Executive Privilege and Inspectors General

Andrew McCanse Wright*

Inspectors general were created by statute to bring internal accountability to the Executive Branch and assist Congress with its oversight responsibilities. That status—housed in the Executive Branch with a congressional-assistance mandate—often places inspectors general on the horns of a separation-of-powers dilemma. How congressional committees and courts address executive privilege claims will shape the legal consequences facing agencies and departments when considering whether to provide records to an inspector general. Those consequences, in turn, will materially affect the effectiveness of the inspectors general corps.

I. Introduction

Dating back to Senate demands for information about President George Washington's instructions for the negotiations of the Jay Treaty, Congress and the Executive have regularly locked in struggles over legislative demands for information.[1] The intensity of longstanding struggles ebbs and flows with divided versus unified government and political polarization.[2] However,

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*Partner, K&L Gates; Senior Fellow and Founding Editor, *Just Security*, New York University School of Law. I worked on some of the oversight matters referenced in this Article at the White House, but I rely solely on factual information contained in the public domain or otherwise nonconfidential sources. I am grateful to Steve Vladeck and the *Texas Law Review* for inviting me to participate in the timely Symposium, Reclaiming—and Restoring—Constitutional Norms, to the American Constitution Society for supporting my participation, and to Caprice Roberts and the faculty of American University Washington College of Law for their helpful comments.

1. *See* Letter from President George Washington to the House of Representatives (Mar. 30, 1796), http://gwpapers.virginia.edu/documents/washingtons-response-to-a-congressional-request-for-documents-30-march-1796/ [https://perma.cc/3J6U-MUM5] (refusing to turn over treaty-negotiation instructions because of diplomatic sensitivities).

2. *See, e.g.*, Douglas L. Kriner & Eric Schickler, *Investigating the President: Committee Probes and Presidential Approval, 1953–2006*, 76 J. POL. 521, 521 (2014) ("Marshaling an original data set of more than 3,500 investigative hearings and over 50 years of public opinion data, we show that increased investigative activity in the hearing room significantly decreases the president's job approval rating."); David C.W. Parker & Matthew Dull, *Divided We Quarrel: The Politics of Congressional Investigations, 1947–2004*, 34 LEGIS. STUD. Q. 319, 321–22 (2009) (finding "congressional investigations activity increases during periods of divided government" and noting that "[d]ivided government is clearly related to an increase in the number and intensity of congressional investigations in the House of Representatives, but evidence of this relationship is much weaker in the Senate"); *see also* DAVID R. MAYHEW, DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946–2002, 3 (2d ed. 2005) (noting the theory that "Congress acting as an investigative body will give more trouble to the executive branch when a president of the opposite party holds power"); Douglas Kriner & Liam Schwartz, *Divided Government and Congressional Investigations*, 33 LEGIS. STUD. Q. 295, 298 (2008) ("[T]he willingness of Congress to exercise its oversight powers to constrain the executive is conditional on whether or not investigations serve the electoral interests of the majority party."); Robert J.

beneath that partisan fluctuation lies a fairly stable, and largely incompatible, institutional understanding of executive privilege in the Legislative and Executive Branches.[3]

Inspectors general (IGs) occupy a unique space in between the warring political branches. Creatures of statute, they are a fairly recent innovation. As a matter of formal legal doctrine, inspectors general sit in the Executive Branch. By statutory design, they have some measure of institutional independence in order to create space for their mandate to root out fraud, waste, and abuse within executive agencies and departments.[4] As the administrative state of the federal government has grown, IGs have become an essential component of the overall government-accountability-and-integrity regime.[5]

Their status in the tug-of-war is often as much a function of norms, practical politics, and personalities involved as it is their statutory authorities or role in the constitutional order.

At times, IGs can be closer to their congressional patrons than their home agency. At other times, the IG may be protective of its parent department from perceived congressional overreach. And there lurks a risk that an IG will play both sides against the middle. These risks are ever present, and the problems they present to the system are dependent on the facts of the specific matter, the congressional need for information, and the Executive Branch confidentiality interests at issue.

Executive privilege involving records in IGs' possession brings these underlying tensions to a head. What effect, if any, does production of confidential department documents to the IG have on executive privilege claims? What effect does IG publication of some of that confidential

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McGrath, *Congressional Oversight Hearings and Policy Control*, 38 LEGIS. STUD. Q. 349, 362 (2013) (concluding that "there are significantly more oversight hearing days for committees controlled by the presidential out-party than for those controlled by the party of the president").

3. *See* Andrew McCanse Wright, *Constitutional Conflict and Congressional Oversight*, 98 MARQ. L. REV. 881, 889 (2014) ("Such situational partisan disputes play out against the backdrop of remarkably stable, but conflicting, institutional perspectives of Capitol Hill and the White House.").

4. *See generally* PAUL C. LIGHT, MONITORING GOVERNMENT: INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY (1993) (studying the impact of different models of accountability in the Inspector General Act of 1978).

5. *See* Shirin Sinnar, *Internal Oversight and the Tenuous Protection of Norms*, 93 N.Y.U. L. REV. ONLINE 61, 62 (2018) ("Legal offices, Inspectors General (IGs), civil rights and compliance offices, independent agencies like the Office of Special Counsel or the Privacy and Civil Liberties Oversight Board, and the bureaucracy itself are part of an 'ecosystem' of accountability."); *see also* Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 442–47 (2009) (describing the dynamic and mutually reinforcing relations between entities external to the Executive Branch and accountability institutions, including inspectors general, internal to the Executive Branch).

information in its report have on waiver of executive privilege over the larger set of records? In other words, can Congress effectively use inspectors general as a backdoor conduit to obtain records over which the President could otherwise validly assert executive privilege?

These are some of the questions presented once the tussle over Executive Branch records shifts onto the IG battleground. And a ruling by the United States District Court for the District of Columbia in the congressional-subpoena litigation related to controversial gun-trafficking investigation tactics in Operation Fast and Furious gave little solace to the Executive Branch that cooperation with inspectors general will preserve the President's privilege interests vis-à-vis Congress. That ruling may therefore have the unintended effect of undermining the effectiveness of inspectors general by intensifying records-access disputes with their home agency.

II. Inspectors General: A Primer

Congress created inspectors general in the mid-1970s to counter fraud, waste, and abuse within the federal government.[6] The Inspector General Act of 1978[7] governs most inspectors general.[8] It establishes IGs' appointment and removal processes and defines their powers and duties. In general, IG offices are comprised of permanent, nonpartisan staff that conduct investigations and audits of federal agencies, programs, and operations. Offices of inspectors general (OIGs) exist in over seventy federal agencies, including all the Executive Branch departments, large agencies, and many boards, commissions, and other entities.[9]

Congress granted inspectors general "substantial independence . . . to audit, investigate, and evaluate federal programs . . . ."[10] A former Inspector General of the General Services Administration observes, "IGs are within the executive branch but function with some degree of independence."[11]

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6. WENDY GINSBERG & MICHAEL GREENE, CONG. RESEARCH SERV., R43814, FEDERAL INSPECTORS GENERAL: HISTORY, CHARACTERISTICS AND RECENT CONGRESSIONAL ACTIONS 1 (2016).

7. Pub. L. No. 95-452, 92 Stat. 1101 (1978) (codified as amended at 5 U.S.C. app. §§ 1–13) [hereinafter IG Act].

8. Three military inspectors general offices are established by separate legislation, and have different origins, authorities, and degrees of independence from those agencies covered by the IG Act. *See* 10 U.S.C. § 3020 (2012) (Army); 10 U.S.C. § 5020 (2012) (Navy); 10 U.S.C. § 8020 (2012) (Air Force). The military inspectors general can raise the same separation-of-powers complexities presented by executive privilege.

9. GINSBERG & GREENE, *supra* note 6, at 1. Several Legislative Branch entities also have inspectors general, including the Library of Congress, the Government Accountability Office, and the Government Printing Office. They are not the subject of this Article.

10. *Id.*

11. Brian Miller, *Independence of Inspectors General Should Not Be Compromised by Congress*, HILL (Aug. 13, 2018), https://thehill.com/opinion/white-house/401491-independence-of-

Notwithstanding their locus in the Executive Branch, they also have a statutory mandate "to assist Congress in its oversight duties."[12] Thus, inspectors general find themselves juxtaposed between status as an Executive Branch entity and a statutory mandate to assist Congress with oversight.

An inspector general's powers to effect change largely flow from norm-based, rather than formal, enforcement mechanisms. Inspectors general have the ability to publish reports outlining misconduct, attract congressional opprobrium for their investigative targets, generate negative media stories, or refer matters to law enforcement agencies.[13] Thus, both the inspector general's mandate and influence are tied to congressional patronage while they sit within an Executive Branch that expects its confidences to be maintained.

III. Executive Privilege: A Primer

Executive privilege represents an assertion of presidential authority to preserve Executive Branch confidentiality interests by withholding information from a judicial or congressional proceeding.[14] Executive privilege doctrine encompasses a bundle of components that cover a range of Executive Branch confidentiality interests.[15] The Executive has confidentiality interests in presidential communications, deliberative processes, investigative integrity, state secrets, and citizen civil liberties that it may seek to shield from disclosure. Such claims can arise in legislative

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inspectors-general-should-not-be-compromised-by-congress [https://perma.cc/5HUE-7YUD].

12. GINSBERG & GREENE, *supra* note 6, at 1.

13. Sinnar, *supra* note 5, at 62 (noting that "most internal oversight institutions have no power to compel executive action or order sanctions for violations" but rather "their power to constrain executive action depends on their ability to investigate, persuade, and/or shame").

14. *See, e.g.*, TODD GARVEY, CONG. RESEARCH SERV., R42670, PRESIDENTIAL CLAIMS OF EXECUTIVE PRIVILEGE: THEORY, LAW, PRACTICE, AND RECENT DEVELOPMENTS 1 (2014) (discussing the modern history of presidential privilege, including the broad contours arising from the Nixon administration); Mark J. Rozell & Mitchel A. Sollenberger, *Presidents: Executive Privilege*, *in* ENCYCLOPEDIA OF PUBLIC ADMINISTRATION AND PUBLIC POLICY (3d. ed. 2015) ("*Executive privilege* is the constitutional principle that permits the president and high-level executive branch officers to withhold information from Congress, the courts, and ultimately the public."); Archibald Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383, 1383 (1974) ("Occasionally Presidents asserted a right to withhold information either for themselves or on behalf of their subordinates, and the claim came to be known as 'executive privilege.'"); Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489, 493 (2007) (arguing that executive privilege runs counter to Congress's "sweeping clause" [another name for the Necessary and Proper Clause] power and the principle of political dialogue presumed within the Constitution).

15. *See, e.g.*, Assertion of Exec. Privilege over Comm. Regarding EPA's Ozone Air Quality Standards and Cal.'s Greenhouse Gas Waiver Request, 32 Op. O.L.C., slip op. at 3 (June 19, 2008) (discussing "presidential communications and deliberative process components of executive privilege").

inquiries, criminal investigations, and civil litigation involving private parties, especially litigation arising under the Freedom of Information Act (FOIA).[16]

Executive Branch interests in secrecy sit in stark tension with the information needs of other actors, including congressional oversight committees, grand juries, and the public. Executive privilege thereby pits Executive Branch functionality against democratic transparency and accountability. For that reason, a presidential order to refuse to give evidence should be used sparingly. Even a fully valid and justifiable assertion of executive privilege can look like stonewalling. When a politically adverse Congress combines with a skeptical press corps that benefits from Executive Branch disclosure, assertions of privilege traditionally come at a political cost to the President.[17]

IV. The Awkward Position of the Inspector General in Privilege Disputes

Inspectors general sit at an awkward intersection between these interbranch disputes. On one hand, their situs within the Executive Branch should further congressional-accountability goals. Their internal status ought to facilitate access to confidential information that the Executive would seek to shield from Congress. Thus, inspectors general can formulate findings to signal to Congress that there has been Executive Branch misconduct without necessarily revealing contested information.[18] Due to certain instances of congressional overreach and an important legal ruling overruling an assertion of privilege, however, in a congressional-subpoena dispute, this model—an inspector general with unfettered access to agency records that might not be disclosed to Congress—is at risk. Instead, new incentives may exacerbate existing Executive Branch reticence to provide fulsome inspector general access to potentially privileged information.

Inspector general access to agency records has been a point of contention even in the absence of an underlying congressional dispute. In 2014, forty-seven inspectors general signed a letter to Congress outlining difficulties obtaining access to records from three Executive Branch entities:

16. 5 U.S.C. § 552 (2012). FOIA recognizes executive privilege interests in its statutory exemptions, although Executive Branch legal doctrine sources privileges to the Constitution.

17. *See* Todd David Peterson, *Contempt of Congress v. Executive Privilege*, 14 J. CONST. L. 77, 109 (2011) ("By requiring that the President himself assert the claim of privilege, it forces the President to be accountable for the decision to withhold documents from Congress and pay the political costs for such a decision.").

18. *See, e.g.*, Letter from Michael Horowitz, Inspector Gen., U.S. Dep't of Justice, to Senator Charles Grassley (Apr. 13, 2018) (providing investigative findings to the Senate in redacted format to protect "privacy interests of individuals" and offering a briefing instead of complying with the Senate request for the underlying investigative files) (on file with author).

the Peace Corps, the Chemical Safety and Hazard Investigation Board, and the Department of Justice.[19] Thereafter, a House committee held a hearing designed to pressure the Obama Administration into acquiescence to inspector general demands.[20]

Sometimes Congress seeks documents in the possession of the inspector general that the Department of Justice has refused to provide. A 2013–2014 dispute over documents requested of the Office of the Inspector General of the Department of the Interior by the House Committee on Natural Resources is illustrative.[21] Amid that standoff, Interior's Deputy Inspector General Mary Kendall testified before the committee, presenting a formalist view of the agency watchdog as a component of the Executive Branch. Her testimony is instructive of the cross-cutting tensions IGs operate under in subpoena fights between political branches:

> We have explained repeatedly that the claim of privilege is DOI's to assert—not the OIG's—and we have repeatedly asked that the Committee attempt to resolve the issue with DOI. We also explained that we have a long-standing understanding with DOI that it would not decline to provide privileged documents to the OIG so long as we gave DOI an opportunity to identify cognizable privileges, as it has here. We have also repeatedly expressed our concern that release of privileged information in this instance by the OIG will seriously impair our access to the same in the future.
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> Of even greater concern is that to release information against the assertion of privilege by DOI would add to the argument that other Federal agencies and departments would use to withhold information from their respective OIGs. This is not simply my assessment; it is a conviction shared by my colleagues in other IG offices.[22]

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19. Letter to Representative Darrell Issa, Senator Thomas R. Carper, Representative Elijah Cummings, and Senator Tom Coburn from forty-seven Inspectors Gen. (Aug. 5, 2014), https://www.grassley.senate.gov/sites/default/files/issues/upload/IG%20Access%20Letter%20to%20Congress%2008-05-2014.pdf [https://perma.cc/BH58-J35C].

20. *Obstructing Oversight: Concerns from Inspectors General: Hearing before the H. Comm. on Oversight and Gov't Reform*, 113th Cong. 3 (2014) (statement of Rep. Daryl Issa, Chairman, H. Comm. on Oversight and Gov't Reform) [hereinafter *Obstructing Oversight*].

21. *See* MAJORITY STAFF, OFFICE OF OVERSIGHT AND INVESTIGATIONS, H. COMM. ON NAT'L RES., HOLDING INTERIOR WATCHDOG ACCOUNTABLE: OVERSIGHT OF THE DEPARTMENT OF THE INTERIOR'S OFFICE OF INSPECTOR GENERAL 17 (2013) (detailing the committee staff's complaints about the Interior OIG leadership, including the failure to comply with a congressional subpoena).

22. *The Office of Inspector General's Ongoing Failure to Comply with a Subpoena for Documents about a Recent Investigation and Oversight of the Solicitor's Office Role and Responsibilities*: *Hearing Before the H. Comm. On Nat. Res.*, 113th Cong., 2d Sess. 8 (Sept. 11, 2014) (testimony of Mary L. Kendall, Deputy Inspector General for the Department of the Interior) [hereinafter *Testimony*].

Others have noted the vulnerability IGs face to noncooperation by their home agency due to their limited independence.[23] And inspectors general have objected to what they perceive as Executive Branch stonewalling.[24]

After addressing the problematic incentives created by congressional efforts to obtain department records in possession of the IG, she turns her attention to congressional accusations that the IG is demonstrating partiality to the Executive Branch by referring the dispute to the Department rather than complying with the subpoena.

> One of the Chairman's letters asserted that our actions to avoid getting pulled into an ongoing dispute between this Committee and the Department is indicative of our lack of independence. We feel certain that the opposite is true—that our independence and neutrality in a dispute between the Committee and the Department that has constitutional implications can only be advanced by the position we have repeatedly expressed: the information the Committee seeks belongs to the Department, and the Committee should be seeking that information from the Department, not from the OIG. We have also made this position clear to DOI, which concurs that it alone has the responsibility and authority to resolve the issues in dispute.
>
> Our position is also consistent with the position of other IG offices—if documents or information in the possession of the OIG that the agency claims as privileged is sought by a Congressional committee, the OIG would refer the committee to the agency.[25]

From Congress's perspective, failure to respond to a subpoena is indicative of IG capture. From the IG's perspective, it is neutrality. And from the Executive's perspective, failure to respond is properly preservative of Executive Branch equities because the OIG has possession but not legal custody of the contested information.

This testimony sets out the dilemma facing inspectors general when Congress pressures them for work papers and underlying agency records containing information the Executive Branch deems confidential and worthy of an assertion of executive privilege. If they comply with congressional demands, they risk future access to department records of a privileged nature. If they do not comply, they face congressional contempt.[26]

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23. *See* Sinnar, *supra* note 5, at 62 ("Located within the executive branch, they face a constant risk of cooptation or obstruction, all the more so when the same political party controls the presidency and Congress.").

24. *Obstructing Oversight*, *supra* note 20, at 42.

25. *Testimony*, *supra* note 22.

26. *See generally* Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. CHI. L. REV. 1083 (2009) (tracing the parliamentary origins of congressional contempt power and the development of its three forms of enforcement: inherent detention power, criminal prosecution, and

Inspectors general are thereby placed on the horns of the separation-of-powers dilemma. The political branches' divergent views driving the whipsaw effect on IGs are deeply rooted. They trace their origins to longstanding good-faith disagreements about the meaning of the Constitution as well as practical political self-interest.[27]

V. Three Risks to Executive Privilege Posed by Inspectors General

Thus, there are three principal ways production of agency records to inspectors general poses a risk to the President's ability to assert executive privilege in defense of executive branch confidentiality interests.

The first risk to the President's ability to preserve Executive Branch confidentiality interests is functional rather than legal. Once agency records are in possession of an OIG, the department or agency—and broader Executive Branch—have lost physical control of the information. As such, the OIG can potentially leak material to the media or Congress, or acquiesce to congressional demands to produce those records over the objection of the IG's home agency. This risk is always present due to the inspector general's degree of structural independence and centrality of congressional patronage, regardless of the incentive structure established by the doctrinal developments on executive privilege.[28] However, that omnipresent possibility will factor into an executive agency's overall risk assessment—driven in part by doctrinal developments—of whether to cooperate fully with an IG information request.

The second potential risk presented by Executive Branch information sharing with inspectors general is waiver doctrine. Like other evidentiary

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civil litigation).

27. *See generally* Andrew McCanse Wright, *Constitutional Conflict and Congressional Oversight*, 98 MARQ. L. REV. 881 (2014) (arguing congressional oversight disputes betray a deep canyon separating Congress and the President as to constitutional meaning, with hierarchy and legal entitlement characterizing the congressional perspective in regular conflict with an Executive Branch view that "congressional oversight requests are the opening salvo in an iterative negotiation process between co-equal branches" concerning the manner, form, quantity, or messenger of the information to be provided).

28. *See, e.g.*, Dara Lind, *Leaked Report: The Trump Administration Violated Court Orders in January's Travel Ban*, VOX (Nov. 21, 2017, 10:50 AM), https://www.vox.com/policy-and-politics/2017/11/21/16684466/inspector-general-dhs-trump-travel-ban [https://perma.cc/5VYG-RA7S] (describing a letter from the Department of Homeland Security inspector general to members of Congress complaining about the agency's review process related to potential attorney–client communications within the department); Charles S. Clark, *GSA Misrepresented White House Role, Costs of FBI Headquarters Decision, IG Says*, GOV'T EXECUTIVE (Aug. 27, 2018), https://www.govexec.com/oversight/2018/08/gsa-misrepresented-white-house-role-costs-fbi-headquarters-decision-ig-says/150845/ [https://perma.cc/XG9M-E4PG] (comparing a final publicly released inspector general report with a previously leaked version).

privileges, executive privilege can be waived.[29] Unlike many other privileges, however, executive privilege waiver is generally narrowly construed.[30] Here, it is not so much that the act of production to an IG would constitute a legal waiver of executive privilege. Rather, it is whether the inspector general's subsequent use of the records containing the confidential information in public documents amounts to a waiver.[31]

As John Bies observes, the Executive Branch needs to consider whether information over which the President contemplates asserting privilege has been waived. In order to faithfully make this determination, one must weigh the relevant considerations:

> This requires both a careful evaluation of what information has been acknowledged publicly and resolving complex legal questions about the scope of any potential waiver, which might differ depending on which aspect of the executive privilege is at issue. For instance, disclosure of an attorney-client communication is generally understood to waive all communications on the same subject. Conversely, the executive branch has typically understood the disclosure of information regarding agency deliberations or classified information to waive protection only of the specific information disclosed or officially acknowledged.[32]

Thus, production of agency records to an IG risks functional control over the information, and subsequent IG treatment of those records could alter the Executive's ability to preserve confidentiality interests.

On one hand, if the confidentiality interest is held by the Executive Branch, and the determination of whether to assert privilege is held by the President, it would be problematic for inspectors general unilaterally to disclose information that could constitute a waiver without formal consultation with the White House and Department of Justice. Of even more concern would be a narrower disclosure that has the legal effect of subject matter waiver for a broader set of information deemed privileged by the

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29. *See In re* Sealed Case (*Espy*), 121 F.3d 729, 741–42 (D.C. Cir. 1997) (holding the White House waived executive privilege as to "specific documents that it voluntarily revealed to third parties outside the White House," including former Agriculture Secretary Mike Espy's attorneys).

30. *See* SCM Corp. v. United States, 473 F. Supp. 791, 796 (Cust. Ct. 1979) ("Since executive privilege exists to aid the government decision-making process, a waiver should not be lightly inferred."); *see also Espy*, 121 F.3d at 741 (contrasting the scope of attorney–client subject matter waivers with the narrower executive privilege waiver doctrine).

31. An indirect waiver theory evokes the old adage: "I don't have a problem keeping secrets, it's just the people I tell."

32. John E. Bies, *Primer on Executive Privilege and the Executive Branch Approach to Congressional Oversight*, LAWFARE (June 16, 2017), https://www.lawfareblog.com/primer-executive-privilege-and-executive-branch-approach-congressional-oversight [https://perma.cc/FX6R-LPEV] (punctuation in original).

President.[33] That would allow for disclosure of materials that the Executive deemed privileged and had not ever been publicly released, notwithstanding case law that disfavors subject matter waiver.[34]

On the other hand, it would be troubling if the Executive Branch were able to effectively wield its confidentiality interests to bury an inspector general's politically inconvenient or legally alarming findings. As a formal legal matter, executive privilege doctrine does not shield executive deliberations demonstrating misconduct.[35] In information-access disputes between Congress and the Executive, however, the Executive Branch has the functional benefit of the status quo, and Congress's power to wrangle production is functionally a matter of political leverage and ancillary legislative powers, with only a distant prospect of a judicial resolution months, if not years, later.[36]

A third risk to executive privilege is the qualified nature of executive privilege. As the seminal Watergate case, *United States v. Nixon*,[37] and its progeny make clear, executive privilege is qualified rather than absolute.[38] At its core, the court must balance the needs of the entity seeking information with the confidentiality interests asserted by the Executive Branch. This interest balancing is where Judge Amy Berman Jackson's ruling in *Oversight Committee v. Holder/Lynch*[39]—the case involving Congress's efforts to obtain records regarding law enforcement's Operation Fast and Furious—becomes a critical consideration for Executive Branch agencies deciding how to address information requests by inspectors general.

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33. Although, as noted above, subject matter waiver is disfavored in executive privilege case precedent.

34. *See* SCM Corp. v. United States, 473 F. Supp. 791, 796 (Cust. Ct. 1979) ("Since executive privilege exists to aid the government decision-making process, a waiver should not be lightly inferred."). *See also Espy*, 121 F.3d at 741–42 (contrasting the scope of attorney–client subject matter waivers with the narrower executive-privilege-waiver doctrine).

35. *See Espy*, 121 F.3d at 738 ("[W]here there is reason to believe the documents sought may shed light on government misconduct, 'the privilege is routinely denied,' on the grounds that shielding internal government deliberations in this context does not serve 'the public interest in honest, effective government.'").

36. *See* Harry Litman, *Congress Can Issue Subpoenas. Will They Matter?*, N.Y. TIMES (Nov. 8, 2018), https://www.nytimes.com/2018/11/08/opinion/congress-democrats-subpoenas-trump.html [https://perma.cc/ZGD2-A5QQ] (discussing the impracticality of protracted congressional-subpoena-enforcement litigation that can last longer than the Congress that issued it).

37. 418 U.S. 683 (1974).

38. *See id.* at 707 (concluding the "legitimate needs of the judicial process may outweigh [p]residential privilege" and proceeding to "resolve those competing interests in a manner that preserves the essential functions of each branch").

39. Comm. on Oversight & Gov't Reform v. Lynch, 156 F. Supp. 3d 101 (D.D.C. 2016).

VI. The Fast and Furious Ruling: Weakened Confidentiality and Realigned Incentives

The court ruling of significance to executive privilege and inspectors general traces its origins to mismanaged gun-trafficking investigations along the southwest border of the United States.[40] Shortly after the congressional investigation of Operation Fast and Furious, the Department of Justice OIG commenced its own parallel investigation.[41] The court case addresses the Department of Justice's refusal to turn over to Congress a number of disputed documents under subpoena that related to open criminal files, secret grand-jury material, and Executive Branch deliberations about how to respond to Congress.[42] Ultimately, President Obama asserted executive privilege.[43] Thereafter, Congress held Attorney General Holder in contempt of Congress and authorized a civil lawsuit to seek judicial enforcement of the congressional subpoena.[44]

From the Department of Justice front-office perspective, an OIG investigation presented risks and benefits. First, Department managers are more likely to regard the inspector general's findings as credible because they are generated by a nonpartisan, professional staff steeped in Department law enforcement culture, and well-versed in the laws, regulations, and norms governing Department conduct. The congressional inquiry was led by one of the President's most vocal political opponents and had a distinctly partisan

40. The underlying congressional investigation sought information related to investigations led by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) that came to be collectively referred to as Operation Fast and Furious. *Operation Fast and Furious Fast Facts*, CNN (Feb. 28, 2019, 3:33 PM), https://www.cnn.com/2013/08/27/world/americas/operation-fast-and-furious-fast-facts/index.html [https://perma.cc/WU4R-M8W7]. Starting during the fall of 2009, ATF agents in Arizona began setting up a series of sting operations targeting gunrunners who were moving large quantities of firearms across the U.S.–Mexico border. But, inadequate surveillance, technology failures, and poor judgment led ATF to allow some of the guns it was using in the stings to "walk," i.e., leave the custody, control, and surveillance of law enforcement. *Id.* A number of those lost weapons ended up in the hands of drug cartels and showed up at various crime scenes on both sides of the U.S.–Mexico border, including at the scene of the murder of Border Patrol Agent Brian Terry in December 2010. *Id.* Within days of Judge Jackson's opinion at issue here, news outlets reported that one of the guns at issue in Operation Fast and Furious was found at El Chapo's hideout. Jesse Byrnes, *'Fast and Furious' Rifle Found in El Chapo's Hideout*, HILL (Jan. 20, 2016, 10:45 AM), https://thehill.com/policy/national-security/266431-fast-and-furious-rifle-reportedly-found-in-el-chapos-hideout [https://perma.cc/K25L-MRRK].

41. *See generally*, OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., A REVIEW OF ATF'S OPERATION FAST AND FURIOUS AND RELATED MATTERS (2012) (documenting results of the investigation).

42. Comm. on Oversight & Gov't Reform v. Holder, 979 F. Supp. 2d 1, 3–5 (D.D.C. 2013).

43. Assertion of Exec. Privilege over Docs. Generated in Response to Cong. Investigation into Operation Fast and Furious, 26 Op. O.L.C. 1, 8 (2012).

44. H.R. Res. 711, 112th Cong. (2012); H.R. Res. 706, 112th Cong. (2012).

flavor.[45] Moreover, the risk to Executive Branch confidentiality interests from disclosure of such sensitive information would be lessened by intrabranch disclosure to an entity that would have an institutional obligation to safeguard those privilege interests. Further, the Department leadership could argue that the accountability brought by an IG determination would dampen—not enhance—the congressional need for the information in dispute. In fact, the Department provided fulsome OIG access to Department records related to Operation Fast and Furious.[46]

Instead, the Department's cooperation with the IG became the court's off-ramp from the sticky interbranch balancing issues and undermined the President's executive privilege claim. In the Operation Fast and Furious subpoena-enforcement litigation, Judge Jackson relied on the Inspector General's disclosure of information in its report as the basis to suggest the confidentiality interests of the Executive Branch had been sufficiently weakened to allow Congress to win.[47] Judge Jackson described her role in interest balancing with a hallmark of flexibility:

> To resolve this question, the Court must balance the competing interests on a flexible, case by case, ad hoc basis, considering such factors as the relevance of the evidence, the availability of other evidence, the seriousness of the litigation or investigation, the harm that could flow from disclosure, the possibility of future timidity by government employees, and whether there is reason to believe that the documents would shed light on government misconduct, all through the lens of what would advance the public's – as well as the parties' – interests.[48]

The court then relied on the OIG disclosure in an effort at avoiding the troubling political question doctrine concerns that would be raised by a judicial determination about the relative investigative interests and

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45. *See* Russell Berman, *Republicans Appoint Obama's Next Pain in the Butt*, ATLANTIC (Nov. 19, 2014), https://www.theatlantic.com/politics/archive/2014/11/Jason-Chaffetz-darrell-issa-chairman-Oversight-and-Government-Reform-Committee/382940/ [https://perma.cc/HDN5-7562] (describing Chairman Darrell Issa's "partisan antics" in congressional investigations).

46. *See* OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, STATEMENT OF MICHAEL E. HOROWITZ BEFORE THE HOUSE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM REPORT BY THE OFFICE OF THE INSPECTOR GENERAL ON THE REVIEW OF ATF'S OPERATION FAST AND FURIOUS AND RELATED MATTERS 2 (Sept. 20, 2012) ("The Administration made no redactions for Executive Privilege, even though our report evaluates in detail and reaches conclusions about the Department's [deliberations about how to respond] to Congress.").

47. *See* Comm. on Oversight & Gov't Reform v. Lynch, No. 12-1332 (ABJ), slip op. at 18 (D.D.C. Jan. 19, 2016) [hereinafter *F&F Order*] (describing its role to determine "whether [Congress]'s need for the document outweighs the [Attorney General]'s need to protect them").

48. *Id.* (citing *In re* Sealed Case (*Espy*) 121 F.3d 729, 737–38 (D.C. Cir. 1997)) (punctuation in original).

confidentiality interests of the political branches.[49] The court noted the Department's reliance on the IG report as an argument to lessen Congress's need for the contested records. The court then landed in the opposite direction.[50]

Judge Jackson's order relied on her holding that Congress's oversight need outweighed the Department's confidentiality interest on the facts of the record. Specifically, the court's need for deliberations to be confidential was substantially weakened by prior subject matter disclosures by the OIG's public report. According to Judge Jackson, "whatever incremental harm that could flow from providing the Committee with the records that have already been publicly disclosed is outweighed by the unchallenged need for the material."[51]

Thus, while the court did not find that the Executive Branch confidentiality interests had been waived, it held that those interests were weakened to the breaking point. In effect, the court's ruling was tantamount to functional, rather than legal, waiver. It penalized the Executive for its cooperation with the OIG.

Indeed, the risk of the Operation Fast and Furious ruling comes in the form of perverse incentives. Having been burned in its efforts to preserve confidentiality vis-à-vis Congress by full cooperation with the IG, agencies could decide to resist providing IGs information in the future.

VII. Conclusion

Inspectors general are unique entities within the separation-of-powers structure. Their semi-independence within the Executive Branch, as well as closer allegiance to Congress, complicate an IG's relations with its agency charge when there is an executive–legislative information-access dispute ongoing about the subject matter of the IG's study. Congressional oversight interests often overlap with IG work product and Congress regularly highlights IG findings. In other instances, Congress has applied serious political, oversight, and budgetary pressure to IGs it deems too cozy with Executive Branch leadership.[52]

Inspectors general should be able to obtain access to their agencies' records in order to do their jobs. However, lurking behind every intra-executive production of documents to an IG lurks the real possibility of an interbranch production of IG work papers to Congress. While both

49. *See id.* at 18–19 (explaining how the disposition avoids structural conflicts between the branches of the federal government).

50. *Id.* at 32.

51. *Id.* at 21.

52. *See, e.g.*, MAJORITY STAFF, *supra* note 21.

congressional oversight and IG mandates often overlap, the intra- versus interbranch production transom could be constitutionally and functionally significant.[53] In fashioning the contours of executive privilege, courts addressing assertion of executive privilege should seek to strike the right balance between honoring congressional-oversight power, preserving Executive Branch confidentiality interests, and furthering the mandate of inspectors general.

53. *Compare* Senate Select Comm. on Pres. Campaign Activities v. Nixon, 498 F.2d 725, 733 (1974) (denying the committee's request for a judicial order requiring President Richard Nixon's compliance with a Senate subpoena for the Watergate tapes), *with* United States v. Nixon, 418 U.S. 683, 714 (1974) (ordering production of the Watergate tapes to the grand jury convened by the special prosecutor). The Supreme Court decision followed the D.C. Circuit by two months. But the parties' arguments and courts' analyses were fundamentally shaped by the interbranch nature of the Senate case and, in the Supreme Court, by the intrabranch nature of the special prosecutor's role as well as interbranch role of the judiciary in a criminal prosecution.