



# Investigating and Prosecuting Political Leaders in a Democracy

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## How to Assess the Difference Between the Rule of Law and Abuses of Power

By Kristy Parker, Justin Florence, and Anne Tindall, with  
contributions from William Ford, Scott Welder, and Grant Tudor

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# Introduction

Former President Donald Trump is facing escalating criminal investigations and possible indictments in multiple jurisdictions, both state and federal. As of this writing, Trump has been indicted in New York for falsifying business records “in order to conceal damaging information and unlawful activity from American voters before and after the 2016 election.”<sup>1</sup> He also has exposure, at a minimum, for offenses related to his efforts to overturn the 2020 presidential election and his mishandling of classified records. The many signs that legal walls are closing in on him have prompted Trump and his political allies to claim that the involved prosecutors, all of whom have been appointed by Democratic officials or are themselves elected Democrats, are “weaponizing” law enforcement out of political animus toward Trump and to harm his chances of winning the 2024 election.

The newly elected Republican House majority has joined the fray by forming a Committee on the Weaponization of Government for the apparent purpose of intervening in the various investigations of Trump and has already demanded information from the Justice Department about ongoing investigations.<sup>2</sup> Several of its members have preemptively accused prosecutors of abusing their power by investigating potential crimes by Trump, even as those same prosecutors assess whether Trump violated laws while abusing *his* presidential powers during his term in office. Representatives Jim Jordan, Bryan Steil, and James Comer, Chairmen of the Judiciary, Administration, and Oversight and Accountability Committees, have also sought information from the Manhattan District Attorney’s Office. Manhattan DA Alvin Bragg responded by suing Jordan to stop the Judiciary Committee from seeking testimony and other information about his office’s ongoing investigation.<sup>3</sup>

These dueling abuse-of-power allegations risk creating confusion and uncertainty for the public. They raise questions about whether our law enforcement institutions are capable of functioning independently of partisan politics and enforcing the rule of law (to include the principle no one, no matter how powerful, is above the law), or whether they have been politicized by both parties in a manner that discredits their work. This, in turn, has serious implications for our democracy. As Protect Democracy explains in our *Authoritarian Playbook*, while our government is run by political actors, “[a]ll democracies have certain functions that operate with some independence from partisan” politics.<sup>4</sup> And in a high-functioning democracy, even the most partisan institutions should avoid using their constitutionally-granted powers for improper political purposes. Thus, improper

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<sup>1</sup> Press Release, *Manhattan District Attorney’s Office, District Attorney Bragg Announces 34-Count Felony Indictment of Former President Donald J. Trump* (Apr. 4, 2023), <https://tinyurl.com/bda4es5c>.

<sup>2</sup> H.R. Res. 12, 118th Cong. (2023).

<sup>3</sup> See *Bragg v. Jordan*, 1:23-cv-03032 (S.D.N.Y. 2023).

<sup>4</sup> Protect Democracy, *The Authoritarian Playbook* 9 (June 2022).

politicization of institutions with investigative and prosecutorial authority “should be treated as a substantial threat” to democracy.<sup>5</sup> Yet the rule of law also demands that political actors be subject to the same laws as everyone else, even when law enforcement and legislative oversight bodies are led by members of an opposing political party. Among other things, that means that a former president’s status should not immunize him from prosecution for violating laws that would be enforced against any other American.

Journalists have a central role to play in helping the public evaluate whether the ongoing criminal investigations of the former president and congressional oversight of those investigations are proceeding appropriately, or whether they are improperly politicized. To do this well, and avoid advancing unhelpful and inaccurate narratives suggesting that “everything is political” or “both sides are to blame,” the media should place the investigations in their proper context and ask the right questions. They should also reject the premise that investigations and prosecutions that involve political actors or have political implications are inherently politically motivated, illegitimate, or too fraught for authorities to pursue.



**Journalists have a central role to play in helping the public evaluate whether the ongoing criminal investigations of the former president and legislative investigations of law enforcement agencies are proceeding appropriately, or whether they are improperly politicized.**

This paper is intended to serve as a guide to answering two overarching questions about the actions of the Justice Department and state and local prosecutors on the one hand, and congressional oversight committees investigating law enforcement on the other:

- ➔ *When is a criminal investigation or prosecution of a political figure – or a declination thereof – an appropriate use of the government’s law enforcement powers versus a politically motivated one (or one in which there has been improper political interference)?*

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<sup>5</sup> *Id.*

→ *When is a congressional investigation of a law enforcement agency or its activities an appropriate use of oversight authority versus a politically motivated effort to interfere in the proper functions of a separate branch or arm of government?*

In doing so, the paper provides important context on:

- The primary duty of prosecutors — to enforce the law and avoid considering politics.
- The appropriate role of prosecutorial discretion, which should not be exercised based on political considerations.
- The president's appropriate role in overseeing the Justice Department and his or her duty to avoid involvement in specific enforcement matters.
- The longstanding norms and guardrails that safeguard the Justice Department's independence from politics, and the constitutional rights of subjects and defendants.
- The Justice Department's policies affirming that investigative and prosecutive decisions should not be based on political considerations and that no one is above the law.
- Comparative research on the importance of imposing accountability for abuses of power by high-ranking political actors.
- Precedent for prosecuting chief executives in the United States and other democracies.
- The appropriate role for congressional oversight of the Justice Department and other law enforcement agencies.
- Appropriate considerations for law enforcement agencies in responding to congressional oversight.

The paper will then offer a series of questions journalists can use to assess, first, whether a prosecution is proceeding according to the law and the law enforcement agency's policies or whether there is reason to suspect improper political motivation or interference; and, second, whether Congress is conducting appropriate oversight or attempting to interfere in legitimate law enforcement operations. Its ultimate aim is to aid the news media and others in informing their audiences while avoiding amplifying unfair or misguided attempts to characterize investigations and prosecutions as politicized.

# Criminal Investigations and Prosecutions

Healthy democracies are governed by the “rule of law,” which is broadly defined as a system of justice resting on publicly promulgated laws that are equally enforced against everyone by law enforcement institutions, as well as by a judiciary that acts independently from partisan politics. This should be so regardless of position, status, wealth, politics, or other factors.<sup>6</sup> Indeed, the American system of justice is predicated on the idea, recently reiterated by the Supreme Court, that “no one is above the law,” a “principle [that] applies, of course, to a President.”<sup>7</sup> While the United States has never fully realized this ideal and significant inequities have pervaded our criminal justice system throughout our history, the “first core priority” of the Justice Department is upholding the rule of law.<sup>8</sup> Accordingly, its Principles of Federal Prosecution are focused on ensuring the fair and impartial administration of justice for all Americans.<sup>9</sup> This mission, in turn, reflects constitutional guarantees of due process and equal protection of the laws, and until recently, both Democratic and Republican presidential administrations have largely endorsed and committed to execute these principles. This is critical because, as political scientists have explained, the weaponization of law enforcement by political leaders for the purpose of punishing their opponents, insulating themselves from accountability, and protecting or rewarding their allies, is a harbinger of democratic decline and rising authoritarianism.<sup>10</sup>

Ensuring that high-ranking political actors, both current and former, are subject to the rule of law is therefore a necessity for a functioning American democracy. Achieving this, however, presents significant challenges, especially when a Justice Department or prosecutor’s office overseen by officials associated with one political party is charged with investigating and prosecuting members of the other. The challenge is especially acute when the subject of the investigation is a political opponent of the sitting president. Meeting it requires prosecutors to function independently even as their offices are led by politically-appointed or elected officials, and to respect a set of guardrails designed to safeguard — and reassure the public of — that independence.

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<sup>6</sup> See U.S. Courts, *Overview - Rule of Law*, <https://tinyurl.com/56jcpp88> (last visited Apr. 20, 2023); see also American Bar Association, *Rule of Law*, <https://tinyurl.com/bdhkkzvtv> (last visited Apr. 20, 2023).

<sup>7</sup> *Trump v. Vance*, 140 S. Ct. 2412, 2432 (2020) (Kavanaugh, B., concurring).

<sup>8</sup> U.S. Dep’t of Just., *Strategic Goal 1: Uphold the Rule of Law*, Dep’t of Just Strat. Plan, <https://tinyurl.com/yu9ubftt> (last visited Apr. 20, 2023).

<sup>9</sup> See U.S. Dep’t of Just., *Principles of Federal Prosecution*, Just. Manual §9-27.001 (2023), <https://tinyurl.com/2w9vstvk>.

<sup>10</sup> See, e.g., Kim Lane Scheppele, *The Rise of Authoritarian Democracies*, Ctr. on Nat’l Sec. at Fordham Law (Mar. 12, 2020), <https://tinyurl.com/3cnaaf2f>; Larry Diamond, *Breaking Out of the Democratic Slump*, 31 J. of Democracy 1, 39-40 (2020); Ryan C. Berg & Christopher Sabatini, *Autocrats Have a Playbook—Now Democrats Need One Too*, Am. Enterprise Inst. (Feb. 11, 2021), <https://tinyurl.com/35x893na>; Dave Davies, ‘How Democracies Die’ Authors Say Trump Is A Symptom Of ‘Deeper Problems’, NPR (Jan. 22, 2018), <https://tinyurl.com/bdhuwm5z>.

At bottom, the mere fact that an investigation has political ramifications does not mean that it is improperly politically motivated. In a system grounded in the rule of law, it is wrong to deploy law enforcement powers against anyone as a means of political retaliation, but it is equally wrong to refrain from investigating or prosecuting someone because of their political status. And it is important for institutional legitimacy for the news media to play a constructive role in helping the public to critically assess when law enforcement agencies are acting in accordance with the rule of law and when they are not. Reporting on investigations and prosecutions should therefore avoid amplifying claims of politicized justice without placing such claims in the proper context.



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The following discussion provides relevant context on the legal landscape and internal guardrails that govern federal prosecutions conducted by the Justice Department, the similar rules that govern local prosecutors, most of whom are elected, and the precedent in the United States and other democracies for imposing criminal accountability on high-ranking political actors.

## Federal Prosecutions and the Justice Department

### *Legal Limits on the President's Oversight of the Justice Department*

The Justice Department is an agency of the executive branch and therefore operates under the president's authority pursuant to Article II of the United States Constitution. Even so, the president does not have unfettered constitutional power to intervene in the Department's affairs.<sup>11</sup> Instead, the president is limited by Article II, Section 3, *i.e.*, the "Take Care Clause," and the Bill of Rights from intervening in specific enforcement matters.<sup>12</sup> The Take Care Clause provides that the president "shall take care that the laws

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<sup>11</sup> Protect Democracy, *No "Absolute Right" to Control DOJ: Constitutional Limits on White House Interference with Law Enforcement Matters* (Mar. 2018), <https://tinyurl.com/bdfv7h53>.

<sup>12</sup> See Ethan J. Lieb, Jed Handelsman Shugerman, & Andrew Kent, *Faithful Execution and Article II*, 132 Harv. L. Rev. 2111 (2019); Daphna Renan, *Presidential Norms and Article II*, 131 Harv. L. Rev. 2187 (2018); Andrew

be faithfully executed,” and the command to act “faithfully” means that the president must act as a fiduciary in the public interest, not corruptly and in his own self-interest. Likewise, the Due Process and Equal Protection Clauses prohibit the president from acting in ways that would interfere in a criminal subject’s right to fair process — such as by making public statements presuming guilt — or cause him or her to be treated differently from other subjects. In addition, the First Amendment prohibits prosecutions in retaliation for speech, association, or political affiliations. The Constitution permits the president to set broad policy for the Justice Department and federal law enforcement agencies, but direct intervention by the president in specific enforcement matters would, in most situations, raise serious questions about the impartiality and evenhandedness of those agencies and, in some circumstances, serious constitutional questions. That is especially so when the enforcement matters involve the president’s political opponents.



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For these reasons, it is, at the very least, improper for the president to:

- Demand prosecutions of specific individuals, whether privately or through public statements or social media posts;
- Publicly announce, absent indictment, trial, or other due process, that specific individuals are guilty, or innocent, of crimes;
- Demand investigations of political opponents or other investigations to further the president’s political or personal interests;
- Demand the dismissal of charges against, or the non-investigation of, political or personal allies;

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McCanse Wright, *The Take Care Clause, Justice Department Independence, and White House Control*, 121 West Virginia L. Rev. 100 (2018); Andrew Kent, Justin Florence, & Ben Berwick, *Defending Mueller’s Constitutional Analysis on Obstruction and Faithful Execution*, Lawfare (May 20, 2019), <https://tinyurl.com/5e6zmd6u>; see also Katherine Shaw, *Speech, Intent, and the President*, 104 Cornell L. Rev. 1337 (2019).

- Publicly comment on the conduct of judges, jurors, witnesses, defendants, or lawyers in ongoing enforcement matters, including trials and other court proceedings.

### *Norms and Guardrails Protecting Justice Department Independence*

The idea that law enforcement should operate independently of political interference “has deep roots in liberal political theory”<sup>13</sup> and in the American system of government. Former Attorney General (and later Supreme Court Justice) Robert Jackson described the dangerous potential of the government’s prosecution powers in a now-famous speech delivered in the Justice Department’s Great Hall on April 1, 1940:

If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted . . . It is in this realm in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. *It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself.*<sup>14</sup>

As Benjamin Wittes and Susan Hennesey explain in *Unmaking the Presidency*, by the time Jackson gave this speech, “the idea that law enforcement should behave apolitically was sufficiently a point of orthodoxy that it suffuses the entire speech.”<sup>15</sup>

Although presidents from both political parties have breached Justice Department independence in various ways over the years,<sup>16</sup> as Professor Andrew Kent has written, the early 1970s were a watershed moment for bipartisan recommitment to the norm.<sup>17</sup> The investigation into the Watergate scandal revealed myriad blatant abuses of the Justice Department by President Richard Nixon, including his directing the Department to investigate his political enemies, his efforts to obstruct the investigation of the Watergate break-in, and his interventions on behalf of his allies to forestall antitrust enforcement. At the same time, the Senate’s Church Committee revealed a host of abuses of the rights of

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<sup>13</sup> Susan Hennesey & Benjamin Wittes, *Unmaking the Presidency: Donald Trump's War on the World's Most Powerful Office* 185 (2020).

<sup>14</sup> Robert Jackson, Att’y Gen. of the United States, *The Federal Prosecutor*, Delivered at the Second Ann. Conf. of U.S Att’ys, 4-5 (Apr. 1, 1940) (emphasis added), <https://tinyurl.com/mukw2y6w>.

<sup>15</sup> Hennesey & Wittes, *Unmaking the Presidency*, *supra* note 13 at 187.

<sup>16</sup> *Id.* at 184-85.

<sup>17</sup> Andrew Kent, *The Man Who Should Be Merrick Garland's Role Model*, *The Atlantic* (May 9, 2021), <https://tinyurl.com/mrx7nuxy>.

private citizens by the FBI, including the wiretapping of Martin Luther King, Jr., and the infiltration and surveillance of various supposedly “subversive” groups and individuals involved in the civil rights and anti-Vietnam War movements — all on the watch of presidents of both parties. In the aftermath of these revelations and Nixon’s resignation, the Justice Department enacted a set of internal policies intended to serve as guardrails against politically-motivated abuses of power. Chief among these were the creation of Offices of Professional Responsibility for both the DOJ and the FBI, the issuance of Domestic Security Investigation Guidelines which set out requirements for the factual predication of FBI investigations, and the issuance of policies governing communications between the White House and Congress and the Justice Department.



**In the aftermath of [revelations from Watergate and the Church Committee], the Justice Department enacted a set of internal policies intended to serve as guardrails against politically-motivated abuses of power.**

The latter, often referred to as White House Contacts Policies, have been issued as a matter of course by every post-Watergate administration until Trump’s and stand for the overarching proposition that neither the president nor Congress should be involved in selecting targets for law enforcement.<sup>18</sup> To that end, while the policies allow communications about broad policy matters, they require that communications about specific-party enforcement matters be strictly limited and monitored. These limitations include channeling communications between the White House, Congress, and the Justice Department about law enforcement matters through designated high-ranking officials who are charged with maintaining compliance with the policy. Notably, during the Trump administration, while White House Counsel Donald McGahn did issue contacts policies to White House staff,<sup>19</sup> the Justice Department initially did not issue its own contacts policies until being called upon to do so, after which it reissued the Obama administration’s policies.<sup>20</sup> Thereafter, the Trump administration openly flouted the spirit and purpose of the norm, as evidenced by Trump’s claim that he had the “absolute right to do what [he]

<sup>18</sup> United to Protect Democracy, *White House Communications with the DOJ and FBI* (Mar. 8, 2017), <https://tinyurl.com/3hz28tzf>.

<sup>19</sup> Memorandum from White House Counsel to All White House Staff, *Communications Restrictions with Personnel at the Department of Justice* (Jan. 27, 2017), <https://tinyurl.com/2jyw79yj>.

<sup>20</sup> Josh Gerstein, *Justice Department issues policy limiting White House contact*, Politico (Jul. 21, 2021), <https://tinyurl.com/yc7mbaeu>.

want[ed] to do with the Justice Department,” as well as his public comments on and calls for investigations of his perceived enemies and his demands for dismissals of investigations of his allies.<sup>21</sup> Indeed, as Wittes and Hennessey note, Trump was remarkably frank in articulating a “vision” for the Justice Department “that almost perfectly inverts the orthodox understanding articulated by Jackson in his famous speech.”<sup>22</sup>

By contrast, Attorney General Merrick Garland has made adherence to the post-Watergate norms safeguarding the Justice Department’s independence a central feature of his leadership, as reflected in his revisions to the Department’s mission statement and strategic plan. Those revisions provide:

The Department must be shielded from all forms of improper influence in its investigations and prosecutions. The Department will continue to ensure that its career professionals, including prosecutors, attorneys, agents, and others, are protected from partisan motives or other improper influences. While the Justice Department appropriately follows the Administration’s direction on policy matters, all Justice Department investigative and prosecutorial decisions will be made independently. In protecting the Department from improper influence, we will be guided by Attorney General Edward Levi’s warning that “[n]othing can more weaken the quality of life or more imperil the realization of the goals we all hold dear than our failure to make clear by words and deed that our law is not the instrument of partisan purpose.”<sup>23</sup>

Notably, Garland explained his decision, following Trump’s 2022 campaign announcement, to appoint a Special Counsel to oversee the ongoing criminal investigations of Trump as aimed at protecting the Department’s “independence and accountability.” However, while President Biden has not made public demands for the Justice Department to act in specific matters similar to Trump’s, he has appropriately drawn criticism for commenting on investigations involving his son, the January 6 insurrection, and Trump’s handling of classified materials.<sup>24</sup>

Finally, the Justice Department has developed norms and policies aimed at preventing the Department’s law enforcement operations from influencing the outcome of elections. Under those norms and policies, which are not codified but

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<sup>21</sup> Michael S. Schmidt & Michael D. Shear, *Trump Says Russia Inquiry Makes U.S. ‘Look Very Bad’*, N.Y. Times (Dec. 28, 2017), <https://tinyurl.com/37fta6ed>.

<sup>22</sup> Hennessey & Wittes, *Unmaking the Presidency*, *supra* note 13 at 190-91.

<sup>23</sup> U.S. Dep’t of Just, *Objective 1.1: Protect Our Democratic Institutions*, Dep’t of Just Strat. Plan, <https://tinyurl.com/yy9ubfft> (last visited Apr. 20, 2023).

<sup>24</sup> Jack Goldsmith, *President Biden Needs To Stop Commenting on Justice Department Investigations*, Lawfare (May 7, 2023), <https://tinyurl.com/2ajr3swx>.

have been issued in the form of memoranda from both Democratic and Republican Attorneys General,<sup>25</sup> investigations of high-level political actors require approval from the Department's Public Integrity Section and, in some cases, the Attorney General. Furthermore, for a period of approximately 60-90 days in advance of a national election (including the presidential primary season), the Department avoids taking overt investigative steps or indicting politically-sensitive cases. Attorney General Garland released the Department's current election non-interference policies in the form of a memorandum several months prior to the 2022 midterms.<sup>26</sup>

### *Justice Department Policies Governing the Fair Administration of Justice*

In addition to the Constitution and internal norms that set boundaries on the role political actors, especially the president, play in law enforcement, the Department's Justice Manual and accompanying Principles of Federal Prosecution provide explicit protections against political influence in the Department's investigative and charging decisions and safeguard the rights of subjects and defendants against the politicization of investigations. The Justice Manual furthers the overarching idea that federal law enforcement should be independent and as free as possible from political interference. But at the same time, it also emphasizes that political actors are not exempt from prosecution for criminal conduct when warranted by the facts and law.

The purpose of the Principles of Federal Prosecution is to guide prosecutors in exercising their discretion in a manner that promotes the "fair, evenhanded administration of the federal criminal laws."<sup>27</sup> A prosecutor's discretion "exists by virtue of the prosecutor's status as a member of the Executive Branch, and the President's responsibility to ensure that the laws of the United States be 'faithfully executed.'"<sup>28</sup> The decision to initiate a prosecution must be grounded in the facts and the law. Thus, "[t]he attorney for the government should commence or recommend federal prosecution if he/she believes that the person's conduct constitutes a federal offense, and that the admissible evidence will probably be sufficient to sustain a conviction," so long as the prosecution furthers a substantial federal interest and there are no other adequate alternatives to secure justice.<sup>29</sup>

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<sup>25</sup> See, e.g., Memorandum from Att'y Gen. Eric Holder to All Dep't Employees, *Election Year Sensitivities* (Mar. 9, 2012), <https://tinyurl.com/35my2du6>; Memorandum from Att'y Gen. William Barr to All Dep't Employees, *Election Year Sensitivities* (May 15, 2020), <https://tinyurl.com/b6zb4wzj>.

<sup>26</sup> Memorandum from the Att'y Gen. Merrick Garland to All Dep't Employees, *Election Year Sensitivities* (May 25, 2022), <https://tinyurl.com/tjm925sd>.

<sup>27</sup> *Principles of Federal Prosecution*, *supra* note 9 §9-27.001.

<sup>28</sup> *Id.* §9-27.110.

<sup>29</sup> *Id.* §9-27.220.

While a “prosecutor has wide latitude in determining when, whom, how, and even whether to prosecute for apparent violations of federal criminal law,”<sup>30</sup> and may consider the likelihood of obtaining a conviction, the Principles forbid a person’s “political associations, activities, or beliefs” from being factored into charging decisions.<sup>31</sup> Moreover, “[w]here the law and the facts create a sound, prosecutable case, the likelihood of an acquittal” due to the political popularity of the defendant “is not a factor prohibiting prosecution.”<sup>32</sup>

In recent years, thousands of alumni of the Justice Department, most of them career officials, have issued multiple public statements affirming the Department’s rules that political affiliations should not excuse individuals from prosecution where warranted by the law.<sup>33</sup> In doing so, they explain that these rules apply regardless of whether the defendant is a former president, a declared candidate for the presidency, or an ally of the current president.



**The Principles [of Federal Prosecution] forbid a person’s “political associations, activities, or beliefs” from being factored into charging decisions.**

Finally, as two of our Protect Democracy colleagues explain, while the Justice Department’s prosecutors have broad discretion to decide not to charge cases, that discretion should be exercised based on the law enforcement principles set forth in the Justice Manual. It should not be based on political considerations such as “the national interest” or whether the prosecution would exacerbate partisan divides, which is “a decision reserved to the president through the power to withhold or issue a pardon.”<sup>34</sup> This division of decision making authority between the Justice Department and the president respects the Department’s primary function, which is to enforce the law independent of politics, and reserves to the president the authority to make decisions

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<sup>30</sup> *Id.* §9-27.110.

<sup>31</sup> *Id.* §9-27.260.

<sup>32</sup> *Id.* §9-27.220.

<sup>33</sup> Protect Democracy, *More than 1,100 DOJ Alumni Endorse AG’s Commitment to Investigate High-Ranking Officials in Connection with Insurrection* (Jan. 14, 2022), <https://tinyurl.com/2s98t93s>; Protect Democracy, *More than 1,000 DOJ Alumni Explain Ongoing Investigations of Trump Should Not Be Deterred by His Presidential Candidacy* (Nov. 28, 2022), <https://tinyurl.com/2ah2zdt3>.

<sup>34</sup> Ian Bassin & Erica Newland, *The Attorney General’s Choice*, N.Y. Rev. of Books (Jul. 22, 2022), <https://tinyurl.com/93sh2r7m>.

about the broader public good — decisions for which he or she is directly accountable to voters. This is precisely the division the Watergate prosecution team and President Gerald Ford believed was appropriate. As Richard Ben-Veniste put it, “The only factor . . . preventing the prosecution of a case with evidence of serious criminality as strong as we had against ex-President Nixon would be political in nature . . . Such a decision would not be in the province of the prosecutor, but rather would rest with the pardon power that can be exercised only by the president.”<sup>35</sup>

In short, the Justice Department’s decisions should rest solely on the factors set forth in the Principles of Federal Prosecution, under which it is as improper to *decline* a prosecution based on politics as it is to initiate a prosecution because of politics.

## State and Local Prosecutions

While the Justice Department is run by a politically-appointed Attorney General, most state and local prosecutors are elected and exercise, with some exceptions, complete authority over law enforcement in their jurisdictions. However, the fact that state and local prosecutors are elected does not mean that they are permitted to enforce the law based on purely political motivations. Local prosecutors must carry out their duties in accordance with the federal Constitution and those of their respective states and, like federal officials, they take oaths of office solemnizing their promise to do so. As noted above, the Constitution requires that all criminal law enforcement be carried out in accordance with the Bill of Rights.

At the same time, local prosecutors must follow the ethical standards applicable in their states and set by their licensing bars. In general, those standards accord with the American Bar Association’s Standards for the Prosecution Function.<sup>36</sup> The Standards define a prosecutor as “an officer of the court” who should “exercise sound discretion and independent judgment in the performance of the prosecution function.”<sup>37</sup> Similar to the Justice Manual, the Standards provide that “[t]he primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict.”<sup>38</sup>

Also consistent with the Justice Manual, the Standards identify improper bases for prosecutorial decisions, one of which is political “considerations”:

The prosecutor should not manifest or exercise, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age,

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<sup>35</sup> *Id.*

<sup>36</sup> American Bar Association, *Standards for the Prosecution Function*, <https://tinyurl.com/y5msd5ms> (last visited Apr. 20, 2023).

<sup>37</sup> *Id.* §3-1.2(a).

<sup>38</sup> *Id.* §3-1.2(b).

sexual orientation, gender identity, or socioeconomic status. *A prosecutor should not use other improper considerations, such as partisan or political considerations, in exercising prosecutorial discretion.*<sup>39</sup>

In discussing prosecutorial discretion, the Standards provide that “the prosecutor is not obliged to file or maintain all criminal charges which the evidence might support.”<sup>40</sup> However, the Standards make clear that it is impermissible for a prosecutor to elect not to charge an otherwise meritorious case because of “partisan or other improper political . . . considerations.”<sup>41</sup>

In sum, as is true in the federal context, it is the duty of local prosecutors to charge cases based on the facts and the law, not on the political status of the subject. Likewise, while a prosecutor’s discretion to charge or not charge a case is broad, the political implications of a case are not a proper consideration. For those reasons, again, it would be as inappropriate to *avoid* charging a political actor because of possible political fallout as it would be *to* charge a political actor in order to disadvantage him or her politically or to advantage the prosecutor.



**As is true in the federal context, it is the duty of local prosecutors to charge cases based on the facts and the law, not on the political status of the subject.**

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<sup>39</sup> *Id.* §3-1.6(a) (emphasis added).

<sup>40</sup> *Id.* §3-4.4(a).

<sup>41</sup> *Id.* §3-4.4(b)(i).

## Accountability and the Rule of Law

### *The Importance of Holding High-Ranking Political Actors Accountable for Abuses of Power*

The laws, rules, and norms governing nonpartisan and independent law enforcement in a democracy exist against the backdrop of a fundamental overarching principle: that imposing accountability for wrongdoing by high-ranking actors is essential both to ensuring that our system of justice is fair and to deterring future abuses of power.

The American system of prosecuting and punishing those who violate our criminal laws is grounded in promoting respect for the law and deterrence of other potential lawbreakers. In addition to the federal statute governing sentencing, which lists these factors, the Principles of Federal Prosecution make clear that “deterrence of criminal conduct . . . is one of the primary goals of the criminal law.”<sup>42</sup> In addition, relevant factors in determining whether to investigate or charge a case include the “nature and seriousness of the offense” and the “history and characteristics of the defendant.”<sup>43</sup> The U.S. Sentencing Guidelines likewise impose an enhancement to the sentencing range for those who abuse positions of public trust.<sup>44</sup> Our system of justice thus recognizes that crimes committed by people who hold positions of public authority or trust are *more* serious than similar offenses committed by private citizens.

Similarly, studies evaluating the question in an international context underscore the conclusion that prosecuting high-ranking political actors when their conduct is criminal in nature is vital to maintaining a democratic system of government.<sup>45</sup> “Especially with elite criminal behavior, *not* pursuing punishment works to undermine confidence in government by visibly carving out exceptions to the rule of law, and broadcasts to other powerful actors that criminality is rewarding.”<sup>46</sup>

### *Precedent for Imposing Accountability on High-Ranking Political Actors in the United States and Other Democracies*

Although, to date, the New York indictment is the first to charge a former American president with a crime, it is not the case, as some have suggested, that prosecuting a former president for criminal conduct “only occurs in third world authoritarian nations.”<sup>47</sup>

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<sup>42</sup> 18 U.S.C. § 3553; *Principles of Federal Prosecution*, *supra* note 9 §9-27.230.

<sup>43</sup> *Principles of Federal Prosecution*, *supra* note 9 §9-27.230, §9-27.730.

<sup>44</sup> U.S. Sentencing Commission, *Guidelines Manual* §3B1.3 (2021), <https://tinyurl.com/ycxxn9nz>.

<sup>45</sup> Protect Democracy, *Towards Non-Recurrence: Accountability Options for Trump-Era Transgressions* (Dec. 2020), <https://tinyurl.com/5y5shd85>.

<sup>46</sup> Grant Tudor & Ian Bassin, *Don't Be Scared of Prosecuting Trump*, *The Atlantic* (Jan. 14, 2021) (emphasis original), <https://tinyurl.com/3zzpmw3n>.

<sup>47</sup> Rep. Andy Biggs (@RepAndyBiggsAZ), Twitter (Mar. 18, 2023, 10:08 AM), <https://twitter.com/RepAndyBiggsAZ/status/1637093509181087746>.

To the contrary, pursuing accountability for high-ranking political officials on the theory that no one is above the law is commonplace in democracies, including the United States.



**Pursuing accountability for high-ranking political officials on the theory that no one is above the law is commonplace in democracies, including the United States.**

The political leaders of multiple democratic countries have been charged with and convicted of crimes, including two former French prime ministers, former prime ministers of Italy and Portugal, a former president of Argentina, and many others.<sup>48</sup> In the United States, Vice President Spiro Agnew was the subject of a grand jury investigation while he was still in office and ultimately resigned as part of a plea agreement.<sup>49</sup> Furthermore, numerous governors of American states have been prosecuted and served prison time. In many of those cases, the defendant governors claimed that they were the victims of political “witch hunts” and otherwise sought to politicize the charges against them. Indeed, as noted previously, it is nearly inevitable that any prosecution of a political leader will take place in a similar atmosphere. Yet, as two of our colleagues have written, the prosecutions did not “plunge the state[s] into a political crisis.”<sup>50</sup> The most important factor in all of these cases was that the facts and the law were widely seen by the public as warranting the prosecutions. While it is not the province of prosecutors to make their decisions based on the public’s reaction, this history is important for the media to consider and explain in the context of possible indictments of a former president.

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<sup>48</sup> Philip Bump, *Accountability for elected officials is a common feature of democracy*, The Washington Post (Mar. 20, 2023), <https://tinyurl.com/yxv79mwh>; Matthew Brown, *Here’s how other democracies have prosecuted political leaders*, The Washington Post (Mar. 31, 2023), <https://tinyurl.com/57mx3xjw>.

<sup>49</sup> James M. Naughton, *Agnew Quits Vice Presidency And Admits Tax Evasion In '67; Nixon Consults On Successor*, N.Y. Times (Oct. 10, 1973), <https://tinyurl.com/58bj8udk>.

<sup>50</sup> Tudor & Bassin, *Don’t Be Scared of Prosecuting Trump*, *supra* note 46.

## Key Questions: Assessing Whether a Prosecution is Appropriate or Whether There is Reason to Suspect Improper Political Motivation or Interference

In light of the relevant laws, rules, and norms, when analyzing or reporting on investigations and prosecutions of a political actor, journalists may wish to use the following questions to guide their coverage and to explain whether an investigation or prosecution of a political actor — or the declination of such an investigation or prosecution — is the product of independent law enforcement grounded in the rule of law or whether it is improperly politically motivated:<sup>51</sup>

- **What is the publicly available evidence in the case and similarly situated cases?**
  - ◆ Does the evidence in the case meet the elements of one or more federal criminal offenses?
  - ◆ Relatedly, what is the history of prosecutions for these offenses? Have others been investigated or prosecuted for similar offenses on similar facts?
  - ◆ Have people who are not politicians been prosecuted for similar or lesser offenses?
  - ◆ Would it make sense for the Justice Department (or other prosecutor's office) *not* to investigate or prosecute if the subject were anyone other than a high-ranking political actor?
  
- **Does the Justice Department or local prosecutor's office have safeguards in place to avoid politicization and does it appear to be following them?**
  - ◆ Has the Justice Department or prosecutor's office issued guidelines governing influence by or contacts with political actors and are they being observed?
  - ◆ Has the Justice Department or prosecutor's office issued policies to prevent election interference and are they being followed?
  - ◆ Are other internal rules and policies being followed?
  - ◆ Have the president or other high-ranking political actors in the jurisdiction commented on the prosecution or attempted to interfere in it?

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<sup>51</sup> See Erica Newland & Kristy Parker, *Politically-Motivated Prosecutions Part I: Legal Obligations and Ethical Duties of Prosecutors*, Just Security (Jul. 27, 2020), <https://tinyurl.com/4nuu2r7s>; see also Erica Newland & Kristy Parker, *Politically-Motivated Prosecutions Part II: Refuse, Report, Resign*, Just Security (Jul. 28, 2020), <https://tinyurl.com/tzkwmxnd>.

➤ **What do the external and internal checks against abuse indicate?**

- ◆ Have institutions outside of the Justice Department or prosecutor's office — grand juries, judges — upheld their actions?
- ◆ Have any prosecutors or other employees resigned or withdrawn from the investigations, or otherwise objected, because of perceived impropriety?
- ◆ Have internal watchdogs (OPR, OIG, state or local review bodies) indicated there is impropriety or cause for concern?

If the answers to these questions suggest the existence of a crime (or at least evidence that warrants further investigation), that the Justice Department or local prosecutor's office is following its own policies and procedures, and that there is no indication of political interference from the White House or other high-ranking political actors, then the investigation or prosecution likely should be pursued regardless of any political implications and coverage should include that context. This is so even — and perhaps especially — if a prosecution is declined under these circumstances. If the answers suggest improper political interference and a departure from procedures, then coverage of the investigation or prosecution should be calibrated accordingly.

## **Congressional Oversight**

Congressional oversight can serve as one potentially valuable check against politicization of federal law enforcement activity. While not explicitly mentioned in the Constitution, Congress's power to investigate is a long-established companion to its legislative function,<sup>52</sup> and congressional investigative committees have done vital work throughout our history to uncover abuses of executive power and tee up necessary reforms. The congressional committees of the Watergate era — from the Select Committee on Presidential Campaign Activities (commonly known as the Watergate Committee)<sup>53</sup> to the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (also known as the Church Committee)<sup>54</sup> — were largely bipartisan investigations that produced legislation and other reforms establishing guardrails to prevent abuses by the president, federal law enforcement, and federal intelligence agencies. As noted above, the work of these committees led directly to the

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<sup>52</sup> U.S. Const. art. I, § 8, cl. 18; see also Congressional Research Service, *Overview of Congress's Investigation and Oversight Powers*, <https://tinyurl.com/2r4z3tj6> (last visited Apr. 20, 2023).

<sup>53</sup> U.S. Senate, Select Committee on Presidential Campaign Activities, <https://tinyurl.com/y5mswmf4>.

<sup>54</sup> U.S. Senate Historical Office, *A History of Notable Senate Investigations: Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities* (The Church Committee), <https://tinyurl.com/58wmzchw>.

implementation of standards and guidelines protecting the Justice Department from partisan manipulation and protecting citizens from politicized prosecutions.

However, when used improperly, congressional oversight can contribute to the politicization of government investigations rather than guard against it. In an era where the executive branch is investigating some members of Congress, and members of Congress are rallying around a party leader who is under investigation, it can be difficult to identify where appropriate oversight ends and improper politicization begins. This section of the paper provides context on congressional oversight and tools for identifying when oversight of law enforcement investigations and prosecutions is itself improper.

## Congress's Interests in Oversight of the Executive Branch on Law Enforcement Matters

Congress's power to investigate and oversee the executive branch is implicit<sup>55</sup> in the Constitution's grant of legislative authority and has been confirmed by historical practice<sup>56</sup> and Supreme Court precedent.<sup>57</sup> That precedent explains that Congress's oversight power is "broad," encompassing: "inquiries concerning the administration of existing laws, as well as proposed or possibly needed statutes"; "surveys of defects in our social, economic or political system for the purpose of enabling Congress to remedy them"; and "probes into departments of the Federal Government to expose corruption, inefficiency or waste."<sup>58</sup> Congress's oversight power includes the authority to "secure needed information" by issuing subpoenas for documents and testimony.<sup>59</sup>



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<sup>55</sup> Congressional Research Service, *Congressional Oversight Manual* 10 (updated Dec. 22, 2022), <https://tinyurl.com/4x6ke556>.

<sup>56</sup> *Id.* at 27-29.

<sup>57</sup> *McGrain v. Daugherty*, 273 U.S. 135 (1927).

<sup>58</sup> *Watkins v. United States*, 354 U.S. 178, 187 (1957).

<sup>59</sup> *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031 (2020).

Congress might pursue oversight inquiries for a number of legislative purposes. The Congressional Research Service explains that these may include inquiries related to Congress's core constitutional responsibilities, such as reviewing the qualifications of presidential nominees for executive office, contemplating the impeachment of executive officials, or making power of the purse decisions on appropriations.<sup>60</sup> And as both the Supreme Court and the Justice Department have recognized, congressional investigations may seek information relevant to "proposed or possibly needed statutes," or the "administration of existing laws."<sup>61</sup>

Congress may also investigate, and indeed has validly investigated, law enforcement matters. During the Obama administration, for instance, the House Oversight and Government Reform Committee probed a criminal investigation undertaken by the U.S. Attorney's Office for the District of Arizona and the Bureau of Alcohol, Tobacco, and Firearms (ATF).<sup>62</sup> That criminal investigation, known as Operation Fast and Furious, sought to address the trafficking of firearms from Mexico into the United States and involved a controversial tactic known as "gunwalking," in which ATF agents permitted the sale of trafficked firearms in the United States in an effort to identify the individuals involved in the gun-trafficking network.<sup>63</sup> The decision to allow guns to "walk" into the country ultimately contributed to the death of a U.S. Customs and Border Patrol agent.<sup>64</sup> The Justice Department repeatedly recognized the legitimacy of the House Oversight and Government Reform Committee's subsequent investigation of Operation Fast and Furious, including in letters and document productions to Congress and briefing in federal court.<sup>65</sup>

## Limitations on the Scope of Congress's Oversight of Law Enforcement Matters

While Congress has various potential interests in conducting oversight of federal law enforcement matters, there are also important limitations on when and how it is appropriate for Congress to exercise its oversight authority. Some of those limitations follow from Congress's proper institutional role in our constitutional structure. Others arise because congressional oversight, even if grounded in a valid legislative purpose, may interfere with the work of the executive branch.

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<sup>60</sup> Congressional Research Service, *Congressional Oversight Manual*, *supra* note 55 at 9-10.

<sup>61</sup> *Watkins*, 354 U.S. at 187; Memorandum Opinion for the Att'y Gen., *Scope of Congressional Oversight and Investigative Power With Respect to the Executive Branch* 60 (Mar. 22, 1985), <https://tinyurl.com/5iz7hjxt>.

<sup>62</sup> See *Comm. on Oversight & Gov't Reform v. Holder*, 979 F. Supp. 2d 1, 3 (D.D.C. 2013); see also Statement of Assistant Att'y Gen. Ronald Weich before the Comm. on Oversight & Gov't Reform, *Operation Fast and Furious: Reckless Decisions, Tragic Outcomes* (Jun. 15, 2011), <https://tinyurl.com/32dmek7y>.

<sup>63</sup> House Comm. on Oversight & Gov't Reform & Senate Comm. on the Judiciary, *The Department of Justice's Operation Fast and Furious: Accounts of ATF Agents*, Joint Staff Report 4 (Jun. 14, 2011), <https://tinyurl.com/2d9b4brb>.

<sup>64</sup> *Id.* at 43.

<sup>65</sup> *Oversight v. Lynch*, 156 F. Supp. 3d 101, 105 (D.D.C. 2016).



While Congress has various potential interests in conducting oversight of federal law enforcement matters, there are also important limitations on when and how it is appropriate for Congress to exercise its oversight authority.

The Supreme Court's recent decision in *Trump v. Mazars* describes several limitations on the scope of Congress's authority. First, a congressional subpoena, it explains, "is valid only if it is 'related to, and in furtherance of, a legitimate task of Congress.'"<sup>66</sup> It must "serve a valid legislative purpose" or concern "a subject on which legislation could be had."<sup>67</sup> This means, as the Court explained in an earlier case, that oversight inquiries may not merely "expose for the sake of exposure."<sup>68</sup> Second, Congress is not itself a law enforcement agency and cannot purport to use its oversight powers to prosecute or punish somebody. Thus, "Congress may not issue a subpoena for the purpose of 'law enforcement,' because 'that power is assigned under our Constitution to the Executive and the Judiciary.'"<sup>69</sup> Relatedly, "Congress may not use subpoenas to 'try' someone 'before [a] committee for any crime or wrongdoing.'"<sup>70</sup> Summarizing these points, the *Mazars* majority reiterated that, "[i]nvestigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible."<sup>71</sup> But as the Justice Department itself has acknowledged, Congress's power to "conduct investigations in order to obtain facts pertinent to possible legislation and in order to evaluate the effectiveness of current laws" is "beyond dispute."<sup>72</sup> And outside the context of the subpoena for the personal records of a sitting president considered in *Mazars*, courts typically have not inquired into the motives behind a congressional investigation so long as it was broadly related to possible legislation.<sup>73</sup>

Congress's authority is subject to a further check in the form of the interbranch accommodation process, or the series of negotiations between Congress and the

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<sup>66</sup> *Mazars*, 140 S. Ct. at 2031.

<sup>67</sup> *Id.* at 2031-32 (internal quotation marks omitted).

<sup>68</sup> *Watkins*, 354 U.S. at 200.

<sup>69</sup> *Mazars*, 140 S. Ct. at 2032.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* (internal citations omitted).

<sup>72</sup> Memorandum Opinion for the Att'y Gen., *Scope of Congressional Oversight*, *supra* note 61 at 60.

<sup>73</sup> Eric Columbus, *The Manhattan District Attorney Sued Jim Jordan. Why? And What Now?*, Lawfare (Apr. 18, 2023), <https://tinyurl.com/3sr6vzva>. See also Quinta Jurecic & Molly E. Reynolds, *Mazars Creep and the Jan. 6 Committee*, Lawfare (Feb. 24, 2022), <https://tinyurl.com/htzmkk7s>.

executive branch that historically has occurred after the former requests information from the latter.<sup>74</sup> As the D.C. Circuit explained in *U.S. v. AT&T Co.*, interbranch information disputes require “each branch [to] take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches.”<sup>75</sup> This means balancing — as Sens. Whitehouse and Kennedy wrote in a recent report — Congress’s need to “seek and obtain information necessary to carry out its constitutional functions” with the executive’s need to “maintain[] confidentiality of certain executive branch information,”<sup>76</sup> to include presidential communications<sup>77</sup> and certain deliberative and predecisional materials.<sup>78</sup> To succeed, the accommodation process requires both branches to engage in “mutual good faith” and that both “Congress and the executive branch decline to exercise the full breadth of their perceived constitutional powers” either to compel access to information or evade oversight.<sup>79</sup> Resulting compromises have included Congress narrowing requests for information or receiving official testimony in private rather than in public, or the executive branch producing a subset of requested documents or summaries thereof, or permitting members of Congress to review especially sensitive materials in controlled, classified settings.<sup>80</sup>

Of particular relevance here, even where there is a legitimate congressional interest in conducting oversight of law enforcement matters, those investigations can interfere in the prosecutorial function the Constitution assigns to the executive branch. These dynamics are especially acute in the case of oversight into open and ongoing law enforcement matters. The Justice Department — in a letter first issued in 2000 to Rep. John Linder, a House subcommittee chairman, and repeatedly re-invoked since — has taken the position that investigations into open matters are necessarily problematic. As Assistant Attorney General Robert Raben wrote for the department in the 2000 letter: “Congressional inquiries during the pendency of a matter pose an inherent threat to the integrity of the Department’s law enforcement and litigation functions. Such inquiries inescapably create the risk that the public and the courts will perceive undue political and Congressional influence over law enforcement and litigation decisions.”<sup>81</sup> The Justice Department has historically declined to comply with congressional subpoenas or requests for information related to live investigations.

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<sup>74</sup> Sen. Sheldon Whitehouse & Sen. John Kennedy, *Overprivileged: A Closer Look at Congressional Oversight, Executive Privilege, and the Separation of Powers*, U.S. Senate Comm. on the Judiciary, Subcomm. on Fed. Courts, Oversight, Agency Action, and Fed. Rights 4-6 (Dec. 22, 2022), <https://tinyurl.com/3jtyerna>.

<sup>75</sup> *United States v. AT&T Co.*, 567 F.2d 121, 127 (D.C. Cir. 1977).

<sup>76</sup> Whitehouse & Kennedy, *Overprivileged*, *supra* note 74 at 2-3.

<sup>77</sup> *United States v. Nixon*, 418 U.S. 683 (1974).

<sup>78</sup> *Army Times Pub. v. Department of Air Force*, 998 F.2d 1067 (D.C. Cir. 1993).

<sup>79</sup> Whitehouse & Kennedy, *Overprivileged*, *supra* note 74 at 5.

<sup>80</sup> *Id.*

<sup>81</sup> Letter from Assistant Att’y Gen. Robert Raben to Rep. John Linder, Chairman of the Subcomm. on Rules and Organization of the House 3 (Jan. 27, 2000), <https://tinyurl.com/4x45z5vn>.

Raben’s letter to Rep. Linder identifies various risks of congressional inquiries into open matters. Congressional oversight might publicize evidence and the identities of witnesses in ways that would harm the integrity of investigations and potentially place witnesses and cooperators at risk. Congress might also — intentionally or accidentally — tip off future witnesses or defendants, placing them on notice before they are contacted by law enforcement, undermining subsequent stages of an investigation or prosecution.

In addition, congressional oversight into active investigations could also, as the Justice Department has explained, “place the Congress in a position to exert pressure or attempt to influence the prosecution of criminal cases.”<sup>82</sup> As noted above, the Constitution prohibits Congress from exercising a prosecutorial function. And as an inherently political body — in contrast to the Justice Department, which is staffed mostly by civil servants — there is great risk that it will improperly inject political considerations into prosecution decisions. As Professor Todd Peterson, a law professor and former Deputy Assistant Attorney General for the Office of Legal Counsel, explains, “Congressional management or manipulation of the criminal investigation process raises many of the same concerns that are reflected in the Bill of Attainder Clause . . . . By influencing the course of an investigation, Congress could prompt the indictment of an individual for a criminal offense.”<sup>83</sup> Indeed, congressional ethics guidance recognizes these risks. The Senate Ethics Committee, for example, “advises Members against contacting an agency decision-maker performing a quasi-judicial, adjudicative, or enforcement function, as doing so can compromise the impartiality of the underlying proceeding.”<sup>84</sup> Accordingly, standard Justice Department contacts policies — as noted above — limit contacts with the Department by both White House *and* congressional personnel to avoid improper political interference and the appearance thereof.

Being required to provide certain deliberative and predecisional information or materials to Congress may undermine the executive branch’s ability to debate issues candidly before making a decision or crafting a legal argument. Courts therefore recognize a “deliberative process privilege” — which shields from public scrutiny information that might inhibit the “frank exchange of ideas” needed to ensure “the quality of administrative decisions.”<sup>85</sup> However, the deliberative process privilege is not absolute, but qualified.<sup>86</sup> In other words, there are instances in which Congress or the public’s interest in information will (and has) overcome the executive branch’s interest in confidentiality. Such instances may include when information already is public but has not yet been officially

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<sup>82</sup> *Id.* at 4.

<sup>83</sup> Todd D. Peterson, *Congressional Oversight of Open Criminal Investigations*, 77 *Notre Dame L. Rev.* 1373, 1438 (2002).

<sup>84</sup> U.S. Senate Comm. on Ethics, *Rules and Standards of Conduct: Constituent Service FAQs* (last visited on Apr. 20, 2023), <https://tinyurl.com/mr3p2ddn>.

<sup>85</sup> *Army Times Pub.*, 998 F.2d at 1070.

<sup>86</sup> *Oversight v. Lynch*, 156 F. Supp. 3d at 105; *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997).

acknowledged, or when the information at issue concerns conduct that may be illegal or unethical.

Finally, while there can be reasonable bases for Congress to investigate *ongoing* law enforcement matters — especially in the context of an impeachment, review of current appropriations, or a consideration of future spending — Congress may be able to achieve a valid legislative or oversight objective by means other than examining information from active law enforcement investigative files. As Professor Peterson observes: “Congress’s interest in evaluating whether the 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 . . . . It is somewhat more difficult, however, to identify whether access to open criminal investigative files is necessary to accomplish this purpose.”<sup>87</sup> Courts similarly consider whether relevant information may be found “with due diligence elsewhere” when reviewing subpoenas for materials potentially covered by the presidential communications component of executive privilege.<sup>88</sup> Finding information elsewhere might take a variety of forms, including reviewing public reporting or seeking closed-door testimony from political appointees responsible for overseeing relevant investigations and prosecutions, rather than inspecting the underlying investigative files themselves.



**When assessing whether a congressional investigation into an open federal law enforcement matter is appropriate or improperly politically motivated, journalists should consider and explain the law governing Congress’s oversight authority and the balancing of the interests between the two branches of government in performing their respective core roles.**

In short, when assessing whether a congressional investigation into an open federal law enforcement matter is appropriate or improperly politically motivated, journalists should consider and explain the law governing Congress’s oversight authority and the balancing of the interests between the two branches of government in performing their respective core roles.

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<sup>87</sup> Peterson, *Congressional Oversight of Open Criminal Investigations*, *supra* note 83 at 1428-29.

<sup>88</sup> *In re Sealed Case*, 121 F.3d at 754; *Karnoski v. Trump*, 926 F.3d 1180, 1205 (9th Cir. 2019).

## Congressional Oversight of State and Local Law Enforcement

Many of the key principles and guardrails that apply to congressional oversight of federal law enforcement also apply to congressional oversight of state and local law enforcement. Oversight inquiries must still serve a valid legislative purpose. Congress may not seek to expose for the sake of exposing. And Congress may not issue subpoenas for the purpose of conducting law enforcement itself. However, the Constitution places an additional constraint on congressional oversight of state and local matters: the federalist structure of our system of government.

As the Supreme Court explained in *Gregory v. Ashcroft*, “our Constitution establishes a system of dual sovereignty between the States and the Federal Government . . . . Just as the separation and independence of the coordinate Branches of the Federal Government serve to prevent the accumulation of excessive power in any one Branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.”<sup>89</sup> Congressional activity that would “upset” that balance of power,<sup>90</sup> for instance by intruding on the exercise of a state’s sovereign power, must therefore be subject to close scrutiny and may be impermissible. This concern is especially acute when it comes to congressional oversight of state and local law enforcement. The Constitution grants Congress only limited authority to pass criminal laws and gives the states broad authority to pass and enforce criminal laws within their own borders. Furthermore, as the Brennan Center for Justice recently noted, a congressional attempt to subpoena information in a state criminal investigation has been, until now, largely unprecedented.<sup>91</sup>

Despite the limits our federalist system places on Congress’s authority with respect to state and local matters, there may still be instances in which such oversight is appropriate. The 14th Amendment of the Constitution, for example, bars states from (among other things) passing or enforcing laws that abridge the privileges and immunities of their citizens or otherwise deny their citizens equal protection of the laws, and empowers Congress to pass legislation enforcing the amendment. Congress also has authority to oversee uses of federal funds disbursed pursuant to its Article I spending power. Similar to oversight of active federal investigations and prosecutions, however, Congress’s exercise of these authorities must be weighed against the particular risks inherent in accessing evidence and witnesses in active state and local cases.

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<sup>89</sup> *Gregory v. Ashcroft*, 501 U.S. 452, 457-58 (1991).

<sup>90</sup> *Id.* at 452.

<sup>91</sup> Martha Kinsella, *Congressional Interference in the Trump Prosecution*, The Brennan Center for Justice (Apr. 14, 2023), <https://tinyurl.com/2p9bxj4r>.



Evaluating the roles of the state and federal government, their respective core functions, and precedent for congressional oversight are critical to assessing the propriety of congressional investigations of state criminal proceedings and contextualizing them for readers.

Again, evaluating the roles of the state and federal government, their respective core functions, and precedent for congressional oversight are critical to assessing the propriety of congressional investigations of state criminal proceedings and contextualizing them for readers.

### **Key Questions: Assessing Whether a Congressional Investigation is Appropriate or Whether There is Reason to Suspect Improper Political Motivation or Interference**

As with criminal investigations and prosecutions, legitimate exercises of congressional oversight power will often have political implications. This does not necessarily mean that any congressional inquiry into a law enforcement matter is inappropriately politically motivated. Indeed, some of the most important historical examples of congressional oversight have focused on abuses of power by the Justice Department and other federal law enforcement agencies. Assessments of the validity of congressional inquiries into law enforcement matters and of law enforcement compliance with them should thus take account of the purpose and timing of the inquiry, along with factors the Supreme Court has identified as distinguishing between legitimate oversight and inappropriate interference, and between the functions of the branches of the federal government and the states.

Journalists may wish to consider the following questions in assessing whether congressional oversight of law enforcement is appropriate.

➤ **Is there a legitimate basis for oversight?**

- ◆ What is the purpose of the oversight? Is there a legislative purpose?
- ◆ If the oversight is directed at state or local law enforcement, is there an acute federal legislative interest that can be served only by inquiring into that state or local law enforcement matter?
- ◆ What is the timing of the oversight? Is it taking place during an ongoing investigation or prosecution, or after the fact?
- ◆ To the extent Congress is inquiring into an open law enforcement matter, is it necessary for Congress to focus on that matter or are there alternative sources of information for Congress to examine that do not involve an active law enforcement matter?
- ◆ Are the relevant members of Congress self-interested beyond conventional political point-scoring and themselves potential subjects of the investigation?

➤ **Is Congress following an appropriate process for conducting oversight?**

- ◆ Is the committee following the established accommodations process or escalating immediately to subpoenas and/or public testimony?
- ◆ Have committee members issued statements prejudging the outcome of the inquiry?
- ◆ What do the subpoena recipients suggest about the nature of the oversight?
  - ◆ Are they experts or officials who appear to have relevant information or people more likely to further partisan narratives?
  - ◆ Are they political appointees or senior, supervisory career officials, as opposed to line attorneys or other lower-level career staff?
- ◆ Has the committee taken measures to respect and protect the privacy (personal, financial, and otherwise) of witnesses, subpoena recipients, or other individuals relevant to the inquiry?

➤ **Is Congress improperly interfering with law enforcement work the executive branch or local prosecutor should be doing?**

- ◆ To the extent Congress is conducting an inquiry into an active criminal investigation, are its activities interfering with witnesses or investigative strategy?
- ◆ Is a congressional investigation interfering with the exercise of a state's sovereign power, in tension with the Constitution's establishment of a system of dual sovereignty between the states and the federal government?
- ◆ Is a congressional investigation of state or local law enforcement raising questions about the propriety of an investigation or prosecution that the targets or defendants of those actions are better-positioned to raise in court?
- ◆ Is a congressional investigation of state or local law enforcement in furtherance of a federal constitutional mandate, such as the 14th amendment's prohibition on state passage or enforcement of laws that abridge the privileges or immunities of their citizens or that deny citizens equal protection of the laws?

Taken together, these questions can help journalists provide their audiences with important context to assess when Congress is acting appropriately in our system of checks and balances as opposed to when it is actually, itself, engaging in improper politicized conduct.

## **Conclusion**

Criminal investigations of current or former politicians and congressional oversight of law enforcement operations will inevitably have political ramifications. However, the analysis of those ramifications is separate from the question of whether a particular use of law enforcement or investigative power — or a decision not to use it — is appropriate under our constitutional system. Importantly, under American rule-of-law principles, the mere fact that a prosecution has political implications is not a reason for the Justice Department or a state prosecutor not to pursue it. The same is true of congressional oversight, which is a vital check on abuses of the government's law enforcement powers.

Analyzing and reporting on the validity and propriety of these investigations thus requires careful attention to the key indicators of whether prosecutors and congressional committees are acting in accordance with applicable laws and norms. Are they acting as independently as possible from partisan interference and motivations? Are they adhering

to internal rules and other guardrails that protect against improper politicization of their work? Are they operating within their proper purviews in our system of government? The answers to these and similar questions can assist the public in understanding whether our institutions are adhering to democratic principles or whether they are being weaponized for more authoritarian purposes.