I Fought the Law and the Law Lost: The Case for Congressional Oversight Over Systemic DOJ Discovery Abuse in Criminal Cases

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ABSTRACT

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This article addresses the need for congressional oversight over systemic DOJ criminal discovery abuse. The first section of the article outlines a sample group of cases across multiple federal districts, which represent the most highly publicized systemic DOJ criminal discovery abuse cases over the last two years. This first section of the article also examines the statistical record of DOJ’s Office of Professional Responsibility (“OPR”) in terms of investigating federal prosecutorial abuse in criminal matters and enforcement of penalties for positive findings of criminal discovery abuse. The article further describes and assesses the strengths and weaknesses of potential regulatory and oversight authorities in terms of addressing the DOJ discovery abuse problem, with a particular emphasis on the respective oversight purposes of those regulatory authorities. More specifically, the article looks at the oversight functioning of OPR, the federal judiciary, state bar authorities and Congress within the context of DOJ criminal discovery abuse. The article concludes by making the case that Congress is the best and most appropriate actor to engage in oversight over systemic DOJ criminal discovery abuse. In reaching this conclusion, the article assesses potential constitutional, executive privilege and practical obstacles to Congress exercising or deciding to exercise its oversight authority over the systemic DOJ criminal discovery abuse present with the federal judiciary system.
I FOUGHT THE LAW AND THE LAW LOST: THE CASE FOR CONGRESSIONAL OVERSIGHT OVER SYSTEMIC DOJ DISCOVERY ABUSE IN CRIMINAL CASES

I. Introduction

In Brady v. Maryland, Justice Douglas wrote that “the United States wins its point whenever justice is done its citizens in the courts.”¹ This article focuses on the converse, when justice is not done, when the Department of Justice (“DOJ”) engages in prosecutorial discovery abuse and Congress’ role in remedying the problem. One federal judge has noted that the DOJ has struggled with prosecutorial discovery abuse in criminal matters from at least the 1970s through to the present, and at least seven well-publicized cases of prosecutorial discovery abuse occurred within the last year alone.² This article posits that there is a need for Congressional oversight over DOJ discovery abuse, that Congressional oversight over DOJ discovery abuse serves goals of needed legislative reform and checks on Executive Branch excesses, and that neither Separation of Powers concerns nor Executive Privilege claims should preclude Congress from engaging in oversight.

The first section of this article outlines recent DOJ discovery abuse cases, as well as statistics regarding DOJ Office of Professional Responsibility (“OPR”) investigations and enforcement of penalties for discovery abuse. The second section examines the purposes of various oversight options for DOJ misconduct and makes the argument that Congressional oversight is the best option, given that Congressional oversight avoids conflict of interest problems inherent in other forms of oversight and serves legislative purposes that other regulatory entities do not or cannot serve. The final section of this article assesses probable Executive Branch objections to Congressional oversight and practical considerations with

favorable implications for Congressional success in overcoming any obstacles to the exercise of oversight over DOJ misconduct.

II. Case-Based and Statistical Evidence of Systemic DOJ Discovery Abuse

Although there are at least seven recent cases involving DOJ prosecutorial discovery abuse, this section focuses on the four of the most well-publicized cases. These cases provide illustrations of the types of discovery abuse occurring, as well as recent judicial responses to discovery abuse. This section also includes a discussion of the statistical evidence demonstrating the scope of DOJ prosecutorial discovery abuse and the failure by OPR to effectively investigate the problem and punish the wrongdoers.

A. Recent DOJ Discovery Abuse Cases

In 2009, the most high profile case of DOJ discovery abuse involved DOJ’s abandonment of a criminal conviction against former Senator Ted Stevens of Alaska. Senator Stevens had been convicted in the United States District Court for the District of Columbia on charges that he failed to disclose $250,000 in gifts on Senate financial disclosure forms. During the trial, prosecutors repeatedly failed to produce exculpatory discovery material to the defense and presented false evidence, resulting in United States District Judge Emmet Sullivan instructing the

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3 The other three recent DOJ discovery abuse cases include two Alaska political corruption cases with connections to the Senator Ted Stevens prosecution. In United States v. Kohring and United States v. Kott, the DOJ, in June, 2009, filed consent motions “on appeal seeking the remand of the cases to the district court and requesting immediate release of the appellants on personal recognizance . . . [on the basis that] the government represented that it had uncovered information that should have been, but was not, disclosed to the appellants prior to trial.” Gregory Linsin, A Cancerous Effect on the Administration of Justice: What can be Done about the Rash of Flagrant DOJ Discovery Violations?, 7/1/2009 Mondaq, 2009 WLNR 12533864, (2009). The third case occurred in August 2009, when Judge Emmet Sullivan of the United States District Court for the District of Columbia dismissed, with prejudice, the DOJ’s international drug case against Zhenli Ye Gon, reprimanding the DOJ for its failure to notify the defense of a key recanting witness until a year after the DOJ was aware of the recantation. Associated Press, Judge Dismisses Major Drug Case: Prosecution of Accused Dealer Falls Apart, SAN JOSE MERCURY NEWS, August 29, 2009, at 4A; Mike Scarcella, A Losing Hand: How DOJ’s Massive Meth Case Fell Apart, 7/27/2009 Nat’l L.J. 1, (Col. 3) (2009).

jury to ignore certain evidence introduced by the prosecution and chastising the prosecution for knowingly introducing inaccurate evidence.\(^5\)

The seriousness of the DOJ’s misconduct only became fully known after the trial, when a FBI whistleblower alleged misconduct “by prosecutors and by fellow FBI agents, including allegations that evidence had been willfully withheld from the defense.”\(^6\) Following the revelation, a newly appointed team of prosecutors also discovered that the defense team was never informed of contradictions between a pretrial interview with a key prosecution witness and the witness’ trial testimony.\(^7\) As a result, the DOJ sought to set aside the verdict and dismiss the indictment.\(^8\) Judge Sullivan approved the dismissal, held three prosecutors in contempt for failing to produce discovery to the defense and appointed an independent counsel to criminally investigate six of the prosecutors, indicating that he had no faith in OPR to investigate the matter.\(^9\) More informally, Judge Sullivan also asked Attorney General Eric “Holder to retrain all federal prosecutors on their evidence-handling practices, and called on his fellow federal judges nationwide to crack down on prosecutorial misconduct.”\(^10\)


\(^6\) *Stevens*, 593 F. Supp.2d at 179 (describing the FBI whistleblower complaint).

\(^7\) Motion of the United States to Set Aside the Verdict and Dismiss the Indictment with Prejudice, *United States v. Stevens*, No. 08-231, 2009 WL 839337 (D.D.C. April 1, 2009) (noting that prosecutors’ pretrial interview with a star witness contradicted that witness’ trial testimony); Goldstein, *supra* note 4.

\(^8\) Id.

\(^9\) Goldstein, *supra* note 4; Neil A. Lewis, *Justice Department Moves to Void Stevens Case*, THE NEW YORK TIMES, April 2, 2009, at A1 (quoting Judge Sullivan “How does the court have confidence that the Public Integrity Section has public integrity?”).

Following on the heels of the Stevens dismissal, in April 2009, Florida United States District Judge Alan Gold sanctioned the DOJ, pursuant to the Hyde Amendment, to pay over $600,000 in defense fees and expenses related to the prosecution of Dr. Ali Shaygan for illegally dispensing and distributing controlled substances. Judge Gold issued the sanctions after learning that the prosecution failed to disclose that two government informants/trial witnesses had secretly taped phone calls with Dr. Shaygan’s defense team as part of a collateral federal witness tampering investigation against defense counsel. Judge Gold also publicly reprimanded the three Assistant United States Attorneys (“AUSA’s”) handling the case and stated that he would request that disciplinary action be taken against two of the federal prosecutors.

The next month, in May 2009, United States District Judge Mark Wolf of the District of Massachusetts dismissed federal gun charges against Darwin Jones after discovering that the AUSA allowed a police officer to lie on the stand at the pretrial hearing and provide testimony regarding the arrest that contradicted information he had given in an earlier government interview. In a Show Cause Order, Judge Wolf considered possible sanctions against the AUSA and expressed his displeasure with the pervasiveness of DOJ discovery abuse, citing a litany of more than 30 years worth of cases involving federal prosecutors’ failure to disclose exculpatory discovery material to defense counsel. Judge Wolf postponed his decision on sanctions, ordering the United States Attorney’s Office (“USAO”) to file updated court

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12 Shaygan, 2009 WL 980289 at*1, 21-22.
13 Id. at 32.
15 Id.
submissions to show cause why sanctions should not be imposed. Ultimately, in February 2010, Judge Wolf opted not to impose sanctions on the AUSA, given evidence that her misconduct was unintentional, that she had participated in several training programs concerning criminal discovery, that she had engaged in substantial self-educational efforts on the subject and that she had begun consulting with a qualified mentor concerning discovery issues since the issuance of the Show Cause Order. However, Judge Wolf noted that OPR was continuing to investigate the AUSA to determine whether she should be disciplined by DOJ or state bar disciplinary authorities, and he remained skeptical that prosecutorial discovery training, alone, would resolve the widespread criminal discovery abuses within DOJ.

Along with DOJ’s biggest political corruption case of 2009, discovery abuse also permeated DOJ’s biggest environmental criminal case to date. In May 2009, a Montana federal jury acquitted W.R. Grace and seven of its executives of an indictment for Clean Air Act violations, fraud, conspiracy, obstruction of justice and endangerment. The indictment was based on charges that the company knowingly exposed Libby, Montana residents to asbestos and then engaged in a cover-up. The jury acquittal followed trial revelations that DOJ failed to disclose evidence as to the depth of the relationship between a star prosecution witness and the prosecution, his bias against one of the individual defendants and his prosecutorial immunity status.

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16 Id. at 185.
18 Id. at 149, 153 n.4.
20 Id.
In an attempt to remedy the prosecutorial misconduct, United States District Judge Donald Malloy ordered the witness to return to the stand for further cross-examination, refused to permit the prosecution to conduct re-direct examination and instructed the jury to disregard the witness’ testimony as to one of the defendants and to view the witness’ entire testimony with skepticism. Judge Malloy also explained to the jury “that the sanction was imposed because of the government’s ‘inexcusable dereliction of duty’ in suppressing or withholding evidence pertinent to the witness’ credibility.”

By no means do the aforementioned cases represent an exhaustive list of DOJ discovery abuse cases, or the full scope of federal prosecutorial misconduct over time. However, the cases illustrate the spread of DOJ discovery abuse across judicial districts, the high profile nature of some of the cases involved, the alarming ethical and criminal issues raised by these cases and the harsh judicial response to federal prosecutorial discovery abuse.

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23 Linsin, supra note 3 (discussing recent DOJ prosecutorial misconduct cases, the causes thereof and suggested responses for defense counsel).

24 Jones, 620 F. Supp.2d at 172 (discussing the history of DOJ discovery abuse cases and Brady violations back to the 1970s); Carissa Hessick, Prosecutorial Subornation of Perjury: Is the Fair Justice Agency the Solution we Have Been Looking For?, 47 S.D. L. Rev. 255, 256 (2002) (outlining a series of 1990s federal DOJ misconduct cases involving subornation of perjury, withholding exculpatory evidence and lying to the court); Jonathan Saltzman, Judge Pursues Leaks in US Probe: Special Prosecutor Could Be Named, BOSTON GLOBE, April 29, 2009 at 1 (discussing 2009 case in which a Massachusetts federal judge threatened to appoint “a special prosecutor to investigate leaks about a secret federal investigation into state contracts awarded to a software company that has ties to associates of . . . the former [Massachusetts] House speaker”); John Farmer, Prosecutors Gone Wild, THE NEW YORK TIMES, April 3, 2009, at A29 (describing a 2007 Seventh Circuit reversal of a federal corruption conviction because the federal government overreached in its application of the ‘theft of honest services’ corruption statute, and a 2004 case, in which a federal judge “threw out the convictions of two men accused of being part of a terrorist ‘sleeper cell’ in Detroit after it was discovered that federal prosecutors had deliberately withheld potentially exculpatory evidence from the defense”); Jonathan Saltzman, Judge Chastises Federal Attorney: Says Prosecutor Failed to Disclose Crucial Evidence, BOSTON GLOBE, January 27, 2009 at 1 (discussing a 2007 case in which a Massachusetts federal judge requested that the Massachusetts Bar Counsel launch disciplinary proceedings against a federal prosecutor “who allegedly withheld key evidence in a New England Mafia case from the early 1990s”).
B. OPR Statistics Regarding Prosecutorial Misconduct

OPR is DOJ’s internal monitor of prosecutorial misconduct.\(^{25}\) Where a judge makes a finding of DOJ misconduct, the matter “must be referred to OPR by Department employees.”\(^{26}\) OPR contends that it almost always conducts investigations on the basis of such judicial findings.\(^{27}\)

Where a judicial finding of misconduct is not involved, DOJ employees “are obligated to report to their supervisors any evidence or non-frivolous allegation of misconduct, or they may bring the information directly to the attention of OPR. Supervisors, in turn, are obligated to report to OPR any matters in which the alleged misconduct is serious.”\(^{28}\) Once OPR is aware of an allegation of misconduct, it will then take one of three measures: 1) Take no action; 2) Start an inquiry or 3) Start a full investigation.\(^{29}\) Assuming OPR decides to conduct a full investigation, it reports the investigative results and recommends a range of discipline “to the Office of the Deputy Attorney General and to the appropriate management officials in the Department.”\(^{30}\) The latter two sets of officials “are responsible for imposing any disciplinary action that may be appropriate.”\(^{31}\)


\(^{27}\) *Id.* at 2.

\(^{28}\) *Id.* at 1-2.

\(^{29}\) *Id.* at 2.

\(^{30}\) *Id.* at 3.

\(^{31}\) *Id.*
OPR is often subject to the criticism that it “fails to adequately investigate and punish instances of misconduct by federal prosecutors.”

Perhaps the biggest concern with OPR oversight is the “fox running the henhouse” argument or the idea that OPR suffers from inherent self-regulation conflicts of interest. This perception of a conflict of interest is exacerbated by the fact that the OPR Counsel is appointed by the Attorney General, and is under the supervision of and reports directly to the Attorney General and the Deputy Attorney General. By contrast, the DOJ’s Inspector General is statutorily independent, appointed by the President and confirmed by the Senate, and the Attorney General cannot prevent or prohibit the Inspector General from conducting an investigation. Accordingly, unlike the independent Inspector General, OPR has been described as a “paper tiger”, which is most often used to create the appearance of investigation to clear its own attorneys.

Events occurring in the Shaygan case illustrate concerns about the role of OPR. Even though the judge reprimanded and sanctioned the USAO in the Shaygan case and requested disciplinary action against two of the prosecutors, DOJ is appealing the ruling and seeking to have the judge recused on the sanctions issue. Critics contend that the Shaygan appeal demonstrates that DOJ and OPR are not taking prosecutorial misconduct seriously and are not

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33 Stephanos Bibas, Prosecutorial Regulation Versus Prosecutorial Accountability, 157 U. Pa. L. Rev. 959, 974-75 (April, 2009) (arguing that like doctors, prosecutors are loath to prosecute their own); Hessick at 258, 269, supra note 24; Ryan E. Mick, The Federal Prosecutors Ethics Act: Solution or Revolution?, 86 Iowa L. Rev. 1251, 1262 (May, 2001).

34 28 C.F.R. § 0.39 (2006) (creating the chain of command for OPR).

35 5 U.S.C. app. § 3(a) (2008); 28 C.F.R. § 0.29a (a) (2006).


holding prosecutors accountable for such misconduct. In the Shaygan case, one of the AUSA’s is still involved in narcotics cases, even though the USAO promised that the AUSA would be reassigned. The other AUSA in the case was reassigned to work on the habeas petitions in the Guantanamo Bay detainees cases.

Historical statistics further illustrate the failures of DOJ and OPR in self-policing and self-regulation. In 1990, a House Committee investigation revealed ten cases where federal judges found very serious prosecutorial misconduct and yet the DOJ never disciplined any of the 10 AUSA’s. Between 1997 and 2000, 100 DOJ attorneys were subject to judicial rebuke, yet OPR only found misconduct in 20% of the cases. DOJ even concedes that most OPR inquiries lead to a finding of no misconduct and “the majority of complaints reviewed by OPR each year are determined not to warrant further investigation because, for example, the complaint is frivolous on its face, is outside OPR’s jurisdiction, or is vague and unsupported by any evidence.”

More current statistics demonstrate a similar pattern of judicial findings of misconduct matched with either rare or no findings of no misconduct by OPR and lax DOJ sanctions. However, it is important to note that the statistics regarding prosecutorial misconduct may not

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38 Id.
39 Id.
40 Id.
41 Lu at 396, 410, supra note 25 (citing that from 1997 through March, 2000, OPR received 3913 complaints, ruled that 49 cases involved prosecutorial misconduct, reported 40 cases to state bar associations for discipline and found no misconduct in 60 cases, despite judicial criticism or findings of misconduct; citing in 2003, that DOJ investigated 98 claims of prosecutorial misconduct and found only 13 cases of actual misconduct).
43 Id.
measure the full scope of the discovery abuse problem because defendants, particularly defendants who plea bargain, may never become aware of withheld exculpatory information, unless the information is leaked.\footnote{Jones, 620 F. Supp.2d at 172.}

In 2007, OPR reported that it opened or received 906 complaints of prosecutorial misconduct and determined that only 23\% or 207 required further investigation.\footnote{2007 OPR Annual Report at 5, supra note 26.} Of the 207 requiring further investigation, OPR closed 136 “inquiries,” of which 34 involved judicial referrals for discipline.\footnote{Id. at 5-7, 24-25.} This means that DOJ found no misconduct in those 34 cases, despite the fact that a federal judge had found misconduct.\footnote{Id. at 25.}

Turning to investigations and inquiries closed in 2007, OPR found misconduct in 31\% or 23 of the 75 full investigations that were closed in 2007.\footnote{Id. at 25.} Internal discipline was initiated in 14 of the 23 matters and in the rest of the cases the subject attorney resigned or was no longer employed by DOJ by the time disciplinary action was to be initiated.\footnote{Id. at 8-9.} Still, only 6 of the 14 matters involved attorney suspensions, with the rest involving reprimands or reassignments.\footnote{Id. at 9.} In terms of inquiries, in 2007, only 13 of 166 allegations or 7.8\% were converted into full investigations.\footnote{Id. at 28.}

DOJ and OPR will likely argue that the statistics merely demonstrate that most claims of prosecutorial misconduct are frivolous. They may further contend that the discrepancy between judicial findings of misconduct and OPR findings of no misconduct may be the result of more...
thorough investigations by OPR than by the courts, OPR’s access to important internal documents to which the court has no access, a judicial bias in favor of defendants, or in some cases judicial personal animosity against particular prosecutors. Perhaps these claims are accurate, but it is equally possible that a “protect your own mentality” may be occurring.

Lack of sufficient resources is an alternative basis for the seemingly small number of investigations and findings of misconduct by OPR and there are two likely explanations for the dearth of resources.\(^5^3\) First, assuming 2007 was a typical year, OPR receives almost 1,000 complaints in a year and yet it is composed of only nine attorneys, an executive officer and support and paralegal staff.\(^5^4\) OPR’s resources have been further taxed by recent intensive and high profile investigations, such as the investigation of the DOJ’s Office of Legal Counsel’s memos legitimizing the CIA’s interrogation techniques of certain terrorism suspects overseas (the “Torture Memo Investigation”), the investigation of political hiring of career attorneys within DOJ’s Civil Rights Division and the investigation of the Bush Administration’s removal of United States Attorneys for improper political reasons.\(^5^5\) Given the lack of manpower and the constraints placed upon the limited manpower available, it would be unsurprising to find that OPR finds it difficult to investigate all of the prosecutorial misconduct complaints that it receives.

\(^{53}\) Hessick at 280, supra note 24.


Part and parcel with OPR’s lack of resources is OPR’s notorious reputation for protracted and delayed investigations.\textsuperscript{56} Regardless of whether OPR’s slow moving investigations are caused by a lack of resources or too many high profile investigations at the same time, the time between notification to OPR of an allegation of prosecutorial misconduct and final OPR disciplinary action can be over a year.\textsuperscript{57} Using a recent high profile example, it took OPR five years to complete its investigation of DOJ’s Office of Legal Counsel, John Yoo and now-Judge Jay Bybee in the Torture Memo Investigation.\textsuperscript{58}

At a minimum, the possible inherent conflicts of interest in DOJ self-regulation, the few findings of misconduct in contrast with the large numbers of complaints, the discrepancy in judicial/OPR misconduct findings and the seemingly lax disciplinary punishments raise questions and demonstrate the need for Congressional hearings and investigation to seek answers. Such questions include: How do DOJ and OPR avoid “the fox running the henhouse” mentality from becoming a reality? Why do so few complaints of misconduct lead to full investigations and findings of misconduct? Do DOJ and OPR need more resources to effectively investigate misconduct allegations? Why is there a discrepancy between judicial findings of misconduct and OPR findings of no misconduct? Why are misconduct punishments so lenient or how effective are the DOJ punishments in terms of deterrence? Given the independence of Congress from the Executive Branch, the bipartisan nature of some oversight hearings and the transparency of Congressional hearings, Congress is in a unique position to seek answers to these

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\textsuperscript{56} Angela Davis, \textit{The Legal Profession’s Failure to Discipline Unethical Prosecutors}, 36 Hofstra L. Rev. 275, 296 (Winter, 2007) (noting that OPR delays referrals to state disciplinary authorities for many years after the initial complaint). \\
\textsuperscript{57} Lu at 408, \textit{supra} note 25 (noting that “by the time a serious allegation [of prosecutorial misconduct] is brought to the attention of the OPR, it will take up to a year for an OPR investigation and action”). \\
\textsuperscript{58} John Yoo, \textit{Closing Arguments: Finally, an end to Justice Department investigation}, PHILA. INQUIRER, February 28, 2010, at C01.
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questions, and determine whether DOJ and OPR are adequately self-policing or whether misconduct is falling through the cracks and changes are needed.

III. The Purposes of the Potential Oversight Authorities

Presently, there are five oversight options for regulating federal prosecutorial misconduct: defense counsel oversight, judicial oversight, OPR self-regulation, state bar disciplinary oversight and Congressional oversight. This section discusses and analyzes the purposes of these oversight options.

A. Defendants’ and Defense Counsel’s Regulatory Purposes

Defendants’ and defense counsel’s purpose in regulating federal prosecutorial misconduct is very narrow, especially for defendants. Criminal defendants are primarily concerned with eliminating or punishing prosecutorial misconduct insofar as it leads to a not guilty verdict, dismissal of charges or reversal of conviction. Some defendants may also seek civil damages for prosecutorial misconduct, though federal prosecutors are generally immune from civil liability for prosecutorial misconduct.\(^{59}\) Similarly, defendants and defense counsel are motivated to expose prosecutorial misconduct where attorneys’ fees are available as a punishment under the Hyde Amendment, as in the Shaygan case.\(^{60}\) Defense counsel, more so than defendants, may also be motivated by a desire to see systemic change in eliminating discovery abuse, as it will benefit all of their clients. Still, most defense counsel and almost all defendants probably view systemic changes as secondary to individual relief.

\(^{59}\) Buckley v. Fitzsimmons, 509 U.S. 259, 273-74 (1993) (holding that prosecutors have qualified immunity when committing investigatory misconduct); Burns v. Reed, 500 U.S. 478 (1991) (holding that prosecutors have absolute immunity for eliciting false statements in a pretrial hearing); Imbler v. Pachtman, 424 U.S. 409, 427 (1976) (finding prosecutor immune from civil suit even after defendant was released through habeas corpus proceeding).

\(^{60}\) Lu at 385, supra note 25.
B. The Federal Courts’ Regulatory Purposes

The goals of court oversight over federal prosecutorial misconduct are to control the behavior of the prosecutors appearing before the court, to assure “that trials are conducted in a fair manner and ‘ensur[e] that justice is done.’”61 Arguably, judicial oversight serves both narrow and broad purposes. The purpose is narrow insofar as the courts aim to expose prosecutorial misconduct only where there are “violations of federal law in the evidence-gathering process that actually prejudice defendants.”62 The Supreme Court is in agreement, holding that courts are primarily concerned with remedying the violation of defendants’ rights.63 However, the Supreme Court has also held that court oversight is more broadly focused on deterring future illegal conduct, as well.64 Beyond protecting individual defendants’ rights, courts seek to promote broader concepts of deterring prosecutorial misconduct throughout the federal court system, a fair criminal justice system that operates in a uniform manner and foster a criminal justice system in which all practicing attorneys meet a certain ethical standard.

Despite the mixed scope of courts’ oversight, court remedies for prosecutorial misconduct are very case specific, including the authority to dismiss cases, reverse convictions, hold a prosecutor in contempt, refer prosecutors to the state bar for discipline, impose fines in some circumstances, exclude evidence, give jury instructions benefitting the defense, orally admonish prosecutors for misconduct, write opinions citing prosecutorial misconduct and award attorneys’ fees under the Hyde Amendment to defendants who are victims of prosecutorial misconduct.

64 Id.
misconduct.\textsuperscript{65} Accordingly, the available judicial remedies force courts to focus more narrowly on the aim of protecting the rights of individual defendants and regulating prosecutorial misconduct on a case-by-case basis.

C. **State Disciplinary Authorities’ Regulatory Purposes**

Federal prosecutors are subject to state disciplinary authorities under the McDade Amendment, a federal statute which subjects “U.S. Attorneys to state laws and rules and local federal court rules regarding professional standards.”\textsuperscript{66} In other words, the McDade Amendment “expressly makes government lawyers subject to the same local ethics rules that govern non-government lawyers.”\textsuperscript{67}

The genesis for the McDade Amendment was a 1989 “policy directive initiated by [then-Attorney General] Dick Thornburgh, instructing DOJ attorneys that, notwithstanding contrary state ethics rules, they could communicate directly with ‘any person who has not been made the subject of formal federal adversarial proceedings arising from that investigation, regardless of whether that person is known to be represented by counsel.’”\textsuperscript{68} Attorney General Janet Reno then expanded the Thornburgh directive to permit DOJ “attorneys to make direct contact with employees of organizations under investigation, even if the organization was represented by counsel, provided that the employees were not at a high level in the organization or ‘known by

\textsuperscript{65} Lu at 386, supra note 25; Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors’ Ethics*, 55 Vand. L. Rev. 381, 401-05 (March, 2002) (assessing arguments regarding state regulation, judicial regulation and Congressional oversight over DOJ prosecutors); Hessick at 268-69, supra note 24.


\textsuperscript{67} Michelle Querijero, *Without Lawyers: An Ethical View of the Torture Memos*, 23 Geo. J. Legal Ethics 241, 249 (Winter, 2010) (reviewing the applicable ethical obligations and sources of ethical obligations of DOJ attorneys within the context of the Torture Memos investigation).

\textsuperscript{68} Sarah Helene Duggin, *The McNulty Memorandum, the KPMG Decision and Corporate Cooperation: Individual Rights and Legal Ethics*, 21 Geo. J. Legal Ethics 341, 366 (Spring, 2008).
the government to be participating as a decision maker in the determination of the organization's legal position.” 69

DOJ used the Supremacy Clause to justify the superiority of its position over state ethics rules. 70 Although a 1998 Eighth Circuit ruling held that DOJ lacked statutory authority to exempt DOJ attorneys from complying with state ethics rules, the fatal blow to DOJ’s attempts to trump state ethics “no contact” rules came from Congressman Joe McDade of Pennsylvania, following his acquittal on federal bribery charges. 71 Incensed by what he believed to be DOJ’s overzealous bribery prosecution and in what is believed to be an act of revenge, Congressman McDade sponsored the McDade Amendment in order “to restrict the DOJ’s ability to exempt itself from state ethics rules.” 72 Despite strong opposition, Congress passed the McDade Amendment in 1998 and it was implemented in 1999. 73

The McDade Amendment expressly imposes upon federal prosecutors the fifty state ethical codes, which were designed to regulate private attorneys and state prosecutors, not federal prosecutors. 74 Accordingly, the purpose behind the creation of the state ethical codes is not necessarily aligned with the regulation of federal prosecutorial misconduct and does not take into account some of the ways in which federal prosecutors differ from other lawyers. As a result, state disciplinary standards fail to account for differences between private attorneys and

69 Id.
70 Id. at 367.
72 LeDonne at 234, supra note 71.
73 Id.
74 Id. at 245.
federal prosecutors and state prosecutors and federal prosecutors, may be too permissive for federal prosecutors in some situations and too restrictive in others, raise federalism concerns due to the application of fifty different disciplinary rules to a uniform corps of federal prosecutors and cause confusion over whether state laws apply or local federal court rules apply when the two are inconsistent.\textsuperscript{75}

Given that the states, in passing their respective ethical codes, never specifically contemplated the application of those codes to federal prosecutors, using state ethics codes as a means toward the goal of reforming systemic federal prosecutorial discovery abuse is probably a bad approach. For effective systemic reform, an effort based on a state ethics approach would require coordination among all fifty states in terms of disciplinary enforcement or ethics code reform, which is a practical impossibility.

D. OPR's Regulatory Purposes

OPR was originally established “to ensure that Department employees perform their duties in accordance with the high professional standards expected of the nation's principal law enforcement agency.”\textsuperscript{76} As set out in its Policies and Procedures, the primary purpose of OPR is “to investigate allegations of misconduct involving Department attorneys that relate to the exercise of their authority to investigate, litigate or provide legal advice, as well as allegations of misconduct by law enforcement personnel when they are related to allegations of attorney misconduct within the jurisdiction of OPR.”\textsuperscript{77} Ideally, OPR should serve as a complement to

\textsuperscript{75} Id. at 235-37 (arguing that many state ethical standards may be too permissive or too restrictive for federal prosecutors); Lu at 404-05, supra note 25; Mick at 1254, supra note 33; Fred C. Zacharias and Bruce A. Green, The Uniqueness of Federal Prosecutors, 88 Geo. L.J. 207, 224-25 (January, 2000) (arguing that the McDade Amendment is bad policy as applied to federal prosecutors).

\textsuperscript{76} 2007 OPR Annual Report at 1, supra note 26.

DOJ’s Professional Responsibility Advisory Office, which provides ethical advice to DOJ attorneys. The former focuses on investigating misconduct and enforcing discipline after misconduct occurs, while the latter serves to educate DOJ attorneys and circumvent ethical problems before they occur.

OPR also exists to provide “advice to the Attorney General and Deputy Attorney General concerning the need for changes in policies and procedures which become evident during the course of OPR's investigations.” Depending on the transparency policies of the presiding Presidential administration, OPR may also serve the purpose of promoting transparency of government misconduct, thereby encouraging public confidence in prosecutorial accountability.

OPR’s purposes and goals with regard to prosecutorial misconduct are all-encompassing. When it is operating in the manner designed, OPR serves to expose individual prosecutorial misconduct, as well as to promote DOJ policy reforms to eliminate discovery abuse on a system-wide basis and prevent future discovery abuse. Along with the goal of promoting justice and protecting defendants’ individual rights, OPR is also concerned with public confidence in DOJ, respect from defense counsel, judicial respect and confidence in DOJ, and the public presentation of the highest ethical standards for DOJ attorneys. Despite OPR’s aim to redress individual and systemic prosecutorial misconduct, the inherent conflicts of interest under which OPR operates probably hinder OPR’s success.


79 OPR Policies and Procedures § 2, supra note 77.

80 Bruce A. Green, Regulating Federal Prosecutors: Let There Be Light, 118 Yale L.J. Pocket Part 156 (March 4, 2009) (arguing for transparency for OPR investigations and disciplinary recommendations).
E. Congress’ Regulatory Purposes

The four primary goals of Congressional oversight over DOJ are to inform Congress of legislative needs, to monitor implementation of legislation that has already passed, to disclose to the public how DOJ is performing its functions and to sustain and vindicate “Congress’s role in our constitutional scheme of separated powers and checks and balances.”81 In the context of DOJ discovery abuse, the intended outcomes of Congressional oversight are threefold. First, Congressional oversight aims to expose any deficiencies in existing exculpatory discovery law, and assuming deficiencies exist, to generate ideas for legislative reform of prosecutorial discovery production obligations. Second, Congressional oversight serves to allow Congress to monitor if and how federal prosecutors are following existing exculpatory discovery obligations, as well as if and how OPR is monitoring, investigating and disciplining federal prosecutors who engage in discovery abuse. Third, Congressional oversight allows Congress to exercise a check on the Executive Branch’s power and relatively unfettered discretion in how it prosecutes criminal cases. Although the Judiciary Branch places checks on the ability of DOJ to engage in unbounded prosecutorial conduct, the broad grant of Constitutional authority to the Executive Branch to prosecute criminal cases still raises the potential for abuse and Congressional oversight reduces the likelihood thereof.

Congressional oversight is not without its own weaknesses. There is always the danger that partisanship will be the driving force behind any exercise of Congressional oversight.82 This partisanship concern also raises the related and legitimate vulnerability that the exercise of


82 Douglas Kriner, Can Enhanced Oversight Repair “The Broken Branch”? 89 B.U. L. Rev. 765, 782 (April, 2009) (discussing evidence that that “the level of congressional investigative activity is responsive to both the partisan composition of Congress and the cohesiveness of the majority party”).
Congressional oversight will lead to the appearance that Congress is attempting to influence federal prosecutions.\(^8^3\)

Across the board, all of the oversight options for regulating prosecutorial misconduct aim to foster a fair criminal justice system that protects individual rights and avoids punishing the innocent. However, OPR oversight and Congressional oversight are the only two types of oversight with the purpose and means for truly systemic reform. Although OPR examines the discovery abuse problem at the micro and macro level, OPR oversight also brings with it inherent conflicts of interest and demonstrated deficiencies in vigorous investigation and enforcement. Accordingly, Congressional oversight is preferential because it resolves the conflict of interest concerns, represents an important check on Executive Branch prosecutorial discretion, and provides an additional opportunity, over and above OPR action, for meaningful systemic reform.

III. An Assessment of Constitutional Issues Concerning Congressional Oversight Over DOJ Discovery Abuse

Having demonstrated a need for and the goals of Congressional oversight over DOJ discovery abuse, the next issue is whether there are any constitutional obstacles to Congress’ exercise of oversight authority. This section discusses the likely constitutional obstacles, focusing specifically on Separation of Powers arguments and Executive Privilege claims.

A. The Constitutional Basis for Congressional Oversight

The Supreme Court has ruled that Congress’ oversight power arises from and is implied within Congress’ Article I legislative power.\(^8^4\) The Court has defined Congress’ oversight power

\(^8^3\) Todd David Peterson, *Congressional Oversight of Open Criminal Investigations*, 77 Notre Dame L. Rev. 1373, 1377 (2002) (discussing Congressional oversight over open criminal investigations and “the potential for undue congressional influence over the decision to investigate or prosecute specific individuals”).

as broad, encompassing “inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes.”85 When government misconduct is at issue, the Supreme Court has held that Congress’ oversight power is at its peak.86 Undoubtedly, Congress has the power “to inquire into and publicize corruption, maladministration, or inefficiencies in the agencies of Government.”87 With regard to DOJ in particular, the Supreme Court has held that DOJ “is a creature of the Congress and subject to its plenary legislative and oversight authority.”88

Given these Supreme Court holdings, there can be little doubt that the Constitution contemplates a Congressional oversight role over DOJ discovery abuse. Congressional oversight is justified by Congress’ power to hold oversight hearings to examine whether DOJ is following proper discovery procedure and is properly investigating and punishing prosecutorial misconduct.89 Congressional oversight is also justified by Congress’ constitutional role of deciding “whether existing legislation or departmental policies [regarding the criminal discovery process] should be changed.”90 Pursuant to its Article I legislative power, Congress must have the power to investigate possible DOJ misconduct in order to study the problem of discovery abuse, determine whether current laws against discovery abuse are adequate and, if not, how those laws should be changed.91 Assuming Congress determines that reform is needed, it can

86 Id.
87 Id. at 200 n. 33.
88 McGrain, 273 U.S. at 177-78.
89 Peterson at 1429, supra note 83 (examining the competing interests of Congress’ need for oversight access to DOJ investigative files and the Executive Branch’s need for confidentiality).
91 McGrain, 273 U.S. at 174 (holding that Congress’ “power of inquiry – with process to enforce it – is an essential and appropriate auxiliary to the legislative function”); Jeffrey A. Meyer, Running Amok, 5/2009 Am. Law. 71 (2009)
then study possible legislative solutions and use its Article I legislative power to enact legislative
reform regarding prosecutorial criminal discovery obligations and/or reform to the existing
system for investigating and disciplining prosecutorial misconduct.

B. Separation of Powers and Executive Branch Objections to Congressional Oversight

Despite the obvious constitutional role for Congressional oversight over DOJ discovery
abuse, the Executive Branch is likely to raise Separation of Powers and related objections to such
oversight. Generally, the five most likely objections to Congressional oversight are as follows:
1) Improper Congressional interference with the fairness of prosecutions; 2) Improper exposure
of government trial strategy; 3) Improper politicization of the judicial criminal process; 4)
Improper interference with OPR’s self-regulating authority; and 5) Executive Privilege concerns,
which are discussed in Section C infra.

In 1941, Attorney General Robert Jackson issued an Opinion of the Attorney General
outlining the following reasons for the Executive Branch’s objections to Congressional oversight
over open and closed criminal proceedings:

Avoiding prejudicial pre-trial publicity, protecting the rights of innocent third
parties, protecting the identity of confidential informants, preventing disclosure of
the government’s strategy in anticipated or pending judicial proceedings, avoiding
the potentially chilling effect on the exercise of prosecutorial discretion by DOJ
attorneys and precluding interference with the President’s constitutional duty to
faithfully execute the laws.92

The Attorney General’s first category of “prosecutorial fairness” objections raise concerns that
Congressional oversight into DOJ discovery abuse will improperly raise pre-trial publicity,

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92 40 Op. A.G. 45, 46-47 (1941); Letter to Hon. John D. Dingell Chairman, House Subcommittee on Oversight and
Investigations, Committee on Energy and Commerce, from Attorney General William French Smith, dated
November 30, 1982 (opining that Congressional access to investigational materials would make Congress “a partner
in the investigation” and raise “a substantial danger that congressional pressures will influence the course of the
investigation”); Rosenberg at 15, supra note 81.
interfere with due process and interfere with concurrent investigations. Given that most of the DOJ discovery cases are closed cases that resulted in a dismissal, vacation of judgment or a not guilty verdict, these objections are somewhat insubstantial.

Nonetheless, the two Ninth Circuit discovery abuse cases and the pending and potential criminal or disciplinary investigations of the prosecutors would be considered open or concurrent investigations, to which the “prosecutorial fairness” concerns may apply. However, as to the due process concern, the Supreme Court has held that “a congressional committee which is engaged in a legitimate legislative investigation need not grind to a halt whenever responses to its inquiries might potentially be harmful to a witness in some distinct proceeding . . . or when crime or wrongdoing is exposed.”\textsuperscript{93} Second, with regard to concurrent investigations, the Supreme Court has held that concurrent investigations should not preclude Congressional oversight “where the information sought is needed to determine what, if any, legislation should be enacted to prevent further ills.”\textsuperscript{94} Third, as to pre-trial publicity, the courts have recognized the potential for unfair prejudice to defendants and resulting problems for pending or future prosecutions, but no court decision has held “that there are any constitutional or legal limitations on Congress’ right to conduct an investigation during the pendency of judicial proceedings.”\textsuperscript{95}

Even if Congressional oversight were to prejudice the prosecution of the two pending discovery abuse cases or any cases against the prosecutors, former Independent Counsel Lawrence Walsh has argued that “the legislative branch has the power to decide whether it is more important perhaps to destroy a prosecution than to hold back testimony they need … It is

\textsuperscript{93} \textit{Hutcheson v. United States}, 369 U.S. 599, 617 (1962).

\textsuperscript{94} \textit{Sinclair v. United States}, 279 U.S. 263, 294 (1929).

\textsuperscript{95} Rosenberg at 17, \textit{supra} note 81.
not a judicial decision, or a legal decision, but a political decision of the highest importance.”

If Walsh is correct, then the courts are unlikely to step in and block Congressional oversight on the grounds of “prosecutorial fairness” concerns. Nonetheless, for publicity and public approval reasons, Congress may not want to risk injecting itself into open or concurrent investigations and ending up with an Iran Contra-type situation, where a Congressional grant of immunity leads to the prosecution being unable to prosecute its criminal target.

Attorney General Jackson’s second categorical justification for opposing Congressional oversight is that such oversight would expose the government’s strategy, methods and weaknesses in judicial proceedings. As with the “prosecutorial fairness” objection, this objection only applies to the open cases of discovery abuse, and even then, blocking Congressional oversight on the basis of exposing government judicial strategy, methods and weaknesses would lead to blocking Congressional oversight over government strategy, methods and weaknesses in a host of other non-judicial contexts. Such a result would completely undermine and eliminate most Congressional oversight, which is a Congressional power firmly rooted in the Constitution and Congress’ Article I power to legislate.

Attorney General Jackson’s third categorical objection to Congressional oversight is that Congressional oversight will interfere with DOJ prosecutorial discretion. The Executive Branch opposes Congressional oversight over open and closed criminal proceedings because of the risk of improper Congressional influence on prosecutorial decision-making in pending and

97 R.S. Ghio, The Iran-Contra Prosecutions and the Failure of Use Immunity, 45 Stan. L. Rev. 229, 229 (November 1992) (citing that the Independent Counsel dropped charges against Oliver North because the prosecution could not prove that the trial witnesses had not been influenced by North’s Congressionally immunized testimony).
98 Rosenberg at 18, supra note 81.
99 Id.
100 Id. at 15.
future criminal cases or the perception of “a desire to make prosecutorial decision-making more directly responsive to congressional pressure.”\textsuperscript{101} The Executive Branch fears that Congressional oversight will have a chilling effect on prosecutors pursuing legitimate criminal investigations and will threaten “the fairness and credibility of prosecutorial decisions [and deliberations.]”\textsuperscript{102}

Although the Executive Branch expresses concerns that Congressional oversight will improperly influence prosecutorial discretion in closed cases because of the potential for influence on prosecutorial discretion in future prosecutions, improper Congressional influence is more of a concern when Congress exercises oversight over open criminal investigations.\textsuperscript{103} Since the majority of the DOJ discovery abuse cases are closed cases, the concerns of improper Congressional influence are lessened in the context of oversight over DOJ discovery abuse.

Even in the context of open criminal investigations, mere Congressional access to information “cannot stop a prosecution or set limits on the management of a particular case.”\textsuperscript{104} Moreover, Congressional oversight over open DOJ discovery abuse cases or open concurrent matters is still constitutionally justified, given Congress’ almost unlimited authority to investigate government misconduct.\textsuperscript{105} To preclude Congress from investigating prosecutorial misconduct because of open investigations would completely undermine Congress’ constitutional duty to investigate government misconduct, an important Legislative Branch check on the Executive Branch.

\textsuperscript{101} Bibas at 979, \textit{supra} note 33 (arguing that prosecutors often object to external oversight on the grounds of prosecutorial discretion); Leslie C. Griffin, \textit{The Prudent Prosecutor}, 14 Geo. J. Legal Ethics 259, 280 (2001) (noting that Congressional oversight raises concerns of politicizing prosecutions); Robinson at 1, \textit{supra} note 90.

\textsuperscript{102} Id.

\textsuperscript{103} Peterson at 1430-31, \textit{supra} note 83.

\textsuperscript{104} Rosenberg at 20, \textit{supra} note 81.

\textsuperscript{105} Watkins, 354 U.S. at 187, 200 n.3.
In any event, Congressional oversight should be focused on the structural and procedural problem of discovery abuse and not on attacking the DOJ for having pursued cases against particular individuals.\(^\text{106}\) Perhaps because of this focus, even in open investigations, “DOJ has consistently been obligated to submit to congressional oversight . . . so that Congress is not delayed unduly in investigating maladministration, misfeasance and/or malfeasance in the Justice Department.”\(^\text{107}\) Nonetheless, prosecutorial discretion concerns may warrant Congress in taking extra precaution in oversight over the Ninth Circuit cases and any cases involving concurrent charges against prosecutors.

Although Attorney General Jackson did not specifically raise this concern, the Executive Branch is also likely to object to Congressional oversight because of fears that a Congressional investigation will politicize federal criminal prosecutions. In the context of Congressional oversight investigations power is very centralized, as Committee Chairs often determine what hearings to hold and often have the sole power to subpoena documents, thereby opening the door for a potential abuse of power.\(^\text{108}\) A Committee Chair may be more concerned with symbolically publicizing a particular prosecution for political gain than using the oversight hearing to develop legislative reform.\(^\text{109}\)

Nonetheless, a Congressional political attack on the DOJ or the Executive Branch seems unlikely in the DOJ discovery abuse cases, given that the DOJ discovery abuse cases have no common partisan, politically charged theme and range from cases involving gun charges to environmental crimes. Even the most political DOJ discovery abuse case, the Stevens case,

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\(^{106}\) Peterson at 1412, supra note 83.

\(^{107}\) Rosenberg at 5, supra note 81.

\(^{108}\) Peterson at 1437, supra note 83.

\(^{109}\) Id. at 1438.
involved a Republican Presidential Administration seeking criminal charges against a
Republican Senator, hardly the basis for a political diatribe from any Congressman or Senator
against the Executive Branch. Moreover, all of the DOJ discovery abuse cases were initiated by
the Bush administration, which is no longer in power.

Along with complaints of improper political influences, the Executive Branch will also
likely argue that Congressional oversight over DOJ discovery abuse violates Separation of
Powers because the policing of prosecutorial misconduct is an Executive Branch function and
Separation of Powers precludes Congress from interfering with or trying to remove or change
OPR’s authority over investigations.\textsuperscript{110} The Executive Branch will claim that OPR is the more
structurally appropriate entity to engage in DOJ oversight because it has superior expertise and
knowledge in regulating prosecutorial misconduct, while Congress lacks the resources for
indepth research into the problem.\textsuperscript{111} To the contrary, the better view is that Congress has the
best tools for oversight as Congressional review is inherently deliberative and recognizes diverse
views on prosecutorial discovery abuse as a systemic problem.\textsuperscript{112} Congress has the ability to
hold hearings and call Executive Branch and Judiciary Branch witnesses to seek the advice of
both in formulating legislative solutions.\textsuperscript{113} Moreover, Congress can bring about reforms with
uniformity through legislation.\textsuperscript{114}

\textsuperscript{110} Mike Scarcella, \textit{Stevens Prosecution Prompts DOJ Damage Control}, 239 NO. 71 Legal Intelligencer 4 (2009)
(noting that Attorney General Holder, in private practice at the time, opposed proposed legislation in 2007 to give
OIG the power to investigate attorney misconduct, and the bill died in committee. The Holder DOJ also requested
that the ABA table a recent proposed Criminal Justice Section resolution calling for greater OPR transparency, and
the ABA acquiesced); Green & Zacharias at 439-42, \textit{supra} note 65; Oliphant at 1, \textit{supra} note 10 (quoting Attorney
General Holder as stating that DOJ is fully capable of investigating itself).

\textsuperscript{111} Bibas at 968, \textit{supra} note 33.

\textsuperscript{112} Mick at 1291, \textit{supra} note 33 (arguing that Congress is the proper regulatory body to provide oversight over
federal prosecutorial ethics because it is “a diverse and inherently deliberative body”).

\textsuperscript{113} \textit{Id.} (noting that “Congress can seek the advice and counsel of the Judicial Conference and the Supreme Court--
pursuant to the Rules Enabling Act--when formulating regulations”).

\textsuperscript{114} \textit{Id.}
Generally, it is somewhat unclear where the Constitution draws the line on the limits of Congressional oversight over DOJ.\textsuperscript{115} Congress certainly has the power to define some of the powers of DOJ, including the power of the DOJ to conduct all litigation involving the United States, and the power of the Attorney General to investigate crimes, to appoint the Director of the FBI to investigate crimes and to promulgate rules regarding the DOJ and the conduct of its employees.\textsuperscript{116} Similarly, Congress plainly has the authority to eliminate federal laws that DOJ is responsible for enforcing and/or denying DOJ the authority to enforce those laws.\textsuperscript{117} However, some have argued that certain Executive Branch powers and DOJ powers derive independently from Article II of the Constitution, including the Constitutional provision that the Executive Branch “take care” that laws be “faithfully executed,” DOJ’s absolute authority to decide whether or not to prosecute a case and the Constitutional prohibition against Congress executing laws or exercising indirect control over the execution of laws.\textsuperscript{118} The question remains unsettled as to a definitive answer on whether there is some inherent Executive Branch power of enforcement, where Congress remains silent on a given issue.

Regardless of the lack of a bright line division of power between DOJ and Congress, the general outline of the division of power simply reinforces that the Separation of Powers issue should be more of a sticking point when Congress engages in oversight that interferes with or

\textsuperscript{115}Zacharias & Green at 250-51, supra note 75.


\textsuperscript{117}Robert Reinstein, The Limits of Executive Power, 59 Am. U. L. Rev. 259, 320 (December, 2009) (noting that “the President's power to execute the laws is subject to plenary legislative control”); Rory Little, Myths and Principles of Federalization, 46 Hastings L.J. 1029, 1069 (April, 1995) (discussing Congressional authority to repeal federalized crimes).

\textsuperscript{118}U.S. CONST. art. II, § 3 (containing the “take care” and “faithfully execute” clauses); Bowsher v. Synar, 478 U.S. 714, 726-27 (1986) (holding that the Constitution prohibits Congress from executing laws or indirectly controlling the execution of laws); United States v. Nixon, 418 U.S. 683, 693 (1974) (holding that the Executive Branch has exclusive prosecutorial discretion); Zacharias & Green at 250-51, supra note 75.
influences DOJ prosecutorial decisions or DOJ’s discretionary decisions on how investigations and prosecutions are to be conducted within the bounds of the law. As discussed supra, in the context of DOJ discovery abuse, the focus of Congressional oversight would be on whether or not DOJ prosecutors are following the laws regarding discovery production and whether or not OPR is adequately investigating and punishing prosecutorial misconduct in that regard. The latter does not raise Separation of Powers concerns because DOJ’s and OPR’s authority to regulate employee conduct arises from statutory authority.119 Furthermore, although the former may facially appear to raise Separation of Powers concerns, it does not because the aim of such oversight is to target prosecutors who are exercising prosecutorial discretion in an illegal manner and not within the bounds of the law. As discussed supra, where government wrongdoing is the focus, Congress’ oversight power is at its strongest.120

C. Executive Privilege Objections to Congressional Oversight

Attorney General Jackson’s final objection to Congressional oversight, Executive Privilege, deserves separate discussion.121 In the context of DOJ discovery abuse, the Executive Branch is likely to raise the following three privileges: the presidential communications privilege, the law enforcement investigatory privilege and the deliberative process privilege.

The presidential communications privilege applies to communications regarding non-delegable Presidential powers that are solicited, received or authored in the course of preparing advice for the President by White House staff with operational proximity to the President.122 This privilege does not apply to the DOJ discovery abuse cases because the testimony and

119 28 U.S.C. § 301 (delegating to agency heads the power to promulgate regulations regarding employee conduct).
120 Watkins, 354 U.S. at 187.
121 Rosenberg at 15, supra note 81.
122 In re Sealed Case, 121 F.3d 729, 752 (D.C. Cir. 1997).
documents to be sought by Congress likely relate to DOJ line prosecutors, senior officials within the individual USAO’s and senior officials within DOJ, not White House staff. Indeed, it would be inappropriate for White House staff to be involved in prosecutorial decision making. Moreover, most of the documents are going to involve internal DOJ communications and decision making. More significantly, the focus of the Congressional oversight is going to be on prosecutorial discovery conduct and supervision and regulation of that conduct, which does not involve a non-delegable Presidential power.

The deliberative process privilege and law enforcement privileges are separate privileges, but employ the same standards for disclosure. The deliberative process privilege protects from disclosure Executive Branch documents that are predecisional and deliberative. 123 The privilege applies to “intra-governmental documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.” 124 The law enforcement investigatory privilege generally protects from disclosure investigative documents related to ongoing criminal investigations. 125 The privilege promotes “effective functioning of law enforcement . . . [and] preserve[s] the integrity of law enforcement techniques and confidential sources, protects witnesses and law enforcement personnel, safeguards the privacy of individuals under investigation, and prevents interference with investigations.” 126

123 In re U.S. Dept. of Homeland Sec., 459 F.3d 565, 569, n.1 (5th Cir. 2006).
124 In re Sealed Case, 121 F.3d at 737.
125 In re U.S. Dept. of Homeland Sec., 459 F.3d at 569, n.1.
Both privileges are “qualified privilege[s] and can be overcome by a sufficient showing of need.”\textsuperscript{127} For both privileges, the courts employ a balancing test to determine whether the privilege is overcome, which in this case would involve balancing the needs of Congress for the deliberative process materials against the Executive Branch’s need for confidentiality.\textsuperscript{128} This balancing analysis likely differs depending on whether Congress is seeking information related to an open investigation or closed investigation, since more deference is given to the Executive Branch when its need for confidentiality is more definite and less diffuse.\textsuperscript{129} It is easy to see how a court would find the Executive Branch’s need for confidentiality more definite where Congress is seeking discovery abuse information related to pending or concurrent investigations than when Congress is seeking discovery abuse information related to closed cases.

Regardless of any potential differences in the privilege analysis of open versus closed cases, Congress’ requisite need for DOJ discovery abuse information is likely met in both cases, as courts have held that where the focus of the Congressional investigation is “on government misconduct, ‘the privilege is routinely denied’ on the grounds that shielding internal government deliberations in this context does not serve ‘the public’s interest in honest, effective government.’”\textsuperscript{130} Accordingly, the majority of previous Congressional oversight investigations into possible DOJ misconduct have been conducted with DOJ producing sensitive deliberational

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\textsuperscript{127} \textit{In re Sealed Case}, 121 F.3d at 737 (holding that the deliberative process privilege is a qualified privilege); \textit{Tuite v. Henry}, 98 F.3d 1411, 1417 (D.C. Cir. 1996) (holding that the law enforcement privilege is a qualified privilege).

\textsuperscript{128} Peterson at 1423, \textit{supra} note 83; \textit{In re Sealed Case}, 121 F.3d at 737-38 (holding that the need determination is to be made flexibly on a case-by-case basis); \textit{Tuite}, 98 F.3d at 1417 (weighing the public interest in nondisclosure against the appellants’ need for access).

\textsuperscript{129} Roberto Iraola, \textit{Congressional Oversight, Executive Privilege, and Requests for Information Relating to Federal Criminal Investigations and Prosecutions}, 87 Iowa L. Rev. 1559, 1586 (August, 2002) (discussing the interplay between Congress and the Executive Branch when Congress requests criminal investigation information from the Executive Branch).

\textsuperscript{130} \textit{In re Sealed Case}, 121 F.3d at 738.
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materials.\textsuperscript{131} In the face of either a deliberative process privilege claim or a law enforcement privilege claim, the result should be no different here, where the centerpiece of the proposed Congressional oversight is DOJ prosecutorial misconduct.

In closing on the issue of Executive Privilege, should Congress wish to avoid litigation, it has various options available for meeting the Executive Branch’s concern regarding confidentiality, while also gaining access to information needed for effective oversight. A few examples which have been used in the past include agreement to: 1) receive Executive Branch information in time stages to allow for criminal investigations to conclude; 2) receive redacted information; 3) receive prepared summaries of information; 4) review material while it remains in executive custody; 5) promises of Congressional confidentiality; 6) limited Congressional staff access or limited Congressional member access; and 7) Congressional review of information in private executive session.\textsuperscript{132} In the end, Congress must make a political decision as to whether it wishes to pursue a confrontational or compromise approach to desired oversight.

**D. Practical Considerations**

There are a number of practical considerations worth examining in assessing whether Congress should engage in oversight over DOJ discovery abuse. First, it is worth noting that many of the recent DOJ scandals have connections to DOJ’s Public Integrity Section (“PIN”).\textsuperscript{133} However, Attorney General Holder has begun to overhaul PIN and in late 2009, the Chief of

\begin{footnotesize}
\textsuperscript{131} Rosenberg at 5, supra note 81.
\textsuperscript{132} Peter M. Shane, *Negotiating for Knowledge: Administrative Responses to Congressional Demands for Information*, 44 Admin. L. Rev. 197, 218-19 (Spring, 1992) (citing examples of Congressional confidentiality agreements in the fact of Executive Privilege claims).
\textsuperscript{133} Cynthia Hujar Orr, *Fear, Favor, and Fidelity*, 33-AUG Champion 5 (August, 2009) (citing that PIN was responsible for withholding evidence in the Stevens case); Bennett L. Gershman, *The Most Dangerous Power of the Prosecutor*, 29 Pace L. Rev. 1, 12-13 (Fall, 2008) (discussing PIN’s connection to the case of former Alabama Governor Don Siegelman and allegations that he was targeted for prosecution to further the interests of the Alabama Republican Party); James K. Robinson, *Restoring Public Confidence in the Fairness of the Department of Justice’s Criminal Justice Function*, 2 Harv. L. & Pol’y Rev. 237, 246-47 (Summer, 2008) (discussing the connection between PIN and the U.S. Attorneys firing scandal).
\end{footnotesize}
PIN, William Welch, agreed to resign his position.\textsuperscript{134} This may demonstrate that Attorney General Holder is holding DOJ officials accountable for their actions and may remove some of the impetus for Congressional action.

Further evidence of Attorney General Holder’s emphasis on prosecutorial accountability comes from a series of January, 2010 memos issued by former Deputy Attorney General David Ogden.\textsuperscript{135} One memo set forth new guidance for federal prosecutors regarding criminal discovery obligations and established “the minimum considerations, [as mandated by DOJ,] that prosecutors should undertake in every case.”\textsuperscript{136} A second memo directed “each USAO and component [to] develop a discovery policy that establishes discovery practice within the district or component.”\textsuperscript{137} Together, the new guidance and new USAO district-based policies are supposed to “assure that USAOs and components have developed a discovery strategy that is consistent with the guidance and takes into account controlling precedent, existing local practices, and judicial expectations.”\textsuperscript{138}

Along with issuing new criminal discovery guidance and mandating district-based USAO discovery policies, Attorney General Holder has also recently appointed a National Coordinator of Criminal Discovery Initiatives and DOJ headquarters has directed each USAO to appoint a discovery coordinator to “provide discovery training to their respective offices no less than


\textsuperscript{136} Memo I, \textit{supra} note 135; Memo III, \textit{supra} note 135.

\textsuperscript{137} Memo I, \textit{supra} note 135; Memo II, \textit{supra} note 135.

\textsuperscript{138} Memo I, \textit{supra} note 135.
annually and serve as on-location advisors with respect to discovery obligations.”\textsuperscript{139} More globally, DOJ headquarters is supposed to be instituting a series of additional DOJ-wide criminal discovery reforms in the future.\textsuperscript{140}

Despite these internal changes, by no means has the Executive Branch undercut Congress and the value of Congressional oversight over DOJ criminal discovery abuse. First, the DOJ reforms do nothing to address the “fox running the henhouse” concern and provide for no external check on DOJ discovery abuse. Arguably, to some extent, the DOJ reforms merely create more internal bureaucracy. Second, at a minimum, Congressional oversight is needed to review the sufficiency and effectiveness of these new DOJ reforms and policies towards resolving the problem of systemic DOJ criminal discovery abuse. At least one court in the federal judiciary has already expressed doubts regarding the reforms, indicating that “[e]xperience causes the court to have some doubt about whether the government's initiatives will succeed.”\textsuperscript{141} The court expressed skepticism regarding the Attorney General and DOJ’s promises of “real change” in terms of systemic DOJ criminal discovery abuse.\textsuperscript{142} Accordingly, recent developments and reforms do not render the need for Congressional oversight a dead issue.


\textsuperscript{140} Memo I, supra note 135 (stating that the DOJ will “[c]reate an online directory of resources pertaining to discovery issues that will be available to all prosecutors at their desktop; Produce a Handbook on Discovery and Case Management similar to the Grand Jury Manual so that prosecutors will have a one-stop resource that addresses various topics relating to discovery obligations; Implement a training curriculum and a mandatory training program for paralegals and law enforcement agents; Revitalize the Computer Forensics Working Group to address the problem of properly cataloguing electronically stored information recovered as part of federal investigations; [and] Create a pilot case management project to fully explore the available case management software and possible new practices to better catalogue law enforcement investigative files and to ensure that all the information is transmitted in the most useful way to federal prosecutors”).

\textsuperscript{141} Jones, 685 F. Supp.2d at 149 (expressing concern that DOJ’s discovery abuse reforms may not be effective).

\textsuperscript{142} Id. at 158 (indicating that “candor compels the court to acknowledge that experience causes it to be somewhat skeptical about the reliability of the assurances that have been given by the Attorney General and United States Attorney”).
In fact, history supports the likelihood that Congress will exercise its oversight authority over DOJ discovery abuse. Throughout history, despite objections from the Executive Branch, Congress has obtained the testimony of line attorneys, FBI field agents, U.S. Attorneys and detailed testimony regarding DOJ’s failure to prosecute certain cases.\textsuperscript{143} Congress has also successfully obtained sensitive deliberational materials from both open and closed investigative files, including, in at least one instance, access to OPR investigative materials.\textsuperscript{144} Given Congress’ success in obtaining access to a wide range of DOJ witnesses and documents as part of oversight investigations, arguably “no element of DOJ is exempt from oversight by a jurisdictional committee of the Congress.”\textsuperscript{145}

Given the focus of this article on prosecutorial discovery abuse and the open and concurrent investigations involved, the history of Congressional oversight involving past prosecutorial misconduct and open criminal investigations is of particular significance. In terms of open criminal investigations, Congress has successfully engaged in oversight and obtained access to DOJ materials related to open criminal investigations in at least the following instances: a 1997 investigation into illegal campaign finance activities; the 1987 investigation into Iran-Contra; and a 1979 investigation into white collar crime in the oil industry.\textsuperscript{146} Congress has also engaged in oversight over prosecutorial misconduct in the following instances: a 2001 investigation into FBI corruption in the Boston Regional office and the misuse of informants; a 1990 investigation into 10 cases in which federal judges found “very serious” prosecutorial

\textsuperscript{143} Rosenberg at 13, \textit{supra} note 81.

\textsuperscript{144} \textit{Id.} at 13, 16-17 (discussing Congressional access to OPR investigative documents during Congressional hearings into “the investigation, apprehension and prosecution of Randall Weaver and Kevin Harris at Ruby Ridge”).

\textsuperscript{145} \textit{Id.}

\textsuperscript{146} \textit{Id.} at 38, 44-45, 47-49.
misconduct, yet the prosecutors were never disciplined; and the 1982 investigation into the ABSCAM bribery sting operation.\textsuperscript{147}

The 2001 House Committee on Government Reform investigation into FBI corruption in the Boston Regional office provides a more detailed account of the nature of Congress’ success in achieving its oversight goals.\textsuperscript{148} The Congressional investigation into FBI corruption was based, in part, on allegations that certain FBI officials knowingly allowed innocent people to be convicted of murder based on false testimony by FBI informants.\textsuperscript{149} The House Committee sought documents related to a DOJ investigation into the handling of confidential informants and the Attorney General initially refused to release the documents.\textsuperscript{150} However, the Attorney General eventually released the requested materials after expert testimony before the Committee revealed over 30 examples of the DOJ providing Congress with access to prosecutorial documents in open and closed cases, including “prosecutorial memoranda, FBI investigative reports, summaries of FBI interviews, memoranda and correspondence prepared during undercover operations and documents presented to grand juries not protected by Rule 6(e).”\textsuperscript{151}

Given this history of expansive Congressional oversight over DOJ, it will be very difficult for DOJ or OPR to successfully resist Congressional oversight over DOJ discovery abuse.\textsuperscript{152} The scope of past Congressional oversight over DOJ demonstrates the sort of historical inertia and momentum needed for Congress to successfully obtain the documents and testimony

\textsuperscript{147} Id. at 49-50 (describing the investigation into the FBI’s Boston Regional office); Peterson at 1396-98, supra note 83 (describing the ABSCAM investigation); Barry Tarlow, \textit{Grand Jury Misconduct - A Window of Opportunity}, 26-FEB Champion 52, 57 (January/February, 2002) (discussing the 1990 investigation into the judicial findings of prosecutorial misconduct).

\textsuperscript{148} Rosenberg at 49, supra note 81.

\textsuperscript{149} Id.

\textsuperscript{150} Id.

\textsuperscript{151} Id. at 49-50.

\textsuperscript{152} Id. at 5, 12-13; Peterson at 1410-11, supra note 83.
needed to investigate DOJ prosecutorial discovery abuse. In politics, once the barn door is open and Congress has increased the level of its intrusion into Executive Branch matters, it becomes extremely difficult to push Congress back out.

**IV. Conclusion**

The media, the courts and the Attorney General have all recognized that DOJ discovery abuse is a problem that requires reform. DOJ discovery abuse is both an ongoing problem, as illustrated by Judge Wolf’s historical list of discovery abuse cases, and a growing problem, as demonstrated by the number of discovery abuse cases in the last year and the recent federal judicial uprising against discovery abuse. Discovery abuse is of particular importance because it can result in the loss of liberty to innocent criminal defendants, as well as undermine public faith in and the credibility of the criminal justice system.

Although the defense bar, defendants, courts and state ethics bars all represent potential oversight options, the purposes and structure of OPR and Congress make them the best options for oversight over DOJ discovery abuse. However, OPR suffers from an inherent conflict of interest, as well as a history of slow moving, lax investigation and enforcement when it comes to DOJ prosecutorial misconduct. Congressional oversight, on the other hand, resolves the conflict of interest concerns, while still focusing on reforming the discovery process, bringing transparency to prosecutorial misconduct and providing an important check on Executive Branch excesses.

Not only is there a need for Congressional oversight and not only does Congress serve a unique and important purpose in providing oversight, but Separation of Powers and Executive Privilege objections to oversight in this instance are weak. Neither objection is a major concern because Congress’ primary focus in oversight is on closed criminal matters, as well as relatively
nonpolitical criminal procedure issues and government wrongdoing, where courts have recognized Congress’ oversight powers to be at their strongest.

Congressional oversight over DOJ extends back to almost a century ago, and time and again Congress has successfully obtained sensitive documents and testimony over Executive Branch objections. Accordingly, history and momentum are on Congress’ side in investigating DOJ discovery abuse. As a matter of need, as a matter of purpose and as a matter of Constitutionality, there should be few, if any, limits on Congressional oversight over systemic DOJ discovery abuse.