

EXAMINING THE JUSTICE DEPARTMENT'S RESPONSE TO THE IRS TARGETING SCANDAL

HEARING

BEFORE THE
SUBCOMMITTEE ON ECONOMIC GROWTH,
JOB CREATION AND REGULATORY AFFAIRS

OF THE
COMMITTEE ON OVERSIGHT
AND GOVERNMENT REFORM
HOUSE OF REPRESENTATIVES

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Thursday, July 17, 2014

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ECONOMIC GROWTH, JOB CREATION,
AND REGULATORY AFFAIRS,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:04 a.m., in room 2154, Rayburn House Office Building, Hon. Jim Jordan (chairman of the subcommittee) presiding.

Present: Representatives Jordan, DeSantis, Duncan, Gosar, Meadows, Bentivolio, Issa, Gowdy, Cartwright, Duckworth, Connolly, Kelly, Horsford, and Cummings.

Staff present: Melissa Beaumont, Assistant Clerk; Molly Boyl, Deputy General Counsel and Parliamentarian; Lawrence J. Brady, Staff Director; David Brewer, Senior Counsel; Steve Castor, General Counsel; Drew Colliatie, Professional Staff Member; John Cuaderes, Deputy Staff Director; Tyler Grimm, Senior Professional Staff Member; Christopher Hixon, Chief Counsel for Oversight; Laura L. Rush, Deputy Chief Clerk; Jessica Seale, Digital Director; Andrew Shult, Deputy Digital Director; Katy Summerlin, Press Assistant, Sarah Vance, Assistant Clerk; Tamara Alexander, Minority Counsel; Meghan Berroya, Minority Chief Counsel; Aryele Bradford, Minority Press Secretary; Jennifer Hoffman, Minority Communications Director; Juan McCullum, Minority Clerk; Donald Sherman, Minority Chief Oversight Counsel; and Katie Teleky, Minority Staff Assistant.

Mr. JORDAN. The committee will come to order. I want to welcome our guests, and we will get to our witness here in just a few minutes. The subcommittee's hearing today continues the committee's ongoing oversight of the IRS and its targeting of conservative tax-exempt groups.

On May 10, 2013, Lois Lerner apologized for the Internal Revenue Service targeting and responding to a planted question at an obscure tax law event. Four days later, Attorney General, Eric Holder, called the targeting outrageous and unacceptable. He vowed that the Justice Department would begin a criminal investigation. That was May of last year. Here we are now, 14 months later and we have heard virtually nothing from the administration about its criminal investigation. What we have heard gives members on both sides of the aisle cause for concern.

We have learned that Barbara Bosserman, an attorney in the civil rights division, is playing a leading role in the investigation.

Ms. Bosserman is a substantial contributor to the President and the Democrat National Committee, and now it is her job to investigate the targeting of people who opposed the President's policies.

The Attorney General then comes out and says Ms. Bosserman is not alone. She is working with the public integrity section and, of course, the Federal Bureau of Investigation. Then we learn that the public integrity section and the FBI actually met with Lois Lerner in 2010 to discuss how to bring prosecution against these groups; the very same groups that were targeted by the IRS.

These are serious apparent conflicts of interests, but the Justice Department just wants us to look the other way. No big deal, they say. Then we have unnamed law enforcement sources who leaked to the Wall Street Journal that no criminal charges were gonna be filed in the IRS targeting investigation. And then you have the President of the United States go on national television and say there is not a smidgen of corruption in the Internal Revenue Service. Well, if that is not prejudging the investigation I don't know what is.

The House has passed a resolution calling on the attorney general to appoint a special prosecutor. Twenty-six Democrats—and I stress that, 26 Democrats—joined every single Republican in the House of Representatives in approving this measure. But the administration still won't do anything. They still won't appoint a special prosecutor. My question is this: what more will it take for the administration to appoint a special counsel? And then we find out just last month that the IRS lost 2 years of emails from Lois Lerner due to a hard drive crash.

Mr. Cole's testimony says that the Justice Department is investigating. That, of course, is good. Someone in the administration recognizes that there is something rotten with missing emails. But more must be done. We have serious concerns about the administration's investigation and serious questions for our witness today. We need to hold all wrongdoers accountable for the targeting of Americans for exercising their First Amendment rights to speak out in a political fashion. And that is why this hearing is so important.

And with that, I would yield to Mr. Cummings—

Mr. CUMMINGS. Thank you very much, Mr. Chairman—

Mr. JORDAN [continuing]. For an opening Statement. The gentleman is recognized.

Mr. CUMMINGS. Chairman Jordan, and I welcome to this hearing Deputy Attorney General Cole. For more than a year, Republicans have claimed that the White House directed the IRS to target conservative groups. But now that we have conducted our investigation, we know the truth. There is no evidence to suggest that the White House played any role in directing or developing the search terms identified by the inspector general as, "inappropriate," or any other aspect of how IRS employees processed these applications.

We have now conducted, ladies and gentlemen, 42 interviews. These were witnesses that were called by the Republicans, and they make it very clear that an IRS screening agent in Cincinnati developed these inappropriate criteria on his own. We also know, from his supervisor—who described himself as a conservative Republican, that is his quote—that he did this not for political rea-

sons but because he was trying to treat similar cases consistently. Not one of the witnesses we interviewed, including senior officials at the IRS, the Treasury Department and the Justice Department identified any White House role in this process.

Our investigation also confirmed the findings of the inspector general, who was appointed by Republicans, whose audit stated that the IRS employees reported that they were, “not influenced by any individual or organization outside the IRS.” The inspector general has testified repeatedly before Congress that he has identified no evidence of any White House role or political motivation.

So now, the Republicans have a different argument, although they are still trying to somehow link this to the White House. Now they claim that the targeting of the conservative groups is a massive governmentwide conspiracy involving the President, the IRS, the Securities and Exchange Commission, the Federal Election Commission and numerous other agencies, all coordinated in response to the Supreme Court’s decision in *Citizens United*.

They claim that the Justice Department is a key player in the conspiracy. They accuse the department of engaging in criminal—they accuse the Justice Department of the United States of America of engaging in criminal activity by obstructing the committee. They claim the department is delaying or even closing down its own investigation for political reasons. And they claim that the appointment of a special counsel is needed.

Mr. Chairman, our staff prepared a detailed, 32-page memo that sets forth the top 10 most egregious accusations against the Department of Justice as well as specific responses showing why each one is unsubstantiated. And I ask unanimous consent that this memo be entered into the official hearing record.

Mr. JORDAN. Without objection.

Mr. CUMMINGS. Let me address just one of these allegations. Last month, Chairman Issa and Chairman Jordan sent a letter to the attorney general claiming that their department conspired with the IRS to compile an illicit registry with more than a million pages of confidential taxpayer information in order to criminally prosecute conservative groups for their political speech. Here is what that letter said.

“The IRS transmitted 21 disks containing over 1.1 million pages of non-profit tax return information, including confidential taxpayer information protected by Federal law to the Federal Bureau of Investigation in October 2010.”

Their letter then accused the department of working with the IRS to “assemble a massive data base of non-profit groups,” which they called, “an illicit and comprehensive registry.” These accusations are complete nonsense. There is no illicit registry, there is no singling out of conservative groups. The vast majority of information was available to the general public. And this information was never used for any investigation or prosecution. In 2010, the IRS provided form 990’s not only from conservative groups, but from all groups regardless of political affiliation.

And it wasn’t until earlier this year, more than 3 years later, that the department discovered that a very limited amount of confidential taxpayer information was stored on those disks. This was

an inadvertent error that affected only 33 of 12,000 forms on those disks; less than half of 1 percent.

The bottom line, as I close, is that these disks were never even reviewed by the FBI or used as part of any investigation or prosecution. On May 29, the department wrote a letter to the committee, stating as follows, "FBI advises that upon receipt of the disks an analyst imported the index which is set forth in one of the disks into a spreadsheet, but did nothing further with the disks. And to the best of our knowledge, the information contained on the disks was never utilized for any investigative purpose."

That is from the FBI. Where is the so-called illicit registry. The fact is that it simply does not exist. This is not the basis of a White House scandal. This is the latest example of Republicans desperately searching for one and then using any excuse they can to manipulate the facts until they no longer have any resemblance to the truth. Our committee has now held 10 hearings on the issue, and the IRS has spent more than \$18 million responding to congressional investigations. It is time to stop wasting millions of taxpayer dollars and start focusing on reforms to help our government work more effectively and efficiently for the American people.

And with that, I yield back.

Mr. JORDAN. I thank the gentleman. I would just also ask for unanimous consent to enter into the record a couple of emails from 2010 from Mr. Pilger, a lawyer in the public integrity section of the Justice Department. Emails to Lois Lerner, and I will just quote—"Thanks, Lois. The FBI says raw format is best because they can put this into their systems." Again, the point that the ranking member was just talking about: 1.1 million pages, 21 disks of information. The FBI got it in exact format they wanted. Had this information for 4 years. And I am aware of the testimony from the Justice Department that they did not use this information.

But what I also know is they had it for 4 years and it did contain 6103 confidential taxpayer information.

Mr. CUMMINGS. Would the gentleman yield for just—

Mr. JORDAN. I would ask unanimous consent, I would ask that we enter this into the record, as well.

Mr. CUMMINGS [continuing]. The gentleman yield just 15 seconds?

Mr. JORDAN. I recognize the ranking member.

Mr. CUMMINGS. And I would ask that Mr. Cole—since we want to be effective and efficient and not be caught up in distraction and dysfunction—that when he answers his questions that he be allowed to answer what you just Stated. Because I want to hear the answer to that, too. All right?

Mr. JORDAN. But I do, too, because we are gonna ask him about it.

Mr. CUMMINGS. All right.

Mr. JORDAN. I hope he does answer and doesn't say it is an ongoing investigation. I hope he does answer our questions today.

Mr. CUMMINGS. Very well.

Mr. JORDAN. That is why we got him here.

Mr. CUMMINGS. Very well.

Mr. JORDAN. Thank you. Anyone else wish to make an opening Statement? For Mr. Cartwright, Ms. Duckworth?

The gentlelady is recognized.

Ms. DUCKWORTH. Thank you, Mr. Chairman. I am reading the opening Statement on behalf of Ranking Member Cartwright. And also, thank you, Deputy General Cole, for testifying today.

On May 14, 2013, Inspector General Russell George released a report stating that IRS employees had used inappropriate criteria to screen applicants for tax-exempt status. Republican and Democratic members, including myself, condemned the IRS mismanagement identified in the inspector general's report. Despite legitimate concerns expressed by some members before this committee had even begun to investigate, Chairman Issa went on national television and declared the IRS was involved in the targeting of the President's political enemies.

The inspector general has repeatedly refuted this baseless allegation. He reported that senior leaders at the IRS said the criteria were not influenced by any individual or organization outside the IRS. Then, on May 17, 2013, the inspector general was asked before a Ways and Means Committee, "Did you find any evidence of political motivation in the selection of tax exemption applicants?" He responded, "We did not, sir."

After interviewing 42 employees in the IRS, Treasury Department and DOJ, and receiving more than 680,000 pages of documents, the committee has not found any evidence of White House involvement or political bias.

Despite these facts, Republicans continue to invent partisan election season conspiracy theories. One of the latest allegations is that the Supreme Court's decision in the Citizens United prompted President Obama, Democratic Members of Congress and the IRS, DOJ and other agencies to launch a governmentwide effort targeting conservative groups. While I firmly believe that the Citizens United decision severely undermines our campaign finance laws—allowing special interest dollars to drown out the voices of average Americans—Republican attempts to characterize these concerns as evidence of political pressure for agencies to target conservative groups lack merit.

These preposterous accusations have also been contradicted by the committee's own investigation. We already know that the inappropriate criteria started with IRS employees in Cincinnati. The inspector general's report said, "that they developed and implemented inappropriate criteria." The IRS screening group manager in Cincinnati confirmed this fact in a committee interview. He explained that his employees first came up with inappropriate search terms not for political reasons, but to promote consistency. And he proved his point by telling us that he is a conservative Republican.

Former IRS commissioner, Doug Shulman, a 2008 President Bush appointee, was asked, "Did the Citizens United case in any way affect the IRS process by handling tax-exempt applications." And his answer? "No. You know, to the best of my knowledge, it did not."

Likewise, the head of the election crimes branch at DOJ said, "Citizens United is a not a problem. It is the law, and so no, I am not aware of any effort or part of any effort to fix a problem from Citizens United."

While Republicans continue to promote their unfounded allegations, they conveniently overlook the funneling of dark money into elections; 501(c)(4) organizations are not barred from participating in political campaigns. But the regulations are clear. They State that political activity must be an insubstantial amount of the group's overall activity, less than 50 percent. These groups can already gain tax-exemption as a section 527 organization, but that would require them to disclose their donors rather than keeping the American people in the dark about where they are getting their money. As I have repeatedly Stated, as I have repeatedly said, anonymous money in politics disrupts the democratic process.

That is why Ranking Member Cartwright introduced the Open Act, which would require corporations and unions to disclose their political spending to shareholders and members. This legislation will shine a light on the dark money funding political activities. I commend Chairman Leahy and Senator Udall of the Senate Judiciary Committee for advancing SJ Resolution 19, a joint resolution proposing an amendment to the Constitution restoring reasonable limits on financial contributions and expenditures in elections.

Thank you, Mr. Chairman, and I yield back.

Mr. JORDAN. I thank the gentlelady.

Members will have 7 days to submit opening Statements for the record.

We now welcome our witness. The Honorable James M. Cole is the deputy attorney general of the United States. Mr. Cole, you know how this works. If you would stand up and raise your right hand.

[Witness sworn.]

Thank you. Pleased to have you with us, Mr. Cole. Again, you have done this a few times. You got 5 minutes, more or less, but around 5 and you get to go. And then you get to answer our questions.

Fire away.

**STATEMENT OF HON. JAMES M. COLE, DEPUTY ATTORNEY
GENERAL, UNITED STATES DEPARTMENT OF JUSTICE**

Mr. COLE. I will take less than that, Mr. Chairman. And before I start, I want to thank the chairman for accommodating the request I made to have a rescheduling of the date of this hearing. When it was first scheduled, I was already scheduled to be down at the Southwest border looking at the McAllen Station and dealing with the issues down, and meeting with the United States attorneys on the southwest border to try and deal with the issues we have there, as well. So thank you for accommodating that.

Mr. JORDAN. You bet.

Mr. COLE. I am here today to testify in response to the committee's oversight interest in allegations that the Internal Revenue Service targeting conservative groups seeking tax-exempt status. When the allegations of IRS targeting surfaced in May 2013, the attorney general immediately ordered a thorough investigation of them. That criminal investigation is being conducted by career attorneys and agents of the department's criminal and civil rights division, the Federal Bureau of Investigation, and the Treasury inspector general for tax administration. That is known as TIGTA.

I have the utmost confidence in the career professionals in the department and in TIGTA. And I know that they will follow the facts wherever they lead and apply the law to those facts. While I understand that you are interested in learning about the results of the investigation, in order to protect the integrity and independence of this investigation we cannot disclose non-public information about the investigation while it remains pending. This is consistent with the long-standing department policy across both Democratic and Republican administrations, which is intended to protect the effectiveness and independence of the criminal justice process as well as the privacy interests of third parties.

I can, however, tell you that the investigation includes investigating the circumstances of the lost emails from Ms. Lerner's computer. In response to your requests, we have undertaken substantial efforts to cooperate with the committee in a manner that is also consistent with our law enforcement obligations. We have produced documents relating to the limited communications regarding 501(c) organizations by criminal division attorneys with Lois Lerner, who is the head of the exempt organizations division at the IRS. We have also taken the extraordinary step of making available, as fact witnesses, two career prosecutors from the department's public integrity section who explained these contacts with Ms. Lerner.

In 2010, for the purpose of understanding what potential criminal violations related to campaign finance activity might evolve following the Supreme Court's decision in *Citizens United* versus the FEC, a public integrity section attorney reached out to the IRS for a meeting, and was directed to Ms. Lerner. In the course of that meeting, it became clear that it would be difficult to bring criminal prosecutions in this area, and, in fact, no criminal investigations were referred to the Department of Justice by the IRS, and no investigations were opened by the public integrity section as a result of the meeting.

A separate contact between the public integrity section and Ms. Lerner occurred in May 2013, when the Department of Justice had been asked both in a Senate hearing and in a subsequent letter from Senator Sheldon Whitehouse whether the department and the Treasury Department had an effective mechanism for communicating about potential false Statements submitted to the IRS by organizations seeking tax-exempt status. An attorney in the public integrity section reached out to Ms. Lerner to discuss the issue. Ms. Lerner indicated that someone else from the IRS would followup with the section, but that followup did not occur.

In sum, these two instances show that attorneys in the public integrity section were merely fulfilling their responsibilities as law enforcement officials. They were educating themselves on the ramifications of changes in the area of campaign finance laws and ensuring that the department remained vigilant in its enforcement of those laws.

As we have explained to the committee previously, in 2010, in conjunction with the meeting I previously described, the IRS provided the FBI with disks that we understood at the time to contain only public portions of filed returns of tax-exempt organizations. As we have indicated in letters to the committee, the FBI has advised

us that upon their receipt of those disks an FBI analyst reviewed only the index of the disks and did nothing further with them.

To the best of our knowledge, they were never used for any investigative purpose. Pursuant to the committee's subpoena, we provided you with copies of the disks on June 2, 2014, when it remained our understanding that the disks contained only publicly available information. Shortly thereafter, the IRS notified the department that the disks appeared to inadvertently include a small amount of information protected by Internal Revenue Code Section 6103, and we promptly notified the committee of this fact, by letter, on June 4, 2014. We promptly provided our copies of the disks to the IRS and suggested that the committee do the same.

In order to provide you with our best information regarding the disks, including the fact that they were not used by the FBI for any investigative purpose, we have now written the committee several letters regarding the disks, and the director of the FBI answered questions about them from Chairman Jordan in a House Judiciary Committee hearing on June 11 of this year.

We recognize the committee's interest in this matter. We share that interest, and are conducting a thorough and complete investigation and analysis of the allegations of targeting by the IRS. While I know you are frustrated by the fact that I cannot, at this time, disclose any specifics about the investigation, I do pledge to you that when our investigation is completed we will provide Congress with detailed information about the facts we uncovered and the conclusions we reached in this matter.

Thank you, Mr. Chairman. I will now be happy to answer the questions.

[Prepared Statement of Mr. Cole follows:]



Department of Justice

STATEMENT OF

**JAMES M. COLE
DEPUTY ATTORNEY GENERAL**

BEFORE THE

**SUBCOMMITTEE ON ECONOMIC GROWTH, JOB CREATION AND
REGULATORY AFFAIRS
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
U.S. HOUSE OF REPRESENTATIVES**

FOR A HEARING EXAMINING

**THE DEPARTMENT OF JUSTICE RESPONSE TO THE IRS
TARGETING SCANDAL**

PRESENTED

JULY 17, 2014

**Statement of Deputy Attorney General James M. Cole
Subcommittee on Economic Growth, Job Creation and Regulatory Affairs
Committee on Oversight and Government Reform
U.S. House of Representatives
July 17, 2014**

Good morning, Chairman Jordan, Ranking Member Cartwright, and Members of the Committee. I am here today to testify in response to the Committee's oversight interest in allegations that the Internal Revenue Service targeted conservative groups seeking tax-exempt status.

When the allegations of IRS targeting surfaced in May of 2013, the Attorney General immediately ordered a thorough investigation of them. That criminal investigation is being conducted by career attorneys and agents of the Department's Criminal and Civil Rights Divisions, the Federal Bureau of Investigation, and the Treasury Inspector General for Tax Administration (TIGTA). I have the utmost confidence in the career professionals in the Department and the TIGTA, and I know that they will follow the facts wherever they lead and apply the law to those facts. While I understand that you are interested in learning about the results of the investigation, in order to protect the integrity and independence of this investigation, we cannot disclose non-public information about the investigation while it remains pending. This is consistent with the longstanding Department policy, across both Democratic and Republican Administrations, which is intended to protect the effectiveness and independence of the criminal justice process, as well as privacy interests of third parties. I can, however, tell you that the investigation includes investigating the circumstances of the lost emails from Ms. Lerner's computer.

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I will now be happy to respond to your questions.

Mr. JORDAN. Thank you.

The gentleman from Florida, Mr. DeSantis, the vice-chair, is recognized.

Mr. DESANTIS. Thank you, Mr. Chairman. Good morning, Mr. Cole.

Mr. COLE. Good morning.

Mr. DESANTIS. Mr. Cole, when we learned in Congress, on June 13, 2014, that 2 years' worth of Lois Lerner's emails were missing, the IRS would not produce those. When did the Justice Department learn of that fact?

Mr. COLE. I think we learned about it after that, from the press accounts that were in the paper following the IRS' notification to the Congress.

Mr. DESANTIS. OK. So you actually read about it in the press. So nobody in the IRS ever went to the Justice Department to give you a heads up, knowing that you were conducting the investigation and that some evidence may be been destroyed?

Mr. COLE. Not before the 13th of June.

Mr. DESANTIS. OK. Now, let me ask you this. You said in your testimony that you share the committee's interest and you are conducting a thorough and complete investigation and analysis of the allegations of targeting by the IRS. If that is the case, then I guess my question is why wouldn't you have known that these emails were missing? Did you just simply not seek to obtain those in the course of the investigation, or did the IRS not provide documents that the Justice Department requested?

Mr. COLE. Well, again, it is difficult to get into the details of the investigation, but there are a number of different sources of emails in the IRS. There are lots of recipients and senders, and we were looking at many different forms and sources of those emails. And it didn't become apparent, based on that, that there were any missing emails before that.

Mr. DESANTIS. Now, let me ask you this. If somebody—you are investigating an entity, government agency, whatever, you know, that agency has a duty, once they know they are under investigation, to preserve evidence, correct?

Mr. COLE. That is correct.

Mr. DESANTIS. And they have a duty to produce the relevant documents that are requested in the course of that, correct?

Mr. COLE. That is correct.

Mr. DESANTIS. And that would fall—I guess, ultimately, the agency head is responsible for ensuring that the agency complies with the Justice Department, right?

Mr. COLE. I would imagine the agency head ultimately bears responsibility. But there are people further down who actually do the work.

Mr. DESANTIS. Now, in the course of investigating a case, if you are investigating an agency, an entity, and there is evidence that is destroyed, and that agency knows that they are under investigation, don't they have a duty to report that to the Justice Department so that you know that the evidence has gone missing?

Mr. COLE. We would like to know that information. It depends on when they learn of it. And it is certainly information that we would like to have.

Mr. DESANTIS. Let me ask you this. If you are in court and you make a representation to a judge, even if it is in good faith, and you later find out that the representation you made is factually incorrect, you have a duty as an attorney and a member of the bar to go back to the court and follow a duty of candor to inform the tribunal of the mistake and correct the record. Is that right?

Mr. COLE. That is correct.

Mr. DESANTIS. So do you think that as you and the Justice Department look—in a congressional investigation, if we have somebody heading an agency or who is involved with an agency, and they provide information to us and that information later they determine to be incorrect, do they have a duty of candor to the Congress to correct the record?

Mr. COLE. Yes.

Mr. DESANTIS. Very well. Let me ask you this, Mr. Cole. There was a letter, we had sent a subpoena for documents, and we received a response on May 28, 2014. It was signed by Peter Kadzik. And in that, the department's position is the same. There are certain items that we requested that the department is not gonna produce. Is that accurate?

Mr. COLE. That is correct.

Mr. DESANTIS. OK. And there were—the reason for that, cited, was substantial confidentiality interests. And I just wanted to clarify. Is not producing the documents—is the reason for that is the President actually asserting executive privilege in this matter?

Mr. COLE. I don't believe there was an assertion of executive privilege. There are law enforcement-sensitive documents and documents involving ongoing investigations that traditionally, over decades, the accommodation with the department and the Congress is that those are not produced because they are law enforcement-sensitive items.

Mr. DESANTIS. My final question would be, this Congress held Lois Lerner in contempt, jeez, almost 9 weeks ago. Federal law requires, when that happens, that the U.S. attorney for the District of Columbia take that to a grand jury. Is it your understanding of that law that that is an obligatory duty that the U.S. attorney must take that before a grand jury?

Mr. COLE. My understanding of the law is that they are—it does not strip the U.S. attorney of the normal discretion that the U.S. attorney has. He proceeds with the case as he believes it is appropriate to do so.

Mr. DESANTIS. So 2-USC-194 says it shall be the duty to bring the matter before the grand jury. So you are saying that actually, even though Congress mandated a duty, a prosecutor would essentially be able to trump that language by exercising discretion?

Mr. COLE. I believe that there are aspects of it that give any prosecutor prosecutorial discretion on how to run a case and how to review a matter. I understand this matter is under review. And as far as whether or not it has been presented to the grand jury, that is information that you can't disclose because grand jury proceedings—

Mr. DESANTIS. I understand that entirely. OK, my time is up. Maybe we will followup on that.

And I yield back.

Mr. JORDAN. The gentleman from Maryland is recognized.

Mr. CUMMINGS. Attorney General Cole, I want to thank you very much for being here, and I wish it were under a more constructive circumstance. Unfortunately, the Republicans on this committee has accused your department, the Justice Department, of engaging in criminal conduct, of obstructing the committee and of conspiring with the IRS to criminally prosecute conservative groups for their political speech. So let me ask you directly, are any of those accusations true?

Mr. COLE. No, they are not.

Mr. CUMMINGS. OK, let me focus on one specific accusation. Chairman Issa and Chairman Jordan have accused the Department of Justice of conspiring with the IRS to create what they call in, "illicit registry," of confidential taxpayer information to prosecute conservative organizations. Their claim is based on the fact that back in 2010 the IRS provided to the FBI 21 computer disks with annual tax returns, or form 990's, from organizations with tax-exempt status. According to your letter, these disks contain the forms of all groups that were filed between January 1, 2007 and October 1, 2010, "regardless of political affiliation." Is that correct?

Mr. COLE. That is my understanding, Representative Cummings, but I have not seen the list myself. My understanding is, it was presented to us as public record information and not selected on the basis of any sort of political affiliation.

Mr. CUMMINGS. So based upon your knowledge, there were—so they were not just conservative organizations.

Mr. COLE. No, not—that is not my understanding.

Mr. CUMMINGS. As I understand it, the vast majority of this information is accessible to the public. It is public information, it is the same as what the IRS provides to the non-profit organizations, guidestar.org. Is that right, to your knowledge?

Mr. COLE. My understanding, when we received the disks, is that it was represented to us that it was all public information.

Mr. CUMMINGS. So these forms were provided in 2010. But earlier this year, more than 3 years later, you discovered that a very limited amount of confidential taxpayer information was stored on those disks. Is that correct?

Mr. COLE. That is correct.

Mr. CUMMINGS. This error affected only 33 of 12,000 forms on those disks. That is less than 1 percent. Is that your understanding?

Mr. COLE. I don't know how much specifically it was. I knew it was a small amount.

Mr. CUMMINGS. Do you have any reason to believe that this error was intentional or that these redactions were done incorrectly or on purpose?

Mr. COLE. I have no basis to be able to conclude anything on that, other than it is just a small amount, and what was represented to us when we received them.

Mr. CUMMINGS. OK. Well, finally, to me, the most important point here is these disks were never reviewed. Is that right, to your knowledge?

Mr. COLE. That is correct. Other than the index, the basically first page of it, they were never reviewed and never used.

Mr. CUMMINGS. And so Deputy Attorney General Cole, to conclude, when you hear claims—you know, and here, having dealt with the Justice—having practiced law for so many years, and dealt with the Justice Department in so many times, and—I mean, some of the very best and brightest citizens go into that department. Many of them could make a lot more money doing other things, but they decide that they are going to give their life to what I call “feed their souls” and make a difference for people. And then to—just the idea to hear that the Justice Department is accused of criminal activity—the very department that has done so much to make sure that our laws are upheld—I mean, I am just—it just—it is very upsetting to me.

And I would just like to give you an opportunity, since you represent so many of these wonderful people who have decided to give their careers to us—and the idea that they would—they are working hard, but then they hear these accusations. I just want to know your reaction to that.

Mr. COLE. Well, Ranking Member Cummings, I represent all of them. And the career people we have at the Department of Justice are really some of the best and most honest lawyers I have ever seen. The amount of integrity that is there is really quite astounding. You are right, they do sacrifice a great deal of money to work there. But they work there because they feel that it is important to go after the pursuit of justice. They work to try and find out what the facts are, what the law is, apply the facts to the law and let the chips fall where they may.

There is no politics that is involved with all of these career people, and it is really impressive to see the work that they do and the results that the Justice Department is able to bring about and the credibility that the Justice Department has because of the wonderful work of the career lawyers that we have.

Mr. CUMMINGS. And is it my understanding that if you all find that this crash of Ms. Lerner’s computer had any criminal elements in it you would be looking into that and addressing it as you would any other criminal case. Is that correct?

Mr. COLE. That is what we do in everything. We look to determine whether there is any facts of any criminal violations of any Federal laws. And if there are, we act appropriately. That is the whole purpose of the Justice Department is to find out what is going on, what the truth is, and then take appropriate action.

Mr. CUMMINGS. Thank you very much, Mr. Chairman.

Mr. JORDAN. I thank the gentleman.

Mr. Cole, isn’t it true that Richard Pilger met with Lois Lerner back in 2010?

Mr. COLE. Yes, it is .

Mr. JORDAN. All right. And isn’t it true that he got the information—this 1.1 million pages of information—in the format that he asked for it, the FBI wanted it in?

Mr. COLE. I think there was a request of several different forms it could come in, as I understand it. And we were asked to pick which one the FBI would prefer.

Mr. JORDAN. Lois Lerner said we are checking with my folks. I am getting you the disk we spoke about. Incoming data regarding 501(c)(4) issues. Does the FBI had a format preference? Mr. Pilger

says the FBI says raw format is best because they can put it into their systems like Excel. So you got it—so Pilger meets with Lois Lerner. You guys ask for specific information. That is right? You guys asked for this data?

Mr. COLE. I am not sure. I haven't seen an email specifically asking for it. I think all of that proceeded—

Mr. JORDAN. Well, it sure implies when you get it in the format you want—when you say we would like it in the Excel format, we would like—regarding 501(c)(4). So sure looks you asked for it. And then you got the data, right?

Mr. COLE. My understanding is, we did get the data. That the requests were made before the meeting, and that—

Mr. JORDAN. Well, here is the question.

Mr. COLE [continuing]. And that the data was delivered—

Mr. JORDAN. Here is the question. If it is publicly available information, why did you ask the IRS for it and why did you have to meet with Lois Lerner to get it?

Mr. COLE. I don't have an answer to that right now, other than maybe—

Mr. JORDAN. Well, that is an important point. We would like an answer to that.

Mr. COLE. I can take that back and try and find it.

Mr. JORDAN. No, you are the one who said, several times already, it is public information. Yet you had to go to Lois Lerner and the IRS and get it in the format you wanted? And Mr. Cummings says that is no big deal? And you had it for 4 years? You had this for 4 years, correct?

Mr. COLE. The information—the disks were in the possession of the FBI for—

Mr. JORDAN. Twenty-one disks?

Mr. COLE. Twenty-one disks.

Mr. JORDAN. One-point-one million pages?

Mr. COLE. I think that is correct.

Mr. JORDAN. And most importantly, it did contain 6103 information, correct?

Mr. COLE. We learned that on about the second—

Mr. JORDAN. I didn't ask when you learn it. I said it contained it. Correct?

Mr. COLE. We learned it late that it contained it, yes.

Mr. JORDAN. So Mr. Cummings just made this big, big, big deal about this is no big deal. Well, in fact, it is. The Justice Department asked for information that you said is publicly available, but you go to Lois Lerner to get it. You get it in 2010 in the format you want it. It is 21 disks, 1.1 million pages. You say it is available publicly, but you don't get it publicly. You go get it from the IRS. And it contains confidential taxpayer donor information. All those are facts, correct?

Mr. COLE. They are not necessarily facts that are all linked together, though, Mr. Chairman.

Mr. JORDAN. They are all in the data base.

Mr. COLE. They are facts that exist.

Mr. JORDAN. They are all in the data base, correct? The IRS told us it was confidential tax—I didn't make that up, Chairman Issa

didn't make that up. The IRS told us it was confidential information in there.

Mr. COLE. There was no request at the time. I am not even sure if the Justice Department—

Mr. JORDAN. Now let's—

Mr. COLE [continuing]. Requested the information, or if the IRS offered it. I am not sure how the idea—

Mr. JORDAN. When you get it in the format you ask for—

Mr. COLE. If I can finish.

Mr. JORDAN. It sure looks like you asked for it.

Mr. COLE. If I can finish, Mr. Chairman.

Mr. JORDAN. OK.

Mr. COLE. I am not sure how the actual idea of providing that information to the Justice Department came up—

Mr. JORDAN. Let's go to your—

Mr. COLE. —4 years ago. But it was provided after the meeting.

Mr. JORDAN. Let's go to your testimony, your written testimony. You say in page two of the written testimony I got that there was a separate contact between this same lawyer, Mr. Pilger, and Ms. Lerner in 2013 in response to Senator Whitehouse comments in a Senate hearing, looking at ways to bring a false Statement action against the very groups who wound up being targeted by the IRS, right? You follow where I am at in your testimony?

Mr. COLE. No, it has nothing to do with the groups targeted by the IRS. That is not correct.

Mr. JORDAN. Regarding false—

Mr. COLE. Whether or not false Statement cases could be brought.

Mr. JORDAN. They are the same groups, trust me. And an attorney in the public's integrity section reached out to Ms. Lerner to discuss the issue. Correct? I am just reading your testimony.

Mr. COLE. That is correct.

Mr. JORDAN. Ms. Lerner indicated that someone else from the IRS would followup with the section, but that followup did not occur. Why didn't the followup occur?

Mr. COLE. I don't know.

Mr. JORDAN. You don't know?

Mr. COLE. I don't know. That would be—

Mr. JORDAN. Let me give you a reason why I think it might not have occurred. Because this correspondence, this meeting, took place on May 8, 2013. You know what happened 2 days later, Mr. Cole?

Mr. COLE. Yes, I do.

Mr. JORDAN. What happened 2 days later?

Mr. COLE. Ms. Lerner talked to—gave a speech at an ABA conference and talked about this issue.

Mr. JORDAN. Yes. Where she explained to the whole world that the IRS was caught with their hand in the cookie jar and they, in fact, were targeting conservative groups. That is why the followup didn't occur. So 2 days before, 2 days before the very lawyer who met with Lois Lerner in 2010 got the data base in the format they wanted, 2 days before—jump ahead 3 years later. Two days before Ms. Lerner goes public, he was meeting with Ms. Lerner again and saying followup will take place.

But the followup doesn't take place because Ms. Lerner goes public and says, you know what—targeting did, in fact, happen. She tried to put the planted question in a bar association speech, spin this in a way that blames good public servants in Cincinnati, which you know is false. And we are—and Mr. Cummings says that is no big deal that you had all this information—give me a break.

One last question I have, right, before I go to the next member. So John Koskinen told this committee just a week ago that he knew in April of this year that a substantial portion of Lois Lerner's emails were lost, and he waited 2 months to tell us. And he waited even longer to tell you. If a private citizen does something like that, under investigation, finds out they have lost important documents and doesn't tell someone, that is a problem.

So is—is it a big deal to you, Mr. Cole, and a big deal to the Justice Department that the head of the Internal Revenue Service waited 2 months to tell the U.S. Congress, 2 months to tell the American people and, most importantly, 2 months to tell the FBI and the Justice Department that they had lost Lois Lerner's emails?

MR. COLE. This is a matter, obviously, we would like to know about the loss of the emails.

MR. JORDAN. I am asking is it a big deal that he waited 2 months?

MR. COLE. It depends on what the circumstances were behind it.

MR. JORDAN. The circumstances were he knew in April. He said that—when I asked him questions just last week, he said he knew in April. And I asked him why didn't you tell us. And he—but he waited 2 months.

MR. COLE. I would like to know all the circumstances from him as to why there was the 2-month wait—

MR. JORDAN. I would have liked to know right away, as well.

MR. COLE. Before I answer the question whether it is a big deal.

MR. JORDAN. All right.

Yield to the gentlelady from Illinois.

MS. DUCKWORTH. Thank you, Mr. Chairman. I believe that in his testimony he actually—the response to why there was a 2-month wait was that he was informed, and then for the next 2 months they were attempting to recover the lost emails from other host computers where those emails were located. So that just because you lose the emails from Ms. Lerner's hard drive, where she was the “from” sender, that they would exist in the “to” recipients. Computers never—I believe over 80 other host computers where they were looking. So that is part of the delay.

But I would like to know, also, the full extent of what was going on, as well.

Deputy General Cole, as I am sure you are aware the nature of the Justice Department's investigation into the IRS practices regarding the tax-exempt applications has been such a lengthy, lengthy discussion before various congressional committees. Despite unsubstantiated allegations that the Justice Department has prematurely closed its investigation for political reasons, Attorney General Holder has repeatedly confirmed before both the House and Senate Judiciary Committees that the Justice Department and FBI are still actively investigating this matter.

On January 29, 2014, the attorney general testified before the Senate Judiciary Committee that the matter, and I quote: “is presently being investigated. Into the use of being done, an analysis is being conducted.”

Several months later, in April—on April 8 of 2014—the Attorney General further testified before the House Judiciary Committee and confirmed that the department’s investigation was still an ongoing matter that the Justice Department is actively pursuing.

Deputy Attorney General Cole, can your please confirm that the department is still actively investigating IRS practices surrounding tax-exempt applications?

Mr. COLE. This is still an ongoing investigation, that is correct.

Ms. DUCKWORTH. Thank you. So accusations that the department has prematurely closed its investigations are false. Is that correct?

Mr. COLE. That is correct.

Ms. DUCKWORTH. Thank you. Some have also lamented the length of time this investigation has spanned. In your experience, is it uncommon for complex investigations such as this one to take a substantial amount of time to complete?

Mr. COLE. Both as a prosecutor and a defense attorney, this is not an unusual amount of time for an investigation like this.

Ms. DUCKWORTH. Thank you. In your opinion, is there anything unusual or troublesome about the length of time the department’s IRS investigation is taking?

Mr. COLE. Not that I have seen, no.

Ms. DUCKWORTH. So this is standard. This is—other investigations of this complexity you would expect would take a similarly lengthy amount of time.

Mr. COLE. This is normal, yes.

Ms. DUCKWORTH. OK. Can you comment on reports that the Justice Department has decided not to bring charges against IRS officials?

Mr. COLE. No decisions have been made in this case.

Ms. DUCKWORTH. OK. Can your confirm that no decision has been made yet about whether to criminally charge anyone in DOJ’s ongoing investigation? I know you said that, but because—in reference to the fact that the investigation is still ongoing.

Mr. COLE. There have been no decisions made about this case as of right now.

Ms. DUCKWORTH. So there is still potential for criminal charges if you were to discover in the investigation some cause.

Mr. COLE. The whole range of options are still open.

Ms. DUCKWORTH. Thank you. I thank you for your cooperation today. And I want to give you a chance to respond to some of the allegations whether the Justice Department worked with the IRS to compile the massive data base for illicit and comprehensive—sorry, an illicit and comprehensive registry for law enforcement officials. Was this something that was a collusion between the Justice Department and the IRS?

Mr. COLE. No, it was not.

Ms. DUCKWORTH. Did the DOJ or the IRS use this registry for the potential prosecution of non-profits?

Mr. COLE. We didn’t. As a matter of fact, we didn’t use it for any purpose.

Ms. DUCKWORTH. OK. And both Chairman Issa and Chairman Jordan have said that in a letter on June 10, 2014 that a special prosecutor is needed for a truly independent criminal investigation of the IRS targeting. Do you support that?

Mr. COLE. I do not. I don't think one is necessary here.

Ms. DUCKWORTH. OK. Now, I am gonna give you a little time to respond to the accusations on how the DOJ is conducting this investigation and these allegations that you are colluding, that you are delaying, that you are lying. And I only have 30 seconds. That is just not a lot of time, but go ahead.

Mr. COLE. Well, short of saying we are not doing that, this is the same thing. We are not talking about what we are doing in investigations either way. If my answers would help us or would hurt us, we are not talking about what we do in investigations. That is just how we proceed with investigations, for a lot of very good reasons.

Ms. DUCKWORTH. Why—why would that—could you name some of the good reasons why you would do that, in general?

Mr. COLE. You don't want—first of all, you don't want people to prejudge when not all the facts are in. You want to make sure that you gather all the facts that are available so that you have a complete and full record on which to make the determinations. You want to protect people's privacy because many times people will provide us information and you don't want to start going out and telling everybody who is talking to us, who is not talking to us. You don't want to have some witnesses infected by what other witnesses have said so that you can get the pure Statements from each type of witness.

Some people, you may just want to make sure they are protected because there are allegations about them that turn out not to be true. And it is not fair for those to be published. You also just want to make sure that everything is done with fairness and thoroughness. And you want to make sure that you have the ability to do that without the interference and the glare of a public spotlight. That is not the way investigations are done well.

Ms. DUCKWORTH. Thank you.

I am out of time, Mr. Chairman.

Mr. JORDAN. Mr. Cole, would that include the President of the United States prejudging the outcome of the case, when he said there is not a smidgen of corruption? You just talked about how you didn't want anyone saying anything, you can't know who is—who you are talking to, what is going on. But yet the head of the executive branch prejudices the entire investigation on a nationally televised interview?

Mr. COLE. Mr. Chairman, I am talking about what the Department of Justice does. Lots of people—

Mr. JORDAN. You are talking about getting to—doing a good investigation, getting to the truth. And you don't want certain witnesses and certain people talking about it. I would think that would include the highest-ranking official in the country.

Mr. COLE. Mr. Chairman, if I may, we don't want—the Justice Department doesn't talk about the investigation. We are the ones who know what the facts are and what the facts are that we are gathering. Lots of people have talked about this investigation on

both sides of it. They are free to do that. That is part of the First Amendment rights. We do not do that because we are the ones with the actual facts.

Mr. JORDAN. Well—but the President is different. Your boss is Eric Holder, his boss is the President of the United States. That is a—that is a completely different category than Members of Congress or a private citizen talking about it. All I am saying is, you just went through a whole list of why you can't talk about certain things, you can't tell us what you are doing. You can't even tell us who is all involved in the case, but somehow we bring up the President, no big deal. I just fail to get that one.

The gentleman from Arizona, Mr. Gosar, is recognized.

Mr. GOSAR. Given the topic of this hearing, I assume you are familiar with the portion of the code of Federal regulations dealing with the prohibitions on disqualification arising from personal or political relationship with regard to criminal investigations, correct?

Mr. COLE. Yes.

Mr. GOSAR. That is Title 28, Section 45.2 of the Code of Regulations, correct?

Mr. COLE. That is correct.

Mr. GOSAR. So you surely understand that it explicitly States, "No employee shall participate in a criminal investigation or prosecution if he has a personal or political relationship with any person or organization substantially involved in the conduct that is the subject of the investigation or prosecution, or any person or organization which he knows has a specific and substantial interest that could be directly affected by the outcome of the investigation or prosecution."

Do you understand that?

Mr. COLE. Yes, that is what it says.

Mr. GOSAR. You probably also understand that there is a carve-out Section B that States, "An employee assigned to or otherwise participating in a criminal investigation or prosecution who believes that his participation may be prohibited by paragraph A of this section shall report the matter and all attendant facts and circumstances to a supervisor at the level of the section chief or the equivalent, or higher. If the supervisor determines that a person or political relationship exists, he shall relieve that employee from participation unless he determines further in writing, after full consideration of all the facts and circumstances, that the relationship will not have the effect of rendering the employee's services less than fully impartial, professional, and the employee's participation would not create an appearance of a conflict of interest likely to affect the public perception of integrity of the investigation or prosecution."

You understand all this applies to the Department of Justice, correct?

Mr. COLE. Yes, it does.

Mr. GOSAR. Do you dispute that this is the regulation and guidance under the Code of Federal Regulations?

Mr. COLE. This is the regulation and the guidance, yes, sir.

Mr. GOSAR. Do you believe that Barbara Bosserman, attorney of the department of civil rights division and a major contributor to

the—President Obama’s campaign and the Democratic National Committee meets those standards set forth in the code?

Mr. COLE. You have to look at Section C of that regulation, which defines those terms. And it defines a political relationship means a close identification with an elected official, a candidate whether or not successful for elective public office, or a political party or a campaign organization arising from service as a principal advisor thereto or a principal official thereof.

Mr. GOSAR. But wouldn’t you say a principal advisor is somebody that contributes to that party?

Mr. COLE. No.

Mr. GOSAR. Or candidate?

Mr. COLE. An advisor would not be a person who makes a contribution.

Mr. GOSAR. Really. Do you also believe that she should also have brought this forward as a conflict of interest?

Mr. COLE. I believe that, as the definition States, she didn’t fall within the political relationship under the definition.

Mr. GOSAR. Well, let me ask you a question. Are you familiar with the impeachment of Richard Nixon?

Mr. COLE. I am.

Mr. GOSAR. Article two, exhibit one was the IRS. So this is very, very poignant in the public’s mindset, is the power to tax is the power to destroy. So, I mean, even more scrutiny should be applied to this. Would you not agree?

Mr. COLE. We are applying a great deal of scrutiny—

Mr. GOSAR. So, I mean, once again the same type of code should be very explicit, though, to Ms. Bosserman in regards to making sure that it is squeaky, squeaky clean in regards to the perception to the public.

Mr. COLE. I agree. And she did not meet the definition.

Mr. GOSAR. Sidestepping, I would say. I mean, I—

Mr. COLE. I would respectfully disagree.

Mr. GOSAR. I am not—I am not an attorney, but I am a dentist and just the implication of that aspect in the public light, mainstream America would show that there was a conflict of interest. And I think from that standpoint, the public is the one that we should be, I think, adhering to, their perception of making sure it is a fair and equitable evaluation. And I think that goes not only to you, but also Ms. Bosserman in regards to their concept to the public. And I think they owe that further detail. Would you not agree?

Mr. COLE. Well, I think you have to go through the regulations. You have to apply the law to the matter. And the law in this matter has a very clear definition of what is meant by the terms, and those terms did not encompass Ms. Bosserman.

Mr. GOSAR. I see. All right, so I want to go back to some of the comments you made here. The President made a comment that there is not a smidgen of opportunity there is corruption in this case. Would you agree with that terminology?

Mr. COLE. Congressman, this investigation is open, and—

Mr. GOSAR. Well, I mean,—I am gonna cut you off there. Because how would you define a smidgen? Small?

Mr. COLE. Congressman, I—

Mr. GOSAR. Smidgen, small. Is it big, it is small? What is a smidgen?

Mr. COLE. I am not sure the context and the meaning the President—

Mr. GOSAR. So you weren't watching the Super Bowl?

Mr. COLE. I was.

Mr. GOSAR. So you actually did—actually hear that. So, I mean, you are a literate person. So a smidgen is—would be what?

Mr. COLE. A smidgen is small.

Mr. GOSAR. So in this case, there is not an opportunity for something to be wrong and corrupted in this aspect, from your professional judgment?

Mr. COLE. Congressman, I am not gonna comment on the findings that we have made so far and the facts that we have gathered in this investigation. We don't do that. If somebody else wants to render an opinion—

Mr. GOSAR. Let me ask you a question. I am gonna cut you off right there. You made a comment—the ranking member that these individuals that work as career attorneys are fantastic people. Are they human?

Mr. COLE. Of course they are.

Mr. GOSAR. So they do make mistakes.

Mr. COLE. Of course they do.

Mr. GOSAR. Well, thank you very much.

Mr. JORDAN. The gentleman from Pennsylvania is recognized.

Mr. CARTWRIGHT. Thank you, Mr. Chairman. Deputy Attorney General Cole, thank you for being here today. I do hope we can use this opportunity to lay to rest some of the more outrageous allegations that have been circulating about the Department of Justice.

Chairman Issa and Chairman Jordan's May 22, 2014 letter to Attorney General Holder noted they were, "shocked to learn that the Justice Department and the IRS had a meeting attended by Lois Lerner in early October, 2010 to discuss the criminal enforcement of campaign finance laws." In that letter, Chairman Issa and Chairman Jordan claimed that testimony about the October 2010 meeting, "reveals that the Justice Department contributed to the political pressure on the IRS to," "fix the problem," posed by the Citizens United decision??????

Question. Deputy Attorney General Cole, do you have any reason to believe that the October 2010 meeting between IRS and DOJ representatives was improper in some fashion?

Mr. COLE. No, I do not.

Mr. CARTWRIGHT. OK. And I also wanted to say, during the transcribed interviews of the DOJ witnesses, committee staff asked about that October 2010 meeting. The chief of DOJ's public integrity section had the following exchange with committee staff. Question. At the October 8, 2010 meeting, did you or anyone else from the Department of Justice suggest to IRS employees that they should, "fix the problem posed by Citizens United decision." Answer: No. And the question was, in your opinion does the Citizens United decision pose a problem.

And the answer was, It is not my role to comment on the law of the land. It is the law of the land. My job is to enforce the law. Citizens United is the law of the land. That was the answer that

was given. Deputy Attorney General Cole, do you agree that Citizens United is the law of the land and that it is DOJ's role and responsibility to enforce that law?

Mr. COLE. Yes, it is. And to enforce all the other laws that are involved in that area.

Mr. CARTWRIGHT. All right. Now, the director of the election crimes branch of the DOJ's public integrity section was asked about Citizens United during his interview. In response, he said the following, "So Citizens United is not a problem. It is the law. And so no, I am not aware of any effort or part of any effort to fix a problem from Citizens United. I am aware that it changed the law, though, and that law enforcement, in reaction to such changes, must be vigilant about the opportunities they present for lawbreaking."

So my question for you, Deputy Attorney General Cole. Are you aware of any attempt by the Justice Department to, "fix a problem posed by Citizens United"?

Mr. COLE. I am aware of no such effort. There was no problem, particularly. That was the law.

Mr. CARTWRIGHT. Well, now that Statements from DOJ witnesses and Deputy Attorney General himself have directly refuted the chairman's allegation that DOJ, "contributed to the political pressure on the IRS to fix the problem posed by the Citizens United decision," I want to say I hope this claim is put to rest once and for all. It is time to stop creating fake scandals and start focusing on conducting real oversight, which is the charge of this committee.

And I yield back.

Mr. JORDAN. I would just ask to consent to enter into a record a Statement made by Ms. Lerner at a speech 8 days after the meeting that Mr. Cartwright just referenced. This is a speech at Duke University October 19, 2010, where Ms. Lerner said, "Everybody is screaming at us right now. Fix it now, before the election." I forgot what Mr. Cartwright said, but what we do know is that Ms. Lerner gave a speech 8 days after that meeting and said everybody is asking me to fix it.

Mr. CONNOLLY. Mr. Chairman?

Mr. JORDAN. I would yield to—

Mr. CONNOLLY. Mr. Chairman, a unanimous consent request?

Mr. JORDAN. Unanimous consent request.

Mr. CONNOLLY. I thank the chair. Since we are putting stuff on the record, I would ask unanimous consent that the full transcript of the staff interview with the director of the elections crimes branch at DOJ—

Chairman ISSA. I object. It is not the—Mr. Chairman, it is not the policy of this committee to put transcripts in the entirety out. I respect the gentleman's right to take any and all pertinent areas, but putting the questions and answers of transcripts has proven to be used to coach witnesses. And the coaching of witnesses later on, I am sure Mr. Cole would tell you, is not productive in an investigation.

Mr. JORDAN. Gentleman from California.

Mr. CONNOLLY. I would just—Mr. Chairman, I have a second unanimous consent request.

Mr. JORDAN. Gentleman is recognized.

Mr. CONNOLLY. I would further ask, since, you know, we don't want to cherry pick around here. I was simply trying to avoid that because I know that the committee chair frowns on that. That the May 29, 2014 interview with the chief of DOJ's public integrity section also be entered into the record.

Chairman ISSA. Again, I object unless the gentleman can cite appropriate items. He is certainly welcome to, but the policy of this chair is that it is destructive to ongoing investigations to do entire transcripts. And, for the most part, it has been avoided.

Mr. CONNOLLY. Well, Mr. Chairman, at the invitation of the chairman then I will cite two—two sections of those interview I hope the chairman would not object to be entered into the record at this time. I—

Mr. JORDAN. That is fine.

Mr. CONNOLLY. But I am afraid I am gonna have to read them because otherwise you won't know.

Chairman ISSA. All right.

Mr. CONNOLLY. So the director of election crimes branch, on May 6, 2014, said, "Since I joined the public integrity section in 1992, I have never encountered politically motivated decisions. To the contrary, it has been my consistent experience this section is active without exception on a strictly nonpartisan basis in all of its decisions and actions. In my experience, politics plays no role in our work as prosecutors, period."

That was part of his interview, and I would ask without objection it be put in the record.

Mr. JORDAN. Without objection.

Mr. CONNOLLY. And then the second one, Mr. Chairman, and then I will cease. On May 29, John Kennedy's birthday, of this year he told—the chief of DOJ's public integrity section explained to our staff, "Since I have been chief of this section"—of the public integrity section—"I have never encountered, nor will I tolerate, any politically motivated decisions. Politics does not and cannot play a role in our work as prosecutors."

And I thank the chair.

Mr. JORDAN. All right, thank the gentleman. We are gonna try to get to two more before we have a couple votes on the floor.

So the chairman of the committee is recognized.

Chairman ISSA. Thank you, Mr. Chairman.

General Cole, a couple of areas. Would you agree that it would be wrong to continue an investigation for any length of time if there isn't a smidgen of evidence of wrongdoing?

Mr. COLE. If you have completed the investigation and you have satisfied yourself that there is no wrongdoing in the investigation, then the investigation is done.

Chairman ISSA. That wasn't my question, General Cole. My question was, if you begin an investigation, and you go through weeks, months, now basically a year and you do not have a smidgen of evidence of a crime, is it appropriate to continue spending taxpayer dollars?

Mr. COLE. It depends on whether you think there is a chance that you may find additional evidence of crime—

Chairman ISSA. Mr. Cole, Mr. Cole—

Mr. COLE [continuing]. That you have considered all the avenues that you need to—

Chairman ISSA. Mr. Cole, General Cole, you have an ongoing investigation. It has been going on now for a year.

Mr. COLE. That is correct.

Chairman ISSA. You have confirmed that ongoing investigation. So it is appropriate to say that your answer is that there either has to be evidence of a crime or a belief by your investigators that there is, in fact, a crime that has been committed that you are investigating. Isn't that correct?

Mr. COLE. There has to be a belief that there is still evidence that is necessary to be looked at to determine whether or not a criminal statute has been violated.

Chairman ISSA. Mr. Cole—

Mr. COLE. That is the purpose—

Chairman ISSA. Mr. Cole, I really appreciate your dodging on behalf of decorum, but—

Mr. COLE. I am not dodging.

Chairman ISSA. My question needs to be answered.

Mr. COLE. The purpose of—

Chairman ISSA. You cannot spend taxpayer dollars if you do not have a belief that it is going to lead to a crime. That would be a frivolous investigation, at some point, wouldn't it?

Mr. COLE. You—

Chairman ISSA. Do you continue looking for crimes for years on innocent people when, in fact, there isn't a smidgen of evidence? Do you continue looking at somebody for criminal investigation for months or years without any evidence just because you, in the long run, think it might happen?

Mr. COLE. You start investigations based on—

Chairman ISSA. No, no. That was a yes or no, General Cole. It really is. Do you do that? I outlined a rather repugnant accusation that the minority has made about this chair and this committee that we are continuing to investigate wrongdoing by the IRS, both in Cincinnati and particularly in Washington, led by Lois Lerner. We continue to investigate it because we believe and Ways and Means has referred to you criminal allegations. Do you continue to investigate if—not—we are not talking about whether or not you are gonna get a successful prosecution, a conviction.

We understand that all of that—sometimes you go for years and you never get—like organized crime, you don't necessarily get a conviction, you don't get what you need. But would you continue investigating, as you have, if you did not have—if your investigators did not have—a belief that a wrongdoing had occurred for which you were trying to build a case? And please, that is a yes or no.

Mr. COLE. Mr. Chairman, unfortunately it is not quite a yes or no.

Chairman ISSA. Oh, yes it is.

Mr. COLE. Oh no it is not..

Chairman ISSA. And we are gonna have this conversation. Would you continue to take people's time, money, force them to get attorneys, investigate, subpoena, grab information, interview people? Would you do that if you did not have a belief that there was a

possibility of a crime, and one that you thought worth investigating? Would you do that?

Mr. COLE. Can I give you my answer, and then you can always followup.

Chairman ISSA. You could give me a yes or no, and then you could further explain. That is how—that is—your boss, the attorney general is a bad witness. Please don't be a bad witness.

Mr. COLE. I am trying not to be a bad witness—

Chairman ISSA. OK, that was a—

Mr. COLE. But not every question has a yes or a no—

Chairman ISSA. Mr. Cole, that was a question that you could answer yes or no. Would you continue to investigate people without a smidgen of evidence? Would you continue to spend the taxpayer dollars when, in fact, there was no reasonable belief that a crime had been committed?

Mr. COLE. Sometimes you investigate to ensure that you have evidence that one wasn't committed.

Chairman ISSA. So you could be—

Mr. COLE. Or to find out whether one was committed.

Chairman ISSA. You could be—Mr. Cole, that means that you could be spending the time and money trying to prove that Lois Lerner is innocent and that this committee was wrong in accusing her. You could be doing that.

Mr. COLE. We are not trying to prove anything.

Chairman ISSA. I didn't ask what you were trying to do. I asked—

Mr. COLE. We are trying to find out what the facts are and determine whether or not there is—

Chairman ISSA. OK. Well, let me get to my obligation to try to get to the facts. I issued you a lawful, constitutionally mandated subpoena. I issued a subpoena to the attorney general. And in it, we asked for all documents and communications between Lois Lerner and employees at the Department of Justice. You responded, and said, "We also have not included documents reflecting the department's internal deliberations about law enforcement matters"—fine—"in which we have substantial confidential interest because we believe that disclosures would chill candid exchange of interviews that are important to sound decisionmaking."

Do you recognize those words? Mr. Peter Kadzik sitting behind you could shake his head yes. He signed the letter.

Mr. COLE. That is a standard policy of the Justice Department.

Chairman ISSA. OK. So I just want to make it clear. The standard policy of the Department of Justice is, you don't give us the Q&A of your interviews because it could have a chilling effect on, or adversely affect, your ongoing investigations. Is that correct?

Mr. COLE. That is correct.

Chairman ISSA. Great. I just wanted to make sure we understood that was what good investigations do. However, when we subpoenaed the documents between the Department of Justice and Lois Lerner we got one tranche. That tranche shows that, in fact, either Justice wanted the goods on lots of people—including information that wasn't publicly available, taxpayer ID information—or Lois Lerner sent that information and the Department of Justice didn't want it. It is only one or the two, because it did get sent.

When we subpoenaed all the communications, was there any reason that you would not and have not delivered to us all of those documents, since that is not your investigation of Lois Lerner but, in fact, our investigation of you being the Department of Justice in addition to Lois Lerner, since there obviously was a relationship there in which documents inappropriate to be sent were sent.

Mr. COLE. Right. I would have to go back and look. There is a difference between the documents that were created at the time and documents that have been created in determining how to respond, as is described in the letter. I don't know which documents are being withheld at this point, Mr. Chairman, so we would have to look at those to see which ones they are.

Chairman ISSA. Will you commit today, in the case of documents that would have been exchanges between Lois Lerner or documents that Lois Lerner may have asked to be sent back and forth, communications at—in those periods of time? This is before—obviously, before you were debating whether to give us information or not. But the documents related to her activities and her—and the IRS' activities.

Will you agree either to give us all the documents related to correspondence back and forth between the IRS and anyone at Department of Justice in this time period that may have been related to the ongoing investigation—501(c)(3)'s and (c)(4)'s and so on—or give us a privileged log? Understanding that as an attorney one or the other is due us. Will you commit to do that?

Mr. COLE. We will commit to give you the documents, or we will give you an indication of what types of documents we are not providing you, as we have done in the past, so that you will understand.

Chairman ISSA. Will you do it in the form of a privileged log so that the documents have sufficient specificity to individually make the claim of why there is a specific privilege, not a blanket—we are giving you some, we are not giving you others—if you don't mind?

Mr. COLE. My understanding, Mr. Chairman, is we have not given privileged logs in the past, and we see no reason to start that now. But we will give you information that will allow you to understand the nature of the documents that are not being provided.

Chairman ISSA. My understanding is that your boss has been held in contempt because he refused to give us documents related to the laws being broken by lying to Congress and the people who knew about it for 10 months. And those internal documents have yet to be produced, in spite of the fact that it is before the court and 2 years later. So understand, I don't care about your history. I don't care about anything except the Constitution. And when the discussion was going on about Citizens United, I almost interrupted for one reason. It is not about the law.

Citizens United is a constitutional decision. It is not a law that can be fixed. You cannot fix a constitutional decision. The Constitution was a decision that the President objected to. The Constitution was the one that he truly failed to have decorum in the well of the U.S. House of Representatives, when he reprimanded the Supreme Court for their decision in Citizens United. And Lois Lerner thought publicly and said publicly they want us to fix it. And Lois

Lerner went about trying to fix it by going after conservative groups for what they believed.

And working with the Department of Justice to try to get audits and further prosecution of people who essentially were conservatives and asserting their constitutional free speech.

So, Mr. Cole, I hope that you would never investigate Lois Lerner or the crimes related to this if there wasn't a smidgen of evidence. I would hope that you were doing it because, in fact, as we know on this committee crimes were committed, regulations were violated, rules were broken and Americans' constitutional rights were violated by Lois Lerner and perhaps others around her.

And I would hope that is the reason your investigation is ongoing. And I look forward to those privileged logs.

Thank you, Mr. Chairman. I yield back.

Mr. JORDAN. The gentleman from Nevada is recognized if—or—we can come—we are gonna come back. We are gonna recess. But if you want to go now, we got 3 minutes and 40 seconds left in the vote.

Mr. HORSFORD. Mr. Chairman, I actually ask for unanimous consent under Rule 9 that the minority be given equal time, based on the fact that the chairman went over additional 5 minutes.

Mr. JORDAN. I have been very lenient with the time, and I have let the ranking member go over. And we will be happy to let you go over if you want. But that may mean we miss votes—but go right ahead.

Mr. HORSFORD. Thank you. Thank you, Mr. General, for being here today. And I want to start by again just reiterating the fact that the chairman asked at the beginning of this hearing for you to swear, under oath, that you were telling the truth, the whole truth and nothing but the truth before this committee. And so throughout the questioning, you have indicated that this investigation is ongoing by the Department of Justice. Is that correct?

Mr. COLE. That is correct.

Mr. HORSFORD. Is there any reason for members of this committee or for millions of Americans to believe that that is not the case, or to believe otherwise?

Mr. COLE. There is no reason, no.

Mr. HORSFORD. After the press report was released in January 2014, has Attorney General Holder explicitly Stated to the public that the investigation is ongoing?

Mr. COLE. I believe he has.

Mr. HORSFORD. Thank you.

I want to bring to the committee's attention the fact, again, that many of us agree that there was absolutely wrongdoing by the IRS on the handling of the tax-exempt status, and the process was unacceptable, and that people do need to be held accountable. I believe that the President famously referred to the IRS mishandling of these applications on Super Bowl Sunday as consisting of "bone-head decisions." The President went further and commented that there was "not even a smidgen of corruption."

Now, much has been made of the President's Statements. Chairman Goodlatte asked, during a June 11, 2014 judiciary hearing, "How can we trust that a dispassionate investigation is being carried out when the President claimed no corruption occurred?" Dur-

ing the same hearing, Chairman Goodlatte asked FBI Director, James Comey, “Can you explain why there is an investigation, given that the President said that there was not even a smidgen of corruption?”

Director Comey responded, “I mean no disrespect to the President or anybody else who has expressed a point of view about the matter, but I don’t care about anyone’s characterization of it. I care, and my troops care, only about the facts. There is an investigation because there was a reasonable basis to believe that crimes may have been committed, and so we are conducting that investigation.”

So Deputy Attorney General Cole, do you agree with the assessment that outside characterizations, even by the President, have no bearing on a particular investigation?

Mr. COLE. That is correct. People don’t know what it is we know, and they have—we do our job, and try to block out whatever people say on the outside.

Mr. HORSFORD. Is it accurate to say that the department does not take direction from the President on how to conduct ongoing investigations?

Mr. COLE. We do not. And that is a very specific line that is drawn.

Mr. CUMMINGS. Will the gentleman yield?

Mr. HORSFORD. Yes.

Mr. CUMMINGS. Just for a second? Mr. Chairman, I understand we have less than a minute—Mr. Chairman. I don’t know whether you were coming back. Were you coming back?

Mr. JORDAN. Yes.

Mr. CUMMINGS. Can he resume his questioning when he comes back? I mean, if you don’t mind. I want us to be able to vote.

Mr. JORDAN. [Off mic.]

Mr. CUMMINGS. Yes, yes. Does that make sense? I just want to make sure we get answers—we are out of time. We got to get to vote.

Mr. JORDAN. But there are 300 people haven’t voted, so—

Mr. CUMMINGS. Yes, well, I am not gonna be one of them.

Mr. JORDAN. All right. It is you up to—I was gonna let him finish all 5 minutes.

Mr. CUMMINGS. Yes, I would—

Mr. JORDAN. Recess? All right? Let me—I am gonna ask one more question. I won’t take your time. I am gonna have one quick question before I go.

Mr. HORSFORD. So I reserve my time, Mr. Chairman, until we return.

Mr. JORDAN. All right. You will get—you will be given your full 2–1/2, 3 minutes, whatever you had left.

Mr. Cole, we are gonna recess. But before we do, is the Department of Justice investigating why the IRS waited 2 months to disclose the loss of Lois Lerner’s emails?

Mr. COLE. I don’t know if that is specifically what we are investigating. We are looking at the loss of the emails, but—

Mr. JORDAN. I am asking you specifically. Are you gonna look at the fact that the head of the agency that targeted conservative

groups knew, in April, and didn't tell us and didn't tell you for 2 months? Are you gonna look at that fact?

Mr. COLE. I think that depends on whether or not the IRS refers or the inspector general refers that to us. This is an area that we will probably want to satisfy ourselves—

Mr. JORDAN. Why should—what should the inspector general have to do with it? If you think that is a problem, I certainly think it is a problem, the American people think it is a problem. I would hope the Justice Department would think it is a problem. So why wouldn't you look into the 2-month lag?

Mr. COLE. We would have to determine if there is a potential criminal violation before we would look at that. We don't just investigate for no reason. There has to be some sort of basis or some sort of thought that it might implicate a Federal criminal statute. So we would have to look at that first.

Mr. JORDAN. All right. We will resume. We are gonna take a recess. You can—obviously, we will be back in probably 30 minutes. So thank you.

Mr. COLE. OK.

Mr. JORDAN. We stand in recess.

[Recess.]

Mr. JORDAN. The committee will be in order.

The gentleman from Nevada is recognized for the remainder of his time.

I believe it was—approximately 3 minutes or so still. I will give you a couple extra minutes. How is that? Put on 3 minutes, if we can. The gentleman is recognized.

Mr. HORSFORD. Thank you. Mr. Attorney General, thank you for continuing to be with us this afternoon.

So as I was concluding my questions before we recessed, I was asking about the fact that regardless of Statements made by outside groups or characterizations that the Department of Justice approaches its investigations in fair, impartial and uninfluenced ways. So if you could just answer, for the record, that—whether it is the case to say that the department does not take direction from the President on how to conduct ongoing investigations.

Mr. COLE. We do not take any direction from the President. Matter of fact, that is a time-honored restriction and barrier that is put in between the Department of Justice and the White House. It is independent in its investigations, and that is honored very scrupulously.

The Department of Justice—I think Director Comey put it very well. When we find allegations that are worthy of investigation, for whatever reason, we investigate them to find out what the true facts are, then apply those facts to the law and make a determination about what the appropriate resolution should be. That is what we do; no more and no less.

Mr. HORSFORD. So has the President's Statement in any way—the Statement that there was “not a smidgen of corruption” influence the department's investigation in any way?

Mr. COLE. No, it has not.

Mr. HORSFORD. Mr. Chairman, what I would like to say is actually the fact that I wish that this committee would approach our oversight function in the way that the Department of Justice is ap-

proaching its investigation, which is to do so fairly, impartially and without prejudging the facts.

And the attorney general here today has indicated that that is definitely the approach that they take. And we want the facts, as well. There are those of us who believe that there was wrongdoing and that there should be accountability.

We just don't think that we should prejudge the circumstances before all of the facts get out, despite the approach by others. I would like to ask unanimous consent, Mr. Chairman, to enter into the record opening Statements of the two Department of Justice employees who were interviewed in the course of this committee—IRS investigation.

Mr. JORDAN. Without objection. Wait, wait, wait, wait. Opening Statements, you said?

Mr. HORSFORD. The chief of the public integrity section, Jack Smith, and the director of the elections crimes branch.

Mr. JORDAN. And what are you asking to enter?

Mr. HORSFORD. I am asking to enter their Statements from their—

Mr. JORDAN. Well, is it the full transcript? We had this debate just a little bit ago. If it is the full transcript, I would object. If it is a Statement they—

Mr. HORSFORD. It is not. However, I want to say for the record, Mr. Chairman, the Republican Armed Services Chairman, Buck McKeon, just released 100 percent of the transcripts from Benghazi. So I am not clear on the standard being used by this chair.

Mr. JORDAN. We are gonna try to move on. I think I am gonna object. I will take a look it, and I am gonna object now. We will take a look at it afterwards.

Mr. HORSFORD. You are gonna object—

Mr. JORDAN. The gentleman from—

Mr. HORSFORD. Can I ask the point of order as to the reason for—

Mr. JORDAN. You need unanimous consent to enter—

Mr. CARTWRIGHT. What would be the rule that—

Mr. JORDAN. I am gonna recognize—I want to try to move and get to as many of our colleagues as I can. So—

Mr. HORSFORD. Mr. Chairman, under rule nine—

Mr. JORDAN [continuing]. For the next vote.

Mr. HORSFORD. I have not finished my time that was allotted to me. No, we were—

Mr. JORDAN. I think you are 42 seconds over.

Mr. HORSFORD. No, the chair was over 5 minutes. I had additional time, we recessed, I have not finished—

Mr. JORDAN. I gave you—I gave you more than the time you had left.

Mr. HORSFORD. No, you—under rule nine—

Mr. JORDAN. And I have given Mr. Cummings more time than 5 minutes. I have given—I think it—talk to Mr. Carver, talk to anyone. I have been pretty generous with the time and I will continue to be generous with the time. But I do want to get to everyone who is here, and Mr. Meadows has been waiting a long time.

Mr. HORSFORD. Under rule nine, I am asking for a parliamentary inquiry—

Mr. JORDAN. The gentleman is—the gentleman from North Carolina is recognized for his 5 minutes.

Mr. HORSFORD. Will you—so the chairman will not recognize my parliamentary—

Mr. JORDAN. I am recognizing the gentleman from North Carolina because you are now a minute 16, plus the additional minute I gave you. You are 2-1/2 minutes over time right now.

Mr. HORSFORD. Because you will not recognize my point of order under rule nine.

Mr. JORDAN. I said I object to your point of order.

You don't have a valid point of order on—

Mr. HORSFORD. There is a valid point of order.

Mr. JORDAN. You need unanimous—you asked for unanimous consent, I objected to that.

Mr. HORSFORD. Has the minority been given equal time?

Mr. JORDAN. Yes, they have. You won't—

Mr. HORSFORD. For the majority.

Mr. JORDAN. Now, in absolute time you won't get as much because you are the minority, you don't have as many members of the committee.

Mr. HORSFORD. That—

Mr. JORDAN. But you are going to be—get equal time for the number of members you have.

The gentleman from North Carolina is recognized.

Mr. MEADOWS. I—

Mr. CARTWRIGHT. Mr. Chair, I would like to be recognized.

Mr. JORDAN. The gentleman from North Carolina has already been recognized. If he will yield you can be recognized. But right now, the gentleman from North Carolina is recognized for 5 minutes.

Mr. CARTWRIGHT. Will the gentleman yield for 30 seconds?

Mr. MEADOWS. Well, yes. I will be glad to yield for 30 seconds.

Mr. CARTWRIGHT. Thank you. Mr. Chairman, I would like to point out that the chairman of the full committee, Mr. Issa, was given a full 10 minutes prior to Mr. Horsford's line of questioning. And it was represented by you to Mr. Horsford that he would be given an extra 5 minutes.

Mr. JORDAN. It was not represented I would give him an extra 5 minutes.

It was represented I would give him extra time, and I gave—

Mr. MEADOWS. I am reclaiming my time.

Mr. JORDAN [continuing]. To ther committee members—

Mr. MEADOWS. I am reclaiming my time.

Mr. JORDAN. And I have done.

Mr. MEADOWS. I thank the chair. And let me go ahead, Mr. Cole, with a few questions. One, in your testimony, your verbal testimony here today, to give you a quote, you say you have "the utmost confidence in TIGTA," in their investigation. Is that—do you stand by that? I mean, that is a direct quote of you.

Mr. COLE. Yes, I do. And the entire team that is investigating this.

Mr. MEADOWS. All right. So let me ask you, is it normal procedure, when TIGTA investigates somebody, to have a member of management in on personal interrogatory discussions with other employees? Why would you—would you normally do that in your investigative mode? To have members of management in the majority of those interviews?

Mr. COLE. A lot of those take place before we——

Mr. MEADOWS. Would you—the question is——

Mr. COLE. I just want to put it in context, Congressman. Because the idea——

Mr. MEADOWS. So were you there when the interviews were happening back in 2011, with TIGTA? How would you put it in context?

Mr. COLE. I am trying—if you will let me explain, I think you will understand. Inspectors general have different types of investigations that they do other than just criminal investigations.

Mr. MEADOWS. Right.

Mr. COLE. This is—we are working with TIGTA on a criminal investigation——

Mr. MEADOWS. I understand that.

Mr. COLE. Prior to this, they were doing an investigation on their own, without us——

Mr. MEADOWS. So your utmost confidence is really about the investigation now, not what happened before.

Mr. COLE. It is the different types of rules that may apply. Sometimes different agencies have union rules that apply and control the way that an inspector general may talk to people. I am not sure what the rules are at the IRS, and they cover TIGTA's——

Mr. MEADOWS. Since you weren't there, we will go on. May 2013 you started an investigation. Is that correct?

Mr. COLE. The Justice Department.

Mr. MEADOWS. The Justice Department started an investigation. And that continues today.

Mr. COLE. Yes, it does.

Mr. MEADOWS. OK. Missing emails that we have now discovered, does it not concern you that your exhaustive investigation did not uncover the fact that there were missing emails and that you had to read about it in the press? Should we be concerned that your investigation is not exhaustive if it took you more than 13 months and you had to read about it in the press that there were missing emails? Does that concern you? It concerns me.

Mr. COLE. I understand it concerns you.

Mr. MEADOWS. Would that concern you?

Mr. COLE. Depends on the reason. And as the—as I have explained, as we have looked through the records in this case there was not a gaping hole. Because these emails come from a lot of different sources.

Mr. MEADOWS. OK.

Mr. COLE. And as a result——

Mr. MEADOWS. And that is reasonable. But the individual with TIGTA that knew about the fact that there were missing emails in October 2012, did you not talk to him? Because he apparently didn't tell you, and he knew about it. Why would he not have told you if you had this ongoing, exhaustive investigation with some-

body from TIGTA of which you have the utmost confidence? And they wouldn't tell you that there were missing emails, when he knew about it?

Mr. COLE. If I am—if I understand your question, the person who I believe knew about it earlier on was in a much different context. And I don't know how much they knew about what related to our investigation at the time.

Mr. MEADOWS. Listen, to——

Mr. COLE. I just don't know. I am not——

Mr. MEADOWS [continuing]. You are—you are insulting the American people.

Mr. COLE. I don't believe——

Mr. MEADOWS. And if you are indicating that someone that was involved in the TIGTA investigation didn't know that there was all that is going on, and that the American people are concerned. Are you—is that what you are saying?

Mr. COLE. I don't know if that person was involved in this TIGTA investigation.

Mr. MEADOWS. Yes. I mean, they wrote notes. That is how we found out about it in October 2012. Actually, the way we found out about it is, you gave us emails and we all of a sudden said why did the IRS not give us these emails. And then it was, Shazam. Here, we found out that these missing emails—when actually someone with TIGTA already knew about it.

Mr. COLE. I would have preferred that the dots get connected earlier, but I think that TIGTA agent, in October 2012, was investigating something quite different. And not this investigation, this matter that TIGTA was in, is my understanding.

Mr. MEADOWS. Oh, really?

Mr. COLE. That is my——

Mr. MEADOWS. Because according—he went back and found notes that there may be a problem. So let's go on a little bit further. The IRS commissioner knew in February that there was a problem, and he says he didn't tell you. Are you concerned about that?

Mr. COLE. Would have liked to have known.

Mr. MEADOWS. Yes, would have liked to have known. We would have, too. And so you found out about it in a newspaper.

Mr. COLE. That is correct.

Mr. MEADOWS. All right. So how exhaustive is your investigation, then, Mr. Cole, if you would have liked to have known about it? How can the American people have confidence in your investigation if the things that you would like to know about aren't getting asked? Are you not having interviews back and forth? Has anybody interviewed the IRS commissioner?

Mr. COLE. As I have said, we don't talk about who we interview and who we don't interview.

Mr. MEADOWS. Well, he says you haven't. So would you think that he was being truthful with Congress?

Mr. COLE. I am not gonna comment on what we do in our investigations. But certainly, as part of looking into the emails, we will look into all of that, as well.

Mr. MEADOWS. Well, when? If 13 or 14 months is not enough, when is enough?

Mr. COLE. We just found about this last month, Congressman, and we are starting to look into it.

Mr. MEADOWS. I will yield back. Thank—

Mr. JORDAN. Mr. Cole, are you asserting that you are going to interview Mr. Koskinen?

Mr. COLE. I didn't say what we were going to do, Mr. Chairman. As you know, we don't talk about the steps we take in investigations, but we will certainly look into, as part of the emails, all of the issues surrounding it.

Mr. JORDAN. The gentleman from South Carolina is recognized.

Mr. GOWDY. Thank you, Mr. Chairman. Deputy Attorney General Cole, you have been done a tremendous disservice when the President prejudged this investigation. It is not fair to the people at the Department of Justice, it is not fair to the people who are investigating, and it is not to the complaining witnesses, the potential victims. It is really unheard of for somebody who purports to be an expert in constitutional law to prejudge an investigation. So I am gonna start with that.

And I know that you cannot provide names and I know that you cannot provide details. But you have, on a number of different occasions this morning, sought to reaffirm that there is an ongoing investigation. So I am gonna ask you about some of the traditional investigatory tools and make sure that those are at play. And again, I am not asking you for names and I am not asking you for specifics. But when you say a matter is being investigated, I think it—and by the way, back in the old days you couldn't even confirm that there was an ongoing investigation. That was the policy back in the old days.

I don't know if the policy has been waived or this particular fact pattern is such that you are willing to confirm an ongoing investigation. But that is policy, that is not law. There is no law that prevents you from answering these questions. Have witnesses been brought before a grand jury?

Mr. COLE. As you well know, Representative Gowdy, we can't talk about anything that takes place before a grand jury. That is not prohibit—that is not permitted under rule 6E.

Mr. GOWDY. Have subpoenas been issued?

Mr. COLE. That is also a grand jury—

Mr. GOWDY. Have administrative subpoenas been issued? Not grand jury subpoenas, but administrative subpoenas been issued?

Mr. COLE. With all due respect, Congressman, we don't talk about the steps we take in our investigations. They are thorough, and—

Mr. GOWDY. Mr. Deputy Attorney General, I understand that. But when the chief law enforcement officer for this country, the chief executive, prejudges an investigation, and you are seeking to assure us that that investigation is ongoing and vibrant and being professionally done, I think it is OK, in this instance, for you to reaffirm us that all the traditional tools available to prosecutors are being used. Administrative subpoenas aren't covered by rule 6E, so you can answer that question.

Mr. COLE. We are using every tool that is appropriate to be used, we are using every facility we can to find out what the facts are in this matter as thoroughly and as completely as we can.

Mr. GOWDY. How many witnesses have been interviewed?

Mr. COLE. I cannot tell you that.

Mr. GOWDY. You cannot because you don't know, or you cannot because you choose not to answer the question?

Mr. COLE. It would be both.

Mr. GOWDY. More than 20?

Mr. COLE. I am not gonna go into a guessing game with you, Congressman.

Mr. GOWDY. Have any proffers been—

Mr. COLE. I am not gonna go into the details of the investigation, I am sorry. I know that is frustrating. But when this is over, we will be providing you with details.

Mr. GOWDY. Well, how would we know when it is over? I mean, obviously if there is an indictment it is over for that person until the prosecution. But how are we—look, you have a constitutional responsibility to do your job. With all due respect, so do we. It is different. Our job is not to prosecute criminal code violations, but it is our job to set policy and to determine whether or not an agency is worthy of the same level of appropriation that it received the year before.

And we can't do our jobs if we are constantly told, not because of the law but because of policy, that we are not gonna answer any of the questions related to the investigation. So how will we know when this investigation is over?

Mr. COLE. We will let you know, either through an indictment that comes out and you will see that, or through us telling you that it is over and providing you with information.

Mr. GOWDY. You don't know how many witnesses have been interviewed.

Mr. COLE. I don't know an exact number, no. But I wouldn't tell you if I did, with all due respect.

Mr. GOWDY. Do you know what percentage of witnesses have been interviewed. Out of the full universe of witnesses that have been—that you have identified, how many have been interviewed?

Mr. COLE. I am not gonna go down that road, Congressman, sorry.

Mr. GOWDY. Are there any plea agreements been signed?

Mr. COLE. I am not gonna go down that road.

Mr. GOWDY. Deputy Attorney General, I asked you the last time you were before a committee that I had the privilege of serving on if you would please, in the quietness of your own conscience, consider whether or not this fact pattern is appropriate for a special prosecutor. And I am sure that you did, but this morning you said you have reached the conclusion that it would not be appropriate. Can you give me the fact pattern where it would be appropriate? If prejudging an investigation that has political overtones and undertones, and the selection of—and I am not prejudging Ms. Bosserman. She, I am sure, is capable of doing a very fine job.

I just find it stunning that she would be picked. Out of the full universe of available Federal prosecutors, to pick a maxed-out donor I just think was very short-sighted. So if it is not this fact pattern, what fact pattern would it be appropriate to ever use a special prosecutor, given the fact that your boss drafted the regulation?

Mr. COLE. It is very, very rare in the history of the Justice Department to use a special prosecutor.

Mr. GOWDY. Give me a fact pattern where it would trigger to you, in your mind, the appropriateness of a special prosecutor.

Mr. COLE. I can't go down and dream up a fact pattern, Mr. Gowdy. But I know the one time we have appointed a special counsel was in the Waco investigation, where Senator Danforth was appointed.

Mr. GOWDY. Well, the regulation is in place. It is pretty plainly written. The interests of justice, potential conflict. You have politics infecting this investigation. You have a prejudgment by the commander in chief that there is not a smidgen—and I will substitute the word “scintilla” because smidgen is not a legal term—there is no evidence of wrongdoing. It has already been determined. You talk about jeopardizing investigation, you talk about compromising a jury pool, I mean, again, I—out of fairness to you, I am not gonna ask you to comment because he is your boss.

But I—really, that was a tremendous disservice to be done to people who dedicate their lives to law enforcement to prejudice an investigation and to do it for a cheap political score during the Super Bowl. So if not here, when? If not this fact pattern, when?

Mr. COLE. Each individual matter is gonna have to be judged on its own individual and unique facts. I can't set out a prescription for when one would be appropriate. All I can tell you is we have analyzed this one, we have looked at the applicable regulations, and this does not meet any standard that would come to the point of warranting a special counsel.

Mr. GOWDY. When you say it has been analyzed, this is a determination that is ultimately made by the attorney general himself?

Mr. COLE. Along with myself.

Mr. GOWDY. Did you seek outside opinions? Did you consult anyone else whose legal opinion you value, and ask, hey, this is an interesting fact pattern. Maybe this is appropriate. To go find a career prosecutor who hasn't maxed out to the RNC or the DNC. I mean, did you seek other people's opinions?

Mr. COLE. The internal deliberations, as you well know, Representative Gowdy, are not things we talk about in public. But we made a thorough review of this matter and determined it didn't meet any sort of standard to warrant a special counsel.

Mr. GOWDY. My time is up, Mr. Cole. I am gonna end the same way I ended last time. This is bigger than politics, it is bigger than election cycles. The one entity in our culture that is universally respected and represented by a woman wearing a blindfold is the Department of Justice. And when we start playing games with that we are in trouble.

Mr. JORDAN. I thank the gentleman.

Mr. Cole, when a criminal investigation is started, isn't usually one of the first things that happens is you go gather and protect and get ahold of the evidence?

Mr. COLE. That usually happens fairly early on, yes.

Mr. JORDAN. OK. So when this investigation was started, did you guys go—well, let's—let's back up. May 22 of last year Lois Lerner came in front of this committee and exercised her Fifth Amendment rights, would not answer our questions. She has been a cen-

tral figure in this whole thing. Has—so back May 23, the day after that, did the FBI and the Justice Department look at going to Ms. Lerner's office and seizing and getting ahold of all the documents, her computer, her files? Did you attempt to do that in May of last year?

Mr. COLE. Don't mean to sound like a broken record, Mr. Chairman, but we are not at liberty to talk about non-public information about what we did in this investigation.

Mr. JORDAN. Well, if you—it would seem to me if you had done that—let me ask it this way. If you had done that maybe we would have learned about the lost emails a lot sooner. Let me ask you this. So how do you—how are you getting the evidence in this case? You were just waiting for the IRS to give it to you like we have to wait for them to give them—give us the documents and the emails?

Mr. COLE. We are doing what we need to do to get the evidence, Mr. Chairman, and we are getting the evidence that we need in this matter.

Mr. JORDAN. So you can't tell me whether you went and got a search warrant, a court order to go and get those documents from Ms. Lerner's office or from the IRS?

Mr. COLE. As I have told you before, and I know it is frustrating to you, but we can't talk about the non-public aspects of the investigation.

Mr. JORDAN. All right. I am gonna go back to this point that I—again, several members have talked about it. If there is a private citizen who was under investigation by the Justice Department and they withheld information, willfully withheld information, about the loss of evidence, the loss of documents, for 2 months would that be a crime?

Mr. COLE. Depends on if they had a legal duty to disclose that, as—when you are dealing with somebody withholding something as opposed to affirmatively making a false Statement, you have to find some sort of legal duty for them to make the disclosure to have that be criminal.

Mr. JORDAN. OK. So it would depend if they had a duty. But that would be something you would look into. You would investigate whether, in fact, they had a duty to disclose to you in an appropriate time fashion that they had, in fact, lost those documents.

Mr. COLE. We would.

Mr. JORDAN. That would be something you would investigate.

Mr. COLE. Yes.

Mr. JORDAN. You said earlier that, relative to Mr. Koskinen, it depends on whether there is a problem with the fact that the commissioner at the IRS knew in April and waited 2 months to tell us, the American people and, more importantly, you. So you are going to investigate that aspect, as well, just like you would for a private citizen?

Mr. COLE. All the issues related to those emails will be wrapped up in the investigation that we do.

Mr. JORDAN. Including the delay?

Mr. COLE. Including the delay.

Mr. JORDAN. So the delay in—the fact that the commissioner at the Internal Revenue Service delayed telling the Congress, the

American people, the FBI and the Justice Department is a matter that you are going to investigate.

Mr. COLE. We are gonna look into what the circumstances were around that, yes.

Mr. JORDAN. Well, that is—that is important.

I would recognize the ranking member for his questions.

Mr. CUMMINGS. Thank you, Mr. Chairman.

Mr. JORDAN. I will go with whoever wants to go. If Mr. Cummings is ready to go—

Mr. CUMMINGS. Thank you very much, Mr. Chairman. All right, Chairman Issa and Chairman Jordan have alleged that prominent Democrats, Mr. Cole, pressured the Department of Justice and the IRS to single out conservative groups for potential prosecution. Both chairmen allege in a May 22 letter to the attorney general that a hearing held in April of last year by a Democratic Senator, “led to the Justice Department reengaging with the IRS on possible criminal enforcement relating to political speech by non-profits.”

A press release accompanying the letter alleged that the department officials and Lois Lerner “discussed singling out and prosecuting tax-exempt applicants at the urging of a Democratic senator.” General Cole, I would like to give you an opportunity to address this allegation. And did the department discuss singling out and prosecuting tax-exempt applicants at the urging of a Democratic senator?

Mr. COLE. No. What happened in that regard was just trying to answer a question of whether we had a mechanism for whether applicants for tax-exempt status, if they had lied on their application for that status—if there was a mechanism for the IRS to refer those types of false Statements to the Justice Department for consideration for prosecution. That is all that was.

Mr. CUMMINGS. And so in other words, if someone—we have been sitting here talking about crime here quite a bit. If someone allegedly committed a crime, would they—or, again, I said “alleged.” Would there be a mechanism by which to get that information to the Justice Department? Is that what you are trying to tell me?

Mr. COLE. That is correct. There was no targeting or anything like that. It was just whether or not we had the proper communications and mechanisms that if it was discovered by the IRS that false Statements had been made were those going to the Justice Department for its consideration.

Mr. CUMMINGS. Does the department typically take direction about prosecution decisions from Members of Congress?

Mr. COLE. No, we do not.

Mr. CUMMINGS. Your testimony today is consistent with Statements made by the Department of Justice officials interviewed by the committee. On May 29, committee staff asked the public integrity section chief the following question, “Did you ever receive any instruction from any Member of Congress to target Tea Party or conservative groups for prosecution?” He responded, “No.” Similarly, on May 6 committee staff asked the director of the election crimes branch—if a letter from a Democratic senator directed him to “target conservative organizations for prosecution.” And he responded no, it did not.

Mr. Deputy Attorney General, are you aware of the department receiving direction from Democratic Members of Congress to target or prosecute a conservative organization, or have you—or any Member of Congress trying to get you to target any organizations? I am just curious.

Mr. COLE. I am not aware of it. But to the extent any such request was made, we would not honor that. We would ignore it.

Mr. CUMMINGS. And so you—when you say you would ignore it, certainly a lot of investigations are started by newspaper articles, I guess. I mean, you see something in an article, and the FBI may see it and certain allegations are made like that. But isn't it a fact that sometimes things that may appear in the newspaper may start a ball to rolling with regard to an investigation? And I was just wondering, just taking a natural extension of that, if someone were to say something that seemed to indicate that perhaps some criminal activity had taken place, or alleged, would you not pursue that?

Mr. COLE. If somebody brought to our attention evidence of a crime we would of course look into it. But if somebody wanted us to target somebody because of their political beliefs we would not go down that road.

Mr. CUMMINGS. And so I am hoping that those accusations we can put to rest. You know, going back to some questions Chairman Issa asked you a moment ago, with regard to the investigation of Ms. Lerner, when you look at the facts that you have got—and I am not asking you to get into that. Let me talk just generally. And you pursue those facts, whatever they may be. And what happens? Does the—does a group of attorneys get together and say, you know what, we move forward with a case. Again, I am taking away from Ms. Lerner, just talking in general I mean, what usually happens there? At what point do you determine that you are gonna proceed, and how does that come about?

Mr. COLE. Generally the way it works is the line attorneys involved in and learn the facts of the investigation. The investigation is conducted largely by the law enforcement agents, many times the FBI. They may be working with the line attorneys in helping figure out what the information is that is needed. When they have gathered all the facts, they take a look at what those facts are in light of the applicable law. Then recommendations are made to their supervisors as to what the resolution should be of the case, and it could be any number of resolutions.

And the supervisors then review those recommendations. They may ask for more information to be gathered because certain facts may not have been developed sufficiently. They may decide that they disagree with the recommendation or agree with the recommendation. Any number of things can happen in that process. But these are all done by the career people, usually with input from the investigators and through the line and division and section chiefs in the divisions that we have in the department by career people.

Mr. CUMMINGS. So that the record is clear. So all of this—now going to Ms. Lerner—there is no decisions that have been made. I assume you can answer that question.

Mr. COLE. No decisions have been made.

Mr. CUMMINGS. No decisions have been made. Everything is wide open, is that right?

Mr. COLE. That is correct.

Mr. CUMMINGS. All right.

I have nothing else. Thank you.

Mr. JORDAN. Thank the gentleman.

Recognize the chairman of the full committee.

Chairman ISSA. Thank you. I can understand that no decision has been made. But let's just go through this because I think it is important. The Ways and Means Committee did do a criminal referral. You have—you are in receipt of that, isn't that correct?

Mr. COLE. That is correct.

Chairman ISSA. And that, in fact, does give you a basis of a number of allegations to investigate. Is that correct?

Mr. COLE. That is correct.

Chairman ISSA. You took those allegations seriously. Is that correct?

Mr. COLE. We do.

Chairman ISSA. So you have serious allegations, referred—based on actual evidence produced from the Ways and Means Committee, voted on by that committee and referred to you, on which you are continuing to consider wrongdoing by Lois Lerner and have not made a final decision.

Mr. COLE. Yes.

Chairman ISSA. Additionally, this committee and the U.S. House of Representatives, as an entire body on a bipartisan basis, referred contempt to the U.S. attorney. Isn't that correct?

Mr. COLE. That is correct.

Chairman ISSA. And the statute says the U.S. attorney shall prosecute that. Is that correct?

Mr. COLE. That, I believe, is the wording of the statute.

Chairman ISSA. At the current time, the U.S. attorney has not prosecuted that. Isn't that correct?

Mr. COLE. No charges have been brought, to my knowledge.

Chairman ISSA. And under the statute, that criminal referral—that referral for contempt—is, in fact, a separate event from any other allegations and is not, in fact, subject to double jeopardy. Isn't that true?

Mr. COLE. I am not sure what you mean by subject to double jeopardy.

Chairman ISSA. That all charges need to be brought, often in a related manner—need to be brought at one time. Otherwise, there is a question of piling them on sequentially. Contempt was, in fact, and is in fact, a separate event that can be—you can go forward with separate from the ongoing criminal investigation of Lois Lerner. Isn't that true?

Mr. COLE. I am not sure I agree with the first part, but contempt is separate.

Chairman ISSA. Contempt is separate. So it is not a charge that has to wait for the other charges and investigation. So today, can you explain to us why the U.S. attorney would not go forward with a contempt that has already been evaluated, voted out of the U.S. House on a bipartisan basis, and bring it? There is not a lot of discovery, and she came, she talked, then she decided to lawyer up,

if you will, with taking the Fifth. And then turned around, talked some more, answered some questions, and then reasserted the Fifth Amendment. The contempt information is available to you on video, online.

Why, in fact, is the U.S. attorney not bringing it? What purpose—what lawful right does he have not to obey “shall bring the case”?

Mr. COLE. I don’t believe it says “shall bring the case,” No. 1. But—

Chairman ISSA. Well, “shall prosecute.”

Mr. COLE. I don’t think it even says shall prosecute.

Chairman ISSA. It is not a “may,” it is a “shall.” Yes, there we go. “Shall have a duty to bring the matter before us.” So OK, he has got to bring it before—look, I am not a lawyer, I don’t try to play one. There are good lawyers here on both on the dais and behind the dais. It is very clear this is not a statute where he gets to think about it and decide if he is gonna do it. This should be brought forward for consideration.

The only question would be what is a reasonable timeline. Now, would you please answer. Do you believe there is a reasonable timeline, and if so would you name that for us?

Mr. COLE. Every case has its own time and it needs its own review. There has been—

Chairman ISSA. This didn’t say you can review it and look at it and think about it. It says we have already made our decision, he has been held in—she has been held in contempt. It is a question of when “shall” applies to bringing the case.

Mr. COLE. Well, “shall” doesn’t say he shall bring a case. That is not there. The prosecutor retains discretion about whether or not a case should be brought.

Chairman ISSA. Let me read this verbatim to you. Because apparently, only verbatim matters here. “To the appropriate United States attorney,”—the U.S. attorney in the District—“whose duty it ‘shall be’ to bring the matter before the grand jury for its action”—shall bring it before the grand jury. There is no discretion there, is there?

Mr. COLE. I believe that the Office of Legal Counsel, when Ted Olson was in that position, rendered an opinion that said there is discretion, in fact.

Chairman ISSA. Then would you please grant us a yes or no? You know, an absence of justice because you may think that you may not have to enforce the Constitution, you may not have to obey Congress, you may not have to deliver information pursuant to crimes committed by the Justice Department in bringing fraudulent Statements before the Congress, and then covering it up for 10 months, the only thing we ask for—that Mr. Cummings, I am sure, would join me is—if you don’t think “shall bring”—shall—I will keep reading it appropriately—shall be to bring the matter before the grand jury for its actions.

If you don’t think that means that in a period of time that would be reasonable to do it, that he shall do it. If you think it is discretionary, would you please give that back to us in a legal opinion so that we can change the law to make it clear you are wrong.

Mr. COLE. We can provide you with that.

Chairman ISSA. I would appreciate having a legal opinion. Now I have one last question. Do you know a person named Virginia Seitz, S-E-I-T-Z?

Mr. COLE. Yes, I do.

Chairman ISSA. Did she work for the Department of Justice for approximately 90 days?

Mr. COLE. She worked for more than 90 days.

Chairman ISSA. How long?

Mr. COLE. I don't know the exact amount.

Chairman ISSA. At that time, was she working on criminal areas, including wire fraud?

Mr. COLE. She was the—Virginia Seitz, I believe, was the assistant attorney general in charge of the Office of Legal Counsel.

Chairman ISSA. OK. So is there any chance that during her tenure policy changed as to the enforcement of Internet online gaming, illegal activities, or any chance that any policy changed under her?

Mr. COLE. I would have to go back and look. I don't know off-hand.

Chairman ISSA. This committee is interested in knowing, during her relatively short tenure apparently, what role she played in evaluating any policy change related to the—going after online gaming. We can followup with appropriate demands if that is necessary. But we would hope that you would inform us as to any policy change, as to going after Internet and online—essentially, online gaming. And any role she may have played in it.

Mr. COLE. If you communicate your request to us, Mr. Chairman—

Chairman ISSA. We will do so.

Mr. CUMMINGS. Will the gentleman yield?

Chairman ISSA. Of course I would yield.

Mr. CUMMINGS. Thank you very much. The only reason I am asking for a yielding is to—I want to join the gentleman. I, too, would—you mention my name, and I am interested in seeing the Olson opinion. But there is something else that I want you to do, too. I want you to provide us with a history of how contempt has been dealt with through Republican and Democratic prosecutors, U.S. attorneys. And any information that you may have with regard to this “shall.”

Because I understand the gentleman's concern. You have got the word “shall” there, but I just want to know what the history has been, the history. And the Olson opinion is just one part of that history. And the question of whether the statute usurps prosecutorial discretion. I hope your people can get something back to us so that we have that entire body of law of whatever you have been doing, your tradition, so that we will know what Republicans and Democrats have been doing.

Chairman ISSA. And I would—I would only amend that ever so slightly to say please leave out of it, or put separately, the questions in which executive privilege has been claimed. Since in the case of Lois Lerner, the case in point, we are talking about what we believe to be a criminal, based on referrals from the Ways and Means Committee, who made Statements before this committee under oath, asserted her Fifth Amendment rights, and made more

Statements under oath. And then reasserted and was held in contempt by the U.S. House of Representatives.

So we are talking narrowly about somebody who came, quite frankly, not in any particular role. She is a former employee of the government, but she came and was held in contempt. Not someone in which the President claims any executive or, you know, similar privileges.

Mr. COLE. I understand.

Chairman ISSA. Mr. Chairman, thank you for your indulgence. This has been very informative, and we will followup with a letter on Ms. Seitz.

Mr. JORDAN. Mr. Cole, we know that emails Lois Lerner sent outside the IRS are missing. We know that she had communications with the Justice Department on several occasions in emails. And we know that you are withholding certain documents from the committee. Is it fair to assume that some of those documents you are withholding actually are emails that Ms. Lerner has—emails from Ms. Lerner to people in the Justice Department?

Mr. COLE. I don't know if it is fair to assume it. I don't know exactly which documents are being withheld. But I don't know if it is fair to assume that it would include—

Mr. JORDAN. Well, let me ask it this way. Can you guarantee us that none of the documents the Justice Department is withholding from Congress are Lois Lerner emails?

Mr. COLE. I can't guarantee. I haven't seen all the documents we are withholding. But we will take a look at them.

Mr. JORDAN. We would like to see the documents, is frankly what we would like to see.

Mr. COLE. I understand, but we are gonna give you the ones that we can give you.

Mr. JORDAN. So you very well could have. I mean, we have all kinds of emails where it is Lois, can you send it to us in the format the FBI wants? We have the pretty extensive correspondence back and forth you are withholding documents. The only emails that are missing—frankly, this is why I raised the question earlier. It would have been nice if you would have went in—and maybe you have, but you won't tell us—got a search warrant, got a court order, went in and seized her files right at the get-go maybe we would have known that all these emails were missing a year ago.

But the fact that emails she has sent outside the IRS are missing, she had direct correspondence with people in the Justice Department, you are now withholding documents from this committee and from the Congress and, more importantly, the American people. Seems to me there are probably some Lois Lerner emails in the documents you are withholding.

Mr. COLE. I am not sure there is a valid assumption that there are probably Lois Lerner's emails that we are withholding. I don't think that is a fair assumption.

Mr. JORDAN. Yes, but what is fair to say is, you cannot guarantee that there aren't.

Mr. COLE. I haven't looked at all the documents, Mr. Chairman, so—

Mr. JORDAN. Well, that would be important for—well—

Mr. COLE. I can't answer that question—

Mr. JORDAN. First of all, it would be important for you to look at it, as the guy who is coming here testifying to say maybe you could give us more information about it. Because second of all, it would be nice if we could get them.

With that, I will recognize the gentleman from Pennsylvania.

Mr. CARTWRIGHT. First off, General Cole, would you like to respond to that last Statement?

Mr. COLE. I am not sure I heard completely the last Statement.

Mr. CARTWRIGHT. All right, fair enough.

A couple issues I want to touch on, on the prejudging and the screaming issues. First of all, I share something with Mr. Gowdy of South Carolina. I prefer technical, legal terms. And when we talk about—you know, when we talk about smidgens, “scintilla” might be better. And when we talk about prejudging, “prejudicing” might be better. And I want to talk about whether anything has been done to prejudice the investigation of the Justice Department. My colleague, Mr. Horsford, touched on this earlier.

Last month, the Judiciary Committee held a hearing, and they brought in FBI Director, James Comey, and went over this. And Chairman Goodlatte asked him can you explain why there is an investigation, given that the President said there was not even a smidgen, or a scintilla, of corruption. And Director Comey, the director of the FBI, said, “I mean no disrespect to the President or anybody else who has expressed a view about the matter, but I don’t care about anyone’s characterization of it. I care, and my troops care, only about the facts. There is an investigation because there was a reasonable basis to believe that crimes may have been committed, and so we are conducting that investigation.”

Now, Deputy Attorney General Cole, do you agree with the FBI director’s assessment that outside characterizations, even by the President of the United States, have no bearing on a particular investigation?

Mr. COLE. That is correct. Outside characterizations by anybody have no bearing on our investigation.

Mr. CARTWRIGHT. And when you talk about career prosecutors, line prosecutors, career investigators, does that apply to these people?

Mr. COLE. It does. These are all career Justice Department investigators, attorneys. None of them are political appointees.

Mr. CARTWRIGHT. Is it accurate to say that the Department of Justice does not take direction from the President on how to conduct ongoing investigations?

Mr. COLE. We do not and we would not.

Mr. CARTWRIGHT. All right. There was also an allegation of screaming going on by the DOJ screaming at the IRS. And I am gonna invite your attention to the testimony of Jack Smith who, as you know, is the chief of the DOJ public integrity section. This was testimony taken on May 29, 2014. Representative Jordan was present. And I am gonna read to you a brief quote from that.

Question—and this was a question to Mr. Smith. “If you direct your attention to the second sentence of the second paragraph below the block quote, it reads, ‘By encouraging the IRS to be vigilant in possible campaign finance crimes by 501(c)(4) groups the department was certainly among the entities, ‘screaming,’ at the

IRS to do something in the wake of Citizens United before the 2010 election.” And the question was, “Are you aware of the department, “screaming at the IRS to do something in the wake of Citizens United before the 2010 election?”

And the chief of the DOJ public integrity section said no. The next question was, “At the October 8, 2010 meeting, did anyone at the department raise their voice at the IRS, speak in strident tones, make demands on the IRS?” The answer was no, by Jack Smith. And then the question was, “Are you aware of anyone at the Department of Justice placing pressure on the IRS to influence the outcome of the 2010 elections?” And the answer was no. And I am gonna put that same question in front of you, Mr. Cole. Are you aware of anybody at the Department of Justice screaming at anybody at the IRS to fix Citizens United or put any kind of pressure on the IRS?

Mr. COLE. No, Mr. Cartwright, not at all. This is not something we would be doing. We are just looking for whether or not there are criminal cases to be made or not, and that is it.

Mr. CARTWRIGHT. Not aware of any screaming.

Mr. COLE. No screaming.

Mr. CARTWRIGHT. And you didn’t do any screaming yourself, I take it.

Mr. COLE. I did not.

Mr. CARTWRIGHT. Thank you, Mr. Cole.

I yield back.

Mr. JORDAN. Mr. Cole, when the President of the United States makes a speech or makes a Statement, does that have meaning? Does that have bearing, does that have influence?

Mr. COLE. On a criminal investigation by the department—

Mr. JORDAN. I am just saying when the President talks, he does an interview, he goes and—he gives speeches all the time. Sometimes he will talk in a way that is designed to send a message to even foreign heads of State. So when the President talks, does that have meaning and influence?

Mr. COLE. As a basic matter, it can, certainly.

Mr. JORDAN. So when the President gives an interview—where he is not telling some story, he is not telling some joke—he is commenting on a serious subject matter, that has influence, that has impact, that has significance. Correct?

Mr. COLE. Not on a criminal investigation.

Mr. JORDAN. I am not—I am just saying in general. I am asking you—you are a smart guy, a lawyer, you have done very well in life. You are at an important position in the U.S. Government and the Justice Department. When the President talks, it has impact.

Mr. COLE. It can.

Mr. JORDAN. It should. He is the President of the United States, President of the greatest country in the world.

Mr. COLE. I understand that.

Mr. JORDAN. The leading—it should have impact.

Mr. COLE. He has asked Congress to do a lot of things. It seems not have had much impact.

Mr. JORDAN. It has impact. It had impact. We heard him. But we think he is—we think he is wrong. Here is my point, then. And I respect—I am like everyone else on this panel, I respect the good

professionals who work in the Department of Justice. But don't you think it is possible, maybe even likely, that in the back of even the best professional—in the back of their mind, they know that the President has said in a public way, in a very public way—a nationally televised interview—that there is nothing there, there is nothing there.

Don't you think that just somewhere deep back in there it may have a—just to use the term my colleague uses, a “scintilla” of impact, just a smidgen of impact, on the decisions of these great professionals who work in your agency?

Mr. COLE. I am gonna echo Director Comey's Statement in that regard. No, it doesn't. These people put out—what other people say, they put it out of their minds, and they go after the facts. That is what they care about. And particularly in high profile cases like this, that happens quite a bit. And they are very expert at putting out of their minds anything but the facts in the law in the case.

Mr. JORDAN. So the—so Barbara Bosserman doesn't take this into account. That the guy she gave a max-out contribution to his campaign goes on national television and says there is nothing there, it is not anywhere—not anywhere in the back of her mind that this thing has already been prejudiced.

Mr. COLE. Her job is to not do that, and she does her job—

Barbara Bosserman, who gave \$6,750 to the President's campaign and the Democrat National Committee. Here is the President who could be a potential target of the investigation, when she hears that, it doesn't impact her at all.

Mr. COLE. It does not. She does her job professionally.

Mr. JORDAN. You can say that for sure. You can speak for Barbara Bosserman here today.

Mr. COLE. Yes, I can.

Mr. JORDAN. That does not impact her.

Mr. COLE. I have confidence in the career prosecutors and career people—

Mr. JORDAN. That is amazing.

Mr. COLE [continuing]. In the Department of Justice.

Mr. JORDAN. That is amazing. OK, thank you.

I will recognize the gentleman from Florida.

Mr. DESANTIS. Thank you, Mr. Chairman. Deputy Attorney General Cole, if the DOJ is investigating an individual or an entity, when is it ever acceptable, if it is acceptable at all, to conceal the fact that the—that evidence sought by law enforcement has been destroyed? I mean, I can see a civil case where you are asking for specific things, a criminal case where a search warrant is issued. Is it acceptable to not disclose that to law enforcement?

Mr. COLE. Again, as I have said with Mr. Jordan and—Chairman Jordan, it depends on the circumstances. They shouldn't conceal it, they shouldn't lie about it. There may or may not be, depending on the circumstances, a duty to tell about it. But those are all gonna depend on the circumstances of—

Mr. DESANTIS. So if you were—the DOJ was prosecuting a civil matter against, say, a company, issues subpoenas asking for emails over a specific period of time, and then that company responded saying, yep, we will comply with it. But if they had reason to be—

lieve that they wouldn't be able to fulfill that request, then that would be a problem if they had represented that to you, correct?

Mr. COLE. Yes. If, at the time they represented that to us, they knew that they weren't complying that would be a problem.

Mr. DESANTIS. And then if they didn't know at the time, but then after sending you the response they figured out that they were wrong, they do have a duty to come back to you and amend that response, correct?

Mr. COLE. Yes, they should come back and tell us.

Mr. DESANTIS. OK. Here is an issue that I just—I was confused about. The DOJ was not informed that emails had been lost or destroyed. Congress obviously wasn't until June. But according to IRS Commissioner Koskinen the Treasury Department and the White House were informed in April. So what would be the reason to disclose that to the Treasury and the White House but not disclose it to either the DOJ or Congress, who are both conducting investigations into the matter?

Mr. COLE. I don't know. That is a question you should probably give to the IRS.

Mr. DESANTIS. Does it bother you, though, that they would have told the Treasury Department without telling the Justice Department?

Mr. COLE. They are part of the Treasury Department so, again, you would have to ask them as to their reasons for doing this.

Mr. DESANTIS. How about the White House? Does it concern you that they would let the White House know, but not tell the Department of Justice?

Mr. COLE. Again, I would want to know what the circumstances were and who at the White House and what was told. I just don't know enough information to answer.

Mr. DESANTIS. So is it gonna be something, though—those circumstances, is that something that you think is appropriate to investigate?

Mr. COLE. This will all be part of our looking into the emails, yes.

Mr. DESANTIS. Recently, two Federal judges have greeted the IRS' claim of lost emails with suspicion. And they have actually—are forcing the IRS to come in and substantiate their claim that these things are somehow lost and not recoverable. And we have people who have advised us, that say, yes, you know we got data from the Challenger explosion, 9–11, all this stuff. And a lot of people in the data community, IT, say, well, come on you are gonna be able to get these emails.

So how would you characterize the Department of Justice? Do you greet the IRS' claim that these emails are simply lost because the hard drive crashed with skepticism?

Mr. COLE. We are trying to find out if there is any way to recover them and do what we can to do that.

Mr. DESANTIS. Is it safe to say that if you were investigating a private entity, and you wanted specific documents, if they simply said, sorry, the hard drive crashed, that would be not—that probably would not be something you would simply just accept at face value?

Mr. COLE. Generally, we would ask what the circumstances were and the facts were behind a Statement that they couldn't be recovered.

Mr. DESANTIS. Let me just followup with this whole thing about the U.S. attorney, whether they shall bring it. Because I think we are kind of—people are using different terms. Bringing something before a grand jury is not the same as prosecuting at the trial, correct?

Mr. COLE. That is correct.

Mr. DESANTIS. So the statute does not impose a duty on the U.S. attorney to actually bring the case to trial, right?

Mr. COLE. That is correct.

Mr. DESANTIS. It imposes a duty on the U.S. attorney to bring it to a grand jury. Is that accurate?

Mr. COLE. The language of the statute, and I don't mean to be just kind of fine-point lawyerly on your, but there is this Ted Olson opinion from—

Mr. DESANTIS. Well, what—I think what Olson is saying is—

Mr. COLE [continuing]. From another—

Mr. DESANTIS [continuing]. He is basically—the statute, to me, is crystal clear. An obligation to bring it before a grand jury. I think what Olson is saying is, look, article two, we are the executive, you guys are the executive branch. You can't force someone, necessarily, to prosecute a case. I think generally that is true. I mean, if we told you just to prosecute every money laundering case you may get a lot of cases that aren't meritorious and so would be a waste of resources. And it would impinge on your discretion.

Mr. COLE. Right.

Mr. DESANTIS. But this, I think, is a little bit different. Because we in Congress have found reason for contempt. It was voted on behalf of the American people. So us imposing a duty simply to bring it to a grand jury and allow them to make a decision, I think is a little bit different.

Let me ask you this. The fact that we impose the duty to bring it to a grand jury, let's just say you accept that. Do you think that imposes a duty on the prosecutor to ask that a true bill be returned? Or could you, as a prosecutor, consistent with that statute go into a grand jury proceeding?

And I don't necessarily think this is what should happen. But could you actually go in your judgment, if you didn't think the contempt was meritorious, and ask the jury not to return a true bill?

Mr. COLE. Well, obviously there is an assumption in your question that it has to be brought before a grand jury. And this Ted Olson opinion does—

Mr. DESANTIS. Assume that, for me, for just a second.

Mr. COLE [continuing]. Does address that, and say that is not necessarily the case. Bringing a matter before the grand jury for action which is, I believe, the wording of the statute, leaves open any number of different resolutions that the grand jury could be asked to bring.

Mr. DESANTIS. Thank you.

I yield back.

Mr. JORDAN. The gentlelady, Ms. Kelly, is recognized.

Ms. KELLY. Thank you, Mr. Speaker—Mr. Chairman.

Republicans allege that efforts to target conservative groups in the screening of applicants' tax-exempt status is the result of an overarching government conspiracy involving the White House, the IRS, the Justice Department, Securities and Exchange Commission, the Federal Election Commission as well as other agencies. According to the Republicans, this vast conspiracy originated after the Supreme Court's 2010 Citizens United decision.

Chairman Issa, in my opinion, issued a partisan staff report on June 16, 2014 concluding that the Justice Department and the IRS had "internalized the President's political rhetoric lambasting Citizens United and non-profit speech." Deputy Attorney General Cole, to the best of your knowledge did the President's political rhetoric about Citizens United cause the department to conspire against non-profit political speech?

Mr. COLE. It did not.

Ms. KELLY. Do you have—

Mr. JORDAN. Would the gentlelady, are you asking about the IRS or the Justice Department?

Ms. KELLY. I haven't yielded.

Mr. JORDAN. I thought the question was did the IRS conspire. Of course they did.

Ms. KELLY. I haven't yielded.

But do you have any reason to believe that the Citizens United has prompted the unwarranted prosecution of political organizations?

Mr. COLE. No, I have no reason to believe that.

Ms. KELLY. Your answer does not surprise me. Because despite conducting 10 hearings, receiving hundreds of thousands of pages of documents, and conducting over 40 transcribed interviews, the committee has been unable to gather any actual evidence of this vast conspiracy my Republican colleagues claim exist.

In fact, the evidence gathered by the committee and the IG show that the inappropriate search terms that were first used by an employee in the Cincinnati determinations unit, and the inspector general's May 14, 2013 report concluded, that the inappropriate criteria, "were not influenced by any individual or organization outside the IRS."

Deputy Attorney General Cole, in the written testimony that you submitted to the committee, you wrote, "I have the utmost confidence in the career professionals in the department and the TIGTA, and I know that they will follow the facts wherever they lead and apply to the law to those facts," which you have said here. Is that the guiding principle that the department uses in conducting all of its investigations?

Mr. COLE. Yes, it is.

Ms. KELLY. I think that this committee should follow these same principles to its investigation of the IRS. It is quite clear that the facts do not lead to the conclusion that Citizens United prompted a governmentwide conspiracy.

And thank you for your testimony.

Mr. CUMMINGS. Will the gentlelady yield?

Ms. KELLY. Yes.

Mr. JORDAN. The gentleman from—

Mr. CUMMINGS. I want to go to what Mr. DeSantis was just asking you. You referred to the Olson case, and I have the Olson case in front of me, the Olson opinion rather. And what it says is we believe that Congress may not direct the executive to prosecute a particular individual without leaving any discretion to the executive to determine whether a violation of the law has occurred. That is what the opinion says. It is a 1984 opinion, dated May 30. And this was a contempt citation coming from the Congress that he was talking about.

So I guess this is consistent with what you were saying. I mean, is this a—so this Olson case in the U.S. attorney's office—I mean, it is well-known. Is that right? In a certain—I mean, this Olson opinion, is this something that is well-known, it is something that you all, you know—

Mr. COLE. It is known, I don't know if it is well-known. But if you are dealing with—

Mr. MEADOWS. Will the gentleman yield?

Mr. COLE [continuing]. A citation—

Mr. MEADOWS. Will the gentleman yield?

Mr. CUMMINGS. Of course.

Mr. MEADOWS. I am confused. Is Mr. Olson—is he a judge? I mean, what opinion are we talking about here? I thought he was a career employee.

Mr. CUMMINGS. I am sorry.

Mr. MEADOWS. I yield back.

Mr. CUMMINGS. Mr. Olson was a—

Mr. MEADOWS. I thank the gentleman from Maryland for yielding.

Mr. COLE. If I may answer, Mr. Olson was not a career employee, but a political employee, political appointee, as the assistant attorney general for the Office of Legal Counsel back in 1984 in the Reagan Administration. The Office of Legal Counsel is asked many times, and is authorized, for the executive branch of government to provide legal opinions which are binding upon the executive branch of government, to interpret various aspects of law that the government has to abide by.

Mr. CUMMINGS. Thank you very much. So you said he was a Reagan employee—appointee?

Mr. COLE. Yes.

Mr. CUMMINGS. Very well. I would like to—since we have talked about this opinion, Mr. Chairman, I would like to enter into the record—

Mr. JORDAN. Without objection.

Mr. CUMMINGS. Very well.

That is all I have.

Mr. JORDAN. The gentleman from North Carolina is recognized.

Mr. MEADOWS. Thank you, Mr. Chairman.

Mr. Cole, let me come back to, really, what I guess I am a little concerned. The public integrity section, you said, reached out to the IRS. Is that correct—in 2010?

Mr. COLE. In 2010, yes. My understanding is they made contact with the IRS.

Mr. MEADOWS. All right. So what was the nexus of why they reached out?

Mr. COLE. I just look at the account that I have heard from Jack Smith and from Richard Pilger, who have testified—given transcribed interviews to the committee about what they were doing at the time.

Mr. MEADOWS. All right. Do you..

Mr. COLE. So I take their purpose as what it was. I think Mr. Smith had seen an article in the newspaper about what appeared to be perhaps a misuse of the tax-exempt organization laws and wanted to find out if there—

Mr. MEADOWS. So that is your opinion.

Mr. COLE. No, that is not my opinion. That is just my understanding of what—

Mr. MEADOWS. OK. But as part of this investigation, wouldn't it be important for us to understand the nexus of them reaching out to the IRS; emails, I mean, motivations. Wouldn't that be important to understand?

Mr. COLE. Right. I think we are in the process of providing that to you. When you talk to both of them about what their motivations were—

Mr. MEADOWS. But I mean, isn't it important for DOJ to look at that? Wouldn't that be part of the investigation?

Mr. COLE. That is not necessarily part of the IRS investigation.

Mr. MEADOWS. Why wouldn't it be? Because, I mean, motives back and forth, wouldn't that be part of it?

Mr. COLE. Nothing happened. That was a brief meeting. There was a discussion about how it would be very, very difficult, if not impossible, to bring cases. There were no investigations started, there were no referrals made. Nothing happened after that. This was a very, very brief—

Mr. MEADOWS. So you say nothing happened.

Mr. COLE [continuing]. And unproductive—

Mr. MEADOWS. How can you give me that kind of specificity with regards to what happened and what didn't happen if you are really not familiar with what went on? Because you just said that prior to that. How can you be so precise in nothing happening. I don't—

Mr. COLE. Because we have had people look at whether or not the public integrity section got any referrals from the IRS as a result of that.

Mr. MEADOWS. So part of your investigation, you have looked at that.

Mr. COLE. We asked about whether that happened.

Mr. MEADOWS. OK, all right. So do you have an open investigation right now on April Sands, who used to be with the FEC?

Mr. COLE. I am not aware one way or another. April Sands?

Mr. MEADOWS. Yes. I mean, maybe you need to read the newspapers about this, when she was the one that actually violated the Hatch Act, worked with the FEC, used to work with Lois Lerner. You are not aware of that?

Mr. COLE. Not off-hand.

Mr. MEADOWS. OK. Well, I would encourage you to become aware of that. Because she admitted that she violated the Hatch Act and that, quite frankly, some of the Twitters asking for donations while

at work, or have been alleged, wouldn't that be important that you look at that, from the Department of Justice?

Mr. COLE. You said she worked at the FEC?

Mr. MEADOWS. Yes.

Mr. COLE. I am not sure that is part of the IRS investigation. It may be—

Mr. MEADOWS. Well, let me just tell you. There was—Ms. Lois Lerner, it has been reported that Lois Lerner and April Sands actually worked together when they were with the FEC. Would part of your investigation—wouldn't—

Mr. COLE. I am not gonna go into all the details, as I have said before, of our investigation. But—

Mr. MEADOWS. But I find it interesting. So you have never heard of April Sands.

Mr. COLE. Not sitting here today. I don't know about every single case that the Justice Department is investigating. We have 112,000 employees.

Mr. MEADOWS. Well, I am—I have been led to believe that you guys are not gonna look at it. And that is troubling because this gets to the very heart of what we have been talking about. And so would you commit here today to take a look at April Sands and the FEC, and what violations of the Hatch Act may or may not have occurred?

Mr. COLE. I will commit here today to find out what the story is and see if it is a matter that is worthy of looking into.

Mr. MEADOWS. All right. So let me close with this. You have done an exhaustive—I think, according to your words—exhaustive research in terms of these missing emails. Is that correct?

Mr. COLE. I don't know if I would use the word "exhaustive."

Mr. MEADOWS. Investigation.

Mr. COLE. We have been very thorough in trying to find emails.

Mr. MEADOWS. OK. So if you have been that thorough, does it not trouble you that it is very slow in forthcoming, and that you have to read the Washington Post to figure out what is going on in terms of IRS employees telling you what may or may not have happened over the last 4 or 5 months?

Mr. COLE. I would have preferred to have learned earlier.

Mr. MEADOWS. OK. So would that be something that would be subject to investigation by the DOJ?

Mr. COLE. As I have said, that will be part of our looking at the emails, all the things that surround it.

Mr. MEADOWS. So the fact that Mr. Koskinen, the commissioner—the IRS commissioner—didn't tell you until months later, that troubles you.

Mr. COLE. We are gonna be finding out what happened—

Mr. MEADOWS. Does that trouble you?

Mr. COLE. Not until I find out all the facts, Congressman.

Mr. MEADOWS. If it is true, does that trouble you?

Mr. COLE. I need to find out all the facts—

Mr. MEADOWS. So you are afraid to say it troubles you.

Mr. COLE. I am not afraid to say anything. I just don't deal with hypotheticals.

Mr. MEADOWS. All right.

I yield back, thank you.

Mr. JORDAN. Thank the gentleman.

The gentleman from Nevada is recognized.

Mr. HORSFORD. Thank you, Mr. Chairman. Let me just say on the outset, I still find it astonishing the lack of courtesy that the chairman continues to show to members of this committee. The fact that members continue to not receive equal time, that the chair interrupts members during our time, the fact that you badger witnesses and make judgments upon employees and their motivations without any evidence.

I think all of this does a disservice to the role of the oversight function which is very serious and has a very clear responsibility to the American people for providing an oversight to Federal agencies; and in this particular case, because there is so much concern about the wrongdoing that occurred at the IRS.

I am also, you know, alarmed by the ongoing efforts by some members of the committee to treat this process like a courtroom. We have three branches of government for a reason. And I know while some members may be versed in the law and may have previous careers in that arena, this is not a courtroom. And yet there are those who continue to try to treat it as such.

I want to speak to the issue of the special prosecutor, and to ask you, Mr. Cole, for your response. The attorney general, in a January 8, 2014 letter, responded—excuse me, Chairman Issa and Chairman Jordan in a letter to the attorney general claimed that Ms. Bosserman, a career attorney in the civil rights division at the Department of Justice, is leading the DOJ-FBI investigation.

However, this allegation was directly refuted by the attorney general in his testimony before the Senate Judiciary Committee on January 29, 2014. I won't read his full testimony. But so that there is no stone left unturned, Deputy Attorney Cole, I would like to ask you the same question that was asked of Mr. Holder. Is Barbara Bosserman the lead attorney in the Department of Justice's investigation or the member of a larger team?

Mr. COLE. She is a member of a larger team. She is not the leader of the investigation.

Mr. HORSFORD. Despite assurances from the department that Ms. Bosserman is not the lead investigator, Chairman Issa and Chairman Jordan continue to assert that her political donations have created a "startling conflict of interest." This supposed conflict of interest is a key justification for some Republican members' request that the special prosecutor be appointed to conduct the criminal investigation.

On May 2, 2014, days before introducing a resolution requesting a special counsel, Chairman Jordan said we need a special counsel to help us get to the truth because the so-called investigation by the Justice Department has been a joke; the current investigation has no credibility because it is being headed by a max donor who is financially invested in the President's success.

Mr. Cole, is there any merit to allegations that Ms. Bosserman's involvement destroys the credibility of the Department of Justice investigation?

Mr. COLE. No, I don't believe there is any merit at all.

Mr. HORSFORD. On June 26, the Department of Justice sent a letter concluding that the appointment of a special counsel is not

warranted. Can your explain the determination as to why the special counsel is not needed?

Mr. COLE. We look at the regulations, we go by law in these matters, and we look at what the regulation is that is applicable here. And we have talked about it already in this hearing. Regulation at 45.2, and Ms. Bosserman's activities don't come anywhere near the ambit of that regulation for her disqualification. There is no reason to take it away from the normal regular order of career prosecutors doing their job, with lots of other people involved: FBI, TIGTA, other people in other divisions and sections in the department.

She is part of a much larger team, and there is no reason to take anything out of the normal course and the normal order. That is usually the best way to do an investigation.

Mr. HORSFORD. Thank you. Well, then, I would assert, rather than wasting more taxpayer money on a special prosecutor, Congress should be focused on addressing some other pressing issues facing our constituents.

And again, Mr. Chairman, I deplore you to please provide a level of decorum and civility so that those of us on this committee who do want to get to the truth and have a fair and impartial process can do so without having an abusive setting in which to operate.

Mr. JORDAN. I thank the gentleman.

Mr. Cole, does Barbara Bosserman have a financial interest in the President's success?

Mr. COLE. I don't believe she does, no.

Mr. JORDAN. So when you give a campaign contribution, you are not invested in—in hoping good things happen to the person you made that investment in?

Mr. COLE. You do not have a financial interest. I know several leading ethics attorneys in the United States have been asked to opine on that and have said it is not even close that there is a conflict of interest just from—

Mr. JORDAN. Of the 112,000 employees that you have at the Justice Department, you couldn't find someone, though, who didn't have this perceived financial interest. You couldn't find someone else to be a part of this team?

Mr. COLE. There is no perceived financial interest, Mr. Chairman.

Mr. JORDAN. There is by the American people. There may not be by you, but there is by the American people.

Mr. COLE. I am not sure I agree with that, but—

Mr. JORDAN. Then you are welcome to come to my district any time you want and talk to all kinds of folks. Because they sure think there is.

The gentleman from Arizona is recognized.

Mr. GOSAR. Thank you, Deputy General Cole. Once again, I am a dentist and so these little minutia things I can go smaller; micro-millimeters, millimeters, you got my point. Can you tell me a little bit more about this statute of 6103? Can you tell me the privileged information, and who gets that 6103?

Mr. COLE. I am not an expert in 6103. It is part of the tax code, and it deals with protecting taxpayer information from disclosure except in certain circumstances.

Mr. GOSAR. OK. So I am gonna make a comparison, I guess. Being a dentist, I have to know HIPAA regulations and OSHA. I am not excused from that, right?

Mr. COLE. That is correct.

Mr. GOSAR. So when we are talking about 6103 within the IRS or DOJ or executive branch, or anybody working within the Federal Government, they are pretty astute to who gets 6103, right?

Mr. COLE. They should be.

Mr. GOSAR. Oh? Does it give them an excuse if they violate that? I mean, when I am under a malpractice case, I don't get an excuse from HIPAA or OSHA, do I?

Mr. COLE. Not that I know of. Depending on the circumstances.

Mr. GOSAR. OK, so—and that is where I want to go here. Because I am talking from America, America wants to make sense of this jargon, this legal jargon. OK, does anybody get away with 6103?

Mr. COLE. If you violate 6103, if you violate the provisions, you should not get away with it. But it depends on the facts and circumstances, as with any case.

Mr. GOSAR. Well, wait a minute. I mean, you just told me, as a regular citizen, I can't get away with HIPAA and OSHA violations. But I can get away with a 6103?

Mr. COLE. No, that is not what I am saying. I am sure——

Mr. GOSAR. OK, I just——

Mr. COLE [continuing]. I am sure that not every single HIPAA or OSHA violation is prosecuted, or dealt with.

Mr. GOSAR. No, I am sure they are not.

Mr. COLE. Serious ones are.

Mr. GOSAR. I know. I understand that. OK.

Mr. COLE. That is what I am saying.

Mr. GOSAR. But, when we share 6103 there has to be an implicit to ask, right, from DOJ?

Mr. COLE. There has to be an approval from the IRS, as I understand it——

Mr. GOSAR. Approval from the DOJ.

Mr. COLE. No, from the IRS to share 6103 information. They have to authorize that.

Mr. GOSAR. Do you have that in your possession from Ms. Lois Lerner?

Mr. COLE. I am sorry?

Mr. GOSAR. Do you have that in your possession from Ms. Lois Lerner?

Mr. COLE. Have what?

Mr. GOSAR. A permission to share 6103. She sent you a disk with 1.1 million applications on there, with some 30 individuals have privileged information, for 6103. And the reason I bring that up is I am hampered as a Member of Congress with pertinent information, or 6103. And this is a willy nilly, just flippant aspect of sharing a disk. She knew it was on there.

Mr. COLE. I don't know that she knew that there was 6103 information on that.

Mr. GOSAR. Well, wait. But the emails——

Mr. COLE. It was represented to us at the time it came that there was not. And I don't know if she is the one who sent it, or if someone else in the IRS—

Mr. GOSAR. She is the one who sent—whoa, whoa. She—she is the one. Thanks, Lois, FBI says they are all formatted best. She is the one that has the correspondence with the FBI in regards to the format of the disk.

Mr. COLE. Right. But that doesn't necessarily mean she prepared the disk, or sent it.

Mr. GOSAR. She is the one that—she has oversight of that, right?

Mr. COLE. I don't know if that is within her control or not. I just don't know. But the question is whether or not whoever sent it knew there was 6103 information on it.

Mr. GOSAR. Well, she is—she has been involved in this regards of the leak of—this formatted aspect because she is the one talking to the FBI. Where I am going with this is, it gives me lenient—more pertinent information if I am learned in person that there was a violation of 6103. Wouldn't that—if I am a learned person?

Mr. COLE. Generally, there has to be an intentional violation. The question is whether this was—the information that was included, whether it was inadvertent or whether it was intentional. At the time it was provided, we were told that there was no non-public information.

Mr. GOSAR. Then, once again, you were told that there was non-pertinent information, and there was.

Mr. COLE. Non-public.

Mr. GOSAR. Non-public information. So once again, to me, this brings—this issue up of this being pertinent information. And that when Congress says that we are doing contempt charges, when we are looking at the criminal or civil violation of an oath of office, doesn't that give us some aspect of hedging our bet?

Mr. COLE. I am not sure what you mean by hedging our bet.

Mr. GOSAR. Well, wouldn't this kind of go in the mindset of a U.S. attorney that they would actually bring forth the contempt charges issue by the—by Congress?

Mr. COLE. I believe the U.S. attorney for the District of Columbia has the contempt citation and is reviewing it, and has assigned it to somebody. And the memo is being reviewed and worded.

Mr. GOSAR. Let me ask you a question. You keep bringing up this Olson ruling. Isn't that a subjective and an interpretive ruling, when the statute is very specific?

Mr. COLE. The opinions by the Office of Legal Counsel, when they issue formal opinions, are binding on the executive branch.

Mr. GOSAR. But isn't it also the—when there is a conflict between the legislative intent of the language and the executive branch that we have to have a better review. So just one interpretive aspect would not be good enough. We should look—

Mr. COLE. That can—I am sure somebody could probably challenge that in the right forum in court if they don't agree with an OLC opinion. But generally, the way the structure is set up for OLC is, they are the source of legal advice for the executive branch.

Mr. GOSAR. Well, thank you, General Cole.

Mr. JORDAN. The gentleman from California, the chairman is, recognized.

Mr. HORSFORD. Mr. Chairman, my——

Chairman ISSA. Thank you, Mr. Cole. Are you interrupting me? Isn't there decorum?

Mr. HORSFORD. I was asking the chairman——

Chairman ISSA. I guess I will yield. Please——

Mr. JORDAN. The gentleman from Nevada is recognized.

Mr. HORSFORD. I was asking whether the chairman had made a determination on my request for unanimous consent to enter the document——

Mr. JORDAN. My apologies. I forgot to look at that. If you—if we can take a look at—the staff can look at the documents, then we will look at it.

The gentleman from California.

Chairman ISSA. General Cole—would you put up on the board the org chart, please? I am glad you brought up this whole question. This is a little small, a little complex. But that org chart up on the board shows the attorney general, followed by you, followed by a whole group of associates, followed by all the division chiefs. Virtually all of those people are political appointees, aren't they?

Mr. COLE. Many of them are. The——

Chairman ISSA. Virtually all. I mean, you and the attorney general and your——

Mr. COLE. Just the attorney——

Chairman ISSA [continuing]. Direct reports are political appointees.

Mr. COLE. By and large, most of them are. Some are career, but the vast majority are political appointees.

Chairman ISSA. Well, even if they are career—even if they are career, they are career people who serve at the pleasure. I mean, you can move them around.

Mr. COLE. Some. They are in the SES service, and there are rules on that. But the vast majority of the assistant attorneys general and the associate attorney general are political appointees.

Chairman ISSA. And the head of the civil rights division?

Mr. COLE. Right now, that person is an acting person and is a career employee.

Chairman ISSA. But they serve at the pleasure of you.

Mr. COLE. That is correct, although there are certain civil service requirements——

Chairman ISSA. But you can move them, right?, to some other position.

Mr. COLE. That would probably——

Chairman ISSA. OK. I mean, they keep their pay but they lose their job. And the criminal division?

Mr. COLE. Same thing. That person is a political appointee, approved by the Senate.

Chairman ISSA. So when we talk about Ms. Bosserman and the team she is on, everybody practically—from her team all the way up to your boss—you are all political appointees who control their lives and so on. So when the question was asked—and the gentleman from Nevada has left, but I think fairly—he was saying, well—he was asking you, and you answered, “Oh, of course. We don't need a special prosecutor.” Don't you understand the Amer-

ican people see you as a political appointee. They see your boss, who has been held in contempt by the House for failure to comply.

They see the Supreme Court finding that those legal opinions you seem to have get nine to zero against you. Now, I am gonna go to one quick one. Your legal opinions included your brief in *Fast & Furious*, didn't they? Before Amy Berman Jackson, right?

Mr. COLE. I am sorry, our legal opinion?

Chairman ISSA. Your legal opinions led to those briefs in the *Fast & Furious* case that is currently in the district court in Washington.

Mr. COLE. We have our lawyers in the civil division who draft those—

Chairman ISSA. OK, so your legal opinions were that you didn't have to provide them, and that you were immune from having to provide them. And that it could—and specifically, your opinion was that she didn't have the right to adjudicate that. Wasn't that so?

Mr. COLE. I believe that was the position we took.

Chairman ISSA. And didn't Judge Jackson say just the opposite? That she did have the authority, and that she found the same as Judge Bates did in an earlier case? That your premise was wrong? And weren't you relitigating the exact same thing that President Bush had lost in the *Conyers* case?

Mr. COLE. We were stating—everybody litigates positions constantly in—

Chairman ISSA. OK. So you are part of an administration that can relitigate that which has been decided. Just yesterday, you decided that there was an inherent—your administration decided there was an inherent right not to deliver a Federal employee, even though in the *Harriet Miers-Bolton* case it was made clear that depositions and witness subpoenas were, in fact, binding. So the strange thing is, is when you talk about legal opinions—and I appreciate the former solicitor general and how well he is held in regard.

But what you are—what you are saying is, is you pick an opinion. And the opinion can be wrong, but your opinion is that you don't fall under us. That, in fact, our oversight is irrelevant, that you don't have to answer our questions, you don't have to produce documents, and you can withhold. That has been a consistent pattern in this administration.

And just yesterday, the President of the United States asserted a brand-new right, an inherent right, not to deliver a political appointee who serves, and interfaces with, the DNC and the D-triple-C—that is the Democratic National Committee and the Democratic National congressional Committee—works directly with those heads to plan the President's targeting of races to support Democrats for their reelection on a partisan basis, and we are not even allowed to hear from that person because there is an inherent right not to produce that.

So when you ask—you say here that you stand—and the attorney general's letter is well thought out, that you don't need a special prosecutor, do you know how absurd it sounds to the American people—absurd it sounds to the American people that you don't need a special prosecutor because all your political appointees overseeing a team of people who may, at the lowest level, actually be career

people hoping to move up. That you political people aren't influencing it, that there is no influence. I just find it amazing, and I know that Mr. Horsford has left and I am sorry he has left because he would get an opportunity, once again, to take the party line.

You are not prosecuting a contempt of Congress because you have got this new opinion that "shall" doesn't mean "shall present to the"—"to the court" or, in this case to the grand jury. But you haven't given it to us, and today is the first time we hear about it.

So I join with the chairman in reiterating that we need a special prosecutor because you are a political appointee, your boss is a political appointee held in contempt by Congress, the people that work for you work for you at your pleasure, and you are controlling an investigation that is slowly reaching no decision. When, in fact, Lois Lerner has been found by a committee of this Congress to have violated laws as she targeted conservatives for their views.

This committee has produced a massive document showing that Lois Lerner targeted them and not liberal groups. And yet you sit here today implying that you are relying on some well-known, more conservative individual's decision as though we are supposed to believe that.

I have got to tell you, when the gentleman from Nevada talks about contempt, yes, we have contempt for the man you work for. Because, in fact, Congress has, as a matter of record, held him in contempt for failure to deliver documents. Your office has implied that a Federal judge had no right to even consider a case that was directly on point a Nixon-era point of lying to Congress and then refusing to deliver documents related to those false Statements.

I am ashamed that you sit here day after day implying that there is no reason for a special prosecutor. The whole reason you want an independent prosecutor is not to be independent of somebody down low, but to be independent of you.

Mr. Chairman, I thank you for your indulgence, and I yield back.

Mr. JORDAN. I thank the gentleman.

And I was just—well, let me do this. One other line of questioning here, Mr. Cole. And I know you have been here awhile, and we are almost done because we have votes on the floor. August 27, 2010, chairman—then-chairman of the White House Counsel of Economic Advisors, Austan Goolsbee, revealed private taxpayer information about Koch Industries in order to imply that they somehow didn't pay their full amount of taxes. How Goolsbee knew this information and whether or not he inappropriately viewed Koch's 6103 protected tax information remains unknown.

My question to you is this. If a White House employee without 6103 authority viewed 6103-protected information, and made that public, would he or she—what they learned, what he or she learned, from that information, would that be a crime?

Mr. COLE. You know, I would have to have all the facts and circumstances. What generally happens when there is disclosure of 6103 information is TIGTA, the IG for the tax department, for the IRS, investigates the matter, determines whether or not they believe there has been a criminal violation of 6103. And if they do believe there has been one, they present it to the Justice Department for our consideration.

Mr. JORDAN. Have you guys investigated this matter?

Mr. COLE. This is—

Mr. JORDAN. Or have you, or are you going to investigate this matter?

Mr. COLE. This is—it depends on whether TIGTA has deteriorated whether or not this matter presents itself with evidence that there was criminal activity. So that is up to TIGTA to decide in the first instance.

Mr. JORDAN. OK, finally, and then I will let the ranking member have some time, too, before we conclude. I just want to go back to what the chairman—just to reiterate this because it is so frustrating to me and it is so frustrating to so many of the good folks I get the privilege of representing in the 4th district of Ohio.

When, in fact, you have the fact pattern we do, the FBI leaking to the Wall Street Journal and no one is gonna be prosecuted. The President prejudicing the case with his comments about no corruption, not even a smidgen. The fact that Barbara Bosserman is the lead investigator, part of the team, and is a max-out contributor to the President's campaign.

The fact that Richard Pilger and Jack Smith had interaction with Lois Lerner in 2010 and 2013. That you had a data base of 1.1 million pages of taxpayer information, donor (c)(4) information, you had it for 4 years, and some of that information was confidential.

All that fact, all that cries out for a special prosecutor. And I would think you would want it just so you can say, "Look, we are gonna get to the—we are gonna be as unbiased as—we are gonna." That would be a welcome thing to do to find someone Republicans, Democrats, everyone could agree on. Oh, fine, let them—let them do the investigation.

That would be something seems like you would want. So if, as Mr. Gowdy pointed out and I think others have pointed out, if that doesn't warrant a special prosecutor I don't know what does. I do not know what—and when I look at the elements contained in the statute, I don't—if that doesn't meet it, I don't know if you ever could meet it. And with that, I will end. And I do thank you for being here today, Mr. Cole.

And I will yield to the ranking member.

Mr. CARTWRIGHT. Thank you, Mr. Chairman. And just a few points I want to cover at the end of this hearing. No. 1, I want to note that the chairman of the full committee was highly critical of our fellow member, Mr. Horsford, noting that Mr. Horsford had left the room. The fact of the matter is that we have been called to vote, and we have less than, I think, 7 minutes on the clock to go vote. That is why Mr. Horsford was not here and was not here to defend himself against the charges made by the chairman of the full committee.

Second, before we let you go, Mr. Cole, I want to—I think I speak on behalf of the full committee. That we all really want to know what happened to those missing emails, all of us. Now, we are all somewhat skeptical that they can't be recovered in some fashion, all of us. And we urge you to do your utmost, and urge your colleagues to find those missing emails. Because when there are emails missing and it makes people suspicious, and then it leads

to unfounded charges and reckless allegations. And this is an arena where reckless allegations find a home. And so I think it would make a lot of sense to redouble your efforts to find those emails.

I also want to mention, a lot has been made in this hearing today about improper influence on the IRS having to do with Citizens United and the way that the IRS folks were targeting certain 501(c)(4) groups. I want to mention here that the inspector general's report, Mr. George, found that Lois Lerner, the former director of exempt organizations at the IRS, did not discover the use of these inappropriate criteria that we are all talking about until a year later, in June 2011. After which she immediately ordered the practice to stop. This is something found by the inspector general.

Mr. MEADOWS. Will the gentleman yield for just one point of clarification?

Mr. CARTWRIGHT. Certainly.

Mr. MEADOWS. We have been going back to this TIGTA report that says that she didn't know until June 2011, when the majority of the TIGTA report were based on emails. Now that we know that emails are missing, to make that conclusion is hard. And I just wanted to point that out.

I yield back.

Mr. CARTWRIGHT. That is a fair point. I want to go on. I also want to point out that the inspector general's report found that employees subsequently began using different inappropriate criteria without management knowledge.

The inspector general's report, Mr. George, stated, "The criteria were not influenced by any individual or organization outside the IRS." In other words, Russell George, the inspector general, whose report brought here before this committee, started the firestorm that has been raging for more than a year-and-a-half. His report said flat out that these IRS people were not influenced by any organization or individual outside the IRS.

Mr. JORDAN. Will the gentleman yield for—

Mr. CARTWRIGHT. I yield.

Mr. JORDAN. Well, one of the reasons is because we didn't have the emails from the Justice Department and Lois Lerner. We got those because Judicial Watch did a FOIA request. But for that, we would have never had Mr. Pilger and Mr. Smith from the Justice Department in for a deposition. So Mr. George didn't have that information in his hand.

Mr. CARTWRIGHT. And I—let's let the witness answer a question here. Mr. Cole, are you aware of any information to the effect that the inspector general's Statement there is incorrect?

Mr. COLE. No. The understanding I have of the interactions between the Justice Department and the IRS on those two meetings was that the IRS, in the first one, said there is really nothing we can do here. And nothing came of it. And on the second meeting, there was never really any substance discussed. It never was followed up on.

Mr. CARTWRIGHT. Well, I thank you for that.

And I yield back, Mr. Chairman.

Mr. JORDAN. The point I am making is, that is the timeframe that are the—is that the timeframe where the emails are lost. The only—I am not even sure the IRS was gonna tell us they lost the

emails, but for the Judicial Watch FOIA request which uncovered the Richard Pilger-Lois Lerner correspondence, Lois Lerner email. Once they knew we got something from Justice, then the IRS says, "Wait a minute. We better let them know we lost all the emails from that time period who went outside the agency." And Mr. Cole has told us today that maybe some of the documents they are withholding from the committee are more of that correspondence.

Mr. COLE. I didn't say that.

Mr. JORDAN. You said you can't guarantee it is not.

Mr. COLE. That is correct.

Mr. JORDAN. That is correct, so——

Mr. COLE. Beause is just—because I haven't seen them. I just can't answer your question.

Mr. JORDAN. Well, it would been nice if you had looked at them before you came here to testify today and you could have been able to answer that question, right? I wish you would of done your homework there, know what documents—you would think you would know what documents you are withholding from the committee.

Mr. COLE. I know we are in the process of gathering and collecting them, and that that process is not done yet. So I——

Mr. JORDAN. We have been trying to get you here a couple weeks. We accommodated your schedule. You knew we were gonna ask about the stuff you are withholding from us, and you didn't even review it?

Mr. COLE. Not the specific documents. I knew what the status was of the review, but I don't review——

Mr. JORDAN. And because you didn't review it, you cannot guarantee that some of those documents you are withholding aren't Lois Lerner emails.

Mr. COLE. And I can't tell you that they are either. That they are or they aren't.

Mr. JORDAN. I know you can't tell us either way because you didn't look at them.

Mr. COLE. That is correct.

Mr. JORDAN. Well, for goodness sake, when you come in front of the Oversight Committee—we have been investigating this thing for 14 months—you would think you would have reviewed the documents you are not gonna let us see. You think. I think my ranking member would—the ranking member would agree with that. You should have reviewed this stuff and you didn't do it. And that is the whole point. We would have not known Lois Lerner's emails were lost but for Judicial Watch doing the FOIA request and we getting that one email which showed, wait a minute, Richard Pilger was talking with Lois Lerner in 2010 when the targeting started. We would have never know that.

And now you tell us you are not even—we got to vote. Votes are out of time. I want to thank the deputy attorney general for being here, and the committee is adjourned.

[Whereupon, at 12:26 p.m., the subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

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Congress of the United States House of Representatives

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MEMORANDUM

July 16, 2014

To: Democratic Members of the Subcommittee on Economic Growth, Job Creation, and Regulatory Affairs

Fr: Democratic Staff

Re: Hearing on "Examining the Justice Department's Response to the IRS Targeting Scandal"

On Thursday, July 17, 2014 at 9:00 a.m., in Room 2154 of the Rayburn House Office Building, the Subcommittee will hold a hearing with James M. Cole, the Deputy Attorney General of the United States, about the Justice Department's ongoing criminal investigation into the treatment of applications for tax-exempt status by the Internal Revenue Service (IRS).

Chairman Darrell Issa and other Republican Committee Members have made a wide range of very serious accusations against numerous Justice Department officials, claiming that they are not adequately pursuing the investigation, that they have multiple conflicts of interest, that they are criminally obstructing the Committee's investigation, and that they have joined with the White House, the IRS, and other agencies in a government-wide conspiracy to target conservative organizations. This memorandum addresses the top ten Republican allegations relating to the Department of Justice:

1. Claim That Justice Department Already Concluded Investigation	4
2. Claim That Justice Department Obstructing Committee Investigation	5
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4. Claim That Justice Department Created "Illicit Registry"	12
5. Claim That Special Counsel Needed	15
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8. Claim That Justice Department Motivated by Politics	22
9. Claim That Prominent Democrats Prompted Targeting	24
10. Claim That Citizens United Prompted Targeting	27

SUMMARY OF REPUBLICAN CLAIMS

1. **Claim That Justice Department Already Concluded Investigation:**
 Republicans have accused the Department of closing the criminal investigation prematurely for political reasons, but their claims are based on anonymous sources in a single press account, and Department officials have stated repeatedly that the criminal investigation remains open and active.
2. **Claim That Justice Department Obstructing Committee Investigation:**
 Republicans have accused the Department of obstructing the Committee's investigation by refusing to provide more information about the status of its investigation, but the Department has explained that both Republican and Democratic administrations have followed the longstanding Executive Branch policy of not disclosing detailed information about ongoing criminal investigations.
3. **Claim That Lead Attorney Has Conflict of Interest:**
 Republicans have accused the Department of compromising the investigation by assigning a lead attorney who previously made donations to President Obama's campaigns, but the Department has explained that she is not the lead attorney and that she is in full compliance with all laws and ethics rules governing Department employees.
4. **Claim That Justice Department Created Illicit Registry:**
 Republicans have accused the Department of conspiring with the IRS to create a massive and illicit database of confidential taxpayer information as part of an effort to target conservative organizations, but these claims are wildly inaccurate because information provided to the Department by the IRS was predominantly publicly available and was never actually reviewed or used for any investigations or prosecutions.
5. **Claim That Special Counsel Needed:**
 Republicans passed a Resolution on the House floor calling on the Attorney General to appoint a special counsel to conduct the criminal investigation, but it relies on many of the same Republican claims that have already been debunked, and the Department has explained why a special counsel is not warranted in this case.
6. **Claim That Justice Department Ignoring Ways and Means Referral:**
 Republicans have accused the Department of ignoring a referral letter sent by the Chairman of the House Committee on Ways and Means alleging criminal violations by Lois Lerner, but despite major factual errors and unsubstantiated claims in the letter, the Department has pledged to carefully consider it as part of its ongoing investigation.
7. **Claim That Justice Department Ignoring Deliberate Computer Crash:**
 Republicans have accused the Department of ignoring what they allege is the intentional destruction of Lois Lerner's computer hard drive in an effort to conceal her emails, but contemporaneous documents and other evidence obtained by the Committee indicate that her computer crash was not deliberate, but rather was caused by a technological malfunction.

8. **Claim That Justice Department Motivated by Politics:**
 Republicans have accused the Department of failing to actively pursue the criminal investigation because of political motivations, but the Committee has obtained no evidence to support these claims.
9. **Claim That Prominent Democrats Prompted Targeting:**
 Republicans have accused the Department of conspiring with the IRS to single out conservative groups for potential prosecution in response to pressure from prominent Democrats, but these claims have been refuted during transcribed interviews conducted by Committee staff.
10. **Claim That *Citizens United* Prompted Targeting:**
 Republicans claim that the targeting of conservative groups is a government-wide conspiracy initiated after the Supreme Court's 2010 decision in *Citizens United* involving the President, the IRS, the Department of Justice, the Securities and Exchange Commission, the Federal Elections Commission, and other agencies, but the Committee has obtained no evidence linking these claims to the inappropriate criteria used by IRS employees in Cincinnati to screen applications for tax-exempt status, which was the basis for the Inspector General's report.

DETAILED REVIEW OF REPUBLICAN CLAIMS

1. Claims That Justice Department Already Concluded Investigation

Republicans have accused the Department of closing the criminal investigation prematurely for political reasons, but their claims are based on anonymous sources in a single press account, and Department officials have stated repeatedly that the criminal investigation remains open and active.

On May 14, 2013, the Treasury Inspector General for Tax Administration issued an audit report concluding that IRS employees in Cincinnati used “inappropriate” criteria to screen applications for tax-exempt status.¹ The same day, Attorney General Eric H. Holder, Jr. announced that the Department was opening a criminal investigation to determine whether “any laws were broken in connection with those matters related to the IRS.”²

On January 13, 2014, a press report cited anonymous sources suggesting that the Department “doesn’t plan to file criminal charges” because investigators have not identified what “would amount to a violation of criminal law.” The report stated: “Instead, what emerged during the probe was evidence of a mismanaged bureaucracy enforcing rules about tax-exemption applications it didn’t understand.”³

In response to this press report, Chairman Issa and Chairman Jordan issued the following statement on January 13, 2014:

Anonymous—and apparently politically motivated—leaks from unnamed law enforcement officials further undermine public assurances by the current and former FBI directors that this is a legitimate investigation. ... These revelations further undermine the credibility of the Attorney General Holder and the Justice Department under his leadership. Given the circumstances, there is little reason for the American people to have confidence in this investigation.⁴

¹ Treasury Inspector General for Tax Administration, *Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review* (May 14, 2013) (2013-10-053).

² *FBI to Investigate Tea Party Tax Affair*, USA Today (May 14, 2013) (online at www.usatoday.com/story/news/politics/2013/05/14/irs-tea-party-investigation/2158899/).

³ *Criminal Charges Not Expected in IRS Probe*, Wall Street Journal (Jan. 13, 2014) (online at <http://online.wsj.com/news/articles/SB10001424052702303819704579318983271821584>).

⁴ House Committee on Oversight and Government Reform, *Issa and Jordan Respond to Report that FBI Does Not Expect Criminal Charges in IRS Targeting Investigation* (Jan. 13, 2014) (online at <http://oversight.house.gov/release/issa-jordan-respond-report-fbi-expect-criminal-charges-irs-targeting-investigation/>).

Since this press report first appeared, Department officials have stated explicitly and repeatedly that the criminal investigation remains open and active.

On January 29, 2014, Attorney General Holder testified before the Senate Judiciary Committee: "This is a matter that is presently being investigated. Interviews are being done, analysis is being conducted." He added that it is not unusual for complex investigations to take time, explaining that "we want to make sure that what we do is comprehensive and that at the end of the day, we get it right."⁵

On April 8, 2014, the Attorney General testified before the House Judiciary Committee that the criminal investigation is "an ongoing matter that the Justice Department is actively pursuing."⁶

On May 27, 2014, the Deputy Attorney General wrote to Chairman Issa reiterating that the Department's investigation is ongoing. He stated that the Department of Justice, along with the Federal Bureau of Investigation (FBI) and the Treasury Inspector General for Tax Administration, "is continuing to investigate."⁷

On June 11, 2014, FBI Director James Comey testified before the House Judiciary Committee that the agency is conducting a "very active investigation."⁸

2. Claim That Justice Department Obstructing Committee Investigation

Republicans have accused the Department of obstructing the Committee's investigation by refusing to provide more information about the status of its investigation, but the Department has explained that both Republican and Democratic administrations have followed the longstanding Executive Branch policy of not disclosing detailed information about ongoing criminal investigations.

On September 6, 2013, Chairman Issa and Chairman Jordan sent a letter to FBI Director Comey seeking investigative documents, alleging that the FBI "failed to provide sufficient information about the status of the investigation," and claiming that the FBI demonstrated "apathy toward the IRS's activities."⁹

⁵ Senate Committee on the Judiciary, *Hearing on Department of Justice Oversight* (Jan. 29, 2014).

⁶ House Committee on the Judiciary, *Hearing on Oversight of the U.S. Department of Justice* (Apr. 8, 2014).

⁷ Letter from Deputy Attorney General James Cole, Department of Justice, to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (May 27, 2014).

⁸ House Committee on the Judiciary, *Hearing on Oversight of the Federal Bureau of Investigation* (June 11, 2014).

⁹ Letter from Chairman Darrell E. Issa, House Committee on Oversight and Government Reform, *et al.*, to Director James B. Comey, Federal Bureau of Investigation (Sept. 6, 2013).

On October 31, 2013, the FBI sent a letter in response, stating:

The documents you have requested are evidence in an ongoing investigation and, as such, cannot be released at this time. I know you share my commitment to maintaining the integrity of our criminal justice system and would like to reassure you that we are carefully evaluating the evidence generated during our investigative efforts. Further, we will be working closely with federal prosecutors to determine whether the evidence reveals a prosecutable violation of any of the statutes within our jurisdiction.¹⁰

On December 2, 2013, Chairman Issa and Chairman Jordan wrote to the FBI Director again, stating:

[T]he recent actions of FBI employees suggest that the Bureau and possibly political appointees within the Department of Justice are intentionally obstructing the Committee's oversight efforts. ... The Department's tactics have impeded a congressional investigation and interfered with the Committee's access to documents and information. Obstructing a congressional investigation is a crime. Making false statements to congressional staff is also a crime. Please ensure that all Bureau employees are aware of the consequences for obstruction and misleading Congress, and that they cooperate fully with the Committee's requests.¹¹

On December 31, 2013, the FBI responded by rejecting these accusations:

It is important that the investigators be permitted to conduct their investigation in a fair and impartial manner and use any documents or communications obtained to conduct interviews and to obtain additional evidence in order to pursue all the facts in the case. Maintaining the integrity of an ongoing criminal investigation has been a longstanding policy of the Department of Justice, and requests to disclose all documents and communications from an investigative file are generally deferred until the investigation has concluded.¹²

On January 8, 2014, Chairman Issa and Chairman Jordan wrote to the Attorney General accusing the Department of "obstruction" and asserting that "the FBI's blatant lack of

¹⁰ Letter from Stephen D. Kelly, Assistant Director, Office of Congressional Affairs, Federal Bureau of Investigation, to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (Oct. 31, 2013).

¹¹ Letter from Chairman Darrell E. Issa, House Committee on Oversight and Government Reform, *et al.*, to Director James B. Comey, Federal Bureau of Investigation (Dec. 2, 2013).

¹² Letter from Stephen D. Kelly, Assistant Director, Office of Congressional Affairs, Federal Bureau of Investigation, to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform, *et al.* (Dec. 31, 2013).

cooperation with the Committee may rise to the level of criminal obstruction of a congressional investigation.”¹³

On January 24, 2014, the Department sent a letter rejecting these accusations: “Your assertion that the FBI has demonstrated a ‘blatant lack of cooperation with the Committee’ that ‘may rise to the level of criminal obstruction’ is misleading and wrong.”¹⁴

On January 28, 2014, Chairman Jordan sent a letter to the Department asserting: “The Justice Department has flatly and unjustifiably refused to cooperate with the Committee’s oversight.”¹⁵ Chairman Jordan’s letter sought the testimony of Barbara Bosserman, a career-DOJ attorney working on the investigation for an upcoming subcommittee hearing.

On January 30, 2014, Deputy Attorney General James Cole sent a letter declining Chairman Jordan’s request for the career attorney’s testimony. He wrote:

The Department’s longstanding policy, applied across Administrations, is to decline to provide Congress with non-public information about ongoing criminal investigations. This policy is intended to protect the effectiveness and integrity of the criminal justice process, as well as the privacy interests of third parties. It also is founded upon our commitment to avoiding any perception that our law enforcement efforts are subject to undue influence from elected officials.¹⁶

The Deputy Attorney General also wrote:

Members of Congress have long understood and respected the Department’s strongly-held concern that subjecting line prosecutors to congressional questioning poses significant risks to the Department’s law enforcement efforts and would have a chilling effect on Department attorneys.¹⁷

¹³ Letter from Chairman Darrell E. Issa, House Committee on Oversight and Government Reform, *et al.*, to Attorney General Eric H. Holder Jr., Department of Justice (Jan. 8, 2014).

¹⁴ Letter from Peter J. Kadzik, Principal Deputy Assistant Attorney General, Department of Justice, to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform, *et al.* (Jan. 24, 2014).

¹⁵ Letter from Chairman Jim Jordan, Subcommittee on Economic Growth, Job Creation and Regulatory Affairs, to Barbara Bosserman, Civil Rights Division, Department of Justice (Jan. 28, 2014).

¹⁶ Letter from Deputy Attorney General James Cole, Department of Justice, to Chairman Jim Jordan, Subcommittee on Economic Growth, Job Creation and Regulatory Affairs (Jan. 30, 2014).

¹⁷ *Id.*

On February 3, 2014, the Deputy Attorney General wrote to Chairman Jordan again, stating that “we will be in a better position to provide Congress with information about our decisions in this matter when it is concluded.”¹⁸

On April 23, 2014, Republican Committee Members wrote to the Attorney General repeating claims that the Department was uncooperative, requesting a broad range of investigative documents, and seeking a transcribed interview of Richard Pilger, the Director of the Election Crimes Branch in the Department’s Public Integrity Section to discuss his interactions with Ms. Lerner.¹⁹

On May 6, 2014, the Department made Mr. Pilger available to the Committee for a transcribed interview with Chairman Jordan and Committee staff, which lasted more than five hours. As the Department explained in a letter the next day, the decision to make this attorney available was an “extraordinary effort to accommodate the Committee.”²⁰

On May 20, 2014, Chairman Issa issued a unilateral subpoena to the Attorney General demanding the documents requested in his April 23, 2014, letter. The cover letter accompanying the subpoena stated:

Because you have failed to comply with this request for documents and because the Department has obstructed the Committee’s oversight, the Committee has no choice but to issue a subpoena compelling your cooperation with this important matter.²¹

The Deputy Attorney General responded to Chairman Issa’s unilateral subpoena on May 27, 2014, stating:

Despite the Department’s extraordinary efforts to date to accommodate the Committee, your letters unjustifiably claim that the Department is obstructing your oversight. Your unwillingness to respect the legitimacy of the Department’s law enforcement interests is reflected in your letter of May 20, in which you question the Department’s commitment “to cooperating with the Committee’s investigation on the Committee’s terms.” (Emphasis added.)

¹⁸ Letter from Deputy Attorney General James Cole, Department of Justice, to Chairman Jim Jordan, Subcommittee on Economic Growth, Job Creation and Regulatory Affairs (Feb. 3, 2014).

¹⁹ Letter from Chairman Darrell E. Issa, House Committee on Oversight and Government Reform, *et al.*, to Attorney General Eric H. Holder Jr., Department of Justice (Apr. 23, 2014).

²⁰ Letter from to Peter J. Kadzik, Principal Deputy Assistant Attorney General, Department of Justice, to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (May 7, 2014).

²¹ Letter from Chairman Darrell E. Issa, House Committee on Oversight and Government Reform, to Attorney General Eric H. Holder Jr., Department of Justice (May 20, 2014).

To be clear, the Department is committed to cooperating in good faith with the Committee's reasonable requests for information—and we are doing so—but to date, you have not reciprocated. Specifically, the Committee has refused to accept the fundamental principle that its efforts to obtain information related to an ongoing investigation run a significant risk of compromising the independence, integrity, and effectiveness of our law enforcement efforts. We cannot yield to pressure to disclose information to Congress where doing so would undermine our core mission as a law enforcement entity.²²

On May 28, 2014, Department officials produced more than 200 pages of documents to the Committee, as they committed before Chairman Issa issued his subpoena.²³

3. Claim That Lead Attorney Has Conflict of Interest

Republicans have accused the Department of compromising the investigation by assigning a lead attorney who previously made donations to President Obama's campaigns, but the Department has explained that she is not the lead attorney and that she is in full compliance with all laws and ethics rules governing Department employees.

On January 8, 2014, Chairman Issa and Subcommittee Chairman Jordan sent a letter to the Attorney General claiming that Civil Rights Division attorney Barbara Bosserman is the "lead" attorney on the investigation. They also asserted that the investigation had been "compromised" by "a startling conflict of interest" because Ms. Bosserman previously donated \$6,750 to President Obama's campaigns and the Democratic National Committee, and because she attended a bill signing event at the White House.²⁴

The Department has explained repeatedly that Ms. Bosserman is not the lead investigator in the investigation. On October 31, 2013, the FBI sent a letter to the Committee explaining that the investigative team includes "11 Special Agents and one Forensic Accountant assigned to the investigation," and that additional personnel would be utilized if necessary to further the investigation. The FBI also stated that it "remains in close coordination with TIGTA."²⁵

²² Letter from Deputy Attorney General James Cole, Department of Justice, to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (May 27, 2014).

²³ Letter from to Peter J. Kadzik, Principal Deputy Assistant Attorney General, Department of Justice, to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (May 28, 2014).

²⁴ Letter from Chairman Darrell E. Issa, House Committee on Oversight and Government Reform, and Chairman Jim Jordan, Subcommittee on Economic Growth, Job Creation and Regulatory Affairs, to Attorney General Eric Holder Jr., Department of Justice (Jan. 8, 2014).

²⁵ Letter from Stephen D. Kelly, Office of Congressional Affairs, Federal Bureau of Investigation, to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform, and Chairman Jim Jordan, Subcommittee on Economic Growth, Job Creation and Regulatory Affairs (Oct. 31, 2013).

On January 29, 2014, Attorney General Holder testified before the Senate Judiciary Committee that Ms. Bosserman is not, in fact, the “lead” attorney in the investigation.²⁶ He explained:

[T]he characterization of this lawyer as the lead lawyer on the case, I think, is not correct. This is an investigation being done by the Civil Rights Division as well as by the Criminal Division of the Justice Department. And if I had to assign a lead in this, I would say that the Criminal Division of Public Integrity Section has actually got the lead. It’s also involving the FBI as well as the inspector general from the—from the Treasury Department.²⁷

The Attorney General also stated:

I was the one who actually ordered the investigation into these matters. They’re being handled by the Criminal Division in the Justice Department, the Civil Rights Division in the Justice Department, the Treasury Inspector General and the FBI, as you indicated.²⁸

During a hearing before the House Judiciary Committee on April 8, 2014, the Attorney General reiterated this point in response to a question from Chairman Issa:

As I look at the investigation and think of who is in the lead, I think of the Criminal Division as having the primary responsibility. And I talk to the assistant attorney general of the Criminal Division. But the people who are doing the work on the ground for the Criminal Division are the people in the Public Integrity Section.²⁹

With respect to allegations of a conflict of interest, Ms. Bosserman’s actions comply with all applicable statutes and regulations.

Pursuant to 28 C.F.R. § 45.2, federal employees are prohibited from participating in a criminal investigation if they have a “political relationship” with an organization having a substantial interest in or directly affected by the outcome of the investigation.³⁰ The regulation defines “political relationship” as arising “from service as a principal adviser thereto or a principal official thereof” and not merely from making political contributions or attending a bill-signing event.³¹

²⁶ Senate Committee on the Judiciary, *Hearing on Department of Justice Oversight* (Jan. 29, 2014).

²⁷ *Id.*

²⁸ *Id.*

²⁹ House Committee on the Judiciary, *Hearing on Oversight of the U.S. Department of Justice* (Apr. 8, 2014).

³⁰ 28 C.F.R. § 45.2.

³¹ *Id.*

In addition, the federal Hatch Act expressly protects the right of career attorneys to make political donations:

It is the policy of the Congress that employees should be encouraged to exercise fully, freely, and without fear of penalty or reprisal, and to the extent not expressly prohibited by law, their right to participate or to refrain from participating in the political processes of the Nation.³²

Under federal law, even the most restricted category of employees “retains the right to vote as he chooses and to express his opinion on political subjects and candidates.”³³ The Office of Special Counsel—the federal agency tasked with enforcing the Hatch Act—advises that even employees with the most restrictions on their political activity “may contribute money to political campaigns, political parties, or partisan political groups.”³⁴

Independent experts have explained that Ms. Bosserman’s political contributions do not create a conflict of interest. Professor Bruce Green of Fordham Law School stated:

[N]o court would seriously entertain a claim that the prosecutor should be disqualified from investigating or prosecuting officials of an executive-branch agency because the prosecutor previously made political donations supporting or opposing the incumbent president or the president’s party.³⁵

He added:

Section 45.2 plainly does not apply to a career prosecutor who contributed to the incumbent president’s campaign or political party. The provision is very limited. It applies only to a prosecutor whose close identification with an official, candidate, party or organization arises from the prosecutor’s prior service as a *principal adviser* to the official or candidate or as a *principal official* of the party or organization that is the subject of the investigation or otherwise an interested party. Few, if any, federal prosecutors fit into that category. A campaign contributor does not, because he or she is not “a principal adviser” or a “principal official.”³⁶

³² 5 U.S.C. § 7321.

³³ 5 U.S.C. § 7323(c).

³⁴ Office of Special Counsel, *THE HATCH ACT: Permitted and Prohibited Activities for Employees Subject to Additional Restrictions* (emphasis in original) (online at <https://www.osc.gov/Resources/HA%20Poster%20Further%20Restricted%20Employees%20with%20OSC%20contact%20info%20%285-11%29.pdf>).

³⁵ Letter from Professor Bruce A. Green, Fordham University Law School, to House Committee on Oversight and Government Reform (Feb. 4, 2014) (online at <http://democrats.oversight.house.gov/uploads/Green%20letter%20to%20House%20Committee%20on%20Oversight%20%282-4-13%29.pdf>).

³⁶ *Id.*

Professor Daniel Richman of Columbia Law School agreed:

Any claim that these contributions, in of themselves, create a conflict of interest or should be cause for disqualification, for a career prosecutor investigating allegations of political targeting in the Executive Branch strikes me as meritless.³⁷

Professor Stephen Saltzburg at the George Washington University Law School also agreed:

I do not regard making contributions as establishing a "close identification" with an official or party or "a close and substantial connection of the type normally viewed as likely to induce partiality."³⁸

On January 28, 2014, Chairman Jordan wrote directly to Ms. Bosserman, alleging that her participation in the investigation created an "appearance of a conflict of interest likely to affect the public perception of the integrity of the investigation or prosecution" pursuant to 28 C.F.R. § 45.2. He requested Ms. Bosserman's testimony before the Subcommittee on February 6, 2014.³⁹

On January 30, 2014, Deputy Attorney General James Cole responded that no Department representative "will be in a position to provide testimony about this ongoing law enforcement matter" because such testimony would be inconsistent DOJ's "long-standing policy and could undermine judicial confidence in the independence of the criminal justice process."⁴⁰

4. Claim That Justice Department Created Illicit Registry

Republicans have accused the Department of conspiring with the IRS to create a massive and illicit database of confidential taxpayer information as part of an effort to target conservative organizations, but these claims are wildly inaccurate because information provided to the

³⁷ Letter from Professor Daniel Richman, Columbia University Law School, to Democratic Staff, House Committee on Oversight and Government Reform (Feb. 5, 2014) (online at <http://democrats.oversight.house.gov/uploads/Richman%20House%20Oversight%20Feb%202014%20letter.pdf>).

³⁸ Statement of Professor Stephen Saltzburg, George Washington University Law School, to Democratic Staff, House Committee on Oversight and Government Reform (Feb. 3, 2014) (online at <http://democrats.oversight.house.gov/uploads/Saltzburg%20Opinion%202-6-14.pdf>).

³⁹ Letter from Chairman Jim Jordan, Subcommittee on Economic Growth, Job Creation and Regulatory Affairs, to Barbara Bosserman, Civil Right Division, Department of Justice (Jan. 28, 2014).

⁴⁰ Letter from Deputy Attorney General James Cole, Department of Justice, to Chairman Jim Jordan, Subcommittee on Economic Growth, Job Creation and Regulatory Affairs (Jan. 30, 2014).

Department by the IRS was predominantly publicly available and was never actually reviewed or used for any investigations or prosecutions.

On June 10, 2014, Chairman Issa and Chairman Jordan sent a letter to the Attorney General claiming that “the Justice Department worked with the IRS to compile a massive database of nonprofit information, including confidential taxpayer information,” which they referred to as “an illicit and comprehensive registry by federal law-enforcement officials.” They claimed that the Department used this registry “for the potential prosecution of nonprofits,” and they argued that “a special prosecutor is needed for a truly independent criminal investigation of the IRS targeting.”⁴¹

These accusations are not supported by the facts. On May 29, 2014, the Department informed the Committee that the IRS had provided 21 computer disks to the FBI in 2010. These disks included approximately 1.1 million pages of Form 990s, which are forms filed each year by groups that already have tax-exempt status. The disks contained forms not only from conservative and progressive groups, but from all groups, “regardless of political affiliation,” filed between January 1, 2007, and October 1, 2010. This is the same information the IRS provides to the non-profit organization Guidestar.org, “which makes the information available to the public through a free account.”⁴²

The Department’s letter explained that the FBI never reviewed the information in the 21 disks and never used the information as part of any investigation or prosecution:

FBI advises that upon receipt of the disks, an analyst imported the index, which is set forth in one of the disks, into a spreadsheet, but did nothing further with the disks, and to the best of our knowledge, the information contained on the disks was never utilized for any investigative purpose.⁴³

The Department reiterated this point in a letter on June 4, 2014, stating that the FBI “did not review the disks except for the index” and that “neither the FBI nor the Department used them for any investigative purpose.”⁴⁴

⁴¹ Letter from Chairman Darrell E. Issa, House Committee on Oversight and Government Reform, and Chairman Jim Jordan, Subcommittee on Economic Growth, Job Creation and Regulatory Affairs, to Attorney General Eric J. Holder Jr., Department of Justice (June 10, 2014).

⁴² Letter from Peter J. Kadzik, Principal Deputy Assistant Attorney General, Department of Justice, to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (May 29, 2014).

⁴³ *Id.*

⁴⁴ Letter from Peter J. Kadzik, Principal Deputy Assistant Attorney General, Department of Justice, to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (June 4, 2014).

FBI Director James B. Comey made this point again in testimony before the House Judiciary Committee on June 11, 2014:

[M]y understanding is an analyst in our Criminal Investigation Division looked at an index of it to see what it was and then parked it to see if DOJ was going to ask us to do anything with it, and they never did. So it sat in her—I don't know whether desk or her file, the last four years.⁴⁵

On June 4, 2014, the Department informed the Committee that it discovered for the first time that the disks submitted by the IRS in 2010 inadvertently included a very limited amount of confidential taxpayer information protected by Section 6103 of the Internal Revenue Code. The Department's letter stated:

The IRS now has informed us that its preliminary review of the disks reveals that a small number of the Form 990s on the disks inadvertently include confidential information protected by I.R.C. § 6103.⁴⁶

Two days later, on June 6, 2014, the IRS confirmed this fact to Committee staff:

Earlier this week, we identified a small number of instances where non-public information was included in approximately 33 of the more than 12,000 returns. This information appears to have been inadvertently not redacted or removed when the Forms 990 were processed for public disclosure.⁴⁷

On June 26, 2014, the Department sent a letter explaining further:

[W]e did not know that the disks contained confidential taxpayer information until after our June 2, 2014 letter to you, and when the IRS informed us that they did, we then promptly relayed that information to the Committee.⁴⁸

⁴⁵ House Committee on the Judiciary, *Hearing on Oversight of the Federal Bureau of Investigation* (June 11, 2014).

⁴⁶ Letter from Peter J. Kadzik, Principal Deputy Assistant Attorney General, Department of Justice, to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (June 4, 2014).

⁴⁷ Email from Leonard T. Oursler, Director, Legislative Affairs, Internal Revenue Service, to House Committee on Oversight and Government Reform Staff (June 6, 2014).

⁴⁸ Letter from Peter J. Kadzik, Principal Deputy Assistant Attorney General, Department of Justice, to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform, and Chairman Jim Jordan, Subcommittee on Economic Growth, Job Creation and Regulatory Affairs (June 26, 2014).

5. Claim That Special Counsel Needed

Republicans passed a Resolution on the House floor calling on the Attorney General to appoint a special counsel to conduct the criminal investigation; but it relies on many of the same Republican claims that have already been debunked, and the Department has explained why a special counsel is not warranted in this case.

On May 7, 2014, Subcommittee Chairman Jim Jordan offered House Resolution 565 calling on the Attorney General to “appoint a special counsel to investigate the targeting of conservative nonprofit groups by the Internal Revenue Service.”⁴⁹ The Resolution included a lengthy recitation of previous Republican accusations and expressed the sense of the House:

[T]he statements and actions of the IRS, the Department of Justice, and the Obama Administration in connection with this matter have served to undermine the Department of Justice’s investigation.⁵⁰

The Resolution sought to justify the need for a special counsel based on Republican accusations of a conflict of interest against Department attorney Barbara Bosserman:

[T]he appointment of a person who has donated almost seven thousand dollars to President Obama and the Democratic National Committee in a lead investigative role, have created a conflict of interest for the Department of Justice that warrants removal of the investigation from the normal processes of the Department of Justice.⁵¹

The Resolution passed with a vote of 250 to 168 on a largely partisan basis, and all Democratic Members of the Oversight Committee opposed the Resolution.⁵²

On June 26, 2014, the Department sent a letter explaining why a special counsel is not warranted in this case:

After consideration of your request, we have concluded that such an appointment is not warranted. This investigation has been and will continue to be conducted by career prosecutors and law enforcement professionals in accordance with established Department policies and procedures, which are designed to ensure the integrity of an ongoing criminal investigation. The Department is committed to integrity and fairness in all of its law enforcement efforts, without regard to politics.⁵³

⁴⁹ H. Res. 565.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² U.S. House of Representatives, Roll Call Vote on Agreeing to H. Res 565 (May 7, 2014).

⁵³ Letter from Peter J. Kadzik, Principal Deputy Assistant Attorney General, Department of Justice, to Chairman Dave Camp, House Committee on Ways and Means (June 26, 2014).

6. **Claim That Justice Department Ignoring Ways and Means Referral**

Republicans have accused the Department of ignoring a referral letter sent by the Chairman of the House Committee on Ways and Means alleging criminal violations by Lois Lerner, but despite major factual errors and unsubstantiated claims in the letter, the Department has pledged to carefully consider it as part of its ongoing investigation.

On April 9, 2014, Rep. Dave Camp, the Chairman of the Committee on Ways and Means sent a referral letter to Attorney General Holder regarding the actions of former IRS employee Lois Lerner. The letter urged the Attorney General to “take a serious review of the evidence uncovered through the Committee’s investigation to determine whether Lerner violated criminal statutes.”⁵⁴ Specifically, the referral letter alleged:

1. Lerner used her position to improperly influence agency action against only conservative organizations, denying these groups due process and equal protection rights under the law as guaranteed by the U.S. Constitution, in apparent violation of 18 U.S.C. § 242;
2. Lerner impeded official investigations by providing misleading statements in response to questions from the Treasury Inspector General for Tax Administration (TIGTA), in apparent violation of 18 U.S.C. § 1001; and
3. Lerner risked exposing, and may actually have disclosed, confidential taxpayer information, in apparent violation of IRC § 6103 by using her personal email to conduct official business.⁵⁵

According to Chairman Camp, Ms. Lerner could face up to 11 years in prison if convicted of these crimes.⁵⁶

Democratic Committee Members opposed Chairman Camp’s letter, and they issued a public statement asserting that Committee Republicans “failed to prove any of their allegations of White House involvement, pursuit of an enemies list, or targeting of only conservative groups.”⁵⁷

⁵⁴ House Committee on Ways and Means, *Ways and Means Committee Refers Lois Lerner to Department of Justice for Criminal Prosecution* (Apr. 9, 2014) (online at <http://waysandmeans.house.gov/news/documentsingle.aspx?DocumentID=375999>).

⁵⁵ Letter from Chairman Dave Camp, House Committee on Ways and Means, to Attorney General Eric H. Holder Jr., Department of Justice (Apr. 9, 2014).

⁵⁶ House Committee on Ways and Means, *Ways and Means Committee Refers Lois Lerner to Department of Justice for Criminal Prosecution* (Apr. 9, 2014) (online at <http://waysandmeans.house.gov/news/documentsingle.aspx?DocumentID=375999>).

⁵⁷ House Committee on Ways and Means Democrats, *Statement from W&M Democrats Opposing Referral Letter to Justice Department* (Apr. 9, 2014) (online at

In Minority Views attached to Chairman Camp's letter, Ranking Member Sander Levin wrote: "The Republicans have hand selected information that they claim proves their case from the over 660,000 documents provided during this investigation."⁵⁸ He also wrote:

[T]he materials released to the public today confirm our position from the very beginning—that Democratic-leaning and progressive groups were subject to the same scrutiny as "Tea Party" and other Republican-leaning groups. Exhibit 21 (attached to the referral letter) contains a list of tax-exempt applications that were subject to additional review.

Among that list are a group of Democratic-leaning organizations with the term "Emerge" in their name. According to a New York Times story dated July 20, 2011, Emerge Maine, Emerge Nevada and Emerge Massachusetts were all denied tax-exempt status after their applications were pending for over three years. These denials happened during the period of TIGTA's audit, but they were not disclosed by the Inspector General in the audit report or during his testimony before Congress. These applications were processed in the same manner as the Tea Party cases as outlined in TIGTA's audit report:

- The cases were identified and screened for political activities;
- They were transferred to Exempt Organizations Technical Unit;
- They were the subject of a Significant Case Report (included in Exhibit 21 of the Republicans Letter);
- They were subject to multiple levels of review within the IRS; and
- They were reviewed by IRS Chief Counsel.⁵⁹

On May 2, 2014, Chairman Camp accused the Department of Justice of ignoring his letter and joined other Republicans in calling for a special counsel. He wrote:

After almost a year of investigating the IRS's targeting of conservative groups, the Ways and Means Committee found that Lois Lerner likely violated multiple criminal statutes. The Department of Justice has a duty to pursue the wrongdoing the Committee laid out in its criminal referral letter. We must hold the IRS accountable so this powerful agency cannot be used as a tool to target and harass Americans for their political beliefs. I have serious concerns that the Department of Justice has brushed aside this investigation and will not pursue Lerner for the wrongdoing she committed. Therefore, DOJ must appoint

<http://democrats.waysandmeans.house.gov/press-release/statement-wm-democrats-opposing-referral-letter-justice-department>

⁵⁸ House Committee on Ways and Means, *Referral to the Honorable Eric H. Holder, Jr., Attorney General, of Former Internal Revenue Service Exempt Organizations Division Director Lois G. Lerner for Possible Criminal Prosecution for Violations of One or More Criminal Statutes Based on Evidence the Committee has Uncovered in the Course of the Investigation of IRS Abuses*, Minority Views, 113th Cong. (Apr. 11, 2014) (H. Rept. No. 113-414).

⁵⁹ *Id.*

a Special Counsel, so we can have an independent review of what really happened at the IRS.⁶⁰

House Republicans also cited Chairman Camp's referral letter in support of the resolution requesting the appointment of a special counsel. In a joint statement, several House Republicans, including Chairman Issa, Chairman Jordan, and Chairman Chaffetz, wrote:

In light of this conflict of interest, the apparent criminal activity by Lois Lerner outlined by the Ways and Means Committee's referral letter to DOJ, and the ongoing disclosure of internal communications showing potentially unlawful conduct by Executive Branch personnel, the removal of the investigation from the normal process is warranted and the appointment of a Special Counsel is in the public's best interest.⁶¹

On May 7, 2014, the Department responded to Chairman Camp's letter by reiterating that its criminal investigation is ongoing and stating that it would consider the information provided:

As you may know, the Department has an ongoing criminal investigation into the IRS's treatment of groups applying for tax-exempt status, which is being conducted jointly with the Treasury Inspector General for Tax Administration (TIGTA). We appreciate your concern and will carefully consider the Committee's findings as part of our investigation into these allegations.⁶²

7. Claim That Justice Department Ignoring Deliberate Computer Crash

Republicans have accused the Department of ignoring what they allege is the intentional destruction of Lois Lerner's computer hard drive in an effort to conceal her emails, but contemporaneous documents and other evidence obtained by the Committee indicate that her computer crash was not deliberate, but rather was caused by a technological malfunction.

On June 13, 2014, Chairman Issa issued the following statement:

The supposed loss of Lerner's emails further blows a hole in the credibility of claims that the IRS is complying with Congressional requests and their repeated assurances that

⁶⁰ House Committee on the Judiciary, *House Republicans Introduce Resolution Calling on Holder to Appoint Special Counsel in IRS Investigation* (May 2, 2014) (online at <http://judiciary.house.gov/index.cfm/2014/5/house-republicans-introduce-resolution-calling-on-holder-to-appoint-special-counsel-in-irs-investigation>).

⁶¹ *Id.*

⁶² Letter from Peter J. Kadzik, Principal Deputy Assistant Attorney General, Department of Justice, to Chairman Dave Camp, House Committee on Ways and Means (May 7, 2014).

they're working to get to the truth. If there wasn't nefarious conduct that went much higher than Lois Lerner in the IRS targeting scandal, why are they playing these games?"⁶³

On June 18, 2014, Chairman Issa appeared on Fox News and stated: "We believe these e-mails could be found. Unless, in fact, the IRS and Lois Lerner have made sure they can't be found."⁶⁴

Later that night, Chairman Issa stated that "official records, like the e-mails of a prominent official, don't just disappear without a trace unless that was the intention."⁶⁵

Other Republican Members of Congress have made similar allegations. On June 17, 2014, Chairman Dave Camp and Rep. Charles Boustany of the Ways and Means Committee issued the following statement:

It looks like the American people were lied to and the IRS tried to cover-up the fact it conveniently lost key documents in this investigation. The White House promised full cooperation, the Commissioner promised full access to Lois Lerner emails and now the Agency claims it cannot produce those materials and they've known for months they couldn't do this.⁶⁶

Contrary to claims that Ms. Lerner intentionally destroyed her emails, the IRS has provided the Committee with contemporaneous emails from 2011 showing that after Ms. Lerner's computer crashed on June 13, 2011, she contacted IRS IT staff for help, and that while they tried to recover her hard drive, they were ultimately unsuccessful.

On July 19, 2011, Ms. Lerner sent an email asking the Associate Chief Information Officer at the IRS for help in recovering her hard drive:

It was nice to meet you this morning—although I would have preferred it was under different circumstances. I'm taking advantage of your offer to try and recapture my lost personal files. My computer skills are pretty basic, so nothing fancy—but there were

⁶³ House Committee on Oversight and Government Reform, *Issa Statement on Lois Lerner's Deleted IRS Emails* (June 13, 2014) (online at <http://oversight.house.gov/release/issa-statement-lois-lerners-deleted-irs-emails/>).

⁶⁴ "Tired of Being Lied To": Issa Expects Investigators Can Find Lerner Emails, Fox News Insider (June 18, 2014) (online at <http://foxnewsinsider.com/2014/06/18/darrell-issa-expects-investigators-can-recover-irs-lost-lois-lerner-emails/>).

⁶⁵ House Committee on Oversight and Government Reform, *Issa Statement on Report that IRS Destroyed Lois Lerner's Hard Drive* (June 18, 2014) (online at <http://oversight.house.gov/release/issa-statement-report-irs-destroyed-lois-lerners-hard-drive/>).

⁶⁶ House Committee on Ways and Means, *Exposed: IRS Kept Secret for Months, More than Just Lerner Emails Lost* (June 17, 2014) (online at <http://waysandmeans.house.gov/news/documentsingle.aspx?DocumentID=384708>).

some documents in the files that are irreplaceable. Whatever you can do to help, is greatly appreciated.⁶⁷

That day, the Associate Chief Information Officer asked his staff to seek assistance from the Field Director for the IT Division's Customer Service Support, writing: "If she can't fix it nobody can."⁶⁸

On July 20, 2011, the Field Director emailed Ms. Lerner to inform her of the status of efforts to recover her hard drive:

I checked with the technician and he still has your drive. He wanted to exhaust all avenues to recover the data before sending it to the "hard drive cemetery." Unfortunately, after receiving assistance from several highly skilled technicians including HP experts, he still cannot recover the data. I do have one other possibility that I am looking into and I hope to update you on the progress soon.⁶⁹

Ms. Lerner replied: "Thanks for the update—I'll keep my fingers crossed."⁷⁰

On August 1, 2011, the Field Director emailed Ms. Lerner explaining that her hard drive was being sent to the IRS Criminal Investigation Division's forensic laboratory:

As a last resort, we sent your hard drive to CI's forensic lab to attempt data recovery. The CI tech working on the recovery is unexpectedly out until Aug 3rd and promised to update me when he returns.⁷¹

On August 5, 2011, the Field Director informed Ms. Lerner that all efforts to recover her hard drive were unsuccessful:

Unfortunately the news is not good. The sectors on the hard drive were bad which made your data unrecoverable. I am very sorry. Everyone involved tried their best.⁷²

⁶⁷ Email from Lois Lerner, Director, Exempt Organizations, Internal Revenue Service, to Associate Chief Information Officer, Internal Revenue Service, *et al.* (July 19, 2011).

⁶⁸ Email from Associate Chief Information Officer, Internal Revenue Service, to Lois Lerner, Director, Exempt Organizations, Internal Revenue Service, *et al.* (July 19, 2011).

⁶⁹ Email from IT Customer Support Field Director, Internal Revenue Service, to Lois Lerner, Director, Exempt Organizations, Internal Revenue Service (July 20, 2011).

⁷⁰ Email from Lois Lerner, Director, Exempt Organizations, Internal Revenue Service, to IT Customer Support Field Director, Internal Revenue Service (July 20, 2011).

⁷¹ Email from IT Customer Support Field Director, Internal Revenue Service, to Lois Lerner, Director, Exempt Organizations, Internal Revenue Service (Aug. 1, 2011).

⁷² Email from IT Customer Support Field Director, Internal Revenue Service, to Lois Lerner, Director, Exempt Organizations, Internal Revenue Service (Aug. 5, 2011).

When IRS Commissioner Koskinen testified before the Ways and Means Committee on June 20, 2014, he emphasized the significant efforts taken by IRS personnel to recover Ms. Lerner's emails, including sending her computer to the IRS Criminal Investigation division's forensics lab:

This step is not normally taken when an employee's computer crashes. The experts at the IRS forensics lab are experienced at recovering hard drives, which is part of their work assisting on criminal cases. The Criminal Investigation employees are highly skilled in this area and respected for their work in the greater law-enforcement community.⁷³

In addition, on June 26, 2014, Inspector General Russell George disclosed to Committee staff that Ms. Lerner informed his office in 2012 that her computer crashed and that she might have difficulty recovering documents. The Inspector General's Director of Audits for the Tax-Exempt Government Entities Unit discovered notes from a meeting he had with Ms. Lerner on October 1, 2012, regarding various audits. In his notes, he wrote that Ms. Lerner stated that "she had lost her hard drive" and that "it may take some effort to recover documentation for the audit team to review."⁷⁴

In a subsequent briefing with Committee staff, the Audit Director stated that he never followed up with Ms. Lerner to determine if her computer crash impacted the recovery of any documents. He also stated that he saw no evidence that Ms. Lerner intentionally destroyed her hard drive, and that he had no reason to believe Ms. Lerner destroyed documents relating to any Inspector General audit.⁷⁵

In a separate briefing with Committee staff, the IRS Assistant Chief Information Officer stated that he has no reason to believe Ms. Lerner intentionally crashed her hard drive:

Q: Do you have any reason to believe that Ms. Lerner intentionally crashed her hard drive?

A: I have no reason to believe it, and haven't seen anything that would say that she did that, no.⁷⁶

⁷³ Statement of John Koskinen, Commissioner, Internal Revenue Service, House Committee on Ways and Means, *Hearing with IRS Commissioner John Koskinen* (June 20, 2014).

⁷⁴ Notes of Director, Tax Exempt Government Entities, Treasury Inspector General for Tax Administration (produced on June 26, 2014).

⁷⁵ Briefing by Director, Tax Exempt Government Entities, Treasury Inspector General for Tax Administration, to House Committee on Oversight and Government Reform Staff (June 27, 2014).

⁷⁶ Briefing by Assistant Chief Information Officer, Internal Revenue Service, to House Committee on Oversight and Government Reform Staff (June 23, 2014).

He told Committee staff that “Ms. Lerner was insistent in trying to recover whatever documents she could.” He stated: “I have no indication that there was anything nefarious about the loss of Ms. Lerner’s emails.” When asked whether he was “aware of anyone at the IRS intentionally destroying documents that are relevant to a Congressional investigation,” he responded, “absolutely not.”⁷⁷

8. Claim That Justice Department Motivated by Politics

Republicans have accused the Department of failing to actively pursue the criminal investigation because of political motivations, but the Committee has obtained no evidence to support these claims.

On June 26, 2014, Senator Ted Cruz stated:

When an attorney general refuses to enforce the law, when an attorney general mocks the rule of law, when an attorney general corrupts the Department of Justice by conducting a nakedly partisan investigation to cover up political wrongdoing, that conduct by any reasonable measure constitutes high crimes and misdemeanors.⁷⁸

On May 2, 2014, Chairman Issa questioned the motives of the Department, stating:

Congressional investigations into the IRS targeting scandal have uncovered evidence of serious criminal activity which must be resolved according to the law. Unfortunately, the Department of Justice’s current investigation has lost credibility and public confidence. Appointing a Special Counsel is a necessary step to restore impartiality to a case that requires it. The person Attorney General Holder appoints must be someone beyond the Administration’s own political circle, whose professional independence and political disinterest is beyond reproach.⁷⁹

On the same day, House Judiciary Committee Chairman Bob Goodlatte alleged that “the President and Administration officials have publicly undermined the investigation on multiple occasions.”⁸⁰

Contrary to these claims, Department officials have explained repeatedly that their investigators are conducting the investigation without regard to political considerations. Appearing before the House Judiciary Committee on April 8, 2014, Attorney General Holder

⁷⁷ *Id.*

⁷⁸ *Ted Cruz: Eric Holder Should Be Impeached Over IRS Scandal*, Huffington Post (June 26, 2014) (online at www.huffingtonpost.com/2014/06/26/ted-cruz-eric-holder_n_5534661.html).

⁷⁹ House Committee on the Judiciary, *House Republicans Introduce Resolution Calling on Holder to Appoint Special Counsel in IRS Investigation* (May 2, 2014) (online at <http://judiciary.house.gov/index.cfm/2014/5/house-republicans-introduce-resolution-calling-on-holder-to-appoint-special-counsel-in-irs-investigation>).

⁸⁰ *Id.*

testified that “the investigation’s being done by career people who have constitutional rights to engage in political activity.” He said: “I don’t think there’s any basis to believe that anybody who was involved in this investigation would conduct themselves in a way that is inappropriate or would be shaded by their political activity.” The Attorney General added:

The men and women who are career employees or who are in the department for lesser periods of time make their decisions based only on the facts and the law and conduct themselves in the way that is in the best traditions of this department, and I’ll stand—put my record up against any other attorney general, any other Justice Department, and any hint that we have engaged in anything that is partisan or inappropriate in nature. I totally 1,000 percent reject.⁸¹

On May 6, 2014, Committee staff interviewed Richard Pilger, a career prosecutor currently serving as the Director of the Election Crimes Branch in the Department’s Public Integrity Section. He stated:

I understand from the committee’s letter that the subject of this interview is my contact with Ms. Lois Lerner, former director of the Internal Revenue Service, Exempt Organizations Division, and the committee members’ question regarding whether the Department of Justice has improperly targeted particular tax-exempt groups for prosecution based upon their political views.

The short answer to that question is absolutely not. I have pursued my career and continued my career at the Public Integrity Section precisely because it was formed in the wake of Watergate to stand against the abuse of power.

Since I joined the Public Integrity Section in 1992, I have never encountered politically motivated decisions. To the contrary, it has been my consistent experience this section has acted, without exception, on a strictly nonpartisan basis in all of its decisions and actions. In my experience, politics plays no role in our work as prosecutors, period.⁸²

He added:

To my knowledge, the IRS did not refer any matters to the Public Integrity Section as a result of contacts with Ms. Lerner. I do not believe that there was anything inappropriate about the direction given to me nor in my interactions with Ms. Lerner.

⁸¹ House Committee on the Judiciary, *Hearing on Oversight of the U.S. Department of Justice* (Apr. 8, 2014).

⁸² House Committee on Oversight and Government Reform, Interview of Richard Pilger, Director, Election Crimes Branch, Office of Public Integrity, Department of Justice, at 7-8 (May 6, 2014).

More specifically, I assure you that the Public Integrity Section never sought to target tax-exempt groups of any kind based upon the partisan content of any political speech, nor would I have ever tolerated such conduct.⁸³

On May 29, 2014, Committee staff interviewed Jack Smith, the Chief of the Public Integrity Section at the Department of Justice, who stated:

Since I've been chief of the section, of the Public Integrity Section, I have never encountered, nor would I tolerate, any politically motivated decisions. Politics does not and cannot play a role in our work as prosecutors.⁸⁴

9. Claim That Prominent Democrats Prompted Targeting

Republicans have accused the Department of conspiring with the IRS to single out conservative groups for potential prosecution in response to pressure from prominent Democrats, but these claims have been refuted during transcribed interviews conducted by Committee staff.

On May 22, 2014, Chairman Issa and Chairman Jordan sent a letter to the Attorney General claiming that "the Department's leadership, including Public Integrity Section Chief Jack Smith, was closely involved in engaging with the IRS in wake of *Citizens United* and political pressure from prominent Democrats."⁸⁵ A press release accompanying their letter claimed that Department officials and Ms. Lerner "discussed singling out and prosecuting tax-exempt applicants, at the urging of a Democratic Senator."⁸⁶

Based on several transcribed interviews conducted by Committee staff, these allegations appear to be without merit.

On April 9, 2013, Senator Whitehouse held a hearing on campaign finance enforcement before the Crime and Terrorism Subcommittee of the Senate Judiciary Committee. One of the witnesses was Mythili Raman, the then-Acting Assistant Attorney General for the Criminal Division. During the hearing, Chairman Whitehouse asked Ms. Raman about the Department's efforts to prosecute false statements on applications for tax-exempt status. Ms. Raman responded: "Without discussing ongoing investigations, we can assure you that we are

⁸³ *Id.* at 11.

⁸⁴ House Committee on Oversight and Government Reform, Interview of Jack Smith, Chief, Office of Public Integrity, Department of Justice, at 7 (May 29, 2014).

⁸⁵ Letter from Chairman Darrell E. Issa, House Committee on Oversight and Government Reform, to Attorney General Eric H. Holder Jr., Department of Justice (May 22, 2014).

⁸⁶ House Committee on Oversight and Government Reform, *Testimony: In 2010, Justice Department Sought Lois Lerner's Help to Prosecute Tax Exempt Groups Engaging in Politics* (May 22, 2014) (online at <http://oversight.house.gov/release/testimony-2010-justice-department-sought-lois-lerners-help-prosecute-tax-exempt-groups-engaging-politics/>).

incredibly vigilant about the use of these organizations as an end run around the contribution limits.”⁸⁷

Ms. Raman also discussed challenges facing the Department in light of the *Citizens United* decision:

We face certain investigative and prosecutorial challenges as a result of this new landscape. With regard to super PACS, the primary challenge we face is establishing illegal coordination between a super PAC and a campaign. ... With regard to designated classes of 501(c) organizations, we are hampered by the fact that unlike PACS—super PACS and other political organizations, these 501(c) are not required to publicly disclose their donors to the FEC, even though those donors’ contributions may be used as expenditures to seek to influence federal elections.⁸⁸

Ms. Raman also made clear the Department’s intent to follow the *Citizens United* decision:

It is not the government’s position to second guess the Supreme Court. I am here, however, to clearly describe what some of our challenges are in light of *Citizens United*. Obviously, the government took a particular position before the Supreme Court and *Citizens United*, but now we have a law, and we intend to follow it.⁸⁹

Following the hearing, Senator Whitehouse sent a letter on April 25, 2013, requesting assurances that the Department was taking all appropriate steps to prosecute false statements on applications for 501(c)(4) status.⁹⁰ Senator Whitehouse’s letter made no reference to Tea Party organizations or any other specific groups.

During a May 29, 2014, transcribed interview with Committee staff, Jack Smith, the Public Integrity Section Chief, had this exchange:

Q: Did Senator Whitehouse in this letter or elsewhere request that the Department of Justice prosecute Tea Party organizations?

A: No.

Q: Did Senator Whitehouse in this letter or elsewhere request that the Department of Justice prosecute conservative organizations?

⁸⁷ Senate Committee on the Judiciary, Subcommittee on Crime and Terrorism, *Hearing on Current Issues in Campaign Finance Law Enforcement* (Apr. 9, 2013).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Letter from Chairman Sheldon Whitehouse, Subcommittee on Crime and Terrorism, Senate Committee on the Judiciary, to Attorney General Eric H. Holder Jr. and Secretary of the Treasury Jacob L. Lew (Apr. 25, 2013).

A: No.

Q: Is it fair to say that your understanding upon receipt of this letter was that Senator Whitehouse was requesting that the Department of Justice prosecute organizations violating campaign finance laws regardless of whether the organizations were affiliated with the Tea Party or any other political ideology?

A: I took the letter to mean exactly what it says, that he wanted assurances that potentially criminally conduct that he described in the letter is being thoroughly investigated. And, from our perspective, if it's being investigated, if there's investigative agency like the IRS doing it, that we're prosecuting it, that there's a mechanism for it to come to us and us to prosecute it. ...

Q: Did you ever receive any instruction from any Member of Congress to target Tea Party or conservative groups for prosecution?

A: No.⁹¹

In addition, on May 6, 2014, Committee staff conducted a transcribed interview of Richard Pilger, the Director of the Election Crimes Branch, who agreed that Senator Whitehouse's letter did not focus on conservative organizations:

Q: Senator Whitehouse's letter did not direct you to target conservative organizations for prosecution?

A: No, it did not.

Q: Did you interpret Senator Whitehouse's letter when you read it to ask DOJ only to prosecute Tea Party organizations?

A: No, and if I had ever read it that way, I would remember that, and I would have had a very strong lasting reaction to it, that it was improper to do so.

Q: Did you interpret Senator Whitehouse's letter to ask DOJ only to prosecute conservative organizations?

A: No.⁹²

Mr. Pilger also had this exchange with Committee staff:

⁹¹ House Committee on Oversight and Government Reform, Interview of Jack Smith, Chief, Office of Public Integrity, Department of Justice, at 150-51 (May 29, 2014).

⁹² House Committee on Oversight and Government Reform, Interview of Richard Pilger, Director, Election Crimes Branch, Office of Public Integrity, Department of Justice, at 68 (May 6, 2014).

Q: Are you aware of any member of Congress directing Department of Justice personnel to target Tea Party or conservative groups for prosecution under 18 USC 1001 or any other statute?

A: I don't recall any such communication with or from Congress. Now, whether any congressional correspondence has ever mentioned a particular group, I don't remember. Whether a correspondence or communication has suggested that a certain group should be targeted as you say or should be investigated or actions should be taken because they are affiliated with one side or the other of the partisan divide, I don't remember that happening, and I think I would remember it happening and I wouldn't—to the extent it was in my power, I wouldn't tolerate it.⁹³

Mr. Pilger confirmed that several meetings were held to prepare Ms. Raman for her testimony before Senator Whitehouse's subcommittee, and that Ms. Lerner participated in one of those meetings. He also told Committee staff that Ms. Lerner never disclosed any information related to IRS employees' use of inappropriate screening criteria to review applications for tax-exempt status in any meeting he attended with her.⁹⁴

Mr. Pilger explained to Committee staff that, in response to Senator Whitehouse's letter, Mr. Smith asked him to contact Ms. Lerner to determine whether the IRS had an effective mechanism to refer evidence of false statements to the Department. He stated that Ms. Lerner explained that she was leaving on vacation, and that he did not "recall that any follow-up occurred thereafter."⁹⁵

10. Claim That Citizens United Prompted Targeting

Republicans claim that the targeting of conservative groups is a government-wide conspiracy initiated after the Supreme Court's 2010 decision in *Citizens United* involving the President, the IRS, the Department of Justice, the Securities and Exchange Commission, the Federal Elections Commission, and other agencies, but the Committee has obtained no evidence linking these claims to the inappropriate criteria used by IRS employees in Cincinnati to screen applications for tax-exempt status, which was the basis for the Inspector General's report.

With respect to the Justice Department, on April 23, 2014, Chairman Issa and other Republican Committee Members sent a letter to the Attorney General alleging that "the Justice Department, like the IRS and the Securities and Exchange Commission, played a role in a

⁹³ House Committee on Oversight and Government Reform, Interview of Richard Pilger, Director, Election Crimes Branch, Office of Public Integrity, Department of Justice, at 74 (May 6, 2014).

⁹⁴ *Id.* at 11, 45, 57-59, 173.

⁹⁵ *Id.* at 10-11.

government-wide effort to target political speech.”⁹⁶ On June 16, 2014, Chairman Issa issued a partisan staff report concluding: “Like the IRS, the Justice Department also received and internalized the President’s political rhetoric lambasting *Citizens United* and nonprofit political speech.”⁹⁷

Contrary to these claims, the investigations conducted by both the Committee and the Inspector General show that the search terms identified as inappropriate in the Inspector General’s report originated with a screening agent in Cincinnati and had absolutely nothing to do with the *Citizens United* decision. Neither investigation has identified any evidence of White House involvement, political motivation, or a government-wide conspiracy.

On May 14, 2013, the Inspector General issued a report concluding that IRS employees in Cincinnati used “inappropriate criteria” to screen applications for tax-exempt status. The first line of the “results” section of the report found that this activity began in 2010 with employees in the Determinations Unit of the IRS office in Cincinnati. The report stated that these employees “developed and used inappropriate criteria to identify applications from organizations with the words Tea Party in their names.” The report also stated that these employees “developed and implemented inappropriate criteria in part due to insufficient oversight provided by management.”⁹⁸

The Inspector General’s report found that Lois Lerner, the former Director of Exempt Organizations at the IRS, did not discover the use of these inappropriate criteria until a year later—in June 2011—after which she “immediately” ordered the practice to stop.⁹⁹ Despite this direction, the Inspector General’s report found that employees subsequently began using different inappropriate criteria “without management knowledge.” The Inspector General reported that “the criteria were not influenced by any individual or organization outside the IRS.”¹⁰⁰

The Committee’s investigation confirmed these findings. On June 6, 2013, Committee staff interviewed an IRS Screening Group Manager in Cincinnati who provided a detailed, first-hand account of how groups applying for tax-exempt status were initially identified by the IRS. A self-identified “conservative Republican” and 21-year veteran of the IRS, he denied that he or anyone on his team was directed by the White House to take these actions or that they were politically motivated. Instead, he explained that the first case at issue in this investigation was

⁹⁶ Letter from Chairman Darrell E. Issa, House Committee on Oversight and Government Reform, to Attorney General Eric H. Holder, Department of Justice (Apr. 23, 2014).

⁹⁷ Republican Staff, House Committee on Oversight and Government Reform, *How Politics Led the IRS to Target Conservative Tax-Exempt Applicants for their Political Beliefs* (June 16, 2014).

⁹⁸ Treasury Inspector General for Tax Administration, *Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review* (May 14, 2013) (2013-10-053).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

initially flagged by one of his own screeners in 2010.¹⁰¹ He explained that he initiated the first effort to gather similar cases in order to ensure their consistent treatment, and that he took this action on his own, without any direction from his superiors. He also confirmed that one of his screeners developed terms identified by the Inspector General as “inappropriate,” such as “Patriot” and “9/12 project,” but that he did not become aware that his screener was using these terms until more than a year later.¹⁰²

On the question of whether the *Citizens United* decision led the IRS to use the inappropriate criteria identified by the Inspector General, on December 4, 2013, former IRS Commissioner Doug Shulman had the following exchange during his transcribed interview with Committee staff:

Q: Sir, to the best of your knowledge, did the *Citizens United* case in any way affect the IRS process for handling tax-exempt applications?

A: Affect the process? No. You know, to the best of my knowledge, it did not.¹⁰²

On November 13, 2013, former Acting IRS Commissioner Steve Miller had this exchange during his transcribed interview with Committee staff:

Q: Did you understand that *Citizens United* would change in any way the way that EO functioned?

A: No.

Q: So there was more money flowing into (c)(4)s than other exempt organizations, but you weren't aware of a way that the case would change the way that EO operated. Is that fair to say?

A: Correct.¹⁰³

On November 6, 2013, IRS Chief Counsel William Wilkins had this exchange during his transcribed interview with Committee staff:

¹⁰¹ Ranking Member Elijah E. Cummings, House Committee on Oversight and Government Reform, *First-Hand Account: Cummings Releases Full Transcript of “Conservative Republican” IRS Manager Explaining Genesis of Tea Party Screening* (June 18, 2013) (online at http://democrats.oversight.house.gov/index.php?option=com_content&task=view&id=5936&Itemid=104).

¹⁰² House Committee on Oversight and Government Reform, Interview of Doug Shulman, Former Commissioner, Internal Revenue Service, at 164 (Dec. 4, 2013).

¹⁰³ House Committee on Oversight and Government Reform, Interview of Steve Miller, Former Acting Commissioner, Internal Revenue Service, at 194-5 (Nov. 13, 2013).

Q: Have you ever been involved in discussions within the IRS about the *Citizens United* case?

A: I don't recall any.

Q: Sir, in your expert opinion, is the *Citizens United* case a tax law case?

A: I believe it's a free speech case and not a tax law case.

Q: In your view, sir, can the *Citizens United* case at all affect the way the IRS approaches or processes applications for exempt status?

A: It didn't change the tax law, is maybe the best way to respond to that.¹⁰⁴

With respect to Republican claims that the Department of Justice conspired to prosecute conservative groups after the *Citizens United* decision, the Committee conducted a transcribed interview of Jack Smith, the Chief of the Department's Public Integrity Section on May 29, 2014. He explained that, after reading a newspaper article, he requested a meeting with the IRS about 501(c) organizations that may be violating the law by claiming that they did not intend to engage in political activity, when they in fact did engage in such activity.¹⁰⁵

Mr. Smith told Committee staff that, when he met with Ms. Lerner on this topic, she stated that such prosecutions would be "difficult or impossible." He also explained that the Department never pursued any such prosecutions:

In September of 2010, I read an article that suggested that, as a result of changes in the law following the Supreme Court's decision in *Citizens United v. FEC*, groups might be attempting to falsely claim 501(c) tax-exempt status to circumvent existing campaign finance laws and disclosure requirements. As a result, I directed Mr. Pilger to set up a meeting with the IRS regarding the issue. Subsequently, a meeting was held in the Public Integrity Section conference room attended by, among others, Mr. Pilger, myself, and Lois Lerner from the IRS. To my knowledge, I had never met Ms. Lerner before that date.

During the meeting, Ms. Lerner expressed strong opinion—her strong opinion that it would be difficult or impossible to prosecute the abuse of tax status by organizations making false representations to gain 501(c) status. No criminal investigations or prosecutions were subsequently referred by the IRS or opened by the Public Integrity Section as a result of this meeting.¹⁰⁶

¹⁰⁴ House Committee on Oversight and Government Reform, Interview of William Wilkins, Chief Counsel, Internal Revenue Service, at 156 (Nov. 6, 2013).

¹⁰⁵ House Committee on Oversight and Government Reform, Interview of Jack Smith, Chief, Public Integrity Section, Department of Justice, at 8-9 (May 29, 2014).

¹⁰⁶ *Id.*

Mr. Smith also had the following exchange with Committee staff:

Q: At the October 8, 2010, meeting, did you or anyone else from the Department of Justice suggest to IRS employees that they should, quote, "fix the problem posed by the Citizens United decision"?

A: No.

Q: In your opinion, does the Citizens United decision pose a problem?

A: It is not my role to comment on the law of the land. It is the law of the land. My job is to enforce the law. Citizens United is the law of the land.

Q: Are you aware of any Department official directing the IRS to, quote, "fix the problem posed by Citizens United"?

A: I'm not.¹⁰⁷

Richard Pilger, Director of the Election Crimes Branch of the Department's Public Integrity Section also told Committee staff that Department officials were not working to "fix" the *Citizens United* case. He explained:

Q: In your tenure at the Justice Department, have you ever been involved in an effort to fix problems posed by the Supreme Court's *Citizens United* decision?

A: I can't accept that framing of the issue, and I don't understand *Citizens United* that way. *Citizens United* isn't a problem, it is the law of the land. It, like other cases in the field of criminal law, have created opportunities that we have to be vigilant about.

They have like *Mapp v. Ohio*, like the *Miranda* case. They have created opportunities, it has created opportunities for criminal conduct to go undetected or given us a challenge in detecting it. But, like all those other cases, it is the law of the land. It is the constitutional right of people and entities to make the contributions that the *Citizens United* court held they could make, in overturning parts of FECA.

So *Citizens United* is not a problem. It is the law. And, so no, I am not aware of any effort or part of any effort to fix a problem from *Citizens United*. I am aware that it changed the law though and that law enforcement in reaction to such changes must be vigilant about the opportunities they present for law breaking.

Q: In order to comply with the law as outlined by the Supreme Court?

¹⁰⁷ *Id.* at 77.

A: Not to quibble, but in order to enforce the laws around the rights recognized by the Supreme Court while still scrupulously respecting those rights.¹⁰⁸

Mr. Smith, the Chief of the Department's Public Integrity Section also directly refuted allegations of a government-wide conspiracy. He had this exchange with Committee staff:

Q: Have you been part of a government-wide effort to target political speech?

A: No.

Q: Are you aware of the Department of Justice participating in a government-wide effort to target political speech?

A: No.

Q: Are you aware of anyone at the Department of Justice collaborating with any IRS employee to treat organizations with conservative viewpoints differently than any other organization?

A: No.¹⁰⁹

Richard Pilger, Director of the Election Crimes Branch in the Department's Public Integrity Section agreed that there was no evidence of a government-wide conspiracy. He had this exchange with Committee staff:

Q: Are you aware of any such effort, government-wide effort to target political speech?

A: No.¹¹⁰

¹⁰⁸ House Committee on Oversight and Government Reform, Interview of Richard Pilger, Director, Election Crimes Branch, Public Integrity Section, Department of Justice, at 128-29 (May 6, 2014).

¹⁰⁹ House Committee on Oversight and Government Reform, Interview of Jack Smith, Chief, Public Integrity Section, Department of Justice, at 85-6 (May 29, 2014).

¹¹⁰ House Committee on Oversight and Government Reform, Interview of Richard Pilger, Director, Election Crimes Branch, Public Integrity Section, Department of Justice, at 127 (May 6, 2014).

From: Pilger, Richard
Sent: Tuesday, October 05, 2010 8:01 PM
To: [REDACTED] (FBI)
Subject: Fw: DATA FORMAT ISSUE -- TIME SENSITIVE

This is incoming data re 501c4 issues. Does FBI have a format preference?

Richard C. Pilger
 Director, Election Crimes Branch &
 Senior Trial Attorney
 Public Integrity Section
 Criminal Division
 United States Department of Justice
 Washington, D.C. 20530
 202 [REDACTED]
 202 [REDACTED] (f)

IMPORTANT: This e-mail is intended only for the addressee. It may contain information that is privileged or otherwise legally protected. If the reader is not an intended recipient, then distribution, copying, or use is prohibited. If you received this e-mail in error, please notify sender immediately.

From: Lerner Lois G <[REDACTED]>
To: Pilger, Richard
Cc: Lerner Lois G <[REDACTED]>; Whitaker Sherry L <[REDACTED]>
Sent: Tue Oct 05 17:52:04 2010
Subject: DATA FORMAT ISSUE -- TIME SENSITIVE

In checking with my folks on getting you the disks we spoke about, I was asked the following:

Before we can get started do you know if they would like the images in Alchemy or Raw format? The difference is, Alchemy you need to search on one of the 5 index fields where Raw format, you load into your on software and you can do what ever you want to with it.

If you're like me, you don't know the answer. But, if you can check and get back to me Wednesday, we can get started and have these in about 2 weeks. If we don't have the information by tomorrow, it will take longer as there are other priorities in line. Please cc Sherry Whitaker on your response as she is likely to see your response before I do. Thanks

Lois G. Lerner
 Director, Exempt Organizations

HOGIR IRS 000020

From: Pilger, Richard
Sent: Wednesday, October 06, 2010 2:05 PM
To: Lerner Lois G
Cc: Whitaker Sherry L; Simmons, Nancy; [REDACTED] (FBI)
Subject: RE: DATA FORMAT ISSUE -- TIME SENSITIVE

Thanks Lois – FBI says Raw format is best because they can put it into their systems like excel.

From: Lerner Lois G [REDACTED]
Sent: Tuesday, October 05, 2010 5:52 PM
To: Pilger, Richard
Cc: Lerner Lois G; Whitaker Sherry L
Subject: DATA FORMAT ISSUE -- TIME SENSITIVE

In checking with my folks on getting you the disks we spoke about, I was asked the following:

Before we can get started do you know if they would like the images in Alchemy or Raw format? The difference is, Alchemy you need to search on one of the 5 index fields where Raw format, you load into your on software and you can do what ever you want to with it.

If you're like me, you don't know the answer. But, if you can check and get back to me Wednesday, we can get started and have these in about 2 weeks. If we don't have the information by tomorrow, it will take longer as there are other priorities in line. Please cc Sherry Whitaker on your response as she is likely to see your response before I do. Thanks

Lois G. Lerner
 Director, Exempt Organizations

Westlaw.

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(O.L.C.)

Office of Legal Counsel
U.S. Department of Justice

****1 *101 PROSECUTION FOR CONTEMPT OF
CONGRESS OF AN EXECUTIVE BRANCH OFFI-
CIAL WHO HAS ASSERTED A CLAIM OF EX-
ECUTIVE PRIVILEGE**

May 30, 1984

As a matter of statutory construction and separation of powers analysis, a United States Attorney is not required to refer a congressional contempt citation to a grand jury or otherwise to prosecute an Executive Branch official who carries out the President's instruction to invoke the President's claim of executive privilege before a committee of Congress.

**MEMORANDUM OPINION FOR THE ATTOR-
NEY GENERAL**

I. Introduction

This memorandum memorializes our formal response to your request for our opinion whether, pursuant to the criminal contempt of Congress statute, 2 U.S.C. ss 192, 194, a United States Attorney must prosecute or refer to a grand jury a citation for contempt of Congress issued with respect to an executive official who has asserted a claim of executive privilege in response to written instructions from the President of the United States. Your inquiry originally arose in the context of a resolution adopted by the House of Representatives on December 16, 1982, during the final days of the 97th Congress, which instructed the Speaker of the House of Representatives to certify the report of the Committee on Public Works and Transportation concerning the "contumacious conduct of the Administrator, United States Environmental Protection Agency, in failing and refusing to furnish certain documents in compliance with a subpoena duces tecum of a duly constituted subcommittee of said committee . . . to the United States Attorney for the District of Columbia, to the end that the Ad-

ministrator . . . may be proceeded against in the manner and form provided by law." H.R. Res. 632, 97th Cong., 2d Sess. (1982). [FN1] Section 192 of Title 2, United States Code, provides, in general, that willful failure to produce documents in response to a congressional subpoena shall be a misdemeanor. Section 194 provides that if such a failure is reported to either house of Congress it "shall" be certified to the "appropriate United States attorney whose duty it shall be to bring the matter before the grand jury for its action."

***102** Your inquiry presents a number of complex issues that will be considered in this memorandum. The first issue is whether the Executive retains some discretion with respect to referral of a contempt of Congress citation to a grand jury. This issue raises questions of statutory construction and the separation of powers with respect to the scope of the Executive's exercise of prosecutorial discretion. The second issue is whether the criminal contempt of Congress statute applies to an Executive Branch official who, on the orders of the President, asserts the President's claim of executive privilege. This issue also involves questions of statutory interpretation and the constitutional separation of powers.

As we have previously discussed with you, and as we explain in detail in this memorandum, we have concluded that, as a matter of both statutory construction and the Constitution's structural separation of powers, a United States Attorney is not required to refer a contempt citation in these circumstances to a grand jury or otherwise to prosecute an Executive Branch official who is carrying out the President's instruction in a factual context such as that presented by the December 16, 1982, contempt citation. First, as a matter of statutory interpretation reinforced by compelling separation of powers considerations, we believe that Congress may not direct the Executive to prosecute a particular individual without leaving any discretion to the Executive to determine whether a violation of the law has occurred. Second, as a matter of statutory interpretation and the constitutional separation of powers, we believe that the contempt of Congress statute was not intended to apply and could

not constitutionally be applied to an Executive Branch official who asserts the President's claim of executive privilege in this context.

****2** Our conclusions are predicated upon the proposition, endorsed by a unanimous Supreme Court less than a decade ago, that the President has the authority, rooted inextricably in the separation of powers under the Constitution, to preserve the confidentiality of certain Executive Branch documents. The President's exercise of this privilege, particularly when based upon the written legal advice of the Attorney General, is presumptively valid. Because many of the documents over which the President may wish to assert a privilege are in the custody of a department head, a claim of privilege over those documents can be perfected only with the assistance of that official. If one House of Congress could make it a crime simply to assert the President's presumptively valid claim, even if a court subsequently were to agree that the privilege claim were valid, the exercise of the privilege would be so burdened as to be nullified. Because Congress has other methods available to test the validity of a privilege claim and to obtain the documents that it seeks, even the threat of a criminal prosecution for asserting the claim is an unreasonable, unwarranted, and therefore intolerable burden on the exercise by the President of his functions under the Constitution.

Before setting out a more detailed explanation of our analysis and conclusions, we offer the caveat that our conclusions are limited to the unique circumstances that gave rise to these questions in late 1982 and early 1983. ***103** Constitutional conflicts within the federal government must be resolved carefully, based upon the facts of each specific case. Although tensions and friction between coordinate branches of our government are not novel and were, in fact, anticipated by the Framers of the Constitution, they have seldom led to major confrontations with clear and dispositive resolutions.

The accommodations among the three branches of the government are not automatic. They are undefined, and in the very nature of things could not have been defined, by the Constitution. To speak of lines of demarcation is to use an inapt figure. There

are vast stretches of ambiguous territory.

Frankfurter and Landis, Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts, 37 Harv. L. Rev. 1010, 1016 (1924) (emphasis in original). "The great ordinances of the Constitution do not establish and divide fields of black and white." Springer v. Philippine Islands, 277 U.S. 189, 209 (1928) (Holmes, J., dissenting). Therefore, although we are confident of our conclusions, prudence suggests that they should be limited to controversies similar to the one to which this memorandum expressly relates, and the general statements of legal principles should be applied in other contexts only after careful analysis.

II. Background

Because the difficult and sensitive constitutional issues that we consider in this opinion could conceivably be resolved differently depending upon the specific facts of a controversy, this analysis is presented in the context of the December 16, 1982, actions of the House of Representatives. The facts surrounding this dispute will be set out in detail in the following pages.

A. EPA's Enforcement of the Superfund Act

****3** On December 16, 1982, the House of Representatives cited the Administrator of the Environmental Protection Agency (EPA) because she declined to produce, in response to a broad subcommittee subpoena, a small portion of the subpoenaed documents concerning the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. ss. 9601, 9657 (Supp. V 1981) (Superfund Act). The Superfund Act, adopted in December of 1980, authorizes the federal government to take steps to remedy the hazards posed by abandoned and inactive hazardous waste sites throughout the United States. **[FN2]** The EPA, which was delegated part of the President's authority to enforce the Superfund Act in August of 1981, **[FN3]** has considerable flexibility with respect to ***104** how this goal may be accomplished. EPA may request the Department of Justice to proceed immediately against those responsible for the hazardous waste sites to "secure such relief as

may be necessary to abate" an "imminent and substantial endangerment to the public health or welfare or the environment." See 42 U.S.C. s 9606. Alternatively, EPA may initiate clean-up efforts itself by using funds from the \$1.6 billion Superfund. See 42 U.S.C. s 9631. If EPA itself implements the clean-up efforts, it may subsequently sue those responsible for the hazardous waste to recover the clean up cost and, in some instances, may obtain treble damages. See 42 U.S.C. s 9607. These two basic enforcement mechanisms are supplemented by other broad enforcement powers, which authorize the issuance of administrative orders "necessary to protect the public health and welfare and the environment" and to require designated persons to furnish information about the storage, treatment, handling, or disposal of hazardous substances. See 42 U.S.C. ss 9606, 9604(e)(1). Finally, the Superfund Act imposes criminal liability on a person in charge of a facility from which a hazardous substance is released, if that person fails to notify the government of the release. See 42 U.S.C. s 9603.

Prior to the initiation of judicial proceedings, EPA must undertake intensive investigation and case preparation, including studying the nature and the extent of the hazard present at sites, identifying potentially responsible parties, and evaluating the evidence that exists or that must be generated to support government action. See Amended Declaration of Robert M. Perry, Associate Administrator for Legal and Enforcement Counsel and General Counsel, EPA, filed in United States v. House of Representatives, Civ. No. 82-3583 (D.D.C. Jan. 14, 1983). Many sites apparently involve hundreds of waste generators; hence, the initial investigation of a site can take months and involve the examination of tens of thousands of documents. Id.

Based on its initial investigations of hazardous waste sites throughout the country, EPA created a comprehensive national enforcement scheme and developed during 1982 an interim priorities list, which identified the 160 sites that posed the greatest risk to the public health and welfare and the environment. [FN4] EPA also promulgated enforcement guidelines to direct the implementation of the Superfund Act against these potentially hazardous sites. See 47 Fed. Reg. 20664 (1982).

****4** Under this basic enforcement scheme, EPA commenced actual enforcement of the Superfund Act. As part of the enforcement effort with respect to each site, EPA generally develops a strategy for conducting negotiations and litigation consistent with its overall enforcement goals and the individual facts of each particular case. Once a case strategy has been developed, EPA notifies responsible parties that it intends to take action at a site unless the parties undertake an adequate clean up program on their own. Following the issuance of notice letters, EPA typically negotiates with responsible parties to agree on a ***105** clean up plan. These negotiations may involve hundreds of potentially responsible parties and millions of dollars in clean up costs. Depending upon the strengths and weaknesses of individual cases and the effect on the overall enforcement effort, EPA may decide to settle with some but not all parties and proceed to litigation with a certain number of potential defendants. If EPA decides to bring a lawsuit, it refers the case to the Land and Natural Resources Division of this Department, which is responsible for conducting the actual litigation. [FN5]

During EPA's enforcement of the Superfund Act, the agency created or received hundreds of thousands of documents concerning various aspects of the enforcement process. Many of these documents concerned the facts relating to specific hazardous waste sites; others involved general agency strategy and policies with respect to the Superfund Act; still others, a small portion of the enforcement files, were attorney and investigator memoranda and notes that contained discussions of subjects such as EPA's enforcement strategy against particular defendants, analyses of the strengths and weaknesses of the government's case against actual or potential defendants, consideration of negotiation and settlement strategy, lists of potential witnesses and their anticipated testimony, and other litigation planning matters. Enforcement officials at both the career and policy level at EPA and in the Land and Natural Resources Division at the Department of Justice determined that some of those documents, which concerned the legal merits and tactics with respect to individual defendants in open enforcement files, were particularly sensitive to the enforcement process and could not be revealed outside

the agencies directly involved in the enforcement effort without risking injury to EPA's cases against these actual and potential defendants in particular and the EPA enforcement process in general. [FN6]

B. The House Subcommittee's Demands for Enforcement Files

In the midst of EPA's ongoing enforcement efforts under the Superfund Act, the Subcommittee on Oversight and Investigations of the House Committee on Public Works and Transportation (Public Works Subcommittee), chaired by Rep. Levitas, began hearings to review EPA enforcement of the Act. In the course of these hearings, the Public Works Subcommittee first demanded access to, and then subpoenaed, a wide range of documents concerning enforcement of the Superfund Act with respect to the 160 sites that were on the *106 agency's interim priorities list. The documents demanded by the Public Works Subcommittee included not only documents concerning the facts relating to these sites and EPA's general policies, but also the sensitive material contained in open case files that set out discussions concerning case strategy with respect to actual and potential defendants. [FN7] The Public Works Subcommittee subpoena was dated November 16, 1982, and was served on November 22, 1982. It called for production of the subpoenaed documents eleven days later on December 2, 1982. The EPA Administrator responded to the Public Works Subcommittee's subpoena by offering to provide the Public Works Subcommittee with access to an estimated 787,000 pages of documents within the scope of the subpoena. [FN8] The EPA and the Land and Natural Resources Division officials responsible for conducting EPA enforcement litigation determined, however, that release outside the enforcement agencies of a limited number of the most sensitive enforcement documents contained in open files concerning current and prospective defendants would impair EPA's ongoing enforcement efforts and prevent EPA and the Department of Justice from effectively implementing the Superfund Act.

**5 Therefore, in accordance with the explicit guidelines adopted by the President to govern possible claims of executive privilege, see Memorandum

re: Procedures Governing Responses to Congressional Requests for Information (Nov. 4, 1982), EPA suggested that some of the documents be withheld under a claim of executive privilege and consulted with this Office and the Office of the Counsel to the President in order to determine whether such a claim might be asserted to avoid impairing the constitutional responsibility of the President to take care that the laws be faithfully executed. A further review of the documents in question by enforcement officials at EPA and the Land and Natural Resources Division was then undertaken to confirm that the particular documents selected for consideration for an executive privilege claim were, in the judgment of those officials, sufficiently sensitive that their disclosure outside the Executive Branch might adversely affect the law enforcement process. The documents were then reviewed by officials in this Office and officials in the Office of the Counsel to the President to confirm that the documents were of the type described by the enforcement officials. Various unsuccessful efforts were thereafter made to resolve the dispute short of a final confrontation. The President, based upon the unanimous recommendation of all Executive Branch officials involved in the process, ultimately determined to assert a claim of executive privilege with respect to 64 documents from open enforcement files that had been identified as sufficiently enforcement sensitive *107 as of the return date of the subpoena that their disclosure might adversely affect pending investigations and open enforcement proceedings. The President implemented this decision in a memorandum dated November 30, 1982, to the EPA Administrator, which instructed her to withhold the particularly sensitive documents from disclosure outside the Executive Branch as long as the documents remained critical to ongoing or developing enforcement actions. The legal basis for this decision was explained in letters from the Attorney General on November 30, 1982, to the House Public Works Subcommittee and one other House subcommittee. [FN9] On December 2, 1982, 64 of the most sensitive documents were withheld from the Subcommittee. [FN10]

C. The Contempt of Congress Proceedings in the House of Representatives

The President's assertion of executive privilege, and

the Attorney General's explanation of the law enforcement considerations and constitutional justification for the decision not to release the documents outside the Executive Branch while enforcement proceedings were ongoing, did not dissuade the congressional subcommittees from pressing their demands for the withheld material. After the EPA Administrator asserted the President's claim of privilege at a December 2, 1982, Public Works Subcommittee hearing, the Subcommittee immediately approved a contempt of Congress resolution against her. The full Committee did likewise on December 10, 1982, and rejected a further proposal by the Department of Justice to establish a formal screening process and briefings regarding the contents of the documents. [FN11] The full House adopted the contempt of Congress resolution on December 16, 1982, [FN12] and the following*108 day Speaker O'Neill certified the contempt citation to the United States Attorney for the District of Columbia for prosecution under the criminal contempt of Congress statute.

D. The Criminal Contempt of Congress Statute

**6 The criminal contempt of Congress statute contains two principal sections, 2 U.S.C. ss 192 & 194. [FN13] Section 192, which sets forth the criminal offense of contempt of Congress, provides in pertinent part:

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House . . . or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than \$1,000 nor less than \$100 and imprisonment in a common jail for not less than one month nor more than twelve months.

Section 194 purports to impose mandatory duties on the Speaker of the House or the President of the Senate, as the case may be, and the United States Attorney, to take certain actions leading to the prosecution of persons certified by a house of Congress to have failed to produce information in response to a sub-

poena. It provides:

Whenever a witness summoned as mentioned in section 192 of this title fails to appear to testify or fails to produce any books, papers, records, or documents, as required, or whenever any witness so summoned refuses to answer any question pertinent to the subject under inquiry before either House . . . or any committee or subcommittee of either House of Congress, and the fact of such failure or failures is reported to either House while Congress is in session or when Congress is not in session, a statement of fact constituting such failure is reported and filed with the President of the Senate or the Speaker of the House, it shall be the duty of the said President of the Senate or the Speaker of the House, as the case may be, to certify, and he shall so certify, the statement of facts aforesaid under the seal of the *109 Senate or House, as the case may be, to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action.

(Emphasis added.)

E. The Department of Justice Civil Suit

Immediately after the House passed the resolution adopting the finding that the EPA Administrator was in contempt of Congress, the Department of Justice filed a civil suit in the United States District Court for the District of Columbia to obtain a ruling that "insofar as the EPA Administrator . . . did not comply with the Subpoena, her non-compliance was lawful" because of a valid Presidential claim of executive privilege. [FN14] The House moved to dismiss the Department's complaint on jurisdictional grounds, and the Department cross moved for summary judgment on the merits. In a letter to Speaker O'Neill dated December 27, 1982, the United States Attorney indicated that during the pendency of the lawsuit, he would take no further action with respect to the Speaker's referral of the contempt citation. The Speaker responded in a letter dated January 4, 1983, in which he took the position that the United States Attorney must, as a matter of law, immediately refer the matter to a grand jury.

**7 The trial court responded to the cross-motions

for dismissal and summary judgment by exercising its discretion under equitable rules of judicial restraint not to accept jurisdiction over the lawsuit, and it dismissed the suit. The court concluded:

When constitutional disputes arise concerning the respective powers of the Legislative and Executive Branches, judicial intervention should be delayed until all possibilities for settlement have been exhausted. . . .

The difficulties apparent in prosecuting the Administrator . . . for contempt of Congress should encourage the two branches to settle their differences without further judicial involvement.

United States v. House of Representatives, 556 F. Supp. 150, 152-53 (D.D.C. 1983). No appeal was taken. [FN15]

*110 F. Resolution of the EPA Dispute

Subsequent to the trial court decision, the two branches engaged in negotiations to reach a compromise settlement. The parties eventually reached an agreement under which the Public Works Subcommittee would have limited access to the withheld documents and would sponsor a resolution to "withdraw" the contempt citation against the EPA Administrator. Pursuant to the agreement, the Subcommittee reviewed the documents, and the House later adopted a resolution withdrawing the contempt citation. H.R. Res. 180, 98th Cong., 1st Sess. (Aug. 3, 1983). The issue whether the House of Representatives in the 98th Congress could "withdraw" the contempt citation of the House during the 97th Congress was never resolved.

During the pendency of the lawsuit and the subsequent settlement negotiations, the United States Attorney for the District of Columbia refrained from referring the contempt citation to the grand jury. The United States Attorney took the position that referral would have been inappropriate during that period and that the statute left him with discretion to withhold referral. See Testimony of Stanley S. Harris before the House Committee on Public Works and Transportation, 98th Cong., 1st Sess. 100-07 (June 16, 1983). Following the passage of the resolution withdrawing the contempt citation, "the relevant facts and documents were presented . . . to a federal grand jury,

which voted unanimously not to indict the EPA Administrator." Letter from Stanley S. Harris, United States Attorney, District of Columbia, to Honorable Thomas P. O'Neill, Jr., Speaker of the House of Representatives (Aug. 5, 1983).

III. Generally Applicable Legal Principles: The Separation of Powers, the Duties of the Executive to Enforce the Law, and the Derivation and Scope of the Principles of Prosecutorial Discretion and Executive Privilege

A. The Separation of Powers

The basic structural concept of the United States Constitution is the division of federal power among three branches of government. Although the expression "separation of powers" does not actually appear in the Constitution, the Supreme Court has emphasized that the separation of powers "is at the heart of our Constitution," and has recognized "the intent of the Framers that the powers of the three great branches of the National Government be largely separate from one another." Buckley v. Valeo, 424 U.S. 1, 119-20 (1976). It needs little emphasis that the separation of powers doctrine is vital to any analysis of the relative responsibilities of the branches of our government, *inter se*. In The Federalist No. 47, James Madison, who believed that "no political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty" than the concept of the separation of powers, defended this tripartite arrangement in the Constitution by citing *111 Montesquieu's well-known maxim that the legislative, executive, and judicial departments should be separate and distinct:

**8 The reasons on which Montesquieu grounds his maxim are a further demonstration of his meaning. "When the legislative and executive powers are united in the same person or body," says he, "there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner." Again: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power,

the judge might behave with all the violence of an oppressor.”

The Federalist No. 47, at 303 (J. Madison) (C. Rossiter ed. 1961); see Buckley v. Valeo, 424 U.S. at 120-21. [FN16]

Of the three branches of the new government created in Philadelphia in 1787, the legislature was regarded as the most intrinsically powerful, and the branch with powers that required the exercise of the greatest precautions.

Madison warned that the “legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex.” The Federalist No. 48, supra, at 309. He admonished that because of their experiences in England, the founders of the thirteen colonies had focused keenly on the danger to liberty from an “overgrown and all-grasping prerogative of an hereditary magistrate, supported and fortified by an hereditary branch of the legislative authority,” but had tended to ignore the very real dangers from “legislative usurpations, which, by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations.” Id. Reflecting the views of many of his colleagues, Madison believed that although the risk of tyranny would naturally come from the King in an hereditary monarchy, in a representative republic, like that created by the constitutional convention, in which executive power was “carefully limited, both in the extent and duration of its power,” the threat to liberty would come from the legislature,

which is inspired, by a supposed influence over the people, with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude, yet not so numerous as to be incapable of pursuing the objects of its passions by means which reason prescribes; it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions.

Id.

*112 The Framers feared that the legislature's power over the purse would foster a dependence by the executive departments on the legislature “which gives

still greater facility to encroachments” by the legislature on the powers of the Executive. Id. at 310. The concerns of the Framers with respect to the power of the legislature have been recognized by the Supreme Court. The Court, citing many of the above statements, has observed that because of the Framers' concerns about the potential abuse of legislative power, “barriers had to be erected to ensure that the legislature would not overstep the bounds of its authority and perform functions of the other departments.” United States v. Brown, 381 U.S. 437, 444 (1965). Justice Powell noted that “during the Confederation, the States reacted by removing power from the executive and placing it in the hands of elected legislators. But many legislators proved to be little better than the Crown.” INS v. Chadha, 462 U.S. 917, 961 (1983) (Powell, J. concurring). After citing several specific legislative abuses that had been of particular concern to the Framers, Justice Powell concluded that it “was to prevent the recurrence of such abuses that the Framers vested the executive, legislative, and judicial powers in separate branches.” Id. at 962.

**9 Thus, the careful separation of governmental functions among three branches of government was a very deliberate and vital structural step in building the Constitution. The Framers understood human nature and anticipated that well-intentioned impulses would lead each of the branches to attempt to encroach on the powers allocated to the others. They accordingly designed the structure of the Constitution to contain intrinsic checks to prevent undue encroachment wherever possible. Particular care was taken with respect to the anticipated tendency of the Legislative Branch to swallow up the Executive. The Framers did not wish the Legislative Branch to have excessive authority over the individual decisions respecting the execution of the laws: “An elective despotism was not the government we fought for.” T. Jefferson, Notes on the State of Virginia 120 (Univ. N.C. Press ed. 1955) [FN17]. The constitutionally prescribed separation of powers creates enforceable abuses that had been of particular concern to the Framers, Justice Powell concluded that it “was to prevent the recurrence of such abuses that the Framers vested the executive, legislative, and judicial powers in separate branches.” Id. The division of delegated

powers was designed “to assure, as nearly as possible, that each Branch of government would confine itself to its assigned responsibility.” *INS v. Chadha*, 462 U.S. at 951. The doctrine of separated powers “may be violated in two ways. One branch may interfere impermissibly with the other’s performance of its constitutionally^{*113} assigned function. Alternatively, the doctrine may be violated when one branch assumes a function that more properly is entrusted to another. *Id.* at 963 (Powell, J. concurring) (citations omitted). Although the Supreme Court has recognized that “a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively,” it has also emphasized that the Court “has not hesitated to enforce the principle of separation of powers embodied in the Constitution when its application has proved necessary for the decision of cases or controversies properly before it.” *Buckley v. Valeo*, 424 U.S. at 121, 123. Therefore, although the Constitution does not contemplate “a complete division of authority between the three branches,” each branch retains certain core prerogatives upon which the other branches may not transgress. *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977). Each branch must not only perform its own delegated functions, but each has an additional duty to resist encroachment by the other branches. “The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.” *INS v. Chadha*, 462 U.S. at 951 (emphasis added).

B. The Duties of the Executive to Enforce the Law

^{**10} The fundamental responsibility and power of the Executive Branch is the duty to execute the law. Article II, s 1 of the Constitution expressly vests the executive power in the President. *Article II, s 3* commands that the President “take Care that the Laws be faithfully executed.” Enforcement of the laws is an inherently executive function, and by virtue of these constitutional provisions, the Executive Branch has the exclusive constitutional authority to enforce federal laws. Since the adoption of the Constitution, these verities have been at the heart of the general understanding of the Executive’s constitutional author-

ity. During the debates on the Constitution, James Wilson noted that the “only powers he conceived strictly executive were those of executing the laws.” 1 M. Farrand, *The Records of the Federal Convention of 1787*, at 65-66 (1937). During the first Congress, James Madison stated that “if any power whatsoever is in its nature executive, it is the power of appointing, overseeing, and controlling those who execute the laws.” 1 *Annals of Congress* 481 (1789). The Supreme Court has recognized this fundamental constitutional principle. In *Springer v. Philippine Islands*, 277 U.S. 189 (1928), the Court observed:

Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions.

Id. at 202. More recently, Judge Wilkey, writing for a unanimous panel of the United States Court of Appeals for the District of Columbia Circuit in a decision later affirmed by the Supreme Court, recognized that the Constitution ^{*114} prevents Congress from exercising its power of “oversight, with an eye to legislative revision,” in a manner that amounts to “shared administration” of the law. *Consumer Energy Council of America v. Federal Energy Regulatory Commission*, 673 F.2d 425, 474 (D.C. Cir. 1982), *aff’d sub nom. Process Gas Consumers Group v. Consumer Energy Council of America*, 43 U.S. 1216 (1983). It thus seems apparent that the drafters of the Constitution intended clearly to separate the power to adopt laws and the power to enforce them and intended to place the latter power exclusively in the Executive Branch. [FN18] As a practical matter, this means that there are constitutional limits on Congress’ ability to take actions that either disrupt the ability of the Executive Branch to enforce the law or effectively arrogate to Congress the power of enforcing the laws.

C. The Derivation and Scope of Prosecutorial Discretion and Executive Privilege

The issues addressed by this memorandum involve two important constitutional doctrines that spring from the constitutional limits imposed by the separation of powers and the Executive’s duty to enforce the laws: prosecutorial discretion and executive priv-

ilege.

1. Prosecutorial Discretion

The doctrine of prosecutorial discretion is based on the premise that because the essential core of the President's constitutional responsibility is the duty to enforce the laws, the Executive Branch has exclusive authority to initiate and prosecute actions to enforce the laws adopted by Congress. That principle was reaffirmed by the Supreme Court in Buckley v. Valeo, 424 U.S. 1 (1976), in which the Court invalidated the provision of the Federal Election Act that vested the appointment of certain members of the Federal Election Commission in the President pro tempore of the Senate and the Speaker of the House. In so holding, the Court recognized the exclusively executive nature of some of the Commission's powers, including the right to commence litigation:

**11 The Commission's enforcement power, exemplified by its discretionary power to seek judicial relief, is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress. A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to "take care that the laws be faithfully executed." Art. II, s. 3.

424 U.S. at 138.

*115 The Executive's exclusive authority to prosecute violations of the law gives rise to the corollary that neither the Judicial nor Legislative Branches may directly interfere with the prosecutorial discretion of the Executive by directing the Executive Branch to prosecute particular individuals. This principle was explained in Smith v. United States, 375 F.2d 243 (5th Cir.), cert. denied, 389 U.S. 841 (1967), in which the court considered the applicability of the Federal Tort Claims Act to a prosecutorial decision not to arrest or prosecute persons injuring plaintiff's business. The court ruled that the government was immune from suit under the discretionary decision exception of the Act on the ground that the Executive's prosecutorial discretion was rooted in the separation of powers under the Constitution:

The President of the United States is charged in Article 2, Section 3, of the Constitution with the

duty to "take Care that the Laws be faithfully executed." The Attorney General is the President's surrogate in the prosecution of all offenses against the United States. . . . The discretion of the Attorney General in choosing whether to prosecute or not to prosecute, or to abandon a prosecution already started, is absolute. . . . This discretion is required in all cases.

We emphasize that this discretion, exercised in even the lowliest and least consequential cases, can affect the policies, duties, and success of a function placed under the control of the Attorney General by our Constitution and statutes.

375 F.2d at 246-47. The court went on to state that this prosecutorial discretion is protected "no matter whether these decisions are made during the investigation or prosecution of offenses." Id. at 248.

The limits and precise nature of the Executive's prosecutorial discretion are discussed in greater detail below. At this point in our examination of the issues considered in this memorandum, it is sufficient to observe that meaningful and significant separation of powers issues are raised by a statute that purports to direct the Executive to take specified, mandatory prosecutorial action against a specific individual designated by the Legislative Branch.

2. Executive Privilege

The doctrine of executive privilege is founded upon the basic principle that in order for the President to carry out his constitutional responsibility to enforce the laws, he must be able to protect the confidentiality of certain types of documents and communications within the Executive Branch. If disclosure of certain documents outside the Executive Branch would impair the President's ability to fulfill his constitutional duties or result in the impermissible involvement of other branches in the enforcement of the law, then the President must be able to claim some form of privilege to preserve his constitutional prerogatives.*116 This "executive privilege" has been explicitly recognized by the Supreme Court, which has stated that the privilege is "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." United States v. Nixon, 418 U.S. 683, 708 (1974).

We believe that it is beyond peradventure that the constitutionally mandated separation of powers permits the President to prevent disclosure of certain Executive Branch documents under the doctrine of executive privilege and that the ability to assert this privilege is fundamental to the President's ability to carry out his constitutionally prescribed duties.

****12** The Supreme Court has suggested that in some areas the President's executive privilege may be absolute and in some circumstances it is a qualified privilege that may be overcome by a compelling interest of another branch. United States v. Nixon, 418 U.S. at 713; see also Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974) (en banc). Nevertheless, the unanimous Supreme Court decision in Nixon clearly stands for the proposition that there is a privilege, that it stems from the separation of powers, and that it may be invoked (although perhaps overridden by a court) whenever the President finds it necessary to maintain the confidentiality of information within the Executive Branch in order to perform his constitutionally assigned responsibilities. [FN19]

The scope of executive privilege includes several related areas in which confidentiality within the Executive Branch is necessary for the effective execution of the laws. First, as the Supreme Court has held, the privilege protects deliberative communications between the President and his advisors. The Court has identified the rationale for this aspect of the privilege as the valid need for protection of communications between high government officials and those who advise and assist them in the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process. United States v. Nixon, 418 U.S. at 705 (footnotes omitted).

Another category of Executive Branch material that is subject to a President's claim of privilege is material necessary "to protect military, diplomatic, or sensitive national security secrets." United States v. Nix-

on, 418 U.S. 683, 706 (1974). In Nixon, the Court stated:

As to those areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities. In *117C & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948), dealing with Presidential authority involving foreign policy considerations, the Court said:

"The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret."

In United States v. Reynolds, 345 U.S. 1 (1953), dealing with a claimant's demand for evidence in a Tort Claims Act case against the Government, the Court said:

"It may be possible to satisfy the court, 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. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers." Id. at 10.

****13** No case of the Court, however, has extended this high degree of deference to a President's generalized interest in confidentiality. Nowhere in the Constitution, as we have noted earlier, is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based. 418 U.S. at 710-11.

An additional important application of executive privilege, which, as noted earlier, relates centrally to the discharge of the President's constitutional duties, involves open law enforcement files. Since the early part of the 19th century, Presidents have steadfastly

protected the confidentiality and integrity of investigative files from untimely, inappropriate, or uncontrollable access by the other branches, particularly the legislature. [FN20] The basis for this application *118 of the privilege is essentially the same as for all aspects of executive privilege; the Executive's ability to enforce the law would be seriously impaired, and the impermissible involvement of other branches in the execution and enforcement of the law would be intolerably expanded, if the Executive were forced to disclose sensitive information on case investigations and strategy from open enforcement files.

IV. The Duty of the Executive Branch When an Executive Official Has Been Cited for Contempt of Congress for Asserting the President's Claim of Executive Privilege

A. Prosecutorial Discretion

The first specific question that is presented by the circumstances that gave rise to this memorandum is whether the United States Attorney is required to refer every contempt of Congress citation to a grand jury. This question raises issues of statutory construction as well as the constitutional limits of prosecutorial discretion. We deal first with the statutory questions.

As a preliminary matter, we note that § 194 does not on its face actually purport to require the United States Attorney to proceed with the prosecution of a person cited by a house of Congress for contempt; by its express terms the statute discusses only referral to a grand jury. Even if a grand jury were to return a true bill, the United States Attorney could refuse to sign the indictment and thereby prevent the case from going forward. United States v. Cox, 342 F.2d 167 (5th Cir.) (en banc), cert. denied, 381 U.S. 935 (1965); In re Grand Jury, January, 1969, 315 F. Supp. 662 (D. Md. 1970). See Hamilton & Grabow, A Legislative Proposal for Resolving Executive Privilege Disputes Precipitated by Congressional Subpoenas, 21 Harv. J. on Legis. 145, 155 (1984). Thus, as a matter of statutory interpretation, there is no doubt that the contempt of Congress statute does not require a prosecution; the only question is whether it requires referral to the grand jury. [FN21]

*119 1. Previous Department of Justice Positions Concerning Prosecutorial Discretion Under the Contempt of Congress Statute

**14 In the past, the Department of Justice has taken the position that if Congress cited an executive officer for contempt because of an assertion of executive privilege and "the Department determined to its satisfaction that the claim was rightfully made, it would not, in the exercise of its prosecutorial discretion, present the matter to a grand jury." Testimony of Assistant Attorney General (now Solicitor General) Rex Lee, Hearings on Representation of Congress and Congressional Interests in Court, Before the Subcomm. on Separation of Powers of the Senate Committee on the Judiciary, 94th Cong., 2d Sess. 8 (1976).

This principle of prosecutorial discretion under the contempt of Congress statute was followed by the Department in the cases of three officials of the Port of New York Authority who were cited for contempt of Congress in 1960 for refusing to produce documents to the House Judiciary Committee. As a part of an investigation of the Port Authority, which had been established by an interstate compact approved by Congress, the Judiciary Committee subpoenaed a large number of documents concerning the Port Authority's operations, most of which the Port Authority declined to produce on the orders of the governors of New York and New Jersey (the states within which the Port Authority was located). Because of the failure to produce the documents, the Committee recommended, and the House adopted, contempt resolutions against three principal officials of the Port Authority. [FN22] On August 23, 1960, these resolutions were referred to the United States Attorney for prosecution. See N.Y. Times, Aug. 24, 1960, at 1. The United States Attorney never referred any of these citations to the grand jury. On November 16, 1960, the Department of Justice announced that it would proceed against the officials by information *120 rather than indictment, and therefore would not present the citations to a grand jury. See N.Y. Times, Nov. 17, 1960, at 1. On November 25, 1960, the Department announced that it would file an information against only one of the Port Authority officials, Executive Director Austin Tobin, and would not prosecute

the remaining two officials. See N.Y. Times, Nov. 26, 1960, at 1. The trial began in January 1961 and continued under the supervision of the new Attorney General, Robert F. Kennedy, who never altered the decision not to prosecute the two remaining officials, in spite of a congressional request to do so. Ultimately Tobin's conviction was reversed by the United States Court of Appeals for the District of Columbia Circuit. Tobin v. United States, 306 F.2d 270 (D.C. Cir.), cert. denied, 371 U.S. 902 (1962). [FN23]

In the foregoing instance, the Department (under two administrations) exercised its prosecutorial discretion not to refer contempt of Congress citations to a grand jury, notwithstanding the seemingly mandatory phrasing of the statute. [FN24] For the reasons set forth more fully below, we continue to adhere to the conclusion that the Department retains prosecutorial discretion not to refer contempt citations to a grand jury.

2. Judicial Opinions Interpreting the Language of § 194

****15** Section 194 imposes similarly worded, nominally mandatory, referral obligations on both the Speaker of the House (or the President of the Senate) and the United States Attorney once a contempt of Congress resolution has been adopted by the House or Senate:

it shall be the duty of the said President of the Senate or the Speaker of the House as the case may be, to certify, and he shall so certify, the statement of facts aforesaid under the seal of the Senate or House, as the case may be, to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action.

(Emphasis added.)

Although the language, "it shall be the duty of" and "whose duty it shall be," might suggest a nondiscretionary obligation, the United States Court of Appeals for the District of Columbia Circuit has expressly held, at least with respect to the Speaker of the House, that the duty is not mandatory, and that, in fact, the Speaker has an obligation under the law, at least in some cases, to exercise his discretion in de-

termining whether to refer a contempt citation. Wilson v. United States, 369 F.2d 198 (D.C. Cir. 1966). In Wilson, the court reversed a conviction for contempt of Congress on the ground that the Speaker had assumed that the statute did not permit any exercise of discretion by him *121 and he had therefore automatically referred a contempt citation to the United States Attorney while Congress was not in session. The court based its conclusion that the Speaker was required to exercise his discretion on the longstanding practice of both the House and Senate and on congressional debates on contempt citations in which the houses had recognized their own discretion not to approve a contempt resolution. The court concluded that because full House approval of a contempt citation is necessary when Congress was in session, the Speaker is required to exercise some discretion when the House is not in session. 369 F.2d at 203-04.

Although the reasons underlying the court's decision not to impose a mandatory duty on the Speaker in Wilson do not necessarily require the same conclusion with respect to the United States Attorney, the decision at least supports the proposition that the seemingly mandatory language of § 194 need not be construed as divesting either the Speaker or the United States Attorney of all discretion. [FN25]

In several cases, the United States Court of Appeals for the District of Columbia Circuit has at least assumed that the United States Attorney retains discretion not to refer a contempt of Congress citation to a grand jury. In these cases, the court refused to entertain challenges to congressional subpoenas, at least in part on the ground that the prospective witnesses would have adequate subsequent opportunities to challenge a committee's contempt finding, including the opportunity to persuade the United States Attorney not to refer the case to a grand jury. For example, in Ansara v. Eastland, 442 F.2d 751 (D.C. Cir. 1971), the court declined to entertain a suit to quash a congressional subpoena on the ground that it would be inappropriate, as a matter of the exercise of its equitable power, to interfere with an ongoing congressional process. The court stated that protections were available "within the legislative branch or elsewhere," and then in a footnote indicated that these

protections resided “perhaps in the Executive Branch which may decide not to present the matter to the grand jury (as occurred in the case of the officials of the New York Port Authority); or perhaps in the Grand Jury which may decide not to return a true bill.” 442 F.2d at 754 n.6 (emphasis added). [FN26] See also *122 Sanders v. McClellan, 463 F.2d 894 (D.C. Cir. 1972). In United States Servicemen's Fund v. Eastland, 488 F.2d 1252 (D.C. Cir. 1973), rev'd on other grounds, 421 U.S. 491 (1974), the court agreed to review a challenge to a congressional subpoena brought by a third party, and it distinguished Ansara and McClellan on the ground that, because the congressional subpoena was issued to a third party, the plaintiffs had no alternative means to vindicate their rights. 488 F.2d at 1260. Among the alternative means the court cited was the right to “seek to convince the executive (the attorney general's representative) not to prosecute.” Id.

**16 These cases emphasize the particular significance of prosecutorial discretion in the context of the contempt of Congress statute. In general, with respect to any criminal allegation, prosecutorial discretion plays an important role in protecting the rights of the accused by providing an additional level of review with respect to the factual and legal sufficiency of the charges. This role is even more important when dealing with the contempt of Congress statute because, as the above cases demonstrate, witnesses generally have no opportunity to challenge congressional subpoenas directly. Thus, as the cases indicate, prosecutorial discretion serves a vital purpose in protecting the rights of the accused in contempt cases by mitigating the otherwise stern consequences of asserting a right not to respond to a congressional subpoena.

Thus, the practice of the Congress and the available judicial authority support the proposition that the seemingly mandatory duties imposed on congressional officials by 2 U.S.C. § 194 are and were intended to be discretionary. The practice of the Executive Branch and the court decisions reflect a similarly discretionary role under the statute for the United States Attorney. Because, as the balance of this memorandum reveals, these interpretations are consistent with other common-law principles and avoid conclusions that would be at odds with the separation of

powers, we believe that a correct reading of 2 U.S.C. § 194 requires recognition of the prosecutor's discretion with respect to referral to a grand jury.

3. Common-Law Prosecutorial Discretion

In addition to the court decisions that suggest that the United States Attorney may decide not to refer a contempt citation to a grand jury, the common-law doctrine of prosecutorial discretion weighs heavily against and, in our opinion, precludes an interpretation that the statute requires automatic referral. Because of the wide scope of a prosecutor's discretion in determining which cases to bring, courts, as a matter of law, do not ordinarily interpret a statute to limit that discretion unless the intent to do so is clearly and unequivocally stated. The general rule is that “the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case.” United States v. Nixon, 418 U.S. 683, 693 (1974). See also Confiscation Cases, 74 U.S. (7 Wall.) 454 (1869). The Attorney General and his subordinates, including the United States Attorneys, have the authority to exercise this discretion reserved to the Executive. United States v. San Jacinto Tin Co., 125 U.S. 273 (1888); The *123 Gray Jacket, 72 U.S. (5 Wall.) 370 (1866). In general, courts have agreed with the view of Judge (now Chief Justice) Burger:

Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought.

**17 Newman v. United States, 382 F.2d 479, 480 (D.C. Cir. 1967). See also United States v. Batchelder, 442 U.S. 114 (1979); Bordenkircher v. Hayes, 434 U.S. 357 (1978).

Courts have applied this general principle of prosecutorial discretion in refusing to interfere with a prosecutor's decision not to initiate a case, despite the specific language of 28 U.S.C. § 547, which states in part that “each United States Attorney, within his district, shall . . . prosecute for all offenses against the United States.” (Emphasis added.) For example, in Powell v. Katzenbach, 359 F.2d 234 (D.C. Cir. 1965), cert. denied, 384 U.S. 906 (1966), the court

denied a mandamus petition that sought to force the Attorney General to prosecute a national bank. The court ruled: "It is well settled that the question of whether and when prosecution is to be instituted is within the discretion of the Attorney General. Mandamus will not lie to control the exercise of this discretion." *Id.* at 234. See also *United States v. Brown*, 481 F.2d 1035 (8th Cir. 1973); *Bass Anglers Sportsman's Society v. Scholze Tannery, Inc.*, 329 F. Supp. 339 (E.D. Tenn. 1971); *Pugach v. Klein*, 193 F. Supp. 630 (S.D.N.Y. 1961); *United States v. Brokaw*, 60 F. Supp. 100 (S.D. Ill. 1945).

Courts exhibit the same deference to prosecutorial discretion even when the specific statute involved uses words that would otherwise have mandatory, nondiscretionary implications. For example, 42 U.S.C. § 1987 states that United States Attorneys are "authorized and required . . . to initiate prosecutions against all persons violating any of the provisions of the federal criminal civil rights statutes." (Emphasis added.) Although a number of cases have been initiated to force a United States Attorney to bring civil rights actions on the ground that this statute imposes a nondiscretionary duty to prosecute, see Note, *Discretion to Prosecute Federal Civil Rights Crimes*, 74 Yale L.J. 1297 (1965), the courts uniformly have rejected the contention that the statute limits a prosecutor's normal discretion to decide not to bring a particular case. For example, in *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375 (2d Cir. 1973), the court ruled that the "mandatory nature of the word 'required' as it appears in § 1987 is insufficient to evince a broad Congressional purpose to bar the exercise of executive discretion in the prosecution of federal civil rights crimes." 477 F.2d at 381. The court noted that although similar mandatory language was contained in other statutes, "(s)uch language has never been thought to preclude the exercise of prosecutorial discretion." *Id.* Accord *Peek v. Mitchell*, 419 F.2d 575 (6th Cir. 1970); *Moses v. Kennedy*, 219 F. Supp. 762 (D.D.C. 1963), *aff'd sub nom. Moses v. Katzenbach*, 342 F.2d 931 (D.C. Cir. 1965). The language employed in 2 U.S.C. § 194 is neither stronger *124 nor more clearly mandatory than the language of § 1987, which the courts have decided is insufficient to limit the normal prosec-

utorial discretion.

****18** In fact, there is nothing to distinguish the contempt of Congress statute from any other statute where the prosecutor retains discretion with respect to who shall be prosecuted. Since the early part of the 19th century, it has been recognized that offenses against Congress that are punishable by Congress through its inherent contempt power may also be violations of the criminal laws and, as such, offenses against the United States, with respect to which the normal rules governing criminal prosecutions apply. See 2 Op. Att'y Gen. 655 (1834) (concluding that an assault against a congressman could be prosecuted consistent with the Double Jeopardy Clause under the criminal laws, even if the defendant had already been punished by Congress, because the act created two separate offenses, one against Congress and one against the United States). This principle was adopted by the Supreme Court when it upheld the constitutionality of the contempt of Congress statute. *In re Chapman*, 166 U.S. 661 (1897). In *Chapman*, the Court held that the contempt statute did not violate the Double Jeopardy Clause even though a defendant could be punished through Congress' inherent contempt power as well as under the contempt statute. The Court concluded that a refusal to testify involved two separate offenses, one against Congress and one against the United States, and that

it is quite clear that the contumacious witness is not subjected to jeopardy twice for the same offence, since the same act may be an offence against one jurisdiction and also an offence against another; and indictable statutory offenses may be punished as such, while the offenders may likewise be subjected to punishment for the same acts as contempts, the two being diverso intuitu and capable of standing together. 166 U.S. at 672.

The import of the Court's conclusion in this context is clear. Congress' inherent contempt power is the remedy for the offense against Congress, and that remedy remains within Congress' control. The crime of contempt of Congress, like any other federal statutory crime, is an offense against the United States that should be prosecuted as is any other crime. This criminal offense against the United States properly

remains subject to the prosecutorial control of the Executive Branch. Therefore, because the contempt statute should be treated as are other federal criminal statutes, we do not believe that § 194 should be read to limit the common law prosecutorial discretion of the United States Attorney. There is nothing in the legislative history of the contempt of Congress statute that is inconsistent with this conclusion. *See* 42 Cong. Globe, 34th Cong., 3d Sess. 4030-44 (1857).

4. Constitutional Considerations

Our construction of § 194 is reinforced by the need to avoid the constitutional problems that would result if § 194 were read to require referral to a *125 grand jury. As discussed above, the constitutionally prescribed separation of powers requires that the Executive retain discretion with respect to whom it will prosecute for violations of the law. Although most cases expressly avoid this constitutional question by construing statutes not to limit prosecutorial discretion, the cases that do discuss the subject make it clear that common law prosecutorial discretion is strongly reinforced by the constitutional separation of powers. *See, e.g., Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375 (2d Cir. 1973); *Powell v. Katzenbach*, 359 F.2d 234 (D.C. Cir. 1965), *cert. denied*, 384 U.S. 906 (1966).

**19 A number of courts have expressly relied upon the constitutional separation of powers in refusing to force a United States Attorney to proceed with a prosecution. For example, in *Pugach v. Klein*, 193 F. Supp. 630 (S.D.N.Y. 1961), the court declined to order the United States Attorney to commence a prosecution for violation of federal wiretap laws on the ground that it was

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

193 F. Supp. at 634. *See also* *Goldberg v. Hoffman*,

225 F.2d 463, 464-65 (7th Cir. 1955). [FN27]

The Fifth Circuit, sitting en banc, has underscored the constitutional foundations of prosecutorial discretion. *United States v. Cox*, 342 F.2d 167 (5th Cir.) (en banc), *cert. denied*, 381 U.S. 935 (1965). In *Cox*, the court overturned a district court's order that a United States Attorney prepare and sign an indictment that a grand jury had voted to return. The plurality opinion stated:

The executive power is vested in the President of the United States, who is required to take care that the laws be faithfully executed. The Attorney General is the hand of the President in taking care that the laws of the United States in legal proceedings*126 and in the prosecution of offenses, be faithfully executed. The role of the grand jury is restricted to a finding as to whether or not there is probable cause to believe that an offense has been committed. The discretionary power of the attorney for the United States in determining whether a prosecution shall be commenced or maintained may well depend upon matters of policy wholly apart from any question of probable cause. Although as a member of the bar, the attorney for the United States is an officer of the court, he is nevertheless an executive official of the Government, and it is as an officer of the executive department that he exercises a discretion as to whether or not there shall be a prosecution in a particular case. It follows, as an incident of the constitutional separation of powers, that courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.

342 F.2d at 171 (footnotes omitted). *See also id.* at 182-83 (Brown, J. concurring); *id.* at 190-93 (Wisdom, J., concurring). Even the three dissenting judges in *Cox* conceded that, although they believed that the United States Attorney could be required to sign the indictment, "once the indictment is returned, the Attorney General or the United States Attorney can refuse to go forward." *Id.* at 179. *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")

(citing, *inter alia*, Cox).

****20** Although prosecutorial discretion may be regulated to a certain extent by Congress and in some instances by the Constitution, the decision not to prosecute an individual may not be controlled because it is fundamental to the Executive's prerogative. For example, the individual prosecutorial decision is distinguishable from instances in which courts have reviewed the legality of general Executive Branch policies. See Nader v. Saxbe, 497 F.2d 676 (D.C. Cir. 1974); Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973) (en banc) (per curiam); NAACP v. Levi, 418 F. Supp. 1109 (D.D.C. 1976). In these cases the courts accepted jurisdiction to rule whether an entire enforcement program was being implemented based on an improper reading of the law. The cases expressly recognize, however, both that a decision to prosecute in an individual case involves many factors other than merely probable cause, and that "the balancing of these permissible factors in individual cases is an executive, rather than a judicial function which follows from the need to keep the courts as neutral arbiters in the criminal law generally . . . and from Art. II, s 3 of the Constitution, which charges the President to 'take Care that the Laws be faithfully executed.'" Nader v. Saxbe, 497 F.2d at 679 n.18. Similarly distinguishable are the cases concerning the constitutional limits on selective prosecution, which hold that prosecutorial discretion may not be exercised on the basis of impermissible factors such as race, religion, or the exercise of free ***127** speech. See, e.g., Marshall v. Jerico, Inc., 446 U.S. 238, 249 (1980); Oyler v. Boles, 368 U.S. 448 (1962).

If the congressional contempt statute were interpreted to divest the United States Attorney of discretion, then the statute would create two distinct problems with respect to the separation of powers. "The doctrine of separated powers is implemented by a number of constitutional provisions, some of which entrust certain jobs exclusively to certain branches while others say that a given task is not to be performed by a given branch." United States v. Brown, 381 U.S. 437, 443 (1965). Divesting the United States Attorney of discretion would run afoul of both aspects of the separation of powers by stripping the Executive of its proper constitutional authority and

by vesting improper power in Congress.

First, as the cases cited above demonstrate, Congress may not deprive the Executive of its prosecutorial discretion. In areas where the President has specific executive authority, Congress may establish standards for the exercise of that authority, but it may not remove all Presidential authority. For example, Congress may require the President to make appointments to certain executive positions and may define the qualifications for those positions, but it may not select the particular individuals whom the President must appoint to those positions. See Buckley v. Velez, 424 U.S. 1 (1976). Similarly, Congress may adopt the criminal provisions for which individuals may be prosecuted and impose certain qualifications on how the Executive should select individuals for prosecution, but it may not identify the particular individuals who must be prosecuted. The courts have declared that the ultimate decision with respect to prosecution of individuals must remain an executive function under the Constitution.

****21** Second, if Congress could specify an individual to be prosecuted, it would be exercising powers that the Framers intended not be vested in the legislature. A legislative effort to require prosecution of a specific individual has many of the attributes of a bill of attainder and would seem to be inconsistent with many of the policies upon which the Constitution's prohibition against bills of attainder was based. See United States v. Brown, 381 U.S. 437 (1965); United States v. Lovett, 328 U.S. 303 (1946). The constitutional role of Congress is to adopt general legislation that will be applied and implemented by the Executive Branch. "It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments." Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136 (1810); see United States v. Brown, 381 U.S. 437, 446 (1965). The Framers intended that Congress not be involved in such prosecutorial decisions or in questions regarding the criminal liability of specific individuals. As the Supreme Court stated in Lovett:

Those who wrote our Constitution well knew the danger inherent in special legislative acts which take away the life, liberty, or property of particu-

lar named persons, because the legislature thinks them guilty of conduct which deserves punishment.

*128 328 U.S. at 317. Justice Powell has echoed this concern: "The Framers were well acquainted with the danger of subjecting the determination of the rights of one person to the 'tyranny of shifting majorities.'" *INS v. Chadha*, 462 U.S. 917, 961 (1983) (Powell, J. concurring). As we have shown above, courts may not require prosecution of specific individuals, even though the Judicial Branch is expressly assigned the role of adjudicating individual guilt. *A fortiori*, the Legislative Branch, which is assigned the role of passing laws of general applicability and specifically excluded from questions of individual guilt or innocence, may not decide on an individual basis who will be prosecuted.

These constitutional principles of prosecutorial discretion apply even though the issue here is referral to the grand jury and not commencement of a criminal case after indictment. A referral to a grand jury commences the criminal prosecution process. That step is as much a part of the function of executing the laws as is the decision to sign an indictment. The cases expressly recognize that prosecutorial discretion applies at any stage of the investigative process, even to the decision whether to begin an investigation at all. *See Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375 (2d Cir. 1973); *Smith v. United States*, 375 F.2d 243, 248 (5th Cir.), cert. denied, 389 U.S. 841 (1967). In the latter case, the court emphasized that prosecutorial discretion was protected "no matter whether these decisions are made during the investigation or prosecution of offenses." 375 F.2d at 248. Moreover, if the Executive has already determined that, as a matter of law, no violation of the law has occurred, it would serve no practical purpose to refer a case to the grand jury. Given the importance of these constitutional principles and the fundamental need to preserve the Executive's power to enforce the laws, we see no reason for distinguishing between the decision to prosecute and the decision to refer to the grand jury in this case. [FN28]

**22 For all of the above reasons, as a matter of statutory construction strongly reinforced by constitu-

tional separation of powers principles, we believe that the United States Attorney and the Attorney General, to whom the United States Attorney is responsible, retain their discretion not to refer a contempt of Congress citation to a grand jury. It follows, of course, that we believe that even if the provision of a statute requiring reference to a grand jury were to be upheld, the balance of the prosecutorial process could not be mandated.

*129 B. Whether the Criminal Contempt of Congress Statute Applies to an Executive Official Who Asserts, On Direct Orders of the President, the President's Claim of Executive Privilege

We next consider, aside from the issue of prosecutorial discretion, whether the criminal contempt of Congress statute is intended to apply, or constitutionally could be applied, to Presidential claims of executive privilege.

1. Previous Department of Justice Interpretations of the Contempt of Congress Statute

The Department of Justice has previously taken the position that the criminal contempt of Congress statute does not apply to executive officials who assert claims of executive privilege at the direction of the President. In 1956, Deputy Attorney General (subsequently Attorney General) William P. Rogers took this position before a congressional subcommittee investigating the availability of information from federal departments and agencies. In a lengthy memorandum of law, Deputy Attorney General Rogers set forth the historical basis of executive privilege and concluded that in the context of Presidential assertions of the privilege, the contempt of Congress statute was "inapplicable to the executive departments." *See Hearings Before a Subcommittee of the House Committee on Government Operations*, 84th Cong., 2d Sess. 2933 (1956). [FN29] We are not aware of any subsequent Department position that reverses or weakens this conclusion, and we have found no earlier Department position to the contrary.

We believe that the Department's long-standing position that the contempt of Congress statute does not apply to executive officials who assert Presidential

claims of executive privilege is sound, and we concur with it. Our conclusion is based upon the following factors: (1) the legislative history of the contempt of Congress statute demonstrates that it was not intended to apply to Presidential assertions of executive privilege; and (2) if the statute were construed to apply to Presidential assertions of executive privilege, it would so inhibit the President's ability to make such claims as to violate the separation of powers.

2. The Legislative History of the Contempt of Congress Statute

Neither the legislative history nor the historical implementation of the contempt statute supports the proposition that Congress intended the statute to apply to executive officials who carry out a Presidential assertion of executive privilege. The criminal contempt statute was originally enacted in 1857 during proceedings in the House of Representatives to consider a contempt of Congress citation against a New York Times correspondent who had refused to ***130** answer questions put to him by a select committee appointed by the House to investigate charges of bribery of certain Representatives. As a result of the committee's unavailing efforts to obtain the reporter's testimony, the committee chairman introduced a bill designed "more effectually to enforce the attendance of witnesses on the summons of either House of Congress, and to compel them to deliver testimony." 42 Cong. Globe 404 (1857). The bill was supported as a necessary tool in the House's efforts to investigate the allegations of bribery. *See id.* at 405 (remarks of the Speaker), 426 (remarks of Sen. Toombs), 427 (remarks of Rep. Davis), 445 (remarks of Sen. Brown). The bill was rushed through Congress in less than a week in order to permit the House to bring greater pressure on the reporter to reveal the alleged source of the congressional corruption. That the bill was sponsored by the select committee, and not the Judiciary Committee, further demonstrates that the bill was not the result of a general consideration of Congress' contempt power, but was enacted as an expedient to aid a specific investigation. Thus, the circumstances of the bill's passage certainly do not affirmatively suggest that Congress anticipated application of the statute to instances in which the President asserted a claim of executive privilege.

****23** In fact, the sponsor of the bill disclaimed any such far-reaching implications. Representative Dunn asked the sponsor, Representative Orr, what impact the proposed bill would have on diplomatic secrets, one of the principal areas in which the President had historically asserted a privilege of confidentiality. Representative Dunn stated that use of the contempt statute by Congress to force disclosure of such material "might be productive of great mischief, and in time of war of absolute ruin of the country." 42 Cong. Globe 431 (remarks of Rep. Dunn). Representative Orr replied, "I can hardly conceive such a case" and emphasized that the bill should not be attacked "by putting instances of the extremest cases" because the "object which this committee had in view was, where there was corruption in either House of Congress, to reach it." *Id.* at 431 (remarks of Rep. Orr). The implication is that Congress did not intend the bill to apply to Presidential assertions of privilege. [FN30]

***131** In the years preceding the adoption of the statute, the President had, on a number of occasions, withheld documents from Congress under a claim of executive privilege, and many of these instances had been hotly contested in the public arena, and at least five of these instances occurred within the decade immediately preceding the enactment of the congressional contempt statute. *See supra* note 19 (collecting authorities). In spite of these highly visible battles over the subject of executive privilege, we have located no indication in the legislative history of the criminal contempt statute that Congress intended the statute to provide a remedy for refusals to produce documents pursuant to a Presidential claim of executive privilege.

The natural inference to be drawn from this vacuum in the legislative history is reinforced by Congress' failure, as far as we know, *ever* to utilize its inherent power of arrest to imprison Executive Branch officials for contempt of Congress for asserting claims of executive privilege, even though Congress had previously asserted and exercised its clearly recognized right to do so with respect to other instances of contempt by private citizens. *See Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821); *Ex Parte Nugent*, 18 F.

Cas. 471 (C.C.D.C. 1848). The absence of any congressional discussion of the use of the contempt power against Presidential claims of executive privilege and Congress' previous failure ever to attempt to use its inherent contempt power in such cases, strongly suggest that the statute was not intended to apply to such assertions.

This conclusion is supported by the subsequent history of the congressional contempt statute. Since enactment of the statute in 1857, there have been numerous instances in which the President has withheld documents from Congress under a claim of executive privilege. Despite the fact that many of these disputes were extraordinarily controversial, until the citation of the EPA Administrator in December 1982, 125 years after the contempt statute was enacted, neither house of Congress had ever voted to utilize the contempt statute against a Presidential assertion of executive privilege. In fact, during congressional debates over Presidential refusals to produce documents to Congress, there have been express acknowledgements by members of Congress that Congress had no recourse against the Executive if the President asserted executive privilege. In 1886, the Senate engaged in a prolonged debate over President Cleveland's order to his Attorney General not to produce to Congress documents concerning the dismissal of a United States Attorney. The debate was intense, controversial, and memorable; 23 years after the debate a Senator termed it the "most remarkable discussion which was ever had upon this question of the President's right to withhold documents from Congress." 43 Cong. Rec. 841 (1909) (remarks of Sen. Bacon). During this debate, even Senators who insisted upon the Senate's right to receive the documents recognized that if the President ordered them not to be produced, "there is no remedy." 17 Cong. Rec. 2800 (1886) (remarks of Sen. Logan); see also id. at 2737 (1886) (remarks of Sen. Voorhees). [FN31]

****24 *132** Congress' failure to resort to the contempt statute during any of the multitude of robust conflicts over executive privilege during the previous century and one quarter and Congress' own explicit recognition that it was without a remedy should the President order the withholding of documents, strongly suggest that Congress never understood the statute to apply to

an executive official who asserted the President's claim of executive privilege. [FN32]

3. Prudential Reasons for Construing the Contempt Statute Not To Apply to Presidential Assertions of Privilege

Courts traditionally construe statutes in order to avoid serious doubts about a statute's constitutionality. Califano v. Yamasaki, 442 U.S. 682, 693 (1979); Crowell v. Benson, 285 U.S. 22, 62 (1932). As stated by the United States Court of Appeals for the District of Columbia Circuit, "when one interpretation of a statute would create a substantial doubt as to the statute's constitutional validity, the courts will avoid that interpretation absent a 'clear statement' of contrary legislative intent." United States v. Brown, 483 F.2d 1314, 1317 (D.C. Cir. 1973) (quoting United States v. Thompson, 452 F.2d 1333, 1337 (D.C. Cir. 1971), cert. denied, 405 U.S. 998 (1972)).

When a possible conflict with the President's constitutional prerogatives is involved, the courts are even more careful to construe statutes to avoid a constitutional confrontation. A highly significant example may be found in the procedural history and holding of United States v. Nixon, 418 U.S. 683 (1974), in which the Court construed the limitation in 28 U.S.C. § 1291 (that appeals be taken only from "final" decisions of a district court) in order to permit the President to appeal an adverse ruling on his claim of executive privilege without having to place himself in contempt of court. Although the plain language of that statute seemed to preclude an appeal of a lower court's ***133** interlocutory ruling on an evidentiary matter, the Court construed the statute to permit an immediate appeal, without going through the otherwise required contempt proceeding:

The traditional contempt avenue to immediate appeal is peculiarly inappropriate due to the unique setting in which the question arises. To require a President of the United States to place himself in the posture of disobeying an order of a court merely to trigger the procedural mechanism of the ruling would be unseemly, and would present an unnecessary occasion for constitutional confrontation between two branches of the government.

418 U.S. at 691-92.

Congress itself has previously recognized the impropriety of resolving executive privilege disputes in the context of criminal contempt proceedings. During the dispute over the Watergate tapes, Congress provided a civil enforcement mechanism through which to test the President's claim of executive privilege. Senator Ervin, the sponsor of the bill, noted in his explanatory statement to the Senate that the use of criminal contempt "may be inappropriate, unseemly, or noneffacious where executive officers are involved." 119 Cong. Rec. 35715 (1973). In defending the civil enforcement procedure before the district court, Congress argued that in that case the contempt procedures would be "inappropriate methods for the presentation and resolution of the executive privilege issue," and that a criminal proceeding would be "a manifestly awkward vehicle for determining the serious constitutional question here presented." Plaintiff's Memorandum of Points and Authorities in Support of Motion for Summary Judgment, Senate Select Committee on Presidential Campaign Activities v. Nixon, Civ. No. 1593-73, at 5 (D.D.C. Aug. 28, 1973).

****25** The United States Court of Appeals for the District of Columbia Circuit has stated on several occasions that criminal contempt proceedings are an inappropriate means for resolving document disputes, especially when they involve another governmental entity. In Tobin v. United States, 306 F.2d 270 (D.C. Cir.), cert. denied, 371 U.S. 902 (1962), the court reversed a contempt of Congress conviction on the ground that the congressional subpoena had gone beyond the investigative authority delegated to the committee that issued the subpoena. After deciding this issue, however, the court felt "inclined to add a few words in conclusion" concerning the problems involved in a criminal contempt of Congress case against a public official. In dictum, the court noted that the "conflicting duality inherent in a request of this nature is not particularly conducive to the giving of any satisfactory answer, no matter what the answer should prove to be," and it cited the "eloquent plea" of District Judge Youngdahl in the case below, which read in part:

Especially where the contest is between different governmental units, the representative of one

unit in conflict with another should not have to risk jail to vindicate his constituency's rights.

***134** Moreover, to raise these issues in the context of a contempt case is to force the courts to decide many questions that are not really relevant to the underlying problem of accommodating the interest of two sovereigns.

306 F.2d at 276. See also United States v. Fort, 443 F.2d 670, 677-78 (D.C. Cir. 1970), cert. denied, 403 U.S. 932 (1971).

The analysis contained in United States v. Nixon demonstrates that principles of the separation of powers compel the application of special rules when a Presidential claim of a constitutional privilege is in tension with the request of another branch for confidential Executive Branch records. In discussing the issue of executive privilege in that case in response to a judicial subpoena, the Court stressed that the President's assertion of privilege was not to be treated as would a claim of a statutory or common law privilege by a private citizen. 418 U.S. at 708, 715. The President's constitutional role as head of one of three separate branches of government means that special care must be taken to construe statutes so as not to conflict with his ability to carry out his constitutional responsibilities. See, e.g., Myers v. United States, 272 U.S. 52 (1926) (upholding the President's removal power against limitations Congress sought to impose). The same special attention is provided, of course, to the other two branches when they assert responsibilities or prerogatives peculiar to their constitutional duties. See, e.g., Gravel v. United States, 408 U.S. 606 (1972) (extending immunity of Speech and Debate Clause to congressional assistants); Pierson v. Ray, 386 U.S. 547 (1967) (granting absolute civil immunity for judges' official actions).

****26** In this case, the congressional contempt statute must be interpreted in light of the specific constitutional problems that would be created if the statute were interpreted to reach an Executive Branch official such as the EPA Administrator in the context considered here. [FN33] As explained more fully below, if executive officials were subject to prosecution for criminal contempt whenever they carried out the President's claim of executive privilege, it would significantly burden and immeasurably impair the Pres-

ident's ability to fulfill his constitutional duties. Therefore, the separation of powers principles that underlie the doctrine of executive privilege also would preclude an application of the contempt of Congress statute to punish officials for aiding the President in asserting his constitutional privilege. [FN34]

*135 4. The Constitutional Implications of Application of the Contempt of Congress Statute to Executive Branch

Officials Who Assert the President's Claim of Privilege

The Supreme Court has stated that, in determining whether a particular statute

disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. United States v. Nixon, 418 U.S. at 711-712. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.

Nixon v. Administrator of General Services, 433 U.S. 425, 443 (1977). Thus, in analyzing this separation of powers issue, one must look first to the impact that application of the congressional contempt statute to Presidential assertions of executive privilege would have on the President's ability to carry out his constitutionally assigned functions. Then, if there is a potential for disruption, it is necessary to determine whether Congress' need to impose criminal contempt sanctions in executive privilege disputes is strong enough to outweigh the impact on the Executive's constitutional role.

In this instance, at stake is the President's constitutional responsibility to enforce the laws of the United States and the necessarily included ability to protect the confidentiality of information vital to the performance of that task. As explained earlier in this memorandum, the authority to maintain the integrity of certain information within the Executive Branch has been considered by virtually every President to

be essential to his capacity to fulfill the responsibilities assigned to him by the Constitution. Thus, as discussed above, and as the Supreme Court has recognized, the capacity to protect the confidentiality of some information is integral to the constitutional role of the President.

For these reasons, the Supreme Court has ruled that the President's assertion of executive privilege is presumptively valid and can be overcome only by a clear showing that another branch cannot responsibly carry out its assigned constitutional function without the privileged information. United States v. Nixon, 418 U.S. at 708. In Nixon, the Court stated that "upon receiving a claim *136 of privilege from the Chief Executive, it became the further duty of the District Court to treat the subpoenaed material as presumptively privileged." 418 U.S. at 713. The United States Court of Appeals for the District of Columbia Circuit has stated that this presumptive privilege initially protects documents "even from the limited intrusion represented by in camera examination of the conversations by a court." Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 730 (D.C. Cir. 1974) (en banc). The court went on to note:

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

Id. at 730. In order to overcome the presumptively privileged nature of the documents, a congressional committee must show that "the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the Committee's functions." Id. at 731 (emphasis added). Thus, the President's assertion of executive privilege is far different from a private person's individual assertion of privilege; it is entitled to special deference due to the critical connection between the privilege and the President's ability to carry out his constitutional duties.

Application of the criminal contempt statute to Presidential assertions of executive privilege would immeasurably burden the President's ability to assert the privilege and to carry out his constitutional functions. If the statute were construed to apply to Presidential assertions of privilege, the President would be in the untenable position of having to place a subordinate at the risk of a criminal conviction and possible jail sentence in order for the President to exercise a responsibility that he found necessary to the performance of his constitutional duty. Even if the privilege were upheld, the executive official would be put to the risk and burden of a criminal trial in order to vindicate the President's assertion of his constitutional privilege. As Judge Learned Hand stated with respect to the policy justifications for a prosecutor's immunity from civil liability for official actions,

to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith.

Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950). The Supreme Court has noted, with respect to the similar issue of *137 executive immunity from civil suits, that "among the most persuasive reasons supporting official immunity is the prospect that damages liability may render an official unduly cautious in the discharge of his official duties." Nixon v. Fitzgerald, 457 U.S. 731, 752 n.32 (1982); see also Harlow v. Fitzgerald, 457 U.S. 800 (1982); Butz v. Economou, 438 U.S. 478 (1978). Thus, the courts have recognized that the risk of civil liability places a pronounced burden on the ability of government officials to accomplish their assigned duties, and have restricted such liability in a variety of contexts. *Id.* [FN35] The even greater threat of criminal liability, simply for obeying a Presidential command to assert the President's constitutionally based and presumptively valid privilege against disclosures that would impair his ability to enforce the law, would unquestionably

create a significant obstacle to the assertion of that privilege. See United States v. Nixon, 418 U.S. 683 (1974).

**28 By contrast, the congressional interest in applying the criminal contempt sanctions to a Presidential assertion of executive privilege is comparatively slight. Although Congress has a legitimate and powerful interest in obtaining any unprivileged documents necessary to assist it in its lawmaking function, Congress could obtain a judicial resolution of the underlying privilege claim and vindicate its asserted right to obtain any documents by a civil action for enforcement of a congressional subpoena. [FN36] Congress' use of civil enforcement power instead of the criminal contempt statute would not adversely affect Congress' ultimate interest in obtaining the documents. Indeed, a conviction of an Executive Branch official for contempt of Congress for failing to produce subpoenaed documents would not result in any order for the production of the documents. [FN37] A civil suit to enforce the subpoena would be aimed at the congressional objective of obtaining the documents, not at inflicting punishment on an individual who failed to produce them. Thus, even if criminal sanctions were not available against an executive official who asserted the President's claim of privilege, Congress would be able to vindicate a legitimate desire to obtain documents if it could establish that its need for the records outweighed the Executive's interest in preserving confidentiality.

The most potent effect of the potential application of criminal sanctions would be to deter the President from asserting executive privilege and to make it difficult for him to enlist the aid of his subordinates in the process. Although *138 this significant *in terrorem* effect would surely reduce claims of executive privilege and, from Congress' perspective, would have the salutary impact of virtually eliminating the obstacles to the obtaining of records, it would be inconsistent with the constitutional principles that underlie executive privilege to impose a criminal prosecution and criminal penalties on the President's exercise of a presumptively valid constitutional responsibility. The *in terrorem* effect may be adequate justification for Congress' use of criminal contempt against private individuals, but it is an inappropriate

basis in the context of the President's exercise of his constitutional duties. In this respect it is important to recall the statement of Chief Justice Marshall, sitting as a trial judge in the Burr case, concerning the ability of a court to demand documents from a President: "In no case of this kind would a court be required to proceed against the President as against an ordinary individual." United States v. Burr, 25 F. Cas. 187, 192 (C.C. Va. 1807). [FN38] This fundamental principle, arising from the constitutionally prescribed separation of powers, precludes Congress' use against the Executive of coercive measures that might be permissible with respect to private citizens. The Supreme Court has stated that the fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution; and in the rule which recognizes their essential equality. Humphrey's Executor v. United States, 295 U.S. 602, 629-30 (1935).

**29 Congress' use of the coercive power of criminal contempt to prevent Presidential assertions of executive privilege is especially inappropriate given the presumptive nature of the privilege. In cases involving congressional subpoenas against private individuals, courts start with the presumption that Congress has a right to all testimony that is within the scope of a proper legislative inquiry. See Barenblatt v. United States, 360 U.S. 109 (1959); McGrain v. Daugherty, 273 U.S. 135 (1927). As noted above, however, the President's assertion of executive privilege is presumptively valid, and that presumption may be overcome only if Congress establishes that the requested information "is demonstrably critical to the responsible fulfillment of the Committee's functions." See Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d at 731; see also United States v. Nixon, 418 U.S. at 708-09. If Congress could use the power of criminal contempt to coerce the President either not to assert or to abandon his right to assert executive privilege, this clearly established presumption would be reversed and the presumptive privilege nullified.

Congress has many weapons at its disposal in the political arena, where it has clear constitutional authority to act and where the President has corresponding political weapons with which to do battle against Congress on equal terms. By wielding the cudgel of criminal contempt, however, Congress seeks to invoke *139 the power of the third branch, not to resolve a dispute between the Executive and Legislative Branches and to obtain the documents it claims it needs, but to punish the Executive, indeed to punish the official who carried out the President's constitutionally authorized commands, [FN39] for asserting a constitutional privilege. That effort is inconsistent with the "spirit of dynamic compromise" that requires accommodation of the interests of both branches in disputes over executive privilege. See United States v. American Telephone & Telegraph Co., 567 F.2d 121, 127 (D.C. Cir. 1977). In the AT&T case, the court insisted on further efforts by the two branches to reach a compromise arrangement on an executive privilege dispute and emphasized that

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.

Id. at 130. Congress' use of the threat of criminal penalties against an executive official who asserts the President's claim of executive privilege, flatly contradicts this fundamental principle. [FN40]

The balancing required by the separation of powers demonstrates that the contempt of Congress statute cannot be constitutionally applied to an executive official in the context under consideration. On the one hand, Congress has no *140 compelling need to employ criminal prosecution in order to vindicate its rights. The Executive, however, must be free from the threat of criminal prosecution if its right to assert executive privilege is to have any practical substance. Thus, when the major impact on the President's ability to exercise his constitutionally mandated function

is balanced against the relatively slight imposition on Congress in requiring it to resort to a civil rather than a criminal remedy to pursue its legitimate needs, [FN41] we believe that the constitutionally mandated separation of powers requires the statute to be interpreted so as not to apply to Presidential assertions of executive privilege. [FN42]

****30** The construction of the statute that is dictated by the separation of powers is consistent with the legislative history of the statute and the subsequent legislative implementation of the statute. Although at the time the criminal statute was enacted, Congress was well aware of the recurring assertions of the right to protect the confidentiality of certain Executive Branch materials, it gave no indication that it intended the contempt statute to tread upon that constitutionally sensitive area. In the many debates on executive privilege since the adoption of the statute, Congress at times has questioned the validity of a Presidential assertion of privilege, but, until December of 1982, it never attempted to utilize the criminal contempt sanction to punish someone for a President's assertion of privilege. Regardless of the merits of the President's action, the fundamental balance required by the Constitution does not permit Congress to make it a crime for an official to assist the President in asserting a constitutional privilege that is an integral part of the President's responsibilities under the Constitution. We therefore conclude that the contempt of Congress statute does not apply to an executive official who carries out the President's claim of executive privilege.

Nearly every President since George Washington has found that in order to perform his constitutional duties it is necessary to protect the confidentiality of certain materials, including predecisional Executive Branch deliberations, national security information, and sensitive law enforcement proceedings, from disclosure to Congress. No President has rejected the doctrine of executive privilege; all who have addressed the issue have either exercised the privilege, attested to its importance, or done both. Every Supreme Court Justice and every Judge of the United States Court of Appeals for the District of Columbia Circuit who has considered the question of executive privilege has recognized its validity and importance

in the constitutional scheme. Executive privilege, properly asserted, is as important to the President as is the need for confidentiality*141 at certain times in the deliberations of the Justices of the Supreme Court and in the communications between members of Congress and their aides and colleagues. Congress itself has respected the President's need for confidentiality; it has never arrested an executive official for contempt of Congress for failing to produce subpoenaed documents and never, prior to the heated closing moments of the 97th Congress in December of 1982, did a House of Congress seek to punish criminally an executive official for asserting a President's claim of privilege.

Naturally, Congress has and always will resist claims of executive privilege with passion and vigor. Congress aggressively asserts its perceived institutional prerogatives, and it will surely oppose any effort by the President to withhold information from it. If it could eliminate claims of executive privilege by requiring that an official who asserts such a claim on behalf of the President be prosecuted criminally, it would surely be in favor of doing so. Thus, the tension between the relative strengths and institutional prerogatives of Congress and the President necessarily reaches a high level of intensity in any case involving a claim of executive privilege. The specter of mandatory criminal prosecution for the good-faith exercise of the President's constitutional privilege adds a highly inflammatory element to an already explosive environment. We believe that the courts, if presented the issue in a context similar to that discussed in this memorandum, would surely conclude that a criminal prosecution for the exercise of a presumptively valid, constitutionally based privilege is not consistent with the Constitution. The President, through a United States Attorney, need not, indeed may not, prosecute criminally a subordinate for asserting on his behalf a claim of executive privilege. Nor could the Legislative Branch or the courts require or implement the prosecution of such an individual.

****31** In some respects, the tensions between the branches, which become exacerbated during these conflicts, and the pressure placed on the President and his subordinates in this context, call to mind the

comments of Chief Justice Chase concerning the impeachment trial of President Andrew Johnson, over which the Chief Justice presided. One of the charges against President Johnson was that he had fired Secretary of War Stanton in violation of the Tenure of Office Act, which purported to strip the President of his removal power over certain Executive Branch officials. [FN43] Chief Justice Chase declared that the President had a duty to execute a statute passed by Congress which he believed to be unconstitutional "precisely as if he held it to be constitutional." However, he added, the President's duty changed in the case of a statute which

directly attacks and impairs the executive power confided to him by the Constitution. In that case it appears to me to be the clear duty of the President to disregard the law, so far at least as it may be necessary to bring the question of its constitutionality before the judicial tribunals.

* * *

*142 How can the President fulfill his oath to preserve, protect, and defend the Constitution, if he has no right to defend it against an act of Congress, sincerely believed by him to have been passed in violation of it? [FN44]

If the President is to preserve, protect, and defend the Constitution, if he is faithfully to execute the laws, there may come a time when it is necessary for him both to resist a congressional demand for documents and to refuse to prosecute those who assist him in the exercise of his duty. To yield information that he in good conscience believes he must protect in order to perform his obligation, would abdicate the responsibilities of his office and deny his oath. To seek criminal punishment for those who have acted to aid the President's performance of his duty would be equally inconsistent with the Constitution.

In the narrow and unprecedented circumstances presented here, in which an Executive Branch official has acted to assert the President's privilege to withhold information from a congressional committee concerning open law enforcement files, based upon the written legal advice of the Attorney General, the contempt of Congress statute does not require and

could not constitutionally require a prosecution of that official, or even, we believe, a referral to a grand jury of the facts relating to the alleged contempt. Congress does not have the statutory or constitutional authority to require a particular case to be referred to the grand jury. In addition, because the Congress has an alternative remedy both to test the validity of the Executive's claim of privilege and to obtain the documents if the courts decide that the privilege is outweighed by a valid and compelling legislative need, a criminal prosecution and the concomitant chilling effect that it would have on the ability of a President to assert a privilege, is an unnecessary and unjustified burden that, in our judgment, is inconsistent with the Constitution.

****32** Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

FN1 Although the December 1982 dispute is now a matter of history, it raises recurring issues.

FN2 Another statute, the Resource Conservation and Recovery Act, 42 U.S.C. ss 6901 et seq., provides federal authority to deal with the current disposal of hazardous industrial wastes.

FN3 See Executive Order No. 12316, "Responses to Environmental Damage" (Aug. 14, 1981).

FN4 Subsequently, EPA published a proposed national priorities list (to replace the interim list), which identified the 418 sites that, in EPA's judgment, required priority in use of the Superfund to effect clean up. See 47 Fed. Reg. 58476 (1982).

FN5 We understand that as of January 14, 1983, EPA had sent more than 1,760 notice letters, undertaken Superfund financed action at 112 sites involving the obligation of in excess of \$236 million, instituted Superfund claims in 25 judicial actions, and obtained one criminal conviction. As of the early months of 1983, EPA and the Department of Justice had reached settlements in 23 civil actions providing for the expenditure of more than \$121 million to conduct clean up operations and were actively negotiating with responsible parties concerning the clean up of 56 sites throughout the country. See Amended De-

claration of Robert M. Perry, Associate Administrator for Legal and Enforcement Counsel and General Counsel of the EPA, filed in *United States v. House of Representatives*, Civ. No. 82-3583 (D.D.C. Jan. 14, 1983).

FN6 Id.

FN7 The subpoena required the EPA Administrator to produce all books, records, correspondence, memorandums, papers, notes and documents drawn or received by the Administrator and/or her representatives since December 11, 1980 the date of enactment of the Superfund Act, including duplicates and excepting shipping papers and other commercial or business documents, contractor and/or other technical documents, for those sites listed as national priorities pursuant to Section 105(8)(B) of the Superfund Act. See *United States v. House of Representatives*, 556 F. Supp. 150, 151 (D.D.C. 1983).

FN8 See Testimony of Administrator Gorsuch before the Public Works Subcommittee, attached as Exhibit C to Declaration of Robert M. Perry, *supra*.

FN9 See Letters to Hon. Elliott H. Levitas and Hon. John D. Dingell from Attorney General William French Smith (Nov. 30, 1982). The Subcommittee on Oversight and Investigations of the House Energy and Commerce Committee (Energy and Commerce Subcommittee), chaired by Representative John D. Dingell, was pursuing a parallel demand for similar documents relating to enforcement of the Superfund Act with respect to certain specific sites that were among the 160 on the interim priorities list. While the Energy and Commerce Subcommittee sought documents relative to three specific hazardous waste sites, the Public Works Subcommittee subpoena demanded production of virtually all documents for all 160 sites. The President's assertion of executive privilege applied to both subpoenas. Although the Energy and Commerce Subcommittee approved a contempt of Congress resolution against the EPA Administrator, this resolution never reached the full Committee or the floor of the House of Representatives.

FN10 As of that date, EPA had been able to examine only a portion of the hundreds of thousands of pages

of documents that had been subpoenaed. The 64 documents that were withheld were those among the subpoenaed documents that had been reviewed and determined to fall within the President's instruction not to produce documents the release of that would adversely affect ongoing enforcement proceedings. See Amended Declaration of Robert M. Perry, *supra*.

FN11 See Letter to Hon. Elliott H. Levitas from Robert A. McConnell, Assistant Attorney General, Office of Legislative Affairs (Dec. 9, 1982).

FN12 The contempt resolution stated:

Resolved, That the Speaker of the House of Representatives certify the report of the Committee on Public Works and Transportation as to the contumacious conduct of Anne M. Gorsuch, as Administrator, United States Environmental Protection Agency, in failing and refusing to furnish certain documents in compliance with a subpoena duces tecum of a duly constituted subcommittee of said committee served upon Anne M. Gorsuch, as Administrator, United States Environmental Protection Agency, and as ordered by the subcommittee, together with all of the facts in connection therewith, under seal of the House of Representatives, to the United States attorney for the District of Columbia, to the end that Anne M. Gorsuch, as Administrator, United States Environmental Protection Agency, may be proceeded against in the manner and form provided by law.

128 Cong. Rec. 31754 (1982).

FN13 A third provision, 2 U.S.C. § 193, which denies the existence of any testimonial privilege for a witness to refuse to testify on the ground that this testimony would disgrace him, is not relevant to the issues discussed in this memorandum.

FN14 See Amended Complaint in *United States v. House of Representatives*, Civ. No. 82-3583 (D.D.C. Dec. 29, 1982).

FN15 Although the United States Court of Appeals for the District of Columbia Circuit previously had been willing to entertain a civil action to resolve a conflict between a congressional subpoena for documents and a Presidential claim of executive privilege

when the action was brought by a congressional committee, Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974) (en banc), the trial court decision in the EPA matter casts some doubt on the viability of such an action when Congress, as in this case, does not wish to resolve the controversy in a civil suit. We must assume, for the purpose of this opinion, that a civil suit is an avenue that is open to Congress, but closed to the Executive, absent a legislature willing to have the matter resolved in a civil proceeding.

Of course, the courts might be more amenable to a civil action challenging a contempt citation if they felt that a criminal prosecution in this context was untenable. The district court judge in the EPA matter noted but did not attempt to consider in depth the “difficulties” of prosecuting an executive official for carrying out the President’s constitutional responsibility.

FN16 Madison characterized Montesquieu as the “oracle who is always consulted and cited on (the) subject (of the separation of powers).” See *The Federalist* No. 47, supra, at 301.

FN17 It is noteworthy, at least from an historical perspective, that the House of Representatives, because of its immense powers, was considered to be the governmental body least vulnerable to encroachments by other segments of government and, at the same time, because of its popular origin and frequent renewal of authority by the people, the body whose encroachment on the other branches would be least distrusted by the public. The Supreme Court later noted:

It is all the more necessary, therefore, that the exercise of power by this body, when acting separately from and independently of all other depositories of power, should be watched with vigilance, and when called in question before any other tribunal having the right to pass upon it that it should receive the most careful scrutiny.

Kilbourn v. Thompson, 103 U.S. 168, 192 (1881).

FN18 Of equal concern was the need to separate the judicial power from the executive power. The drafters intended to preserve the impartiality of the judiciary as “neutral arbiters in the criminal law” by separating the judiciary from the prosecutorial func-

tion. Nader v. Saxbe, 497 F.2d 676, 679 n.18 (D.C. Cir. 1974).

FN19 Presidents have invoked the privilege throughout our history for a variety of reasons. See, e.g., “History of Refusals by Executive Branch to Provide Information Demanded by Congress,” 6 Op. O.L.C. 751 (1982); Memorandum from John Harmon, Assistant Attorney General, Office of Legal Counsel, to Robert Lipschutz, Counsel to the President (June 8, 1977); Position of the Executive Department Regarding Investigative Reports, 40 Op. Att’y Gen. 45 (1941).

FN20 As explained by Attorney General (later, Supreme Court Justice) Robert Jackson in April 1941:

Disclosure of the reports could not do otherwise than seriously prejudice law enforcement. Counsel for a defendant or prospective defendant, could have no greater help than to know how much or how little information the Government has, and what witnesses or sources of information it can rely upon.

40 Op. Att’y Gen. 45, 46 (1941). As similarly expressed a few years later by Deputy Assistant Attorney General Kauper:

Over a number of years, a number of reasons have been advanced for the traditional refusal of the Executive to supply Congress with information from open investigational files. Most important, the Executive cannot effectively investigate if Congress is, in a sense, a partner in the investigation. If a congressional committee is fully apprised of all details of an investigation as the investigation proceeds, there is a substantial danger that congressional pressures will influence the course of the investigation.

Memorandum for the Deputy Counsel to the President from Deputy Assistant Attorney General Kauper re: Submission of Open CID Investigation Files (Dec. 19, 1969). This significant constitutional privilege provides a foundation for our discussion below of the penalties that Congress may attach to the President’s assertion of the privilege in response to a congressional subpoena.

FN21 Although it is by no means certain as a matter of law, if the case were referred to a grand jury, the

United States Attorney might be required to take certain steps short of signing the indictment, and the grand jury's decision might well become public. In *Cox*, a majority of the court (made up of the three dissenting judges and one concurring judge) took the view that the United States Attorney could be required to prepare an indictment for use by the grand jury. In addition, the district court in *In re Grand Jury*, *supra*, held that even though the United States Attorney could not be required to sign an indictment, in the circumstances of that case "the substance of the charges in the indictment should be disclosed, omitting certain portions as to which the Court, in the exercise of its discretion, concludes that the public interest in disclosure is outweighed by the private prejudice to the persons involved, none of whom are charged with any crime in the proposed indictment." 315 F. Supp. at 678-79. Under this analysis, if the contempt citation were to reach a grand jury and the grand jury were to vote a true bill, a court might be able to require the United States Attorney to prepare an indictment and then might order the disclosure of that indictment as voted by the grand jury. For the reasons set out in our discussion of prosecutorial discretion, the court could not, however, order the United States Attorney to prosecute.

Because the contempt of Congress statute does not require the United States Attorney to refer to a grand jury a citation for contempt of Congress issued to an executive official who has asserted the President's claim of executive privilege, we have not attempted to determine definitively what additional steps, if any, the United States Attorney could be required to take if such a matter were referred to a grand jury.

FN22 See 106 Cong. Rec. 17313 (1960) (citation against Austin J. Tobin, Executive Director of the Authority); *id.* at 17316 (citation against S. Sloan Colt, Chairman of the Board); *id.* at 17319 (citation against Joseph G. Carty, Secretary). The contempt resolution in each case read as follows:

Resolved, That the Speaker of the House of Representatives certify the report of the Committee on the Judiciary as to the contumacious conduct of name in failing and refusing to furnish certain documents in compliance with a subpoena duces

tecum of a duly constituted subcommittee of said committee served upon him and as ordered by the subcommittee, together with all of the facts in connection therewith, under seal of the House of Representatives, to the United States attorney for the District of Columbia, to the end that name may be proceeded against in the manner and form provided by law.

FN23 The Court of Appeals ruled that the documents requested by the Committee went beyond the investigative authority delegated to the Committee by the House.

FN24 We know of at least two other individuals who were cited for contempt of Congress, but whose cases were not referred to a grand jury by the Department of Justice. See Department of Justice File No. 51-51-484 (1956). The file was closed because the Department concluded that there was an insufficient basis for prosecution.

FN25 In this respect, we believe that Wilson implicitly disapproved the dictum of *Ex parte Frankfeld*, 32 F. Supp. 915 (D.D.C. 1940), in which the district court stated:

It seems quite apparent that Congress intended to leave no measure of discretion to either the Speaker of the House or the President of the Senate, under such circumstances, but made the certification of facts to the district attorney a mandatory proceeding, and it left no discretion with the district attorney as to what he should do about it. He is required, under the language of the statute, to submit the facts to the grand jury.

Id. at 916. The *Frankfeld* court expressly linked the responsibilities of the Speaker and the United States Attorney. Wilson ruled that the Speaker's duty is discretionary, at least when the House is not in session. Therefore, since the Speaker's duty is *in pari materia* with the duty of the United States Attorney, the law, at least in the District of Columbia Circuit, seems to be that both duties should be viewed as containing some elements of discretion.

FN26 *Ansara v. Eastland* was cited with approval three times by Judge Smith in *United States v. House of Representatives*, 556 F. Supp. 150, 152-53 (D.D.C.

1983). Thus, although the opinion made a passing reference to the mandatory nature of referral, Judge Smith must have recognized that the United States Attorney retained prosecutorial discretion.

FN27 These conclusions are not inconsistent with Rule 48(a) of the Federal Rules of Criminal Procedure, which requires leave of court before dismissal of a criminal action. This provision is intended primarily to protect defendants against repeated prosecutions for the same offense, and a court's power to deny leave under this provision is extremely limited. See *Rinaldi v. United States*, 434 U.S. 22 (1977); *United States v. Hamm*, 659 F.2d 624 (5th Cir. 1981); *United States v. Ammidown*, 497 F.2d 615 (D.C. Cir. 1973). The United States Court of Appeals for the Fifth Circuit has stated that the constitutionality of Rule 48(a) is dependent upon the prosecutor's unfettered ability to decide not to commence a case in the first place. *United States v. Cox*, 342 F.2d 167 (5th Cir.) (en banc), cert. denied, 381 U.S. 935 (1965). Moreover, Judge Weinfeld has stated that even if a court denied leave to dismiss an indictment, a court "in that circumstance would be without power to issue a mandamus or other order to compel prosecution of the indictment, since such a direction would invade the traditional separation of powers doctrine." *United States v. Greater Blouse, Skirt & Neckwear Contractors Ass'n*, 228 F. Supp. 483 (S.D.N.Y. 1964).

FN28 These conclusions are not inconsistent with Rule 48(a) of the Federal Rules of Criminal Procedure, which requires leave of court before dismissal of a criminal action. This provision is intended primarily to protect defendants against repeated prosecutions for the same offense, and a court's power to deny leave under this provision is extremely limited. See *Rinaldi v. United States*, 434 U.S. 22 (1977); *United States v. Hamm*, 659 F.2d 624 (5th Cir. 1981); *United States v. Ammidown*, 497 F.2d 615 (D.C. Cir. 1973). The Fifth Circuit has stated that the constitutionality of Rule 48(a) is dependent upon the prosecutor's unfettered ability to decide not to commence a case in the first place. *United States v. Cox*, 342 F.2d 167 (5th Cir.) (en banc), cert. denied, 381 U.S. 935 (1965). Moreover, Judge Weinfeld has stated that even if a court denied leave to dismiss an indictment, a court "in that circumstance would be

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FN29 The memorandum cited, inter alia, a 1909 Senate debate over the issue of executive privilege in which Senator Dolliver questioned "where Congress gets authority either out of the Constitution or the laws of the United States to order an executive department about like a servant." 43 Cong. Rec. 3732 (1909). Other historical examples cited by the report are discussed below.

FN30 The legislative history contains one reference to the application of the statute against executive officials. During the floor debates, Representative Marshall attacked the bill by claiming that it "proposes to punish equally the Cabinet officer and the culprit who may have insulted the dignity of this House by an attempt to corrupt a Representative of the people." 42 Cong. Globe at 429. This statement does not, however, suggest that the statute was intended to apply to Presidential assertions of executive privilege. Indeed, virtually all previous assertions of executive privilege against Congress had been made by the President himself, and Congress expressed no intent to utilize the criminal contempt provisions against the President. Representative Marshall's statement, therefore, simply lends support to the proposition, with which we agree, that there are certain circumstances in which the congressional contempt statute might be utilized against an executive official, such as instances in which an executive official, acting on his own, engaged in disruptive and contumacious conduct during a congressional hearing, or in which an executive official, acting on his own, committed an offense. See *Marshall v. Gordon*, 243 U.S. 521 (1917). As the remainder of Representative Marshall's remarks demonstrate, the principal force driving the bill was Congress' desire to obtain an expeditious method for investigating questions regarding the integrity of Congress and not to provide Congress with a statute requiring the President to prosecute criminally those who had asserted the President's constitutionally based claim of executive privilege.

We have found no evidence in the legislative history that supports an intention to apply the proposed statute in such a context.

FN31 The only remedy then recognized by the Senators was the ultimate sanction of impeachment. See 17 Cong. Rec. 2737, 2800 (1886). As we note below, a much more effective and less controversial remedy is available -- a civil suit to enforce the subpoena -- which would permit Congress to acquire the disputed records by judicial order. See also Senate Select Committee on Presidential Campaign Practices v. Nixon, 498 F.2d 725 (D.C. Cir. 1974) (en banc).

FN32 Congress' practices with respect to the contempt statute and the absence of any previous application of the statute to an Executive Branch official in these circumstances are highly probative of the meaning and applicability of the statute. In general, the Supreme Court has examined historical practice to determine the scope of Congress' powers. For example, in determining the scope of Congress' power to call and examine witnesses, the Court looked to the historical experience with respect to investigations and concluded that when Congress' practice in the matter is appraised according to the circumstances in which it was begun and to those in which it has been continued, it falls nothing short of a practical construction, long continued, of the constitutional provisions respecting their powers; and therefore should be taken as fixing the meaning of those provisions, if otherwise doubtful. McGrain v. Daugherty, 273 U.S. 135, 174 (1927); see also Fairbank v. United States, 181 U.S. 283, 308 (1901). Moreover, the Court traditionally gives great weight to a contemporaneous construction of a statute by the agency charged with its execution. See Power Reactor Development Co. v. Electricians, 367 U.S. 396, 408 (1961); Unemployment Compensation Comm'n v. Aragon, 329 U.S. 143, 153 (1946). In this instance, Congress is responsible for taking the first step in implementing the contempt statute. Therefore, Congress' previous interpretations and past uses of the statute are analogous to the contemporaneous construction of the agency charged with implementation of the statute, and are of significance in determining the meaning of the statute.

FN33 The same principle applies to protect the constitutional functions of the other branches. The separation of powers would similarly seem to require that a statute that made it a crime to disregard a statute passed by Congress be read not to apply to a judge who struck down a congressional enactment as unconstitutional.

FN34 In addition to the encroachment on the constitutionally required separation of powers that prosecution of an Executive Branch official in this context would entail, there could be a serious due process problem if such an official were subjected to criminal penalties for obeying an express Presidential order, an order which was accompanied by advice from the Attorney General that compliance with the Presidential directive was not only consistent with the constitutional duties of the Executive Branch, but also affirmatively necessary in order to aid the President in the performance of his constitutional obligations to take care that the law was faithfully executed. See Cox v. Louisiana, 379 U.S. 559 (1965); Raley v. Ohio, 360 U.S. 423 (1959).

Furthermore, a person can be prosecuted under § 192 only for a "willful" failure to produce documents in response to a congressional subpoena. See United States v. Murdock, 290 U.S. 389, 397 98 (1933); Townsend v. United States, 95 F.2d 352, 359 (D.C. Cir.), cert. denied, 303 U.S. 664 (1938). There is some doubt whether obeying the President's direct order to assert his constitutional claim of executive privilege would amount to a "willful" violation of the statute. Moreover, reliance on an explicit opinion of the Attorney General may negate the required mens rea even in the case of a statute without a willfulness requirement. See Model Penal Code § 2.04(3)(b); United States v. Barker, 546 F.2d 940, 955 (D.C. Cir. 1976) (Mehrig J., concurring).

FN35 See also Barr v. Matteo, 360 U.S. 564 (1959); Spalding v. Vilas, 161 U.S. 483 (1896). Some officials, such as judges and prosecutors, have been given absolute immunity from civil suits arising out of their official acts. Imbler v. Pachtman, 424 U.S. 409 (1976); Pierson v. Ray, 386 U.S. 547 (1967).

FN36 It is arguable that Congress already has the

power to apply for such civil enforcement, since 28 U.S.C. s 1331 has been amended to eliminate the amount in controversy requirement, which was the only obstacle cited to foreclose jurisdiction under s 1331 in a previous civil enforcement action brought by the Senate. See Senate Select Committee on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51 (D.D.C. 1973). In any event, there is little doubt that, at the very least, Congress may authorize civil enforcement of its subpoenas and grant jurisdiction to the courts to entertain such cases. See Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974) (en banc); Hamilton and Grabow, A Legislative Proposal for Resolving Executive Privilege Disputes Precipitated by Congressional Subpoenas, 21 Harv. J. on Legis. 145 (1984).

FN37 See Hamilton and Grabow, *supra*, 21 Harv. J. on Legis. at 151.

FN38 The Nixon Court thought this statement significant enough in the context of an executive privilege dispute to quote it in full at two separate places in its decision. United States v. Nixon, 418 U.S. at 708, 715.

FN39 One scholar (former Assistant Attorney General for the Civil Division, and now Solicitor General, Rex Lee) has noted that

when the only alleged criminal conduct of the putative defendant consists of obedience to an assertion of executive privilege by the President from whom the defendant's governmental authority derives, the defendant is not really being prosecuted for conduct of his own. He is a defendant only because his prosecution is one way of bringing before the courts a dispute between the President and the Congress. It is neither necessary nor fair to make him the pawn in a criminal prosecution in order to achieve judicial resolution of an interbranch dispute, at least where there is an alternative means for vindicating congressional investigative interests and for getting the legal issues into court.

Lee, Executive Privilege, Congressional Subpoena Power, and Judicial Review: Three Branches, Three Powers, and Some Relationships, 1978 B.Y.U. L.

Rev. 231, 259.

FN40 Even when a privilege is asserted by a cabinet official, and not the President, courts are extremely reluctant to impose a contempt sanction and are willing to resort to it only in extraordinary cases and only after all other remedies have failed. In In re Attorney General, 596 F.2d 58 (2d Cir.), cert. denied, 444 U.S. 903 (1979), the court granted the government's mandamus petition to overturn a district court's civil contempt citation against the Attorney General for failing to turn over documents for which he had asserted a claim of privilege. The court recognized that even a civil contempt sanction imposed on an Executive Branch official "has greater public importance, with separation of powers overtones, and warrants more sensitive judicial scrutiny than such a sanction imposed on an ordinary litigant." 596 F.2d at 64. Therefore, the court held that holding the Attorney General of the United States in contempt to ensure compliance with a court order should be a last resort, to be undertaken only after all other means to achieve the ends legitimately sought by the court have been exhausted. *Id.* at 65. In the case of a Presidential claim of executive privilege, there is even more reason to avoid contempt proceedings because the privilege claim has been made as a constitutionally based claim by the President himself and the sanction involved is criminal and not civil contempt. The use of criminal contempt is especially inappropriate in the context under discussion because Congress has the clearly available alternative of civil enforcement proceedings.

FN41 See Hamilton and Grabow, A Legislative Proposal for Resolving Executive Privilege Disputes Precipitated by Congressional Subpoenas, 21 Harv. J. on Legis. 145 (1984).

FN42 We believe that this same conclusion would apply to any attempt by Congress to utilize its inherent "civil" contempt powers to arrest, bring to trial, and punish an executive official who asserted a Presidential claim of executive privilege. The legislative history of the criminal contempt statute indicates that the reach of the statute was intended to be coextensive with Congress' inherent civil contempt powers (except with respect to the penalties imposed). See 42

Cong. Globe 406 (remarks of Rep. Davis). Therefore, the same reasoning that suggests that the statute could not constitutionally be applied against a Presidential assertion of privilege applies to Congress' inherent contempt powers as well.

FN43 The Tenure of Office Act was, of course, later declared to have been unconstitutional. Myers v. United States, 272 U.S. 52 (1926).

FN44 R. Warden, *An Account of the Private Life and Public Services of Salmon Portland Chase* 685 (1874). Chief Justice Chase's comments were made in a letter written the day after the Senate had voted to exclude evidence that the entire cabinet had advised President Johnson that the Tenure of Office Act was unconstitutional. *Id.* See M. Benedict, *The Impeachment and Trial of Andrew Johnson* 154-55 (1973). Ultimately, the Senate did admit evidence that the President had desired to initiate a court test of the law. *Id.* at 156.

8 U.S. Op. Off. Legal Counsel 101, 1984 WL 178358 (O.L.C.)
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**Questions for James M. Cole
Deputy Attorney General
United States Department of Justice**

**Questions from Chairman Jordan
Committee on Oversight and Government Reform
Subcommittee on Economic Growth, Job Creation and Regulatory Affairs**

**Subcommittee hearing on:
“Examining the Justice Department’s Response to the IRS Targeting Scandal”**

- 1. On May 20, 2014, the Committee issued a subpoena to Attorney General Eric Holder for material related to the Justice Department’s interactions with Lois Lerner and the Internal Revenue Service. This subpoena remains outstanding. On May 28, 2014, the Department produced a subset of documents responsive to the Committee’s subpoena. What custodians and search terms did the Department utilize to identify the documents produced to the Committee on May 28, 2014?**

After the Department of Justice (the Department) received a letter from the Committee on April 23, 2014, requesting documents and information regarding contacts between attorneys in the Criminal Division and Ms. Lois Lerner of the Internal Revenue Service (IRS), we began a good-faith search for responsive material in the possession of the Criminal Division. Given the Department’s efforts, we were surprised when we received the Committee’s subpoena on May 20, 2014.

The Committee’s April 23, 2014, letter and its May 20, 2014, subpoena requested all communications “between or among Lois Lerner and employees of the Department of Justice” for a time period of approximately five years. Because it is not practicable for the Department to search the email accounts of every single Department employee, no matter how unlikely it is that he or she communicated with Ms. Lerner, we searched the accounts of individuals who reasonably may have communicated with Ms. Lerner.

We also received requests from other congressional committees for Department communications with additional IRS employees whose email may have been lost by the IRS because of technological problems. To ensure the completeness of our response to the Committee, the Department monitored the results of those searches to determine whether any additional custodians should be searched. The Department has now completed its document productions to those other congressional committees and has determined that there are no additional custodians who are likely to have communicated with Ms. Lerner.

The Department has now provided to the Committee all emails between Ms. Lerner and Department employees that were identified as a result of the extensive search detailed above.

- 2. On May 20, 2014, the Committee issued a subpoena to Attorney General Eric Holder for material related to the Justice Department’s interactions with Lois Lerner and the Internal Revenue Service. This subpoena remains outstanding. On July 25, 2014, the Department produced a subset of documents responsive to the Committee’s subpoena. What custodians and search terms did the Department utilize to identify the documents produced to the Committee on July 25, 2014?**

Please see answer to #1.

3. **On May 20, 2014, the Committee issued a subpoena to Attorney General Eric Holder for material related to the Justice Department's interactions with Lois Lerner and the Internal Revenue Service. This subpoena remains outstanding. On August 15, 2014, the Department produced a subset of documents responsive to the Committee's subpoena. What custodians and search terms did the Department utilize to identify the documents produced to the Committee on August 15, 2014?**

Please see answer to #1.

4. **On May 20, 2014, the Committee issued a subpoena to Attorney General Eric Holder for material related to the Justice Department's interactions with Lois Lerner and the Internal Revenue Service. This subpoena remains outstanding. On July 25, 2014, the Department informed the Committee that it is continuing to search for material responsive to the Committee's subpoena. What custodians and search terms is the Department currently utilizing to identify material responsive to the Committee's subpoena dated May 20, 2014?**

Please see answer to #1.

5. **On May 20, 2014, the Committee issued a subpoena to Attorney General Eric Holder for material related to the Justice Department's interactions with Lois Lerner and the Internal Revenue Service. This subpoena remains outstanding. On May 28, 2014, the Department notified the Committee that it is withholding documents responsive to the subpoena, but refused to provide a privilege log with information about the withheld documents. Department staff has informed Committee staff that the Department has not provided a privilege log because it continues to search for responsive material. When does the Department anticipate completing its searches for material responsive to the Committee's subpoena dated May 20, 2014?**

The Committee's subpoena of May 20, 2014, requested four specific categories of documents: (1) all documents and communications referring or relating to 501(c)(4) tax-exempt organizations; (2) all documents and communications referring or relating to applicants for 501(c)(4) tax-exempt status; (3) all documents and communications between and among Lois G. Lerner and employees of the Department of Justice; and (4) all documents and communications referring or relating to the potential prosecution of tax-exempt applicants for statements made on Internal Revenue Service forms. The Department has now provided to the Committee all emails between Ms. Lerner and Department employees that were identified as a result of the extensive search detailed above in response to Question 1. Throughout this process we have endeavored to accommodate the Committee's oversight needs, consistent with Executive Branch confidentiality interests. As we have previously explained, it is longstanding Executive Branch practice not to disclose material from open case files or internal deliberations about our law enforcement efforts. This practice is vital to protecting the independence, integrity, and effectiveness of the Department's law enforcement efforts and the candid exchange of views that is essential to decision-making in the course of those efforts.

To the extent that we identify additional documents responsive to your requests that the Department can produce without undermining the interests described above, we will produce such documents to the Committee at that time.

6. Is the Department asserting any privilege on material responsive to the Committee's subpoena of May 20, 2014?

Please see answer to #5.

7. By letter dated June 10, 2014, the Committee requested the following three categories of material:
- a. All documents and communications between or among employees of the Department of Justice and employees of the Internal Revenue Service referring or relating to the 21 disks of nonprofit information transmitted from the Internal Revenue Service to the Justice Department on or around October 6, 2010;
 - b. All documents and communications between or among employees of the Department of Justice and employees of the Internal Revenue Service referring or relating to the production of the 21 disks of nonprofit information to the Committee on June 2, 2014; and
 - c. All documents and communications between or among employees of the Department of Justice and employees of the Internal Revenue Service referring or relating to the discovery of confidential taxpayer information protected by I.R.C. 6103 on the 21 disks of nonprofit information produced to the Committee on June 2, 2014.

On June 26, 2014, the Department informed the Committee that these requests implicate "Executive Branch confidentiality interests." It is unclear whether the Department has identified responsive material or whether it is asserting a blanket confidentiality interest without identifying the material. Has the Department identified material responsive to the Committee's requests of June 10, 2014?

With respect to the Committee's request in subparagraph (a) for communications regarding the transmittal of disks from the IRS to the FBI in October 2010, the Department produced to the Committee on May 28, 2014 all such communications that were located after a diligent search. Beginning in May of 2014, as part of the Department's effort to respond to the Committee's subpoena and consistent with established third-agency practice, the Department consulted with the IRS regarding the content of the disks that the IRS provided to the FBI in October 2010. Some communications generated in the course of that consultation are responsive to subparagraphs (b) and (c). The Committee's request for internal communications generated in the course of our efforts to respond to the congressional inquiry implicates Executive Branch separation of powers concerns and confidentiality interests, especially the concern that disclosure of such materials would have a chilling effect on communications by agency employees that would interfere with our ability to respond to congressional oversight requests. Accordingly, it is longstanding Executive Branch practice not to disclose internal communications generated in the course of efforts to respond to congressional inquiries. To the extent that we identify additional documents responsive to your requests that the Department can produce without undermining the equities described above, we will produce such documents to the Committee at that time.

8. By letter dated June 10, 2014, the Committee requested the following three categories of material:
- a. All documents and communications between or among employees of the Department of Justice and employees of the Internal Revenue Service referring or relating to the 21 disks of nonprofit information transmitted from the Internal Revenue Service to the Justice Department on or around October 6, 2010;

- b. All documents and communications between or among employees of the Department of Justice and employees of the Internal Revenue Service referring or relating to the production of the 21 disks of nonprofit information to the Committee on June 2, 2014; and
- c. All documents and communications between or among employees of the Department of Justice and employees of the Internal Revenue Service referring or relating to the discovery of confidential taxpayer information protected by I.R.C. 6103 on the 21 disks of nonprofit information produced to the Committee on June 2, 2014.

On June 26, 2014, the Department informed the Committee that these requests implicate "Executive Branch confidentiality interests." Is it the Department's position that every document responsive to the Committee's three requests for material in its June 10, 2014, letter implicates "Executive Branch confidentiality interests"?

Please see the response to #7.

- 9. Is the Department asserting any privilege on material responsive to the Committee's request of June 10, 2014?**

Throughout this process we have endeavored to accommodate the Committee's oversight needs, consistent with Executive Branch confidentiality interests. As described above in response to Question 7, the Committee's request for internal communications generated in the course of our efforts to respond to the congressional inquiry implicate Executive Branch separation of powers concerns and confidentiality interests. Disclosure of such materials would have a chilling effect on communications by agency employees that would interfere with our ability to respond to congressional oversight requests. Accordingly, it is longstanding Executive Branch practice not to disclose internal communications generated in the course of efforts to respond to congressional inquiries. To the extent that we identify documents responsive to your requests that the Department can produce without undermining the equities described above, we will produce such documents to the Committee at that time.

