STATEMENT OF

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HEARING ON THE WEAPONIZATION OF THE FEDERAL GOVERNMENT

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY

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Chairman Jordan, Ranking Member Plaskett, and members of the Subcommittee:

Thank you for inviting me to testify today. My name is Elliot Williams, and over the course of fifteen years, I had the honor of serving in all three branches of our government. Across that time, I worked as both a career prosecutor and a political appointee; as both a rank-and-file employee and a senior manager; for elected politicians and appointed officials; and in both Republican and Democratic administrations.

In each of those positions, and in each branch of government, I was proud to work alongside public servants who were devoted to the missions of their institutions and whose ultimate goal was to serve and protect the American people.

For a major portion of my time in government, I served in roles directly tied to the relationship between the executive and legislative branches of government: I served as counsel to the United States Senate Committee on the Judiciary; Assistant Director for Congressional Relations at U.S. Immigration and Customs Enforcement; and in my final role, as a Deputy Assistant Attorney General for legislative affairs at the U.S. Department of Justice.

Having sat in the seats of the staff behind you, as well as in the role of the executive branch official responding to your requests, I can say that each institution's interests are critically important to the functioning of our government, and so when they conflict, it is crucial to recognize that our government is best served by reaching a compromise or accommodation that protects the core interests of each branch.

Oversight generally

Congressional oversight -- the reviewing, monitoring, and supervision of federal agencies, programs, and activities -- is essential to good government. It helps to ensure that officials who hold the public trust apply laws fairly and spend funds wisely. It uncovers abuse and uproots waste; it encourages efficiency and fosters transparency.[1] When working properly, oversight creates a symbiotic relationship between the executive and legislative branches: Congress is better informed when making legislative decisions that touch the executive branch, and the executive branch is in a better position to carry out its role in the implementation of future laws and its participation in the legislative process. There is a natural, and perfectly reasonable, push and pull of constitutional and legal interests when two branches of government interact. But too much pushing, or pulling, from either party, poorly serves the American people.

[1] *See* CRS Report 97-936, *Congressional Oversight* by L. Elaine Halchin and Frederick M. Kaiser (2012).

The accommodations process

Many in the public may not be aware that the oversight process consists of more than just contentious public hearings. Many, if not most, requests between the branches are voluntary. And more often than not, the branches of government comply with one another's requests, in part or in full, after negotiation and compromise.

As the D.C. Circuit Court of Appeals has written, "[t]he coordinate branches do not exist in an exclusively adversary relationship to one another when a conflict in authority arises. Rather, each branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation."[2]

Both Congress and the Justice Department have long recognized this principle.[3] The Justice Department has attempted throughout the years to balance satisfying legitimate legislative interests with protecting the executive branch's confidentiality interests. In the context of the Justice Department, those confidentiality interests may apply to national security information; materials protected by law (such as grand jury materials protected by Rule 6(e) of the Federal Rules of Criminal Procedure and taxpayer information subject to the protections of 28 U.S.C. § 6103); information or materials the disclosure of which might compromise open criminal or civil cases or inappropriately invade individuals' personal privacy; and predecisional communications within the Justice Department (such as internal memoranda).

Similarly, Congress has a long history of engaging in responsible oversight of the executive branch, reaching accommodations with the executive branch that have regularly included narrowing investigative requests, agreeing to limit access to information, agreeing to accept information in a different format, such as a briefing, and even at times delaying a congressional investigation until the work of the Justice Department is completed.

Open matters

Congressional inquiries into open, ongoing criminal prosecutions or investigations reach the height of this institutional conflict and require the most significant need for accommodations. Since at least the turn of the 20th century, the Justice Department has resisted any attempts to obtain its investigatory files during an ongoing investigation. This is due to the Justice Department's fundamental concern that providing information

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[2] *United States v. American Tel. and Tel. Co.*, 567 F.2d 121, 127 (D.C. Cir. 1977).

[3] *See, e.g.,* Letter from Robert Raben, Assistant Attorney General, Office of Legislative Affairs, U.S. Department of Justice to Rep. John Linder, Chairman, Subcommittee on Rules and Organization, House Committee on Rules (Jan. 27, 2000).

related to an ongoing investigation would pose an inherent threat to the integrity of the Justice Department's law enforcement and litigation functions, and thus to the impartial administration of justice in the United States.

For instance, more than 80 years ago, Attorney General Robert H. Jackson notified Congress that "all investigative reports are confidential documents of the executive department of the Government, to aid in the duty laid upon the President by the Constitution to 'take care that the Laws be faithfully executed,' and that congressional or public access to them would not be in the public interest."[4]

Recognizing Congress's undeniable interest in oversight, there are several reasons why a healthy, functioning Justice Department must exercise extreme caution in disclosing information about ongoing matters to Congress. First, the Justice Department's disclosure of case files and other materials could enable Congress to pressure or attempt to influence the prosecution of criminal cases. As Charles Cooper, former Assistant Attorney General for the Office of Legal Counsel during the Reagan administration once wrote, such disclosures could in effect make Congress a "partner" in criminal investigations, opening the door to second-guessing tactical decisions and influencing the outcomes of criminal investigations.[5] Nearly forty years later, the concerns he voiced about faith in the justice system might be even more acute, with public trust in government currently at near-historic lows.[6]

Second, prosecutors must be cautious about providing Congress or the public with a template for how non-public investigations are proceeding. As Attorney General Jackson said, "[c]ounsel for a defendant or prospective defendant, could have no greater help than to know how much or how little information the Government has, and what witnesses or sources of information it can rely upon."[7] Having served as a prosecutor, I would add to Attorney General Jackson's observation that his concern shouldn't be limited to defendants and potential defendants alone. Ongoing investigations could be significantly impaired if prospective *witnesses* are tipped off about the existence or nature of open investigations of another party.

Finally, two principles enshrined in the Constitution and decades of jurisprudence are that everyone in the United States (1) is entitled to a presumption of innocence in criminal matters to which they are a party, and (2) retains significant individual privacy interests.

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[4] 40 Op. Att'y. Gen. 45, 46 (1941).
[5] *Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act*, 10 Op. OLC 68, 76-77 (1986), quoting *Memorandum for Edward L. Morgan, Deputy Counsel to the President*, from Thomas Kauper, Deputy Assistant Attorney General, Office of Legal Counsel (Dec. 16, 1969).
[6] *See, e.g., Public Trust in Government: 1958-2022*, Pew Research Center, found at https://www.pewresearch.org/politics/2022/06/06/public-trust-in-government-1958-2022/ (captured February 7, 2023).
[7] 40 Op. Atty. Gen. at 46.

The revelation that an individual is or might be the target or subject of an open investigation -- or perhaps was the subject of a now-closed investigation -- could have profound and devastating impacts on that person. The Justice Department's longstanding practice has been to keep this in mind when working with Congress to respond to its oversight requests.

And even as Congress maintains that it has the authority to investigate any matter within its jurisdiction, members of Congress often have deep concerns about negatively affecting the outcome of a prosecution or having even the appearance of a partisan influence on the criminal justice system. In my experience, these concerns have led to Congress proceeding carefully with its work, in close consultation with the Justice Department, in order to avoid compromising criminal cases. Some accommodations made by Congress have included deferring Congressional investigation until a criminal investigation is closed, securing information against public release, or withholding sensitive documents that would reveal sources or investigative methods.

For example, when the House Oversight Committee wanted to obtain documents from Special Counsel Patrick Fitzgerald's investigation into the leak of the covert identity of CIA officer Valerie Plame Wilson, they consulted with the Special Counsel and ultimately agreed to delay receiving information until after the investigation and litigation had completed. Even then, the Chair worked closely with the Special Counsel to narrow his requests to documents that the Special Counsel agreed would not infringe on his prosecutorial independence or intrude upon grand jury secrecy.[8]

In another example, when the Senate established a select committee to study the operations of the Federal Bureau of Investigation following the Department of Justice's undercover sting operation against members of Congress known as "ABSCAM," that committee established an agreement with the Justice Department whereby the Department was permitted "to withhold from the committee documents that might compromise ongoing investigations or reveal sensitive sources or investigative techniques, though the Department was required to describe each such document withheld, explain the basis of the denial, and give the committee an opportunity to propose conditions under which the documents might be provided."[9]

Conclusion

From the failed St. Clair expedition in 1792 through Watergate and the Iran-Contra hearings in the contemporary era, and any number of others today, Congress has never

[8] Letter from Henry A. Waxman, Chairman, Committee on Oversight and Government Reform, to Michael B. Mukasey, Attorney General (Dec. 3, 2007).
[9] *See, e.g.,*, Congressional Research Service, *Congressional Investigations of the Department of Justice, 1920-2007: History Law and Practice* (Aug. 20, 2008) at 45.

shied away from scrutinizing executive activity. This is a good thing. The public deserves to know about the workings of the executive branch: where it has succeeded and where it can be improved.

While the legislative and executive branches may not always have interests that align, their relationship is rooted in their roles as set by the Constitution and need not be hostile.

As with any process of negotiation or accommodation, not every party will always receive the materials or information they seek to recover, nor will they be able to protect every bit of information they wish to shield. In the give-and-take of the separation of powers, to paraphrase the Rolling Stones, you can't always get what you want, but if you try sometimes, you get what the Constitution and other precedent allow to be shared between coordinate branches of government, each of which has legitimate and serious interests to protect.

Thank you again for inviting me to testify, and I look forward to answering your questions.