

# Introduction to Criminal Referrals by Congress

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Earlier this week, the Select Committee to Investigate the January 6th Attack on the United States Capitol (Select Committee) unanimously [reported](#) its final investigative report to the House of Representatives. Although the full report is not yet available, the Select Committee has released [introductory material](#) that includes criminal referrals for former President Donald Trump and others for possible violations of [18 U.S.C. § 1512](#) (obstruction of an official proceeding), [18 U.S.C. § 371](#) (conspiracy), [18 U.S.C. § 1001](#) (false statements), and [18 U.S.C. § 2383](#) (inciting or aiding insurrection). According to the report's [introductory material](#), “the facts found support further evaluation by the Department of Justice of specific criminal charges.” The Select Committee also authorized Chairman Bennie Thompson to transmit all supporting evidence relevant to the referrals to the Department of Justice (DOJ).

This Legal Sidebar will describe and define congressional criminal referrals; situate referrals within a constitutional context; and discuss what standards, if any, guide their use.

## Background and Process

[Legislative investigations](#) by congressional committees can be wide ranging and often directly or indirectly involve issues of misconduct. As the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) recently [noted](#), “[m]issteps and misbehavior are common fodder for legislation.” As a result, congressional committees will occasionally come across evidence of a criminal offense in the course of an investigation. When that occurs, committees have sometimes chosen to take that information and make a “criminal referral” to the DOJ.

Although there is no established or accepted definition, a congressional criminal referral is a non-binding communication to the DOJ, made either by a congressional committee or by individual Members of Congress, that specifically articulates evidence supporting the possible commission of a crime and asks the DOJ to either conduct further investigation or otherwise pursue the matter. While congressional criminal referrals often involve offenses against Congress (for example, [lying to Congress](#) or [obstructing a congressional investigation](#)), a committee can make a referral whenever an investigation has uncovered evidence of possible criminal wrongdoing.

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The process by which committees or Members make criminal referrals to the DOJ is generally not governed by federal statute or chamber rules. It is instead typically an informal, ad hoc process, largely uninhibited by legal or procedural constraints, in which committees, committee chairs, or individual Members of Congress make referral decisions based on the facts and circumstances of a given case. There are two narrow exceptions to this general rule. First, criminal referrals by the ethics committees in the [House](#) and [Senate](#) are governed by chamber or committee rules. Second, unlike other criminal offenses, the criminal contempt of Congress statute ([2 U.S.C. § 194](#)) explicitly establishes a process for each chamber to “certify” an offending witness directly to a U.S. Attorney. The [criminal contempt of Congress](#) statute—which was enacted in 1857 as an exercise of Congress’s inherent contempt power—is unique, and its certification process should be viewed as distinct from other referrals.

## Constitutional Principles

Criminal referrals reflect the constitutional separation of powers. Congress is not a “[law enforcement or trial agency](#)” and may neither itself, nor through its officers, directly enforce federal law. “Legislative power,” the Supreme Court has [held](#), “is the authority to make laws, but not to enforce them . . . .” Congress has no power to bring its own criminal prosecutions for violations of federal law; the Constitution reserves that authority for the executive branch. This circumstance is true even for criminal offenses that protect the institutional prerogatives 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](#)). Instead, Congress generally must rely on the DOJ to vindicate Congress’s institutional interests by prosecuting those that violate these criminal provisions.

A congressional criminal referral does not, and likely cannot, *require* the DOJ to initiate a prosecution. There are several constitutional reasons for this.

First, criminal referrals do not comply with bicameralism and presentment and therefore cannot have the force and effect of law. In *INS v. Chadha*, the Supreme Court held that if Congress wishes to create “legal rights” or obligations, it must do so in the “finely wrought” process established in Article I of the Constitution: passage by both chambers of Congress and presentment to the President. Criminal referrals, which are not presented to the President and are typically not approved by either chamber of Congress, let alone both, do not comply with this constitutionally mandated process and therefore cannot have binding legal effect.

Second, in describing the executive’s law enforcement power, the Supreme Court has [suggested](#) that “the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case . . . .” Initiating a criminal prosecution, the Court has [reasoned](#), is within the “special province of the executive branch” and at the heart of what is known as “prosecutorial discretion.” While Congress can confine the exercise of that discretion in a variety of ways, enacting a binding legislative measure that purported to substitute Congress’s prosecutorial determination for that of the executive’s may raise constitutional concerns.

For these reasons, criminal referrals do not force the DOJ to take prosecutorial action. They may, however, influence DOJ decisionmaking and, therefore, should not be treated as a wholly symbolic act. This is true for several reasons. First, if the referral is formally approved by a committee or a chamber of Congress, it represents a reasoned determination of a component of the legislative branch of government that should be accorded due respect. Second, a referral may present the DOJ with previously unknown evidence uncovered through Congress’s own investigatory processes. Third, a thorough, publicly available referral exposes evidence of possible wrongdoing, potentially resulting in substantial public (in addition to existing congressional) pressure for the DOJ to act.

## Standard of Proof

In the judicial system, the *burden of proof*—or degree of certainty to which parties must prove their allegations through the production of evidence—varies depending on the type of proceeding. In a [criminal trial](#) the prosecutor must prove each element of a crime “beyond a reasonable doubt.” In [civil litigation](#), plaintiffs generally need only prove allegations by a “preponderance of the evidence.” Federal grand juries use yet a different standard and may issue an indictment on a finding that there is “[probable cause](#)” to believe that a crime has occurred.

There is no applicable standard of proof connected to a congressional criminal referral. Indeed, it does not appear that a committee need be convinced that a crime has occurred at all to make a referral. It could, for example, make a referral on the belief that further investigation by the DOJ may be warranted, perhaps because the alleged conduct is tangential to the committee’s investigation; outside the committee’s purview; or requires investigatory tools and resources not possessed by the committee. For example, in the 116th Congress, the Senate Select Committee on Intelligence [referred](#) information to law enforcement authorities “for whatever action it deemed appropriate,” expressing only that “crimes may have been committed and that further investigation might be warranted.”

Given the discretion involved, congressional referrals have characterized the amount of evidence that should trigger a referral in different ways. The Select Committee appears to have articulated a “[sufficient evidence](#)” standard. A House Intelligence Committee chair [referred](#) a witness where the evidence “strongly indicate[d]” a criminal violation; a past Senate Judiciary Committee chairman [described](#) his committee’s practice of making referrals when it has “credible evidence of a criminal violation”; and the House Ways and Means Committee has made [referrals](#) where it has “evidence that tends to show intentional wrongdoing.” As noted, the House Rules impose a specific standard of proof for criminal referrals from the House Ethics Committee. [Under Rule XI](#), referrals are permitted when there is “substantial evidence of a violation.”

Although there does not appear to be an explicit evidentiary burden that a committee (other than the ethics committees) must meet to make a referral, the DOJ’s standard for opening an investigation is low. According to Federal Bureau of Investigation [guidelines](#), the standard for initiating an investigation appears to be the existence of evidence that a crime “may have occurred.” Still, there are prudential reasons that a committee may wish to provide as much evidence as possible with the referral. A referral holds only the persuasive weight that the evidence contained within can bear. The greater the evidence of misconduct a referral includes (and the more clearly the referral connects that evidence to each element of a criminal offense), the easier (and possibly more likely) it is for the DOJ to act on the referral. That said, the decision of whether to initiate prosecution is subject to the executive branch’s discretion, as informed by a number of Justice Department [policies](#).

Finally, it is possible that extreme cases of abuse of the referral process—for example, if a committee or Member were to publicly make an entirely unsupported criminal referral with the intent of damaging the target’s reputation—could raise ethical issues or possibly trigger civil claims for [defamation](#), though the latter would likely implicate congressional immunities under the [Speech or Debate Clause](#).

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