CONGRESS'S POWER TO INVESTIGATE LOCAL PROSECUTORS

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ABSTRACT

Prompted by the unprecedented 2023 congressional investigation into Manhattan District Attorney Alvin Bragg's prosecution of Donald Trump, this Article is the first to examine the constitutional tension between Congress's investigative authority and state sovereignty in the context of congressional inquiries into local prosecutions. The urgency of addressing this undertheorized issue is underscored by the increasing frequency of conflicts between federally controlled institutions and state or local governments dominated by opposing political parties.

As partisan tensions persist, congressional investigations into state and local law enforcement actions could become increasingly common, raising profound questions about the balance of power within the United States' federalist system. This Article argues that while Congress possesses broad investigative authority to fulfill its legislative functions, this power is not unlimited, particularly when it encroaches on states' sovereign control over local law enforcement.

By analyzing structural constitutional constraints, individual rights guarantees, and pragmatic considerations that shape congressional investigations, the Article distills a set of guiding principles that courts, commentators, and political actors can apply to congressional efforts to investigate state or local prosecutorial decisions. These principles will help ensure that congressional oversight respects state autonomy and preserves the foundational balance of power between the states and the federal government.

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INTRODUCTION

In 2023, Manhattan District Attorney ("DA") Alvin Bragg indicted Donald Trump on thirty-four counts of falsifying business records to conceal hush money payments to adult film actress Stormy Daniels.[1] Depending on who you ask, this was either a righteous prosecution to protect the citizens of New York from fraudulent business practices[2] or a politically motivated

1. Press Release, Manhattan Dist. Att'y's Off., District Attorney Bragg Announces 34-Count Felony Indictment of Former President Donald J. Trump (Apr. 4, 2023), https://manhattanda.org/district-attorney-bragg-announces-34-count-felony-indictment-of-former-president-donald-j-trump [https://perma.cc/E6VL-NC85].

2. Complaint at 35–36, Bragg v. Jordan, 669 F. Supp. 3d 257 (S.D.N.Y. 2023) (No. 23-cv-3032); Letter from Alvin L. Bragg, Jr., Dist. Att'y, Cnty. of N.Y., to Rep. Jim Jordan, Chairman, House Comm.

"abuse of prosecutorial authority"[3] that constituted a "disgrace to the judicial system."[4] Alleging that it was the latter, several legislative committees launched an investigation into Bragg's office, demanding access to communications between and among current and former employees of the Manhattan DA's office and the Justice Department, as well as information relating to the DA's use of federal funds.[5] Despite Bragg's characterization of Congress's investigation into his prosecutorial decisions as an "unconstitutional attempt to undermine" an active investigation and an impermissible invasion of state sovereignty,[6] similar inquiries were launched into both New York State Attorney General Leticia James and Fulton County, Georgia District Attorney Fani Willis.[7]

These investigations raise undertheorized constitutional questions about the interaction between Congress's investigative powers and principles of state sovereignty. As all first-year Constitutional Law students learn, the United States has a federalist structure in which individual states remain sovereign in all areas not governed by the powers delegated to the federal government.[8] State and local criminal law enforcement have long been viewed as quintessential realms of state and local authority.[9]

At the same time, Congress enjoys broad investigative powers, grounded in the Constitution, for the purpose of carrying out its functions of

on the Judiciary, Rep. Bryan Steil, Chairman, House Comm. on House Admin., and Rep. James Comer, Chairman, House Comm. on Oversight & Accountability (Mar. 31, 2023) [hereinafter March 31 Letter].

3. Letter from Rep. Jim Jordan, Chairman, Comm. on the Judiciary, Rep. Bryan Steil, Chairman, Comm. on House Admin., and Rep. James Comer, Chairman, Comm. on Oversight & Accountability, to Alvin L. Bragg, Jr., Dist. Att'y, N.Y. Cnty. 1 (Mar. 20, 2023) [hereinafter March 20 Letter].

4. Mary Clare Jalonick, *Republican Lawmakers React with Fury to Trump Verdict and Rally to His Defense*, AP NEWS (May 30, 2024, at 21:23 ET), https://apnews.com/article/trump-verdict-republicans-guilty-reaction-congress-election-c8193404866565c55b093086890cbef8 [https://perma.cc/D7BA-22JG] (noting J.D. Vance's response to guilty verdict).

5. March 20 Letter, *supra* note 3, at 3.

6. Ilya Marritz & Deepa Shivaram, *DA Bragg Sues Jim Jordan, Claiming 'An Unconstitutional Attempt to Undermine' the Case*, NPR (Apr. 11, 2023, at 19:04 ET), https://www.npr.org/2023/04/11/1169302613 [https://perma.cc/VQ5B-6S87].

7. *See, e.g.*, Rebecca Beitsch, *Jim Jordan Threatens New York AG with Subpoena over Hush Money Prosecutor*, THE HILL (June 18, 2024, at 12:19 ET), https://thehill.com/regulation/court-battles/4727586-jim-jordan-threatens-ny-ag-subpoena-hush-money-prosecutor/mlite [https://perma.cc/3SFX-PDTN]; Katherine Doyle, *Fani Willis, the DA Who Charged Trump in Georgia, Subpoenaed by House GOP*, NBC NEWS (Feb. 2, 2024, at 11:48 ET), https://www.nbcnews.com/politics/congress/fani-willis-da-charged-trump-georgia-subpoenaed-house-gop-rcna136683 [https://perma.cc/A7QL-5FS5].

8. U.S. CONST. amend. X.

9. *See, e.g.*, Shinn v. Ramirez, 142 S. Ct. 1718, 1730 (2022) ("The power to convict and punish criminals lies at the heart of the States' 'residuary and inviolable sovereignty.' " (quoting THE FEDERALIST NO. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961))); Bond v. United States, 572 U.S. 844, 848 (2014) ("[O]ur constitutional structure leaves local criminal activity primarily to the States."); Engle v. Isaac, 456 U.S. 107, 128 (1982) ("The States possess primary authority for defining and enforcing the criminal law.").

legislation and oversight.[10] And there are some exercises of state criminal law enforcement power that could legitimately be subject to congressional investigation. This is perhaps most evident in situations in which the investigation involves a state or locality's use of federal funds: any time Congress appropriates money to the states, it is entitled to know how that money is spent. In addition, Congress regularly conducts investigations regarding state compliance with federal laws, and it needs to gather information regarding state action—including state prosecutorial action—when contemplating the exercise of its enforcement powers under the Thirteenth, Fourteenth, or Fifteenth Amendments.[11] The Bragg investigation, however, raises none of these issues. Rather, it is a congressional investigation into a local prosecutor's use of state law, state rules, and state procedures to punish and deter crime taking place within his jurisdiction.

This Article attempts to answer the question of how to address conflicts between these two fundamental constitutional principles—Congress's investigative power and state sovereignty—in the context of local law enforcement. It is an undertheorized question, in part, because such investigations are unusual.[12] While the Supreme Court has issued numerous decisions delimiting the boundaries of Congress's investigative powers,[13] none has addressed Congress's power to investigate state and local law enforcement. Similarly, debates over the scope of states' rights usually center around questions such as whether a particular federal statute or policy exceeds constitutional bounds and thus infringes on state authority,[14] or whether the federal government is stepping on states' constitutional toes by requiring them to enact or enforce federal policy.[15] The House of Representatives' recent investigations into state and local law enforcement offices therefore raise a new question about the relationship between federal

10. *See, e.g.*, Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2031 (2020) (noting that the Supreme Court has "held that each House [of Congress] has power 'to secure needed information' in order to legislate" (quoting McGrain v. Daugherty, 273 U.S. 135, 161 (1927))); Watkins v. United States, 354 U.S. 178, 187, 215 (1957) (noting that the congressional power to obtain information is "broad" and "indispensable"); *McGrain*, 273 U.S. at 174 ("[T]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.").

11. If local prosecutors are using state criminal law to deny or deter citizens from participating in elections based on their race, for example, or if state law enforcement agencies are systemically engaging in the excessive use of force, Congress's oversight and enforcement authority allows it to investigate.

12. I could find no other example of such an investigation.

13. *See infra* Section I.A.

14. *E.g.*, United States v. Lopez, 514 U.S. 549 (1995); United States v. Morrison, 529 U.S. 598 (2000); Gonzales v. Raich, 545 U.S. 1 (2005); City of Boerne v. Flores, 521 U.S. 507 (1997); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

15. *E.g.*, Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992).

and local authorities: whether and when congressional investigations of specific state or local law enforcement actions are constitutionally justified, and when, if ever, they represent an impermissible encroachment into state sovereignty.

This question is not merely theoretical. While this type of investigation might have been novel when the investigation into Bragg's office was launched in 2023, it may not be the last of its kind. More and more frequently, we are seeing states or localities controlled by one political party square off against a federal government controlled by the other party; this phenomenon can be found in the context of sanctuary cities (whether for immigration or for guns), environmental policy, school funding, deployment of National Guard troops, and more. While most of these conflicts arise through challenges to federal laws or executive policies, legislators are not blind to the significant rewards—in the form of both fundraising and reputational benefits—that redound to political actors who place themselves on the front lines of fights over controversial issues of the day. In particular, the ongoing debate over whether and when the institutions of government have been "weaponized" against political opponents means that local prosecutions can be cast as battles in the ongoing cultural wars.[16] As a result, investigations into local prosecutions provide members of Congress with opportunities to reap these benefits, and we can expect them to do so. This will be particularly true in times of unified control over the federal government. When Congress is controlled by the same party as the White House, investigations into executive activities are much less likely to occur. Legislators seeking credit for furthering their party's platform through investigative activities, therefore, might turn their critical eyes to what state officials are doing.

Trump v. United States, which held that presidents are largely immune from prosecution for actions taken in their official capacity,[17] does not eliminate the possibility that there will be state prosecutions for Congress to investigate. The holding in *Trump v. United States* does not apply to unofficial acts, which are acts taken outside the scope of the president's official duties.[18] So, it does not preclude the kind of prosecution that Bragg

16. *Compare, e.g.*, Exec. Order No. 14147, 90 Fed. Reg. 8235 (Jan. 20, 2025) ("The American people have witnessed the previous administration engage in a systematic campaign against its perceived political opponents, weaponizing the legal force of numerous Federal law enforcement agencies and the Intelligence Community against those perceived political opponents."), *with* Paul Waldman, *Trump's 'Weaponization' Order Seeks To Do Exactly What It Condemns*, MS NOW (Jan. 23, 2025, at 12:46 ET), https://www.ms.now/opinion/msnbc-opinion/trump-weaponization-government-executive-order-patel-bondi-rcna188948 [https://perma.cc/GU5N-FQF8] ("Trump claims he will end 'the weaponization of government' by weaponizing it against his foes." (citation omitted)).

17. Trump v. United States, 144 S. Ct. 2312 (2024).

18. *Id.* at 2332.

pursued—prosecution for purely private, unlawful action taken before the president entered the White House—nor does it preclude state investigation into the activities of federal officials (other than the president) who do not enjoy immunity as broad as the president's.

Thus, thinking more deeply about whether and when Congress is entitled to access information about any given state or local prosecution remains a valuable exercise. This Article concludes that the question does not lend itself to an easily implemented, formulaic answer. Instead, it requires case-specific analysis of the facts at issue, the interests at stake on either side of the equation, and recognition of what Justice Jackson described in the *Steel Seizure* case as "contemporary imponderables"—the contextual, shifting, and unpredictable political realities against which the conflict plays out.[19] Nevertheless, this Article argues that there are several principles that developed in challenges to other types of congressional investigations that can provide guidance for resolving information disputes between Congress and local prosecutors. It examines several of these principles in detail and identifies how they could apply to congressional investigations of local prosecutions.

The Article proceeds in three parts. Part I will set out in more detail the competing constitutional principles that congressional investigations of state law enforcement officials implicate and how the House of Representatives' recent investigations into local law enforcement bring those interests into conflict with one another. Part II will then explore how the limits of congressional investigative authority have been determined in other contexts. Part III then returns to each of the contexts discussed in Part II and seeks to apply their lessons to the dispute over the investigation into Bragg's office. This exercise reveals several concrete principles that should guide evaluation of the legitimacy of any congressional investigation into state or local law enforcement entities. The Article then briefly concludes.

I. COMPETING CONSTITUTIONAL PRINCIPLES

Nearly a century ago, the Supreme Court recognized that Congress must possess broad, robust investigative authority to effectively perform its constitutional functions.[20] At least as fundamental to the constitutional structure, however, is the principle of federalism, which guarantees the states sovereignty over their local affairs[21]—and law enforcement has long been

19. Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

20. McGrain v. Daugherty, 273 U.S. 135 (1927); *see also infra* Section I.A.

21. *See, e.g.*, Alden v. Maine, 527 U.S. 706, 713 (1999) (pointing out that the states retain the sovereignty they enjoyed before the ratification of the Constitution); THE FEDERALIST NO. 39, *supra* note

deemed a quintessentially local affair.[22] This Part will explore the contours of each of these principles to lay the foundation for the discussion that follows. It will then detail how the House's recent investigations into local law enforcement activities bring those principles into conflict.

A. CONGRESS'S POWER TO INVESTIGATE

Congress's investigative authority dates back to the earliest days of the Republic.[23] The seminal 1927 Supreme Court opinion of *McGrain v. Daugherty* recognized that each house of Congress possesses "not only such powers as are expressly granted to them by the Constitution, but such auxiliary powers as are necessary and appropriate to make the express powers effective."[24] It went on to identify "the power of inquiry—with process to enforce it" as "an essential and appropriate auxiliary to the legislative function."[25] The Court explained that no legislative body can legislate wisely or effectively in the absence of information respecting the conditions that the legislation is intended to affect or change; and when the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it.[26]

In other words, Congress's investigative powers exist to enable Congress to seek and acquire the information it needs to carry out its constitutional responsibilities.[27] Subsequent cases confirmed this view of the nature of Congress's investigative authority—that it is rooted in the Constitution because it is "inherent in the legislative process."[28] While many of the relevant precedents are decades old, the Roberts Court explicitly reaffirmed this premise in 2020 when it held that Congress has the power to subpoena the private records of sitting presidents.[29]

9, at 245 (James Madison) (noting that the states "form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere").

22. *See* Shinn v. Ramirez, 142 S. Ct. 1718 (2022); Bond v. United States, 572 U.S. 844 (2014); Engle v. Isaac, 456 U.S. 107 (1982).

23. *See, e.g.*, Andrew McCanse Wright, *Constitutional Conflict and Congressional Oversight*, 98 MARQ. L. REV. 881, 897 (2014) ("Congress asserted [a right to conduct investigations] shortly after the adoption of the Constitution.").

24. *McGrain*, 273 U.S. at 173.

25. *Id.* at 174.

26. *Id.* at 175.

27. Watkins v. United States, 354 U.S. 178, 187 (1957) ("No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress.").

28. *Id.*; *see also* Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 504 (1975) ("[A] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect." (quoting *McGrain*, 273 U.S. at 175)).

29. Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2031 (2020) (describing Congress's power to obtain information as "broad" and "indispensable," encompassing "inquiries into the administration of existing laws, studies of proposed laws, and 'surveys of defects in our social, economic or political system

In addition to being constitutionally grounded, Congress's investigative authority is broad. One formulation explains that it encompasses "inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes[;] surveys of defects in our social, economic or political system;" and "probes into departments of the Federal Government to expose corruption, inefficiency[,] or waste."[30] Another Supreme Court opinion noted that Congress's investigative authority is "as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."[31]

Broad as Congress's investigative powers are, they are not unlimited. For example, Congress has no "general power of inflicting punishment" (beyond punishing its own members), nor may it "inquir[e] into the private affairs of the citizen."[32] Also off limits are exposure for its own sake[33] and investigations "solely for the personal aggrandizement of the investigators."[34] Instead, "the power actually possessed is limited to inquiries relating to matters of which the particular house 'has jurisdiction' and in respect of which it rightfully may take other action."[35] Thus, to be permissible, an investigation must fall within the investigating committee's jurisdiction and must be "related to, and in furtherance of, a legitimate task of the Congress."[36]

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for the purpose of enabling the Congress to remedy them.' " (quoting *Watkins*, 354 U.S. at 187)).

30. *Watkins*, 354 U.S. at 187; *see also McGrain*, 273 U.S. at 177–78 (stating that Congress's investigative authority facilitates legislating and assessing whether executive-branch agencies are performing their duties); Wright, *supra* note 23, at 907 (stating that Congress investigates for "prospective legislation, present execution of law, and government misconduct" as well as baser political purposes); Assertion of Exec. Privilege in Response to a Cong. Subpoena, 5 Op. O.L.C. 27, 30 (1981) (acknowledging Congress's legitimate interest in obtaining information to assist it in legislating as well as in engaging in executive oversight); Frederick M. Kaiser, *Congressional Oversight of the Presidency*, 499 ANNALS AM. ACAD. POL. & SOC. SCI. 75, 81 (1988) (stating that Congress influences bureaucratic behavior through "review, monitoring, and supervision of past or ongoing executive activity").

31. Barenblatt v. United States, 360 U.S. 109, 111 (1959); *see also* Sinclair v. United States, 279 U.S. 263, 291–92 (1929); *Mazars*, 140 S. Ct. at 2031 (recognizing the breadth of Congress's authority to conduct inquiries) (quoting *Watkins*, 354 U.S. at 187). For congressional subpoenas to be legally sufficient, "(1) the committee's investigation of the broad subject matter area must be authorized by Congress, (2) the investigation must be pursuant to 'a valid legislative purpose,' and (3) the specific inquiries involved must be pertinent to the broad subject matter areas which have been authorized by Congress." Joel D. Bush, *Congressional-Executive Access Disputes: Legal Standards and Political Settlements*, 9 J.L. & POL. 719, 722 (1993) (quoting Wilkinson v. United States, 365 U.S. 399, 408–09 (1961)).

32. Kilbourn v. Thompson, 103 U.S. 168, 182, 190 (1880); *see also McGrain*, 273 U.S. at 173–74 ("[N]either house is invested with 'general' power to inquire into private affairs and compel disclosures."); *Watkins*, 354 U.S. at 187 ("There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress.").

33. *See Watkins*, 354 U.S. at 200 ("We have no doubt that there is no congressional power to expose for the sake of exposure.").

34. *E.g.*, *id.* at 187.

35. *McGrain*, 273 U.S. at 170.

36. *Watkins*, 354 U.S. at 187.

When it comes to identifying the purpose of a congressional investigation—and thus assessing whether that purpose is legitimate—courts have declined to look behind the motives provided by investigators to determine whether those motives are sincere or pretextual. Historically, so long as the investigation objectively serves a legitimate legislative purpose, courts have generally deemed that sufficient.[37] The executive branch, by contrast, has at times asserted the right to assess for itself whether legislative inquiries into executive branch activities serve legitimate legislative interests.[38]

Finally, there are limits even on investigations whose legitimacy is unquestioned. As an initial matter, recipients of congressional subpoenas may assert constitutional rights—such as the right not to incriminate oneself.[39] In the case of information held by the executive branch, those limits also include things like executive privilege.[40] In addition, the specific information or testimony Congress seeks must be pertinent to the investigative purpose. In *Wilkinson v. United States*, the Supreme Court articulated a three-prong test to determine the legal sufficiency of a congressional subpoena: (1) the Committee's investigation of the broad subject matter area must be "authorized by Congress"; (2) the investigation must be pursuant to "a valid legislative purpose"; and (3) the specific inquiries involved must be "pertinent" to the broad subject matter areas that have been authorized by Congress.[41] The test laid out in *Wilkinson* rises to the level of a constitutional due process requirement when the request comes in the form of a congressional subpoena, with which noncompliance can lead to criminal prosecution for contempt of Congress.[42] Of course, all

37. *See id.* at 200 (noting that legislators' "motives alone would not vitiate an investigation which had been instituted by a House of Congress if that assembly's legislative purpose is being served"); Barenblatt v. United States, 360 U.S. 109, 132 (1959) ("So long as Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power.").

38. *See infra* Section II.B.

39. *Barenblatt*, 360 U.S. at 112; *see also Watkins*, 354 U.S. at 188 ("The Bill of Rights is applicable to investigations as to all forms of governmental action."); United States v. Rumely, 345 U.S. 41, 44 (1953) (recognizing that the First Amendment imposes limits on Congress's investigative power).

40. *E.g.*, Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 732 (D.C. Cir. 1974). The executive considers law enforcement information presumptively privileged and argues that Congress may not access it absent a sufficient showing of need. *See* Assertion of Exec. Privilege in Response to Cong. Demands for L. Enf't Files, 6 Op. Att'ys Gen. 31 (1982). Other categories of information the executive deems privileged are presidential communications, United States v. Nixon, 418 U.S. 683, 708 (1974), deliberative process information, Confidentiality of the Att'y Gen.'s Commc'ns in Counseling the President, 6 Op. O.L.C. 481, 483 (1982), national security information, Access to Classified Info., 20 Op. O.L.C. 402, 404 (1996), and attorney-client or work-product materials, Memorandum from Steven A. Engel, Assistant Att'y Gen., Off. of Legal Couns., to Couns. to the President, Cong. Oversight of the White House (Jan. 8, 2021) (on file with author).

41. Wilkinson v. United States, 365 U.S. 399, 408–09 (1961).

42. *Watkins*, 354 U.S. at 205.

congressional requests for information or testimony bring with them an implicit (or sometimes explicit) threat of subpoena for noncompliance. Therefore, the rules applicable to subpoenas also shape the scope of any congressional information request.

The upshot of the relevant case law is that Congress enjoys expansive powers of investigation so long as the investigating committee has jurisdiction over the issue and Congress as a whole has a legitimate interest in the information being sought.

B. STATE SOVEREIGNTY

"The powers delegated by [the Constitution] to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."[43] While much has changed since James Madison wrote those words in *Federalist No. 45*, the idea that individual states remain sovereign entities empowered to govern as they see fit in arenas beyond federal control remains a foundational one.[44] Indeed, the Tenth Amendment ensures as much when it provides that "powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."[45] As recently as 1990, the Supreme Court described as an "axiom" the idea "that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause."[46] The Constitution preserves the sovereign status of states by dictating that they retain the trappings of traditional sovereignty—the primacy of the authority within their respective spheres—rather than relegating them to "the role of mere provinces or political corporations."[47]

Perhaps foremost among the justifications for the United States' federalist structure is the check it places on potential abuses of government

43. THE FEDERALIST NO. 45, *supra* note 9, at 292–93 (James Madison).

44. *See, e.g.*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 549 (1985) ("The States unquestionably do 'retai[n] a significant measure of sovereign authority' . . . to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government.").

45. U.S. CONST. amend. X.

46. Gregory v. Ashcroft, 501 U.S. 452, 457 (1991).

47. Alden v. Maine, 527 U.S. 706, 715 (1999). The Supreme Court in *Alden v. Maine* also explained that

> [t]he federal system established by our Constitution . . . reserves to [states] a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status. The States "form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere."

Id. at 714 (quoting THE FEDERALIST NO. 39, *supra* note 9, at 245 (James Madison)).

power.[48] Where the separation of powers prevents any one branch of the federal government from accumulating too much power, federalism sets up the state and federal governments as checks on one another.[49] As Justice Kennedy once put it, "[t]he Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other."[50]

Cases and commentators have identified numerous additional potential benefits of federalism, including "increasing opportunities for political participation; maximizing choice and utility through state or local government competition and citizens' rights of exit; maintaining opportunities for creation or preservation of diverse cultures; providing opportunities for experiment and beneficial innovation; . . . and enhancing personal and group liberty or empowerment, by providing multiple layers of government to which citizens may appeal."[51]

48. *See Gregory*, 501 U.S. at 458 ("Perhaps the principal benefit of the federalist system is a check on abuses of government power."); New York v. United States, 505 U.S. 144, 181 (1992) ("[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power." (quoting Coleman v. Thompson, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting))).

49. *See New York*, 505 U.S. at 181 ("Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." (quoting *Gregory*, 501 U.S at 458)).

50. *E.g.*, U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring); *see also Gregory*, 501 U.S. at 459 ("In the tension between federal and state power lies the promise of liberty."); United States v. Lopez, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring) ("Though on the surface the idea may seem counterintuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one."); Heather K. Gerken, *The Supreme Court, 2009 Term — Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 34 (2010) (describing state sovereignty as a "natural cognate to the separation of powers," while cooperative aspects of federalism echo checks and balances, "a system that mixes conflict and cooperation to produce governance"); Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 387 (1997) ("[W]hen power is diffused, different governments can adopt a mix of policies that meet the preferences of different citizens, thus maximizing the way in which government as a whole satisfies individual preferences.").

51. Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 HARV. L. REV. 2180, 2213–14 (1998) (footnotes omitted); *see also, e.g.*, *Gregory*, 501 U.S. at 458 ("This federalist structure of joint sovereigns . . . assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry." (first citing Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1491–511 (1987); and then citing Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 3–10 (1988))); Friedman, *supra* note 50, at 318 nn.2–3 (mentioning cases and articles noting potential benefits of federalism, such as the relative ease of democratic participation at the local level, the accountability that comes with interacting with local officials, the potential for creative responses to immediate necessity, the fostering of cultural and local diversity, and the diffusion of power to protect liberty); Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549, 1552 n.6 (2012) (noting additional sources making similar arguments). There is, of course, disagreement as to the extent to which federalism delivers on these promises. *See, e.g.*, Friedman, *supra* note 50, at 318–19 (arguing that we presume that federalism has these laudatory effects without sufficiently interrogating the premise).

Despite broad consensus that federalism can play an important role in the constitutional scheme, how the principle should be operationalized is a topic of long-standing debate. Heather K. Gerken has categorized three types of institutional arrangements that scholars have identified, through which states can vindicate their sovereign interests and realize the boons of federalism: (1) states as autonomous sovereigns, (2) federalism as process, and (3) cooperative federalism.[52] The sovereignty-as-autonomy theory[53] posits that states, as sovereigns, must "enjoy the power to rule without interference in a policymaking domain of their own"—and that courts should ensure that the federal government does not interfere in such domains.[54] Process theorists share the view that federalism preserves for states the ability to engage in policymaking separate and apart from the federal government, but they reject a role for the courts in policing the line between state and federal authority.[55] Instead, they argue, the political process itself contains within it the tools that states need to vindicate their own interests.[56] Finally, cooperative federalism stresses the ability of states to satisfy local policy preferences through their administration of federal programs.[57] Because so many federal regimes—environmental law, health care, and others—are implemented on the ground by state administrators, these state bureaucrats have power to shape the policy through the way they implement it. These three means of operationalizing federalism principles are not mutually exclusive. Indeed, some scholars concede that each of these different models may be appropriate depending on the context at issue.[58]

52. *See* Gerken, *supra* note 51, at 1550–60.

53. Whether the emphasis is on state sovereignty or state autonomy, this theory is focused on preserving a separate sphere of authority for state governments. *See* Heather K. Gerken, *The Supreme Court, 2013 Term — Comment: Slipping the* Bonds *of Federalism*, 128 HARV. L. REV. 85, 114 (2014) (both autonomy and sovereignty endorse "the notion that states should be able to preside over their own empires").

54. Gerken, *supra* note 51, at 1553; *see also* Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 4 (2004) ("[V]irtually all the values that federalism is supposed to promote—such as regulatory diversity, political participation, and restraints on tyranny—turn on the capacity of the states to exercise self-government.").

55. *See* Gerken, *supra* note 51, at 1556 (arguing that sovereignty and process theories of federalism "are just markedly similar accounts, with both emphasizing the need to provide states with an opportunity to exit from the federal system. Their differences center on the means necessary to protect that exit option, not on the end itself.").

56. *See, e.g.*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 553 (1985); Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1520–60 (1994) (arguing, *inter alia*, that national parties give the states some leverage over national politicians, and because states administer federal policy, the national government cannot take states' interests for granted).

57. *See* Gerken, *supra* note 51, at 1557 ("As administrators of the federal regime, states often have a great deal of discretion in carrying out federal policies" and "wield power in the nooks and crannies of the administrative system.").

58. *See id.* at 1552 ("Federalism debates are best understood not as disagreements over which model to choose but as disputes over how to strike the right balance between different types of institutional arrangements. Such debates, however, can only be hashed out in context—domain by

Regardless of what theory of federalism's implementation one favors, however, each of them represents recognition of a zone of authority in which the state is the ultimate sovereign. The challenge is that it is notoriously difficult to identify precisely the line between state and federal power. In the words of one Supreme Court Justice, "The task is to identify a mode of analysis that allows Congress to regulate more than nothing . . . and less than everything . . . ."[59] Indeed, the Supreme Court has engaged in a series of trial and error in this regard.[60] Nevertheless, there remain some substantive areas of law more commonly associated with state and local government than with the federal government. And as the Supreme Court recently recognized, "the clearest example of traditional state authority is the punishment of local criminal activity."[61] This is not to say that the federal government has no role here; indeed, the increase in federal criminal regulation has been well-documented,[62] and local jurisdictions frequently work hand in glove with the feds to enforce federal laws.[63] Federal intervention in the criminal law arena, however, tends to represent exercises of concurrent authority, not preemptive authority. In other words, despite Congress's expansion of criminalization at the federal level, federal action does not *displace* state authority to develop and implement its own laws, policies, and priorities. So, while there are numerous contexts in which state and federal authorities implement criminal law in a "cooperative federalism" fashion, criminal law remains one of the primary areas of quintessentially local control.

domain, policymaking arena by policymaking arena.").

59. Gonzales v. Raich, 545 U.S. 1, 47 (2005) (O'Connor, J., dissenting).

60. *Compare, e.g.*, United States v. E.C. Knight Co., 156 U.S. 1 (1895) (holding that the Commerce Clause empowers Congress to regulate only those activities with a direct effect on interstate commerce), *with* United States v. Darby, 312 U.S. 100 (1941) (holding that the Commerce Clause empowers Congress to regulate any activity with a substantial effect on interstate commerce); *compare* Nat'l League of Cities v. Usery, 426 U.S. 833 (1976) (holding that the Tenth Amendment bars Congress from regulating states' "traditional government functions"), *with Garcia*, 469 U.S. 528 (rejecting the holding of *National League of Cities* as "unworkable").

61. Bond v. United States, 572 U.S. 844, 858 (2014); *see also* Gerken, *supra* note 51, at 1561 (noting that national policymakers "for the most part" leave "areas like criminal law, family law, public health, election administration, corporate law, and the like" to state regulation); Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV., 429, 430 (2004) ("[T]he police power of states includes the power to prohibit wrongful and to regulate rightful conduct of individuals.").

62. *See, e.g.*, Michael M. O'Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783, 806 (2004); Lauren M. Ouziel, *Legitimacy and Federal Criminal Enforcement Power*, 123 YALE L.J. 2236, 2261 (2014).

63. *See, e.g.*, O'Hear, *supra* note 62, at 815–20 (describing state-federal partnership in drug law enforcement).

C. A CONFLICT BETWEEN CONGRESS'S POWER TO INVESTIGATE AND STATE SOVEREIGNTY

In recent years, Congress's expansive investigative powers and the constitutional commitment to state sovereignty came into conflict when committees of the House of Representatives launched investigations into several local law enforcement offices, each of which had (coincidentally?) initiated civil or criminal enforcement actions against then-former President Trump.[64] The Judiciary Committee's investigation into Bragg's prosecution of Trump is the investigation in which the opposing parties' various arguments are most well-developed and thus allow the most rigorous examination. As a result, this Section will focus on that investigation. It will first briefly describe the facts of the investigation. It will then set out the interests that Congress asserted to justify that investigation as well as the Manhattan DA's objections to them, demonstrating the ways in which the investigation brought competing constitutional interests—Congress's investigative authority and state sovereignty—into conflict.

1. The Bragg Investigation

The prospect of initiating an investigation into local law enforcement initially arose when social media reports announced that a Manhattan grand jury was on the cusp of returning an indictment against Trump for falsifying business records in violation of New York law.[65] In the wake of these reports, Trump's lawyers sent a letter to Representative Jim Jordan, Chair of the House Judiciary and House Oversight Committees, urging him to initiate an investigation into what the letter called an "egregious abuse of [Bragg's] power."[66]

64. In addition to the investigation into Bragg, Representative Jim Jordan subpoenaed documents and information from the New York Attorney General's office, *see* Beitsch, *supra* note 7, and the Fulton County District Attorney's ("DA") office led by Fani Willis, Letter from Jim Jordan, Chairman, H.R. Comm. on the Judiciary, to Letitia James, Att'y Gen., Off. of the N.Y. State Att'y Gen. (May 15, 2024) [hereinafter May 15 Letter].

65. *See, e.g.*, Annie Grayer, Alayna Treene, Melanie Zanona & Kristen Holmes, *Inside the Backchannel Communications Keeping Donald Trump in the Loop on Republican Investigations*, CNN: POL. (Mar. 28, 2023, at 12:00 ET), https://www.cnn.com/2023/03/28/politics/trump-gop-investigations-backchannel/index.html [https://perma.cc/4CPK-9GW6].

66. Annie Karni & Luke Broadwater, *House G.O.P., Defending Trump, Targets Bragg Ahead of Expected Indictment*, N.Y. TIMES (Mar. 20, 2023), https://www.nytimes.com/2023/03/20/us/politics/house-republicans-trump-indictment.html [https://web.archive.org/web/20260202224940/https://www.nytimes.com/2023/03/20/us/politics/house-republicans-trump-indictment.html]; *see also* Keven McCarthy (@SpeakerMcCarthy), TRUTH SOCIAL (Mar. 19, 2023, at 12:35 PT), https://truthsocial.com/@SpeakerMcCarthy/posts/110051624106641020 [https://web.archive.org/web/20260131043302/https://truthsocial.com/@SpeakerMcCarthy/posts/110051624106641020] (announcing that Congress would "investigate any use of federal funds that are used to facilitate the perversion of justice by Soros-backed DA's [sic] across the country").

On March 20, 2023, the chairmen of three congressional committees jointly launched an investigation into Bragg's "decision to pursue such a politically motivated prosecution."[67] The committees demanded that Bragg provide testimony, as well as several categories of documents—any communications between his office and the U.S. Department of Justice ("DOJ") relating to the investigation of Trump, any communications involving former Manhattan DA employees Carey Dunne and Mark Pomerantz relating to Trump, and any documents or communications regarding the office's receipt and use of federal funds.[68] Two days later, letters went directly to Dunne and Pomerantz, both of whom had worked on investigations into Trump, requesting the same categories of information.[69]

In its response, Bragg's office characterized the committees' request as "an unprecedent[ed] inquiry into a pending local prosecution," a "transparent campaign to intimidate and attack" the DA, and "an unlawful incursion into New York's sovereignty"; it added that compliance with the request "would interfere with law enforcement."[70] It did offer, however, to provide information about its use of federal funds (in a subsequent letter, the DA's office indicated that it did not spend any funds received through federal grant programs on the Trump matter).[71] Bragg also sent letters to Dunne and Pomerantz, instructing them to decline to respond to the legislators' requests because they "raise[d] significant concerns about federalism, state sovereignty, the limits on congressional power, and the purpose and legality of the inquiry."[72]

After Bragg's office unsealed an indictment against Trump, the House Judiciary Committee subpoenaed Pomerantz, instructing him to appear for a deposition before the Committee.[73] It also sought documents and testimony

67. March 20 Letter, *supra* note 3.

68. *Id.* Dunne had been General Counsel to Bragg's predecessor, Cyrus Vance, and briefly Special Assistant to Bragg. Complaint, *supra* note 2, at 17. Pomerantz had written a book describing his role in the DA's office's investigation into Trump and expressing his view that the former president should be indicted. MARK POMERANTZ, PEOPLE VS. DONALD TRUMP: AN INSIDE ACCOUNT (2023).

69. Complaint, *supra* note 2, at 17.

70. Letter from Alvin L. Bragg, Jr., Dist. Att'y, Cnty. of N.Y. and Leslie D. Dubeck, Gen. Couns., Dist. Att'y, Cnty. of N.Y., to Rep. Jim Jordan, Chairman, House Comm. on the Judiciary, Rep. Bryan Steil, Chairman, House Comm. on House Admin., and Rep. James Comer, Chairman, House Comm. on Oversight & Accountability (Mar. 23, 2023) [hereinafter March 23 Letter]; Complaint, *supra* note 2, at 1, 29; March 31 Letter, *supra* note 2.

71. March 23 Letter, *supra* note 70. Subsequently, the DA informed the committees that no federal funds the state received as grants had been expended on the investigation or prosecution of Trump, but that in prior investigations of Trump and the Trump organization, it had used approximately $5,000 the state previously acquired through its joint efforts with the federal government to seize assets employed in the commission of crimes, which had yielded more than $1 billion over the past 15 years. March 31 Letter, *supra* note 2.

72. Complaint, *supra* note 2, at 1, 24.

73. *Id.* at 37.

from Matthew Colangelo—a former employee of the Office of the New York State Attorney General and previously employed as Senior Counsel in Bragg's office.[74] Colangelo had worked on previous investigations into Trump before Bragg hired him to participate in the prosecution of Trump for falsification of business records.[75] The letter to Colangelo demanded documents and communications between Colangelo and anyone else (including the DA's office prior to his employment there) about either his prospective employment or Trump.[76]

On April 11, 2023, Bragg's office sued in federal court to block enforcement of the subpoena served on Pomerantz on the grounds that it lacked a legitimate legislative purpose.[77] In the alternative, if the court determined there was a legitimate legislative purpose for the Committee's investigation, the complaint asked that it declare the subpoena unenforceable because it sought privileged material and secret grand jury material.[78] Southern District of New York District Judge Vyskocil rejected Bragg's arguments. While "mindful of potential federalism concerns" raised by the case, she concluded that the Committee had legitimate legislative purposes justifying both the investigation itself and the Pomerantz subpoena.[79] Notably, she observed that a court's role in assessing the validity of "a congressional subpoena is strictly limited to determining only whether the subpoena is 'plainly incompetent or irrelevant to *any* lawful purpose.' "[80] Therefore, while Bragg described the Committee's stated interests as pretextual, the judge explained that courts are "required to presume that a congressional committee's stated legislative object is 'the real object' " of the investigation.[81]

In the wake of the district court's decision, Bragg and the Committee reached an agreement for Pomerantz to testify at a closed-door session of the House Judiciary Committee; but, at that meeting, Pomerantz invoked his Fifth Amendment right against self-incrimination and declined to provide substantive answers.[82] In addition, after Trump had been tried and convicted

74. *Id.* at 41.
75. *Id.*
76. *Id.*
77. *Id.* at 44.
78. *Id.* at 47.
79. Bragg v. Jordan, 669 F. Supp. 3d 257, 265 (S.D.N.Y. 2023).
80. *Id.* at 267–68 (emphasis in original) (citing McPhaul v. United States, 364 U.S. 372, 381 (1960)).
81. *Id.* at 269 (quoting McGrain v. Daugherty, 273 U.S. 135, 178 (1927)).
82. Stephen Groves, *Former Trump Prosecutor Mostly Mum Before Congress on Details of Hush-Money Prosecution*, AP NEWS (May 12, 2023, at 14:33 PT), https://apnews.com/article/trump-bragg-jordan-pomerantz-house-investigation-50ffeb205c50dab473153d8de1db3e7f [https://perma.cc/X6YW-JHWW].

on all counts brought against him by the Manhattan DA, Bragg and Colangelo agreed to testify before Congress after Trump's sentencing.[83] Meanwhile, Representative Jordan also sought information about Colangelo's role in investigating Trump from several of Colangelo's former employers, including the federal Justice Department and the Office of the New York State Attorney General.[84] Indeed, Representative Jordan threatened to subpoena New York Attorney General James if she did not voluntarily provide that information.[85]

2. Congress's Interests

Identifying the interest behind committee investigations is critical to determining their lawfulness.[86] As noted above, congressional investigations must be within the jurisdictional scope of the investigating committee's charge and must serve legitimate legislative interests. Moreover, a specific subpoena is enforceable only if the materials it seeks are "pertinent to the matter under inquiry."[87] In its letters seeking information from local law enforcement offices, the Judiciary Committee provided several different—and arguably evolving—justifications for its investigation. As discussed in Section III.B, at least some of the justifications identified here likely qualify as legitimate legislative purposes for the investigation as a whole, though it is possible that a subpoena of *all* of the information the Committee requested would be overbroad.

At the outset, the Committee explicitly described its investigation as an effort to "conduct[] oversight of politically motivated prosecutions by state and local officials."[88] Representative Jordan wanted Bragg to " 'explain'

83. Jillian Sykes, Gloria Pazmino & Shania Shelton, *Manhattan District Attorney Alvin Bragg Agrees to Testify Before Congress Following Trump Verdict*, CNN: POL. (June 8, 2024, at 14:04 ET), https://www.cnn.com/2024/06/08/politics/alvin-bragg-agrees-testify-congress [https://perma.cc/3DCW-T9MT]; Beitsch, *supra* note 7. Originally scheduled in June, the judge in Trump's New York criminal trial postponed sentencing until January 2025. There is no record that either Bragg or Colangelo actually ever testified before Congress.

84. Beitsch, *supra* note 7.

85. *Id.*

86. The Committee on the Judiciary was the only committee involved in the litigation, and its Chairman Jim Jordan took the lead in the Bragg investigation while acting alone in its investigations into Leticia James's and Fani Willis's offices; therefore, this discussion will identify the rationales for the investigation provided by that committee.

87. Sinclair v. United States, 279 U.S. 263, 291–92 (1929).

88. May 15 Letter, *supra* note 64; *see also* Letter from Rep. Jim Jordan, Chairman, House Comm. on the Judiciary, Rep. Bryan Steil, Chairman, House Comm. on House Admin., and Rep. James Comer, Chairman, House Comm. on Oversight & Accountability, to Alvin L. Bragg, Jr., Dist. Att'y, Cnty. of N.Y. 5 (Mar. 25, 2023) [hereinafter March 25 Letter] ("The information sought by the Committees will allow us to assess the extent to which your reported effort to indict a former President and current declared candidate for that office is politically motivated."). In the Committee's view, "the indictment of a former President of the United States by an elected local prosecutor of the opposing political party (and who will face the prospect of re-election) implicates substantial *federal* interests." INTERIM STAFF REP. OF THE

himself" and threatened "that the House of Representatives will 'hold Alvin Bragg . . . to account' for indicting Mr. Trump."[89] Similarly, the Committee sought information that would "shed substantial light on the underlying motives for [Bragg's] investigation into and indictment of President Trump"[90] because, in its view, existing information raised questions regarding the DA's office's "commitment to evenhanded justice."[91] Subsequently, the Committee argued that it was concerned about the potentially political nature of the prosecution not because they disagreed with it, but because it "could have a profound impact on how Presidents choose to exercise their official duties while in office."[92]

While the politics of local prosecutors may not provide a compelling interest for congressional investigation, the Committee subsequently asserted additional justifications for its investigation that address more traditional congressional concerns. First, it asserted that the prosecutions raised the question of whether Congress should "draft legislative reforms to, among other things, protect former and current Presidents from" such prosecutions.[93] One legislative proposal would have allowed former and current presidents and vice presidents to remove their cases from state to federal courts.[94] The law already allows removal for actions filed in state courts against federal officers acting within the scope of their official

COMM. ON THE JUDICIARY, U.S. H.R., AN ANATOMY OF A POLITICAL PROSECUTION: THE MANHATTAN DISTRICT ATTORNEY'S OFFICE'S VENDETTA AGAINST PRESIDENT DONALD J. TRUMP 32 (2024) [hereinafter INTERIM STAFF REPORT]. Moreover, having brought one such prosecution, the Committee argued that the Manhattan DA has made future such prosecutions more likely (the Atlanta DA's prosecution being a case in point in the Committee's view), thus necessitating federal legislative action. *Id.* at 34. If state and local prosecutors can engage in politically motivated prosecutions, the Report argues, the threat of such prosecution "could have a profound impact on how Presidents choose to exercise their official duties while in office." *Id.* at 32. This argument loses much of its force after *Trump v. United States* determined that presidents enjoy immunity from prosecution by the federal government for their official presidential actions. *See* Trump v. United States, 144 S. Ct. 2312 (2024).

89. Complaint, *supra* note 2, at 2.

90. *Id.* at 42.

91. Letter from Rep. Jim Jordan, Chairman, H.R. Comm. on the Judiciary, to Mark F. Pomerantz, Former N.Y. Cnty. Special Asstistant Dist. Att'y, Free. & Fair Litig. Grp. (Mar. 22, 2023); Complaint, *supra* note 2, at 23 (quoting an interview by James Comer on CNN in which he said he wanted Bragg to "come explain to us exactly what he's investigat[ing]," and asserting that if Bragg "makes a good explanation, . . . then we'll back off").

92. INTERIM STAFF REPORT, *supra* note 88, at 32.

93. March 25 Letter, *supra* note 88, at 5. Another area of potential legislation the Committee cited stems from its concern that local prosecutions against federal officials create the potential for conflict between the Secret Service, whose mandate is to protect presidents and former presidents, and local law enforcement officials seeking to enforce an indictment or conviction. According to the Committee, such potential necessitates oversight "to inform potential legislation that would address or remedy any potential conflicts between federal and local authorities." *Id.* at 3.

94. INTERIM STAFF REPORT, *supra* note 88, at 32; March 25 Letter, *supra* note 88, at 3 (indicating that the Committee was considering "whether to draft legislation that would, if enacted, insulate current and former presidents from . . . improper state and local prosecutions").

duties.[95] Second, the Committee identified the question of whether Congress should clarify the preemptive effect of the Federal Election Campaign Act ("FECA"), the violation of which was one factor underlying Trump's felony convictions.[96] Third, the Committee stated that it wanted to study whether to amend "the authorities of special counsels [to] better delineate their relationships with other prosecuting entities" (because the facts on which Bragg's indictment was based were originally discovered by Special Counsel Robert Mueller in his investigation into Russian interference in the 2016 presidential election).[97] Finally, the Committee raised the use of federal funds as a justification for its investigation of Bragg. Again, concrete legislative proposals were based on this justification: proposed legislation would have excluded the Manhattan DA's office from any award of federal funds and barred state and local law enforcement agencies from using funds or property seized through asset forfeiture to investigate or prosecute a president, vice president, or presidential candidate.[98] The Committee also raised the possibility of using Congress's spending power to combat what it viewed as political prosecutions. It suggested, for example, tying "federal funds to improved public safety metrics" to dissuade local prosecutors from focusing on "apparent political prosecutions over commonsense public safety measures,"[99] or to impose conditions "to ensure that [federal] funds are not used to engage in discrimination on the basis of partisan affiliation or political beliefs."[100]

As Bragg's office pointed out, these asserted federal interests in federal funding conditions or statutory amendments are likely only part of the investigations' motivations. Recall that numerous supporters of former-President Trump weighed in publicly with their views regarding Bragg's prosecution, calling it an abuse of his office[101] and prosecutorial misconduct,[102] and pledged to "hold [him] to account."[103] In other words, the investigation was at least in part motivated by the desire to attack the validity

95. 28 U.S.C. § 1442.

96. March 25 Letter, *supra* note 88, at 3.

97. *Id.* at 4.

98. INTERIM STAFF REPORT, *supra* note 88, at 32. The investigation into Willis's office is more directly tied to federal funding, in that the Committee justified its efforts at oversight of the Fulton County District Attorney's Office's ("FCDAO") by seeking "two specific categories of documents: (1) documents and communications referring or relating to the FCDAO's receipt and use of federal funds and (2) documents and communications referring or relating to any allegations of the misuse of federal funds by the FCDAO." Letter from Jim Jordan, Chairman, H.R. Comm. on the Judiciary, to Fani T. Willis, Dist. Att'y, Fulton County Dist. Att'y's Off. (Mar. 14, 2024).

99. March 25 Letter, *supra* note 88, at 4.

100. *Id.*

101. Complaint, *supra* note 2, at 12–15.

102. *Id.* at 15.

103. *Id.* at 45.

of the prosecution itself; any desire for legislative reforms or inquiries into spending federal funds were likely secondary. Of course, as Section I.A makes plain, legislative motive is not something courts typically consider when assessing the legitimacy of a congressional investigation. Whether local law enforcement offices should adopt that same rule when considering whether and how to respond to congressional subpoenas is, of course, a different question.

3. New York's Interests

Some of Bragg's objections to the Committee's information demands relied on the argument that Congress had overstepped its authority. Due to what the DA's office characterized as investigators' "constantly shifting purported legislative interests and purposes that supposedly justify the Committee's unwarranted 'incursion' into a state criminal case," for example, it argued that no legitimate legislative purpose supported the investigation.[104] Moreover, the DA argued that the investigation was initiated "for the personal aggrandizement of the investigators or to 'punish' those investigated"—neither of which is a permissible justification for congressional inquiries.[105]

Other objections were grounded explicitly in federalism. Pointing to Supreme Court cases such as *United States v. Lopez*[106] and *NFIB v. Sebelius*,[107] Bragg articulated an argument based purely on state sovereignty: the Committee "has no power under the Constitution to oversee state and local criminal matters."[108] Locally elected state officials followed the laws and procedures of the State of New York and handed down an indictment issued by a grand jury made up of citizens of New York. With respect to the subpoena to Colangelo, Bragg described requests for information about "the 'circumstances and chain of events that led to [Mr. Colangelo's] hiring by the New York County District Attorney's Office' " as a congressional effort to conduct " 'oversight' of the District Attorney's personnel decisions."[109] As noted above, congressional efforts to second-guess the DA's decision to pursue a lawful prosecution—at best through the use of the bully pulpit, at

104. *See id.* at 46 (describing the Committee's asserted interests as "obvious pretexts for interfering with the District Attorney's Office's work enforcing the laws of the State of New York on behalf of the People").

105. *Id.* at 2 (citing Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2031 (2020)).

106. United States v. Lopez, 514 U.S. 549 (1995) (holding that the Gun Free School Zone Act of 1990 exceeded Congress's power to regulate interstate commerce).

107. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012) (five Justices voted for the proposition that the individual mandate to purchase health insurance included in the Affordable Care Act of 2010 exceeded Congress's power to regulate interstate commerce).

108. Complaint, *supra* note 2, at 2.

109. *Id.* at 42.

worst through threats and intimidation[110]—exceed the scope of Congress's powers.

Bragg also presented arguments that would justify withholding at least some of the requested information on a more granular basis. New York law, for example, requires that grand jury information remain secret.[111] This law might permit—or require—withholding that type of information from congressional committees, even if it was responsive to a valid subpoena. In addition, the Rules of Professional Conduct bar prosecutors from making extrajudicial statements during criminal prosecutions.[112] Any current employee of the DA's office would therefore be bound by those rules, though they may not apply to former prosecutors like Pomerantz. Bragg's office also pointed out that the information the Committee sought might be subject to various privileges, such as deliberative process, work product, and confidential investigative material.[113]

In dismissing Bragg's complaint, the district court rejected these arguments out of hand. Once the judge determined that the Committee had articulated a legitimate legislative purpose for its investigation—she pointed to the desire to investigate the use of federal funds—that was the end of her inquiry. There was no effort to balance the sovereign interests of New York with the power of Congress. Nevertheless, these state objections raise nontrivial constitutional questions in their own right. Any mechanism for resolving such disputes ought to account for the interests asserted on both sides of the equation, rather than mechanically deferring to Congress.

***

This Section demonstrates that, while not every congressional justification for its inquiry into Bragg's prosecution of Trump had a legitimate basis, some did. Some of those legitimate justifications—even if at least partially pretextual—arguably empowered Congress to engage in investigations that threaten to infringe on New York's state sovereignty. The challenge therefore is determining how to honor Congress's constitutional role while protecting the states' sovereign interests. The next Part begins to address this question by exploring some of the ways in which congressional investigative power is balanced against competing interests in other contexts.

110. *See id.* at 19–21 (documenting Trump's social media posts calling Bragg a "SOROS BACKED ANIMAL" and showing himself threatening Bragg with a baseball bat). Bragg also received death threats and a package containing white powder. *Id.*

111. *Id.* at 47.

112. *Id.* at 5–6; March 23 Letter, *supra* note 70.

113. Complaint, *supra* note 2, at 7, 47–49.

II. CONSTRAINTS ON CONGRESSIONAL INVESTIGATIONS

Recognizing that both Congress and local officials have legitimate interests at stake in these disputes, the challenge becomes finding a way to balance them. As with any effort to balance competing interests, there is no silver bullet. There are, however, places to look for some guidance. This Part first looks at three contexts in which congressional investigative authority runs up against competing interests to consider how those interests are accommodated and what those accommodations might teach us about resolving congressional–state disputes. Two of these contexts involve the separation of powers. First, there are disputes over congressional access to *federal* law enforcement information. Second, there are disputes over the valid scope of congressional investigations outside the law enforcement context that raise separation-of-powers concerns. Third, there are disputes between Congress and individual witnesses when congressional investigations risk infringing on individual constitutional rights. Finally, this Part considers some of the constraints Congress faces in accessing information due to practical, rather than legal or theoretical, limits. To be sure, the contexts discussed in this Part raise questions different from those implicated in congressional investigations of state and local law enforcement. Nevertheless, as we will see in Part III, they provide useful lenses through which to look at competing federalism and congressional interests in the context of investigations into state or local law enforcement activity.

A. FEDERAL LAW ENFORCEMENT AND THE SEPARATION OF POWERS

While the investigation into Bragg's prosecution of former-President Trump is an anomaly, debates over congressional access to law enforcement information at the federal level are long-standing. In fact, disputes over congressional requests to the Justice Department regarding law enforcement activity form their own unique subset of interbranch information disputes—and are often particularly contentious.[114] This Section will highlight how these separation-of-powers disputes balance congressional and executive interests.

In the words of the Justice Department's Office of Legal Counsel ("OLC"),[115] "it has been the policy of the Executive Branch throughout this

114. *See* ALISSA M. DOLAN & TODD GARVEY, CONG. RSCH. SERV., R42811, CONGRESSIONAL INVESTIGATIONS OF THE DEPARTMENT OF JUSTICE, 1920–2012: HISTORY, LAW, AND PRACTICE 1 (2012) ("Over time, however, congressional probes of the Department of Justice . . . have proved to be amongst the most contentious, stemming from the presumptive sensitivity of its principal law enforcement mission.").

115. The Office of Legal Counsel ("OLC") is an office within the Justice Department that provides

Nation's history generally to decline to provide committees of Congress with access to or copies of law enforcement files except in the most extraordinary circumstances."[116] The Justice Department has articulated numerous reasons for this policy,[117] but one concern grounded in the separation of powers features particularly prominently in their arguments: concerns about Congress exerting undue influence over prosecutorial decisions.[118] As one OLC memo put it, keeping "a congressional committee[] fully apprised of all details of an investigation as the investigation proceeds,"[119] would turn Congress into "a partner in the investigation . . . [raising] a substantial danger that congressional pressures will influence the course of the investigation."[120]

the executive branch with definitive interpretations of law. OLC opinions are binding on executive branch officials unless and until they are overruled by the attorney general or the president.

116. Assertion of Exec. Privilege in Response to Cong. Demands for L. Enf't Files, 6 Op. Att'ys Gen. 31, 32 (1982). The executive branch considers law enforcement information to be protected by executive privilege. Prosecution for Contempt of Cong. of an Exec. Branch Off. Who Has Asserted a Claim of Exec. Privilege, 8 Op. O.L.C. 101, 117–18 (1984) [hereinafter Olson Memo] ("The basis [for applying executive privilege to law enforcement files] 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.").

117. The canonical articulation of this policy came in a 1941 memo by then-Attorney General (and later Supreme Court Justice) Robert Jackson, in which Jackson informed Congress that "all investigative reports are confidential documents of the executive department of the Government, . . . and that congressional or public access to them would not be in the public interest." Position of the Exec. Dep't Regarding Investigative Reps., 40 Op. Att'ys Gen. 45, 46 (1941). Such information, Jackson argued, could jeopardize ongoing prosecutions by revealing details of the prosecution's case, *id.* at 46–47, deter or put in danger Department of Justice's ("DOJ") sources of information, *id.* at 46, and include unproven or inaccurate information about innocent individuals, *id.* at 47.

Subsequent executive branch memos both reaffirmed and expanded Jackson's list of concerns. In particular, executive branch officials worried about undermining the perception of "the integrity, impartiality, and fairness of the law enforcement process as a whole" by spreading law enforcement information beyond those who truly needed to have it, about pretrial publicity leading to "postponement or other modification of the prosecution on due process grounds," and disclosures that could generally impair the "government's ability to prosecute fully and fairly." Response to Cong. Requests for Info, Regarding Decisions Made Under the Indep. Couns. Act, 10 Op. O.L.C. 68, 76 (1986) [hereinafter Cooper Memo].

118. *See, e.g.*, Olson Memo, *supra* note 116, at 117 ("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.").

119. Cooper Memo, *supra* note 117, at 76 (quoting Memorandum from Thomas E. Kauper, Deputy Assistant Att'y Gen., O.L.C., to Edward L. Morgan, Deputy Couns. to the President (Dec. 19, 1969)); *see also* Cong. Subpoenas of Dep't of Just. Investigative Files, 8 Op. O.L.C. 252, 263 (1984) ("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." (citing Memorandum from Thomas E. Kauper to Edward L. Morgan, *supra*)).

120. *See* DOLAN & GARVEY, *supra* note 114, at 7 (citing Letter from William French Smith, Att'y Gen., to John D. Dingell, Chairman, House Subcomm. on Oversight & Investigation, Comm. on Energy & Com. (Nov. 30, 1982)).

As Todd David Peterson has emphasized, the value of preserving executive independence in prosecutorial decision-making lies "not simply upon the idea that the executive branch must have freedom in order to perform its job properly, but, more fundamentally, upon the perception that giving either the judicial or legislative branches influence over the decision to prosecute would concentrate too much authority in the hands of one branch."[121] The authority that writes the laws should not also be involved in enforcing or adjudicating them. Thus, OLC views any judicial or legislative interference with the executive's prosecutorial discretion regarding any individual as an unconstitutional encroachment on the executive's authority to execute the laws.[122] Congressional involvement in prosecutorial decisions, in other words, poses a threat to liberty by breaking down the boundaries between the branches of the federal government.

At the same time, the executive recognizes that not all congressional requests for law enforcement information are created equal. Concerns about improper congressional involvement are at their height when an investigation remains open—particularly pre-indictment—when such involvement might influence the course of DOJ's actions.[123] Moreover, according to DOJ, Congress's lack of law enforcement responsibilities means that its need to access information about open investigations is "generally limited."[124] By contrast, executive branch lawyers acknowledge that once an investigation has been closed, objections to providing Congress access to investigative files fade.[125] While such disclosure should generally withhold materials that include "unpublished details of allegations against particular individuals" or "details that would reveal confidential sources[]

121. Todd David Peterson, *Congressional Oversight of Open Criminal Investigations*, 77 NOTRE DAME L. REV. 1373, 1430 (2002).

122. *See* Cooper Memo, *supra* note 117, at 72 ("Article II of the Constitution places the power to enforce the laws solely in the Executive Branch of government. . . . [N]either the judicial nor legislative branches may directly interfere with the prosecutorial discretion of the Executive Branch by directing the executive to prosecute particular individuals.").

123. *See* Peterson, *supra* note 121, at 1439 ("The process of evaluating [DOJ's conduct of an ongoing investigation] necessarily creates congressional pressure to change the direction of the DOJ's investigation.").

124. *See* Cong. Requests for Info. from Inspectors Gen. Concerning Open Crim. Investigations, 13 Op. O.L.C. 77, 80 (1989).

125. Cooper Memo, *supra* note 117, at 77. Todd David Peterson argues that sharing files might be appropriate even before a case is closed if a defendant has already been indicted. Peterson, *supra* note 121, at 1389. According to the DOJ, however, "the separation of powers necessity of protecting the integrity and effectiveness of the prosecutorial process continues after an investigation closes." Assertion of Exec. Privilege Concerning the Special Couns.'s Interviews of the Vice President and Senior White House Staff, 32 Op. Att'ys Gen. 7, 10 (2008) [hereinafter Mukasey Memo].

and investigative techniques and methods,"[126] providing summaries or redacted versions of documents can often resolve this concern.[127]

The executive branch has long conceded, however, that Congress has "a legitimate legislative interest in overseeing the Department's enforcement of . . . [relevant statutes] and in determining whether legislative revisions" should be made.[128] These inquiries require information not about specific investigations but rather about the executive branch's policies regarding implementation of criminal statutes more generally. The bottom line is that open file requests should be regarded with skepticism, while disclosing information about closed investigations or enforcement policy more generally raises fewer red flags.[129]

By contrast, Congress's official view is that law enforcement information is the same as any other executive branch information. Thus, congressional investigators maintain that, as long as the committee has jurisdiction over the subject matter of the investigation and the request for information is supported by a legitimate legislative purpose, that should suffice.[130] At the same time, however, Congress also acknowledges that "law enforcement information" is a category encompassing numerous kinds of information. So, while Congress concedes that it "cannot dictate prosecutorial policy or decisions in particular cases,"[131] it maintains that it may legislate regarding prosecutorial policy generally. Thus, rather than distinguishing between open and closed investigations, Congress focuses on whether the inquiry targets DOJ decision-making in a particular case as opposed to more general questions relating to DOJ's enforcement of the

126. Cooper Memo, *supra* note 117, at 77.

127. Peterson, *supra* note 121, at 1381. The full documents themselves might be disclosed on a case-by-case basis. *See* Cooper Memo, *supra* note 117, at 81. According to the executive branch, after an investigation is closed, executive privilege continues to protect documents whose disclosure might "hamper prosecutorial decision-making in future cases" or undermine the executive branch's "long-term institutional interest in maintaining the integrity of the prosecutorial decision-making process." Mukasey Memo, *supra* note 125, at 10 (citing Cooper Memo, *supra* note 117).

128. Cooper Memo, *supra* note 117, at 74.

129. This is not to say that the executive happily hands over all law enforcement material upon closing an investigation. During the contentious 2019 congressional investigation into the ATF's botched gun-related operation known as Operation Fast and Furious, for example, "the DOJ released numerous documents related to the program, but President Obama specifically claimed executive privilege over DOJ internal documents that were responsive to the committee's subpoena." DOLAN & GARVEY, *supra* note 114, at 10. Legal wrangling over these documents went on for years.

130. *See* MORTON ROSENBERG, CONG. RSCH. SERV., R95-464, INVESTIGATIVE OVERSIGHT: AN INTRODUCTION TO THE LAW, PRACTICE AND PROCEDURE OF CONG. INQUIRY 2 (1995) ("[O]nce having established its jurisdiction and authority, and the pertinence of the matter under inquiry to its area of authority, a committee's investigative purview is substantial and wide-ranging."); *id.* at 22 ("[T]he fact that information is sought on the Executive's enforcement of criminal laws would not in itself seem to preclude congressional inquiry.").

131. *Id.* at 22.

laws.[132] In Congress's view, the question should be whether the investigation "prevents the executive branch from accomplishing its assigned functions" and, if so, "whether that impact is justified by an overriding need to promote objectives within the congressional authority of Congress."[133]

Despite these very different articulations of the appropriate rules, Peterson's historical inquiry into actual past practices reveals that "Congress seems generally to have been respectful of the need to protect material contained in open criminal investigative files. There is almost no precedent for Congress attempting to subpoena such material, and even fewer examples of the DOJ actually producing such documents."[134] Congress has, however, succeeded in obtaining materials from closed files, except for grand jury materials that the government is obligated to keep confidential.[135] Congress's own research arm has reached similar conclusions.[136]

In summary, both Congress and the executive branch recognize constitutionally significant distinctions among requests for law enforcement information. DOJ's objections to disclosure are particularly forceful when Congress is inquiring about an ongoing, open investigation—a context with significant separation-of-powers implications. At the same time, other inquiries—those related to closed investigations, examinations of DOJ's enforcement policies, and alleged wrongdoing within the DOJ—raise fewer structural constitutional concerns.[137] While the executive branch and Congress may discuss this topic using very different language, their disparate reasoning seems to have resulted in similar ultimate conclusions regarding what information appropriately can be shared with congressional inquiries. In practice, therefore, it seems that Congress has largely acquiesced in the understanding that its access to information regarding ongoing law enforcement activities is particularly sensitive, and it is unlikely to press for such information in the absence of an urgent need.

132. *Id.*

133. Peterson, *supra* note 121, at 1387 (citing ROSENBERG, *supra* note 130, at 11).

134. *Id.* at 1410.

135. *Id.*

136. *See* DOLAN & GARVEY, *supra* note 114, at 2 ("In the last 85 years, Congress has consistently sought and obtained access to information concerning prosecutorial misconduct by Department of Justice officials in closed cases; and access to pre-decisional deliberative prosecutorial memoranda—while often resisted by the Department—is usually released upon committee insistence as well. In contrast, the Department rarely releases—and committees rarely subpoena—material relevant to open criminal investigations.").

137. One area in which Congress might assert a right to access information about open criminal investigations is when Congress has its own ongoing investigation into the same set of circumstances. *See generally* David Rapallo, *Congress's Power to Investigate Crime: Did Trump Kill* Kilbourn*?*, 27 N.Y.U. J. LEGIS. & PUB. POL'Y 135 (2024) (arguing that Congress has the constitutional authority to investigate criminal conduct in order to assess problems and craft solutions).

B. THE SCOPE OF CONGRESS'S AUTHORITY

Another point of interbranch dispute over congressional access stems from the requirement that congressional investigations serve a legitimate legislative purpose. Recall that all congressional investigations must be "related to, and in furtherance of, a legitimate task of the Congress."[138] Executive officials have raised objections both to the substance of an investigation—arguing that there *is* no legitimate legislative purpose justifying the investigation—and to the motivation behind an investigation—that idea that the legitimate justification congressional investigators have offered is not *actually* motivating the inquiry. As noted above, the courts typically decline to entertain challenges to legislators' subjective motives; but in interbranch disputes, the executive branch continues to raise them. These disputes between Congress and the executive over whether a congressional investigation exceeds Congress's powers offer another context in which to think about managing information disputes that implicate structural constitutional principles.

Challenges to congressional investigations based on executive branch assessments of legislative purpose are not new, but they proliferated during Trump's first administration. Trump's OLC articulated a robust role for the executive itself in assessing the validity of Congress's investigations, asserting that the executive had not only the *authority* but also the *responsibility* to independently confirm "the legitimacy of an investigative request."[139] This view arguably reversed what had been the default rule—broad deference to congressional determinations of its own information needs, similar to the courts' approach—into one in which the executive claimed the power to deny access to any information unless Congress could convince the executive branch of the legitimacy of its inquiry.[140] Trump's DOJ challenged congressional investigations on these grounds in several instances. For example, in a 2019 OLC memo considering whether House committees had a legitimate legislative interest in the tax returns of then-

138. Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2031 (2020) (quoting Watkins v. United States, 354 U.S. 178, 187 (1957)); *see also* Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 506 (1975) (concerns "a subject 'on which legislation could be had' ").

139. Cong. Comm.'s Request for the President's Tax Returns Under 26 U.S.C. § 6103(f), 43 Op. O.L.C. 151, 171 (2019) [hereinafter 2019 Engel Memo]; *id.* at 165 ("The Secretary had concluded that the Committee's proffered reason was pretextual . . . [and] fell outside Congress's constitutional power of inquiry."); Jonathan Shaub, *Previously Undisclosed OLC Opinions Illuminate the Growth of Executive Power*, LAWFARE (Sep. 23, 2022, at 08:01 PT), https://www.lawfaremedia.org/article/previously-undisclosed-olc-opinions-illuminate-growth-executive-power [https://perma.cc/8FYE-LZHB] ("OLC has concluded that it can . . . reject congressional interests in oversight as illegitimate.").

140. Cong. Oversight of the White House, 45 Op. O.L.C. *1, *13 (2021) [hereinafter 2021 Engel Memo] (advising that executive branch officials "must 'examine the objective fit between [the committee's proffered] purpose and the information sought, as well as any other evidence that may bear upon the Committee's true objective' ").

President Trump and several of his businesses, DOJ rejected the validity of the congressional request. It opined that "[t]he Committee's asserted purpose—to consider legislation regarding the IRS's practices in auditing presidential tax filings—was implausible," and that in rejecting the request, the Department of the Treasury had " 'reasonably and correctly' concluded that the Committee's stated purpose was pretextual[,] and its actual purpose" for the request "was simply to provide a means for public disclosure of the President's tax returns."[141] It went on to argue that while courts are bound to apply deference to Congress's statements of purpose, the executive need not do so.[142] Indeed, it averred, the executive should "engage in searching inquiries about congressional motivation."[143]

When the Biden OLC revisited this question, it disagreed. It replaced the 2019 memo with a memo of its own, concluding that OLC had gone "astray" when it determined "that the Executive Branch should closely scrutinize the Committee's stated justifications for its requests in a manner that fail[s] to accord the respect and deference due a coordinate branch of government."[144] Instead, it concluded that, like courts, "Executive Branch officials must apply a presumption that Legislative Branch officials act in good faith and in furtherance of legitimate objectives."[145] This is so even if there are members of Congress motivated by a desire to act solely "for the sake of exposure"[146] and despite the fact that some legislators might be motivated, at least in part, by political considerations.[147] The Biden OLC

141. 2019 Engel Memo, *supra* note 139, at 178, 183. Trump also challenged the legitimacy of Congress's January 6 Committee's request for White House records in the possession of the National Archives and Records Administration. Trump v. Thompson, 20 F.4th 10, 22 (D.C. Cir. 2021).

142. In making this argument, the 2019 Engel Memo distinguished between review by courts and review by the executive branch, arguing that the former is "not well equipped to second-guess the action[s] of the political branches," a constraint that does not apply to the executive. 2019 Engel Memo, *supra* note 139, at 177.

143. *Id.* at 175.

144. Ways & Means Comm.'s Request for the Former President's Tax Returns & Related Tax Info. Pursuant to 26 U.S.C. § 6103(f)(1), 45 Op. O.L.C. *1, *4 (2021).

145. *Id.* at *1. The memo also noted developments between 2019 and 2021 that may be relevant to the question, such as the fact that the request no longer involved the tax returns of a sitting president and that the congressional committee elaborated on the purposes of the investigation and ensured that the request closely aligned with those purposes. *Id.* at *17–18. In the view of the Biden OLC, the 2019 Opinion also failed to account for the fact that the House had invoked a statute that represented "a judgment by the political branches, going back nearly a century, that the congressional tax committees should have special access to tax information." *Id.* at *4. It also opined, however, that similar deference must apply to congressional subpoenas as well. *Id.* at *23.

146. *Id.* at *4 (citing Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2032 (2020)); 2021 Engel Memo, *supra* note 140, at *22 ("[T]he Supreme Court has long insisted that '[w]e are bound to presume that the action of the legislative body was with a legitimate object if it is capable of being so construed.' "); Barry v. United States ex rel. Cunningham, 279 U.S. 597, 619 (1929) ("The presumption in favor of regularity, which applies to the proceedings of courts, cannot be denied to the proceedings of the Houses of Congress, when acting upon matters within their constitutional authority.").

147. *See* 2021 Engel Memo, *supra* note 140, at *26 ("Congress is composed of elected members

conceded that the presumption of regularity to which Congress is entitled can be overcome, but in order to do so, " 'it must be obvious' that a congressional committee's investigation has exceeded the bounds of legislative power."[148] The Biden administration's clarification of the executive branch's views on this subject echoed the conclusion of most of the courts that reached the question during the first Trump administration.[149] With Trump's return to the Oval Office, we can expect to see OLC about-face once again and return to the theory articulated in the 2019 memo.

One of the many battles over information between Congress and the first Trump administration yielded a Supreme Court opinion that seems to have staked out a middle ground between the Trump and Biden OLC positions, at least when the information at stake implicates the separation of powers. In *Trump v. Mazars*, the House Oversight Committee issued a subpoena to then-President Trump's bank and accounting firms for personal financial and business records.[150] The President sued to enjoin enforcement of the subpoena on the grounds that it was not supported by a legitimate legislative purpose.[151] The Supreme Court was neither willing to reject Congress's proffered justifications for the subpoena nor to unconditionally support Congress's request. Splitting the difference, the Court both affirmed the broad scope and importance of congressional investigative authority and held that the level of deference afforded to congressional committees might differ when the information requested involves a sitting president.[152] This caution came from the Court's concern that congressional requests for information from the president, even when those requests involve only personal information, "may aim to harass the [p]resident or render him 'complaisan[t] to the humors of the Legislature,' " and thereby " 'exert an

who stand for re-election. It is therefore neither unusual nor illegitimate for partisan or other political considerations to factor into Congress's work.").

148. Ways & Means Comm.'s Request for the Former President's Tax Returns & Related Tax Info. Pursuant to 26 U.S.C. § 6103(f)(1), 45 Op. O.L.C. *1, *26 (2021) (quoting Tenney v. Brandhove, 341 U.S. 367, 378 (1951)). Applying what it considered to be the proper deference to Congress, this 2021 OLC memo titled *Ways and Means Committee's Request for the Former President's Tax Returns and Related Tax Information Pursuant to 26 U.S.C. § 6103(f)(1)* concluded that the executive had to comply with Congress's subpoena for the tax returns because "the subjects the Chairman [had] invoked are ones upon which legislation might be had; the information requested [was] relevant to informing Congress about them"; "the Committee [had] been authorized to seek information in support of each of the Committee's stated objectives for the information"; and the Executive had to "accept the Chairman's stated rationales as genuine notwithstanding statements by some legislators that might give rise to a supposition that they may have other motives for obtaining the information." *Id.* at *29–30.

149. *See, e.g.*, Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 508 (1975) ("Our cases make clear that in determining the legitimacy of a congressional act we do not look to the motives alleged to have prompted it."); *supra* Section I.A.

150. *Mazars*, 140 S. Ct. at 2026–28.

151. *Id.* at 2028.

152. *Id.* at 2031–32, 2033–34.

imperious controul' over the Executive Branch."[153] In other words, it stressed that the inquiry, despite asking for information unrelated to the president's official duties, raised separation-of-powers concerns that had to be taken into account.

To accommodate these separation-of-powers concerns, the Supreme Court announced that, when "assessing whether a subpoena directed at the President's personal information" is a legitimate subject of a congressional subpoena, "courts must perform a careful analysis that takes adequate account of the separation of powers principles at stake, including both the significant legislative interests of Congress and the 'unique position' of the President."[154] This analysis requires judges reviewing such requests to take into account four factors: first, "courts should carefully assess whether the asserted legislative purpose warrants the significant step of involving the President and his papers"; second, "courts should insist on a subpoena no broader than reasonably necessary to support Congress's legislative objective"; third, "courts should be attentive to the nature of the evidence offered by Congress to establish that a subpoena advances a valid legislative purpose"; and finally, "courts should be careful to assess the burdens imposed on the President by a subpoena."[155] Note, however, that the Court indicated that other considerations "may be pertinent as well" because "one case every two centuries does not afford enough experience" for the Court to develop "an exhaustive list."[156]

The case does not set any particular standard that Congress must meet to establish the legitimacy of its purpose, but it arguably places Congress on "a far shorter leash," as one pair of commentators put it, when the information it seeks belongs to the president.[157] In doing so, the Court decides that while the courts should accept as legitimate Congress's stated motives, they should also more closely examine the fit between those stated motives and the information it requests. It thus seems to acknowledge that sometimes Congress's information demands go beyond what its stated motivations actually require, and it is the judiciary's role to narrow such overbroad requests.[158]

153. *Id.* at 2034 (quoting THE FEDERALIST NO. 71, *supra* note 9, at 483–84 (Alexander Hamilton)).

154. *Id.* at 2035 (citing Clinton v. Jones, 520 U.S. 681, 698 (1997)).

155. *Id.* at 2035–36.

156. *Id.* at 2036.

157. Quinta Jurecic & Molly E. Reynolds, Mazars *Creep and the Jan. 6 Committee*, LAWFARE (Feb. 24, 2022, at 08:01 PT), https://www.lawfaremedia.org/article/mazars-creep-and-jan-6-committee [https://perma.cc/9NYJ-XJFF]. On remand after *Mazars*, the D.C. Circuit upheld a narrower version of the congressional subpoenas. *See generally* Trump v. Mazars USA, LLP, 39 F.4th 774 (D.C. Cir. 2022).

158. *See* Josh Chafetz, *Nixon/Trump: Strategies of Judicial Aggrandizement*, 110 GEO. L.J. 125, 142 (2021) ("Judicial institutions, the Court says, need this information to do justice; Congress, on the other hand, is likely to just be engaged in fishing expeditions.").

Congress seems to have taken the *Mazars* Court's message to heart when establishing the Select Committee to Investigate the January 6th Attack on the United States Capitol—an investigation Congress knew would face strong resistance from Trump and his allies. That Committee's charge explicitly empowered it to make "legislative recommendations" and propose "changes in law, policy, procedures, rules, or regulations" both to "prevent future acts" of such violence and to "improve the security posture of the United States Capitol Complex."[159] By clearly articulating this mandate—which is both broad and explicitly targeted at future legislative action—it provided both the executive and any courts examining its requests for information with a clear legislative purpose, rendering it less vulnerable to charges of seeking information for the impermissible purposes of inflicting punishment, exposure for its own sake, or aggrandizement of the investigators. When the committee involved is a standing committee with broad responsibilities, such as the House Judiciary Committee, having such a clearly defined mandate is less likely. Legislators could, however, specify in their information requests and subpoenas exactly what legislative purpose the inquiry seeks to further. And, as discussed below, subpoena recipients should insist that they do so.

C. Congressional Investigations and Individual Rights

Structural constitutional concerns such as separation of powers are not the only limits on congressional investigative authority: individual rights are also relevant, because like any other state actor, "Congress . . . must exercise its powers subject to . . . the relevant limitations of the Bill of Rights."[160] Thus, congressional witnesses enjoy, *inter alia*, the right to not incriminate themselves;[161] the right to due process;[162] and the rights to expression, assembly, and free exercise of religion as protected by the First Amendment.[163] In honoring these rights in the context of congressional

159. H.R. Res. 503, 177th Cong. § 4(b)(1), (c)(2) (2021); *About*, SELECT COMM. TO INVESTIGATE JAN. 6TH ATTACK ON U.S. CAPITOL, https://january6th-benniethompson.house.gov/about [https://perma.cc/4GVH-9ZED].

160. Barenblatt v. United States, 360 U.S. 109, 112 (1959); *see also* Watkins v. United States, 354 U.S. 178, 188 (1957) ("The Bill of Rights is applicable to investigations as to all forms of governmental action."); United States v. Rumely, 345 U.S. 41, 58 (1953) (holding that Congress may not demand that a witness produce information about protected First Amendment activities).

161. Quinn v. United States, 349 U.S. 155, 162 (1955) (holding that witnesses at congressional hearings are entitled to assert their Fifth Amendment right against self-incrimination).

162. Hannah v. Larche, 363 U.S. 420, 440–51 (1960) (discussing the nature of due process rights that apply to witnesses called before investigative and factfinding bodies).

163. *Watkins*, 354 U.S. at 178.

investigations, the Supreme Court has laid down some principles that serve to limit congress's investigative power.

In *Watkins v. United States*, the Supreme Court explored the relationship between individual rights and legislative purpose, opining that the courts "cannot simply assume . . . that every congressional investigation is justified by a public need that overbalances any private rights affected."[164] In this case, John Watkins was convicted of contempt of Congress for refusing to answer certain questions from a subcommittee of the House Committee on Un-American Activities.[165] While testifying freely regarding his own past behavior, he declined to answer questions regarding the past political activities of acquaintances. Such questions, he argued, were irrelevant to the Committee's work and thus beyond the scope of Congress's authority.[166]

The *Watkins* Court announced two individual rights–based limits on the power of a committee to compel witness testimony. These limits are grounded in the fact that congressional interest "in demanding disclosures from an unwilling witness"[167] is based in the committee's role as an agent of Congress.[168] Committees are thus "restricted to the missions delegated to them . . . to acquire certain data to be used by the House or the Senate in coping with a problem that falls within its legislative sphere. No witness can be compelled to make disclosures on matters outside that area."[169] As the Court recognized, despite the best of intentions, legislative inquiries untethered to a designated investigative purpose can "lead to ruthless exposure of private lives in order to gather data that is neither desired by the Congress nor useful to it."[170] So, one safeguard of individual rights comes from the requirement that a committee pursue only the information relevant to the identified purpose of the authorized investigation.

A related safeguard comes from the requirement that the purpose of the authorized investigation is identified with sufficient specificity to allow witnesses to determine whether a question posed to them is pertinent to that inquiry.[171] Indeed, when it comes to subpoenas for compulsory testimony—

164. *Id.* at 198.
165. *Id.* at 181.
166. *Id.* at 185.
167. *Id.* at 198.
168. *Id.* at 201.
169. *Id.* at 206; *see also id.* at 201 ("The more vague the committee's charter is, the greater becomes the possibility that the committee's specific actions are not in conformity with the will of the parent House of Congress.").
170. *Id.* at 205.
171. *Id.* at 208–09 ("It is obvious that a person compelled to make this choice is entitled to have knowledge of the subject to which the interrogation is deemed pertinent. That knowledge must be

the defiance of which can result in criminal prosecution[172]—the due process requirement of notice requires the investigating committee to provide that level of specificity.[173] So, while Congress is free to define a committee's investigative authority as it sees fit, individual rights "should not be placed in danger in the absence of a clear determination by the House or the Senate that a particular inquiry is justified by a specific legislative need."[174] Ultimately, in *Watkins*, the Court opined that the charter for the House Committee on Un-American Activities—to investigate all questions related to subversive and un-American propaganda activities in the United States[175]—even when combined with statements from the Committee Chair and the context in which the proceedings took place, was so broad as to prevent anyone from deducing exactly what "kind of investigation that the Committee was directed to make."[176] In other words, the Court determined that the stated purpose of the investigation was sufficiently vague that it raised due process concerns. It then used the principle of constitutional avoidance—a legislative inquiry that risks trenching on individual constitutional rights should be interpreted to do so only if there is no other interpretation of the relevant committee's charge—to hold that Watkins's conviction could not be upheld.[177]

The Court had reached a similar result in *United States v. Rumely*, in which a defendant charged with contempt of Congress raised First Amendment objections to his conviction. In that case, the Court determined that a congressional mandate to investigate "lobbying activities" did not authorize a House committee to require a witness to disclose the names of individuals who bought his "politically tendentious[]" books.[178] Such an interpretation, the Court noted, would essentially authorize a committee to "inquire into all efforts of private individuals to influence public opinion through books and periodicals, however remote the radiations of influence

available with the same degree of explicitness and clarity that the Due Process Clause requires in the expression of any element of a criminal offense.").

172. 2 U.S.C. § 192 ("Every person who . . . refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor.").

173. *See Watkins*, 354 U.S. at 198–99.

174. *Id.* at 205. The scope and purpose of an inquiry may be sought in the committee's "authorizing resolution, the remarks of the chairman or members of the committee, or even the nature of the proceedings themselves." *Id.* at 209.

175. *See id.* at 201–02 (quoting committee charge).

176. *Id.* at 204.

177. *See* United States v. Rumely, 345 U.S. 41, 46 (1953) ("Whenever constitutional limits upon the investigative power of Congress have to be drawn by this Court, it ought only to be done after Congress has demonstrated its full awareness of what is at stake by unequivocally authorizing an inquiry of dubious limits."); *Watkins*, 354 U.S. at 198 (noting that in *Rumely* "[i]t was concluded that, when First Amendment rights are threatened, the delegation of power to the committee must be clearly revealed in its charter").

178. *Rumely*, 345 U.S. at 42, 44.

which they may exert upon the ultimate legislative process," an outcome that raised doubts about the constitutionality of the inquiry under the First Amendment.[179] The upshot of *Watkins* and *Rumely* is essentially a clear statement rule: courts should not interpret a vague statement of the scope of a congressional inquiry to threaten individual constitutional rights unless "Congress has demonstrated its full awareness of what is at stake by unequivocally authorizing an inquiry of dubious limits."[180]

Unlike the challenges to the scope of congressional authority discussed in Section II.B, these individual rights claims operate not at the macro level of whether an investigation has a legitimate legislative purpose; rather, they allow the recipients of subpoenas to raise more granular objections to particular lines of inquiry. Thus, even affording great deference to Congress's right to define its own legislative priorities and information needs, the targets of congressional investigations have grounds on which to resist specific inquiries or demands that do not clearly further the legislative purpose that congressional investigators identified.

D. Practical Constraints on Congressional Investigations

As I and others have detailed elsewhere, federal interbranch disputes over congressional information requests are usually resolved in the political arena through negotiations between Congress and the executive branch,[181] at least in part because both Congress and the executive branch have tools at their disposal that allow them to pursue their institutional interests through self-help.[182] Congress can, for example, decline to confirm executive branch appointments or curb appropriations if the executive does not comply with investigative requests.[183] The executive, meanwhile, enjoys the benefit of preferring the status quo—if Congress cannot force it to disclose information

179. *Id.* at 46.
180. *Id.*
181. *E.g.*, Emily Berman, *Weaponizing the Office of Legal Counsel*, 62 B.C. L. REV. 515 (2021).
182. *See, e.g.*, JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 45–198 (2017).
183. *See id.* at 45–152 (discussing Congress's power to impact executive behavior through its control over appropriations and the Senate's role in confirming presidential appointments).

in its possession, it wins[184]—as well as doctrinal tools like executive privilege, which has proven to be immensely effective in thwarting congressional information access.[185]

When we view these disputes between the branches of the federal government as the *political* battles that they are (though often waged in the language of law), it becomes clear that their course will be dictated, at least in part, by the prevailing political dynamics. These dynamics can either facilitate congressional access to executive branch information or impose significant practical limits on that access. When, for example, Congress lacks sufficient political capital to force the executive branch to turn over information, the executive may feel free to reject Congress's information requests. By contrast, investigations focused on high-profile scandals or related to clear evidence of executive misconduct—instances in which Congress often enjoys significant political support for its investigation from the public and the executive branch expects to pay a political cost for refusing to cooperate—can succeed in dislodging relevant information from the executive.

In recent decades, however, the executive branch has become more and more successful at stonewalling Congress entirely.[186] There are multiple reasons for this, but a significant factor are the mechanics of enforcing the terms of congressional subpoenas. If an executive branch official defies a congressional subpoena and interbranch negotiations fail to yield a compromise, the traditional means of enforcing compliance has been to hold (or threaten to hold) the official in contempt of Congress. Over the past several presidential administrations, however, contempt of Congress charges have been revealed as toothless because Congress has no effective means of enforcing them. Efforts at enforcement can follow one of three paths. First, Congress can exercise its inherent contempt power, arrest the contemnor, and detain them until they comply with the subpoena or until that congressional session ends. For pragmatic reasons, Congress has not availed itself of this option since 1934[187] and is unlikely to do so today.[188]

184. *See, e.g.*, Emily Berman, *Recalibrating Interbranch Bargaining*, 66 WM. & MARY L. REV. 395, 403 (2024); Memorandum from William H. Rehnquist, Assistant Att'y Gen., Off. of Legal Couns., to John D. Ehrlichman, Assistant to the President for Domestic Affs., Power of Congressional Committee to Compel Appearance or Testimony of "White House Staff" (1971) ("[S]ince the Legislative Branch wants something the Executive Branch has . . . [a]ll the Executive has to do is maintain the status quo and [it] prevails.").

185. *See* Berman, *supra* note 181, at 547–48; Jonathan David Shaub, *The Executive's Privilege*, 70 DUKE L.J. 1, 28 (2020).

186. *See supra* note 185.

187. Jurney v. MacCracken, 294 U.S. 125 (1935) (denying writ of habeas corpus to individual held by the Senate Sergeant at Arms for contempt of Congress).

188. In 2024, the House did vote on a resolution whether to hold Attorney General Merrick Garland

The second enforcement option is to refer a finding of congressional contempt to the Justice Department, as envisioned by 2 U.S.C. § 192, which criminalized noncompliance with a congressional subpoena as a federal misdemeanor in 1857.[189] When a committee reports to the full House or Senate that a witness has defied a subpoena, "it shall be the duty" of the President of the Senate or the Speaker of the House to "certify" the contempt to the U.S. attorney, who "shall" bring the matter to a grand jury.[190] Despite this mandatory language, the Justice Department has determined that it retains discretion regarding whether to pursue contempt of Congress charges.[191] Moreover, its view is that when a contemnor has declined to comply with a subpoena at the president's direction, prosecution is inappropriate.[192] As a result, contempt of Congress prosecutions of either current or former executive branch officials are vanishingly rare.[193]

Because these first two options are ineffective, Congress has recently resorted to filing civil suits to enforce its subpoenas on several occasions.[194] Such suits, however, have met with limited success as well, in part because the pace of litigation guarantees that any definitive judicial order requiring compliance with a subpoena will not come until long after the Congress that initiated the investigation has ended.[195]

Another reason subpoena enforcement has proved difficult may be that, while the investigating committee is eager to press the issue, the full House

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in contempt of Congress and, as punishment, fine him $10,000 per day for refusing to turn over the audio of Special Counsel Robert Hur's interviews with then-President Biden regarding his handling of classified information, but the resolution failed 204-210. Jordain Carney, *House GOP Fails To Pass Effort To Fine Garland $10,000 Per Day*, POLITICO (July 11, 2024, at 13:39 ET), https://www.politico.com/live-updates/2024/07/11/congress/house-gop-flops-on-inherent-contempt-00167562 [https://perma.cc/LQT5-7FJH].

189. 2 U.S.C. § 192 (criminalizing "willfully" failing to comply with a valid congressional subpoena for either documents or testimony).

190. *Id.* § 194.

191. Olson Memo, *supra* note 116.

192. *Id.*

193. One notable exception is the case of Steve Bannon, who was prosecuted for contempt of Congress for failing to comply with the January 6 Committee. *See* Ashraf Khalil, *Steve Bannon Convicted on Contempt Charges for Defying Jan. 6 Committee Subpoena*, PBS (July 22, 2022, at 16:13 ET), https://www.pbs.org/newshour/politics/steve-bannon-convicted-on-contempt-charges-for-defying-jan-6-committee-subpoena [https://perma.cc/TL3A-SSUG].

194. *See* Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974); United States v. AT&T, 567 F.2d 121 (D.C. Cir. 1977); Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53 (D.D.C. 2008); Comm. on Oversight & Gov't Reform v. Lynch, 156 F. Supp. 3d 101 (D.D.C. 2016). What role courts *should* play in this interbranch drama is a hotly contested question. Some scholars argue that the courts should play no role in resolving these disputes because the political branches each have sufficient tools to assert their own interests. *E.g.*, CHAFETZ, *supra* note 182, at 182–95. Others view the executive's advantages too formidable for Congress to surmount on its own, and therefore courts should step in. *See* Berman, *supra* note 184, at 400–01; Jonathan David Shaub, *Interbranch Equity*, 25 U. PENN. J. CONST. L. 780, 785 (2023).

195. *See, e.g.*, Berman, *supra* note 181, at 558; Berman, *supra* note 184, at 451.

or Senate might not be similarly enthusiastic. If initial interbranch negotiations fail, threats of holding the witness in contempt might be more effective in prompting further executive branch concessions if it was clear that there would be consequences for defiance—consequences with respect to executive branch appointments or budget requests, for example. However, so long as a committee's requests are not backstopped by broad congressional willingness to press the issue, the best a committee can do is to resort to the ineffective contempt-of-Congress tool. Thus, absent strong public support or voluntary cooperation by the executive branch officials in possession of the information, Congress's ability to force disclosure is limited, even through the use of valid subpoenas.

III. IMPLICATIONS FOR INVESTIGATIONS OF STATE AND LOCAL LAW ENFORCEMENT

This Part extracts some principles that have emerged from the constraints on congressional investigations discussed above and considers whether and to what extent they provide guidance on thinking about when investigations of state and local law enforcement activities might be appropriate generally, as well as how they might apply to the investigation into Bragg in particular. Section A returns to the specific structural concerns raised in the context of law enforcement information; Section B examines the limits on the scope of congressional investigative authority more broadly; Section C reviews the role of individual rights; and Section D discusses practical constraints.

A. LOCAL LAW ENFORCEMENT AND FEDERALISM

The Justice Department argues that separation-of-powers principles that disallow Congress from engaging in prosecutorial activity render any inquiry into individual prosecutorial decisions, particularly in open investigations, inherently suspect. Bragg's argument that the congressional inquiry into his prosecution of former President Trump violates the principles of federalism is a similar argument—an argument grounded in the Constitution's structure. The Supreme Court itself has articulated this analogy: "[j]ust as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."[196]

To the extent that the DOJ's arguments about congressional access to federal law enforcement information based in the separation of powers are

196. Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

persuasive—a question on which I do not take a position here—federalism raises similar red flags when Congress demands information about local law enforcement investigations. Any conception of federalism that requires the preservation of states' "power to rule without interference in a policymaking domain of their own"[197] seems to render impermissible federal intervention into state or local prosecutions that influences the course of the investigation. The Supreme Court has explicitly stated that, even in seeking to vindicate federal interests, the federal government should "always endeavor[] to do so in ways that will not unduly interfere with the legitimate activities of the States."[198]

Congressional actions that exert political influence over state and local law enforcement decisions undermine *state* autonomy in the same way that efforts to exert political influence over federal law enforcement undermines *executive* autonomy. If federal prosecutors must be free from congressional influence when determining whether to indict under criminal laws passed by Congress, surely state and local prosecutors have at least as much discretion in implementing state laws—laws whose passage included no role for Congress. Indeed, even inquiries deemed relatively innocuous in the federal context—general inquiries into the Justice Department's policies regarding the implementation of criminal statutes[199]—would be problematic if directed at state and local prosecutors, unless those prosecutors were violating federal law or misusing federal funds.[200] Congress does not—and should not—have any role in regulating state and local law enforcement policies or priorities regarding the implementation of purely state criminal law.

Thus, the principles of federalism and prosecutorial independence both militate against congressional scrutiny of local law enforcement actions, whereas at the federal level, only the latter is implicated. Structural constitutional concerns, therefore, supply a legitimate argument that state and local prosecutors should resist congressional inquiries. As with their federal counterparts, the law-enforcement nature of the information does not mean that Congress should be automatically denied access. What it does mean is that safeguards for prosecutorial independence are equally as

197. *See* Gerken, *supra* note 51, at 1553.

198. Younger v. Harris, 401 U.S. 37, 44 (1971); *id.* at 46 (articulating a "fundamental policy against federal interference with state criminal prosecutions").

199. *See* Peterson, *supra* note 121, at 1429.

200. By contrast, if local agencies are working with federal entities to enforce federal law or are employing federal funds for their operation, then Congress's interests would look much like they do when considering federal law enforcement activities. *See id.* at 1428 ("Congress has an obvious legislative interest in evaluating statutes that are enforced by the DOJ, and information on how those statutes are being enforced is relevant to this legislative inquiry."). In no case, however, is Congress's claim on information stronger in the local context than it is in the federal context.

important regardless of whether that prosecutor is a federal or state actor. So, while a tentative consensus has developed at the federal level that inquiries into specific, ongoing investigations should be viewed with some skepticism, and, as a general rule, information about such investigations should not be shared outside the prosecutor's office, that principle should apply even more forcefully in the state and local context.

This concern over improper external influence was particularly salient in the Bragg investigation. To be sure, the high-profile nature of the case ensured that, even in the absence of congressional action, it would attract significant attention and strong opinions, both in favor of and against the prosecution.[201] However, the inevitable pressure that public notoriety attracts poses far less of a threat to prosecutorial independence than scrutiny coming from another government institution, especially one with a federal megaphone (and control of the federal treasury). Indeed, the congressional investigators' actions seemed designed not necessarily to glean information from Bragg's office, but rather to maximize external criticism of its prosecutorial decisions. First, as Bragg himself pointed out in his district court complaint, the Committee's rationale for investigating shifted over time. What explicitly started as an effort to "hold Alvin Bragg to account" morphed into an inquiry into matters more amenable to congressional action once the investigation faced pushback from the DA's office.[202] Second, the House Judiciary Committee held a rare "field hearing" in New York, purportedly to draw attention to high crime rates in New York City. Given, however, that it was the only such hearing the Judiciary Committee held and that Committee Chairman Jordan's Ohio district had a murder rate three times that of New York City at the time,[203] the hearing seemed designed more to disparage Bragg's performance than to actually address the very real problem of violent crime.

In the end, the Bragg investigation seems to have ended up in the same place as many federal law enforcement investigations do: Bragg offered up information clearly within the scope of legitimate congressional inquiry—

201. *See* Brief for Jeffrey A. Udell & Alexander Kahn as Amici Curiae at 2, Bragg v. Jordan, 669 F. Supp. 3d 257 (S.D.N.Y. 2023) (No. 23-3032).

202. *See* Complaint, *supra* note 2, at 2, 5 (adding that "Chairman Jordan and his congressional allies . . . changed their story multiple times, creating as it suits them a scattershot hodgepodge of new purported legislative interests").

203. Lauren-Brooke Eisen & Ames Grawert, *Jordan's Field Hearing on Crime in NYC Is Bad Disguise for Attacks on DA Bragg*, BRENNAN CTR. (Apr. 19, 2023), https://www.brennancenter.org/our-work/analysis-opinion/jordans-field-hearing-crime-nyc-bad-disguise-attacks-da-bragg [https://perma.cc/LY7Q-XDRE].

information about how his office spent federal funds—but declined to provide specific information about the Trump investigation until after the prosecution was completed and the defendant was sentenced.[204]

B. THE SCOPE OF CONGRESS'S AUTHORITY

As laid out in Section I.C.2, over the short course of the Bragg investigation, congressional investigators articulated no less than five distinct legislative purposes behind their information demands. This Section will look at each of these purposes in turn and assess whether they articulate a legitimate legislative purpose. Spoiler alert: some do, and some do not. It will then consider how Congress's articulation of its investigative purposes should impact the information requests issued to Bragg and other local prosecutors.

At the very outset of the dispute, legislators failed to articulate a legitimate legislative purpose. The initial motivations congressional investigators expressed arose from their view that Trump's prosecution was political in nature.[205] As such, the Committee sought to require Bragg to identify his motives for bringing the prosecution and to "hold [him] to account" for the prosecution.[206] Thus, at least initially, the investigation was justified solely as an attempt to second-guess the basis of Bragg's decision to launch an investigation and prosecution with which the Committee's majority members disagreed. Probing or regulating the motivation behind local law enforcement's exercise of prosecutorial discretion, however, does not fall within the scope of either the Judiciary Committee's mandate or Congress's constitutional role.

Moreover, the very fact that local prosecutors tend to be elected officials—a fact that the Committee cites in support of its characterization of the Bragg investigation as political—argues *against* the propriety of congressional involvement. Local district attorneys' electoral success relies on winning their constituents' support for their priorities and policies. The Supreme Court has insisted that federal policy not swamp state governments' ability to remain both "responsive to the local electorate's preferences . . . [and] accountable to the people."[207] Indeed, one commonly cited benefit of our federalist system is that the states provide additional

204. *See* Andrew Solender, *Alvin Bragg To Testify to Congress As GOP Bashes Trump Case*, AXIOS (June 11, 2024), https://www.axios.com/2024/06/11/alvin-bragg-testify-congress-trump-jim-jordan [https://web.archive.org/web/20250331070913/https://www.axios.com/2024/06/11/alvin-bragg-testify-congress-trump-jim-jordan].

205. *See supra* Section I.C.2.

206. *See supra* note 202 and accompanying text.

207. New York v. United States, 505 U.S. 144, 168 (1992).

opportunities for political participation and expression of views that may not be represented at the federal level.[208] The exercise of an elected prosecutor's prosecutorial discretion is therefore part and parcel of sovereign states' ability to set local policy free from federal control.

Next, the Committee expressed concern that the alleged political nature of the prosecution "could have a profound impact on how Presidents choose to exercise their official duties while in office."[209] This justification was of dubious legitimacy even when it was first articulated. Any prosecution can be challenged in the normal course of litigation as a vindictive or politically motivated prosecution. Evaluating that charge is the role of a judge, not the role of Congress. Thus, sitting presidents have always known that, should they be targeted for politically motivated prosecution, there is an avenue for raising such a challenge. The assumption that such a concern would affect a president's official actions is therefore speculative at best. The justification became even less forceful a rationale after the Supreme Court's decision in *Trump v. United States*.[210] That case conferred on the president criminal immunity for any official acts, rendering the Committee's concern about the impact of prosecution on such acts irrelevant. Since there cannot be any criminal prosecution for the way "Presidents choose to exercise their official duties while in office," Congress need not worry about state or local prosecutors pursuing such prosecutions. Thus, the mere concern about the political nature of a local prosecution never justified a legislative inquiry and certainly does not do so post-*Trump v. United States*.

Subsequently, the Committee provided justifications that are plausibly within the realm of valid legislative inquiry as well as within the scope of the Judiciary Committee's jurisdiction—several related to potential legislation and one related to Congress's spending power. The first piece of potential legislative change was the idea that it might be wise to empower former and current presidents and vice presidents to remove any case against them from state court to federal court.[211] This remedy is already available in civil or criminal cases against the United States, a federal agency, or a person holding federal office, if the case relates to acts taken "under color of such office."[212] This type of legislative reform is clearly related to the Judiciary Committee's jurisdiction over the judiciary and judicial proceedings, federal courts and judges, and revision and codification of federal statutes.[213] And

208. *See supra* note 51 and accompanying text.

209. INTERIM STAFF REPORT, *supra* note 88, at 32.

210. Trump v. United States, 144 S. Ct. 2312 (2024).

211. *See supra* note 94 and accompanying text.

212. 28 U.S.C. § 1442.

213. *See* JASON A. SMITH, CONSTITUTION: JEFFERSON'S MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 116-177, at 454 (2021).

since Congress controls the jurisdiction of the federal courts,[214] any investigation into whether to allow removal of local prosecutions to the federal courts has a legitimate legislative purpose. Whether that ability to remove should be extended to cases against someone holding federal office in cases unrelated to their official actions is a legitimate question for Congress to explore.

The Committee provided two additional legislation-related motives for its investigation. The first is consideration of whether Congress should clarify the preemptive effect of the FECA; the second is consideration of whether to amend "the authorities of special counsels [to] better delineate their relationships with other prosecuting entities."[215] As with removal statutes, any amendment of federal legislation, such as FECA, is fair game for congressional action—as is legislation concerning the Justice Department's use of special prosecutors. Finally, the inquiry cited the states' use of federal funds as an underlying rationale for investigating. Congress is well within its rights to require any state or federal agency to account for the ways in which it is spending federal funds. That is, after all, a primary purpose of congressional oversight and, arguably, inherent in the responsible exercise of the appropriations power. So, to the extent that these proposals would modify Justice Department programs that supply federal funds to state and local law enforcement, these proposals, too, fall within the scope of the Committee's jurisdiction and Congress's authority.[216] In short, whatever one believes about the true motivations of congressional leaders and Jordan in pursuing the investigation of Bragg and other local law enforcement officials, the Committee articulated justifications that arguably bring the investigation writ large within both Congress's power as a whole and the Committee's mandate in particular.

Articulating a legitimate legislative purpose, however, does not alone determine the validity of a legislative information request or subpoena. If, as posited above, the structural constitutional requirements of federalism are equally as integral to effective functioning of government institutions as the separation-of-powers doctrine, concerns that the Supreme Court articulated in *Mazars* might also justify imposing some judicial safeguards on congressional subpoenas seeking information from state and local prosecutors. When congressional investigations implicate the separation of

214. U.S. CONST. art. III, § 2.

215. *See supra* Section I.C.2.

216. U.S. CONST. art. I, § 8, cl. 1 (giving Congress the power to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and the general Welfare of the United States"); South Dakota v. Dole, 483 U.S. 203, 207–08 (1987) (authorizing conditional funding).

powers, the *Mazars* Court noted, courts must "be attentive to the nature of the evidence offered by Congress to establish that a subpoena advances a valid legislative purpose."[217] If congressional information requests "may aim to harass the President or render him 'complaisan[t] to the humors of the Legislature,' " and thereby "exert an imperious controul" over the president, those same risks exist in the context of local law enforcement.[218] In essence, the *Mazars* Court determined that while the information Congress sought was private financial information, Congress's pursuit of that information had sufficient implications for executive branch autonomy such that some additional scrutiny of congressional purposes was in order.

In the Bragg investigation, the information at issue is not information about an executive official's private life; rather, it is information about a state executive officer's performance of official duties.[219] Nevertheless, as discussed above, such requests threaten state autonomy in the same way that Congress's inquiry into the president's personal life threatened executive autonomy (and thus the separation of powers). Indeed, Bragg's office plainly viewed the investigation as one intended to influence the exercise of its powers—to, in the Supreme Court's words, "exert an imperious controul" over prosecutorial decisions.[220] In its complaint seeking to enjoin the congressional subpoena issued to Pomerantz, Bragg's office explicitly invoked the *Mazars* factors in arguing that the subpoenas should be quashed.[221] The district court rejected the *Mazars* analogy, however, because

217. Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2036 (2020). The Court also set out several "special considerations" that courts should account for in congressional subpoena cases involving sitting presidents: "whether the asserted legislative purpose warrants the significant step of involving the President and his papers"; whether "other sources could reasonably provide Congress the information it needs in light of its particular legislative objective"; whether the legislative subpoena is "broader than reasonably necessary to support Congress's legislative objective"; whether the evidence of Congress's legislative purpose is "detailed and substantial"; and how extensive are the "burdens imposed on the President by [the] subpoena." *Id.* at 2022, 2035–36.

218. *Id.* at 2034 (quoting THE FEDERALIST NO. 71, *supra* note 9, at 483–84 (Alexander Hamilton)).

219. In the federal context, concerns about congressional overreach in those circumstances would be addressed through executive privilege and the other political constraints discussed above. In that context, therefore, there is no need for a *Mazars*-like examination of the basis for the investigation. The Manhattan DA, however, has no analogous privilege to assert in response to congressional requests for official information.

220. *Mazars*, 140 S. Ct. at 2034.

221. Specifically, it argued that the Committee's requests failed the four-part *Mazars* test because

> the purported legislative purposes Chairman Jordan has invoked to support the subpoena are unsupported, speculative, specious, and/or unconstitutional. The subpoena is more broad than reasonably necessary to support any claimed congressional objective. Chairman Jordan and the Judiciary Committee have offered no evidence in support of any legislative purpose they have attempted to invoke to justify their subpoena. And the subpoena is unduly burdensome because it would substantially burden both the New York criminal justice system and the District Attorney's Office as it prepares for Mr. Trump's criminal trial.

Complaint, *supra* note 2, at 46. The complaint went on to argue that the subpoena "also burdens the District Attorney and the criminal justice system by politicizing Mr. Trump's trial and undermining the public's faith in the integrity of the criminal justice system. The Committee's subpoena to Mr. Pomerantz the subpoena being challenged was not the president's private papers, but rather a subpoena to a private individual who had written a book about the subject on which Congress sought information.[222] Reasonable minds can disagree as to whether that was the right outcome in that particular case. One can argue that burdening a former employee cannot have an effect on current staff in the office. On the other hand, such burdens send an ominous message to those employees, indicating that even after their public service has ended, they could be subjected to congressional inquiries into the way that they performed their job. As the Supreme Court argued in its recent case about presidential criminal immunity, concern over future consequences such as these can chill a government official's behavior.[223] And while congressional investigation is not as severe a consequence as criminal prosecution, it does come with hefty legal bills, significant disruption of daily life, and a great deal of anxiety.

Regardless of the appropriate answer in the context of former law enforcement officials, the argument for a *Mazars*-like inquiry into whether a subpoena to the current district attorney or their staff is justified is compelling. Again, this argument relies on the analogy between separation of powers and federalism concerns articulated above. However, if the *Mazars* safeguards are necessary to protect structural constitutional protections for the executive, it seems logical to require them when protecting structural constitutional protections for state sovereignty as well.

C. Congressional Investigations of Local Law Enforcement and Individual Rights

The individual rights cases regarding congressional subpoena enforcement foreground the idea that a subpoena must not only be issued pursuant to a legitimate legislative investigation within the scope of the relevant committee's jurisdiction, but also seek information that is pertinent to that legislative inquiry.[224] Moreover, the legislative interest must be defined at a level of specificity that allows the targets of subpoenas to assess the pertinence of the information they are being asked to provide.[225] To be sure, *Watkins* made it plain that witnesses must look broadly to ascertain legislative purpose in order to determine the pertinence of specific information. This means reviewing not only a committee's charter, but also

and its other intrusive serial requests for documents and testimony are plainly aimed at burdening the District Attorney's Office by harassing them, attempting to intimidate them, and trying to distract them from their preparation of Mr. Trump's criminal case." *Id.*

222. Bragg v. Jordan, 669 F. Supp. 3d 257, 269–70 (S.D.N.Y. 2023).

223. Trump v. United States, 144 S. Ct. 2312 (2024).

224. *See supra* notes 40–41 and accompanying text.

225. *See supra* note 173 and accompanying text.

the subpoenas themselves, the committee chair's statements, and even the context of the investigation as a whole.[226] Congress thus has significant leeway in establishing its need for particular information. Nevertheless, viewed through this framework, it is not enough to say that a particular committee had a valid legislative purpose. It must also state that purpose clearly, and the information it demands must be pertinent to that purpose.

So how did the Judiciary Committee's subpoenas and other information requests fare under these rules? Recall that the Committee asked Bragg's office as well as two former employees for: (1) documents and communications between or among the DA and the Justice Department regarding the DA's investigation of Trump; (2) documents and communications involving Dunne and Pomerantz referring to Trump; and (3) documents and communications relating to the DA's use of federal funds. Some of these demands for information ran afoul of the individual rights protections afforded to the subject of congressional subpoenas.

Consider first the question whether presidents and vice presidents should be empowered to remove their cases from state court to federal court and whether the information the Judiciary Committee sought from Bragg, Dunne, Pomerantz, and Colangelo is pertinent to this inquiry. Any pertinent information would have to be from the first or second category of requested information, because it is not clear why any communications about the use of federal funds would be pertinent to the question of removal. It is a closer question, however, whether communications between and among the DA, the Justice Department, and former prosecutors would be pertinent. Imagine, for example, such communications indicated that the prosecution was in fact unsupported by probable cause or admissible evidence but that Bragg and his assistants chose to press forward nonetheless. Such communications might be viewed as evidence that Trump could not receive fair treatment from Bragg. However, the fairness concerns justifying removal are fairness of the *venue*, not prosecutorial fairness writ large. Indeed, even if the case were to be removed to federal court, Bragg would remain the prosecutor and the charges would remain the same state law charges.[227] So in the end, the communications the Committee sought seem unrelated to the question whether the defendants in such cases should be able to remove their proceedings to federal court.

226. *See supra* notes 175–76 and accompanying text.

227. *See* 28 U.S.C. § 1442(a)(1) (allowing removal of a civil or criminal case against a person holding federal office if the case relates to acts taken "under color of such office"); Arizona v. Manypenny, 451 U.S. 232, 242 (1981) ("[T]he invocation of removal jurisdiction by a federal officer does not revise or alter the underlying law to be applied.").

With respect to amending FECA to expand its preemptive effect, the Judiciary Committee is on stronger footing. Because Bragg alleged that a violation of FECA was one of the underlying crimes that Trump's falsification of business records was alleged to have furthered,[228] the DA's office necessarily had to interpret what FECA permitted and what it did not permit. It is thus likely that communications among the employees of the DA's office would include interpretations of FECA and arguments as to why they applied to the facts alleged against Trump. If the Judiciary Committee's concern was that state or local prosecutors were misinterpreting or abusing FECA such that its enforcement needed to be limited to federal officials, information about how that law was interpreted by Bragg's office was certainly pertinent. Of course, in those circumstances, only documents or communications that dealt with the meaning and application of FECA would be pertinent to Congress's inquiry, not any and all communications regarding the investigation. As written, the requests for *all* documents and information referring to Trump are overbroad if premised on the potential need for FECA amendments.

Similarly, one can imagine communications in the first two categories of information that are pertinent to Congress's legitimate consideration of whether and how to modify the rules surrounding special counsels. As with the FECA amendment, however, such information and communications would be limited to any that include information about the relationship between the special counsel and Bragg's office, not all information related to the prosecution of Trump.

Finally, Congress is well within its rights to require any state or federal agency to provide information about the ways in which it is spending federal funds. From the outset, Bragg's office expressed a willingness to meet and discuss how to provide Congress what it needed in this regard.[229] The Committee declined, however, to take the DA's office up on this offer. When Congress and the executive clash over congressional information requests, the courts have said that the branches have a constitutional obligation to seek to resolve their dispute through a process of mutual accommodation and negotiation.[230] It seems unlikely, therefore, that courts would be willing to enforce a subpoena that Congress issued before it had made any effort to reach an accommodation with the subpoena's target.

228. *See supra* note 96 and accompanying text.

229. *See supra* note 71 and accompanying text.

230. United States v. AT&T, 567 F.2d 121, 127 (D.C. Cir. 1977) (holding that the political branches' responsibility to seek mutually acceptable resolutions through "a spirit of dynamic compromise" is a constitutional obligation).

Note, however, that even if the Judiciary Committee's information requests were overbroad given the stated reasons for the legislative inquiries, this does not invalidate the subpoena in its entirety or vitiate its recipients' obligations to comply with it. Rather, it provides the subpoena's targets with reasons to resist providing *certain* information or answering *certain* questions. What that may mean in practice is that witnesses must appear to give testimony or turn over some communications, but they may refuse to answer nonpertinent questions or turn over nonpertinent documents. If the concern is that Congress is exerting improper influence over local prosecutors' decision-making, requiring witnesses to appear at all may constitute the harm, regardless of whether they must answer all questions posed to them. After all, testifying before Congress is incredibly burdensome. Preparation for such testimony takes time that could then not be spent on the ongoing prosecutions, and it takes resources, as most unwilling congressional witnesses would be wise to retain counsel to help them prepare.

As with all witnesses, state law enforcement officials are protected by the limits on congressional subpoena enforcement imposed by individual rights. In addition, such officials might also have numerous nonconstitutional objections to providing certain information. Issues such as the preservation of grand jury secrecy, the professional obligation not to discuss ongoing matters outside of court, and claims of deliberative process or attorney-client privilege all might provide additional grounds on which state officials could resist information disclosure to Congress. As with individual rights claims, however, these bases for objection would apply to particular pieces of information, rather than to the entire investigation.

D. PRACTICAL CONSTRAINTS ON CONGRESSIONAL INVESTIGATIONS OF LOCAL LAW ENFORCEMENT

Finally, as noted above, the relative absence of binding doctrine regarding congressional–executive information disputes derives from the sense that these are political battles and that each branch has sufficient means at its disposal to defend its institutional interests. It is therefore worth considering the extent to which state and local prosecutors have the tools at their disposal to safeguard state autonomy from congressional overreach. In other words, in the language of federalism theory, Is this an instance in which process theory—which argues that states have sufficient tools available to them in the political arena to protect their own sovereign interests—applies, or is some other enforcement mechanism necessary?[231] As noted above, the

231. *See supra* notes 55–56 and accompanying text.

executive has been relatively successful, particularly recently, in resisting congressional efforts to access executive branch information. The question then becomes whether state and local prosecutors will be more or less able than the executive branch to push back on legislative information requests.

The federal political branches' ability to impose their will on one another depends on numerous circumstantial factors—the level of public support for their position, their relative political capital, historical precedent, and how committed to acquiring the information Congress is versus how adamantly the executive insists on nondisclosure, among others.[232] In some ways, state and local prosecutors have an advantage over the federal executive in resisting congressional information requests. First, while the federal executive must consider the views of an ideologically heterogeneous nationwide constituency, state and local law enforcement officers are most often elected by their local constituency, whose preferences are likely to align with their own. In other words, Bragg is unlikely to face adverse electoral consequences or blowback in the public arena for resisting congressional inquiries into his office's activities—indeed, the opposite is likely true. After all, this is one aspect of federalism that is often lauded—the ability for states and localities to be responsive to the local population and to reflect regional political and policy differences. Second, local prosecutors do not rely on the federal legislature to confirm their personnel appointments, to fund their operations, or to define the scope of their authorities. So, in that sense, Congress has fewer levers to pull in order to exert pressure on these offices.

On the other hand, to the extent that state and local law enforcement agencies rely on federal funding, supplies, and training, Congress does in fact have significant leverage over them. State and local law enforcement agencies are the beneficiaries of billions of federal dollars each year.[233] These funds support a wide range of programs, including money to hire additional law enforcement personnel, provide victims' services, receive training and technical assistance, and more[234]—benefits that district attorneys would not want to jeopardize by antagonizing congressional investigators. That said, just as states rely heavily on federal funding, federal law enforcement leans heavily on state and local officials to enforce the vast majority of criminal law. In that way, this is a symbiotic relationship, like the one between the federal legislative and executive branches, in which each

232. *See* Berman, *supra* note 181, at 526–31.

233. *See* Grant Services Team, *2023 DOJ Budget Highlights Enforcement and Safety Priorities*, LEXIPOL (Jan. 12, 2023), https://www.lexipol.com/resources/blog/2023-doj-budget-highlights-enforcement-and-safety-priorities [https://perma.cc/9ZFE-6JMS].

234. *See id.*; *Grants*, DEP'T JUST., https://www.justice.gov/grants [https://perma.cc/LG3B-YAUA].

side has incentives to retain good relationships. So, on the purely political dynamics, states are probably at least as well suited to resist congressional overreach as the federal executive.

One complication in this story, however, is that local prosecutors are not *themselves* sovereign states. They are one component of a larger sovereign entity, and that sovereign entity may be of more than one mind regarding any given prosecutor's decisions. Indeed, recent years have seen state governments dominated by one political party pressuring local prosecutors from the other political party to take (or not take) certain investigative or prosecutorial steps.[235] So if a local prosecutor's state government does not support the prosecutor's actions, that is another potential source of pressure to cooperate with a congressional investigation that the federal executive need never worry about. Different local prosecutors are quite differently situated from one another with respect to the degree of homogeneity of prosecutorial priorities within their state. As a result, some offices may be less able to resist congressional information requests than others. Each will depend on the particular political dynamics within their state. In the case of Bragg, the state government in Albany did not step into the conflict. In fact, the state Attorney General's office was pursuing its own investigation into Trump's alleged private misdeeds and thus was rowing in the same direction as Bragg. However, that convergence of interests is by no means guaranteed.

Another tool that state prosecutors lack is the protection of executive privilege, which has proved a powerful tool for resisting congressional subpoenas of executive officials. Not only does this deprive them of a means of resisting congressional inquiries that has proved quite effective at the federal level, but it also renders state officials more likely to be vulnerable to prosecution for contempt of Congress. As noted above, the executive branch has determined that executive officials cannot be prosecuted for contempt if they resist disclosure to Congress on the president's instructions.[236] State and local officials lack this shield. And while it is unclear whether the Justice Department would prosecute a state official for contempt of Congress, one can imagine a DOJ controlled by the same party whose members are spearheading the relevant investigation doing so.[237]

235. *See, e.g.*, Gary Fineout, *DeSantis Suspends Another Elected Prosecutor in Move Derided As 'Politically Motivated'*, POLITICO (Aug. 9, 2023, at 12:48 ET), https://www.politico.com/news/2023/08/09/desantis-suspends-state-attorney-worrell-00110445 [https://web.archive.org/web/20250823025021/https://www.politico.com/news/2023/08/09/desantis-suspends-state-attorney-worrell-00110445].

236. *See supra* note 191 and accompanying text.

237. *See generally* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006) (arguing that legislators tend to pursue the interests of their political parties rather than the interests of Congress as an institution).

Should a state or local law enforcement office lack the ability to resist congressional interference through pragmatic, practical means, it might need to rely on judicial intervention to resist congressional encroachment, as some scholars advocate in the federal context as well.[238] Here, local prosecutors have an advantage over Congress. Their timeline is likely longer than the two-year countdown congressional investigators face upon assuming office. In Bragg's case, he sought judicial intervention to prevent Pomerantz from complying with a subpoena, not to avoid complying with his own. The district court found the Pomerantz case to be an easy question.[239] However, because that subpoena was issued to a private citizen rather than a state official, the court was able to sidestep the difficult state autonomy questions discussed above. As a result, it is difficult to predict how courts might treat suits pitting local prosecutors against congressional committees.

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The above analysis suggests numerous principles that should apply when Congress investigates local prosecutors. First, as with investigations into federal law enforcement, open, ongoing investigations should be presumptively off limits. If there are indications that state or local law enforcement are violating individual rights or misusing federal funds, Congress should certainly pursue such concerns. However, rarely will such investigations need immediate access to information about open investigations.

Second, investigators' proffered justifications—and the extent to which the information they seek is pertinent to or necessary for a valid legislative inquiry—should be examined to ensure that both legislative and state sovereign interests are accommodated. The Supreme Court in *Mazars* identified four factors in this inquiry: first, courts should undertake a careful assessment of "whether the asserted legislative purpose warrants the significant step of" involving a local law enforcement office; second, subpoenas should be "no broader than reasonably necessary to support Congress's legislative objective"; third, "the nature of the evidence offered by Congress" must "establish that a subpoena advances a valid legislative purpose"; and finally, the burdens imposed on the president—or in this case, the local law enforcement office—must be considered.[240]

238. *See* sources cited *supra* note 194.

239. Bragg v. Jordan, 669 F. Supp. 3d 257, 276 (S.D.N.Y. 2023) ("The sole question before the Court at this time is whether Bragg has a legal basis to quash a congressional subpoena that was issued with a valid legislative purpose. He does not.").

240. *See supra* notes 153–56 and accompanying text.

Given the federalism implications, I would add a fifth requirement here: a clear statement rule. In numerous circumstances, the Supreme Court has held that, if the federal government intends to wade into an area traditionally reserved for state action, it must make a clear statement to that effect.[241] In the absence of such a clear statement, courts should assume that Congress did not intend to upset the federal–state balance. Thus, Congress or the investigating committee should have to articulate a clear statement of legislative purpose that explains why it must entangle itself in what are usually purely state or local matters. Further, that clearly stated purpose should be articulated in ways that allow the recipients of congressional information requests to ascertain whether the requested information is pertinent. Recall that clear statement rules and constitutional avoidance apply in the face of vague or ambiguous statements of congressional purpose in order to avoid infringing on witnesses' First Amendment or due process rights when faced with specific questions.[242] Local law enforcement should not have to read tea leaves or scour legislators' public statements to discern the purpose of any given inquiry or to determine what specific information is pertinent to that inquiry.

Finally, the same constitutional obligation to seek to accommodate one another's interests that applies in the context of congressional–executive information disputes should apply in congressional–local information disputes. This means that congressional committees must be willing to engage in good-faith negotiations to explain their legitimate information needs and to respect local law enforcement's sovereign autonomy.

CONCLUSION

The central puzzle at the heart of delimiting Congress's investigative powers is how to enable valid investigations and discourage fishing expeditions, overreach, and investigations with no true legislative purpose behind them. This line-drawing exercise is destined to fail, because what constitutes a fishing expedition is often in the eye of the beholder. The very same elected officials who decry investigations launched by their political rivals as abuses of power are the ones launching aggressive investigations when given the opportunity. This long-standing dilemma has only been exacerbated by the extreme partisan polarization and mutual disdain between partisans that are the hallmark of this particular political moment. In such an environment, political actors need only please their most avid supporters and

241. Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (the Supreme Court presumes that Congress does not intend to "upset the usual constitutional balance of federal and state powers"); Bond v. United States, 572 U.S. 844, 848 (2014).

242. *See supra* note 180 and accompanying text.

can afford to alienate large blocs of the electorate. Partisan actions are rewarded with attention and fundraising windfalls, while compromise risks inspiring a primary challenge in the next election. In such an environment, we must recognize that politicians—including congressional investigators—have strong incentives to pursue investigations designed to mobilize partisans rather than to improve the function of government. And, as Justice Roberts admonished in *Mazars*, we cannot ignore the prevailing dynamics.[243] At the same time, Congress does have a critical role to play. Particularly in an era of breathtakingly expansive claims of executive power, it is important to ensure that Congress can, when it decides to do so, successfully investigate legitimate questions underlying effective oversight and legislation. It is thus important to build a legal regime that provides tools for resisting inquiries justified by pretextual reasons while satisfying compliance with legitimate information needs. This Article sought to explore what that regime might look like in the context of congressional investigations of state and local prosecutions. It demonstrated that, as in purely federal disputes over information, there is no easy means of differentiating between valid congressional requests and congressional overreach. However, those federal disputes also provide some guidance regarding how to think about how clashes between Congress and local law enforcement should be analyzed and resolved.

243. Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2034 (2020) ("We would have to be 'blind' not to see what '[a]ll others can see and understand': that the subpoenas [represent] a clash between rival branches of government over records of intense political interest for all involved.").