Statement for the Record
House Committee on Homeland Security Democrats Shadow Hearing
June 10, 2026

Ranking Member Thompson, members of the committee, my sincere thanks for inviting me to share my views with you today. I should note at the outset that my views are just that, not necessarily those of the Cato Institute or its board of directors.

As a former intelligence analyst with the CIA and a previously commissioned officer in the Army of the Republic, I understand well the threats we face from abroad. In my view, none of those threats today are as grave as the threat we face from our own government, specifically the Executive branch and its sweeping law enforcement and intelligence gathering powers.

The march of technology has made those powers all the more fearsome, particularly when they are combined with little or no meaningful judicial restraint on their use and Executive branch assertions of inherent authority to use them at will.

The Congress is once again debating the future of one of those powers--Title VII of the Foreign Intelligence Surveillance Act (FISA). Let me take this opportunity to provide committee members with some facts about this frequently scandal-plagued program.

FISA Section 702: The 21st Century Digital Writ of Assistance

As I noted in a recent piece[1] on the Cato At Liberty blog,

> For years, the Foreign Intelligence Surveillance Court (FISC) has held that querying Section 702–acquired data with a US-person term is not a separate Fourth Amendment event and requires no warrant—the program need only be “reasonable” at the point of collection. That rests on a “foreign intelligence exception” the Foreign Intelligence Surveillance Court of Review (FISCR) read into the amendment in *In re Directives*, building on *In re Sealed Case*.

The reality is that the Fourth Amendment contains no so-called "national security exception"--a deliberate choice by the Constitution's drafters, who were among the most prolific users of what in their day were called "codes and ciphers"--what we today call encryption. Had the

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[1] *The Fourth Amendment Forecloses a Foreign Intelligence Exception: A Brief Case Against the FISA Section 702 Program*, June 3, 2026. Available online at https://www.cato.org/blog/fourth-amendment-forecloses-foreign-intelligence-exception-brief-case-against-fisa-section-702

Founders believed that a such an exception was necessary, they would've included it in the text of the Fourth Amendment.

As I noted in the aforementioned essay,

> Under the canon that expressing one thing implies excluding others, the absence of a national security...is a choice, not a gap for courts to fill. The “foreign intelligence exception” supplies the carve-out the Framers declined to write.

Moreover, the Fourth Amendment was created to prohibit the use of general warrants--the infamous "writs of assistance" used so frequently by British colonial officials against American colonists that the practice became a proximate cause of the American Revolution.

The FISA Section 702 program has resurrected that vice in digital form.

The very nature of the operation of the Section 702 program guarantees that the communications of innocent Americans will be swept up in the program's electronic dragnet--**meaning that the digital version of U.S. Persons "papers and effects" are seized by the government in the complete absence of the Fourth Amendment's probable cause requirement**. A secret court--the FISC--has repeatedly blessed this facially unconstitutional practice for over a decade.

In contrast, over 18 months ago in the Eastern District of New York, Judge LaShann DeArcy Hall ruled[2] in *U.S. v. Hasbajrami* that any search of the FISA Section 702 database for information on an American citizen requires a probable cause-based warrant issued by a federal judge. The Trump Justice Department's appeal of that decision was argued before the Second Circuit in late April 2026 and the decision is pending.

Indeed, just weeks before the Second Circuit hearing on the Hasbajrami Section 702-related case, Senator Ron Wyden (D-OR), the longest serving and most experienced member of the Senate Select Committee on Intelligence, revealed[3] the existence of a March 17, 2026, FISC opinion that, in Wyden's words,

> "...found major compliance problems related to the surveillance law known as section 702. These compliance problems are directly related to Americans’ Constitutional rights..."

Despite Wyden's repeated requests, the Trump regime has thus far refused to declassify and make public that FISC opinion--a situation that should cause Congress to examine how it is that

[2] Section 702 Memorandum and Order - *U.S. v. Hasbajrami* (11-cr-00623-LDH). Available online at https://www.aclu.org/documents/section-702-memorandum-and-order-u-s-v-hasbajrami-11-cr-00623-ldh

[3] "Wyden Statement on Revelation of Major Compliance Problems With FISA Section 702 Surveillance," April 10, 2026. Available online at https://www.wyden.senate.gov/news/press-releases/wyden-statement-on-revelation-of-major-compliance-problems-with-fisa-section-702-surveillance

the Executive branch can preclude a federal court from making public violations of federal surveillance law.

The Cato Institute has been in federal court since October 2024 seeking letterhead memoranda, emails, instant messages (via platforms such as Slack, Microsoft Teams, or similar platforms), text messages, and records in any other format to/from/between FBI and DoJ's National Security Division, the Attorney General's office, the Office of Legal Counsel, and the FISC regarding FBI FISA Section 702 noncompliance incidents between August 16, 2024 and January 24, 2025. Given the gravity of the Justice Department and FBI conduct in this case, the members of the Committee should be made aware of the following facts.

On March 18, 2026, DC District Chief Judge James Boasberg ordered[4] the Justice Department to turn over to the Cato Institute Section 702 noncompliance records pursuant to a long-running Cato Freedom of Information Act (FOIA) lawsuit.[5] The FBI had until April 10, 2026, to process 28 pages of records relating to FBI noncompliance incidents under FISA Section 702, in this case, and rather critically involving correspondence between the FBI and Congress.

Judge Boasberg's language was pointed—he specifically noted that "several further weeks to process 28 pages is sufficient." The message was clear: no more delays.

The FBI missed the deadline anyway.

On April 9—the day *before* the court-ordered deadline—DOJ's opposing counsel gave an explicit assurance to Cato's attorneys at Loevy & Loevy: the first tranche of records would be sent via FedEx overnight, going out the afternoon of April 10, which itself was problematic because it meant that the records would be delivered *after* Boasberg's April 10 deadline.

That representation was made by an officer of the court to opposing counsel in active litigation. It wasn't a maybe. It was a decision not to deliver the records to Cato by the close of business on April 10. And why the Bureau chose to use taxpayer dollars to overnight material that could easily have been **emailed** is another indicator of the lack of seriousness with which the FBI treated Boasberg's order.

No package arrived at the offices of Loevy & Loevy of Chicago, Cato's counsel of record in this (and all) of Cato's FOIA cases.

Only through the dogged persistence of Loevy & Loevy FOIA litigator Merrick Wayne did the Justice Department finally email a paltry [14 heavily redacted pages]() of material late on the afternoon of April 13. Another 14 pages were withheld in full on the basis of alleged "national

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[4] Minute order by Judge James Boasberg, March 18, 2026. Available online at https://www.cato.org/blog/boasberg-compels-disclosure-fisa-noncompliance-incident-records

[5] *Cato v. FBI et al*, 25-cv-03656. Complaint available online at https://www.cato.org/sites/cato.org/files/2025-10/1.%20Complaint.pdf

security" or "intelligence sources and methods" grounds. Even redacted, the released records show continuing negligence with 702 database searches by FBI personnel.

What's more, **the FBI clearly completed its review of this material by March 23—**just five days after Boasberg issued his order. Rather than release the material before the end of March—as it easily could have—the Bureau sat on the material for over two more weeks--ensuring it was not made public until almost the day of the Section 702 vote in the House in April 2026. This episode is a literal replay[6] of the FBI's stonewalling of a prior Cato FOIA lawsuit when Section 702 was set to expire in April 2024 during the Biden administration.

This pattern and practice of stonewalling the release of Section 702 noncompliance incident records is ongoing.

In another long-running Section 702 noncompliance incidents FOIA lawsuit against the FBI spanning the period June 8, 2023, to August 19, 2024, on June 4, 2026, the FBI reported to Judge Walton that it had "identified **approximately 39,650 potentially responsive pages** to the request" but that it didn't intend to release any of the material before "August 15, 2026, which FBI anticipates will consist of approximately 128 pages, followed thereafter processing 250 pages per month."[7] (emphasis added)

The Trump Justice department is stonewalling the release of 1) an apparently very damaging FISC opinion on the Section 702 program and 2) the release of **thousands** of pages of 702 noncompliance incident records in two Cato FOIA lawsuits. Congress should take no action to renew the 702 program for the long term unless and until that FISC opinion and the 702 noncompliance records at issue have been released and reviewed by House and Senate members.

Commercially Available Data: Closing the Databroker "Fourth Amendment end run" loophole

Making the Section 702 program truly Fourth Amendment compliant is critical--but it is not enough to truly stop Executive branch surveillance overreach.

Indeed, it is the vast and ever-increasing amount of commercial digital data on each and every one of us, and the ability of federal law enforcement to obtain that data with our tax dollars, that represents perhaps the greatest long-term threat to our civil liberties and personal privacy.

In the nearly 18 months since Trump began his second term in office, the Justice and Homeland Security Department agents working for his regime have employed publicly or commercially available data at scale to surveil and track down not only migrants--legal or otherwise--but

[6] "Did the Justice Department Mislead a Federal Court to Secure FISA Renewal?" Cato at Liberty blog, September 13, 2024. Available online at https://www.cato.org/commentary/did-justice-department-mislead-federal-court-secure-fisa-renewal

[7] *Cato v. FBI*, 24-cv-02839-RBW, Joint Status Report, June 4, 2026, p. 2.

Americans opposed to Trump's immigration and other policies. A review of some the headlines of the media accounts of these activities tells the tale:

"ICE Agents Have List of 20 Million People on Their iPhones Thanks to Palantir"[8]

"Meta Silently Added Face-Recognition Code for Its Smart Glasses to Millions of Phones"[9]

"Security News This Week: The FBI Wants 'Near Real-Time' Access to US License Plate Readers"[10]

"ICE is spending millions of dollars on iris scanners, expanding its arsenal of tech tools"[11]

"Wildlife Conservation Police Are Searching Thousands of Flock Cameras for ICE"[12]

"Supreme Court Wrangles With Police Use of Cell Location Data to Find Suspects"[13]

"Government requests for social media user data up 770 percent in past decade: Research"[14]

"Police are finding suspects based on their online searches as courts weigh privacy concerns"[15]

"All the Ways Big Tech Fuels ICE and CBP"[16]

"ICE has spun a massive surveillance web. We talked to people caught in it"[17]

The stories I've cited thus far only cover the period from March through early June 2026, but they should give you a clear and frightening picture of how easy it's become for federal, state,

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[8] 404 Media, May 12, 2026. Available online at https://www.404media.co/ice-agents-have-list-of-20-million-people-on-their-iphones-thanks-to-palantir/?ref=daily-stories-newsletter
[9] WIRED, June 4, 2026. Available online at https://www.wired.com/story/meta-smart-glasses-face-recognition-nametag-connections
[10] WIRED, May 23, 2026. Available online at https://www.wired.com/story/security-news-this-week-fbi-license-plate-reader-real-time-access/
[11] NPR, May 27, 2026. Available online at https://www.npr.org/2026/05/27/nx-s1-5822429/ice-buys-iris-scanners-tech-tools
[12] 404 Media, April 6, 2026. Available online at https://www.404media.co/floridas-wildlife-cops-are-searching-thousands-of-flock-cameras-for-ice/
[13] *New York Times*, April 27, 2026. Available online at https://www.nytimes.com/2026/04/27/us/politics/supreme-court-cell-data-geofence.html
[14] *The Hill*, April 1, 2026. Available online at https://thehill.com/policy/technology/5811187-google-meta-apple-data-spikes/
[15] Associated Press, February 23, 2026. Available online at https://apnews.com/article/google-reverse-keyword-search-privacy-c5a0bc6f3790213f92e78aae720d2379
[16] WIRED, March 3, 2026. Available online at https://www.wired.com/story/how-big-tech-is-powering-trumps-immigration-crackdown/
[17] NPR, March 5, 2026. Available online at https://www.npr.org/2026/03/04/nx-s1-5717031/ice-dhs-immigrants-surveillance-confrontation-deportation-mobile-fortify

and local police to acquire and use social media and commercially available data to track where we go, who we meet with, what we say online, the things that we buy, the services we use--the list is nearly endless.

None of this raw data or the sophisticated AI-enabled software programs used to sort, categorize, and disseminate this data to ICE or other law enforcement organizations is classified in the traditional national security sense of the term. But as some of the stories above relate, federal law enforcement organizations do all they can to keep the public in the dark about the power and reach of these capabilities.

Had the Senate acted on the House-passed Fourth Amendment is Not For Sale Act in 2024, it is likely that legislation would today be law and the commercial information currently being used at will to target President Trump's political opponents would require a warrant to obtain. Enactment of that legislation or its equivalent is of paramount importance to close the so-called "data broker loophole" that affects all of us.

A Fatal Constitutional Flaw, and How To Fix It

Any post-Trump era governmental reform effort must also contend with the fact that reining in the surveillance threat I've highlighted only addresses the problems with the tools themselves--not the mindset and the power wielding them.

Twice in my lifetime, I've witnessed two presidents misuse DoJ to achieve their own political ends--Richard Nixon and Donald Trump. In each case, such presidential misconduct has triggered a constitutional crisis and widescale civil unrest. So long as the Justice Department remains within the Executive branch, it will always be a powerful coercive tool waiting to be used by another unscrupulous president. To avoid that outcome, we have to change the very structure of our government.

In my view, that process must begin with moving the Justice Department out of the Executive branch and placing it under the administrative control of the federal judiciary.

Under this proposal, no federal judge--including the Chief Justice of the Supreme Court--would have line-of-control authority over a DoJ relocated to the federal judiciary. However, this change--taking an ostensibly neutral but frequently politicized law enforcement entity--out of a political branch of government and beyond any president's control is likely the only certain way to preclude a future domestic tyranny.

Indeed, the Chairman of the Senate Watergate Committee, the late Senator Sam Ervin of North Carolina, became convinced as a result of Nixon's misuse of the Justice Department that it should be moved outside of presidential reach. Because there are so many parallels between Senator Ervin's era and ours, let me offer the Committee the historical background that ties directly to our current moment.

Watergate and Beyond

In the spring of 1974, with the Watergate cover-up unraveling and the wreckage of the Saturday Night Massacre still fresh, Senator Ervin convened four days of hearings on a question most of official Washington preferred not to ask: whether the Department of Justice belonged in the executive branch at all. Sam Ervin's Subcommittee on Separation of Powers took testimony on his bill, S. 2803, which would have severed the Justice Department from presidential control and reconstituted it as "an independent establishment of the United States."[18] The bill never became law.

Half a century later, that outcome looks less like a settled judgment than a deferred reckoning—one the country is now paying for daily.

The argument Ervin lost in 1974 was, in its essentials, the argument for putting prosecution beyond the reach of any single elected official. The arguments his critics won with—that the problem was personal rather than structural, that democratic accountability required presidential control, that character and vigilance would suffice—have been tested in the most rigorous way imaginable: by a President who set out to do precisely what Ervin feared, and who, in the sixteen months since January 20, 2025, has largely succeeded.

The record of those sixteen months is the empirical refutation of the case against Ervin's proposal. It is also the strongest argument to date that insulation by statute is likely not enough—that the prosecutorial power must be removed from presidential control by constitutional text if the Republic is to survive its next two and a half centuries with some semblance of the rule of law intact.

What Ervin Saw

Ervin did not come to the subject as a radical. He came to it as a constitutionalist who had spent the previous year chairing the Select Committee on Presidential Campaign Activities and watching, in real time, the machinery of federal law enforcement bent to partisan ends. His diagnosis was institutional, not merely moral. "It has become common in recent decades," he told the subcommittee in his opening statement, "for Presidents to appoint their campaign managers to head the Department of Justice—a practice that can only lead to charges of politics interfering with the administration of justice."[19] John Mitchell, the campaign manager turned Attorney General who then returned to run the Committee to Re-elect the President, was the proximate case. But Ervin was careful to insist the disease was older than Nixon.

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[18] *Removing Politics from the Administration of Justice*: Hearings Before the Subcommittee on Separation of Powers of the Committee on the Judiciary, U.S. Senate, 93d Cong., 2d Sess., on S. 2803 and S. 2978 (Mar. 26–28 and Apr. 2, 1974) [hereinafter Separation of Powers Hearings]. The full text of S. 2803 is reprinted at pp. 249–57; Ervin's introduction of the bill, from 119 Cong. Rec. (Dec. 12, 1973), is reprinted at pp. 377–81.

[19] Separation of Powers Hearings, supra, at 2–3 (opening statement of Sen. Ervin).

He reached back to the 1924 Senate investigation of Attorney General Harry Daugherty, and to Attorney General McGranery's 1953 recommendation that U.S. Attorneys be placed in the civil service—evidence that the politicization of Justice was a recurring structural feature, not an aberration of one administration.[20] The materials he entered into the record traced the line further still: to Andrew Jackson, who during the Bank controversy of the 1830s removed a Treasury Secretary who would not carry out his deposit-removal policy and replaced him with one who would; to A. Mitchell Palmer's 1920 raids justified by "private information" that "removed all doubt"; to Robert Jackson, who, once on the Supreme Court, candidly declined to treat his own earlier views as Attorney General as authority on the scope of presidential power.[21]

This history mattered to Ervin because it established the point his critics would spend four days resisting: that the conflict between the Attorney General's duty to the law and his loyalty to the President was not a flaw in particular men but a flaw in the office—built into the design the moment Congress placed the prosecutorial function under a single elected officer's command. The Office of Attorney General had been created by the Judiciary Act of 1789; the Department itself was not established until 1870. Neither, Ervin argued, was constitutionally required to sit where it sat. "All powers of the Attorney General and of the Department of Justice flow from acts of Congress," he observed. "What Congress gives, Congress can take away."[22]

Against the objection that the Take Care Clause made prosecution "inherently executive" and beyond congressional reach, Ervin was emphatic: "There is not one syllable in the Constitution that says that Congress cannot make the Justice Department independent of the President." He pointed to the General Accounting Office and the independent regulatory commissions as agencies that "execute certain laws independently of the President," and he invoked the Steel Seizure Case for the proposition that the duty to execute the laws does not license the President to override an act of Congress.[23]

This was the bet S. 2803 made, and it is worth naming the bet precisely, because its fragility is the hinge of the whole story.
Ervin proposed to achieve prosecutorial independence by *statute*—by amending Titles 3, 5, and 28 to lift the Department out of the Executive branch, fix the Attorney General's term at six years,

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[20]Id. at 2–3. The historical pattern was developed at greater length in the materials Ervin placed in the record, including Arthur S. Miller, "Justice Without Politics," *The Progressive* (Apr. 1974), reprinted id. at 377–81.
[21]Miller, Justice Without Politics, reprinted in Separation of Powers Hearings, supra, at 378–79 (quoting the Palmer characterizations). For Robert Jackson's reluctance to treat his prior advocacy as Attorney General as authority, see Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634–35 (1952) (Jackson, J., concurring).
[22]Separation of Powers Hearings, supra, at 3 (opening statement of Sen. Ervin).
[23]Id. at 3. Ervin's removal-protection mechanism rested on *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), and *Wiener v. United States*, 357 U.S. 349 (1958)—the same line of authority the Supreme Court has since narrowed in *Seila Law LLC v. CFPB*, 591 U.S. 197 (2020).

and protect him/her from removal except "for neglect of duty or malfeasance in office."[24] The independence of the Department would rest, in the end, on a single removal-protection clause—a clause that, by Ervin's own logic, a later Congress could repeal, and that a later Supreme Court could read out of the Constitution. He was building a wall, but he was building it of statutory brick.

Ervin understood the wall would be tested. His introduction of the bill framed the matter in terms that read today as something close to prophecy. "Our Government loses its strength and resiliency," he wrote, "when one branch encroaches upon the powers of another and the separation of powers is disturbed." The events of Watergate had "called into question the function of the Department of Justice" and revealed that it could be "used for political purposes by the White House." The remedy was not to trust better men but to repair the structure: "The Department of Justice should be insulated from the direct political control of the executive branch of government to preserve the independence essential to the proper administration of justice."[25]

The Clause That Was Never Read

Everything in the case against Ervin—and everything in the constitutional doctrine that has since hardened around presidential control of prosecution—rests on a single sentence in Article II, Section 3: "he shall take Care that the Laws be faithfully executed."

On the modern reading, this is the textual fountainhead of the unitary executive: a grant of supervisory command over everyone who enforces federal law, such that to place a prosecutor beyond the President's control is to violate the Constitution itself. Chief Justice Roberts gave the reading its canonical modern form in *Seila Law*: "The entire executive Power belongs to the President alone."[26] But this reading is far weaker than its confidence suggests—and the courts that rely on it have, with rare exception, never actually done the work of interpreting the clause at all.

Begin with the text, which is genuinely ambiguous, and between two readings the modern doctrine simply collapses into one.

The *supervisory* reading takes "take Care that the Laws be faithfully executed" as a command to oversee others—a grant of power over the whole machinery of enforcement. The older *personal-duty* reading takes it as an obligation on the President *himself*: that he execute his own office faithfully, that he not abuse or exceed his powers, that he not attempt to suspend or nullify laws he dislikes. The first makes the clause a source of presidential power; the second makes it a

[24]Separation of Powers Hearings, supra, at 250–51 (text of S. 2803, proposed 28 U.S.C. § 501(b)–(c)).
[25]Remarks of Sen. Ervin on Introducing S. 2803, 119 Cong. Rec. (Dec. 12, 1973), reprinted in Separation of Powers Hearings, supra, at 377.
[26]*Seila Law LLC v. CFPB*, 591 U.S. 197, 213 (2020) (quoting U.S. Const. art. II, §§ 1, 3).

constraint on the President. The same fourteen words have been read, by the Supreme Court, to mean both—sometimes in the same era.[27]

The drafting history points *away* from the supervisory reading, not toward it.

The formulations the Convention worked through foregrounded the President's personal obligation: "He shall take care *to the best of his ability* that the laws of the United States be faithfully executed," and "It shall be *his duty* to provide for the due & faithful exec[ution] of the Laws." The Committee on Style—whose job was to polish language, not to alter substance—compressed these into the final "take care that the laws be faithfully executed," dropping precisely the personalizing words ("his ability," "his duty") that anchored the clause to the President's own conduct.[28]

To hang the unitary executive on a stylistic edit is to attribute to the Committee on Style a substantive constitutional revision it had no authority to make.

Structure reinforces the point. The clause does not stand alone; it sits in a list of the President's personal obligations in Article II, Section 3: "He shall from time to time give to the Congress Information… he shall receive Ambassadors… he shall Commission all the Officers of the United States."

Each of these is a personal duty. The canon of consistent usage suggests that a clause embedded among personal duties is itself a personal duty—not a sudden, anomalous grant of plenary supervisory power wedged between the duty to inform Congress and the duty to commission officers.

Early practice cuts the same way.

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[27]The personal-duty reading draws support from the pre-1787 background of "faithful execution" language, which Kent, Leib, and Shugerman show was for centuries associated with the duties of public and private officeholders and imposed three fiduciary-like requirements: (1) a duty not to act ultra vires; (2) a duty not to misuse an office's funds or take unauthorized profits; and (3) diligent, good-faith, honest, and impartial execution of office. Kent, Leib & Shugerman, supra, at 2120, 2178–91. On their reading, the clause "limit[s] Presidents to exercise their power in good faith, for the public interest, and not for reasons of self-dealing, self-protection, or other bad faith, personal purposes"—a constraint on the President rather than a grant of supervisory command. Id. at 2179.

[28]The "to the best of his ability" formulation derives from the Committee of Detail draft; the final compression was the work of the Committee of Style. *See The Records of the Federal Convention of 1787*, at 171, 185, 600 (Max Farrand ed., 1911) (Committee of Detail and Committee of Style drafts); Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, "Faithful Execution and Article II," 132 Harv. L. Rev. 2111, 2121–28 (2019) (tracing the drafting sequence through the Philadelphia Convention). The Committee of Style was understood to lack authority to alter substantive meaning—the principle the Supreme Court applied to the Census Clause in *Utah v. Evans*, 536 U.S. 452 (2002)—which counsels against reading its compression of the clause as a deliberate expansion of presidential power.

Washington, confronting the Whiskey Rebellion, described his obligation as the duty "to *see* the Laws executed"[29]—the language of oversight and final responsibility, not of direct command over how subordinates exercise their judgment. More striking still is an 1823 opinion of Attorney General William Wirt—the longest-serving Attorney General and the principal early interpreter of the office—holding that the President's Take Care duty required of him scarcely more than that he bring a criminally negligent official to account, by removal, impeachment, or prosecution.[30] On Wirt's view—rendered by a man actually administering the early Republic—"taking care" meant holding officers accountable for their fidelity, not exercising supervisory control over their discretion. That is nearly the opposite of what the clause is now said to mean.

So where did the broad reading come from? Not from 1787. The diametrically opposed theory—that Congress cannot vest any executive officer with discretion the President is not entitled to control—was first asserted in unambiguous terms in Andrew Jackson's Protest Message of April 15, 1834: nearly half a century after ratification, by the same President who, in the Bank controversy, removed the Treasury Secretary who refused to execute his policy and installed one who would.[31] The supervisory reading, in other words, did not descend from the Framers. It was manufactured by a power-expanding President in the 1830s, layered over by the cases of an administrative state the founders never imagined, and finally treated by the modern Court as if it had been obvious all along.

This is the deepest indictment, and it is one the case law itself supplies: the Supreme Court "invokes the Take Care Clause often and for many purposes, but with rare exception, has not parsed the text of the clause or examined its historical provenance in the conventional way one

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[29]George Washington, on the Whiskey Rebellion (1794): "it is my duty to see the Laws executed: to permit them to be trampled upon with impunity would be repugnant to" that duty. See 33 *The Writings of George Washington* 464 (John C. Fitzpatrick ed., 1940). The verb—"see" executed rather than "execute" or "direct the execution of"—connotes oversight and ultimate responsibility rather than plenary command over subordinates' discretion.

[30]Opinion of Att'y Gen. William Wirt, 1 Op. Att'y Gen. 624, 625 (1823) (advising President Monroe that "it could never have been the intention of the constitution… that he should in person execute the laws himself," and that the President's role was one of "general superintendence"); see Constitution Annotated, ArtII.S3.3.4 (Removal Power as the President's Primary Means of Supervision) (reading the opinion to require of the President scarcely more than that he exercise his removal authority—or set in motion impeachment or prosecution—when subordinate officers fail to execute the laws faithfully). The Supreme Court took a compatible view in *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838), holding that the Take Care duty does not foreclose Congress from entrusting the construction of its statutes to an executive officer other than the President. Wirt's reading treats "take care" as a duty to hold officers accountable for their own faithful execution—not as a power to direct how they exercise their discretion.

[31]President Andrew Jackson, Protest to the Senate (Apr. 15, 1834), in *3 A Compilation of the Messages and Papers of the Presidents* 1288 (James D. Richardson ed., 1897). The supervisory theory of the clause—that Congress cannot vest an executive officer with discretion the President is not entitled to control—traces to this assertion of removal-grounded authority, made nearly half a century after ratification, not to the founding record.

thinks of the Court interpreting the Constitution."[32] The clause has been pressed into at least five distinct and partly contradictory services—source of the removal power, limit on Article III standing, source of prosecutorial discretion, command to respect legislative supremacy, and source of inherent authority to protect federal operations—with the same words read in one breath to grant the President discretion *not* to enforce a law and in the next to forbid him from suspending one. A clause made to prove five different and conflicting things is a clause whose meaning has been assumed rather than established.

None of this proves the personal-duty reading is correct; the ratification evidence is mixed, and William Maclaine's praise of the clause at the North Carolina convention is usually read to support the view that the President must execute laws he personally dislikes—though even that is closer to a constraint on the President than a grant of command over every federal prosecutor.[33] The honest conclusion is the one that matters here: we do not know, with anything like the certainty modern doctrine pretends, that the Take Care Clause confers the plenary supervisory power on which the case against prosecutorial independence depends. The textual, structural, and early-practice evidence is at least as consistent with a reading that would pose no obstacle to Ervin's design at all.

And this is exactly why the fix must be constitutional rather than statutory.

If the Take Care Clause genuinely meant what the modern Court says it means, Ervin's bill would have been doomed from the start. If it means what the founding evidence more plausibly suggests, his bill should have been valid—and the doctrine striking down prosecutorial independence rests on a century-and-a-half-old misreading. Either way, the lesson is the same. So long as the question turns on a contested clause that the Court has chosen to read in favor of presidential power, no statute insulating prosecution is safe; it can be invalidated whenever a President with a friendly Court chooses to press the unitary-executive theory to its conclusion. An amendment does not argue with the Take Care Clause. It supplies new text the clause cannot override—removing the question from the realm of interpretation altogether.

What His Critics Answered

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[32] Kent, Leib & Shugerman, supra, at 2113 (observing that the Faithful Execution Clauses "are cited often, but their background and original meaning have never been fully explored," and that courts and the executive branch "rely on one or both clauses as support for expansive views of presidential power"); see also Constitution Annotated, ArtII.S3.1.3.1 (Take Care Clause: Overview) (cataloguing the clause's varied and conflicting uses). The Court has deployed the clause far more often than it has interpreted it.

[33] Statement of William Maclaine, North Carolina Ratifying Convention (July 28, 1788), in 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 140–41 (Jonathan Elliot ed., 2d ed. 1836) (describing the Faithful Execution Clause as "one of the [Constitution's] best provisions" and emphasizing the value of ensuring laws are executed even where the President disagrees with their purpose). See Kent, Leib & Shugerman, supra, at 2128–32 (surveying the ratification debates).

The case against Ervin was made most powerfully not by defenders of a politicized Justice Department—there were none willing to defend it by name—but by men who shared his diagnosis but rejected his cure. Two witnesses framed the opposition that would prevail.

Sorensen: "Personal, not institutional"

Theodore Sorensen, who had served as special counsel to President Kennedy, opened by conceding everything in Ervin's premise. The Department "should not be a mere political arm of the White House"; the Attorney General "should not be his party's chief patronage dispenser." He even quoted Theodore Roosevelt's 1904 letter to Attorney General Moody insisting that Justice officers "should be kept most free from any suspicion of improper action on partisan or factional grounds."[34] And then he opposed the bill.

His central claim was that the problem was "personal, not institutional," and that no statute could cure a defect of character: "Calling the Department of Justice independent does not make it independent." A strong Attorney General would resist White House pressure without any statutory change; a weak one would yield "regardless of fine words about independence in the agency statutes."[35] The safeguard, in Sorensen's view, lay in democratic accountability, not structural separation. An Attorney General "never elected by the people" should not "make policy with regard to the administration of justice in any way he sees fit, without regard to the policies" of "a popularly elected President." A President who campaigned on law and order "must not be confronted with an Attorney General of sharply differing views appointed for a fixed term by his predecessor."[36]

From this Sorensen drew the conclusion that has framed the defense of presidential control ever since: "Do not fragment that responsibility—fix it, on the President, where it belongs. How else can a President be held responsible for his own Constitutional obligation to take care that the laws be faithfully executed?" To make Justice independent, he warned, would "invite the President to create a 'little Department of Justice' in the White House" to do the work the real one would no longer do at his direction.[37]

Cutler: the narrow fix

Lloyd Cutler agreed with Ervin more than Sorensen did. He rejected the character-is-enough theory outright—"I do not think that integrity is enough"—on conflict-of-interest grounds, and he affirmatively argued that the Take Care Clause did not compel presidential control of prosecution: "Nothing in the Constitution appears to compel such a conclusion, and to read the Constitution in that fashion would be to accept as Constitutionally mandated institutional

[34]Separation of Powers Hearings, supra, at 15–16 (statement of Theodore C. Sorensen).
[35]Id. at 15–16.
[36]Id. at 17.
[37]Id. at 19.

arrangements which force us to tolerate conflicts of interest… that we cannot and do not tolerate in ordinary judges and lawyers."[38]

But Cutler parted from Ervin on scope. He would keep the prosecutor inside the Department, presidentially appointed and removable for cause, with jurisdiction limited to election-law crimes and official misconduct—because the Civil, Antitrust, and Civil Rights Divisions, and the FBI, "should not be freed from the restraints of political instructions."[39] Ervin's wholesale approach, he objected, "would raise other problems in areas of law enforcement that impinge directly on legitimate areas of executive discretion." His was the incrementalist's answer: a scalpel where Ervin proposed surgery. It is essentially the answer the country adopted four years later in the Ethics in Government Act's independent counsel—and allowed to lapse in 1999.

Between them, Sorensen and Cutler carried the day. The bill died in subcommittee. Justice stayed in the executive branch, its independence left to norms, to the character of its leaders, and to the vigilance of a Senate that confirmed them. For half a century, that settlement mostly held—which its defenders took as proof that Ervin had been wrong, and which was in truth only proof that no President had yet been willing to test it to destruction.

The Test

That President arrived on January 20, 2025. What followed is not a story of one bad Attorney General making bad calls. It is a story of the structure itself—presidential command of the investigative and prosecutorial apparatus—being used exactly as it was designed to be used, toward ends that would have horrified every witness who testified for Ervin's bill, including those who opposed it.

Within days of the inauguration, the Trump Justice Department leadership began firing the prosecutors who had worked on the criminal cases against the President himself. More than a dozen career attorneys who had worked on the January 6 and Mar-a-Lago documents prosecutions were terminated, with the Department "specifically citing their work on those cases."[40] The rationale was stated without embarrassment. In a memorandum directing the firings, the acting leadership wrote that it did not "believe that the current leadership of the Justice Department can trust these FBI employees to assist in implementing the President's agenda faithfully."[41]

Read that sentence against Sorensen's framework and the trap springs shut. Sorensen had argued that prosecution should reflect "the policy of the President elected by the people." Here

[38]Id. at 235–36, 244–45 (statement and testimony of Lloyd N. Cutler).
[39]Id. at 236 (Cutler prepared statement).
[40]Trump Administration Purge of FBI Triggers Battle for Career Staff, The Hill (Feb. 4, 2025); FBI Executives Ousted as Trump DOJ Fires Jan. 6 Prosecutors, CBS News (Feb. 1, 2025).
[41]Memorandum of Acting Deputy Att'y Gen. Emil Bove, quoted in CBS News (Feb. 1, 2025), and in floor remarks of Sen. Richard Durbin (Feb. 11, 2025).

was that very principle—fidelity to "the President's agenda"—converted into a loyalty test and turned against the prosecutors who had enforced the law against the President. The accountability Sorensen prized as the system's safeguard had become the instrument of its capture. His framework offered no defense, because he had located the safeguard in the one place from which the abuse now flowed.

The purge widened from there. The Bureau's leadership was directed to compile lists of the roughly 2,400 agents who had worked on the January 6 investigations—the largest criminal investigation in the Department's history—for possible termination.[42] The Attorney General established a "Weaponization Working Group" charged with examining "the activities of all departments and agencies exercising civil or criminal enforcement authority… over the last four years"—the prosecutorial power aimed, retrospectively, at the prior administration's prosecutors.[43] By early 2026, a former assistant director in charge of the FBI's Washington Field Office, fired in the purge, was running for Congress on the explicit charge that the administration had "weaponized the Department of Justice against political opponents."[44]

Here is the decisive point. Cutler's narrow mechanism—an independent counsel confined to official-misconduct and election cases—would have had no purchase on any of this. The conflict of interest he sought to manage was not confined to a special class of cases; the *entire* enforcement apparatus was repurposed, prospectively and retrospectively, as an instrument of presidential will and political retribution. Only the structural removal of the whole criminal-prosecution function from presidential control—the thing Cutler thought too broad and Ervin thought necessary—would have reached it.

The instrument was the one Roosevelt built

There is a bitter symmetry in which agency stood at the center of the 2025 purge. The FBI exists because Theodore Roosevelt—the same President whose 1904 letter Sorensen quoted as his lodestar—wanted a domestic investigative force under executive control and built one when Congress tried to deny him the tool. In May 1908, responding in part to the use of borrowed Secret Service agents to investigate sitting members of Congress, Congress barred the Justice Department from employing Treasury's operatives. Roosevelt and Attorney General Charles Bonaparte responded the following month by assembling a force of special agents inside the Department—the body that became the Bureau of Investigation and, in 1935, the Federal Bureau of Investigation.[45]

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[42] *The Hill* (Feb. 4, 2025); see also statement of Rep. Jamie Raskin, Ranking Member, House Judiciary Committee (Jan. 31, 2025).
[43] Floor statement of Sen. Richard Durbin (Feb. 11, 2025) (describing the working group). The characterization is the senator's; the working group's existence and mandate are not disputed.
[44] Ex-FBI Official Fired by Trump Admin Lobs DOJ Weaponization Accusation While Launching U.S. House Bid, Fox News (Feb. 24, 2026) (statements of David Sundberg).
[45] On the founding of the Bureau over congressional objection, and its origins in the executive's desire for a domestic investigative capability, see Patrick G. Eddington, *The Triumph of Fear: Domestic Surveillance*

Sorensen put Roosevelt on the stand as his witness for the proposition that character restrains the executive. The historical record—the record set out at length in my book *The Triumph of Fear*—convicts that witness. Roosevelt held the high-minded character; the 1904 letter was sincere. And he built the surveillance apparatus anyway, over Congress's express objection, the moment he found it useful. Character did not restrain him. The absence of a structural barrier is what let him act, and the weakness of the barrier Congress did erect—a mere appropriations rider—is what let him route around it in a single month. He did, in fact, exactly what Sorensen warned an independent Department would force a President to do: he created his own investigative arm to get the work done. He simply did it inside the Department of Justice rather than the White House, because the Department was already his.

Where the Structure Held

The fairest test of Ervin's thesis is to ask where the executive's overreach was checked and where it was not—and to notice that the two diverged along precisely the line Ervin drew.

Consider the parallel campaign by Trump to put soldiers on the streets of American cities. Across 2025, the regime federalized and deployed, or attempted to deploy, National Guard troops into Los Angeles, Portland, Chicago, and elsewhere over the objections of state governors, invoking a rarely used statute permitting federalization when the President is "unable with the regular forces to execute the laws."[46] California, Oregon, and Illinois sued. Federal district courts in all three states ruled against the President, the Seventh Circuit affirmed in the Illinois case, and in December 2025 the Supreme Court refused to lift the block, holding that the government "failed to identify a source of authority that would allow the military to execute the laws in Illinois."[47] By the start of 2026, most of the troops had gone home, having cost the Treasury millions while never being mobilized for their stated purpose.[48]

The deployments were stopped. But notice *how* they were stopped—and notice what was not. The Guard deployments ran into a structural barrier: the Posse Comitatus Act, the statutory predicate for federalization, the constitutional limits on domestic use of the military. Those barriers gave the courts something to hold, and the courts held. The prosecutorial purges, by contrast, ran into almost nothing. Because the President's command of the Department of Justice is constitutionally orthodox—because that power sits exactly where Sorensen and Cutler insisted

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and Political Repression from McKinley Through Eisenhower (Georgetown Univ. Press, 2025). The May 27, 1908 restriction was enacted as a rider to the Sundry Civil Appropriations Act.

[46]See Trump's Threat to Invoke the Insurrection Act, Explained, ACLU (Jan. 30, 2026); 10 U.S.C. § 12406(3).

[47]Order in the Illinois National Guard litigation (U.S. Dec. 23, 2025) (per curiam, over dissents of Alito, Thomas, and Gorsuch, JJ.); see CNN, Supreme Court Blocks National Guard Deployment to Chicago (Dec. 23, 2025); ABC News (Dec. 24, 2025). For doctrinal analysis, see Elizabeth Goitein & Hannah James, Trump v. Illinois: A Narrow Supreme Court Decision with Broad Implications, Just Security (Apr. 6, 2026).

[48]Illinois Lawsuit over National Guard Deployment Dismissed, CBS Chicago (Apr. 20, 2026) (citing Congressional Budget Office estimate).

it should—there was no comparable structure for a court to enforce. The firings were challenged in employment litigation, slowly and after the fact; the agents and prosecutors were already gone. Where a structural limit existed, abuse was at least partially checkable. Where the structure vests the power in the President, abuse reined. That contrast is Ervin's argument rendered in the events of a single year.

And even the barrier that held was left ajar. The Supreme Court's decision foreclosed the statutory route the President had taken while leaving open the Insurrection Act—a two-century-old grant of authority the President has repeatedly threatened to invoke, including after the immigration-enforcement violence in Minneapolis in early 2026, to override the courts and put the military on American streets regardless.[49]

The Honest Objection, and the Answer

The defender of the 1974 settlement has one serious reply, and it deserves a serious answer. The system, he will say, resisted. Courts blocked the deployments. The Supreme Court ruled against the President. Fired officials are suing; one is running for Congress. The press reported all of it. The checks—courts, elections, a free press, congressional oversight—worked, and no constitutional amendment was needed. Ervin's alarm was overwrought then and is overwrought now.

The reply has force, and it should not be waved away. But it proves less than it claims. The checks worked partially, slowly, and at ruinous cost. They worked against the National Guard deployments—where a structural barrier existed—and largely failed against the prosecutorial purges, where one did not. The remedies that did arrive were backward-looking: a court can order a wrongfully fired prosecutor reinstated, but it cannot un-chill a career service that has watched its colleagues purged for enforcing the law, nor restore the institutional knowledge that walks out the door, nor undo the message sent to every remaining agent about the cost of investigating or challenging political power. And the most dangerous door—the Insurrection Act—remains open, its use deferred only due to the President's forbearance....which could evaporate at any time.

The claim here is not that the Republic has collapsed as yet. The claim is narrower and harder to refute: that a constitutional structure requiring this much emergency litigation, reaching the Supreme Court on the shadow docket, to contain a single determined executive—and succeeding only where some *other* structural barrier happens to exist—is a structure at extreme risk of destruction.

Ervin identified the flaw in 1974. He proposed to fix it with statutory brick. The events of 2025 and 2026 show why brick is not enough. A removal-protection clause can be invalidated by a

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[49]CNN, Supreme Court's National Guard Decision Could Force New Debate over Insurrection Act (Dec. 24, 2025); CBS Chicago, Trump Threatened to Use the Insurrection Act in Chicago and Illinois, but Never Did (Jan. 15, 2026).

Supreme Court majority aligned with a president's view of executive power. A political norm can be ignored. An appropriations rider can be evaded in a month, as Roosevelt proved in 1908. What cannot be so easily undone is constitutional text.

Sorensen was right that the problem cannot be solved by good men alone—he simply drew the wrong conclusion from it. If character will not save us, then structure must. He was right, too, that a President denied an instrument will try to build another. The answer is not to leave the instrument in his hands, but to place it where his hands cannot reach: in an independent Justice Department, constituted within the judicial branch, insulated from removal not by statute but by the Constitution itself, leaving to the executive only the civil and advisory functions that legitimately answer to elected policy. That is the structural correction the 1974 hearings groped toward and could not complete, because their authors believed—reasonably, in their moment—that a statute would do.

We no longer have the luxury of that belief. The Department of Justice has now been turned, openly and on the record, into an instrument for rewarding the President's friends and punishing those who oppose him. The instrument at the center of that abuse is the one Theodore Roosevelt built to evade Congress, doing in 2025 what Congress feared it would do in 1908.

The pattern Ervin traced from Jackson through Palmer through Mitchell did not end with Watergate; it runs straight through to the present, gathering force.

If the American experiment is to last another two hundred and fifty years—if the rule of law is to mean more than the forbearance of whoever holds the prosecutorial power—then that power must be taken out of the President's hands. Not insulated. Not reformed. Removed, by amendment, beyond the reach of any President who would do what this one has done. Ervin saw the wall would be tested. It has been. It did not hold. The next one must be built of something stronger than brick.