

# FEDERAL PROSECUTORIAL INDEPENDENCE

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## ABSTRACT

*Of all the controversial presidential actions during President Trump's first three years in office, few challenged the norms of presidential behavior more than his constant barrage of attacks on his own Department of Justice. President Trump violated traditional norms governing the relationship between the White House and the Department of Justice in two distinct ways. First, on Twitter and in other public statements, he repeatedly called upon the Department to investigate political opponents. Second, the President repeatedly attacked the Department's investigation of Russian interference with the 2016 presidential election ("the Mueller investigation") and other investigations relating to the misconduct of the President and his associates. White House interference in cases where the President has a personal or political stake raises obvious conflict-of-interest problems that threaten the impartiality of the criminal justice system. Not since Richard Nixon has a president been so heedless of these potential conflicts of interest. President Trump's efforts to influence individual investigations raised serious concerns within and outside of the Department of Justice.*

*Thus far, the academic treatments of President Trump's DOJ interactions have focused solely on the rules that have traditionally governed the relationship between the White House and the Department of Justice. These articles have made persuasive cases that President Trump's actions violate these informal norms and constitutionally based policies. Although the President properly must be concerned with the general policies that govern the allocation of prosecutorial resources and the focus of government law enforcement at the Department of Justice, it is a different matter when the White House becomes involved with*

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*individual investigations and prosecutions. White House influence over individual cases creates at least the appearance of improper political influence designed to punish opponents and shield the friends of the incumbent President.*

*The case against White House involvement in individual cases becomes much stronger, however, when placed in the context of constitutional limitations on the involvement of both the judicial and legislative branches in individual prosecutorial decision making. These rules prevent federal judges and the Congress from ordering federal prosecutors to initiate criminal cases or investigations. Moreover, the rules are sufficiently strict to prevent the other branches from influencing prosecutorial decisions through indirect methods such as congressional oversight of open criminal investigations.*

*The constitutional rules governing federal prosecutorial independence derive from the fundamental constitutional principle that all three branches must act independently before the federal government may punish someone for violating federal criminal law. Congress must act by passing a criminal statute of general applicability; the executive branch must independently investigate potential violations of that law and select individuals for prosecution; and the federal courts must determine individual guilt in a trial where the right to a jury is guaranteed. Thus, judicial and legislative involvement in individual prosecutorial decisions is constitutionally forbidden not because the involvement infringes on the President's authority, but rather because such involvement would impermissibly aggrandize the other branches by giving them power over more than one stage of the three-stage federal criminal justice process.*

*These constitutional restrictions on judicial and legislative involvement in prosecutorial decisions strongly reinforce the case for prosecutorial independence from White House involvement in individual cases and investigations. The integrity of the process depends upon prosecutorial decisions that are free from political influence and based solely on the merits of the individual case. Each branch must play its part independently of the others, and the role of the executive branch is compromised if political influence taints the process of independent prosecutorial decision-making.*

*How then might we respond to these challenges to federal prosecutorial independence? The first response is conceptual. We can reinforce the norm of prosecutorial independence within the executive branch by placing it in the context of the separation-of-powers principles*

*that mandate prosecutorial independence from the judicial and legislative branches. These principles explain why the norm of prosecutorial independence from the White House in individual cases is so important. Second, Congress has several informal mechanisms to strengthen and preserve this norm, including oversight hearings and the Senatorial confirmation process. Third, we should consider potential statutory or regulatory changes that would protect prosecutorial independence in individual cases while respecting the President's constitutional power to direct the general policies and management of the Department of Justice.*

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## INTRODUCTION

Of all the controversial presidential actions during President Trump’s first three years in office, few challenged the norms of presidential behavior more than his constant barrage of attacks on his own Department of Justice.<sup>1</sup> President Trump violated traditional norms governing the relationship between the White House and the Department of Justice in two distinct ways. First, on Twitter and in other public statements, he repeatedly called upon the Department to investigate political opponents.<sup>2</sup> Second, the President repeatedly attacked the Department’s investigation of Russian interference with the 2016 presidential election (“the Mueller investigation”) and other

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1. For a thorough discussion of the significance of President Trump’s actions towards the Department of Justice, see generally Bruce Green and Rebecca Roiphe, *Can the President Control the Department of Justice?*, 70 ALA. L. REV. 1 (2018); Andrew Kent, *Congress and the Independence of Federal Law Enforcement*, 52 U.C. DAVIS L. REV. 1927 (2018); Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187 (2018); Andrew McCanse Wright, *The Take Care Clause, Justice Department Independence, and White House Control*, 121 W. VA. L. REV. 355 (2018); Mark Mazzetti et al., *Intimidation, Pressure and Humiliation: Inside Trump’s Two-Year War on the Investigations Encircling Him*, N.Y. TIMES (Feb. 19, 2019), <https://www.nytimes.com/2019/02/19/us/politics/trump-investigations.html>; *No “Absolute Right” to Control DOJ: Constitutional Limits on White House Interference with Law Enforcement Matters*, PROTECT DEMOCRACY (2018), <https://protectdemocracy.org/resource-library/document/no-absolute-right-control-doj/>.

2. See Mazzetti, *supra* note 1 (describing how the President encouraged House Republicans to conduct oversight hearings regarding Hillary Clinton and members of the FBI); see also *infra* text accompanying notes 273–283.

investigations relating to the misconduct of the President and his associates.<sup>3</sup> White House interference in cases where the President has a personal or political stake raises obvious conflict-of-interest problems that threaten the impartiality of the criminal justice system. Not since Richard Nixon has a president been so heedless of these potential conflicts of interest.<sup>4</sup> President Trump's efforts to influence individual investigations raised serious concerns within and outside of the Department of Justice.<sup>5</sup>

Concern over these issues intensified after the release of the Mueller Report ("the Report").<sup>6</sup> In particular, Volume II of the Report recounts 10 instances of obstruction of justice by President Trump, each of which, at the very least, constitutes an unprecedented interference with the work of the Department of Justice in ongoing investigations.<sup>7</sup> Whether the Report establishes a case for criminal obstruction of justice is the subject of an ongoing intense debate.<sup>8</sup> Even if the President's actions do not amount to conduct that could be prosecuted as obstruction of justice, they raise grave concerns about politically motivated White House influence over open criminal investigations.

Thus far, the academic treatment of President Trump's DOJ interactions has focused solely on the rules that have traditionally governed the relationship between the White House and the

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3. See Mazzetti, *supra* note 1 (detailing how the President used Twitter to call the Mueller investigation a "witch hunt" and undermine potential witnesses to the investigation).

4. See Green and Roiphe, *supra* note 1, at 3 (referencing President Nixon's "Saturday Night Massacre" in his attempt to stop the Special Counsel investigation).

5. See Mazzetti, *supra* note 1.

6. United States Department of Justice, *Report on the Investigation into Russian Interference in the 2016 Presidential Election*, Special Counsel Robert S. Mueller, III (2019) [hereinafter Mueller Report]. The version released by the Department of Justice in May of 2019 was redacted to protect grand jury material and information that could reveal investigative sources and methods or cause harm to ongoing investigations.

7. See *id.* at Volume II, 15–158 (describing potential instances of obstruction of justice).

8. See Read: Attorney General Barr's Letter on the Mueller Report's Principal Conclusions, WASH. POST (Apr. 30, 2019, 8:01 PM), <https://www.washingtonpost.com/context/read-attorney-general-barr-s-principal-conclusions-of-the-mueller-report/218b8095-c5e3-4eab-9135-4170f5b3e87f/> (Attorney General Barr summarizing the findings of the Mueller Report and said: "I have concluded that the evidence developed during the Special Counsel's investigation is not sufficient to establish that the President committed an obstruction-of-justice offense."); see *contra* Rachael Bade, et al., *Democrats Close in on Citing Barr for Contempt*, WASH. POST (May 7, 2019, 2:59AM), [https://www.washingtonpost.com/world/national-security/trump-would-have-been-charged-with-obstruction-were-he-not-president-hundreds-of-former-federal-prosecutors-assert/2019/05/06/e4946a1a-7006-11e9-9f06-5fc2ee80027a\\_story.html](https://www.washingtonpost.com/world/national-security/trump-would-have-been-charged-with-obstruction-were-he-not-president-hundreds-of-former-federal-prosecutors-assert/2019/05/06/e4946a1a-7006-11e9-9f06-5fc2ee80027a_story.html) ("More than 450 former federal prosecutors who worked in Republican and Democratic administrations have signed on to a statement asserting special counsel Robert S. Mueller III's findings would have produced obstruction charges against President Trump—if not for the office he holds.").

Department of Justice.<sup>9</sup> These articles have made persuasive cases that President Trump's actions violate these informal norms and constitutionally based policies.

Although President Trump properly must be concerned with the general policies that govern the allocation of prosecutorial resources and the focus of government law enforcement at the Department of Justice, it is a different matter when the White House becomes involved with individual investigations and prosecutions. At the very least, White House influence over individual cases creates the appearance of improper political influence designed to punish opponents and shield the friends of the incumbent President. The problem of White House involvement in open cases becomes much stronger, however, when placed in the context of constitutional limitations on the involvement of both the judicial and legislative branches in individual prosecutorial decision making. These rules prevent federal judges and Congress from ordering federal prosecutors to initiate criminal cases or investigations. Moreover, the rules are sufficiently strict to prevent the other branches from influencing prosecutorial decisions through indirect methods, such as congressional oversight of open criminal investigations.<sup>10</sup>

The constitutional rules governing federal prosecutorial independence derive from the fundamental constitutional principle that all three branches must act independently before the United States government may punish someone for violating federal criminal law. Congress must act by passing a criminal statute of general applicability; the executive branch must independently investigate potential violations of that law and select individuals for prosecution; and the federal courts must determine individual guilt in a trial where the right to a jury is guaranteed. Thus, judicial and legislative involvement in individual prosecutorial decisions is constitutionally forbidden not only because the involvement infringes on the President's authority, but also because such involvement would impermissibly aggrandize the other branches by giving them power over more than one stage of the three-stage federal criminal justice process.

These constitutional restrictions on judicial and legislative involvement in prosecutorial decisions strongly reinforce the case for prosecutorial independence from White House involvement in

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9. See, e.g., Kent, *supra* note 1; Wright, *supra* note 1.

10. Todd David Peterson, *Congressional Oversight of Open Criminal Investigations*, 77 NOTRE DAME L. REV. 1373, 1437–38 (2002) [hereinafter Peterson, *Congressional Oversight*].

individual cases and investigations. This does not mean that the Constitution prohibits such White House interference; rather, it means that politically motivated White House involvement in individual prosecutions is a serious abuse of presidential power.

This article analyzes these issues in four parts. Part I describes the role of each branch in the criminal justice process. Part II examines the independence of federal prosecutors from the judicial branch. Part III assesses the parallel constitutional restrictions on the legislative branch, which prevent Congress from ordering the initiation or closure of criminal investigations or cases.<sup>11</sup> Part IV shifts to the executive branch to analyze the traditional constraints on White House involvement in individual cases.<sup>12</sup> Part V discusses some normative conclusions about federal prosecutorial independence.<sup>13</sup>

This final section considers responses to the challenges to federal prosecutorial independence.<sup>14</sup> The first response is conceptual. We can reinforce the norm of prosecutorial independence within the executive branch by placing it in the context of the separation-of-powers principles that mandate prosecutorial independence from the judicial and legislative branches. These principles explain why prosecutorial independence from the White House in individual cases is so important. Second, Congress has several informal mechanisms that strengthen and preserve this norm, including oversight hearings and the Senate confirmation process. Third, we should consider potential statutory or regulatory changes that would protect prosecutorial independence in individual cases while respecting the President's constitutional power to direct the general policies and management of the Department of Justice.

## I. THE ROLE OF EACH OF THE BRANCHES IN THE CRIMINAL JUSTICE PROCESS

All three branches play an important and distinct role before a person is incarcerated for a crime.<sup>15</sup> The legislature must pass a law of

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11. *See infra* Part III.

12. *See infra* Part IV.

13. *See infra* Part V.

14. *See id.*

15. *See In re Sealed Case*, 838 F.2d 476, 489 (D.C. Cir. 1988), *rev'd on other grounds*, *Morrison v. Olson*, 487 U.S. 654 (1988) (“The constitutional scheme is as simple as it is complete—Congress passes the criminal law in the first instance, the President enforces the law, and individual cases are tried before a neutral judiciary involved in neither the creation nor the execution of that law.”). In *Morrison*, the Supreme Court reversed the D.C. Circuit’s decision

general applicability that defines certain types of activities as criminal. The executive must designate a particular individual as deserving of prosecution under applicable standards of prosecutorial discretion. Finally, the judiciary must pass upon the guilt or innocence of that specific individual. The separation of these functions into three separate branches helps to ensure that no person is subjected to the ultimate coercive power of the state on the basis of the actions of only one or two branches of the federal government. This distribution and separation of the powers serves as an important protection against arbitrary punishment.<sup>16</sup> Each branch has the exclusive authority over its constitutionally given power that precludes the other two branches from exercising those same powers.

When it comes to the executive branch in particular, its power is limited to making the decision of whether to prosecute.<sup>17</sup> As John Marshall stated when he was a member of Congress, the executive branch may “direct that the criminal be prosecuted no further. This is . . . the exercise of an indubitable and a constitutional power.”<sup>18</sup> The Office of Legal Counsel (“OLC”) summed up the principle thusly: “The Executive’s exclusive authority to prosecute violations of the law gives rise to the corollary that neither the Judicial nor Legislative Branches may directly interfere with the prosecutorial discretion of the Executive by directing the Executive Branch to prosecute particular individuals.”<sup>19</sup> In reviewing the basis for this principle, this article pays attention to the reasons behind the limitations on judicial and legislative power to inform the reader’s understanding of federal prosecutorial independence within the executive branch.

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holding that the Independent Counsel Provisions of the Ethics in Government Act were unconstitutional, see *Morrison*, 487 U.S. at 659–60, 697, but did not disapprove the above-cited principle.

16. See *In re Sealed Case*, 838 F.2d at 488 (“The Constitution therefore carefully distributes the various responsibilities for criminal prosecution among each of the three branches, so that citizens may not be endangered by one branch acting alone.”).

17. *In re Aiken County*, 725 F.3d 255, 263 (D.C. Cir. 2013).

18. Congressman John Marshall, Speech to the House of Representatives (1800), *reprinted in* 18 U.S. app. at 29 (1820) (cited in *Aiken County*, 725 F.3d at 263).

19. *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. Off. Legal Counsel 101, 115 (1984), 1984 WL 178358 [hereinafter Olson Memorandum].

## II. FEDERAL PROSECUTORIAL INDEPENDENCE FROM THE JUDICIAL BRANCH

The judicial branch has a limited and specific role to play in the criminal justice process. The courts may act to determine individual guilt or innocence only after Congress declares that certain conduct is subject to criminal sanctions and the executive branch independently determines who should be prosecuted for criminal violations. The different doctrines that reflect this constitutional principle are discussed below.

### A. *The Prohibition Against Judicially Created Crimes*

During the first two decades after the ratification of the Constitution, there was considerable controversy over whether federal courts had inherited the traditional English common law power to recognize and punish crimes as a matter of common law without statutory warrant.<sup>20</sup> Prior to 1812, at least eight federal circuit court cases had recognized federal common law crimes.<sup>21</sup> Moreover, the issue split the dominant parties of the 1790s, with the Federalists generally supporting the legitimacy of federal common law crimes and the Jeffersonians opposing it.<sup>22</sup> By the time the issue reached the Court, however, this debate had been decisively resolved against the constitutionality of federal common law crimes.<sup>23</sup>

*United States v. Hudson and Goodwin*<sup>24</sup> delivered the death blow. The case involved an indictment for criminal libel about the President and Congress published in a Connecticut newspaper.<sup>25</sup> Although there was no statute making libel a criminal offense, it was recognized as a crime at common law. If the federal courts possessed all the common-law powers of their English forbears, it would have been well within the Court's authority to punish the alleged offense. Instead, the Court unanimously recognized the incompatibility of English common-law power with the constitutionally mandated separation of powers in the context of criminal prosecutions.<sup>26</sup> The Court held:

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20. Gary D. Rowe, Note, *The Sound of Silence: United States v. Hudson & Goodwin, The Jeffersonian Ascendancy, and the Abolition of Federal Common Law Crimes*, 101 YALE L.J. 919, 924 (1992).

21. *See id.* at 920 n.8 (citing relevant cases).

22. *Id.* at 922.

23. *Id.* at 922–23.

24. 11 U.S. 32 (1812).

25. Rowe, *supra* note 20, at 924.

26. *Id.* at 922 (“[The abolition of common law crimes] crystallized the realization . . . that the

If it may communicate certain implied powers to the general Government, it would not follow that the Courts of that Government are vested with jurisdiction over any particular act done by an individual in supposed violation of the peace and dignity of the sovereign power. The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence.<sup>27</sup>

This decision established a firm principle that separated the roles of Congress and the courts with respect to criminal prosecutions. The courts adjudicate individual guilt or innocence once a case has been brought before them, but they play no role in determining the generally applicable rules governing what types of conduct may be subject to criminal prosecution, as Congress has the exclusive authority to make such rules through the legislative process.

### *B. The Prohibition Against Judicially Mandated Prosecutions*

The constitutional prohibition against judicial involvement in the creation of federal crimes extends equally to the selection of individuals for prosecution. The principle that courts will not step in to order the prosecution of a particular individual is not merely a common-law doctrine; it is rooted in the constitutional separation of powers. For example, in *United States v. Nixon*<sup>28</sup> the Court announced in sweeping dictum that “the executive branch has exclusive authority and absolute discretion to decide whether to prosecute a case.”<sup>29</sup> The Court has acknowledged this principle on many other occasions.<sup>30</sup> Moreover, the Court has recognized the authority of the Attorney General to be the exclusive representative of the United States in litigation.<sup>31</sup>

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Constitution and the common law could not coexist, that the American system of government had broken off from its English antecedents more sharply than anyone had quite realized.”)

27. *Hudson & Goodwin*, 11 U.S. at 34. However, the Court recognized that a court has the inherent power to impose sanctions for contempt of court. This power is discussed at greater length. See *infra* text accompanying notes 54–61.

28. 418 U.S. 683 (1974).

29. *Id.* at 693.

30. For example, in *Heckler v. Chaney*, the Court stated, in relation to sanctioning the FDA’s discretion to not commence an enforcement action against a drug manufacturer in evaluating the use of lethal injection as a method of capital punishment, that “[a]n agency’s refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to ‘take Care that the Laws be faithfully executed.’” 470 U.S. 821, 832 (1985) (citing U.S. CONST. art. II, § 3)

31. See *United States v. San Jacinto Tin Co.*, 125 U.S. 273, 282–85 (1888); *The Confiscation*

The lower courts have expressly recognized this constitutional limitation on their power as well. For example, in *Pugach v. Klein*,<sup>32</sup> a district court refused to order a United States Attorney to prosecute an individual for a violation of federal wiretap laws.<sup>33</sup> The court asserted that it was without the power to make such an order because it was

clear beyond question that it is not the business of the Courts to tell the United States Attorney to perform what they conceive to be his duties. Article II, § 3 of the Constitution provides that “[the President] shall take Care that the Laws [shall] be faithfully executed.” The prerogative of enforcing the criminal law was vested by the Constitution, therefore, not in the Courts, nor in private citizens, but squarely in the executive arm of the government.<sup>34</sup>

This constitutional division of authority rests on two principles: a non-interference principle, which prevents the judicial and legislative branches from second-guessing decisions that can be made more effectively by the executive branch; and a non-aggrandizement principle, which prevents other branches from abusing their authority by adding prosecutorial power to the other powers they exercise.<sup>35</sup>

The non-interference principle is founded on the idea that federal prosecutors are empowered to consider a wide range of factors in determining whom to prosecute. The Supreme Court discussed these multiple factors in *Wayte v. United States*,<sup>36</sup> a case dealing with the issue of selective prosecution:

This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill suited to judicial review. Such factors as the strength of the case, the prosecution’s general deterrence value, the Government’s enforcement priorities, and the case’s relationship to the Government’s overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor’s motives and decision-making to outside inquiry, and may undermine prosecutorial

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Cases, 74 U.S. 454, 457 (1869); *The Gray Jacket*, 72 U.S. 370, 371 (1866).

32. 193 F. Supp. 630 (S.D.N.Y. 1961).

33. *Id.* at 635.

34. *Id.* at 634.

35. Todd David Peterson, *Procedural Checks: How the Constitution (And Congress) Control the Power of the Three Branches*, 13 DUKE J. CONST. L. & PUB. POL’Y 211, 221 (2017) [hereinafter Peterson, *Procedural Checks*].

36. 470 U.S. 598 (1985).

effectiveness by revealing the Government's enforcement policy. All these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute.<sup>37</sup>

Thus, because the executive branch is uniquely competent to take account of these many permissible factors, the other branches are prohibited from interfering with decisions not to prosecute.

Prosecutorial discretion at the federal level, however, is about more than just respect for the authority of the executive branch; it is an integral part of the separation of powers created by the Constitution to protect citizens' rights by limiting the power of the branches to abuse their authority. Thus, the focus is not just on the extent to which executive branch power may be limited or circumscribed, but rather on the extent to which the authority of the judiciary may be enlarged to include a power that may be reserved solely to the executive branch. This distinction is more than a semantic one. It reflects a genuine difference with respect to the policies of the constitutionally mandated separation of powers: the need to avoid a concentration of powers that can lead to the deprivation of individual rights.

This constitutional principle was the foundation for the Fifth Circuit's decision in *United States v. Cox*,<sup>38</sup> the leading circuit court case on the scope of federal prosecutorial discretion. In *Cox*, the court overturned a district court order that required a United States Attorney to prepare and sign an indictment returned by a grand jury. The court noted that "[t]he Attorney General is the hand of the President in taking care that the laws of the United States in legal proceedings and in the prosecution of offenses be faithfully executed" and "as an incident of the constitutional powers, . . . the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions."<sup>39</sup>

Even the three dissenting judges in *Cox* conceded that although they believed that the United States Attorney could be required to sign the indictment, "once the indictment is returned, the Attorney General

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37. *Id.* at 607–08; accord *Town of Newton v. Rumery*, 480 U.S. 386, 396 (1987); see James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1540–42 (1981) (discussing how the Supreme Court has largely upheld the exercise of prosecutorial discretion except in the rare cases where prosecutions are initiated based on race, sex, religion, or the exercise of free speech rights or motivated by personal animus or retaliation).

38. 342 F.2d 167 (5th Cir. 1965) (en banc), cert. denied, 381 U.S. 935 (1965).

39. *Id.* at 171.

or the United States Attorney can refuse to go forward.”<sup>40</sup> *Cox* clearly links the discretion not to prosecute a particular individual with the constitutional principle of separation of powers.<sup>41</sup>

Many other lower courts have cited *Cox* with approval and followed the Fifth Circuit’s lead.<sup>42</sup> For example, the Second Circuit stated:

The relevance of *Cox* to our opinion is not in its teaching that indictments require consent of the government attorney. More pertinent is *Cox*’s telling statement about the nature of the checks and balances inherent in our legal system. Not only must the prosecutor wait for the grand jury’s determination before he or she may proceed in a felony case, but the grand jury may not issue an indictment where the prosecutor is opposed. Moreover, the court lacks the power to compel the prosecutor to proceed over his objection. Viewed in this light, the federal grand jury system reflects the structure of our constitutional scheme, requiring, for proper resolution, diffusion of power and the existence of checks and balances.<sup>43</sup>

By emphasizing the “diffusion of power” and the existence of “checks and balances,” the Court made clear that prosecutorial discretion is not just a matter of protecting executive power, but also about protecting individual rights by ensuring that each branch is an independent

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40. *Id.* at 179 (Rives, J. concurring in part and dissenting in part).

41. *Cox* did not, however, shield the entire prosecutorial process from judicial supervision. A majority of the court (composed of the three dissenting judges and one concurring judge) took the view that the United States Attorney could be required to prepare an indictment for use by the grand jury. *See id.* at 177–81 (Rives, Gewin, & Bell, JJ. concurring in part and dissenting in part); *id.* at 182–85 (Brown, J., concurring). In addition, the district court in *In re Grand Jury*, 315 F. Supp. 662 (D. Md. 1970), held that although a United States Attorney could not be required to sign an indictment and forced to proceed with a prosecution, in a case in which the grand jury wished to indict, “the substance of the charges in the indictment should be disclosed, omitting certain portions as to which the Court, in the exercise of its discretion, concludes that the public interest in disclosure is outweighed by the private prejudice to the persons involved, none of whom are charged with any crime in the proposed indictment.” *Id.* at 678–79. Thus, at least under this view, the United States Attorney might be required to prepare and publish an indictment under certain circumstances, although the court could not require him to proceed with a prosecution.

42. *See, e.g.*, *United States v. Navarro-Vargas*, 408 F.3d 1184, 1200 (9th Cir. 2005); *United States v. Easton*, 937 F.2d 160, 162 (5th Cir. 1991); *Fields v. Soloff*, 920 F.2d 1114, 1117–18 (2nd Cir. 1990); *United States v. Hammer*, Criminal Action No. 4:96–CR–0239, 2014 WL 2465276, at \*17 (M.D. Pa. May 29, 2014); *United States v. Slone*, 969 F. Supp. 2d 830, 837 (E.D. Ky. 2013); *In re Mayer*, No. 05–33 (SRC), 2006 WL 20526, at \*2 (D.N.J. Jan. 4, 2006); *United States v. Chi Keung Chim*, 708 F. Supp. 38, 44 (E.D.N.Y. 1989).

43. *Soloff*, 920 F.2d at 1118.

decision-maker within its assigned area of the criminal prosecution process.

Then-Circuit Judge Brett Kavanaugh stated the reasons for requiring independent prosecutorial decision-making even more clearly:

The Executive’s broad prosecutorial discretion and pardon powers illustrate a key point of the Constitution’s separation of powers. One of the greatest *unilateral* powers a President possesses under the Constitution, at least in the domestic sphere, is the power to protect individual liberty by essentially under-enforcing federal statutes regulating private behavior—more precisely, the power either not to seek charges against violators of a federal law or to pardon violators of a federal law. The Framers saw the separation of the power to prosecute from the power to legislate as essential to preserving individual liberty . . . . After enacting a statute, Congress may not mandate the prosecution of violators of that statute. Instead, the President’s prosecutorial discretion and pardon powers operate as an independent protection for individual citizens against the enforcement of oppressive laws that Congress may have passed (and still further protection comes from later review by an independent jury and Judiciary in those prosecutions brought by the Executive).<sup>44</sup>

Judge Kavanaugh understood that prosecutorial discretion limits the judiciary’s power to order prosecution of a particular individual on the basis of a statute that mandates universal prosecution. The courts may not aggrandize their authority by assuming prosecutorial functions that have constitutionally been assigned to the executive branch.

Other courts concur that prosecution is a purely executive function that may not be exercised by the courts.<sup>45</sup> In no case has any court ever

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44. *In re Aiken County*, 725 F.3d 255, 390 (D.C. Cir. 2013) (emphasis in original).

45. Indeed, the courts have occasionally expounded at some length on this constitutional principle, even when it might not have been entirely necessary. For example, in *Smith v. United States*, 375 F.2d 243 (5th Cir. 1967), *cert. denied*, 389 U.S. 841 (1967), the court of appeals upheld the dismissal of a Federal Tort Claims Act suit against the United States for failure to prosecute individuals whom the plaintiff alleged were interfering with and injuring the plaintiff’s business. *Id.* at 244. In holding that the prosecutor’s decision not to bring a criminal case was protected by the discretionary function exception of the FTCA, the Court held: “The President [of] the United States is charged in Article 2, Section 3 of the Constitution with the duty to ‘take Care that the Laws be faithfully executed . . . .’” *Id.* at 246. “The Attorney General is the President’s surrogate in the prosecution in all offenses against the United States. The discretion of the Attorney General in choosing whether to prosecute or not to prosecute, or to abandon a prosecution already started, is absolute . . . . This discretion is required in all cases.” *Id.* at 246–47; *see also* *Goldberg v. Hoffman*, 225 F.2d 463, 464–65 (7th Cir. 1955) (granting a U.S. Attorney’s motion to

directly ordered the executive branch to commence a prosecution.<sup>46</sup> Thus, case law supports the general proposition that the executive alone may make the prosecutorial decision to bring a criminal case and that the courts may not override that decision.

*C. Judicial Exceptions to the Executive's Exclusive Prosecutorial Discretion*

Notwithstanding the above doctrine, the executive does not have absolute control over all prosecutorial decisions. First, there are certain judicially recognized exceptions to the absolute authority of a prosecutor which have allowed courts to challenge prosecutorial inaction and review a prosecutor's decision to dismiss a case that has already been brought. Second, the Supreme Court has permitted trial courts to initiate prosecutions for criminal contempt of court in situations where parties have violated court orders.

The courts have been empowered to restrict the scope of prosecutorial discretion in certain limited instances. By and large, however, these instances involve the imposition of external restrictions on the unlimited freedom of the executive branch to make prosecutorial decisions rather than grants of authority to the judicial branch to initiate prosecutorial action. For example, the Supreme Court has suggested that there are constitutional restrictions against selective prosecution based on the exercise of a protected constitutional right.<sup>47</sup> As previously indicated, these cases do not pose significant separation of powers problems because they do not transfer executive power to another branch and thereby increase the concentration of authority in the coordinate branch. Instead, these cases simply recognize

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dismiss in a mandamus suit that sought to enjoin the prosecution of a particular criminal case because requiring the U.S. Attorney to do so was beyond the power of the court).

46. *But see* Young v. United States *ex rel* Vuitton et Fils, S.A., 481 U.S. 787, 794 (1987) (approving the appointment by a court of a special prosecutor to prosecute criminal contempt of court).

47. *See* Wayte v. United States, 470 U.S. 598, 610 (1985) (requiring that a party claiming a prosecutorial equal protection violation show "that the passive enforcement system had a discriminatory effect and that it was motivated by a discriminatory purpose"); Oyler v. Boles, 368 U.S. 448, 456 (1962) (finding no equal protection violation for the state prosecutor's selective prosecution of a habitual offender statute because there was no allegation that there was selective enforcement based on "race, religion, or other arbitrary classification"); Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886) (recognizing an equal protection violation when a race-neutral law is administered in a discriminatory way); *see also* United States v. Murdock, 548 F.2d 599, 600 (5th Cir. 1977); United States v. Cammisano, 546 F.2d 238, 241 (8th Cir. 1976); United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974).

constitutional restraints upon the authority of the executive to take prosecutorial action.<sup>48</sup>

Rule 48(a) of the Federal Rules of Criminal Procedure creates another potential limitation on prosecutorial discretion. The rule limits the power of the Attorney General or the United States Attorney to dismiss a prosecution in a case that has already been brought before the courts.<sup>49</sup> In particular, a federal prosecutor may not dismiss a case simply by filing a *nolle prosequi*, only to prosecute the same case at a later date.

Rule 48 was adopted principally “to protect a defendant against prosecutorial harassment, *e.g.*, charging, dismissing, and recharging when the Government moves to dismiss an indictment over the defendant’s objection.”<sup>50</sup> The lower courts do not agree on the extent to which Rule 48(a) allows courts to refuse a request to dismiss an indictment, even with the defendant’s consent, and the Supreme Court has not yet resolved this issue.<sup>51</sup> The courts seem to recognize, however, that the purpose of Rule 48(a) is to protect against prosecutorial

48. A slightly different problem is presented by decisions ordering the executive branch to enforce criminal statutes that were being generally ignored. *See Nader v. Saxbe*, 497 F.2d 676, 679–82 (D.C. Cir. 1974); *Adams v. Richardson*, 480 F.2d 1159, 1163 (D.C. Cir. 1973) (*per curiam*) (*en banc*); *N.A.A.C.P. v. Levi*, 418 F. Supp. 1109, 1115–17 (D.D.C. 1976). For example, in *Nader*, the plaintiffs challenged the general failure of the Department of Justice to bring any prosecutions under the Federal Corrupt Practices Act, 43 Stat. 1070 *et seq.*, 2 U.S.C. former §§ 241–56, *repealed by*, the Federal Election Campaign Act (FECA), Pub. L. 92–225, Title IV, § 405, Feb. 7, 1972, 86 Stat. 20. The court of appeals, in upholding the lower court’s dismissal based on standing, indicated in dictum that “established precedents [do not] necessarily foreclose judicial review” of such non-prosecution policies suggesting they “lie outside the constitutional and statutory limits of ‘prosecutorial discretion.’” *Nader*, 497 F.2d at 679. The complaint did not ask the court to determine whether “a particular violator should be prosecuted” but, rather, review the Department’s total failure to enforce a criminal statute. *Id.* Thus, cases like *Nader* reaffirm, rather than weaken, the judicial reluctance to grant a prosecutorial power to a branch other than the executive.

49. FED. R. CRIM. P. 48(a) (“The government may, with leave of court, dismiss an indictment, information, or complaint. The government may not dismiss the prosecution during trial without the defendant’s consent.”).

50. *Rinaldi v. United States*, 434 U.S. 22, 29 n.15 (1977); *see also United States v. Hayden*, 860 F.2d 1483, 1487–89 (9th Cir. 1988); *United States v. Abreu*, 747 F. Supp. 493, 502 (N.D. Ind. 1990) (citations omitted) (“The primary purpose of the Rule 48(a) requirement that leave of court be obtained before dismissing charges ‘is [the] protection of defendant’s rights . . . ‘to prevent harassment of a defendant by charging, dismissing, and re-charging without placing a defendant in jeopardy.’” (internal citations omitted)).

51. *United States v. Wallace*, 848 F.2d 1464, 1468 (9th Cir. 1988); *United States v. Weber*, 721 F.2d 266, 268 (9th Cir. 1983); *United States v. Hamm*, 659 F.2d 624, 632 (5th Cir. 1981); *United States v. Cowan*, 524 F.2d 504, 507–08 (5th Cir. 1975), *cert. denied*, 425 U.S. 971 (1976); *United States v. Ammidown*, 497 F.2d 615, 620 (D.C. Cir. 1973).

abuses, not to transfer prosecutorial power to the judicial branch. The Fifth Circuit has stated:

The rule was not promulgated to shift absolute power from the Executive to the Judicial Branch. Rather, it was intended as a power to check power. The Executive remains the absolute judge of whether a prosecution should be initiated and the first and presumptively the best judge of whether a pending prosecution be terminated.<sup>52</sup>

Indeed, the Fifth Circuit has stated that the constitutionality of Rule 48(a) is dependent upon the prosecutor's discretion not to commence a case in the first place.<sup>53</sup> Even in cases where courts have asserted some authority to deny leave to dismiss, they have doubted their constitutional power to order the executive to proceed with a prosecution. Judge Weinfeld concluded that if the government failed to proceed with a prosecution after refusal of leave to dismiss an indictment, the court "would be without power to issue mandamus or other order to compel prosecution of the indictment since a direction would invade the traditional separation of powers doctrine."<sup>54</sup> Thus, the case law interpreting Rule 48(a) also supports the proposition that federal prosecutors retain sole power to decide whom to prosecute.

The only significant exception to the consistent refusal to allow federal courts to initiate prosecutions is contained in the Supreme Court's decision in *Young v. United States ex rel. Vuitton et. Fils S.A.*<sup>55</sup> In *Young*, the Court considered whether federal trial courts have the inherent authority to initiate prosecutions for criminal contempt of court.<sup>56</sup> The Court concluded that the courts have such power pursuant to Rule 42(b) of the Federal Rules of Criminal Procedure, which provides for disposition of criminal contempt upon notice and hearing.<sup>57</sup> The Court explained that the federal courts would be at the mercy of other branches if they were without the authority to initiate prosecutions for violations of their own injunctions:

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52. *Cowan*, 524 F.2d at 513.

53. *United States v. Cox*, 342 F.2d 167, 171–72 (5th Cir. 1965) (en banc), cert. denied, 381 U.S. 935 (1965).

54. *United States v. Greater Blouse, Skirt and Neckwear Contractors Ass'n*, 228 F. Supp. 483, 489 (S.D.N.Y. 1964); accord *Cowan*, 524 F.2d at 511 ("The result is that although the court is authorized to deny the motion to dismiss in the public interest, it is nevertheless constitutionally powerless to compel the government to proceed.").

55. 481 U.S. 787 (1987).

56. *Id.* at 792.

57. *Id.* at 794.

The ability to punish disobedience to judicial orders is regarded as essential in ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on other branches. If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls “the judicial power of the United States” would be a mere mockery. Courts cannot be at the mercy of another branch in deciding whether such proceedings should be initiated. The ability to appoint a private attorney to prosecute a contempt action satisfies the need for an independent means of self-protection, without which the courts would be mere boards of arbitration whose judgments and decrees would be only advisory.<sup>58</sup>

The Court emphasized, however, that a prosecution for criminal contempt in this manner should be a measure of last resort, and the Court suggested that a court should consider the imposition of criminal contempt “only if the civil remedy is deemed inadequate.”<sup>59</sup> In addition, the Court noted that a trial court ordinarily should first request the appropriate prosecuting authority to initiate the criminal contempt proceeding. Only when the prosecuting officials in the United States Attorney’s office fail to initiate criminal actions should a court appoint its own prosecutor.<sup>60</sup> The Court underscored the need for judicial restraint because “the rationale for the appointment authority is necessity. If the Judiciary were completely dependent on the Executive Branch to redress direct affronts to its authority, it would be powerless to protect itself if that branch declined prosecution.”<sup>61</sup>

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58. *Id.* at 796 (citations and internal quotations omitted).

59. *Id.* at 801. In a subsequent case, the Court upheld statutory restrictions on the authority of an independent prosecutor to file a petition for certiorari without approval by the Solicitor General. *United States v. Providence Journal Co.*, 485 U.S. 693, 708 (1988). Thus, a contempt prosecution is subject to some control by the executive branch, at least at the Supreme Court level.

60. *Young*, 481 U.S. at 801–02. In a later case, the Court noted that “[u]nder the procedures set out in *Young*, it seems evident that the majority of contempt cases will be prosecuted by the United States Attorney.” *Providence Journal Co.*, 485 U.S. at 706.

61. *Young*, 481 U.S. at 801. Justice Scalia’s concurrence vigorously contested the majority’s conclusion that a court may appoint a prosecutor for a criminal contempt of court by attacking the assumption that the executive’s decision to decline to prosecute a contempt of court would render the judiciary impotent and thus improperly subject to executive branch control. To the contrary:

[T]he ability of the executive branch to block a prosecution for criminal contempt of court is a carefully designed and critical element of our system of Government. There are numerous instances in which the Constitution leaves open the theoretical possibility that the actions of one Branch may be brought to naught by the actions or inactions of another. Such dispersion of power was central to the scheme of forming a Government

This exception for criminal contempt of court does not significantly diminish the general conclusion that judicial power cannot extend to the selection of individuals for prosecution. This is because *Young* did not hold that trial courts can require the executive to prosecute criminal contempt cases or that the courts have the power to enforce such a requirement.<sup>62</sup> What is important to keep in mind is that the separation of powers rationale for restricting the power of selecting individuals for prosecution to the executive branch rests not only on the idea that the branch is better suited to exercise prosecutorial discretion, but also on the more fundamental principle that all three branches must exercise independent judgments before a person can be punished under federal criminal law. *Young* stands only for the limited proposition that the Constitution does not deprive courts of the traditional methods for enforcing compliance with their own orders. The general limitation on judicial initiation of prosecutions remains intact because, if the courts were to usurp the executive's role in selecting individuals for prosecution, then one of the essential checks on government power would be lost.

#### *D. Conclusions about Prosecutorial Independence from the Judicial Branch*

The Constitution prescribes that the judicial branch's only role in the criminal justice process is to determine individual guilt or innocence and impose appropriate punishment. The courts play no role in the creation of federal crimes; that is a power exclusively reserved to Congress. Similarly, the courts play no role in the selection of individuals for prosecution, a power that is exclusively reserved to the executive branch. This constitutional division of authority protects individual liberty by imposing a check on federal power that requires all three branches to perform their separate constitutional duty before any individual may be subjected to criminal punishment.

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with enough power to serve the expansive purposes set forth in the preamble of the Constitution, yet one that would 'secure the blessings of liberty' rather than use its power tyrannically.

*Id.* at 817 (Scalia, J., concurring).

62. Todd D. Peterson, *Prosecuting Executive Branch Officials for Contempt of Congress*, 66 N.Y.U. L. REV. 563, 603 (1991) [hereinafter Peterson, *Contempt of Congress*].

### III. FEDERAL PROSECUTORIAL INDEPENDENCE FROM THE LEGISLATIVE BRANCH

Similar constraints prevent the legislative branch from mandating the prosecution of particular cases. Indeed, because Congress is such a politically responsive body, the dangers of politically motivated prosecutions make the restrictions on Congress even more potent than the restrictions on the federal courts. This section will first examine the general prohibition on congressional initiation of prosecutions. It will then turn to the strict applications of the prohibition that apply even in the case of criminal contempt of Congress citations and congressional oversight of open criminal investigations.

#### *A. Congressional Power to Initiate Criminal Investigations or Cases*

The same constitutional principles that prohibit judicial participation in the decision to prosecute apply more strongly to Congress, which, because of its highly politicized nature, could threaten the integrity of a criminal investigation. In upholding the independent counsel provisions of the Ethics in Government Act, the Supreme Court relied heavily on the fact that the statute gave Congress no formal role in selecting individuals for prosecution, nor any control over the selection or removal of the independent counsel.<sup>63</sup> The Court noted with respect to the removal power:

This case does not involve an attempt by Congress itself to gain a role in the removal of executive officials other than its established powers of impeachment and conviction. The Act instead puts the removal power squarely in the hands of the Executive Branch; an independent counsel may be removed from office only by the personal action of the Attorney General, and only for good cause. There is no requirement of congressional approval of the Attorney General's removal decision, though the decision is subject to judicial review.<sup>64</sup>

With respect to the issue whether the statute created an impermissible aggrandizement of Congress's powers, the Court stated:

We observe first that this case does not involve an attempt by Congress to increase its own powers at the expense of the Executive

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63. See *Morrison v. Olson*, 487 U.S. 654, 685–93 (1988) (“[T]his case does not involve an attempt by Congress itself to gain a role in the removal of executive officials.”); *id.* at 693–96 (“The Act does empower certain Members of Congress to request the Attorney General to apply for the appointment of an independent counsel . . .”).

64. *Id.* at 685 (citations, footnotes, and internal quotations omitted).

Branch . . . . Indeed, with the exception of the power of impeachment—which applies to all officers of the United States—Congress retained for itself no powers of control or supervision over an independent counsel. The Act does empower certain Members of Congress to request the Attorney General to apply for the appointment of an independent counsel, but the Attorney General has no duty to comply with the request, although he must respond within a certain time limit.<sup>65</sup>

The clear implication of the Court’s opinion is that, had the statute given Congress authority to appoint, remove, or control the independent counsel, it would have created a serious constitutional problem.<sup>66</sup> Under our constitutional scheme, there simply is no role for Congress in the prosecution of individual cases.<sup>67</sup> The Founders recognized that the combination of legislative and prosecutorial power is a much more explosive mixture than the combination of judicial and prosecutorial power because the former would likely lead to the abuse of power due to the highly political nature of the legislature.<sup>68</sup> Madison argued:

[I]n a representative republic, where the executive magistracy is carefully limited both in the extent and the duration of its power; and where the legislative power is exercised by an assembly, which is inspired by a supposed influence over the people with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude; yet not so numerous as to be incapable of pursuing the objects of its passions, by means which reason prescribes; it is against the enterprising ambition of this department, that the people ought to indulge all their jealousy and exhaust all their precautions.<sup>69</sup>

Madison and others particularly feared that the judicial power of determining individual guilt or innocence might be usurped by the legislature.<sup>70</sup>

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65. *Id.* at 694 (citations omitted).

66. See Peterson, *Procedural Checks*, *supra* note 35, at 221 (explaining that the limitation on the President’s power to remove the independent counsel did not present remotely as significant a constitutional issue as would a provision giving power to Congress to appoint or direct a prosecutor).

67. See *In re Aiken County*, 725 F.3d 255, 264 (D.C. Cir. 2013) (stating that “[a]fter enacting a statute, Congress may not mandate the prosecution of violators of that statute” and the President has “prosecutorial discretion and pardon powers” as a mechanism to protect citizens from “oppressive laws” and further protected “by an independent jury and Judiciary”).

68. Cass Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 435 (1987).

69. THE FEDERALIST NO. 48, at 333–34 (James Madison) (J. Cooke Ed., 1961).

70. *Id.* at 337; see also THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 195 (stating

The Constitution reflects this suspicion of any legislative involvement in the adjudication of individual guilt or innocence, as evidenced in the Bill of Attainder Clause.<sup>71</sup> Historically, Sixteenth Century Parliament would single out and punish the political enemies of the Crown.<sup>72</sup> The Clause's inclusion in the Constitution demonstrates the Framers' deep distrust of any legislative involvement in determinations of individual guilt or innocence, and it explains the Framers' specific constitutional remedy of separating the functions involved in the prosecution and conviction of crimes.<sup>73</sup> In the Court's words, the Clause serves as a "bulwark against tyranny."<sup>74</sup>

Given these strong constitutional policies, the Supreme Court has consistently ruled that Congress's role is to adopt legislation of general applicability. These laws are applied and implemented by the executive branch, and adjudications of individual guilt or innocence remain in the realm of the judiciary: "It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments."<sup>75</sup> This conclusion reflects a clear understanding of the dangers posed by the involvement of the most political branch in any aspects of the determination of individual guilt or innocence. As the Supreme Court stated in *United States v. Lovett*,<sup>76</sup>

Those who wrote our Constitution well knew the danger inherent in special legislative acts which take away the life, liberty, or property of particular named persons, because the legislature thinks them guilty of conduct which deserves punishment.<sup>77</sup>

Of course, legislative control over prosecution of a crime would not in and of itself constitute a bill of attainder. Nevertheless, the Bill of Attainder Clause, the cases interpreting that clause, and the other expressions of constitutional concern over any legislative involvement

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that the Legislature "has accordingly *in many instances decided rights* which should have been left to *judicial controversy* . . ." (emphasis added)).

71. U.S. CONST. art. I, § 9, cl. 3; *United States v. Brown*, 381 U.S. 437, 442–46 (1965); *United States v. Lovett*, 328 U.S. 303, 316–18 (1946).

72. See *Brown*, 381 U.S. at 441–42.

73. Paul Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 308–09 (1989).

74. *Brown*, 381 U.S. at 443.

75. *Fletcher v. Peck*, 10 U.S. 87, 136 (1810); see also *Brown*, 381 U.S. at 446 (quoting *Peck*, 10 U.S. at 136).

76. 328 U.S. 303 (1946).

77. *Id.* at 317; see *INS v. Chadha*, 462 U.S. 919, 961 (1983) (Powell, J., concurring) ("The Framers were well acquainted with the danger of subjecting the determination of the rights of one person to the 'tyranny of shifting majorities.'").

in the determination of individual guilt or innocence suggest that there are powerful constitutional problems with any legislative involvement in the criminal adjudication process other than passing statutes of general applicability. Because Congress is far less isolated than the courts from political pressures, allowing it to participate in prosecutorial decisions presents dangerous risks of politically motivated decision-making.<sup>78</sup>

*B. Prosecutorial Discretion Under the Criminal Contempt of Congress Statute*

Congress lacks the power to initiate a prosecution even in cases of criminal contempt of Congress, despite arguments that the criminal contempt statute could be construed to require the executive to act and that Congress must be able to mandate prosecution to protect its constitutional prerogatives. The criminal contempt of Congress statute contains two principal sections, United States Code Title 2, sections 192 and 194. Section 192, which sets forth the criminal offense of contempt of Congress, makes it a misdemeanor for any summoned witness before either House of Congress or its committees to “willfully . . . default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry.”<sup>79</sup> Section 194 purports to impose duties on the Speaker of the House or the President of the Senate, as the case may be, and the United States Attorney, to take certain actions leading to the prosecution of persons certified by a House of Congress to have failed to produce information in response to a subpoena. It provides that if a witness fails to provide subpoenaed documents or testimony and the House or Senate adopts a contempt of Congress resolution:

*it shall be the duty of the said President of the Senate or the Speaker of the House, as the case may be, to certify, and he shall so certify, the statement of facts aforesaid under the seal of the Senate or House, as the case may be, to the appropriate United States Attorney,*

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78. *See supra* Part I. It does not seem to be a persuasive defense against this point to suggest that the executive branch may bring prosecutions for politically motivated reasons as well. It is, of course, possible that political considerations may play a role in some executive branch prosecutorial decisions, although there are both constitutional and customary restrictions on such influence. It hardly warrants a concession to congressional political influence of the prosecutorial process to suggest that there have been executive abuses in the past. Surely the separation of powers, if it has any meaning, is designed to keep the branches within certain bounds in order to minimize the chances for abuse of power. That abuses may occur is no justification for ignoring the protections that the separation of powers was designed to provide.

79. 2 U.S.C. § 192 (2018) (emphasis added).

*whose duty it shall be to bring the matter before the Grand Jury for its action.*<sup>80</sup>

Section 194 does not expressly require the United States Attorney to bring a contempt prosecution or even sign an indictment with respect to individuals cited for contempt of Congress. The statute refers simply to the “duty” of the United States Attorney to bring the matter “before the grand jury for its action.” Many members of Congress, however, have insisted that, at the very least, the United States Attorney must submit every contempt-of-Congress citation to a grand jury for possible indictment.<sup>81</sup> Several commentators have agreed with Congress and argued that the statute divests the United States Attorney of any discretion in deciding whether to refer a contempt-of-Congress citation to a grand jury.<sup>82</sup> One commentator summed up this position as follows:

The duties of the executive under § 194 are mandatory. The statute calls on the executive, as the enforcer of the laws, to act as a necessary conduit between the legislative and judicial branches. The required action involves neither independent judgment of guilt or innocence nor a great expenditure of time, effort, or expense. It simply requires a presentation of a contempt citation to a grand jury. The allegation that discretion exists is without legal or logical foundation.<sup>83</sup>

Notwithstanding these arguments, the constitutional concerns about congressional influence over individual prosecutions are so strong that they apply even in the case of criminal contempt of

80. 2 U.S.C. § 194 (2018) (emphasis added).

81. For example, during the dispute between the U.S. House of Representatives and the Department of Justice over a congressional subpoena to the EPA, House officials argued that the United States Attorney was required to present the contempt of Congress citation to the grand jury. See Leslie Maitland, *Administration Battles Citation of E.P.A. Chief*, N.Y. TIMES, Dec. 18, 1982, at 1 (“The House resolution directed the United States Attorney for the District of Columbia to present a criminal contempt case against Mrs. Gorsuch to a grand jury.”); see also Peterson, *Congressional Oversight*, *supra* note 10, at 1398–1401 (describing the House contempt citation process against EPA Administrator Gorsuch).

82. Stanley Brand, the former General Counsel to the Clerk of the House of Representatives, has urged: “[T]he better argument is that [S]ection 194 requires that all witnesses cited by a House of Congress for contempt and referred to the United States Attorney be brought before the grand jury.” Stanley M. Brand & Sean Connelly, *Constitutional Confrontations: Preserving a Prompt and Orderly Means by Which Congress May Enforce Investigative Demands Against Executive Branch Officials*, 36 CATH. U. L. REV. 71, 86–87 (1986) [hereinafter Brand & Connelly].

83. Robert E. Palmer, Note, *The Confrontation of the Legislative and Executive Branches: An Examination of the Constitutional Balance of Powers and the Role of the Attorney General*, 11 PEPP. L. REV. 331, 357–58 (1984).

Congress. The Department of Justice traditionally has taken the view that the United States Attorney retains the discretion to decide whether to refer a contempt-of-Congress citation to a grand jury.<sup>84</sup> Although notable cases of executive non-referral have been rare, there have been instances in which the DOJ has declined to refer contempt citations to the grand jury. One such instance occurred in 1960 in the context of another dispute with a government agency over congressional access to documents. In that case, the Port of New York Authority (which had been established by an interstate compact approved by Congress) asserted, on instructions from the Governors of New York and New Jersey, a claim of privilege in response to a Judiciary Committee subpoena for a large number of documents concerning the Port Authority's operations. As a result of the Port Authority's failure to produce documents, the House approved contempt-of-Congress citations against three of the Authority's principal officers.<sup>85</sup> Although Congress referred the contempt resolutions to the United States Attorney for prosecution,<sup>86</sup> the United States Attorney never referred any of the contempt citations to a grand jury. One of the three officials was ultimately prosecuted by information rather than indictment, while the remaining two were never prosecuted in spite of congressional demands to refer all three to a grand jury for indictment.<sup>87</sup> Thus, the Department used its

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84. For example, in the brief filed by the Department of Justice in *United States v. House of Representatives*, the Department argued that "Section 194 does not require the United States Attorney to initiate a prosecution." H.R. Rep. No. 99-435, at 1610 (1985).

85. See 106 CONG. REC. 17258, 17281 (1960) (recommending a citation against Austin J. Tobin, Executive Director of the Authority); 106 CONG. REC. 17258, 17316 (1960) (offering a privileged resolution against S. Sloan Colt, Chairman of the Board of Directors); 106 CONG. REC. 17258, 17319 (1960) (recommending citation against Joseph G. Carty, Secretary). The contempt resolution in each case reads as follows:

Resolved, that the speaker of the House of Representatives certify the report of the Committee on the Judiciary as to the contumacious conduct of [name] in failing and refusing to furnish certain documents in compliance with a subpoena duces tecum of a duly constituted subcommittee of said committee served upon him and as ordered by the subcommittee, together with all of the facts in connection therewith, under seal of the House of Representatives, to the United States Attorney for the District of Columbia, to the end that [name] may be proceeded against in the manner and form provided by law.

86. See C.P. Trussell, *House Cites Three in Port Authority in Contempt Case*, N.Y. TIMES, Aug. 24, 1960, at 1 ("The question of contempt of Congress now goes to the Department of Justice with a House recommendation that the matter be handled 'in the manner and form provided by law.'").

87. See Alvin Shuster, *Port Board Chief is Accused by U.S. in Contempt Case*, N.Y. TIMES, Nov. 26, 1960, at 1 (describing the contempt-of-Congress process).

prosecutorial discretion to insulate specific individuals from prosecution for contempt of Congress.

Department of Justice officials have reiterated this view in congressional testimony and OLC opinions. In congressional testimony given in 1976, the Department took the position that if an executive officer were cited for contempt because of an assertion of executive privilege and “the Department determined to its satisfaction that the claim was rightfully made, it would not, in the exercise of its prosecutorial discretion, present the matter to a grand jury.”<sup>88</sup> In 1984, OLC, in an opinion signed by Assistant Attorney General Theodore Olson, concluded not only that the Constitution prohibits Congress from mandating an individual contempt prosecution, but that it also prohibits Congress from requiring the Department of Justice to refer a contempt-of-Congress citation to a grand jury.<sup>89</sup>

For a number of reasons, the Department’s opinion seems to be clearly correct.<sup>90</sup> First, in several cases the D.C. Circuit has assumed that the United States Attorney retains some discretion in deciding whether to refer a citation for contempt of Congress to a grand jury where they refused to entertain pre-enforcement challenges to congressional subpoenas. These decisions rested in part on the ground that the subpoenaed witness would have a chance to persuade the United States Attorney not to prosecute if the witness were subsequently cited for contempt of Congress. For example, in *Ansara v. Eastland*, the D.C. Circuit dismissed a suit to quash a congressional subpoena on the ground that interfering with an ongoing congressional investigation would be an inappropriate exercise of its equitable power.<sup>91</sup> The court concluded that a subpoenaed witness would not be greatly prejudiced by the absence of judicial relief because he could find alternative protection “within the legislative branch or elsewhere.”<sup>92</sup> In a footnote, the court stated that these protections could be found “perhaps in the executive branch which may decide not to present the matter to the

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88. *Testimony of Assistant Attorney Gen. Rex Lee, Hearings on Representation of Congress and Congressional Interest in Courts, Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary, 94th Cong., 2d Sess. 8 (1976).*

89. Olson Memorandum, *supra* note 19, at 102.

90. *See generally* Peterson, *Contempt of Congress*, *supra* note 62 (arguing that Congress should not be able to exercise prosecutorial authority to force the executive to charge contempt of Congress allegations).

91. *See* 442 F.2d 751, 754 (D.C. Cir. 1971) (“[I]n the absence of establishment by Congress of a procedure for advance judicial consideration and declaration, we do not think the courts can soundly interject themselves in cases like this for the purpose of granting emergency relief.”).

92. *Id.*

grand jury (as occurred in the case of the officials of the New York Port Authority);<sup>93</sup> or perhaps in the Grand Jury which may decide not to return a true bill.”<sup>94</sup> In *United States Servicemen’s Fund v. Eastland*,<sup>95</sup> the D.C. Circuit reviewed a third-party challenge to a congressional subpoena. The court heard the case in spite of the earlier precedents denying pre-enforcement review, because, in part, the plaintiffs would have no opportunity to vindicate their rights through a contempt proceeding in which they might “seek to convince the executive (the Attorney General’s representative) not to prosecute . . . .”<sup>96</sup> Significantly, these cases emphasize the importance of allowing a potential defendant the ability to persuade a federal prosecutor not to press charges, which preserves the requirement that all three branches maintain their independent roles in the federal criminal justice system.

Nevertheless, given the holding of *Young*, where the Supreme Court allowed federal courts to appoint prosecutors for criminal contempt of court,<sup>97</sup> one could argue that Congress needs the right to require prosecution of its own contempt cases. After all, if the courts are empowered to appoint prosecutors to bring criminal contempt charges against those who interfere with a court’s ability to carry out its constitutional functions, perhaps Congress has a correlative right to prosecute those who interfere with Congress’s ability to carry out its own constitutional mandate. This appealing notion should be resisted, however, because the branches of the federal government are not symmetrical; each is unique in the powers it possesses and the extent to which it reflects and responds to political pressure. Because each branch is unique, the constitutional concerns about the potential abuse of power differ from branch to branch. The constitutional authority that

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93. *Id.* Several articles have questioned the persuasiveness of this decision on the ground that “the Court’s language in *Ansara* is somewhat mysterious in view of the fact that there does not appear to be any such Port Authority case in which grand jury presentment failed to occur following congressional referral.” Brand & Connelly, *supra* note 82, at 86 n. 109; see also James Hamilton & John C. Grabow, *A Legislature Proposal for Resolving Executive Privilege Disputes Precipitated by Congressional Subpoenas*, 21 HARV. J. ON LEGIS. 145, 154 n.58 (1984) (“It is unclear what case the D.C. Circuit was referring to in this rather cryptic statement, for it cited no case involving the New York Port Authority.”). It seems clear, however, that the Court of Appeals was referring to the contempt citations of Austin J. Tobin, Executive Director of the Port Authority, Sloan Colt, Chairman of the Board of Directors of the Port Authority and Joseph G. Carty, the Secretary of the Port Authority, who were cited for contempt of Congress in 1960. None of these contempt citations were ever referred to the grand jury and only one was ever prosecuted. See *infra* text accompanying notes 98–89.

94. *Ansara*, 442 F.2d at 754 n.6.

95. 488 F.2d 1252 (D.C. Cir. 1973), *rev’d on other grounds*, 421 U.S. 491 (1975).

96. *Id.* at 1260.

97. See *supra* text accompanying notes 54–60.

may be necessary and appropriate for the judicial branch may be unnecessary and potentially dangerous in the hands of the legislature. For several reasons, this is the case with respect to prosecutions for contempt of Congress.

First, the courts have a greater need to initiate a contempt prosecution than Congress, which is amply empowered to protect its prerogatives by political means that are not available to the courts. The Court in *Young* seemed to be responding to fears about the judiciary's inability to protect itself, a fear that dates back to the adoption of the Constitution. In one of the best-known passages from the Federalist, Hamilton declared:

[T]he judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them . . . . The judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.<sup>98</sup>

Unlike the courts, Congress has ample weapons to utilize against the President if it concludes the executive branch is preventing it from performing its functions. The history of executive disputes provides a classic example of the power of Congress's access to the press as a means to mobilize political power against the executive branch.<sup>99</sup> If Congress has the political will to persevere in an investigation, it virtually always wins and is able to obtain the records that it legitimately needs.<sup>100</sup>

Not only does Congress have less of a need to mandate contempt prosecution, but the dangers of allowing Congress to mandate a prosecution are significantly greater. The federal district courts are relatively more immune from political pressure, as they are governed by precedent and subject to review by courts of appeals. Thus, although the concentration of prosecutorial power together with judicial authority is not without significant dangers, the accumulation of powers

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98. THE FEDERALIST NO. 78, at 522–23 (Alexander Hamilton) (J. Cooke ed., 1961).

99. See Todd David Peterson, *Contempt of Congress v. Executive Privilege*, 14 U. PA. J. CONST. L. 77, 139–46 (2011) (describing how Congress used the media, its advice and consent power, and negotiations to obtain the information it wanted from the Executive).

100. See *id.* (noting that the Congresses during the Reagan, Clinton, and the George W. Bush administrations were able to obtain the information and documents they wanted).

is not as volatile as it would be in a more political context. The constitutional separation of powers contemplates that there will not only be one check before conviction is possible, but two; the judicial branch must convict after the executive branch has decided to prosecute. Regardless of whether *Young* is correctly decided, it need not be extended to contempt of Congress, where the need for such additional power is far less than it is in the case of the judiciary and the potential for political abuse is so much greater.

### C. Congressional Oversight of Criminal Investigations

The rationale for limiting Congress's power to initiate or control any criminal investigation applies even in the context of oversight hearings. Congressional disclosure of information obtained from open criminal investigations has the real potential to apply inappropriate political pressure on the prosecutorial decision-making process. As former Senator Carl Levin explained:

Only the executive branch has the constitutional authority to prosecute. Congress can, when it comes across what it thinks is criminal activity, refer a matter to the Justice Department for possible prosecution, but its role and authority stops there. Should it seek to try to influence the discretionary authority of the executive branch in a prosecutorial matter, the third branch of government, the judiciary, could throw out the prosecution based on political influence.<sup>101</sup>

Because of the potential for undue political influence and numerous other problems, the Department of Justice has traditionally refused to disclose to Congress any information from open criminal investigation files.<sup>102</sup>

The Department's position was first explained in a 1941 opinion by Attorney General Robert H. Jackson.<sup>103</sup> Jackson's opinion took the form of a response to a request from the Chair of the House Committee on Naval Affairs for FBI and Department of Justice "reports, memoranda, and correspondence . . . in connection with 'investigations

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101. Carl Levin, *Congress Dangerously Wields its Oversight Power in Russia Probe*, THE HILL (May 15, 2018, 7:00 AM), <http://thehill.com/opinion/judiciary/387648-congress-dangerously-wields-its-oversight-power-in-russia-probe>.

102. See Peterson, *Congressional Oversight*, *supra* note 10, at 1385–1411 (describing how there is little precedent of the Executive providing Congress with information from open criminal investigations).

103. *Position of the Executive Department Regarding Investigative Reports*, 40 Op. Atty. Gen. 45, 1941 WL 1875 (Jackson, A.G.).

made by the Department of Justice arising out of' labor disputes at businesses with naval contracts."<sup>104</sup> Attorney General Jackson rejected the request and cited examples, dating back to 1904, in which the Attorney General had refused to disclose information from open criminal investigative files.<sup>105</sup> These refusals were, in Jackson's view, consistent with other instances in which the executive branch had asserted privilege in response to congressional requests for information.<sup>106</sup> The Attorney General concluded that the information sought by Congress was "chiefly valuable, for use by the Executive Branch of the Government in the executions of the laws. It can be of little, if any, value with the framing of legislation or with a performance of any other constitutional duty [by] Congress . . . . Certainly, the evil which would necessarily flow from its untimely publication would far outweigh any possible good."<sup>107</sup>

In a 1969 opinion, the Office of Legal Counsel stated that the reason for protecting information from open criminal investigations was to protect against potential improper congressional influence. "The executive cannot effectively investigate if Congress is, in a sense, a partner in the investigation. If a congressional committee is fully apprised of all details of an investigation as the investigation proceeds, there are substantial dangers that congressional pressures will influence the course of the investigation."<sup>108</sup> In order to protect potential defendants from politically motivated prosecutions, Congress must not be involved in any open criminal investigations.

OLC reiterated this position in a 1986 opinion for the Attorney General concerning congressional requests for information regarding decisions made under the Independent Counsel Act.<sup>109</sup> In that opinion,

104. *Id.* at 45.

105. *Id.*

106. *Id.*

107. *Id.* at 50. Attorney General Herbert Brownell reaffirmed the policy set forth in the Jackson opinion in 1956. See May 15, 1956 Memorandum of Attorney General Brownell, reprinted in *Mercury Pollution and Enforcement of the Refuse Act of 1899: Hearings before the Subcommittee on Conservation and Natural Resources of the House Committee on Government Operations*, Part I, 92d Cong. 26–27 (1971). Attorney General Brownell permitted disclosures from certain closed files, but stated that with respect to open cases, "the file may not be available for examination by the committee's representative." *Id.*

108. *Congressional Subpoenas of Department of Justice Investigations*, 8 Op. Off. Legal Counsel 252, 263 (1984), 1984 WL 178369 (quoting Memorandum for Edward L. Morgan, Deputy Counsel to the President, from Thomas E. Kauper, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Submission of Open CID Investigation Files 2* (Dec. 19, 1969)).

109. *Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act*, 10 Op. Off. Legal Counsel 68, 68 (1986).

Assistant Attorney General Charles Cooper recognized that Congress had a “legitimate legislative interest in overseeing the Department’s enforcement of the Independent Counsel Act and relevant criminal statutes in determining whether legislative revisions to the act should be made.”<sup>110</sup> Cooper warned, however, that “Congress could not justify an investigation based on its disagreement with the prosecutorial decision regarding appointment of an independent counsel for a particular individual. Congress simply cannot constitutionally second guess that decision.”<sup>111</sup> Even where Congress has a general legislative interest in reviewing the implementation of a statute, Cooper stated, “the policy of the Executive Branch throughout the Nation’s history has generally been to decline to provide committees of Congress with access to, or copies of, open law enforcement files except in extraordinary circumstances.”<sup>112</sup> Open files must be protected in order to avoid congressional pressures that might unduly influence an investigation given the “well-founded fears that the perception of the integrity, impartiality, and fairness of the law enforcement process as a whole will be damaged if sensitive material is distributed beyond those persons necessarily involved in the investigation and prosecution process.”<sup>113</sup>

In 1993, former Attorney General Benjamin Civiletti explained and further developed the traditional position of the Department of Justice.<sup>114</sup> In a speech at the Heritage Foundation, Civiletti cited a House investigation of the Department’s Environmental Crimes Unit and protested the Department’s decision to make line attorneys available for congressional questioning.<sup>115</sup> Attorney General Civiletti explained that the Constitution vests the decision on whom to prosecute in the executive branch and does not permit Congress to influence the Department’s decisions in individual cases.<sup>116</sup> According to Civiletti, congressional involvement in individual cases presents the

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110. *Id.* at 74.

111. *Id.*

112. *Id.* at 76.

113. *Id.*

114. Benjamin R. Civiletti, *Justice Unbalanced: Congress and Prosecutorial Discretion*, THE HERITAGE LECTURES NO. 472, 1 (Nov. 12, 1993), <https://www.heritage.org/political-process/report/justice-unbalanced-congress-and-prosecutorial-discretion> [hereinafter Civiletti].

115. *See id.*; *see also* Jerry Seper, *Hill Probe of Justice Lawyers Hampers Agency, Civiletti Says*, WASH. TIMES, Sept. 1, 1993, at A4 (“Mr. Civiletti said the ruling . . . will undermine the power of the executive branch of government to carry out its constitutionally assigned role.”).

116. Civiletti, *supra* note 114, at 34.

risk of improper political influence in an individual's case.<sup>117</sup> Thus, in the Department's view, congressional involvement threatens not only the separation of powers, but individual liberty as well.<sup>118</sup>

Congress has, on occasion, attempted to push back against the Department's refusal to disclose information from open criminal investigation files. After Attorney General Civiletti's speech received wide attention in the media,<sup>119</sup> the House Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce commissioned a Congressional Research Service ("CRS") study to respond to Attorney General Civiletti's views.<sup>120</sup> This memorandum took the position that

[N]umerous pertinent Supreme Court precedent[s] in this area, never mentioned by Mr. Civiletti, support a broad and encompassing power in the Congress to engage in oversight and investigation of the administration of executive agencies that would reach all sources of information that would enable it to carry out its legislative function. In the absence of a countervailing constitutional privilege or a self-imposed statutory restriction upon its authority, the Congress, and its committees, have plenary power to compel information needed to discharge its legislative function from executive agencies, private persons and organizations, and, within certain constraints, the information so obtained may be made public.<sup>121</sup>

The CRS memorandum cited Supreme Court precedent supporting the general investigative power of Congress and relied on "significant historical precedent . . . for committees receiving documents and testimony as to both open and closed cases as a result of accommodation, voluntary or otherwise."<sup>122</sup> In addition, the

117. *Id.* at 5.

118. The framers linked the two principles together and believed that the separation of powers provided a solid bulwark against infringements on individual liberty. Rebecca Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1531 (1991).

119. *E.g.*, Editorial, *General Dingell*, WALL STREET J., Sept. 2, 1993, at A12.

120. Morton Rosenberg, *Legal and Historical Substantiality of Former Attorney General Civiletti's Views as to the Scope and Reach of Congress's Authority to Conduct Oversight in the Department of Justice*, CONG. RES. SERV. (Oct. 15, 1993), reprinted in *Hearing: "EPA's Criminal Enforcement Program," Before the Subcomm. on Oversight & Investigations of the H. Comm. on Energy & Commerce*, 103d Cong. 12-41 (1993) [hereinafter 1993 CRS Memorandum]; TODD GARVEY, CONG. RES. SERV., RL34097, CONGRESS'S CONTEMPT POWER AND THE ENFORCEMENT OF CONGRESSIONAL SUBPOENAS: LAW, HISTORY, PRACTICE, AND PROCEDURE (2017) (examining the source of the contempt power).

121. 1993 CRS Memorandum, *supra* note 120, at 2.

122. *Id.* at 6.

memorandum relied upon case law that upheld the power of Congress to investigate matters that were the subject of pending litigation.<sup>123</sup> According to the CRS memorandum, the potentially prejudicial effect that congressional hearings may have on pending cases was insufficient to deny Congress access to material from criminal files.<sup>124</sup>

Finally, the CRS memorandum rejected the view that “prosecution is an inherently Executive function” and that congressional access to information related to the exercise of that function is thereby limited.<sup>125</sup> Relying on the Supreme Court’s decision in *Morrison v. Olson*, which sustained the constitutionality of the independent counsel provisions of the Ethics in Government Act, the CRS memorandum argued that the exercise of prosecutorial discretion “is in no way ‘central’ to the functioning of the executive branch.”<sup>126</sup> Thus, the memorandum concluded, “in the face of legitimate committee oversight there can be no credible claim of encroachment or aggrandizement by the legislature of essential Executive powers.”<sup>127</sup> As a consequence, the appropriate judicial test is one that determines whether the challenged legislative action “prevents the executive branch from accomplishing its assigned functions” and, if so, “whether that impact is justified by an overriding need to promote objectives within the congressional authority of Congress.”<sup>128</sup> Using this test, the CRS memorandum concluded:

Congressional oversight and access to documents in testimony, unlike the action of a court, cannot stop a prosecution or set limits on the management of a particular case. Access to information by itself does not disturb the authority and discretion of the Executive branch to decide whether to prosecute a case.<sup>129</sup>

As a result, “the fact that information is sought on the Executive’s enforcement of criminal laws would not in itself seem to preclude congressional inquiry.”<sup>130</sup>

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123. *Id.* at 6–7 (citing *Sinclair v. United States*, 279 U.S. 263, 294 (1929), and *Delaney v. United States*, 199 F.2d 107 (1st Cir. 1952)).

124. 1993 CRS Memorandum, *supra* note 120, at 9.

125. *Id.*

126. *Id.* (citing *Morrison v. Olson*, 487 U.S. 654, 691–92 (1988)).

127. *Id.* at 11.

128. *Id.* (citing *Mistretta v. United States*, 488 U.S. 361, 382 (1989)).

129. *Id.*

130. *Id.*; see also Mort Rosenberg, *Why Congressional Inquiries Trump Federal Investigations*, PROJECT ON GOV’T OVERSIGHT, <https://www.pogo.org/analysis/2018/05/why-congressional-inquiries-trump-federal-investigations/> (last visited Apr. 15, 2019, 3:32 PM) (“There appears to be no court precedent that imposes a threshold burden on committees . . . . An inquiring

The chief problem with the CRS position is that it fails to address the principal rationale for blocking congressional access to open criminal investigative files, which is the potential for improper congressional influence over decisions about whom to prosecute. The issue is not whether congressional access “prevents the executive branch from accomplishing its assigned functions”; rather, the issue is whether congressional access gives Congress the power to influence individual cases, which is authority that should not reside in the legislative branch. This is an aggrandizement problem, not an interference problem, and the Supreme Court has been much more vigilant about aggrandizement issues than it has with respect to interference issues.<sup>131</sup> The concern is not whether Congress impedes the work of the Department. Rather, congressional influence presents the risk of that politics may play a role in prosecutorial decisions that should be based on the merits of the case alone.

Moreover, the historical record simply does not support congressional access to open investigative files as opposed to closed files where the potential for influencing prosecutorial decisions is not as great. A number of factors are significant in analyzing the relevant historical record. First, it is important to distinguish between investigations of Department of Justice misconduct and investigations of departmental inaction or failure to prosecute. The former types of investigations present many fewer risks to individual rights and may indeed serve to protect them. The latter create the risk of politically influenced prosecutorial action, which may interfere with individual rights. Second, one must distinguish between civil and criminal investigations. Although there is a potential for improper congressional influence over both, the concerns are greater in the context of criminal investigations, which can involve much greater intrusions on individual rights. Third, it is important to determine the stage of an investigation at the time Congress seeks information. Here, it is not only important to distinguish between open and closed investigations, but also between investigations in which the Department has already secured indictments and investigations that are still in the preliminary pre-

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committee need only show that the information it seeks is within the broad subject matter of its authorized jurisdiction, is in aid of a legitimate legislative function, and is pertinent to the area of concern.”).

131. See Peterson, *Procedural Checks*, *supra* note 35, at 220–21 (describing how the Court typically takes a functionalist approach when a statute restricts or, in other words, interferes, with the power of a branch but a formalist approach when a statute seeks to aggrandize power in a particular branch).

indictment phase. In the former, the DOJ has already decided to proceed against particular individuals, and the danger of a congressional investigation relates principally to disclosure of a roadmap to the prosecution's case. In the latter, these concerns are compounded by the much weightier concern that Congress might influence the Department to bring a case that it might not otherwise have decided to prosecute.

Based upon these principles, an earlier study concluded that there were no significant historical precedents supporting Congress's right to obtain documents from open criminal investigations.<sup>132</sup> Since that time, congressional advocates have added additional investigations to the list of proposed precedents for such investigations, most notably in an update of the earlier Congressional Research Service report published in 2012.<sup>133</sup> This article examines these new precedents to determine if any support congressional access to open criminal investigation files.

### 1. The Removal and Replacement of United States Attorneys in 2006

In 2006, Attorney General Alberto Gonzales controversially fired and replaced nine United States Attorneys. In the wake of allegations that the firings were prompted by the failure of the United States Attorneys to initiate politically motivated investigations and prosecutions, Congress began a series of hearings related to the firings.<sup>134</sup> These congressional oversight hearings ultimately generated congressional subpoenas and an assertion of executive privilege by the

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132. See Peterson, *Congressional Oversight*, *supra* note 10, at 1447–48 (“In order to prevent [congressional interference] from occurring, the President and the DOJ should reassert the traditional position of the DOJ that Congress may not have access to open criminal investigative files.”).

133. See generally ALISSA M. DOLAN & TODD GARVEY, CONG. RESEARCH SERV., R42811, CONGRESSIONAL INVESTIGATIONS OF THE DEPARTMENT OF JUSTICE, 1920-2012: HISTORY, LAW, AND PRACTICE (2012) (updating the 2012 CRS report) [hereinafter Dolan & Garvey].

134. See generally *Restoring Checks and Balances in the Confirmation Process of United States Attorneys: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 110th Cong. (2007); *Insuring Executive Branch Accountability: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 110th Cong. (2007); *Continuing Investigation into the U.S. Attorneys Controversy: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 110th Cong. (2007); *Continuing Investigation into the U.S. Attorneys Controversy and Related Matters (Part II): Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 110th Cong. (2007); *Continuing Investigation into the EUS Attorneys Controversy and Related Matters (Part III): Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 110th Cong. (2007) (presenting hearings related to the firings of U.S. Attorneys).

President in connection with the subpoenas issued to White House Counsel Harriet Miers and the White House Chief of Staff, Joshua Bolten.<sup>135</sup> After the Department of Justice refused to refer the House's contempt citation to a grand jury, the House filed a civil enforcement action in federal district court.<sup>136</sup> In that case, the D.C. federal district court granted the Committee's motion for partial summary judgment and held that "Ms. Miers is not absolutely immune from congressional process" and that she had to appear before the Committee to provide testimony.<sup>137</sup> Although the court clearly upheld the legitimacy of the House Committee's investigation, neither the subpoenas nor any other part of the investigation dealt with open criminal investigations. Thus, the incident does not stand as a precedent for such congressional authority.

## 2. CIA Agent Identity Leak

After columnist Robert Novak wrote a column that revealed the identity of Valerie Plame Wilson, a covert CIA agent, the FBI commenced an investigation into whether the White House had illegally disclosed Plame's identity.<sup>138</sup> The disclosure was in retaliation for remarks made by her husband, former U.S. ambassador Joseph Wilson, which were critical of the Bush Administration.<sup>139</sup> In 2007, Vice President Cheney's chief of staff, I. Lewis "Scooter" Libby, was convicted of perjury, obstruction of justice, and making a false statement to federal investigators concerning the alleged illegal disclosure.<sup>140</sup> After this trial, the House Oversight and Government Reform Committee began an investigation into the security leak and ultimately subpoenaed documents from the Department of Justice investigation, including transcripts of the interviews with the President and Vice President.<sup>141</sup> The Department of Justice resisted disclosure of these transcripts and, ultimately, the President formally asserted a claim of executive privilege over the relevant documents.<sup>142</sup>

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135. See DOLAN & GARVEY, *supra* note 133, at 40.

136. See Comm. on Judiciary v. Miers, 558 F. Supp. 2d 53, 108 (D.D.C. 2008) (holding that former White House Counsel was not entitled to absolute immunity from testifying).

137. *Id.* at 98, 108.

138. DOLAN & GARVEY, *supra* note 133, at 41.

139. *Id.* at 42.

140. *Id.* at 41.

141. *Id.* at 42.

142. *Id.* at 42-43.

Although the Committee scheduled a hearing on a potential contempt of Congress citation, it was postponed and the Committee did not pursue further action on the subpoena.<sup>143</sup> This investigation provides no support for congressional claims of authority to investigate open criminal investigations.<sup>144</sup> Although the Department of Justice did provide some information relating to the investigation, this did not take place until after the investigation and trial had been completed.<sup>145</sup> Moreover, even with respect to the closed investigation, the Department successfully resisted the Committee's efforts to obtain the President's and Vice President's interview transcripts.

### 3. Operation Fast and Furious

In 2011, whistleblowers within the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), an agency within the Department of Justice, claimed that an ATF initiative dubbed "Operation Fast and Furious" had permitted straw purchases of firearms to be distributed to drug cartel members in Mexico.<sup>146</sup> In 2010, two of these guns were found near a shootout that had resulted in the death of a U.S. border patrol agent.<sup>147</sup> In a March 2011 letter to the Department of Justice, the House Oversight and Government Reform Committee requested all documents and communications regarding Operation Fast and Furious.<sup>148</sup> In response to a subsequent Committee subpoena, the Department of Justice produced numerous redacted files but refused to disclose certain documents that "contain[ed] detailed information about . . . investigative activities . . . including information that would identify investigative subjects, sensitive techniques, anticipated actions, and other details that would assist individuals in evading our law enforcement effort."<sup>149</sup> Furthermore, the Department argued that other documents were "withheld in order to protect pending criminal investigations and prosecutions."<sup>150</sup>

Upon receiving the above documents, the Committee subpoenaed Attorney General Eric Holder to obtain the documents the

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143. *Id.* at 44.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 45.

149. *Id.* at 45 (quoting Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa (June 14, 2011)).

150. *Id.* (quotations and internal citations omitted).

Department did not produce.<sup>151</sup> In response to a draft report for committee consideration of a contempt of Congress citation, the Department of Justice continued to withhold “core investigative materials from . . . ongoing criminal investigations in order to protect the independence and integrity of those efforts,” which reflected a long-held “non-partisan commitment” to separation-of-powers principles dating to the “early part of the 19<sup>th</sup> Century.”<sup>152</sup> In particular, the Department protested that disclosure would allow Congress to “influence . . . the course of the investigation” or “seriously prejudice law enforcement.”<sup>153</sup> Eventually, after the Committee agreed to narrow its subpoena, negotiations over disclosure collapsed, and President Obama asserted a claim of executive privilege over the documents because some documents “encompassed executive branch deliberative communications” and others contained “information about ongoing criminal investigations and prosecutions.”<sup>154</sup>

The House approved a formal contempt citation against Attorney General Eric Holder for refusing to disclose the documents.<sup>155</sup> In response, the Deputy Attorney General informed the Speaker of the House that the Department would not bring the congressional contempt citation before a grand jury or take any other action to prosecute the Attorney General.<sup>156</sup> The House Committee filed a lawsuit against the Department of Justice seeking to obtain civil enforcement of the House subpoena.<sup>157</sup> Almost four years later, the District Court issued an opinion requiring disclosure of some of the subpoenaed documents on the ground that the deliberative process privilege asserted by the Department of Justice was unwarranted because of the substantial disclosure of those documents in an intervening report by the Inspector General of the Department of Justice.<sup>158</sup> For present purposes, the key point is that by the time the

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151. *Id.*

152. *Id.* at 46 (quoting Letter from Dep. Att’y Gen. James M. Cole to Chairman Darrell Issa (May 15, 2012), <http://online.wsj.com/public/resources/documents/DAGLetter5-15-12.pdf>).

153. *Id.*

154. *Id.* at 47.

155. *Id.* at 48.

156. *Id.*

157. Complaint, Comm. on Oversight & Gov’t Reform v. Holder, no. 1:12-CV-1332 (D.D.C. Aug. 13, 2012).

158. Comm. on Oversight & Gov’t Reform v. Lynch, 156 F. Supp. 3d 101, 114 (D.D.C. 2016) (stating that the circumstances “serve to persuade the Court that 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”). Under the Inspector

opinion was issued, any pending investigations that might have been affected by the documents had long since been closed or resolved.<sup>159</sup> Thus, the ordered disclosures did not affect any pending or open criminal investigation.

The litigation over the enforcement of the House Committee's subpoena dragged on for many years. The court's first opinion dealt with the President's motion to dismiss on jurisdiction and justiciability grounds.<sup>160</sup> In particular, the court ruled that the political question doctrine did not prevent the court from assuming jurisdiction over the executive privilege dispute,<sup>161</sup> the court had adequate subject matter jurisdiction pursuant to the federal question statute,<sup>162</sup> the congressional plaintiff had standing to bring the lawsuit,<sup>163</sup> and the court was not precluded from issuing a decision on the merits by the D.C. Circuit's doctrine of equitable discretion.<sup>164</sup> Thereafter, both parties moved for summary judgment: the House Committee on the ground that the "Attorney General could not invoke executive privilege to shield records that did not involve direct communications with the President,"<sup>165</sup> and the Department of Justice on the ground that "the entire set of records was covered by the deliberative process prong of the executive privilege."<sup>166</sup> The court denied both motions without prejudice on the ground that "the executive branch could properly invoke the deliberative process privilege in response to a legislative demand, but that it could not do so unless the prerequisites for the application of the privilege had been established."<sup>167</sup> The court then ordered the Department to review each of the withheld documents, produce all that were not both pre-decisional and

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General Act of 1978, the Inspector General has to submit his or her reports to Congress. *See* Pub. Law 95-452, 92 Stat. 1101, § 5(b).

159. The last person to be prosecuted in connection with the Fast and Furious scheme was sentenced on December 12, 2012. *See* Fernanda Santos, *Prison Term in Guns Case Tied to Agent's Killing*, N.Y. TIMES, Dec. 13, 2012, at A25.

160. *See* Comm. on Oversight & Gov't Reform v. Holder, 979 F. Supp. 2d 1, 4 (D.D.C. 2013) (finding that there is "federal subject matter jurisdiction over this complaint, and it alleges a cause of action that plaintiff has standing to bring").

161. *Id.* at 10–11.

162. *Id.* at 17.

163. *Id.* at 21.

164. *Id.* at 24.

165. Comm. on Oversight & Gov't Reform, U.S. House of Representatives v. Lynch, 156 F. Supp. 3d 101, 107 (D.D.C. 2016); Comm. on Oversight & Gov't Reform, U.S. House of Representatives v. Holder, Civil Action No. 12–1332 (ABJ), 2014 WL 12662665 (D.D.C. Aug. 20, 2014).

166. *Lynch*, 156 F. Supp. 3d at 107.

167. *Id.*

deliberative, and create a specific index of all documents as to which the Department continued to assert privilege.<sup>168</sup>

With respect to the documents withheld on the basis of the deliberative process privilege, the court ruled that the Department's list was sufficiently detailed to suffice as a basis upon which to assert the privilege.<sup>169</sup> Moreover, the Court rejected the House Committee's contention that the deliberative process privilege applied only to deliberations concerning the development of policy.<sup>170</sup> In addition, the Court stated it was "mindful of the principles that caution against judicial intervention in a dispute between the other two branches, and it recognizes that those principles derived from the balance of separate powers carefully enunciated in the Constitution."<sup>171</sup> These principles led the court to conclude that "in the unique situation presented here, the court can decide this issue based on undisputed facts, without intruding upon legislative or executive prerogatives and without engaging in what would otherwise become a troubling assessment of the relative merit and weight of the interests being asserted by either party."<sup>172</sup> In the specific circumstances of this case, because the contents of the documents as to which the Department asserted a deliberative process privilege had already been substantially disclosed by a detailed report of the Department's Inspector General, the Department could "point to no particular harm that would flow from compliance with this subpoena, for these records, that it did not already bring about itself."<sup>173</sup>

The Department withheld other documents, however, because they contained "certain law enforcement sensitive material" and other protected information.<sup>174</sup> In particular, the court noted the Department had requested that the Committee "refrain from contacting or subpoenaing cooperating and other witnesses in indicted federal criminal cases as part of its investigation of Operation Fast and Furious while the criminal matters remain pending."<sup>175</sup> Although, as the court remarked, "at oral argument, counsel for the Committee acknowledged that these are privileges that are regularly respected in legislative requests for information as a matter of comity," the House argued that

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168. *Id.* at 108.

169. *Id.* at 108–10.

170. *Id.* at 110–12.

171. *Id.* at 113.

172. *Id.*

173. *Id.* at 114.

174. *Id.* at 119 (citing Defendant's Opposition to Motion to Compel at 27–28).

175. *Id.* at 120 (citing Letter from Ronald Weich to Darrell E. Issa (Apr. 19, 2012)).

they did not “have sufficient trust in the Department of Justice to take the Department’s word on [redactions]” made to exclude this type of privileged material.<sup>176</sup> The court rejected the Committee’s argument, however, and ruled that it “has been provided with no reason to believe that its assistance is needed to verify for counsel for one branch of government assertions made by an officer of the court representing another, equal branch of government.”<sup>177</sup> As a result, the court denied the Committee’s motion with respect to these documents relating to an open criminal investigation and ordered the parties to negotiate about the resolution of the Committee’s request for this material.<sup>178</sup>

Ultimately, the Department of Justice declined to appeal the district court’s decision and turned over documents which they had claimed the deliberative process privilege.<sup>179</sup> The House Committee, however, filed an appeal to obtain the remaining documents withheld by the Department,<sup>180</sup> and two years later the parties finally agreed to a settlement that involved disclosure of other documents, although none pertaining to any open criminal investigation.<sup>181</sup> The settlement, however, encountered a snag when District Judge Amy Berman Jackson declined to vacate her two rulings, an action that both parties had agreed upon as part of the settlement agreement.<sup>182</sup> In May of 2019, the parties finally informed the court of appeals that they had settled the matter (although leaving each side some room to continue to negotiate further details).<sup>183</sup> Nothing in the case supports Congress’s claim to access to material from an open criminal investigation.

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176. *Id.* (citing Tr. of July 30, 2015 Hearing [Dkt. 109] at 49).

177. *Id.*

178. *Id.* at 120–21.

179. Josh Gerstein, *Obama Relents in Fight Over Fast and Furious Documents*, POLITICO (Apr. 8, 2016, 4:59 PM), [www.politico.com/story/2016/04/Obama-relents-in-fight-over-fast-and-furious-documents-221741](http://www.politico.com/story/2016/04/Obama-relents-in-fight-over-fast-and-furious-documents-221741).

180. Brief for Appellant, Comm. on Oversight & Gov’t Reform of the U.S. House of Representatives v. Barr, No. 16-5078 (D.C. Cir. Oct. 6, 2016), 2016 WL 5868690.

181. Todd Ruger, *DOJ Agrees to Give Oversight Panel Fast and Furious Documents*, ROLL CALL (Mar. 7, 2018, 3:25 PM), <https://www.rollcall.com/news/policies/DOJ-agrees-give-oversight-panel-fast-furious-documents>.

182. Comm. on Oversight & Gov’t Reform, U.S. House of Representatives v. Sessions, 344 F. Supp. 3d 1, 15 (D.D.C. 2018).

183. Katelyn Polantz, *Settlement in Fast and Furious Executive Privilege Lawsuit Between DOJ and the House*, CNN POLITICS, (May 8, 2019, 7:56 PM), <https://www.cnn.com/2019/05/08/politics/fast-and-furious-settlement-doj-house/index.html>.

#### 4. Disclosure of Information Relating to the Mueller Investigation of Russian Influence on the 2016 Election

In a profoundly perverse twist, the only significant disclosure of material from open criminal investigation files to Congress came at the behest of President Trump's congressional supporters with the open approval and support of President Trump. In July of 2017, aided by several members of Congress, the Trump Administration began to go on the offensive against Mueller and his team of investigators.<sup>184</sup> House Republicans obtained "some of the Government's most sensitive investigative files—including secret wire taps and the existence of an FBI informant—that were part of the Russia inquiry."<sup>185</sup> President Trump urged the members of Congress in private phone conversations "to keep up the House Republicans' oversight work."<sup>186</sup> Furthermore, President Trump pressured administration officials, including Deputy Attorney General Rod Rosenstein, to share sensitive materials from the open Russian investigation with Congress.<sup>187</sup> Devin Nunes, the Chair of the House Intelligence Committee, threatened to hold the Deputy Attorney General in contempt or impeach him if he did not produce the investigative documents, including the file that was the basis for commencing the Russia investigation.<sup>188</sup> Members of Congress unabashedly acknowledged that their investigative efforts had helped the President's defense.<sup>189</sup>

Former Department of Justice officials bemoaned these disclosures as setting a terrible precedent for congressional access to open investigations. Matthew Miller, the former Department of Justice spokesperson under President Obama, stated: "This cave by DOJ will have long-lasting ramifications. This is an area governed solely by precedent, and DOJ is setting precedent that it is ok for Congress to interfere with, and receive documents pertaining to, active investigations."<sup>190</sup> Former U.S. Attorney and Deputy Assistant Attorney General Harry Litman wrote in the *Washington Post*: "This capitulation alters the balance of power between the Justice Department and the Hill and makes it substantially more difficult for

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184. Mazzetti, *supra* note 1.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. Matthew Miller (@matthewamiller), TWITTER (Apr. 19, 2018, 11:49 AM), <https://twitter.com/matthewamiller/status/987040540968521728>.

department officials to resist future congressional interference in active, politically charged investigations.”<sup>191</sup>

Given the circumstances of these disclosures, however, they should hardly be given any precedential weight in future confrontations between Congress and the Department of Justice. The earlier conflicts<sup>192</sup> were clear adversarial battles between the two branches in which Congress sought criminal investigatory materials and the Executive zealously sought to protect its constitutional prerogatives. This was a case in which the President was openly pressuring the Department to disclose the material because it was in his own self-interest to discover information to aid in his defense of the Mueller investigation. In essence, the President was colluding with the House Committee to obtain backdoor discovery about the investigation. The political alignment of the President and the House Committee prompted the two branches to ignore their typical institutional roles. Given the conflict of interest between the President’s desire for information about his own case and the institutional interests of the Department of Justice, this incident hardly represents a legitimate precedent for future congressional investigative demands for records from open criminal cases.

Indeed, because of the conflict of interest, the case presents a perfect example of the potential harms of disclosures from open cases. As former Senator Carl Levin wrote,

How dangerous is the assault by House Republicans on the special counsel investigation by Robert Mueller? In terms of the operation of our system of government, it is very dangerous indeed. There is an ongoing investigation into Russian influence in the 2016 election. While Donald Trump is apparently not a target, his campaign and some of his top campaign officials are. This is a criminal investigation in which President Trump has a deep and personal interest.<sup>193</sup>

Given the circumstances, it is appropriate to recall the warning of Attorney General Robert Jackson, who wrote:

Disclosure of the reports could not do otherwise than seriously prejudice law enforcement. Counsel for a defendant or prospective

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191. Harry Litman, *Rod Rosenstein Has Made Two Critical Missteps*, WASH. POST (Apr. 23, 2018), [https://www.washingtonpost.com/opinions/rod-rosenstein-has-made-two-critical-missteps/2018/04/23/4bd9c740-4689-11e8-9072-f6d4bc32f223\\_story.html?utm\\_term=.c77a1ed935f3](https://www.washingtonpost.com/opinions/rod-rosenstein-has-made-two-critical-missteps/2018/04/23/4bd9c740-4689-11e8-9072-f6d4bc32f223_story.html?utm_term=.c77a1ed935f3).

192. See *supra* Parts III.C.1–3.

193. Levin, *supra* note 101.

defendant, could have no greater help than to know how much or how little information the government has, and what witnesses or sources of information it can rely upon. This is exactly what these reports are intended to contain.<sup>194</sup>

President Trump sought the material for precisely those reasons, and thus became exhibit A for the case against disclosure of open criminal investigative files.

#### 5. The Conclusions that We May Draw from the Historical Record

The historical record makes it clear that Congress has conducted oversight of the Department of Justice on many occasions. Most of these investigations involved allegations of investigative or prosecutorial misconduct by Department officials. Many of the investigations did not require disclosure of pre-decisional deliberative material from the Department's criminal files. On a number of occasions, however, Congress has obtained such deliberative material from closed files, in spite of the Department's reluctance to disclose such records. In the face of a congressional subpoena, the Department has withheld such material only if the material was protected by Rule 6(e) of the Federal Rules of Criminal Procedure<sup>195</sup> or if the President asserted a claim of executive privilege.

On the other hand, there is little precedent for Congress demanding material contained in open criminal investigative files, and there are even fewer examples of the Department of Justice actually producing such documents. This precedent is particularly significant because so many executive privilege disputes with Congress are resolved on the basis of the perceived legitimacy of each branch's claim based on past practice. Based on the potential for improper congressional influence over the decision to prosecute a particular individual, Congress should not conduct oversight of open criminal investigations.

#### *D. Conclusions about Prosecutorial Independence from the Legislative Branch*

The Constitution excludes Congress from any involvement in prosecutorial decisions in individual cases even more forcefully than it excludes the judiciary. Not only may Congress not give itself the power

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194. Jackson, *supra* note 103.

195. The rule requires those who are part of the grand jury proceeding to "not disclose a matter occurring before the grand jury," including the grand jurors and the government attorney. FED. R. CRIM. P. 6(e)(2).

to appoint or control a prosecutor in ordinary cases, it may not do so even in cases involving criminal contempt of Congress. Moreover, the constitutional concern about the influence of congressional politics is so significant that Congress is constitutionally barred from oversight of open criminal investigations. These rules are not designed to protect the President's constitutional prerogatives; they are designed to protect the three-step process of federal criminal prosecution from political influence and unfairness to those who are subject to criminal investigation and prosecution. The Constitution requires federal prosecutorial independence from congressional interference in order to protect individual liberty and preserve the integrity of the criminal justice system.

#### IV. PROSECUTORIAL INDEPENDENCE WITHIN THE EXECUTIVE BRANCH

Notwithstanding the President's constitutional authority to manage the executive branch, there are important norms that prevent the White House from intervening in individual criminal cases. This section explores those norms by first discussing the reasons for the norms and the historic commitment to the separation of political influence from prosecutorial decision-making. The section then recounts how this decades-old principle suffered a serious blow during the Nixon Administration, only to bounce back and be reinvigorated by a succession of Attorneys General who were sensitive to the need for integrity in the federal criminal justice system. The section concludes with an analysis of the instances in which President Trump has repeatedly violated those norms in ways that cast doubt on the integrity of the criminal investigation process.

##### *A. The Strong Policy Against White House Involvement in Individual Prosecutions*

The President has the power to “nominate, and by and with the Advice and Consent of the Senate, appoint,”<sup>196</sup> and remove at will all of the top officials at the Department of Justice, including the Attorney General, the Deputy Attorney General, the Associate Attorney General, the Solicitor General, all the Assistant Attorneys General who head the individual divisions within the Department of Justice, and the

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196. U.S. CONST. art. II, § 2, cl. 2.

United States Attorneys.<sup>197</sup> This power does not mean, however, that the President has the absolute right to intervene in decisions about individual cases or investigations.<sup>198</sup> There are important issues of federal prosecutorial independence within the executive branch that relate to laws or policies that insulate federal prosecutors from influence by the president or others within the White House. As President Obama wrote in the *Harvard Law Review*,

Even at the federal level, there are important limits on the president's authority . . . . Nowhere are these limits more important than in the administration of the criminal law. For good reason, particular criminal matters are not directed by the President personally but are handled by career prosecutors and law enforcement officials who are dedicated to serving the public and promoting public safety. The President does not and should not decide who or what to investigate or prosecute or when an investigation or prosecution should happen.<sup>199</sup>

This insulation of federal prosecutors from political direction from the White House in individual cases or investigations is founded on the same principles that prevent congressional influence over specific cases. Of course, the White House must be able to discuss general prosecutorial policy and other matters of general Department administration, but White House discussions with line prosecutors delegitimize the prosecutorial process by raising the risk of politically motivated decisions. For this reason, there have long been strict policies regulating White House contact with the Department of Justice for at least the last 80 years.<sup>200</sup>

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197. See 28 U.S.C. § 541(b)–(c) (2018) (“Each United States Attorney is subject to removal by the President.”); see also *Morrison v. Olson*, 487 U.S. 654, 696 n.34 (1988) (noting that U.S. Attorneys are appointed by the president and “subject to termination at will”).

198. *Contra* Donald J. Trump, (@realDonaldTrump), TWITTER, (Feb. 14, 2020, 8:33 AM), <https://twitter.com/realDonaldTrump/status/1228311415192215553> (remarking that, when it comes to intervening in criminal cases, he has “the legal right to do so”); Kevin Liptak, *Trump Says He Didn't Ask Justice Department to Change Stone Sentencing Recommendations*, CNN (Feb. 11, 2020, 5:33 PM), <https://www.cnn.com/2020/02/11/politics/donald-trump-roger-stone-justice-department/index.html> (President Trump declaring that he has “stay[ed] out of [criminal cases] to a degree that people wouldn't believe” but asserted that “I'd be able to do it if I wanted, I have the absolute right to do it”).

199. Barack Obama, Commentary, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 823 (2017) (footnotes omitted).

200. Scholars have debated the significance of the historical record prior to 1940. Several scholars have argued that, in the early years of the republic, prosecutions of federal crimes were largely independent of any centralized control. See Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 DUKE L.J. 561, 585–86; Harold J. Krent, *Executive Control Over Criminal Law Enforcement: Some Lessons From History*, 38 AM. U. L. REV. 275, 286 (1989) (“From an early period, Congress

These intra-branch issues deal with two different types of prosecutorial independence. First, a specially appointed prosecutor may be protected from removal in order to avoid a conflict of interest when the prosecutor is investigating potential criminal wrongdoing by the president or his close associates. Second, statutes or strong policy norms may insulate federal prosecutors, including U.S. Attorneys, from direct contact with the president or others in the White House to protect against the appearance that investigations or prosecutions have been initiated because of political influence.

Although the president is the sole head of the executive branch and has the constitutional right to supervise subordinates within the executive branch,<sup>201</sup> there have traditionally been strong policy norms forbidding White House involvement in the initiation of particular criminal investigations or prosecutions. Attorney General Robert Jackson identified “the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted.”<sup>202</sup> He noted:

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limited the Executive’s effective control over criminal law enforcement ‘affirmatively’ by dispersing supervisory responsibility among various executive officials.”). Others have disagreed. For example, Presidents have not always abstained from involvement in individual investigations or prosecutions. Professor Saikrishna Prakash has argued that “[h]istorical claims . . . about the insulation of federal prosecution from presidential control are largely wrong.” Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 526 (2005) (“Presidents Washington, Adams, and Jefferson believed that they had constitutional authority to direct federal district attorneys. In fact, each directed district attorneys to begin and cease prosecutions in . . . cases suffused with foreign affairs implications, cases involving the domestic political opposition, and even cases concerning the nation’s territorial integrity.”). Professor Prakash, cites, among instances, President Washington’s decision to order prosecution of the participants in the Whiskey Rebellion and President John Adams’s control over prosecutions against his political enemies under the Sedition Act of 1798. *Id.* at 555–65. Attorney General Roger B. Taney authored a legal opinion in 1831 in which he concluded that a president had the power to direct a federal district attorney to discontinue a civil forfeiture case. See Kate Andrias, *The President’s Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1050–54 (2013). Professors Green and Roiphe conclude, with respect to the early history, “[t]he early history might suggest an intermediate position. Although the early presidential involvement in criminal prosecution was justified as an exercise of authority to ‘take care’ that federal laws are faithfully exercised, most of the reported examples seem to implicate other presidential powers and, in particular, the power to conduct foreign affairs. One might argue that, rather than possessing plenary authority over criminal prosecutions, presidents could supersede ordinary prosecutorial independence only in cases where enumerated presidential powers were implicated.” See Green & Roiphe, *supra* note 1, at 15; see *id.* at 38–69 (providing a thorough history of the 18th and 19th century history of presidential involvement in prosecutions).

201. See *Myers v. United States*, 272 U.S. 52, 135 (1926) (asserting that the President has the power to “supervise and guide” his subordinates in “their construction of the statutes under which they act”).

202. Robert H. Jackson, “*The Federal Prosecutor*” *An Address by Robert H. Jackson, Attorney General, Delivered at the Second Annual Conference of U.S. Attorneys*, 1, 4 (Apr. 1, 1940,

The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. Or the prosecutor may choose a more subtle course and simply have a citizen's friends interviewed. The prosecutor can order arrests, present cases to the grand jury in secret session, and on the basis of this one-sided presentation of the facts, can cause a citizen to be indicted and held for trial.<sup>203</sup>

The danger is that, if a prosecutor targets, or is told to target, a particular person,

[i]t is not a question of discovering the commission of a crime and then looking for the man who committed it, it is a question of picking the man and then searching the law books, or putting investigators to work to pin some offense on him. It is in this realm—in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies.<sup>204</sup>

Given this power, there is a unique danger in allowing the president or his political operatives within the White House to press federal prosecutors to investigate particular persons or groups. Unfortunately, notwithstanding the general principle that politics should not influence individual prosecutions, there have been times when the White House has attempted to use federal prosecutor power for political ends. For example, President Lyndon Johnson ordered the FBI to investigate and report on civil rights groups and anti-Vietnam war groups for political reasons.<sup>205</sup> President Richard Nixon used the Department of Justice even more aggressively to investigate political opponents, including members of Congress and journalists.<sup>206</sup> Both Attorney General John Mitchell and his successor, Richard Kleindienst, allowed the Department of Justice to be used for political purposes and as a tool to advance presidential power.<sup>207</sup>

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10:00 AM), <https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/04-01-1940.pdf>.

203. *Id.* at 1.

204. *Id.* at 5.

205. See ATHAN THEOHARIS, *THE FBI AND AMERICAN DEMOCRACY: A BRIEF CRITICAL HISTORY* 126–27 (2004).

206. STANLEY I. KUTLER, *THE WARS OF WATERGATE: THE LAST CRISIS OF RICHARD NIXON* 180, 233, 367 (1990); ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 256–57 (1973).

207. NANCY V. BAKER, *CONFLICTING LOYALTIES: LAW AND POLITICS IN THE ATTORNEY'S OFFICE, 1789–1990*, 120–21 (1992).

The Nixon White House not only utilized the Department of Justice to threaten opponents, but it also intervened on numerous occasions to halt or interfere with investigations of potential wrongdoing by the White House. After resigning as President Nixon's first Attorney General, John Mitchell became the head of President Nixon's re-election campaign.<sup>208</sup> Mitchell approved the plans for illegal electronic surveillance of the Democratic National Committee's headquarters at the Watergate Hotel as well as other illegal campaign activities suggested by the White House and other campaign officials.<sup>209</sup> After the police arrested the operatives who attempted to break into the DNC headquarters, the FBI opened an investigation under the federal criminal statutes that banned unauthorized wiretaps.<sup>210</sup> At that point, John Ehrlichman, one of President Nixon's chief White House aides, called the FBI and told them, "I have a mandate from the President of the United States . . . the FBI is to terminate the investigation of the break-in."<sup>211</sup> When the FBI official who took Ehrlichman's call refused to close the investigation, Ehrlichman threatened to "doom the FBI official's career."<sup>212</sup> When that effort failed to halt the investigation, President Nixon asked a senior CIA official to inform the FBI that national security would be compromised if the FBI did not end the investigation of the Watergate break-in.<sup>213</sup>

Throughout the FBI's initial investigation of the Watergate break-in, the Department of Justice briefed the White House counsel on the investigation and kept the White House informed of the results of the investigation and the grand jury's proceedings.<sup>214</sup> Finally, and most infamously, President Nixon ultimately ordered the Attorney General to fire Archibald Cox, the special prosecutor in charge of the Watergate investigation.<sup>215</sup> Attorney General Elliott Richardson and Deputy Attorney General William Ruckelshaus each resigned rather than

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208. *Id.* at 120–23.

209. *Id.* at 122–25.

210. *Id.* at 126.

211. TIM WEINER, ENEMIES: A HISTORY OF THE FBI 309 (2012).

212. *Id.* at 309–10.

213. *Id.* at 310–11.

214. KEITH W. OLSON, WATERGATE: THE PRESIDENTIAL SCANDAL THAT SHOOK AMERICA 58 (2016).

215. Neil A. Lewis, *Elliott Richardson Dies at 79; Stood Up to Nixon and Resigned in "Saturday Night Massacre"*, N.Y. TIMES (Jan 1, 2000), <https://www.nytimes.com/2000/01/01/us/elliott-richardson-dies-79-stood-up-nixon-resigned-saturday-night-massacre.html>.

comply with the President's order to fire the special prosecutor.<sup>216</sup> Ultimately, the firing of special prosecutor Archibald Cox generated so much controversy that Acting Attorney General Robert Bork appointed Leon Jaworski as the new Special Prosecutor to investigate crimes related to the Watergate break-in.<sup>217</sup>

*B. The Implementation and Evolution of Post-Nixon DOJ Policies to Maintain Prosecutorial Independence*

In the wake of President Nixon's resignation, Congress enacted a multitude of statutes to limit the ability of the White House to misuse the Department of Justice. These statutes included the Foreign Intelligence Surveillance Act,<sup>218</sup> the Ethics in Government Act,<sup>219</sup> and the Inspector General Act.<sup>220</sup>

Subsequent Attorneys General took actions that were equally significant. For example, in 1976, Attorney General Edward Levi adopted guidelines for FBI investigations in order to prevent the kinds of abuses that had occurred during the Nixon years and the tenure of J. Edgar Hoover as head of the FBI.<sup>221</sup> Two years later, Attorney General Griffin Bell adopted strict guidelines governing communications between the White House and Department of Justice officials.<sup>222</sup> He acknowledged that "the partisan activities of some Attorneys General in this century combined with the unfortunate legacy of Watergate, have given rise to an understandable public concern that some

216. Carroll Kilpatrick, *Nixon Forces Firing of Cox: Richardson, Ruckelshaus Quit*, WASH. POST (Oct. 1, 1973), <https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/102173-2.htm>.

217. Kenneth B. Noble, *Bork Irked by Emphasis on His Role in Watergate*, N.Y. TIMES (July 2, 1987), <https://www.nytimes.com/1987/07/02/us/bork-irked-by-emphasis-on-his-role-in-water-gate.html>.

218. Foreign Intelligence Surveillance Act of 1978, Pub. L. 95-451, 92 Stat. 1783 (providing procedures the government needs to follow before surveilling American citizens and providing congressional and judicial oversight over such surveillance).

219. Ethics and Government Act of 1978, Pub. L. 95-521, 92 Stat. 1824 (requiring public disclosure of financial information for public officials and setting the procedures that would trigger the appointment of a special counsel).

220. Inspector General Act of 1978, Pub. L. 95-452, 92 Stat. 1101, codified as amended at 5 U.S.C. App. § 1 *et. seq.* (creating Inspector General positions for various departments and agencies, including the Department of Justice, that have the authority to review internal documents and investigate, *inter alia*, fraud).

221. See John T. Eliff, *Attorney General's Guidelines for FBI Investigations*, 69 CORNELL L. REV. 785, 796-97, 798-99 (1984) (outlining the threshold requirements before opening up domestic security investigations).

222. Griffin B. Bell., *An Address by The Honorable Griffin B. Bell Attorney General of the United States*, (Sept. 6, 1978, 11:00 AM), <https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/09-06-1978b.pdf>.

decisions at Justice may be the products of favor, or pressure, or politics.”<sup>223</sup>

In order to remedy this concern, Attorney General Bell stated that the primary responsibility for exercising prosecutorial discretion within the Department had been assigned to the Assistant Attorneys General in charge of each division.<sup>224</sup> Of course, an Assistant Attorney General would be permitted to consult with the Attorney General, the Deputy Attorney General, or the Associate Attorney General, “but it is the Assistant Attorney General’s responsibility to reach a decision in the first instance.”<sup>225</sup> In particular, because “Assistant Attorneys General must be insulated from influences that should not affect decisions in particular criminal or civil cases[,] . . . all communications about particular cases, from members of Congress or their staffs, or members of the White House staff, should be referred to my office, or the offices of the Deputy or the Associate Attorney General. It will be our job to screen these communications to ensure that any improper attempts to influence a decision do not reach the Assistant Attorney General.”<sup>226</sup> Attorney General Bell captured the essence of the potential problems that could arise from contacts between the White House (or Congress) with DOJ officials charged with prosecutorial decisions: “[T]he problem is that their positions of power create a potential for unintentional influence upon a decision, and they give rise to the appearance of improper influence.”<sup>227</sup>

Attorney General Bell continued, “it is improper for any member of Congress, any member of the White House staff, or anyone else, to attempt to influence anyone in the Justice Department with respect to a particular litigation decision, except by legal arguments or the provision of relevant facts. This principle is essential to our proper function, because litigation decisions are frequently discretionary.”<sup>228</sup> Attorney General Bell concluded that, after the unfortunate events of the Watergate era, the Department “may now be in the position to establish firmly the tradition that the Attorney General and the lawyers under him must be free from outside interference in reaching professional judgments on legal matters. We must do everything that

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223. *Id.* at 3.

224. *Id.* at 6–7.

225. *Id.* at 7.

226. *Id.*

227. *Id.* at 7–8.

228. *Id.* at 9.

we can, in our time, to help establish and reinforce such a tradition. I firmly believe that the procedures and principles I have prescribed are a long, important step toward that crucial goal.”<sup>229</sup> Attorney General Bell also stated, “the U.S. Attorneys are under these rules just as much as anyone else.”<sup>230</sup>

Attorney General Bell’s remarks reflected a general consensus in the post-Watergate era that prosecutorial decisions at the Department of Justice should be insulated from both actual and apparent influence from the White House and Congress.<sup>231</sup> The President and officials in the White House, however, must necessarily and properly communicate with the Attorney General to establish enforcement priorities and general Department of Justice policy.<sup>232</sup> However, after Watergate, scholars and politicians agreed that the Department of Justice should never be used for partisan political purposes, personal vendettas, or corrupt self-dealing, that the senior leaders of the Department should play no role in electoral campaigns, and that the Department should not engage in the collection of partisan political information.<sup>233</sup>

Attorney General Bell’s Policy was reaffirmed by his successor, Benjamin R. Civiletti, in a memorandum he issued to the heads of all offices, boards, bureaus and divisions of the Department of Justice.<sup>234</sup> Attorney General Civiletti stated that, as a general principle, the officials with primary responsibility to initiate and supervise prosecutions

229. *Id.* at 12–13.

230. *Id.* at 21.

231. *See, e.g.*, PREVENTING IMPROPER INFLUENCE ON FEDERAL LAW ENFORCEMENT AGENCIES, REPORT OF THE AMERICAN BAR ASSOCIATION’S SPECIAL COMMITTEE TO STUDY FEDERAL LAW ENFORCEMENT AGENCIES 37–38 (1976) (arguing that “the Attorney General should remain a loyal member of the Cabinet backed up by a highly competent and impartial core of attorneys” and that the DOJ should be “divorced from *partisan* politics”).

232. For instance, Assistant Attorney General for the OLC, Robert G. Dixon, gave this explanation justifying the necessary role the President plays in setting Department priorities:

The people of the country are properly concerned about matters such as organized crime, civil rights, pornography, the death penalty, and enforcement of the antitrust laws. These and other areas are legitimate issues of public interest in a presidential campaign. The President should be able to set broad priorities in these and related areas . . . .

*Removing Politics from the Administration of Justice: Hearings Before the Subcomm. on Separation of the S. Comm. of the Judiciary*, 93rd Cong. at 16. (1974).

233. Kent, *supra* note 1, at 1943.

234. Memorandum from Benjamin R. Civiletti to Heads of Offices, Boards, Bureaus and Divisions (Oct. 18, 1979), [www.justice.gov/ag/aghistorical/Civiletti/1979/10-18-1979.pdf](http://www.justice.gov/ag/aghistorical/Civiletti/1979/10-18-1979.pdf).

must be insulated from influences that should not affect decisions in particular criminal or civil cases. To ensure that this occurs, to continue the independence of the Department of Justice, to prevent even the appearance of conflicts of interest and to provide for the most efficient and effective system of proper communications with outside parties, we must provide for specific procedures to regulate communication concerning pending cases.<sup>235</sup>

To implement this policy, Attorney General Civiletti directed that any communications from the White House or Congress concerning a pending case should be directed only to the offices of the Attorney General, the Deputy Attorney General or the Associate Attorney General.<sup>236</sup> The memorandum also directed that any request for formal legal advice or legal opinions should be directed to the Office of the Attorney General or OLC.<sup>237</sup> In addition, Civiletti limited the people in the White House who could contact the Department of Justice to either the head of the Domestic Policy Staff or the Counsel to the President.<sup>238</sup> The policy also permitted the Assistant to the President for National Security Affairs to raise matters relating to intelligence and national security.<sup>239</sup> Attorney General Civiletti concluded by stating: “We at Justice are not infallible, but the responsibility for wielding our power fairly is ours alone. Criticism after the fact is perfectly proper. Criticism before the fact must be channeled so that fairness is not defeated, and justice is served.”<sup>240</sup>

Although Attorney General Civiletti’s policy remained in effect during the George H.W. Bush and Clinton administrations, it was significantly relaxed during the George W. Bush administration. In 2007, the Senate Committee on the Judiciary noted in a report that, “by adding the Offices of the Attorney General, Deputy Attorney General, President, Vice President, White House Counsel, National Security Council, and Homeland Security, in their entirety, the new Bush Administration policy<sup>241</sup> permitted at least 417 people in the White House to communicate with at least 42 people at the Department on

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235. *Id.* at 1.

236. *Id.* at 1–2.

237. *Id.* at 2.

238. *Id.* at 2–3.

239. *Id.* at 3.

240. *Id.* at 4.

241. This policy, issued by Attorney General John Ashcroft, expanded the list of people in various offices in the White House who may communicate with certain members of the Department of Justice regarding pending criminal investigations. S. Rep. No. 110-203, at 15–16 (Appendix B).

non-National Security related matters.”<sup>242</sup> The same Senate report noted that in May of 2006, Attorney General Alberto Gonzales issued a new policy that “permits at least 895 people in the Executive Branch to communicate with at least 42 people at the Department on non-National Security related matters.”<sup>243</sup>

Perhaps not coincidentally, during Attorney General Gonzalez’s tenure the Department of Justice suffered the worst threat to prosecutorial independence since Watergate. Attorney General Gonzalez abruptly fired nine United States Attorneys at one time because of alleged performance issues.<sup>244</sup> As the DOJ Inspector General later reported: “The way the Department handled the removal of nine U.S. Attorneys in 2006, and the after-the-fact reasons proffered for this, resulted in significant controversy, concerns that the removals were undertaken for improper political purposes and allegations that the reasons proffered by the Department for the removals were not accurate.”<sup>245</sup> After a lengthy investigation that resulted in a report of well over 350 pages, the Inspector General concluded that its investigation found significant evidence that political partisan considerations were an important factor in the removal of several of the U.S. Attorneys.<sup>246</sup> In what the Inspector General characterized as the “most troubling example,” the report found that the United States Attorney for the District of New Mexico was removed because of “complaints from New Mexico Republican politicians and party activists about [the U.S. Attorney’s] handling of voter fraud and corruption cases . . . and that the Department removed the U.S. Attorney without any inquiry into his handling of the cases.”<sup>247</sup> The controversy over these firings led to a congressional investigation and disputed claims of executive privilege, which then led to a congressional lawsuit seeking production of White House documents and testimony from two White House officials.<sup>248</sup> The U.S. Attorney firings seriously

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242. *Id.* at 2–3.

243. *Id.* at 3.

244. David M. Driesen, *Firing U.S. Attorneys: An Essay*, 60 ADMIN. L. REV. 707, 710 & n.11 (2007); Bruce A. Green & Fred C. Zacharias, “*The U.S. Attorneys Scandal*” and the Allocation of Prosecutorial Power, 69 OHIO ST. L.J. 187, 187–88 (2008).

245. U. S. DEP’T OF JUSTICE OFFICE OF THE INSPECTOR GEN., AN INVESTIGATION INTO THE REMOVAL OF NINE U.S. ATTORNEYS IN 2006 325 (2008).

246. *Id.* at 325–58 (analyzing the process used in terminating the nine U.S. Attorneys and concluded, based on the findings of fact, that the reasons justifying their removal were “based on improper political factors” and that “political partisan considerations were an important factor in the removal of several of the U.S. Attorneys”).

247. *Id.* at 326.

248. See *Comm. on Judiciary v. Miers*, 558 F. Supp. 2d 53, 106–07 (D.D.C. 2008) (holding that

damaged the credibility of the Department and ultimately contributed to the departure of Attorney General Gonzales.<sup>249</sup>

Michael Mukasey, the successor to Attorney General Gonzales, issued a revised memorandum covering communications between the White House and the Department of Justice.<sup>250</sup> Attorney General Mukasey's memorandum argued that on "many subjects, the White House and the Department must be able to communicate freely in order to carry out efficiently the administration's policies and programs."<sup>251</sup> As a result, "all communications between the Department and the White House that concern policy, legislation, budgeting, political appointments, personnel matters related to political appointees, public affairs, informal legal opinions, intergovernmental relations, administrative matters, or similar matters may be handled directly by the parties concerned."<sup>252</sup> The memorandum cautioned that

[c]ommunications with respect to pending criminal or civil-enforcement matters, however, must be limited. Therefore, the Department will advise the White House about such criminal or civil-enforcement matters only when it is important for the President's duties and where appropriate from a law enforcement perspective. This limitation recognizes the President's ability to perform his obligation to "take care that the laws be faithfully executed" while ensuring that there is public confidence that the laws of the United States are administered and enforced in an impartial manner.<sup>253</sup>

In order to implement this principle, the memorandum directed that, on non-national security related matters regarding any specific pending Department investigation or criminal or civil-enforcement matter, "communications between the Department and the White House should be limited to the Counsel to the President or Deputy Counsel and the Attorney General or Deputy Attorney General."<sup>254</sup>

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former White House Counsel was not entitled to absolute immunity from testifying before Congress).

249. See Steven Lee Myers and Philip Shenon, *Embattled Attorney General Resigns*, N.Y. TIMES, August 27, 2007, at 1.

250. Memorandum from Attorney General Michael Mukasey for Heads of Department Components and United States Attorneys (Dec. 19, 2007), <https://www.justice.gov/sites/default/files/ag/legacy/2008/04/15/ag-121907.pdf>.

251. *Id.* at 1.

252. *Id.*

253. *Id.* at 1–2.

254. *Id.* at 2.

The Associate Attorney General could communicate regarding civil-enforcement matters, and the Solicitor General could communicate on matters relating to appeals.<sup>255</sup>

After the election of President Obama, Attorney General Eric Holder issued a much more detailed memorandum governing communications with the White House and Congress.<sup>256</sup> That memorandum stated that the

Assistant Attorneys General, the United States Attorneys, and the heads of investigative agencies in the Department have the primary responsibility to initiate and supervise investigations and cases. These officials, like their superiors and their subordinates, must be insulated from influences that should not affect decisions in particular criminal or civil cases.<sup>257</sup>

Attorney General Holder cited the Supreme Court in determining that those who exercise the Department's investigatory and prosecutorial powers are representatives "not of an ordinary party to a controversy, but of a sovereign whose obligation to government impartiality is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."<sup>258</sup>

The memorandum required that initial communications between the Department and the White House regarding pending or future criminal investigations or cases would include only the Attorney General or Deputy Attorney General and the Counsel to the President, the principal Deputy Counsel to the President, the President, or the Vice President.<sup>259</sup> The memorandum permitted the Associate Attorney General also to be involved with communications concerning a pending or contemplated civil investigation or case.<sup>260</sup> If continuing contact between the Department of Justice and the White House would be required, then the officials involved in the initial communication could designate subordinates to carry on this contact, but those officials

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255. *Id.*

256. Memorandum from Attorney General Eric Holder for Heads of Department Components, All United States Attorneys, at 1 (May 11, 2009), [https://www.justice.gov/oip/foia-library/communications\\_with\\_the\\_white\\_house\\_and\\_congress\\_2009.pdf/download](https://www.justice.gov/oip/foia-library/communications_with_the_white_house_and_congress_2009.pdf/download).

257. *Id.*

258. *Id.* (citing *Berger v. United States*, 295 U.S. 78, 88 (1935)).

259. *Id.* at 2.

260. *Id.* at 2.

were required to keep their superiors regularly informed of such contacts.<sup>261</sup>

With respect to congressional inquiries, the memorandum required that any communications from individual senators or members of Congress or their staffs should be directed only to the Attorney General or Deputy Attorney General in the case of criminal investigations and the Associate Attorney General in the case of civil investigations or cases.<sup>262</sup> Moreover, the memorandum also limited communications with respect to personnel decisions regarding positions in the civil service.<sup>263</sup> In such matters, “communications regarding positions in the career service are not proper when they concern a job applicant’s or a job holder’s partisan affiliation. Efforts to influence personnel decisions concerning career positions on partisan grounds should be reported to the Deputy Attorney General.”<sup>264</sup>

### *C. The Trump Administration’s Disregard of DOJ Precedent*

One week after President Trump’s inauguration, his White House Counsel, Donald F. McGahn, wrote a memorandum to all White House staff concerning communications restrictions with personnel at the Department of Justice.<sup>265</sup> The memorandum stated that the DOJ advises the White House about contemplated or pending investigations or enforcement actions under specific guidelines issued by the Attorney General and that “[a]s a general matter, only the President, Vice President, Counsel to the President, and Deputy Counsel to the President may be involved in such communications. These individuals may designate subordinates to engage in ongoing contacts about a particular matter with counterparts at DOJ similarly designated by DOJ.”<sup>266</sup> The memorandum further required that “[c]ommunications with DOJ about individual cases or investigations should be routed through the Attorney General, Deputy Attorney General, Associate Attorney General, or Solicitor General, unless the Counsel’s office

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261. *Id.*

262. *Id.*

263. *Id.* at 3.

264. *Id.* at 3.

265. Memorandum from Donald F. McGahn II to All White House Staff, at 1 (Jan. 27, 2017), <https://www.politico.com/f/?id=0000015a-dde8-d23c-a7ff-dfef4d530000>.

266. *Id.*

approves different procedures for the specific case at issue.”<sup>267</sup> Moreover,

[t]he President, the Vice President, Counsel to the President, and Deputy Counsel to the President are the only White House officials who may initiate a conversation with DOJ about a specific case or investigation. These rules recognize the president’s constitutional obligation to take care that the laws of the United States are faithfully executed, while insuring maximum public confidence that those laws are administered and applied impartially in individual investigations or cases.<sup>268</sup>

Notwithstanding this apparent continuation of the policies set forth in Attorney General Holder’s Memorandum, the Trump White House quickly began to honor these restrictions in the breach.<sup>269</sup>

For example, the New York Times reported that White House Counsel Donald McGahn “was working to secure access to what Mr. McGahn believed to be an order issued by the Foreign Intelligence Surveillance Court authorizing some form of surveillance relating to Mr. Trump and his associates.”<sup>270</sup> Moreover, individuals in the White House apparently asked the FBI to refute reports that Trump campaign advisors had contact with Russia during the presidential campaign.<sup>271</sup> In addition, the New York Daily News reported that White House Senior Advisor Stephen Miller called the home of the U.S. Attorney for the Eastern District of New York to give instructions on how he should defend the Administration’s travel ban.<sup>272</sup>

Moreover, President Trump has violated the spirit of the policies regarding White House contacts with the Department of Justice in the numerous public statements in which he has called for the

267. *Id.*

268. *Id.* at 1–2.

269. See *White House Communications with the DOJ and FBI*, PROTECT DEMOCRACY (Mar. 8, 2017), <https://protectdemocracy.org/agencycontacts/> (describing examples of the Trump Administration’s breach of longstanding bipartisan policies limiting contacts between the White House and the DOJ).

270. Michael D. Shear & Michael S. Schmidt, *Trump, Offering No Evidence, Says Obama Tapped His Phones*, N.Y. TIMES (Mar. 4, 2017), <https://www.nytimes.com/2017/03/04/us/politics/trump-obama-tap-phones.html>.

271. Spencer Ackerman, *White House Confirms Conversation with FBI About Trump and Russia*, THE GUARDIAN (Feb. 4, 2017), <https://www.theguardian.com/us-news/2017/feb/24/donald-trump-russia-reince-priebus-fbi-talks-james-comey>.

272. Harry Siegel, *Stephen Miller Called Brooklyn U.S. Attorney at Home and Told Them How to Defend Travel Ban in Court*, N.Y. DAILY NEWS (Feb. 18, 2017), <https://www.nydailynews.com/opinion/stephen-miller-called-u-s-attorney-travel-ban-defense-article-1.2975873>.

investigation, indictment, or prosecution of various individuals.<sup>273</sup> President Trump, in the face of criticism of his frequent pronouncements, asserted, “I have the absolute right to do what I want with the Justice Department.”<sup>274</sup> As one scholar observed,

President Trump has made unorthodox private contacts with Department officials with responsibility for criminal investigations touching on his interests; publicly criticized senior department officials for prosecutorial and investigative judgments; and accused former officials including his predecessor, of politically motivated surveillance and criminal conduct. All of these comments will be heard by the FBI and others in the Department conducting investigations touching on President Trump’s personal and political interests. It exacerbates an already charged political climate that presents challenges to the exercise of independent professional judgment on the part of law enforcement and prosecutors.<sup>275</sup>

President Trump’s communications and comments have related both to potential investigations of political opponents and to investigations of himself and his political allies. In the first category, he renewed his campaign demands for reopening the criminal investigation of Hilary Clinton’s email use.<sup>276</sup> President Trump also demanded investigations of his opponent’s connections to a controversial uranium deal and Democratic payments for the so-called “Steele dossier” which included reports of Russian collusion with the Trump campaign and other controversial allegations against President Trump.<sup>277</sup> He later wondered when the Department would “act” to

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273. See Michael S. Schmidt & Maggie Haberman, *Trump Wanted to Order Justice Dept. to Prosecute Comey and Clinton*, N.Y. TIMES (Nov. 20, 2018, 11:09 AM), <https://www.nytimes.com/2018/11/20/us/politics/president-trump-justice-department.html> (describing how the President urged, both privately and publicly, to investigate and prosecute former FBI director James Comey for “mishandling sensitive government information and for his role in the Clinton email investigation” and former Democratic presidential candidate Hillary Clinton for grievances propped up by right-wing media such as the “Uranium One deal”).

274. Michael S. Schmidt, *Excerpts from Trump’s Interview with The Times*, N.Y. TIMES (Dec. 28, 2017), <https://www.nytimes.com/2017/12/28/us/politics/trump-interview-excerpts.html>.

275. Wright, *supra* note 1, at 360–61.

276. See Louis Nelson, *Trump Ratchets Up Call for DOJ to Investigate Hilary Clinton*, POLITICO (Nov. 3, 2017, 7:56 AM), <https://www.politico.com/stories/2017/11/03/trump-doj-investigate-Hillary-Clinton-244505>; see also Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 2, 2017, 6:13 PM), <https://twitter.com/realdonaldtrump/status/926404584456773632?lang=en> (“What About the Deleted [sic] e-mails, uranium, Podesta, the server, plus, plus . . .”); Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 3, 2017, 4:11 AM), <https://twitter.com/realdonaldtrump/status/926406490763784194?lang=en> (“At some point the Justice Department, and the FBI, must do what is right and proper.”).

277. In a series of four posts on Twitter, President Trump stated: “Never seen such Republican ANGER AND UNITY as I have concerning the lack of investigation on Clinton

prosecute Hillary Clinton’s former aide, Huma Abedin.<sup>278</sup> The Mueller Report found that President Trump “pushed back on the DOJ contacts policy, and said words to the effect of, ‘You’re telling me that Bobby and Jack didn’t talk about investigations? Or Obama didn’t tell Eric Holder who to investigate?’”<sup>279</sup> In addition, the Report found that the President later called Attorney General Jeff Sessions at home and “asked if Sessions would ‘unrecuse’ [sic] himself. According to Sessions, the President asked him to reverse his recusal so that Sessions could direct the Department of Justice to investigate and prosecute Hillary Clinton . . . .”<sup>280</sup> The President renewed his request that Sessions investigate Hillary Clinton later in 2017.<sup>281</sup> At that time, “the President met privately with Sessions and said that the Department of Justice was not investigating individuals and events that the President thought the Department should be investigating.”<sup>282</sup> According to notes taken at the meeting, “the President mentioned Clinton’s emails and said, “Don’t tell us, just take [a] look.”<sup>283</sup>

In the second category, communications and comments relating to investigations involving President Trump or his associates, President Trump has attempted to influence the course of those investigations both publicly and privately. Publicly, the President frequently expressed his ire over both Robert Mueller’s independent counsel investigation of Russian interference with the 2016 presidential election and the investigation by the United States Attorney for the Southern District of New York into hush payments made by President Trump’s former attorney, Michael Cohen, to women who had extramarital affairs with

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made Fake Dossier (now \$12 million).” Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 29, 2017, 6:53 AM), <https://twitter.com/realdonaldtrump/status/924635359480303616?lang=en>; “[t]he uranium to Russia deal, the 33,000+ deleted emails, the Comey leaks and so much more. Instead they look at phony Trump/Russia.” *Id.* (Oct. 29, 2017, 7:02 AM), <https://twitter.com/realdonaldtrump/status/924637600094326784?lang=en>; “‘Collusion,’ which doesn’t exist. The Dems are using this terrible (and bad for our country) witch hunt for evil politics, but the R’s.” *Id.* (Oct. 29, 2017, 7:09 AM), <https://twitter.com/realdonaldtrump/status/924639422066384896?lang=en>; “are now fighting back like never before. There is so much GUILT by Democrats/Clinton, and now the facts are pouring out. DO SOMETHING!” *Id.* (Oct. 29, 2017, 7:17 AM), <https://twitter.com/realdonaldtrump/status/924641278947622913?lang=en>.

278. David Nakamura & Matt Zapotosky, *Trump Urges Justice Department to “Act” on Comey, Suggests Huma Abedin Should Face Jail Time*, WASH. POST. (Jan. 2, 2018), [https://www.washingtonpost.com/news/post-politics/wp/2018/01/02/trump-urges-justicedepartment-to-act-on-comey-suggests-huma-abedin-should-facejailtime/?utm\\_term=.1e477dbd ac2e](https://www.washingtonpost.com/news/post-politics/wp/2018/01/02/trump-urges-justicedepartment-to-act-on-comey-suggests-huma-abedin-should-facejailtime/?utm_term=.1e477dbd ac2e).

279. Mueller Report, *supra* note 6, at Vol. II, 51.

280. *Id.* at 107.

281. *Id.* at 109.

282. *Id.*

283. *Id.*

Donald Trump.<sup>284</sup> For example, he made numerous public criticisms of the Mueller investigation, which he repeatedly called a politically motivated “witch hunt.”<sup>285</sup> As CNN noted, President Trump “has used the ‘Russia-hoax’ label at least once a month since March.”<sup>286</sup>

The President also acted outside of the public’s view. The New York Times published an extensive review of President Trump’s efforts to oppose and obstruct the various investigations of potential criminal behavior in his administration.<sup>287</sup> The Times noted that its investigation revealed “the extent of an even more sustained, more secretive assault by Mr. Trump on the machinery of federal law enforcement. Interviews with dozens of current and former government officials and others close to Mr. Trump, as well as a review of confidential White House documents, reveal numerous unreported episodes in a two-year drama.” As the Times further reported:

The story of Mr. Trump’s attempt to defang the investigations has been voluminously covered in the news media, to such a degree that many Americans have lost track of how unusual his behavior is. But fusing the strands reveals an extraordinary story of a president who has attacked the law enforcement apparatus of his own government like no other president in history, and who has turned the effort into an obsession.<sup>288</sup>

The Mueller Report confirmed the Times story and detailed additional presidential efforts to restrict or terminate the Russia investigation. The Mueller report cataloged these actions in over 140 pages of detailed factual findings, which will here be only briefly

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284. See Linda Qiu, *Truth-Testing Trump’s 250-plus Attacks on the Russia Inquiry*, N.Y. TIMES (Aug. 18, 2018), <https://www.nytimes.com/2018/08/18/us/politics/fact-check-trump-russia-election-interference.html>; Josh Gerstein et. al, *Cohen Says He Paid Hush Money at Candidate Trump’s Direction*, POLITICO (Aug. 21, 2018, 2:50 PM), <https://www.politico.com/story/2018/08/21/michael-cohen-strikes-plea-deal-with-prosecutors-790646> (describing President Trump’s apparent role during the election in having Michael Cohen pay for the silence of two women who allegedly had affairs with the President).

285. E.g., Noah Berman & Brian Bennett, *Trump Lashes Out, Calls Russia Investigation a “Witch Hunt”*, L.A. TIMES (May 18, 2017, 2:45 PM), <https://www.latimes.com/politics/la-na-pol-trump-special-counsel-20170518-story.html>.

286. Brian Stelter, *Trump Says This is All a Hoax. Mueller, Congress and Facebook Disagree*, CNN (Sept. 22, 2017, 10:33 AM), <https://money.cnn.com/2017/09/22/media/trump-facebook-russia/index.html>.

287. See Mazzetti, *supra* note 1 (detailing the President’s attempts to end investigations that could criminally implicate him by seeking to remove relevant personnel, discrediting the Mueller investigation and its witnesses, and using his personal lawyer, Rudolph Giuliani, as a conduit of information from the Mueller investigation).

288. *Id.*

summarized.<sup>289</sup> The Report notes that in January of 2017, the President asked FBI Director James Comey to dinner at the White House and that when Comey arrived, “he was surprised and concerned to see that no one else had been invited.”<sup>290</sup> During the dinner, the President made comments that Comey interpreted to be “an effort to create a patronage relationship by having Comey ask for his job.”<sup>291</sup> Later, the President stated to Comey, “I need loyalty, I expect loyalty.”<sup>292</sup> A few weeks later in February, the President cleared the Oval Office after a meeting in order to speak privately with Director Comey.<sup>293</sup> Once he was alone with Comey, the President brought up the investigation of then-National Security Director Michael Flynn. The President said to Comey that Flynn “is a good guy and has been through a lot . . . I hope you can see your way clear to letting this go, to letting Flynn go. He is a good guy. I hope you can let this go.”<sup>294</sup> The Mueller Report notes that Comey testified under oath that he took the President’s statement “‘as a direction’ because of the President’s position and the circumstances of the one-on-one meeting.”<sup>295</sup>

The Report also recounts President Trump’s efforts to get Director Comey to “lift the cloud” created by the Russia investigation,<sup>296</sup> by which he meant that Comey should—in Comey’s words—“find a way to get out that we weren’t investigating him.”<sup>297</sup> When the President called Comey to follow up on this conversation, Comey said that he had passed the President’s request along to senior DOJ officials and “he informed the President that the traditional channel for such a request would be to have the White House Counsel contact DOJ leadership.”<sup>298</sup>

The events leading up to the termination of FBI Director Comey give further examples of the President’s efforts to influence the investigation and the public’s perception of it. Before Comey’s testimony at a Senate oversight hearing, the President “said it would be the last straw if Comey did not take the opportunity to set the record straight by publicly announcing that the President was not under

289. See Mueller Report, *supra* note 6, at Vol. II, 15–149.

290. *Id.* at 33.

291. *Id.* at 34.

292. *Id.* at 34.

293. *Id.* at 39–40.

294. *Id.* at 40.

295. *Id.*

296. *Id.* at 57–58.

297. *Id.* at 58.

298. *Id.* at 58–59.

investigation.”<sup>299</sup> After Comey declined to answer questions about the Russia investigation, the “President became very upset and directed his anger at [Attorney General] Sessions.”<sup>300</sup> According to notes taken by the Attorney General’s chief of staff, the President said: “This is terrible Jeff. It’s all because you recused. AG is supposed to be most important appointment. Kennedy appointed his brother. Obama appointed Holder. I appointed you and you recused yourself. You left me on an island. I can’t do anything.”<sup>301</sup> By the next weekend, the President had decided to fire Comey.<sup>302</sup> The President wanted to include in the letter firing Comey the fact that Comey had refused to state that the President himself was not under investigation.<sup>303</sup>

After Comey’s dismissal, the White House asked the Department of Justice to put out a statement that it was Deputy Attorney General Rosenstein’s idea to fire Comey.<sup>304</sup> Rosenstein declined to put out a “false story” and told the President that it would not be a good idea for Rosenstein to hold a press conference because he “would tell the truth that Comey’s firing was not his idea.”<sup>305</sup> Notwithstanding Rosenstein’s comments, the White House press secretary told reporters, “[i]t was all [Rosenstein]. No one from the White House. It was a DOJ decision.”<sup>306</sup> The next day, in an Oval Office meeting with the Russian Foreign Minister and the Russian Ambassador, the President said, “I just fired the head of the F.B.I. He was crazy, a real nut job. I faced great pressure because of Russia. That’s taken off . . . I’m not under investigation.”<sup>307</sup> After repeated false statements by the White House press office about who initiated Comey’s termination, the President admitted in an interview that he had already made up his mind to fire Comey and continued: “And in fact, when I decided to just do it, I said to myself – I said, you know this Russia thing with Trump and Russia is a made-up story. It’s an excuse by the Democrats for having lost an election that they should’ve won.”<sup>308</sup>

In discussing the facts relating to Comey’s firing, the Mueller Report noted: “Substantial evidence indicates that the catalyst for the

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299. *Id.* at 62.

300. *Id.* at 63.

301. *Id.*

302. *Id.* at 64.

303. *Id.* at 67.

304. *Id.* at 70.

305. *Id.*

306. *Id.*

307. *Id.* at 71.

308. *Id.* at 73.

President's decision to fire Comey was Comey's unwillingness to publicly state that the President was not personally under investigation, despite the President's repeated requests that Comey make such an announcement."<sup>309</sup> Moreover, the Report added, "[t]he President also said he wanted to be able to tell his Attorney General 'who to investigate.'"<sup>310</sup> The Report concluded: "The initial reliance on a pretextual justification [for firing Comey] could support an inference that the President had concerns about providing the real reason for the firing, although the evidence does not resolve whether those concerns were personal, political, or both."<sup>311</sup>

The Mueller Report also details the President's extensive efforts to remove Mr. Mueller from his special counsel position.<sup>312</sup> Among the many facts cited by the Report are the following. After learning of the appointment of the special counsel, the President became so upset that he "slumped back in his chair and said, 'Oh my God. This is terrible. This is the end of my Presidency. I'm fucked.'"<sup>313</sup> After expressing his anger that Sessions had recused himself, he urged Attorney General Sessions to resign. The Report states, "Sessions recalled that the President said to him, 'you were supposed to protect me,' or words to that effect."<sup>314</sup> The Report also recounts the President's many efforts to get Mueller removed on various conflict-of-interest grounds.<sup>315</sup> Eventually, the President told the White House Counsel to have Mueller removed from office.<sup>316</sup> The Counsel, however, did not follow the President's instructions, even after receiving a follow-up call from the President with a second request to have Mueller fired.<sup>317</sup> The Report concludes: "Substantial evidence indicates that the President's attempts to remove the Special Counsel were linked to the Special Counsel's oversight of investigations that involved the President's conduct – and, most immediately, to reports that the President was being investigated for potential obstruction of justice."<sup>318</sup>

After failing to have Mueller removed from office, the President made considerable efforts to curtail the Special Counsel

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309. *Id.* at 75.

310. *Id.* at 76.

311. *Id.* at 77.

312. *Id.* at 77–87.

313. *Id.* at 78.

314. *Id.* at 78.

315. *Id.* at 80–84.

316. *Id.* at 85.

317. *Id.* at 86.

318. *Id.* at 89.

investigation.<sup>319</sup> First, the President asked his former campaign manager, Corey Lewandowski, to deliver a message to Attorney General Sessions to limit the investigation to future election interference.<sup>320</sup> Lewandowski, however, never delivered the message. The President later told Lewandowski “that if Sessions did not meet with him, Lewandowski should tell Sessions he was fired,” but again, the meeting never took place.<sup>321</sup> Other efforts to limit the investigation included public criticism of Attorney General Sessions for not controlling the investigation<sup>322</sup> and ordering his Chief of Staff to demand Session’s resignation.<sup>323</sup> The Mueller Report concluded that “substantial evidence indicates that the President’s effort to have Sessions limit the scope of the Special Counsel’s investigation to future election interference was intended to prevent further investigative scrutiny of the President’s and his campaign’s conduct.”<sup>324</sup>

In sum, the efforts by the President and his legal team to interfere with and discredit the investigations of his potential criminal activity make President Nixon’s efforts to derail the Watergate investigation look like small potatoes in comparison. The Mueller report put the President’s acts together this way:

Our investigation found multiple acts by the President that were capable of exerting undue influence over law enforcement investigations, including the Russia-interference and obstruction investigations. The incidents were often carried out through one-on-one meetings in which the President sought to use his official power outside of usual channels. These actions ranged from efforts to remove the Special Counsel and to reverse the effect of the Attorney General’s recusal; to the attempted use of official power to limit the scope of the investigation; to direct and indirect contacts with witnesses with the potential to influence their testimony. Viewing the acts collectively can help to illuminate their significance. For example, the President’s direction to McGahn to have the Special Counsel removed was followed almost immediately by his direction to Lewandowski to tell the Attorney General to limit the scope of the Russia investigation to prospective election-interference only – a temporal connection that suggests

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319. *Id.* at 90.

320. *Id.* at 91.

321. *Id.* at 92–93.

322. *Id.* at 93.

323. *Id.* at 94.

324. *Id.* at 97.

that both acts were taken with a related purpose with respect to the investigation.<sup>325</sup>

The President's efforts to influence individual cases before the Department of Justice did not cease with the conclusion of the Mueller investigation. For example, the President became publicly involved in the case of his friend and confidant, Roger Stone, who was convicted in November of 2019 of obstructing an inquiry by the House Intelligence Committee into Russian interference in the 2016 election, lying to federal investigators, and attempting to prevent the testimony of a witness who could disclose his false testimony.<sup>326</sup> After President Trump complained on Twitter that the prosecutors' recommended sentence of seven to nine years in prison was "horrible and very unfair" and went on to say that he "[c]annot allow this miscarriage of justice," Attorney General William Barr intervened in the case and changed the recommendation to a more lenient sentence.<sup>327</sup> After the Attorney General's action, three of the four prosecutors who investigated and prosecuted the case withdrew from the case, and a fourth resigned from the Department altogether.<sup>328</sup> The prosecutors' anger was amplified by the fact that they were told of the reversal only after Fox News reported it.<sup>329</sup>

The action created a firestorm of protest as department lawyers and former federal prosecutors spoke out against the reversal of the prosecutors' recommendation.<sup>330</sup> One former prosecutor stated, "in essence, the leadership of the Justice Department has commandeered the sentencing in a politically sensitive criminal matter, reversing the position uniformly accepted and promoted by the career prosecutors."<sup>331</sup> The New York Times reported:

Prosecutors across the United States, who spoke on the condition of anonymity to avoid reprisals, said this week that they had already been wary of working on any case that might catch Mr. Trump's attention and that the Stone episode only deepened their concern.

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325. *Id.* at 157.

326. See Katie Benner, Sharon LaFraniere, & Adam Goldman, *Prosecutors Quit Roger Stone Case After Justice Dept. Intervenes on Sentencing*, N.Y. TIMES, February 11, 2020, at 1.

327. *Id.*

328. *Id.*

329. *Id.*

330. See Katie Benner, Sharon LaFraniere, and Adam Goldman, *After Stone Case, Prosecutors Say They Fear Pressure From Trump*, N.Y. TIMES, February 12, 2020, at 1.

331. *Id.*

They also said that they were worried that Mr. Barr might not support them in politically charged cases.<sup>332</sup>

In spite of the Justice Department's denials that any official had conferred with President Trump about the case, many remained skeptical about the legitimacy of the process. Jack Goldsmith, who headed the Office of Legal Counsel under George W. Bush, commented: "Even assuming that Bill Barr is acting with integrity, it is impossible to believe that because the president is making him look like his political lap dog, Trump makes it impossible to have confidence in the department's judgment."<sup>333</sup>

Given the evidence contained in the Mueller Report and the President's interference in the Stone investigation, there is little doubt that the traditional independence of federal prosecutors is facing one of its most significant challenges. The current White House has ignored the previously well-entrenched limitations designed to prevent politics from influencing criminal investigations and cases. Although, at this point, there is not any definitive evidence that the President's efforts have affected any particular investigations or prosecutions, there is ample reason to consider how one might reinforce these important protections against misuse of the federal criminal enforcement regime.

#### V. POSSIBLE WAYS TO REINFORCE FEDERAL PROSECUTORIAL INDEPENDENCE

This final section considers ways to think about how Congress or future administrations might respond to the challenges to federal prosecutorial independence. The first response is conceptual. We can reinforce the norm of independent prosecutorial decision making by placing it in the context of the separation-of-powers principles that mandate prosecutorial independence from the judicial and legislative branches and then looking for ways to reinforce this norm. The second response involves potential statutory or regulatory changes that would protect prosecutorial independence in individual cases while respecting the President's constitutional power to direct the general policies and management of the Department of Justice.

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332. *Id.*

333. *Id.* Even the Attorney General himself subsequently complained that President Trump's comments on individual cases like Stone's "make it impossible for me to do my job." Katie Benner, *Barr Says Attacks From Trump Make Work 'Impossible'*, N.Y. TIMES, February 13, 2020, at 1.

*A. Conceptualizing Federal Prosecutorial Independence as Part of the Constitutionally Mandated Separation of Powers*

By looking at the subject of federal prosecutorial independence from the perspective of all three branches, it is much easier to understand why there must be exceptionally strong separation-of-powers policy limitations on White House involvement in individual cases and investigations. The strict limitations on judicial and legislative involvement in individual cases are not designed just to protect presidential prerogative; they are required in order to protect the integrity of the constitutional mandate that all three branches participate independently in the federal criminal process. The judicial branch may conduct the trials in individual cases, but it may not create or recognize common law crimes, nor may it require the executive to bring or try a particular case. The legislative branch may pass laws of general applicability, but it may take no part in directing or even influencing the selection of those who will be prosecuted, nor may it participate in the adjudicative process that determines individual guilt or innocence. The executive is left with the task of investigating possible crimes and bringing individuals to trial.

For the executive's separate role in individual prosecutions to be meaningful, however, it must be carried out in a manner that is free from political influence or even the appearance of political influence.<sup>334</sup> Just as Congress must carry out its constitutional oversight role without allowing it to influence open criminal investigations, the executive branch must carry out its prosecutorial role without White House involvement in individual cases. Each branch must prevent politics from tainting the investigative and prosecutorial process. If they weaken their commitment to this principle, individual liberty is jeopardized and the Constitution's careful design is damaged. This is not merely a question of good policy; it addresses the issue of abusive use of presidential power in a way that threatens individual liberty and presidential accountability. The constitutional prohibitions on judicial and congressional interference explain why politically based influence in individual criminal prosecutions is an abuse of presidential prerogative.

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334. The constitutional policies that underlie the restrictions on the legislature and the judiciary necessarily imply a norm that restricts political interference from the White House. The policy is not a matter of constitutional law, but is rather a governing principle that derives from the structure and principles of the Constitution.

The first way to reinforce this principle is for the Senate Judiciary Committee to demand that every Senate-confirmed nominee for positions in the Department of Justice agree to adhere to the principles most recently set forth in the Holder memorandum.<sup>335</sup> For example, after the U.S. Attorney crisis forced the resignation of Attorney General Alberto Gonzales, the Senate used the confirmation hearings for his successor, Michael Mukasey, to repeatedly question the nominee about the Justice Department's White House Contacts policy and obtain a commitment to issuing detailed procedures to restrict contacts between the White House and the Department of Justice lawyers.<sup>336</sup> After his confirmation, Attorney General Mukasey fulfilled his commitment and issued a new memorandum restricting contacts between the White House and Department of Justice lawyers.<sup>337</sup>

This should not be an *ad hoc* process but should become a standard that both parties agree, in advance of any nomination, to apply to nominees of both parties.<sup>338</sup> These commitments could be monitored by vigorous oversight of any potential violations of the policy and enforced by censure votes or even, in the appropriate case, possible impeachment.<sup>339</sup> The Government Accountability Office and the Department of Justice Inspector General could be given roles in monitoring compliance with the White House contacts policy.<sup>340</sup> If the Judiciary Committee has the will and the institutional sense of purpose to enforce this policy, the public would be much more aware of its importance and would care about enforcement of the policy, which would make breaches of the policy much less likely.

### *B. Possible Statutory and Regulatory Changes*

If the commitments of nominees prove to be an insufficient barrier to improper White House interference, Congress might consider statutory changes, including mandates that the Department adopt formal regulations to implement a White House contacts policy.<sup>341</sup> It seems clear that it would not be constitutionally impermissible for

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335. See *supra* text accompanying notes 256–64; see also Kent, *supra* note 1, at 1955–57.

336. See *Nomination of Michael B. Mukasey to be Attorney General of the United States: Hearing Before the S. Comm. on the Judiciary*, 110th Cong., at 99–100 (2007) (questions of Chairman Patrick J. Leahy); *id.* at 147–49 (questions of Sen. Sheldon Whitehouse).

337. See *supra* text accompanying notes 250–55.

338. If necessary, in order to avoid partisan motives, both parties could set a confirmation standard on this issue that would not be implemented until after the next presidential election.

339. Kent, *supra* note 1, at 1957–60.

340. *Id.* at 1960–61.

341. *Id.* at 1962–64.

Congress to significantly regulate White House involvement in individual prosecutions. As Peter Shane has recently argued, given the weak link between the Framers' conception of core executive power and the federal prosecutorial function, there is little constitutional reason to limit Congress's ability to regulate the relationship between the White House and federal prosecutors.<sup>342</sup> Indeed, as Shane points out,

Criminal prosecution, like environmental protection or food safety regulation, is an administrative function for which the executive branch would have no role except insofar as Congress grants such a role through its statutory enactments. Indeed the peripheral status of the prosecutor in relation to the core of executive power is especially clear precisely because, at the time of the Founding, prosecution would have been understood to have as much of a judicial as it does an executive character. Against the actual historical background of prosecution, it is entirely faithful to original understanding to respect Congress's authority to determine the scope of presidential policy control over criminal prosecutors.<sup>343</sup>

One additional change would be easy to implement. Congress could require the DOJ and White House to file a regular report of any contacts that were outside the scope of the White House contacts policy with the House and Senate Judiciary Committees. In 2007, the Senate considered a bill titled "Security from Political Interference in Justice Act of 2007."<sup>344</sup> The bill, S. 1845, came out of a Senate hearing involving the testimony of Attorney General Alberto Gonzales concerning the greatly expanded number of White House and Department of Justice officials who were permitted to discuss open investigations and cases.<sup>345</sup> The bill would have required both the Department of Justice and the White House to submit semiannual reports to the Senate and House Committees on the Judiciary listing all "covered communications" between the White House and the Department of Justice, with certain exceptions.<sup>346</sup> Covered communications were defined as "any communications relating to an on-going investigation conducted by the Department of Justice in any civil or criminal matter (regardless of whether a civil action or criminal indictment or information has been

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342. Peter Shane, *Prosecutors at the Periphery*, 94 CHICAGO-KENT L. REV. 241, 241–45 (2019).

343. *Id.* at 264.

344. Security from Political Interference in Justice Act of 2007, S. 1845, 110th Cong. (2007).

345. S. Rep. No. 110-203, at 3–6, 17–19 (2007).

346. *Id.* § (3).

filed).”<sup>347</sup> They did not include “any communication relating to policy, appointments, legislation, rule-making, budgets, public relations, programmatic matters, intergovernmental relations, administrative or personnel matters, appellate litigation, or requests for legal advice.”<sup>348</sup> For the communications that originated from the Department of Justice, the bill exempted the communications of the Attorney General, the Deputy Attorney General, and the Associate Attorney General from being reported.<sup>349</sup> For communications that originated from White House, the bill exempted the communications of the President, the Vice President, the Counsel to the President and the Counselor to the President.<sup>350</sup> The Senate report noted, “one of the most common and effective tools of congressional oversight is to require the Executive Branch to produce reports to Congress.”<sup>351</sup> Although the Judiciary Committee favorably reported the bill by a vote of 14 yeas and 2 nays, the full Senate took no further action on the bill.<sup>352</sup> Congress should now resume consideration and pass such a bill.

Beyond this kind of measure, Congress should tread very carefully lest they fall victim to the overregulation that followed the resignation of President Nixon. Given the egregious conduct described in the Mueller Report, Congress might be very tempted to impose sweeping limitations on the President’s authority or to resurrect some of the now-discarded statutory reforms of the post-Watergate era. These measures lapsed or were repealed for good reason. In the long run, they created more problems than they solved.

For example, it would be a mistake to resurrect the wisely discarded independent counsel provisions of the Ethics in Government Act. The hair-trigger appointments of independent counsels under the old statute generated overlong investigations of mostly insignificant subjects. The few investigations that were worthy of independent investigation could (and would) have been easily handled by a special counsel appointed by the Department of Justice like Leon Jaworski and Robert Mueller. Even if a renewed statute were still deemed

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347. *Id.* § (2)(1)(A).

348. *Id.* § (2)(1)(B).

349. *Id.* § (2)(2).

350. *Id.* § (2)(3).

351. S. Rep. No. 110-203, at 7 (2007).

352. *Id.* at 8. The House released its own version of the bill. *See* Security from Political Interference in Justice Act of 2007, H.R. 3848, 110th Cong. (2007).

constitutional,<sup>353</sup> it would be unwise and probably not necessary to solve the problem of improper White House contacts.<sup>354</sup>

There is even more reason to reject proposals that were not adopted after Watergate. For example, legislation to make the Department of Justice more independent by imposing limitations on the President's power to remove senior Department of Justice officials are constitutionally suspect and unnecessary.<sup>355</sup> Those proposals did not succeed even during the hyper-regulatory phase of the post-Nixon era, and they should not be resurrected now.<sup>356</sup> The Department of Justice is a resilient organization with lawyers who are committed to the impartial enforcement of the law. Without diminishing the gross impropriety of the conduct documented by the Mueller Report, it is worth noting that there has been no evidence that the Department altered the investigation or prosecution of individual cases in response to the attempted interference by the White House. Part of the reason that the more radical proposals for Department of Justice independence have not succeeded (in addition to the significant constitutional problems associated with making the entire Department of Justice an independent agency) is the significant decentralization of the Department of Justice, which makes *routine* interference in prosecutorial decision-making quite difficult.<sup>357</sup> That decentralization

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353. In recent years, some scholars have been sympathetic to Justice Scalia's dissent in *Morrison*. See, e.g., *Counsels and the Separation of Powers: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 5 (2017) (statement of Akhil Reed Amar asserting that “[t]he lion’s share of the constitutional law scholars who are most expert and most surefooted on this particular topic now believe that *Morrison* was wrongly decided and/or that the case is no longer ‘good law’ that can be relied upon as a sturdy guidepost to what the current Court would and should do”). Other scholars pointedly disagree and continue to regard *Morrison* as good law. See, e.g., Shane, *supra* note 342. The fact remains that, whatever individual Justices may have said before being confirmed, the Supreme Court itself has not given any indication that it would reexamine *Morrison* or that the Court’s decision in *Morrison* is not good law.

354. Even before the Independent Counsel Act expired, some critics argued that it would be preferable to assign prosecutions of federal officials to career prosecutors because, functionally, they are least likely to act in a partisan fashion. See, e.g., Julie O’Sullivan, *The Independent Counsel Statute: Bad Law, Bad Policy*, 33 AM. CRIM. L. REV. 463, 475 (1996) (“DOJ prosecutors, who have a necessarily broader focus and are privy to a store of institutional knowledge and experience, are better positioned to exercise their discretion in a professional and equitable manner, and are accountable if they do not.”).

355. See Kent, *supra* note 1, at 1980–96 (proposing that the structure of the FBI be changed in order for its director to only be removed for cause).

356. See *supra* notes 218–20.

357. See Leslie B. Arffa, *Separation of Prosecutors*, 128 YALE L.J. 1078, 1115–18 (2019); Green and Zacharias, *supra* note 244, at 196–200 (describing the organizational structure of the DOJ as “some mix of centralization and grant of discretion to lower-level attorneys” and noting that the DOJ is so large and complex that, as a practical matter, the Attorney General is limited in his ability to influence the work of the U.S. Attorneys).

operates as a significant intra-branch check on regular and consistent instances of unwelcome political influence.<sup>358</sup>

#### CONCLUSION

The separation of powers operates nowhere more clearly than in the distribution of powers over federal criminal prosecution. Each branch has a clearly defined role to play, and each branch is limited in the extent to which it participates in the determination of individual guilt or innocence. Congress may pass laws of general applicability. The executive may identify and prosecute those who violate those laws. The courts may determine individual guilt or innocence. Congress's role in creating criminal law is consistent with its political character. The Constitution requires electoral accountability for the creation of our laws. That is why, in the federal system, the mainly unaccountable courts have no role in the creation of the criminal laws. On the other hand, we want the courts that determine individual guilt or innocence to operate independently so that the application of the criminal law is not tainted by political influence. The executive's role involves both general and individual decision-making. With respect to general prosecutorial policy, it is appropriate for the politically accountable White House to direct the actions of the Department of Justice. With respect to individual cases, however, the involvement of the White House is just as suspect as the involvement of Congress. It is up to Congress to make certain that this important intra-branch separation-of-powers norm is respected at the Department of Justice.

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358. Arffa, *supra* note 357, at 1115.