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WHEN POWERS COLLIDE: CONGRESS'S POWER TO INVESTIGATE, THE PRESIDENT'S POWER TO INVESTIGATE CRIMES, AND THE SEPARATION OF POWERS

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INTRODUCTION

"The congressional investigation can be an instrument of freedom," Senator Sam J. Ervin, Jr., Chairman of the Watergate Committee, wrote. "Or it can be freedom's scourge."[1] As I argue in this note, when Congressional investigations improperly intrude

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[1] Sam J. Ervin, Jr., *Introduction* to JAMES HAMILTON, THE POWER TO PROBE: A STUDY OF CONGRESSIONAL INVESTIGATIONS, at xi, xii (1976).

into the Executive's exclusive power to investigate criminal wrongdoing, those investigations become freedom's scourge.

The Constitution implies Congress's power to investigate because it is necessary to carry out its enumerated powers. Congressional investigations are constrained by three major limitations; one is practical and the other two are legal. Those limitations are resource limitations, legislative purpose limitations, and separation of powers limitations. Resource limitations are practical limitations and are imposed by the complexity of the inquiry and the committee's available resources, such as staffing, time, and money. Legislative purpose limitations are the limitations imposed by the constitutional requirement that investigations must advance a valid legislative purpose. Separation of powers limitations are the limitations imposed by the Constitution that bar a legislative investigation from becoming an exercise of judicial or executive power. In other words, Congress's "power to investigate must not be confused with any of the powers of law enforcement; those powers are assigned under our Constitution to the Executive and the Judiciary."[2]

The modern history of congressional investigations shows that sometimes they proceed concurrently with open Executive Branch criminal investigations, whether independently to determine what occurred or to oversee (and perhaps influence) Executive discretion in charging decisions.[3] It appears at times that legislative committees seek to exercise a fundamentally Executive power by investigating criminal wrongdoing that does not fall within the impeachment power. Specifically, I consider whether—assuming unitary Executive theory—Congress may undertake criminal investigations while exercising its investigatory power. Here, an understanding of unitary

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[2] Quinn v. United States, 349 U.S. 155, 161 (1955).

[3] *See infra* Section III.A (discussing the Secretary Hillary Clinton E-Mail Server episode); *see also infra* Section III.B (discussing the January 6th Committee investigation of Dr. John C. Eastman).

executive theory is important, because it places emphasis on the separation of powers and cautions that threats to each branch's independence are greatest when lines are blurred between the branches.

Part I discusses the legal backgrounds of congressional investigations and the power to investigate crimes. Part I then establishes that the Executive has the exclusive power to investigate crimes. Part II develops a rule for limiting legislative investigations of crimes and criminal activity. Finally, Part III applies that rule in the context of two case studies. The first case study examines congressional committees' investigations of then-Secretary of State Hillary Clinton's use of a private e-mail server during her government service. The second case study examines the investigation by the Select Committee to Investigate the January 6th Attack on the United States Capitol of potential wrongdoing by Dr. John C. Eastman.

I. LEGAL BACKGROUND

Before turning to the case studies, one must understand the legal rules that are implicated by Congress's investigation of crimes. I will discuss the scope of Congress's investigatory power and how the President holds the power to investigate crimes exclusively.

A. CONGRESS CANNOT EXERCISE A NON-LEGISLATIVE POWER UNDER THE GUISE OF ITS INVESTIGATORY POWER

The Constitution grants certain legislative powers to Congress[4] and vests the executive power in the President of the United States.[5]

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[4] U.S. CONST. art. I, § 1, cl. 1.
[5] U.S. CONST. art. II, § 1, cl. 1.

The powers granted to Congress are limited to the "legislative Powers herein granted" in the Constitution.[6] In other words, Congress may only legislate on the matters the Constitution permits it to.[7] While the power to investigate is not explicitly granted to Congress, the Supreme Court has recognized that the power to conduct investigations "is inherent in the legislative process" and is broad.[8] Although that power is broad, it is not boundless. Congress may investigate "only in furtherance of a legislative purpose."[9]

However, Congress has such broad authority to legislate that nowadays almost anything can give rise to a valid legislative purpose.[10] Therefore, generally, there is no real limit imposed by the valid legislative purpose requirement. But, at times, another limit can and does impose a real limit on Congress's ability to investigate: the separation of powers. In fact, the Court employed separation of powers principles to curtail Congress's power to investigate and prosecute a private citizen for a crime in *Kilbourn v. Thompson*.[11]

In *Kilbourn*, citizen Kilbourn challenged Congress's ability to punish him for contempt.[12] After refusing to testify before a committee of the House of Representatives Kilbourn was found guilty of contempt by the House of Representatives and imprisoned by House Sergeant-at-Arms Thompson.[13] The Court held that

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[6] U.S. CONST. art. I, § 1, cl. 1.

[7] *See* McCulloch v. Maryland, 17 U.S. 316, 323–24 (1819) (holding that Congress only has the powers in the Constitution); *see also* United States v. Morrison, 529 U.S. 598, 618–19 (2000) (discussing how the Federal Government lacks general police power and that even broad readings of the enumerated powers cannot yield a general police power).

[8] Watkins v. United States, 354 U.S. 178, 187 (1957).

[9] *Id.* at 201.

[10] *See, e.g.*, Anthony Fisher, *Sex, Violence and Satan: 6 Unbelievably Dumb Congressional Hearings*, REASON (Jan. 18, 2013, 1:05 PM) [https://perma.cc/53DM-BJNT] (collecting examples of strange congressional hearings, no doubt enabled by Congress's nearly boundless authority under the Commerce Clause).

[11] 103 U.S. 168, 199–200 (1880).

[12] *Id.* at 181.

[13] *Id.* at 196.

Congress's finding of guilt was actually an exercise of judicial power and was therefore invalid.[14] The Court used the Article III Vesting Clause to justify its holding that Congress holds no judicial power beyond those judicial powers expressly provided to Congress within the Constitution.[15] Further, the Court held that:

> If the investigation which the committee was directed to make was judicial in its character, and could only be properly and successfully made by a court of justice, and if it related to a matter wherein relief or redress could be had only by a judicial proceeding, we do not, after what has been said, deem it necessary to discuss the proposition that the power attempted to be exercised was one confided by the Constitution to the judicial and not to the legislative department of the government. We think it equally clear that the power asserted is judicial and not legislative.[16]

Therefore, if Congress exercises power other than its legislative power, such an exercise violates the Constitution's separation of powers scheme. And in *Kilbourn*, Congress exercised a judicial power—and thereby violated the separation of powers—by judging Kilbourn guilty of a crime and punishing him for it. It is thus clear that there are limits to Congress's investigatory power, namely that

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[14] *See id.* at 192 ("the House of Representatives not only exceeded the limit of its own authority, but assumed a power which could only be properly exercised by another branch of the government, because it was in its nature clearly judicial."); *see also id.* at 200 ("the House of Representatives finding Kilbourn guilty of contempt, and the warrant of its speaker for his commitment to prison, are not conclusive in this case, and in fact are no justification, because, as the whole plea shows, the House was without authority in the matter.").

[15] *Id.*; Congressionally-held judicial powers comprise impeachment and removal, U.S. CONST. art. I, § 2–3; and punishing or expelling members for disorderly behavior, U.S. CONST. art. I, § 5.

[16] *Kilbourn,* 103 U.S. at 193.

Congress cannot exercise a non-legislative power under the guise of its investigatory power.

B. UNDER UNITARY EXECUTIVE THEORY, THE POWER TO INVESTIGATE CRIMES IS HELD EXCLUSIVELY BY THE PRESIDENT

Unitary executive theory is the understanding that "[t]he Constitution gives presidents the power to control their subordinates by vesting all of the executive power in one, and only one, person: the president of the United States."[17] "Justice Scalia's dissent in *Morrison v. Olson* provides the most succinct and cogent judicial articulation of the unitary executive theory,"[18] under which the Vesting Clause of Article II of the Constitution is considered a general grant[19] of executive power to the President of the United States.[20] Using the Vesting Clause of Article II as support, Justice Scalia argues in his *Morrison* dissent that "all purely executive power must be under the control of the President,"[21] and that the President has exclusive control over "quintessentially executive activity."[22] In *Morrison*, Justice Scalia asserts unequivocally that "[g]overnmental investigation and prosecution of crimes is a quintessentially executive function."[23] Therefore, according to Justice Scalia, the

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[17] STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 4 (2008).

[18] David M. Dreisen, *The Unitary Executive Theory in Comparative Context*, 72 HASTINGS L. J. 1, 7 (2020).

[19] *See* Zivotofsky *ex rel.* Zivotofsky v. Kerry, 576 U.S. 1, 40 (2015) (Thomas, J., concurring in part) ("[T]he practices of the Washington administration and First Congress confirm that Article II's Vesting Clause was originally understood to include a grant of residual foreign affairs power to the Executive.").

[20] *See* Morrison v. Olson, 487 U.S. 654, 734 (1988) (Scalia, J., dissenting) (". . . the Constitution seems to require, as the Founders seemed to expect, and as our past cases have uniformly assumed—all purely executive power must be under the control of the President.").

[21] *Id.* at 710.

[22] *Id.* at 706.

[23] *Id.* at 706.

President has exclusive control over the exercise of governmental investigations into criminal wrongdoing.[24]

After considering the issue in an updated analysis, I agree that governmental investigation and prosecution are exclusively executive functions. The exclusive executive function analysis comes from *Zivotofsky ex rel. Zivotofsky v. Kerry*.[25] In that case, the Court used a two-step approach to determine whether an executive power is exclusive: first, the Court determined whether the power was an executive power or not by relying on constitutional text, constitutional structure, precedent, and the history of the power;[26] second, the Court sought to determine whether the executive power was an exclusively executive power by looking to "[t]he various ways in which the President may unilaterally effect [the power]—and the lack of any similar power vested in Congress[,] . . . [and] functional consideration. [27] Importantly, under the *Zivotofsky* analysis, history need not be "all on one side" but rather it should "on balance . . . provide strong support for the conclusion that the . . . power is the President's alone."[28] I will proceed here as the Court did in *Zivotofsky*: First, determining whether the power is executive, based on constitutional text, structure, precedent, and history, and, second, determining whether the power is exclusive.

1. THE POWER TO INVESTIGATE CRIMES IS HELD BY THE EXECUTIVE

The Court in *Zivotofsky* gave several factors to look to when determining whether a power is an executive power or not, which are constitutional text, constitutional structure, precedent, and

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[24] *Id.*
[25] Zivotofsky *ex rel.* Zivotofsky v. Kerry, 576 U.S. 1, 10, 14 (2015).
[26] *Id.* at 10.
[27] *Id.* at 14.
[28] *Id.* at 24.

history.[29] My analysis of these factors shows that the power to investigate crimes is an executive power.

i. CONSTITUTIONAL TEXT

There are two primary sources of the Executive's power to investigate crimes in the Constitution's text. The first is the Vesting Clause of Article II and the second is the Take Care Clause.

An adherent to unitary executive theory would interpret the Vesting Clause of Article II to vest executive power in the President.[30] That general grant of *executive* power in the President includes the power to execute the criminal law, which includes investigating and prosecuting crimes. Secondly, the President has the duty to "take Care that the Laws be faithfully executed."[31] Once again, the President must ensure that the criminal laws are executed, which means the President has the power to investigate crimes. Otherwise, the criminal law would be a dead letter. Finally, those Clauses have been interpreted by the Supreme Court to indicate that criminal investigatory power is an executive power.[32]

Saikrishna Prakash has written extensively on the executive's power to control law enforcement and the prosecutorial process.[33] Prakash asserts that "the Executive Power and Faithful Execution Clauses suggest that . . . the president can order official prosecutors in all their prosecutorial actions. He can order them to commence or cease a prosecution, and he can instruct them in their conduct of prosecutions."[34] Thus, the broad power granted by the Clauses

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[29] *Id.* at 10.

[30] *See supra* Section I.B. (discussing how the Vesting Clause of Article II forms the basis for much of unitary executive theory).

[31] U.S. CONST. art. II, § 3.

[32] *See infra* Section I.A.1.iii. (discussing the Supreme Court's interpretation of the Vesting Clause of Article II and the Take Care Clause as granting to the President power to control criminal investigations).

[33] Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 539 (2005).

[34] *Id.*

includes the power to investigate crimes. Prakash also argues that the Pardon Clause may provide positive evidence of the President's power to conduct criminal investigation.[35] The Constitution provides that the President has the power to "grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment." [36] Prakash argues that the Clause indicates the President's ability to prevent prosecutions or to completely stop the prosecution of someone as it is happening. [37] Taking these three Clauses together strongly supports the conclusion that the Constitution's grant of executive power to the President encompasses the power to conduct criminal investigations.

ii. CONSTITUTIONAL STRUCTURE

The structure of the Constitution also indicates that the power to investigate crimes is an executive function by curtailing Congress's power when it comes to responding to crimes. Consider that Congress may not pursue a bill of attainder against a person,[38] that Congress's enumerated powers do not include criminal prosecution or investigation, [39] and that Congress explicitly has the power to punish and investigate only its own members for wrongdoing.[40] This structure prompts the question: If the power to investigate crimes exists in Congress, why did the Framers so painstakingly cabin Congress's ability to undertake criminal-law-style investigations? It would not make much sense for Congress to have a general power to undertake criminal-law-style investigations while such personal investigations are carefully excepted in the Constitution. Such a

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[35] *Id.* at 542 n.133.
[36] U.S. CONST. art. II, § 2.
[37] *See* Prakash, *supra* note 33, at 542 n.133.
[38] U.S. CONST. art. I, § 9, cl. 3.
[39] *Id.* § 8.
[40] *Id.* § 5.

construction would render the clause specifying Congress's power to punish its own members superfluous—and, generally, the words of the Constitution should be given effect.[41] Therefore, the structure of the Constitution supports the notion that criminal investigations are an executive function.

iii. SUPREME COURT PRECEDENT

Supreme Court precedent provides further support for the conclusion that the law enforcement power is held by the President via Article II's Vesting and Take Care Clauses.[42] For instance, in *Nixon v. Fitzgerald*, the Court wrote that the Article II Vesting Clause "establishes the President as the chief constitutional officer of the Executive Branch, entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity. These include the *enforcement* of federal law—it is the President who is charged constitutionally to 'take Care that the Laws be faithfully executed.'"[43] The function of criminal investigation is an aspect of law enforcement over which the President must exercise control in order to maintain the existence of a branch that is both executive in nature and unified.[44]

In *Heckler v. Chaney*, the Supreme Court recognized in dicta that the decisions of a prosecutor are "the special province of the Executive Branch, inasmuch as it is the Executive who is charged by

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[41] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.").

[42] *See generally* TODD GARVEY, CONG. RSCH. SERV., R43708, THE TAKE CARE CLAUSE AND EXECUTIVE DISCRETION IN THE ENFORCEMENT OF THE LAW (2014) (discussing Supreme Court precedent supporting the notion that law enforcement is an executive power).

[43] Nixon v. Fitzgerald, 457 U.S. 731, 750 (1982) (emphasis added).

[44] Free Enter. Fund v. Public Co. Acct. Oversight Bd., 561 U.S. 477, 492 (2010) ("As Madison stated on the floor of the First Congress, 'if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws.'" (quoting 1 Annals of Cong. 463 (1789) (Joseph Gales ed., 1834)).

the Constitution to 'take Care that the Laws be faithfully executed.'"[45] In *Chaney*, the Supreme Court considered "the extent to which a decision of an administrative agency to exercise its 'discretion' not to undertake certain enforcement actions is subject to judicial review under the Administrative Procedure Act."[46] In answering that question, the Court analogized the decision to initiate administrative proceedings to the discretion accorded to prosecutors,[47] and concluded that such a decision is not subject to judicial review.[48]

In *U.S. v. Nixon*, the Court considered whether President Nixon could be compelled to produce his infamous tape recordings with advisors.[49] The Court considered whether such a question is justiciable and concluded that it is.[50] In doing so, the Court considered whether "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case" and therefore the "President's decision is final in determining what kind of evidence is to be used in a given criminal case."[51] Although the Court did not partake in that logical leap, the Court did not object to the first premise advanced by President Nixon, that the decision to prosecute a case is solely the province of the Executive Branch.[52] Justice Scalia used these cases to support his view that "[g]overnmental investigation and prosecution of crimes is a quintessentially executive function."[53] In at least three cases, the

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[45] 470 U.S. 821, 832 (1985) (quoting U.S. CONST. art. II § 3).

[46] *Id.* at 823.

[47] *Id.* at 832.

[48] *Id.* at 837–38.

[49] 418 U.S. 683, 686 (1974).

[50] *Id.* at 693.

[51] *Id.* (citing to Confiscation Cases, 74 U.S. (7 Wall.) 454 (1868) and United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965), *cert. denied sub nom.* Cox v. Hauberg, 381 U.S. 935 (1965) for support).

[52] *See id.* at 693–97 (asserting that whether President Nixon could withhold the tape recordings is a justiciable question).

[53] Morrison v. Olson, 487 U.S. 654, 706 (Scalia, J., dissenting).

Supreme Court indicated that the power to investigate crimes sits in the executive branch.

iv. HISTORY OF THE CRIMINAL INVESTIGATORY POWER

The history of the criminal investigatory power confirms that the power has long been treated as an executive one. "In separation-of-powers cases th[e] Court has often 'put significant weight upon historical practice.'"[54] And although, "[p]ast practice does not, by itself, create power," "a governmental practice [that] has been open, widespread, and unchallenged since the early days of the Republic . . . should guide our interpretation of an ambiguous constitutional provision."[55]

Although some have argued that the power to investigate crimes is a power mixed between the Executive and the Judiciary,[56] the weight of the historical evidence is in favor of the power to investigate crimes being an executive power.

Before the creation of the United States, the power to prosecute was held by the King of England, as executive.[57] The King had special attorneys who "worked under the direction of the crown" to prosecute cases against persons in court.[58]

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[54] Zivotofsky *ex rel.* Zivotofsky v. Kerry, 576 U.S. 1, 23 (2015) (quoting NLRB v. Noel Canning, 573 U.S. 513, 524, (2014) (emphasis omitted)).

[55] NLRB v. Noel Canning, 573 U.S. 513, 573 (2014) (Scalia, J., concurring in judgment) (alteration in original; internal quotation marks omitted).

[56] Susan Low Bloch makes a hard-hitting argument in *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning there was Pragmatism*, 1989 DUKE L. J. 561 (1989). Bloch argues that the Attorney General does not neatly fit into the "executive" category. *Id.* at 565. William B. Gwyn argues that "there are no good reasons for considering criminal prosecutions as purely 'executive' in character." *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 GEO. WASH. L. REV. 474, 491 (1989). He argues that it is probative that the *Judiciary* Act provides for the creation of the Attorney General, and tends to indicate that the powers of the Attorney General are judicial in nature. *Id.* at 493.

[57] Prakash, *supra* note 33, at 548.

[58] *Id.*

In our nation's early history, "[i]n the colonies and the states, state governors directed official prosecutors."[59] There is considerable evidence that when the Framers "referred to the law execution powers of the president they were referring principally to the power to investigate and prosecute alleged offenders . . . The president would avenge public wrongs and ensure the rigor of equal law by prosecuting those who violated federal law."[60] This notion fits with the constitutional text argument from above that discusses the power of the President to execute the law.[61]

Later, during President John Adams's administration, Secretary of State Timothy Pickering "ordered district attorneys to investigate or prosecute the publishers" of Republican newspapers.[62] When the publishers did not cease, the Senate "requested [President Adams] to instruct the proper law officer to commence and carry on a prosecution against [the publisher]."[63] President Adams did then instruct the Pennsylvania district attorney to conduct the prosecution.[64] This episode evinces the long-standing congressional and presidential understanding that the President controlled the law enforcement function from early on in the republic.

In 1870, Congress created the Department of Justice, and since then the Department of Justice, as a part of the executive branch, has exercised control over criminal prosecutions.[65] Further, the Federal Bureau of Investigation ("FBI") is currently the main arm of criminal investigation, and it is housed within the Department of Justice, which is within the executive branch. This has been the case since

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[59] *Id.* at 546.
[60] *Id.* at 552.
[61] *See supra* Section I.A.1.i.
[62] Prakash, *supra* note 33, at 558.
[63] 10 Annals of Cong. 184 (1800) (Joseph Gales ed. 1834).
[64] Prakash, *supra* note 33, at 559.
[65] *Id.* at 530.

1908 when the precursor to the FBI was created.[66] Therefore, for over 100 years, the power to investigate federal crimes has been comfortably housed within the executive branch of the government. Moreover, many executive agencies possess the power to investigate crimes, including the Bureau of Alcohol, Tobacco, Firearms and Explosives, Department of Veterans Affairs (Criminal Investigations Division, Office of the Inspector General), Drug Enforcement Administration, Environmental Protection Agency (Office of Inspector General), Fish and Wildlife Service (Office of Law Enforcement), Health and Human Services (Office of Inspector General), Homeland Security Investigations, Internal Revenue Service (Criminal Investigation Division), U.S. Marshals Service, U.S. Postal Inspection Service, and the U.S. Secret Service.[67]

The power to investigate crimes has been squarely held by the Executive for well over 100 years, without notable challenge. These facts add significant weight to the notion that the power to investigate crimes is fundamentally an executive power.[68]

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[66] John F. Fox, Jr., *The Birth of the Federal Bureau of Investigation*, FBI (July 2003) [https://perma.cc/QZ6S-YEBP].

[67] U.S. ATTORNEY'S OFFICE, M.D. PA., FEDERAL INVESTIGATIVE AGENCIES (last visited Jan. 23, 2023, 5:22 PM) [https://perma.cc/WQ26-4BVG].

[68] The only legislative agency of which I am aware that has some authority to investigate crimes is the United States Capitol Police. Although "police" is in the name, Capitol Police is a far cry from a traditional law enforcement agency—it is more of a security service for the Capitol and certain surrounding buildings and Members of Congress. *See* 2 U.S.C. § 1961 (restricting policing powers of the Capitol Police to the Capitol Buildings and Grounds); *see also* 2 U.S.C. § 1966 (providing Capitol Police with the authority to protect Members of Congress and their families, if such protection is deemed necessary). The power to maintain order and peace on Capitol Grounds and security for Members of Congress is markedly different from the general criminal investigatory functions of a traditional police force. Regardless, here, as in *Zivotofsky*, history need not be "all on one side, but on balance it provides strong support for the conclusion that the . . . power is the President's alone." Zivotofsky *ex rel.* Zivotofsky v. Kerry, 576 U.S. 1, 23 (2015).

2. THE POWER IS HELD *EXCLUSIVELY* BY THE EXECUTIVE

The previous section having established that the power to investigate crimes is an executive function, I turn to determining whether that power is exclusively held by the President. In *Zivotofsky*, the Court sought to determine whether the power was exclusive by looking to "[t]he various ways in which the President may unilaterally effect [the power] . . . [and] functional considerations."[69] I will consider those factors in turn.[70]

i. WAYS THE PRESIDENT MAY UNILATERALLY EFFECT CRIMINAL INVESTIGATIONS

Under unitary executive theory, this factor is met rather easily. The President may generally direct criminal prosecutions under unitary executive theory.[71] Looking to history, one sees that the President exercised control over the commencement and ceasing of prosecutions.[72] In fact, presidents were quite open about their involvement in criminal prosecutions—some discussed their control over criminal investigations in public.[73] In short, "presidents understood that they were constitutionally empowered to direct official prosecutions."[74] Prakash writes: "The Constitution, as

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[69] *Id.* at 14.

[70] Importantly, the standard to show that an executive power is exclusive is lower than one may expect. *See id.* at 23 ("Here, history is not all on one side, but on balance it provides strong support for the conclusion that the recognition power is the President's alone. As *Zivotofsky* argues, certain historical incidents can be interpreted to support the position that recognition is a shared power. But the weight of historical evidence supports the opposite view, which is that the formal determination of recognition is a power to be exercised only by the President.").

[71] Bruce A. Green & Rebecca Roiphe, *May Federal Prosecutors Take Direction from the President?*, 87 FORDHAM L. REV. 1817, 1820 (2019).

[72] Prakash, *supra* note 33, at 553.

[73] *Id.*

[74] *Id.*

originally understood, made the president the constitutional prosecutor of all offenses against the United States. Consistent with English, colonial, and state practices, and in the absence of congressional authorization, early presidents assumed complete control over official prosecutors."[75] In short, under unitary executive theory, the President totally controls criminal investigation and criminal prosecution. As a result, he may give effect to criminal investigations.

Further, in *Zivotofsky*, the Court suggests that if Congress lacks a similar power to the President, then that fact indicates the President may unilaterally effect the power. By clear constitutional structure, Congress lacks power to conduct criminal investigations, as I have discussed above.[76]

ii. FUNCTIONAL CONSIDERATIONS

There are two sets of functional considerations: constitutional and practical. The constitutional consideration is that thwarting the separation of powers exacerbates the structural concerns that the Constitution was designed to address. Certain Enlightenment political theorists, on whom the Framers of the Constitution relied in their development of the Constitutional structure, expressed concerns over the negative consequences of different branches conflating powers. For instance, in 1656, Marchamont Nedham wrote that "where [Kingdoms and States] have had any thing of Freedom among them, the Legislative and Executive Powers have been managed in distinct hands."[77] In 1748, Montesquieu wrote: "When legislative power is united with executive power in a single person

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[75] *Id.* at 596.

[76] *See supra* Section I.A.1.ii. (noting that the limits of Congress's power as it relates to criminal prosecution had been carefully provided for in the Constitution only to apply to limited circumstances).

[77] MARCHAMONT NEDHAM, THE EXCELLENCIE OF A FREE-STATE; OR THE RIGHT CONSTITUTION OF A COMMONWEALTH 110 (Blair Worden, ed. 2011).

or in a single body of the magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically."[78] Thomas Jefferson wrote in 1784 that "concentrating [legislative, executive, and judicial powers] in the same hands is precisely the definition of despotic government."[79] Finally, in Federalist No. 51, Publius wrote that "to a certain extent, [separation of powers] is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own."[80] I could continue with this parade of history, but the point stands: the entire American constitutional structure is founded on the idea that different branches of government have different jobs and cannot exercise another branch's power.[81] And when Congress co-exercises a criminal investigatory power, Congress breaches this sacred division of power and ignores the long history and fervent warnings concerning violating such a sacred division.

There are also at least two practical considerations for the American constitutional scheme if separation of powers is lost in this area by legislative overstep: (1) weakened due process in congressional investigations, and (2) lost public confidence in both the legislature and federal law enforcers if the public views investigations as politically motivated.

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[78] MONTESQUIEU, THE SPIRIT OF LAWS 157 (Anne M. Cohler et al. eds., Anne M. Cohler et al. trans., 1989).

[79] THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 120 (William Peden ed. 1954).

[80] THE FEDERALIST NO. 51, at 252 (Alexander Hamilton or James Madison) (Coventry House Publishing, ed. 2015).

[81] This notion is further supported by the Supreme Court's decision in Bowsher v. Synar, 478 U.S. 714 (1986). In *Bowsher*, Congress permitted the Comptroller General of the United States, an agent of Congress, to execute the Balanced Budget and Emergency Deficit Control Act. *Id*. at 734. The Supreme Court ruled that placing such authority to execute the law in the hands of a legislative agent is unconstitutional. *Id.*

The Constitution provides fewer procedural protections before Congress than before a court. With respect to due process in congressional investigations, the Supreme Court has held that:

> The Bill of Rights is applicable to investigations as to all forms of governmental action. Witnesses cannot be compelled to give evidence against themselves. They cannot be subjected to unreasonable search and seizure. Nor can the First Amendment freedoms of speech, press, religion, or political belief and association be abridged.[82]

This may appear to provide broad protections for the subjects of a congressional investigation, but in practice, it is much narrower. For example, the standard for the reasonableness of a congressional subpoena is whether the "adequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes, and scope of the inquiry."[83] This is troubling because Congress itself can set the scope of the investigation as broad and then issue subpoenas to a broad purpose. In the criminal context, by contrast, the scope of the subpoenas are limited to the nature of the offense at hand and is overseen by a judge.[84] Moreover, Sixth Amendment procedural rights are not applicable in a legislative investigation.[85] Therefore, although subjects of a congressional investigation enjoy some protections, those protections are smaller in scope than in an ordinary criminal proceeding.

Finally, public confidence in criminal and congressional investigations are crucial. The rule of law depends on, among other things, public trust in the criminal process. If Congress undertakes

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[82] Watkins v. United States, 354 U.S. 178, 188 (1957).

[83] McPhaul v. United States, 364 U.S. 372, 382 (1960).

[84] FED. R. CRIM. P. 17(a).

[85] *See* Hannah v. Larche, 363 U.S. 420, 449 (1960) (noting that subjects of governmental investigations do not have rights of appraisal, confrontation, or cross-examination in those investigations).

essentially criminal investigations, then it may be the case that the public will grow to view the investigation itself as politically motivated.[86] And then if the Department of Justice brings related charges, the entire criminal prosecution runs the risk of being seen by the public as motivated by politics rather than motivated by seeking justice.

C. THE POWER TO INVESTIGATE CRIMES IF AN EXCLUSIVE EXECUTIVE POWER

The previous two sections satisfy the analysis from *Zivotofsky*. Although the "history is not all on one side . . . on balance it provides strong support for the conclusion that the . . . power is the President's alone."[87] Given the weight of the evidence above, it is fair to conclude that the power to investigate crimes is an exclusive executive power.

II. HOW TO DETERMINE IF A CRIMINAL INVESTIGATION IS TAKING PLACE

Determining whether a criminal investigation is taking place is difficult because "[t]here is no universally accepted, concise definition of the [criminal] investigative function."[88] However, a definition is necessary for this analysis. For our purposes, a practical and useful definition of *criminal investigation* must take a highly realistic approach and incorporate the notion that while Congress may not formally undertake a criminal investigation, it also cannot undertake any proceeding that would amount to a de facto criminal

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[86] Some of the attacks levied against the January 6th Committee are reminiscent of this concern about perceived political motivation. *See* Andy Biggs, *Democrats must stop using Jan. 6 committee to advance its witch hunt*, THE HILL (Sept. 10, 2021, 11:45 AM) [https://perma.cc/Z5NU-39E6].

[87] Zivotofsky *ex rel.* Zivotofsky v. Kerry, 576 U.S. 1, 23 (2015).

[88] Peter W. Greenwood, et al., THE CRIMINAL INVESTIGATION PROCESS VOLUME III: OBSERVATIONS AND ANALYSIS 6 (1975).

investigation. A de facto criminal investigation is one that bears the indicium of a criminal investigation, even though the body conducting the investigation cannot undertake a formal criminal prosecution. Outside the congressional criminal investigation context, a criminal investigation may be fairly defined as "the police effort to collect facts that will lead to the identification and apprehension of an offender and provide evidence of his guilt."[89] Similarly, in the congressional investigation context, a congressional criminal investigation is, "the [congressional] effort to collect facts that will lead to the identification and apprehension of an offender and provide evidence of his guilt."[90] If the circumstances of the congressional investigation tend toward the collection of facts that will eventually identify and apprehend an offender and provide evidence of his or her guilt, then the committee has undertaken an unconstitutional de facto criminal investigation.

One might argue that another potential definition of 'criminal investigation' would solve the problem here. That is the "formal" definition of criminal investigation. That is, a criminal investigation is whenever an investigation is being conducted in order to give rise to a criminal prosecution. If this definition is used, then no congressional investigation could ever run afoul of the separation of powers, because no prosecution can be contemplated by Congress outside of an impeachment inquiry.[91] This definition is tempting for good reason: it entirely fits within the narrative that Congress cannot conduct criminal investigations.

But this definition leads to a major problem: Congress could essentially make itself a public investigatory body for criminal conduct. This could adversely affect an actual investigation being

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[89] *Id.*

[90] *Id.*

[91] Impeachment is a judicial proceeding. *See* THE FEDERALIST NO. 66, at 324 (Alexander Hamilton) (Coventry House Publishing ed., 2015) (referring to the power to try impeachments as an exercise of the "right of judging").

undertaken by the FBI, or worse, needlessly disparage the reputation of some innocent person in public either explicitly or implicitly—all while affording the investigation's subject fewer procedural protections.[92]

I will use the first definition discussed here. That is, a de facto criminal investigation is the effort to collect facts that will lead to the identification and apprehension of an offender and provide evidence of his guilt, and thereby bears the indicium of a criminal investigation.

III. CASE STUDIES

A. SECRETARY HILLARY CLINTON'S USE OF PRIVATE E-MAIL SERVER

The House Oversight and Government Reform Committee's handling of Secretary Hillary Clinton's private e-mail server and the e-mails on that server is a prime example of the proper handling of this kind of situation. Secretary Clinton used a private e-mail server and some of the e-mails that were saved on the server contained classified information.[93] Some Members of Congress were concerned that Secretary Clinton's use of a private e-mail server violated 18 U.S.C. § 1924(a), a federal law about retaining classified government information or 18 U.S.C. § 793, a federal law about mishandling classified information.[94] Secretary Clinton testified about her e-mails, but not in an investigation about the e-mail server itself. Rather, the

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[92] *See supra* Section I.A.2.ii. (discussing how individuals have fewer procedural protections before Congress than in Court).

[93] Press Release, James B. Comey, Statement by FBI Director James B. Comey on the Investigation of Secretary Hillary Clinton's Use of a Personal E-Mail System (July 5, 2016) [hereinafter Comey Statement].

[94] MAJ. STAFF OF S. COMM. ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS, 116TH CONG., THE CLINTON EMAIL SCANDAL AND THE FBI'S INVESTIGATION OF IT: AN INTERIM REPORT 8–9 [https://perma.cc/PQ84-NSRD]; 18 U.S.C. §§ 793(f), 1924(a).

investigation was about the tragedy that occurred in Benghazi, Libya, on September 11, 2012 and the e-mail server issue was only a side issue for the Committee.[95] She was, however, investigated by the FBI for criminal conduct connected with the retention of classified e-mails on her private e-mail server.[96]

Instead of launching its own investigation of Secretary Clinton, the House Oversight and Government Reform Committee deferred to the FBI to make its decision about whether to recommend prosecution of Secretary Clinton or not.[97] But as soon as the FBI decided not to prosecute Secretary Clinton, the Committee was off to the races.[98] In three months, the Republican-controlled House Committee on Oversight and Government Reform issued more than 70 subpoenas related to Hillary Clinton's e-mails and the FBI's decision not to recommend prosecution.[99] But, importantly, the Committee never fully investigated Secretary Clinton herself. Rather,

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[95] Instead, Secretary Clinton testified in the House Oversight Committee's investigation into the 2012 Benghazi terrorist attack, which began to concern her e-mails more and more. Eric Lipton, Noam Scheiber, & Michael S. Schmidt, *Clinton Emails Became the New Focus of Benghazi Inquiry*, N.Y. TIMES (Oct. 11, 2015) [https://perma.cc/S2WM-W57V]. During the testimony, "Republican lawmakers on the panel for the most part avoided any mention of [Secretary Clinton's] use of a private email server. . .. [C]ommittee Republicans focused mostly on accusations that Mrs. Clinton had ignored security needs in Benghazi." Michael D. Shear & Michael S. Schmidt, *Benghazi Panel Engages Clinton in Tense Session*, N.Y. TIMES (Oct. 22, 2015) [https://perma.cc/6J74-TB4B].

[96] Comey Statement, *supra* note 93.

[97] This is evidenced by the fact that reporting as early as August of 2015 indicated that Secretary Clinton did not abide by government policies in the use of her e-mail server. Michael S. Schmidt, *Judge Says Hillary Clinton Didn't Follow Government Email Policies*, N.Y. TIMES (Aug. 20, 2015) [https://perma.cc/EHX5-WYC9]. And the investigation did not take place until July 2016, after Director Comey declined to prosecute Secretary Clinton. *See* Press Release, Chaffetz Demands Emergency Hearing With FBI Director Less Than 48 Hours After Recommendation in Clinton Case (July 6, 2016) [hereinafter GOP Emergency Hearing Statement].

[98] GOP Emergency Hearing Statement, *supra* note 97.

[99] Press Release, House Republicans Issued More Than 70 Subpoenas and Letters Investigating Hillary Clinton Just Since the FBI's Decision on Emails in July (Sept. 29, 2016) [hereinafter GOP Issues 70+ Subpoenas and Letters].

the Committee investigated the handling of the FBI investigation by former FBI Director James Comey and his FBI associates.[100]

This is exactly the proper role of Congress. The Committee did not disrupt the potential criminal investigation of Secretary Clinton. In fact, they waited until *after* FBI Director James Comey announced that the FBI did not conclude that there was enough information available upon which to begin its investigation into a prosecution of Secretary Clinton.[101] And then the Committee never investigated Secretary Clinton personally. Instead, they focused their attention on the FBI's investigation of Secretary Clinton.[102] The Committee's investigation thus did not tend to show Secretary Clinton's guilt or innocence—because the investigation was not aimed at showing her guilt or innocence—and was not a de facto criminal investigation.

B. DR. JOHN C. EASTMAN AND THE JANUARY 6TH COMMITTEE

The Select Committee to Investigate the January 6th Attack on the United States Capitol ("the January 6th Committee") was a Select Committee charged with three purposes:

> (1) To investigate and report upon the facts, circumstances, and causes relating to the January 6, 2021, domestic terrorist attack upon the United States Capitol Complex . . . and relating to the interference with the peaceful transfer of power . . . .

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[100] *See supra* note 95 (discussing how the e-mail server issue was a mere side issue to the Benghazi attack); *see also supra* note 97 and accompanying text (noting that the Committee was focused on the FBI's decision not to prosecute Secretary Clinton, rather than the merits of a potential prosecution).

[101] GOP Emergency Hearing Statement, *supra* note 97.

[102] *See* GOP Issues 70+ Subpoenas and Letters, *supra* note 99 (listing subpoenas, none of which are for Secretary Clinton herself).

> (2) To examine and evaluate evidence developed by relevant Federal, State, and local governmental agencies . . . .
>
> (3) To build upon the investigations of other entities . . . .[103]

The general object of the January 6th Committee seems to fall within a valid legislative purpose. That is, Congress may pass legislation relating to the security of the Capitol Building and the Capitol Complex.[104] However, the specific ways in which the Committee conducted its affairs violates the separation of powers.[105]

This brings us to Dr. John C. Eastman. Dr. Eastman has been described as "the architect of Donald Trump's legal strategy to

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[103] H.R. Res. 503, 117th Cong. § 3 (2021).

[104] *See* U.S. Const. art. I, sec. 8, cl. 17 (granting Congress the power to make laws for the Seat of Government "and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.").

[105] This situation follows a trend in congressional investigations going back at least fifty years. Consider the congressional investigation in Doe v. McMillan, 412 U.S. 306 (1973). In *McMillan*, the House of Representatives Committee for the District of Columbia investigated the schools and school administration in D.C. to assess their "organization, management, operation, and administration." H.R. Res. 76, 91st Cong., 1st Sess., 115 Cong. Rec. 2784. In releasing the Committee's final report, the Committee disclosed extremely sensitive disciplinary information about some students, whose names the Committee did not redact. *Id.* at 329 (Douglas, J., concurring). The petitioners did not challenge the general validity of the investigation itself, rather they challenged the specific way in which the Committee published the children's names without their or their parents' consent. *Id.* The Court held that the Committee was not protected under the Speech and Debate Clause and did not enjoy immunity from suit. *Id.* at 324. While the Court only addressed the immunity issue, the point still stands that while the general object of an investigation may be permissible, the specific way in which an investigation is conducted may contravene some other principle of law. This was also the case in Wilkinson v. United States, 365 U.S. 399 (1961). In *Wilkinson*, the House Un-American Activities Committee (HUAC) investigated Wilkinson for his connections to members of the Communist Party. *Id.* at 404. The Court did not accept the challenge to the Committee's authorization to conduct the investigation. *Id.* at 410. Rather, the Court asked whether the questions the Committee asked Wilkinson was asked were pertinent to the investigation taking place. *Id.* at 409. Despite this challenge, the Court in *Wilkinson* held that the questioning was pertinent to the investigation and Wilkinson's challenge failed. *Id.* at 412.

overturn the 2020 election."[106] On January 18, 2022, Dr. Eastman's former employer, Chapman University, received a subpoena from the January 6th Committee for "all documents and communications . . . attributable to Dr. John Eastman, that are related in any way to the 2020 election or the January 6, 2021 Joint Session of Congress."[107] Dr. Eastman alleged the subpoena was invalid because "the Committee is attempting to exercise a law enforcement function, rather than genuine legislative activity." For support, Dr. Eastman cited in court filings to *Eastland v. U.S. Servicemen's Fund*, which states that the "Congress is not invested with a general power to inquire into private affairs. The subject of any inquiry must be one on which legislation could be had."[108]

I will now turn to analyze Dr. Eastman's case in the context of our separation of powers problem. We must determine whether the investigation into Dr. Eastman tends toward showing his guilt or innocence and thereby bears the indicium of a criminal investigation. I will now examine the evidence available to determine if Congress has undertaken a de facto criminal investigation.

First, the Committee's assertion of the crime–fraud exception to attorney–client privilege gives weight to the notion that it is engaging in a criminal investigation. Dr. Eastman asserts attorney–client privilege over the e-mails requested in the subpoena.[109] The Committee has responded claiming that the e-mails fall within the

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[106] Kyle Cheney, Judge rejects Eastman effort to slow down Jan. 6 committee, POLITICO (Mar. 5, 2022) [https://perma.cc/W6ZJ-P3ZX].

[107] Exhibit B to Complaint at 5, Eastman v. Thompson, 594 F. Supp. 3d 1156 (C.D. Cal. 2022) (No. 8:22-cv-00099-DOC-DFM).

[108] Complaint at 6, *Eastman*, 594 F. Supp. 3d 1156 (C.D. Cal. 2022) (No. 8:22-cv-00099-DOC-DFM) (quoting Eastland v. U. S. Servicemen's Fund, 421 U.S. 491, 504 n.15 (1975)) (internal citation and quotation marks omitted).

[109] *Id.* at 6–7.

crime–fraud exception to attorney–client privilege.[110] Essentially, this exception prevents communications that enable criminal or fraudulent activity from being protected by the privilege.[111] Setting aside the issue of whether the attorney–client privilege applied at all, the simple fact that the crime–fraud exception has been asserted is probative. Logically, in order to assert this exception to the privilege, one must essentially accuse the attorney of engaging in criminal activity. Accordingly, by asserting that the attorney–client privilege does not cover Dr. Eastman's communications by way of the crime–fraud exception, the Committee is accusing Dr. Eastman of a crime.

Second, Dr. Eastman points to statements and actions by members of the January 6th Committee as evidence of the unlawfulness of this congressional investigation. Congressman Jamie Raskin, a member of the January 6th Committee, stated in an interview that: "Well of course [President Trump] was charged with 'incitement to violent insurrection' in the House and he was impeached for it . . . [b]ut you're right he's not been criminally charged yet for it. But we're perfectly willing to turn over evidence of criminal acts to the Department of Justice."[112] While not dispositive, this statement is probative of the true nature of the Committee's inquiry—that it is acting in a way that tends to show guilt or innocence. It indicates that the Committee, if it discovers evidence of criminal wrongdoing, will hand over that information to the FBI. It also indicates the exact concern mentioned above: that Congress acts as the public factfinder on behalf of the FBI.[113]

Third, on March 2, 2022, Chairman Bennie Thompson and Vice Chair Liz Cheney released a joint statement on the *Eastman* matter. In it contains an informative sentence: "The Select Committee is not

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[110] Congressional Defendants' Brief in Opposition to Plaintiff's Privilege Assertions at 39, *Eastman*, 594 F. Supp. 3d 1156 (C.D. Cal. 2022) (No. 8:22-cv-00099-DOC-DFM).

[111] *Id.*

[112] Complaint at 8-9, *Eastman*, 594 F. Supp. 3d 1156 (C.D. Cal. 2022) (No. 8:22-cv-00099-DOC-DFM).

[113] *See supra* Section I.A.2.ii.

conducting a criminal investigation. But . . ."[114] The statement goes on to read:

> Dr. Eastman's privilege claims raise the question whether the crime-fraud exception to the attorney-client privilege applies in this situation. . . . The facts we've gathered strongly suggest that *Dr. Eastman's emails may show that he helped Donald Trump advance a corrupt scheme* to obstruct the counting of electoral college ballots and a conspiracy to impede the transfer of power.[115]

Is this a crime? Very likely so. 18 U.S.C. § 1512(b) makes it a crime to "knowingly use[] intimidation, threaten[], or corruptly persuade[] another person, or attempt[] to do so, or engage[] in misleading conduct toward another person, with intent to (1) influence, delay, or prevent the testimony of any person in an official proceeding . . . ."[116] Alternatively, 18 U.S.C. § 1512(d) provides: "[w]hoever intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person from — (1) attending or testifying in an official proceeding . . . or attempts to do so, shall be fined under this title or imprisoned not more than 3 years, or both."[117] In short, there are statutes under which Dr. Eastman may be charged with a crime if he did what the Committee accuses him of doing.

Fourth, Chairman Bennie Thompson was quoted as stating "If we have access to the records, they'll speak for themselves. So we look forward, as a committee, to getting it. And we'll let the evidence

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[114] Press Release, Chairman Thompson & Vice-Chair Cheney, Thompson & Cheney Statement on Filing in Eastman Lawsuit (Mar. 2, 2022) [https://perma.cc/69KQ-HKMA] [hereinafter Thompson/Cheney Statement]; *cf. I'm not racist, but…*, WIKIPEDIA (Jan. 18, 2023, 2:06 PM) [https://perma.cc/MAD3-D38A].

[115] Thompson/Cheney Statement, *supra* note 114 (emphasis added).

[116] 18 U.S.C. §1512(b)(1).

[117] 18 U.S.C. § 1512(d)(1).

based on what we look at *determine guilt or innocence*."[118] Dr. Eastman notes this in his filing as well.[119] Perhaps this was just a slip of the tongue, but this kind of statement from the Chairman of the January 6th Committee is telling—determining guilt or innocence is a function that the legislature cannot exercise outside of limited circumstances provided for in the Constitution.[120]

Putting all this together, the Committee's conduct reflects that it engaged in a criminal investigation properly assigned to the Executive Branch. The January 6th Committee effectively accused Dr. Eastman of a crime by citing the crime–fraud exception in its subpoena, the Committee developed an evidentiary record and has expressed interest in handing that record over to the FBI, the Committee admitted it wanted Dr. Eastman's e-mails in order to show how Dr. Eastman may have engaged in an illegal scheme with President Trump, it appears there are crimes with which Dr. Eastman could be charged, and Chairman Thompson stated that he wants the evidence to determine *guilt or innocence*. A committee undertakes a de facto criminal investigation when it makes efforts to collect facts that will lead to the identification and apprehension of an offender and provide evidence of his guilt, and thereby bears the indicium of a criminal investigation. The Committee identified Dr. Eastman and expressed its willingness to hand over information to the FBI (which goes to the apprehension element, because the FBI would be able to apprehend Dr. Eastman if charges were brought against him). Finally, on the guilt prong, the Committee's assertion of the crime–fraud exception logically necessitates an accusation of criminal activity and the Committee Chairman himself stated that he wanted

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[118] Kyle Cheney and Josh Gerstein, *Trump cannot shield White House records from Jan. 6 committee, judge rules*, POLITICO (Nov. 9, 2021) [https://perma.cc/H8Z9-BFMZ] (emphasis added).

[119] Complaint at 9, Eastman v. Thompson, 594 F. Supp. 3d 1156 (C.D. Cal. 2022) (No. 8:22-cv-00099-DOC-DFM).

[120] *See supra* note 15 (noting the Constitution provides limited judicial powers to Congress).

the evidence to show guilt or innocence. Thus, the Committee is making significant efforts to collect facts to apprehend and provide evidence of Dr. Eastman's guilt. The January 6th Committee is therefore undertaking an unconstitutional criminal investigation into Dr. Eastman.

CONCLUSION

I have shown that under a unitary executive theory, the function of investigating crimes is exclusively an executive power. Congress may undertake investigations for valid legislative purposes but cannot breach the separation of powers in the process. Accordingly, Congress may not undertake a de facto criminal investigation by way of its implied investigatory power. Courts may begin to develop rules to determine when Congress has undertaken an unconstitutional criminal investigation. I suspect courts will look to determine whether Congress has undertaken an investigation that is so substantially like a criminal investigation that it might as well be considered a criminal investigation.

Good legislating requires information, but being a good constitutional actor requires respecting the separation of powers. Congress must be careful in its inquiries to avoid violating the separation of powers in its pursuit of the truth and good legislating.