>52</sup> "Though the *Zolin* Court did not specify the level of proof necessary to trigger *in camera* inspection, all courts that have addressed this issue concur that it is very low." Cary Bricker, *Revisiting the Crime-Fraud Exception to the Attorney-Client Privilege: A Proposal to Remedy the Disparity in Protections for Civil and Criminal Privilege Holders*, 82 TEMP. L. REV. 149, 154 (2009).

There is one major difference between the crime-fraud exception to attorney-client privilege and the proposed crime-fraud exception to executive privilege. Whereas in the former the exception is invoked in order to obtain evidence for use in trial,<sup>53</sup> the successful application of the latter exception would require the release of subpoenaed materials or testimony to the litigating Congressional Committee for use in its investigations.<sup>54</sup> In other words, there would be no prosecutions immediately following the disclosure of evidence of malfeasance. In order to institute this difference, the application of the crime-fraud exception would require Congressional Committees seeking enforcement of a subpoena to adhere to OLC precedent<sup>55</sup> and not pursue the prosecution of a sitting president should the disclosed evidence reveal that he or she has acted criminally. Furthermore, in order to be consistent in the application of the exception, Congress would, in practice, expand the OLC precedent to include all executive branch officials within the scope of executive privilege.<sup>56</sup>

To acquire the subpoenaed evidence over which the President has asserted executive privilege, the relevant Congressional Committee would litigate to enforce the subpoena and argue that the materials or testimony are subject to the crime-fraud exception.<sup>57</sup> If the Congressional Committee makes the

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<sup>53</sup> See *Zolin*, 491 U.S. at 555.

<sup>54</sup> Timothy T. Mastrogiacomo, Note, *Showdown in the Rose Garden: Congressional Contempt, Executive Privilege, and the Role of the Courts*, 99 GEO. L.J. 163, 186 (2010) ("Civil enforcement is probably Congress's best option when its goal is to actually obtain subpoenaed information").

<sup>55</sup> See Memorandum from Robert G. Dixon, Jr., Assistant Att'y Gen., Dep't of Just., on Amenability of the President, Vice President, and Other Civil Officers to Federal Criminal Prosecution While in Office (Sept. 24, 1973), at 31–32, <https://fas.org/irp/agency/doj/olc/O92473.pdf> [<https://perma.cc/WM4N-J4QM>].

<sup>56</sup> See discussion *infra* pp. 114–15. This Note assumes a rough equivalence between those executive branch officials over whom the president can assert executive privilege and those who can be impeached. However, the matter of which executive branch officials are subject to impeachment remains an open question and consequently raises the possibility of the president asserting executive privilege in relation to an executive branch official who cannot be impeached. See ArtII.S4.1.2.1 Offices Eligible for Impeachment n.8, [https://constitution.congress.gov/browse/essay/artII\\_S4\\_1\\_2\\_1/#ALDF\\_00013857](https://constitution.congress.gov/browse/essay/artII_S4_1_2_1/#ALDF_00013857) [<https://perma.cc/XUA8-7EHV>]. Therefore, should a Congressional Committee succeed before a court in applying the proposed crime-fraud exception while investigating an executive branch official over whom the president has asserted executive privilege but who is not subject to impeachment, it will be able to incorporate the disclosed evidence of malfeasance into a referral to the Department of Justice.

<sup>57</sup> TODD GARVEY, CONG. RES. SERV., R45653, CONGRESSIONAL SUBPOENAS: ENFORCING EXECUTIVE BRANCH COMPLIANCE 5–6 (2019); see also Mastrogiacomo, *supra* note 54, at 181 ("Judicial enforcement of constitutional protections is not available until Congress uses, or asks a court to use, coercive force: an executive branch

showing that *Zolin* requires, and if *in camera* review finds evidence of malfeasance in the materials or testimony, the privilege claim would fail. Consequently, the court would order the executive branch to release the evidence in question to the Congressional Committee. Congress would then utilize the disclosed materials or testimony in making the decision to impeach, in the impeachment process itself, and, should the official be removed from office, once more in a referral to the Department of Justice if Congress chooses to pursue the prosecution of the individual.

This Note argues that a crime-fraud exception in the context of congressional subpoenas would perform three critical functions in restoring Congress's power vis-à-vis the executive branch. First, it would send a crucial prophylactic signal to the president and executive branch officials that would deter unlawful behavior on their part. Second, it would provide an antidote to the detrimental effects that hyperpartisanship has wrought on Congress's ability to investigate the executive branch. Finally, it would serve as a check and balance on the steady expansion of the executive branch's power by preserving Congress's investigatory prerogatives in the face of the newest instrument of executive overreach: the protective assertion of executive privilege. On balance, a crime-fraud exception to executive privilege would enhance rather than diminish the ability of Congress to conduct oversight when Congressional supervision is needed most while according respect to the executive branch's need for confidentiality in lawful circumstances.

Part I of this Note will provide a brief history of executive privilege via an analysis of the key case law underlying the doctrine and discuss the core tenets of the privilege that dictate its use. Part II will describe the origins of Congress's power to investigate and the current rules for overcoming executive privilege in that context. Part III will discuss how, in playing the three critical functions mentioned above, a crime-fraud exception would balance Congress's interest in performing its oversight duties with the executive branch's interest in confidentiality while simultaneously reducing instances of criminal or fraudulent conduct by the executive branch.

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official cannot file a civil suit invoking executive privilege to enjoin the enforcement of a congressional subpoena before Congress has used one of its contempt powers or seeks civil enforcement.”).

## I

## THE BIRTH AND DEVELOPMENT OF EXECUTIVE PRIVILEGE

Executive privilege formally received its judicial imprimatur in 1974 when the Supreme Court decided *United States v. Nixon*.<sup>58</sup> In *Nixon*, the Court held that executive privilege has a constitutional basis implicit in the Constitution's separation of powers-based arrangement and Article II's delegation of presidential power.<sup>59</sup> The Court also laid down several important markers for the doctrine. First, the Court acknowledged the necessity of executive privilege:

The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking [sic]. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately.<sup>60</sup>

In addition, the Court held that all presidential communications are presumptively privileged.<sup>61</sup> However, the Court refused to concede Nixon's argument that the privilege is absolute and unqualified.<sup>62</sup> Rather, it held that executive privilege is indeed qualified and can give way when the president's generalized interest in confidentiality is outweighed.<sup>63</sup> But what exactly can outweigh the president's generalized interest in confidentiality? In *Nixon*, the factor that played that role was "the legitimate needs of the judicial process" in a criminal trial:<sup>64</sup>

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<sup>58</sup> 418 U.S. 683, 713 (1974).

<sup>59</sup> *Id.* at 705 ("Whatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Art. II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties.").

<sup>60</sup> *Id.* at 708.

<sup>61</sup> *See id.*

<sup>62</sup> *See id.* at 707 ("The impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art. III.").

<sup>63</sup> *See id.* at 711-12 ("[W]e must weigh the importance of the general privilege of confidentiality of Presidential communications in performance of the President's responsibilities. . . . The interest in preserving confidentiality is weighty indeed and entitled to great respect.").

<sup>64</sup> *Id.* at 707.

[W]hen the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.<sup>65</sup>

With this relatively brief, fact-specific decision, executive privilege was thus born. However, because the opinion is light on details and narrow in its application, the judiciary would have to wade into the treacherous waters of executive privilege time and again to articulate the factors that outweigh the president's interest in confidentiality.

The Court added meat to the bones of executive privilege with its decision in *In re Sealed Case* ("*Espy*").<sup>66</sup> The case arose out of allegations of bribery against Secretary of Agriculture Mike Espy.<sup>67</sup> As part of its inquiry, a grand jury, called by the Kenneth Starr-led Independent Counsel, subpoenaed the White House Counsel, which had been collecting materials as part of its own investigation into the matter.<sup>68</sup> Importantly, President Bill Clinton never viewed any of the documents collected by the White House Counsel before claiming the presidential communications privilege over them to prevent their disclosure to the grand jury.<sup>69</sup> This represents a significant departure from previous cases involving executive privilege, as up until *Espy*, every case dealing with executive privilege had involved communications to which the president himself was a party.<sup>70</sup> In contrast, the White House Counsel in *Espy* had solicited and received documents that the president had never reviewed.<sup>71</sup> Involving elements not present in *Nixon*, this situa-

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<sup>65</sup> *Id.* at 713.

<sup>66</sup> 121 F.3d 729, 752 (D.C. Cir. 1997).

<sup>67</sup> *See id.* at 734

<sup>68</sup> *Id.* ("This case involves an effort by the Office of the Independent Counsel to compel performance of a subpoena *duces tecum* issued by the grand jury investigating former Secretary of Agriculture Alphonso Michael Espy and served on the Counsel to the President.") (internal parentheticals omitted).

<sup>69</sup> *See* Jonathan K. Geldert, *Presidential Advisors and Their Most Unpresidential Activities: Why Executive Privilege Cannot Shield White House Information in the U.S. Attorney Firings Controversy*, 49 B.C. L. REV. 823, 836 (2008) ("[W]hen President Clinton asserted executive privilege over documents produced by the White House Counsel's office, but never actually seen by the President himself, the D.C. Circuit in *Espy* faced several questions unanswered by earlier decisions. . . ."). For an explanation of the presidential communications privilege in the context of executive privilege, see *supra* note 1 and accompanying text.

<sup>70</sup> *See id.*

<sup>71</sup> *See In re Sealed Case*, 121 F.3d at 746.

tion presented a ripe opportunity for the court to shape executive privilege.

In *Espy*, the D.C. Circuit held that executive privilege applies to presidential communications<sup>72</sup> and to “communications made by presidential advisors in the course of preparing advice for the President . . . even when these communications are not made directly to the President.”<sup>73</sup> It also applies to both “communications which these advisers solicited and received from others” and “those they authored themselves.”<sup>74</sup> In addition, the court expanded the ambit of executive privilege to include immediate White House advisors<sup>75</sup> and members of their staffs with “broad and significant responsibility for investigating and formulating the advice to be given the President on [a] particular matter.”<sup>76</sup> However, the court was careful to circumscribe the reach of executive privilege, holding that the privilege does not generally extend to the vast majority of employees at executive branch agencies.<sup>77</sup> In light of this reasoning, the court found that “the privilege attached to documents that the White House Counsel had obtained in the course of preparing to advise the President on the Espy situation.”<sup>78</sup>

Additionally, the court used *Espy* to hammer out the particulars of executive privilege. Drawing on *Nixon v. Administrator of General Services*,<sup>79</sup> the court stated that the presidential communications privilege covers “documents or other materials that reflect presidential decisionmaking and deliberations

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<sup>72</sup> See *id.* at 744 (“The President can invoke the privilege when asked to produce documents or other materials that reflect presidential decisionmaking and deliberations and that the President believes should remain confidential.”).

<sup>73</sup> *Id.* at 752.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* Interestingly, the court would subsequently adopt an organizational, rather than functional, approach to determining whether an individual qualifies as an immediate presidential advisor. See *Judicial Watch, Inc. v. U.S. Dep’t of Justice*, 365 F.3d 1108, 1114 (D.C. Cir. 2004).

<sup>76</sup> *In re Sealed Case*, 121 F.3d at 758.

<sup>77</sup> *Id.* at 752 (“[T]he presidential communications privilege should be construed as narrowly as is consistent with ensuring that the confidentiality of the President’s decisionmaking process is adequately protected. Not every person who plays a role in the development of presidential advice, no matter how remote and removed from the President, can qualify for the privilege. In particular, the privilege should not extend to staff outside the White House in executive branch agencies.”).

<sup>78</sup> Geldert, *supra* note 69, at 838. See also *In re Sealed Case*, 121 F.3d at 752 (“[C]ommunications made by presidential advisers in the course of preparing advice for the President come under the presidential communications privilege, even when these communications are not made directly to the President.”).

<sup>79</sup> 433 U.S. 425, 430 (1977).

and that the President believes should remain confidential[,]”<sup>80</sup> as well as “communications made in the process of arriving at presidential decisions,”<sup>81</sup> as opposed to executive branch decision making generally. Furthermore, the presidential communications privilege applies only to matters that require direct presidential decision making<sup>82</sup> rather than to those that, though involving the communications of covered executive branch officials and their staffs, are unrelated to official government matters.<sup>83</sup> Moreover, the court held that “the presidential communications privilege applies to documents in their entirety, and covers final and post-decisional materials as well as pre-deliberative ones” and factual information.<sup>84</sup>

*Espy* also described the showing necessary to overcome an assertion of executive privilege. As explained by Geldert, “[f]irst, the desired information must be sought in pursuit of an important and appropriate function.”<sup>85</sup> In other words, a party seeking to overcome “executive privilege must do so in pursuit of a legitimate function[,]”<sup>86</sup> such as a congressional investigation.<sup>87</sup> “Second, the party seeking the information must have great need for the information; it must be relevant and unavailable with due diligence elsewhere.”<sup>88</sup> When viewed in the context of executive privilege case law that came before it, the *Espy* need standard subsumes the standards in *Nixon v. Sirica*,<sup>89</sup>

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<sup>80</sup> In re Sealed Case, 121 F.3d at 744.

<sup>81</sup> *Id.* at 745.

<sup>82</sup> The presidential communications privilege may be limited to Article II functions that are “quintessential and non-delegable.” *See id.* at 752–53.

<sup>83</sup> *See id.* at 752 (“The presidential communications privilege should never serve as a means of shielding information regarding governmental operations that do not call ultimately for direct decisionmaking by the President. If the government seeks to assert the presidential communications privilege in regard to particular communications of these ‘dual hat’ presidential advisers, the government bears the burden of proving that the communications occurred in conjunction with the process of advising the President.”).

<sup>84</sup> *See id.* at 745 (“*Nixon* argued that the presidential privilege must be qualified to ensure full access to facts in judicial proceedings, thereby assuming that factual material comes under the privilege.”).

<sup>85</sup> Geldert, *supra* note 69, at 841.

<sup>86</sup> *Id.*

<sup>87</sup> *See* discussion *infra* p. 119.

<sup>88</sup> Geldert, *supra* note 69, at 841.

<sup>89</sup> 487 F.2d 700, 717 (1973) (finding that a “uniquely powerful” showing must be made in order to overcome an assertion of executive privilege).

*Nixon*,<sup>90</sup> and *Select Committee*<sup>91</sup> and “should carry significant weight in the context of a congressional subpoena.”<sup>92</sup> “Finally, courts [must] balance the public interests served by confidentiality with those served by disclosure.”<sup>93</sup> While the court in *Espy* described a balancing of public interests like that employed in previous executive privilege cases,<sup>94</sup> it did not itself undertake to balance any factors, leaving open questions of which competing interests predominate when performing the analysis.<sup>95</sup>

While *Espy* and the other executive privilege cases present a general outline of the application of executive privilege in various circumstances, the case law in regard to congressional subpoenas in particular is lacking.<sup>96</sup> However, the congressional subpoenas issued to various high-level presidential advisors in the Trump Administration as part of the House Judiciary Committee’s investigation into Russian interference involve the precise actors and subject matter that fall within the bailiwick of executive privilege.<sup>97</sup> Current political circumstances may soon provide the courts an opportunity to further articulate executive privilege and perhaps institute the crime-fraud exception described herein.

## II

### CONGRESS’S INVESTIGATORY POWER AND ITS INTERACTIONS WITH EXECUTIVE PRIVILEGE

There are only six settled cases in which the court explicitly addresses Congress’s need for information in the face of an executive privilege claim.<sup>98</sup> The most notable is *Select Commit-*

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<sup>90</sup> *United States v. Nixon*, 418 U.S. 683, 713 (“[G]eneralized assertion[s] of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.”).

<sup>91</sup> *Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (1974) (establishing that executive privilege yields to evidence “demonstrably critical to the responsible fulfillment of [a Senate] Committee’s functions”).

<sup>92</sup> Geldert, *supra* note 69, at 845.

<sup>93</sup> *Id.* at 841.

<sup>94</sup> *See In re Sealed Case*, 121 F.3d 729, 753–57 (D.C. Cir. 1997).

<sup>95</sup> *See* Geldert, *supra* note 69, at 846. However, case law provides several factors that the court may weigh when applying the balancing test: “the strength of Congress’s need for the information in the request letters, the likelihood of a leak of the information in the Subcommittee’s hands, and the seriousness of the harm to national security from such a release,” as well as “the reasonableness of the alternatives offered by the parties.” *United States v. AT&T*, 551 F.2d 384, 391, 394 (D.C. Cir. 1976).

<sup>96</sup> *See supra* note 8 and accompanying text.

<sup>97</sup> *See* discussion *supra* pp. 106–07.

<sup>98</sup> They are *United States v. AT&T*, 551 F.2d 384, 385 (D.C. Cir. 1976); *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 732



*tee on Presidential Campaign Activities v. Nixon*.<sup>99</sup> In *Select Committee*, the District of Columbia Court of Appeals instituted a high bar for overcoming an assertion of executive privilege in response to a congressional subpoena. To satisfy *Select Committee*, the evidence in question must be “demonstrably critical to the responsible fulfillment of the Committee’s functions.”<sup>100</sup> Furthermore, the court proclaimed that this standard is concerned “not [with] the nature of the presidential conduct that the subpoenaed material might reveal, but, instead, [with] the nature and appropriateness of the function in the performance of which the material was sought, and the degree to which the material was necessary to its fulfillment.”<sup>101</sup>

While such a stringent standard may be appropriate when Congress conducts ordinary oversight of the executive branch, investigations into criminal or fraudulent activity necessarily occupy a distinct plane and call for enhanced means and measures. In such situations, congressional oversight capabilities should be at their apex and evidentiary materials and testimony readily accessible even if the president invokes executive privilege. In addition, with its caveat to the standard, the court unwittingly inflicted great harm on Congress’s ability to properly examine executive branch malfeasance. By detaching the content of the subpoenaed materials or testimony from the bar needed to overcome an assertion of executive privilege, the court effectively transformed a question of substance into one of procedure, thereby holding evidence of criminality to the same constitutional standards as for lawful materials. In doing so, the judiciary constrained Congress’s ability to meet its oversight responsibilities.

This reining in of congressional investigatory capabilities under the current regime raises grave separation of powers concerns, as well as questions of whether the legislature can adequately check and balance the executive branch. The notion of separation of powers, at its most basic level, is “the idea that each branch exercises its own powers and does not in-

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(D.C. Cir. 1974); *Comm. on Oversight & Governmental Reform v. Lynch*, 156 F. Supp. 3d 101, 103 (D.D.C. 2016); *Comm. on Oversight and Government Reform v. Holder*, 979 F. Supp. 2d 1, 9–10 (D.D.C. 2013); *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 105–05 (D.D.C. 2008); and *United States v. House of Representatives*, 556 F. Supp. 150, 153 (D.D.C. 1983).

<sup>99</sup> 498 F.2d 725, 732 (1974). The *Espy* standard subsequently incorporated the high bar established in *Select Committee* into its standard for overcoming an assertion of executive privilege. See *supra* note 83 and accompanying text.

<sup>100</sup> *Select Comm.*, 498 F.2d at 731.

<sup>101</sup> *Id.* (citation omitted).

trude on the powers of the other branches.”<sup>102</sup> However, this description paints a deceptively simple picture of the operation of the principle. As Founding Father James Madison’s writing suggests, the Framers of the Constitution may have had a far more dynamic understanding of separation of powers:

It was shown in the last paper that the political apothegm there examined does not require that the legislative, executive, and judiciary departments should be wholly unconnected with each other. I shall undertake, in the next place, to show that unless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained.<sup>103</sup>

Regardless of what the Framers had in mind for the separation of powers, it has turned out to be one of the most complex and least understood doctrines in American law and government.<sup>104</sup>

Notably, the Constitution does not explicitly grant Congress the power to conduct investigations.<sup>105</sup> However, at the time of the founding, there was a tradition among Anglo-American legislative bodies, particularly the British Parliament and Assemblies of the American colonies before the adoption of the Constitution, of investigating matters and compelling production of materials and testimony.<sup>106</sup> Furthermore, some scholars argue that the legislative power of inquiry was so deeply held as a matter of fact that the Framers did not bother to discuss it at the Constitutional Convention of 1787.<sup>107</sup> Regardless, the congressional power to investigate received judicial sanction in *McGrain v. Doherty*, in which the court affirmed Congress’s ability to gather information while performing over-

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<sup>102</sup> Jack M Beermann, *An Inductive Understanding of Separation of Powers*, 63 ADMIN. L. REV. 467, 472 (2011).

<sup>103</sup> THE FEDERALIST NO. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961).

<sup>104</sup> See Beermann, *supra* note 102, at 468.

<sup>105</sup> See generally U.S. CONST. art. I (establishing Congress’s powers and limits).

<sup>106</sup> See Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. CHI. L. REV. 1083, 1093–127 (2009).

<sup>107</sup> See FINAL REP. OF THE JOINT COMM. ON THE ORG. OF CONGRESS (Dec. 1993), <https://archives-democrats-rules.house.gov/Archives/jcoc2aq.htm> [<https://perma.cc/NXU5-CC59>] (“There was little discussion of the power to oversee, review, or investigate executive activity at the Constitutional Convention of 1787 or later in the *Federalist Papers*, which argued in favor of ratification of the Constitution. The lack of debate was because oversight and its attendant authority were seen as an inherent power of representative assemblies which enacted public law.”).

sight of the executive branch.<sup>108</sup> Moreover, the Court in *Watkins v. United States* later held that “[t]he power of the Congress to conduct investigations is inherent in the legislative process.”<sup>109</sup> Thus, historical practice and judicial rulings both validate Congress’s investigatory power.

However, the standards that *Select Committee*, and later *Espy*, articulated undermine Congress’s ability to properly fulfill its oversight responsibilities. Faced with a high bar to clear in order to overcome executive privilege, Congress has been made less than a co-equal partner of the executive branch, inhibiting the legislature’s ability to serve as a check and balance on the president and other executive branch officials.<sup>110</sup> Compounded by the executive branch’s aggrandizement of power in the middle to late twentieth century,<sup>111</sup> as well as

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<sup>108</sup> See *McGrain v. Doherty*, 273 U.S. 135, 180 (1927) (affirming that the Senate has the power to investigate the Attorney General).

<sup>109</sup> *Watkins v. United States*, 354 U.S. 178, 187 (1957). Specifically, Congress is permitted to investigate any matter for which it has a “valid legislative purpose.” *Quinn v. United States*, 349 U.S. 155, 161 (1955). However, these broad investigatory powers are not without limit:

Since Congress may only investigate into those areas in which it may potentially legislate or appropriate, it cannot inquire into matters which are within the exclusive province of one of the other branches of the Government. . . . Neither can it supplant the Executive in what exclusively belongs to the Executive. And the Congress, in common with all branches of the Government, must exercise its powers subject to the limitations placed by the Constitution on governmental action. . . .

*Barenblatt v. United States*, 360 U.S. 109, 111–12 (1959). Furthermore, Congress must consider certain factors when it subpoenas a President’s personal information and papers, including “whether the asserted legislative purpose warrants the significant step of involving the President and his papers[]”; whether a subpoena issued pursuant to an investigation is “no broader than reasonably necessary to support Congress’s legislative objective[]”; whether “the nature of the evidence offered by Congress to establish that a subpoena advances a valid legislative purpose[]” actually does so; and whether “the burdens imposed on the President by subpoena[]” are too great to justify production by the President. *Trump v. Mazars USA LLP*, 591 U.S. [on pages 19–20 of the opinion] (2020).

<sup>110</sup> In the *Federalist*, Madison wrote on the importance of preserving the powers of the branches of government, including the Legislature, against encroachment from other branches:

But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachment of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. . . . [T]he constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other. . . .

THE FEDERALIST NO. 51, at 321–22 (James Madison) (Clinton Rossiter ed., 1961).

<sup>111</sup> See generally ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY 212–77* (1973) (detailing the growth of executive power in the two centuries following the nation’s founding).

developments like hyperpartisanship that are beyond the direct control of the executive branch yet limit Congress's investigatory power, the legislative branch's institutional decline continues apace. The following section will discuss how a crime-fraud exception to claims of executive privilege made in response to congressional subpoenas would bolster Congress as an institution by enabling it to more fully exercise the investigatory powers that the Constitution has allotted it.

### III

#### GIVING CONGRESS ITS DUE: A CRIME-FRAUD EXCEPTION TO EXECUTIVE PRIVILEGE

A crime-fraud exception to assertions of executive privilege in response to congressional subpoenas would dramatically alter the balance of power between the legislative and executive branches when the executive branch has acted unlawfully. By facilitating oversight of executive action, it would introduce a countervailing force against the ever-expanding power of the executive branch in three ways. First, a crime-fraud exception to executive privilege would send a signal to executive branch officials that an assertion of the privilege will not conceal misconduct. Second, a crime-fraud exception would weaken the ability of hyperpartisanship to insulate officials from investigation and the consequences of any subsequently-discovered malfeasance. Third, a crime-fraud exception would serve as a counterbalance to a novel form of executive privilege called a "protective assertion of executive privilege" that threatens to substantially expand the power of the executive branch to resist congressional investigation.

#### A. The Crime-Fraud Exception as a Prophylactic Against Executive Branch Misconduct

A crime-fraud exception to assertions of executive privilege in response to congressional subpoenas would provide a crucial prophylactic against executive misconduct by strengthening Congress's power to investigate wrongdoing. The exception would send a powerful signal to the president and his senior advisors that executive privilege cannot, and will not, conceal their criminal or fraudulent conduct from a Congressional Committee. Moreover, a crime-fraud exception would communicate a zero-tolerance policy for misconduct in a way that a balancing test, with its consideration of numerous clashing

factors that are subject to the whims and biases of judges,<sup>112</sup> never could.

In traditional legal analysis, it is an established fact that balancing tests involve much more subjective judicial reasoning than do bright-line rules,<sup>113</sup> potentially leading to outcomes that are variable and inconsistent.<sup>114</sup> Consequently, it is theoretically possible that the balancing test that courts use to resolve questions of executive privilege, if applied by a judge subscribing to theories of broad executive power and facing the right set of countervailing factors, can sustain an assertion of executive privilege that incidentally conceals information related to criminal or fraudulent conduct.<sup>115</sup> Furthermore, in the absence of the proposed exception, executive branch officials have fewer incentives to avoid criminal or fraudulent conduct; believing that executive privilege will protect them, they may act with disregard for the law.

Galbiati and Vertova's 2008 study offers hints as to how executive branch officials would respond to a crime-fraud exception to executive privilege.<sup>116</sup> From their starting point, which describes rules as "obligations backed by incentives[,]"<sup>117</sup> Galbiati and Vertova observe changes in individuals' behavior in response to the imposition of both a rule without accompanying incentives and a rule backed by incentives.<sup>118</sup> In performing their study, they utilized one-shot lin-

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<sup>112</sup> See Patrick M. McFadden, *The Balancing Test*, 29 B.C. L. REV. 585, 640 (1988) ("There is a further difficulty in ascertaining the 'political' content of the balancing test because the weight of the elements balanced in the test are affected by the world view of the judges who employ it.").

<sup>113</sup> See *id.* at 586–87.

<sup>114</sup> See *id.* at 643–46.

<sup>115</sup> The following quotation is one example of scholarly treatment of this concern:

The standard of review as first developed in the Watergate and AT&T cases, a functional balancing test, has been reinforced by modern separation of powers jurisprudence which tends to favor functionalism in the absence of a clear answer from the Constitution's text. The court would essentially ask whether disclosure of the disputed information harms the President's ability to perform his constitutional duties more than nondisclosure would harm Congress's ability to perform its constitutional functions. A court can anticipate that the parties, having failed to negotiate and desiring to avoid institutional concessions, will present polar arguments. Achieving an 'optimal' balance between these interests unavoidably will involve some level of subjectivity.

Randall K. Miller, *Congressional Inquests: Suffocating the Constitutional Prerogative of Executive Privilege*, 81 MINN. L. REV. 631, 684–85 (1997).

<sup>116</sup> Roberto Galbiati & Pietro Vertova, *How Laws Affect Behavior: Obligations, Incentives and Cooperative Behavior*, 38 INT. REV. L. ECON. 48, 48 (2014).

<sup>117</sup> *Id.*

<sup>118</sup> See *id.* at 49, 55–56.

ear public goods games as their experimental setups.<sup>119</sup> The incentive in this experiment is a reward for contributing more than a suggested minimum contribution, accompanied by a penalty for contributing less.<sup>120</sup>

Galbiati and Vertova compared the results of several one-shot linear public goods games. In one game, there was no requested minimum contribution from participants in the experiment, while in another, there was a high requested minimum contribution but no incentives.<sup>121</sup> They found that a rule without incentives, represented by the high requested minimum contribution, can, on its own, cause some change in the average amount that individuals contribute.<sup>122</sup> In fact, under that regime, there was a 41% increase in the average contributions that participants made when compared with the average contributions in the experimental setup without a requested minimum contribution.<sup>123</sup> This effect is even more pronounced when a high minimum contribution request with incentives is introduced, producing an increase of more than 80% in the average contribution as compared with the average contribution in the experimental setup without a requested minimum.<sup>124</sup> In contrasting these outcomes, Galbiati and Vertova concluded that while there is some compliance from the institution of a rule without attendant incentives, there is even greater compliance when a rule is accompanied by incentives.<sup>125</sup>

This study sheds light on the effects a crime-fraud exception to executive privilege would have on the behavior of execu-

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119 A public goods game is best illustrated by way of example:

In a typical setup in experimental economics an experimenter endows e.g. six players with \$10 each. The players are then offered to invest their money into a common pool knowing that the experimenter [sic] will triple the amount in the pool and distribute it equally among all participants irrespective of their contributions. If all players cooperate and contribute their \$10, they will end up with \$30 each. However, each player faces the temptation to defect and to free-ride on the other player's contributions since each invested dollar yields only a return of 50 cents to the investor. Therefore the 'rational' and dominating solution is to defect and invest nothing. Consequentially, groups of rational players will forego the public good and are thus unable to increase their initial endowment.

Christoph Hauert, *Public goods games* (Oct. 28, 2005), <https://www.univie.ac.at/virtuallabs/PublicGoods/index.html#pgg> [<https://perma.cc/V2EV-PVYY>].

120 See Galbiati & Vertova, *supra* note 116, at 50.

121 See *id.* at 50–52.

122 See *id.* at 52–53.

123 See *id.* at 53.

124 *Id.* at 54.

125 See *id.* at 55–56.

tive branch officials, for executive branch conduct and a crime-fraud exception to executive privilege can be analogized to the situations in the study. The current state of affairs, which lacks a crime-fraud exception and in which the public merely expects officials to carry out their duties lawfully, resembles the scenario in the experiment with no minimum contribution request.<sup>126</sup> The executive branch's forbearance from conduct that would trigger the crime-fraud exception and the avoidance of criminal penalties for malfeasance can be analogized as the rule and the incentive, respectively.

Should the comparison to the study hold true, a crime-fraud exception would likely encourage significantly greater compliance with the law among executive branch officials. Because the crime-fraud exception would inhibit the use of executive privilege to conceal evidence of illicit activities and thereby increase the risk of criminal liability, executive branch officials would be incentivized by the crime-fraud exception to behave in accordance with the law. Furthermore, this effect would be pervasive, as high-level officials to whom executive privilege applies would be motivated to deter behavior among subordinates that could expose the officials to personal or political risk. As a result, the effect of this change on individuals' behavior would be the deterrence of misconduct throughout the executive branch and fewer incidences of criminal malfeasance.

#### B. The Crime-Fraud Exception as an Antidote to Hyperpartisanship

As mentioned above, it is possible that, in applying the balancing test governing executive privilege, a court may find that certain factors militate in favor of sustaining executive privilege even in the face of criminality.<sup>127</sup> In other words, it is wholly possible that Congress will one day investigate executive branch malfeasance that involves matters traditionally accorded the highest levels of confidentiality, such as those implicating national security, and over which executive privilege typically casts a shadow of confidentiality.

In fact, such a scenario is not unheard of, as that exact situation occurred during the Iran Contra Affair.<sup>128</sup> The con-

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<sup>126</sup> See discussion of the limits on Congressional oversight *supra* pp. 119–20.

<sup>127</sup> See *supra* pp. 121–22.

<sup>128</sup> See generally MALCOLM BYRNE, IRAN-CONTRA: REAGAN'S SCANDAL AND THE UNCHECKED ABUSE OF PRESIDENTIAL POWER (2014) (providing an account of the investigation of the Iran-Contra scandal and President Reagan's role in the affair).

troverly arose in 1986, when a Lebanese newspaper reported that the United States was selling arms to Iran during the Iran-Iraq War in the hopes of securing the release of American hostages held by the terrorist group Hezbollah.<sup>129</sup> This story was newsworthy because the quid pro quo that the United States engaged in with the terrorist group violated the government's long-standing policy of refusing to negotiate with terrorists.<sup>130</sup> To make matters worse, the United States used proceeds from these arms sales to fund the Contras, a rebel group in Nicaragua that had engaged in such grave human rights abuses that Congress had voted to suspend all government assistance.<sup>131</sup>

In early 1987, the Democratic Party-controlled Congress announced that it would investigate the matter. It quickly zeroed in on Lieutenant Colonel Oliver North of the National Security Council<sup>132</sup> as a focal point of the entire scandal, culminating in his testimony before the Joint Iran Contra Congressional Committee from July 7, 1987 to July 14, 1987.<sup>133</sup> Though much of North's testimony involved information related to his execution of executive branch directives, Republican president Ronald Reagan did not assert executive privilege to protect his aide.<sup>134</sup> However, his refusal to invoke the privilege was not rooted in a sense of duty or dedication to principles; instead, it was the result of cold political calculation. When the scandal first broke, Reagan categorically denied the allegations, calling them "outlandish."<sup>135</sup> The public did not believe the president, and with every denial or dismissal of the

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<sup>129</sup> See Bryan Craig, *The Iran-Contra Affair*, U. VA. MILLER CTR. (July 12, 2017), <https://millercenter.org/issues-policy/foreign-policy/iran-contra-affair> [<https://perma.cc/5ZDR-KQ6D>].

<sup>130</sup> In practice, the United States has negotiated with terrorists on numerous occasions over the last fifty years, but the mantra of no negotiation still persists. See Alan Gomez, *Is it Ever Right to Negotiate with Terrorists?*, U.S.A. TODAY (June 2, 2014, 4:54 PM), <https://www.usatoday.com/story/news/world/2014/06/01/bergdahl-release-taliban-prisoner-trade/9835759/> [<https://perma.cc/4A6G-7JPY>].

<sup>131</sup> See Craig, *supra* note 129.

<sup>132</sup> See generally OLIVER NORTH, UNDER FIRE: AN AMERICAN STORY (Post Hill Press ed., 2018) (1991) (providing North's personal account of the investigation of his involvement in the scandal).

<sup>133</sup> *Hearings Timeline: Understanding the Iran-Contra Affairs*, BROWN U., [https://www.brown.edu/Research/Understanding\\_the\\_Iran\\_Contra\\_Affair/v-on1.php](https://www.brown.edu/Research/Understanding_the_Iran_Contra_Affair/v-on1.php) [<https://perma.cc/82HS-RKQQ>] (last visited Mar. 10, 2020).

<sup>134</sup> *North Testifies He Felt Like Chess Pawn, Admits Lying*, L.A. TIMES (Apr. 9, 1989), <https://www.latimes.com/archives/la-xpm-1989-04-09-mn-1699-story.html> [<https://perma.cc/NL3S-6QKD>].

<sup>135</sup> See James Kitfield & Michael Stecher, *What the White House Can Learn From Iran-Contra*, REALCLEARPOLITICS (May 31, 2017), [https://www.realclearpolitics.com/articles/2017/05/31/what\\_the\\_white\\_house\\_can\\_learn\\_from\\_iran-contra\\_134048.html](https://www.realclearpolitics.com/articles/2017/05/31/what_the_white_house_can_learn_from_iran-contra_134048.html) [<https://perma.cc/7R56-UDCL>].



charges, his trust deficit with the American people deepened.<sup>136</sup> In fact, it was during the scandal that Reagan's approval rating dropped from 63% to 47%, near the lowest levels of his entire presidency.<sup>137</sup>

The Iran Contra Affair resulted in the convictions of eleven individuals embroiled in the scandal, including Oliver North.<sup>138</sup> However, if the controversy were to occur today, the outcome would likely be very different because the set of circumstances and political pressures that led President Reagan to abstain from asserting executive privilege may no longer exist. In recent American politics, hyperpartisanship has reigned supreme.<sup>139</sup> Accompanying the strengthening of the wings of the American political spectrum has been the disappearance of a middle susceptible to persuasion.<sup>140</sup> As voters have congregated around the conservative and progressive posts of the Republican and Democratic Parties respectively,<sup>141</sup> there has been a decline in crossover voting and ticket splitting.<sup>142</sup> Additionally, Republican and Democratic voters are increasingly misinformed about the opposite side's positions<sup>143</sup> and hold deeply negative views of the opposing party.<sup>144</sup> In fact, more

<sup>136</sup> See *id.*

<sup>137</sup> See Lydia Saad, *Gallup Vault: Reaction to Iran-Contra 30 Years Ago*, GALLUP (Nov. 25, 2016), <https://news.gallup.com/vault/198164/gallup-vault-reaction-iran-contra-years-ago.aspx> [<https://perma.cc/B2EX-LWZ4>]. Reagan's lowest approval rating was 35% in 1983. See *Presidential Approval Ratings—Gallup Historical Statistics and Trends*, GALLUP, <https://news.gallup.com/poll/116677/presidential-approval-ratings-gallup-historical-statistics-trends.aspx> [<https://perma.cc/6VMH-L5ZU>] (last visited Mar. 10, 2020).

<sup>138</sup> See *Summary of Prosecutions: Understanding the Iran-Contra Affair*, BROWN U., [https://www.brown.edu/Research/Understanding\\_the\\_Iran\\_Contra\\_Affair/v-on1.php](https://www.brown.edu/Research/Understanding_the_Iran_Contra_Affair/v-on1.php) [<https://perma.cc/D9LZ-YW62>] (last visited Mar. 10, 2020).

<sup>139</sup> See Niraj Chokshi, *U.S. Partisanship Highest in Decades, Pew Study Finds*, N.Y. TIMES (June 23, 2016), <https://www.nytimes.com/2016/06/24/us/politics/partisanship-republicans-democrats-pew-research.html> [<https://perma.cc/ZR3Q-93D8>].

<sup>140</sup> See Grep Ip, *The Shrinking of the Political Middle—and What It Means*, WALL ST. J. (Jan. 21, 2019, 6:30 AM), <https://www.wsj.com/articles/the-shrinking-of-the-political-middleand-what-it-means-11548070200> [<https://perma.cc/Y8JR-XXAV>].

<sup>141</sup> Carroll Doherty, Jocelyn Kiley & Bridget Johnson, *The Partisan Divide on Political Values Grows Even Wider*, PEW RES. CTR. 11–13 (Oct. 5, 2017), <http://assets.pewresearch.org/wp-content/uploads/sites/5/2017/10/05162647/10-05-2017-Political-landscape-release.pdf> [<https://perma.cc/4LTP-SU5D>].

<sup>142</sup> Geoffrey Skelley, *Split-Ticket Voting Hit a New Low in 2018 Senate and Governor Races*, FIVETHIRTYEIGHT (Nov. 19, 2018, 6:00 AM), <https://fivethirtyeight.com/features/split-ticket-voting-hit-a-new-low-in-2018-senate-and-governor-races/> [<https://perma.cc/KKA3-EZ5N>].

<sup>143</sup> See *The Perception Gap*, MORE IN COMMON (2019), <https://perception-gap.us/> [<https://perma.cc/424N-6PJA>].

<sup>144</sup> See Chokshi, *supra* note 139.

and more voters choose to associate only with those who hold similar beliefs and build their social networks largely with politically like-minded individuals.<sup>145</sup>

Structural issues have also played a role in the proliferation of hyperpartisanship in American politics. The number of swing districts, the so-called “battleground districts,” has declined at a precipitous rate in recent years, and the vast majority of officials elected to nationwide office come from electoral units that lean heavily in their favor in voter composition.<sup>146</sup> Responsive to these factors, elected officials are incentivized to take extreme positions that appeal to the activist wings of their parties to avoid primary challenges.<sup>147</sup> As they do so, and drive the Republican and Democratic Parties further and further apart, the cycle of hyperpartisanship continues to turn with no reprieve in sight.

Under such circumstances, supporters of the respective parties rally to the elected officials on their side, particularly in times of controversy,<sup>148</sup> due to the psychological tendency to make decisions in accordance with preconceived notions rather than the available facts.<sup>149</sup> Given the political incentives to take extreme, activist-friendly positions<sup>150</sup> and the psychological biases that cause people to believe claims that validate their preexisting beliefs,<sup>151</sup> elected officials and those under their charge further lose whatever incentives they had to accept responsibility for their missteps or to cooperate with the opposite

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<sup>145</sup> See Doherty, Kiley & Johnson, *supra* note 141, at 65–71.

<sup>146</sup> See Nate Silver, *As Swing Districts Dwindle, Can a Divided House Stand?*, N.Y. TIMES (Dec. 27, 2012, 9:46 AM), <https://fivethirtyeight.blogs.nytimes.com/2012/12/27/as-swing-districts-dwindle-can-a-divided-house-stand/> [<https://perma.cc/L89N-NYVZ>].

<sup>147</sup> See generally Jonathan Rauch & Raymond J. La Raja, *Re-Engineering Politicians: How Activist Groups Choose Our Candidates Long Before We Vote*, BROOKINGS INST. (Dec. 7, 2017), <https://www.brookings.edu/research/re-engineering-politicians-how-activist-groups-choose-our-politicians-long-before-we-vote/> [<https://perma.cc/X3PN-TC5V>] (describing the growing role of highly ideological independent activist groups in driving party politics through candidate selection and by mounting primary challenges to incumbents).

<sup>148</sup> Nicole Hemmer, *A Forgotten Lesson of Watergate: Conservatives May Rally Around Trump*, VOX (May 17, 2017, 1:31 PM), <https://www.vox.com/the-big-idea/2017/5/12/15630372/watergate-impeachment-conservative-public-opinion-trump-history> [<https://perma.cc/FR6B-UK53>].

<sup>149</sup> See Julia Belluz & Brian Resnick, *Trump Understands What Many Miss: People Don't Make Decisions Based on Facts*, VOX (Feb. 8, 2017, 9:53 AM), <https://www.vox.com/policy-and-politics/2016/11/16/13426448/trump-psychology-fact-checking-lies> [<https://perma.cc/5HF5-GLCN>] (explaining how individuals' decisions are often based on preconceived notions rather than facts).

<sup>150</sup> See Rauch & La Raja, *supra* note 147.

<sup>151</sup> See Belluz & Resnick, *supra* note 149.

side, say, in response to a congressional subpoena for materials. Moreover, presidents no longer need to expend a significant amount of political capital in asserting executive privilege.<sup>152</sup> By doubling down against allegations of wrongdoing, painting investigations against them as “witch hunt,”<sup>153</sup> and invoking executive privilege at little cost to themselves, presidents are able to escape culpability with their bases. And as elections at all levels have increasingly been decided by thin margins in which the difference between victory and defeat relies on “turning out your base,”<sup>154</sup> bipartisanship receives the final nail in its coffin.

In this era of extreme hyperpartisanship that destroys incentives for appealing to voters across a wide spectrum, a crime-fraud exception to executive privilege would enable Congress to better perform its oversight duties by protecting the legislature’s investigatory prerogatives vis-a-vis the executive branch. Namely, Congress would be able to obtain subpoenaed materials or testimony over which executive privilege has been asserted without having to rely on assistance from public opinion in compelling executive branch officials to cooperate. In other words, the proposed crime-fraud exception would enable Congress to effectively pursue investigations of the executive branch regardless of where the public stands on a particular investigation. In this way, Congress can lead on the issue of

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<sup>152</sup> Traditionally, “the President himself assert[s] the claim of privilege, [] forc[ing] the President to be accountable for the decision to withhold documents from Congress and pay the political cost for such a decision.” Todd David Peterson, *Contempt of Congress v. Executive Privilege*, 14 U. PA. J. CONST. L. 77, 109 (2011). Given that voters increasingly interpret facts through a partisan lens, it is probable that this political cost has sharply dropped in the current era of hyperpartisanship. See Belluz & Resnick, *supra* note 149.

<sup>153</sup> See Eric Tucker, Mary Clare Jalonick & Michael Balsamo, *Mueller Rejects Trump’s Claims of Exoneration, ‘Witch Hunt’*, ASSOCIATED PRESS (July 25, 2019), <https://www.apnews.com/71c78db8033540518f45baf1a6505dff> [<https://perma.cc/L54K-NB2F>]. President Trump is not the only political figure to have believed himself or herself the victim of a witch hunt. See William Cummings, *Trump Thinks He is the Target of a ‘Witch Hunt.’ Nixon Thought So Too*, USA TODAY (May 18, 2017, 5:58 PM), <https://www.usatoday.com/story/news/politics/onpolitics/2017/05/18/trump-nixon-witch-hunt/101846962/> [<https://perma.cc/9P9U-UX8Q>].

<sup>154</sup> See *2004: The Base Strategy*, PBS, <https://www.pbs.org/wgbh/pages/frontline/shows/architect/rove/2004.html> [<https://perma.cc/4RBK-CVXP>]; see also Andrew Kohut, *Misreading Election 2012*, WALL STREET J., Nov. 13, 2012, <https://www.wsj.com/articles/SB10001424127887323894704578113231375465160> [<https://perma.cc/E4B6-XUDF>] (arguing that the outcome of the 2012 election was heavily influenced by both Obama’s popularity with the Democratic base and Romney’s unpopularity with the Republican base).

investigating executive branch misconduct and create public opinion rather than merely follow it.<sup>155</sup>

Additionally, a crime-fraud exception would add teeth to congressional subpoenas, as Congress would no longer have to demonstrate the significant level of need that the *Select Committee*<sup>156</sup> and *Espy*<sup>157</sup> standards require to overcome executive privilege claims. Instead, congressional subpoenas would be subject to the much more lenient *Zolin* standard for the disclosure of evidence of criminal or fraudulent conduct.<sup>158</sup> As a result, a crime-fraud exception to executive privilege would represent a meaningful expansion of Congress's investigatory power in cases of executive branch misconduct and permit an investigating Congressional Committee to more easily access information regardless of the direction in which the political winds are blowing.

### C. The Crime-Fraud Exception as a Defense Against Protective Assertions of Executive Privilege

Finally, a crime-fraud exception to executive privilege claims invoked in response to congressional subpoenas would preserve Congress's power in the face of a new kind of executive overreach. This type of overreach, which the executive branch has begun to weaponize against congressional subpoenas, is the "protective assertion of executive privilege."<sup>159</sup> A protective assertion of executive privilege is "a non-assertion assertion" of executive privilege that "ensures the President's ability to make a final decision whether to assert privilege following a full review of [ ] materials."<sup>160</sup> In other words, a president makes a

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<sup>155</sup> See Todd Stern, *The Real Reason Nancy Pelosi Is Ducking Impeachment*, WASH. POST (June 13, 2019, 5:44 PM), [https://www.washingtonpost.com/opinions/pelosi-is-wrong-democrats-must-open-an-impeachment-inquiry-without-delay/2019/06/13/0ca2160c-8e10-11e9-adf3-f70f78c156e8\\_story.html](https://www.washingtonpost.com/opinions/pelosi-is-wrong-democrats-must-open-an-impeachment-inquiry-without-delay/2019/06/13/0ca2160c-8e10-11e9-adf3-f70f78c156e8_story.html) [https://perma.cc/A45E-S9BA].

<sup>156</sup> See discussion *supra* pp. 117–18.

<sup>157</sup> See discussion *supra* pp. 113–17.

<sup>158</sup> See discussion *supra* pp. 109–11.

<sup>159</sup> Jonathan Shaub, *What Is a 'Protective' Assertion of Executive Privilege?*, LAWFARE (May 8, 2019, 8:23 PM) [hereinafter Shaub, *Protective Assertion*], <https://www.lawfareblog.com/what-protective-assertion-executive-privilege> [https://perma.cc/8VFZ-YJQC].

<sup>160</sup> *Id.* (quoting Letter from Stephen Boyd, Assistant Att'y Gen., U.S. Dep't of Just., to Jerrold Nadler, Chairman, U.S. House Comm. on the Judiciary (May 8, 2019) (on file with Just Security at the Reiss Center on Law), [https://www.justsecurity.org/wp-content/uploads/2019/08/Chairman-Nadler-letter\\_8-May-2019-003.pdf](https://www.justsecurity.org/wp-content/uploads/2019/08/Chairman-Nadler-letter_8-May-2019-003.pdf) [https://perma.cc/2GBG-S7CK]). Protective assertions of executive privilege have a cousin in the non-assertion assertions of executive privilege common in testimony before Congress on matters over which a president may

protective assertion of executive privilege in order to determine whether to formally assert executive privilege.

President Clinton invoked the first protective assertion of executive privilege in 1996 in response to a subpoena issued by the House of Representatives Committee on Government Reform and Oversight.<sup>161</sup> This subpoena called for production of such a tremendous volume of documents that executive branch review of which documents were entitled to executive privilege would not have concluded before the subpoena's deadline. Relying on a memorandum penned during the Reagan administration,<sup>162</sup> then-Attorney General Janet Reno wrote:

[E]xecutive privilege may properly be asserted with respect to the entire set of White House Counsel's Office documents currently being withheld from the Committee, pending a final Presidential decision on the matter. This would be a protective assertion of executive privilege designed to ensure [the president's] ability to make a final decision, after consultation with the Attorney General, as to which specific documents are deserving of a conclusive claim of executive privilege.<sup>163</sup>

Protective assertions of executive privilege provide two unique advantages. First, they protect the confidentiality of materials that are typically beyond the scope of standard executive privilege.<sup>164</sup> Traditionally, executive privilege has been invoked to conceal specific categories of information: presidential communications, sensitive law enforcement information, internal deliberations, confidential national security or diplomatic information (including classified information), and attorney-client information.<sup>165</sup> However, protective assertions of

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make a claim of executive privilege. See Shaub, *Protective Assertion*, *supra* note 158.

<sup>161</sup> Memorandum from Janet Reno, Att'y Gen., *Protective Assertion of Executive Privilege Regarding White House Counsel's Office Documents* (May 8, 1996) [hereinafter *Reno Memorandum*], [https://www.justice.gov/sites/default/files/olc/opinions/1996/05/31/op-olc-v020-p0001\\_0.pdf](https://www.justice.gov/sites/default/files/olc/opinions/1996/05/31/op-olc-v020-p0001_0.pdf) [<https://perma.cc/6CZ7-7EQB>].

<sup>162</sup> Memorandum from Ronald Reagan, President of the U.S., *Procedures Governing Responses to Congressional Requests for Information* (Nov. 4, 1982), at 1-2, <https://www.justice.gov/ola/page/file/1090526/download> [<https://perma.cc/P6X8-XV8F>].

<sup>163</sup> RENO MEMORANDUM, *supra* note 161.

<sup>164</sup> See Shaub, *Protective Assertion*, *supra* note 159.

<sup>165</sup> These are the types of materials over which the executive branch believes it can claim executive privilege, though Congress disputes that executive privilege can be asserted over information concerning many of these categories. See John E. Bies, *Primer on Executive Privilege and the Executive Branch Approach to Con-*

executive privilege enable the executive branch to cast a wide net of confidentiality that catches materials of every sort. Because the purpose of a protective assertion of executive privilege is to provide the president with more time to review documents potentially subject to a formal assertion of executive privilege, “[t]he ‘protective’ assertion protects *all* the documents during the period of consideration, relieving the executive branch of the need to justify the withholding of any particular document or piece of information.”<sup>166</sup>

Protective assertions of executive privilege provide another key advantage that redounds to the benefit of the individual or individuals implicated by a congressional subpoena: it shields them from being held in criminal contempt of Congress. Typically, when an individual refuses to comply with a congressional subpoena, Congress responds by threatening to hold the individual in contempt.<sup>167</sup> There are two types of contempt in which Congress can hold an individual. The first arises under the inherent contempt power of Congress,<sup>168</sup> which “permits Congress to rely on its own constitutional authority to detain and imprison a contemnor until the individual complies with congressional demands.”<sup>169</sup> However, this means of contempt is largely toothless. It has not been exercised in almost a century,<sup>170</sup> and “the specter of Congress sending the sergeant-at-arms to arrest White House and Justice Department officials and imprison them in the basement of the Capitol or a D.C. jail is laughably absurd and would be challenged immediately through a writ of habeas corpus.”<sup>171</sup>

The other type of contempt at Congress’s disposal is that outlined in the criminal contempt statute,<sup>172</sup> which “permits Congress to certify a contempt citation to the executive branch

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*gressional Oversight*, LAWFARE (June 16, 2017, 8:30 AM), <https://www.lawfareblog.com/primer-executive-privilege-and-executive-branch-approach-congressional-oversight> [<https://perma.cc/8N89-T2H6>].

<sup>166</sup> See Shaub, *Protective Assertion*, *supra* note 159.

<sup>167</sup> See TODD GARVEY, CONG. RES. SERV., RL34097, CONGRESS’S CONTEMPT POWER AND THE ENFORCEMENT OF CONGRESSIONAL SUBPOENAS: LAW, HISTORY, PRACTICE, AND PROCEDURE 1 (2017).

<sup>168</sup> The inherent contempt power of Congress received judicial approval in *Anderson v. Dunn*, 19 U.S. 204, 219 (1821).

<sup>169</sup> GARVEY, *supra* note 167, at 1.

<sup>170</sup> The case adjudicating the writ of habeas corpus filed by the contemnor in that instance is *Jurney v. MacCracken*, 294 U.S. 125, 125–26 (1935).

<sup>171</sup> Jonathan Shaub, *Masters from Two Equal Branches of Government’: Trump and Congress Play Hardball*, LAWFARE (Apr. 27, 2019, 10:00 AM), <https://www.lawfareblog.com/masters-two-equal-branches-government-trump-and-congress-play-hardball> [<https://perma.cc/HYF6-B49S>].

<sup>172</sup> 2 U.S.C. §§ 192, 194 (2018).

for the criminal prosecution of the contemnor.”<sup>173</sup> After Congress certifies the contempt citation to the executive branch, the United States Attorney for the District of Columbia takes over and can choose to refer the individual to a grand jury.<sup>174</sup> However, “[e]xisting OLC precedent holds that ‘the criminal contempt of Congress statute does not apply to executive officials who assert claims of executive privilege at the direction of the President.’”<sup>175</sup> Although it remains an open question, in practice it seems that the claim of executive privilege can be of any sort of executive privilege. Thus, when a president makes a protective assertion of executive privilege, executive branch officials receive the same relief from criminal contempt as they would have if the president had asserted the standard form of executive privilege.<sup>176</sup> Moreover, this is true even if the materials over which the president has made the protective assertion do not fall within the categories typically subject to the standard form of executive privilege.<sup>177</sup>

President Clinton’s invocation of the protective assertion of executive privilege was a temporary measure. Two weeks later, Attorney General Reno issued an opinion listing the documents

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<sup>173</sup> GARVEY, *supra* note 167.

<sup>174</sup> See *Prosecution for Contempt of Cong. of an Exec. Branch Official Who Has Asserted a Claim of Exec. Privilege*, 8 Op. O.L.C. 101, 102, 110, 118–22, 142 (1984) (providing the basis for the United States Attorney of the District of Columbia “retain[ing] some discretion with respect to referral of a contempt of Congress citation to a grand jury.”). The United States Attorney for the District of Columbia, under the guidance of the incumbent Department of Justice, often declines to prosecute a congressional contempt citation when the subject of the citation is an executive branch official. This refusal to prosecute further frustrates Congress’s ability to obtain materials and testimony from executive branch officials. See, e.g., Fred Barbash, *Congress’s Subpoena Power Is Not What It Used To Be*, WASH. POST (Apr. 3, 2019, 6:58 PM), [https://www.washingtonpost.com/world/national-security/congress-subpoena-power-is-not-what-it-used-to-be/2019/04/03/cf32e1de-5638-11e9-8ef3-fbd41a2ce4d5\\_story.html](https://www.washingtonpost.com/world/national-security/congress-subpoena-power-is-not-what-it-used-to-be/2019/04/03/cf32e1de-5638-11e9-8ef3-fbd41a2ce4d5_story.html) [<https://perma.cc/85N2-ESJV>]; *Lois Lerner Not Charged with Criminal Contempt in IRS Controversy*, THE GUARDIAN (Apr. 1, 2015, 5:12 PM), <https://www.theguardian.com/us-news/2015/apr/01/lois-lerner-criminal-contempt-charges-irs> [<https://perma.cc/37S5-H8YW>]; *Panel Absolves Mrs. Burford*, N.Y. TIMES (June 25, 1983), <https://www.nytimes.com/1983/06/25/us/panel-absolves-mrs-burford.html> [<https://perma.cc/AJ4W-5NNE>].

<sup>175</sup> See Shaub, *Protective Assertion*, *supra* note 159. In other words, this position “applies only to executive branch officials acting pursuant to a presidential assertion of privilege.” See *id.*

<sup>176</sup> See *id.* (“A protective assertion of privilege relieves the executive branch official . . . from any concerns about contempt, but it also eliminates, at least temporarily, the need to weigh privilege for each individual document.”).

<sup>177</sup> See *id.* (describing how protective assertions of executive privilege provide “the executive branch a backdoor way to assert privilege over information that does not necessarily fall within the traditional components of executive privilege.”).

over which Clinton could formally invoke executive privilege.<sup>178</sup> However, in its ongoing disputes with Congress, the Trump Administration threatens to pervert the principles behind protective assertions of executive privilege.

On May 8, 2019, President Trump made a protective assertion of executive privilege in response to the House Judiciary Committee's intention to hold Attorney General William Barr in contempt of Congress for failing to comply with a Committee subpoena to turn over the unredacted Mueller Report and the underlying materials.<sup>179</sup> President Trump's protective assertion of executive privilege represents only the second time that this form of executive privilege has ever been invoked.<sup>180</sup> The infrequency of protective assertions of executive privilege means that there is little guidance as to its parameters and limits. In short, its use is potentially unfettered:

[A]s a theoretical matter, it's not readily apparent that the Trump administration would need to act that quickly [to identify materials over which it will formally assert executive privilege] in this case, assuming it could; nor that it would feel that it is required to ever formally follow up the protective assertion with a conclusive assertion of executive privilege.<sup>181</sup>

It is possible then that the Trump Administration, and future occupants of the White House, may begin to utilize protective assertions of executive privilege as ends in and of themselves, without regard to ever formally asserting executive privilege.

Ideally, the executive branch would not pursue such a course in utilizing protective assertions of executive privilege. However, as the trend for executive power is towards expansion rather than contraction,<sup>182</sup> and as presidents are loath to give up any of the increases in executive power that their predeces-

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<sup>178</sup> Reno Memorandum, *supra* note 161.

<sup>179</sup> See Rachael Bade, Carol D. Leonnig & Matt Zapotosky, *Trump Asserts Executive Privilege Over Mueller Report; House Panel Holds Barr in Contempt*, WASH. POST (May 8, 2019, 7:34 PM), [https://www.washingtonpost.com/politics/barr-to-trump-invoke-executive-privileged-over-redacted-mueller-materials/2019/05/07/51c52600-713e-11e9-b5ca-3d72a9fa8ff1\\_story.html](https://www.washingtonpost.com/politics/barr-to-trump-invoke-executive-privileged-over-redacted-mueller-materials/2019/05/07/51c52600-713e-11e9-b5ca-3d72a9fa8ff1_story.html) [<https://perma.cc/WU7S-L28C>]; see also Shaub, *Protective Assertion*, *supra* note 159 ("President Trump has formally asserted executive privilege in response to the House judiciary committee's plan to hold Attorney General William Barr in contempt of Congress for failing to comply with the committee's subpoena seeking the full, unredacted Mueller report and the underlying documents.").

<sup>180</sup> See Shaub, *Protective Assertion*, *supra* note 159.

<sup>181</sup> *Id.*

<sup>182</sup> Glenn Sulmasy, *Executive Power: The Last Thirty Years*, 30 U. PA. J. INT'L L. 1355, 1355 (2009) ("Regardless of which political party controls the Congress, the institution of the executive continues to grow and increase in power. . . .").



sors achieved,<sup>183</sup> it is highly unlikely that future presidents will eschew such a use of protective assertions of executive privilege.

In spite of this, a crime-fraud exception to executive privilege would serve as a meaningful check on this proliferation of executive branch power and represent an expansion of Congressional power for two reasons. First, it would enable Congress to access withheld materials in the face of a protective assertion of executive privilege despite the loss of the contempt power and the leverage it provides.<sup>184</sup> In other words, in cases of criminality or fraud, Congress would be able to pierce the confidentiality that the privilege typically provides and acquire the materials in question even though it has lost the ability to coax individuals into cooperating. In sum, a crime-fraud exception to executive privilege would offset the loss of the contempt power by enabling an investigating Congress to achieve its ultimate goal: access to withheld materials.

Second, a crime-fraud exception to protective assertions of executive privilege would prevent evidence of unlawful activity that is of a type typically beyond the scope of executive privilege from receiving the confidentiality that the protective assertion provides.<sup>185</sup> In the absence of a crime-fraud exception to executive privilege, a president can make a protective assertion of executive privilege over a wide swath of materials that contains evidence of unlawful activity, including items that do not fall within one of the privileged categories.<sup>186</sup> Though the evidence of unlawful conduct may technically be unprivileged, a protective assertion would nevertheless sweep it under the umbrella of confidentiality.<sup>187</sup> Furthermore, as the courts have yet to resolve whether a protective assertion of executive privilege has a bounded duration, the executive branch official would receive the protection of the privilege for an indefinite period. Thus, a

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<sup>183</sup> See *id.* at 1366.

<sup>184</sup> The proposed crime-fraud exception would also permit a Congressional Committee to access documents and testimony over which executive privilege has been claimed in spite of a refusal by the United States Attorney for the District of Columbia to prosecute a congressional contempt citation. See note 173 and accompanying text.

<sup>185</sup> See Shaub, Protective Assertion, *supra* note 159 (explaining how the scope of protective assertions of executive privilege is broader than that of actual executive privilege).

<sup>186</sup> See *supra* p. 130.

<sup>187</sup> See Shaub, Protective Assertion, *supra* note 158. For example, protective assertions of executive privilege conceal grand jury materials and the privacy of the individual or individuals who are the subject of a grand jury, neither of which fall within the categories of information that actual executive privilege protects. See *id.* See *supra* p. 130.

president can hypothetically conceal information related to executive branch misconduct, whether constituting a traditionally privileged category or not, until he or she leaves office and potentially beyond under the guise of executive privilege.<sup>188</sup>

A crime-fraud exception would prevent such an occurrence. It would give Congress recourse to the courts to argue for access to withheld materials related to unlawful conduct and, in doing so, bypass the wide net of confidentiality that protective assertions of executive privilege typically cast. Simultaneously, a crime-fraud exception would respect the executive branch's prerogatives and interest in confidentiality, as the executive branch would still receive all the benefits of a protective assertion of executive privilege if the court does not find evidence of criminal or fraudulent conduct in the subpoenaed materials during an *in camera* review.<sup>189</sup> Thus, a crime-fraud exception would punch a hole in the fabric of this novel use of executive privilege in cases of criminal or fraudulent conduct while preserving the privilege when it is asserted in the context of lawful activity.

#### CONCLUSION

When the moment summons Congress to investigate executive branch misconduct, it would be foolish to deprive Congress of the tools it needs to be thorough and decisive. Yet for more than two centuries, despite being the only branch of government that can impeach officials,<sup>190</sup> Congress has performed its oversight duties with one arm tied behind its back by executive privilege. Moreover, Congress has traditionally been damned if it does litigate and damned if it doesn't when faced

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<sup>188</sup> There is some precedent for a president refusing to testify before Congress following the end of his or her presidency. *Text of Address by Truman Explaining to Nation His Actions in the White Case*, N.Y. TIMES (Nov. 17, 1953), <https://timesmachine.nytimes.com/timesmachine/1953/11/17/83740732.html?pageNumber=26> [<https://perma.cc/D8GG-V3VP>] ("It is just as important to the independence of the Executive that the actions of the President should not be subjected to the questioning by the Congress [sic] after he has completed his term of office as that his actions should not be questioned while he is serving as President."). There is also precedent for former presidential advisors enjoying immunity from congressional (should this be capitalized?) testimony following their tenures in the executive branch. See, e.g., Immunity of Former Counsel to the President from Compelled Cong. Testimony, 31 Op. O.L.C. 191, 191 (2007) (laying out the justification for former White House Counsel Harriet Miers's refusal to provide testimony in response to a subpoena by the Committee on the Judiciary of the House of Representatives).

<sup>189</sup> See Introduction, *supra* p. 110 (discussing the *Zolin* standard of review for attorney-client privilege).

<sup>190</sup> U.S. CONST. art. I, § 2.

with an assertion of executive privilege. If it does litigate, courts will more than likely avoid the merits of the case on procedural grounds and direct Congress and the executive branch to negotiate a solution, despite the fact that Congress and the government are before a court in the first place because they could not negotiate a solution.<sup>191</sup> If Congress does not litigate, it abdicates one of the key responsibilities of its institution and cedes more ground to the executive branch, thereby exacerbating its own impotence and making a joke of the separation of powers and checks and balances that characterize the American system of governance.

A crime-fraud exception to assertions of executive privilege in response to congressional subpoenas would help level the playing field between the two branches in those moments when Congress is most needed to serve as a check and balance on the executive branch. A crime-fraud exception would signal to executive branch officials that executive privilege will not conceal their malfeasance; would counteract hyperpartisanship as a force that insulates executive branch officials from the consequences of their actions; and would rein in the expansive reach of protective assertions of executive privilege.<sup>192</sup> For years, Congress has surrendered power to the executive branch.<sup>193</sup> A crime-fraud exception to executive privilege would help it take some of that power back.

The Trump era has served as a crucible for the institutions that comprise the American system of governance. In some cases, it has highlighted their strengths and given us reason to celebrate the genius and foresight of the minds that forged it. In other cases, it has exposed our institutions' limitations and forced them into situations they are ill-equipped to handle. A crime-fraud exception to executive privilege would rectify a major weakness in the oversight function of the legislative branch and allow Congress to more faithfully serve as a check and balance on the executive branch in accordance with the Constitution's separation of powers. In the United States, "No one is

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<sup>191</sup> See, e.g., *United States v. House of Representatives*, 556 F. Supp. 150, 153 (D.D.C. 1983).

<sup>192</sup> See Shaub, *Protective Assertion*, *supra* note 159.

<sup>193</sup> See Dana Nelson, *The Growth of Executive Power Has Turned Politics into War*, WASH. POST (Mar. 8, 2016), <https://www.washingtonpost.com/news/in-theory/wp/2016/03/08/the-growth-of-executive-power-has-turned-politics-into-war/> [<https://perma.cc/S5CL-6KV8>] ("[A]s experts approvingly concede, the president has become the main agent within U.S. democracy. Presidential government replaced congressional government over the course of the 20th century.").

above the law” is a common refrain. A crime-fraud exception to executive privilege would help render this aphorism a reality.