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INTRODUCTION

Throughout President Bill Clinton's second term one of the most vexing problems facing the Department of Justice (DOJ) was how to handle the investigation concerning possible violations of the campaign finance laws during the 1996 presidential election. The DOJ investigated allegations that both presidential campaigns had violated the criminal provisions of the Federal Election Act and other statutes

governing fundraising and the election process.[1] The investigation was further complicated by the potential applicability of the Independent Counsel Reauthorization Act,[2] which required the Attorney General to seek the appointment of an independent counsel to investigate allegations against senior executive branch officials whenever the Attorney General, upon completion of a preliminary investigation under this chapter, determined that there were "reasonable grounds to believe that further investigation is warranted."[3] In spite of intense pressure from Congress and the media to appoint an independent counsel to investigate the campaign finance allegations, Attorney General Janet Reno resisted the appointment of what would have been the eighth independent counsel appointed during her time in office.[4]

The pressure on the Attorney General increased when the press disclosed that FBI Director Louis Freeh had written a memorandum recommending the appointment of an independent counsel to investigate the campaign finance matter.[5] The Senate and the House committees investigating the campaign finance issue immediately requested a copy of the Freeh memorandum.[6] The DOJ, however, citing a long-standing policy of not disclosing materials from an open criminal investigation, refused to deliver a copy of the Freeh memorandum to the congressional committees; instead, the DOJ provided a confidential oral briefing concerning the Freeh memorandum to the chairmen and ranking members of the Senate and House committees.[7] During a later hearing in July 1998, Senator Fred Thompson, a member of the Senate committee, disclosed substantial parts of an apparently leaked copy of the Freeh memorandum during a hearing at which Attorney General Reno testified.[8]

The subsequent disclosure that Charles LaBella, the head of the Department's campaign finance task force, had also recommended

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1 *See* COMM. ON GOV'T REFORM AND OVERSIGHT, REFUSAL OF ATTORNEY GENERAL JANET RENO TO PRODUCE DOCUMENTS SUBPOENAED BY THE GOVERNMENT REFORM AND OVERSIGHT COMMITTEE, H.R. REP. No. 105-728 (1998) [hereinafter H.R. REP. No. 105-728].

2 *See* Independent Counsel Reauthorization Act of 1994, 28 U.S.C. §§ 591–599 (1994 & Supp. III 1997) (lapsed in 1999).

3 *Id.* § 592.

4 *See* CHARLES A. JOHNSON & DANETTE BRICKMAN, INDEPENDENT COUNSEL: THE LAW AND THE INVESTIGATIONS 142–43 (2001).

5 *See* David Johnston, *F.B.I.'s Chief Tries To Influence Reno: Memo Argues for Appointment of Independent Prosecutor*, N.Y. TIMES, Dec. 2, 1997, at A1.

6 *See* H.R. REP. No. 105-728, *supra* note 1, at 13.

7 *See id.*

8 *See Department of Justice Oversight: Hearing Before the Senate Comm. on the Judiciary*, 105th Cong. 11 (1998) (statement of Sen. Fred Thompson).

the appointment of an independent counsel generated even more controversy.[9] The House committee first requested and then subpoenaed the LaBella memorandum and renewed its demands for the Freeh memorandum.[10] The Department again resisted disclosure of the memoranda, but it stopped short of requesting that the President assert a claim of executive privilege over the Freeh and LaBella memoranda.[11]

Ultimately, the House Committee on Government Reform and Oversight, by a vote of twenty-four to nineteen, adopted a resolution recommending to the full House of Representatives that Attorney General Reno be cited for contempt of Congress.[12] After lengthy negotiations between the DOJ and the House committees, the DOJ redacted from the memoranda material protected by Rule 6(e) of the Federal Rules of Criminal Procedure and disclosed the redacted copies of the memoranda to select members of the Senate and House committees.[13] These disclosures only increased the demands that Attorney General Reno appoint a campaign finance independent counsel and did not satisfy the concerns of the investigating committees.[14] Ultimately, the DOJ produced a revised version with less material redacted, and this version wound up on the website of the House committee.[15]

The controversies over disclosure of the memoranda prompted both the DOJ and Congress to reassess, and ultimately to reaffirm, their long-standing policies concerning congressional oversight of open criminal investigations. Congressional advocates argued that Congress has a legitimate interest in overseeing the criminal investigation process and that this interest permits congressional committees to demand information from the DOJ, even concerning matters that are still under active investigation.[16] The DOJ, on the other hand, reiterated its traditional position that Congress has no right to information from an open criminal investigation.[17] Like most such con-

9 *See* David Johnston, *Report to Reno Urges a Counsel over Donations*, N.Y. TIMES, July 23, 1998, at A1.

10 *See* H.R. REP. NO. 105-728, *supra* note 1, at 14.

11 *See id.* at 15.

12 *See id.* at 1.

13 Telephone Interview with Craig Iscoe, Associate Deputy Attorney General (Jan. 2002). Mr. Iscoe was the chief person at the DOJ involved in communicating with the Burton Committee on the issue of campaign finance documents.

14 *See* Karen Alexander, *Into the Wilderness: Candidates Will Push the Envelope After Campaign Finance Rules Became Even Blurrier in 1998*, LEGAL TIMES, Dec. 21, 1998, at 16.

15 Telephone Interview with Craig Iscoe, *supra* note 13.

16 *See* H.R. REP. NO. 105-728, *supra* note 1, at 16–26.

17 *See id.* at 45–47.

flicts between the executive and legislative branches, this dispute ultimately remained unresolved.

Congressional oversight may involve the criminal investigation process in three different ways. First, Congress may investigate a matter that is simultaneously being investigated by the DOJ. This type of oversight may raise concerns about the due process rights of the accused and the potential for interference with the criminal investigation and subsequent trial of suspected criminals.[18] Second, Congress may investigate allegations of prosecutorial misconduct by DOJ officials. These types of investigations focus on the way in which the DOJ might violate the constitutional rights of the accused or use excessive force in responding to alleged criminal activity.[19] These types of investigations may raise concerns that are similar to those in other executive privilege disputes, in particular, the concern that disclosure of deliberative information will discourage DOJ officials from expressing their views freely. Third, Congress may seek information concerning the failure of the DOJ to investigate or prosecute particular types of crime or specific allegations of criminal misconduct against identified suspects. This third type of investigation raises the same concerns about the deliberative process as the second category, but it also creates problems related to the potential for undue congressional influence over the decision to investigate or prosecute specific individuals.

Although the issues raised by the first two kinds of oversight have been extensively debated in the academic literature,[20] the issues raised by congressional access to information from open criminal investigations have been little discussed. This lack of attention is an unfortunate oversight because the disputes over access to information relating to open criminal investigations recur with distressing fre-

18 *See generally* Delaney v. United States, 199 F.2d 107 (1st Cir. 1952); United States v. Mitchell, 372 F. Supp. 1239 (S.D.N.Y. 1973).

19 *See, e.g., FBI Oversight: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. of the Judiciary*, 94th Cong. (1975–1976) (including review of domestic intelligence operations); S. REP. No. 94-755 (1976) (discussing constitutional rights in context of foreign and military intelligence operations).

20 *See, e.g.*, Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L.Q. 713 (1999); Allen B. Moreland, *Congressional Investigations and Private Persons*, 40 S. CAL. L. REV. 189 (1967); Howard R. Sklamberg, *Investigation Versus Prosecution: The Constitutional Limits on Congress's Power To Immunize Witnesses*, 78 N.C. L. REV. 153 (1999); Walter W. Steele, Jr., *Unethical Prosecutors and Inadequate Discipline*, 38 SW. L.J. 965 (1984); Kristine Strachan, *Self-Incrimination, Immunity and Watergate*, 56 TEX. L. REV. 791 (1978); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521 (1981); John van Loben Sels, Note, *From Watergate to Whitewater: Congressional Use Immunity and Its Impact on the Independent Counsel*, 83 GEO. L.J. 2385 (1995).

quency, and Congress and the executive branch have found virtually no common ground on this question. Congress asserts that it has the right to obtain information from open criminal files in order to conduct necessary oversight, while the DOJ resists disclosure because of the potential for improper influence on the investigation. There has been little progress in establishing accepted boundaries on the scope of Congress's authority to investigate in this area.

Moreover, despite the DOJ's recognition that disclosures from open investigations present unique problems, these disputes are negotiated in the context of the same well-established protocol for evaluating possible claims of executive privilege that is used for all disputes over congressional access to information from the executive branch. The procedure, which requires an assertion of executive privilege from the President in order to refuse to comply with a congressional subpoena,[21] is well-suited to the resolution of most claims of executive privilege. The procedure, and the negotiation process of which it is a part, do an excellent job of balancing the competing claims of Congress and the executive branch.[22] In the context of congressional access to open criminal investigation files, however, the procedure makes it far too difficult to resist congressional influence that has the potential to influence improperly the course of a criminal investigation.

This Article contends that the President should instruct the DOJ to deny congressional access to information from open criminal investigations without the necessity of obtaining a presidential assertion of executive privilege in each individual case. This per se privilege should apply up to the time that an indictment is brought or the investigation is closed. After that point, the current procedures for asserting privilege on a case-by-case basis should continue to apply. In addition, the President should instruct the DOJ not to assert privilege in response to a subpoena arising out of a legitimate impeachment investigation or an investigation into specific allegations of certain kinds of affirmative DOJ misconduct.[23]

This Article begins by describing the traditional positions of Congress and the DOJ with respect to these kinds of congressional inquiry. This Article then reviews the history of congressional investigations to determine the extent to which historical practice may provide guidance on this question. Although Congress has claimed

21 *See infra* text accompanying notes 275–83.

22 *See* Todd D. Peterson, *Prosecuting Executive Branch Officials for Contempt of Congress*, 66 N.Y.U. L. REV. 563, 625–31 (1991).

23 *See infra* text accompanying note 157.

that a long list of precedents supports its claims of access to open criminal investigation files, a close examination of the record reveals scant precedent for the disclosure to Congress of information from active criminal investigations. Next, this Article examines the constitutionally based arguments of both sides of the conflict. Congress has substantial investigatory power that is supported by long practice and substantial Supreme Court precedent. The executive branch has a corresponding right to withhold certain kinds of information from congressional inquiry. This right is grounded in both the need to encourage a free and open deliberative process within the executive branch and the right to prevent Congress from improperly interfering with a criminal investigation. Finally, this Article examines how these competing interests apply in the context of congressional access to open criminal investigative files. This Article concludes that, in this context, Congress's limited need for information from open criminal investigative files is outweighed by the threat of improper congressional influence over individual criminal cases, as well as other harms to the ability of the DOJ to investigate and prosecute the cases. These concerns warrant a per se rule that bars congressional access to open criminal investigative files without the need for a presidential assertion of privilege.

I. The History of Congressional Demands for Information Concerning Open Criminal Investigations

This Part describes the history of congressional efforts to obtain information from open criminal investigative files in order to provide a historical context for the analysis of the competing claims of right. The first Section looks at how each branch has explained its position on the controversy. The second Section then examines the historical precedents that might provide a basis for Congress's claims for a right to obtain information in open criminal investigative files.

A. The Branches Explain Their Positions

1. The Department of Justice's Position on Disclosure of Information from Open Criminal Investigation Files

The classic statement of the executive branch's position on congressional access to open investigative files was set forth in a 1941 opinion by Attorney General Robert H. Jackson.[24] Jackson's opinion took the form of a response to a request from the Chair of the House

24 40 Op. Att'y Gen. 45 (1941).

Committee on Naval Affairs for FBI and DOJ "reports, memoranda, and correspondence . . . in connection with internal 'investigations made by the DOJ arising out of strikes, subversive activities in connection with labor disputes, or labor disturbances of any kind in industrial establishments which have naval contracts, either as prime contractors or subcontractors.'"[25] Attorney General Jackson set forth a number of reasons for his refusal to provide the requested documents. First, he stated that

> [d]isclosure of the reports could not do otherwise than seriously prejudice law enforcement. Counsel for a defendant or prospective 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.[26]

Attorney General Jackson noted that the disclosure of these particular reports would also prejudice the national defense and "be of aid and comfort to the very subversive elements against which you wish to protect the country."[27]

Second, Attorney General Jackson argued that disclosure of the reports would have the potential to compromise confidential informants:

> As you probably know, much of this information is given in confidence and can only be obtained upon pledge not to disclose its sources. A disclosure of the sources would embarrass informants—sometimes in their employment, sometimes in their social relations, and in extreme cases might even endanger their lives. We regard the keeping of faith with confidential informants as an indispensable condition of future efficiency.[28]

Finally, Attorney General Jackson argued that disclosure of the investigative reports could harm those mentioned therein:

> Disclosure of information contained in the reports might also be the grossest kind of injustice to innocent individuals. Investigative reports include leads and suspicions, and sometimes even the statements of malicious or misinformed people. Even though later and more complete reports exonerate the individuals, the use of particular or selected reports might constitute the grossest injustice, and we all know that a correction never catches up with an accusation.[29]

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25 *Id.* at 45.

26 *Id.* at 46.

27 *Id.*

28 *Id.* at 46–47.

29 *Id.* at 47.

Attorney General Jackson followed his explanation of the rationale for non-disclosure with a list of instances, dating back to 1904, in which the Attorney General had refused to supply information concerning criminal investigations. 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.[30] The Attorney General concluded his opinion by stating 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.[31]

Attorney General Jackson's opinion combined arguments relating to the general assertion of executive privilege by the executive branch with arguments about the particular harms that might arise from disclosure of information from open criminal investigative files. Even with respect to the latter, however, Attorney General Jackson emphasized the harm of public disclosure of the documents rather than the potential for improper congressional interference in an ongoing investigation.

Attorney General Herbert Brownell reaffirmed the policy set forth in the Jackson opinion in 1956.[32] His memorandum stated that, if the congressional request concerned a closed case ("one in which there is no litigation or administrative action pending or contemplated"), the file would be made available for review in the DOJ, in the presence of the official having custody of the file.[33] The memorandum specified, however, that before making the file available to a congressional committee representative,

> all reports and memoranda from the FBI as well as investigative reports from any other agency, will be removed from the file and not made available for examination; provided however that if the committee representative states that it is essential that information from the FBI reports and memoranda be made available, he will be advised that the request will be considered by the department. There-

30 *Id.* at 47–48.

31 *Id.* at 50.

32 *See Mercury Pollution and Enforcement of the Refuse Act of 1899: Hearings Before the Subcomm. on Conservation and Natural Resources of the House Comm. on Gov't Operations*, 92d Cong. 26–28 (1971) (Memorandum of Attorney General Brownell, May 15, 1956).

33 *Id.* at 26.

> after a summary of the contents of the FBI reports and memoranda involved will be prepared which will not disclose investigative techniques, the identity of confidential informants, or other matters which might jeopardize the investigative operations of the FBI.[34]

With respect to open cases, the memorandum stated that "the file may not be available for examination by the committee's representative."[35] Instead, the memorandum suggested that a reply letter should advise the committee that its request relates to a matter in which litigation or administrative action is pending or contemplated and that a file cannot be made available until the case is completed.[36] In addition, the reply letter should "set forth a status of the case in as much detail as is practicable and prudent without jeopardizing the pending contemplated litigation or administrative action."[37]

In a later memorandum, the Department's Office of Legal Counsel (OLC) specifically focused on the potential for congressional interference in an open investigation as a reason for withholding information from Congress: "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."[38]

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.[39] In that opinion, Assistant Attorney General Charles Cooper acknowledged 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."[40] The opinion cautioned, 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 constitu-

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34 *Id.* at 27.

35 *Id.*

36 *Id.*

37 *Id.*

38 Memorandum from Thomas E. Kauper, Deputy Assistant Attorney General, Office of Legal Counsel, to Edward L. Morgan, Deputy Counsel to the President, Submission of Open CID Investigation Files 2 (Dec. 19, 1969), *cited in* 8 Op. Off. Legal Counsel 252, 263 (1984).

39 10 Op. Off. Legal Counsel 68 (1986).

40 *Id.* at 74.

tionally second-guess that decision."[41] Notwithstanding Congress's legislative interest, OLC noted that "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."[42] This policy, according to the OLC opinion, was based upon a number of important interests, including the need to avoid congressional pressures that might unduly influence an investigation, the potential damage to law enforcement from the disclosure of sensitive techniques, methods, or strategy, the protection of confidential informants, the need to protect the rights of innocent individuals whose names might be disclosed in the files, and "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."[43] Based on these policies, the opinion concluded, there were strong reasons for not disclosing to Congress any information contained in open investigative files concerning the decision whether to appoint an independent counsel.

The OLC opinion did not, however, go so far as to state that information concerning the appointment or non-appointment of independent counsel would never be disclosed to Congress. The opinion suggested that disclosure of information from an open file concerning whether to appoint an independent counsel would be evaluated under the procedures established by a presidential memorandum governing invocations of executive privilege.[44] That memorandum stated that "executive privilege will be asserted only in the most compelling circumstances, and only after careful review demonstrates that assertion of the privilege is necessary."[45] The memorandum also set out a procedure for obtaining presidential authorization for the assertion of executive privilege in response to a congressional subpoena for documents. On the basis of this memorandum, the OLC opinion concluded that, if necessary, the

> decision to assert executive privilege in response to a congressional subpoena, however, is the President's to make. Under the terms of

41 *Id.*

42 *Id.* at 76.

43 *Id.*

44 *Id.* at 81 (referring to the Memorandum from [President Reagan] to the Heads of Executive Departments and Agencies Regarding Procedures Governing Responses to Congressional Requests for Information (Nov. 4, 1982) [hereinafter Responses to Requests Memorandum]).

45 *Id.* at 81 n.21 (quoting Responses to Requests Memorandum).

> the Reagan memorandum, executive privilege cannot be asserted vis-à-vis [sic] Congress without specific authorization by the President, based on recommendations made to him by the concerned department head, the Attorney General, and the Counsel to the President. That decision must be based on the specific facts of the situation, and therefore it is impossible to predict in advance whether executive privilege could or should be claimed as to any particular types of documents or information.[46]

In 1989, the OLC reaffirmed its opinion that Congress should not have access to information in open criminal files in the context of an opinion on congressional requests for information from inspectors general.[47] Assistant Attorney General Douglas Kmiec concluded that Congress has a very limited oversight interest in ongoing investigations, while the executive branch has a compelling interest in protecting the confidentiality of such files.[48] Like the 1986 Cooper opinion, the Kmiec opinion cautioned that, in the absence of a specific congressional request for documents, it could not advise whether a particular document should be withheld.[49]

In 1993, former Attorney General Benjamin Civiletti used the occasion of an address to the Heritage Foundation to elaborate on the traditional position of the DOJ.[50] This speech cited a House investigation of the DOJ's Environmental Crimes Unit in launching a sharp attack both on congressional inquiries into criminal investigative files and on the DOJ's recent decision to make line attorneys available for congressional questioning in connection with the House's investigation of the DOJ's prosecution of environmental crimes.[51] Attorney General Civiletti argued that the Constitution requires the executive branch to make the decision on whom to prosecute and does not permit Congress to usurp that role.[52] Anyone targeted for investigation has the opportunity not only to defend himself in court, but also to persuade the prosecutor not to bring a case before an indictment is brought. That right, according to Civiletti, could be overwhelmed by congressional demands for prosecution in the individual's case.[53]

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46 *Id.* at 92.

47 *See* 13 Op. Off. Legal Counsel 77 (1989).

48 *Id.* at 83.

49 *Id.*

50 *See* Benjamin R. Civiletti, Justice Unbalanced: Congress and Prosecutorial Discretion, Address Before the Heritage Foundation (Aug. 19, 1993) (The Heritage Found., The Heritage Lectures No. 472, 1993).

51 *See* Jerry Seper, *Hill Probe of Justice Lawyers Hampers Agency, Civiletti Says*, WASH. TIMES, Sept. 1, 1993, at A4.

52 *See* Civiletti, *supra* note 50, at 3.

53 *See id.* at 5.

Thus, congressional involvement threatens not only the separation of powers, but individual liberty as well.[54]

Civiletti's speech received wide attention in the media, and it struck a nerve in Congress as well.[55] The House Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce commissioned a Congressional Research Service study to respond to Attorney General Civiletti's views.[56] This study, and the historical precedents it discussed, are reviewed in the following section.

2. Congress's Position on Disclosure of Information from Open Criminal Investigative Files

At various times, congressional committees have taken the position that Congress has the right to obtain any documents from the DOJ, even if those documents are contained in open criminal investigation files. These assertions of authority have been supported by a research memorandum from the Congressional Research Service (CRS) that has appeared in various forms over the last ten years. For example, in a 1993 memorandum to the House Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce, the CRS responded to the Civiletti speech discussed earlier.[57] This memorandum took the position that

> [n]umerous pertinent Supreme Court precedents 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

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

55 *See* Editorial, *General Dingell*, WALL ST. J., Sept. 2, 1993, at A12.

56 *See* Morton Rosenberg, Congressional Research Service, *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, reprinted in EPA's Criminal Enforcement Program: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 103d Cong. 12–41 (1993) [hereinafter 1993 CRS Memorandum].

57 *See id.*

> agencies, private persons and organizations, and, within certain constraints, the information so obtained may be made public.[58]

According to the CRS memorandum, there is

> no court precedent that imposes a threshold burden on committees to demonstrate "substantial reason to believe wrongdoing occurred" before they may seek disclosure with respect to the conduct of specific open and closed criminal and civil cases. Indeed, the case law is quite to the contrary. An inquiring committee need only show that the information sought is within the broad subject matter of its authorized jurisdiction, used in aid of a legitimate legislative function, and is pertinent to the area of concern.[59]

In addition to citing Supreme Court precedent supporting the broad investigative power of Congress, the CRS memorandum 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."[60] In addition, the CRS memorandum relied upon case law that upheld the power of Congress to investigate matters that were the subject of pending litigation.[61] According to the CRS memorandum, the potentially prejudicial effect that congressional hearings may have on pending cases is an insufficient reason to deny Congress its power of investigation.[62]

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.[63] Relying on the Supreme Court's decision in *Morrison v. Olson*,[64] 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."[65] This reading of *Morrison* was supported, according to the CRS memorandum, by the decisions upholding the *qui tam* provisions of the False Claims Act, such as *United States* ex rel. *Kelly v. Boeing Co.*,[66] in which the court rejected the defendant's "assertion that all prosecutorial power of any

58 *Id.* at 2.

59 *Id.*

60 *Id.* at 6.

61 *Id.* at 6–7 (citing Sinclair v. United States, 279 U.S. 263, 294 (1929); Delaney v. United States, 199 F.2d 107, 114 (1st Cir. 1952)).

62 1993 CRS Memorandum, *supra* note 56, at 9.

63 *Id.*

64 487 U.S. 654 (1988).

65 1993 CRS Memorandum, *supra* note 56, at 9.

66 9 F.3d 743 (9th Cir. 1993).

kind belongs to the executive branch."[67] Thus, the memorandum concluded that "in the face of legitimate committee oversight there can be no credible claim of encroachment or aggrandizement by the legislature of essential Executive powers."[68] 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."[69] 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. The assertion of prosecutorial discretion in the face of a Congressional demand for information would seem to be akin to the 'generalized' claim of confidentiality made in the Watergate executive privilege cases. That general claim—lacking in specific demonstration of disruption of Executive functions—was held to be overcome by the more focused demonstration of need for information by a coordinate branch of government.[70]

As a result, the memorandum determined, "the fact that information is sought on the Executive's enforcement of criminal laws would not in itself seem to preclude congressional inquiry."[71]

The CRS position was amplified and placed in the context of all legislative oversight in a 1995 CRS Report for Congress.[72] This report echoes the arguments made in the 1993 CRS memorandum. In particular, the report noted that, in *Morrison v. Olson*,[73] the Court "took the occasion to reiterate the fundamental nature of Congress's oversight function (receiving reports or other information and oversight of the independent counsel's activities. . . [are] functions that we have recognized as generally incidental to the legislative function of con-

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67 *Id.* at 758.

68 1993 CRS Memorandum, *supra* note 56, at 10.

69 *Id.* at 11 (citing Mistretta v. United States, 488 U.S. 361, 382 (1989)).

70 *Id.*

71 *Id.*

72 *See* MORTON ROSENBERG, CONGRESSIONAL RESEARCH SERVICE, INVESTIGATIVE OVERSIGHT: AN INTRODUCTION TO THE LAW, PRACTICE AND PROCEDURE OF CONGRESSIONAL INQUIRY (1995) [hereinafter 1995 CRS REPORT]; *see also* 1993 CRS Memorandum, *supra* note 52, at 12–41 (1993).

73 487 U.S. 654 (1988).

gress, citing *McGrain v. Daugherty*.)"[74] This report again focused on the *Boeing* case, in which the Ninth Circuit upheld the *qui tam* provisions of the False Claims Act.[75] The 1995 CRS Report emphasized that congressional oversight

> does not and cannot dictate prosecutorial policy or decisions in particular cases. Congress may enact statutes that influence prosecutorial policy and information relating to enforcement of the laws which seem necessary to perform that legislative function. Thus, under the standard enunciated in *Morrison v. Olson* and *Nixon v. Administrator of General Services*, the fact that information is sought on the executive's enforcement of criminal laws would not in itself seem to preclude congressional inquiry.[76]

II. THE HISTORY OF CONGRESSIONAL DEMANDS FOR INFORMATION FROM OPEN CRIMINAL INVESTIGATION FILES

Given the significance that both Congress and the DOJ place on the history of congressional oversight of open criminal investigations, it is important to review the specific incidents cited by the CRS memoranda and congressional committee reports as precedents for the type of disclosure demanded in the campaign finance investigation. A number of factors are significant in analyzing the precedential effect of these congressional investigations. First, it is important to distinguish between investigations of DOJ 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 individual rights. The latter, for reasons set forth more fully below, 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 DOJ has already secured indictments and investigations that are still in the preliminary pre-indictment phase. In the former, the DOJ has already decided to proceed against particular individuals, and the danger of a congres-

74 1995 CRS REPORT, *supra* note 72, at 27.

75 *See* United States *ex rel.* Kelly v. Boeing Co., 9 F.3d 743 (9th Cir. 1993).

76 1995 CRS REPORT, *supra* note 72, at 29.

sional 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 DOJ to bring a case that it might not otherwise have decided to prosecute.[77] The examples cited by the CRS will be examined with these principles in mind.

A. The Palmer Raids

In 1920 and 1921, House and Senate committees investigated the so-called "Palmer Raids." These hearings concerned actions directed by Attorney General A. Mitchell Palmer that resulted in the arrest and deportation of thousands of suspected Communists and others who allegedly advocated the overthrow of the United States government.[78] During these hearings, Attorney General Palmer, accompanied by his special assistant, J. Edgar Hoover, testified concerning the details of a number of deportation cases. A number of confidential documents were produced to the committees, but the only open cases cited by the CRS were cases in which trials had already been completed and were pending on appeal.[79] The DOJ did not produce any documents from cases that were under active investigation.*

B. Teapot Dome

One of the most extensive congressional investigations of the DOJ took place in the wake of the Teapot Dome scandal.[80] While the Senate Committee on Public Lands and Surveys investigated the bribery and kickback allegations concerning the leasing of naval oil reserves (which formed the heart of the scandal), a Senate select committee was established to investigate "charges of misfeasance and nonfeasance in the Department of Justice."[81] This investigation gave rise to two important Supreme Court cases, including *McGrain v. Daugherty*,[82] which established the constitutional authority of Congress to

77 *See infra* text accompanying notes 348–51.

78 *See Charges of Illegal Practices in the Department of Justice: Hearings Before a Subcomm. of the Senate Comm. on the Judiciary*, 66th Cong. (1921); *Attorney General A. Mitchell Palmer on Charges Made Against Department of Justice by Louis F. Post and Others: Hearings Before the House Comm. on Rules*, 66th Cong. (1920).

79 *See* 1995 CRS REPORT, *supra* note 72, at 24.

80 *See Investigations of Hon. Harry M. Daugherty, Formerly Attorney General of the United States: Hearings Before the Senate Select Comm. on Investigation of the Attorney Gen.*, 68th Cong. (1924) [hereinafter *Daugherty Hearings*].

81 McGrain v. Daugherty, 273 U.S. 135, 151 (1927).

82 *Id.*

compel testimony.[83] The *McGrain* case involved a subpoena for the testimony of the former Attorney General's brother, but the Senate also sought testimony and information from the DOJ.

Although Attorney General Harry M. Daugherty was uncooperative in responding to the Senate committee's inquiries,[84] his successor, Harlan Fisk Stone, was much more forthcoming. Indeed, portions of the hearing transcript would certainly come as a shock to those familiar with recent contentious disputes between the executive and legislative branches. For example, when A.T. Seymour, the assistant to the new Attorney General, appeared before the committee at the Attorney General's request, the committee chair, Senator Burton K. Wheeler, appeared uncertain about the purpose of the testimony or even what kind of information Mr. Seymour might provide the committee. Instead, Seymour took the initiative to volunteer information concerning matters as to which he had personal knowledge.[85] This remarkable exchange certainly suggests that Attorney General Stone sought to accommodate the investigating committee's need for information in order to reestablish the credibility of the DOJ.

The records of the hearing do not, however, clearly indicate that the DOJ provided much information from open criminal investigative

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83 *See id.; see also* Sinclair v. United States, 279 U.S. 263 (1929) (holding that the pendency of lawsuit against a congressional witness provides no defense to contempt citation for failure to testify in response to congressional subpoena).

84 *Daugherty Hearings, supra* note 80, at 1078–79.

85 The exchange began this way:

> Senator Wheeler. I do not know just what your idea about the matter is, Mr. Seymour, but Mr. Stone has asked that you be called. I do not know what particular cases you want to tell us about.
>
> Mr. Seymour. Well, I have been in office since the 10th day of November, 1922, and Mr. Stone wrote a letter which he showed to me, asking the committee to hear statements about things with which I had personal contact.
>
> Senator Wheeler. Yes; about specific cases?
>
> Mr. Seymour. Yes; and I will be glad to go over those in any order that the committee may see fit to direct, or I will do it—
>
> Senator Wheeler. (Interposing). As I understand it, Mr. Seymour, the only things that we are interested in going into are the things which have been brought out here in the testimony. Now, I have not any particular case in mind that I want to go into.
>
> Mr. Seymour. I see.
>
> Senator Wheeler. Unless it is something that you, yourself, have, or that the Department wants to have you testify to.
>
> Mr. Seymour. Well, there have been—
>
> Senator Wheeler. (Interposing). I am not familiar with which cases you want to go into.

Id. at 3099.

files. Although Senate committee chairman Smith Brookhard stated that Attorney General Stone "is furnishing us with all the files we want, whereas the former Attorney General, Mr. Daugherty, refused nearly all that we asked,"[86] these files appear to have come from closed cases or, in some instances, cases that were on appeal. The only apparent exception involved the testimony of an accountant from the DOJ who had been involved in an investigation of fraudulent property sales by the Alien Property Custodian's Office. These reports set forth factual findings from the investigation and also included some recommendations for further action.[87] Although these files had not been formally closed by the DOJ, it appears from the context that the investigations were moribund.[88] Moreover, this information seems clearly not to have been as sensitive as the case analyses and recommendations of prosecutors.

C. Investigations of the Department of Justice During the 1950s–1990s

The CRS report also discusses the investigation of a special House subcommittee that was created to investigate possible abuses within the DOJ in the 1950s. This committee looked into several investigations by the DOJ, each of which will be considered separately below.[89]

1. Grand Jury Curbing

One of the areas considered by the subcommittee was a charge that the DOJ had improperly restrained a grand jury inquiry in St. Louis concerning the failure to enforce federal tax fraud laws. It is clear from the record of this hearing that the committee received numerous documents concerning the deliberative process within the DOJ, including transcripts of telephone conversations among DOJ attorneys about the grand jury investigation,[90] and testimony from current and former DOJ attorneys.[91]

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86 *Id.* at 2389.

87 *Id.* at 1495–547.

88 The same is true for information concerning a similar inquiry into the disappearance of large amounts of liquor under the Department's control during the Harding administration. *Id.* at 1790.

89 *See Investigations of the Department of Justice: Hearings Before the Special Subcomm. To Investigate the Dep't of Justice of the House Comm. on the Judiciary*, 82d Cong. (1952), 83d Cong. (1953) [hereinafter *DOJ Investigation Hearings*]. This subcommittee reported its conclusions in a report titled INVESTIGATION OF THE DEPARTMENT OF JUSTICE, H.R. REP. No. 83-1079 (1953) [hereinafter H.R. REP. No. 83-1079].

90 *DOJ Investigation Hearings*, 83d Cong., *supra* note 89, at 759–66.

91 *Id.* at 808–94, 1064–117, 1256–318.

The subcommittee also investigated similar allegations that the DOJ had interfered with another grand jury investigation of Communist infiltration of the United Nations. This investigation included testimony from several grand jurors and DOJ attorneys.[92] The chief counsel of the committee expressly disclaimed any effort to reveal the actual testimony of witnesses appearing before the grand jury and stated that the committee was "seeking information solely relating to attempts to delay or otherwise influence the grand jurors' deliberations."[93] Neither of these investigations, however, involved the disclosure of information from an open criminal investigation file.

2. Prosecution of Routine Cases

The CRS memorandum also discusses the subcommittee's investigation of possible corruption in the DOJ's Tax Division. As was true during Teapot Dome, the resignation of an Attorney General, in part due to the allegations of corruption, resulted in increased cooperation by the new Attorney General with the committee's investigation.[94] The information provided by the DOJ, however, seems to have been related solely to closed cases. For example, the subcommittee investigated charges that the DOJ was dilatory in its handling of routine cases by reviewing the files of closed cases to determine whether DOJ attorneys had acted expeditiously in prosecuting the cases.[95] Although the subcommittee was given access to some FBI communications relating to the processing of cases, the committee agreed not to seek confidential FBI reports.[96]

3. New York City Police Brutality

During the 83rd Congress the subcommittee investigated allegations that the DOJ's Criminal Division had reached an agreement with the New York City Police Department not to prosecute cases of police brutality that might have violated federal civil rights statutes.[97] The subcommittee obtained testimony from a number of DOJ employees including the former Attorney General, current and former assistant attorney generals, and other DOJ attorneys and FBI agents.[98] The DOJ produced some deliberative memoranda and correspondence re-

92 *Id.* at 1653–812.
93 *Id.* at 1579–80.
94 *See* H.R. REP. No. 83-1079, *supra* note 89, at 69.
95 *See DOJ Investigation Hearings*, 83d Cong., *supra* note 89, at 895–964.
96 *Id.* at 897.
97 *See* 1993 CRS Memorandum, *supra* note 56, at 28.
98 *DOJ Investigation Hearings*, 83d Cong., *supra* note 89, at 252–94.

lating to its investigations,[99] but the material, and the committee's questions, focused principally upon the nature of the alleged agreement rather than the merits of specific cases. None of the information came from open criminal investigative files.

4. Investigations of Consent Decree Program

The CRS report also cites an investigation by the House Judiciary Committee's Antitrust Subcommittee during 1957 and 1958 concerning consent decrees negotiated by the Antitrust Division, particularly those with the oil pipeline industry and American Telephone & Telegraph Co. (AT&T).[100] Although the DOJ did allow two Antitrust Division attorneys to testify concerning their reasons for dissenting from the DOJ's decision to enter a consent decree with AT&T,[101] the DOJ resisted disclosing information from its files in the case. Indeed, the committee's report complained that the "extent to which the Department of Justice went to withhold information from the committee in this investigation is unparalleled in the committee's experience."[102] Deputy Attorney General William P. Rogers justified the DOJ's decision to withhold the documents on two grounds. First, he argued that disclosure of the files "would violate the confidential nature of settlement negotiations and, in the process, discourage defendants, present and future, from entering into such negotiations."[103] Second, Rogers argued that if the DOJ disclosed memoranda and recommendations prepared by Antitrust Division attorneys, the "essential process of full and flexible exchange might be seriously endangered were staff members hampered by the knowledge they might at some later date be forced to explain before Congress intermediate positions taken."[104] Thus, not only did the DOJ refuse to disclose any information from open investigative files, it also objected to disclosure of deliberative material from a closed case.

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99 *Id.* at 62–63, 233–34, 239–41, 258–59, 262, 269–73.

100 *See Consent Decree Program of the Department of Justice: Hearings Before the Antitrust Subcomm. of the House Comm. on the Judiciary*, 85th Cong. (1957–1958) [hereinafter *Consent Decree Hearings*]; STAFF OF HOUSE COMM. ON THE JUDICIARY, 86th CONG., REPORT OF THE ANTITRUST SUBCOMMITTEE (SUBCOMMITTEE 5) ON CONSENT DECREE PROGRAM OF THE DEPARTMENT OF JUSTICE (Comm. Print 1959) [hereinafter CONSENT DECREE REPORT]; 1993 CRS Memorandum, *supra* note 56, at 29.

101 *Consent Decree Hearings*, *supra* note 100, at 3711–44.

102 CONSENT DECREE REPORT, *supra* note 100, at xiii.

103 *Consent Decree Hearings*, *supra* note 100, at 1674–75.

104 *Id.* at 1675.

5. COINTELPRO and Related Investigations of FBI-DOJ Misconduct

The CRS report cites several investigations by Senate and House committees between 1974 and 1978 concerning domestic intelligence operations of the FBI and other parts of the DOJ.[105] These investigations included testimony from some current and former officials of the FBI and DOJ, including Attorney General Edward Levi and FBI Director Clarence Kelly. In addition, the Chair of the Judiciary Committee requested the General Accounting Office (GAO) to review FBI counterintelligence operations.[106] In response to a request from the GAO, the FBI prepared summaries of information contained in the files from selected closed cases.[107] The summaries described the information that led to the opening of the investigation, how information was collected, instructions received from FBI headquarters, and a summary of the documents in the file.[108] In addition, the GAO interviewed some of the FBI agents involved in the cases as well as the agents who prepared the summaries.[109] In a later review of additional cases, the GAO obtained FBI case summaries of further cases, as well as copies of some documents with the names of informers and other sensitive data redacted.[110] None of this information, however, came from open investigative files. Moreover, the purpose of the investigation was not to probe the failure of the DOJ to prosecute particular cases, but rather to investigate potentially abusive investigative techniques that violated the individual rights of citizens.

6. White Collar Crime in the Oil Industry

The 1993 CRS memorandum describes 1979 Joint Hearings by the Subcommittee on Energy and Power of the House Committee on Interstate and Foreign Commerce and the Subcommittee on Crime of the House Judiciary Committee. These hearings examined allegations of fraudulent pricing in the oil industry and the alleged failure of the Departments of Energy and Justice to investigate and prosecute possi-

105 *See* 1993 CRS Memorandum, *supra* note 56, at 30; *see also FBI Oversight: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 94th Cong. (1975–1976), 95th Cong. (1978) [hereinafter *House FBI Hearings*]; *Intelligence Activities: Hearings on S. Res. 21 Before the Senate Select Comm. To Study Governmental Operations with Respect to Intelligence Activities*, 94th Cong. (1975) [hereinafter *Senate Intelligence Hearings*]; S. REP. No. 94-755 (1976).

106 *See House FBI Hearings*, 94th Cong., *supra* note 105, at 1–2.

107 *Id.* at 4.

108 *Id.* at 3–4.

109 *Id.*

110 *House FBI Hearings*, 95th Cong., *supra* note 105, at 103.

ble criminal offenses.[111] During these hearings, the joint committees received testimony in closed hearings concerning open cases in which the DOJ had obtained indictments and was preparing for trial. In addition, the DOJ provided documents, and a staff attorney testified in open session concerning a final decision not to proceed with a particular case.[112] It seems clear, however, that the DOJ did not provide any information from open criminal investigative files for which there had not yet been a decision to seek an indictment. In addition, the hearing records suggest that the committees and the DOJ reached an accommodation that provided the committees with information while insuring that the DOJ's prosecutions would not be disrupted. The Chair of the Subcommittee on Energy and Power acknowledged the potential problems:

> We know indictments are outstanding. We do not wish to interfere with the rights of any parties to a fair trial. To this end we have scrupulously avoided any actions that might have affected the indictment of any party. In these hearings, we will restrict our questions to the process in the general schemes to defraud and the failure of the Government to pursue these cases. Evidence and comments on specific cases must be left to the prosecutors in the cases they bring to trial.[113]

A deputy assistant attorney general for the Criminal Division also acknowledged the accommodation:

> I would like to commend Chairman Conyers, Chairman Dingell, and all the members of the committee and staff for the sensitivity which they have shown during the course of these hearings to the fact that we have ongoing criminal investigations and proceedings, and the appropriate handling of the question in order not to interfere with those investigations and criminal trials.[114]

Thus, although the DOJ disclosed significant information from open files, none of this information related to pre-indictment matters, and the congressional committees strictly limited the disclosure of information that might have provided a roadmap to the DOJ's theories in individual prosecutions.

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111 *See White Collar Crime in the Oil Industry: Joint Hearings Before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce and the Subcomm. on Crime of the House Comm. on the Judiciary*, 96th Cong. (1979) [hereinafter *White Collar Crime Hearings*].

112 *Id.* at 156–57.

113 *Id.* at 2.

114 *Id.* at 134.

7. The Billy Carter-Libya Investigation

In 1980, a special subcommittee of the Senate Judiciary Committee investigated the activities on behalf of the Libyan government of President James E. Carter's brother, Billy.[115] Part of these oversight hearings focused on the DOJ's investigation of Billy Carter and whether Attorney General Benjamin Civiletti had improperly withheld certain intelligence information from the Criminal Division attorneys investigating the matter. In the course of these hearings, Attorney General Civiletti, Assistant Attorney General Philip Heymann, and three of Heymann's assistants testified before the committee concerning general DOJ procedures, the general scope of the Billy Carter investigation, and the DOJ's decision to bring a civil rather than a criminal action against Carter.[116] The DOJ also produced certain documents from the Billy Carter file, including some memoranda written by prosecutors, handwritten notes of the attorney in charge of the Foreign Agents and Registration section of the Criminal Division, and several FBI investigative reports.[117] Although certain deliberative, predecisional material was disclosed to the congressional committee, it is clear that, by the time the committee received the information, the case had been concluded.

8. The ABSCAM Investigation

In 1982, a Senate select committee investigated the undercover law enforcement actions of the DOJ in connection with a bribery sting operation that resulted in the convictions of one senator, six members of the House of Representatives, and a number of local officials.[118] FBI Director William Webster and other representatives from the DOJ testified about the DOJ's policies and practices concerning undercover operations as well as some of the specifics relating to ABSCAM

115 *See Inquiry into the Matter of Billy Carter and Libya: Hearings Before the Subcomm. To Investigate the Activities of Individuals Representing the Interests of Foreign Gov'ts of the Senate Comm. on the Judiciary*, 96th Cong. (1980) [hereinafter *Billy Carter Hearings*]; SUBCOMM. TO INVESTIGATE INDIVIDUALS REPRESENTING THE INTERESTS OF FOREIGN GOV'TS, COMM. ON THE JUDICIARY, INQUIRY INTO THE MATTER OF BILLY CARTER AND LIBYA, S. REP. NO. 96-1015 (1980) [hereinafter S. REP. NO. 96-1015].

116 *See Billy Carter Hearings*, *supra* note 115, at 116–30, 683–1153.

117 *Id.* at 755–978.

118 *See Law Enforcement Undercover Activities: Hearings Before the Senate Select Comm. To Study Law Enforcement Undercover Activities of Components of the Dep't of Justice*, 97th Cong. (1982) [hereinafter *ABSCAM Hearings*]; SENATE SELECT COMM. TO STUDY UNDERCOVER ACTIVITIES OF THE DEP'T OF JUSTICE, FINAL REPORT, S. REP. NO. 97-682 (1982) [hereinafter S. REP. NO. 97-682].

and several other undercover operations.[119] In addition, several members of the DOJ's Brooklyn Organized Crime Strike Force testified or participated in interviews with committee staff.[120] The DOJ acknowledged that its policy was not to permit line attorneys to testify "because it tends to inhibit prosecutors from proceeding through their normal tasks free from the fear that they may be second-guessed, with the benefit of hindsight, long after they take actions and make difficult judgements [sic] in the course of their duties."[121] Nevertheless, the DOJ permitted the testimony in this instance "because of their value to you [i.e., Congress] as fact witnesses and because you have assured us that they will be asked to testify solely as to matters of fact within their personal knowledge and not conclusions or matters of policy."[122] The committee and the DOJ entered into a detailed access agreement that permitted the committee to review certain ABSCAM-related documents and prosecutorial memoranda but allowed the DOJ to withhold from the committee documents that might compromise on-going investigations or reveal confidential sources of information or investigative techniques.[123] In addition, the committee undertook a "pledge of confidentiality" under which it was permitted to utilize information obtained from sensitive documents but was prohibited from identifying the particular documents from which it obtained the information.[124] The agreement also required that sensitive documents be kept in a secure room with access limited to the committee's members, its two counselors, and certain designated document custodians.[125]

The Senate's ABSCAM investigation, while extensive and thorough, intruded minimally on the DOJ's prosecutorial discretion. First, the Senate committee obtained no information from open criminal investigation files. Second, the subject of the investigation was alleged prosecutorial misconduct in creating sting operations to identify corrupt members of Congress. The Senate committee did not investigate alleged prosecutorial inaction. Third, to the extent that the Senate committee sought sensitive DOJ information that might reveal departmental deliberations or confidential sources and methods, the committee and the DOJ engaged in an elaborate accommodation pro-

119 *See ABSCAM Hearings*, *supra* note 118, at 10–85, 153–226, 255–559, 895–924, 1031–70.

120 *See* S. REP. No. 97-682, *supra* note 118, at 8–10.

121 *Id.* at 486.

122 *Id.*

123 *See id.* at 472–84.

124 *Id.* at 478.

125 *Id.* at 472–84.

cess to permit some committee access while maintaining the confidentiality of important departmental secrets.

9. The EPA Investigation and Its Aftermath

In 1982, the Subcommittee on Oversight and Investigations of the House Committee on Public Works and Transportation requested that the Environmental Protection Agency (EPA) produce thousands of documents concerning EPA enforcement of the Superfund Act.[126] The Subcommittee on Oversight and Investigations of the House Energy and Commerce Committee pursued a parallel demand for similar documents.[127] The EPA and the DOJ resisted disclosure of the documents on the ground that they were from open civil investigative files in matters enforced by the EPA and the DOJ's Lands Division.[128] After negotiations to reach an accommodation broke down, the House committee subpoenaed the documents from EPA Administrator Anne Gorsuch.[129] Based upon advice and recommendations from the DOJ and OLC, President Ronald Reagan directed EPA Administrator Gorsuch to withhold, under a claim of executive privilege, sixty-four documents from open enforcement files on the ground that their disclosure might adversely affect pending investigations and open enforcement proceedings.[130] The President's assertion of executive privilege applied to the subpoenas issued by both the Public Works Subcommittee and the Energy and Commerce Subcommittee. After the assertion of privilege, the Public Works Committee recommended, and the full House approved, a contempt of Congress resolution against Administrator Gorsuch.[131] The Speaker of the House later certified the contempt citation to the U.S. Attorney for the District of Columbia for prosecution under the criminal contempt of Congress statute.[132] This contempt citation was the first ever issued

126 *See* COMM. ON PUB. WORKS AND TRANSP., CONTEMPT OF CONGRESS, H.R. REP. NO. 97-968, at 36 (1982).

127 SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS, HOUSE COMM. ON ENERGY AND COMMERCE, 98TH CONG., INVESTIGATION OF THE ENVIRONMENTAL PROTECTION AGENCY 1 (Comm. Print 1984).

128 *See* Mark J. Rozell, *Executive Privilege and the Modern Presidents: In Nixon's Shadow*, 83 MINN. L. REV. 1069, 1097 (1999).

129 *See* H.R. REP. NO. 97-968, at 4.

130 *Id.*

131 Ultimately, the Energy and Commerce Subcommittee approved a contempt of Congress resolution against Administrator Gorsuch, but this resolution reached neither the full committee nor the floor of the House of Representatives.

132 *See* COMM. ON PUB. WORKS AND TRANSP., RELATING TO THE CONTEMPT CITATION OF ANNE M. (GORSUCH) BURFORD, H.R. REP. NO. 98-323, at 9–10 (1983); Peterson, *supra* note 22, at 571–74.

against an executive branch official for asserting a presidential claim of privilege.[133]

After the House adopted the contempt citation against Administrator Gorsuch, the DOJ filed a civil suit in the United States District Court for the District of Columbia to obtain a ruling that the Administrator's noncompliance with the subpoena was lawful because of the President's claim of executive privilege.[134] The trial court, however, granted the House's motion to dismiss on the ground that, in the exercise of the court's equitable discretion, it should not accept jurisdiction over the lawsuit. The court ruled:

> When constitutional disputes arise concerning the respective powers of the Legislative and Executive Branches, judicial intervention should be delayed until all possibilities for settlement have been exhausted . . . The difficulties apparent in prosecuting [the a]dministrator . . . for contempt of Congress should encourage the two branches to settle their differences without further judicial involvement.[135]

After the dismissal of the DOJ's lawsuit, the House committee and the DOJ renewed discussions concerning the disclosure of the EPA documents. Ultimately, the parties reached an agreement that permitted congressional access to the documents, and the House agreed to a resolution to withdraw the contempt citation against the Administrator.[136] The House withdrew the contempt resolution, notwithstanding the uncertainty over whether the 98th Congress could withdraw a contempt citation voted upon during the 97th Congress and, more generally, whether it is ever possible to withdraw a contempt of Congress citation. Unlike civil contempt, which is cured when the subpoenaed documents are produced, criminal contempt may not be cured by the subsequent production of subpoenaed materials.[137]

The agreement on the contempt citation did not, however, end the controversy. In 1983, the House Judiciary Committee began to investigate the circumstances surrounding the assertion of privilege by Administrator Gorsuch.[138] Judiciary Committee staff reviewed

133 *See* Peterson, *supra* note 22, at 568–74 (indicating that the Gorsuch dispute was the first exertion of this sort of congressional power).

134 *See* United States v. House of Representatives, 556 F. Supp. 150 (D.D.C. 1983).

135 *Id.* at 152–53.

136 *See* H.R. Res. 180, 98th Cong. (1983).

137 *See* United States v. Brewster, 154 F. Supp. 126, 136 (D.D.C. 1957), *rev'd on other grounds*, 255 F.2d 899 (D.C. Cir.), *cert. denied*, 358 U.S. 842 (1958).

138 *See* HOUSE COMM. ON THE JUDICIARY, INVESTIGATION OF THE ROLE OF THE DEPARTMENT OF JUSTICE IN THE WITHHOLDING OF ENVIRONMENTAL PROTECTION AGENCY

thousands of documents from the Land and Natural Resources Division, the Civil Division, the OLC, the Office of Legislative Affairs, the Office of Public Affairs, and the offices of the Attorney General, Deputy Attorney General, and Solicitor General.[139] After a long series of disputes about disclosure of documents reviewed by committee staff, the DOJ eventually produced all of the documents requested by the committee.[140] In addition, the committee staff interviewed twenty-six current and former department employees, including four assistant attorney generals.[141] As a result of this investigation, the committee requested that the DOJ initiate an independent counsel proceeding against three of the senior department officials who participated in the EPA matter.[142] After a preliminary investigation, the Attorney General referred only the former Assistant Attorney General for the OLC to the special judicial panel for investigation by an independent counsel.[143] This independent counsel investigation culminated in the Supreme Court's decision upholding the constitutionality of the independent counsel provisions of the Ethics in Government Act.[144]

Although this investigation was one of the most sweeping and intrusive congressional investigations of the DOJ ever conducted by a congressional committee, the only part of the investigation that involved criminal investigative files was a committee request for documents concerning the criminal investigation of former EPA Assistant Administrator Rita Lavelle. The committee did not seek this information in order to second-guess the prosecution, but rather to discover if the DOJ had planned to institute the investigation in order to obstruct the committee's inquiry.[145] The DOJ initially objected to producing any of these documents "consistent with the longstanding practice of the Department" not to provide "access to active criminal files."[146] The committee chair responded that it was improper for the DOJ to withhold the documents without asserting a claim of executive privi-

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DOCUMENTS FROM CONGRESS IN 1982–83, H.R. REP. NO. 99-435 (1985) [hereinafter H.R. REP. NO. 99-435].

139 *Id.* at 807–3120.

140 *Id.* at 655, 660.

141 *Id.* at 3123-25.

142 *See* Morrison v. Olson, 487 U.S. 654, 666 (1988).

143 *See* Alison Frankel, *Ted Olson's Five Years in Purgatory*, AM. LAW., Dec. 1988, at 68. Independent Counsel Alexia Morrison, after a two-and half-year investigation, decided not to indict the former assistant attorney general. *Id.* at 70.

144 *See* Morrison v. Olson, 487 U.S. 654 (1988).

145 *See* H.R. REP. NO. 99-435, *supra* note 138, at 3104–07.

146 Letter from D. Lowell Jensen, Associate Attorney General, to Peter W. Rodino, Jr., Chairman of the House Committee on the Judiciary (Oct. 30, 1984), *reprinted in* H.R. REP. NO. 99-435, *supra* note 138, at 3074, 3076.

lege and that "in this case, of course, no claim of executive privilege could lie because of the interest of the committee in determining whether the documents contained evidence of misconduct by executive branch officials."[147] Ultimately, the committee narrowed the focus of its request to "predicate" documents relating to the decision to begin an investigation, rather than to any documents produced after the investigation had begun, and the DOJ produced those documents.[148]

This complex and protracted dispute ultimately produced little significant precedent for the issue at hand. The documents produced in the original EPA investigation related to civil, rather than criminal, investigations, and the EPA produced the documents in response to specific allegations of improper conduct, rather than allegations of prosecutorial inaction. The only documents produced from criminal files—those relating to Rita Lavelle—were similarly produced in response to specific allegations of departmental misconduct and were limited to whether the DOJ had initiated the prosecution solely for the purpose of frustrating the congressional investigation. As a result, the lengthy investigations provide little precedent for congressional investigation of prosecutorial inaction. Nor do they provide significant precedent for congressional access to documents from open criminal investigative files.

10. The Navy Shipbuilding Claims

A rare instance in which Congress actually subpoenaed documents from an open criminal investigative file is not listed by any of the CRS memoranda. In 1984, the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee issued a subpoena to the Assistant Attorney General of the Criminal Division to appear and produce documents relating to three investigations of alleged false shipbuilding claims against the Navy.[149] In response to subpoenas from the Senate committee, the Criminal Division provided information from two of the three files from which documents had been requested, with the exception of material that was prohibited from release by Rule 6(e) of the Federal Rules of Criminal Proce-

147 Letter from Peter W. Rodino, Jr., Chairman of the House Committee on the Judiciary, to William French Smith, Attorney General of the United States (Nov. 8, 1984), *reprinted in* H.R. REP. No. 99-435, *supra* note 138, at 3090, 3092.

148 *Id.* at 3106.

149 *See Congressional Subpoenas of Department of Justice Investigative Files*, 8 Op. Off. Legal Counsel 252 (1984).

dure.[150] With respect to the redacted grand jury material, the assistant attorney general stated that he would seek a motion from the court to permit disclosure of the Rule 6(e) materials.[151] He declined to release DOJ documents from the third investigation on the ground that it was still pending before an active grand jury, but he offered to make the documents available to the committee as soon as the case had been closed.[152]

On the day following the appearance by the Assistant Attorney General, the Senate subcommittee issued a new subpoena to the Attorney General to produce a long list of documents from the remaining open criminal investigation file.[153] In response to the subpoena, an opinion by OLC reiterated the DOJ's policy of not disclosing information from open criminal investigative files.[154] The opinion concluded that "the serious concerns for the integrity of the investigative and prosecutive process that underlie the legal principles discussed above have vivid application to the current matter."[155] The opinion conceded, however, that there were exceptions to the general policy against disclosing matters from open criminal investigative files. First, the DOJ might release some material if it does "not implicate any of the constitutional or pragmatic problems" discussed above.[156] Second, it conceded that "privilege should not be invoked to conceal evidence of wrongdoing or criminality on the part of executive officers."[157] Thus, the opinion recommended a document-by-document review of the file to determine if any of the documents should be disclosed to Congress.[158] Finally, the opinion concluded that, even though documents not protected by Rule 6(e) could not be withheld without a presidential assertion of privilege, the DOJ could withhold the documents demanded by the subpoena "without the formal assertion of a [privilege] claim on the basis that additional time is necessary to determine whether a claim should be made."[159] The opinion reasoned that such an exception to the general rule governing assertion of the privilege was necessary because

150 FED. R. CRIM. P. 6(e) (prohibiting disclosure of matters occurring before a grand jury).

151 *Id.* at 256.

152 *Id.*

153 *Id.* at 257.

154 *Id.*

155 *Id.* at 267.

156 *Id.*

157 *Id.*

158 *See id.* at 267–68.

159 *Id.* at 269.

> inherent in the constitutional doctrine of executive privilege is the right to have sufficient time to respond to review subpoenaed documents in order to determine whether an executive privilege claim should be made. If the Executive Branch could be required to respond to a subpoena (either judicial or congressional) without having adequate opportunity to review the demanded documents and determine whether a privilege claim would be necessary in order to protect the constitutional prerogatives of the President, the President's ability effectively to assert a claim of executive privilege would be effectively nullified. . . . Thus . . . the right to withhold documents for a time sufficient to make a determination whether to assert privilege is an element of executive privilege itself, and it is a justifiable basis upon which to withhold documents.[160]

There is no subsequent record of any further dispute about the documents demanded in this matter. Justice Department officials contacted about this question recalled that no documents from the open file were produced.

11. The Iran-Contra Investigation

In January 1987, both the House and Senate created special committees to investigate the Iran-Contra scandal. In addition to investigating the scandal itself, both committees looked into the "Meese Inquiry," the investigation led by Attorney General Edwin Meese that allegedly tipped off the National Security Counsel staff to the sensitivity of this issue and permitted them to destroy a number of relevant documents.[161]

Both Iran-Contra committees obtained DOJ documents concerning this preliminary investigation and interviewed the DOJ employees who participated in the investigation, including Attorney General Meese. The Meese Inquiry, however, was not an active criminal investigation. Indeed, one of the most significant criticisms of the Meese Inquiry was that it was conducted not by experienced Criminal Division prosecutors but by high-level officials from other parts of the DOJ, including the OLC. Thus, this part of the Iran-Contra investigation should be characterized not as a review of open criminal investigation files, but rather as an investigation into alleged misconduct by senior department officials that permitted high-level officials in the White House to destroy relevant documents and otherwise evade re-

160 *Id.*

161 *See* HOUSE SELECT COMM. TO INVESTIGATE COVERT ARMS, TRANSACTIONS WITH IRAN & SENATE COMM. ON SECRET MILITARY ASSISTANCE TO IRAN AND THE NICARAGUAN OPPOSITION, REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, H.R. REP. NO. 100-433 (1987).

sponsibility for their illegal activity. Moreover, the Meese investigation itself was long over and could not be characterized as an open inquiry.

12. The Rocky Flats Environmental Crimes Plea Bargain

In June 1992, the Subcommittee on Investigations and Oversight of the House Committee on Science, Space, and Technology began to investigate a plea bargain entered into by the DOJ with Rockwell International Corp., which had acted as the manager and operating contractor at the Department of Energy's Rocky Flats Nuclear Weapons Facility.[162] The plea bargain was the result of a five-year investigation of possible environmental crimes at the Rocky Flats facility. The investigating subcommittee decided to investigate the matter because of concerns about "the size of the fine agreed to relative to the profits made by the contractor and the damage caused by inappropriate activities" and the failure to indict any individuals in the case.[163]

The subcommittee heard testimony from the U.S. Attorney for the District of Colorado, an assistant U.S. attorney from Colorado, a DOJ line attorney from Main Justice, and an FBI field agent.[164] It also received a number of FBI field investigative reports and interview summaries that were not subject to Rule 6(e) of the Federal Rules of Criminal Procedure.[165] Initially, however, the witnesses under subpoena refused, on the basis of written instructions from the acting head of the Criminal Division, to answer questions concerning the internal deliberations in which decisions were reached about whom to prosecute in the investigation.[166] In response to this refusal to provide information, the subcommittee chair sent a letter to President George Bush "requesting that he either personally assert executive privilege as the basis for directing the witnesses to withhold the information or direct DOJ to retract its instructions to the witnesses."[167]

After the DOJ reiterated its position that disclosure would have an adverse effect on departmental deliberations, the subcommittee moved to hold the U.S. Attorney in contempt of Congress.[168] Ultimately, the DOJ and the subcommittee worked out an accommoda-

162 *See Environmental Crimes at the Rocky Flats Nuclear Weapons Facility: Hearings Before the Subcomm. on Investigations and Oversight of the House Comm. on Science, Space, and Tech.*, 102d Cong. (1992) [hereinafter *Rocky Flats Hearings*]; *see also* Rozell, *supra* note 128, at 1112–15.

163 *See* 1993 CRS Memorandum, *supra* note 56, at 40.

164 *Rocky Flats Hearings*, *supra* note 162, vol. 1, at iii.

165 *See id.* vol. 1, at 389–1009, 1111–251.

166 *Id.* at 84.

167 1993 CRS Memorandum, *supra* note 56, at 41.

168 *Id.*

tion under which DOJ employees agreed to testify concerning internal deliberations with a promise of confidentiality from the committee.[169] The DOJ testimony, however, related to closed investigations, and the DOJ did not disclose any documents from an open criminal case file. Thus, this investigation provides no support for congressional access to open files.

13. The Campaign Finance Investigation

The 1998 campaign finance investigation marked the first time that Congress was able to obtain significant prosecutorial recommendations in the midst of an active criminal investigation. Congress subpoenaed specific documents that set forth the facts uncovered in the investigation in great detail and described possible theories of prosecution. Moreover, these documents were not the thoughts of a single line attorney or investigator, but rather were authored by the Director of the FBI, Louis J. Freeh, and the chief of the DOJ's campaign finance task force. It is hard to imagine any more sensitive documents in the context of a criminal investigation. Thus, it is hardly surprising that the DOJ resisted disclosing the documents. Given the high political stakes, it is similarly unsurprising that Chairman Dan Burton persisted in his efforts to obtain the documents. In the process, the combatants laid out their respective constitutional arguments concerning Congress's right to obtain the documents.

When the committee first requested the Freeh memorandum, the Attorney General refused to produce the memorandum "based principally on the longstanding Department policy on declining to provide congressional committees with access to open law enforcement files."[170] After the issuance of a subpoena for the Freeh memorandum, Attorney General Janet Reno and Director Freeh jointly signed a letter declining to comply with the subpoena on the ground that

> [p]ublic and judicial confidence in the criminal justice process would be undermined by congressional intrusion into an ongoing criminal investigation. Access to the confidential details of an ongoing investigation would place Members of Congress in a position

169 *See Meetings To Subpoena Appearance of Employees of the Department of Justice and the FBI and To Subpoena Production of Documents from Rockwell International Corporation: Hearings Before the Subcomm. on Investigations and Oversight of the House Comm. on Science, Space, and Tech.*, 102d Cong. 1–3, 82–86, 143–51 (1992).

170 Letter from Janet Reno, United States Attorney General, to Dan Burton, Chairman, House Committee on Government Reform and Oversight (Dec. 4, 1997), *reprinted in* H.R. REP. No. 105-728, *supra* note 1, at 29, 30.

> to exert pressure or attempt to influence the prosecution of specific cases, irreparably damaging enforcement efforts.[171]

The letter also emphasized the potential impact on the willingness of DOJ lawyers to provide candid and confidential advice and recommendations, the danger that the memorandum could provide a "roadmap" of the investigation for the benefit of potential defendants, and the potential damage to the reputation of individuals who might be mentioned in the memorandum but who would never be the subject of a prosecution.[172] Finally, the letter argued that notwithstanding the committee's effort to cite precedent for such a subpoena, it was "unprecedented for a Congressional committee to demand internal decisionmaking memoranda generated during an on-going criminal investigation."[173]

The Attorney General and Director Freeh wrote a similar letter to Chairman Burton in response to his request for a copy of the Charles LaBella memorandum.[174] The letter cited both the 1941 Jackson opinion and the 1986 OLC opinion and restated the arguments discussed above.[175] In addition, the letter noted that both the LaBella and Freeh memoranda relied heavily on information obtained by a grand jury during a criminal investigation, which is protected by Rule 6(e) of the Federal Rules of Criminal Procedure.[176] Although the committee's subpoena had expressly excluded such material from the scope of its request, the Attorney General and FBI Director argued that the Rule 6(e) information contained in the memoranda was "closely intertwined with other material."[177]

These views were reiterated in a subsequent letter from Attorney General Reno to Chairman Burton, in which the Attorney General offered to accommodate the committee's needs by providing "a confidential briefing on appropriate portions of the LaBella memorandum

171 Letter from Janet Reno, United States Attorney General, and Louis J. Freeh, FBI Director, to Dan Burton, Chairman, House Committee on Government Reform and Oversight (Dec. 8, 1997), *reprinted in* H.R. REP. No. 105-728, *supra* note 1, at 38, 38.

172 *Id.*, *reprinted in* H.R. REP. No. 105-728, *supra* note 1, at 38, 38–39.

173 *Id.* at 39.

174 *See* Letter from Janet Reno, United States Attorney General, and Louis J. Freeh, FBI Director, to Dan Burton, Chairman, House Committee on Government Reform and Oversight (July 28, 1998), *reprinted in* H.R. Rep. No. 105-728, *supra* note 1, at 45–47.

175 *Id.*, *reprinted in* H.R. REP. No. 105-728, *supra* note 1, at 47.

176 *Id.*, *reprinted in* H.R. REP. No. 105-728, *supra* note 1, at 47.

177 *Id.*, *reprinted in* H.R. REP. No. 105-728, *supra* note 1, at 47.

after I have had an opportunity to evaluate it fully."[178] Notwithstanding the conclusions of the 1986 OLC memorandum, however, the letter did not indicate that the Attorney General was asserting a claim of executive privilege or that she would ask the President to assert such a claim.

Chairman Burton did not accept the Attorney General's analysis of Congress's right to compel production of the two memoranda. The committee justified its need for the Freeh and LaBella memoranda on the ground that the memoranda would

> enable the Committee to assess, on one hand, the strength of their recommendations to the Attorney General and, on the other hand, will hopefully provide the Committee with some insight into the reasons that the Attorney General continues to reject these recommendations. In the event that the Attorney General has identified some loophole in the statute that enables her to resist the appointment of an independent counsel contrary to the evident purpose of the Independent Counsel Act, this Committee will be able to recommend legislative changes to eliminate that loophole. Thus, the subpoena of the two memoranda represents an exercise of its basic oversight responsibilities.[179]

In particular, the committee emphasized the failure of the Attorney General to obtain a formal presidential claim of executive privilege:

> The Attorney General has raised a number of objections to producing the subpoenaed documents. The objections have consisted solely of an enunciation of general Department policy against providing investigative materials to Congress, and an explanation of that policy, and the Attorney General has not asserted any claim of privilege in response to the Committee's subpoena. The Attorney General's response to the Committee's subpoena is wholly inadequate. The Committee has issued a lawful subpoena, and the Attorney General has not made a claim of privilege in response. Rather, she has simply refused to comply with the subpoena.[180]

The committee also invoked the 1986 OLC opinion as support for its conclusion that the only basis for refusing to comply with a proper committee subpoena would be a "properly-invoked claim of executive privilege."[181] As a result, the committee concluded that

178 Letter from Janet Reno, United States Attorney General, to Dan Burton, Chairman, House Committee on Government Reform and Oversight (Aug. 4, 1998), *reprinted in* H.R. REP. No. 105-728, *supra* note 1, at 83, 84.

179 H.R. REP. No. 105-728, *supra* note 1, at 10.

180 *Id.* at 15.

181 *Id.* at 16 & n.40.

"even if the Department's policy concerns were well-grounded (which . . . they are not), there would be no legal basis for the Attorney General's refusal to comply."[182]

The Burton Committee also specifically responded to the policy objections raised by the DOJ to justify non-disclosure of the Freeh and LaBella memoranda. First, the committee argued that it was not attempting to influence the decision whether to prosecute a particular person. Rather, the committee argued, it was merely attempting to ensure that

> those decisions are made by a conflict-free prosecutor as required by the Independent Counsel Act. If Congress cannot obtain information regarding how the Attorney General is interpreting and applying the Independent Counsel Act, it would be unable to ensure that the Attorney General is complying with the recusal provisions of the Independent Counsel Act as Congress intended, or, if necessary, make legislative changes to express congressional intent more forcefully.[183]

The committee argued that it had "a history of assisting, not hampering, the Department's investigation."[184] The committee also emphasized that it had refrained from publicly releasing subpoenaed documents, even though it asserted the right to do so, and that it had permitted the DOJ to redact all grand jury information protected by Rule 6(e) of the Federal Rules of Criminal Procedure.[185] Although the committee conceded that "the Department's concerns are not groundless," it concluded that "the Committee's legitimate oversight needs simply outweigh those concerns."[186]

In addition, the committee argued that the DOJ's "claim that the Committee's interest in the memoranda will have a chilling effect on the Attorney General's advisors is unconvincing."[187] The committee noted that despite the leaking of the Freeh memorandum to the media, the public discussion of Director Freeh's candid advice had not had any chilling effect on LaBella's "even more frank assessment of the Department's work."[188] Finally, the committee argued that it was "far more likely that the Attorney General's refusal to consider the

182 *Id.* at 16.
183 *Id.* at 17–18.
184 *Id.* at 18.
185 *Id.* at 19.
186 *Id.* at 18.
187 *Id.* at 19.
188 *Id.*

recommendations of her close advisors will have a chilling effect on their willingness to offer such advice in the future."[189]

The committee also rejected the DOJ's concern that production of the Freeh and LaBella memoranda would offer suspects in the campaign finance investigation a "roadmap" to the DOJ's investigation, which would allow them to evade prosecution.[190] The committee argued that such concerns were unfounded because it had permitted Rule 6(e) material to be redacted from the memoranda and because Congress had, in numerous cases, "received this type of information without harming the prosecution of targeted individuals."[191] The committee made the unusual argument that, if the memoranda had "contained such valuable prosecutorial information," the DOJ would not have allowed them to be leaked to the press, and that, in any event, the committee was prepared to take the necessary steps to ensure that sensitive information would not be released to the public.[192]

The committee also took the Attorney General and FBI Director Freeh to task for claiming that it was "unprecedented for a Congressional committee to demand internal decisionmaking memoranda generated during an ongoing criminal investigation."[193] The committee argued that not only was the statement "clearly false" but that it was "common for congressional committees to demand this type of information," and that "the Department has frequently complied with precisely these types of demands."[194]

Finally, the Committee concluded its analysis by discussing a number of the precedents that had been described in the earlier CRS memoranda. In those cases, the committee argued,

> congressional committees investigating malfeasance or nonfeasance by the Department of Justice have received a wide array of information, ranging from internal Department documentary evidence to testimonial evidence from Department officials. Such oversight by Congress has uncovered serious instances of wrongdoing within the Department, and has made possible the prosecution of criminal suspects when otherwise the Department would not have pursued such cases.[195]

189 *Id.*

190 *Id.* at 19–20.

191 *Id.* at 19.

192 *Id.* at 20.

193 *Id.* (quoting Letter from Janet Reno, United States Attorney General, and Louis J. Freeh, FBI Director, to Dan Burton, Chairman, House Committee on Government Reform and Oversight, *supra* note 171, *reprinted in* H.R. Rep. No. 105-728, *supra* note 1, at 38, 39).

194 *Id.* at 20.

195 *Id.* at 20–21.

Ultimately, the political context in which the dispute arose determined which side would prevail. Attorney General Reno's conclusion that it would be impossible to seek a presidential assertion of executive privilege severely limited the ability of the DOJ to protect the Freeh and LaBella memoranda. The failure to obtain a presidential assertion of privilege galvanized committee members in support of Chairman Burton's efforts to obtain the documents. It also left the Attorney General vulnerable to a citation for contempt of Congress. As a result, the DOJ had little choice but to produce redacted versions of the memoranda for selected committee members. Although Congress did not receive the full memoranda, this marked the first time that Congress had access to such significant prosecutorial documents in the midst of an ongoing criminal investigation.

D. Conclusions That May Be Drawn from the Historical Record

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

On the other hand, Congress seems generally to have been respectful of the need to protect material contained in open criminal investigative files. There is almost no precedent for Congress attempting to subpoena such material, and even fewer examples of the DOJ actually producing such documents. Aside from the documents prepared by a non-lawyer that were voluntarily disclosed during the Teapot Dome investigation, there is no evidence that the DOJ had ever disclosed, prior to an indictment, material from an open criminal investigative file until the campaign finance investigation. The disclosure of the Freeh and LaBella memoranda, even in the limited form in which it took place, could create a novel and dangerous precedent for the DOJ. By subpoenaing these sensitive prosecutorial memoranda, and by insisting upon disclosure in the absence of a presidential assertion of executive privilege, Congress has crossed a previously unbreached barrier and established a potential basis for future con-

gressional committees to force disclosures from open criminal investigative files.

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. Although the accommodation process between Congress and the executive branch is conducted in a highly political atmosphere, the arguments made by each side are grounded in legal doctrine and rely heavily on past experience.[196] Often, the executive branch is able to persuade Congress that a particular request is illegitimate based on the representation that such information has never previously been provided to Congress. Conversely, Congress's determination to obtain information is steeled if it finds instances in which similar information has been provided in the past. Congress's reaction is to conclude that if the agency has produced such information before, it can certainly produce it again, and the resistance must be based upon the desire to cover up something that Congress would clearly want to see. Thus, the campaign finance precedent may lead to other instances in which Congress may feel justified in demanding information from open criminal investigative files,[197] and it may again press the DOJ to the point of a contempt of Congress vote. At that point, unless the political circumstances permit the rare presidential assertion of privilege, the DOJ would be forced to disclose the documents, at least in some form, and another precedent would have been set. At some point, the weight of precedent could become so powerful that Congress might routinely be able to obtain information from open criminal investigative files. Therefore, it is important to supplement the examination of past precedents with constitutional analysis of the issues surrounding the disclosure of such material, in order to determine whether the approach taken by the DOJ sufficiently safeguards the criminal investigation process from improper congressional influence.

III. Traditional Analysis of Privilege Disputes Between Congress and the Department of Justice

The resolution of executive privilege disputes between Congress and the DOJ has generally proceeded on the same principles applied

196 *See, e.g.*, H.R. Rep. No. 105-728, *supra* note 1, at 6–8, 15–24.

197 Indeed, by some accounts, it has already had this effect, as the Senate Judiciary Committee has joined Chairman Burton's committee in pursuing information from open criminal investigative files. *See* Jim Oliphant, *Target: Reno*, Legal Times, June 19, 2000, at 1.

to the resolution of other executive privilege disputes between Congress and the executive branch. In this conflict, each branch has inherent constitutional rights and privileges. When such inherent constitutional powers come into conflict, resulting disputes are normally resolved by balancing the potential impact on the constitutional prerogatives of each branch. In order to explain how this has traditionally been accomplished in the context of executive privilege disputes with Congress, this Section first analyzes the constitutional prerogatives of each branch and then examines how the conflict between these inherent constitutional powers has been resolved.

A. Congress's Inherent Constitutional Authority To Investigate and Compel Production of Documents

Congress's authority to investigate and compel the production of documents derives not from any express grant of investigative power, but rather from the general grant of legislative authority set forth in Article I, Section 1 of the Constitution: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."[198] The implied power to investigate is based on the principle that, in order to legislate effectively, Congress must be able to investigate and study the subjects of possible legislation.[199] On the basis of this general grant of legislative authority, Congress, from its very first decade, has investigated a wide variety of issues that might have warranted legislative action.[200]

The Supreme Court looked to this extensive history of congressional investigations when it expressly recognized Congress's constitutional authority to subpoena witnesses and documents in *McGrain v. Daugherty*.[201] In *McGrain*, the Court stated that, like the executive, both houses of Congress "possess not only such powers as are ex-

198 U.S. CONST. art. I, § 1. *See generally* CONGRESS INVESTIGATES: A DOCUMENTED HISTORY 1792–1974 (Arthur Schlesinger, Jr. & Roger Bruns eds., 1975) [hereinafter CONGRESS INVESTIGATES] (discussing congressional investigations); ERNEST J. EBERLING, CONGRESSIONAL INVESTIGATIONS: A STUDY OF THE ORIGIN AND DEVELOPMENT OF THE POWER OF CONGRESS TO INVESTIGATE AND PUNISH FOR CONTEMPT (Octagon Books 1973) (1928) (outlining the extent of congressional investigatory power in the wake of the Teapot Dome scandal); JOHN C. GRABOW, CONGRESSIONAL INVESTIGATIONS: LAW AND PRACTICE (1988) (analyzing the extent of congressional inquiry practice).

199 *See* LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 184 (1985).

200 *See* CONGRESS INVESTIGATES, *supra* note 198; GRABOW, *supra* note 198, at 4–5; James M. Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 HARV. L. REV. 153, 168–94 (1926).

201 273 U.S. 135, 174 (1927).

pressly granted to them by the Constitution, but such auxiliary powers as are necessary and appropriate to make the express powers effective . . . ."[202] The Court then analyzed the investigative practices of legislatures in the United States and Great Britain and concluded that in "actual legislative practice power to secure needed information by such means has long been treated as an attribute of the power to legislate."[203] Based upon this longstanding legislative practice, the Court concluded that "the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function."[204] As previously discussed, *McGrain* itself dealt with an investigation of the DOJ growing out of the Teapot Dome scandal of the 1920s. The Court noted that, in the wake of allegations of oil company payoffs to officials in the Harding administration, Congress became concerned about "various charges of misfeasance and nonfeasance in the Department of Justice" and that these charges were "investigated to the end that the practices and deficiencies which, according to the charges, were operating to prevent or impair its right administration might be definitely ascertained and that appropriate and effective measures might be taken to remedy or eliminate the evil."[205] In particular, the investigation was directly related to Congress's legislative authority by virtue of proposed legislation to remove litigation authority from the DOJ and place it in the control of a special counsel to be appointed by the President.[206] Thus, the Court made it clear that the investigation was not designed to rouse the DOJ from inaction to take prosecutive steps against particular defendants, but rather to determine whether Congress should pass specific legislation to remedy identified problems.

The precedents cited by the Court emphasized this link between the investigative power and the power to legislate. For example, in *Wilckens v. Willet*,[207] the New York Court of Appeals ruled that the House of Representatives had the power to compel the attendance in testimony of witnesses because it "is a necessary incident to the sovereign power of making laws; and its exercise is often indispensable to the great end of enlightened, judicious and wholesome legislation."[208] Similarly, in *People v. Keeler*,[209] the New York Court of Appeals ruled

202 *Id.* at 173.
203 *Id.* at 161.
204 *Id.* at 174.
205 *Id.* at 151.
206 *Id.*
207 40 N.Y. (1 Keyes) 521 (1864).
208 *McGrain*, 273 U.S. at 165 (quoting *Wilckens*, 40 N.Y. (1 Keyes) at 525).
209 2 N.E. 615 (N.Y. 1885).

that the power to compel testimony "may be indispensable to intelligent and effectual legislation to ascertain the facts which are claimed to give rise to the necessity for such legislation . . . ."[210] The *McGrain* Court expressly distinguished *Kilbourn v. Thompson*,[211] which held that neither house of Congress possesses a "general power of making inquiry into the private affairs of the citizen" and that an inquiry that relates to "a matter wherein relief or redress could be had only by a judicial proceeding" is not within the legislature's authority.[212] The *McGrain* Court concluded: that *Kilbourn* "contained no suggestion of contemplated legislation; that the matter was one in respect to which no valid legislation could be had"; and that the matter was the subject of a bankruptcy proceeding still pending in court.[213] Thus, *Kilbourn* did not resolve the question whether Congress could compel testimony in the context of an investigation related to specific proposed legislation. *McGrain*, therefore, does not lend support to the proposition that Congress has a free-standing right to investigate, and *Kilbourn* stands for precisely the opposite conclusion. Indeed, the *McGrain* Court expressly recognized that "neither house is invested with 'general' power to inquire into private affairs and compel disclosures, but only with such limited power of inquiry as is shown to exist" to support its legislative function.[214]

The distinction between Congress's power to investigate in aid of its legislative function and the absence of authority to investigate for other purposes was emphasized in *Watkins v. United States*.[215] In that case, a witness was subpoenaed to appear before a subcommittee of the House Committee on Un-American Activities. The witness, an official of organized labor, testified concerning his association with the Communist Party. He refused, however, to answer questions requesting that he identify persons who were formerly associated with the Communist Party.[216] As a result of this refusal to testify, the House cited the witness for contempt of Congress, and the U.S. Attorney prosecuted the witness for contempt. The witness appealed his criminal conviction, and the Supreme Court reversed the decision of the court of appeals and overturned the conviction.[217] The Court empha-

210 *McGrain*, 273 U.S. at 166 (quoting *Keeler*, 2 N.E. at 624).

211 103 U.S. 168 (1880).

212 *Id.* at 190, 193, *quoted in McGrain*, 273 U.S. at 170.

213 *McGrain*, 273 U.S. at 171.

214 *Id.* at 173–74.

215 354 U.S. 178 (1957).

216 *Id.* at 185.

217 *Id.* at 216.

sized that Congress's investigatory power, although broad, was subject to clear limitations:

> The power of Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into Departments of the Federal Government to expose corruption, inefficiency or waste. But, broad as is this power of inquiry, it is not unlimited. There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress. . . . Nor is the Congress a law enforcement or trial agency. These are functions of the executive and judicial departments of government. No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress. Investigations conducted solely for the personal aggrandizement of the investigators or to "punish" those investigated are indefensible.[218]

In addition, the Court ruled that Congress's investigatory power is subject to the limitations imposed by the Bill of Rights:

> The Bill of Rights is applicable to investigations as to all forms of governmental action. Witnesses cannot be compelled to give evidence against themselves. They cannot be subjected to unreasonable search and seizure. Nor can the First Amendment freedoms of speech, press, religion, or political belief and association be abridged.[219]

Indeed, the Court expressed a healthy skepticism of Congress's assertions of legislative purpose for a particular inquiry, particularly when it might affect individual rights:

> [T]he mere semblance of legislative purpose would not justify an inquiry in the face of the Bill of Rights. The critical element is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosures from an unwilling witness. We cannot simply assume, however, that every congressional investigation is justified by a public need that overbalances any private rights affected. To do so would be to abdicate the responsibility placed by the Constitution upon the judiciary to ensure that the Congress does not unjustifiably encroach upon an individual's right to privacy nor abridge his liberty of speech, press, religion or assembly.[220]

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218 354 U.S. at 187.

219 *Id.* at 188.

220 *Id.* at 198-99.

On the basis of these principles, the Court ruled that the House committee had not sufficiently specified how the questions propounded to the defendant were pertinent to a matter that was the proper subject of legislative inquiry.[221]

In addition, although Congress frequently justifies oversight hearings on the ground that it has the responsibility to inform the public on matters of public concern, the Supreme Court has ruled that the informing function is not a necessary part of the legislative process. In *Hutchinson v. Proxmire*,[222] Senator William Proxmire was sued for libel arising out of one of his infamous "Golden Fleece" awards, designed to bring attention to wasteful federal procurement.[223] Senator Proxmire asserted Speech or Debate Clause immunity for the press release that announced the award.[224] The Court rejected the immunity claim on the ground that "transmittal of such information by individual members in order to inform the public and other members is not a part of the legislative function or the deliberations that make up the legislative process."[225] Thus, congressional oversight merely for the purpose of informing the public is not an essential element of Congress's constitutional responsibility.

Notwithstanding the above limitations, however, Congress, as a practical matter, rarely finds it difficult to find an adequate justification for oversight hearings. Congress can find a legislative purpose for virtually any oversight investigation, and the courts have not prevented it from obtaining documents on the ground that there is no legitimate legislative need for the investigation. Nevertheless, it will be important to recall the limitations on Congress's investigative authority when it comes time to weigh congressional need for oversight of open criminal investigations against the possible harms of such oversight.[226]

B. Power of the Executive Branch To Maintain the Confidentiality of Internal Documents

The executive branch has inherent constitutional authority to maintain the confidentiality of its own internal documents. As the Supreme Court noted in *United States v. Nixon*,[227]

221 *Id.* at 214–16.
222 443 U.S. 111 (1979).
223 *Id.* at 118.
224 *Id.*
225 *Id.* at 133.
226 *See* discussion *infra* Part IV.
227 418 U.S. 683 (1974).

> There is nothing novel about governmental confidentiality. The meetings of the Constitutional Convention in 1787 were conducted in complete privacy. . . . Moreover, all records of those meetings were sealed for more than 30 years after the Convention. . . . Most of the Framers acknowledged that without secrecy no constitution of the kind that was developed could have been written.[228]

When it began to operate under the new Constitution, the executive branch maintained that it had the right to preserve from public disclosure documents relating to its internal deliberations.[229] The scope of this privilege has been the subject of rich and extensive scholarly literature.[230] The Supreme Court in *Nixon* indicated that the right to preserve confidentiality of executive branch documents flowed from the Constitution:

> Whatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Art. II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of

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228 *Id.* at 705 n.15 (citations omitted).

229 *See* 6 Op. Off. Leg. Counsel 751 (1982) (describing instances since the founding of the Republic in which officials in the Executive Branch have refused to disclose information or produce documents requested by Congress).

230 *See, e.g.*, RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH (1974); MARK J. ROZELL, EXECUTIVE PRIVILEGE: THE DILEMMA OF SECRECY AND DEMOCRATIC ACCOUNTABILITY (1994); Raoul Berger, *Congressional Subpoenas to Executive Officials*, 75 COLUM. L. REV. 865 (1975); Jeffrey L. Bleich & Eric B. Wolff, *Executive Privilege and Immunity: The Questionable Role of the Independent Counsel and the Courts*, 14 ST. JOHN'S J. LEGAL COMMENT. 15 (1999); Archibald Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383 (1974); Norman Dorsen & John H.F. Shattuck, *Executive Privilege, the Congress and the Courts*, 35 OHIO ST. L.J. 1 (1974); Rex E. Lee, *Executive Privilege, Congressional Subpoena Power, and Judicial Review: Three Branches, Three Powers, and Some Relationships*, 1978 BYU L. REV. 231; Randall K. Miller, *Congressional Inquests: Suffocating the Constitutional Prerogative of Executive Privilege*, 81 MINN. L. REV. 631 (1997); Bernard Schwartz, *Executive Privilege and Congressional Investigatory Power*, 47 CAL. L. REV. 3 (1959); Peter M. Shane, *Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims Against Congress*, 71 MINN. L. REV. 461 (1987); Peter M. Shane, *Negotiating for Knowledge: Administrative Responses to Congressional Demands for Information*, 44 ADMIN. L. REV. 197 (1992); Abraham D. Sofaer, *Executive Power and the Control of Information: Practice Under the Framers*, 1977 DUKE L.J. 1; Symposium, *Executive Privilege and the Clinton Presidency*, 8 WM. & MARY BILL RTS. J. 535 (2000); Symposium, United States v. Nixon, 22 UCLA L. REV. 1 (1974); Symposium, United States v. Nixon*: Presidential Power and Executive Privilege Twenty-Five Years Later*, 83 MINN. L. REV. 1061 (1999); Irving Younger, *Congressional Investigations and Executive Secrecy: A Study in the Separation of Powers*, 20 U. PITT. L. REV. 755 (1959); Joel D. Bush, Note, *Congressional-Executive Access Disputes: Legal Standards and Political Settlements*, 9 J.L. & POL. 719 (1993).

> the confidentiality of Presidential communications has similar constitutional underpinnings.[231]

The *Nixon* Court, however, concluded that the deliberative process component of this privilege was not absolute.[232] Rather, this prerogative might come into conflict with the prerogatives of other branches, including the judiciary's need for information to accomplish its constitutional role in adjudicating cases.[233] Thus, although the Court acknowledged that the President's need to freely explore alternatives in predecisional deliberations justified "a presumptive privilege for Presidential communications,"[234] and, even though the "privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution,"[235] the privilege had to yield, in that case, to the "demonstrated, specific need for evidence in a pending criminal trial."[236] Thus, the Court required a balancing process in which a court adjudicating an executive privilege dispute must weigh the potential impact of disclosure on the executive's ability to carry out its constitutional functions against the potential impact of nondisclosure on the ability of the judiciary to carry out its own functions.[237]

This balancing approach was utilized again by the Court in *Nixon v. Administrator of General Services*,[238] in which the Court considered the validity of a statute that placed President Richard Nixon's presidential records at the disposal of the National Archives for review and possible public disclosure.[239] President Nixon claimed that executive privilege shielded these documents from review, and Congress responded that it was constitutionally authorized to adopt a statute that would provide for limited review and publication.[240] The Supreme Court decided that in resolving whether the statute

> disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is present must we

231 *Nixon*, 418 U.S. at 705–06 (footnote omitted).

232 The Court did indicate that other possible bases for the privilege, such as "military or diplomatic secrets," might be absolute. *Id.* at 710–11.

233 *See id.* at 710 n.18, 711–12.

234 *Id.* at 708.

235 *Id.*

236 *Id.* at 713.

237 *See id.* at 711–12, 712 n.19.

238 433 U.S. 425 (1977).

239 *See id.* at 429.

240 *See id.* at 430–33.

> then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.[241]

The Supreme Court used a similar balancing approach in analyzing whether the President and his subordinates had immunity from civil lawsuits for damages.[242] In subsequent cases, the D.C. Circuit has continued to use the balancing approach of *United States v. Nixon.* For example, in *In re Sealed Case,*[243] the court evaluated a claim of executive privilege made in response to a subpoena from the independent counsel investigating Secretary of Agriculture Michael Espy.[244] The court distinguished between a general deliberative process privilege that applied throughout the executive branch and a presidential communications privilege that applied to the President and his close advisors, and it ruled that a greater showing of need was required to overcome the latter privilege.[245] With respect to presidential communications, the D.C. Circuit ruled that, under *Nixon,* the President's interest in confidentiality of presidential communications could be overcome by the judicial branch's need for documents only if the parties seeking the documents could prove "first, that each discrete group of the subpoenaed materials likely contains important evidence; and second, that this evidence is not available with due diligence elsewhere."[246] The court also noted that "the factors of importance and unavailability are also used by courts in determining whether a sufficient showing of need has been demonstrated to overcome other qualified executive privileges, such as the deliberative process privilege or the law enforcement investigatory privilege."[247] The D.C. District Court utilized a similar balancing approach in *In re Bruce R. Lindsey (Grand Jury Testimony),*[248] which involved a subpoena from the Independent Counsel Kenneth Starr in connection with the Monica Lewinsky investigation.

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241 *Id.* at 443 (citations omitted).

242 *See* Nixon v. Fitzgerald, 457 U.S. 731, 744–57 (1982) (holding that the President possesses absolute immunity from an implied right of action for civil damages); Harlow v. Fitzgerald, 457 U.S. 800, 806–19 (1982) (holding that the President's advisors possess qualified immunity from similar civil actions).

243 121 F.3d 729 (D.C. Cir. 1997).

244 *See id.* at 734–36.

245 *See id.* at 736–40.

246 *Id.* at 754.

247 *Id.* at 755.

248 158 F.3d 1263, 1266–67 (D.C. Cir. 1998), *cert. denied sub nom.* Office of the President v. Office of the Indep. Couns., 525 U.S. 996 (1998).

By contrast, the courts have rarely ruled on the validity of assertions of executive privilege in response to a congressional subpoena. The Supreme Court has never directly addressed this question, and in *United States v. Nixon*, the Court expressly disclaimed any intent to do so.[249] The D.C. Circuit has confronted an executive-legislative privilege dispute on only three occasions,[250] and it only reached the merits in one of those cases. In *Senate Select Committee on Presidential Campaign Activities v. Nixon*,[251] the court considered a suit by the Senate Select Committee on Presidential Campaign Activities to enforce its subpoena that directed President Nixon to make available to the committee tape recordings of specified conversations between President Nixon and John Dean.[252] The district court had quashed the subpoena after weighing "the public interest protected by the President's claim of privilege against the public interests that would be served by disclosure to the committee in this particular instance."[253]

The court of appeals utilized the same balancing test that had provided the basis for its previous decision enforcing the special prosecutor's subpoena for President Nixon's tapes.[254] The court described this process as follows:

> So long as the presumption that the public interest favors confidentiality can be defeated only by a strong showing of need by another institution of government—a showing that the responsibilities of that institution cannot responsibly be fulfilled without access to records of the President's deliberations—we believed in *Nixon v. Sirica*, and continue to believe, that the effective functioning of the presidential office will not be impaired.[255]

In applying that balance, the court found it unnecessary to resolve whether Congress possessed a general oversight power, apart from its legislative power, that might support its claim for the tapes.[256] The court reasoned that the House Judiciary Committee was already in possession of the tapes and the Senate committee's "need for the subpoenaed tapes is, from a congressional perspective, merely cumulative."[257] As a result, the court concluded that

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249 *See* United States v. Nixon, 418 U.S. 683, 712 n.19 (1974).

250 *See Sealed Case*, 121 F.3d at 739 n.10.

251 498 F.2d 725 (D.C. Cir. 1974).

252 *See id.* at 726.

253 *Id.* at 728.

254 *Id.* at 729–31; *see also* Nixon v. Sirica, 487 F.2d 700, 716–18 (D.C. Cir. 1973).

255 *Senate Select Comm. on Presidential Campaign Activities*, 498 F.2d at 730.

256 *See id.* at 732.

257 *Id.*

> [t]he sufficiency of the committee's showing of need has come to depend, therefore, entirely on whether the subpoenaed materials are critical to the performance of its legislative functions. There is a clear difference between Congress's legislative tasks and the responsibility of a grand jury, or any institution engaged in like functions. While fact-finding by a legislative committee is undeniably a part of its task, legislative judgments normally depend more on the predicted consequences of proposed legislative actions and their political acceptability, than on precise reconstruction of past events . . . .[258]

Thus, the court focused on the specific source of Congress's need for the documents and whether there were alternative methods for satisfying that legislative need.[259]

In *United States v. AT&T Co.*,[260] the DOJ brought an action to enjoin AT&T from complying with a House subcommittee subpoena issued in the course of investigating one of the national security wiretaps.[261] The subpoena requested AT&T to produce DOJ letters requesting AT&T assistance in carrying out the wiretaps.[262] The DOJ objected to the disclosures and began to negotiate with the subcommittee chairman over an alternative means to satisfy the subcommittee's interest without damaging national security.[263] After negotiations broke down, the DOJ sued to enjoin AT&T from complying with the subpoena, and the committee chairman intervened as a defendant.[264] Initially, the court of appeals suggested a possible settlement of the dispute and refused to decide the case on the merits.[265] When the case came back to the court after settlement talks failed, the court, while refusing to dismiss the case on justiciability grounds, again sent the case back to the parties to resolve through informal settlement negotiations.[266] The D.C. Circuit concluded, as it had in its first hearing of the matter, that it remained inappropriate to resolve the dispute definitively:

> Given our perception that it was a deliberate feature of the constitutional scheme to leave the allocation of powers unclear in certain situations, the resolution of conflict between the coordinate

258 *Id.*
259 *See id.* at 732–33.
260 567 F.2d 121 (D.C. Cir. 1977).
261 *Id.* at 122–23.
262 *Id.* at 123.
263 *Id.* at 123–24.
264 *Id.* at 124.
265 *See id.*; *see also* United States v. AT&T Co., 551 F.2d 384, 395 n.18 (D.C. Cir. 1976) (outlining a possible settlement agreement).
266 *AT&T*, 567 F.2d at 125–33.

> branches in these situations must be regarded as an opportunity for a constructive *modus vivendi*, which positively promotes the functioning of our system. The Constitution contemplates such accommodation. Negotiation between the two branches should thus be viewed as a dynamic process affirmatively furthering the constitutional scheme.[267]

Thus, instead of finally resolving the dispute over the subpoena, the opinion suggested the contours of a proposed settlement and urged the parties to negotiate on the basis of the court's suggestion.[268] Both parties later agreed to dismiss the case in 1978.[269]

As previously noted, in *United States v. House of Representatives*,[270] the district court dismissed an action brought by the DOJ for a declaratory judgment that Anne Gorsuch had acted lawfully in refusing to comply with a House subpoena.[271] The court followed the lead of earlier D.C. Circuit opinions refusing to allow pre-enforcement challenges of congressional subpoenas and invoked the doctrine of equitable discretion to refrain from deciding the case on the merits.[272] The court concluded "[t]he difficulties apparent in prosecuting Administrator Gorsuch for contempt of Congress should encourage the two branches to settle their differences without further judicial involvement."[273]

The case law on executive privilege establishes some useful guidelines about the nature of the executive branch's interest in maintaining the confidentiality of documents and the methodology used by the courts in balancing that interest against the needs of the other branches. First, with respect to documents needed in a criminal proceeding, the Supreme Court has recognized a presumptive privilege for deliberative documents within the executive branch. More importantly, the Court has established a methodology for resolving the competing claims of the executive and judicial branches. The courts must weigh the potential impact on the ability of the executive branch to perform its constitutional functions if documents are disclosed against the impact on the ability of the judiciary to perform its functions if the documents are withheld. Courts have shown no reluctance to decide these questions in appropriate cases where documents have been de-

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267 *Id.* at 130 (footnotes omitted).

268 *See id.* at 131–33.

269 *See* ROZELL, *supra* note 230, at 95–96.

270 556 F. Supp. 150 (D.D.C. 1983).

271 *See id.* at 153.

272 *See id.* at 152 (citing, inter alia, Sanders v. McClellan, 463 F.2d 894, 899 (D.C. Cir. 1972); Ansara v. Eastland, 442 F.2d 751, 754 (D.C. Cir. 1971)).

273 *Id.* at 153.

manded from the executive branch and executive privilege has been asserted. In performing the balancing test, the courts have looked to the specific factual context presented by the dispute and have ordered disclosure only where there was a clearly demonstrated need for the documents in the judicial proceeding that could not be met through some alternative.

With respect to disputes between the executive branch and Congress, the D.C. Circuit has played the principal role in defining the contours of the privilege. First, it has recognized the assertion of executive privilege against Congress and has rejected congressional claims that Congress has the unilateral right to obtain any documents it deems necessary to its own business. Second, the court has utilized a methodology similar to the resolution of judicial-executive privilege disputes, in which the court balances the need of the executive branch to maintain the confidentiality of the documents against the needs of Congress to obtain the subpoenaed documents. Third, the court has refrained from becoming involved in how to strike that balance in individual cases or even in providing significant guidelines on how individual cases should be resolved. Instead, the court has encouraged both branches to negotiate with each other to reach a compromise over disputed issues of disclosure. Indeed, in the usual executive-legislative branch dispute, informal resolution performs a much better job of balancing the respective needs of the executive branch and Congress than a court would be able to do in the context of a judicial proceeding.[274]

1. How the Executive Branch Implements These Principles When It Asserts Executive Privilege

President Nixon was the first President to promulgate a directive on the subject of executive privilege.[275] President Reagan updated this memorandum in 1982, and this memorandum remains the principal executive branch statement on the assertion of executive privilege against Congress.[276] The Reagan memorandum states that the executive branch might find it necessary to withhold documents in

274 *See* Peterson, *supra* note 22, at 625–31.

275 *See* Memorandum from Richard Nixon, President of the United States, for the Heads of Executive Departments & Agencies on Establishing a Procedure To Govern Compliance with Congressional Demands for Information (Mar. 24, 1969), *reprinted in* H.R. REP. No. 99-435, pt. 2, at 807 (1986).

276 *See* Memorandum from Ronald Reagan, President of the United States, to the Heads of Executive Departments & Agencies on Procedures Governing Responses to Congressional Requests for Information (Nov. 4, 1982), *reprinted in* H.R. REP. No. 99-435, pt. 2, at 1106 (1986).

order to protect "the confidentiality of national security secrets, deliberative communications that form a part of the decision-making process, or other information important to the discharge of the Executive Branch's constitutional responsibilities."[277] Although the memo warns that "[l]egitimate and appropriate claims of privilege should not be thoughtlessly waived," it admonishes that "good faith negotiations between Congress and the Executive Branch have minimized the need for invoking executive privilege, and this tradition of accommodation should continue as the primary means of resolving conflicts between the branches."[278]

The memorandum also sets forth a detailed procedure for the assertion of privilege. First, the memorandum requires that all congressional requests for information be complied with "as promptly and as fully as possible" unless executive officials determine that disclosure would raise a substantial issue of executive privilege.[279] The memorandum specifies that if the head of an executive department or agency believes that compliance with a subpoena raises a substantial question of executive privilege, he must notify and consult with the assistant attorney general for the OLC and the counsel to the President.[280] The memo requires the department head, the Attorney General, and the counsel to the President to consult with one another and review the potential executive privilege claim to determine whether the requested documents could be released or whether some compromise might be reached with Congress.[281] If these executive officials determine that a claim of privilege should be asserted, they are required to present the issue to the President for a final decision on whether to invoke executive privilege.[282] The memo explicitly warns that to "insure that every reasonable accommodation is made to the needs of Congress, executive privilege shall not be invoked without specific presidential authorization."[283]

The procedures established by the Reagan memorandum are based upon the principle that the interests of Congress and the executive branch must be evaluated every time the President asserts executive privilege to withhold documents demanded by a congressional subpoena. The memorandum rejects categorical assertions of privilege and emphasizes the importance of resolving each dispute

277 *Id.*, *reprinted in* H.R. REP. No. 99-435, at 1106.
278 *Id.*, *reprinted in* H.R. REP. No. 99-435, at 1106.
279 *Id.*, *reprinted in* H.R. REP. No. 99-435, at 1106.
280 *Id.*, *reprinted in* H.R. REP. No. 99-435, at 1107.
281 *Id.*, *reprinted in* H.R. REP. No. 99-435, at 1107.
282 *Id.*, *reprinted in* H.R. REP. No. 99-435, at 1107.
283 *Id.*, *reprinted in* H.R. REP. No. 99-435, at 1106.

through the accommodation process. Moreover, by having the President strike that balance himself, the memorandum limits substantially the number of occasions on which executive privilege will be asserted. Thus, although the memorandum generally allows for the assertion of privilege, it makes it very difficult to assert the privilege in any particular case.

During the Clinton administration, White House Counsel Lloyd N. Cutler issued a memorandum to all executive branch general counsels on the subject of executive privilege that supplements the earlier Reagan memorandum.[284] The Cutler memorandum discusses assertions of executive privilege to protect "the confidentiality of deliberations within the White House, including its policy councils, as well as communications between the White House and executive departments and agencies."[285] In this context, the memorandum also states that in "circumstances involving communications relating to investigations of personal wrongdoing by government officials, it is our practice not to assert executive privilege, either in judicial proceedings or in congressional investigations and hearings."[286] In addition, the memorandum states that executive privilege must always be weighed against the competing government interests favoring disclosure, including the judiciary's need to obtain relevant evidence and Congress's need for facts relating to legislative or oversight purposes.[287] The Cutler memorandum also sets forth procedures for handling potentially privileged White House documents, which require agencies receiving requests for any document created in the White House to treat such documents as presumptively protected by executive privilege and to inform the White House that it has received a document request that would cover the White House document.[288] Like its Reagan predecessor, the Cutler memorandum states that if release of the document would pose a substantial question of executive privilege, the White House counsel should consult with the DOJ and other affected agencies in order to determine whether to recommend that the President invoke executive privilege.[289] Although, in contrast to the

284 *See* Memorandum from Lloyd N. Cutler, Special Counsel to the President, to All Executive Department and Agency General Counsels on Congressional Requests to Departments and Agencies for Documents Protected by Executive Privilege (Sept. 28, 1994), http://www.house.gov/refor/oversight/finance/privilege/letters/9_28_94.html (last visited Apr. 26, 2002).

285 *Id.*

286 *Id.*

287 *Id.*

288 *Id.*

289 *Id.*

Reagan memorandum, the Cutler memorandum does not expressly state that only the President may assert executive privilege, it does emphasize that "executive privilege belongs to the President, not individual departments or agencies."[290]

The Cutler memorandum was later supplemented by a memorandum from Cutler's successor as counsel to the President, Abner J. Mikva.[291] Mikva's memorandum clarifies that, although the Cutler memorandum refers to general principles applicable to all claims of executive privilege, the policies set forth in the Cutler memorandum were intended to "apply to congressional requests to departments and agencies for documents reflecting intra-White House decisions . . . or communications between the White House . . . and a department or agency."[292] The Mikva memorandum explains that the Cutler memo "did not address other contexts in which issues of executive privilege arise."[293] Based upon this clarification, it seems clear that the Cutler memorandum was intended to be limited to instances in which executive branch departments or agencies received requests for documents involving the White House, a branch of privilege procedure generally known as third-party practice. Thus, the prevailing statement on presidential assertions of executive privilege remains the 1982 Reagan memorandum.

By ensuring that executive privilege may only be invoked by the President, the Reagan memorandum dramatically limits the number of instances in which executive branch agencies may withhold documents in response to a congressional subpoena. As a practical matter, this policy, in the great majority of instances, ensures that the accommodation process among Congress and the executive agencies will effectively balance the respective needs of the executive branch and Congress with respect to the production of sensitive documents. As I have explained at length elsewhere, the back and forth negotiations that characterize congressional requests for executive branch documents help to filter out both congressional claims that are not based on a substantial need for the documents and executive branch privilege claims that are not grounded in a true assessment of the adverse

290 *Id.*

291 *See* Memorandum from Abner J. Mikva, Counsel to the President, to All Executive Branch Department and Agency General Counsels on Follow-Up Guidance on Responding to Congressional Requests to Departments and Agencies for Documents That May Be Subject to Executive Privilege Claims (Nov. 10, 1994) (on file with author).

292 *Id.*

293 *Id.*

impact on the executive branch if the documents are disclosed.[294] Because of the high political costs associated with the assertion of executive privilege, Presidents will rarely be inclined to make a formal privilege invocation.

The impact of such an assertion of privilege is, however, significant. In 1984, following the Gorsuch controversy, the OLC opined that it would be unconstitutional to prosecute an executive branch official who asserted a claim of executive privilege on instructions from the President.[295] Based upon this memorandum, the OLC later determined that a formal assertion of executive privilege would have the effect of immunizing an executive branch official from prosecution for contempt of Congress.[296] In the absence of a formal claim of executive privilege, however, an executive branch official withholding a subpoenaed document could be subject to a contempt of Congress citation and subsequent criminal prosecution. Thus, in the absence of such a formal assertion of privilege, a determined congressional committee has the power to coerce compliance with the subpoena and disclosure of the document. Given the difficulty in obtaining a presidential assertion of privilege,[297] this means that Congress has substantial power to compel the disclosure of confidential executive branch documents, including those contained in open criminal investigative files.

This is precisely what happened in the battle over the Freeh and LaBella memoranda. The Burton committee requested the memoranda, and, initially, the DOJ resisted disclosure on the basis of its tradition of withholding information from open criminal investigative files. Ultimately, however, the negotiations over an accommodation of the congressional request collapsed, and the Burton committee subpoenaed both documents. Given the President's legal and political troubles at the time, the Attorney General was unable to request a formal assertion of executive privilege over the memoranda, and the Burton committee moved to hold the Attorney General in contempt of Congress.[298] In its report to the full House seeking a contempt of Congress resolution, the Burton committee specifically noted that the Attorney General had failed to seek a presidential assertion of privilege and argued that her decision to withhold the Freeh and LaBella memoranda without a claim of privilege constituted contempt of Con-

294 *See* Peterson, *supra* note 22, at 625–31.

295 8 Op. Off. Legal Counsel 101, 142 (1984).

296 *See* 10 Op. Off. Legal Counsel 68, 91 (1986).

297 *See* Peterson, *supra* note 22, at 625–31.

298 *See* H.R. REP. No. 105-728, *supra* note 1, at 1.

gress.[299] Faced with the possibility of a contempt of Congress vote by the full House, Attorney General Reno had no choice but to disclose the memoranda (with Rule 6(e) material redacted) to the Burton subcommittee. If this breach of the wall that has previously surrounded open criminal investigative files were enlarged by subsequent congressional investigations, there would be a significant risk of improper congressional interference in prosecutorial decision making. The next Part of the Article explores why this would be constitutionally problematic and how the doctrine of privilege should be modified in order to take account of this concern.

IV. Evaluating Congress's Right To Obtain Information from Open Criminal Investigation Files

The final question to be answered is whether congressional requests for information from open criminal investigative files should be treated any differently from other congressional oversight of the DOJ. Congressional committees have maintained that there should be no distinction and that Congress has a right to obtain information from open criminal investigations whenever it has a legislative need for such information.[300] The DOJ has regularly asserted that information in open criminal investigative files needs special protection, but it has never asserted executive privilege itself without an individualized presidential instruction to protect this type of material.[301] In order to evaluate this question, it is necessary to weigh Congress's need for such material against the impact on the executive branch if it is required to disclose such material. In addition, when evaluating Congress's need, it is appropriate to determine whether congressional access to such material creates the potential for improper aggrandizement of Congress's authority.

A. Does Congress Ever Have a Need for Documents from Open Criminal Investigations?

It would not be difficult to identify legitimate congressional interests in obtaining information from the DOJ. Congress has an obvious legislative interest in evaluating statutes that are enforced by the DOJ, and information on how those statutes are being enforced is relevant to this legislative inquiry. For example, in the case of the campaign finance investigation, Congress's interest in evaluating whether the

299 *See id.*

300 *See id.* at 17–24.

301 *See* discussion *supra* Part III.B.1.

current campaign finance laws adequately accomplish their stated purpose would be aided by information concerning the prosecutions brought by the DOJ under the current statute. Moreover, information about investigations of government officials would have been relevant to legislative deliberations about extending the Independent Counsel Act. Such information would help Congress to determine whether the current laws are adequate and, if found wanting, how they should be amended.

It is somewhat more difficult, however, to identify whether access to open criminal investigative files is necessary to accomplish this purpose. The vast majority of the information in which Congress would be interested should be contained in already closed files, which greatly exceed the number of open criminal investigations. Moreover, it is unlikely that information contained in open investigative files would provide information that is different in kind from that which is contained in closed files. Finally, even if open criminal investigative files contained information of a different kind, if Congress were foreclosed from obtaining such information, the bar would not be permanent. Rather, Congress's right to obtain such information would merely be delayed until such time as the file was closed or the case had reached a sufficiently advanced stage that the concerns about congressional access were minimized.[302] Thus, at least with respect to Congress's use for the purpose of legislation, its need for information from criminal investigative files could be substantially satisfied without access to open investigations.

Congress might assert, however, that it has a legitimate right to obtain information for the purpose of oversight of the current operations of the DOJ. Such information may be relevant to appropriations issues, including whether the investigating divisions are adequately funded, or simply to determine whether the DOJ is performing its statutory duties properly. As a general rule, Congress has asserted the right to investigate whether agencies of the executive branch are adequately performing their assigned function, and the executive branch has not resisted such inquiries. General oversight of executive branch operations takes place in front of congressional committees on a daily basis. The question that is raised here, however, is whether there is anything special about the criminal investigative process that sets it apart from other permissible subjects of congressional oversight. That question will be analyzed in Section B below.

302 *See* discussion *infra* Part IV.E.1.

B. The Legitimacy of Congressional Oversight of Open Criminal Investigations

This Section will argue that there are, in fact, important differences that set apart open criminal investigations from other permissible subjects of congressional inquiry. To some extent, every congressional oversight investigation of the executive branch involves the potential for interfering with the manner in which the executive branch has chosen to execute the laws. Such interference, although it may be questioned from a policy perspective as inefficient and uninformed legislative micro-management, does not raise constitutional concerns that warrant categorical restrictions on Congress's ability to demand information.

With respect to open criminal investigative files, however, Congress's oversight and its potential influence upon the criminal investigative process raise much more serious constitutional concerns. As will be detailed much more fully below, the decision to prosecute a particular criminal case has been protected from interference by either the judicial or legislative branches. The need to preserve executive branch prosecutorial discretion is based not simply upon the idea that the executive branch must have freedom in order to perform its job properly, but, more fundamentally, upon the perception that giving either the judicial or legislative branches influence over the decision to prosecute would concentrate too much authority in the hands of one branch.

The Constitution creates a division of authority in which all three branches must participate before a person is incarcerated for a crime. The legislature must pass a law of general applicability that defines which activity will be regarded as criminal and specifies a punishment, but it may not play a role in enforcing that law. As the Supreme Court noted almost 200 years ago: "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."[303] The executive branch is vested with the authority to identify which individuals should be prosecuted for violating criminal statutes, and the judicial branch must determine the guilt or innocence of the individual selected for prosecution by the executive. The division of authority for legislating, prosecuting, and adjudicating matters of criminal liability ensures that no person may be subjected to the ultimate coercive power of the state through the action of only one or two branches of the federal government.

303 Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136 (1810).

Thus, divided authority acts as an important protection against arbitrary punishment.

The Supreme Court implicitly recognized this point in *United States v. Hudson & Goodwin*,[304] in which the Court held that the federal courts have no authority to punish common-law crimes against the United States.[305] *Hudson & Goodwin* involved an indictment for criminal libel of the President and Congress based upon an article published in a Connecticut newspaper.[306] Although no federal statute made libel a criminal offense, the common law recognized libel as a crime.[307] The Supreme Court held,

> 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 shall have jurisdiction of the offence.[308]

This point is also supported by the rule of lenity, which requires courts to construe ambiguities in criminal statutes to the benefit of criminal defendants.[309] The rule of lenity, like *Hudson & Goodwin*, ensures that Congress, and not the courts, will define the crime, and it also protects defendants against arbitrary and discriminatory application of the law by prosecutors.[310] The rule thus embodies separation of powers principles in dividing authority among the three branches.

The Constitution itself implements this policy of divided authority over criminal prosecutions in several individual provisions, beginning with Article III's guarantees of judicial independence. The Article III incidents of office ensure that neither the President nor Congress will be able to influence, at least directly, the judiciary's decisions on individual cases. Similarly, the Bill of Attainder Clause pro-

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304 11 U.S. (7 Cranch) 32 (1812).

305 *Id.* at 32–34.

306 *Id.* at 32.

307 *Id.*

308 *Id.* at 34.

309 *See* WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 362 (2000).

310 *Id. But see* Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345 (arguing that the rule of lenity has been applied erratically in the federal courts and that it should be abandoned by the federal courts). Professor Kahan has proposed elsewhere that the values the rule is designed to protect could be accommodated if the Department of Justice promulgated regulations stating precisely how criminal statutes would be applied. *See* Dan M. Kahan, *Is* Chevron *Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469 (1996).

hibits Congress from imposing individual punishment; this power is reserved to the judicial branch after the initiation of a prosecution by the executive.

This constitutional division of authority has been developed by the courts in several different areas. First, the courts have refused to assume the authority to initiate prosecutions over the objection of the executive branch. Second, congressional influence over the decision to prosecute is even more constitutionally troubling than involvement of the judicial branch. As a result, oversight that gives the Congress the ability to influence executive branch decisions on whom to prosecute should be viewed with great suspicion, and Congress's legitimate oversight concerns are outweighed by the danger that Congress will impermissibly interfere with the decision to prosecute.

C. *The Restraints on Judicial Interference with Prosecutorial Discretion*

The courts have traditionally refused to interfere with the executive branch's exercise of the authority to designate who will be prosecuted for violations of criminal statutes. The courts have imposed, of course, limitations on how the executive branch exercises prosecutorial discretion,[311] but they have merely imposed a check on the executive's prosecutorial authority to prevent its use in a constitutionally impermissible manner; they have not assumed the authority to order the initiation of a prosecution on their own. The Supreme Court has spoken in broad terms about the scope of the executive branch's authority over the decision to prosecute. In *United States v. Nixon*,[312] the Court announced in sweeping dictum that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case . . . ."[313] In other cases, the Court has deferred to the executive branch's authority over prosecutorial decisions and, in particular, has acknowledged the authority of the Attorney General to act as the exclusive representative of the United States

311 For example, the Supreme Court has prohibited selective prosecution based upon political speech or the race of the defendant. *See, e.g.*, Wayte v. United States, 470 U.S. 598, 608 (1985); United States v. Batchelder, 442 U.S. 114, 124–25 (1979); Oyler v. Boles, 368 U.S. 448, 456 (1962); Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886). In addition, the Court has prohibited the selection of individuals for prosecution based upon personal animus or retaliatory motives. *See* Blackledge v. Perry, 417 U.S. 21, 25–29 (1974); North Carolina v. Pearce, 395 U.S. 711, 723–26 (1969).

312 418 U.S. 683 (1974).

313 *Id.* at 693.

in court litigation.[314] In *Heckler v. Chaney*,[315] the Supreme Court addressed the question of prosecutorial discretion in the context of an administrative enforcement action.[316] In *Heckler*, the action at issue was the failure of the Food and Drug Administration to evaluate the use of lethal injections as a method of capital punishment.[317] Although the drugs in question had been tested for other medical purposes, they had not been "approved for use in human executions."[318] Under the statute at issue in that case, the Court broadly upheld the prosecutorial discretion of the executive and stated that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion."[319] The Court went on to note that

> an 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."[320]

On the other hand, the Court recognized, at least in dictum, Congress's right to make most administrative actions judicially reviewable "[i]f it has indicated an intent to circumscribe agency enforcement discretion, and has provided meaningful standards for defining the limits of that discretion . . . ."[321] Thus, although the Court hinted that Congress could authorize the courts to take a more active role in directing the application of prosecutorial discretion in administrative cases, it never suggested that such authority would extend to criminal cases in which a person could be deprived of his liberty.

The leading lower court case on the scope of prosecutorial discretion is *United States v. Cox*.[322] In *Cox*, an en banc panel of the Fifth Circuit reversed a district court order that a U.S. Attorney prepare and sign an indictment that a grand jury had voted to return.[323] The

314 *See* United States v. San Jacinto Tin Co., 125 U.S. 273, 278–86 (1888); Confiscation Cases, 74 U.S. (7 Wall.) 454, 456–59 (1869); The Gray Jacket, 72 U.S. (5 Wall.) 370, 371 (1866).

315 470 U.S. 821 (1985).

316 *Id.* at 823.

317 *Id.* at 824.

318 *Id.* at 823.

319 *Id.* at 831.

320 *Id.* at 832.

321 *Id.* at 834.

322 342 F.2d 167 (5th Cir. 1965) (en banc) (plurality opinion), *cert. denied*, 381 U.S. 935 (1965).

323 *Id.* at 172.

plurality opinion explained the scope and origin of prosecutorial discretion as follows:

> The executive power is vested in the President of the United States, who is required to take care that the laws be faithfully executed. The 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. The role of the grand jury is restricted to a finding as to whether or not there is probable cause to believe that an offense has been committed. The discretionary power of the attorney for the United States in determining whether a prosecution shall be commenced or maintained may well depend upon matters of policy wholly apart from any question of probable cause. Although as a member of the bar, the attorney for the United States is an officer of the court, he is nevertheless an executive official of the Government, and it is as an officer of the executive department that he exercises a discretion as to whether or not there shall be a prosecution in a particular case. It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States and their control over criminal prosecutions.[324]

Although they believed that the U.S. Attorney could be required to sign the indictment, even the dissenters in *Cox* conceded that "once the indictment is returned, the Attorney General or the U.S. Attorney can refuse to go forward."[325]

Similarly, in *Pugach v. Klein*,[326] a district court refused to order a U.S. Attorney to prosecute a particular individual for violation of federal wiretap laws 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, Section 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.[327]

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324 *Id.* at 171 (footnotes omitted); *see also id.* at 182–83 (Brown, J., concurring) (discussing justification for prosecutorial discretion); *id.* at 190–93 (Wisdom, J., concurring) (same).

325 *Id.* at 179 (Rives, Bell, and Bell, JJ., concurring in part, dissenting in part).

326 193 F. Supp. 630 (S.D.N.Y. 1961).

327 *Id.* at 634.

Other courts have agreed that the decision whether to bring a prosecution is entirely within the discretion of the executive branch.[328]

D. The Restraints on Congressional Influence over Prosecutorial Discretion

If the courts have no constitutional role to play in the selection of individuals for prosecution then, a fortiori, Congress has no constitutional authority to participate in the selection of individuals for prosecution. As a constitutional matter, Congress is far more powerful and subject to political whim.[329] The framers acknowledged that the highly political nature of the legislature might give rise to potential abuses of power. As James Madison argued in *Federalist No. 48*,

> [i]n a representative republic, where the Executive magistracy is carefully limited in both the extent and duration of its power; and where the legislative powers 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.[330]

The framers worried, in particular, about the potential of the legislature to usurp the judiciary's authority to determine individual guilt

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328 *See, e.g.*, Smith v. United States, 375 F.2d 243 (5th Cir.), *cert. denied*, 389 U.S. 841 (1967). In *Smith*, the court of appeals upheld the dismissal of a Federal Tort Claims Act (FTCA) suit against the United States for failure to prosecute individuals who the plaintiff alleged were interfering with and injuring the plaintiff's business. *Id.* at 248. 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 that

> [t]he 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 . . . ." The Attorney General is the President's surrogate in the prosecution of 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 (citations omitted); *see also* Goldberg v. Hoffman, 225 F.2d 463, 464–65 (7th Cir. 1955) (concluding that the judicial review of an exercise of administrative discretion by an executive officer is beyond the power of the court).

329 *See* THE FEDERALIST No. 78, at 522–23 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

330 *Id.* No. 48, at 333–34 (James Madison).

or innocence.[331] Thomas Jefferson expressed concern that the legislature "has accordingly in many instances decided rights which should have been left to judicial controversy."[332]

The framers' deep suspicion of legislative involvement in individual guilt or innocence was incorporated into the Constitution in the form of the clause that expressly prohibits bills of attainder.[333] In striking down a legislative action as a violation of the Bill of Attainder Clause, the Supreme Court noted that

> [t]hose who wrote our Constitution knew well 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.[334]

Justice Powell's concurrence in *INS v. Chadha*[335] echoes this language: "The Framers were well acquainted with the danger of subjecting the determination of the rights of one person to the 'tyranny of shifting majorities.'"[336]

Congress is capable of using the oversight process to insert itself improperly into the adjudication of an individual's case. For example, in *Pillsbury Co. v. FTC*,[337] the Fifth Circuit considered Pillsbury's challenge to a Federal Trade Commission (FTC) order on the ground that extensive oversight questioning of FTC commissioners had deprived it of due process.[338] After the filing of an FTC complaint against Pillsbury, a Senate committee conducted hearings at which it examined the Chairman of the FTC and several members of his staff, including the general counsel who later became Chairman of the Commission himself and who wrote the final opinion from which Pillsbury appealed.[339] During the hearings, the FTC witnesses were questioned specifically about the Pillsbury case.[340] Based upon this extensive questioning, the court concluded that the hearings "constituted an improper intrusion into the adjudicatory processes of the Commission and were of such a damaging character as to have re-

331 *Id.* at 337.

332 THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 195 (J.W. Randolph ed., 1853) (1787).

333 *See* U.S. CONST. art. I, § 9, cl. 3.

334 United States v. Lovett, 328 U.S. 303, 317 (1946).

335 462 U.S. 919 (1983).

336 *Id.* at 961 (Powell, J., concurring).

337 354 F.2d 952 (5th Cir. 1966).

338 *Id.* at 954.

339 *Id.* at 955–62.

340 *Id.*

quired at least some of the members in addition to the chairman to disqualify themselves."[341]

The court acknowledged that Congress asserted no direct authority over the Commission and that the commissioners may have been able to ignore the senators' views, but it concluded that it could not "shrug off such a procedural due process claim merely because the officials involved should be able to discount what is said and to disregard the force of the intrusion into the adjudicatory process."[342] In so finding, the court concluded that its holding would not create "any adverse effect upon the legitimate exercise of the investigative power of Congress."[343]

Recent scholars suggest that the framers were right to worry about the highly political nature of Congress and the potential for abuse of power, particularly when Congress acts by committee in an oversight capacity. Congressional committees are not subject to "veto gates,"[344] the procedural obstacles that restrain action by the full Congress.[345] Not only may committees act quickly without these procedural constraints, but in many committees, subpoena authority is delegated to the committee chair, who may decide to subpoena documents on his own. The freedom of congressional committees to act without significant restraints has led several commentators to term them "engines of rent-seeking," that are unrepresentative of the entire body.[346]

In the oversight context, the committee structure often leads to investigations purely for political purposes rather than for the purpose of gathering information on potential problems and creating legislative solutions.[347] For example, David Mayhew has argued that committee oversight involves two salient characteristics: (1) "particularism," or a narrow focus on issues that will create special benefits for

341 *Id.* at 963.

342 *Id.* at 964.

343 *Id.*

344 *See* McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, LAW & CONTEMP. PROBS., Winter/Spring 1994, at 3, 16–21.

345 These include the constitutional requirements of bicameral passage and presentment to the President, the formal legislative rules by which each house binds itself, and the informal rules that can block legislative action. *See* ESKRIDGE ET AL., *supra* note 309, at 68–70.

346 *Id.* at 71; *see* Kenneth Shepsle & Barry Weingast, *Legislative Politics and Budget Outcomes*, *in* FEDERAL BUDGET POLICY IN THE 1980S, at 343 (Gregory Mills & John Palmer eds., 1994); Barry R. Weingast & William J. Marshall, *The Industrial Organization of Congress; or, Why Legislatures, Like Firms, Are Not Organized as Markets*, 96 J. POL. ECON. 132 (1988).

347 *See* ESKRIDGE ET AL., *supra* note 309, at 206.

a limited class of people; and (2) on issues of a broader interest, inaction or only symbolic action that seeks to make a statement without actually accomplishing anything.[348] This view of committee action suggests that committees are unlikely to pay attention to particular prosecutions for the purpose of truly reforming the statutory structure and are much more likely to do so in order to promote narrow political interests. Those political interests could gravely prejudice the investigation of particular individuals.

The danger of congressional oversight of open criminal investigations is that Congress will seek, through the disclosure of deliberative documents or the compelled testimony of DOJ attorneys, to influence the course of an ongoing investigation. Congressional management or manipulation of the criminal investigation process raises many of the same concerns that are reflected in the Bill of Attainder Clause and the *Pillsbury* case. By influencing the course of an investigation, Congress could prompt the indictment of an individual for a criminal offense. That the individual would still have the right to a criminal trial in federal court is no cure for the impermissible interference by Congress in the prosecutorial selection process. Defendants have the right to argue their case before both a judge and a DOJ that are free from congressional influence. These checks protect individual liberty and ensure that individuals will not be subjected to criminal punishment, including possible incarceration, unless both the executive branch and the judicial branch concur in a determination that the defendant has committed a crime. Congressional influence over the course of an open investigation could remove one of those checks, to the detriment of individual liberty. Former Attorney General Civiletti captured this problem nicely in a 1993 speech to the Heritage Foundation:

> Imagine a scenario, if you would, in which an individual is targeted for investigation into alleged violations of federal criminal law. This individual is not a lawyer, but believes his actions were proper under the law, and so attempts to persuade the prosecutor not to indict. This kind of situation occurs daily for prosecutors.
>
> Now, imagine that our hapless individual, to be heard by the prosecutor, has to shout over the loud protestations of Members of Congress urging indictment of this very individual; or that Members of Congress are standing ready to chastise the prosecutor if no indictment is brought. To imagine such a scenario is to understand why congressional involvement in prosecutorial decisions can be perilous to civil liberty.[349]

348 *See* DAVID MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 134–40 (1974).

349 Civiletti, *supra* note 50, at 5–6.

Thus, Congress's best argument for why it needs information from open criminal investigative files is precisely the reason why it should not have access to it. The only reason why Congress needs information from open files, as opposed to the information that it could collect from investigations that have been closed, is to assess the current performance of the DOJ. The process of evaluating current performance necessarily creates congressional pressure to change the direction of the DOJ's investigation if Congress judges it to be insufficiently aggressive. This attempt to influence prosecutors to prosecute more aggressively in particular cases is precisely the kind of influence that Congress is not supposed to wield over the criminal investigation process.

Chairman Burton's distinction, in the context of the campaign finance investigation, that his committee was not attempting to influence the decision whether to prosecute a particular individual, but merely attempting to ensure that "those decisions are made by a conflict-free prosecutor as required by the Independent Counsel Act,"[350] is a distinction without a difference. Seeking to force the appointment of an independent counsel is as much an interference in the prosecutive process as seeking to force an indictment. Certainly from the perspective of the target of an investigation, such congressional influence would be at least as frightening.

Neither is it an answer to this concern to say that congressional oversight of executive agencies always involves the risk of congressional influence over executive branch functions that Congress could not constitutionally perform itself. It is true that the subjects of congressional oversight frequently include executive branch activity that Congress could not itself perform. For example, Congress frequently reviews the work of the Department of Treasury in regulating the national economy, work that neither Congress nor its agents could undertake.[351] Indeed, Congress may conduct oversight regarding the enforcement actions taken by the Department of Treasury against those who violate the nation's banking laws. Yet, while these investigations might run the risk of influencing (perhaps improperly) the course of investigations against individual investigative targets, they do not pose the same risk to individual liberty that would be created by congressional influence over a criminal investigation. The Bill of Attainder Clause and the other expressions of the framers' concern

350 H.R. REP. No. 105-728, *supra* note 1, at 17.

351 *See generally* Bowsher v. Synar, 478 U.S. 714 (1986) (holding that Congress may not assign to its agent, the Comptroller General, executive responsibilities under the Graham-Rudman-Hollings Deficit Reduction Act).

about legislative involvement in criminal investigations suggest that there is a special danger in congressional interference with the investigation of a particular individual for a crime.

Similarly, it is no defense to congressional interference to point out that it is permissible for Congress to remove direct presidential authority over at least some kinds of investigations. In *Morrison v. Olson*,[352] the Supreme Court upheld the constitutionality of the independent counsel provisions of the Ethics in Government Act, which established a mechanism for independent investigations of high level executive branch officials.[353] The Court concluded that the Constitution did not require that the President be able to control every federal prosecution.[354] At about the same time, several scholars pointed out that, as an historical matter, neither the President nor the Attorney General always retained control over the criminal investigation process.[355] The historical record demonstrates, however, that "while individuals played a role in starting the prosecution process, they did not control the prosecutions once begun," and the executive retained the right to refuse to proceed with a prosecution.[356] Moreover, freedom from presidential control is not the same as the imposition of congressional influence. Indeed, the purpose of the Independent Counsel Act was to remove politics as a factor in the investigation of high level executive branch officials by authorizing criminal investigations in which the prosecutor would be independent from both the President and Congress. Neither *Morrison* nor the history of independent prosecutions supports the conclusion that Congress may permissibly influence the course of a criminal investigation.

The concern about potential congressional influence over with a criminal investigation is substantial reason by itself to preclude congressional oversight of an open criminal investigation. When coupled with the other arguments traditionally marshaled by the DOJ to oppose disclosing material from open criminal files, the argument

352 487 U.S. 654 (1988).

353 *Id.* at 659–69.

354 *Id.* at 696.

355 *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 (recounting the development of the Attorney General and its impact of that history on modern constitutional conflict over executive control); Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 285–310 (1989).

356 Krent, *supra* note 355, at 296. Professor Krent also quotes Chief Justice Marshall as noting while presiding over a trial that "[t]he usage in this country, has been to pass over, unnoticed, presentments on which the [United States] attorney does not think it proper to institute proceedings." *Id.* (quoting United States v. Hill, 26 F. Cas. 315, 316 (C.C.D. Va. 1809)).

against congressional access becomes truly compelling. These other arguments include, first, the potential harm created by disclosing to potential defendants a roadmap of the prosecution's case. Indeed, the DOJ has worried that potential defendants might utilize the services of friends in Congress to obtain discovery of prosecution materials that would not otherwise be available through the criminal discovery process.[357] In addition, disclosure of material from open criminal files risks potential embarrassment of innocent parties who may nevertheless have been subject to investigation. Finally, disclosure from open investigative files could risk disclosing informants and other confidential sources and methods of investigation.

E. Defining a Per Se Privilege for Information in Open Criminal Investigation Files

When arrayed together with the problems created by congressional influence over an investigation, these concerns present a compelling case for a per se privilege against disclosure to Congress of information from open criminal investigation files. It is difficult to imagine any instance in which Congress's interest in determining whether the DOJ is adequately investigating particular individuals could overcome the powerful reasons to resist such disclosure. Given the strong and consistent balance in favor of nondisclosure, it should be unnecessary for the Attorney General to seek formal presidential approval before asserting a privilege against enforced disclosure of these materials to Congress. As previously noted,[358] the principal purpose for requiring presidential assertion of privilege before withholding documents in response to a congressional subpoena is to enable the President to evaluate the need of Congress for the information against the potential negative impact on the executive branch that would flow from the disclosure of the information to Congress. In this case, however, because there is no instance in which Congress's need for information from an open criminal investigation could outweigh the negative effects of disclosure of such information, presidential evaluation and balancing of the interests involved is unnecessary. An additional reason for insisting upon a presidential assertion of executive privilege is to discourage the executive branch from abusing the privilege and withholding important information from Congress. As long as it is necessary for the President to assert the claim, political pressures will work to minimize the occasions on which it is as-

357 *See* H.R. REP. No. 99-435, *supra* note 138, at 124–32.

358 *See supra* text accompanying notes 283–84.

serted.[359] In the case of congressional demands for information from open criminal files, however, there is no reason to discourage the assertion of privilege. Indeed, there is every reason to encourage the nondisclosure of such information.

In practical effect, the retention of the requirement in the Reagan memorandum that only the President may authorize the assertion of privilege serves only to enable Congress to obtain information to which it should not be entitled. As long as this requirement is retained, Congress will use it, as it did in the campaign finance investigation, to coerce disclosure from the DOJ. If, however, the President were to amend the Reagan memorandum to permit the Attorney General to withhold any information contained in an open criminal investigative file, the Attorney General's hand would be strengthened in any disclosure dispute with Congress. Presumably, the DOJ would then apply its current policy of refusing to prosecute an executive official who asserts a claim of executive privilege pursuant to presidential order to the Attorney General's decision to withhold information from open criminal files. Thus, Congress would lose the ultimate weapon of a contempt of Congress prosecution, and Congress would be unable to coerce the disclosure of documents as it did with respect to the Freeh and LaBella memoranda.

1. Limitations on the Privilege for Materials from Open Criminal Investigation Files

The first question concerning the potential scope of a privilege for materials in open criminal investigation files is whether the privilege would cover open files at every stage in the investigation and prosecution of a crime, all the way through a final appeal, or whether the protection would stop at some point short of the final resolution of the case. Because the principal concern that warrants separate treatment for open criminal files stems from the potential for Congress to influence the selection of individuals for prosecution, it is not necessary to protect criminal investigative files through the entire trial and appeal. Indeed, the critical moment for the purpose of this policy would appear to be the time of indictment, when an individual is selected by the DOJ for prosecution. Prior to that point, congressional oversight might influence the decision whether to bring a criminal charge. At the time of indictment, the DOJ has made its choice to proceed with a prosecution, so the concern over congressional influence lessens considerably.

359 *See* Peterson, *supra* note 22, at 628–31.

This is not to say, however, that there are no concerns that may warrant the assertion of privilege over materials in a still-open, but post-indictment, criminal file. The disclosure of deliberative materials may have the effect of inhibiting prosecutors from setting forth their views in a full and frank manner. The file may still contain leads and references to innocent third parties, the disclosure of which would be harmful to such persons. Moreover, the disclosure of a criminal file after indictment, but before trial, may provide defendants with a roadmap of the prosecution's case. All of these factors may warrant an assertion of privilege if Congress's need for disclosure is not strong. At this stage, however, the assertion of privilege would more appropriately be handled in the context of the usual balancing test that is applied to internal deliberative executive branch documents, including the requirement that the President assert privilege before the documents are withheld. Furthermore, limitation of the privilege to pre-indictment investigations minimizes the impact on Congress's investigative authority. Congress need not wait until the final resolution of a criminal appeal, a process that may take years.

Such a limitation on the per se privilege for open criminal investigation files is also consistent with the history of how disputes between Congress and the DOJ over disclosure of criminal investigative information have been resolved. At least until the campaign finance investigation dispute, the few instances in which the DOJ has disclosed to Congress information from open criminal files have involved cases that had proceeded beyond the indictment stage.[360] Indeed, virtually all of the disclosures in this group came while cases were pending on appeal, a time when disclosure of roadmap information is of no concern to the prosecution because its case has already been presented at trial. Thus, the historical record of dispute resolution suggests that the dividing line proposed under this approach in fact coincides with the time when the protection of open criminal files is most important.

The second question that must be considered about the scope of a per se privilege is whether there is any specialized showing of congressional need that might overcome the per se privilege. At the very least, Congress should be able to obtain such material for use in an impeachment proceeding, either because the evidence in the file directly implicates the President or another executive branch official or because the file shows wrongdoing by the Attorney General or another DOJ official that would warrant impeachment.[361] Once the impeachment process has begun, Congress has plenary authority to

360 *See* discussion *supra* Part I.B.1.

361 *See* Peterson, *supra* note 22, at 630.

obtain whatever information it needs to complete its investigation, and it therefore seems to be generally recognized that executive privilege will not shield even the President from producing documents relating to an impeachment inquiry.[362]

An exception to the per se privilege might apply even in some instances in which Congress could identify specific alleged wrongdoing by DOJ officials that fell short of an impeachable offense. This exception would acknowledge that Congress has a much stronger and constitutionally appropriate interest in investigating malfeasance by DOJ officials than it does in investigating the mere failure to prosecute a particular individual or even set of individuals. This limitation on the scope of the per se privilege would also be consistent with past executive branch practice. As previously noted, the DOJ has, on a number of occasions, stated that executive privilege should not be invoked in order to protect evidence of affirmative executive branch misconduct.[363] This exception is, however, not easy to define and apply in concrete cases. If defined broadly, for example, it might include such allegations as favoritism towards certain investigative targets, an exception that would be so broad as to swallow the per se privilege entirely. Moreover, congressional investigators are remarkably creative when it comes to identifying nominally legitimate motives for far-reaching investigations. Thus, it is important to define carefully what types of information would be available to Congress under this exception.

First, it would seem clear that Congress should be able to obtain information relating to allegations that the DOJ was systematically violating the rights of individuals under investigation. This type of prosecutorial and investigative misconduct does not involve allegations of prosecutorial inaction, but rather the overzealous use of prosecutorial powers. Therefore it does not raise the concerns, discussed earlier, about congressional coercion to force the prosecution of a particular individual. This form of the exception would prevent the DOJ from covering up such wrongdoing by keeping a file open for an indefinite period so as to frustrate congressional efforts to expose the alleged misconduct.

On the other hand, mere allegations that DOJ prosecutors are improperly failing to prosecute particular individuals would not be

362 *See* FISHER, *supra* note 199, at 204–05; Cox, *supra* note 230, at 1436–37. A number of Presidents have acknowledged that Congress has plenary authority to obtain documents in connection with an impeachment proceeding. *See* 1 JAMES D. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 195 (1899) (Washington); 4 *id.* at 435 (Polk); 7 *id.* at 362 (Grant).

363 *See supra* note 157 and accompanying text.

the type of misconduct that would allow immediate congressional oversight during the pendency of an investigation. This would be true even if Congress alleged that the failure to prosecute was based on favoritism or bias in favor of particular targets of investigation. In order to obtain DOJ documents from ongoing criminal investigations, Congress should be required to show that the DOJ has violated some express legal prohibition, such as, for example, the laws against bribery of public officials. If Congress were able to investigate on the basis of allegations of favoritism, then any investigation would be fair game for the oversight committees. Allegations of some kind of favoritism almost always accompany congressional requests for criminal investigation documents.[364]

Moreover, in order to overcome the DOJ's per se privilege, Congress would have to identify specific allegations of wrongdoing, rather than simply assert the need to sift through open files for some evidence of departmental misconduct. This requirement would be designed to prevent Congress from influencing mere non-prosecution under the pretext of investigating wrongdoing. Thus, in order to establish an exception to the per se rule, Congress would have to have some substantial evidence of the type of affirmative misconduct (and not mere prosecutorial inaction) that would warrant an exception to the rule. Such a rule is not uncommon as a prerequisite to discovery of government files in administrative law cases,[365] and should be strictly enforced in this context to make certain that congressional investigators do not use pretextual allegations to justify the investigation of mere failures to prosecute particular individuals.

2. How To Implement the Per Se Privilege for Information in Open Criminal Investigation Files

The DOJ could implement the recommendations set forth above by proposing to the President a revision of President Reagan's memorandum on executive privilege.[366] The amended memorandum should restate the general procedures for assertion of executive privi-

364 Such allegations were, of course, formed the core of Congress's campaign finance investigations. *See* discussion *supra* Part II.C.13.

365 *See* Richard McMillan, Jr. & Todd D. Peterson, *The Permissible Scope of Hearings, Discovery, and Additional Factfinding During Judicial Review of Informal Agency Action*, 1982 DUKE L.J. 333, 370–71.

366 This proposed executive order should not only set forth the President's instructions on how to claim a per se privilege, but should also incorporate the instructions concerning protection of White House documents contained in the Cutler and Mikva memoranda issued subsequent to the Reagan memorandum. *See supra* notes 275–97 and accompanying text.

lege, including the requirement that claims of privilege other than those to which the per se privilege would apply must be presented to the President on a case-by-case basis for the President's decision whether to assert the privilege. With respect to the issue discussed here, however, the memorandum should be amended to state that the President directs the Attorney General to withhold from Congress any material contained in an open criminal investigative file prior to the indictment of the person who is the subject of the investigation or until such time as the file is closed without indictment. After the subject of an investigation has been indicted or the file has been closed, the information in the criminal files should be subject to the same procedures as other confidential executive branch information; it may be withheld from Congress if the President decides to assert privilege over those particular documents. The revised order should also state that the per se privilege would not apply in response to demands arising out of a legitimate congressional impeachment investigation or other investigation in which Congress has provided adequate grounds to believe that the files may contain information of affirmative departmental misconduct. Based upon this executive order, the Attorney General would be able to protect the confidentiality of open criminal investigative files, under the limited circumstances described here, without the need to obtain a presidential assertion of privilege in response to every congressional subpoena. The OLC should then make it clear, in advance of any dispute over a specific file, that the immunity from contempt of Congress that normally applies to an executive official who refuses to produce documents based upon the President's claim of executive privilege would equally apply to the Attorney General when she withholds documents in response to the President's general direction to withhold documents from open criminal investigative files. Such a revision to the Reagan memorandum on executive privilege would prevent undue congressional influence over the selection of individuals for prosecution, while preserving Congress's right to investigate affirmative misconduct by DOJ officials.

Needless to say, the revision to the Reagan memorandum and any subsequent guidance from the OLC should take place prior to the initiation of a specific dispute over disclosure of DOJ documents. Once a specific dispute has begun, any action to revise the memorandum can be too easily characterized as a pretext to protect the documents at issue in that particular case. At that point, as a political matter, it becomes difficult, if not impossible, to change the general structure governing disclosure of executive branch documents to Congress. Such general changes should be made in advance of the need to apply the changes to be effected by the revised memorandum.

CONCLUSION

In the recurring battles between Congress and the executive branch over congressional access to executive branch information, precedent and the perception of precedent play important roles in determining the final outcome of the disputes. In these conflicts, where the judiciary is unlikely to intervene to adjudicate a dispute, determination and resolve are everything. If Congress can point to instances in which it has obtained similar information, its resolve to obtain the same kind of documents inevitably stiffens. Conversely, if the executive branch can point to a long history of principled refusals to disclose certain kinds of documents to Congress, its case is greatly strengthened, and Congress is much more likely to retreat from its document demands. In the context of this negotiation environment, the disclosure (even though in redacted form to a limited group of recipients) of the Freeh and LaBella campaign finance memoranda creates a precedent that may develop into wider and more frequent congressional demands for information from open criminal investigative files.

If Congress were to obtain frequent access to such files, important separation of powers principles would be breached, with disastrous consequences for individual liberty. The framers created a federal criminal justice system in which all three branches must act before an individual may be incarcerated for a crime. Congress's role is carefully limited to the passage of statutes of general applicability. The executive's role in this constitutional structure is to identify individuals who deserve to be brought before the judicial branch for an adjudication of guilt. If Congress were permitted to conduct active oversight of open criminal investigations with access to documents from the investigative files, it would inevitably influence prosecutorial decisions that ought to be made without congressional interference.

In order to prevent this 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. In order to implement this position in a meaningful way, the President should amend President Reagan's memorandum on assertions of executive privilege against Congress to instruct the DOJ to assert privilege in response to congressional demands for any information from an open criminal investigative file. Congress's legitimate needs can be accommodated by limiting this per se privilege to the pre-indictment phase of the investigation; congressional demands for information from post-indictment files or closed investigations can adequately be handled under the existing procedures for the assertion of privilege on a

case-by-case basis. In addition, the revised presidential memorandum should make it clear that the per se privilege should not be asserted in response to demand for use in a legitimate impeachment investigation or with respect to a congressional investigation of affirmative wrongdoing by DOJ officials. In this way, the constitutional prerogatives of both branches can be protected, and the protections built into the criminal prosecution process can be preserved.