CONGRESSIONAL LAW ENFORCEMENT

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I. INTRODUCTION

Congress does not work for the President. It is an obvious notion. And yet, one could be forgiven for wondering whether the modern Congress—at least when controlled by a majority party that is the same as the President's—fully appreciates the significance of this elementary yet critical aspect of the constitutional separation of powers. Not always but far too often, the idea of a separated, independent Congress with institutional prerogatives of its own has yielded to the idea of a Congress whose chief obligation is to protect a President of the same party from harm or embarrassment and to pursue a "shared agenda."[1]

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1. *See* Jordain Carney, *McConnell pushes back on reports of rift with Trump: We have shared agenda*, THE HILL (Aug. 23, 2017), http://thehill.com/blogs/floor-action/senate/347699-mcconnell-trump-and-i-are-committed-to-advancing-shared-agenda

The practice of serving as the offensive line for a quarterback president may sound appealing when fending off a primary opponent or speaking to the local party faithful, but it can have negative and lasting consequences for the separation of powers. Creating a political system in which a majority in Congress and a president of the same party function as a single governmental entity, can be detrimental to the equilibrium of power that the Constitution promotes.[2] When Congress becomes too closely aligned with the President, it becomes more difficult for Congress to fulfill its roles within the constitutional framework. Moreover, it leaves members of Congress vulnerable to pressure or threats from the President, which can be especially dangerous to a member of Congress who represents a district or a state in which the President remains relatively popular or where internal loyalty is strongly enforced among party leaders and voters.[3] The appeal of an easy re-election, or of avoiding a primary, can be too powerful to resist.

Perhaps this kind of informal arrangement corresponds to the oversized role of parties.[4] But perhaps it also corresponds to the oversized role that the modern President plays in American politics and government.[5] The idea that Congress would be subordinated to, and at the political mercy of, the President would have been unfamiliar to the founding generation, even those who advocated an energetic executive.

The Federalist, for example, is littered with references to the dominant power of the legislative branch in a republic. In his discussion of the separation of powers, James Madison states that the legislature "is

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(reporting that Senate Majority Leader Mitch McConnell stated, "we are committed to advancing our shared agenda together").

2. *See* Daryl K. Levinson & Richard Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006). *See also* Lee Drutman, *There is No Separation of Powers Without Divided Government*, VOX (Jan. 3, 2018), https://www.vox.com/polyarchy/2018/1/3/16844848/separation-of-powers-divided-government (describing the significance of party loyalty and arguing that the Framers made a mistake by not anticipating the rise of parties).

3. *See, e.g.*, Alexandra Filindra & Laurel Harbridge-Young, *This is Why More Republicans in Congress Haven't Criticized Trump*, WASH. POST (Aug. 2, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/08/02/why-havent-more-republicans-in-congress-criticized-trump-heres-what-our-research-found/?utm_term=.f9a1627c2a43 (showing results of study on risks to Republicans who criticize President Trump). *See also* Levinson & Pildes, *supra* note 2, at 2322–23 (describing emergence of an independent presidency with its own popular voter base).

4. *Id.* at 2324–25.

5. *See* MORTON ROSENBERG, WHEN CONGRESS COMES CALLING: A STUDY ON THE PRINCIPLES, PRACTICES, AND PRAGMATICS OF LEGISLATIVE INQUIRY 7 (2017) (explaining that an increase in presidential power has been fueled in part by "the acquiescence of Congress itself and its failure to effectively asserts its own powers and prerogatives in response to such encroachments.").

everywhere extending the sphere of its activity and drawing all power into its impetuous vortex."[6] He refers to the "superiority" of the legislature,[7] and says that the "tendency of republican governments is to an aggrandizement of the legislative at the expense of other departments."[8] In *Number 51*, Madison famously remarks that in republican governments, "the legislative authority necessarily predominates."[9] Even Alexander Hamilton acknowledged that the President's power was no match for that of Congress, which would have a tendency both to absorb the powers of the others branches, and to either intimidate or seduce the executive.[10] The Hamiltonian executive needed the elements of energy not only to ensure an administration that was not feeble, but also to counter the strength of the legislature.[11] In describing the import of a qualified veto, Hamilton noted the "superior weight and influence" of the legislature in a republican government and the "hazard to the executive in a trial of strength" with the Congress.[12]

How quaint those notions seem today. How strange it would be to the Founding generation, were they to view modern American politics, that Congress's implicit subordination to the presidency would manifest itself in routine amity with, intimidation by, or sheer obsequiousness toward, the Chief Executive.

Perhaps most problematically, this kind of arrangement makes it more difficult for the majority in Congress to engage in serious and meaningful oversight and investigation of the President's administration—or perhaps of the President himself—when there is potential wrongdoing to pursue. As Josh Chafetz has written "[g]athering information is not a peripheral part of Congress's job; it is central to the legislature's identity and function."[13] If Congress is to restore and preserve its unique place in the constitutional design, then it must be willing to serve as a counterweight to the ever-growing place of the

6. THE FEDERALIST NO. 48, at 277 (James Madison) (Clinton Rossiter ed., 1961).
7. *Id.* at 278.
8. THE FEDERALIST NO. 49, at 283–84 (James Madison) (Clinton Rossiter ed., 1961).
9. THE FEDERALIST NO. 51, at 290 (James Madison) (Clinton Rossiter ed., 1961).
10. THE FEDERALIST NO. 73, at 409 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
11. THE FEDERALIST NO. 70, at 391 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
12. THE FEDERALIST NO. 73, at 412 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
13. JOSH CHAFETZ, CONGRESS'SS CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 152 (2017).

presidency in American political life. Using its oversight and investigative function responsibly is a good place to start.[14]

The Trump presidency has offered the 115th Congress an opportunity to do just that. To be sure, we have seen meaningful exercises of congressional oversight and investigative authority in recent Congresses—consider the United States Attorneys firing scandal during the George W. Bush years[15] or the Internal Revenue Service targeting scandal during the Obama Administration.[16] But in those matters, the majority party in Congress differed from the President's. Congress now has the chance to prove that even when it is controlled by the party to which the President also belongs, it is unafraid of his stature.[17]

And yet, the separation of powers does not require an independence of the branches that makes them islands unto themselves, operating in total isolation from the others.[18] Often, the branches need each other. There are obvious examples from the constitutional text.[19] But there are less obvious examples, as well. One, and the focus here, is that Congress often relies on investigators and prosecutors in the executive branch to hold persons accountable for interfering with congressional functions, where that interference implicates a federal criminal law that protects the institutional integrity of the legislative branch. The contempt statute,[20] the obstruction statute,[21] even the statutes protecting members of

14. *See* ROSENBERG, *supra* note 5, at 7. Whether Congress uses its investigative tools responsibly is another matter. For an argument that Congress should be more sensitive to rights, see Andrew McCanse Wright, *Congressional Due Process*, 85 MISS. L.J. 401 (2016). For a comprehensive overview of congressional investigative power as applied in the context of client representation, see James Hamilton et al., *Congressional Investigations: Politics and Process*, 44 AM. CRIM. L. REV. 1115 (2007).

15. *See* S. REP. NO. 110-522 (2008).

16. *See* STAFF OF H. COMM. ON OVERSIGHT AND GOVERNMENT REFORM, 113TH CONG., THE INTERNAL REVENUE SERVICE'S TARGETING OF CONSERVATIVE TAX-EXEMPT APPLICANT (Comm. Print 2014).

17. *See* Carl Levin, *Congress Needs Bipartisanship to Fully Investigate Russian influence*, THE HILL (Jan. 23, 2018), http://thehill.com/opinion/national-security/370137-congress-needs-bipartisanship-in-investigating-russian-influence ("The investigative power of Congress is at its most effective when it is exercised for institutional purposes and not for political purposes.").

18. *See* United States v. Nixon, 418 U.S. 683, 707 (1974).

19. *See* U.S. CONST. art. I, § 7 (stating that Congress needs the president before enacting legislation into law). *See id.* art. II, § 2 (stating that presidential appointments require Senate consent). *See id.* art. I, § 3 (stating that Chief Justice presides over presidential impeachment).

20. *See* 2 U.S.C.A. § 192 (West 2018).

21. *See* 18 U.S.C.A § 1505 (West 2018).

Congress from acts of violence,[22] are all designed to safeguard the legislature as a constitutional body. At the same time, as one group of authors has explained, congressional investigations can actually assist federal prosecutors in more readily acquiring information and more aggressively pursuing criminality.[23]

And yet, it is only the executive branch that can bring formal prosecutorial resources to bear in enforcing those laws through the criminal justice system. This kind of arrangement requires that the executive take seriously its obligation to "take care that the laws be faithfully executed,"[24] as well as its obligation to "preserve, protect, and defend the Constitution."[25] That obligation should include defending not only executive prerogatives but also specifically protecting the institution of Congress from harm. So while federal prosecutors do not work for Congress, their law enforcement role pursuant to Article II will often require their cooperation in protecting Congress's institutional interests.

But what if those responsible for prosecuting offenses against the Congress do not do so? What if Congress's institutional interests conflict with those of the executive? What recourse does Congress have to protect itself, especially when it is abandoned by the executive? Plenty. Indeed, albeit rarely, Congress often becomes a kind of law enforcement and even prosecutorial entity unto itself. Sometimes in its quasi-law enforcement role, it seeks enforcement of the criminal law, with the aid of the executive and the judiciary. Other times, it is empowered to act outside of the formal criminal law and protect its institutional prerogatives by internally enforcing institutional—or congressional—law. In each instance, these congressional tools are often necessitated by, and yet can also raise questions of, the constitutional separation of powers. This article therefore examines the notion of Congress as law enforcer, exploring the constitutional dynamics of both inter- and intra-branch law enforcement.

II. INTER-BRANCH CONGRESSIONAL LAW ENFORCEMENT

A dedicated constitutionalist might find it odd to describe the legislative branch as engaged in law enforcement. As the Supreme Court

22. *See id.* § 351 (killing, kidnapping, or assaulting a member of Congress or Member-elect), and § 1114 (killing or attempting to kill officers or employees of the United States in performance of, or on account of, duties).

23. *See* Michael D. Bopp, et al., *Trouble Ahead, Trouble Behind: Executive Branch Enforcement of Congressional Investigations*, 25 CORNELL J. L. & PUB. POL'Y 453, 467 (2015).

24. *See* U.S. CONST. art. II, § 3.

25. *See id.* art I, § 1.

has said, Congress is not a "law enforcement or trial agency."[26] But, when properly understood and invoked, congressional authority to initiate, and to oversee, enforcement of the laws and the processes it creates that protect Congress's institutional integrity is not only consistent with constitutionalism, it is a key element of it. Congress has a special obligation in enforcing *congressional* law, a body of law unique to the legislature as an institution, that protects the prerogatives and privileges of each house, and that binds only those who are part—or make themselves a part, or are made a part—of the legislative function. It may be codified as a criminal law that safeguards Congress, or it may reflect internal congressional rules, procedures, and privileges.

A. Congressional Referrals for Criminal Investigation and Prosecution

Even within a constitutional and political regime in which congressional law enforcement has a place, not all mechanisms for enforcing congressional privileges are achievable by Congress alone. There is a duality to the separation of powers: whereas the branches retain independence and unique formal powers, the protection of one branch—and of the Constitution—may sometimes demand another branch's exercise of its unique constitutional authority. Sometimes Congress, even when it takes direct action, must rely upon another branch to make its action effective against someone who has been accused of breaching a legislative privilege.[27] One of the primary ways in which Congress engages in a quasi-*criminal* law enforcement role, then, is by referring cases for criminal prosecution or investigation. Unlike intra-branch tools, these referrals function as an example of how Congress endeavors to work cooperatively with the executive to protect institutional interests and integrity.[28]

Typically, though not always, a referral occurs after or during a congressional investigation, in which Congress uncovers evidence that, in its view, would (or could) be sufficient to support a successful

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26. Watkins v. United States, 354 U.S. 178, 187 (1957).

27. Civil mechanisms fall into this inter-branch enforcement domain. This would include civil contempt in the Senate and any special action authorized by the House to enforce a compulsory process demand. *See* 2 U.S.C.A § 288b(b) (West 2018); 28 U.S.C.A § 1365 (West 2018). *But cf.* Stanley M. Brand & Sean Connelly, *Constitutional Confrontations: Preserving a Prompt and Orderly Means by Which Congress May Enforce Investigative Demands Against Executive Branch Officials,* 36 CATH. U. L. REV. 71, 86 (1986) (arguing that existing congressional enforcement tools are preferable to civil enforcement).

28. *See* Bopp, et al., *supra* note 23, at 467 (describing cooperative relationships between Congress and prosecutors).

prosecution in federal district court. Sometimes, the rules of the chamber or a committee will govern such referrals.[29] Criminal prosecution referrals also happen via statutory authorization, in the case of contempt.[30] Pursuant to 2 U.S.C. sections 192 and 194, whenever someone who has been summoned before Congress makes "willful default" or refuses to answer questions,[31] the President of the Senate or Speaker of the House is required to certify the fact of the witness's failure to the United States Attorney, "whose duty it shall be to bring the matter before the grand jury for its action."[32]

The House investigation into the IRS activities with respect to certain conservative political organizations provides an example of each. The investigation sought to determine whether the IRS during the Obama Administration had targeted these organizations for disparate treatment in the processing of applications for tax-exempt status.[33] The investigation focused for some time on Lois Lerner, Director of the IRS Exempt Organizations Division.[34] After an appearance before the House Oversight and Government Reform Committee in which she gave an opening statement professing her innocence, Lerner subsequently refused to answer questions from the committee, relying upon her Fifth Amendment privilege against compelled self-incrimination.[35] The Committee later voted to reject her Fifth Amendment claim,[36] and when she again refused to answer, the Committee referred her case to the House, which voted to certify a contempt finding to the United States Attorney for the District of Columbia, Ronald Machen.[37] Eventually, however, Machen determined that Lerner's invocation of the Fifth Amendment privilege was legitimate and he refused to bring the case before a grand jury.[38]

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29. *See* HOUSE RULE XI, cl. 3(a)(3), 115th Cong, at 20 (stating that the House Ethics Committee may report certain violations of federal or state law regarding a person within its jurisdiction, with approval of the House or two-thirds of the Committee); RULE 7(a), SEN. SELECT COMM. ON ETHICS, at 37 (rev. 1999) (permitting report to federal or state authorities for violations of law or perjury, but requiring recorded vote supported by at least four members for referral based on violations of law).

30. 2 U.S.C.A. § 194 (West 2018).

31. *Id.* § 192.

32. *Id.* § 194.

33. *See* H.R. REP. NO. 113-415, at 4–6 (2014).

34. *Id.* at 5–6.

35. *Id.* at 9–11.

36. *Id.* at 11–12.

37. *See* H.R. Res. 574, 113th Cong. (2014).

38. *See* Letter from the Honorable Ronald C. Machen Jr., United States Attorney for the District of Columbia to the Honorable John Boehner (Mar. 31, 2015), https://oversight.house.gov/wp-content/uploads/2012/08/July-30-2012-Machen-to-Grassley.pdf.

At the same time, the House Ways and Means Committee had been conducting its own investigation of the IRS, and determined that there was evidence that Lerner had committed multiple federal crimes.[39] This included willful deprivation of constitutional rights and making a false statement during the investigation conducted by the Treasury Inspector General for Tax Administration.[40] Committee Chairman Dave Camp eventually sent a letter to the Attorney General detailing the evidence against Lerner, including evidence that she had shown political bias in conducting her work, and asked the Attorney General to "pursue this evidence and ensure that the victims of IRS abuse do not also suffer neglect from the criminal justice system."[41] Lerner was never prosecuted.

Compare this kind of referral to one from the House Energy and Commerce Committee leadership in September 2002, asking for a criminal probe of Martha Stewart, based on statements made to the Committee through her lawyers.[42] The Committee leadership's letter was careful to emphasize that it was not their "Constitutional role" to reach a "formal conclusion" as to whether Stewart had violated any federal laws.[43] Nevertheless, the letter asserted the leadership's obligation to inform the Department of Justice about specific and credible information that "could suggest a Federal crime has been committed."[44] Stewart was never prosecuted for lying to Congress, though she was eventually prosecuted and convicted for lying to the FBI and for obstruction of justice.[45]

Other examples of criminal referrals in recent years have been numerous and a few contempt citations have been issued against other high-ranking executive branch officials.[46] These include, for example, a

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39. *See* H.R. REP. NO. 113-414 (2014).

40. *Id.* at 2.

41. *Id.*

42. *See* Letter from Representative W.J. "Billy" Tauzin, et al. to The Honorable John Ashcroft, Attorney General (Sept. 10, 2002), http://www.techlawjournal.com/cong107/privacy/idtheft/20010619.asp (hereafter "Tauzin Letter").

43. *Id.* at 7.

44. *Id.*

45. *See* Constance L. Hayes & Leslie Eaton, *The Martha Stewart Verdict: The Overview; Stewart Found Guilty of Lying in Sale of Stock*, N.Y. TIMES (Mar. 6, 2004), http://www.nytimes.com/2004/03/06/business/martha-stewart-verdict-overview-stewart-found-guilty-lying-sale-stock.html.

46. The Garvey CRS report contains a helpful cataloguing of contempt actions since 1980, including floor action to certify contempt. *See* TODD GARVEY, CONG. RESEARCH SERV., RL 34097, CONGRESS'SS CONTEMPT POWER AND THE ENFORCEMENT OF CONGRESSIONAL SUBPOENAS: LAW, HISTORY, PRACTICE AND PROCEDURE 74–76 (May 12, 2017); *see also* CARL BECK, CONTEMPT OF CONGRESS: A STUDY OF THE PROSECUTIONS INITIATED BY THE COMMITTEE ON UN-AMERICAN ACTIVITIES, 1945-1957 191–248 (1959) (providing a detailed list of contempt actions from 1787 through 1958).

certified contempt finding against Attorney General Eric Holder for withholding documents in the Fast and Furious gun-walking scandal;[47] and contempt certifications for former White House Counsel Harriet Miers and White House Chief of Staff Josh Bolten as part of the United States Attorneys firing scandal investigation.[48] None of them were ever prosecuted, nor was their case even presented to a grand jury. And more recently, Senate Judiciary Committee Chairman Charles Grassley and Senator Lindsey Graham sent a referral to the Attorney General concerning Christopher Steele, a British intelligence officer and author of the "Trump Dossier," based on their concerns that Steele may have made criminally false statements "regarding his distribution of information contained in the dossier."[49]

Not all referrals even result directly from the referrer's use of congressional investigative power, however. In December 2013, for example, in the wake of information made public as a result of Edward Snowden's leaks of classified national security information, seven House Republicans sent a letter to Attorney General Holder asking him to investigate Director of National Intelligence James Clapper.[50] According to their letter, Clapper allegedly made a false statement—not to any of the authors' committees, or even in the House at all, but rather to the Senate Select Committee on Intelligence.[51] Prior to the leaks, the letter stated, Clapper initially denied that the National Security Agency collected data on Americans.[52] Clapper later retracted his answer in a formal response to Senator Ron Wyden of Oregon, and was never prosecuted.[53]

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47. *See* H.R. Res. 711, 112th Cong. (2012).

48. *See* H.R. Res. 979, 110th Cong. (2008).

49. *See* Memorandum from Senator Charles Grassley and Senator Lindsey Graham to the Honorable Rod Rosenstein, Deputy Attorney General, and the Honorable Christopher Wray, Director of the Federal Bureau of Investigation, Regarding Referral of Christopher Steele for Potential Violation of 18 U.S.C. § 1001 (undated and redacted), https://fas.org/irp/congress/2018_cr/grassley-doj.pdf. The memo suggests that Steele may have violated 18 U.S.C. § 1001, and indicates that the potentially false statements may have been made to the Congress or to federal law enforcement or to a British court. *Id.* at 1.

50. *See* Letter from Representative James Sensenbrenner, et al., to the Honorable Eric Holder, Attorney General (Dec. 19, 2013).

51. *Id.*

52. *Id.*

53. *Id.*

B. Criminal Referrals and the Separation of Powers

There is no readily apparent prohibition on congressional referrals for prosecution. But safeguarding the separation of powers, and the executive's prosecutorial discretion, requires Congress to exercise prudence in how it conveys a referral. Rather than making demands of federal prosecutors simply in the interest of detecting and punishing crime, and to ensure that criminal prosecutions are not tainted by perceived political motivations of legislators,[54] Congress should take care that such referrals advance, or are otherwise in aid of, its legislative function.

The Energy and Commerce Committee's Martha Stewart letter expresses the view that it is not the "Constitutional role" of Congress to determine whether in fact someone has committed a crime.[55] Whether or not that is literally true, it conveys a sensible caution and a defensible understanding of Congress's role in criminal justice. Consequently, the criminal referral letters are often couched as a kind of good citizenship rather than true prosecutorial decision-making by the legislature: Congress is simply alerting authorities that there is evidence of criminality.

Indeed, the executive is not bound to act on the congressional referral, and referrals for investigation generally work no real interference with executive functions or decision-making—except where, as in the case of criminal contempt, a federal prosecutor is required to at least bring the referral before the grand jury.[56] Yet, even in the case of criminal contempt, recent history shows that the Department is reluctant to use the grand jury, particularly where an executive branch official has been cited.[57] Instead, the modern Department has consistently declined to act on these congressional contempt referrals.[58]

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54. *See* Todd David Peterson, *Congressional Oversight of Open Criminal Investigations*, 77 NOTRE DAME L. REV. 1373, 1440 (2002) (urging caution with respect to congressional influence over criminal investigations).

55. *See* Tauzin Letter, supra note 42 at 7.

56. *See* 2 U.S.C.A. § 194 (West 2018).

57. *See Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 128 (1984).

58. *Cf.* BECK, *supra* note 46, at 210, 213–15 (identifying individuals prosecuted in district court for contempt of Congress, prior to 1959). As Beck's history indicates, Frances Townsend was successfully prosecuted for contempt of the 74th Congress. *Id.* at 213–14. His conviction was affirmed on appeal. *See* Townsend v. United States, 95 F.2d 352 (D.C. Cir. 1938). He later received a presidential pardon from President Franklin Roosevelt. BECK, *supra* note 46, at 214. The other cases that Beck lists in which there was either indictment or indictment and prosecution for contempt of Congress involved witnesses before the House Un-American Activities Committee. *See id.* at 214–16.

The problem with the criminal contempt statute, then, is not that it empowers a congressional referral (or "certification"). The problem is that it *commands* the United States Attorney to bring the case before a grand jury.[59] There is considerable scholarly debate about whether criminal prosecution is a core executive function.[60] If it is—and there is authority to that effect[61]—then this kind of directive arguably violates the separation of powers because it interferes with the executive's authority to make charging decisions in criminal cases.[62] Indeed, the Justice Department has consistently taken the position—dating to an Office of Legal Counsel memo from 1984—that it retains discretion to refuse presentment to a grand jury of a congressional contempt citation.[63] Of course, as explored more fully below with respect to obstruction of Congress, a statutory scheme that did not direct the Justice Department to seek grand jury review would create the possibility that the executive could simply decide not to proceed, even in a meritorious case, thus undermining congressional prerogatives. But the answer for this is an internal mechanism,[64] rather than a statutory scheme that permits Congress to effectively command prosecutorial decisions on the criminal side.[65]

Whether the referrals are legitimate, unseemly, or constitutionally problematic may vary based on the nature of the referral. Reporting facts gathered through a congressional investigation is not the same as directing or ordering a federal prosecution—federal prosecutors likely

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59. *See* 2 U.S.C.A. § 194 (West 2018).

60. *Compare, e.g.*, Harold J. Krent, *Executive Control Over Criminal Law Enforcement: Some Lessons From History*, 38 AM. U. L. REV. 275 (1989), *with* Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521 (2005).

61. *See* United States v. Nixon, 418 U.S. 683, 693 (1974) ("the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case").

62. *See* Todd D. Peterson, *Prosecuting Executive Branch Officials for Contempt of Congress*, 66 N.Y.U. L. REV. 563 (1991); J. Richard Broughton, *Politics, Prosecutors, and the Presidency in the Shadows of Watergate*, 16 CHAP. L. REV. 161, 179 (2012). There can be little doubt that Congress very often frames the manner in which prosecutions are carried out (by creating or repealing criminal laws, imposing statutes of limitations, etc.). The question is whether the exercise of prosecutorial discretion—the decision whether to charge a crime and what available punishment to seek— is unique to the executive branch. On this matter, there is authority favoring the executive. *See Nixon*, 418 U.S. at 693.

63. *See Prosecution for Contempt of Congress of an Executive Branch Official Who has Asserted A Claim of Executive Privilege*, 8 Op. O.L.C. at 128. *But see* Brand & Connelly, *supra* note 27, at 88 (arguing that it is "constitutionally permissible . . . for Congress to decree that every person cited by a House of Congress for contempt be brought before a grand jury").

64. *See infra*, Part III.

65. *See* Peterson, *supra* note 62, at 608.

often appreciate the congressional help in building cases.[66] So Congress is on firmer constitutional ground when its referral for investigation and possible prosecution arises from the course of its investigative activities, so long as it does not presume to substitute its prosecutorial discretion for that of the executive. Hence, the "good citizenship" referral practice. Congress is on strongest constitutional ground when its referral arises from a legitimate legislative inquiry *and* where the referral relates to a crime that implicates Congress's institutional functions.

Consequently, if a congressional inquiry exposes facts that would be sufficient to prove a crime but not one against Congress, then the justification for the referral is a generalized interest in investigating and punishing criminality. This is not a weak or entirely unpersuasive justification, but it is not unique to Congress or its legislative function, except where the relevant facts were discovered through Congress's exercise of its investigative authority. After all, any citizen could alert law enforcement authorities about the commission, or evidence, of a crime. When *Congress* does so, however, the alert carries special weight. That weight increases when Congress's report is based on facts and information that it has gathered through the expenditure of its own authority, time, and resources. If, on the other hand, a congressional inquiry exposes facts that would be sufficient to justify a case for some criminalized affront to the legislative body (e.g., contempt, obstruction, or lying) then Congress's referral advances not just a generalized interest in punishing criminality but also its institutional interest in protecting the integrity of its proceedings and privileges. These congressional referrals should be taken especially seriously by federal prosecutors, though even in these cases, Congress should take care not to demand, or unduly pressure the executive for, a prosecution.

III. INTRA-BRANCH CONGRESSIONAL LAW ENFORCEMENT

It is true that the American separation of powers relies to some extent on mixing of powers so as to permit appropriate controls, improve the functioning of each branch, and prevent encroachments and accumulations of power. Madison addressed this matter in *Federalist No. 47*, conceding that if the mixture of departmental power in the new Constitution were to produce an accumulation of power in any single department, the document would have been worthy of rejection.[67] Rather than making the departments totally separate and distinct, Madison

66. *See* Bopp, et al., *supra* note 23, at 467, 499.

67. *See* THE FEDERALIST NO. 47, at 270–71 (James Madison) (Clinton Rossiter ed., 1961).

argued, the constitutional design seeks to protect each department against encroachments by the others.[68] The "means of self-defense to ward off encroachment," Harvey Mansfield explains, "necessarily involve[s] the branches with one another, but only for the sake of the independence of each."[69] The design also relies upon each department asserting its prerogatives so as to protect its unique institutional interests to resist total accumulations of power.[70] Ambition, Madison famously says, counteracting ambition.[71] Madison understood the concern that, in a regime where legislative authority necessarily predominates, the executive and judicial departments should not be wholly dependent upon the legislature.[72] Yet, in today's American government, Congress must have the same powers of self-defense. And, Congress cannot do this effectively if it is wholly dependent on the executive to hold accountable those who commit offenses against, or defy or impede, the legislature. So while Congress must maintain relationships of cooperation and accommodation with the executive branch to ensure vindication of its interests through criminal prosecution where appropriate, Congress also needs its own internal enforcement mechanisms to supplement the mechanisms of the federal criminal law that protect it.[73]

A. Information Gathering and Inherent Contempt

Intra-branch congressional law enforcement takes a variety of forms, many of which mimic the kind of work done by prosecutors in the executive branch. But when Members and staff engage in these various activities, they do so, not with the object of specifically enforcing the criminal law, but with the object of serving the institutional interests of the Congress and aiding the legislative function. Sometimes, that function requires the use of procedures for which only Congress is, and should be, responsible.

Pursuant to the Federal Witness Immunity Act, Congress has the power to grant immunity to witnesses, which might be thought of as a strategy unique to prosecutors.[74] Immunity grants can serve the

68. THE FEDERALIST NO. 48, at 276–77 (James Madison) (Clinton Rossiter ed., 1961).

69. *See* HARVEY MANSFIELD, JR., AMERICA'S CONSTITUTIONAL SOUL 122 (1991).

70. *See* THE FEDERALIST NO. 51, at 290 (James Madison) (Clinton Rossiter ed., 1961).

71. *Id.* at 289–90.

72. *Id.* at 289.

73. *See* ROSENBERG, *supra* note 5, at 6–7, 23.

74. *See* 18 U.S.C.A. §§ 6002(3), 6005 (West 2018); *see also* Howard R. Sklamberg, *Investigation Versus Prosecution: The Constitutional Limits on Congress'ss Power to Immunize Witnesses,* 78 N.C. L. REV. 153 (1999) (explaining development of modern immunity law).

institutional interests of Congress and aid the Congress in enforcing its prerogatives by giving it access to information it otherwise would not obtain. As is true with criminal investigations, immunity grants help avoid the invocation of the privilege against compelled self-incrimination and induce witnesses to cooperate with investigations, allowing investigators to obtain potentially valuable information.[75] Although governed by a statutory scheme in which the Attorney General must be informed of Congress's application for immunity, and the application submitted to the judiciary, the grant does not require the acquiescence or approval of the executive branch (and even the court's role is ministerial).[76] Notice that Congress intends to seek immunity enables the executive to consider how its own investigations and criminal prosecutions may be affected by Congress's action, and for Congress to engage in the same kind of reflection.[77] It also offers an opportunity for federal prosecutors to work directly with Congress to discern whether the grant of immunity would compromise a federal investigation or prosecution, a matter to which Congress must remain sensitive, particularly in light of lessons from the Iran-Contra scandal.[78]

Congress also has the power to issue subpoenas, a power that the Supreme Court has described as essential to protecting Congress's investigative authority.[79] Indeed, many of the most useful law enforcement mechanisms that Congress employs are designed to assist it with compulsory process. One such mechanism is inherent contempt. It is entirely internal and requires no participation or acquiescence of the executive branch. And Congress may employ it even in cases that do not involve enforcing compulsory process demands.

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75. *See* John H. Land, *Federal Witness Immunity Act: Expanding the Scope of Pre-Testimony Judicial Review*, 5 LOY. U. CHI. L.J. 470, 473 (1974) (describing Congress's role as investigator and explaining that both the executive and legislative branches have interests in granting immunity).

76. *See* 18 U.S.C.A. § 6005(b)(3) (West 2018).

77. *See* Sklamberg, *supra* note 74, at 166–70. Sklamberg argues that Congress should be permitted to grant immunity only where "demonstrably critical" to its investigative functions. *Id.* at 198.

78. *See* United States v. North, 910 F.2d 843 (D.C. Cir. 1990). Congress granted North use immunity, but his subsequent criminal convictions were eventually reversed because federal prosecutors improperly used North's immunized congressional testimony; *see also* ROSENBERG, *supra* note 5, at 21–23 (explaining impact of immunity on federal prosecution); Hamilton et al., *supra* note 14, at 1165 (explaining that after the Iran-Contra cases, "committees fear that obtaining use immunity will taint" future prosecutions).

79. *See* McGrain v. Daugherty, 273 U.S, 135, 175 (1927) ("Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed.").

Drawn from parliamentary practice,[80] and buoyed by explicit approval from the Supreme Court,[81] Congress has the power to accuse a person of contempt of the privileges of the body, try that person before the Bar of the relevant house, and punish the person by imprisonment in a congressional jail.[82] Though the Constitution does not provide for this practice, the Court has recognized its historical pedigree and has agreed that inherent contempt power extends to protect the institution of Congress from interference and contumacy.[83] Neither chamber has used inherent contempt since 1935;[84] it has been described as "unseemly," as well as ineffectual.[85] But it remains available as a tool for punishing breaches of legislative privilege and is not supplanted by the criminal contempt statute.[86]

Though not governed by an explicit statutory authorization, as with impeachment, procedures have developed for employing the practice.[87] Those procedures mimic the processes of criminal prosecution and adjudication. Accusation typically comes in the form of a resolution approved by the full chamber, followed by either trial before the Bar of the house or evidentiary proceeding in a committee that will make a subsequent recommendation as to guilt and punishment.[88] Perhaps the most important limit on punishment for inherent contempt is temporal—Congress may only imprison the contemnor for the remainder of the session during which the contempt occurred.[89] Inherent contempt punishment is therefore typically short in duration, and does not function as a criminal conviction, with all of the collateral consequences that attend such a conviction. Finally, once in custody, the contemnor can seek a writ of habeas corpus from a federal court,[90] which functions as a potential external, inter-branch limit on the scope of inherent contempt,

80. *See* CHAFETZ, *supra* note 13, at 153–67.

81. *See* Anderson v. Dunn, 19 U.S. 204 (1821).

82. *See* GARVEY, *supra* note 46, at 10–11; CONG. RESEARCH SERV., RL 34097, CONGRESS'SS CONTEMPT POWER AND THE ENFORCEMENT OF CONGRESSIONAL SUBPOENAS: LAW, HISTORY, PRACTICE, AND PROCEDURE 10–11 (May 12, 2017).

83. *See Anderson*, 19 U.S. at 228 (holding that without inherent power, Congress could be "exposed to every indignity and interruption that rudeness, caprice, or even conspiracy may mediate against it.").

84. *See* ROSENBERG, *supra* note 5, at 25.

85. *See* S. REP. NO. 95-170 (1977); *see also* ROSENBERG, *supra* note 5, at 25 (describing these shortcomings).

86. *See* Jurney v. MacCracken, 294 U.S. 125, 151 (1935).

87. *See* Bopp, et al., *supra* note 23, at 460–61; GARVEY, *supra* note 46, at 11–12.

88. *See id.*

89. *See* Watkins v. United States, 354 U.S. 178, 207 n.45 (1957).

90. *See* Marshall v. Gordon, 243 U.S. 521 (1917); *Jurney*, 294 U.S. at 152.

though the initiation and execution of inherent contempt proceedings are entirely internal to the relevant legislative chamber.[91]

C. Inherent Contempt, Separation of Powers, and the Safeguards of Impeachment

Although inherent contempt procedures include many of the same protections afforded during a criminal trial, it has the look of a process that might be constitutionally problematic. Some commentators have objected that inherent contempt permits a bill of attainder, or deprives alleged contemnors of various procedural protections.[92] Those are weighty concerns, but perhaps overstated in this specific context. Once it is acknowledged that Congress's inherent contempt rules are not criminal,[93] many of these constitutional concerns dissipate, though use of this power ought to remain carefully circumscribed and motivated solely by the need for the vindication of institutional interests.[94]

Moreover, where the contemnor is an executive branch official, special separation of powers problems can arise if Congress is to take custody of the official and incarcerate them, thus preventing them from assisting the President in carrying out his constitutional functions.[95] But if the executive branch does not take action against one of its own officials, and Congress cannot exercise inherent power, then all that remains is for Congress to litigate its position and hope that the judicial branch takes Congress's side. While that may be temporarily effective in some cases,[96] it—no less than reliance on federal criminal law enforcement by the executive—places Congress's prerogatives at the mercy of another branch of government.[97] As Chafetz writes, "in going to the courts as supplicants in contempt cases, the houses of Congress

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91. *See* GARVEY, *supra* note 46, at 12.

92. *See* Steven G. Calabresi, et al., *The Rise and Fall of the Separation of Powers*, 106 NW. U. L. REV. 527, 537–38 n.50 (2012).

93. *See In re* Chapman, 166 U.S. 661, 672 (1897).

94. *See* Peterson, *supra* note 62, at 610–12.

95. *See* Comm. On the Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53, 91–92 (D.D.C. 2008). *Cf.* Timothy T. Mastrogiacomo, *Showdown in the Rose Garden: Congressional Contempt, Executive Privilege, and the Role of Courts*, 99 GEO. L.J. 163, 180–81 (2010) (analyzing the *Miers* litigation and arguing that use of inherent contempt against an executive branch official "should not be dismissed out of hand").

96. *Id.* at 75.

97. *See* CHAFETZ, *supra* note 13, at 194–95; *see also* Michael A. Zuckerman, *The Court of Congressional Contempt*, 25 J.L. & POL. 41, 63–64 (2009) (stating Congress's need to "set aside reliance on another branch for protection"). Zuckerman suggests an internal adjudicative body specifically designed by Congress for contempt. *Id.* at 75.

thus simultaneously diminish their own standing in the public sphere and enhance the courts' standing."[98]

But even assuming that inherent contempt was either constitutionally problematic, or simply too clunky and undesirable, a final intra-branch tool awaits: impeachment. Impeachment is not explicitly criminal but bears many hallmarks of criminal justice decision-making and process.[99] And, it typically does not demand participation or coordination with another branch, except where the Chief Justice sits in a presidential impeachment.[100] While impeachment can be used for broader purposes, it can also be used to protect Congress from offenses against its privileges, where those offenses are committed by officials subject to the Impeachments Clause.[101] About this, I will have more to say in the next section.

IV. SYNTHESIZING CONGRESSIONAL LAW ENFORCEMENT: OBSTRUCTION OF CONGRESS

Among the many federal criminal laws that protect the institution of Congress is the federal obstruction of justice statute, which includes congressional investigations within its ambit. In light of existing inter- and intra-branch tools for protecting congressional prerogatives, obstruction of Congress offers a useful case study for synthesizing the various themes already developed in this article.

A. The Elements of Section 1505 Obstruction

A number of federal criminal statutes punish efforts to interfere with congressional proceedings. These include witness tampering;[102] retaliating against witnesses;[103] obstruction of a congressional inquiry;[104] contempt of Congress;[105] and the general conspiracy statute, which would apply to any offense against the United States.[106] For purposes of

98. CHAFETZ, *supra* note 13, at 195; *see also* BECK, *supra* note 46, at 189 (arguing that use of inherent contempt would "force the issues to be decided within the political and not the judicial arena" and would make contempt power more responsible).

99. *See* J. Richard Broughton, *Conviction, Nullification, and the Limits of Impeachment as Politics*, 68 CASE W. RES. L. REV. 275 (2017).

100. *See* U.S. CONST. art I, § 3.

101. *See id.* art. II, § 4.

102. 18 U.S.C.A. § 1512 (West 2018).

103. *Id.* § 1513.

104. *Id.* § 1505.

105. 2 U.S.C.A. § 192 (West 2018).

106. 18 U.S.C.A. § 371 (West 2018).

this Article, consider only obstruction. The relevant statute, 18 U.S.C. section 1505, provides:

> [w]hoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede . . . the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House or any committee of either House or any joint committee of the Congress—
>
> Shall be fined under this Title, or imprisoned not more than 5 years, or if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both.[107]

The statute requires a pending proceeding.[108] This is important because much attention has been focused on section 1505 as the obstruction of justice statute that the Special Counsel may be investigating with respect to President Trump's May 2017 firing of FBI Director James Comey, which some have speculated is within the ambit of Special Counsel Robert Mueller's investigation.[109] The problem with that theory is the Justice Department's guidance on what constitutes a pending proceeding. According to the Criminal Resource Manual in the United States Attorneys Manual (and some lower federal court cases), an FBI investigation is not a pending proceeding.[110] An ongoing congressional investigation, however, is.[111] And it is generally understood to encompass a wide range of acts that could invoke it.[112]

United States v. Mitchell, for example, held that Congress's power of inquiry, as understood in section 1505, is based on a totality of the

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107. *Id.* § 1505.

108. *Id.*

109. *See, e.g.*, Devlin Barrett et al., *Special Counsel is Investigating Trump for Possible Obstruction of Justice, Officials Say*, WASH. POST (June 14, 2017), https://www.washingtonpost.com/world/national-security/special-counsel-is-investigating-trump-for-possible-obstruction-of-justice/2017/06/14/9ce02506-5131-11e7-b064-828ba60fbb98_story.html?nid&utm_term=.8b63ca572e06; Charlie Savage, *Trump, Comey, and Obstruction of Justice: A Primer*, N.Y. TIMES (June 8, 2017), https://www.nytimes.com/2017/06/08/us/politics/obstruction-of-justice-trump-comey.html.

110. *See* U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS MANUAL, CRIMINAL RESOURCE MANUAL § 1727 (stating that FBI investigations "are not section 1505 proceedings" and citing cases).

111. *See* 18 U.S.C.A. § 1505 West 2018).

112. *See* United States v. Cisneros, 26 F. Supp. 2d 24, 38–39 (D.D.C. 1998).

circumstances approach.[113] "If it is apparent that the investigation is a legitimate exercise of investigative authority by a congressional committee in an area within the committee's purview, it should be protected by [section] 1505," the court found.[114] The court went further, adding that "corrupt endeavors to influence congressional investigations must be proscribed even when they occur prior to formal authorization."[115] Moreover, as the Fifth Circuit recently held, section 1505 encompasses subcommittee, as well as committee, inquiries.[116]

The omnibus portion of the statute also requires a corrupt state of mind, which section 1515(b) defines, for purposes of section 1505, as "acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information."[117] This provision was added in 1996 as part of the False Statements Accountability Act and in light of the District of Columbia Circuit's holding in *United States v. Poindexter* that the term "corruptly" in the original statute was unconstitutionally vague.[118] The legislative history of section 1515(b) demonstrates unequivocally that Congress was responding directly to the *Poindexter* decision by enabling the term "corruptly" to cover false statements to Congress.[119]

The amended statutory scheme, though, contains something of an anomaly. In the original legislation introduced by Senator Arlen Specter, the new provision initially said that "corruptly" means "acting with an improper purpose, personally or by influencing another, including *but not limited to*, making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information."[120] When a substitute bill was offered and the Senate adopted the House version of the legislation (H.R. 3166), however, the phrase "but not limited to" had been deleted.[121] That deletion worked the only change in the bill that was eventually enacted into law, thus raising the question as

113. United States v. Mitchell, 877 F.2d 294 (4th Cir. 1989).

114. *Id.* at 300–01.

115. *Id.*

116. *See* United States v. Rainey, 757 F.3d 234, 241–44 (5th Cir. 2014). It is unclear whether section 1505 extends to investigations pursued by individual members and staff. *See* Bopp, et al., *supra* note 23, at 471.

117. 18 U.S.C.A. § 1515(b) (West 2018).

118. *See* United States v. Poindexter, 951 F.2d 369 (D.C. Cir. 1991).

119. *See* 142 CONG. REC. S4858 (1996) (statement of Sen. Levin); 142 CONG. REC. S8940 (1996) (statement of Sen. Specter); 142 CONG. REC. S11607 (1996) (statement of Sen. Bryan).

120. *See* S. 1734, 104th Cong., 2 (1996) (emphasis added).

121. *See* H.R. 3166, 104th Cong., (1996); *see also* 142 CONG. REC. S8938-39 (1996) (describing Amendment 5091 and H.R. 3166).

to whether "corruptly" in section 1505 (as defined in section 1515(b)) includes any conduct other than the conduct enumerated after the word "including." Would, for example, an effort to persuade a member of Congress to terminate an investigation fall within the scope of section 1505? In other words, is *any* improper purpose covered, or only those improper purposes listed after "including"?

Whether the word "including" in section 1515(b) should be read to mean "including but not limited to" appears to be an open question. But the arguments for it are superior. The legislative change suggests that if Congress had meant the statute to mean "but not limited to" it would have left the original language. But such a restrictive interpretation of the statute would prove counter-intuitive, and the floor statements on the legislation do not suggest such a limitation. On September 27, 1996, Senator Richard Bryan stated that, in response to the *Poindexter* case, "[a]ny individual who tries to impede a congressional or other governmental investigation, regardless of whether the individual acts on his own, or through the actions of another individual in going to be penalized—period."[122] Senator Bryan believed that the existing legislation was sufficient to describe the type of conduct prohibited, but in the interest of clarifying the statute after *Poindexter*, Senator Bryan explained that it would "prohibit witnesses from engaging with improper purpose in any of the variety of means by which individuals may seek to impede a congressional or other governmental investigation."[123] On July 25, Senator Carl Levin explained that the bill would bring section 1505 "back into line with other Federal obstruction statutes, by making it clear that section 1505 prohibits obstructive acts by a person acting alone as well as when inducing another to act."[124] Senator Levin read the bill as "restor[ing] the strength and usefulness of the Congressional obstruction statute as well as restor[ing] its parity with other obstruction statutes protection federal investigations."[125]

Moreover, courts have read statutes that use the term "includes" as being non-exhaustive (though only where the word "includes" is used instead of the word "means;"[126] in section 1515(b), Congress unhelpfully used both "means" and "including.").[127] Also, members of the House who drafted the original bill, and of the Senate who agreed to the substitute, could have viewed the "but not limited to" language as

122. 142 CONG. REC. S11607 (1996) (Sen. Bryan).
123. *Id.* at 11608 (Sen. Bryan).
124. 142 CONG. REC. S8941 (1996) (Sen. Levin).
125. *Id.*
126. *See* United States v. Whiting, 165 F.3d 631, 633 (8th Cir. 1999).
127. *See* 18 U.S.C.A. § 1515(b) (West 2018).

superfluous. Unfortunately, the legislative record does not appear to offer a definitive answer, though that answer may lie in the canons of construction and in a sensible understanding of what the bill was attempting to accomplish. Because *Poindexter* reduced the scope of section 1505, the point of adding section 1515(b) was to make section 1505 *more* expansive, so as to capture the conduct covered both by the original statute as well as the conduct that would have included Poindexter's acts.[128] If read so as to effectuate a legislative purpose—of the kind articulated by Senators Levin and Bryan— of targeting a broad range of improper motivations or intentions in impeding or influencing a congressional inquiry, then the statute would cover a corrupt effort to pressure members of Congress to terminate or redirect an investigation.

Indeed, given the significant place of section 1505 in safeguarding the institutional interests of the Congress and the integrity of its investigations, it would seem strange to so restrict the coverage of the statute that it would not protect the Congress against such an effort when Congress was trying to ensure broader, not narrower, protection against obstruction.

B. Identifying Corrupt Obstruction

Identifying a "corrupt" obstruction of Congress can be complicated, particularly once one acknowledges that Congress is a political body subject to persuasion. Unlike criminal contempt, we have recent examples of obstruction prosecutions through which to obtain some guidance. Obstruction can be providing false documents to Congress,[129] or by making false or misleading statements to Congress.[130] The Justice Department has also sought a section 1505 indictment where a cabinet official concealed evidence that could have been relevant to his confirmation proceedings before the relevant Senate committee.[131] But a corrupt effort to terminate, thwart, or redirect an investigation has also been prosecuted under section 1505.

In *Mitchell*, for example, the defendants were nephews of Representative Parren Mitchell, who chaired the House Small Business Committee.[132] They were convicted under section 1505 based on their collection of a $50,000 fee for trying to stop the Committee's

128. *See* 142 CONG. REC. S4858 (1996) (statement of Sen. Levin); 142 CONG. REC. S8940 (1996) (statement of Sen. Specter); 142 CONG. REC. S11607 (1996) (statement of Sen. Bryan).

129. *See* United States v. Rainey, 757 F.3d 234, 238 (5th Cir. 2014).

130. *See* United States v. Poindexter, 951 F.2d 369, at 337 (D.C. Cir. 1991).

131. *See* United States v. Cisneros, 26 F. Supp. 2d 24, 39–40 (D.D.C. 1998).

132. United States v. Mitchell, 877 F.2d 294, 296–97 (4th Cir. 1989).

investigation into the Wedtech Corporation, which had come under scrutiny for obtaining contracts through a program managed by the Small Business Administration, despite questions about whether Wedtech was eligible.[133] Although they never took additional steps to thwart the investigation, and there was no evidence of services rendered upon payment of the fee, the defendants were convicted of "endeavoring" to obstruct the investigation and their convictions were upheld by the Fourth Circuit.[134]

Harder cases, though, may arise where the effort to terminate or redirect an investigation comes from executive branch actors exerting influence on Congress. In November 2017, the *New York Times* reported that President Trump had pressured the Republican leadership in the Senate to end committee inquiries into Russian active measures during the 2016 elections.[135] Those inquires began in early 2017, shortly after Trump's inauguration and after it had been revealed that American intelligence agencies have high confidence that Russian government operatives attempted to influence the elections.[136] It was later reported that then-candidate Trump's son, Donald Trump Jr., reportedly agreed to take a meeting in 2016 with Russian-connected officials in exchange for damaging information about Trump's opponent, Hillary Clinton.[137] Although the *Times* report did not indicate any specific threat made by the President against any Senator for his or her role in conducting the inquiry—in fact, the White House denied that the President tried to exert any "undue influence on committee members"[138]—multiple Senators stated on the record that the President expressed interest in having the investigations come to an end.[139] One Senator, speaking anonymously,

133. *Id.* at 295–96.

134. *Id.* at 297.

135. *See* Jonathan Martin, et al., *Trump Pressed Top Republicans to End Senate Russia Inquiry*, N.Y. TIMES (Nov. 30, 2017), https://www.nytimes.com/2017/11/30/us/politics/trump-russia-senate-intel.html.

136. *See* Press Release, Senate Select Committee on Intelligence, Joint Statement on Committee Inquiry into Russian Intelligence Activities (Jan. 13, 2017), https://www.intelligence.senate.gov/press/joint-statement-committee-inquiry-russian-intelligence-activities; Press Release, House Permanent Select Committee on Intelligence, Joint Statement on Progress of Bipartisan HPSCI Inquiry into Russian Active Measures (Jan. 25, 2017), https://democrats-intelligence.house.gov/news/documentsingle.aspx?DocumentID=211.

137. *See* Jo Becker, et al., *Russian Dirt on Clinton? 'I Love It,' Donald Trump Jr. Said*, N.Y. TIMES (July 11, 2017), https://www.nytimes.com/2017/0/11/us/politics/trump-russia-email-clinton.html.

138. Martin, et al., *supra* note 135.

139. *Id.*

stated that the President requested that the Senator urge his colleagues to end the investigations.[140]

Imagine, too, different hypothetical facts. Imagine that the President invited the chairman of the investigating committee to fly with him on Air Force One, or offered to put in a good word for the committee chairman with wealthy and influential party donors. Or imagine an administration official offering to help with key legislation if the inquiry would end. Or suppose that a high-ranking White House staffer offered to arrange for the President to travel to the committee chairman's home district and hold a rally, or for the chairman to play golf with the President—all with the hopes that, by engaging in friendly contact with the chairman and in ways that could help him politically, the administration can thwart a potentially damaging investigation. Is this "corruptly . . . endeavoring"[141] to obstruct Congress?

It is tempting to brush these examples, and the *Times* story, off as ordinary politics, the kind of arm-twisting and informal persuasion that often characterizes a modern president's relationship with Congress.[142] It may also be tempting to regard these kinds of moves as a clumsy effort by a political novice to either focus attention on his political agenda (or, more precisely, his "shared agenda" with those in Congress that he is contacting) or to persuade congressional leaders to spend their time more wisely. Interaction between presidents and senators (or, for that matter, Representatives) regarding legislative work are not unusual, and a president new to the legislative process might well feel an even stronger need to develop those relationships with regular contact.[143] But should the nature of, and motivations for, the contact matter, especially if the President's *own conduct* is under investigation? If so, then these examples more strongly suggest the use of an official position to influence a congressional investigation by ensuring their termination or

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140. *Id.*

141. 18 U.S.C.A. § 1505 (West 2018).

142. For one influential view of this dynamic, see RICHARD NEUSTADT, PRESIDENTIAL POWER 33 (1960).

143. *See* Julian E. Zelizer, *How Presidents Work Congress*, POLITICO (July 27, 2009), https://www.politico.com/story/2009/07/how-presidents-work-congress-025441?o=1. For additional perspective on relationships between presidents and Congress, see Mark A. Peterson, *The President and Congress, in* THE PRESIDENCY AND THE POLITICAL SYSTEM 475 (Michael Nelson ed., 6th ed. 2000) (stating that "the most important arena for presidential-congressional interaction is legislating"). Of course, whether modern presidents play an outsized or too-dominant role in legislative affairs is another matter. *See, e.g.*, J. Richard Broughton, *Rethinking the Presidential Veto,* 42 HARV. J. LEGIS. 91, 106-110 (2005) (expressing concern about expansive presidential efforts to dictate national legislation).

pressuring members to terminate them. And if so, this could trigger section 1505 concerns.

Setting aside whether the President was using his soft political powers properly, it seems even less convincing to rely on the President's hard constitutional powers. Presidents are constitutionally empowered to make recommendations to Congress. Article II provides that the President "shall, from time to time, give to the Congress information of the State of the Union, and recommend to its consideration such measures as he shall judge necessary and expedient."[144] A defense of presidential calls to Congress to terminate an investigation involving the President might be defended on the ground that this constitutes a recommendation to Congress within the meaning of the Recommendation Clause.[145] But a fair reading of the constitutional text undermines that claim.

As Vesan Kesavan and Gregory Sidak have argued, the term "measures" in the Recommendation Clause refers to legislation, either ordinary or "higher" (such as a constitutional amendment).[146] That is, the Clause permits the president power to propose definite legislation, not merely to ruminate on policy generally.[147] The authors concede that "measures" may be understood to mean something akin to "matters," and permit the President to be somewhat less definite with respect to the subjects on which he is recommending action.[148] But even understanding the Recommendation Clause in its broadest sense, an informal conversation with select members of the Senate about terminating a congressional investigation in which the president is implicated does not amount to "recommending" a "measure" pursuant to Article II.

Assuming, then, that the person exerting, or attempting to exert, influence upon Congress is engaged neither in permissible political overtures nor the exercise of a constitutional power, we must consider enforcement of the federal criminal law or congressional law.

C. Punishing Obstruction: Referral, Special Counsel, Inherent Contempt, or Impeachment?

Section 1505—like any criminal law that protects Congress's institutional functions or its members—ought to function as a criminal-

144. U.S. CONST. art. II, § 3.

145. *Id.*

146. *See* Vesan Kesavan & J. Gregory Sidak, *The Legislator-in-Chief*, 44 WM. & MARY L. REV. 1, 48–49, 54 (2002); *see also* J. Gregory Sidak, *The Recommendation Clause*, 77 GEO. L.J. 2079 (1989) (arguing for this understanding of the Clause).

147. Kesavan & Sidak, *supra* note 146, at 50.

148. *Id.* at 51–52.

law-check on the president, or any executive branch official, in their relationship with Congress. And where the obstruction arose out of a congressional inquiry, congressional practice suggests that a criminal referral to the Justice Department would be appropriate.[149] Indeed, this would be one of the cases in which the justification for a congressional referral would be especially strong—a case in which the facts constituting obstruction were discovered through, or as a result of, an exercise of congressional investigative power, and the crime is by definition one against the institution of Congress. But even assuming that a case appeared to satisfy all of the elements for a charge of obstructing Congress under section 1505, several problems arise.

First, if the potential target is the President, the separation of powers substantially limits the criminal law options. The Justice Department continues to follow the view—emanating from Office of Legal Counsel memos in 1973 and 2000—that a sitting president cannot be indicted or tried for a crime.[150] This theory, however, would not extend to any other official, only the president. Still, if the Justice Department's approach to contempt certifications offers any guidance, then there is some likelihood that the Department would not seek an indictment even for a subordinate executive branch official.[151] Guidance could also be found in raw partisan politics, or even, more precisely, the politics of presidential loyalty. Imagine, for example, a president who believed that the Justice Department was being insufficiently loyal to him personally, and who publicly criticized the Department and the Attorney General specifically.[152] It is not unreasonable to believe that—to keep his job as Attorney General and to appease the president's sense of loyalty, or to appease partisan interests with whom he is connected—the Attorney

149. *See supra*, Part II.A.

150. *See* A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. 222 (2000); Memorandum from Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, Re: Amenability of the President, Vice President and Other Civil Officers to Federal Criminal Prosecution While in Office (Sept. 24, 1973).

151. *See supra*, Part III.

152. *See* Donald J. Trump (@realdonaldtrump), TWITTER (July 25, 2017, 3:13 AM), https://twitter.com/realDonaldTrump/status/889790429398528000 (accusing Attorney General Jeff Sessions of being "VERY weak" on Hillary Clinton's potential criminal activity); Donald J. Trump (@realdonaldtrump), TWITTER (July 24, 2017, 7:49 AM), https://twitter.com/realDonaldTrump/status/889467610332528641 (referring to Sessions as "our beleaguered A.G."); *see also* Michael S. Schmidt & Maggie Haberman, *Trump Humiliated Jeff Sessions After Mueller Appointment,* N.Y. TIMES (Sept. 14, 2017), https://www.nytimes.com/2017/09/14/us/politics/jeff-sessions-trump.html (reporting that the President berated Sessions and "said he should resign" after Sessions recused himself from the Russian meddling investigation).

General may forego investigating or prosecuting cases in which the President or members of his Administration are implicated.

The obvious answer for this phenomenon, of course, is the use of a special counsel. Under existing regulations, the Attorney General or whoever is acting in that capacity "will" appoint a special counsel when a criminal investigation is justified and investigation within the existing Department of Justice "would present a conflict of interest for the Department or other extraordinary circumstances" and such appointment "is in the public interest."[153] But while special counsel are often desirable, they are not perfect solutions to the instant problem. Special counsel investigations can be time-consuming, often do not expose important facts to public light, and there is no assurance that a special counsel will actually bring a criminal prosecution.[154] Special counsels, moreover, are bound by the principles of federal prosecution that guide all other Justice Department prosecutors,[155] meaning that there are circumstances in which special counsel may forego prosecution even if sufficient evidence exists. As Michael Rappaport has argued—in proposing special investigative committees in Congress to investigate executive wrongdoing, rather than special counsels—a special counsel is not politically accountable and may both overenforce and underenforce criminal law against the official.[156]

More fundamentally, though, mere reliance on a special counsel once again raises the problem of congressional punting to the executive. That is, even if Congress refers a violation of the obstruction statute to the Justice Department, Congress still needs the cooperation of the executive. And yet, just as with traditional contempt of Congress (default or refusal to answer), if the Justice Department refuses to prosecute, Congress must still have a remedy to protect itself. Otherwise, as with other statutes, where a person knows—or has high confidence—that he or she will not be prosecuted under section 1505, he or she has little incentive to comply with the statute or with Congress's demands. Consequently, in a situation where a sitting President or administration official has engaged in conduct that would satisfy the elements of section 1505, but where the Justice Department refuses prosecution and a special counsel is either unavailable or ineffective in vindicating Congress's

153. 28 C.F.R. 600.1 (1999).

154. *See* Peter Zeidenberg, *The Huge Problem with Appointing Special Prosecutors*, WASH. POST (Mar. 2, 2017), https://www.washingtonpost.com/opinions/the-huge-problem-with-appointing-special-prosecutors/2017/03/02/0730b788-ff5f-11e6-8f41-ea6ed597e4ca_story.html?utm_term=.547f973c2c5e.

155. *See* UNITED STATES ATTORNEYS MANUAL 9-27.001 *et seq.* (2018)

156. Michael B. Rappaport, *Replacing Independent Counsels with Congressional Investigations*, 148 U. PA. L. REV. 1595, 159–1603 (2000).

institutional interests through the criminal law, Congress must therefore rely on its own enforcement mechanisms.

The first is the remedy of, or something closely akin to, inherent contempt. Inherent contempt for obstruction may sound somewhat discordant. But if one assumes the validity of inherent contempt process, there is no reason that process should not extend to acts that constitute obstruction, such as endeavoring to make an investigation vanish.

The obstructing Congress statute and the contempt statute look similar. But, they criminalize different things. The contempt statute requires that the person making default or refusing to answer questions be summoned (subject to compulsory process).[157] The obstruction statute has no such compulsory process requirement; it simply requires a pending proceeding before a house of Congress that Congress has power to pursue.[158] Also, the contempt statute targets a failure to appear or a failure to answer questions.[159] It does not, however, cover a situation in which a person tries to influence, obstruct, or impede a congressional inquiry, where doing so is *not* the result of default or failure to answer.[160] In other words, contempt may involve a default or a refusal to answer, which also is done corruptly and obstructs or impedes the inquiry (in which case, *both* section 192 and section 1505 apply), but one may corruptly influence, obstruct, or impede without willful default or refusal to answer (in which case only section 1505 would apply). Consequently, Congress needs a remedy for obstruction as well as for contempt, which is the virtue of having section 1505.

The Supreme Court has taken a similar position, though not specifically in the section 1505 context. In *Anderson v. Dunn*, where the Court gave its blessing to inherent contempt, the relevant conduct was an attempted bribe of a Member of the House (Representative Louis Williams) by a non-member (John Anderson).[161] The Court explained that contempt was essential to guard against, and punish, obstruction of its legislative function, and did not place any formal limits on the kind of breach of privilege that may suffice.[162]

Similarly, in *Jurney v. MacCracken*, the Senate initiated contempt proceedings against a lawyer who had asserted attorney-client privilege in withholding certain documents from a special Senate committee.[163] Before the committee ruled against MacCracken's privilege assertion,

157. *See* 2 U.S.C.A. § 192 (West 2018).
158. *See* 18 U.S.C.A. § 1505 (West 2018).
159. *See* 2 U.S.C.A. § 192 (West 2018).
160. *Id.*
161. Anderson v. Dunn, 19 U.S. 204 (1821).
162. *Id.* at 228.
163. Jurney v. MacCracken, 294 U.S. 125, 144–45 (1935).

some documents had been destroyed, though MacCracken later provided what remaining documents he had.[164] The Court upheld Congress's use of internal contempt punishment, stating that, "[n]o act is so punishable unless it is of a nature to obstruct the performance of the duties of the Legislature."[165] Moreover, as long as the act "was of a nature to obstruct the legislative process, the fact that the obstruction has since been removed, or that its removal has become impossible, is without legal significance."[166] *Jurney's* language therefore suggests that inherent contempt remains available for a range of conduct against any legislative privilege, including obstruction more broadly.

Finally, Chafetz's and Beck's additional examples of inherent contempt process further make clear that the inherent contempt remedy is available for conduct that offends the prerogatives or integrity of the legislative body broadly, beyond what would be prosecutable merely pursuant to the criminal contempt statute.[167] Obstruction of a kind that would fit the standards of a section 1505 prosecution, then, would seem to also justify inherent contempt.

Institutional punishment also avoids the "criminalization of politics" argument.[168] One may argue, for example, that efforts to influence or end a congressional inquiry may simply be raw politics—crude, ethically dicey overtures, but not appropriate subjects of the criminal law or criminal punishments. But viewed as enforcement of *congressional* law, rather than criminal law, inherent contempt permits redress for offenses against Congress's institutional integrity rather than subjecting the congressional offender to the kind of broader moral condemnation that comes from a criminal conviction.

Still, as mentioned earlier, there remains the claim that inherent contempt is an ineffectual punishment—time consuming procedures, punishment of significantly limited duration, and unworthy of the resources it requires[169]—as well as the argument that it is constitutionally unsound.[170] There remains another option, equally if not more time consuming, but arguably with stronger teeth and more lasting effects: impeachment.

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164. *Id.* at 147.

165. *Id.* at 147–48.

166. *Id.* at 148.

167. *See* CHAFETZ, *supra* note 13, at 172–95; BECK, *supra* note 46, at 191–216.

168. For a recent critique of the "criminalization of politics" notion, see George Brown, *Applying* Citizens United *to Ordinary Corruption: With a Note on* Blagojevich, McDonnell, *and the Criminalization of Politics*, 91 NOTRE DAME L. REV. 177, 177–227 (2015).

169. *See* ROSENBERG, *supra* note 5, at 25.

170. *See Calabresi, et al.*, *supra* note 92, at 537–38.

Though impeachment would apply to any executive branch official, it is especially useful in the case of the President, who is likely to face immunity from criminal prosecution,[171] as well inherent contempt.[172] Regardless of who the officer is, there is ample support for the contention that obstructing Congress can be an impeachable offense (as "treason," bribery, or "other high crime or misdemeanor").[173] Rather than targeting mere common law or statutory crimes, impeachment targets abuse of the public trust,[174] which—as in the case of obstruction committed by an administration official, or the President—may intersect with the formal requirements of the criminal law. So, though in a sense political and not strictly criminal,[175] impeachment protects the institutions of government, though it does so through removal from office rather than conventional criminal punishment.[176]

Hamilton explained that impeachment concerns "the misconduct of public men, or, in other words, the abuse or violation of some public trust."[177] He further argued that impeachments are "with peculiar propriety . . . POLITICAL, as they relate chiefly to injuries done immediately to society itself."[178] So while the underlying act need not be

171. *See generally* THE FEDERALIST NO. 69 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

172. *See* Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege, 8 Op. O.L.C. 101, 128 (1984).

173. *See* U.S. CONST. art. I, § 4.

174. *See* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 746 (1833); *see also* Michael J. Gerhardt, *The Lessons of Impeachment History*, 67 GEO. WASH. L. REV. 603, 609–10 (1999) (compiling prominent authorities who agree that "other high crimes and misdemeanors" refers to conduct that need not be an indictable crime, but rather is an abuse of power—a "political crime"); Ronald D. Rotunda, *An Essay on the Constitutional Parameters of Federal Impeachment*, 76 KY. L.J. 707, 725–26 (1987–88) (explaining why "American experience supports the conclusion that an impeachable offense need not be a crime"); Frank O. Bowman III & Stephen L. Sepinuck, *High Crimes & Misdemeanors: Defining the Constitutional Limits on Presidential Impeachment*, 72 S. CAL. L. REV. 1517, 1523 (1999) (noting the weight of authority for the rule that impeachable offenses need not be crimes and compiling sources).

175. *See* Jonathan Turley, *Congress As Grand Jury: The Role of the House of Representatives in the Impeachment of an American President*, 67 GEO. WASH. L. REV. 735, 789 (1999) (describing the Senate's role as "political"); Michael J. Gerhardt, *The Constitutional Limits To Impeachment and Its Alternatives*, 68 TEX. L. REV. 1, 90 (1989); Bowman & Sepunick, *supra* note 174, at 1563 (describing impeachment as a "political process."). *Cf.* Broughton, *supra* note 99 (arguing that, though political and not strictly criminal, impeachment bears a close relationship to the criminal law).

176. *See* STORY, COMMENTARIES § 803. Criminal punishment, of course, remains available after removal; *see also* U.S. CONST. art. I, 3.

177. *See* THE FEDERALIST NO. 65, at 396 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

178. *Id.*

a common law or statutory crime to be impeachable, those public offenses that—like treason and bribery—constitute abuses of power or offenses against the institutions of government, undermine public confidence, and are sufficiently grave to warrant removal from office can sensibly be regarded as impeachable.[179] Obstruction of Congress through a deliberate effort to pressure, cajole, or influence members to terminate an inquiry—particularly where there were signs that the inquiry may reveal information damaging to the official or to the administration, and where the effort to end the inquiry was intended to prevent the revelations—fits this understanding. As Charles Black argued, when obstruction of justice "occurs in connection with governmental matters, and when its perpetrator is the person principally charged with taking care that the laws be faithfully executed, there must come a point at which excuses fail."[180]

IV. CONCLUSION

Congress does not work for the President. And while federal prosecutors in the Executive Branch do not work for Congress, their Article II law enforcement function often requires their cooperation in helping to protect Congress's institutional interests. Still, Congress has its own mechanisms for enforcing congressional law and for defending the institutional prerogatives that congressional law safeguards. Those enforcement mechanisms can serve the constitutional separation of powers. Like any exercise of congressional power, of course, congressional law enforcement is subject to potential abuse. And just as

179. *See* CHARLES L. BLACK JR., IMPEACHMENT: A HANDBOOK 46 (1974).

180. *Id.* Notably, the House's ill-fated move to impeach IRS Commissioner John Koskinen in 2016 raised the issue of obstructing Congress. One of the articles of impeachment filed against Koskinen stated that Koskinen failed to respond to congressional subpoenas and that while he was Commissioner IRS employees destroyed evidence relevant to the subpoena. *See* Impeaching John Andrew Koskinen, Commissioner of the Internal Revenue Service, for high crimes and misdemeanors, H.R. Res. 848, 114th Cong. (2016). The Article stated that "this action impeded congressional investigations" into the IRS's "targeting of Americans based on their political affiliation." *Id.* The House, referring the matter to the Judiciary Committee, never voted in the Articles against Koskinen and he eventually left office. *See* Mike DeBonis, *House Snuffs Out Conservatives' IRS Impeachment Push*, WASH. POST (Dec. 6, 2016), https://www.washingtonpost.com/news/powerpost/wp/2016/12/06/house-snuffs-out-conservatives-irs-impeachment-push/?utm_term=.c355a39b3144. It is also notable that obstruction of justice (though not of Congress specifically) was among the articles of impeachment filed against both President Clinton and President Nixon. *See* Impeaching William Jefferson Clinton, President of the United States, for high crimes and misdemeanors, H.R. Res. 611, 105th Cong. (1998); *see also* H.R. REP. NO. 93-1305, at 1–4 (1974).

congressional law enforcement derives from the separation of powers, so, too, does the separation of powers limit it. Mindful of the separation of powers, though, Congress's law enforcement function is at its zenith when its institutional interests have been compromised or undermined, and the executive has chosen not to protect those interests through applicable federal criminal law.