

## Legal Sidebar

# Prosecution of Criminal Offenses against Congress

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A House Oversight and Government Reform Committee [hearing](#) regarding the Federal Bureau of Investigation's (FBI) inquiry of the potential mishandling of classified information has renewed questions about the process by which offenses against Congress are prosecuted. In the hearing, FBI Director James Comey [indicated](#) that in order for the FBI to investigate a potential incident of a witness providing false testimony under oath to a congressional committee, the FBI would need a "referral" from Congress. Chairman Jason Chaffetz sent such a [referral](#) several days after the hearing. Director Comey's comment raises questions about the interplay between the executive branch and Congress with regard to prosecuting crimes that are intended to protect the integrity of the legislative and oversight processes.

The constitutional separation of powers significantly limits Congress's role in the enforcement of federal law. Because exercising both the power to make *and* enforce the law would be an apparent violation of the separation of powers, Congress may neither itself, nor through its officers, directly enforce federal law. The Supreme Court has [clearly stated](#) that "Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them...." The Court has also [suggested](#) that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case...." Furthermore, the initiation of criminal prosecutions is within the "[special province of the executive branch](#)" and at the heart of what is known as "prosecutorial discretion." As a result, it is generally left to the executive branch to determine when and how criminal provisions are to be enforced.

These separation of powers principles apply equally to criminal provisions that have been enacted, in part, to protect the institutional interests of Congress, such as contempt of Congress ([2 U.S.C. § 192](#)), perjury ([18 U.S.C. § 1621](#)), obstruction of a congressional proceeding ([18 U.S.C. § 1505](#)), and false statements ([18 U.S.C. § 1001](#)). In each instance, the executive branch retains discretion in making prosecutorial decisions, such as who to prosecute, when to prosecute, and whether to prosecute.

In limited circumstances, Congress has enacted referral procedures in an attempt to influence or participate in the process by which certain criminal provisions are enforced. The criminal contempt of Congress statute provides such an example. Under [2 U.S.C. § 192](#), failure to comply with a duly issued congressional subpoena for either documents or testimony constitutes a misdemeanor offense. In conjunction with this general prohibition, [2 U.S.C. § 194](#) outlines the process by which a violation of § 192 is to be referred to the Department of Justice (DOJ), including language that purports to *require* the DOJ to present a referral for the charge to a grand jury. The law further provides that if either the House or

Senate approves a contempt citation, it is the duty of the President of the Senate or the Speaker of the House to “certify” that citation “to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action.” Despite the mandatory nature of this language, the DOJ has asserted that it retains the discretion to determine whether to present a criminal contempt citation to the grand jury, based on the separation of powers principles discussed above.

Other criminal provisions that protect the institutional interests of Congress do not have a comparable certification or referral process. The [perjury statute](#), for example, states that whoever “having taken an oath before a competent tribunal ... that he will testify ... truly ... willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true ... is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both.” The [false statements](#) and [obstruction](#) provisions similarly declare certain conduct to be unlawful, and they establish a penalty for any violation without establishing any additional process by which a potential violation is to be referred from Congress to the executive branch for prosecution.

In practice, and consistent with Director Comey’s statement at the hearing, the DOJ generally awaits a referral from a congressional committee before investigating an alleged violation or initiating a prosecution. In his [testimony](#), Director Comey explained DOJ’s rationale:

We out of respect for the legislative branch being a separate branch, we do not commence investigations that focus on activities before Congress without Congress asking us to get involved. That’s a long-standing practice of the Department of Justice and the FBI. So we don’t watch on TV and say we ought to investigate that, Joe Smith said this -- in front of the committee. It requires the committee to say, “We think we have an issue here; would you all take a look at it?”

While historical practice and comity may dictate the desirability of such a referral, the law itself does not appear to require it. Moreover, the receipt of such a referral does not require the executive branch to take action. There [are several examples](#) in which the DOJ has declined to investigate and/or prosecute in situations where congressional committees have referred potential charges to the DOJ and urged the initiation of a prosecution, particularly with regard to executive branch officials.

So what options does Congress have if its criminal referrals are not acted upon to Congress’s satisfaction? Congress could choose to revive the [Independent Counsel](#) statute, which [expired](#) in 1999 and has not been reauthorized by Congress. The statute [envisions](#) the appointment, by a panel of federal judges, of a counsel to investigate and prosecute high ranking executive branch officials for violation of federal laws. However, under this regime, the DOJ, through the Attorney General, would still be responsible for requesting the appointment of the independent counsel and would not be required to do so based on congressional demands. When the constitutionality of the statute was [challenged](#), DOJ’s role in the scheme appeared to be a critical factor in the Supreme Court’s analysis upholding the law. Alternatively, Congress could, hypothetically, choose to establish its own special investigator to probe the allegations and make non-binding recommendations regarding prosecutions. However, such a congressionally appointed counsel likely would not be permitted to initiate prosecutions on his own. The potential constitutional concerns surrounding such an appointment are discussed in further detail in this [previous Legal Sidebar](#). It does not appear that Congress has ever appointed such a congressional

investigator in the past. Congress has other options outside of the criminal prosecution realm, if it chooses to use them, such as the initiation of [inherent contempt](#) proceedings.

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