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# Congressional Oversight Manual

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Committees of Congress

# Summary

Today's lawmakers and congressional aides, as well as commentators and scholars, recognize that Congress's lawmaking role does not end when it passes legislation. Oversight is considered fundamental to making sure that laws work and are being administered in an effective, efficient, and economical manner. This function is seen as one of Congress's principal roles as it grapples with the complexities of American government.

A fundamental objective of the *Congressional Oversight Manual* is to assist Members, committees, and legislative staff in carrying out this vital legislative function. It is intended to provide a broad overview of the procedural, legal, and practical issues that are likely to arise as Congress conducts oversight. This includes information on the mechanics of oversight practice based on the House and Senate rules, common investigative techniques, and an inventory of statutes that impact oversight activity. In addition, the *Manual* discusses important legal principles that have developed around Congress's oversight practice. It is not intended to address all the legal issues that committees, Members, and staff may encounter when engaged in investigative activities. The *Manual* is organized both to address specific questions and to support those seeking a general introduction to or broader understanding of oversight practice.

CRS first developed the *Congressional Oversight Manual* four decades ago following a three-day December 1978 Workshop on Congressional Oversight and Investigations. The workshop was organized by a group of House and Senate committee aides from both parties and CRS at the request of the bipartisan House leadership. The *Manual* was produced by CRS with the assistance initially of a number of House committee staffers. In subsequent years, CRS has sponsored and conducted various oversight seminars for House and Senate staff and updated the *Manual* periodically.

Over the years, CRS has assisted many Members, committees, party leaders, and staff aides in the performance of the oversight function: providing consultative support on matters ranging from routine oversight and basic information gathering to the most complex and highest profile investigations conducted by Congress. Given the size and scope of the modern executive establishment, Congress's oversight role may be even more significant—and more demanding—than when Woodrow Wilson wrote in his classic *Congressional Government* (1885): "Quite as important as lawmaking is vigilant oversight of administration."

Legal questions on Congress's investigatory powers should be directed to CRS legislative attorneys. For ease of reference, the relevant CRS legislative attorneys and legal products are cited throughout this report.

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# Purposes, Authority, and Participants

Throughout its history, Congress has engaged in oversight—broadly defined as reviewing, monitoring, and supervising the implementation of public policy by the executive branch. Investigating how a statute is being administered enables Congress to assess whether federal agencies and departments are administering programs in an effective, efficient, and economical manner. The expansion of the national government's size and scope has only increased Congress's need for and use of available oversight tools *to check on and check the executive*. The "checking" function serves to protect Congress's policymaking role and its place under Article I in the U.S. constitutional system of checks and balances.[1]

Congress's oversight role is also significant because it shines the spotlight of public attention on many critical issues, which enables lawmakers and the general public to make informed judgments about executive performance. Woodrow Wilson, in his classic 1885 study *Congressional Government*, emphasized that the "informing function should be preferred even to its [lawmaking] function." He added that unless Congress conducts oversight of administrative activities, the "country must remain in embarrassing, crippling ignorance of the very affairs which it is most important it should understand and direct."[2]

Congress's authority to conduct oversight comes from four overlapping sources: the Constitution, Supreme Court decisions, laws, and House and Senate rules. First, oversight is an implicit constitutional responsibility of Congress. According to historian Arthur Schlesinger Jr., the Framers believed "it was not considered necessary to make an explicit grant of such authority. The power to make laws implied the power to see whether they were faithfully executed."[3]

Second, the investigative authority of Congress is broad and bolstered by an array of Supreme Court decisions. For example, in *Watkins v. United States*,[4] the Court stated that the "power of Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed laws." There are limits to Congress's power to investigate, such as the Constitution (e.g., the protection accorded witnesses under the Fifth Amendment against self-incrimination).

Third, there are numerous laws that provide Congress with the authority to conduct oversight. Despite its lengthy heritage, oversight was not given explicit recognition in public law until enactment of the Legislative Reorganization Act of 1946.[5] That act required House and Senate standing committees to exercise "*continuous watchfulness*" over programs and agencies within their jurisdiction.

Fourth, the House and Senate have often amended their formal rules to encourage and strengthen committee oversight of the administration of laws. For example, House rules direct committees to create oversight subcommittees, undertake futures research and forecasting, and review the impact of tax expenditures within their respective jurisdictions. Senate rules require each standing committee to include regulatory impact statements in committee reports accompanying legislation.

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[1] See James Madison, *Federalist* No. 48.

[2] Woodrow Wilson, *Congressional Government* (Boston: Houghton Mifflin, 1885), p. 303.

[3] Arthur Schlesinger Jr. and Roger Burns, eds., *Congress Investigates: A Documented History, 1792-1974*, vol. 1 (New York: Chelsea House, 1975), p. xiii.

[4] 354 U.S. 178 (1957).

[5] P.L. 79-601, 60 Stat. 812 (1946).

Oversight occurs in virtually any congressional activity and through a wide variety of channels, organizations, and structures. These range from formal committee hearings to informal Member contacts with executive officials, from staff studies to reviews by congressional support agencies, and from casework conducted by Member offices to studies prepared by non-congressional entities, such as academic institutions, private commissions, or think tanks.

## Purposes

Congressional oversight of the executive is designed to fulfill a variety of purposes, such as those outlined below.

### *Ensure Executive Compliance with Legislative Intent*

Congress, of necessity, must delegate discretionary authority to federal administrators. To make certain that these officers faithfully execute laws according to the intent of Congress, committees and Members can review the actions taken and regulations formulated by departments and agencies.

### *Improve the Efficiency, Effectiveness, and Economy of Governmental Operations*

A large federal bureaucracy makes it imperative for Congress to encourage and secure efficient and effective program management and to make every dollar count toward the achievement of program goals. A basic objective is strengthening federal programs through better managerial operations and service delivery. Such steps can improve the accountability of agency managers to Congress and enhance program performance.

### *Evaluate Program Performance*

Systematic program performance evaluation remains an evolving technique of oversight. Modern program evaluation uses social science and management methodologies—such as surveys, cost-benefit analyses, and efficiency studies—to assess the effectiveness of ongoing programs.

### *Prevent Executive Encroachment on Legislative Prerogatives and Powers*

Many commentators, public policy analysts, and legislators state that Presidents and executive officials may overstep their authority in various areas, such as the impoundment of funds, executive privilege, and war powers. Increased oversight—as part of the constitutional checks and balances system—can redress what many in the public and Congress might view as executive arrogation of legislative prerogatives.

### *Investigate Alleged Instances of Poor Administration, Arbitrary and Capricious Behavior, Abuse, Waste, Dishonesty, and Fraud*

Instances of fraud and other forms of corruption, wasteful expenditures, incompetent management, and the subversion of governmental processes can provoke legislative and public interest in oversight.

### *Assess Agency or Officials' Ability to Manage and Implement Program Objectives*

Congress's ability to evaluate the capacity of agencies and managers to carry out program objectives can be accomplished in various ways. For example, numerous laws require agencies to submit reports to Congress. Some of these are regular, occurring annually or semi-annually, for instance, while others are activated by a specific event, development, or set of conditions. Reporting requirements may promote self-evaluation by the agency. Organizations outside of Congress—such as offices of inspector general, the Government Accountability Office (GAO), and study commissions—also advise Members and committees on how well federal agencies are working.

### *Review and Determine Federal Financial Priorities*

Congress exercises some of its most effective oversight through the appropriations process, which provides the opportunity to assess agency and departmental expenditures in detail. In addition, most federal agencies and programs are under regular and frequent reauthorizations—on an annual, two-year, five-year, or other basis—giving authorizing committees the opportunity to review agency activities, operations, and procedures. As a consequence of these oversight efforts, Congress can abolish or curtail obsolete or ineffective programs by cutting off or reducing funds. Congress might also increase funding for effective programs.

### *Ensure That Executive Policies Reflect the Public Interest*

Congressional oversight can appraise whether the needs and interests of the public are adequately served by federal programs. Such evaluations might prompt corrective action through legislation, administrative changes, or other means and methods. Legislative reviews might also prompt measures to consolidate or terminate duplicative and unnecessary programs or agencies.

### *Protect Individual Rights and Liberties*

Congressional oversight can help safeguard the rights and liberties of citizens and others. By revealing abuses of authority, oversight hearings and other efforts can halt executive misconduct and help prevent its recurrence through, for example, new legislation or indirectly by heightening public awareness of the issue(s).

### *Other Purposes*

The purposes of oversight—and what activities are illustrative of this function—can also be stated in more precise terms. Like the general purposes noted above, these more specific purposes unavoidably overlap because of the numerous and multifaceted dimensions of oversight. A brief list includes the following:

- review the agency rulemaking process,
- monitor the use of contractors and consultants for government services,
- encourage and promote mutual cooperation between the branches,
- examine agency personnel procedures,
- acquire information useful in future policymaking,
- investigate constituent complaints and media critiques,

- assess whether program design and execution maximize the delivery of services to beneficiaries,
- compare the effectiveness of one program with another,
- protect agencies and programs against unjustified criticisms, and
- appraise federal evaluation activities.

**Thoughts on Oversight and Its Rationales from...**

James Wilson (*The Works of James Wilson*, 1896, vol. II, p. 29), an architect of the Constitution and Associate Justice on the first Supreme Court:

> The House of Representatives … form the grand inquest of the state. They will diligently inquire into grievances, arising both from men and things.

Woodrow Wilson (*Congressional Government*, 1885, p. 297), perhaps the first scholar to use the term *oversight* to refer to the review and investigation of the executive branch:

> Quite as important as legislation is vigilant oversight of administration.
>
> It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents.
>
> The informing function of Congress should be preferred even to its legislative function.

John Stuart Mill (*Considerations on Representative Government*, 1861, p. 104), British utilitarian philosopher:

> [T]he proper office of a representative assembly is to watch and control the government; to throw the light of publicity on its acts; to compel a full exposition and justification of all of them which any one considers questionable.

# Authority to Conduct Oversight

## U.S. Constitution

The Constitution grants Congress extensive authority to oversee and investigate executive branch activities. The constitutional authority for Congress to conduct oversight stems from such explicit and implicit provisions as

- *The power of the purse.* The Constitution provides: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[6] Each year the House and Senate Committees on Appropriations review the financial practices and needs of federal agencies. The appropriations process allows Congress to exercise extensive control over the activities of executive agencies. Congress can define the precise purposes for which money may be spent, adjust funding levels, and prohibit expenditures for certain purposes.
- *The power to organize the executive branch.* Congress has the authority to create, abolish, reorganize, and fund federal departments and agencies. It has the authority to assign or reassign functions to departments and agencies and grant new forms of authority and staff to administrators. Congress, in short, exercises ultimate authority over executive branch organization and generally over policy.[7]
- *The power to make all laws for "carrying into Execution" Congress's own enumerated powers as well as those of the executive.* Article I grants Congress a

[6] U.S. Const. art. I, §9, cl. 7.

[7] U.S. Const. art. I, §9; see also U.S. Const. art. II, §2, cl. 2.

wide range of powers, such as the power to tax and coin money, regulate foreign and interstate commerce, declare war, provide for the creation and maintenance of armed forces, and establish post offices.[8] Augmenting these specific powers is the Necessary and Proper Clause, also known as the "Elastic Clause," which gives Congress the authority to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[9] These provisions grant broad authority to regulate and oversee departmental activities established by law.

- *The power to confirm officers of the United States*. The confirmation process not only involves the determination of a nominee's suitability for an executive (or judicial) position but also provides an opportunity to examine the current policies and programs of an agency along with those policies and programs that the nominee intends to pursue.[10]
- *The power of investigation and inquiry.* A traditional method of exercising the oversight function, an implied power, is through investigations and inquiries into executive branch operations. Legislators often seek to know how effectively and efficiently programs are working, how well agency officials are responding to legislative directives, and how the public perceives the programs. The investigatory method helps to ensure a more responsible bureaucracy while supplying Congress with information needed to formulate new legislation.
- *Impeachment and removal*. Impeachment provides Congress with a powerful, ultimate oversight tool to investigate alleged executive and judicial misbehavior and to eliminate such misbehavior through the convictions and removal from office of the offending individuals.[11]

**The Supreme Court on Congress's Power to Oversee and Investigate**

*McGrain* v. *Daugherty*, 273 U.S. 135, 177, 181-182 (1927):

> Congress, investigating the administration of the U.S. Department of Justice (DOJ) during the Teapot Dome scandal, was considering a subject "on which legislation could be had or would be materially aided by the information which the investigation was calculated to elicit." The "potential" for legislation was sufficient. The majority added, "We are of [the] opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function."

*Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 509 (1975):

> Expanding on its holding in *McGrain*, the Court declared, "To be a valid legislative inquiry there need be no predictable end result."

## Principal Statutory Authority: Illustrative Examples

### *Direct Expansions of Congress's Oversight Power*

A number of laws directly augment and safeguard Congress's authority, mandate, and resources to conduct oversight and legislative investigations. For example, there are pertinent statutes that

[8] U.S. Const. art. I, §8.

[9] U.S. Const. art. I, §8, cl. 18.

[10] See U.S. Const. art. II, §2, cl. 2.

[11] See U.S. Const. art. II, §4.

affect congressional proceedings, such as obstruction (18 U.S.C. §1505), false statements by witnesses (18 U.S.C. §1001(c)(2)), and contempt procedures (2 U.S.C. §§192, 194). Among several other noteworthy laws, listed chronologically, are the following:[12]

- *1912 anti-gag legislation and whistleblower protection laws for federal employees:*
  - The *Lloyd-La Follettee Act of 1912* (5 U.S.C. §7211) countered executive orders, issued by Presidents Theodore Roosevelt and William Howard Taft, that prohibited civil service employees from communicating directly with Congress. It also guaranteed that "the right of any persons employed in the civil service … to petition Congress, or any Member thereof, or to furnish information to either House of Congress, or to any committee or member thereof, shall not be denied or interfered with."
  - The *Whistleblower Protection Act of 1989* (P.L. 101-12, 5 U.S.C. ch. 12) makes it a prohibited personnel practice for an agency employee to take (or not take) any action against an employee that is in retaliation for disclosure of information that the employee believes relates to violation of law, rule, or regulation or evidences gross mismanagement, waste, fraud, or abuse of authority (5 U.S.C. §2302(b)(8)). The prohibition is explicitly intended to protect disclosures to Congress: "This subsection shall not be construed to authorize the withholding of information from Congress or the taking of any personnel action against an employee who discloses information to Congress."
  - The *Intelligence Community Whistleblower Protection Act* (P.L. 105-272) establishes special procedures for personnel in the Intelligence Community to transmit urgent concerns involving classified information to inspectors general and the House and Senate Select Committees on Intelligence.
  - Section 714 of the *Consolidated Appropriations Act, 2010* (P.L. 111-117) prohibits the payment of the salary of any officer or employee of the federal government who prohibits, prevents, attempts, or threatens to prohibit or prevent any other federal officer or employee from having direct oral or written communication or contact with any Member, committee, or subcommittee. This prohibition applies irrespective of whether such communication was initiated by such officer or employee or in response to the request or inquiry of such Member, committee, or subcommittee. Further, any punishment or threat of punishment because of any contact or communication by an officer or employee with a Member, committee, or subcommittee is prohibited under the provisions of this act.
  - Section 716 of the *Consolidated Appropriations Act, 2010* (P.L. 111-117) prohibits the expenditure of any appropriated funds for use in implementing or enforcing agreement in Standard Forms 312 and 4414 of the government or any other non-disclosure policy, form, or agreement if such policy, form, or agreement does not contain a provision that states that the restrictions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligation, rights, and liabilities created by Executive Order

[12] See also pages 67-71.

12958;[13] the Lloyd-La Follette Act (5 U.S.C. §7211); the Military Whistleblower Act (10 U.S.C. §1034); the Whistleblower Protection Act (5 U.S.C. §2303(b)(8)); the Intelligence Identities Protection Act (50 U.S.C. §421 *et seq.*); and *United States Code* Title 18, Sections 641, 793, 794, 798, and 952 and Title 50, Section 783(b).

- *Budget and Accounting Act of 1921* (P.L. 67-13) *establishing GAO*
  - Stated that GAO "shall be independent of the executive departments and under the control and direction of the Comptroller General of the United States."
  - Granted authority to the comptroller general to "investigate, at the seat of government or elsewhere, all matters relating to the receipt, disbursement, and application of public funds."
- *Legislative Reorganization Act of 1946* (P.L. 79-600):
  - Mandated House and Senate committees to exercise "continuous watchfulness" of the administration of laws and programs under their jurisdiction.
  - Authorized, for the first time in history, permanent professional and clerical staff for committees.
  - Authorized and directed the comptroller general to make administrative management analyses of each executive branch agency.
  - Established the Legislative Reference Service, renamed the Congressional Research Service by the 1970 Legislative Reorganization Act (see below), as a separate department in the Library of Congress and called upon the service "to advise and assist any committee of either House or joint committee in the analysis, appraisal, and evaluation of any legislative proposal … and otherwise to assist in furnishing a basis for the proper determination of measures before the committee."
- *Intergovernmental Cooperation Act of 1968* (P.L. 90-577):
  - Required that House and Senate committees having jurisdiction over *grants-in-aid* conduct studies of the programs under which grants-in-aid are made.
  - Provided that studies of these programs are to determine whether (1) their purposes have been met, (2) their objectives could be carried on without further assistance, (3) they are adequate to meet needs, and (4) any changes in programs or procedures should be made.
- *Legislative Reorganization Act of 1970* (P.L. 91-510):
  - Revised and rephrased in more explicit language the oversight function of House and Senate standing committees: "each standing committee shall *review* and study, on a continuing basis, the application, administration, and execution of those laws or parts of laws, the subject matter of which is within the jurisdiction of that committee."
  - Required most House and Senate committees to issue biennial oversight reports.

[13] Executive Order 12958 was promulgated by President Bill Clinton on April 20, 1995, and established the classification system for national security information.

  - Strengthened the program evaluation responsibilities and other authorities and duties of the GAO.
  - Re-designated the Legislative Reference Service as the Congressional Research Service, strengthening its policy analysis role and expanding its other responsibilities to Congress.
  - Recommended that House and Senate committees ascertain whether programs within their jurisdiction could be appropriated for annually.
  - Required most House and Senate committees to include in their committee reports on legislation five-year cost estimates for carrying out the proposed program.
  - Increased by two the number of permanent staff for each standing committee, including provisions for minority party hirings, and provided for hiring of consultants by standing committees.
- *Federal Advisory Committee Act of 1972* (P.L. 92-463):
  - Directed House and Senate committees to make a continuing review of the activities of each advisory committee under its jurisdiction.
  - The studies are to determine whether (1) such committee should be abolished or merged with any other advisory committee, (2) its responsibility should be revised, and (3) it performs a necessary function not already being performed.[14]
- *Congressional Budget and Impoundment Control Act of 1974* (P.L. 93-344):
  - Expanded House and Senate committee authority for oversight. Permitted committees to appraise and evaluate programs themselves "or by contract, or (to) require a Government agency to do so and furnish a report thereon to the Congress."
  - Directed the comptroller general to "review and evaluate the results of Government programs and activities" on his own initiative or at the request of either House or any standing or joint committee and to assist committees in analyzing and assessing program reviews or evaluation studies. Authorized GAO to establish an Office of Program Review and Evaluation to carry out these responsibilities.
  - Strengthened GAO's role in acquiring fiscal, budgetary, and program-related information;
  - Established House and Senate Budget Committees and the Congressional Budget Office (CBO). The CBO director is authorized to "secure information, data, estimates, and statistics directly from the various departments, agencies, and establishments" of the government.
  - Required any House or Senate legislative committee report on a public bill or resolution to include an analysis (prepared by CBO) providing an estimate and comparison of costs that would be incurred in carrying out the bill during the next and following four fiscal years in which it would be effective.
- *Public Debt Limit Increase of 2010* (P.L. 111-139):

[14] 86 Stat. 771 (1972).

  - Required the comptroller general to conduct routine investigations to identify programs, agencies, offices, and initiatives with duplicative goals and activities within departments and government-wide and report annually to Congress on the findings, including the cost of such duplication.
- *GAO Access and Oversight Act of 2017* (P.L. 115-3):
  - Authorized GAO to obtain federal agency records, including through civil actions, required to discharge GAO's audit, evaluation, and investigative duties.
  - Provided that no provision of the Social Security Act shall be construed to limit, amend, or supersede GAO's authority to obtain information or inspect records about an agency's duties, powers, activities, organization, or financial transactions.
  - Required agency statements on actions taken or planned in response to GAO recommendations to be submitted to the congressional committees with jurisdiction over the pertinent agency program or activity.

### *Indirect Expansions of Congress's Oversight Power*

Separate from expanding its own authority and resources directly, Congress has strengthened its oversight capabilities indirectly by, for instance, establishing study commissions to review and evaluate programs, policies, and operations of the government. In addition, Congress has created various mechanisms, structures, and procedures within the executive branch that improve the executive's ability to monitor and control its own operations and, at the same time, provide additional information and oversight-related analyses to Congress. These statutory provisions include

- *Inspector General Act of 1978* (P.L. 95-452, 5 U.S.C. Appendix 3): Established offices of inspectors general in all cabinet departments and larger agencies and numerous boards, commissions, and government corporations.
- *Chief Financial Officers Act of 1990* (P.L. 101-576): Established chief financial officers in all cabinet departments and larger agencies.
- *Financial Integrity Act of 1982* (P.L. 97-255): Designed to improve the government's ability to manage its programs.
- *Cash Management Improvement Act of 1990* (P.L. 101-453): Designed to improve the efficiency, effectiveness, and equity in the exchange of funds between the federal government and state governments.
- *Government Performance and Results Act of 1993* (P.L. 103-62), as amended by the *GPRA Modernization Act of 2010* (P.L. 111-352): Designed to increase efficiency, effectiveness, and accountability within the government.
- *Government Management and Reform Act of 1994* (P.L. 103-356): Designed to improve the executive's stewardship of federal resources and accountability.
- *Paperwork Reduction Act of 1995* (P.L. 104-13): Controlled federal paperwork requirements.
- *Information Technology Management Reform Act* (P.L. 104-106): Established the position of chief information officer in federal agencies to provide relevant advice for purchasing the best and most cost-effective information technology available.

- *Single Audit Act of 1984* (P.L. 98-502), as amended by the *Single Audit Act Amendments of 1996* (P.L. 104-156): Established uniform audit requirements for state and local governments and nonprofit organizations receiving federal financial assistance;
- *Small Business Regulatory Enforcement Fairness Act of 1996* (P.L. 104-121): Created a mechanism, the Congressional Review Act (CRA), by which Congress can review and disapprove a final federal rule or regulation.
- *Economic Stabilization Act of 2008* (P.L. 110-343):
  - Allowed the Secretary of the Treasury to purchase and insure "troubled assets" to help promote the strength of the economy and financial system. The act established two organizations to provide broad oversight of the program—a Financial Stability Oversight Board and a Congressional Oversight Panel.
  - Placed audit responsibilities for the program with two individuals—a new special inspector general for the Troubled Asset Relief Program and the comptroller general. In 2010, Congress called on GAO to report annually, identifying "areas of potential duplication, overlap, and fragmentation, which, if effectively addressed, could provide financial and other benefits."
- *Federal Funding Accountability and Transparency Act of 2006* (P.L. 109-282): Enabled the public to access information on all entities and organizations receiving federal grants and contracts over $25,000. Summary information on these matters is made available on a single, searchable website: USASpending.gov. The law required the comptroller general to submit a report to Congress on compliance with the act. The 2006 law was amended two years later by the Government Funding Transparency Act of 2008 (P.L. 110-252). It required recipients of federal awards to report certain information about themselves and other recipients.
- *Digital Accountability and Transparency Act of 2014* (P.L. 113-101):
  - Established government-wide standardization of federal spending data beyond grants and contracts with the aim of creating a unified, publicly accessible data set of information on all federal spending.
  - Required the comptroller general, after reviewing federal agency inspector general reports, to submit to Congress and make publicly available a report assessing and comparing the completeness, timeliness, quality, and accuracy of the data submitted by federal agencies and the implementation and use of data standards by federal agencies.

## Illustrative Examples of House and Senate Rules on Oversight

### *House Rules*

House rules[15] grant the Committee on Oversight and Reform a comprehensive role in the conduct of oversight. For example, the committee has the authority or responsibility to

[15] The rules of the House of Representatives are available at https://rules.house.gov/rules-and-resources/rules-house-representatives.

- review and study on a continuing basis the operation of government activities at all levels, including the Executive Office of the President (Rule X, clause 3).
- receive and examine reports of the Comptroller General and submit to the House such recommendations as it considers necessary or desirable in connection with the subject matter of the reports (Rule X, clause 4).
- study intergovernmental relationships between the United States and the states and municipalities and between the United States and international organizations of which the United States is a member (Rule X, clause 4).
- conduct investigations, at its discretion and at any time, of matters that are jurisdictionally conferred to another standing committee. The findings and recommendations of the Oversight and Reform Committee in such an investigation shall be made available to any other standing committee having jurisdiction over the matter involved (Rule X, clause 4).
- report to the House not later than April 15 in the first session of a Congress—after consultation with the Speaker, the majority leader, and the minority leader—the authorization and oversight plans submitted by the committees together with any recommendations that the Oversight and Reform Committee, or the House leadership group, may make to ensure the most effective coordination of authorization and oversight plans (Rule X, clause 2).
- choose to adopt a rule authorizing and regulating the taking of depositions by a Member or counsel of the committee including pursuant to subpoena under clause 2(m) of Rule XI (Rule X, clause 4).
- evaluate the effect of laws enacted to reorganize the legislative and executive branches of government.

House rules also provide authority for oversight by other standing committees as follows:

- Each standing committee (except Appropriations) shall review and study the application, administration, execution, and effectiveness of all laws within its jurisdiction and determine whether laws and programs addressing subjects within its jurisdiction should be continued, curtailed, or eliminated (Rule X, clause 2). Information pertinent to committee oversight and investigative procedures, such as subpoena power, can be found in Rule XI, clauses 1 and 2.
- Committees have the authority to review and study the impact or probable impact of tax policies on subjects that fall within their jurisdiction (Rule X, clause 2).
- Certain committees have special oversight authority (i.e., to review and study, on an ongoing basis, specific subject areas that are within the legislative jurisdiction of other committees). Special oversight is somewhat akin to the broad oversight authority granted the Committee on Oversight and Reform by the 1946 Legislature Reorganization Act except that special oversight is generally limited to named subjects (Rule X, clause 3).
- Each standing committee having more than 20 members shall establish an oversight subcommittee or require its subcommittees to conduct oversight in their respective jurisdictional areas (Rule X, clause 2 and 5).
- Committee reports on measures are to include oversight findings separately set out and clearly identified. They are also to include a statement of general performance goals and objectives, including outcome-related goals and objectives, for which the measure authorizes funding (Rule XIII, clause 3).

- Each standing committee, or a subcommittee thereof, shall hold at least one hearing during each 120-day period following the establishment of the committee on the topic of waste, fraud, abuse, or mismanagement in government programs that that committee may authorize. Such hearings shall include a focus on the most egregious instances of waste, fraud, abuse, or mismanagement in government programs as documented by any report the committees have received from the comptroller general or an inspector general. Committee and subcommittees shall also hold at least one hearing on issues raised by reports issued by the comptroller general indicating that federal programs or operations that the committee may authorize are at high risk for waste, fraud, and mismanagement, known as the "high-risk list" or "high-risk series" (Rule XI, clause 2).
- The chair of each standing committee (except Appropriations, Ethics, and Rules) shall prepare, in consultation with the ranking minority member, an oversight plan for that Congress not later than March 1 of the first session of a Congress. Committee plans shall be submitted simultaneously to the Committees on Oversight and Reform and House Administration. No later than April 15 in the first session of a Congress—after consultation with the Speaker, the majority leader, and the minority leader—the Committee on Oversight and Reform shall report to the House on the oversight plans of the committees together with any recommendations that it, or the House leadership group, may make to ensure the most effective coordination of oversight plans and otherwise to achieve these objectives. In developing their plans, each standing committee shall to the maximum extent feasible (Rule X, clause 2):
    - consult with other committees that have jurisdiction over the same or related laws, programs, or agencies with the objective of ensuring maximum coordination and cooperation among committees when conducting reviews of such laws, programs, or agencies and include in the plan an explanation of steps that have been or will be taken to ensure such coordination and cooperation;
    - review specific problems with federal rules, regulations, statutes, and court decisions that are ambiguous, arbitrary, or nonsensical or that impose severe financial burdens on individuals;
    - give priority consideration to including in the plan the review of those laws, programs, or agencies operating under permanent budget authority or permanent statutory authority;
    - have a view toward ensuring that all significant laws, programs, or agencies within the committee's jurisdiction are subject to review every 10 years; and
    - have a view toward insuring against duplication of federal programs.
- Each committee must submit to the House not later than January 2 of each odd-numbered year a report that includes (Rule XI, clause 1):
    - separate sections summarizing the legislative and oversight activities of the committee during the applicable period,
    - a summary of the oversight plans submitted by the committee,
    - a summary of the actions taken and recommendations made with respect to the authorization and oversight plans, and

- a summary of any additional oversight activities undertaken by that committee and any recommendations made or actions taken thereon.

In addition, the Speaker, with the approval of the House, may appoint special ad hoc oversight committees for the purpose of reviewing specific matters within the jurisdiction of two or more standing committees (Rule X, clause 2).

### *Senate Rules*

Under Senate Rules,[16] each standing committee (except for Appropriations and Budget) shall review and study, on a continuing basis, the application, administration, and execution of those laws, or parts of laws, within its legislative jurisdiction (Rule XXVI, clause 8).

In addition to that general oversight requirement, "comprehensive policy oversight" responsibilities are granted to specified standing committees. This duty is similar to special oversight in the House. For example, the Committee on Agriculture, Nutrition, and Forestry is authorized to study and review, on a comprehensive basis, matters relating to food, nutrition, and hunger both in the United States and in foreign countries—and rural affairs—and report thereon from time to time (Rule XXV, clause 1(a)).

All standing committees, except Appropriations, are required to include regulatory impact evaluations in their committee reports accompanying each public bill or joint resolution (Rule XXVI, clause 11). The evaluations are to include matters such as

- an estimate of the numbers of individuals and businesses that would be regulated,
- a determination of the measure's economic impact and effect on personal privacy, and
- a determination of the amount of additional paperwork that will result from the regulations.

The Committee on Homeland Security and Governmental Affairs exercises jurisdiction over government operations generally and the U.S. Department of Homeland Security (DHS) in particular. Selected oversight duties under Rule XXV, clause 1(k) include

- reviewing and studying on a continuing basis the operation of government activities at all levels to determine their economy, effectiveness, and efficiency;
- receiving and examining reports of the comptroller general and submit recommendations as it deems necessary to the Senate;
- evaluating the effects of laws enacted to reorganize the legislative and executive branches of the government; and
- studying intergovernmental relationships between the United States and the states and municipalities and international organizations of which the United States is a member.

Finally, on March 1, 1948 (during the 80th Congress), the Senate adopted S.Res. 189, which established the Permanent Subcommittee on Investigations of the Committee on Homeland Security and Governmental Affairs (then titled the Committee on Government Operations). The subcommittee was an outgrowth of the 1941 Truman Committee (after Senator Harry Truman), which investigated fraud and mismanagement of the nation's war program. The Truman Committee ended in 1948, but the chairman of the Government Operations Committee

[16] The rules of the Senate are available at https://www.rules.senate.gov/rules-of-the-senate.

transferred the functions of the Truman Committee to a subcommittee: the Permanent Subcommittee on Investigations. Since then this subcommittee has investigated scores of issues, such as government waste, fraud, and inefficiency.

## Congressional Participants in Oversight

### *Members*

Oversight is generally considered a committee activity. However, both casework and other project work conducted in Members' personal offices, or in their district or state offices, can result in findings about bureaucratic behavior and policy implementation. These discoveries, in turn, can lead to the adjustment of agency policies and procedures and to changes in public law.

Casework—responding to constituent requests for assistance on projects or complaints or grievances about program implementation—provides an opportunity to examine bureaucratic activity and operations, if only in a selective way. The accessibility of governmental websites also allows interested constituents to monitor federal activities and expenditures and to share their findings or observations with Members, relevant committees, and legislative staff.

Individual Members may also conduct their own investigations or ad hoc hearings or direct their staff to conduct oversight studies. Members might also request GAO, another legislative branch agency, a specially created party task force, a private research group, or some other entity to conduct an investigation. Individual lawmakers lack the authority to use compulsory processes (e.g., subpoenas) or conduct official hearings.

### *Committees*

The most common method of conducting oversight is through the committee structure. Legislative history demonstrates that the House and Senate have long used their standing committees—as well as joint, select, or special committees—to investigate federal activities and agencies:

- The House Committee on Oversight and Reform and the Senate Committee on Homeland Security and Governmental Affairs have broad oversight jurisdiction over virtually the entire federal government. They have been vested with broad investigatory powers over government-wide activities.
- The House and Senate Committees on Appropriations have similar responsibilities when examining and reviewing the fiscal activities of the federal government.
- Each standing committee of Congress has oversight responsibilities for reviewing government activities principally within their jurisdiction. These panels also have the authority to establish oversight and investigative subcommittees. The establishment of an oversight subcommittee does not preclude the other legislative subcommittees from conducting oversight.
- Certain House and Senate committees have "special oversight" or "comprehensive policy oversight" of designated subject areas, as noted above.

### *Personal Staff*

Constituent letters, complaints, and requests for projects and assistance frequently bring issues and deficiencies in federal programs and administration to the attention of Members and their

personal office staffs. The casework performed by a Member's staff for constituents can be an effective oversight tool.

Casework can be an important vehicle for pursuing both the oversight and legislative interests of the Member. Members and their staff aides are mindful of the relationship between casework and the oversight function. This connection is facilitated by a regular exchange of ideas among the Member, legislative aides, and caseworkers on problems brought to the office's attention by constituents. Casework might also prompt legislative initiatives to resolve those problems.

Caseworkers and other legislative staffers may seek to maximize service to their Member's constituents when they establish a relationship with the staff of the subcommittees and committees that handle the areas of concern to the Member's constituents. Through this interaction, the staff of the pertinent standing committee(s) can be made aware of the problems with the agency or program in question, assess how widespread and significant they are, determine their causes, and recommend corrective action.

Member office staff might also identify cases that lead to formal changes in agency procedures and processes. Staff follow-up may enhance this type of informal oversight. Telephone and email inquiries, reinforced with written requests, tend to ensure agency attention to issues raised by caseworkers and Members' constituents.

### *Committee Staff*

As issues become more complex, the professional staffs of committees can provide the expertise required to conduct effective oversight and investigations. Committee staff typically have the experience, knowledge, and analytical skills to conduct proficient and thorough oversight for the committees and subcommittees they serve. Committees may also call upon legislative support agencies for assistance, hire consultants, "borrow" staff from federal departments, or employ academics and others with specialized expertise.

Committee staff, in summary, occupy a central position in the conduct of oversight. Their informal contacts with executive officials at all levels constitute one of Congress's most effective techniques for performing its "continuous watchfulness" function.

### *Congressional Support Agencies and Offices*

Of the agencies in the legislative branch, three directly assist Congress in support of its oversight function:

1. CBO;
2. CRS, of the Library of Congress; and
3. GAO.

For further detail on these offices, see "Oversight Information Sources and Consultant Services" later in this report.

Through their work assisting in the overall operations of the House and Senate, additional offices that might play a role in oversight include, among others, the House General Counsel's Office, House Parliamentarian's Office, Senate Parliamentarian's Office, House Clerk's Office, Secretary of the Senate's Office, Office of Senate Legal Counsel, Senate and House Historian's Office, and the Senate Library.

# Oversight Coordination and Processes

A persistent challenge for Congress in conducting oversight is coordination among committees, both within each chamber as well as between the two houses. As the final report of the House Select Committee on Committees of the 93rd Congress noted, "Review findings and recommendations developed by one committee are seldom shared on a timely basis with another committee, and, if they are made available, then often the findings are transmitted in a form that is difficult for Members to use."[17] Despite the passage of time, this statement remains relevant today. Oversight coordination between House and Senate committees is also uncommon, and it occurs primarily in the aftermath of perceived major policy failures or prominent inter-branch conflicts, as with the Iran-Contra affair and the 9/11 terrorist attacks.

Intercommittee cooperation on oversight can be beneficial for a variety of reasons. For example, it can help minimize unnecessary duplication and conflict and inhibit agencies from playing one committee against another. There are formal and informal ways to achieve oversight coordination among committees.

## Oversight Coordination

### *General Techniques of Ensuring Oversight Coordination*

The House and Senate can establish select or special committees to probe issues and agencies, promote public understanding of national concerns, and coordinate oversight of issues that span the jurisdiction of more than one standing committee.

House rules require the findings and recommendations of the Committee on Oversight and Reform to be considered by the authorizing committees if presented to them in a timely fashion. Such findings and recommendations are to be published in the authorizing committees' reports on legislation.[18] House rules also require the oversight plans of committees to include ways to maximize coordination between and among committees that share jurisdiction over related laws, programs, or agencies.[19]

### *Specific Means of Ensuring Oversight Coordination*

Specific means of ensuring oversight coordination include the following:

- Joint committee or subcommittee oversight hearings on programs or agencies.
- Informal agreement among committees to oversee certain agencies and not others. For example, the House and Senate Committees on Commerce agreed to hold oversight hearings on certain regulatory agencies in alternate years.
- Consultation between the authorizing and appropriations committees. The two Committees on Commerce have worked closely with their corresponding appropriations subcommittees to alert those panels to the authorizing committees' intent with respect to regulatory ratemaking by such agencies as the Federal Communications Commission.

[17] H.Rept. 93-916, at 68 (1974).

[18] House Rule XIII(3)(c)(1).

[19] House Rule X(2)(d)(1)(A).

# Oversight Through Legislative and Investigative Processes

## *The Budget Process*[20]

The Congressional Budget and Impoundment Control Act of 1974,[21] as amended, enhanced the legislative branch's capacity to shape the federal budget. The act has had major institutional and procedural effects on Congress:

- *Institutionally*, Congress created three new entities: the Senate Committee on the Budget, the House Committee on the Budget, and CBO.
- *Procedurally*, the act established methods that permit Congress to determine budget policy as a whole; relate revenue and spending decisions; determine priorities among competing national programs; and ensure that revenue, spending, and debt legislation are consistent with the overall budget policy.

The budget process coexists with the established authorization and appropriation procedures and significantly affects each:

- On the *authorization side*, the Budget Act requires committees to submit their budgetary "views and estimates" on matters under their jurisdiction to the Committee on the Budget not later than six weeks after the President submits a budget or at such time that the Budget Committee might request.
- On the *appropriations side*, new contract and borrowing authority must go through the appropriations process. Subcommittees of the Appropriations Committees are assigned a financial allocation that determines how much may be included in the measures they report, although less than one-third of federal spending is subject to the annual appropriations process. (The tax and appropriations panels of each house also submit budgetary views and estimates to their respective Budget Committees.)
- In deciding spending, revenue, credit, and debt issues, Congress is sensitive to trends in the overall composition of the annual federal budget (expenditures for defense, entitlements, interest on the debt, and domestic discretionary programs).[22]

In short, these Budget Act reforms have the potential to strengthen oversight by enabling Congress to better relate program priorities to financial claims on the national budget. Each committee, knowing that it will receive a fixed amount of the total to be included in a budget resolution, has an incentive to scrutinize existing programs to make room for new programs or expanded funding of ongoing projects or to assess whether programs have outlived their usefulness.

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[20] For a general overview of the budget process, see CRS Report 98-721, *Introduction to the Federal Budget Process*, coordinated by James V. Saturno; and CRS In Focus IF11032, *Budgetary Decisionmaking in Congress*, by Megan S. Lynch. CRS also reports regularly on legislative activity on the budget and appropriations as well as actions that affect the budget process itself. See, for example, CRS Report R44874, *The Budget Control Act: Frequently Asked Questions*, by Grant A. Driessen and Megan S. Lynch; and CRS Report R45552, *Changes to House Rules Affecting the Congressional Budget Process Included in H.Res. 6 (116th Congress)*, by James V. Saturno and Megan S. Lynch.

[21] P.L. 93-344, 88 Stat. 297, codified at 2 U.S.C. §§607-688.

[22] See, for example, CRS Report R45941, *The Annual Sequester of Mandatory Spending through FY2029*, by Charles S. Konigsberg; and CRS Insight IN11148, *The Bipartisan Budget Act of 2019: Changes to the BCA and Debt Limit*, by Grant A. Driessen and Megan S. Lynch.

### *The Authorization Process*

Through its authorization power, Congress exercises significant control over government agencies. The entire authorization process may involve a host of oversight tools—hearings, studies, and reports—but the key to the process is the *authorization statute*.

An authorization statute creates and shapes government programs and agencies, and it contains the statement of legislative policy for the agency. Authorization is the *first* lever in congressional exercise of the power of the purse. It usually allows an agency to be funded, but it does *not* guarantee financing of agencies and programs. Frequently, authorizations establish dollar ceilings on the amounts that can be appropriated.

The authorization-reauthorization process is a significant oversight tool. Through this process, Members are informed about the work of an agency and given an opportunity to direct the agency's effort in light of experience.[23]

Expiration of an agency's program provides an opportunity for in-depth oversight. In recent decades, there has been a mix of permanent and periodic (annual or multi-year) authorizations, although reformers at times press for *biennial budgeting* (i.e., acting on a two-year cycle for authorizations, appropriations, and budget resolutions). Periodic reauthorizations increase the likelihood that an agency will be scrutinized systematically.

In addition to formal amendment of the agency's authorizing statute, the authorization process gives committees an opportunity to exercise informal, nonstatutory controls over the agency. An agency's understanding that it must come to the legislative committee for renewed authority increases the influence of the committee. This condition helps to account for the appeal of short-term authorizations. *Nonstatutory controls* used by committees to exercise direction over the administration of laws include statements made in

- committee hearings,
- committee reports accompanying legislation,
- floor debate, and
- contacts and correspondence with the agency.

If agencies fail to comply with these informal directives, the authorization committees can apply sanctions or move to convert the informal directive to a statutory command.

### *The Appropriations Process*

The appropriations process is among Congress's most significant forms of oversight. Its strategic position stems from the constitutional requirement that "no Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[24] This "power of the purse" allows the House and Senate Committees on Appropriations to play a prominent role in oversight.

The oversight function of the Committees on Appropriations derives from their responsibility to examine the budget requests of the agencies as contained in the President's budget. The decisions of the committees are conditioned on their assessment of the agencies' need for their budget

[23] For an illustration of the authorization process serving as a tool to conduct oversight and inform policy decisions, see CRS Report R46107, *FY2020 National Defense Authorization Act: Selected Military Personnel Issues*, coordinated by Bryce H. P. Mendez.

[24] U.S. Const. art. I, §9, cl. 17.

requests as indicated by past performance. In practice, the entire record of an agency is fair game for the required assessment. This comprehensive overview and the "carrot and stick" of appropriations recommendations make the committees significant focal points of congressional oversight and are a key source of their power in Congress and in the federal government generally.[25]

Enacted appropriations legislation frequently contains at least five types of *statutory controls* on agencies:

1. It specifies the *purpose* for which funds may be used.
2. It defines the specified *funding level* for the agency as a whole as well as for programs and divisions within the agency.
3. It sets *time limits* on the availability of funds for obligation.
4. It may contain *limitation* provisions. For example, in appropriating $350 million to the Environmental Protection Agency (EPA) for research and development, Congress added this condition: "Provided, That not more than $55,000,000 of these funds shall be available for procurement of laboratory equipment, supplies, and other operating expenses in support of research and development."[26]
5. It may stipulate how an agency's budget can be *reprogrammed* (shifting funds within an appropriations account).

*Nonstatutory controls* are a major form of oversight. Language in committee reports and in hearings, letters to agency heads, and other communications give detailed instructions to agencies regarding committee expectations and desires. Agencies are not legally obligated to abide by nonstatutory recommendations, but failure to do so may result in a loss of funds and flexibility the following year. Agencies ignore nonstatutory controls at their peril.

**An Example of Nonstatutory Control of Agency Appropriations**

The conference report for the Omnibus Consolidated and Emergency Supplemental Appropriations for FY1999 provides guidelines for the reprogramming and transfer of funds for the Treasury and General Government Appropriations Act, 1999. Each request from an agency to the review committee "shall include a declaration that, as of the date of the request, none of the funds included in the request have been obligated, and none will be obligated, until the Committees on Appropriations have approved the request."[27]

## *The Investigatory Process*

Congress's power to investigate is *implied* in the Constitution. Numerous Supreme Court decisions have upheld the legislative branch's right of inquiry, provided it stays within its legitimate legislative sphere. The roots of Congress's authority to conduct investigations extend back to the British Parliament and colonial assemblies. In addition, the House of Representatives has been described as the "grand inquest of the nation."[28] Since the Framers expected lawmakers to employ the investigatory function, based upon parliamentary precedents, it was seen as unnecessary to invest Congress with an explicit investigatory power.

[25] See, for example, CRS Report R46061, *Voluntary Testimony by Executive Branch Officials: An Introduction*, by Ben Wilhelm.

[26] 108 Stat. 2319 (1994).

[27] H.Rept. 105-825, p. 1472 (1998).

[28] See generally William H. Rehnquist, *Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson* (New York: William Morrow, 1992).

Investigations and related activities may be conducted by

- individual Members,
- committees and subcommittees,
- staff or outside organizations and personnel under contract, or
- congressional support agencies such as GAO and CRS.

Investigations may serve several purposes:

- They can help to ensure honesty and efficiency in the administration of laws.
- They can secure information that assists Congress in making informed policy judgments.
- They may aid in informing the public about the administration of laws.

See the next section of this report on "Investigative Oversight" for greater detail and analysis.

### *The Confirmation Process*

By establishing a public record of the policy views of nominees, congressional hearings allow lawmakers to call appointed officials to account at a later time. Since at least the Ethics in Government Act of 1978,[29] which encouraged greater scrutiny of nominations, Senate committees have set aside more time to probe the qualifications, independence, and policy views of presidential nominees, seeking information on everything from their physical health to their financial assets. The confirmation process can assist in oversight in at least three ways:

1. The Constitution provides that the President "shall nominate, and by and with the *Advice and Consent of the Senate*, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law."[30] The consideration of appointments to executive branch leadership positions is a major responsibility of the Senate and especially of Senate committees, which review and hold hearings regarding the qualifications of nominees.
2. Confirmation hearings serve as an opportunity for senatorial oversight and influence, providing a forum for the discussion of the policies and programs the nominee intends to pursue. The confirmation process as an oversight tool can be used to provide policy direction to nominees, inform nominees of congressional interests, and seek commitments on future behavior.
3. Once a nominee has been confirmed by the Senate, oversight includes following up to ensure that the nominee fulfills any commitments made during confirmation hearings. Subsequent hearings and committee investigations can explore whether such commitments have been kept.

[29] P.L. 95-521, 92 Stat. 1824, codified at 5 U.S.C. App. §§101 *et seq.*

[30] U.S. Const. art. II, §2, cl. 2 (emphasis added).

The President has alternative authority to make appointments that do not require the advice and consent of the Senate, including, under certain circumstances, recess appointments[31] and designations under the Vacancies Act.[32]

### *The Impeachment Process*

The impeachment power of Congress is a unique oversight tool available to Congress. Impeachment applies to the President, Vice President, and other federal civil officers in the executive and judicial branches.[33] Impeachment offers Congress

- a constitutionally mandated method for obtaining information that might otherwise not be made available, and
- an implied threat of punishment for an official whose conduct exceeds acceptable boundaries.

Impeachment procedures differ from those of conventional congressional oversight. The most significant procedural differences center on the *roles* played by each house of Congress. The House of Representatives has the sole power to impeach.[34] A simple majority is needed in the House to approve articles of impeachment. The Senate has the sole power to try an impeachment.[35] A two-thirds majority is required in the Senate to convict and remove the individual. Should the Senate deem it appropriate in a given case, it may, by majority vote, impose an additional judgment of disqualification from holding further federal offices of honor, trust, or profit.[36]

The impeachment process is cumbersome and infrequently used. The House has voted to impeach in 20 cases. The Senate has voted to convict in eight cases, all pertaining to federal judges. The most recent executive impeachment trial was that of President Clinton in 1998-1999;[37] the most recent judicial impeachment trial was that of U.S. District Court Judge G. Thomas Porteous Jr. in 2010. A number of constitutional and procedural issues were addressed in the Clinton impeachment trial and other past impeachment proceedings, although the answers to some of these questions remain ambiguous. For example

- The impeachment process has been continued from one Congress to the next,[38] although the procedural steps vary depending upon the stage in the process.

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[31] U.S. Const. art. II, §2, cl. 3. For more information on recess appointments, see CRS Report R44997, *The Vacancies Act: A Legal Overview*, by Valerie C. Brannon.

[32] 5 U.S.C. §§3345 *et seq.* For more information on the Vacancies Act, see CRS Report RS21412, *Temporarily Filling Presidentially Appointed, Senate-Confirmed Positions*, by Henry B. Hogue.

[33] U.S. Const. art. II, §4. See CRS Report R46013, *Impeachment and the Constitution*, by Jared P. Cole and Todd Garvey.

[34] U.S. Const. art. II, §2, cl. 5.

[35] U.S. Const. art. II, §3, cl. 7.

[36] While the Constitution does not speak to the vote threshold necessary for disqualification, this has been the practice of the Senate across history. See CRS Report R46013, *Impeachment and the Constitution*, by Jared P. Cole and Todd Garvey at 14-15.

[37] As of this writing, the House of Representatives has impeached President Donald Trump, but the Senate has yet to begin his trial.

[38] For example, President Clinton was impeached by the House of Representatives on December 19, 1998, near the conclusion of the 105th Congress. Shortly after the 106th Congress convened on January 3, 1999, the Senate conducted a trial.

- The Constitution defines the grounds for impeachment as "Treason, Bribery, or other high Crimes and Misdemeanors."[39] However, the meaning and scope of "high Crimes and Misdemeanors" remains in some dispute and depends on the interpretation of individual legislators.
- The Constitution provides for impeachment of the "President, Vice President, and all civil Officers of the United States."[40] While the outer limit of the "civil Officers" language is not altogether clear, past precedents suggest that it covers at least federal judges and executive officers subject to the Appointments Clause.
- Members of the House and Senate are not subject to impeachment because they are not "civil officers." The House impeached William Blount, a U.S. Senator from Tennessee, in 1797, but the Senate chose to *expel* him from the Senate instead of conducting an impeachment trial.

# Investigative Oversight[41]

Congressional oversight and investigations, which are often adversarial, can serve to sustain and vindicate Congress's role in the United States' constitutional scheme of separated powers. The rich history of congressional investigations—from the failed St. Clair expedition in 1792 and including Teapot Dome, Watergate, Iran-Contra, and Whitewater—have established, both legally and as a matter of practice, the nature and contours of congressional prerogatives necessary to maintain the integrity of the legislative branch.

This section provides an overview of some of the more common legal, procedural, and practical issues that committees may face in the course of conducting oversight and/or congressional investigations. It begins with a general summary of Congress's constitutional authority to perform oversight and investigations. It then turns to a discussion of the legal tools commonly used by congressional committees in conducting oversight and investigations, including the legal basis for subpoenas, staff depositions, and committee hearings, as well as a discussion of the various forms of contempt of Congress, the primary enforcement mechanism available. The section will then discuss limitations on congressional authority to conduct successful oversight and investigations, including constitutional privileges, such as executive privilege. Finally, the section will address a series of frequently encountered legal issues, such as the applicability of the Privacy Act and the Freedom of Information Act, access to grand jury materials and pending litigation files, and access to classified and confidential information.

## Constitutional Authority to Perform Oversight and Investigative Inquiries

Congress's authority to obtain information, including classified and confidential information, is, generally speaking, broad. While there is no express provision of the Constitution or specific statute authorizing the conduct of congressional oversight or investigations, the Supreme Court has firmly established that such power is essential to the legislative function as to be implied from

[39] U.S. Const. art. II, §4.

[40] U.S. Const. art. II, §4.

[41] This report is not intended to address all the legal issues that committees, Members, and staff may encounter when engaged in investigative activities. Legal questions on Congress's investigatory powers should be directed to CRS legislative attorneys.

the general vesting of legislative powers in Congress.[42] In *Eastland v. United States Servicemen's Fund*, for instance, the Court stated that the "scope of its power of inquiry … is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."[43] In *Watkins v. United States*, the Court emphasized that the "power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes."[44] The Court also noted that the first Congresses held "inquiries dealing with suspected corruption or mismanagement of government officials"[45] and stated that the investigative power "comprehends probes into departments of the federal government to expose corruption, inefficiency, or waste."[46]

## Authority of Congressional Committees

Oversight and investigative authority is implied in Article I of the Constitution and rests with the House of Representatives and Senate. The House and Senate have delegated this authority to various entities, the most relevant of which are the standing committees of each chamber. Committees of Congress have the power only to inquire into matters within the scope of the authority delegated to them by their parent bodies.[47] However, a committee's investigative purview is substantial and wide-ranging if it satisfies this jurisdictional requirement and if the committee has a legislative purpose for conducting the inquiry.

### Committee Jurisdiction

Establishing committee jurisdiction is the foundation for any attempt to obtain information and documents from the executive branch or a private entity or person. A claim of lawful jurisdiction, however, does not automatically entitle the committee to access whatever documents and information it may seek. Rather, an appropriate claim of jurisdiction authorizes the committee to inquire and request information. The specifics of such access may still be subject to prudential, political, and constitutionally based privileges asserted by the targets of the inquiry.

A congressional committee is a creation of its parent house and, therefore, can inquire only into matters within the scope of the authority that has been delegated to it by that body.[48] Thus, the enabling chamber rule or resolution that gives life to the committee also defines the grant and limitations of the committee's power.[49] In construing the scope of a committee's authorizing charter, courts look to the words of the rule or resolution itself and then, if necessary, to the usual sources of legislative history such as floor debate, legislative reports, and prior committee practice and interpretation.

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[42] See, for example, Nixon v. Administrator of General Services, 433 U.S. 435 (1977); Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975); Barenblatt v. United States, 360 U.S. 109 (1959); Watkins v. United States, 354 U.S. 178 (1957); McGrain v. Daugherty, 273 U.S. 135 (1927).

[43] *Eastland*, 421 U.S. at 504, n. 15 (quoting *Barenblatt*, 360 U.S. at 111).

[44] *Watkins*, 354 U.S. at 187.

[45] *Watkins*, 354 U.S. at 192.

[46] *Watkins*, 354 U.S. at 187.

[47] See United States v. Rumely, 345 U.S. 41 (1953).

[48] *Rumely*, 345 U.S. at 42, 44 (1953); see also *Watkins*, 354 U.S. at 198.

[49] Once established, the investigative authority delegated to a committee by its parent chamber may be augmented through adoption of a House or Senate resolution that confers additional authority to the committee.

House Rule X and Senate Rule XXV address the organization of each chamber's standing committees and establish their jurisdiction.[50] Jurisdictional authority for "special" investigations may be given to a standing committee, a joint committee of both houses, a subcommittee of a standing committee, or another entity (a "task force," for instance). The current House and Senate rules confer jurisdiction on their standing committees with a high degree of specificity, and in recent years, the authorizing resolutions for special and select committees have also been drafted with particular care. Therefore, it may be more difficult for a noncompliant witness to claim in court that a committee has overstepped its delegated scope of authority.

## Legislative Purpose

While the congressional power of inquiry is broad, it is not unlimited. The Supreme Court has cautioned that the power to investigate may be exercised only "in aid of the legislative function"[51] and cannot be used to expose for the sake of exposure alone. The *Watkins* Court underlined these limitations, stating

> There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress … nor is the Congress a law enforcement or trial agency. These are functions of the executive and judicial departments of government. No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress.[52]

A committee's inquiry must have a legislative purpose or be conducted pursuant to some other constitutional power of Congress, such as the authority of each House to discipline its own members, judge the returns of their elections, and conduct impeachment proceedings.[53] The 1881 Supreme Court decision in *Kilbourn v. Thompson*[54] held that the challenged investigation was an improper probe into the private affairs of individuals. However, in *McGrain v. Daugherty*, the Court presumed legislative purpose for an investigation.[55] The House or Senate rule or resolution authorizing the investigation does not have to specifically state the committee's legislative purpose.[56] In *In re Chapman*,[57] the Court upheld the validity of a resolution authorizing an inquiry into charges of corruption against certain Senators despite the fact that it was silent as to what might be done when the investigation was completed. The Court stated

> The questions were undoubtedly pertinent to the subject matter of the inquiry. The resolutions directed the committee to inquire "whether any Senator has been, or is, speculating in what are known as sugar stocks during the consideration of the tariff bill now before the Senate." What the Senate might or might not do upon the facts when ascertained, we cannot say nor are we called upon to inquire whether such ventures might be defensible, as contended in argument, but it is plain that negative answers would have cleared that body of what the Senate regarded as offensive imputations, while affirmative

[50] See House Rule X, 116th Congress (2019); Senate Rule XXV, 116th Congress (2019).

[51] Kilbourn v. Thompson, 103 U.S. 168, 204 (1880).

[52] *Watkins*, 354 U.S. at 187.

[53] See, for example, McGrain v. Daugherty, 273 U.S. 135; In Re Chapman, 166 U.S. 661 (1897).

[54] 103 U.S. 168 (1881).

[55] *McGrain*, 273 U.S. 135.

[56] *McGrain*, 273 U.S. 135. See also Townsend v. United States, 95 F.2d 352 (D.C. Cir. 1938); U.S. Congress, Joint Committee on Congressional Operations, *Leading Cases on Congressional Investigatory Power*, committee print, 94th Congress, 2nd session, January 1976, 62-125 (Washington: GPO, 1976), p. 7. For a different assessment of case law concerning the requirement of a legislative purpose, see Allen B. Moreland, *Congressional Investigations and Private Persons*, 40 So. Cal. L. Rev. 189, 232 (1967).

[57] 166 U.S. 661, 669 (1897).

> answers might have led to further action on the part of the Senate within its constitutional powers.
>
> Nor will it do to hold that the Senate had no jurisdiction to pursue the particular inquiry because the preamble and resolutions did not specify that the proceedings were taken for the purpose of censure or expulsion, if certain facts were disclosed by the investigation. The matter was within the range of the constitutional powers of the Senate. The resolutions adequately indicated that the transactions referred to were deemed by the Senate reprehensible and deserving of condemnation and punishment. The right to expel extends to all cases where the offense is such as in the judgment of the Senate is inconsistent with the trust and duty of a Member.
>
> We cannot assume on this record that the action of the Senate was without a legitimate object, and so encroach upon the province of that body. Indeed, we think it affirmatively appears that the Senate was acting within its right, and it was certainly not necessary that the resolutions should declare in advance what the Senate meditated doing when the investigation was concluded.[58]

In *McGrain v. Daugherty*,[59] the original resolution that authorized the Senate investigation into the Teapot Dome affair made no mention of a legislative purpose. A subsequent resolution for the attachment of a contumacious witness declared that his testimony was sought for the purpose of obtaining "information necessary as a basis for such legislative and other action as the Senate may deem necessary and proper."[60] The Court found that the investigation was ordered for a legitimate legislative purpose. It wrote

> The only legitimate object the Senate could have in ordering the investigation was to aid it in legislating, and we think the subject matter was such that the presumption should be indulged that this was the real object. An express avowal of the object would have been better; but in view of the particular subject-matter was not indispensable….
>
> The second resolution—the one directing the witness be attached—declares that this testimony is sought with the purpose of obtaining "information necessary as a basis for such legislative and other action as the Senate may deem necessary and proper." This avowal of contemplated legislation is in accord with what we think is the right interpretation of the earlier resolution directing the investigation. The suggested possibility of "other action" if deemed "necessary or proper" is of course open to criticism in that there is no other action in the matter which would be within the power of the Senate. But we do not assent to the view that this indefinite and untenable suggestion invalidates the entire proceeding. The right view in our opinion is that it takes nothing from the lawful object avowed in the same resolution and is rightly inferable from the earlier one. It is not as if an inadmissible or unlawful object were affirmatively and definitely avowed.[61]

Moreover, it has been held that a court cannot say that a committee of Congress exceeds its power when the purpose of its investigation is supported by reference to specific problems that in the past have been, or in the future may be, the subject of appropriate legislation.[62] In the past, the types of legislative activity that have justified the exercise of investigative power have included the primary functions of legislating and appropriating,[63] the function of deciding whether or not

[58] *In re Chapman*, 166 U.S. at 699.

[59] 273 U.S. 135 (1927).

[60] See 273 U.S. at 153.

[61] 273 U.S. at 179-80.

[62] Shelton v. United States, 404 F.2d 1292, 1297 (D.C. Cir. 1968), cert denied, 393 U.S. 1024 (1969).

[63] *Barenblatt*, 360 U.S. 109.

legislation is appropriate,[64] oversight of the administration of the laws by the executive branch,[65] and the congressional function of informing itself in matters of national concern.[66] In addition, Congress's power to investigate such diverse matters as foreign and domestic subversive activities,[67] labor union corruption,[68] and organizations that violate the civil rights of others[69] have all been upheld by the Supreme Court.

Despite the Court's broad interpretation of legislative purpose, its scope is not without limits. Courts have held that a committee lacks legislative purpose if it appears to be conducting a legislative trial rather than an investigation to assist in performing its legislative function.[70] However, although "there is no congressional power to expose for the sake of exposure,"[71] "so long as Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power."[72]

## Legal Tools Available for Oversight and Investigations

A review of congressional precedents indicates that there is no single method or set of procedures for engaging in oversight or conducting an investigation.[73] Historically, congressional committees appeared to rely a great deal on public hearings and subpoenaed witnesses to gather information and accomplish their investigative goals. In more recent years, congressional committees have seemingly relied more heavily on staff level communication and contacts as well as other "informal" attempts at gathering information—document requests, informal briefings, interviews, etc.—before initiating the necessary formalistic procedures such as issuing committee subpoenas, holding on-the-record depositions, and/or engaging the subjects of inquiries in public hearings. This section discusses the formal process of issuing subpoenas, depositions, and holding committee hearings. This section also reviews Congress's authority to grant witnesses limited immunity for the purpose of obtaining information and testimony that may be protected by the Fifth Amendment's right against self-incrimination.

### Subpoena Power

As a corollary to Congress's accepted oversight and investigative authority, the Supreme Court has determined that the issuance of subpoenas "has long been held to be a legitimate use by Congress of its power to investigate."[74] The Court has referred to the subpoena power as "an

[64] Quinn v. United States, 349 U.S. 155, 161 (1955).

[65] *McGrain*, 273 U.S. at 295.

[66] *Rumely*, 345 U.S. at 43-45; see also *Watkins*, 354 U.S. at 200 n. 3.

[67] See, for example, *Barenblatt*, 360 U.S. 109; *Watkins*, 354 U.S. 178; McPhaul v. United States, 364 U.S. 372 (1960).

[68] Hutcheson v. United States, 369 U.S. 599 (1962).

[69] *Shelton*, 404 F.2d 1292.

[70] See United States v. Icardi, 140 F. Supp. 383 (D.D.C. 1956); United States v. Cross, 170 F. Supp. 303 (D.D.C. 1959).

[71] *Watkins*, 354 U.S. at 200. However, Chief Justice Warren, writing for the majority, made it clear that he was not referring to the "power of the Congress to inquire into and publicize corruption, mal-administration or inefficiency in agencies of the Government."

[72] *Barenblatt*, 360 U.S. at 132.

[73] See, for example, Roger A. Bruns, David L. Hostetter, and Raymond W. Smock, eds., *Congress Investigates: A Critical and Documentary History* (New York: Facts on File, 2011).

[74] *Eastland*, 421 U.S. at 504.

essential and appropriate auxiliary to the legislative function"[75] and said the following about its usefulness to Congress:

> A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed. All this was true before and when the Constitution was framed and adopted. In that period the power of inquiry—with enforcing process—was regarded and employed as a necessary and appropriate attribute of the power to legislate—indeed, was treated as inhering in it.[76]

A properly authorized subpoena issued by a committee or subcommittee has the same force and effect as a subpoena issued by the parent house itself. Individual committees and subcommittees must be delegated the authority to issue subpoenas. Senate Rule XXVI(1) and House Rule XI(2)(m)(1) presently empower all standing committees and subcommittees to issue subpoenas requiring the attendance and testimony of witnesses and the production of documents. Special or select committees must be specifically delegated that authority by Senate or House resolution. The rules governing issuance of committee subpoenas vary by committee. Some committees require a full committee vote to issue a subpoena, while others empower the chairman to issue them unilaterally or with the concurrence of the ranking minority member.[77]

Congressional subpoenas are served by the U.S. Marshal's office, committee staff, or the Senate or House Sergeants-at-Arms. Service may be effected anywhere in the United States. The subpoena power has been held to extend to aliens physically present in the United States. As will be discussed below, however, securing compliance of U.S. nationals and aliens living in foreign countries is more complex.[78]

A witness seeking to challenge the legal sufficiency of a subpoena has limited remedies to defeat the subpoena even if it is found to be legally deficient. In order for a subpoena to be valid, the underlying investigation must meet the following general criteria, as articulated by the Supreme Court in *Wilkinson v. United States*:

- The committee's investigation of the broad subject matter area must be authorized by Congress.
- The investigation must be pursuant to "a valid legislative purpose."[79]
- The specific inquiries must be pertinent to the broad subject matter areas that have been authorized by Congress.[80]

However, regardless of the subpoena's legal sufficiency, courts will generally not entertain a subpeona recipient's attempt to block a subpoena under the Speech or Debate Clause because the

[75] *McGrain*, 273 U.S. at 174-75.

[76] *McGrain*, 273 U.S. at 175; see also Buckley v. Valeo, 424 U.S. 1, 138 (1976); *Eastland*, 421 U.S. at 504-505.

[77] See, for example, House Committee on Oversight and Reform, Rule 12(g); Senate Committee on Homeland Security and Governmental Affairs, Rule 5(c).

[78] See "Common Law Privileges."

[79] As to the requirement of "valid legislative purpose," the Supreme Court has made it clear that Congress does not have to state explicitly what it intends to do as a result of an investigation. In re Chapman, 166 U.S. 661, 669 (1897).

[80] Wilkinson v. United States, 365 U.S. 399, 408-09 (1961).

Constitution[81] provides "an absolute bar to judicial interference" with such compulsory process.[82] As a consequence, a witness's typical judicial recourse is to refuse to comply with the subpoena, risk being cited for contempt, and then challenge the legal sufficiency of the subpoena in the contempt prosecution.

## Staff Deposition Authority

Committees often rely on informal staff interviews to gather information to prepare for investigative hearings. However, in recent years, congressional committees have also used staff-conducted depositions as a tool in exercising their investigatory power.[83] On a number of occasions such specific authority has been granted pursuant to Senate and House resolutions.[84] When granted, procedures for taking depositions may be issued, including provisions for notice (with or without a subpoena), transcription of the deposition, the right to be accompanied by counsel, and the manner in which objections to questions are to be resolved.[85]

Staff depositions afford a number of significant advantages for committees engaged in complex investigations, including the ability to

- obtain sworn testimony quickly and confidentially without the necessity of Members devoting time to lengthy hearings that may be unproductive because witnesses do not have the facts needed by the committee or refuse to cooperate;
- obtain testimony in private, which may be more conducive to candid responses than public hearings;
- verify witness statements that might defame or tend to incriminate third parties before they are repeated publicly;
- prepare for hearings by screening witness testimony in advance, which may obviate the need to call other witnesses;
- question witnesses outside of Washington, DC, without the inconvenience of conducting field hearings with Members present.

Moreover, Congress has enhanced the efficacy of the staff deposition process by re-establishing the applicability of criminal prohibition against false statements to statements made during congressional proceedings, including the taking of depositions.[86]

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[81] U.S. Const. art. I, §6, cl. 1. See also CRS Report R45043, *Understanding the Speech or Debate Clause*, by Todd Garvey.

[82] *Eastland*, 421 U.S. at 503-07.

[83] In the House, in the 116th Congress, the Permanent Select Committee on Intelligence and all standing committees, with the exception of the Committee on Rules, have the standing authority to take depositions (H.Res. 6 §103(a)). In the Senate, the Committees on Agriculture, Nutrition, and Forestry; Ethics; Homeland Security and Governmental Affairs and its Permanent Subcommittee on Investigations; Indian Affairs; Foreign Relations; and Commerce, Science, and Technology and the Special Committee on Aging all appear to have deposition authority. See U.S. Congress, Senate, *Authority and Rules of Senate Committees, 2019-2020*, 116th Congress, 1st session, July 19, 2019, S. Doc. 116-6 (Washington: GPO, 2019).

[84] See CRS Report 95-949, *Staff Depositions in Congressional Investigations*, by Jay R. Shampansky, at notes 16 and 18. This CRS report is available to congressional clients upon request.

[85] See, for example, "116th Congress Regulations for Use of Deposition Authority," *Congressional Record*, daily edition, vol. 165 (January 25, 2019), p. H1216.

[86] 18 U.S.C. §1001; False Statements Accountability Act of 1996, P.L. 104-292. Congress acted in response to the Supreme Court's decision in *Hubbard v. United States*, 514 U.S. 695 (1995), holding that Title 18, Section 1001, of the *United States Code* applied only to false statements made in executive branch department and agency proceedings.

Certain disadvantages may also inhere. Unrestrained staff may be tempted to engage in tangential inquiries. Also, depositions present a "cold record" of a witness's testimony and may not be as useful for Members as in-person presentations.

## Hearings

House Rule XI(2) and Senate Rule XXVI(2) require that committees adopt written rules of procedure to be used in hearings and publish them in the *Congressional Record*. The failure to publish such rules has resulted in the invalidation of a perjury prosecution.[87] Once properly promulgated, such rules are judicially cognizable and must be strictly observed. The House and many individual Senate committees require that all witnesses be given a copy of a committee's rules.

Both the House and the Senate have adopted rules permitting a reduced quorum for taking testimony and receiving evidence. House committees are required to have at least two Members present to take testimony.[88] Senate rules allow the taking of testimony with only one Member in attendance.[89] Most committees have adopted the minimum quorum requirement, and some require a higher quorum for sworn rather than unsworn testimony.[90] For perjury purposes, the quorum requirement must be met at the time the allegedly perjured testimony is given, not at the beginning of the session.[91] Reduced quorum requirement rules do not apply to authorizations for the issuance of subpoenas. Senate rules require a one-third quorum of a committee or subcommittee, while the House requires a quorum of a majority of the members unless a committee delegates authority for issuance to its chairman.[92]

Senate and House rules limit the authority of their committees to meet in closed session. For example, the House requires testimony to be held in closed session if a majority of a committee or subcommittee determines that it "may tend to defame, degrade, or incriminate any person."[93] Such testimony taken in closed session is normally releasable only by a majority vote of the committee. Similarly, confidential material received in a closed session requires a majority vote for release.

In most oversight and investigative hearings, the chair usually makes an opening statement. In the case of an investigative hearing, the opening statement is an important means of defining the subject matter of the hearing and thereby establishing the pertinence of questions asked of the witnesses. Not all committees swear in their witnesses, but a few committees require that all witnesses be sworn.[94] Most committees leave the swearing of witnesses to the discretion of the chair. If a committee wishes the potential sanction of perjury to apply, it should, in accordance

[87] United States v. Reinecke, 524 F.2d 435 (D.C. Cir. 1975) (holding that failure to publish a committee rule setting one Senator as a quorum for taking hearing testimony was a sufficient ground to reverse a perjury conviction for testimony under such circumstances).

[88] House Rule XI(2)(h)(2), 116th Congress (2019).

[89] Senate Rule XXVI(7)(a)(2), 116th Congress (2019). See, for example, S.Doc. 116-6, *Authority and Rules of Senate Committees, 2019-2020*; Special Committee on Aging, Rule 5.1 at 6.

[90] See, for example, S.Doc. 116-6, *Authority and Rules of Senate Committees, 2019-2020*; Committee on Appropriations, Rule II(3) at 19.

[91] Christoffel v. United States, 338 U.S. 84, 90 (1949).

[92] Senate Rule XXVI(7)(a)(1); House Rule XI(2)(m)(3).

[93] House Rule XI(2)(k)(5).

[94] See, for example, Senate Special Committee on Aging, Rule II.

with the statute, administer an oath and swear in its witnesses.[95] However, it should be noted that false statements not under oath are also subject to criminal sanctions.[96]

A witness does not have the right to make a statement before being questioned, but the opportunity is usually accorded. Committee rules may prescribe the length of such statements and also require written statements be submitted in advance of the hearing. Questioning of witnesses may be structured so that members alternate for specified lengths of time. Questioning may also be conducted by staff at the committee's discretion. Witnesses may be allowed to review a transcript of their testimony and make non-substantive corrections.

The right of a witness to be accompanied by counsel is recognized by House rule and the rules of Senate committees. The House rule limits the role of counsel, who are to serve solely "for the purpose of advising [witnesses] concerning their constitutional rights."[97] Some committees have adopted rules specifically prohibiting counsel from "coaching" witnesses during their testimony.[98]

A committee has complete authority to control the conduct of counsel. Indeed, the House rules provide, "The chair may punish breaches of order and decorum, and of professional ethics on the part of counsel, by censure and exclusion from the hearings; and the committee may cite the offender to the House for contempt."[99] Some Senate committees have adopted similar rules.[100] There is no right of cross-examination of adverse witnesses during an investigative hearing. However, witnesses are entitled to a range of other constitutional protections, such as the Fifth Amendment right to avoid making self-incriminating statements, which are discussed in more detail below.[101]

## Congressional Immunity

The Fifth Amendment to the Constitution provides in part that "no person … shall be compelled in any criminal case to be a witness against himself."[102] The privilege against self-incrimination is available to a witness in a congressional investigation.[103] When a witness before a committee asserts this testimonial constitutional privilege, the committee may obtain a court order granting the witness immunity if two-thirds of the full committee votes for the order.[104] Such an order compels the witness to testify and grants him or her immunity against the *use* of that testimony, and other information derived therefrom, in a subsequent criminal prosecution.[105] The witness may still be prosecuted on the basis of other evidence.

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[95] 18 U.S.C. §1621.

[96] 18 U.S.C. §1001.

[97] House Rule XI(2)(k)(3).

[98] See, for example, U.S. Congress, Senate Committee on Homeland Security and Governmental Affairs, Permanent Subcommittee on Investigations, *Rules of Procedure*, committee print, 116th Congress, 1st session, February 7, 2019, S. Prt. 116-6 (Washington: GPO, 2019).

[99] House Rule XI(2)(k)(4).

[100] See, for example, Senate Special Committee on Aging, Rule II; Senate Permanent Subcommittee on Investigations Rules, Rule 7.

[101] See "Constitutional Limitations."

[102] U.S. Const. amend. V.

[103] Watkins v. United States, 354 U.S. 178 (1957); Quinn v. United States, 349 U.S. 155 (1955).

[104] See 18 U.S.C. §6005.

[105] 18 U.S.C. §6005. This type of immunity is known as "use immunity."

Grants of immunity have occurred in a number of notable congressional investigations, including the investigations of Watergate (John Dean and Jeb Magruder) and Iran-Contra (Oliver North and John Poindexter). The decision to grant immunity involves a number of complex issues but is ultimately a strategic decision for Congress. As observed by Iran-Contra Independent Counsel Lawrence E. Walsh, "The legislative branch has the power to decide whether it is more important perhaps even to destroy a prosecution than to hold back testimony they need. They make that decision. It is not a judicial decision or a legal decision but a political decision of the highest importance."[106]

In determining whether to grant immunity to a witness, a committee might consider, on the one hand, its need for the witness's testimony to perform its legislative, oversight, and informing functions and, on the other, the possibility that the witness's immunized congressional testimony could jeopardize a successful criminal prosecution.

## Enforcement of Congressional Authority

### Contempt of Congress

While the threat or actual issuance of a subpoena normally provides sufficient leverage to ensure compliance with a congressional demand for information, the contempt power is Congress's most forceful tool to punish the contemnor and/or remove the obstruction to compliance. The Supreme Court has recognized the contempt power as an inherent attribute of Congress's legislative authority, reasoning that if it did not possess this power, it "would be exposed to every indignity and interruption that rudeness, caprice or even conspiracy may mediate against it."[107]

There are two different types of contempt proceedings. Both the House and the Senate may cite a witness for contempt under their inherent contempt power or under the criminal contempt procedure established by statute.[108]

#### *Inherent Contempt*

Under the inherent contempt power, the individual is brought before the House or Senate by the Sergeant-at-Arms, tried at the bar of the body, and, if found in contempt, may be imprisoned. The purpose of the imprisonment or other sanction may be either punitive[109] or coercive.[110] Thus, the witness can be imprisoned for a specified period of time as punishment or for an indefinite period (but not, at least in the case of the House, beyond the adjournment of a session of Congress) until he or she agrees to comply. The inherent contempt power has been recognized by the Supreme Court as inextricably related to Congress's constitutionally based power to investigate.[111] Between 1795 and 1934 the House and Senate used the inherent contempt power over 85 times, in most instances to obtain (successfully) testimony and/or production of documents. The inherent contempt power has not been exercised by either house since 1934. This procedure

[106] Lawrence E. Walsh, *The Independent Counsel and the Separation of Powers*, 25 HOUS. L. REV. 1, 9 (1988).

[107] Anderson v. Dunn, 19 U.S. (6 Wheat.) 204 (1821).

[108] See 2 U.S.C. §§192, 194. For a comprehensive treatment of the history and legal development of the congressional contempt power, see CRS Report RL34097, *Congress's Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure*, by Todd Garvey.

[109] Jurney v. MacCracken, 294 U.S. 125, 147 (1935).

[110] McGrain v. Daugherty, 273 U.S. 135, 161 (1927).

[111] See *Anderson*, 19 U.S. (6 Wheat.) 204; see also *McGrain*, 273 U.S. 135.

appears to be disfavored now because it has been considered too cumbersome and time-consuming to hold contempt trials at the bar of the offended chamber. Moreover, some have argued that the procedure is ineffective because punishment cannot extend beyond Congress's adjournment date.[112]

### *Statutory Criminal Contempt*

Recognizing the practical limitations of the inherent contempt process, in 1857 Congress enacted a statutory criminal contempt procedure as an alternative. The statute, with minor amendments, is now codified at Title 2, Sections 192 and 194, of the *U.S. Code*. A person who has been subpoenaed to testify or produce documents before the House or Senate or a committee and who fails to do so—or who appears but refuses to respond to questions—is guilty of a misdemeanor, punishable by a fine of up to $100,000 and imprisonment for up to one year.[113] A contempt citation must be approved by the subcommittee (if applicable), the full committee, and the full House or Senate.[114] After the President of the Senate or the Speaker of the House has certified a contempt, it is the "duty" of the U.S. Attorney "to bring the matter before the grand jury for its action."[115]

The criminal contempt procedure was rarely used until the 20th century, but since 1935 it has been essentially the exclusive vehicle for punishment of contemptuous conduct. Prior to Watergate, no executive branch official had ever been the target of a criminal contempt proceeding. Since 1975, however, 15 cabinet-level or senior executive officials have been cited for contempt for failure to testify or produce subpoenaed documents by either a subcommittee, a full committee, or by a house.[116] Nonetheless, the effectiveness of the criminal contempt process against executive branch officials remains uncertain. For example, following a vote to hold EPA Administrator Anne Gorsuch Burford in contempt in 1982, DOJ questioned whether Congress could compel the U.S. Attorney to submit the citation to a grand jury.[117] In that case, the documents in question were turned over to Congress before the issue was litigated, leaving the question unanswered. Similar issues arose during the contempt proceedings against Attorney General Eric Holder in 2012 and Attorney General William Barr and Secretary of Commerce Wilbur Ross in 2019. Following a successful vote on a criminal contempt citation in each case, DOJ decided not to attempt to prosecute the cases.[118] The question of a U.S. Attorney's "duty" under Section 192 to enforce contempt citations remains unresolved.

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[112] See Ernest J. Eberling, *Congressional Investigations: A Study of the Origin and Development of the Power of Congress to Investigate and Punish for Contempt* (New York: Columbia University Press, 1928), pp. 289, 302-316.

[113] 2 U.S.C. §192.

[114] If the House or Senate is out of session, the contempt citation is filed with the Speaker of the House or the President of the Senate, respectively. See 2 U.S.C. §194.

[115] See 2 U.S.C. §194.

[116] The 15 officials are as follows: Secretary of State Henry Kissinger (1975); Secretary of Commerce Rogers C. B. Morton (1975); Secretary of Health, Education, and Welfare Joseph A Califano Jr. (1978); Secretary of Energy Charles Duncan (1980); Secretary of Energy James B. Edwards (1981); Secretary of the Interior James Watt (1982); EPA Administrator Anne Gorsuch Burford (1983); Attorney General William French Smith (1983); White House Counsel John M. Quinn (1996); Attorney General Janet Reno (1998); White House Counsel Harriet Miers (2008); White House Chief of Staff Joshua Bolton (2008); Attorney General Eric Holder (2012); Attorney General William Barr (2019); and Secretary of Commerce Wilbur Ross (2019). Additionally, Lois Lerner, former director of the Exempt Organizations unit in the Internal Revenue Service, was held in contempt in 2014.

[117] See *Prosecution for the Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. Off. Legal Counsel 101 (1984).

[118] Letter from James M. Cole, Deputy Attorney General, to John Boehner, Speaker of the House, June 28, 2012,

### *Statutory Civil Enforcement of Subpoenas in the Senate*

As an alternative to both the inherent contempt power and criminal contempt, in 1978 Congress enacted a civil enforcement procedure that is applicable only to the Senate.[119] First, the statute gives the U.S. District Court for the District of Columbia jurisdiction over a civil action to enforce, secure a declaratory judgment concerning the validity of, or prevent a threatened failure or refusal to comply with any subpoena or order issued by the Senate or a Senate committee or subcommittee.[120] Upon approval of a Senate resolution, the Senate Office of Legal Counsel is approved to bring suit seeking one of these remedies. However, this statutory civil enforcement procedure does not apply to subpoenas issued to officers or employees of the executive branch.[121]

If the court orders enforcement of the subpoena and the individual still refuses to comply, he or she may be tried by the court in summary proceedings for contempt of court, with sanctions being imposed to coerce compliance.[122] This civil enforcement procedure provides an element of flexibility, allowing the subpoenaed party to raise possible constitutional and other defenses to the subpoena without risking a criminal prosecution. Since the statute's enactment in 1979, the Senate has authorized the Office of Senate Legal Counsel to seek civil enforcement of a subpoena for documents or testimony at least six times, the last in 1995.[123] None of these actions was brought against executive branch officials.

### *Civil Enforcement of Subpoenas in the House*

While the House cannot pursue actions under the Senate's civil enforcement statute discussed above, it can pursue civil enforcement under certain circumstances. The full House may adopt a resolution finding the person in contempt and authorizing the committee and/or the House general counsel to pursue a civil action in federal district court against the contumacious witness. In addition, the Bipartisan Legal Advisory Group may authorize the chair of a standing or permanent select committee to pursue a civil action for the same purposes.[124] The committee or the House general counsel then files suit in the appropriate federal district court, requesting declaratory and/or injunctive relief to enforce the subpoena. This civil enforcement procedure has been employed three times: in 2008 against George W. Bush Administration officials Harriet Miers and

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http://oversight.house.gov/wp-content/uploads/2012/08/June-28-2012-Cole-to-Boehner.pdf (regarding Attorney General Holder). Letter from Jeffrey A. Rosen, Deputy Attorney General, to Nancy Pelosi, Speaker of the House, July 24, 2019 (regarding Attorney General Barr and Secretary Ross).

[119] Ethics in Government Act of 1978, P.L. 95-521, §§703, 705, 92 Stat. 1877-80 (1978) (codified as amended at 2 U.S.C. §§288b(b) 288d and 28 U.S.C. §1365 (2012)).

[120] 28 U.S.C. §1365.

[121] 28 U.S.C. §1365.

[122] The act specifies that "an action, contempt proceeding, or sanction … shall not abate upon adjournment sine die by the Senate at the end of a Congress if the Senate or the committee or subcommittee … certifies to the court that it maintains its interest in securing the documents, answers, or testimony during such adjournment" (28 U.S.C. §1365(b) (2012)). In the first case brought under the new procedure, the witness unsuccessfully argued that the possibility of "indefinite incarceration" violated the due process and equal protection provisions of the Constitution and allowed for cruel and unusual punishment. *Application of the U.S. Senate Permanent Subcommittee on Investigations*, 655 F.2d 1232 (D.C. Cir.), *cert. denied*, 454 U.S. 1084 (1981).

[123] See CRS Report RL34097, *Congress's Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure*, by Todd Garvey, Table A-3 (Floor Votes on Civil Enforcement Resolutions in the Senate, 1980-Present).

[124] House Rule II(8)(b).

Joshua Bolten, in 2012 against Attorney General Eric Holder, and in 2019 against Attorney General William Barr and former White House Counsel Donald McGahn II.[125]

### Perjury and False Statement Prosecutions

#### *Testimony Under Oath*

A witness under oath before a congressional committee who willfully gives false testimony is subject to prosecution for perjury pursuant to Title 18, Section 1621, of the *U.S. Code*. The false statement must be "willfully" made before a "competent tribunal" and involve a "material matter."[126] For a legislative committee to be competent for perjury purposes, a quorum must be present.[127] Both houses have adopted rules establishing less than a majority of members as a quorum for taking testimony, normally two members for House committees[128] and one member for Senate committees.[129] The requisite quorum must be present at the time the alleged perjurious statement is made, not merely at the time the session convenes.[130]

#### *Unsworn Statements*

Most statements made before Congress, at both the investigatory and hearing phases of oversight, are unsworn. The practice of swearing in all witnesses at hearings is infrequent. Prosecutions may be brought to punish congressional witnesses for giving willfully false testimony not under oath. Under Title 18, Section 1001, of the *U.S. Code*, false statements by a person in "any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House and Senate" are punishable by a fine of up to $250,000 or imprisonment for not more than five years, or both.[131]

## Limitations on Congressional Authority

### Constitutional Limitations

There are constitutional limits not only on Congress's legislative powers but also on its oversight and investigative powers. The Supreme Court has observed that "Congress, in common with all branches of the Government, must exercise its powers subject to the limitations placed by the Constitution on governmental action, more particularly in the context of this case, the relevant limitations of the Bill of Rights."[132] This section discusses provisions that may limit Congress's oversight authority.

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[125] See generally Committee on Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53 (D.D.C. 2008); Committee on Oversight and Government Reform, U.S. House of Representatives v. Holder, 973 F. Supp. 2d 1 (D.D.C. 2013); H.Res. 430.

[126] 18 U.S.C. §1621(a).

[127] Christoffel v. United States, 338 U.S. 84, 90 (1949).

[128] House Rule XI(2)(h)(2).

[129] Senate Rule XXVI(7)(a)(2) allows its committees to set a quorum requirement at less than the normal one-third for taking sworn testimony. Almost all Senate committees have set the quorum requirement at one member.

[130] *Christoffel*, 338 U.S. at 90.

[131] 18 U.S.C §1001 (2006).

[132] Barenblatt v. United States, 360 U.S. 109, 112 (1959).

### *First Amendment*

Although the First Amendment, by its terms, is expressly applicable only to legislation that abridges freedom of speech, press, religion (establishment or free exercise), or assembly, the Supreme Court has held that the amendment also restricts Congress in conducting oversight and/or investigations.[133] In *Barenblatt v. United States*, the Court stated that "where First Amendment rights are asserted to bar government interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown."[134] Thus, unlike the Fifth Amendment privilege against self-incrimination (discussed below), the First Amendment does not give a witness an absolute right to refuse to respond to congressional demands for information.[135]

The Supreme Court has held that in balancing the personal interest in privacy against the congressional need for information, "the critical element is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosure from an unwilling witness."[136] To protect the rights of witnesses, in cases involving the First Amendment, the courts have emphasized the requirements discussed above concerning authorization for the investigation, delegation of power to investigate to the committee involved, and the existence of a legislative purpose.[137] While the courts have recognized the application of the First Amendment to congressional investigations, and it could be invoked by witnesses as grounds for not complying with congressional demands for information, the Supreme Court has never relied on the First Amendment as grounds for reversing a criminal contempt of Congress conviction. Nonetheless, as illustrated by the examples below, Congress may also give weight to First Amendment claims raised by witnesses.

Potential concerns regarding a witness's First Amendment right may impact a committee's decision on how to proceed in an investigation. In a 1976 investigation of the unauthorized publication in the press of the report of the House Select Committee on Intelligence, the Committee on Standards of Official Conduct (since renamed the Committee on Ethics) subpoenaed four news media representatives, including Daniel Schorr.[138] The Standards of Official Conduct Committee concluded that Schorr had obtained a copy of the Select Committee's report and had made it available for publication. Although the Ethics Committee found that "Schorr's role in publishing the report was a defiant act in disregard of the expressed will of the House of Representatives to preclude publication of highly classified national security

[133] Watkins v. United States, 354 U.S. 178, 197 (1957).

[134] 360 U.S. 109, 126 (1959).

[135] 360 U.S. 109, 126 (1959).

[136] *Watkins*, 354 U.S. at 198. A balancing test was also used in *Branzburg v. Hayes*, which involved the claimed privilege of newsmen not to respond to demands of a grand jury for information. See Branzburg v. Hayes, 408 U.S. 665 (1972). In its 5-4 decision, the Court concluded that the grand jury's need for the information outweighed First Amendment considerations, but the opinion indicates that "the infringement of protected First Amendment rights must be no broader than necessary to achieve a permissible governmental purpose" and that "a State's interest must be 'compelling' or 'paramount' to justify even an indirect burden on First Amendment rights." Branzburg v. Hayes, 408 U.S. 699-700 (1972); see also Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963) (applying the compelling interest test in a legislative investigation).

[137] See, for example, *Barenblatt*, 360 U.S. 109; *Watkins*, 354 U.S. 178; United States v. Rumely, 345 U.S. 41 (1953); see also 4 *Deschler's Precedents of the U.S. House of Representatives*, ch. 15, §10, n. 15 and accompanying text (1994).

[138] H.Rept. 94-1754, 94th Congress, 6 (1976).

information," it declined to cite him for contempt for his refusal to disclose his source.[139] The desire to avoid a clash over First Amendment rights was apparently a major factor in the committee's decision on the contempt matter.[140]

First Amendment concerns can also impact Congress's decisions on whether a non-cooperative witness will be found to be in Contempt of Congress. The Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce (since renamed the Committee on Energy and Commerce), in the course of its probe of allegations that deceptive editing practices were employed in producing the television news documentary program *The Selling of the Pentagon*, subpoenaed Frank Stanton, the president of CBS. He was directed to deliver to the subcommittee the "outtakes" of the program.[141] When, on First Amendment grounds, Stanton declined to provide the subpoenaed materials, the subcommittee unanimously voted a contempt citation. The full committee voted 25-13 to report the contempt citation to the full House.[142] After extensive debate, the House failed to adopt the committee report, voting instead to recommit the matter to the committee.[143] During the debate, several Members expressed concern that approval of the contempt citation would have a "chilling effect" on the press and would unconstitutionally involve the government in the regulation of the press.[144]

### *Fourth Amendment*

The Fourth Amendment appears to protect congressional witnesses against subpoenas that are unreasonably broad or burdensome.[145] However, the extent of this protection is not clear. In *McPhaul v. United States*, the Supreme Court stated that a congressional subpoena seeking "all records, correspondence, and memoranda" of an organization was not unreasonably broad solely because the scope of the underlying investigation was broad or because the committee was not in a position to provide a precise description of the materials being subpoenaed.[146]

### *Fifth Amendment Privilege Against Self-Incrimination*

The Supreme Court has indicated that the privilege against self-incrimination afforded by the Fifth Amendment is available to a witness in a congressional investigation.[147] The privilege is

[139] H.Rept. 94-1754, 94th Congress, 6 (1976) at 42-43.

[140] H.Rept. 94-1754, 94th Congress, 6 (1976) at 47-48 (additional views of Representatives Spence, Teague, Hutchinson, and Flynt).

[141] The outtakes were portions of the CBS film clips that were not actually broadcast. The subcommittee wanted to compare the outtakes with the tape of the broadcast to determine if improper editing techniques had been used.

[142] H.Rept. 92-349, 92nd Congress (1971). CBS's legal argument was based in part on the claim that Congress could not constitutionally legislate on the subject of editing techniques and therefore the subcommittee lacked a valid legislative purpose for the investigation. H.Rept. 92-349, 92nd Congress (1971) at 9.

[143] See *Congressional Record*, vol. 117 (1971), pp. 23922-23926, 24603-24659, 24720-24753.

[144] See *Congressional Record*, vol. 117 (1971), pp. 24731-24732.

[145] McPhaul v. United States, 364 U.S. 372 (1960); see also Shelton v. United States, 404 F.2d 1292 (D.C. Cir. 1968), cert. denied, 393 U.S. 1024 (1969). However, while several Supreme Court opinions have suggested that the Fourth Amendment's broader prohibition against unreasonable searches and seizures is applicable to congressional committees, there has not been a decision directly addressing the issue. See Watkins v. United States, 354 U.S. 178, 188 (1957), McPhaul v. United States 364 U.S. 372 (1960).

[146] *McPhaul*, 364 U.S. at 382.

[147] Watkins v. United States, 354 U.S. 178 (1957); Quinn v. United States, 349 U.S. 155 (1955).

personal in nature[148] and may not be invoked on behalf of a corporation,[149] small partnership,[150] labor union,[151] or other "artificial" organization.[152] The privilege protects a witness from being compelled to testify but generally not against a subpoena for existing documentary evidence.[153]

The basis for asserting the privilege has been described by the U.S. District Court for the District of Columbia as follows:

> The privilege may only be asserted when there is reasonable apprehension on the part of the witness that his answer would furnish some evidence upon which he could be convicted of a criminal offense … or which would reveal sources from which evidence could be obtained that would lead to such conviction or to prosecution therefore…. Once it has become apparent that the answers to a question would expose a witness to the danger of conviction or prosecution, wider latitude is permitted the witness in refusing to answer other questions.[154]

There is no required verbal formula for invoking the privilege, nor does there appear to be a necessary warning by the committee.[155] A committee should recognize any reasonable indication that the witness is asserting his privilege.[156]

The privilege against self-incrimination may generally only be waived "intelligently and unequivocally"[157] and an ambiguous statement of a witness before a committee would not be treated as a waiver.[158] Where a committee is uncertain whether the witness is in fact invoking the privilege against self-incrimination or is claiming some other basis for declining to answer, the committee should direct the witness to specify his or her privilege or objection.[159] The committee

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[148] See *McPhaul*, 364 U.S. 372.

[149] Hale v. Henkel, 201 U.S. 43 (1906).

[150] Bellis v. United States, 417 U.S. 85 (1974).

[151] See United States v. White, 322 U.S. 694 (1944).

[152] *Bellis*, 417 U.S. at 90; see also Rogers v. United States, 340 U.S. 367 (1951).

[153] Fisher v. United States, 425 U.S. 391, 409 (1976); Andresen v. Maryland, 427 U.S. 463 (1976). These cases concerned business records. There may be some protection available in the case of a subpoena for personal papers. See McCormick, at §§126, 127. However, where compliance with a subpoena *duces tecum* (i.e, for production of evidence) would constitute implicit testimonial authentication of the documents produced, the privilege may apply. United States v. Coe, 465 U.S. 605 (1984).

[154] United States v. Jaffee, 98 F. Supp. 191, 193-94 (D.D.C. 1951); see also Simpson v. United States, 241 F.2d 222 (9th Cir. 1957) (privilege inapplicable to questions seeking basic identifying information, such as the witness's name and address).

[155] Although there is no case law on point, it seems unlikely that *Miranda* warnings are required. That requirement flows from judicial concern as to the validity of confessions evoked in an environment of a police station, isolated from public scrutiny, with the possible threat of physical and prosecutorial jeopardy—an environment clearly distinguishable from a congressional context. See Miranda v. Arizona, 384 U.S. 436 (1966).

[156] Quinn v. United States, 349 U.S. 155 (1955).

[157] *Emspak*, 349 U.S. at 195.

[158] *Emspak*, 349 U.S. at 195. See also Johnson v. Zerbst, 304 U.S. 458, 464 (1938). It remains undetermined whether the rule of "testimonial subject matter waiver" applies to claims of privilege in congressional hearings. That doctrine provides that if a witness provides testimony on a particular subject matter, he or she has waived the privilege against self-incrimination as it relates to that subject only. See Brown v. United States, 356 U.S. 148 (1958); Mitchell v. United States, 526 U.S. 314 (1999). But see Presser v. United States, 284 F.2d 233 (D.C. Cir 1960) (suggesting that the *Brown* rule applies in congressional proceedings).

[159] Emspak v. United States, 349 U.S. 190 (1955); see also U.S. Congress, Joint Committee on Congressional Operations, *Leading Cases on Congressional Investigatory Power*, committee print, 94th Congress, 2nd session, January 1976, 62-125 (Washington: GPO, 1976), p. 63.

can review the assertion of the privilege by a witness to determine its validity, but the witness is not required to provide further explanation.

Under federal statute, when a witness asserts the privilege, the full house or the committee conducting the investigation may seek a court order that (a) directs the witness to testify and (b) grants the witness immunity against the use of his or her testimony, or other evidence derived from this testimony, in a subsequent criminal prosecution.[160] As previously discussed, the immunity that is granted is "use" immunity, not "transactional" immunity.[161] Neither the immunized testimony that the witness gives nor evidence derived therefrom may be used against him or her in a subsequent criminal prosecution, except one for perjury or contempt relating to his or her testimony. However, the witness may be convicted of the crime (the "transaction") on the basis of other evidence.[162]

An application for a judicial immunity order must be approved by a majority of the House or Senate or by a two-thirds vote of the full committee seeking the order.[163] The Attorney General must be notified at least 10 days prior to the request for the order and can request a delay of 20 days in issuing the order.[164] Although the order to testify may be issued before the witness's appearance,[165] it does not become legally effective until the witness has been asked a question, invoked privilege, and been presented with the court order.[166] The court's role in issuing the order has been held to be ministerial, and thus, if the procedural requirements under the immunity statute have been met, the court may not refuse to issue the order or impose conditions on the grant of immunity.[167]

### *Fifth Amendment Due Process Rights*

The due process clause of the Fifth Amendment requires that "the pertinency of the interrogation to the topic under the … committee's inquiry must be brought home to the witness at the time the questions are put to him."[168] "Unless the subject matter has been made to appear with undisputable clarity, it is the duty of the investigative body, upon objection of the witness on grounds of pertinency, to state for the record the subject under inquiry at that time and the manner in which the propounded questions are pertinent thereto."[169] Additionally, in a contempt proceeding, to satisfy both the requirement of due process as well as the statutory requirement

[160] 18 U.S.C. §§6002, 6005.

[161] See "Congressional Immunity."

[162] The constitutionality of granting a witness only use immunity, rather than transactional immunity, was upheld in Kastigar v. United States, 406 U.S. 441 (1972).

[163] 18 U.S.C. §6005(a) (2012).

[164] However, DOJ may waive the notice requirement. Application of the Senate Permanent Subcommittee on Investigations, 655 F.2d 1232, 1236 (D.C. Cir. 1980), cert. denied, 454 U.S. 1084 (1981).

[165] Application of the Senate Permanent Subcommittee on Investigations, 655 F.2d 1257 (D.C. Cir. 1980), cert. denied, 454 U.S. 1084 (1981).

[166] See In re McElreath, 248 F.2d 612 (D.C. Cir. 1957) (en banc).

[167] Application of the U.S. Senate Select Committee on Presidential Campaign Activities, 361 F. Supp. 1270 (D.D.C. 1973). In *dicta*, however, the court referred to the legislative history of the statutory procedure, which suggests that although a court lacks power to review the advisability of granting immunity, a court may consider the jurisdiction of Congress and the committee over the subject area and the relevance of the information that is sought to the committee's inquiry. See ibid. at 1278-79.

[168] Deutch v. United States, 367 U.S. 456, 467-68 (1961). As the court explained in that case, there is a separate statutory requirement of pertinency.

[169] Watkins v. United States, 354 U.S. 178, 214-15 (1957).

that a refusal to answer be "willful," a witness should be informed of the committee's ruling on any objections raised or privileges asserted.[170]

## Executive Privilege

The executive branch may respond to a congressional request or demand to testify or produce documents with an assertion of executive privilege. Executive privilege has two different dimensions: the deliberative process privilege, which relates to executive branch decisionmaking processes, and the presidential communications privilege, which relates to presidential decisionmaking.

### *Presidential Communications Privilege*

Presidential communications privilege is a constitutionally based privilege, rooted in "the supremacy of each branch within its own assigned area of constitution duties" and the separation of powers.[171] The privilege is designed to protect direct presidential decisionmaking processes.[172] Presidential communications enjoy the presumption of privilege, but the protection is not absolute and can be overcome by an appropriate showing of need by the requesting party.[173]

## Common Law Privileges

### *Deliberative Process Privilege*

The deliberative process privilege has been invoked in response to requests for documents and communications created during the decisionmaking process, such as internal executive branch advisory opinions, recommendations, and related communications.[174] The deliberative process privilege *may* protect from disclosure executive branch documents and communications that are *predecisional*, meaning they are created prior to reaching the agency's final decision, and *deliberative*, meaning they relate to the thought process of executive officials and are not purely factual.[175] Additionally, the privilege does not protect entire documents. Rather, the executive

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[170] *Deutch*, 367 U.S. at 467-68.

[171] United States v. Nixon, 418 U.S. 683, 705 (1974).

[172] Presidential communications are documents and other communications authored by or solicited and received by the President or presidential advisors who work in the White House. See, for example, In re: Sealed Case (Espy), 121 F.3d 729, 737 (D.C. Cir. 1997).

[173] See *Nixon* at 713. For a more thorough discussion of the Nixon decision and related litigation, see CRS Report R42670, *Presidential Claims of Executive Privilege: History, Law, Practice, and Recent Developments*, by Todd Garvey.

[174] In public discourse on "executive privilege," the deliberative process privilege is sometimes treated as an aspect of the presidential communications privilege recognized in *United States v. Nixon* and discussed above. Some cases involving deliberative process may also involve presidential communications and, therefore, have a potential constitutional element, but this may not be true in all instances.

[175] *Espy*, 121 F.3d at 737. *Espy* involved documents relating to the President's appointment and removal power, which the court characterized as a "quintessential and non-delegable Presidential power." The court continued to say:

> In many instances, presidential powers and responsibilities … can be exercised or performed without the President's direct involvement, pursuant to a presidential delegation of power or statutory framework. But the President himself must directly exercise the presidential power of appointment or removal. As a result, in this case there is assurance that even if the President were not a party to the communications over which the government is asserting presidential privilege, these communications nonetheless are intimately connected to his presidential decisionmaking.

Ibid. (internal citations omitted). Therefore, while the court did not hold that the presidential communications privilege

branch is required to disclose non-privileged factual information that can be reasonably segregated from privileged information in the requested documents. Like the presidential communications privilege, the deliberative process privilege has been found to be qualified, not absolute: It can be overcome by an adequate showing of need.[176]

The purpose underlying the deliberative process privilege is to protect the "'quality of agency decisions' by allowing government officials freedom to debate alternative approaches in private."[177] The executive branch may also contend that the privilege protects against disclosure of proposed policies before they are fully considered or adopted, preventing public confusion about the difference between preliminary discussions and final decisions.

### *Attorney-Client Privilege*

The attorney-client privilege is a judge-made exception to the normal principle of full disclosure in the adversary process that is to be narrowly construed and has been confined to the judicial forum.[178]

In practice, the exercise of committee discretion in accepting a claim of attorney-client privilege has turned on a "weighing [of] the legislative need for disclosure against any possible resulting injury"[179] to the witness.[180] On a case-by-case basis, a committee can consider, among other factors

- the strength of a claimant's assertion in light of the pertinency of the documents or information sought to the subject of the investigation;
- the practical unavailability of the documents or information from any other source;
- the possible unavailability of the privilege to the claimant if it had been raised in a judicial forum; and
- the committee's assessment of the cooperation of the witness in the matter.

A valid claim of attorney-client privilege is likely to receive substantial weight. Doubt as to the validity of the asserted claim, however, may diminish the force of such a claim.[181] In the end, it is the congressional committee alone that determines whether to accept a claim of attorney-client privilege.

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may be applied only to communications and documents relating to quintessential and non-delegable presidential powers, this may serve as a limit on the privilege.

[176] *Espy*, 121 F.3d at 737.

[177] *Espy*, 121 F.3d at 737.

[178] Westinghouse Electric Corp. v. Republic of the Philippines, 951 F.2d 1414, 1423 (3d Cir. 1991).

[179] U.S. Congress, House Interstate and Foreign Commerce, Oversight and Investigations, *Volume 1 International Uranium Control*, 95th Congress, 1st session, May 2, 1977, Serial No. 95-39 (Washington: GPO, 1977) (hereinafter *International Uranium Cartel*].

[180] Committees may also consider their statutory duty to engage in continuous oversight of the application, administration, and execution of laws that fall within their jurisdiction. See 2 U.S.C. §190d.

[181] See, for example, *Contempt of Congress Against Franklin L. Haney*, H.Rept. 105-792, 105th Congress, 11-15 (1998); *Proceedings Against John M. Quinn, David Watkins, and Matthew Moore (Pursuant to Title 2, United States Code, Sections 192 and 194)*, H.Rept. 104-598, 104th Congress, 40-54 (1996); *Refusal of William H. Kennedy, III, To Produce Notes Subpoenaed by the Special Committee to Investigate Whitewater Development Corporation and Related Matters*, S.Rept. 104-191, 104th Congress, 9-19 (1995); *Proceedings Against Ralph Bernstein and Joseph Bernstein*, H.Rept. 99-462, 99th Congress, 13, 14 (1986); *International Uranium Cartel*, supra note 174, at 54-60.

### *Other Common Law Testimonial Privileges*

The Federal Rules of Evidence recognize testimonial privileges for witnesses in judicial proceedings so that they need not reveal confidential communications between doctor and patient, husband and wife, or clergyman and parishioner.[182] Although CRS found no court case directly on point, it appears that congressional committees are not legally required to allow a witness to decline to testify on the basis of these other, similar testimonial privileges.[183] In addition, the various rules of procedure generally applicable to judicial proceedings, such as the right to cross-examine and call other witnesses, need not be accorded to a witness in a congressional hearing.[184] The basis for these determinations is rooted in Congress's Article I, Section 5, rulemaking powers,[185] under which each house is the exclusive decisionmaker regarding the rules of its own proceedings. This rulemaking authority and general separation of powers considerations suggest that Congress and its committees are not obliged to abide by rules established by the courts to govern their own proceedings.[186]

Though congressional committees may not be legally obligated to recognize privileges for confidential communications, they may do so at their discretion. Historical precedent suggests that committees have often recognized such privileges.[187] The decision as to whether or not to allow such claims of privilege turns on a "weighing [of] the legislative need for disclosure against any possible resulting injury."[188]

## Statutory Limit on Congressional Access to Information

In certain circumstances, Congress has chosen to enact laws that limit its own ability to access specific types of information. One well-known example of such self-limiting action is Title 26, Section 6103(f), of the *U.S. Code*, under which only the House Committee on Ways and Means, the Senate Committee on Finance, and the Joint Committee on Taxation are permitted access to individuals' tax returns.[189] For any other committee to receive such information, the House or

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[182] Fed. R. Evid. 501.

[183] See generally U.S. Congress, House Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, *Attorney-Client Privilege: Memoranda Opinions of the American Law Division, Library of Congress*, committee print, 98th Congress, 1st session, 1983. But see Moreland, *Congressional Investigations and Private Persons*, pp. 265-267. It should be noted that courts have refused to grant claims of work-product immunity, in response to a grand jury subpoena, over documents prepared by the White House counsel's office in anticipation of possible congressional hearings. See, for example, In re Grand Jury Subpoena Duces Tecum, 112 F.3d 907, 924-25 (8th Cir. 1997); In re Grand Jury Proceedings, 5 F. Supp. 2d 21, 39 (D.D.C. 1998).

[184] United States v. Fort, 443 F.2d 670 (D.C. Cir. 1970), cert. denied, 403 U.S. 932 (1971), (citing Hannah v. Larche, 363 U.S. 420 (1960)).

[185] U.S. Const. art. 1, §5, cl. 2.

[186] See generally Telford Taylor, *Grand Inquest: The Story of Congressional Investigations* (Cambridge, MA: Da Capo Press, 1974), pp. 227-228.

[187] James Hamilton, *The Power to Probe: A Study of Congressional Investigations* (New York: Random House, 1977), p. 244. Hamilton notes that John Dean, the former counsel to the President, testified before the Senate Watergate Committee after President Nixon had "waived any attorney-client privilege he might have had because of their relationship." See also S.Rept. No. 2, 84th Congress (1955).

[188] See *International Uranium Cartel*, supra note 174, at 60.

[189] 26 U.S.C. §6103(f)(1). Returns are to be submitted to the requesting committee in a manner that protects the privacy of the individual. In the event that information identifying (either directly or indirectly) any tax filer is requested, it may be furnished to the committee only "when sitting in closed executive session unless such taxpayer otherwise consents in writing to such disclosure." Ibid.

Senate must pass a resolution[190] specifying the purpose for which the information is to be furnished and that the requested information cannot be reasonably obtained from any other source.[191] The information is to be provided only when the requesting committee is sitting in closed executive session.[192]

Other commonly cited statutory restrictions on oversight are Title 50, Sections 3091-3093, of the *U.S. Code*, relating to foreign intelligence activities. Section 3091 governs congressional oversight of "intelligence activities"[193] generally. It requires that the President ensure that congressional intelligence committees are "fully and currently informed" of intelligence activities[194] and "promptly" notified of illegal intelligence activities.[195] Section 3092 governs oversight of intelligence activities that are not covert actions, and Section 3093 governs oversight of covert actions. Each section imposes a duty on the Director of National Intelligence and the heads of other entities involved in intelligence activities to

> with due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters … keep the congressional intelligence committees fully and currently informed of all intelligence activities, other than a covert action.… which are the responsibility of, are engaged in by, or are carried out for or on behalf of, any department, agency, or entity of the United States Government.[196]

Self-imposed limits on congressional oversight powers raise the question of whether statutes that generally prohibit public disclosure of information also restrict congressional access. Federal courts have held that the executive branch and private parties may not withhold documents from Congress based on a law that restricts public disclosure, because the release of information to a congressional requestor is not considered to be a disclosure to the general public.[197]

From time to time the President, the executive branch, and private parties have argued that certain statutes of general applicability prevent the disclosure of confidential or sensitive information to congressional committees. For example, a frequently cited statute to justify such non-disclosure is the Trade Secrets Act, a criminal provision that generally prohibits the disclosure of trade secrets and other confidential business information by a federal officer or employee "unless otherwise authorized by law."[198] A review of the Trade Secrets Act's legislative history, however, provides

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[190] In the case of other joint or special committees, a concurrent resolution is required. 26 U.S.C. §6103(f)(1).

[191] 26 U.S.C. §6103(f)(3).

[192] 26 U.S.C. §6103(f)(3).

[193] *Intelligence activities* is defined to include "covert actions" and "financial intelligence activities" but is not further defined in law (50 U.S.C. §3091(f)). *Covert action* is also defined in statute (50 U.S.C. §3093(e)). *Intelligence activities* is defined by Executive Order 12333 (as amended) as "all activities that agencies within the Intelligence Community are authorized to conduct pursuant to this Order" (Executive Order 12333, "United States Intelligence Activities," 46 *Federal Register* 59941, December 4, 1981). Additionally, detailed definitions of *intelligence activities* and *intelligence-related activities* are contained in the Senate resolution establishing the Senate Select Committee on Intelligence and the House Rule establishing the House Permanent Select Committee on Intelligence. See S.Res. 400, 94th Congress, §14(a); House Rule X(11).

[194] This requirement includes reporting on "significant anticipated intelligence activity as required by this subchapter" (50 U.S.C. §3091(a)).

[195] 50 U.S.C. §3091(a).

[196] 50 U.S.C. §§3092(a), 3093(b).

[197] See, for example, F.T.C. v. Owens-Corning Fiberglass Corp., 626 F.2d 966, 970, 974 (D.C. Cir. 1980); Exxon Corp. v. F.T.C., 589 F.2d 582, 585-89 (D.C. Cir. 1978), cert. denied, 441 U.S. 943 (1979); Ashland Oil Co., Inc. v. F.T.C., 548 F.2d 977, 979 (D.C. Cir. 1976).

[198] 18 U.S.C. §1905.

no indication that it was ever intended to apply to Congress, its employees, or any legislative branch agency or its employees.[199]

In instances in which the target of a congressional inquiry attempts to withhold information based on a general nondisclosure statute that is silent with respect to congressional disclosure, the committee may have to take additional steps to access the information. Potential solutions include negotiations with the target; accommodations in the form of accepted redactions or other means of providing the information; or a "friendly subpoena," which may provide the targeted entity or individual with the necessary legal cover to assist the committee with its inquiry. Each of these and many other prospective solutions can be employed at the committee's discretion.

### *Options for Obtaining Materials from Overseas*

If a congressional demand for information has been enforced in U.S. courts through, for example, a criminal contempt conviction or the civil enforcement of a subpoena, U.S. courts may be able to seek assistance from foreign countries to enforce a court order. There are two ways for U.S. courts to request assistance from foreign countries in obtaining evidence (including witness testimony) located outside the United States: mutual legal assistance treaties and letters rogatory.

Mutual legal assistance treaties provide for two countries' mutual assistance in criminal proceedings. The existence of a mutual legal assistance treaty, however, does not guarantee that a congressional subpoena will be enforced in a foreign jurisdiction. Rather, the specific wording of the treaty must be consulted.

Letters rogatory are formal requests made by a court in one country to a competent body in another country to serve process or order testimony of a witness or the production of evidence.[200] U.S. courts are statutorily authorized to issue such letters.[201] However, letters rogatory are generally considered a measure of last resort and are generally used only when no mutual legal assistance treaty exists.[202]

Although reciprocity is not coterminous with international comity, many countries use reciprocity as a guide to determine compliance with letters rogatory. Thus, it is important to examine U.S. compliance with other countries' letters rogatory to determine the likely extent of reciprocal compliance abroad. The applicable statute authorizes a U.S. district court to assist a foreign court if

- the person from whom discovery is sought resides (or may be found) in the district of the court to which the application is made,
- the discovery is for use in a proceeding before a foreign tribunal, and
- the application is made directly by a foreign tribunal rather than by any other "interested person."[203]

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[199] See, for example, CNA Financial Corp. v. Donovan, 830 F.2d 1132, 1144-52 (D.C. Cir. 1987) (discussing, in depth, the legislative history of the Trade Secrets Act).

[200] See 22 C.F.R. §92.54.

[201] 28 U.S.C. §§1781, 1782.

[202] See U.S. Department of State, "Preparation of Letters Rogatory," https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/internl-judicial-asst/obtaining-evidence/Preparation-Letters-Rogatory.html ("Before initiating the letters rogatory process, parties should determine whether the country where they are seeking to serve process or take evidence is a party to any multilateral treaties on judicial assistance").

[203] 28 U.S.C. §1782 (2006).

### *Ability to Serve Congressional Subpoenas Overseas*

There appear to be few examples of congressional attempts to issue, serve, and enforce subpoenas abroad.[204] Congress's experiences during the Iran-Contra investigations demonstrate both of the potential difficulties of securing judicial assistance abroad and the need for imaginative improvisation.[205] The House and Senate select committees investigating the Iran-Contra matter were faced with formidable obstacles from the outset, including, but not limited to, a relatively short deadline to complete their investigation, a parallel independent counsel investigation competing for the same evidence, witnesses and evidence in foreign countries with strict secrecy laws, and an Administration that would not cooperate in facilitating any possible diplomatic accommodations.

These challenges were evident in the committees' attempts to obtain information contained in Swiss bank accounts. The committees sought a sharing agreement with the independent counsel, who was authorized by federal law and a Swiss treaty to seek Swiss judicial assistance, but he was reluctant to jeopardize his relationship with the Swiss government.[206] Instead, in 1987, the committees issued an order requiring that former Major Richard V. Secord execute a consent directive authorizing the release of his offshore bank records and accounts to the committee.[207] When Secord refused to sign the consent directive, the committee sought a court order directing him to comply.[208] The court ruled that there was a testimonial aspect to requiring the signing of the consent directive, and, thus, a court order would violate Secord's Fifth Amendment right against self-incrimination.[209] The court did not otherwise challenge the committees' ability to seek such an order.

The committees concluded that to obtain the critical financial records, they would grant use immunity to a principal target of the investigation, who was living in Paris and would not subject himself to U.S. jurisdiction, in return for the records. To establish its own investigative legitimacy and allay concerns about the force of the immunity grant, the committees obtained an order (a "commission") from a district court, under Rule 28 of the Federal Rules of Civil Procedure, empowering him (the "commissioner") to obtain evidence in another country and to bring it back.[210] Finally, the House committee issued the chief counsel a commission, much like a subpoena in format, to further document his official status. The witness turned over the financial

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[204] See John C. Grabow, *Congressional Investigations: Law and Pratice* (Clifton, NJ: Prentice Hall, 1988), §3.2(b) (noting a 1985 attempt by a Senate committee to serve a member of the Soviet navy while on a Soviet freighter located temporarily in American waters and a 1986 attempt by various House committees to serve Ferdinand Marcos, the exiled former president of the Philippines). However, the author does not provide any supporting authority documenting these attempts or any explanation for why they were unsuccessful.

[205] See generally George W. Van Cleve and Charles Tiefer, *Navigating the Shoals of "Use" Immunity and Secret International Enterprises in Major Congressional Investigations: Lessons of the Iran-Contra Affair*, 55 MO. L. REV. 43 (1990).

[206] See 28 U.S.C. §1782.

[207] Senate Select Comm. on Secret Military Assistance to Iran and the Nicaraguan Opposition v. Secord, 664 F. Supp. 562, 563 (D.D.C. 1987).

[208] Ibid.

[209] Ibid. at 564-66. In 1988 the Supreme Court adopted the Senate's argument in a different case, holding that such a directive is not testimonial in nature. See Doe v. United States, 487 U.S. 201 (1988).

[210] This tool contrasts with a letter rogatory, which goes to a foreign court, and with domestic deposition practice, which occurs on notice without going to or from any court.

documents and aided in deciphering and understanding them.[211] The legal sufficiency of the tactic was never tested in court but proved effective in obtaining the documents.

## Frequently Encountered Information Access Issues

Congressional oversight and investigations can often become adversarial, especially if the target of an investigation refuses to disclose requested information. In those situations, the targeted entity may attempt to argue that disclosure of the information is prohibited by a specific law, rule, or executive decision. Another common tactic is to assert that the information is so sensitive that Congress is not among those entitled or authorized to have the information. This section will address some of the most common laws, rules, and orders that have been cited as the basis for targeted entities withholding information from Congress.

### The Privacy Act

The Privacy Act prohibits, with certain exceptions, the disclosure by a federal agency of "any record which is contained in a system of records" to any person or to another agency, except pursuant to a written request by, or with the prior written consent of, the subject of the record.[212] The statutory limitations do not apply to disclosure of records by the executive "to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee."[213] This exemption applies, by its terms, to a disclosure to the House or Senate or to a committee or subcommittee that has jurisdiction over the subject of the disclosure.

### The Freedom of Information Act (FOIA)[214]

FOIA requires publication in the *Federal Register* of various information, such as descriptions of an agency's organization and procedures. It also requires that certain materials, such as statements of policy that have not been published in the *Federal Register* and certain staff manuals, be made available for public inspection.[215] In addition, FOIA provides that all other records are to be disclosed in response to a specific request by any person, except records that fall under one of the nine exemptions from the disclosure requirements.[216] FOIA also provides for both administrative and judicial appeals when access to information is thought to be improperly denied by an agency.

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[211] Ibid. at 79-80.

[212] 5 U.S.C. §552a. The term *record* is defined as "any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph" (5 U.S.C. §552(a)(4)). The phrase *system of records* means "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual" (5 U.S.C. §552(a)(5)).

[213] 5 U.S.C. §552a(b)(9). The House report on the act explained that the congressional exemption "relates to personal information needed by the Congress and its committees and subcommittees. Occasionally, it is necessary to inquire into such subjects for legislative and investigative reasons." See H.Rept. 93-1416, 93rd Congress, 13 (1974). The legislative history of the act is sketched in *Devine v. United States*, 202 F.3d 547, 552 (2nd Cir. 2000).

[214] For additional information on FOIA see CRS Report R41933, *The Freedom of Information Act (FOIA): Background, Legislation, and Policy Issues*, by Meghan M. Stuessy.

[215] 5 U.S.C. §552.

[216] 5 U.S.C. §552(b).

FOIA applies to "agencies,"[217] which are defined to include "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency."[218] Congress is not included within the scope of the definition of *agency*. Therefore, records of the House, Senate, congressional committees, and Members are not subject to disclosure under FOIA.[219]

Additionally, FOIA specifically provides that the statute "is not authority to withhold information from Congress."[220] When a congressional committee of jurisdiction is seeking information from an agency for legislative or oversight purposes, it does not act pursuant to FOIA but rather pursuant to Congress's constitutional oversight authority.[221] Therefore, an agency may not cite a FOIA exemption as the reason for withholding disclosure.

Individual Members, Members not on a committee of jurisdiction, or minority Members of a jurisdictional committee may, like any person, request agency records.[222] However, DOJ has interpreted the congressional exemption not to apply to such requests.[223] Thus, the standard FOIA exemptions that an agency could invoke to prevent disclosure to the general public can also be cited to prevent disclosure to these categories of Members.

## Grand Jury Materials

In the course of an investigation, Congress may seek access to evidence that was presented before a grand jury. As a general matter, Federal Rule of Criminal Procedure 6(e) provides for the secrecy of "matters occurring before the grand jury," unless a court authorizes disclosure for the purposes of a judicial proceeding or at the request and showing by a defendant that he needs the information to justify dismissal of an indictment. Although the rule codifies the traditional policies underlying grand jury secrecy, it remains subject to recognized exceptions[224] and was arguably not intended to insulate from disclosure all information once it is presented to a grand jury.[225] There are examples in which entities of the legislative branch have sought and received material that was covered by Rule 6(e). For example, in 1952, the Senate Banking Committee filed a motion requesting access to documents in the custody of the U.S. Attorney that had been shown to a federal grand jury.[226] The court ordered the documents disclosed, over the objections of the U.S. Attorney, concluding that "when the fact or document is sought for itself,

[217] 5 U.S.C. §552(a).

[218] 5 U.S.C. §552(f)(1).

[219] See, for example, United We Stand Am. v. IRS, 359 F.3d 595, 597 (D.C. Cir. 2004) (stating, "The Freedom of Information Act does not cover congressional documents"); Dow Jones & Co. v. DOJ, 917 F.2d 571, 574 (D.C. Cir. 1990) (holding that Congress is not an agency for any purpose under FOIA).

[220] 5 U.S.C. §552(d).

[221] See, for example, McGrain v. Daugherty, 273 U.S. 135 (1927). When a committee seeks information from the executive, it may do so by means of an informal request from committee staff or a letter signed by the committee chair or by exercise of the subpoena authority, which is vested in standing committees by both bodies. House Rule XI(2)(m); Senate Rule XXVI.

[222] H. Rept. 1497, 89th Congress, 11-12 (1966).

[223] See DOJ, Office of Information and Privacy, "Freedom of Information Act Guide," September 4, 2019, https://www.justice.gov/oip/page/file/1199421/download, p. 19 (stating that "individual Members of Congress possess the same rights of access as 'any person'").

[224] See In re Report & Recommendation of Grand Jury, 370 F. Supp. 1219, 1229 (D.D.C. 1974).

[225] United States v. Saks & Co., 426 F. Supp. 812, 814 (S.D.N.Y. 1976).

[226] In re Senate Banking Committee Hearings, 19 F.R.D. 410 (N.D. Ill. 1956).

independently, rather than because it was stated before or displayed to the grand jury, there is no bar of secrecy."[227] Most recently, in the context of an impeachment inquiry, the U.S. District Court for the District of Columbia ruled that the House Committee on the Judiciary was entitled to access grand jury materials.[228]

Similarly, in *In re Grand Jury Investigation of Ven-Fuel et al.*,[229] a federal district court held that a subcommittee request for documents presented to a grand jury was not prohibited by Rule 6(e). The court held that when Congress is acting within the "legitimate sphere of legislative activity" it is legally entitled to Rule 6(e) information.[230] The court thus ordered that the chair and Members of the subcommittee "be permitted to examine all of the documents, without segregation and identification of those upon which the criminal indictment was based, in order to determine what specific documents they wish produced for their use."[231]

When information is sought by a congressional committee in order to reveal what actually occurred before the grand jury, however, the courts have been much more reluctant to order its disclosure. In *In Re Grand Jury Impaneled October 2, 1978 (79-2)*,[232] the District Court for the District of Columbia held that a subcommittee's request for an inventory of all documents subpoenaed by a grand jury fell within the scope of Rule 6(e) and, therefore, was not required to be disclosed.[233]

## Documents Related to Pending Litigation

Often congressional committees decide to investigate matters in which federal litigation is currently pending, which may be met by resistance from DOJ. These rationales have included a desire to avoid 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 a potential 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.[234] For instance, in response to a 1982 congressional investigation of the EPA, Attorney General William French Smith argued that withholding EPA attorneys' memoranda and notes regarding enforcement strategy, case preparation, and settlement consideration prevented prejudice to the cause of effective law

[227] Ibid. at 412.

[228] In re Application of the Committee on the Judiciary, U.S. House of Representatives, for an Order Authorizing the Release of Certain Grand Jury Materials, Grand Jury Action No. 19-48 (D.D.C. October 25, 2019, J. Howell). The District Court's decision has been appealed and, as of this writing, is under review by the U.S. Circuit Court for the District of Columbia. For a more detailed discussion of access to information in impeachment investigations, including grand jury materials, see CRS Report R45983, *Congressional Access to Information in an Impeachment Investigation*, by Todd Garvey.

[229] 441 F. Supp. 1299, 1302-03 (D. Fla. 1977).

[230] Ibid. at 1307 (stating that "[t]here is no question that Chairman Moss and the Subcommittee have demonstrated their constitutionally independent legal right to the documents that they seek for their legitimate legislative activity.").

[231] Ibid.

[232] 510 F. Supp. 112 (D.D.C. 1981).

[233] Ibid. at 114.

[234] DOJ's views of this issue were most famously articulated by Attorney General Robert Jackson in 1941. 40 Op. Atty. Gen. 45 (1941). The opinion argued that "congressional or public access to [internal DOJ documents] would not be in the public interest" because it would "seriously prejudice law enforcement." Ibid. at 46-47.

enforcement.[235] He additionally expressed concern that disclosure would raise "a substantial danger that congressional pressures will influence the course of the investigation."[236]

In the 2001-2002 House Government Reform Committee investigation of the misuse of informants by the Federal Bureau of Investigation (FBI), despite maintaining its historical position, DOJ ultimately disclosed internal deliberative prosecutorial documents following increased congressional pressure. In a February 1, 2002, letter to Chairman Burton, the DOJ Assistant Attorney General for Legislative Affairs explained

> Our particular concern in the current controversy pertains to the narrow and especially sensitive categories of advice memoranda to the Attorney General and the deliberative documents making recommendations regarding whether or not to bring criminal charges against individuals. We believe that the public interest in avoiding the polarization of the criminal justice process required greater protection of those documents which, in turn, influences the accommodation process. This is not an "inflexible position," but rather a statement of a principled interest in ensuring the integrity of prosecutorial decision-making.[237]

Oversight in the face of pending litigation poses a choice for Congress. On one hand, congressionally generated publicity may harm the executive branch's prosecutorial effort. On the other hand, access to information under secure conditions can fulfill the congressional oversight objectives and need not be inconsistent with the executive's authority to pursue its case. Although powerful arguments may be made on both sides, the decision to pursue a congressional investigation of pending civil or criminal matters remains a choice that is solely within Congress's discretion to make.

## Classified Material

### *How Are Materials Classified?*

The standards for classifying and declassifying information are contained in Executive Order 13526.[238] These standards provide that the President, Vice President, agency heads, and any other officials designated by the President may classify information upon a determination that its unauthorized disclosure could reasonably be expected to damage national security.[239] Such information must be owned by, produced by, or under the control of the federal government and must concern one of the areas delineated by the executive order.[240]

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[235] See Attorney General William French Smith, letter to the Honorable John D. Dingell, Chairman, House Subcommittee on Oversight and Investigation, Committee on Energy and Commerce, November 30, 1982, reprinted in H.Rept. 97-968 at 37-38.

[236] Smith, letter to Dingell, (quoting former Deputy Assistant General Thomas E. Kauper). This policy is said to be "premised in part on the fact that the Constitution vests in the President and his subordinates the responsibility to 'take Care that the Laws be faithfully executed.'"

[237] U.S. Congress, House Government Reform, *Investigation into Allegations of Justice Department Misconduct in New England-Volume 1*, 107th Congress, May 3, 2001, Serial No. 107-56 (Washington: GPO, 2002), pp. 520-556, 562-604.

[238] Executive Order 13526, 75 *Federal Register* 707, January 5, 2010.

[239] Ibid. at §1.3. The unauthorized disclosure of foreign government information is presumed to damage national security. Ibid. at §1.1(b).

[240] Ibid. at §1.4. The areas are as follows: military plans, weapons systems, or operations; foreign government information; intelligence activities, intelligence sources/methods, cryptology; foreign relations or foreign activities of the United States, including confidential sources; scientific, technological, or economic matters relating to national security; federal programs for safeguarding nuclear materials or facilities; vulnerabilities or capabilities of national

Information is classified at one of three levels based on the amount of danger that its unauthorized disclosure could reasonably be expected to cause to national security.[241] Information is classified as

- "top secret" if its unauthorized disclosure could reasonably be expected to cause "exceptionally grave damage" to national security,
- "secret" if its unauthorized disclosure could reasonably be expected to cause "serious damage" to national security, and
- "confidential" if its unauthorized disclosure could reasonably be expected to cause "damage" to national security.

Significantly, for each level, the original classifying officer must identify or describe the specific danger potentially presented by the information's disclosure.[242] The officer who originally classifies the information establishes a date for declassification based upon the expected duration of the information's sensitivity. If the officer cannot set an earlier declassification date, then the information must be marked for declassification after 10 or 25 years, depending on the sensitivity of the information.[243] The deadline for declassification can be extended if the threat to national security still exists.[244]

### *Who Can Access Classified Materials?*

Access to classified information is generally limited to those who

- demonstrate their eligibility to the relevant agency head (for example, through a security clearance);
- sign a nondisclosure agreement; and
- have a need to know the information, which is satisfied upon "a determination within the executive branch … that a prospective recipient requires access to specific classified information in order to perform or assist in a lawful and authorized governmental function."[245]

The information being accessed may not be removed from the controlling agency's premises without permission.[246] Each agency is required to establish systems for controlling the distribution of classified information.[247]

The executive order does not contain any instructions regarding disclosures to Congress or its committees of jurisdiction. "Members of Congress, as constitutionally elected officers, do not

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security systems; or weapons of mass destruction. Ibid. In addition, when classified information that is incorporated, paraphrased, restated, or generated in a new form, that new form must be classified at the same level as the original. Ibid. at §§2.1-2.2.

[241] Ibid. at §1.2.

[242] Ibid. Classifying authorities are specifically prohibited from classifying information for reasons other than protecting national security, such as to conceal violations of law or avoid embarrassment. Ibid. at §1.7(a).

[243] Ibid. at §1.5.

[244] Ibid.at §1.5(c).

[245] Ibid. at §§4.1, 6.1(dd). The need-to-know requirement can be waived, however, for former Presidents and Vice Presidents, historical researchers, and former policymaking officials who were appointed by the President or Vice President. Ibid. at §4.4.

[246] Ibid. at §4.1.

[247] Ibid. at §4.2.

receive security clearances as such, but are instead presumed to be trustworthy," thereby fulfilling the first requirement to access classified materials.[248] Members of Congress still face the "need to know" requirement. A Member could assert that he or she fulfills this requirement based on the constitutional duties and responsibilities of his or her office. The executive branch may disagree with this interpretation and has previously stated that it retains the final authority to determine if a Member has a need to know.[249] Congressional aides, support staff, and other legislative branch employees do not automatically have access to classified information and, therefore, must go through the necessary security clearance process prior to being permitted to review such information.

The executive order's silence with respect to disclosure to Congress, combined with the absence of any other law restricting congressional access to classified material, suggests that mere classification likely cannot be used as a legal basis to withhold information from Congress. That said, practical and political concerns with respect to controlled access, secure storage, and public disclosure may provide persuasive rationales for withholding or limiting congressional access. Committees and subcommittees have wide discretion to negotiate with the Administration regarding these issues. For example, an investigating committee or subcommittee could choose to review documents at an executive branch secure facility, permit redactions of certain information, limit the ability of staff to review certain material, and/or opt to hold non-public meetings, briefings, and hearings where classified information will be discussed. None of these measures are legally required, but all are within the investigating entity's discretion and may assist in facilitating the disclosure of materials sought during the investigation.

## Sensitive but Unclassified Materials

Committees conducting investigations and oversight of executive branch agencies may require access to information and documents that are "sensitive" but do not rise to the level of being classified. This general category of "sensitive but unclassified" (SBU) information can present access issues for congressional committees. The fact that information is "sensitive" does not provide a *legal* basis for withholding it from duly authorized jurisdictional committees of Congress. However, there may be legitimate political and policy reasons why an agency's classification of information as "sensitive" should be afforded due deference.

SBU material can take numerous forms. Some categories are statutorily authorized, while others are creations of the agency that authored or is holding the requested information. One example of a statutorily authorized SBU category is found in the statute creating the Transportation Security Administration (TSA). The statute requires the TSA director to

> prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security … if [he] decides that disclosing the information would—(A) be an unwarranted invasion of personal privacy; (B) reveal a trade secret or privileged or confidential commercial or financial information; or (C) be detrimental to the security of transportation.[250]

The statute also expressly states that the general authority provided to withhold information from the public "does not authorize information to be withheld from a committee of Congress

[248] Christopher H. Schroeder, *Access to Classified Information*, 20 Op. Off. Legal Counsel 402, *11 (1996).

[249] See, for example, ibid.

[250] 49 U.S.C. §114(r)(1); CRS Report RL33670, *Protection of Security-Related Information*, by Gina Stevens and Todd B. Tatelman. This CRS report is available to congressional clients upon request.

authorized to have the information."[251] Pursuant to this statute, TSA promulgated regulations defining *sensitive security information* (SSI) and restrictions on its disclosure.[252] In addition, the SSI regulations appear to insulate congressional committees and their staffs from any sanctions or penalty from the receipt and disclosure of SSI. The definition of *covered persons*—those subject to the SSI regulations—does not appear to include Members of Congress, committees, or congressional staff.[253] Moreover, the regulations specifically state, as directed by the statute, that "[n]othing in this part precludes TSA or the Coast Guard from disclosing SSI to a committee of Congress authorized to have the information."[254]

Many agencies have developed their own internal information protection regimes that may be cited in response to congressional requests. One example of such an agency-created regime is "for official use only" (FOUO). According to a DHS Management Directive, the FOUO classification[255] distinguishes between documents marked FOUO and other information that may be protected from public disclosure under different designations. Specifically, the directive defines *FOUO* as "not to be considered classified information"[256] and "is not automatically exempt from disclosure under the provisions of" FOIA.[257] The directive makes clear that FOUO information is not intended to be withheld from other governmental entities, stating that such information "may be shared with other agencies, federal, state, tribal, or local government and law enforcement officials."[258] Such a definition appears to include Congress (and, thus, authorized committees and subcommittees) among the entities to which the information can be disclosed. Such inclusion is consistent with Congress's broad constitutionally based authority to obtain information from executive agencies.

## Individual Member and Minority Party Authority to Conduct Oversight and Investigations

Individual Members and Members of the minority party may conduct investigatory oversight on their own initiative. However, absent the support of the body or a committee, such an investigation will not enjoy legal authority available to each house and its committees to institute *official* committee investigations, hold hearings, or issue subpoenas.[259] The role of Members of the minority in the investigatory oversight process is governed by the rules of each house and its committees. Although individual Members may seek the voluntary cooperation of agency officials or private persons, no court has directly recognized an individual Member's right, other

[251] 49 U.S.C. §114(r)(2).

[252] 49 C.F.R. Part 1520.

[253] See 49 C.F.R. §1520.7 (providing 13 specific categories of "covered persons").

[254] 49 C.F.R. §1520.15(c).

[255] DHS, "Safeguarding Sensitive but Unclassified (For Official Use Only) Information," Management Directive System MD No. 11042.1, 2005.

[256] Ibid. at ¶ 4.

[257] Ibid. at ¶ 6(a)(4).

[258] Ibid. at ¶ 6(h)(6).

[259] Minority Members are accorded some rights under the rules. For example, in the House of Representatives, whenever a hearing is conducted on any measure or matter, the minority may, upon the written request of a majority of the minority Members to the chairman before the completion of the hearing, call witnesses selected by the minority and presumably request documents. House Rule XI 2(j)(1); see also House Banking Committee Rule IV(4).

than a committee chair,[260] to exercise the committee's oversight authority without the permission of a majority of the committee or its chair.

Senate rules provide substantially more effective means for individual minority-party Members to engage in "self-help" to support oversight objectives than afforded their House counterparts. Senate rules emphasize the rights and prerogatives of individual Senators and, therefore, minority groups of Senators.[261] The most important of these rules are those that effectively allow unlimited debate on a bill or amendment unless an extraordinary majority votes to invoke cloture.[262] Senators can use their right to filibuster, or simply the threat of filibuster, to delay or prevent the Senate from reaching a vote on legislative business. Other Senate rules can also directly or indirectly aid the minority in gaining investigatory rights. For example, the right of extended debate also applies in committee and, unlike on the floor, the cloture rule may not be invoked in committee. Each Senate committee decides for itself how it will control debate, and therefore a Member may have opportunities to threaten or cause delay in committee. Also, Senate Rule XXVI prohibits the reporting of any measure or matter from a committee unless a majority of the committee is present, another point of possible tactical leverage. Even beyond the potent power to delay, Senators can promote their goals by taking advantage of other parliamentary rights and opportunities that are provided by the Senate's formal procedures and customary practices, such as are afforded by the processes dealing with floor recognition and the amending process.

### *5 U.S.C. Section 2954: The "Rule of Seven" Statute*

Another potential tool for minority participation in oversight is Title 5, Section 2954, of the *U.S. Code*, commonly known as the "rule of seven."[263] Under the statute, seven members of the House Oversight and Reform Committee or five members of the Senate Committee on Homeland Security and Governmental Affairs can request information from executive agencies on matters within their committee jurisdiction, which the agencies "shall" provide.[264] While the statute appears to confer a right upon these Members, a judicially recognized right of action to enforce the statute when an agency refuses to disclose information has not been established and, based on the recent District Court decision in *Cummings v. Murphy*,[265] courts may not recognize such a right of action.

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[260] Ashland Oil Co., Inc. v. FTC, 548 F. 2d 977, 979-80 (D.C. Cir. 1976), affirming 409 F. Supp. 297 (D.D. C. 1976); see also Exxon v. FTC, 589 F.2d 582, 592-93 (D.C. Cir. 1978) (acknowledging that the "principle is important that disclosure of information can only be compelled by authority of Congress, its committees and subcommittees, not solely by individual members"); In re Beef Industry Antitrust Litigation, 589 F.2d 786, 791 (5th Cir. 1979) (refusing to permit two Members of Congress from intervening in private litigation because they "failed to obtain a House Resolution or any similar authority before they sought to intervene.")

[261] See CRS Report RL30360, *Filibusters and Cloture in the Senate*, by Valerie Heitshusen and Richard S. Beth.

[262] Senate Rule XXII.

[263] Ibid. at 876 n.7. Title 5, Section 2954, provides: "An Executive agency, on request of the Committee on [Oversight and] Government [Reform] of the House of Representatives, or of any seven members thereof, or on request of the Committee on Government Operations of the Senate, or any five members thereof, shall submit any information requested of it relating to any matter within the jurisdiction of the committee."

[264] The text of the statute refers to the House Committee on Government Operations, a predecessor to the House Committee on Oversight and Reform, and the Senate Committee on Governmental Affairs, a predecessor to the Senate Committee on Homeland Security and Governmental Affairs.

[265] Cummings v. Murphy, 321 F. Supp.3d 92 (D.D.C. 2018).

## Specialized Investigations

Oversight at times occurs through specialized, temporary investigations of a specific event or development. These can be dramatic, high-profile endeavors focusing on scandals, alleged abuses of authority, suspected illegal conduct, or other unethical behavior. The stakes are high, possibly even leading to the end of individual careers of high-ranking executive officials. Congressional investigations can induce resignations, firings, and impeachment proceedings and question major policy actions of the executive, as occurred in these notable instances: the Senate Watergate Committee investigation into the Nixon Administration in the early 1970s, the Church and Pike select committees' inquiries in the mid-1970s into intelligence agency abuses, the 1981 and 1982 House and Senate select committee inquiries into the ABSCAM scandal, the 1987 Iran-Contra investigation during the Reagan Administration, the multiple investigations of scandals and alleged misconduct during the Clinton Administration, the Hurricane Katrina probe in 2005 during the George W. Bush Administration, the Benghazi panel established in 2014 and again in 2015 during the Obama Administration, and investigations into Russian interference in the 2016 presidential election during 2017 and 2018. On these investigations and others, interest in Congress, the executive, and the public is frequently intense and impassioned.

**Prominent Select Investigative Committees**

**Senate Watergate Committee (1973-74),** S.Res. 60, 93rd Congress, 1st session.

"To establish a select committee of the Senate to conduct an investigation and study of the extent, if any, to which illegal, improper, or unethical activities were engaged in by any persons, acting individually or in combination with others, in the presidential election of 1972, or any campaign, canvass, or other activity related to it."

**House Select Committee on the Iran-Contra Affair (1987),** H.Res. 12, 100th Congress, 1st session.

"The select committee is authorized and directed to conduct a full and complete investigation and study, and to make such findings and recommendations to the House as the select committee deems appropriate, regarding the sale or transfer of arms, technology, or intelligence to Iran or Iraq; the diversion of funds realized in connection with such sales and otherwise, to the anti-government forces in Nicaragua; the violation of any law, agreement, promise, or understanding regarding the reporting to and informing of Congress; operational activities and the conduct of foreign and national security policy by the staff of the National Security Council; authorization and supervision or lack thereof of such matters by the President and other White House personnel; the role of individuals and entities outside the government; other inquiries regarding such matters, by the Attorney General, White House, intelligence community, and Departments of Defense, Justice, and State; and the impact of such matters on public and international confidence in the United States Government."

Although the circumstances that give rise to one or another committee investigation can vary significantly, the investigations themselves tend to share some common attributes, including these five:

1. Investigative hearings may be *televised* or *webcast* and often result in *extensive news media coverage*.
2. Such investigations may be undertaken by *different organizational arrangements*. These include temporary select committees, standing committees and their subcommittees, specially created subcommittees, or specially commissioned task forces within an existing standing committee.
3. Specially created investigative committees usually have a *short life span* (e.g., six months, one year, or at the longest until the end of a Congress, at which point the panel would have to be reauthorized for the inquiry to continue).
4. The investigative panel often has to *employ additional and special staff*—including investigators, attorneys, auditors, and researchers—because of the

added workload and need for specialized expertise in conducting such investigations and in the subject matter involved. Such staff can be hired under contract from the private sector, transferred from existing congressional offices or committees, transferred from the congressional support agencies, or loaned ("detailed") by executive agencies, including the FBI. The staff would require appropriate security clearances if the inquiry looked into matters of national security.

5. Such special panels have often been vested with investigative authorities not ordinarily available to standing committees. Staff deposition authority is the most commonly provided authority, but given the particular circumstances, special panels have also been vested with the authority to obtain tax information, seek international assistance in information gathering efforts abroad, and participate in judicial proceedings related to the investigation (for instance, to enforce a committee-issued subpoena). The specific authorities granted to some of the most prominent investigations undertaken in recent decades are displayed in **Table 1**.

**Table 1. Special Investigative Authorities of Selected Investigating Committees**

| Investigation | Authorizing Resolution(s) | Staff Deposition Authority | International Information Gathering Authority | Tax Information Access Authority | Authority to Participate in Judicial Proceedings |
|---|---|---|---|---|---|
| **Senate Watergate Investigation** | S.Res. 60, 93rd Cong. (1973)<br>S.Res. 194, 93rd Cong. (1973)<br>S.Res. 327, 93rd Cong. (1974) | Yes | Yes | No | Yes |
| **President Nixon Impeachment** | H.Res. 803, 93rd Cong. (1974) | Yes | Yes | No | No |
| **Church Committee** | S.Res. 21, 94th Cong. (1975)<br>S.Res. 377, 94th Cong. (1976) | Yes | Yes | No | No |
| **House Select Committee on Assassinations** | H.Res. 1540, 94th Cong. (1976)<br>H.Res. 222, 95th Cong. (1977)<br>H.Res. 433, 95th Cong. (1977) | Yes | Yes | No | Yes |
| **Koreagate** | H.Res. 252, 95th Cong. (1977) | No | Yes | No | Yes |
| **Billy Carter Investigation** | 126 Cong. Rec. 19544-46 (1980) (unanimous consent agreement); S.Res. 495, 96th Cong. (1980)<br>S.Res. 496, 96th Cong. (1980) | Yes | No | Yes | No |

| Investigation | Authorizing Resolution(s) | Staff Deposition Authority | International Information Gathering Authority | Tax Information Access Authority | Authority to Participate in Judicial Proceedings |
|---|---|---|---|---|---|
| **ABSCAM (House)** | H.Res. 67, 97th Cong. (1981) | No | Yes | No | Yes |
| **ABSCAM (Senate)** | S.Res. 350, 97th Cong. (1982)<br>S.Res. 517, 97th Cong. (1982) | Yes | No | No | No |
| **Iran-Contra Affair (House)** | H.Res. 12, 100th Cong. (1987) | Yes | Yes | Yes | Yes |
| **Iran-Contra Affair (Senate)** | S.Res. 23, 100th Cong. (1987)<br>S.Res. 170, 100th Cong. (1987) | Yes | Yes | No | Yes |
| **Judge Hastings Impeachment** | H.Res. 320, 100th Cong. (1987) | Yes | No | No | No |
| **Judge Nixon Impeachment** | H.Res. 562, 100th Cong. (1988) | Yes | No | No | No |
| **October Surprise** | H.Res. 258, 102nd Cong. (1992) | Yes | Yes | No | Yes |
| **Senate Whitewater** | S.Res. 229, 103rd Cong. (1994)<br>S.Res. 120, 104th Cong. (1995) | Yes | Yes | Yes | Yes |
| **White House Travel Office** | H.Res. 369, 104th Cong. (1996) | Yes | No | No | No |
| **House Campaign Finance** | H.Res. 167, 105th Cong. (1997) | Yes | Yes | No | No |
| **Senate Campaign Finance** | S.Res. 39, 105th Cong. (1997) | Yes | No | No | No |
| **National Security and Commercial Concerns with China** | H.Res. 463, 105th Cong. (1998) | Yes | Yes | Yes | Yes |
| **Teamsters Election Investigation** | H.Res. 507, 105th Cong. (1998) | Yes | No | No | No |
| **2012 Terrorist Attack in Benghazi** | H.Res. 567, 113th Cong. (2014)<br>H.Res. 5, 114th Cong. (2015) | Yes | No | No | No |

**Source:** Congressional Research Service.

**Note:** More comprehensive compilations of authorities and rules of Senate and House special investigatory committees can be found in Senate Committee on Rules and Administration, *Authority and Rules of Senate Special Investigatory Committees and Other Senate Entities*, 1973-97, S.Doc. 105-16, 105th Congress, 1st session (1998); and U.S. Congress, House Committee on Rules, Subcommittee on the Legislative Process, *Guidelines for the Establishment of Select Committees*, 98th Congress, 1st session, (Washington, DC: GPO, 1983).

# Selected Oversight Techniques

Some oversight techniques—such as conducting hearings with agency officials, receiving reports on agency activities and performance, and scrutinizing budget requests—are relatively straightforward. There are several techniques for which explanation or elaboration may prove helpful for a better understanding of their utility.

## Identifying Relevant Committee Jurisdiction

A basic step in conducting oversight involves identifying the committee(s) with jurisdiction over the policy matter or programs of interest. The committee jurisdictional statements in House Rule X and Senate Rule XXV specify the subjects that fall within each committee's jurisdiction. In general, the rules do not address in detail specific departments, agencies, programs, or laws. Therefore, multiple committees may exercise some jurisdiction—especially in regard to oversight—over the same departments and agencies or over different elements of the same agency activities. While the House and Senate Parliamentarians are the sole definitive arbiters of committee jurisdiction, various legislative support agencies (the CBO, CRS, or GAO) may be able to assist committees in identifying the relevant committee(s) of jurisdiction for proposed oversight activities.

## Orientation and Periodic Review Hearings with Agencies

Oversight hearings (or even "pre-hearings") may be held for the purposes of briefing Members and staff on the organization, operations, and programs of an agency and determining how an agency intends to implement any newly enacted legislation. Hearings can also be used as a way to obtain information on the administration, effectiveness, and economy of agency operations and programs.

Agency officials can be noticeably influenced by the knowledge and expectation that they will be called before a congressional committee regularly to account for the activities of their agencies. Such hearings benefit the committee by, for example

- helping committee members keep up to date on important administrative developments;
- serving as a forum for exchanging and communicating views on pertinent problems and other relevant matters;
- providing background information that could assist members in making sound legislative and fiscal judgments;
- identifying program areas within each committee's jurisdiction that may be vulnerable to waste, fraud, abuse, or mismanagement; and
- determining whether new laws are needed or whether changes in the administration of existing laws will be sufficient to resolve problems.

The ability of committee members during oversight hearings to focus on meaningful issues and ask penetrating questions will be enhanced if staff have accumulated, organized, and evaluated relevant data, information, and analyses about administrative performance.

Ideally, each standing committee should regularly monitor the application of laws and implementation of programs within its jurisdiction. A prime objective of the "continuous watchfulness" mandate (Section 136) of the Legislative Reorganization Act of 1946 is to encourage committees to take an active and ongoing role in administrative review and not wait for public revelations of agency and program inadequacies before conducting oversight. As Section 136 states in part: "each standing committee of the Senate and House of Representatives shall exercise continuous watchfulness of the execution by the administrative agencies concerned of any laws, the subject matter of which is within the jurisdiction of such committee."

Committee personnel could be assigned to maintain active liaison with appropriate agencies and record their pertinent findings routinely. Information compiled in this fashion will be useful not only for routine oversight hearings but also for oversight hearings that may be called unexpectedly, perhaps following a public outcry on a particular issue, in which the opportunity to conduct an extensive background study is limited.

It can be important for a committee to direct specific questions to agency witnesses in advance of a hearing so that they will be on notice regarding the kinds of questions the committee wants answered. This allows witnesses to be more responsive to the committee's questions and may limit their ability to provide rambling or evasive statements.

## Casework

Casework is a congressional activity that typically occurs in Members' personal offices and includes the response or services provided to constituents who request assistance on a wide variety of matters. These could include problems with various federal agencies and departments that could signal a need for further oversight. Casework inquiries can be simple and include requests for assistance in applying for Social Security, veterans', educational, or other benefits. More complex inquiries might involve tracking misdirected benefits payments or efforts to obtain, or seek relief from, a federal administrative decision.[266]

Casework inquiries and the efforts of congressional constituent services staff to respond can provide important micro-level insights into executive agency activities. Together, constituent inquiries and agency responses may afford Members an early warning about whether an agency or program is functioning as Congress intended and which programs or policies might warrant additional institutional oversight or further legislative consideration.[267]

[266] CRS provides a variety of resources to assist congressional offices with casework. These include CRS Report RL33209, *Casework in a Congressional Office: Background, Rules, Laws, and Resources*, by R. Eric Petersen and Sarah J. Eckman; CRS In Focus IF10503, *Constituent Services: Overview and Resources*, by Sarah J. Eckman; and "Casework and Other Constituent Services," available to congressional offices at http://www.crs.gov/resources/CASEWORK?source=search.

[267] Larry P. Ortiz et al., "Legislative Casework: When Policy and Practice Intersect," *Journal of Sociology and Social Welfare*, vol. 31 (June 2004), pp. 49-52; Representative Lee H. Hamilton, "Casework," *Congressional Record*, vol. 142, (July 24, 1996), pp. 19015-19016; and John R. Johannes, "Casework as a Technique of U.S. Congressional Oversight of the Executive," *Legislative Studies Quarterly*, vol. 4 (August 1979), pp. 325-351.

## Performance Audits

Performance auditing of executive departments is among the most frequently undertaken techniques of legislative oversight. A performance audit is intended to help Congress (and other oversight entities) hold executive officers accountable for their use of public funds with a primary aim to facilitate improvement of various government programs and operations.[268] According to GAO, performance audits aim to accomplish four key objectives:

1. **Program effectiveness and results.** Determine whether a program or activity is achieving its legislative, regulatory, or organizational goals and objectives, as well as whether resources are being used efficiently, effectively, and economically to achieve program results.
2. **Internal control.** Determine whether an internal control system for a program or activity provides reasonable assurance of achieving efficient and effective operations, reliability of reporting, and compliance with applicable laws and regulations.
3. **Compliance.** Determine whether a program or activity complies with criteria established by laws, regulations, contracts, grant agreements, or other requirements.
4. **Prospective analysis.** Identify projected trends and impact of a program or activity and possible policy alternatives to address them.[269]

Performance audits may be undertaken by external auditors (e.g., GAO or inspectors general) or internal auditors (e.g., agency audit teams or agency-hired consultants). Internal auditors often work under the direction of their affiliated agency, and their reports may be designed to meet the needs of executive officials. Regardless, internal audit reports might be useful in conducting legislative oversight.[270]

GAO and other audit entities may consider several questions when assessing government programs and operations, such as the following:

- How successful is the program in accomplishing the intended results? Could program objectives be achieved at less cost?
- Has agency management clearly defined and promulgated the objectives and goals of the program or activity?
- Have performance standards been developed?
- Are program objectives sufficiently clear to permit agency management to accomplish effectively the desired program results? Are the objectives of the component parts of the program consistent with overall program objectives?

[268] GAO's *Government Auditing Standards*—also known as the *Yellow Book*—identifies three types of engagements that audit agencies may conduct: (1) financial audits, (2) attestation engagements and reviews of financial statements, and (3) performance audits. See GAO, *Government Auditing Standards, 2018 Revision*, GAO-18-568G, pp. 7-14, https://www.gao.gov/assets/700/693136.pdf.

[269] GAO issues government auditing standards—commonly referred to as generally accepted government auditing standards—as part of the *Yellow Book*. The *Yellow Book* includes performance audit standards and objectives. According to GAO, the four listed categories of performance audit objectives are not mutually exclusive and can be pursued simultaneously within a single audit engagement. For more information on performance audit objectives and standards, see GAO, *Government Auditing Standards, 2018 Revision*, pp. 10-14 and 154-193.

[270] Agencies sometimes consider internal audit reports as predecisional and thus not suitable for release to Congress or the public.

- Are program costs reasonably commensurate with the benefits achieved?
- Have alternative programs or approaches been examined, or should they be examined to determine whether objectives can be achieved more economically?
- Were all studies, such as cost-benefit studies, appropriate for analyzing costs and benefits of alternative approaches?
- Is the program producing benefits or detriments that were not contemplated by Congress when it authorized the program?
- Is the information furnished to Congress by the agency adequate and sufficiently accurate to permit Congress to monitor program achievements effectively?
- Does top management have the essential and reliable information necessary for exercising supervision and control and for ascertaining directions or trends?
- Does management have internal review or audit facilities adequate for monitoring program operations, identifying program and management problems and weaknesses, and insuring fiscal integrity?

## Monitoring the *Federal Register* and *Unified Agenda*

The *Federal Register*, available at https://www.federalregister.gov/, is published Monday through Friday (except official holidays) by the Office of the Federal Register in the National Archives and Records Administration. It provides a uniform system for making available to the public regulations and legal notices issued by federal agencies and the President. These include presidential proclamations and executive orders, federal agency documents having general applicability and legal effect, documents required to be published by act of Congress, and other federal agency documents of public interest. Final regulations are codified by subject in the *Code of Federal Regulations*.

Documents are typically on file for public inspection in the Office of the Federal Register for at least one day before they are published unless the issuing agency requests earlier filing. The list of documents on file for public inspection can be accessed at https://www.federalregister.gov/public-inspection. Regular scrutiny of the *Federal Register* by committees and staff may help them to identify proposed rules and regulations in their areas of jurisdiction that merit congressional review as to need and likely effect.

Another website, Reginfo.gov (http://www.reginfo.gov/public/), also includes information about proposed and completed activities of federal agencies. Specifically, it provides information on OMB review of regulations under Executive Order 12866 and information collection requests under the Paperwork Reduction Act. It also contains the *Unified Agenda of Regulatory and Deregulatory Actions*, a semiannual publication of regulations and deregulatory actions that are currently under development at agencies across the government. OMB's Office of Information and Regulatory Affairs (OIRA) and the Regulatory Information Service Center of the General Services Administration (GSA) are responsible for this website.

## Special Studies and Investigations by Staff, Support Agencies, Outside Contractors, and Others

***Staff investigations.*** The staffs of committees and individual members play a vital role in the legislative process. Committee staffs, through field investigations or on-site visits, for example, can help a committee develop its own independent evaluation of the effectiveness of laws.

***Support agencies.*** The legislative support agencies, directly or indirectly, can assist committees and members in conducting investigations and reviewing agency performance.[271] GAO is the agency most involved in investigations, audits, and program evaluations. It has a large, professional investigative staff and produces numerous reports useful in oversight.

***Outside contractors.*** The 1974 Budget Act, as amended, and the Legislative Reorganization Act of 1970 authorize House and Senate committees to enlist the services of individual consultants or organizations to assist them in their work:

- A committee might contract with an independent research organization or employ professional investigators for short-term studies.
- Committees may also utilize, subject to appropriate approvals, federal and support agency employees to aid them in their oversight activities.
- Committees might also establish a voluntary advisory panel to assist them in their work.

***Investigative commissions.*** Congress has periodically established independent commissions to conduct studies or to investigate an event, activity, or government function. Commissions are typically made up of outside experts and tasked with issuing a report to Congress (or to Congress and the President) that contains the commission's findings and recommendations.[272]

## Communicating with the Media

Public awareness of a problem can contribute to oversight. Public and media attention to an issue may be considered a separate form of oversight or may be viewed as a complement to other oversight techniques.

Official resources are available to assist Members in interacting with the media and scheduling press conferences and with the broadcasting of official proceedings. Additionally, nearly all Members maintain one or more social media accounts and use their institutional websites to help communicate with constituents and publicize issues.[273]

## Press Gallery Offices

The staff of the House and Senate press galleries provide services both for journalists and Members of Congress. The press galleries can assist Members or staff with the distribution of press releases, facilitate Member communications with journalists, and help arrange location reservations or other logistics for press conferences or interviews.[274]

Within each chamber, separate gallery offices exist for the daily press, periodical press, and radio/TV press. A single office, serving both chambers, exists for the press photographers' gallery. The websites for each gallery are provided in **Table 2**.

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[271] See "Oversight Information Sources and Consultant Services" later in this report for information on the capabilities of CRS, GAO, and CBO.

[272] For additional information on advisory commissions, see CRS Report R40076, *Congressional Commissions: Overview and Considerations for Congress*, by Jacob R. Straus and William T. Egar.

[273] For more information, see CRS In Focus IF10299, *Linking with Constituents: Presentation of Social Media on Member of Congress Websites*, by Jacob R. Straus and Matthew E. Glassman.

[274] For additional information on the congressional press galleries, see CRS Report R44816, *Congressional News Media and the House and Senate Press Galleries*, by Sarah J. Eckman.

**Table 2. Press Gallery Names and Websites**

| Gallery Name | Website |
|---|---|
| House Press Gallery | https://pressgallery.house.gov |
| Senate Press Gallery | https://www.dailypress.senate.gov |
| Press Photographers' Gallery | https://www.pressphotographers.senate.gov/ |
| House Radio and Television Gallery | http://radiotv.house.gov |
| Senate Radio and Television Gallery | https://www.radiotv.senate.gov |
| House Periodical Press Gallery | https://periodical.house.gov |
| Senate Periodical Press Gallery | http://www.periodicalpress.senate.gov |

**Source:** U.S. Congress, Joint Committee on Printing, *Official Congressional Directory*, 116th Congress.

## Reporting Requirements, Consultation, and Other Sources of Information

Congressional oversight of the executive branch is dependent to a large degree upon information supplied by the agencies being overseen. Reporting requirements and provisions that require an agency to consult with Congress or nonfederal stakeholders have been used in an attempt to ensure congressional and public access to information, statistics, and other data on the workings of the executive branch. Thousands of reports arrive annually on Capitol Hill or are made public, and Congress and the public may thereby attempt to influence agencies' decisionmaking.[275]

Concerns about unnecessary, duplicative, and wasteful reports have prompted efforts to reexamine these requirements.[276] One such initiative, in part stimulated by recommendations from the Vice President's National Performance Review and from the GAO, resulted in the Federal Reports Elimination and Sunset Act of 1995. In 2010, Congress established a statutory process for executive agencies and the President to use if they choose more systematically to propose the elimination or modification of reporting requirements.[277]

### *Reporting Requirements*

Reporting requirements affect executive and administrative agencies and officers, including the President, independent boards and commissions, and federally chartered corporations (as well as the judiciary). These statutory provisions vary in terms of the specificity, detail, and type of information that Congress demands. Reports may be required at periodic intervals, such as semiannually or at the end of a fiscal year, or submitted only if and when a specific event, activity, or set of conditions exists. The reports may also call upon an agency, commission, or officer to

- study, and provide recommendations, about a particular problem or concern;

[275] See *Congress Evolving in the Face of Complexity: Legislative Efforts to Embed Transparency, Participation, and Representation in Agency Operations*, by Clinton T. Brass and Wendy Ginsberg, in CRS Committee Print CP10000, *The Evolving Congress: A Committee Print Prepared for the Senate Committee on Rules and Administration*, coordinated by Walter J. Oleszek, Michael L. Koempel, and Robert Jay Dilger.

[276] For discussion, see CRS Report R42490, *Reexamination of Agency Reporting Requirements: Annual Process Under the GPRA Modernization Act of 2010 (GPRAMA)*, by Clinton T. Brass.

[277] Ibid.

- alert Congress or particular committees and subcommittees about a proposed or planned activity or operation;
- provide information about specific ongoing or just-completed operations, projects, or programs; or
- summarize an agency's activities for the year or the prior six months.

**Examples of Reporting Requirements in Law**

**Initial Requirement in the 1789 Treasury Department Act:**

"That it shall be the duty of the Secretary of the Treasury … to make report, and give information to either branch of the legislature, in person or in writing (as he may be required), respecting all matters referred to him by the Senate or House of Representatives, or which shall appertain to his office" (1 Stat. 65-66 (1789)).

**Reporting on Covert Action in the 1991 Intelligence Oversight Act:**

"The President shall ensure that the intelligence committees are kept fully and currently informed of the intelligence activities of the United States, including any significant anticipated intelligence activity….

(1) The President shall ensure that any finding [authorizing a covert action] shall be reported to the intelligence committees as soon as possible after such approval and before the initiation of the covert action, except as otherwise provided in paragraph (2) and paragraph (3).

(2) If the President determines that it is essential to limit access to the finding to meet extraordinary circumstances affecting the vital interests of the United States, the finding may be reported to the chairmen and ranking minority members of the intelligence committees, the Speaker and minority leader of the House of Representatives, the majority and minority leaders of the Senate, and such other members of the congressional leadership as may be included by the President.

(3) Whenever a finding is not reported [in advance to the committees], the President shall fully inform the intelligence committees in a timely fashion and shall provide a statement of the reasons for not giving prior notice" (105 Stat. 441-443 (1991)).

## *Prior Consultation*

Congress sometimes includes provisions in law or report language that require or direct agencies to consult with Congress or nonfederal stakeholders before taking actions. Provisions like these may inform Congress and the public about agencies' plans and activities. The provisions may create opportunities for Congress and nonfederal stakeholders to influence an agency's decisionmaking in areas that range from reallocation of budgetary resources through reprogramming,[278] notice-and-comment rulemaking,[279] and establishment of goals.[280]

[278] CRS Report R43098, *Transfer and Reprogramming of Appropriations: An Overview of Authorities, Limitations, and Procedures*, by Michelle D. Christensen.

[279] CRS Report RL32240, *The Federal Rulemaking Process: An Overview*, coordinated by Maeve P. Carey.

[280] CRS Report R42379, *Changes to the Government Performance and Results Act (GPRA): Overview of the New Framework of Products and Processes*, by Clinton T. Brass.

**A Sample Prior Consultation Provision**

A provision in the Conference Committee report on the 1978 Ethics in Government Act illustrates this development: "The conferees expect the Attorney General to *consult* with the Judiciary Committees of both Houses of Congress *before* substantially expanding the scope of authority or mandate of the Public Integrity Section of the Criminal Division" (emphasis added).

## *Other Significant Sources of Information*

A number of general management laws provide for additional sources of information, data, and material that may aid congressional oversight endeavors. Many of the laws include reporting requirements or other provisions that involve public participation. Some illustrative examples are included below, along with citations to when they were originally enacted.[281]

### *Chief Financial Officers (CFO) Act of 1990*, as Amended (P.L. 101-576, 31 U.S.C. §§901 *et seq.*)

The CFO Act was intended to improve financial management throughout the federal government through various procedures and mechanisms:

- The 1990 act and subsequent amendments created two new posts within OMB, along with a new position of chief financial officer in each of the larger executive agencies, including all Cabinet departments.
- The CFO Act also provides for improvements in agency systems of accounting, financial management, and internal controls to assure the issuance of reliable financial information and to deter fraud as well as the waste and abuse of government resources.
- The enactment, furthermore, calls for the production of complete, reliable, timely, and consistent financial information for use by both the executive and the legislature in the financing, management, and evaluation of federal programs.
- The act, as amended, requires most executive branch entities to submit audited financial statements annually.

### *Government Performance and Results Act (GPRA)* (P.L. 103-62), *as Amended by the GPRA Modernization Act (GPRAMA)* (P.L. 111-352, 31 U.S.C. §1101 note)

This act—commonly known as GPRA and amended substantially by GPRAMA—requires federal agencies to submit long-range strategic plans, annual performance plans based on these, follow-up annual reports, and government-wide performance plans:

- *Strategic plans*. The strategic plans specify general goals and objectives for agencies based on the basic missions and underlying statutory or other authority of an agency. These plans, initially required in 1997, are to be developed in consultation with relevant congressional offices and with information from "stakeholders" and then submitted to Congress.
- *Annual performance plans and goals*. Based on these long-term plans, which may be modified if conditions and agency responsibilities change, the agencies are directed to set annual performance goals and to measure the results of their

[281] Many of the laws were codified in the *U.S. Code*, sometimes in one place and other times across a number of locations, and subsequently amended.

programs in achieving these goals. The annual plans, which are also available to Congress, began with FY1999.

- *Annual performance reports*. Each agency is to issue yearly follow-up reports assessing the implementation of its annual plan. Beginning in 2000, these are required to be submitted after the end of the fiscal year.
- *Government-wide plans and goals*. GPRA, as amended in 2010, calls for a federal government performance plan and priority goals under the direction of OMB. These are to include "outcome-oriented goals covering a limited number of crosscutting policy areas; and goals for management improvements needed across the Federal Government."

***Congressional Review Act* (P.L. 104-121)**

This act, enacted in 1996, established a special set of parliamentary procedures by which Congress can review and disapprove federal rules and regulations.[282] Congress has legislative authority over federal regulations, as regulations are issued by agencies pursuant to statutory delegations of authority. The CRA made it easier for Congress to exercise that legislative authority: It allows Congress to use expedited procedures to consider legislation—in the form of a joint resolution—disapproving a rule issued by a federal agency. Specifically, the CRA requires that

- All agencies promulgating a covered rule must submit a report to each house of Congress and the comptroller general containing specific information about the rule before it can go into effect.
- Rules designated by OMB as "major" may normally not go into effect until at least 60 days after submission, while non-major rules may become effective "as otherwise allowed in law," usually 30 days after publication in the *Federal Register*.
- All covered rules are subject to fast-track disapproval by passage of a joint resolution, even if they have already gone into effect, for a period of at least 60 days. Upon enactment of such a joint resolution, no new rule that is "substantially the same" as the disapproved rule may be issued unless it is specifically authorized by a law enacted subsequent to the disapproval of the original rule.
- "No determination, finding, action, or omission" under the CRA shall be subject to judicial review.

***Paperwork Reduction Act of 1995* (P.L. 104-13, 44 U.S.C. ch. 35)**

This most recent version of paperwork reduction legislation builds on a heritage of statutory controls over government paperwork that dates to 1942. Among other things, the current act and its 1980 predecessor more clearly defined the oversight responsibilities of OMB's OIRA: It is authorized to develop and administer uniform information policies in order to ensure the availability and accuracy of agency data collection. Congressional oversight has been strengthened through its subsequent reauthorizations and the requirement for Senate confirmation of OIRA's administrator.

[282] For a detailed discussion, see CRS Report R43992, *The Congressional Review Act (CRA): Frequently Asked Questions*, by Maeve P. Carey and Christopher M. Davis; and CRS In Focus IF10023, *The Congressional Review Act (CRA)*, by Maeve P. Carey and Christopher M. Davis.

***Federal Managers' Financial Integrity Act (FMFIA) of 1982* (P.L. 97-255)**

FMFIA is designed to improve the government's ability to manage its programs by strengthening internal management and financial controls, accounting systems, and financial reports. The internal accounting systems are to be consistent with standards that the comptroller general prescribes, including a requirement that all assets be safeguarded against waste, fraud, loss, unauthorized use, and misappropriation.

FMFIA also provides for ongoing evaluations of the internal control and accounting systems that protect federal programs against waste, fraud, abuse, and mismanagement. The enactment further mandates that the head of each agency report annually to the President and Congress on the condition of these systems and on agency actions to correct any material weakness that the reports identify.

FMFIA is also connected to the Chief Financial Officers Act of 1990, which calls upon the director of OMB to submit a financial management status report to appropriate congressional committees. Part of this report is to be a summary of reports on internal accounting and administrative control systems as required by FMFIA.

***Clinger-Cohen Act of 1996* (P.L. 104-106, 40 U.S.C. §§11101 *et seq.*)**

This act brought attention to how agencies invest in information technology. The act gave more responsibility to individual agencies, revoking the primary role that the GSA had played previously, and established the position of chief information officer in federal agencies to provide relevant advice to agency heads.

***Federal Advisory Committee Act (FACA)* (P.L. 92-463, 5 U.S.C. Appendix)**

Congress formally acknowledged the merits of using advisory committees to obtain expert views drawn from business, academic, government, and other interests when it enacted FACA in 1972. Congressional enactment of FACA established the first requirements for the management and oversight of federal advisory committees to ensure impartial and relevant expertise. As required by FACA, GSA administers and provides management guidelines for advisory committees. From 1972 until 1997, GSA submitted a hard copy of its annual comprehensive review of agency federal advisory committees to the President and Congress. Since 1998, however, GSA has maintained a specialized, federal government, interagency, information-sharing database that collects data on federal advisory committee activities government-wide and is publicly available on the web. The database is available at http://www.facadatabase.gov.

***Unfunded Mandates Reform Act of 1995* (P.L. 104-4, 2 U.S.C. §§1501 *et seq.*)**

After considerable debate, the Unfunded Mandates Reform Act was enacted early in the 104th Congress. Generally, unfunded intergovernmental mandates include responsibilities or duties that federal programs, standards, or requirements impose on governments at other levels without providing for the payment of the costs of carrying out these responsibilities or duties. The intent of the mandate legislation was to limit the ability of the federal government to impose costs on state and local governments through unfunded mandates. The enactment has three components: revised congressional procedures regarding future mandates, requirements for federal agency regulatory actions, and authorization for a study of existing mandates to evaluate their usefulness. The primary objective was to create procedures that would draw attention to, if not stop, congressional authorization of new unfunded mandates on state and local governments.

Federal Funding Accountability and Transparency Act (FFATA), as Amended by the Digital Accountability and Transparency (DATA) Act (P.L. 109-282, 31 U.S.C. §6101 note)

Under FFATA, OMB established a searchable, free, and public website that enables anyone to go online to find certain information about most federal grants, loans, and contracts.[283] OMB eventually established the website as USAspending.gov. Subsequently, Congress significantly amended FFATA with passage of the DATA Act (P.L. 113-101). Among other things, the amended version of FFATA requires the Secretary of the Treasury and director of OMB to establish government-wide financial data standards. In addition, the amended law requires online reporting of extensive data on budget execution.

## Resolutions of Inquiry

The House of Representatives can call upon the executive for factual information through resolutions of inquiry (House Rule XIII, clause 7).[284] This is a *simple resolution* considered in and approved by only the House. Resolutions of inquiry are addressed to either the President or heads of Cabinet-level agencies to supply specific factual information to the chamber. The resolutions traditionally usually "*request*" the President or "*direct*" administrative heads to supply such information. In calling upon the President for information, especially about foreign affairs, the qualifying phrase—"if not incompatible with the public interest"—is often added.

Such resolutions are to ask for facts, documents, or specific information. These devices are *not* to request an opinion or require an investigation (see box below). Resolutions of inquiry can trigger other congressional methods of obtaining information, such as through supplemental hearings or the regular legislative process.

### Resolutions of Inquiry in Practice

**The first resolution of inquiry** was approved on March 24, 1796, when the House sought documents in connection with the Jay Treaty negotiations:

> *Resolved*, That the President of the United States be requested to lay before this House a copy of the instructions to the minister of the United States, who negotiated the treaty with the King of Great Britain … together with the correspondence and other documents relative to the said treaty; excepting such of the said papers as any existing negotiation may render improper to be delivered (*Journal of the House of Representatives*, 4th Congress, 1st session, March 24, 1796. p. 480).

**A contemporary illustration** occurred on March 1, 1995, when the House adopted H.Res. 80, as amended (104th Congress, 1st session). The resolution sought information about the Mexican peso crisis at the time and an Administration plan to use up to $20 billion in resources from the Exchange Stabilization Fund to help stabilize the Mexican currency and financial system. The resolution read: *"Resolved*, That the President, is hereby requested to provide the House of Representatives (consistent with the rules of the House), not later than 14 days after the adoption of this resolution, the following documents in the possession of the executive branch, if not inconsistent with the public interest." The House request then specified the matters that the documents were to cover: the condition of the Mexican economy, consultations between the government of Mexico on the one hand and the U.S. Secretary of the Treasury and/or the International Monetary Fund on the other, market policies and tax policies of the Mexican government, and repayment agreements between Mexico and the United States, among other things.

If a resolution of inquiry is not reported by all the committees of referral within 14 legislative days after its introduction, any Representative can move to discharge the panels and bring the

[283] Two federal government websites resulted from the enactment of FFATA. USAspending.gov, at http://www.usaspending.gov/, includes spending data for contracts, grants, direct payments, insurance, and loans/guarantees. The FFATA Search Portal, at http://www.ffata.org/ffata/, contains information about contracts and grants.

[284] For a more detailed discussion of Resolutions of Inquiry see CRS Report R40879, *Resolutions of Inquiry: An Analysis of Their Use in the House, 1947-2017*, by Christopher M. Davis.

resolution to the floor for consideration. Action by the committees to report the resolution within the 14 days, however, effectively sidetracks House floor action on the resolution. For this reason, House committees virtually always mark up and report resolutions of inquiry referred to them, even when they do not support the goals of the legislation. By reporting the resolution within the specified 14-day window, a committee of referral retains control over the measure and prevents supporters of the resolution from going to the floor and making the privileged motion to discharge.

## Limitations and Riders on Appropriations

Congress uses a two-step legislative procedure: authorization of programs in bills reported by legislative committees followed by the funding of those programs in bills reported by the Committees on Appropriations. Congressional rules generally encourage these two steps to be distinct and sequential. Authorizations should not be in general appropriation bills or appropriations in authorization measures. However, there are various exceptions to the general principle that Congress should not make policy through the appropriations process. One exception is the practice of permitting "limitations" in an appropriations bill. So-called riders (language extraneous to the subject of the bill) are also sometimes added to control agency actions.

### *Limitations*

Although House rules forbid in any general appropriations bill a provision "changing existing law," certain "limitations" may be admitted. "Just as the House under its rules may decline to appropriate for a purpose authorized by law, so it may by limitation prohibit the use of the money for part of the purpose while appropriating for the remainder of it."[285] Limitations can be an effective device in oversight by strengthening Congress's ability to exercise control over federal spending and to reduce unnecessary or undesired expenditures. Under House Rule XXI, no provision changing existing law can be reported in any general appropriation bill "except germane provisions that retrench expenditures by the reduction of amounts of money covered by the bill" (the Holman rule, rarely used in modern practice).

**A Sample Appropriations Limitation**

**The Hyde Amendment, Labor-HHS Appropriations Act for FY1998, 111 Stat. 1516, §§509, 510 (1997):** "None of the funds appropriated under this Act shall be expended for any abortion … [except] (1) if the pregnancy is the result of an act of rape or incest; or (2) in the case where a woman suffers from a physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy itself, that would, as certified by a physician, place the woman in danger of death unless an abortion is performed."

Rule XXI was amended in 1983 in an effort to restrict the number of limitations on appropriations bills. The rule was changed again in 1995 by granting the majority leader a central role in determining consideration of limitation amendments. The procedures for limitation in the House are set forth in the House rulebook, Sections 1044(b), 1053-62.

[285] *Constitution, Jefferson's Manual, and Rules of the House of Representatives*, H.Doc. No. 115-177, 115th Congress, 2nd Session §1053 (2019).

### *Riders*

Unlike limitations, legislative "riders" are extraneous to the subject matter of the bill to which they are added. Riders appear in both authorization bills and appropriations bills. In the latter case, such provisions would be subject to a point of order in the House on the grounds that they are attempts to place legislation in an appropriations bill, although in almost every case, Members' ability to lodge a point of order may be restricted by the procedure used to consider the legislation. In the Senate, Rule XVI prohibits the addition to general appropriations bills of amendments that are legislative or non-germane. Both chambers have procedures to waive these prohibitions.

**A Sample Appropriations Rider**

**Department of Homeland Security Appropriations Act, 2007, P.L. 109-295 §550, 120 Stat. 1355 (2006):** "(a) No later than six months after the date of enactment of this Act, the Secretary of Homeland Security shall issue interim final regulations establishing risk-based performance standards for security of chemical facilities and requiring vulnerability assessments and the development and implementation of site security plans for chemical facilities: Provided, That such regulations shall apply to chemical facilities that, in the discretion of the Secretary, present high levels of security risk: Provided further, That such regulations shall permit each such facility, in developing and implementing site security plans, to select layered security measures that, in combination, appropriately address the vulnerability assessment and the risk-based performance standards for security for the facility: Provided further, That the Secretary may not disapprove a site security plan submitted under this section based on the presence or absence of a particular security measure, but the Secretary may disapprove a site security plan if the plan fails to satisfy the risk-based performance standards established by this section: Provided further, That the Secretary may approve alternative security programs established by private sector entities, Federal, State, or local authorities, or other applicable laws if the Secretary determines that the requirements of such programs meet the requirements of this section and the interim regulations: Provided further, That the Secretary shall review and approve each vulnerability assessment and site security plan required under this section: Provided further, That the Secretary shall not apply regulations issued pursuant to this section to facilities regulated pursuant to the Maritime Transportation Security Act of 2002, P.L. 107-295, as amended; Public Water Systems, as defined by section 1401 of the Safe Drinking Water Act, P.L. 93-523, as amended; Treatment Works as defined in section 212 of the Federal Water Pollution Control Act, Public Law 92-500, as amended; any facility owned or operated by the Department of Defense or the Department of Energy, or any facility subject to regulation by the Nuclear Regulatory Commission."

## Legislative Veto and Advance Notice

Many acts of Congress have delegated authority to the executive branch on the condition that proposed executive actions be submitted to Congress for review and possible disapproval before they can be put into effect. This way of ensuring continuing oversight of policy areas follows two paths: the legislative veto and advance notification.

### *Legislative Veto*

Beginning in 1932, Congress delegated authority to the executive branch with the condition that proposed executive actions would be first submitted to Congress and subjected to disapproval by a committee, a single house, or both houses. Over the years, other types of legislative veto were added, allowing Congress to control executive branch actions without having to enact a law. In 1983, the Supreme Court ruled that the legislative veto was unconstitutional on the grounds that all exercises of legislative power that affect the rights, duties, and relations of persons outside the legislative branch must satisfy the constitutional requirements of bicameralism and presentment of a bill or resolution to the President for his signature or veto.[286] Despite this ruling, Congress

[286] *INS v. Chadha*, 462 U.S. 919 (1983).

has continued to enact proscribed legislative vetoes, and it has also relied on informal arrangements to provide comparable controls.

*Statutory Legislative Vetoes*

Congress responded to *Chadha* by converting some of the one-house and two-house legislative vetoes to joint resolutions of approval or disapproval, thus satisfying the requirements of bicameralism and presentment. However, Congress continues to rely on legislative vetoes. Since the *Chadha* decision, hundreds of legislative vetoes have been enacted into public law, usually in appropriations acts. These legislative vetoes are exercised by the Appropriations Committees. Typically, funds may not be used or an executive action may not begin until the Appropriations Committees have approved—or, at least, not disapproved—the planned action, often within a specified time limit.

**A Sample Statutory Legislative Veto Provision**

**Department of Transportation and Related Agencies Appropriations Act 2001, 114 Stat. 1356A-2 (2000):** For the appropriation account "Transportation Administrative Service Center," no assessments may be levied against any program, budget activity, subactivity or project funded by this statute "unless notice of such assessments and the basis therefore are presented to the House and Senate Committees on Appropriations and are approved by such Committees."

*Informal Legislative Vetoes*

Unlike a formal legislative veto, where the arrangement is spelled out in the law, the informal legislative veto occurs where an executive official pledges not to proceed with an activity until Congress or certain committees agree to it. An example of this appeared during the 101st Congress. In the "bipartisan accord" on funding the Contras in Nicaragua, the Administration pledged that no funds would be obligated beyond November 30, 1989, unless affirmed by letter from the relevant authorization and appropriations committees and the bipartisan leadership of Congress.[287]

## *Advance Notification or Report-and-Wait*

Statutory provisions may stipulate that before a particular activity can be undertaken by the executive branch or funds obligated, Congress must first be advised or informed, ordinarily through a full written statement, of what is being proposed. These statutory provisions usually provide for a period of time during which action by the executive must be deferred, giving Congress an opportunity to pass legislation prohibiting the pending action or using political pressure to cause executive officials to retract or modify the proposed action. This type of "report and wait" provision has been upheld by the Supreme Court. The Court noted: "The value of the reservation of the power to examine proposed rules, laws and regulations before they become effective is well understood by Congress. It is frequently, as here, employed to make sure that the action under the delegation squares with the Congressional purpose."[288]

[287] See Bernard Weinraub, "Bush and Congress Sign Policy Accord on Aid to Contras," *New York Times*, March 25, 1986, https://www.nytimes.com/1989/03/25/world/bush-and-congress-sign-policy-accord-on-aid-to-contras.html.

[288] Sibbach v. Wilson, 312 U.S. 1 (1941).

**A Sample Report-and-Wait Provision**

**Comprehensive Anti-Apartheid Act of 1986, P.L. 99-440, §311:** "The President may suspend or modify any of the measures required by this title or section 501(c) or section 504(b) thirty days after he determines, and so reports to the Speaker of the House of Representatives and the chairman of the Committee on Foreign Relations of the Senate, that the Government of South Africa has [taken certain actions] unless the Congress enacts within such 30-day period, in accordance with section 602 of this Act, a joint resolution disapproving the determination of the President under this subsection."

## Independent Counsel[289]

The statutory provisions for the appointment of an independent counsel (formerly called "special prosecutor") were originally enacted as Title VI of the Ethics in Government Act of 1978 and codified at Title 28, Sections 591-599, of the *U.S. Code*. The independent counsel was reauthorized in 1983, 1987, and 1994. It expired on June 30, 1999. The mechanisms of the independent counsel law were triggered by the receipt of information by the Attorney General that alleged a violation of any federal criminal law (other than certain misdemeanors or "infractions") by a person covered by the act. Certain high-level federal officials—including the President, Vice President, and heads of departments—were automatically covered by the law. In addition, the Attorney General had discretion to seek an independent counsel for any person for whom there may exist a personal, financial, or political conflict of interest for DOJ personnel to investigate, and the Attorney General could seek an independent counsel for any Member of Congress when the Attorney General deemed it to be in the "public interest."

After conducting a limited review of the matter (a 30-day threshold review of the credibility and specificity of the charges and a subsequent 90-day preliminary investigation with a possible 60-day extension), the Attorney General—if he or she believed that "further investigation is warranted"—would apply to a special "division of the court," a federal three-judge panel appointed by the Chief Justice of the Supreme Court, requesting that the division appoint an independent counsel. The Attorney General of the United States was the *only* officer in the government authorized to apply for the appointment of an independent counsel. The special division of the court selected and appointed the independent counsel, and designated his or her prosecutorial jurisdiction, based on the information provided the court by the Attorney General. The independent counsel had the full range of investigatory and prosecutorial powers and functions of the Attorney General or other DOJ employees.

[289] For additional information, see CRS Report R44857, *Special Counsel Investigations: History, Authority, Appointment and Removal*, by Jared P. Cole

**Collisions Between Congress and Independent Counsels**

"The Congress' role here is terribly important. It is for them to present to the public as soon as possible a picture of the actual facts as to the Iran/Contra matter. This is so because there has been so much exposed without sufficient clarity to clear up the questions. There is a general apprehension that this is damaging. Congress properly wants to bring this to an end soon and that gives them a real feeling of urgency for their investigation.

"[The House and Senate Iran-Contra Committees] are trying to provide a factual predicate which will enable Congress to decide intelligently whether there is a need for a statutory amendment or for a closer oversight over covert activities and other matters…. As they quite properly point out, they cannot wait for Independent Counsel to satisfy himself as to whether a crime may or may not have been committed. They have a problem of their own….

"We are proceeding with much greater detail than Congress would think necessary for their purposes. We come into collision when the question of immunity arises….

"There is a greater pressure on Congress to grant immunity to central figures than there is for Independent Counsel. Over the last three months, we have had long negotiations over this question of immunity….

"If the Congress decides to grant immunity, there is no way that it can be avoided. They have the last word and that is a proper distribution of power….

"The reason why Congress must have this power to confer immunity is because of the importance of their role. The legislative branch has the power to decide whether it is more important perhaps even to destroy a prosecution than to hold back testimony they need."

Lawrence E. Walsh, *The Independent Counsel and the Separation of Powers*, 25 HOUS. L. REV. 1, 9 (1988).

There was no specific term of appointment for independent counsels. They could serve for as long as it took to complete their duties concerning that specific matter within their defined and limited jurisdiction. Once a matter was completed, the independent counsel filed a final report. The special division of the court could also find that the independent counsel's work was completed and terminate the office. A periodic review of an independent counsel for such determination was to be made by the special division of the court. An independent counsel, *prior* to the completion of his or her duties, could be removed from office (other than by impeachment and conviction) only by the Attorney General of the United States for good cause, physical or mental disability, or other impairing condition, and such removal could be appealed to the court. The procedures for appointing and removing the independent counsel were upheld by the Supreme Court in *Morrison* v. *Olson*.[290]

Investigation by the independent counsel could compete with parallel efforts by congressional committees to examine the same issue. Congress could decide to accommodate the needs of the independent counsel, such as delaying a legislative investigation until the independent counsel completed certain phases of an inquiry (see box above).

Although Congress could call on the Attorney General to apply for an independent counsel by a written request from the House or Senate Judiciary Committee, or a majority of members of either party of those committees, the Attorney General is not required to begin a preliminary investigation or to apply for an independent counsel in response to such a request. However, in such cases DOJ was required to provide certain information to the requesting committee.

The independent counsel was directed by statutory language to submit to Congress an annual report on the activities of such independent counsel, including the progress of investigations and any prosecutions. Although it was recognized that certain information would have to be kept

[290] 487 U.S. 654 (1988)

confidential, the statute stated that "information adequate to justify the expenditures that the office of the independent counsel has made" should be provided.[291]

The conduct of an independent counsel was subject to congressional oversight, and an independent counsel was required to cooperate with that oversight.[292] In addition, the independent counsel was required to report to the House of Representatives any "substantial and credible" information that may constitute grounds for any impeachment.[293] On September 11, 1998, Independent Counsel Kenneth W. Starr forwarded to the House a report concluding that President Clinton may have committed impeachable offenses. The House passed two articles of impeachment (perjury and obstruction of justice), but the Senate voted 45-55 on the perjury charge and 50-50 on the obstruction of justice charge, short of the two-thirds majority required under the Constitution.

The independent counsel statute expired in 1992, partly because of criticism directed at Lawrence Walsh's investigation of Iran-Contra. The statute was reauthorized in 1994, but objections to the investigations conducted by Kenneth Starr into Whitewater, Monica Lewinsky, and other matters put Congress under pressure to let the statute lapse on June 30, 1999.

Unless Congress in the future reauthorizes the independent counsel, the only available option for an independent counsel is to have the Attorney General invoke existing authority to appoint a special prosecutor to investigate a particular matter. For example, when the independent counsel statute expired in 1992 and was not reauthorized until 1994, Attorney General Janet Reno appointed Robert Fiske in 1993 to investigate the Clintons' involvement in Whitewater and the death of White House aide Vincent Foster. On July 9, 1999, Attorney General Reno promulgated regulations concerning the appointment of outside, temporary counsels, to be called "Special Counsels," in certain circumstances to conduct investigations and possible prosecutions of certain sensitive matters or matters which may raise a conflict for DOJ.[294] Such special counsels would have substantially less independence than the statutory independent counsel, including removal for "misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Department policies."

The regulations promulgated by Attorney General Reno remain in place today. They were applied most recently when in May 2017 Deputy Attorney General Rod Rosenstein appointed former FBI director Robert Mueller as special counsel to investigate the Russian government's efforts to "influence the 2016 election and related matters."[295]

# Statutory Offices of Inspector General

Statutory inspectors general (IGs), whose origins date back to the mid-1970s, have been granted substantial independence and authorities to combat waste, fraud, and abuse within designated federal departments and agencies.[296] To execute their missions, offices of inspector general

[291] 28 U.S.C. §595(a)(2).

[292] 28 U.S.C. §595(a)(1).

[293] 28 U.S.C. §595(c).

[294] 28 C.F.R. Part 600.

[295] Office of Deputy Att'y Gen., Order No. 3915-2017, Appointment of Special Counsel to Investigate Russian Interference with the 2016 Presidential Election and Related Matters (May 17, 2017), https://www.justice.gov/opa/press-release/file/967231/download.

[296] For more information on statutory IGs, see CRS Report R45450, *Statutory Inspectors General in the Federal Government: A Primer*, by Kathryn A. Francis.

(OIGs) conduct and publish audits and investigations, among other duties. Established by public law as nonpartisan, independent offices, OIGs exist in more than 70 federal entities, including departments, agencies, boards, commissions, and government-sponsored enterprises.[297]

## Inspector General Act of 1978

The majority (65 of 74) of IGs are governed by the Inspector General Act of 1978, as amended (hereinafter IG Act).[298] The IG Act originally created OIGs in 12 "federal establishments" and provided the blueprint for IG authorities and responsibilities.[299] The IG Act has been substantially amended three times since its enactment, as described below.

5. **The Inspector General Act Amendments of 1988 (**P.L. 100-504**)** expanded the number of OIGs in federal establishments and created a new set of IGs in "designated federal entities" (DFEs). The act also established separate appropriations accounts for IGs in federal establishments and added to the annual reporting obligations of all IGs and agency heads.
6. **The Inspector General Reform Act of 2008 (**P.L. 110-409**)** established a new Council of the Inspectors General for Integrity and Efficiency (CIGIE); established salary, bonus, and award provisions; added budget protections for OIGs; required OIG websites to include all completed audits and reports; and amended IG removal requirements and reporting obligations.
7. **The Inspector General Empowerment Act of 2016 (**P.L. 114-317**)** aimed to enhance IGs' access to agency records; vested CIGIE with new coordination responsibilities regarding audits and investigations that span multiple IG jurisdictions; amended the membership and investigatory procedures of CIGIE's Integrity Committee; and required IGs to submit documents containing recommendations for corrective action to affiliated agency heads, congressional committees of jurisdiction, and others upon request.

### Purpose and Role

#### *Purpose*

Pursuant to the IG Act, the principal purposes of IGs include

- conducting and supervising audits and investigations related to agency programs and operations;
- providing leadership and coordination and recommending policies for activities designed to promote the economy, efficiency, and effectiveness and the

[297] Three other IG posts are recognized in public law: for the Departments of the Air Force (10 U.S.C. §8020), Army (10 U.S.C. §3020), and Navy (10 U.S.C. §5020). This report does not examine these offices because they have a significantly different history, set of authorities, operational structure, and degree of independence compared to other statutory IGs.

[298] 5 U.S.C. Appendix (IG Act).

[299] P.L. 95-452. Two IGs whose origins pre-dated the IG Act served as models: in 1976, in the Department of Health, Education, and Welfare—now Health and Human Services (P.L. 94-505)—and in 1977, in the then-new Department of Energy (P.L. 95-91). The IG Act establishes OIGs in many federal agencies and defines the IG as the head of each of these offices. The act assigns to the IG specific duties and authorities, including the authority "to select, appoint, and employ such officers and employees as may be necessary for carrying out the functions, powers, and duties of the Office." See 5 U.S.C. Appendix (IG Act) §6(a)(7).

prevention and detection of fraud and abuse in such programs and operations; and

- keeping the agency head and Congress fully and currently informed about problems and deficiencies relating to such programs and the necessity for and progress of corrective action.[300]

***Role***

To carry out their purposes, the IG Act grants covered IGs broad authority to

- conduct audits and investigations;
- access directly the records and information related to agency programs and operations;
- request assistance from other federal, state, and local government agencies;
- subpoena information and documents and administer oaths when conducting interviews;
- hire staff and manage their own resources;
- receive and respond to complaints from agency employees, whose identity is to be protected; and
- implement the cash incentive award program in their agency for employee disclosures of waste, fraud, and abuse.[301]

Notwithstanding these authorities, IGs are not authorized to take corrective action themselves. Moreover, the IG Act prohibits the transfer of "program operating responsibilities" to an IG.[302]

## Types and Categories

Currently, 74 statutory IGs exist in the federal government.[303] Of these IGs, 65 are governed by the IG Act, and the remaining nine are governed by individual statutes outside the IG Act. Statutory IGs may be grouped into four different types: (1) establishment IGs, (2) DFE IGs, (3) other permanent IGs, and (4) special IGs. IGs were grouped into these four types based on criteria that are commonly used to distinguish between IGs, including authorizing statute, appointment method, affiliated federal entity and the branch of government in which it is located, oversight jurisdiction, and oversight duration.[304] Each type is described in more detail below.

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[300] 5 U.S.C. Appendix (IG Act) §2. IGs not covered by the IG Act generally have similar or identical purposes, although some IG missions may vary.

[301] 5 U.S.C. §4512. IGs operating under their own statutory authorities may have similar or identical authorities to those covered by the IG Act, although some IGs may have additional authorities or be prohibited from exercising the authorities listed in this report.

[302] 5 U.S.C. Appendix (IG Act) §8G(b); 5 U.S.C. Appendix (IG Act) §9(a)(2). One rationale for this proscription is that it would be difficult, if not impossible, for IGs to audit or investigate programs and operations impartially and objectively if they were directly involved in carrying them out.

[303] Some now-defunct statutory IGs have been abolished or transferred either when their parent agencies met the same fate or when superseded by another OIG. For example, the OIG in the Office of the Director of National Intelligence (DNI)—which operated under the full discretionary authority of the DNI (P.L. 108-458)—was supplanted by the IG of the Intelligence Community. The new Intelligence Community IG post was established by the Intelligence Authorization Act of 2010 (P.L. 111-259, §405) with substantially broader authority, jurisdiction, and independence than the previous IG.

[304] IGs can be grouped in a variety of ways based on several criteria. IGs could be categorized into types other than

- **Establishment IGs.** IGs for federal establishments lead permanent offices that operate under the IG Act for the 15 Cabinet departments and Cabinet-level agencies, as well as larger agencies in the executive branch. Each establishment IG is appointed by the President with the advice and consent of the Senate and removable by the President (or through the impeachment process in Congress). The IG cannot be removed by the affiliated agency head. Each establishment IG typically oversees the programs and operations of his or her affiliated agency.[305]
- **DFE IGs.** IGs for DFEs lead permanent offices that operate under the IG Act for smaller boards, commissions, foundations, and government-funded enterprises in the executive branch, as well as certain defense intelligence agencies. Each DFE IG is appointed and removable by the affiliated agency head. Similar to establishment IGs, each DFE IG typically oversees the programs and operations of his or her affiliated agency.[306]
- **Other permanent IGs.** This category includes seven permanent IGs that operate under statutes outside the IG Act for certain legislative branch agencies and executive branch intelligence agencies (listed below). The appointment structure varies by IG—legislative branch IGs are appointed and removable by the affiliated agency head, while IGs for the Central Intelligence Agency and Intelligence Community are appointed by the President with the advice and consent of the Senate and removable by the President (or through the impeachment process in Congress).
  - Architect of the Capitol (established by P.L. 110-161);
  - GAO (P.L. 110-323);
  - Government Publishing Office (P.L. 100-504);
  - Library of Congress (P.L. 109-55);
  - U.S. Capitol Police (P.L. 109-55);
  - Central Intelligence Agency (P.L. 101-193); and
  - Intelligence Community (P.L. 111-259).
- **Special IGs.** Two temporary offices with sunset dates operate under statutes outside of the IG Act: (1) the Special IG for the Troubled Asset and Relief Program (SIGTARP; P.L. 110-343), and (2) the Special IG for Afghanistan Reconstruction (SIGAR; P.L. 110-181).[307] The IG for SIGTARP is appointed by the President with the advice and consent of the Senate and is removable by the President.[308] The IG for SIGAR is appointed and removable by the President alone. Special IGs' oversight jurisdictions are unique in that they are expressly authorized to oversee a specific set of government programs or operations that span multiple agency jurisdictions rather than those under a single agency's jurisdiction.

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those listed here based on a different set of criteria.

[305] For a list of federal establishments, see 5 U.S.C. Appendix (IG Act) §12.

[306] For a list of DFEs, see 5 U.S.C. Appendix (IG Act) §8G.

[307] SIGTARP and SIGAR are listed, respectively, at 12 U.S.C. §5231 and 5 U.S.C. Appendix (IG Act) §8G note.

[308] The Troubled Asset Relief Program investment authority expired on October 3, 2010. However, SIGTARP continues to operate, as it is authorized to carry out the office's duties until the government has sold or transferred all assets and terminated all insurance contracts acquired under the program.

## Authorities and Responsibilities

As mentioned previously, the IG Act vests establishment IGs and DFE IGs—which comprise nearly 90% of all statutory IGs—with many authorities and responsibilities to carry out their respective missions. Several of these authorities and responsibilities are described below.[309]

### Oversight Jurisdiction

Typically, the jurisdiction of an IG includes only the programs, operations, and activities of a single affiliated entity and its components. In some cases, however, one IG operates for multiple federal entities.[310] For example, the IG of the Board of Governors for the Federal Reserve System was given jurisdiction over the Consumer Financial Protection Bureau, which was established as an "independent bureau" in the Federal Reserve System by the Dodd-Frank Wall Street Reform and Consumer Protection Act.[311] In other cases, multiple IGs operate for a single federal entity. For example, two statutory IGs operate for Department of the Treasury—one IG to oversee department-wide programs and operations and one IG to oversee the programs and operations of the Internal Revenue Service.

### Reporting Requirements

IGs have various reporting obligations to Congress, the Attorney General, agency head(s), and the public. One such obligation is to report suspected violations of federal criminal law directly and expeditiously to the Attorney General.[312] IGs are also required to report semiannually about their activities, findings, and recommendations to the agency head, who must submit the IG's report to Congress within 30 days.[313] The agency head's submission must provide the IG's report unaltered, but it may include any comments from the agency head. These semiannual reports are to be made available to the public within 60 days of their submission to Congress.[314] IGs are also to report "particularly serious or flagrant problems" immediately to the agency head, who must submit the IG report (unaltered, but with the IG's comments) to Congress within seven days.[315] The majority of statutory IGs have also elected to participate in Oversight.gov, a central repository for OIG reports that was established in 2017.[316]

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[309] In general, the authorities and responsibilities of IGs operating outside of the IG Act are beyond the scope of this report and can differ from those governed by the act. In certain cases, such differences are significant. In addition, unique statutory authorities and responsibilities for some IGs covered by the IG Act are also out of scope. Many IGs covered by the IG Act have been provided additional, unique responsibilities and powers on a selective basis.

[310] 5 U.S.C. Appendix (IG Act) §§2, 8G(g)(1), and 12(2). For more information on IG oversight jurisdiction, see CRS Report R43814, *Federal Inspectors General: History, Characteristics, and Recent Congressional Actions*, by Kathryn A. Francis and Michael Greene.

[311] P.L. 111-203, §§1011,1081(1)-(2).

[312] 5 U.S.C. Appendix (IG Act) §4(d).

[313] 5 U.S.C. Appendix (IG Act) §5(a), (b).

[314] 5 U.S.C. Appendix (IG Act) §5(c).

[315] 5 U.S.C. Appendix (IG Act) §5(d). This is commonly referred to as the "Seven Day Letter." More broadly, IGs are to keep the agency head and Congress "fully and currently informed" by means of the required reports and "otherwise." See 5 U.S.C. Appendix (IG Act) §4(a)(5).

[316] Establishment of, and participation in, Oversight.gov is not statutorily required. A list of participating OIGs is available at CIGIE, "About Oversight.gov," https://oversight.gov/about. For more information on Oversight.gov, see CRS Insight IN10752, *Inspector General Community Launches Oversight.gov to Increase Accessibility to Reports*, by Kathryn A. Francis.

## Independence

Pursuant to the IG Act, IGs are to be selected without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial and management analysis, law, public administration, or investigations.[317] IGs have broad authorities and protections to support and reinforce their independence, such as the authority to hire their own staff and access all records related to the programs and operations of their affiliated entities.[318] IGs determine the priorities and projects for their offices without outside direction in most cases. IGs may decide to conduct a review requested by the agency head, the President, legislators, employees, and others. They are not obligated to do so, however, unless it is required by law.[319] IGs serve under the "general supervision" of the agency head, reporting exclusively to the head or to the officer next in rank if such authority is delegated.[320]

## Budget Formulation

Establishment and DFE IGs are required to develop annual budget estimates that are distinct from the budgets of their affiliated entities. Such budget estimates must include some transparency into the requested amounts before agency heads and the President can modify them.[321] The budget formulation and submission process for the aforementioned IG types includes the following key steps:

- **IG budget estimate to affiliated agency head.** The IG submits an annual budget estimate for its office to the affiliated entity head. The estimate must include (1) the aggregate amount for the IG's total operations, (2) a subtotal amount for training needs, and (3) resources necessary to support CIGIE.
- **Agency budget request to President.** The affiliated entity head compiles and submits an aggregated budget request for the IG to the President. The budget request includes any comments from the IG regarding the entity head's proposal.
- **President's annual budget to Congress.** The President submits an annual budget to Congress. The budget submission must include (1) the IG's original budget that was transmitted to the entity head, (2) the President's requested amount for the IG, (3) the amount requested by the President for training of IGs, and (4) any comments from the IG if the President's amount would "substantially inhibit" the IG from performing his or her duties.[322]

This process arguably provides a level of budgetary independence from their affiliated entities, particularly by enabling Congress to perceive differences between the budgetary perspectives of

[317] 5 U.S.C. Appendix (IG Act) §§3(a) and 8G(c).

[318] For more information on IG authorities, see 5 U.S.C. Appendix (IG Act) §§4 and 6.

[319] The heads of eight agencies—the Departments of Defense, Homeland Security, Justice, and Treasury, plus the U.S. Postal Service (USPS), Federal Reserve Board, Central Intelligence Agency, and the Office of the DNI—are explicitly authorized to prevent or halt the IG from initiating, carrying out, or completing an audit or investigation or issuing a subpoena, and then only for certain reasons: to preserve national security interests or to protect ongoing criminal investigations, among a few others. See 5 U.S.C. Appendix (IG Act) §§8, 8D(a), 8E(a), 8G(f), 8G(g)(3), 8G(f)(3)(A), and 8I(a); 50 U.S.C. §3033(f)(1); and 50 U.S.C. §3517(b)(3). When exercising this power, the governing statute generally provides for congressional notification of the exercise of such authority.

[320] 5 U.S.C. Appendix (IG Act) §§3(a), 8G(d).

[321] 5 U.S.C. Appendix (IG Act) §§6(g) and 8G(g)(1).

[322] 5 U.S.C. Appendix (IG Act) §§6(g) and 8G(g)(1).

IGs and affiliated agencies or the President. Governing statutory provisions outline the following submission process, although it is unclear whether every IG interprets the statute similarly.

## Appropriations

Federal laws explicitly provide establishment IGs a separate appropriations account for their respective offices.[323] This requirement provides an additional level of budgetary independence from the affiliated entity by preventing attempts to limit, reallocate, or otherwise reduce IG funding once it has been specified in law, except as provided through established transfer and reprogramming procedures and related interactions between agencies and the appropriations committees.[324]

Appropriations for DFE IGs, in contrast, are part of the affiliated entity's appropriations account. Absent statutory separation of a budget account, the appropriations may be more susceptible to some reallocation of funds, although other protections may apply.[325]

## Appointment and Removal Methods

Appointment and removal procedures can vary among statutory IGs. Establishment IGs are appointed and removable by the President. When exercising removal authority, the President must communicate the reasons to Congress in writing 30 days prior to the scheduled removal date.[326] DFE IGs, by contrast, are appointed and can be removed by the agency head, who must notify Congress in writing 30 days in advance when exercising the removal authority.[327] In cases where a board or commission is considered the DFE head, removal of a DFE IG requires the written concurrence of a two-thirds majority of the board or commission members.[328] The U.S. Postal Service IG is the only IG that can be removed only "for cause," and then only by the written concurrence of at least seven of the nine presidentially appointed governors of USPS.[329]

## Coordination and Oversight

Coordination among the IGs and oversight of their actions exists through several channels, including interagency bodies created by public law or administrative directive:

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[323] 31 U.S.C. §1105(a)(25).

[324] For more information on reprogramming and transfers, see CRS Report R43098, *Transfer and Reprogramming of Appropriations: An Overview of Authorities, Limitations, and Procedures*, by Michelle D. Christensen.

[325] For example, appropriations committees may choose to allocate funding to an IG in ways that would require advance notification of any attempt by an affiliated entity head to reprogram funds away from the IG to another purpose.

[326] 5 U.S.C. Appendix (IG Act) §3(a)-(b). This advance notice allows the IG, Congress, or other interested parties to examine, and possibly object to, the planned removal.

[327] 5 U.S.C. Appendix (IG Act) §8G(c) and (e). Differences arise over who is considered the "head of the agency" in a DFE. The agency head may be (1) an individual serving as the administrator or director or as spelled out in law (e.g., the Archivist of the United States in the National Archives and Records Administration); (2) the chairperson of a board or commission, a full board, or council as specified in law (e.g., the National Council on the Arts in the National Endowment for the Arts); or (3) a certain supermajority of a governing board. See 5 U.S.C. Appendix (IG Act) §§8G(f)(1)-(2) and (4)). For the USPS, for instance, the USPS governors appoint the inspector general.

[328] 5 U.S.C. Appendix (IG Act) §8G(e)(1).

[329] 39 U.S.C. §202(e)(3).

- **CIGIE.** CIGIE is the primary coordinating body for statutory IGs.[330] Among other things, CIGIE is intended to aid in coordination among IGs and maintain programs and resources to train and professionalize OIG personnel.[331] CIGIE includes all statutory IGs along with other relevant officers, such as a representative of the FBI and the Special Counsel of the Office of Special Counsel.[332] The CIGIE chairperson is an IG chosen from within its ranks, while the executive chairperson is the OMB deputy director of management.[333]
- **CIGIE Integrity Committee.** The CIGIE Integrity Committee—the sole statutory committee of the council—plays a lead role in addressing allegations of IG wrongdoing. The committee receives, reviews, and refers for investigation alleged misconduct by the IG or OIG according to processes and procedures detailed in the IG Act.[334] The committee is composed of six members—four IGs on the full council, the FBI representative on the council, and the director of the Office of Government Ethics. The committee chairperson is elected to a two-year term by the members of the committee.[335]
- **Other coordinative bodies.** Other interagency mechanisms have been created by law or administrative directive to assist coordination among IGs. For example, Congress established a Lead Inspector General for overseas contingency operations—a formal role assigned to one of three IGs (Departments of Defense, Department of State, and U.S. Agency for International Development) to coordinate comprehensive oversight of program and operations in support of covered overseas contingency operations.[336] Further, Congress established a Council of Inspectors General on Financial Oversight to facilitate information sharing among them and develop ways to improve financial oversight.[337] Organizations have also been administratively created to help coordinate IG activities and capabilities for selected policy issues, such as the Defense Council on Integrity and Efficiency and Disaster Assistance Working Group.[338]

# Oversight Information Sources and Consultant Services

Congress calls upon a variety of sources for information and analysis to support its oversight activities. Most of this assistance is provided by legislative support agencies: CRS, CBO, and GAO. In addition to the legislative support agencies, various support offices established in the

[330] 5 U.S.C. Appendix (IG Act) §11.

[331] 5 U.S.C. Appendix (IG Act) §11(c)(E).

[332] 5 U.S.C. Appendix (IG Act) §11(b)(1).

[333] 5 U.S.C. Appendix (IG Act) §11(b)(2).

[334] 5 U.S.C. Appendix (IG Act) §11(d).

[335] 5 U.S.C. Appendix (IG Act) §11(d)(2).

[336] P.L. 112-239, §848; codified at 5 U.S.C. Appendix (IG Act) §8L.

[337] P.L. 111-203, §989E; codified at 5 U.S.C. Appendix (IG Act) §11 note.

[338] For more information on the Defense Council on Integrity and Efficiency, see http://www.dodig.mil/Resources/DCIE/ and https://media.defense.gov/2003/Jan/16/2001711908/-1/-1/1/DCIE%20Charter%20-%20Final.pdf. For more information on the Disaster Assistance Working Group, see https://www.ignet.gov/content/disaster-assistance-working-group.

House and Senate may have a role in oversight through the legal, legislative, administrative, financial, and ceremonial functions they perform. Two of these—the Offices of Senate Legal Counsel and House General Counsel—are highlighted below. A range of outside interest groups and research organizations also provide rich sources of information.

## CRS

CRS[339] is the public policy research arm of Congress. Originally established as the Legislative Reference Service in 1914, CRS was renamed and given expanded research and analytic duties with the passage of the Legislative Reorganization Act of 1970.[340]

CRS analysts, attorneys, and information specialists provide nonpartisan, confidential analysis on current and emerging issues of national policy. CRS works exclusively for Congress, providing the legislature with an independent source of information and assisting the Congress in its ability to oversee the executive branch in a system characterized by separation of powers.

In addition to serving the committees and party leaders of the House and Senate, CRS responds to requests for assistance from all Members of both houses regardless of their party, length of service, or political philosophy. CRS also assists congressional staff in district and state offices.

CRS supports the House and Senate at all stages of the legislative process. Individual Members or their staffs may request help from CRS, for example, in learning about issues; developing ideas for legislation; providing technical assistance during hearings; evaluating and comparing legislative proposals made by the President, their colleagues, or private organizations; understanding the effects of House and Senate rules on the legislative process; and clarifying legal effects a bill may have.

CRS provides assistance in the form of reports, memoranda, customized briefings, introductory classes, seminars, digitally recorded presentations, courses offering continuing education credits, information obtained from governmental and nongovernmental databases, and consultations in person and by telephone. Its analysts also deliver expert testimony before congressional committees.

Although CRS does not draft bills, resolutions, and amendments, CRS staff may join the staff of Members and committees consulting with the professional drafting staff within each chamber's Office of the Legislative Counsel as they translate the Member's policy decisions into formal legislative language. CRS is also prohibited from preparing products of a partisan nature or advocating bills or policies and researching individual Members or living former Members of Congress (other than holders of, or nominees to, federal appointive office). It also cannot undertake casework or provide translation services, provide personal legal or medical advice, undertake personal or academic research, provide clerical assistance, or conduct audits or field investigations.

In all of their work, CRS staff are governed by requirements for confidentiality, timeliness, accuracy, objectivity, balance, and nonpartisanship. CRS makes no legislative or other policy recommendations to Congress. Its responsibility is to ensure that Members of the House and

[339] Published reports, seminars and training offered, other resources and services provided by CRS are available at https://www.crs.gov/.

[340] P.L. 63-127, ch. 141, July 16, 1914; P.L. 79-601, ch. 753, title II, §203, August 2, 1946, 60 Stat. 836; P.L. 91-510, title III, §321(a), October 26, 1970, 84 Stat. 1181; 2 U.S.C. §166.

Senate have available the best possible information and analysis on which to base the policy decisions the American people have elected them to make.

The Librarian of Congress appoints the director of CRS "after consultation with the Joint Committee on the Library."[341]

Pursuant to the FY2018 Consolidated Appropriations Act, a website was launched on September 18, 2018, to provide public access to CRS reports (https://crsreports.congress.gov/).[342] The confidentiality of congressional requests or responses (such as confidential memoranda) remains unchanged, and these confidential communications may be released only by Congress.

## CBO

Since its founding in 1974,[343] CBO has provided an objective, impartial, and nonpartisan source of budgetary and economic information to support the congressional budget process in the House and Senate. Economists and policy analysts at CBO generate a variety of products in support of Congress and the budget process, including dozens of reports and hundreds of cost estimates each year.

CBO provides formal cost estimates of virtually every bill reported by congressional committees in addition to preliminary, informal estimates of legislative proposals at various stages of the legislative process. Additionally, CBO regularly prepares reports on the economic and budget outlook, analysis of the President's budget proposals, scorekeeping reports, assessments of unfunded mandates, and products and testimony related to other budgetary matters.[344]

CBO does not make policy recommendations, and its reports and cost estimates contain information regarding the agency's assumptions and methodologies. All of CBO's products, apart from informal cost estimates for legislation being developed privately by Members of Congress or their staffs, are available to the Congress and the public on CBO's website.

The Speaker of the House of Representatives and the President pro tempore of the Senate jointly appoint the CBO director after considering recommendations from the two budget committees. The Congressional Budget and Impoundment Control Act of 1974 specifies that CBO's director is to be chosen without regard to political affiliation.

## GAO

The Government Accountability Office, formerly known as the General Accounting Office, was established by the Budget and Accounting Act of 1921 as an independent auditor of government agencies[345] and has statutory authority to gather information from and investigate agencies.[346] The GAO's mission is to support Congress in meeting its constitutional responsibilities and to help improve the performance and ensure the accountability of the federal government.

GAO issues hundreds of reports, testimony statements, and legal opinions each year. GAO's reports typically support congressional oversight through focusing on

[341] 2 U.S.C. §166.

[342] P.L. 115-141; March 23, 2018; 2 U.S.C. §166a.

[343] P.L. 93-344, July 12, 1974; 2 U.S.C. §§601-603.

[344] For a more detailed description of CBO products, see https://www.cbo.gov/about/products.

[345] P.L. 67-13, June 10, 1921; 31 U.S.C. §702. Renamed by P.L. 108-271, 118 Stat. 811.

[346] 31 U.S.C. §716.

- auditing agency operations to determine whether federal funds are being spent efficiently and effectively;
- identifying opportunities to address duplication, overlap, waste or inefficiencies in the use of public funds;
- reporting on how well government programs and policies are meeting their objectives;
- performing policy analyses and outlining options for congressional consideration; and
- investigating allegations of illegal and improper activities.

GAO's objective is to produce high-quality reports, testimonies, briefings, and other products and services that are objective, fact-based, nonpartisan, non-ideological, fair, and balanced. The agency operates under strict professional standards, including Government Auditing Standards and a quality assurance framework. GAO's products include oral briefings, testimony, and written reports. All non-classified reports are made available to the public through posting on GAO's website. Report recommendations that remain to be addressed, including those that are a priority, are included in GAO's Recommendations Database (https://www.gao.gov/recommendations).

Most GAO reports are prepared in response to congressional requests or requirements in statute or committee or conference reports. GAO is required to do work requested by committee chairs and, as a matter of policy, assigns equal status to requests from ranking minority members and subcommittee leaders. A small percentage of reviews are undertaken under the comptroller general's authority.

GAO's Watchdog website (http://watchdog.gao.gov/), available on the House and Senate intranet, provides information on how to request GAO reports, GAO's policies for accepting and prioritizing mandates and requests (contained in its *Congressional Protocols*[347]) and information about ongoing reviews, among other things. GAO encourages Members and staff to consult with its staff when considering a request or mandate for a report.

In addition to its audits and evaluations, GAO offers a number of other services, including performing forensic audits and investigations of fraud, waste, and abuse; providing various legal services; prescribing accounting principles and standards for the executive branch; providing other services to help the audit and evaluation community improve and keep abreast of current developments; occasionally detailing staff to work for congressional committees for up to one year, on request of committee leadership; and providing testimony from the comptroller general on high-level issues and the role of government.

GAO is led by the comptroller general of the United States, who is appointed by the President with the advice and consent of the Senate, from a list of candidates selected by a bipartisan, bicameral congressional commission. The comptroller general serves a term of 15 years. GAO's staff are located in Washington, DC, and in field offices located in Atlanta, Boston, Chicago, Dallas, Dayton, Denver, Huntsville, Los Angeles, Norfolk, Oakland, and Seattle.

## Offices of Senate Legal Counsel and House General Counsel

Since their establishment, the Offices of Senate Legal Counsel and House General Counsel have developed parallel yet distinctly unique and independent roles as institutional legal "voices" of

[347] GAO's *Congressional Protocols* can be accessed at https://www.gao.gov/products/GAO-17-767G.

the two bodies they represent. Both offices perform functions important to committee oversight, including representing the committees of their respective chambers in certain judicial proceedings.

## Senate Legal Counsel

The Office of Senate Legal Counsel provides legal assistance and representation to Senators, committees, officers, and employees of the Senate on matters pertaining to their official duties. It was established "to serve the institution of Congress rather than the partisan interests of one party or another"[348] in the Ethics in Government Act of 1978.[349]

Statutory duties of the office include defensive legal representation of the Senate, its committees, members, officers, and employees;[350] representation in legal proceedings to aid investigations by Senate committees;[351] representation of the Senate itself in litigation in cases in which the Senate is a party and also as amicus curiae when the Senate has an institutional interest;[352] providing legal advice and assistance to Members;[353] and performing such other duties consistent with the nonpartisan purposes and limitations of Title VII of the Ethics Act as the Senate may direct.[354]

Critical to committee oversight, the Senate legal counsel may represent committees in proceedings to obtain evidence for Senate investigations. Specifically, the office may represent a Senate committee or subcommittee in a civil action to enforce a subpoena.[355] Additionally, a committee may direct the Senate legal counsel to represent it or any of its subcommittees in an application for an immunity order.[356]

The office also has a number of advisory functions. Principal among these are the responsibility of advising members, committees, and officers of the Senate with respect to subpoenas or requests for the withdrawal of Senate documents and the responsibility of advising committees about their promulgation and implementation of rules and procedures for congressional investigations. The office also provides advice about legal questions that arise during the course of investigations.[357]

In addition, the counsel's office provides information and advice to members, officers, and employees on a wide range of legal and administrative matters relating to Senate business. Unlike the House practice, the Senate legal counsel plays no formal role in the review and issuance of subpoenas. However, since it may become involved in civil enforcement proceedings, it has

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[348] S.Rept. 95-170, 95th Congress, 2nd session 84 (1978).

[349] P.L. 95-520, §§701 *et seq.*, 92 Stat. 1824, 1875 (1978), codified principally in 2 U.S.C. §§288 *et seq.*

[350] 2 U.S.C. §288c. For further discussion, see U.S. Congress, Senate, *Riddick's Senate Procedure: Precedents and Practice*, 101st Congress, 2nd session, S.Doc. 101-28 (Washington: GPO, 1992), pp. 1236-1247, https://www.gpo.gov/fdsys/pkg/GPO-RIDDICK-1992/pdf/GPO-RIDDICK-1992-127.pdf.

[351] 2 U.S.C. §288d.

[352] 2 U.S.C. §288e.

[353] 2 U.S.C. §288g.

[354] 2 U.S.C. §288g(c). For examples of activities conducted by the Office of Senate Legal Counsel under this authority, see *Riddick's Senate Procedure*, pp. 1245-1246.

[355] The procedure for directing the Senate legal counsel to bring a civil action to enforce a subpoena is detailed in statute. See 2 U.S.C. §288d and 28 U.S.C. §1365.

[356] 2 U.S.C. §288b(d)(2), 288f.

[357] 2 U.S.C. §288g(a)(5) and (6).

welcomed the opportunity to review proposed subpoenas for form and substance prior to their issuance by committees.

The office is led by the Senate legal counsel and deputy counsel, who are appointed by the President pro tempore of the Senate from among recommendations submitted by the majority and minority leaders of the Senate without regard for political affiliation.[358]

### House General Counsel

The House Office of General Counsel, authorized under House Rule II, clause 8, serves the role of counsel for the institution. The office provides legal assistance and representation to members, committees, officers, and employees of the House of Representatives, without regard to political affiliation, on matters pertaining to their official duties.

The work of the office typically includes providing legal advice and assistance to House committees in the preparation and service of subpoenas; representing members, committees, officers, and employees of the House in judicial proceedings; providing legal advice and assistance to members; and providing legal guidance regarding requests from executive branch agencies.

Committees often work closely with the Office of General Counsel in drafting subpoenas; dealing with various asserted constitutional, statutory, and common-law privileges; responding to executive agencies and officials that resist congressional oversight; and navigating the statutory process for obtaining a contempt citation with respect to a recalcitrant witness.

The office represents the interests of House committees in judicial proceedings. The office represents committees in federal court on applications for immunity orders pursuant to Title 18, Section 6005, of the *U.S. Code*; appears as amicus curiae in cases affecting House committee investigations; defends against attempts to obtain direct or indirect judicial interference with congressional subpoenas or other investigatory authority; represents committees seeking to prevent compelled disclosure of non-public information relating to their investigatory or other legislative activities; and appears in court on behalf of committees seeking judicial assistance in obtaining access to documents or information such as documents that are under seal or materials that may be protected by Rule 6(e) of the Federal Rules of Criminal Procedure.

The general counsel, deputy general counsel, and other attorneys of the office are appointed by the Speaker. The office functions "pursuant to the direction of the Speaker, who shall consult with a Bipartisan Legal Advisory Group," which consists of the majority and minority leaderships.

## OMB

OMB (http://www.whitehouse.gov/omb) came into existence under its current name in 1970. Its predecessor agency, the Bureau of the Budget, was established in 1921. Initially created as a unit in the Treasury Department, the agency has been a part of the Executive Office of the President since 1939.

### *Capabilities*

OMB, though created by law as passed by Congress, functions in many ways as the President's agent for the management and implementation of policy, including the federal budget. In practice, OMB's major responsibilities include

[358] 2 U.S.C. §288(a)(2).

- assisting the President in the preparation of budget proposals and development of a fiscal program;
- supervising and controlling the administration of the budget in the executive branch, including transmittal to Congress of proposals for deferrals and rescissions;
- keeping the President informed about agencies' activities (proposed, initiated, and completed) in order to coordinate efforts, expend appropriations economically, and minimize unnecessary overlap and duplication;
- administering the process of review of draft proposed and final agency rules established by Executive Order 12866;
- administering the process of review and approval of collections of information by federal agencies and reducing the burden of agency information collection on the public under the Paperwork Reduction Act of 1995;
- overseeing (1) the manner in which agencies disseminate information to the public (including electronic dissemination); (2) how agencies collect, maintain, and use statistics; (3) how agencies' archives are maintained; (4) how agencies develop systems for ensuring privacy, confidentiality, security, and the sharing of information collected by the government; and (5) how the government acquires and uses information technology, pursuant to the Paperwork Reduction Act of 1995,[359] the Clinger-Cohen Act of 1996,[360] and other legislation;
- studying and promoting better governmental management, including making recommendations to agencies regarding their administrative organization and operations;
- clearing and coordinating agencies' draft testimony and legislative proposals and making recommendations about presidential action on legislation;
- assisting in the preparation, consideration, and clearance of executive orders and proclamations;
- planning and developing information systems that provide the President with agency and program performance data;
- establishing and overseeing implementation of financial management policies and requirements for the federal government;
- assisting in development of regulatory reform proposals and programs for paperwork reduction and the implementation of these initiatives;
- improving the economy and efficiency of the federal procurement process by providing overall direction for procurement policies, regulations, procedures, and forms.

### *Limitations*

OMB is inevitably drawn into institutional and partisan struggles between the President and Congress. Difficulties with Congress notwithstanding, OMB is a central coordinator and overseer for executive agencies and is, therefore, a rich potential source of information for investigative

[359] P.L. 104-13, 44 U.S.C. ch. 35.

[360] P.L. 104-106, 40 U.S.C. §§11101 *et seq.*

and oversight committees. In addition, Congress may through legislation assign duties to OMB in order to establish oversight mechanisms and advance congressional oversight objectives.

## Budget Information

Since enactment of the 1974 Budget Act, as amended, Congress has more budgetary information than ever before. Extensive budgetary materials are also available from the executive branch. Some of the major sources of budgetary information are available on and off Capitol Hill. They include (1) the President and executive agencies (recall that under the Budget and Accounting Act of 1921, the President presents annually a national budget to Congress); (2) CBO; (3) the House and Senate Budget Committees; (4) the House and Senate Appropriations Committees; and (5) the House and Senate legislative committees. In addition, CRS and GAO prepare reports that address the budget and related issues.

Discretionary spending, the component of the budget that the Appropriations Committees oversee through the appropriations process, accounts for about one-third of federal spending. Other House and Senate committees, particularly Ways and Means and Finance, oversee more than $2 trillion in spending through reauthorizations, direct spending measures, and reconciliation legislation. In addition, the House Ways and Means Committee and the Senate Finance Committee oversee a diverse set of programs—including tax collection, tax expenditures, and some user fees—through the revenue process. The oversight activities of all of these committees is enhanced through the use of the diverse range of budgetary information that is available to them.

### *Executive Branch Budget Products*

**Budget of the United States Government** contains the Budget Message of the President and information on the President's budget proposals by budget function.

**Analytical Perspectives, Budget of the United States Government** contains analyses that are designed to highlight specified subject areas or provide other significant presentations of budget data that place the budget in perspective. This volume includes economic and accounting analyses, information on federal receipts and collections, analyses of federal spending, information on federal borrowing and debt, baseline or current services estimates, and other technical presentations. The *Analytical Perspectives* volume also contains supplemental material with several detailed tables—including tables showing the budget by agency and account and by function, subfunction, and program—that are available on the internet and as a CD-ROM in the printed document.

**Historical Tables** provides data on budget receipts, outlays, surpluses or deficits, federal debt, and federal employment over an extended time period, generally from 1940 or earlier to present. To the extent feasible, the data have been adjusted to provide consistency with the budget and to provide comparability over time.

**The Appendix, Budget of the United States Government** contains detailed information on the various appropriations and funds that constitute the budget. The *Appendix* contains financial information on individual programs and appropriation accounts. It includes for each agency the proposed text of appropriations language, budget schedules for each account, legislative proposals, explanations of the work to be performed and the funds needed, and proposed general provisions applicable to the appropriations of entire agencies or groups of agencies. Information is also provided on certain activities whose transactions are not part of the budget totals.

Several other points about the President's budget and executive agency budget products are worth noting. First, the President's budgetary communications to Congress continue after the

January/February submission and usually include a series of budget amendments and supplementals, the Mid-Session Review, Statements of Administration Policy (SAPs) on legislation, and even revised budgets on occasion. Second, most of these additional communications are issued as House documents and are available on the web from GPO Access or the OMB home page (in the case of SAPs). Third, the initial budget products often do not provide sufficient information on the President's budgetary recommendations to enable committees to begin developing legislation, and that further budgetary information is provided in the "justification" materials (see below) and the later submission of legislative proposals. Finally, the internal executive papers (such as agency budget submissions to OMB) are often not made available to Congress.

### *Some Other Sources of Useful Budgetary Information*

**Committees on Appropriations.** The subcommittees of the House and Senate Appropriations Committees hold extensive hearings on the fiscal year appropriations requests of federal departments and agencies. Each federal department or agency submits *justification material* to the Committees on Appropriations. Their submissions can run from several hundred pages to over 2,000 pages. The Appropriations Subcommittees typically print this material with the hearing record of the federal officials concerning these requests.

**Budget committees.** The House and Senate Budget Committees, in preparing to report the annual concurrent budget resolution, conduct hearings on overall federal budget policy. These hearings and other fiscal analyses made by these panels address various aspects of federal programs and funding levels that can be useful sources of information.

**Other committees.** To assist the Budget Committees in developing the concurrent budget resolution, other committees are required to prepare "views and estimates" of programs in their jurisdiction. Committee views and estimates, usually packaged together and issued as a committee print, may also be a useful source of detailed budget data.

**Internal agency studies and budget reviews.** These agency studies and reviews are often conducted in support of budget formulation and can yield useful information about individual programs. The budgeting documents, evaluations, and priority rankings of individual agency programs can provide insights into executive branch views of the importance of individual programs.

## Non-Federal Information Resources

Committees and Members can acquire useful information about executive branch programs and performance from non-federal stakeholders. These stakeholders may bring expertise to congressional deliberations, and they may be categorized in many ways. Illustrative examples of these stakeholders and their potential contribution to congressional oversight are described below.

**State and local governments** may offer valuable information to congressional overseers on the efficiency, effectiveness, and fairness of federal programs and policies, including potential implementation challenges and unintended consequences. State and local governments administer many federal programs, policies, and funds—such as those related to healthcare (e.g., Medicaid), workforce development, education, and disaster management—and often audit or evaluate their effectiveness. Some state and local programs have also served as models for similar programs at the federal level.

**Think tanks and good government organizations** are research entities that periodically conduct studies of public policy issues that may inform Members and committees on how well federal

agencies and programs are working. Examples of think tanks include the Brookings Institution, the RAND Corporation, and the Heritage Foundation. Examples of good government organizations include the National Academy of Public Administration, the Partnership for Public Service, and the Project on Government Oversight (POGO). Think tanks and good government organizations may operate under various legal authorities (e.g., 501(c)(3) status with the Internal Revenue Service), and their political ideologies and policy issues of focus can vary widely. Some organizations, such as POGO, focus explicitly on improving government and congressional oversight.

**Interest groups** might provide unique perspectives on the impact of legislation to Members and committees, including potential unintended consequences on specific populations. In general, interest groups are organizations that represent individuals or entities who share common views on a specific public policy issue, such as civil rights, education, or health. An interest group often takes a particular position on a policy issue and advocates for adoption of laws and policies that align with that position. Such advocacy can include attempts to directly influence public policy, including lobbying Members and congressional committees.

**Non-governmental organizations (NGOs)**, broadly speaking, are entities that are independent of government involvement or control. The acronym *NGO* can encompass a broad range of entities, such as international organizations or domestic nonprofit organizations. Similar to think tanks, NGOs can vary in terms of their purpose, legal authorities, policy areas of focus, and political or religious affiliations. NGOs may be active in different aspects of social, political, scientific, environmental, and humanitarian policy areas. NGOs might provide valuable assistance to congressional overseers in navigating a broad range of policy issues. According to the Department of State, NGOs "often develop and address new approaches to social and economic problems that governments cannot address alone."[361]

**Private sector companies** might assist Members and committees in overseeing the implementation of agency programs and policies, including by identifying potential application of private sector expertise and practices to government programs and services. Companies that are regulated may also have feedback on the effectiveness of the regulation and how related implementation could be improved. Companies may also market themselves to federal agencies, seeking brand recognition and contracts. In addition to providing consultative services to agencies, private sector companies may publish insights and perspectives on certain federal policy issues, such as shared services, information technology, and cybersecurity.

**Members of the general public** can provide useful feedback on how well federal programs and services are working. Such feedback can assist Members and committees in obtaining policy-relevant information about program performance and in evaluating the problems individuals might be having with federal administrators and agencies. A variety of methods might be employed to solicit the views of those who receive federal programs and services, including investigations and hearings, field and on-site meetings, and surveys.

[361] U.S. Department of State, "Non-Governmental Organizations (NGOs) in the United States," January 20, 2017, https://www.state.gov/j/drl/rls/fs/2017/266904.htm.

# Appendix A. Illustrative Subpoena

**Subpena Duces Tecum**

**By Authority of the House of Representatives of the Congress of the United States of America**

*To* Custodian of Documents International Brotherhood of Teamsters

You are hereby commanded to produce the things identified on the attached schedule before the Subcommittee on Oversight and Investigations Committee on Education and the Workforce of the House of Representatives of the United States, of which the Hon. Pete Hoekstra is chairman, by producing such things in Room B-346A of the Rayburn Building, in the city of Washington, on March 17, 1998, at the hour of 5:00 p.m.

*To* Any staff member or agent of the Committee on Education and the Workfor of the age of 18 years or older or to any United States Marshal to serve and make return.

Witness my hand and the seal of the House of Representatives of the United States, at the city of Washington, this 10th day of March, 1998.

Peter Hoekstra

The Honorable Pete Hoekstra *Chairman.*

Attest:

Robin H. Carle

*Clerk.*

Subpena for..Custodian of Documents....

International Brotherhood of Teamsters

25 Louisiana Avenue, N.W.....

Washington, D.C. 20001.....

before the Committee on the Education....

and the Workforce, Subcommittee on

Oversight and Investigations.....

Served..... .....

.....

.....

.....

.....

.....

.....House of Representatives

## GENERAL INSTRUCTIONS

1. In complying with this Subpoena, you are required to produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You are also required to produce documents that you have a legal right to obtain, documents that you have a right to copy or have access to, and documents that you have placed in the temporary possession, custody, or control of any third party. No records, documents, data or information called for by this request shall be destroyed, modified, removed or otherwise made inaccessible to the Committee.
2. In the event that any entity, organization or individual denoted in this subpoena has been, or is also known by any other name than that herein denoted, the subpoena shall be read to also include them under that alternative identification.
3. Each document produced shall be produced in a form that renders the document susceptible of copying.
4. Documents produced in response to this subpoena shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when this subpoena was served. Also identify to which paragraph from the subpoena that such documents are responsive.

5. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same document.
6. If any of the subpoenaed information is available in machine-readable form (such as punch cards, paper or magnetic tapes, drums, disks, or core storage), state the form in which it is available and provide sufficient detail to allow the information to be copied to a readable format. If the information requested is stored in a computer, indicate whether you have an existing program that will print the records in a readable form.
7. If the subpoena cannot be complied with in full, it shall be complied with to the extent possible, which shall include an explanation of why full compliance is not possible.
8. In the event that a document is withheld on the basis of privilege, provide the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.
9. If any document responsive to this subpoena was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances by which the document ceased to be in your possession, or control.
10. If a date set forth in this subpoena referring to a communication, meeting, or other event is inaccurate, but the actual date is known to you or is otherwise apparent from the context of the request, you should produce all documents which would be responsive as if the date were correct.
11. Other than subpoena questions directed at the activities of specified entities or persons, to the extent that information contained in documents sought by this subpoena may require production of donor lists, or information otherwise enabling the re-creation of donor lists, such identifying information may be redacted.
12. The time period covered by this subpoena is included in the attached Schedule A.
13. This request is continuing in nature. Any record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon location or discovery subsequent thereto.
14. All documents shall be Bates stamped sequentially and produced sequentially.
15. Two sets of documents shall be delivered, one set for the Majority Staff and one set for the Minority Staff. When documents are produced to the Subcommittee, production sets shall be delivered to the Majority Staff in Room B346 Rayburn House Office Building and the Minority Staff in Room 2101 Rayburn House Office Building.

**GENERAL DEFINITIONS**

1. The term “document” means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, interoffice and intra office communications, electronic mail (E-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations,

questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, discs, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disc, or videotape. A documents bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.

2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether face to face, in a meeting, by telephone, mail, telexes, discussions, releases, personal delivery, or otherwise.

3. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this subpoena any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.

4. The term "White House" refers to the Executive Office of the President and all of its units including, without limitation, the Office of Administration, the White House Office, the Office of the Vice President, the Office of Science and Technology Policy, the Office of Management and Budget, the United States Trade Representative, the Office of Public Liaison, the Office of Correspondence, the Office of the Deputy Chief of Staff for Policy and Political Affairs, the Office of the Deputy Chief of Staff for White House Operations, the Domestic Policy Council, the Office of Federal Procurement Policy, the Office of Intergovernmental Affairs, the Office of Legislative Affairs, Media Affairs, the National Economic Council, the Office of Policy Development, the Office of Political Affairs, the Office of Presidential Personnel, the Office of the Press Secretary, the Office of Scheduling and Advance, the Council of Economic Advisors, the Council on Environmental Quality, the Executive Residence, the President's Foreign Intelligence Advisory Board, the National Security Council, the Office of National Drug Control, and the Office of Policy Development.

March 10, 1998

Custodian of Documents
International Brotherhood of Teamsters
25 Louisiana Avenue, N.W.
Washington, D.C. 20001

**SCHEDULE A**

1. All organizational charts and personnel rosters for the International Brotherhood of Teamsters ("Teamsters" or "IBT"), including the DRIVE PAC, in effect during calendar years 1991 through 1997.

2. All IBT operating, finance, and administrative *manuals* in effect during calendar years 1991 through 1997, including, but not limited to those that set forth (1) operating policies, practices, and procedures; (2) internal financial practices and reporting requirements; and (3) authorization, approval, and review responsibilities.

3. All annual audit reports of the IBT for the years 1991 through 1996 performed by the auditing firm of Grant Thornton.
4. All IBT annual reports to its membership and the public for years 1991 through 1997, including copies of IBT annual audited financial statements certified to by independent public accountants.
5. All books and records showing receipts and expenditures, assets and liabilities, profits and losses, and all other records used for recording the financial affairs of the IBT including, journals (or other books of original entry) and ledgers including cash receipts journals, cash disbursements journals, revenue journals, general journals, subledgers, and workpapers reflecting accounting entries.
6. All Federal Income Tax returns filed by the IBT for years 1991 through 1997.
7. All minutes of the General Board, Executive Board, Executive Council, and all Standing Committees, including any internal ethics committees formed to investigate misconduct and corruption, and all handouts and reports prepared and produced at each Committee meeting.
8. All documents referring or relating to, or containing information about, any contribution, donation, expenditure, outlay, in-kind assistance, transfer, loan, or grant (from DRIVE, DRIVE E&L fund, or IBT general treasury) to any of the following entities/organizations:

   a. Citizen Action

   b. Campaign for a Responsible Congress

   c. Project Vote

   d. National Council of Senior Citizens

   e. Vote Now ‘96

   f. AFL-CIO

   g. AFSCME

   h. Democratic National Committee

   i. Democratic Senatorial Campaign Committee (“DSCC”)

   j. Democratic Congressional Campaign Committee (“DCCC”)

   k. State Democratic Parties

   1. Clinton-Gore ‘96

   m. SEIU
9. All documents referring or relating to, or containing information about any of the following individuals/entities:

   a. Teamsters for a Corruption Free Union

   b. Teamsters for a Democratic Union

   c. Concerned Teamsters 2000

   d. Martin Davis

   e. Michael Ansara

   f. Jere Nash

g. Share Group

h. November Group

i. Terrence McAuliffe

j. Charles Blitz

k. New Party

1. James P. Hoffa Campaign

m. Delancy Printing

n. Axis Enterprises

o. Barbara Arnold

p. Peter McGourty

q. Charles McDonald

r. Theodore Kheel

10. All documents referring or relating to, or containing information on about, communications between the Teamsters and the White House regarding any of the following issues:

a. United Parcel Service Strike

b. Diamond Walnut Company Strike

c. Pony Express Company organizing efforts

d. Davis Bacon Act

e. NAFTA Border Crossings

f. Ron Carey reelection campaign

g. IBT support to 1996 federal election campaigns.

i. All documents referring or relating to, or containing information about, communications between the Teamsters and the Federal Election Commission.

12. All documents referring or relating to, or containing information about, communications between the Teamsters and the Democratic National Committee, DSCC, or DCCC.

13. All documents referring or relating to, or containing information about, communications between the Teamsters and the Clinton-Gore ‘96 Campaign Committee.

14. All documents referring or relating to, or containing information about, policies and procedures in effect during 1996 regarding the approval of expenditures from the IBT general treasury, DRIVE E&L fund, and DRIVE PAC.

15. All documents referring or relating to, or containing information about the retention by the IBT of the law firm Covington & Burling and/or Charles Ruff.

16. All documents referring or relating to, or containing information about work for the IBT performed by the firm Palladino & Sutherland and/or Jack Palladino.

17. All documents referring or relating to, or containing information about work for the IBT performed by Ace Investigations and/or Guerrieri, Edmund, and James.

18. All documents referring or relating to, or containing information about IBT involvement in the 1995-1996 Oregon Senate race (Ron Wyden vs. Gordon Smith).
19. All documents referring or relating to, or containing information about, Ron Carey's campaign for reelection as general president of the Teamsters.
20. All documents referring or relating to, or containing information about organization, planning, and operation of the 1996 IBT Convention.
21. All documents referring or relating to, or containing information about the following:

    a. Trish Hoppey

    b. John Latz

    c. any individual with the last name of "Golovner".

    d. Convention Management Group.
22. All documents referring or relating to, or containing information about the Household Finance Corporation.
23. All documents referring or relating to, or containing information about, any "affinity credit card" program or other credit card program sponsored by or participated in by the IBT.
24. A list of all bank accounts held by the International Brotherhood of Teamsters including the name of the bank, account number, and bank address.
25. All documents referring or relating to, or containing information about, payments made by the IBT to any official or employee of the Independent Review Board.
26. Unless otherwise indicated, the time period covered by this subpoena is between January 1991 and December 1997.

# Appendix B. Examples of White House Response to Congressional Requests

**THE WHITE HOUSE**

**November 4, 1982**

**MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES**

**SUBJECT: Procedures Governing Responses to Congressional Request for Information**

The policy of this administration is to comply with Congressional Requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch. While this Administration, like its predecessors, has an obligation to protect the confidentiality of some communications, executive privilege will be asserted only in the most compelling circumstances, and only after careful review demonstrates that assertion of the privilege is necessary. Historically, good faith negotiations between Congress and the executive branch has minimized the need for invoking executive privilege, and this tradition of accommodation should continue as the primary means of resolving conflicts between the Branches. To ensure that every reasonable accommodation is made to the needs of Congress, executive privilege shall not be invoked without specific Presidential authorization.

The Supreme Court has held that the Executive Branch may occasionally find it necessary and proper to preserve the confidentiality of national security secrets, deliberative communications that form a part of the decision-making process, or other information important to the discharge of the Executive Branch's constitutional responsibilities. Legitimate and appropriate claims of privilege should not thoughtlessly be waived. However, to ensure that this Administration acts responsibly and consistently in the exercise of its duties, with due regard for the responsibilities and prerogatives of Congress, the following procedures shall be followed whenever Congressional requests for information raise concerns regarding the confidentiality of the information sought:

1. Congressional requests for information shall be complied with as promptly and as fully as possible, unless it is determined that compliance raises a substantial question of executive privilege. A "substantial question of executive privilege" exists if disclosure of the information requested might significantly impair the national security (including the conduct of foreign relations), the deliberative processes of the Executive Branch or other aspects of the performance of the Executive Branch's constitutional duties.

2. If the head of an executive department or agency ("Department Head") believes, after consultation with department counsel, that compliance with a Congressional request for information raises a substantial question of executive privilege, he shall promptly notify and consult with the Attorney General through the Assistant Attorney General for the Office of Legal Counsel, and shall also promptly notify and consult with the Counsel to the President. If the information requested of a department or agency derives in whole or in part or from information received from another department or agency, the latter entity shall also be consulted as to whether disclosure of the information raises a substantial question of executive privilege.

3. Every effort shall be made to comply with the Congressional request in a manner consistent with the legitimate needs of the Executive Branch. The Department Head, the Attorney "General and the Counsel to the President may, in the exercise of their discretion in the

circumstances, determine that executive privilege shall not be invoked and release the requested information.

4. If the Department Head, the Attorney General or the Counsel to the President believes, after consultation, that the circumstances justify invocation of executive privilege, the issue shall be presented to the President by the Counsel to the President, who will advise the Department Head and the Attorney General of the President's decision.
5. Pending a final Presidential decision on the matter, the Department Head shall request the Congressional body to hold its request for the information in abeyance. The Department Head shall expressly indicate that the purpose of this request is to protect the privilege pending a Presidential decision, claim of privilege.
6. If the President decides to invoke executive privilege, the Department Head shall advise the requesting Congressional body that the claim of executive privilege is being made with the specific approval of the President.

Any questions concerning these procedures or related matters should be addressed to the Attorney General, through the Assistant Attorney General for the Office of Legal Counsel, and to the Counsel to the President.

**Ronald Reagan**

**THE WHITE HOUSE**

**September 28, 1994**

**MEMORANDUM FOR ALL EXECUTIVE DEPARTMENT AND AGENCY GENERAL COUNSELS**

**FROM: LLOYD N. CUTLER, SPECIAL COUNSEL TO THE PRESIDENT**

**SUBJECT: Congressional Requests to Departments and Agencies for Documents Protected by Executive Privilege**

The policy of this Administration is to comply with congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch. While this Administration, like its predecessors, has an obligation to protect the confidentiality of core communications, executive privilege will be asserted only after careful review demonstrates that assertion of the privilege is necessary to protect Executive Branch prerogatives.

The doctrine of executive privilege protects the confidentiality of deliberations within the White House, including its policy councils, as well as communications between the White House and executive departments and agencies. Executive privilege applies to written and oral communications between and among the White House, its policy councils and Executive Branch agencies, as well as to documents that describe or prepares for such communications (e.g. "talking points"). This has been the view expressed by all recent White House Counsels. In circumstances involving communications relating to investigations of personal wrongdoing by government officials, it is our practice not to assert executive privilege, either, in judicial proceedings or in congressional investigations and hearings. Executive privilege must always be weighed against other competing governmental interests, including the judicial need to obtain relevant evidence, especially in criminal proceedings, and the congressional need to make factual findings for legislative and oversight purposes.

In the last resort, this balancing is usually conducted by the courts. However, when executive privilege is asserted against a congressional request for documents, the courts usually decline to intervene until after the other two branches have exhausted the possibility of working out a

satisfactory accommodation. It is our policy to work out such an accommodation whenever we can, without unduly interfering with the President's need to conduct frank exchange of views with his principal advisors.

Historically, good faith negotiations between Congress and the Executive Branch have minimized the need for invoking executive privilege.

Executive privilege belongs to the President, not individual departments or agencies. It is essential that all requests to departments and agencies for information of the type described above be referred to the White House Counsel before any information is furnished. Departments and agencies receiving such request should therefore follow the procedures set forth below, designed to ensure that this Administration acts responsibly and consistently with respect to executive privilege issues, with due regard for the responsibilities and prerogatives of Congress:

> First, any document created in the White House, including a White House policy council, or in a department or agency, that contains the deliberations of, or advice to or from, the White House, should be presumptively treated as protected by executive privilege. This is so regardless of the document's location at the time of the request or whether it originated in the White House or in a department or agency.
>
> Second, a department or agency receiving a request for any such document should promptly notify the White House Counsel's Office, and direct any inquiries regarding such a document to the White House Counsel's Office.
>
> Third, the White House Counsel's Office, working together with the department or agency (and, where appropriate, DOJ), will discuss the request with appropriate congressional representatives to determine whether a mutually satisfactory recommendation is available.
>
> Fourth, if efforts to reach a mutually satisfactory accommodation are unsuccessful, and if release of the document would pass a substantial question of executive privilege, the Counsel to the President will consult with DOJ and other affected agencies to determine whether to recommend that the President invoke the privilege.

We believe this policy will facilitate the resolution of issues relating to disclosures to Congress and maximize the opportunity for reaching mutually satisfactory accommodations with Congress. We will of course try to cooperate with reasonable congressional requests for information in ways that preserve the President's ability to exchange frank advice with his immediate staff and the heads of the executive departments and agencies.

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