Department of Justice

STATEMENT OF

CHRISTOPHER SCHROEDER
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL
DEPARTMENT OF JUSTICE

BEFORE THE
SUBCOMMITTEE ON FEDERAL COURTS, OVERSIGHT, AGENCY ACTION, AND FEDERAL RIGHTS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

AT A HEARING ENTITLED

"BREAKING THE LOGJAM PART 2: THE OFFICE OF LEGAL COUNSEL'S ROLE IN SHAPING EXECUTIVE PRIVILEGE DOCTRINE"

PRESENTED
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Mr. Chairman, Ranking Member Kennedy, and Members of the Subcommittee, I appreciate the opportunity to appear here today to present the views of the Department of Justice concerning some recurring issues that arise in the accommodation process between the Executive Branch and Legislative Branch in the course of congressional oversight. The Department shares the Subcommittee's interest in a productive dialogue about these issues.

My testimony focuses on four points: (i) the vital role of congressional oversight in protecting our democracy; (ii) corresponding Executive Branch interests that can be implicated by congressional requests for information; (iii) the nature of the constitutionally mandated accommodation process and this Administration's commitments to cooperation and the accommodation process; and (iv) the roles the Office of Legal Counsel ("OLC") can play with respect to the accommodation process.

I.

Congressional oversight is vital to our functioning democracy. As a former chief counsel to the Senate Judiciary Committee, I can particularly appreciate that Congress's oversight authority is essential to the performance of its constitutional functions. Congress's authority to investigate "is inherent in the legislative process," *Watkins v. United States*, 354 U.S. 178, 187 (1957), and "'is an essential and appropriate auxiliary to the legislative function,'" *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031 (2020) (quoting *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927)). As the Supreme Court has explained, Congress's investigative authority extends to subjects on which it may legislate and "encompasses inquiries into the administration of existing laws, studies of proposed laws, and 'surveys of defects in our social, economic or political system for the purpose of enabling Congress to remedy them.'" *Id.* (quoting *Watkins*, 354 U.S.

at 187); *see generally Ways and Means Committee's Request for the Former President's Tax Returns and Related Tax Information Pursuant to 26 U.S.C. § 6103(f)(1)*, 45 Op. O.L.C. __, at *19–21 (July 30, 2021). My time as a chief counsel on this Committee also imbued in me a strong appreciation of oversight in promoting accountability in government. Diligent oversight is "the proper duty of a representative body." *Mazars*, 140 S. Ct. at 2033 (internal quotation marks omitted).

Congressional oversight can be valuable to the Executive Branch as well. As the Department explained in its 2000 letter to Representative John Linder, the "information that committees gather in this oversight capacity is . . . important for the Executive Branch in the future implementation of the law and its participation in the legislative process. We have found that the oversight process can shed valuable light on Department operations and assist our leadership in addressing problems that might not otherwise have been clear." Letter for John Linder, Chairman, Subcommittee on Rules and Organization of the House Committee on Rules, from Robert Raben, Assistant Attorney General, Office of Legislative Affairs, at 1 (Jan. 27, 2000) ("Linder Letter").

II.

At the same time, Congress's authority to obtain information from the Executive Branch is expansive but not absolute both because Congress's power of inquiry is constitutionally limited and because such demands can implicate important Executive Branch interests and practical considerations. *See, e.g.*, *McGrain*, 273 U.S. at 173–74. If, for instance, this Subcommittee were to demand the production of one million documents by tomorrow, it would be logistically impossible for the Executive Branch to comply. And if the Subcommittee were, for example, to demand the case file of an ongoing, active criminal investigation, the Executive Branch would also be unable to comply. Disclosure of information in an active criminal investigation could undermine the investigation and future prosecutorial efforts, and harm the reputation of the target of a criminal investigation even though a criminal complaint may ultimately not be filed. The Linder Letter discusses such issues at length. *See* Linder Letter at 3–5.

The Constitution confers upon the President the power to "safeguard[] the public interest in candid, confidential deliberations within the Executive Branch," *Mazars*, 140 S. Ct. at 2032 (citing *United States v. Nixon*, 418 U.S. 683, 708, 715 (1974)), as well as military, diplomatic, and national security information. Such confidentiality is "fundamental to the operation of Government." *Nixon*, 418 U.S. at 708. The need for confidentiality is especially acute with respect to presidential decisionmaking communications and information involving national security and foreign affairs. Confidentiality is also important for Executive Branch deliberative processes, as well as for attorney-client communications and attorney work product. And for the reasons we explained at length in the Linder Letter, it is especially important to preserve the confidentiality of ongoing criminal investigations. *See* Linder Letter at 3–5. Presidents throughout the country's history, dating back to the Washington Administration, have exercised their constitutional authority to protect the Executive Branch's functioning and the public interest more broadly in response to congressional requests for information. *See History of Refusals by*

Executive Branch Officials to Provide Information Demanded by Congress, 6 Op. O.L.C. 751 (1982).

III.

Hard questions, of course, arise when the institutional interests of Congress and the Executive Branch pull in opposite directions. The constitutional separation of powers positions the two political Branches in "an ongoing relationship that the Framers intended to feature both rivalry and reciprocity." *Mazars*, 140 S. Ct. at 2026. "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634, 635 (1952) (Jackson, J., concurring). The Constitution structures some of this relationship with precision, such as the system of bicameralism and presentment. *See I.N.S. v. Chadha*, 462 U.S. 919 (1983). Other aspects of the relationship, however, are left flexible, to be managed by the interaction of the two political Branches in a manner that allows each to accomplish its constitutionally assigned functions. *See Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443 (1977). In these more flexible areas, the practices that the two Branches have developed over many years are critically important in fashioning a workable government.

When a congressional request for information that is premised on a legitimate legislative interest implicates Executive Branch confidentiality or other institutional interests, the Executive Branch does not simply disregard the request. As Attorney General Garland has explained, Congress's "oversight responsibility . . . is a vital duty imposed by the Constitution." Responses to Questions for the Record to Judge Merrick Garland, Nominee to Be United States Attorney General at 35. "[I]t is important for the [Justice] Department," as it is for all agencies, "to be responsive to Congress in a timely fashion as appropriate." *Id.* The Department should "not use any excuse to not answer" requests for information from Congress. Attorney General Confirmation Hearing, Day 1, C-SPAN at 4:27 (Feb. 22, 2021). Instead, the Executive Branch seeks to meet Congress's requests in a manner that does not jeopardize its own interests.

In these situations, the two Branches historically have negotiated resolutions to satisfy each Branch's needs and interests, if not always all of what either Branch desires. This tradition of negotiation and compromise has come to be known as the accommodation process.

As the D.C. Circuit explained in *United States v. American Telephone & Telegraph Co.*, the Constitution itself "contemplates" that process:

> The framers, rather than attempting to define and allocate all governmental power in minute detail, relied . . . on the expectation that where conflicts in scope of authority arose between the coordinate branches, a spirit of dynamic compromise would promote resolution of the dispute in the manner most likely to result in efficient and effective functioning of our governmental system. Under this view, the coordinate branches do not exist in an exclusively adversary relationship to one another when a conflict in authority arises. Rather, each branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation

> through a realistic evaluation of the needs of the conflicting branches in the particular fact situation.

567 F.2d 121, 127 (D.C. Cir. 1977) (footnote omitted). "Negotiation between the two branches should thus be viewed as a dynamic process affirmatively furthering the constitutional scheme." *Id.* at 130. This constitutionally mandated accommodation process often results in an acceptable "*modus vivendi*," *id*., in which each Branch refrains from demanding strict adherence to the constitutional prerogatives it understands itself to possess and accepts instead a compromise as the most effective and efficient resolution.

Discussions between a committee and an agency in the accommodation process typically concern how to narrow or prioritize the committee's requests in light of the Executive Branch's interests and the committee's particular needs. For example, the committee might more clearly explain why the information is critical to its legislative efforts and might narrow the request to omit some or all of the information where production would compromise Executive Branch interests. For its part, the agency may be able to produce or permit modes of access to certain information. For instance, the agency might brief the committee on the information subject to the request, present summaries of the desired information, or supply a subset or partially redacted set of the requested documents. Because public disclosure might have a greater impact on Executive Branch confidentiality and other interests than sharing with Congress, an agency will sometimes provide for *in camera* review of certain materials. In these and other ways, each Branch will attempt to reach an acceptable compromise that satisfies the other Branch's legitimate needs.

This accommodation process is the subject of President Reagan's 1982 memorandum to the heads of executive agencies. *See* Memorandum for the Heads of Executive Departments and Agencies, from Ronald Reagan, *Re: Procedures Governing Responses to Congressional Requests for Information* (Nov. 4, 1982) ("Reagan Memorandum").

The Reagan Memorandum directs agencies to "comply with Congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch." *Id.* at 1. As the Memorandum explains, the Executive Branch should make good-faith attempts to accommodate Congress's requests for information, just as Congress is obliged to make good-faith attempts to accommodate the Executive Branch's confidentiality and other interests when requesting that information and negotiating a resolution. This tradition of negotiation and compromise is the cornerstone of the accommodation process.

As the Reagan Memorandum makes clear, the process of negotiation and compromise is the "primary means of resolving conflicts between the Branches." *Id.* In recent decades, there have been a handful of instances in which the Executive Branch and Congress have reached impasse, resulting in a presidential assertion of executive privilege. These instances are well known and the subject of extensive attention. Several were the subject of litigation or OLC opinions. But they are the exceptions, not the rule, and too often in public discourse they are allowed to overshadow the overwhelming record of accommodation achieved by both Branches. Successful compromises, generally achieved without fanfare, though not necessarily to the complete satisfaction of either side, often are made possible when both Branches hew to the

accommodation process: It "is not simply an exchange of concessions or a test of political strength. It is an obligation of each branch to make a principled effort to acknowledge, and if possible to meet, the legitimate needs of the other branch." *Assertion of Executive Privilege in Response to a Congressional Subpoena*, 5 Op. O.L.C. 27, 31 (1981). A presidential invocation of executive privilege occurs only as a last resort "in the most compelling circumstances, and only after careful review demonstrates that assertion of the privilege is necessary." Reagan Memorandum at 1. Only in those rare cases where the two parties are unable to reach a mutually acceptable compromise that accounts for the needs of both Branches does the Executive Branch consider the assertion of privilege. As the Supreme Court has counseled:

> Executive privilege is an extraordinary assertion of power "not to be lightly invoked." *United States v. Reynolds*, 345 U.S. 1, 7 (1953). Once executive privilege is asserted, coequal branches of the Government are set on a collision course . . . . These "occasion[s] for constitutional confrontation between the two branches" should be avoided whenever possible. *United States v. Nixon*, [418 U.S.] at 692.

Cheney v. U.S. Dist. Ct. for D.C., 542 U.S. 367, 389–90 (2004).

Disputes over information requests have been resolved using this "tradition of negotiation and compromise" for more than 200 years. *Mazars*, 140 S. Ct. at 2029–31. Yet the accommodation process can only operate properly when both Branches of government are approaching it in the same spirit of good faith. Just as the Executive Branch should not pretermit the accommodation process by refusing to engage with a congressional committee that has propounded a request based on a legitimate legislative need, or by making a premature assertion of executive privilege, Congress should not act to compel production of documents or testimony, or use other coercive means to accomplish its ends, before the negotiation process has run its course. I reiterate today this Administration's firm commitment to the accommodation process.

IV.

I will conclude by describing several roles that the Office of Legal Counsel can play with respect to the accommodation process.

First, as part of its responsibility to provide "legal advice to the various agencies of the Government," 28 C.F.R. § 0.25(a), OLC provides informal counseling to agencies about Congress's oversight authority and Executive Branch positions and institutional interests in order to help them respond to oversight requests in a manner consistent with longstanding practice. However, OLC does not monitor incoming congressional requests or the Executive Branch's responses. Nor does the Office participate in the negotiations between committees and agencies during the accommodation process, or act as a referee between them during that process. In the context of oversight requests directed toward the Department of Justice, OLC's advice is more extensive than with other agencies, *see id.* § 0.25, but OLC does not make the Department's decisions on responding to requests.

Second, OLC plays a distinct role in those rare cases where the accommodation process breaks down and the agency is considering whether to request that the President assert executive

privilege. In such cases, OLC participates more substantially in deliberations with the agency and the White House Counsel's Office about the potential need and basis for a presidential assertion of executive privilege, as described in the numbered paragraphs of the Reagan Memorandum. If a decision is made to request such an assertion, OLC will prepare an Attorney General opinion to the President setting forth the legal basis for the President's possible assertion.

Finally, on relatively rare occasions, OLC is asked to address a novel legal question that arises following a congressional request for information, which it may do in a formal opinion or other written legal advice. OLC has also occasionally issued general guidance in a freestanding opinion about oversight or executive privilege that is not tied to a particular oversight dispute.

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Thank you for the opportunity to discuss these important issues. I look forward to answering any questions the Subcommittee may have.