

PRINCIPLES FOR NEGOTIATING CONGRESSIONAL ACCESS TO OPEN DEPARTMENT OF JUSTICE FILES

*Dylan S. Reichman**

In recent years, Congress has ramped up investigations into the conduct of the Department of Justice (“DOJ”). Republicans in the House, for example, have undertaken a sweeping review of the purported “weaponization” of the DOJ through the creation of the Select Subcommittee on the Weaponization of the Federal Government. And in these investigations, Congress has increasingly made a bold ask: Congress has demanded access to files from open DOJ investigations and prosecutions.

When Congress, during a congressional investigation, requests access to files from open DOJ investigations and prosecutions, are such requests proper? The answer, perhaps surprisingly, is yes. Congress’s broad investigatory power provides it with the legal right to access open DOJ case files. Yet, doing so raises weighty separation of powers concerns, such as maintaining the integrity of ongoing investigations and prosecutions, executive privilege, and protecting national security interests.

Disputes between Congress and the DOJ (and its predecessors) over congressional access to the files of open investigations and prosecutions are uncommon but have occurred repeatedly from the Founding to the present. These disputes raise concerns that cry out for a principled framework within which Congress and the

* Juris Doctor, 2023, Georgetown University Law Center; Associate, Wilmer Cutler Pickering Hale and Dorr LLP.[†] I would like to thank the staff of the Government Law Review for their meticulous edits and hard work. Any errors are mine, not theirs. I am deeply grateful for the guidance and inspiration provided by Judge Richard Leon and Professor John Podesta, without whom this paper would not be possible. I would also like to thank Professor Michael Cedrone, who helped me become the writer and person I am today. Finally, I would like to thank my family for their enduring love and support.

[†] Institutional affiliation for identification purposes only.

DOJ can negotiate. This is particularly so because such disputes have almost always been handled out of court, in the “hurly-burly” of the political process.

This paper draws on deeply rooted legal principles undergirding the respective authorities of Congress and the DOJ and a rich history and tradition of such disputes—dating from the Founding to present—to propose a series of factors Congress and the DOJ should weigh when negotiating congressional access to open DOJ case files. This paper also highlights numerous accommodations the parties have historically provided to one another—such as the DOJ granting congressional interviews of line prosecutors or Congress agreeing to view sensitive documents without taking notes. And ultimately, this paper argues that the more heavily the factors weigh in favor of one party, the more substantial accommodations the other party should provide. Drawing on the law, history, and tradition, this paper seeks to provide a principled basis that Congress and the DOJ can use to smoothly resolve future disputes while maintaining the constitutional prerogatives of each institution.

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I. INTRODUCTION

On January 10, 2023, the Republican majority in the House of Representatives voted to authorize the creation of the Select Subcommittee on the Weaponization of the Federal Government.¹ The authorizing resolution set the scope of the subcommittee’s investigative functions and authority,² including an explicit authorization to “conduct a full and complete investigation” into, among other things, “the expansive role of article II authority vested in the executive branch to collect information on or otherwise investigate citizens of the United States, *including ongoing criminal investigations*.”³ To fulfill its investigation, the chair of the House Judiciary Committee, Representative Jim Jordan, “may authorize and issue subpoenas to be returned at the select subcommittee.”⁴

In short order, Chairman Jordan wrote to Attorney General Merrick Garland requesting, among other things, documents and information relating to active criminal investigations.⁵ On

¹ Establishing a Select Subcommittee on the Weaponization of the Federal Government as a Select Investigative Subcommittee of the Committee on the Judiciary, H.R. Res. 12, 118th Cong. (2023).

² *Id.* § 1(b).

³ *Id.* § 1(b)(1), 1(b)(1)(A) (emphasis added).

⁴ *See id.* § 1(c)(1)(B).

⁵ *See* Letter from Representative Jim Jordan, Chairman, House Comm. on the Judiciary, to Merrick B. Garland, Att’y Gen., U.S. Dep’t of Just. (Jan. 17,

January 20, 2023, Assistant Attorney General Carlos Uriarte responded.⁶ In his letter, he pushed back on the notion that Congress was entitled to the Department of Justice (“DOJ”) files on open cases, asserting that “[l]ongstanding Department policy prevents us from confirming or denying the existence of pending investigations in response to congressional requests or providing non-public information about our investigations.”⁷

While this example suggests that Congress’s right to access the DOJ’s files on open cases during congressional investigations is legally and factually unsettled, nothing could be further from the truth. Indeed, from the Founding to the present, Congress and the DOJ have negotiated congressional access to DOJ files on open cases dozens of times. Yet, each time this process occurs, both Congress and the DOJ seemingly ignore this rich tradition and start from square one: Congress asserts it has near-absolute authority to obtain the DOJ’s open case files, and the DOJ responds by claiming that such requests are unprecedented and legally dubious.⁸ And ultimately, in almost every case, Congress and the DOJ have ended up negotiating, leading to congressional access to the DOJ’s open case files under painstakingly constructed sets of conditions.

Despite the weighty constitutional and practical concerns implicated by those negotiations, they have historically proceeded on ad hoc, unprincipled bases. This paper draws on a robust body of case law, history, and tradition to propose a consistent theoretical framework within which Congress and the DOJ can negotiate congressional access to the DOJ’s open case files in the

2023).

⁶ Letter from Carlos Uriarte, Assistant Att’y Gen., U.S. Dep’t of Just., to Representative Jim Jordan, Chairman, House Comm. on the Judiciary (Jan. 20, 2023).

⁷ *Id.* at 3.

⁸ See, e.g., Charles J. Cooper, Assistant Att’y Gen., Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act, 10 Op. O.L.C. 68, 76 (1986) [hereinafter Cooper Opinion] (“[T]he policy of the Executive Branch throughout our Nation’s history has generally been to decline to provide committees of Congress with access to, or copies of, open law enforcement files except in extraordinary circumstances. . . . No President, to our knowledge, has departed from this position affirming the confidentiality and privileged nature of open law enforcement files.”); Robert B. Shanks, Deputy Assistant Att’y Gen., Congressional Subpoenas of Department of Justice Investigative Files, 8 Op. O.L.C. 252, 257 (1984) [hereinafter Shanks Opinion] (asserting “the obligation of the Executive Branch not to disclose internal information pertaining to an open investigation”).

future. And ultimately, drawing on the history and tradition of such negotiations, this paper argues that, where the interest of one branch is stronger, the other branch should provide greater accommodations to ensure that access to those files does not run afoul of each branch's interests.

Section II explores the legal principles underlying Congress's power to conduct investigations, the DOJ's concerns regarding congressional access to its open case files, and the law governing such access. Section III reviews the rich history and tradition of congressional access to the DOJ's files on open cases, highlighting key features of the negotiations involved in a select sample of such occurrences.

Section IV then draws upon the legal background, history, and tradition to propose a theoretical framework to guide future negotiations between Congress and the DOJ for congressional access to the DOJ's open case files during congressional investigations. This paper argues that a consistent theoretical framework is needed to protect each branch's institutional prerogatives during those negotiations.

As this paper demonstrates, Congress is entitled to access the majority of the DOJ's files on open cases, but several factors must guide and circumscribe the conditions of that access. These factors serve to vindicate both Congress's right to access those files and the DOJ's right to limit access to them. Ultimately, principled negotiations between Congress and the DOJ for congressional access to the DOJ's files on open cases during congressional investigations are possible. The legal background, history, and tradition can provide those principles, allowing for consistency in future negotiations and the protection of each branch's constitutional prerogatives.

II. LEGAL BACKGROUND

While interbranch disputes over congressional access to executive branch files during congressional investigations are typically resolved in the "hurly-burly, the give-and-take of the political process between the legislative and the executive," the contours of that political process are nonetheless shaped by a rich

legal background.⁹ This Section explores that background to show how it affects the boundaries, stakes, and leverage involved in interbranch negotiations during congressional investigations. First, this Section illustrates Congress's broad investigatory power. Next, the paper turns to the DOJ's historical objections to congressional access to its open files. Finally, this Section addresses case law governing congressional investigative demands for the DOJ's files on open cases. These three areas of the law set the stage—and the stakes—for disputes over congressional access to open DOJ files.

A. Congress's Power to Investigate

1. Scope of Congress's Investigatory Power

Courts have long recognized Congress's broad power to "investigate matters and conditions relating to contemplated legislation."¹⁰ While the text of the Constitution does not provide Congress with an investigatory power,¹¹ the Supreme Court has found that the Constitution implicitly grants it, holding that the "power, deeply rooted in American and English institutions, is indeed co-extensive with the power to legislate."¹² As part of this power, Congress may issue subpoenas for documents and testimony to further its investigations.¹³ This is because the "power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function"¹⁴ implicit in Congress's role in the constitutional scheme. And given its constitutional gravity, the power is "broad" and "indispensable."¹⁵

This power includes the prerogative to investigate in furtherance of congressional oversight of the coordinate branches. For example, in *Sinclair v. United States*, the Supreme Court explained that "undoubtedly the Senate had power to delegate authority to its committee to investigate and report what had

⁹ *Trump v. Mazars USA, LLP*, 591 U.S. 848, 859 (2020) (quoting *Hearings on S. 2170 et al. Before the Subcomm. on Intergovernmental Rels. of the S. Comm. on Gov't Operations*, 94th Cong., 1st Sess., 87 (1975) (statement of A. Scalia, Assistant Att'y Gen., Off. of Legal Couns.)).

¹⁰ *Quinn v. United States*, 349 U.S. 155, 160 (1955).

¹¹ *See Mazars*, 591 U.S. at 862.

¹² *Quinn*, 349 U.S. at 160.

¹³ *E.g.*, *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 505 (1975).

¹⁴ *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927).

¹⁵ *Watkins v. United States*, 354 U.S. 178, 187 (1957).

been and was being done by executive departments.”¹⁶ As is pertinent here, this oversight power includes oversight of the executive branch and, as a result, the DOJ. Similarly, in *Eastland v. United States Servicemen’s Fund*, the Supreme Court approved as constitutionally valid Congress’s investigation “to make a complete study of the ‘administration, operation, and enforcement of the Internal Security Act of 1950.’”¹⁷ There, the oversight of the executive branch’s implementation of the Internal Security Act was deemed as properly within Congress’s investigative ambit.

In *McGrain v. Daugherty*, the Court affirmed Congress’s authority to investigate the DOJ itself as part of its oversight power. There, Congress sought to investigate whether the Attorney General was properly prosecuting alleged antitrust violations and other illegalities.¹⁸ The Court characterized the subject of the investigation as:

the administration of the Department of Justice—whether its functions were being properly discharged or were being neglected or misdirected, and particularly whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and prosecution of proceedings to punish crimes and enforce appropriate remedies against the wrongdoers.¹⁹

The Court held that the subject of the investigation was properly within Congress’s oversight jurisdiction, stating “[p]lainly the subject was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit.”²⁰

Congress’s power to investigate is “broad” and “indispensable”²¹ as “an essential and appropriate auxiliary to the legislative function.”²² This power includes the broad power to conduct oversight over the coordinate branches²³ so long as the

¹⁶ *Sinclair v. United States*, 279 U.S. 263, 294 (1929).

¹⁷ *Eastland*, 421 U.S. at 506 (quoting S. Res. 341, 91st Cong., 2d Sess. (1970)).

¹⁸ *McGrain*, 273 U.S. at 151.

¹⁹ *Id.* at 177.

²⁰ *Id.*

²¹ *Watkins v. United States*, 354 U.S. 178, 187 (1957).

²² *McGrain*, 273 U.S. at 174.

²³ *See, e.g., Sinclair v. United States*, 279 U.S. 263, 294 (1929); *see also Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 506 (1975); *McGrain* 273 U.S. at 151; *cf. S. Select Comm. on Presidential Campaign Activities v. Nixon*,

investigation is conducted to “investigate matters and conditions relating to contemplated legislation.”²⁴

2. Limits on Congress’s Power to Investigate

Despite its breadth, because Congress’s investigatory power “is justified solely as an adjunct to the legislative process,”²⁵ it is not unlimited. “Congress may only investigate into those areas in which it may potentially legislate or appropriate”²⁶ And while Congress’s legislative and appropriations powers are “penetrating and far-reaching,”²⁷ there are several important limitations to those powers and, therefore, Congress’s investigatory power.

Chief among those limitations, and from which all other limitations flow, is the mandate that Congress may only conduct investigations “related to a valid legislative purpose.”²⁸ Congressional subpoenas, issued to fulfill Congress’s investigatory powers, must “concern[] a subject on which legislation could be had.”²⁹ Because the power to investigate is an adjunct of Congress’s Article I legislative powers,³⁰ the separation of powers counsels that Congress “cannot inquire into matters which are within the exclusive province of one of the other branches of the Government.”³¹ This is so because “the powers confided by the Constitution to one of these departments cannot be exercised by another.”³²

This separation-of-powers-based limitation carries with it several subsidiary limitations to ensure that Congress remains within the sphere of its Article I authority. First, Congress’s “power to investigate must not be confused with any of the powers of law enforcement; those powers are assigned under our

498 F.2d 725, 732 (D.C. Cir. 1974) (“[W]e need neither deny that the Congress may have, quite apart from its legislative responsibilities, a general oversight power, nor explore what the lawful reach of that power might be under the Committee’s constituent resolution.”).

²⁴ *Quinn v. United States*, 349 U.S. 155, 160 (1955).

²⁵ *Trump v. Mazars USA, LLP*, 591 U.S. 848, 862 (2020) (quoting *Watkins*, 354 U.S. at 197).

²⁶ *Barenblatt v. United States*, 360 U.S. 109, 111 (1959).

²⁷ *Id.*

²⁸ *Id.* at 127; see also *Mazars*, 591 U.S. at 863; *Quinn*, 349 U.S. at 161.

²⁹ *Mazars*, 591 U.S. at 863 (citations and quotation marks omitted).

³⁰ See *Watkins*, 354 U.S. at 197.

³¹ *Barenblatt*, 360 U.S. at 112.

³² *Kilbourn v. Thompson*, 103 U.S. 168, 191 (1880).

Constitution to the Executive and the Judiciary.”³³ Unlike a grand jury, whose charge is to determine whether there is probable cause to believe certain individuals committed crimes, Congress is charged with legislating, and there is therefore “a clear difference between Congress’s legislative tasks and the responsibility of a grand jury, or any institution engaged in like functions.”³⁴ Similarly, Congress “may not use subpoenas to ‘try’ someone ‘before [a] committee for any crime or wrongdoing.’”³⁵ In short, Congress is not “a law enforcement or trial agency. These are functions of the executive and judicial departments of government. No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress.”³⁶

Relatedly, “there is no congressional power to expose for the sake of exposure.”³⁷ “Congress may not constitutionally require an individual to disclose his political relationships or other private affairs except in relation to” a valid legislative purpose.³⁸ And “[i]nvestigations conducted solely for the personal aggrandizement of the investigators or to ‘punish’ those investigated are indefensible.”³⁹

For example, in *Trump v. Mazars*, three House committees sought “information about the finances of President Donald J. Trump, his children, and affiliated businesses” to “help guide legislative reform in areas ranging from money laundering and terrorism to foreign involvement in U. S. elections.”⁴⁰ Given the “weighty concerns regarding the separation of powers” implicated by the subpoenas targeting a sitting President’s personal financial records, the Supreme Court promulgated a series of factors for courts to balance in weighing disputes over such subpoenas.⁴¹ “First, courts should carefully assess whether the asserted legislative purpose warrants the significant step of

³³ *Quinn*, 349 U.S. at 161.

³⁴ S. Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 732 (D.C. Cir. 1974).

³⁵ *Trump v. Mazars USA, LLP*, 591 U.S. 848, 863 (2020) (quoting *McGrain v. Daugherty*, 273 U.S. 135, 179 (1927)).

³⁶ *Watkins v. United States*, 354 U.S. 178, 187 (1957).

³⁷ *Id.* at 200.

³⁸ *Barenblatt v. United States*, 360 U.S. 109, 127 (1959).

³⁹ *Watkins*, 354 U.S. at 187; see *Mazars*, 591 U.S. at 863.

⁴⁰ *Mazars*, 591 U.S. at 853.

⁴¹ *Id.* at 869.

involving the President and his papers.”⁴² This factor essentially tests the strength of the asserted legislative purpose and implicitly requires a heightened need to obtain the President’s personal records.⁴³ Second, the Court counseled that subpoenas for the President’s personal records should be “no broader than reasonably necessary to support Congress’s legislative objective,” essentially amounting to a specificity requirement.⁴⁴ Third, the Court required Congress to proffer “detailed and substantial” evidence to justify its claim that the subpoena serves a valid legislative purpose.⁴⁵ Fourth, and finally, the Court explained that “courts should be careful to assess the burdens imposed on the President by a subpoena.”⁴⁶

Mazars can be read narrowly to only have relevance to congressional investigations requesting the President’s personal records. However, read more broadly, *Mazars* teaches that where Congress requests records during a congressional investigation that raise “weighty concerns regarding the separation of powers,”⁴⁷ it should support its request with (1) a strong legislative purpose, (2) specificity in its request, (3) an evidentiary showing to support the request, and (4) consideration of the burden its request would have on the Executive.⁴⁸

In sum, Congress’s power to investigate may be “broad,”⁴⁹ “penetrating[,] and far-reaching,”⁵⁰ including its power to conduct oversight over the coordinate branches.⁵¹ Its power must be limited to matters “on which legislation could be had.”⁵² Congress must avoid “inquir[ing] into matters which are within the exclusive province of one of the other branches of the

⁴² *Id.*

⁴³ *See id.* at 870 (“While we certainly recognize Congress’s important interests in obtaining information through appropriate inquiries, those interests are not sufficiently powerful to justify access to the President’s personal papers when other sources could provide Congress the information it needs.”).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 871.

⁴⁷ *Id.* at 869.

⁴⁸ *Id.* at 869–71.

⁴⁹ *Watkins v. United States*, 354 U.S. 178, 187 (1957).

⁵⁰ *Barenblatt v. United States*, 360 U.S. 109, 111 (1959).

⁵¹ *See, e.g., S. Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 732 (D.C. Cir. 1974) (“[W]e need neither deny that the Congress may have, quite apart from its legislative responsibilities, a general oversight power, nor explore what the lawful reach of that power might be under the Committee’s constituent resolution.”).

⁵² *Mazars*, 591 U.S. at 863 (citations and quotation marks omitted).

[g]overnment,”⁵³ including law enforcement powers.⁵⁴ Congress may not merely expose for the sake of exposure⁵⁵ or seek to punish those it investigates.⁵⁶

B. The Department of Justice’s Objections to Congressional Access to Open Case Files

Under Article II of the Constitution, the DOJ fulfills part of the executive branch’s mandate to “take [c]are that the [l]aws be faithfully executed”⁵⁷ by assuming the responsibility “to enforce the laws adopted by Congress,” including by “prosecut[ing] particular individuals.”⁵⁸ “The Attorney General is the President’s surrogate in the prosecution of all offenses against the United States. . . . The discretion of the Attorney General in choosing whether to prosecute or not to prosecute, or to abandon a prosecution already started, is absolute”⁵⁹

The DOJ has historically proffered numerous objections to Congress accessing its files on open cases. This Section highlights the major objections proffered by the DOJ and explores the law supporting or undermining those objections.

1. Grand Jury Materials

The DOJ has staunchly objected to congressional access to its open case files when those files contain grand jury information.⁶⁰ Grand jury secrecy “enjoys ancient common law roots, [and] has received consistent and emphatic protection by the Supreme

⁵³ *Barenblatt*, 360 U.S. at 111–12.

⁵⁴ *E.g.*, *Quinn v. United States*, 349 U.S. 155, 161 (1955); *Watkins*, 354 U.S. at 187.

⁵⁵ *Watkins*, 354 U.S. at 200.

⁵⁶ *Id.* at 187.

⁵⁷ U.S. CONST. art. II, § 3; *see also* Robert H. Jackson, Position of the Executive Department Regarding Investigative Reports, 40 Op. Att’y Gen. 45, 46 (1941) [hereinafter Jackson Opinion]; Theodore B. Olson, Assistant Att’y Gen., History of Refusals by Exec. Branch Offs. to Provide Info. Demanded by Cong.: Part II—Invocations of Exec. Privilege by Exec. Offs., 6 Op. O.L.C. 782, 782 (1983) [hereinafter Olson Opinion—Part II].

⁵⁸ Cooper Opinion, *supra* note 8, at 72.

⁵⁹ Shanks Opinion, *supra* note 8, at 264–65 (quoting *Smith v. United States*, 375 F.2d 243, 246–47 (5th Cir. 1967)).

⁶⁰ *See, e.g., id.* at 257–62.

Court over the years.”⁶¹ The doctrine of grand jury secrecy serves several purposes:

(1) [T]o prevent the escape of persons whose indictment may be contemplated; (2) to ensure freedom to the grand jury in its deliberations; (3) to prevent subornation of perjury or tampering with grand jury witnesses; (4) to encourage the free disclosure of information to the grand jury; and (5) to protect from unfavorable publicity persons who are accused of crimes but are ultimately exonerated.⁶²

Federal Rule of Criminal Procedure 6(e) (hereafter referred to as “Rule 6(e)”) prohibits the disclosure of “matter[s] occurring before the grand jury” unless one of five narrow exceptions is met.⁶³ At the outset, it is important to note that,

[w]hile the meaning of this ambiguous phrase has been the subject of extensive litigation, and [occasional] apparently inconsistent judicial decisions, it is generally recognized that Rule 6(e) prohibits the disclosure of any material that would reveal the strategy or direction of the grand jury investigation, the nature of the evidence produced before the grand jury, the views expressed by members of the grand jury, or anything else about the grand jury’s deliberations.⁶⁴

As to Rule 6(e)’s exceptions, the main exception permits disclosure when the prosecution is so directed by a court “preliminarily to or in connection with a judicial proceeding.”⁶⁵ However, “[a] congressional committee’s oversight responsibilities simply ‘do not constitute a “judicial proceeding”’ within the meaning of Rule 6(e).”⁶⁶ A second exception allows an attorney for the government to disclose matters occurring before the grand jury “for use in performing that attorney’s duty.”⁶⁷ This exception is a narrow one, “limited to use by those attorneys who conduct the criminal matters to which the materials pertain.”⁶⁸ This limited exception even “preclud[es] attorneys within [the DOJ] engaged in parallel civil and criminal investigation from

⁶¹ *Id.* at 258.

⁶² *Id.* at 259 (citing *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 681–82 n.6 (1958)).

⁶³ FED. R. CRIM. P. 6(e).

⁶⁴ Shanks Opinion, *supra* note 8, at 260–61 (internal citations omitted).

⁶⁵ FED. R. CRIM. P. 6(e)(3)(E)(i).

⁶⁶ Shanks Opinion, *supra* note 8, at 259–60 (citing *In re Grand Jury Impaneled October 2, 1978*, 510 F. Supp. 112, 114 (D.D.C. 1981)).

⁶⁷ FED. R. CRIM. P. 6(e)(3)(A)(i).

⁶⁸ *United States v. Sells Eng’g, Inc.*, 463 U.S. 418, 427 (1983).

exchanging grand jury material subject to Rule 6(e).⁶⁹ It is therefore almost certainly inapposite to disclosure in response to requests from Congress.

Rule 6(e)'s broad sweep and the lack of applicable exceptions seemingly protect a wide range of materials that are often in the DOJ's open criminal case files. And while the DOJ has, by and large, provided a blanket objection to congressional access to grand jury materials, there have been a few notable exceptions. For example, in 1985 and 1986, Congress conducted an investigation "to determine why no individuals were charged in connection with an investigation of E.F. Hutton in which the company pled guilty to 2,000 felony counts."⁷⁰ Congress "sought letters to Hutton employees promising not to prosecute, draft indictments, and internal DOJ communications regarding proposals by or within the Justice Department regarding the disposition of charges against Hutton employees."⁷¹ In response, the DOJ "went to court to seek guidance regarding the applicability of Rule 6(e) to the documents sought by the subcommittee."⁷² The court dismissed the DOJ's motion, ruling that there was no "case or controversy."⁷³ Nonetheless, the court expressed "serious doubt whether the secrecy requirements in Rule 6(e) apply to the information requested by the [s]ubcommittee."⁷⁴

In a starker example, in 1952 and 1953, a special House subcommittee received extensive documents and testimony regarding allegations that the DOJ "had attempted improperly to curb a grand jury inquiry in St. Louis into the failure to enforce federal tax fraud laws."⁷⁵ The subcommittee took testimony of DOJ officials ranging from the former Attorney General to a line Assistant U.S. Attorney.⁷⁶ In addition, the subcommittee took the

⁶⁹ Shanks Opinion, *supra* note 8, at 260.

⁷⁰ MORTON ROSENBERG, CONG. RSCH. SERV., CONGRESSIONAL INVESTIGATIONS OF THE DEPARTMENT OF JUSTICE: 1920-2007: HISTORY, LAW, AND PRACTICE 49 (2007) [hereinafter ROSENBERG].

⁷¹ *Id.* (citing STAFF OF H. COMM. ON THE JUDICIARY, 99TH CONG., E.F. HUTTON MAIL AND WIRE FRAUD 1119 (Comm. Print 1986)).

⁷² *Id.* at 50.

⁷³ *In re Harrisburg Grand Jury*—83-2, 638 F. Supp. 43, 46 (M.D. Pa. 1986).

⁷⁴ *Id.* at 46 n.4.

⁷⁵ ROSENBERG, *supra* note 70, at 37–38.

⁷⁶ *Id.* at 38.

testimony of several grand jurors and the presiding judge of the grand jury, and received the notes of the U.S. Attorney, interdepartmental correspondence, and the notes of one grand juror—with names redacted.⁷⁷ Despite this extraordinary disclosure in the face of Rule 6(e)'s strict secrecy mandate, both the DOJ and the subcommittee endeavored to protect "[t]he sanctity of the grand jury as a process of American justice . . . at all costs," and the subcommittee "stated that . . . [it] was seeking information solely relating to attempts to delay or otherwise influence the grand jurors' deliberations, not which would reveal the actual testimony of witnesses appearing before them."⁷⁸

In sum, the DOJ rigorously protects grand jury materials in its files, and disclosure of grand jury material has been rare, only occurring where the specific matters occurring before the grand jury appear to have an enumerated exception; Rule 6(e) requires no less.⁷⁹

2. National Security and Foreign Affairs

The DOJ has strenuously objected to congressional access to its files where the files relate to national security and foreign affairs.⁸⁰ "These powers have been viewed as falling within a 'zone of twilight' in which the President and Congress share authority or in which its distribution is uncertain."⁸¹ And while the executive branch may well have "entirely legitimate" concerns about endangering national security and foreign affairs information by disclosing it generally, "the degree to which the executive may exercise its discretion in implementing that concern is unclear when it conflicts with an equally legitimate assertion of authority by Congress to conduct investigations relevant to its legislative functions."⁸²

Despite this subject matter sitting in a "zone of twilight" between the executive branch and Congress, courts have afforded

⁷⁷ *Id.* at 38 & n.132.

⁷⁸ *Id.* at 38 (citing *Investigation of the Department of Justice: Hearing on H.R. 95 Before the Special Subcomm. to Investigate the Dep't of Just. of the H. Comm. on the Judiciary*, 82d Cong., 1579–80 (1952)).

⁷⁹ FED. R. CRIM. P. 6(e)(2)–(3).

⁸⁰ See, e.g., Jackson Opinion, *supra* note 57, at 46.

⁸¹ *United States v. Am. Tel. & Tel. Co. (AT&T)*, 567 F.2d 121, 128 (D.C. Cir. 1977) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

⁸² *Id.*

“the utmost deference to Presidential responsibilities” in this area.⁸³ Indeed, in dispatching with President Nixon’s blanket assertion of executive privilege over his files, the Supreme Court suggested that its calculus over protecting the files might change if the contents of those files related to national security, stating:

*Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of [p]residential communications is significantly diminished by production of such material for in camera inspection with all the protection that a district court will be obliged to provide.*⁸⁴

Indeed, the Supreme Court has recognized a “more particularized and less qualified privilege,”⁸⁵ “which protects military and state secrets.”⁸⁶ The privilege is appropriate where the government shows, “from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged.”⁸⁷

Taken together, these cases recognize that information relating to national security and foreign affairs should be afforded higher degrees of protection when they are the subject of interbranch disputes. When the DOJ’s open case files contain such information, the executive branch has a stronger claim to shield such materials from disclosure. However, when that prerogative “conflicts with an equally legitimate assertion of authority by Congress to conduct investigations relevant to its legislative functions,”⁸⁸ the balance becomes “unclear”⁸⁹ and therefore subject to negotiation.

⁸³ *United States v. Nixon*, 418 U.S. 683, 710 (1974).

⁸⁴ *Id.* at 706 (emphasis added).

⁸⁵ *Nixon v. Adm’r of Gen. Servs. (Nixon v. GSA)*, 433 U.S. 425, 447 (1977).

⁸⁶ *United States v. Reynolds*, 345 U.S. 1, 7 (1953).

⁸⁷ *Id.* at 10.

⁸⁸ *United States v. Am. Tel. & Tel. Co. (AT&T)*, 567 F.2d 121, 128 (D.C. Cir. 1977).

⁸⁹ *Id.*

3. Protecting the Confidentiality of Ongoing Investigations and Prosecutions

Protecting the confidentiality of the DOJ's files—especially in open cases—is vital to fulfilling the DOJ's constitutional mandate.⁹⁰ When investigating potential violations of the law, the DOJ, including the Federal Bureau of Investigation (“FBI”) must often use “sensitive techniques, methods, or strateg[ies].”⁹¹ These techniques can include using confidential informants or questioning sensitive witnesses, the confidentiality of whom can be of central importance to preserving the integrity of an investigation.⁹² Confidentiality is vital to the DOJ's role in investigating potential violations of the law, as tipping off potential violators to the evidence gathered in a pending investigation—or even the existence of an investigation itself—can help wrongdoers evade being brought to justice.⁹³ As the DOJ has explained, “[c]ounsel for a defendant or prospective defendant, could have no greater help than to know how much or little information the [g]overnment has and what witnesses or sources of information it can rely upon.”⁹⁴ Maintaining the confidentiality and integrity of ongoing investigations and prosecutions is therefore paramount to protecting the DOJ's interests.

4. Executive Privilege

The DOJ has also, at times, advanced the argument that executive privilege covers open DOJ case files, thereby preventing Congress from obtaining access to them.⁹⁵ This invocation is meant to “maintain[] the integrity of the prosecutorial decision-making process.”⁹⁶ Executive privilege comes in two main flavors. The first, the presidential communications privilege, protects communications made or received by the President and/or

⁹⁰ See, e.g., Olson Opinion—Part II, *supra* note 57, at 782–83; Shanks Opinion, *supra* note 8, at 262–65.

⁹¹ See Cooper Opinion, *supra* note 8, at 76.

⁹² See, e.g., *id.*; Jackson Opinion, *supra* note 57, at 46–47.

⁹³ See, e.g., Jackson Opinion, *supra* note 57, at 46.

⁹⁴ *Id.*

⁹⁵ See, e.g., Theodore B. Olson, Assistant Att’y Gen., History of Refusals by Exec. Branch Offs. to Provide Info. Demanded by Cong.: Part I—Presidential Invocations of Exec. Privilege Vis-à-Vis Cong., 6 Op. O.L.C. 751, 751–52 (1982) [hereinafter Olson Opinion—Part I]; Cooper Opinion, *supra* note 8, at 75–81.

⁹⁶ Cooper Opinion, *supra* note 8, at 77.

presidential advisors in the course of preparing advice for the President.⁹⁷ The deliberative process privilege, in contrast, is a common law privilege “allow[ing] the government to withhold documents and other materials that would reveal ‘advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.’”⁹⁸ For deliberative process privilege to apply, the materials in question must be (1) predecisional and (2) deliberative.⁹⁹

Both forms of executive privilege are qualified and may be overcome by a sufficient showing of need. For both, “courts must balance the public interests at stake in determining whether the privilege should yield in a particular case, and must specifically consider the need of the party seeking privileged evidence.”¹⁰⁰ The presidential communications privilege presumptively applies when the executive branch invokes it. However, it may be overcome if the party seeking the allegedly privileged documents makes two showings: “first, that each discrete group of the subpoenaed materials likely contains important evidence; and second, that this evidence is not available with due diligence elsewhere.”¹⁰¹ Overcoming deliberative process privilege requires a lesser, more flexible, and more “ad hoc” showing.¹⁰² Courts must balance several competing factors, such as “‘the relevance of the evidence,’ ‘the availability of other evidence,’ ‘the seriousness of the litigation,’ ‘the role of the government,’ and the ‘possibility of future timidity by government employees.’”¹⁰³ “When there is any reason to believe government misconduct [has] occurred,” the deliberative process privilege “disappears altogether.”¹⁰⁴

Whether executive privilege applies in the case of open DOJ case files therefore depends on the nature and circumstances of the congressional requests and the contents of the DOJ’s files. If

⁹⁷ *In re Sealed Case* (Espy), 121 F.3d 729, 745–52 (D.C. Cir. 1997).

⁹⁸ *Id.* at 737 (quoting *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.D.C. 1966), *aff’d*, 384 F.2d 979 (D.C. Cir. 1967)).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 746.

¹⁰¹ *Id.* at 754.

¹⁰² *Id.* at 737.

¹⁰³ *Id.* at 737–38 (quoting *In re Subpoena Served Upon the Comptroller of the Currency*, 967 F.2d 630, 634 (D.C. Cir. 1992)).

¹⁰⁴ *Id.* at 746.

the documents in the files were solicited and received by the President or his or her advisors, the presidential communications privilege may apply.¹⁰⁵ And “internal agency documents that are not ‘solicited and received’ by the President or his Office are instead protected against disclosure, if at all, by the deliberative process privilege.”¹⁰⁶ In either case, the privilege may be overcome by a showing of need by the party seeking the documents. Additionally, where Congress demonstrates a compelling need for presidential communications, or—as is more likely applicable to the contents of DOJ’s open case files—deliberative process communications, a compelling showing of need based on the nature and circumstances of the congressional investigation would weigh strongly in favor of disclosure to Congress.

5. Due Process Rights of Third Parties

The DOJ has also resisted disclosing the contents of its case files—open and closed—to protect the due process rights of targets and subjects of its investigations. As then-Attorney General Robert Jackson explained:

Disclosure of information contained in the reports might also be the grossest kind of injustice to innocent individuals. Investigative reports include leads and suspicions, and sometimes even the statements of malicious or misinformed people. Even though later and more complete reports exonerate the individuals, the use of particular or selected reports might constitute the grossest injustice, and we all know that a correction never catches up with an accusation.¹⁰⁷

The public disclosure of mere allegations or unsubstantiated claims against individuals—guilty and innocent alike—may therefore violate their privacy and due process rights.

In addition, the DOJ has taken the position that “potential targets of enforcement actions are entitled to protection from widespread premature disclosure of investigative information.”¹⁰⁸ This protection applies in the context of congressional investigations because there is “no difference between prejudicial publicity instigated by the United States through its executive

¹⁰⁵ See *Jud. Watch, Inc. v. Dep’t of Just.*, 365 F.3d 1108, 1109–12 (D.C. Cir. 2004).

¹⁰⁶ *Id.* at 1112.

¹⁰⁷ Jackson Opinion, *supra* note 57, at 47.

¹⁰⁸ Shanks Opinion, *supra* note 8, at 263.

arm and prejudicial publicity instigated by the United States through its legislative arm.”¹⁰⁹ As such, “[p]retrial publicity originating in Congress, therefore, can be attributed to the [g]overnment as a whole and can require postponement or other modification of the prosecution on due process grounds.”¹¹⁰

Protecting the due process rights of targets and subjects of DOJ investigations and prosecutions may therefore require greater measures to ensure the information contained in the DOJ’s files about such individuals remains confidential and is not disclosed to the public.

6. Separation of Powers

Finally, one objection repeatedly proffered by the DOJ is that congressional requests for open case files amount to an unconstitutional encroachment on the executive branch’s exclusive law enforcement function, violating the separation of powers.¹¹¹ The DOJ has noted that *Barenblatt v. United States* supports the proposition that Congress “cannot inquire into matters which are within the exclusive province of one of the other branches of the Government. . . . Neither can it supplant the Executive in what exclusively belongs to the Executive.”¹¹² The DOJ has asserted that the executive branch has the “exclusive authority to enforce the laws adopted by Congress,”¹¹³ which would seemingly foreclose congressional intrusion into that which “exclusively belongs to the Executive.”¹¹⁴

This objection fails on three grounds. First, and as noted above,¹¹⁵ Congress has constitutionally proper oversight power to supervise the activities of the DOJ, a weakness to the DOJ’s absolutist position that it has acknowledged in the past.¹¹⁶ Second, the law enforcement power of the federal government is not *exclusively* vested in the executive branch. In *Morrison v.*

¹⁰⁹ Delaney v. United States, 199 F.2d 107, 114 (1st Cir. 1952).

¹¹⁰ Shanks Opinion, *supra* note 8, at 264.

¹¹¹ See, e.g., Cooper Opinion, *supra* note 8, at 72–74.

¹¹² Barenblatt v. United States, 360 U.S. 109, 112 (1959); see also Cooper Opinion, *supra* note 8, at 74 (quoting Barenblatt).

¹¹³ Cooper Opinion, *supra* note 8, at 72 (emphasis added).

¹¹⁴ Barenblatt, 360 U.S. at 112 (emphasis added).

¹¹⁵ See *supra* notes 16–20 and accompanying text.

¹¹⁶ See, e.g., Cooper Opinion, *supra* note 8, at 72.

Olson,¹¹⁷ the Supreme Court examined the constitutionality of the congressionally created Office of the Independent Counsel. There, the Court acknowledged that the authorizing statute “reduces the amount of control or supervision that the Attorney General and, through him, the President exercises over the investigation and prosecution of a certain class of alleged criminal activity.”¹¹⁸ The Court recognized that the independent counsel, a creature of the legislature, was performing “executive” actions by undertaking “law enforcement functions that typically have been undertaken by officials within the Executive Branch.”¹¹⁹ Nonetheless, the Court reasoned that it “simply d[id] not see how the President’s need to control the exercise of that discretion is *so central to the functioning of the Executive Branch* as to require as a matter of constitutional law that the counsel be terminable at will by the President.”¹²⁰ *Morrison*, therefore, stands for the proposition that law enforcement is not *exclusively* an executive branch function,¹²¹ such that *Barenblatt* would preclude congressional investigation into the performance of that function.

Third, and perhaps most importantly, the Supreme Court has “squarely rejected the argument that the Constitution contemplates a complete division of authority between the three branches.”¹²² Instead, as the Court explained in *Nixon v. Administrator of General Services* (referred to hereafter as *Nixon v. GSA*), when Congress “prevents the Executive Branch from accomplishing its constitutionally assigned functions,” the proper inquiry is determining “whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.”¹²³ Therefore, to the extent that congressional access to open DOJ files infringes upon the DOJ’s ability to perform its constitutionally assigned investigation and prosecution functions, the *Nixon v. GSA* test, weighing the impact

¹¹⁷ *Morrison v. Olson*, 487 U.S. 654 (1988).

¹¹⁸ *Id.* at 695.

¹¹⁹ *Id.* at 691.

¹²⁰ *Id.* at 691–92 (emphasis added).

¹²¹ See also *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 751 (9th Cir. 1993) (holding that “prosecutorial functions need not always be undertaken by Executive Branch officials” and denying that “only the Executive Branch has the power to enforce laws, and therefore to prosecute violations of law”).

¹²² *Nixon v. Adm’r of Gen. Servs.* (*Nixon v. GSA*), 433 U.S. 425, 443 (1977) (citing *United States v. Nixon*, 418 U.S. 683, 707 (1974)).

¹²³ *Id.*

on the DOJ versus the need to promote congressional objectives, is the proper standard.

C. Law Pertaining to Access to Open Case Files

While the Supreme Court does not appear to have directly addressed the question of whether Congress may access the DOJ's files on open cases during congressional investigations, several leading cases strongly suggest that it may do so.

As a general matter, "the Executive cannot, any more than the other branches of government, invoke a general confidentiality privilege to shield its officials and employees from investigations by the proper governmental institutions into possible criminal wrongdoing."¹²⁴ This is because congressional access to materials "that [] shed light upon issues in civil or criminal litigation" serves "a social interest that cannot be doubted."¹²⁵

For example, in *Sinclair v. United States*, the DOJ had instituted a lawsuit against Mammoth Oil Company charging the company with fraud and conspiracy and also began a separate grand jury investigation into the company.¹²⁶ At the same time, Congress sought to investigate the DOJ's handling of the Teapot Dome scandal, which implicated the Mammoth Oil case.¹²⁷ Sinclair, a defendant in the federal lawsuit, was explicitly questioned regarding matters "relat[ing] to pending controversies before any of the Federal courts in which Mr. Sinclair is a defendant, and which questions would involve his defense."¹²⁸ Sinclair refused to answer those questions and was held in contempt.¹²⁹ The Supreme Court affirmed Sinclair's contempt conviction, holding that, so long as Congress has a valid legislative purpose animating its investigation, "the authority of that body, directly or through its committees, to require pertinent disclosures in aid of its own constitutional power is not abridged because the information sought to be elicited may also be of use

¹²⁴ S. Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 731 (D.C. Cir. 1974).

¹²⁵ *Nixon v. GSA*, 433 U.S. at 453–54.

¹²⁶ *Sinclair v. United States*, 279 U.S. 263, 288–90 (1929); *see also* ROSENBERG, *supra* note 70, at 37.

¹²⁷ ROSENBERG, *supra* note 70, at 35–37.

¹²⁸ *Sinclair*, 279 U.S. at 290 (quotation marks omitted).

¹²⁹ *Id.* at 288–89.

in" the "prosecution of pending suits."¹³⁰

Other cases have similarly held that the pendency of civil and criminal proceedings does not inhibit congressional investigations that may demand evidence relevant to those proceedings. In *Hutcheson v. United States*, the Supreme Court built on *Sinclair* to hold that "a congressional committee which is engaged in a legitimate legislative investigation need not grind to a halt whenever responses to its inquiries might potentially be harmful to a witness in some distinct proceeding, or when crime or wrongdoing is disclosed."¹³¹ Additionally, the Court in *Nixon v. GSA* held that "[l]egislation designed to guarantee the availability of evidence for use at criminal trials is a fair exercise of Congress' responsibility to the 'due process of law in the fair administration of criminal justice.'"¹³²

Although these cases teach that Congress may investigate matters relating to open criminal and civil cases and obtain documents that may be relevant to those proceedings, nonetheless there are limits on congressional investigations in this area. Because Congress is not "a law enforcement or trial agency,"¹³³ and there is therefore "a clear difference between Congress's legislative tasks and the responsibility of a grand jury, or any institution engaged in like functions,"¹³⁴ "Congress is without authority to compel disclosures for the purpose of aiding the prosecution of pending suits"¹³⁵ In addition, it is unclear whether Congress may claim that it has a valid legislative purpose in investigating incompetence or malfeasance in particular prosecutions where those prosecutions are still pending and therefore unresolved.¹³⁶

Those limitations notwithstanding, the Supreme Court has made it clear that Congress may investigate matters that may be

¹³⁰ *Id.* at 295.

¹³¹ *Hutcheson v. United States*, 369 U.S. 599, 618 (1962) (internal citation omitted).

¹³² *Nixon v. Adm'r of Gen. Servs. (Nixon v. GSA)*, 433 U.S. 425, 477 (quoting *United States v. Nixon*, 418 U.S. 683, 713 (1974)).

¹³³ *Watkins v. United States*, 354 U.S. 178, 187 (1957).

¹³⁴ *S. Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 732 (D.C. Cir. 1974).

¹³⁵ *Sinclair*, 279 U.S. at 295.

¹³⁶ *Cf. Kilbourn v. Thompson*, 103 U.S. 168, 194 (1880) ("How could the House of Representatives know, until it had been fairly tried, that the courts were powerless to redress the creditors of Jay Cooke & Co.? The matter was still pending in a court, and what right had the Congress of the United States to interfere with a suit pending in a court of competent jurisdiction?").

the subject of active criminal or civil litigation and may obtain documents that relate to those proceedings.¹³⁷ This body of case law strongly suggests that the fact that a DOJ investigation or prosecution is open at the time of a congressional investigation is no excuse for the DOJ to withhold those files from Congress.

III. HISTORICAL EXAMPLES OF CONGRESSIONAL INVESTIGATIVE ACCESS TO OPEN DOJ CASE FILES

The law supports the contention that Congress may access the DOJ's open case files, and so too does historical practice. This Section recounts several examples—from the Founding to the present—where the DOJ has given Congress access to its open case files. Indeed, during Congress's investigation of alleged corruption in the FBI's field office relating to its use of Whitey Bulger as an informant, it “heard expert testimony describing over [thirty] specific instances since 1920 of the Department of Justice giving access to prosecutorial memoranda *for both open and closed cases*.”¹³⁸ While more complete accounts of such interactions between the DOJ and Congress have been laid out elsewhere, this Section recounts these specific examples both to (1) show that Congress has, indeed, accessed the DOJ's files on open cases several times from the Founding to present, and (2) highlight several key features of the negotiations that led to Congress's access to those documents.¹³⁹

¹³⁷ *S. Select Comm. on Presidential Campaign Activities*, 498 F.2d at 732.

¹³⁸ ROSENBERG, *supra* note 70, at 56 (emphasis added).

¹³⁹ See *id.*; ALISSA M. DOLAN & TODD GARVEY, CONG. RSCH. SERV., CONGRESSIONAL INVESTIGATIONS OF THE DEPARTMENT OF JUSTICE, 1920-2012: HISTORY, LAW, AND PRACTICE (2012); Damaging Disarray: Organizational Breakdown and Reform in the Justice Department's Environmental Crimes Program, 103d Cong., 2d Sess., 321–50 (Dec. 1994) (Memorandum from Morton Rosenberg to Subcommittee on Oversight and Investigations, House Committee on Energy and Commerce (Oct. 15, 1993)); *Investigation into Allegations of Justice Department Misconduct in New England—Volume 1: Hearings Before the H. Comm. on Gov't Reform*, 107th Cong., 1st and 2d Sess., 520–56, 562–604 (2002) (testimony of Charles Tiefer describing history of the DOJ providing Congress access to its files in open and closed cases since Watergate and testimony of Morton Rosenberg describing similar history from 1920s forward).

*A. Investigations Involving Congressional Access to Open DOJ
Files or Accommodations Required for Access*

1. The Investigation of Aaron Burr

In the summer of 1807, Aaron Burr and General James Wilkinson, Governor of the Louisiana Territory, conspired to invade Mexico as the heads of a private army.¹⁴⁰ However, while the planning was underway, “rumors began to swirl that Burr was conspiring to detach States by the Allegheny Mountains from the Union.”¹⁴¹ Wilkinson, worried he would be associated with Burr, wrote a letter to President Thomas Jefferson, in which he accused Burr of “plotting to attack New Orleans and revolutionize the Louisiana Territory.”¹⁴² In response to a request for information from the House of Representatives, on January 22, 1807 President Jefferson sent Congress a letter publicly accusing Aaron Burr of being “the prime mover” of “designs [that] were in agitation in the western country unlawful and unfriendly to the peace of the union.”¹⁴³ Although the predicate information for the claim was constituted by mere “rumors, conjectures, and suspicions,”¹⁴⁴ President Jefferson recounted in his letter how he sent a confidential informant to the area, seemingly unconcerned with exposing sources and methods.¹⁴⁵ President Jefferson declared that Burr’s “guilt is placed beyond question,”¹⁴⁶ even though Burr was not yet in custody.¹⁴⁷

Thus, early in the history of the Republic, the executive branch responded to a congressional inquiry and publicly released a summary of an open investigation, disclosing sources and methods, naming the primary target, and even declaring his guilt.¹⁴⁸

¹⁴⁰ *Trump v. Vance*, 591 U.S. 786, 793–94 (2020).

¹⁴¹ *Id.* at 794.

¹⁴² *Id.*

¹⁴³ 16 ANNALS OF CONG. 39–40 (1807).

¹⁴⁴ *Id.* at 39.

¹⁴⁵ *Id.* at 39–40.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 40, 43. Burr’s trial did not take place until the fall of 1807. See *United States v. Burr*, 25 F. Cas. 187 (C.C.D. Va. 1807) (Marshall, C.J.).

¹⁴⁸ 16 ANNALS OF CONG. 40, 43 (1807).

2. The Palmer Raids

In response to concerns about a communist conspiracy to conduct a nationwide bombing campaign, between November 1919 and January 1920, Attorney General A. Mitchell Palmer ordered DOJ and Bureau of Investigation agents to conduct mass raids and arrests of suspected radicals.¹⁴⁹ Thousands of suspected radicals were arrested and the DOJ began the process, through the Department of Labor (which had immigration authority), of deporting hundreds of those it had rounded up in the raids.¹⁵⁰ Public and congressional “criticism of Palmer and his tactics that emerged from the year of fear was deep and scathing.”¹⁵¹ The House and Senate both began investigations into the DOJ’s conduct.¹⁵²

Acting Secretary of Labor Louis Post, who had the authority to conduct deportations, was called to testify before Congress.¹⁵³ “Post told Congress about the Justice Department’s wide-scale abuse of power and about warrantless searches and arrests.”¹⁵⁴ In addition, despite the cases of the arrestees being open at the time of his appearance, Post testified that “[v]ery few, if any, were the kind of aliens that Congress could in reasonable probability have intended to comprehend in its anti-alien legislation” and eventually canceled the vast majority of warrants after his testimony.¹⁵⁵ “By the middle of 1920, the paranoia of the Red Scare was on the wane, and a serious critique of the civil rights violations of the Palmer Raids began to emerge.”¹⁵⁶

The Senate then called Attorney General Palmer and his Special Assistant, J. Edgar Hoover, for three days of testimony.¹⁵⁷ The two men “discussed the details of numerous deportation cases, including cases which were on appeal.”¹⁵⁸ Palmer provided

¹⁴⁹ See Harlan Grant Cohen, Note, *The (Un)Favorable Judgment of History: Deportation Hearings, the Palmer Raids, and the Meaning of History*, 78 N.Y.U. L. REV. 1431, 1453–61 (2003) (describing build-up to and execution of the raids).

¹⁵⁰ *Id.* at 1460–62.

¹⁵¹ *Id.* at 1461.

¹⁵² See ROSENBERG, *supra* note 70, at 35.

¹⁵³ Cohen, *supra* note 149, at 1462.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 1465.

¹⁵⁷ ROSENBERG, *supra* note 70, at 35.

¹⁵⁸ *Id.*

Congress with a variety of materials relating to open cases, including Bureau of Investigation reports on deportation cases.¹⁵⁹ Palmer also disclosed:

instructions to the Bureau outlining the procedures to be followed in the surveillance and arrest of suspected Communists, and a lengthy memorandum of comments and analysis prepared by one of Palmer's special assistants, which responded to a District Court opinion, at the time under appeal, critical of the Department's actions in these deportation cases.¹⁶⁰

The congressional investigation into the Palmer Raids shows that Congress has exercised investigative oversight over active law enforcement investigations since the earliest days of centralized federal law enforcement.

3. Teapot Dome

In the wake of the Teapot Dome scandal, "a Senate select committee was constituted to investigate 'charges of misfeasance and nonfeasance in the Department of Justice,' in failing to prosecute the malefactors in the Department of the Interior as well as other cases."¹⁶¹ The select committee heard extensive testimony from Bureau of Investigation agents and DOJ attorneys "about specific instances of the Department's failure to prosecute alleged meritorious cases."¹⁶² "*Not all of the cases upon which testimony was offered were closed*, as one of the committee's goals in its questioning was to identify cases in which the statute of limitations had not run out and prosecution was still possible."¹⁶³ This testimony included the testimony of George W. Storck, a DOJ investigator, who testified about his investigations in cases that remained open,¹⁶⁴ returns obtained in response to a grand jury subpoena duces tecum,¹⁶⁵ and a report Storck wrote to

¹⁵⁹ *Id.* (citing *Charges of Illegal Practices of the Department of Justice: Hearing Before a Subcomm. of the S. Comm. on the Judiciary*, 66th Cong. 12-14, 18-19, 484-538 (1921)).

¹⁶⁰ *Id.* (citing *Charges of Illegal Practices of the Department of Justice: Hearing Before a Subcomm. of the S. Comm. on the Judiciary*, 66th Cong. 12-14, 18-19, 484-538 (1921)).

¹⁶¹ *Id.* (quoting *McGrain v. Daugherty*, 273 U.S. 135, 151 (1927)).

¹⁶² *Id.* at 36.

¹⁶³ *Id.* at 36 (emphasis added).

¹⁶⁴ See *Investigation of Hon. Harry M. Daugherty, Formerly Attorney General of the United States: Hearing on S. Res. 157 Before the S. Select Comm. on Investigation of the Att'y Gen.*, 68th Cong. 1495-1549 (1924) [hereinafter *Investigation of Hon. Harry M. Daugherty*].

¹⁶⁵ See *id.* at 1499-1500.

the Attorney General on a still-active case.¹⁶⁶

This initial cooperation, however, seems to have come from the initiative of the witnesses themselves; the DOJ itself initially refused to cooperate.¹⁶⁷ However, after Attorney General Harry Daugherty resigned amid charges of corruption, his successor, Harlan F. Stone, “granted [Congress] broad access to Department files.”¹⁶⁸ The chairman of the committee went so far as to comment that Stone “is furnishing us with all the files we want, whereas the former Attorney General, Mr. Daugherty, refused nearly all that we asked.”¹⁶⁹

4. AT&T Wiretaps

In the mid-1970s, the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce conducted an investigation to “examine the nature and extent of warrantless wiretapping in the United States for asserted national security purposes, and to determine whether legislation was required to curb possible abuse of that power.”¹⁷⁰ The subcommittee subpoenaed AT&T, requiring it “to turn over to the Subcommittee all national security request letters” sent to it by the FBI.¹⁷¹ The DOJ and the subcommittee attempted to negotiate to determine what, if any, accommodations each branch would provide as prerequisites to the DOJ allowing access to those files; however, negotiations broke down and the DOJ sued to block enforcement of the subpoena.¹⁷²

When further negotiations proved fruitless, the D.C. Circuit prescribed a set of accommodations each branch needed to make to ensure Congress would have access to the documents. And while the documents related to older, and therefore likely closed cases,¹⁷³ the case is nonetheless illuminating for the purposes of

¹⁶⁶ *See id.* at 1514–15.

¹⁶⁷ *See* ROSENBERG, *supra* note 70, at 36.

¹⁶⁸ *Id.*

¹⁶⁹ *Investigation of Hon. Harry M. Daugherty*, *supra* note 164, at 2389.

¹⁷⁰ *United States v. Am. Tel. & Tel. Co. (AT&T)*, 567 F.2d 121, 123 (D.C. Cir. 1977).

¹⁷¹ *Id.*

¹⁷² *Id.* at 123–24.

¹⁷³ *Id.* at 131 (noting sample years from which memoranda were to be culled were 1972 and 1975).

this paper given the accommodations the D.C. Circuit required. First, the court mandated that the DOJ could use a “substitution procedure,” in which sensitive information was substituted with filler, so long as committee staff would have the ability to collect a random sample of unedited memoranda and compare them with the edited memoranda.¹⁷⁴ Further, staff would be allowed to take notes, but the notes would be left in the custody of the FBI under seal.¹⁷⁵ In addition, the court determined that staff for the subcommittee could be subject to security clearance requirements depending on the nature of the documents.¹⁷⁶ And with these significant accommodations in place, Congress was allowed to access the files it sought.

5. Abscam

In 1982, the Senate established a select committee to study the DOJ’s undercover activities, mainly focusing on its conduct during the Abscam investigations and prosecutions.¹⁷⁷ Despite many of the high-profile criminal convictions of politicians remaining open on appeal while the select committee conducted its investigation,¹⁷⁸ the DOJ gave Congress “access to almost all of the confidential documents generated during the covert stage of the undercover operation known as Abscam,” as well as prosecutorial memoranda from Abscam cases.¹⁷⁹

The select committee agreed to extensive accommodations to protect the integrity of the DOJ’s prosecutions. Pursuant to an agreement between the select committee and the DOJ, grand jury materials protected by Rule 6(e) were withheld; the DOJ was allowed to withhold documents that might reveal sensitive sources or methods, although it was required to describe the documents withheld, the basis for withholding, and potentially negotiate access to those documents; the select committee could use information gleaned from the documents but could not say

¹⁷⁴ *Id.* at 131–32.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 134.

¹⁷⁷ ROSENBERG, *supra* note 70, at 44–45.

¹⁷⁸ *See, e.g.*, *United States v. Myers*, 692 F.2d 823 (2d Cir. 1982); *United States v. Kelly*, 707 F.2d 1460 (D.C. Cir. 1983); *United States v. Williams*, 705 F.2d 603 (2d Cir. 1983); *United States v. Jenrette*, 744 F.2d 817 (D.C. Cir. 1984); *United States v. Jannotti*, 673 F.2d 578 (3d Cir. 1982); *United States v. Weisz*, 718 F.2d 413 (D.C. Cir. 1984).

¹⁷⁹ ROSENBERG, *supra* note 70, at 45.

from which document it gleaned what information; confidential documents were kept in a secure room; and access to confidential documents was limited to committee members and select staff.¹⁸⁰

6. Trump and Biden Classified Documents

After a long-running dispute between former President Trump and the National Archives and the DOJ, on August 8, 2022, the FBI executed a search warrant on the former President's residence, where they found, among other things, over 100 classified documents.¹⁸¹ Although the DOJ was already investigating the matter, on November 18, 2022, Attorney General Merrick Garland appointed Jack Smith as Special Counsel to oversee, among other investigations, "the ongoing investigation involving classified documents and other presidential records, as well as the possible obstruction of that investigation."¹⁸²

On November 2, 2022, "[t]he White House discovered classified documents from Biden's time as Vice President at the Penn Biden Center in Washington, D.C."¹⁸³ And on December 20, 2022, additional classified documents were found at President Biden's residence.¹⁸⁴ Just as he had done with former President Trump, on January 12, 2023, Attorney General Garland appointed Robert K. Hur as Special Counsel to investigate "the possible unauthorized removal and retention of classified documents or other records discovered at the Penn Biden Center for Diplomacy and Global Engagement and the Wilmington, Delaware, private

¹⁸⁰ *Id.*

¹⁸¹ See Rosalind S. Helderman & Dan Rosenzweig-Ziff, *A Timeline of What Led to Trump's Classified Documents Indictment: Key Moments in the Investigation of Donald Trump's Handling of Classified Documents After Leaving the White House*, WASH. POST, <https://www.washingtonpost.com/national-security/2022/08/30/mar-a-lago-timeline-trump-documents/> [https://perma.cc/GX4L-C28J] (June 11, 2023, 3:29 PM EDT).

¹⁸² Press Release, Off. Pub. Affs., U.S. Dep't of Just., Appointment of a Special Couns. (Nov. 18, 2022), <https://www.justice.gov/archives/opa/pr/appointment-special-counsel-0> [https://perma.cc/2U79-AA6L].

¹⁸³ Erin Doherty, *What We Know About the Biden Classified Documents Investigation*, AXIOS, <https://www.axios.com/2023/01/12/biden-classified-documents-timeline> [https://perma.cc/ZF8N-8L4X] (Feb. 1, 2023).

¹⁸⁴ *Id.*

residence of President Joseph R. Biden Jr.”¹⁸⁵

As of the time of writing, both investigations remain open. Yet, in March and April 2023, “the so-called Gang of Eight, which includes the leaders of both chambers and the chairmen and ranking members of the two congressional intelligence committees,” began a “concerted bipartisan push” for access to the classified documents.¹⁸⁶ The DOJ initially resisted, arguing that “if the documents leaked, it could compromise any potential prosecution.”¹⁸⁷ In response, the Gang of Eight “stressed that a special counsel’s investigation does not obviate their oversight responsibilities,” and the executive branch eventually relented, granting the Gang of Eight access to the documents in early April 2023.¹⁸⁸

These documents are the predicate documents that serve as the basis for two open, and overwhelmingly important, criminal investigations. And the documents are related to national security and foreign affairs—documents normally treated with great deference by the coordinate branches during interbranch disputes. Nonetheless, the DOJ shared them with the Gang of Eight. Once more, the DOJ and Congress negotiated congressional access to open DOJ case files.

B. Key Takeaways

A review of these cases allows us to synthesize two important features of interbranch fights over congressional access to open DOJ files. First, Congress has gained access to these files through the “hurly-burly, the give-and-take of the political process between the legislative and the executive,”¹⁸⁹ that is, through negotiations with the DOJ. While *AT&T* stands apart as an exception to the rule, the court only stepped in after extensive

¹⁸⁵ Press Release, Off. Pub. Affs., U.S. Dep’t of Just., Appointment of a Special Couns. (Jan. 12, 2023), <https://www.justice.gov/archives/opa/pr/appointment-special-counsel-1> [<https://perma.cc/X4A7-9REK>].

¹⁸⁶ Karoun Demirjian & Julian E. Barnes, *Leaders in Congress Given Classified Records Found at Homes of Biden and Trump*, N.Y. TIMES (Apr. 11, 2023), <https://www.nytimes.com/2023/04/11/us/politics/congress-trump-biden-classified-documents.html> [<https://perma.cc/G3LB-YTHE>].

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Trump v. Mazars USA, LLP*, 591 U.S. 848, 859 (2020) (quoting *Hearings on S. 2170 et al. Before the Subcomm. on Intergovernmental Rels. of the S. Comm. on Gov’t Operations*, 94th Cong., 1st Sess., 87 (1975) (statement of A. Scalia, Assistant Att’y Gen., Off. of Legal Couns.)).

negotiations, which “did not resolve the dispute,” but nonetheless “did narrow the gap between the parties and provide a more informed basis for further judicial consideration.”¹⁹⁰ And the court took great pains to explain that the negotiations:

reflect[ed] something of greater moment than the mere degree to which ordinary parties are willing to compromise. Given our perception that it was a deliberate feature of the constitutional scheme to leave the allocation of powers unclear in certain situations, the resolution of conflict between the coordinate branches in these situations must be regarded as an opportunity for a constructive *modus vivendi*, which positively promotes the functioning of our system. The Constitution contemplates such accommodation. Negotiation between the two branches should thus be viewed as a dynamic process affirmatively furthering the constitutional scheme. Correspondingly, a court judgment that reflects the compromises achieved through negotiation marks an allocation of powers determined in furtherance of the constitutional process.¹⁹¹

AT&T and the other examples cited above teach that negotiations between the coordinate branches govern the process for congressional investigative access to the DOJ’s files.

Second, these negotiations did not only produce mere access to the files; rather, the negotiations reflected an agreement by each branch to provide specific accommodations to the other in accessing the files. A (non-exhaustive) list of those accommodations, and the instances in which those accommodations were provided, follows in Table 1.

¹⁹⁰ *United States v. Am. Tel. & Tel. Co. (AT&T)*, 567 F.2d 121, 130 (D.C. Cir. 1977).

¹⁹¹ *Id.* (footnote omitted).

Table 1
Accommodations Provided by the Coordinate Branches

By Congress	By the Executive Branch
Agreeing not to demand documents and testimony regarding the grand jury process and protected by Rule 6(e) (Abscam)	Offering various levels of personnel—from line-level investigators and prosecutors to top officials—for testimony (Palmer Raids; Teapot Dome)
Allowing for substitutions and redactions of sensitive information in DOJ documents (AT&T)	Providing full access to investigative reports and deliberative prosecutorial memoranda—under open or restricted access (Palmer Raids; Teapot Dome; Abscam)
Only allowing certain members and/or staff to view the files in question, including with security clearance requirements (AT&T; Abscam; Trump & Biden)	Agreeing to let congressional members and staff take notes on the materials, but keeping those notes in the custody of the FBI (AT&T)
Not seeking documents and testimony that would reveal sensitive sources and methods (Abscam)	Summarizing documents the DOJ withheld from Congress and providing a basis for withholding the documents (Abscam)
Viewing documents in a secure room (AT&T; Abscam; Trump & Biden)	Providing Congress with information regarding targets of ongoing investigations and the predicate information supporting those investigations (Burr; Teapot Dome; Trump & Biden)

As Table 1 demonstrates, both Congress and the executive branch have provided the other branches with significant accommodations to ensure that access to the documents Congress sought would be under conditions that mollified the concerns of the other branch. And history and tradition teach that where one branch has a more compelling interest in the negotiation, the other branch has provided a wider array of accommodations.

IV. PROPOSED FRAMEWORK FOR NEGOTIATING CONGRESSIONAL ACCESS TO OPEN DOJ CASE FILES

As this paper has sought to demonstrate, congressional investigative access to open DOJ case files occurs through a dynamic negotiation process, almost always (except for *AT&T*) occurring out of court, during which each branch may provide the other with a wide range of accommodations. Yet, as described in Section II.B, *supra*, the DOJ has raised several weighty objections to congressional access to those files. These objections—including protecting national security, keeping sensitive sources and methods confidential, grand jury secrecy, and preserving the integrity of ongoing investigations and prosecutions—raise serious separation of powers concerns.

Nixon v. GSA teaches that when Congress “prevents the Executive Branch from accomplishing its constitutionally assigned functions,” the proper inquiry is determining “whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.”¹⁹² The gravity of these negotiations suggests that “[a] balanced approach is necessary, one that takes a considerable impression from the practice of the government, and resist[s] the pressure inherent within each of the separate [b]ranches to exceed the outer limits of its power.”¹⁹³

Yet, and perhaps because these negotiations occur out of court, there has been little, if any, principled guidance on how to conduct that balancing test in the specific context of congressional access to open DOJ files. This Section proposes a series of factors that Congress and the DOJ should weigh when

¹⁹² *Nixon v. Adm’r of Gen. Servs. (Nixon v. GSA)*, 433 U.S. 425, 443 (1977).

¹⁹³ *Mazars*, 591 U.S. at 869 (2020) (internal citations and quotation marks omitted).

applying that test to this context. And this paper argues that, in keeping with history and tradition, the greater the balance of those factors weighs in favor of one branch, the more substantial accommodations (of the type listed in Table 1, *supra*) the other branch should provide.

A. Congressional Factors

Several factors weigh in favor of Congress during negotiations for access to open DOJ case files. First, history and tradition teach that where a congressional investigation has a popular mandate, Congress has been given greater access to DOJ files. For example, in the wake of the Palmer Raids, a “serious critique of the civil rights violations of the Palmer Raids began to emerge.”¹⁹⁴ Thereafter, Attorney General Palmer and J. Edgar Hoover sat for a full three days of testimony before Congress¹⁹⁵ and provided Congress with a broad array of information on open cases, including investigative reports and deliberative prosecutorial memoranda.¹⁹⁶ Similarly, after the Teapot Dome scandal, public outrage in response to alleged corruption by Attorney General Dougherty forced him to resign,¹⁹⁷ and the DOJ thereafter began, in the words of the committee chairman, “furnishing us with all the files we want[ed], whereas the former Attorney General, Mr. Daugherty, refused nearly all that we asked.”¹⁹⁸ More recently, the massive public spectacle surrounding the execution of a search warrant at the premises of a former President and the subsequent discovery of classified documents that were potentially improperly held by President Biden helped force the DOJ’s hand into providing the Gang of Eight with access to the predicate documents supporting both open Special Counsel criminal investigations.¹⁹⁹ These examples teach that the greater public support Congress has for its investigation, the greater access the DOJ should provide.

Mazars is also instructive in suggesting additional factors that may weigh in Congress’s favor where its requests “implicate

¹⁹⁴ Cohen, *supra* note 149, at 1465 (footnote omitted).

¹⁹⁵ ROSENBERG, *supra* note 70, at 35.

¹⁹⁶ *Id.* (citing *Charges of Illegal Practices of the Department of Justice: Hearing Before a Subcomm. of the S. Comm. on the Judiciary*, 66th Cong. 431–43, 458–69, 472–76, 484–538 (1921)).

¹⁹⁷ *See id.* at 35–36.

¹⁹⁸ *Investigation of Hon. Harry M. Daugherty*, *supra* note 164, at 2389.

¹⁹⁹ Demirjian & Barnes, *supra* note 186.

weighty concerns regarding the separation of powers,”²⁰⁰ as is the case in congressional investigations requesting access to open DOJ case files. These factors include the strength of the asserted legislative purpose, the specificity of Congress’s request, and the evidence supporting the nexus between the request and the proffered legislative purpose.²⁰¹ While, strictly speaking, *Mazars* is not binding outside of the context of requests for the President’s personal records, history and tradition support utilizing these factors to weigh Congress’s interests during negotiations for open DOJ case files as well. For example, in *AT&T*, the congressional request for wiretap applications implicated national security, a thorny area that occupies a “‘zone of twilight’ in which the President and Congress share authority or in which its distribution is uncertain.”²⁰² There, Congress’s legislative purpose was strong: “examin[ing] the nature and extent of warrantless wiretapping in the United States for asserted national security purposes, and . . . determin[ing] whether legislation was required to curb possible abuse of that power.”²⁰³ And Congress’s request was highly specific, only requesting letters sent from the FBI to AT&T in 1972 and 1975.²⁰⁴ And viewing the applications would help Congress to determine whether the process was being abused; that is, the evidence was directly connected to the legislative purpose. Together, *Mazars* and *AT&T* suggest that the *Mazars* factors should apply in weighing Congress’s interest.

In sum, the following factors should be considered when weighing Congress’s interest in obtaining open DOJ case files: (1) the extent to which Congress has a public mandate, (2) the strength of its legislative purpose, (3) the specificity of its request, and (4) the nexus between the request and the legislative purpose.

²⁰⁰ *Trump v. Mazars USA, LLP*, 591 U.S. 2019, 869 (2020).

²⁰¹ *Id.* at 869–71.

²⁰² *United States v. Am. Tel. & Tel. Co. (AT&T)*, 567 F.2d 121, 128 (D.C. Cir. 1977) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

²⁰³ *Id.* at 123.

²⁰⁴ *Id.* at 123–24, 131.

B. DOJ Factors

Drawing on this paper's analysis of the DOJ's historical objections to congressional access to its open case files,²⁰⁵ several factors weigh in favor of the DOJ's side of the scale. First, where grand jury materials are involved, Rule 6(e) strictly protects those materials that relate to matters occurring before the grand jury.²⁰⁶ Grand jury secrecy "enjoys ancient common law roots, [and] has received consistent and emphatic protection by the Supreme Court over the years."²⁰⁷ As such, when requests that cover materials implicating Rule 6(e) are involved, the balance tips almost absolutely in the DOJ's favor with respect to those specific materials.

Second, the need to protect information relating to national security and foreign affairs in the DOJ's files is paramount. While national security and foreign affairs are subjects that occupy a "zone of twilight"²⁰⁸ in the constitutional scheme, the Supreme Court has recognized a "more particular and less qualified privilege,"²⁰⁹ "which protects military and state secrets."²¹⁰ The privilege is appropriate where the government shows, "from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged."²¹¹ Therefore, the existence of national security and foreign affairs materials in open DOJ case files does not completely prevent congressional access to those materials; instead, Congress should provide more substantial accommodations to the DOJ to protect the sanctity of those materials.

Third, protecting the integrity and confidentiality of ongoing investigations may weigh in favor of the DOJ. This is especially so where "sensitive techniques, methods, or strateg[ies]"²¹² are

²⁰⁵ See *supra* Section II.B.

²⁰⁶ See FED. R. CRIM. P. 6(e)(6) ("Records, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury.").

²⁰⁷ Shanks Opinion, *supra* note 8, at 258.

²⁰⁸ *AT&T*, 567 F.2d at 128 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

²⁰⁹ *Nixon v. Adm'r of Gen. Servs. (Nixon v. GSA)*, 433 U.S. 425, 447 (1977).

²¹⁰ *United States v. Reynolds*, 345 U.S. 1, 7 (1953).

²¹¹ *Id.* at 10.

²¹² Cooper Opinion, *supra* note 8, at 76.

contained in the requested documents, as protecting the confidentiality of the investigation is vital to the DOJ's role in investigating potential violations of the law because tipping off potential violators to the evidence gathered in a pending investigation, or even the existence of an investigation itself, can help wrongdoers evade being brought to justice.²¹³

Fourth, to the extent that the documents contained in open DOJ files involve communications made to, or solicited by, the President and his or her aides, or where the materials are predecisional and deliberative, the presidential communications and deliberative process executive privileges may apply, respectively.²¹⁴ While these privileges are qualified and may be overcome by showings of need by Congress,²¹⁵ executive privilege is meant to "maintain[] the integrity of the prosecutorial decision-making process."²¹⁶ Therefore, to the extent that executive privilege may apply, the DOJ's interest grows stronger.

Fifth and finally, where the release of information contained in the DOJ's open case files may impinge upon the due process rights of third parties, the balance tilts slightly in the DOJ's favor.²¹⁷ The public disclosure of mere allegations or unsubstantiated claims against individuals, guilty and innocent alike, may violate their privacy and due process rights.²¹⁸ Of course, the executive branch has not been shy in the past about exposing information relating to targets of open investigations, such as in the case of Aaron Burr and the targets of open investigations discussed in the wake of the Teapot Dome scandal.²¹⁹ This factor therefore only weakly tilts the scales in the DOJ's favor.

In sum, the following factors weigh in the DOJ's favor during negotiations for congressional access to the DOJ's files on open cases: (1) the existence of Rule 6(e) materials in the files, (2) the potential exposure of national security and foreign affairs materials, (3) the need to protect the confidentiality and integrity

²¹³ See, e.g., Jackson Opinion, *supra* note 57, at 46.

²¹⁴ See *United States v. Am. Tel. & Tel. Co. (AT&T)*, 567 F.2d 121, 129 (D.C. Cir. 1977); *In re Sealed Case (Espy)*, 121 F.3d 729, 737 (D.C. Cir. 1997).

²¹⁵ *E.g., Espy*, 121 F.3d at 737.

²¹⁶ Cooper Opinion, *supra* note 8, at 77.

²¹⁷ Jackson Opinion, *supra* note 57, at 47.

²¹⁸ Shanks Opinion, *supra* note 8, at 263.

²¹⁹ See ROSENBERG, *supra* note 70, at 35.

of ongoing investigations and prosecutions, (4) the applicability of executive privilege, and (5) the need to protect the due process rights of third parties.

V. CONCLUSION

Throughout our nation's history—from the Founding to the present—Congress and the executive branch have negotiated to provide Congress with access to the DOJ's (or its predecessors') open case files during congressional investigations. This practice is supported—and shaped—by a robust body of case law and history and tradition. Yet, little guidance has existed to consistently guide these negotiations. This paper proposes a series of factors that Congress and the DOJ should balance during such negotiations to determine the interests of each branch. And history and tradition teach that, where one branch has a stronger interest, the other branch should provide a wider array of accommodations. Utilizing this framework would allow both Congress and the DOJ to continue this nation's well-established tradition of congressional access to the DOJ's open files while protecting the constitutional prerogatives of each branch. Consistent adherence to the methodological framework proposed by this paper would therefore benefit the coordinate branches and provide consistency to negotiations that have existed since the Founding and are sure to repeat in the future.