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Congressional Oversight Manual

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Committees of Congress

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Congressional Oversight Manual

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."

SUMMARY

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Contents

Introduction to Congressional Oversight and the *Oversight Manual* 1
The *Oversight Manual* 1
How to Use This Manual 1
The Purposes of Oversight 2
Authority to Conduct Oversight 6
Principal Statutory Authority: Illustrative Examples 8
Illustrative Examples of House and Senate Rules on Oversight 13
The Oversight Process 17
Oversight in Three Key Questions 17
Question 1: Which Issues Warrant Oversight? 17
Question 2: How to Get the Desired Information? 19
Question 3: What Can Be Done with This Information? 20
Congress as an Oversight Body 20
Congressional Participants in Oversight 20
Oversight Coordination 22
General Techniques of Ensuring Oversight Coordination 23
Oversight Through Legislative and Investigative Processes 23
Investigative Oversight 29
Historical Background 30
Constitutional Authority to Conduct Oversight and Investigative Inquiries 32
The Constitutional Scope of the Investigative Power: Legislative Purpose 33
Legislative Purpose and Investigations Involving the President 37
Authority of Congressional Committees 39
Jurisdiction 40
Committee Rules 41
Legal Tools Available for Oversight and Investigations 41
Hearings 42
Deposition Authority 43
The Subpoena Power 45
Responding to Non-Compliance: Subpoena Enforcement 48
Criminal Provisions Protecting the Investigative Power 55
Limitations on Congressional Authority 56
Constitutional Limitations 56
Common-Law Privileges 61
Executive Privilege 64
Statutory Limit on Congressional Access to Information 67
Classified Material 68
Individual Member Authority to Conduct Oversight and Investigations 71
Specialized Investigations 73
Selected Oversight Techniques 76
Identifying Relevant Committee Jurisdiction 76
Orientation and Periodic Review Hearings with Agencies 76
Casework 77
Performance Audits 78
Monitoring the *Federal Register* 79

Monitoring the *Unified Agenda* ... 79
Special Studies and Investigations by Staff, Support Agencies, Outside Contractors, and Others ... 80
Communicating with the Media ... 80
Press Gallery Offices ... 81
Resolutions of Inquiry ... 81
Limitations and Riders on Appropriations ... 82
Legislative Veto and Advance Notice ... 84
Independent Counsel ... 85
Reporting, Testimonial, Notice, and Consultation, Requirements ... 88
Reporting Requirements ... 88
Testimony Requirements ... 89
Notice and Prior Consultation ... 89
Statutory Oversight Enablers ... 90
Statutory Offices of Inspector General ... 93
Inspector General Act of 1978 ... 94
Purpose and Role ... 94
Types and Categories ... 95
Authorities and Responsibilities ... 96
Oversight Jurisdiction ... 97
Reporting Requirements ... 97
Independence ... 97
Budget Formulation ... 98
Appropriations ... 98
Appointment and Removal Methods ... 99
Coordination and Oversight ... 100
Oversight Information Sources and Consultant Services ... 101
Congressional Research Service ... 101
Congressional Budget Office ... 102
Government Accountability Office ... 103
Offices of Senate Legal Counsel and House General Counsel ... 104
Senate Legal Counsel ... 104
House General Counsel ... 105
Office of Management and Budget ... 106
Budget Information ... 107
Nonfederal Information Resources ... 109

Tables

Table 1. Special Investigative Authorities Explicitly Provided to Selected Investigating Committees ... 74
Table 2. Press Gallery Names and Websites ... 81

Appendixes

Appendix A. Illustrative Subpoena ... 111
Appendix B. Examples of White House Response to Congressional Requests ... 118

Contacts

Author Information..... 121

Introduction to Congressional Oversight and the *Oversight Manual*

Writing in 1993, the Joint Committee on the Organization of Congress defined *congressional oversight* as the "review, monitoring, and supervision of the executive and the implementation of public policy."[1] This definition captures the functional core of Congress's oversight of the executive branch. Nonetheless it is the beginning, rather than an end, of understanding oversight as it has been practiced since the 1st Congress. As outlined in this manual, the purposes, tools, and practice of congressional oversight extend far beyond the confines of a simple definition.

The *Oversight Manual*

CRS has published the *Congressional Oversight Manual* since 1978. In that time, it has been one of the most comprehensive resources for information on congressional oversight and benefited from the experience and knowledge of dozens of CRS experts. Since it was first published, the work of Congress and the resources available to conduct oversight have significantly changed. For instance, the spread of interconnected information technology systems and development of the internet allow for the more rapid and wide-scale collection and preservation of information about the activities of the government and have significantly increased the availability of that data to both the public and Congress. In addition, as outlined below, Congress has developed a wide array of management, oversight, and transparency laws that facilitate oversight, create internal controls within the executive branch, and bring more government data to the public eye.[2]

CRS's primary goal with the *Oversight Manual* is to provide an overview of oversight practice that is useful to congressional stakeholders with varying oversight familiarity. For those new to the Hill, the *Oversight Manual* serves as a broad introduction to the rules and techniques of effective oversight and the array of options available to Congress and its Members. For more experienced hands, the *Oversight Manual*'s broad coverage should make it a useful desk reference for both existing oversight techniques and recent developments on issues relevant to the practice of oversight.

How to Use This Manual

As its name implies, the *Oversight Manual* is intended to be a guidebook for congressional oversight. To that end, while it is designed to allow for cover-to-cover reading, CRS understands that many readers will be looking for specific information relevant to particular oversight activity. Therefore, CRS has organized the *Oversight Manual* in a manner that will allow for easy navigation from the table of contents.

A large share of the *Oversight Manual* is devoted to a technical discussion of the legal and procedural parameters of Congress's oversight activities and a survey of certain well-established techniques and tools for conducting oversight.[3] Nonetheless, the initial sections provide a more

[1] U.S. Congress, Joint Committee on the Organization of Congress, *Organization of Congress: Final Report*, committee print, 103rd Cong., 1st sess., December 1993, S.Rept. 103-215; H.Rept. 103-413 (Washington: GPO, 1993), p. 150.

[2] See "Statutory Oversight Enablers" below.

[3] To supplement this discussion of oversight techniques, the *Oversight Manual* also contains examples of past oversight activity.

general discussion of oversight, including its purposes, Congress's authority, and a high-level review of the oversight process itself. These sections may be especially useful as an introduction to those who are relatively new to oversight.

By necessity, while this manual provides breadth and detail on many oversight issues, it may not discuss every issue related to oversight or provide a precise answer to every question. This is particularly true when it comes to two subjects that receive frequent attention. The first is what might be thought of as the "art" of oversight,[4] including decisions such as the selection of oversight priorities and strategy and the use of limited congressional resources. The second subject involves potential ways to adjust the laws and chamber rules governing oversight. The *Oversight Manual* focuses on oversight as it currently is, not as it might be. While both of these topics are beyond the scope of this guide, CRS experts are available to answer specific questions related to all aspects of oversight, to support specific oversight activities, and to discuss potential adjustments to the rules and practices that enable oversight.

The Purposes of Oversight

Congress has engaged in oversight throughout its history. Investigating how statutes, budgets, and policies are implemented by the executive branch enables Congress to assess whether federal agencies and departments are administering programs in an effective, efficient, and economical manner and to gather information that may inform legislation. The expansion of the national government and bureaucracy has only increased Congress's need for and use of available oversight tools *to check on and check the executive*.[5] This "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.

St. Clair's Defeat: The First Congressional Investigation of the Executive Branch

On November 4, 1791, a U.S. military contingent under the command of General Arthur St. Clair (who was also the governor of the Northwest Territory) was defeated in battle by a coalition of local American Indian tribes near what is now the Ohio-Indiana border. This battle, commonly referred to as St. Clair's Defeat, is notable because it was the subject of what is generally considered to be the first formal investigation by Congress.

Soon thereafter, the House of Representatives of the 2nd Congress established a special committee to investigate the battle and requested not only that General St. Clair and Secretary of War Henry Knox testify before the committee but also that the George Washington Administration produce documents related to the incident. Only a few years removed from the debates of the Constitutional Convention and aware of the precedent-setting role of his Administration, President Washington and his Cabinet (which included, among others, Thomas Jefferson and Alexander Hamilton) carefully considered the appropriate response to the House's request. As recorded by Jefferson in his notes, Washington concluded that the executive branch should "communicate such papers as the public good would permit and ought to refuse those the disclosure of which would injure the public." Washington then decided that, in the case of St. Clair's Defeat, cooperation with Congress was appropriate.

In addition to being the first major oversight investigation by Congress, this case established two important precedents that continue to shape the relationship between Congress and the presidency to this day. First is the assumption that compliance with congressional request should be the default for presidential Administrations. Second is the argument that the President may decline to provide certain information in some circumstances if doing so would be in the public interest. The second point is directly related to the ongoing debate about the scope and nature of executive privilege.

[4] For a report on oversight that engages with some of these issues, see Project on Government Oversight, *The Art of Congressional Oversight* (Washington, DC: Project on Government Oversight, 2019), http://www.pogoarchives.org/m/coi/pogo-the-art-of-congressional-oversight-handbook.pdf.

[5] See, for example, letter from Sen. Charles Grassley to President Donald Trump, June 7, 2017, https://www.judiciary.senate.gov/imo/media/doc/2017-06-07%20CEG%20to%20DJT%20(oversight%20requests).pdf.

Sources: Louis Fisher, *The Politics of Executive Privilege* (Durham, NC: Carolina Academic Press, 2004), pp. 10-11; and *Thomas Jefferson, The Writings of Thomas Jefferson, vol. 1,* edited by Richard H. Johnston, Albert E. Bergh, and Andrew A. Lipscomb (Washington, DC: Thomas Jefferson Memorial Association, 1903), pp. 303-305.

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."[6]

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.

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

Ensure Executive Compliance with Statutory Requirements and 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. This purpose grows in importance as Congress delegates more rulemaking authority to agencies.

The Congressional Review Act

The Congressional Review Act (CRA, P.L. 104-121) is a tool that Congress may use to overturn regulations issued by federal agencies. The CRA, which was enacted in 1996, requires agencies to report on their rulemaking activities to Congress. The CRA was intended to reassert control over agency rulemaking by establishing a special set of expedited or "fast track" legislative procedures, particularly in the Senate, for considering legislation to overturn rules.

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.

[6] Woodrow Wilson, *Congressional Government* (Boston: Houghton Mifflin, 1885), p. 303. More recently, Professor Josh Chafetz, a scholar of Congress and its role in the federal government in the 21st century, has referred to this function as "congressional overspeech." Josh Chafetz, "Congressional Overspeech," *Fordham Law Review*, vol. 89 (2020), p. 596.

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. Information about program performance may be useful to Congress as it fulfills its roles as both legislator and appropriator and makes decisions about government programs and the amount of funding they will receive.

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.

GAO's High-Risk List

Since 1990, GAO has operated its "High-Risk Program" to monitor and report on identified aspects of government operations that GAO determines to be at high risk of waste, fraud, abuse, and mismanagement. Over this period, GAO has added and removed a number of programs and operations from what is commonly referred to as the High-Risk List based on evaluation criteria developed by GAO. Typically, GAO publishes an update to its report on the High-Risk List every two years, coinciding with the start of a new Congress. The High-Risk List has become a popular tool for Congress to identify programs and other activities that may benefit from additional monitoring by committees.

Sources: U.S. Government Accountability Office, *High Risk Series: Substantial Efforts Needed to Achieve Greater Progress on High-Risk Areas*, GAO-19-157SP, March 6, 2019, https://www.gao.gov/products/GAO-19-157sp; and U.S. Congress, House Committee on Oversight and Government Reform, *Exploring GAO's High-Risk List and Opportunities for Reform*, 113th Cong., 1st sess., February 14, 2013, 113-3 (Washington: GPO, 2013).

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).

Draw Public Attention to Issues

Congressional oversight can provide Congress and its Members with the opportunity to highlight issues, activities of the government, and other events that they wish to bring to the attention of the public. In some instances, Congress may believe that it will be better able to achieve a goal if public pressure or energy is directed to a particular matter and that oversight activities may be one way to generate that attention.

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,
- signal policy preferences to agencies,
- 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

Congress's authority to conduct oversight comes from the Constitution and is informed by Supreme Court decisions, laws, and House and Senate rules. 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."[7]

The investigative authority of Congress has been broadly interpreted by an array of Supreme Court decisions. For example, in *Watkins v. United States*,[8] 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).

There are also numerous laws that impact how Congress conducts oversight. Despite its lengthy heritage, oversight was not given explicit recognition in public law until enactment of the Legislative Reorganization Act of 1946.[9] That act required House and Senate standing committees to exercise "*continuous watchfulness*" over programs and agencies within their jurisdictions.

Finally, 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

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

[8] 354 U.S. 178 (1957).

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

committee to include regulatory impact statements in committee reports accompanying legislation.

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."[10] 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.[11]
- *The power to make all laws for "carrying into Execution" Congress's own enumerated powers as well as those of the executive branch.* Article I grants Congress a 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.[12] 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."[13] 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.[14]
- *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

[10] U.S. Const. art. I, §9, cl. 7.

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

[12] U.S. Const. art. I, §8.

[13] U.S. Const. art. I, §8, cl. 18.

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

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 oversight tool to investigate alleged executive and judicial misbehavior and to eliminate such misbehavior through the conviction and removal from office of the offending individuals.[15]

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 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). Other noteworthy laws are listed below.

- *1912 anti-gag legislation and whistleblower protection laws for federal employees:*
  - The *Lloyd-La Follette 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."

[15] See U.S. Const. art. II, §4.

- 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 713 of the *Consolidated Appropriations Act, 2020* (P.L. 116-93) 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 743 of the *Consolidated Appropriations Act, 2020* (P.L. 116-93) 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 nondisclosure 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 12958;[16] 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

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

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.
  - 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 hiring, 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.[17]
- *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

[17] 86 Stat. 771 (1972).

(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):
  - 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 Capabilities

Separate from expanding Congress's own authority and resources directly, Congress has strengthened its oversight capabilities indirectly by establishing many ongoing processes and institutions through which other actors may track developments and identify issues that merit Congress's attention. Some scholars have characterized this as "fire alarm" oversight.[18] From this perspective, it is possible that

[18] See Mathew D. McCubbins and Thomas Schwartz, "Congressional Oversight Overlooked: Police Patrols versus Fire Alarms," *American Journal of Political Science*, vol. 28, no. 1 (February 1984), p. 175.

> the bureaucracy might not pursue Congress's goals. But citizens and interest groups can be counted on to sound an alarm in most cases in which the bureaucracy has arguably violated Congress's goals. Then Congress can intervene to rectify the violation. Congress has not necessarily relinquished legislative responsibility to anyone else. It has just found a more efficient way to legislate.[19]

Congress has done this, for instance, by 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 ability of the public and interested stakeholders to monitor activities of the President and executive agencies and, at the same time, provide additional information and oversight-related analyses to Congress. In some cases, Congress has created oversight processes within the executive branch in which actors in agencies are statutorily required to exercise oversight over certain activities and make information known to Congress and the public. These statutory provisions include, but are not limited to, the following:[20]

- *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 branch'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

[19] McCubbins and Schwartz, "Congressional Oversight Overlooked."

[20] Many of these statutes are discussed in CRS Report RL30795, *General Management Laws: A Compendium*, by Clinton T. Brass et al. (available to congressional clients upon request). For an analysis of themes that cut across these statutes, see CRS Report RL32388, *General Management Laws: Major Themes and Management Policy Options*, by Clinton T. Brass. See also Clinton T. Brass and Wendy Ginsberg, "Congress Evolving in the Face of Complexity: Legislative Efforts to Embed Transparency, Participation, and Representation in Agency Operations," 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.

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[21] 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

- 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).

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

- 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 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 these 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, Ethics, and Rules) 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, clauses 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).

The House Select Subcommittee on the Coronavirus Crisis

On April 23, 2020, the House passed H.Res. 938, which created the Select Subcommittee on the Coronavirus Crisis of the House Committee on Oversight and Reform. Similarly to previous select committees dedicated to a specific issue, the select subcommittee was directed by the resolution to "conduct a full and complete investigation and study" and to issue a final report to the House on a number of specific issues related to the impact of the Coronavirus Disease 2019 (COVID-19) pandemic and the federal government's response (See H.Res. 935 for the operational text regarding the select subcommittee). The select subcommittee, which was retained for the 117th Congress, was able to hold a number of briefings and hearings, release reports, and request information from the executive branch as the pandemic and the government's response evolved.

While a large number of committees and subcommittees in both chambers have oversight jurisdiction relevant to specific aspects of the pandemic and pandemic response, the House was able to both use and adapt its standing rules to create a subcommittee tasked with overseeing and investigating the issue as a whole.

Senate Rules

Under Senate rules,[22] 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 oversight jurisdiction over government operations generally, including the U.S. Department of Homeland Security. 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 submitting recommendations as it deems necessary to the Senate;

[22] The rules of the Senate are available at https://www.rules.senate.gov/rules-of-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 its chair, Senator Harry Truman), which investigated fraud and mismanagement of the nation's war program. The Truman Committee ended in 1948, but the chair of the Government Operations Committee 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.

The Oversight Process

There are probably as many ways to conduct oversight as there are issues Members and committees might want to oversee. Congress's oversight-related activities could conceivably range from day-to-day activities, such as assisting constituents in their interactions with agencies, to much more formal actions, such as impeachment proceedings.[23] Nonetheless, it is possible to sketch the broad outlines of oversight processes with a mind toward the basic question: *How does one conduct oversight?*

Oversight in Three Key Questions

The oversight process might likely include a series of questions that are frequently relevant to planning for and executing oversight actions. Such questions, though not a comprehensive guide to the oversight process, may serve to succinctly describe some broad contours and identify some important issues that may warrant consideration. While the process outlined within these questions has a beginning, a middle, and an end, oversight will not always follow such a clear path. It has the potential to take Congress in unexpected directions and may not always unfold in a typical, or even predictable, manner.

Question 1: Which Issues Warrant Oversight?

Any information that a Member or his or her staff learns about the operations of the executive branch might become the basis for additional oversight. Such information can come from a wide variety of sources and in many forms. Congress might receive information from constituents, agency officials (who may or may not be acting as whistleblowers), inspectors general, GAO, interest groups, or the media. Information can also come in other forms, including congressionally mandated reports and other government publications, agency responses to

[23] Because of the variety of options available to committees and Members in the performance of their duties, the *Oversight Manual* does not attempt to provide a technical set of step-by-step directions through any particular oversight action. For such a guide for investigative hearings, see Morton Rosenberg, *When Congress Comes Calling: A Study on the Principles, Practices, and Pragmatics of Legislative Inquiry* (Washington, DC: The Constitution Project, 2017), pp. 33-38.

questions from Members during or outside of committee hearings, or personal observations of executive branch activities.

Fire Alarms and Police Patrols

One of the most influential recent models of congressional oversight identifies two principal strategies employed by Congress: "fire alarms" and "police patrols." According to professors Matthew McCubbins and Thomas Schwartz, "fire alarms" are the "system of rules, procedures, and informal practices that enable individual citizens and organized interest groups to examine administrative decisions, to charge executive agencies with violating congressional goals, and to seek remedies from the agencies, courts, and Congress itself." Statutes that promote transparency and establish internal controls in the executive branch can be thought of as fulfilling this role and allow Congress to respond with additional oversight when an "alarm" is sounded.

"Police patrols," on the other hand, reflect oversight that occurs when "Congress examines a sample of executive-agency activities, with the aim of detecting and remedying any violations of legislative goals." This style of oversight is more active and most similar to what is traditionally understood to be congressional oversight, including holding hearings, mandating reports and studies, and informally interacting with agency officials.

Over the past half-century, Congress has increased opportunities for "fire alarm" oversight by passing laws that promote transparency and increase internal executive branch controls. While statutes like this may have both positives and negatives in comparison to "police patrol" style techniques, they undoubtedly expand opportunities for Congress and the public to learn about the activities of the executive branch and may allow Congress to more effectively deploy its oversight resources. Of course, this style might also create drawbacks or trade-offs for Congress to consider as well.

Source: Mathew D. McCubbins and Thomas Schwartz, "Congressional Oversight Overlooked: Police Patrols and Fire Alarms," *American Journal of Political Science*, vol. 28, no. 1 (February 1984), pp. 165-179.

The decision about which potential oversight matters to pursue is, ultimately, based on the judgment of party leadership, committees, and individual Members and may include factors that are outside the scope of the *Oversight Manual*.[24] However, there are some logistical considerations that may be relevant to these discussions in some cases. Those considerations might include Congress's authority to conduct oversight, the resources required to successfully complete an oversight project, and the anticipated outcome of successful oversight.

Authority to Oversee

While Congress's authority to conduct oversight is expansive, it is not unlimited. Cases may arise where it is not entirely clear whether Congress has the authority to take a specific action or gather particular information. While potentially unresolved questions about the limits of Congress's oversight authority may not dissuade Congress from conducting oversight in those areas, understanding the issues that could arise when considering oversight options might be useful information when determining whether to proceed.

Resources

Oversight has costs. Of particular importance are the staff and Member time devoted to a particular activity, both of which can be scarce resources.[25] Any activity, including oversight, will

[24] A classic study of congressional oversight by political scientist Morris Ogul identifies seven "opportunity factors" that impact the likelihood of oversight. In Ogul's discussion those factors are legal authority to conduct oversight, staff resources, the subject matter at issue, committee structure, status of the interested Members on the relevant committee, relations with the executive branch, and the priorities of Members. Morris S. Ogul, *Congress Oversees the Bureaucracy* (Pittsburgh, PA: University of Pittsburgh Press, 1976), pp. 11-22.

[25] See, for example, U.S. Congress, House Select Committee on the Modernization of Congress, *Final Report*, 116th Cong., 2nd sess., October 2020, pp. 98-127, https://modernizecongress.house.gov/imo/media/doc/ModernizationCommittee_10152020r1Compressed%20(newest%20gpo%20report).pdf.

have opportunity costs that may need to be weighed against other potential activities. Such consideration might guide Members and committees to choose between potential oversight opportunities or between oversight and other activities.

Anticipated Outcome

Another practical question that might be considered is the probable outcome for a particular oversight action. While it is not possible to know, in advance, what exactly will result from a specific oversight activity, experienced Members and staff may nonetheless have a well-informed idea of how and where a project is likely to go and how long it might take to get there. An educated guess on the information that is expected to come from particular oversight activity may be valuable in determining whether to proceed with that activity.

Question 2: How to Get the Desired Information?

Once the decision to take on a particular oversight matter has been made, a plan for that oversight must be formulated. Similar to the previous section, this section identifies more specific questions that may be helpful in this process: What information is available, where is it, and how can Congress get the information? As with the other steps in the process, the answers to these questions will depend, in large part, upon the particular goals of the Members or committees conducting oversight.

What Information Is Available and Who Has It?

Having identified a specific or general goal for an oversight action, it will likely be useful to determine what relevant information is available to Congress and which agency or official is likely to have that information. In some cases, the answer to this question will be apparent based on the issue itself. For instance, when investigating an allegation of mismanagement within an agency, the agency's own records and officials are likely to be a primary source of information on the operations of the agency.

There are many instances, however, in which it might be more difficult to make these determinations. First, it might not be obvious that certain information would be useful to Congress's activities even if it is readily available. Second, it may be difficult to determine where documents or officials with relevant information can be found, even if Congress has a good sense of the information it wants. Third, in some cases, certain data that Congress can imagine would be useful for oversight purposes simply may not exist. Particularly for complex oversight activities, there is no single strategy for overcoming these potential hurdles, but careful research, a willingness to ask questions, and the ability to think creatively from the beginning to the end of the process will all be helpful skills. Sometimes, the oversight process may even reveal unexpected information sources and additional issues.

The Watergate Investigation and President Nixon's Oval Office Tapes

Probably the best known of all congressional oversight actions are the investigations of the Watergate break-in that culminated in the resignation of President Richard M. Nixon on August 9, 1974. Perhaps the most compelling piece of information to come out of these investigations were taped conversations in the Oval Office involving President Nixon himself. While information came to the public from many sources during the inquiry, the possible existence of a taping system in the Oval Office was first raised by White House advisor John Dean in testimony before the Senate Select Committee on Presidential Campaign Activities. Committee investigative staff followed up on Dean's comments, and the existence of the taping system was confirmed by another Administration official, Alexander Butterfield. The discovery of these tapes, which played an important role in compelling President

Nixon's resignation, might never have occurred had Congress not already been investigating the Watergate break-in.

Source: U.S. Congress, Senate Select Committee on Presidential Campaign Activities, *The Final Report of the Select Committee on Presidential Campaign Activities*, committee print, 93rd Cong., 2nd sess., June 1974, S.Rept. 93-981 (Washington: GPO, 1974).

How Can Congress Get the Information?

Just as important as identifying what relevant information is available and who has it is determining what Congress needs to do to obtain the information. Sometimes gathering information will be one of the biggest challenges Congress faces when conducting oversight. Much of this *Manual* is devoted to the variety of tools available to Congress to obtain information even in the face of resistance from the executive branch.

In many cases, however, information will already be available to Congress, either because disclosure is required by statute or because a federal agency, other organization, or individual has chosen to release the information to Congress or the public. Similarly, it will often be possible to obtain information via direct communication between Members or staff and agency officials. There are strong incentives for agencies to engage with Congress, and they may provide information upon request in many instances.[26]

Question 3: What Can Be Done with This Information?

Some might argue that oversight has value for its own sake because it increases transparency of the executive branch to the public and creates an environment of increased accountability for officials. However, it is also the case that oversight is useful to Congress because it provides information on the state of the government that can be applied when Congress makes decisions on agency budgets, program authorizations, and other legislation.[27] How the knowledge gained from oversight can be applied in those other functions will depend on the nature of that information and the priorities and preferences of Congress. In any case, though, it can be valuable to understand early in the oversight process how the Congress might use the information it may learn. Such knowledge might influence other key decisions such as the timeline, prioritization, and commitment of resources for a particular action.

Congress as an Oversight Body

Congressional Participants in Oversight

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:

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

[27] See, for example, Kenneth Lowande, "Who Polices the Administrative State?," *American Political Science Review*, vol. 112, no. 4 (2018), pp. 874-890.

- 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 a panel's legislative subcommittees from conducting oversight.

Certain House and Senate committees have "special oversight" or "comprehensive policy oversight" of designated subject areas, as noted above.

Members

Oversight is generally considered a committee activity. However, both casework and other project work conducted in Members' personal offices, including 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, an inspector general, 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. Members might choose to publicize this work by releasing staff reports with their findings; sharing information with their constituents, the media, and other stakeholders; or using what they learn to support additional oversight or legislation.

Committee Staff

As issues become more complex, the professional staff of House and Senate committees can provide the expertise required to conduct effective oversight and investigations. Committee staff are expected to 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.

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 staff. 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.

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

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."[28] Despite the passage of time, this statement remains relevant

[28] Lowande, "Who Polices the Administrative State?"

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.

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.[29] 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.[30]

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.

Oversight Through Legislative and Investigative Processes

The general principles and processes outlined above can be applied to any congressional activity that includes oversight. This section identifies major areas of congressional activity and how they relate to and facilitate oversight. Congress has a central role in the development of the budget, the operations of agencies and general management of the executive branch, confirmation of appointees to senior positions across the government, and, of course, the consideration and approval of all legislation.

The Legislative Process

While oversight is frequently considered to be a separate track of congressional activity running adjacent to the body's exercise of legislative authority, there are important ways in which the two

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

[30] House Rule X(2)(d)(2)(A).

activities overlap. Oversight, for instance, can impact decisions on legislation by providing information that influences legislative priorities or identifies areas of interest. In some cases, Congress establishes reporting and study requirements for GAO, inspectors general, and agencies that generate recommendations for agency or congressional action, which in turn provide both oversight information and ideas for potential legislation.

In recent decades, an additional connection between the legislative and oversight powers of Congress has arguably increased in importance. As Congress has expanded its use of statutory tools that facilitate oversight, it has devoted more attention to developing such legislation, overseeing its implementation, and evaluating its effectiveness.[31] In turn, this additional data flowing toward Congress and the public on an ongoing basis can be used to inform work on legislation.

The Budget Process[32]

The Congressional Budget and Impoundment Control Act of 1974,[33] 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.)

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[31] On example of such legislation is the GPRA Modernization Act of 2010 (P.L. 111-352) which, among other things, updated the system for Congress and the executive branch to identify and consider the elimination of reporting requirements that are no longer useful. See CRS Report R42490, *Reexamination of Agency Reporting Requirements: Annual Process Under the GPRA Modernization Act of 2010 (GPRAMA)*, by Clinton T. Brass.

[32] 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.

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

- 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).[34]

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.

The Authorization Process

Through its authorization power, Congress exercises significant control over government agencies. The entire authorization process[35] 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.[36]

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. 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.

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. *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.

[34] 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.

[35] See CRS Report R46497, *Authorizations and the Appropriations Process*, by James V. Saturno.

[36] 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.

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."[37] 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 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 (i.e., the authority of the committees to withhold or reduce appropriations to uncooperative agencies) 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.[38]

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 $79,500,000, for certain activities of the U.S. Trade and Development Agency, Congress added this condition: "Provided, That of the funds appropriated under this heading, not more than $5,000 may be available for representation and entertainment expenses."[39]
5. It may stipulate how an agency's budget can be *reprogrammed* (shifting funds within an appropriations account) or *transferred* (shifted between appropriations accounts).

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.

[37] U.S. Const. art. I, §9, cl. 17. For a more detailed discussion of Congress's appropriations power, see CRS Report R46417, *Congress's Power Over Appropriations: Constitutional and Statutory Provisions*, by Sean M. Stiff.

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

[39] P.L. 116-6, 133 Stat. 293 (2019).

An Example of Nonstatutory Control of Agency Appropriations

The conference report for the third Consolidated Appropriations Act for FY2019 (P.L. 116-6) defines those activities that will be considered reprogramming and provides guidelines for the reprogramming of funds for the Department of the Interior, Environment, and Related Agencies Act. The act requires covered agencies to submit certain reprogramming requests to the Committees on Appropriations for approval. Further requirements for the content of these requests are laid out in the conference report and include "a description of anticipated benefits, including anticipated efficiencies and cost-savings, as well as a description of anticipated personnel impacts and funding changes anticipated to implement the proposal."

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.[40] The roots of Congress's authority to conduct investigations extend back to the British Parliament and the colonial assemblies.[41] In addition, for its impeachment power, the House of Representatives has been described as the "grand inquest of the nation."[42] 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.

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.

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,[43] 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:

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[40] See "Authority to Conduct Oversight" section.

[41] See Marshall Edward Dimock, *Congressional Investigating Committees* (Baltimore: Johns Hopkins Press, 1929), pp. 46-56.

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

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

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."[44] 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.
2. 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.

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[45] and designations under the Vacancies Act.[46]

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.[47] Impeachment offers Congress

- an auxiliary constitutional method for obtaining information that might otherwise not be made available, and
- an implied threat of removal 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.[48] A simple majority is needed in the House to approve articles of impeachment. The Senate has the sole power to try an impeachment.[49] A two-thirds majority is required in the Senate to convict and remove the

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

[45] 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.

[46] 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.

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

[48] U.S. Const. art. II, §2, cl. 5. See CRS Report R45769, *The Impeachment Process in the House of Representatives*, by Elizabeth Rybicki and Michael Greene.

[49] U.S. Const. art. II, §3, cl. 7. See CRS Report R46185, *The Impeachment Process in the Senate*, by Elizabeth Rybicki and Michael Greene.

individual from office. 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.[50]

The impeachment process is 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 Donald Trump in 2021, and 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 impeachment trial of President Bill Clinton and other modern 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,[51] although the procedural steps vary depending upon the stage in the process.
- The Constitution defines the grounds for impeachment as "Treason, Bribery, or other high Crimes and Misdemeanors."[52] However, the meaning and scope of "high Crimes and Misdemeanors" remains in some dispute and depends on the interpretation of individual legislators.[53]
- The Constitution provides for impeachment of the "President, Vice President, and all civil Officers of the United States."[54] While the outer limit of the "civil Officers" language is not altogether clear, past precedents suggest that it covers at least federal judges and senior executive officers.

Investigative Oversight[55]

This section provides an overview of some of the more common legal issues that committees may face in the course of conducting oversight and investigations. It begins by briefly describing the historical development of the legislative "power of inquiry" and follows with a general summary of Congress's authority under the U.S. Constitution to perform oversight and investigations. It then discusses the legal tools commonly used by congressional committees in conducting that oversight as well as the mechanisms used by Congress to enforce its demands for information. The section then briefly discusses possible legal limitations on the investigative power, including those arising from the Constitution, the common law, and statutory restrictions.

[50] 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.

[51] 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.

[52] U.S. Const. art. II, §4.

[53] CRS Report R46013, *Impeachment and the Constitution*, by Jared P. Cole and Todd Garvey.

[54] U.S. Const. art. II, §4.

[55] 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.

Historical Background

The rich and varied history of legislative investigations, which can be traced from the English Parliament to American colonial legislatures and through to the United States Congress, has played a leading role in establishing the nature and contours of the congressional "power of inquiry."[56] This history supports the unmistakable conclusion that the power to investigate has long been considered an essential attribute of legislative bodies.

It is difficult to identify, at least with precision, the emergence of Parliament's protean investigatory powers. By the early 17th century however, Parliament had apparently recognized its power to investigate by requiring—on a case-by-case basis—the attendance of witnesses and the production of documents in furtherance of the body's "duty to inquire into every Step of publick management…."[57] These early investigations carried out by parliamentary committees focused on the king's ministers, in order to oversee their execution of the law, as well as private parties.[58] As the gathering information relating to both the passage of new laws and the administration of existing laws became seen as an essential ingredient of the legislative process, compulsory investigatory powers were provided on a more general and permanent basis to established parliamentary committees of inquiry.[59] This overarching historical notion of the power of inquiry as a necessary component of the legislative power was transported to America, where it was incorporated into the practice of colonial governments and, after independence, to U.S. state governments.[60]

The Constitutional Convention saw almost no discussion of Congress's power to conduct oversight and investigations, although individual Members of the convention appear to have understood Congress to clearly possess "inquisitorial" powers.[61] A proposal to explicitly provide Congress with the power to punish for contempts, a power often used by Parliament as a means to effectuate its investigatory powers, was made but not acted upon.[62] Nevertheless, it is likely that

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[56] *See* Barenblatt v. United States, 360 U.S. 109, 111 (1959) ("The power of inquiry has been employed by Congress throughout our history, over the whole range of the national interests concerning which Congress might legislate or decide upon due investigation not to legislate….").

[57] 13 R. CHANDLER, HISTORY & PROCEEDINGS OF THE HOUSE OF COMMONS 172 (1743); ERNEST J. EBERLING, CONGRESSIONAL INVESTIGATIONS: A STUDY OF THE ORIGIN AND DEVELOPMENT OF THE POWER OF CONGRESS TO INVESTIGATE AND PUNISH FOR CONTEMPT 34 (1928) (noting that Parliament viewed the subpoena power as "too serious a matter for general delegation").

[58] James M. Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 HARV. L. REV. 153, 161-62 (1926).

[59] *Id*. at 163-64.

[60] *Id*. at 165-168 (highlighting examples of Colonial and State legislatures engaging in investigations). While English Parliamentary practice often informs the powers of Congress, it is clear that the usefulness of parliamentary precedents in defining Congress's investigatory powers is somewhat limited due to significant distinctions between the two legislative bodies. As the Supreme Court has repeatedly suggested, Parliament's investigatory and contempt powers were derived from the bodies authority to exercise a "blend[]" of both legislative and judicial powers. Marshall v. Gordon, 243 U.S. 521, 533 (1917) (concluding that the English contempt power "rested upon an assumed blending of legislative and judicial authority possessed by the Parliament"). Congress, under the separation of powers doctrine, exercises no judicial power. *Kilbourn*, 103 U.S. at 192 (1880) (suggesting that "no judicial power is vested in the Congress"). Thus, unlike Parliament, any authority to investigate and subsequently enforce its orders must rest solely on legislative authority provided to the body by the Constitution.

[61] *See e.g.*, 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 206 (1937) (remarks of George Mason) (Members of Congress "are not only Legislators but they possess inquisitorial powers. They must meet frequently to inspect the Conduct of the public offices"); JAMES WILSON 3 THE WORKS OF THE HONOURABLE JAMES WILSON 219 (1804) (noting the traditional power of legislators to act as "grand inquisitors of the realm").

[62] *See* 2 FARRAND, *supra* note 61, at 340; JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE

the general view was that no express enumeration of the power of inquiry or the power to punish for contempt was considered necessary because the Framers' conception of legislative power, based on centuries of consistent practice by both Parliament and colonial legislatures, included the ability to gather information relevant to the conduct of the House and Senate's legislative functions.[63] As one scholar has put it, the contemporary understanding of legislative power at the time of the adoption of the Constitution "possessed a content sufficiently broad to include the use of committees of inquiry with powers to send for persons and paper."[64]

Long-standing and unbroken congressional practice confirms this view. Congress has exhibited a robust view of its own investigatory powers from the very outset, especially in regard to the legislature's role in overseeing the administration of government.[65] During the 1st Congress, the House appointed five Members to investigate Senator Robert Morris's prior activities as Superintendent of Finance under the Articles of Confederation.[66] The House later established the first special investigating committee in 1792 for the purpose of inquiring into Major General Arthur St. Clair's disastrous military excursion into the Northwest Territory in which nearly 700 federal troops were killed by the Western Confederacy of American Indians.[67] The mere act of authorizing such a committee set an important precedent in that adoption of the resolution was preceded by a debate over whether it was appropriate, and indeed constitutional, for the House to investigate the matter or whether it was preferable to urge the President to carry out the inquiry.[68] Although some asserted that the House lacked authority to inquire into executive operations, that position was defeated, and the investigating committee was established with clear authority to "call for such persons, papers and records as may be necessary to assist their inquiries."[69]

The investigation itself also established important precedents for Congress's authority to gather information from the executive branch, including in relation to sensitive military matters. After some discussion within Washington's Cabinet of the President's authority to withhold requested information from Congress, the special committee obtained documents from both the War Department and the Treasury Department as well as testimony from Cabinet officials Henry Knox and Alexander Hamilton.[70]

Congress also acted swiftly to use federal law and internal rules to strengthen its investigatory powers. In 1798, Congress enacted a statute recognizing its powers to not only obtain evidence through testimony but to do so from witnesses under oath.[71] The statute specifically authorized the President of the Senate, the Speaker of the House, and a chair of a select committee to administer oaths to witnesses testifying before Congress.[72] During this same time period, both the

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SEPARATION OF POWERS 171 (2017).

[63] Landis, *supra* note 58, at 169-70.

[64] *Id.* at 169.

[65] Hannah v. Larche, 363 U.S. 420, 444, 80 S. Ct. 1502, 1516 (1960) ("The investigative function of [legislative] committees is as old as the Republic."); EBERLING, *supra* note 57, at 33.

[66] 2 ANNALS OF CONG. 1514 (1790); DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801 20 (1997) ("Thus, within a year of its first meeting, in the face of an explicit constitutional challenge, the House of Representatives flatly asserted a broad power to investigate the conduct of a former executive…").

[67] TELFORD TAYLOR, GRAND INQUEST: THE STORY OF CONGRESSIONAL INVESTIGATIONS 17-19 (1974).

[68] *See* 3 ANNALS OF CONG. 490-94 (1792).

[69] TAYLOR, *supra* note 67, at 22.

[70] *Id*. at 23-24.

[71] Act of May 3, 1798, ch. 36, 1 STAT. 554.

[72] *Id*. The power to administer oaths was expanded to all standing committee chairs in 1817. Act of Feb. 8, 1817, ch. 10, 3 STAT. 345. *See also*, *McGrain*, 273 U.S. at 167.

House and Senate began to delegate to ad hoc select committees the authority to call for papers or persons. Committee investigations have continued apace to the modern day, representing a pervasive and nearly ubiquitous aspect of the legislative function,[73] as has Congress's use of statutory provisions and internal chamber to support committee investigations. The investigatory power is therefore thoroughly rooted in history and stands on an equal footing with Congress's other legislative powers.[74]

Constitutional Authority to Conduct Oversight and Investigative Inquiries

Although the "power of inquiry" was not expressly provided for in the Constitution, the Supreme Court has nonetheless described investigations as so central to the legislative function as to be implicit in Article I's vesting of "legislative Powers" in the Congress.[75] In the seminal case of *McGrain v. Daugherty*, a unanimous Supreme Court declared that "the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function."[76] Congressional investigations are therefore properly characterized as an implied constitutional power of Congress.[77] It is a power that serves to both ensure that Congress can make effective and informed legislative decisions and to check executive power, thereby sustaining Congress's role in the United States' constitutional scheme of separated powers.[78]

This power to gather information related to the legislative function is both critical in purpose, as Congress "cannot legislate wisely or effectively in the absence of information," and extensive in scope, as Congress is empowered to obtain pertinent testimony and documents through investigations into nearly any matter properly before the body.[79] In *Eastland v. United States*

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[73] S*ee* Watkins v. United States, 354 U.S. 178, 200 n.33 (1957) (noting that Congress has "assiduously" performed oversight "[f]rom the earliest times in its history").

[74] *Watkins*, 354 U.S. at 187; WOODROW WILSON, CONGRESSIONAL GOVERNMENT 303 (15th ed. 1913) (asserting that the "informing function of Congress should be preferred even to its legislative function"). *See also* J. William Fulbright, *Congressional Investigations: Significance for the Legislative Process*, 18 U. CHI. L. REV. 440, 441 (1951) (describing the power of investigation as "perhaps the most necessary of all the powers underlying the legislative function").

[75] *Watkins*, 354 U.S. at 187 ("The power of the Congress to conduct investigations is inherent in the legislative process.").

[76] *See* McGrain v. Daugherty, 273 U.S. 135, 174 (1927).

[77] *Id.*; *Watkins*, 354 U.S. at 197 (concluding that the investigative power is "justified solely as an adjunct to the legislative process"). Although the Supreme Court has at times referred to the investigative power as an "inherent" power, *id*. at 187, it is perhaps more accurate to refer to it as an implied power. While an inherent power may not be tethered to a textual grant of authority, an implied power is derived by implication from an enumerated power. *See* Scott C. Idleman, *The Emergence of Jurisdictional Resequencing in the Federal Courts*, 87 CORNELL L. REV. 1, 42–43 (2001).

[78] Quinn v. United States, 349 U.S. 155, 160-61 (1955) ("Without the power to investigate—including of course the authority to compel testimony, either through its own processes or through judicial trial—Congress could be seriously handicapped in its efforts to exercise its constitutional function wisely and effectively.") (citations omitted).

[79] *McGrain*, 273 U.S. at 175 ("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."). Congress's oversight function is subject to a variety of legal limitations. *See* Eastland v. United States Servicemen's Fund, 421 U.S. 491, 504 n.15 (1975) ("Although the power to investigate is necessarily broad it is not unlimited…. We have made it clear [] that Congress is not invested with a ''general' power to inquire into private affairs.' The subject of any inquiry always must be one 'on which legislation could be had.'") (citations omitted); Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2031-32 (2020) (noting that the power to conduct investigations is "subject to several limitations" including those arising from "constitutional rights").

Servicemen's Fund, for instance, the Supreme 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."[80] Similarly, in *Watkins v. United States*, the Court emphasized that the "power of the Congress to conduct investigations is inherent in the legislative process."[81] "That power," the Court established, "is broad" and "encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes"[82] and "comprehends probes into departments of the federal government to expose corruption, inefficiency, or waste."[83] Included within the scope of the power is the authority to initiate investigations, hold hearings, request testimony or documents from witnesses, and, in situations where either a government or private party is not forthcoming, compel compliance with congressional requests through the issuance and enforcement of subpoenas.[84]

The Supreme Court most recently reaffirmed both the importance and breadth of Congress's investigatory power in *Trump v. Mazars*.[85] There, the Court observed that "[w]ithout information, Congress would be shooting in the dark, unable to legislate 'wisely or effectively.'" As such, Congress's investigatory powers must be understood to include "inquiries into the administration of existing laws, studies of proposed laws, and 'surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them.'"[86]

The Constitutional Scope of the Investigative Power: Legislative Purpose

Broad as the investigative power may be, it is not unlimited.[87] The Supreme Court has cautioned that because the power to investigate derives from Article I's grant of "legislative powers," it may be exercised only "in aid of the legislative function."[88] No inquiry "is an end in itself" but instead "must be related to, and in furtherance of, a legitimate task of the Congress."[89] The Supreme Court has generally implemented this principle by requiring that compulsory committee investigative actions—including subpoenas for documents or testimony—serve a valid legislative purpose.

This "legislative purpose" requirement is quite generous, permitting investigations into any topic upon which legislation could be had or over which Congress may properly exercise authority.[90] This includes investigations undertaken by Congress to inform itself about how existing laws function, whether new laws are necessary, and if old laws should be repealed or altered.[91]

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

[81] Watkins v. United States, 354 U.S. 178, 187 (1957).

[82] *Id.*

[83] *Id*.

[84] *See McGrain*, 273 U.S. at 175 (noting that the "power of inquiry" was "intended to be effectively exercised, and therefore to carry with them such auxiliary powers as are necessary and appropriate to that end.").

[85] Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2031 (2020).

[86] *Id*. (citing *McGrain*, 273 U.S at 161, 174-75).

[87] The legislative purpose test generally governs the scope of the investigative power granted (implicitly) to each house of Congress by the Constitution. That grant of power is then limited by other constitutional constraints. *Id.* at 2031-32. For a discussion of other constitutional limitations on congressional investigations *see infra* "Constitutional Limitations".

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

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

[90] *Barenblatt*, 360 U.S. at 111.

[91] *Id*.

Investigations into whether the executive branch is complying with its obligation to faithfully execute laws passed by Congress also serve a legislative purpose, as do "probes into departments of the Federal Government to expose corruption, inefficiency or waste."[92] The Supreme Court also appears to have recognized Congress's legitimate role in informing the public "concerning the workings of its government"—a task the legislature has "assiduously performed" since "the earliest times in its history."[93]

In practice, the legislative purpose requirement rarely acts as a significant restriction on legislative investigations, especially those relating to government operations. This is principally because the scope of what constitutes a permissible legislative purpose is broad but also because the application of the legislative purpose test has generally been quite deferential to the investigating committee. For example, in addition to broadly interpreting the scope of the types of investigations that aid the legislative function, the Supreme Court has at times effectively adopted a presumption that committees act with a legislative purpose when engaged in an investigation of governmental activity.[94] This can be seen, for example, in *McGrain*, a case arising out of a congressional investigation of the Attorney General's failure to prosecute certain individuals following the Teapot Dome scandal.[95] Initially, a federal district court had invalidated the congressional committee's attempts to obtain testimony from the Attorney General's brother, a private citizen. The lower court reasoned that the committee's purpose was not legislative in nature but was undertaken to "determine the guilt of the Attorney General" and to "put him on trial," which Congress "has no power to do."[96] The Supreme Court, however, explicitly rejected this characterization of the committee's purpose, holding instead that:

> [T]he subject to be investigated was the administration of the Department of Justice—whether its functions were being properly discharged or were being neglected or misdirected, and particularly whether the Attorney General and his assistants were performing or neglecting their duties…. Plainly the subject was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit.[97]

In light of this oversight role, the Court held that "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."[98]

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

[93] *Id*. at 200, n. 33; *In re* United States Senate Select Comm. on Presidential Campaign Activities, 361 F. Supp. 1270, 1281 (D.D.C. 1973) ("It is apparent as well that a committee's legislative purpose may legitimately include the publication of information."). *But see* Hutchinson v. Proxmire, 443 U.S. 111, 133 (1979) (holding that with respect to Speech or Debate Clause immunity that "the transmittal of [] information by individual Members in order to inform the public and other Members is not a part of the legislative function or the deliberations that make up the legislative process"); Benford v. Am. Broad. Cos., 502 F. Supp. 1148, 1154 (D. Md. 1980) ("The Supreme Court, however, has never advocated a broad reading of the "informing function."). Justice Brennan voiced perhaps the fullest explanation of Congress's "informing function" in his dissenting opinion in *Gravel v. United States*. 408 U.S. 606, 638-64 (1972) (Brennan, J. dissenting). Brennan's position, however, was not adopted by the majority opinion.

[94] *McGrain*, 273 U.S. at 178 (holding that "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"); *id*. ("We are bound to presume that the action of the legislative body was with a legitimate object if it is capable of being so construed …") (citation omitted).

[95] *Id*. at 150-54.

[96] *Ex parte* Daugherty, 299 F. 620, 639-40 (S.D. Ohio 1924).

[97] *McGrain*, 273 U.S. at 177.

[98] *Id*. at 178.

The judiciary's application of the legislative purpose test is informed by other principles that have previously reflected a reluctance to question a committee's reasons for seeking information. The Supreme Court has made clear that when "Congress acts in pursuance of its constitutional power," the courts should not inquire into "the motives which spurred the exercise of" the investigative power.[99] Even evidence of bad intent will not "vitiate" an otherwise valid investigation.[100]

Nor is a committee required to "declare in advance" the purpose of an inquiry or its ultimate legislative or oversight goal.[101] The Supreme Court has stated, "The very nature of the investigative function—like any research—is that it takes the searchers up some 'blind alleys' and into nonproductive enterprises. To be a valid legislative inquiry there need be no predictable end result."[102]

The judicial reluctance to question congressional motives and the general presumption that committees act with a legislative purpose both play a significant role in limiting the effectiveness of raising legislative purpose as a defense to an otherwise valid congressional subpoena. However, the courts have acknowledged at least two general classes of investigations in which Congress may generally lack a legislative purpose: investigations into private conduct with no relation to the legislative function and investigations that usurp functions committed to another branch of government.

Investigations into Private Conduct with No Relation to the Legislative Function

Congress does not act with a legislative purpose when investigating private conduct that has no nexus to the legislative function. In the 1880 decision of *Kilbourn v. Thompson*, the Supreme Court held broadly that Congress does not "possess[] the general power of making inquiry into the private affairs of the citizen."[103] But the Court has subsequently described the "loose language" of *Kilbourn* and its narrow conception of Congress's investigative power as "severely discredited."[104] For example, in discussing the reach of *Kilbourn*, the Court appears to have made a distinction between investigating purely private conduct of private citizens, which typically would not serve a legislative purpose, and investigating the private conduct of public office holders, which may, in some circumstances, serve a legislative purpose due to Congress's role in preserving good government.[105] For example, in *Hutcheson v. United States*, the Court held that

[99] Barenblatt v. United States, 360 U.S. 109, 132 (1959) Judicial attempts to look inside the minds of Members "misperceives the [c]ourt's role, which is not to determine the validity of the legislative purpose by 'testing the motives of committee members' based on public statements." *See* Senate Permanent Subcomm. On Investigations v. Ferrer, 199 F. Supp. 3d 125, 137 (D.D.C. 2016).

[100] *Watkins*, 354 U.S. at 200 (concluding that courts should not "test[] the motives of committee members" when evaluating an investigation's purpose).

[101] *In re* Chapman, 166 U.S. 661, 670 (1897) (noting that "it was certainly not necessary that the resolutions should declare in advance what the Senate meditated doing when the investigation was concluded").

[102] *Eastland*, 421 U.S. at 509.

[103] 103 U.S. 168, 190 (1881). In that case the Court invalidated the House's imprisonment of a member of the public during an investigation into the collapse of a private real estate pool. Taking a very restrictive view of Congress's investigation authorities, the opinion also questioned the House's authority to punish witnesses for non-compliance with investigative requests unless the inquiry was connected to either impeachment or the House's power to judge the election and qualification of its Members. *Id*.

[104] United States v. Rumely, 345 U.S. 41, 46 (1953); Hutcheson v. United States, 369 U.S. 599, 613 n.16 (1962).

[105] The Court also appears to have distinguished investigations into private conduct of the President. *See infra*

"[a]t most, *Kilbourn* is authority for the proposition that Congress cannot constitutionally inquire 'into the private affairs of individuals who hold no office under the government' when the investigation 'could result in no valid legislation on the subject to which the inquiry referred.'"[106]

Despite its criticism of *Kilbourn*, the Court has still expressed concern that congressional investigations into private conduct could infringe on personal privacy. In the 1957 decision of *Watkins v. United States*, the Court, in an opinion overturning a criminal contempt of Congress conviction on due process grounds, also discussed more generally Congress's investigative powers and described the legislative branch as having "no general authority to expose the private affairs of individuals without justification in terms of the functions of Congress."[107] Although acknowledging that "[t]he public is, of course, entitled to be informed concerning the workings of its government," that justification for government oversight "cannot be inflated into a general power to expose where the predominant result can only be an invasion of the private rights of individuals."[108] As such, an investigation into "individual affairs is invalid if unrelated to any legislative purpose," as are attempts to "expose for the sake of exposure."[109]

Functions Committed to Another Branch of Government

A second class of investigations that may lack a legislative purpose are those that appear to usurp functions exclusively committed to another branch of government. In *Barenblatt v. United States* the Supreme Court explained, "Lacking the judicial power given to the Judiciary, [Congress] cannot inquire into matters that are exclusively the concern of the Judiciary. Neither can it supplant the Executive in what exclusively belongs to the Executive."[110] The Court elaborated on this separation of powers line of reasoning in *Watkins*, where it stated that Congress is not "a law enforcement or trial agency. These are functions of the executive and judicial departments of government.… Investigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible."[111] Most recently, in *Mazars,* the Court reaffirmed that

> Congress may not issue a subpoena for the purpose of "law enforcement," because "those powers are assigned under our Constitution to the Executive and the Judiciary." Thus Congress may not use subpoenas to "try" someone "before [a] committee for any crime or wrongdoing."[112]

While it is clear that Congress cannot arrogate to itself either the executive or judicial function by attempting to directly enforce the law or otherwise prosecute and try an individual for wrongdoing, it is not clear how this separation of powers constraint applies to investigations touching on other exclusive functions of the executive or judicial branches.[113] In *Tenney v. Brandhove*, for example, the Court suggested that "[t]o find that a committee's investigation has

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"Legislative Purpose and Investigations Involving the President".

[106] *Rumely*, 345 U.S. at 46.

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

[108] *Id*. at 200.

[109] *Id*. at 198, 200.

[110] 360 U.S. 109, 112 (1959).

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

[112] Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2032 (2020).

[113] Congress's impeachment function, which has at time been characterized as possessing "judicial" features, arguably represents an exception to this general prohibition. *See* CRS Report R45983, *Congressional Access to Information in an Impeachment Investigation*, by Todd Garvey at 6-11.

exceeded the bounds of legislative power it must be obvious that there was a usurpation of functions exclusively vested in the Judiciary or the Executive."[114]

Legislative Purpose and Investigations Involving the President

The legislative purpose test appears to apply with greater scrutiny and less deference to Congress when a committee is investigating the President. In *Trump v. Mazars*, President Trump brought suit in his personal capacity to block his banks and accounting firm from complying with various committee subpoenas for the President's personal financial records.[115] Applying the deferential legislative purpose standard used by the Court in previous cases,[116] the opinions below concluded that the committees had a valid legislative purpose for seeking the President's personal records.[117] On appeal to the Supreme Court, *Mazars* presented the Court with its first opportunity to directly consider the legislative purpose test in a congressional investigation of the President.

The *Mazars* opinion clarified that in the context of congressional investigations the President must, as a constitutional matter, be treated differently than others.[118] The opinion described the courts below as having mistakenly "treated these cases much like any other," applying standards and principles established in "precedents that do not involve the President's papers."[119] Subpoenas for the President's personal records, the Court determined, involve significant separation of powers concerns that trigger a different, more scrutinizing approach to the scope of Congress's power. But the Court rejected as inappropriate invitations to import the heightened "demonstrated, specific need" or "demonstrably critical" standards that had been used in prior cases involving executive privilege—a privilege not at issue in *Mazars* due to the personal nature of the documents sought.[120] Instead, the Chief Justice Roberts's opinion for the Court identified at least four "special considerations" to help lower courts to appropriately balance the "legislative interests of Congress" with "the 'unique position' of the President" when a committee subpoena seeks the President's private papers.[121]

- First, a reviewing court should "carefully assess whether the asserted legislative purpose warrants the significant step of involving the President and his

[114] Tenney v. Brandhove, 341 U.S. 367, 378 (1951).

[115] The challenged subpoenas were issued as part of different ongoing committee investigations: The House Committee on Oversight and Reform sought information in connection to its review of federal ethics laws, the House Financial Services Committee sought information in connection to its investigation into abuses of the financial system, and the House Permanent Select Committee on Intelligence sought information in connection to its investigation into foreign interference in U.S. elections. *See generally*, CRS Legal Sidebar LSB10517, *Trump v. Mazars: Implications for Congressional Oversight*, by Todd Garvey.

[116] *See* CRS Legal Sidebar LSB10301, *Legislative Purpose and Adviser Immunity in Congressional Investigations*, by Todd Garvey.

[117] *Mazars*, 140 S. Ct. at 2028-29.

[118] *Id*. at 2026. *See also*, United States v. Burr, 25 F. Cas. 30, 192 (CC Va. 1807) (No. 14,692d) (noting that the court would not "proceed against the president as against an ordinary individual"). The *Mazars* opinion also treated a congressional investigation as "different" from a "judicial proceeding." *Mazars*, 140 S. Ct. at 2026.

[119] *Mazars*, 140 S. Ct. at 2033.

[120] *Id*. at 2032. ("We disagree that these demanding standards apply here…. We decline to transplant that protection root and branch to cases involving nonprivileged, private information, which by definition does not implicate sensitive Executive Branch deliberations."). The Court also rejected the House's proposed approach, which it characterized as failing to "take adequate account of the significant separation of powers issues raised by congressional subpoenas for the President's information." *Id*. at 2033.

[121] *Id.* at 2035.

papers."[122] The Court elaborated that Congress's "interests are not sufficiently powerful to justify access to the President's personal papers when other sources could provide Congress the information it needs."[123]

- Second, courts "should insist on a subpoena no broader than reasonably necessary to support Congress's legislative objective."[124] Specific demands, the High Court reasoned, are less likely to "intrude" on the operation of the Presidency.[125]
- Third, "courts should be attentive to the nature of the evidence offered by Congress to establish that a subpoena advances a valid legislative purpose."[126] To this end, Congress's position is strengthened when a congressional committee can provide "detailed and substantial evidence" of its legislative purpose.[127]
- Fourth, "courts should be careful to assess the burdens imposed on the President by a subpoena."[128] Here the Court reasoned that in comparison to the burdens imposed by judicial subpoenas, the burdens imposed on the President by congressional subpoenas "should be carefully scrutinized, for they stem from a rival political branch that has an ongoing relationship with the President and incentives to use subpoenas for institutional advantage."[129]

These "special considerations" appear to subject congressional subpoenas for the President's personal records to a less deferential standard than other congressional subpoenas. The Court cautioned that "other considerations," besides those specifically identified, might also be relevant, as "one case every two centuries does not afford enough experience for an exhaustive list" of factors to be considered by a reviewing court.[130]

Mazars' "special considerations" appear to be tailored to Presidential records.[131] To view the case otherwise—for example, to apply the "special considerations" to congressional subpoenas issued as part of a more typical oversight investigation into *agency* activity—would put the opinion in tension with previous precedent, including the principles established in *McGrain*.[132] Nothing in

[122] *Id*. at 2036.

[123] *Id*.

[124] *Id*.

[125] *Id*.

[126] *Id*.

[127] *Id*.

[128] *Id*.

[129] *Id*.

[130] *Id.*

[131] It is not entirely clear how *Mazars* may apply to investigations focused on official conduct and seeking governmental records. *See* CRS Legal Sidebar LSB10517, *Trump v. Mazars: Implications for Congressional Oversight*, by Todd Garvey. It could be argued that the standards adopted in *Mazars* are applicable only when a congressional committee directly targets the personal or private records of a President. Under that interpretation, judicially imposed limits on Congress's authority to obtain *official* records of the President would be reviewed under the deferential "legislative purpose" standard applied in previous cases (though, even if the subpoena is validly issued under this standard, the President might still invoke applicable privileges to withhold some records). On the other hand, it could be argued that the "special considerations" test set forth in *Mazars* applies to requests for either personal or official records. Even then, the considerations may apply differently to requests for official records compared to the President's private information.

[132] *See supra* "The Constitutional Scope of the Investigative Power: Legislative Purpose".

the *Mazars* opinion appears to signal that the majority intended to alter previously established principles in congressional investigations not involving the President.

Authority of Congressional Committees

The implied constitutional authority to conduct investigations resides independently in both the House of Representatives and the Senate, but each chamber has delegated responsibility for carrying out the investigative role to its standing and select committees.[133] For example, under House rules, a standing House committee may conduct "such investigations and studies as it considers necessary or appropriate in the exercise of its responsibilities."[134] In the Senate, each standing committee "may make investigations into any matter within its jurisdiction."[135] As a result, the power of inquiry and investigation is one that is exercised primarily by committees of Congress rather than by the full House or Senate. And that investigative role is more than a discretionary power, it is a statutory duty. Under 2 U.S.C. § 190d "each standing committee of the Senate and the House of Representatives shall review and study, on a continuing basis, the application, administration, and execution of those laws … the subject matter of which is within the jurisdiction of that committee."[136]

The enabling chamber rule or resolution that gives a committee life is also the charter that defines the grant and limitations of the committee's investigative powers. The committee charter constrains committees in two meaningful ways. First, as a creation of its parent house, a congressional committee may inquire only into matters within the scope of the authority that has been delegated to it—i.e. within its jurisdiction.[137] Second, in conducting investigations, a committee generally must comply with any procedural requirements contained in its charter, its own rules, or the rules of the parent chamber.[138]

Enforcement of these limitations by the courts, like judicial scrutiny of other internal congressional matters, is generally quite limited.[139] Indeed, the Speech or Debate Clause generally prevents direct challenges to how a committee carries out its legislative and investigative operations.[140] As a result, it is generally only when the *committee* seeks to enforce a subpoena or other investigative demands that a court is presented with the opportunity to determine compliance with procedural rules.[141] Even then, courts are generally reluctant to examine internal matters unless a House, Senate, or committee rule implicates constitutional rights.[142] However, it does appear that when a court is forced to either construe the scope of a committee's jurisdiction or interpret committee rules, it will generally look to the words of the

[133] *See e.g.,* House Rule X(2); House Rule XI(1)(b); House Rule XI(2)(m); Senate Rule XXV; Senate Rule XXVI(1).

[134] House Rule XI(1)(b).

[135] Senate Rule XXVI(1).

[136] 2 U.S.C. § 190d(a).

[137] *See* Watkins v. United States, 354 U.S. 178, 206 (1957) ("Plainly these committees are restricted to the missions delegated to them…. No witness can be compelled to make disclosures on matters outside that area.").

[138] *See* Yellin v. United States, 374 U.S. 109, 111-12 (1963).

[139] *See* Tenney v. Brandhove, 341 U.S. 367, 378 (1951) ("The courts should not go beyond the narrow confines of determining that a committee's inquiry may fairly be deemed within its province.").

[140] Eastland v. United States Servicemen's Fund, 421 U.S. 491, 501 (1975).

[141] Judicial review of subpoenas is also quite narrow. *See* "Limitations on Challenging a Subpoena" *infra*.

[142] *See* United States v. Ballin, 144 U.S. 1, 5 (1892) (declaring that the House's rulemaking authority "is a continuous power, always subject to be exercised by the house, and, within the limitations suggested, absolute and beyond the challenge of any other body or tribunal").

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.[143]

Jurisdiction

A committee may not exercise compulsory investigative powers in connection to matters outside of its jurisdiction.[144] This jurisdictional limitation is fundamental to the operation of a committee, as it arises from the very nature of the "source" of the committee's authority: the delegation from the parent body.[145] A committee "is restricted to the missions delegated to it by the parent body," and "no witness can be compelled to make disclosures on matters outside that area."[146] For standing committees, that jurisdictional delegation can generally be found in House Rule X and Senate Rule XXV.[147]

The consequence of a committee exceeding its jurisdiction is apparent from *United States v. Rumely*.[148] There, the secretary of an organization that published and sold books of "particular political tendentiousness" challenged his conviction for contempt of Congress on the grounds that the committee that cited him for contempt had exceeded its jurisdiction.[149] The resolution establishing the committee, which the Supreme Court viewed as "the controlling charter of the committee's powers," had authorized the committee to investigate "lobbying activities intended to influence … legislation."[150] The Court interpreted "lobbying activities" to extend only to "representation made directly to the Congress" and thus concluded that the committee had no authority to investigate or enforce a subpoena against a witness who had sought only to influence public opinion.[151]

In adopting this interpretation of "lobbying activities," the Court expressly stated that it gave the committee's jurisdiction a "more restricted scope" in part so as to avoid the possibility that enforcement of the subpoena would violate the witnesses First Amendment right to engage in political speech.[152] The Court has followed a similar approach in subsequent cases, at times adopting a narrow interpretation of either a committee jurisdiction or the scope of an individual investigation in order to avoid the possibility of a constitutional conflict on the grounds that

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[143] *See Watkins*, 354 U.S. at 209. Courts have also construed delegations of investigatory powers narrowly when necessary to avoid "passing on serious constitutional questions." Tobin v. United States, 306 F.2d 270, 274-75 (D.C. Cir. 1962).

[144] United States v. Rumely, 345 U.S. 41, 42, 44 (1953); *see also Watkins*, 354 U.S. at 198, 206 ("Plainly these committees are restricted to the missions delegated to them, *i.e.*, to acquire certain data to be used by the House or the Senate in coping with a problem that falls within its legislative sphere. No witness can be compelled to make disclosures on matters outside that area.").

[145] *Watkins*, 354 U.S. at 206.

[146] *Id*.

[147] *See* House Rule X, 113th Cong. (2013); Senate Rule XXV, 114th Cong. (2013). Jurisdictional authority for "special" investigations may be given to a standing committee, a joint committee of both houses, or a special subcommittee of a standing committee, among other options.

[148] *Rumely*, 345 U.S. at 42-48.

[149] *Id*. at 42, 48.

[150] *Id*. at 44.

[151] *Id*. at 47.

[152] *Id*. ("Certainly it does no violence to the phrase 'lobbying activities' to give it a more restricted scope. To give such meaning is not barred by intellectual honesty. So to interpret is in the candid service of avoiding a serious constitutional doubt.").

"[p]rotected freedoms should not be placed in danger in the absence of a clear determination by the House or the Senate that a particular inquiry is justified by a particular legislative need."[153]

Committee Rules

A committee also must generally comply with chamber and committee rules relating to the conduct of investigations.[154] For example, in *Yellin v. United States*, the Supreme Court overturned a contempt conviction stemming from a witness's refusal to answer questions in a public hearing.[155] The witness had argued that the conviction was improper because the committee had failed to comply with its own rules regarding the availability of closed, or executive, sessions.[156] Those rules expressly required that in determining whether to close a hearing, the committee consider the possible injury to the witness's reputation that may result from a public hearing.[157] The Court held that in exercising investigative powers, a committee may be "held to observance of its rules."[158] Finding that the committee had not given due consideration to the witness's requests for a private hearing, the Court overturned the contempt conviction.[159] The Court reached a similar conclusion in *GoJack v. United States*.[160] There a committee rule required that all "major investigations" be initiated only with the majority approval of the committee.[161] The underlying investigation that gave rise to the contempt prosecution had not been authorized; thus the court reversed the conviction.[162]

Legal Tools Available for Oversight and Investigations

There is no single method or set of procedures for engaging in legislative oversight or conducting an investigation.[163] Although public attention often focuses on public hearings and subpoenaed witnesses, congressional committees frequently rely on informal tools to gather the information necessary to accomplish the committee's investigative goals, such as staff-level communication

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[153] *See Watkins*, 345 U.S. at 224; Tobin v. United States, 306 F.2d 270, 275 (D.C. Cir. 1962) (holding that if Congress had intended a committee to begin an investigation "sure to provoke the serious and difficult constitutional questions…it would have spelled out this intention in words more explicit than the general terms found in the authorizing resolutions under consideration." *But see Barenblatt*, 360 U.S. at 121 (rejecting the avoidance approach adopted in *Rumely* on the grounds that Congress had placed a clarifying "legislative gloss" on the meaning of the applicable committee rule).

[154] House Rule XI(2) and Senate Rule XXVI(2) require that committees adopt written rules of procedure and publish them in the *Congressional Record*. The failure to publish such rules has resulted in the invalidation of a perjury prosecution. United States v. Reinecke, 524 F.2d 435 (D.C. Cir. 1975) (holding that failure to publish committee rule setting one Senator as a quorum for taking hearing testimony was a sufficient ground to reverse a perjury conviction).

[155] Yellin v. United States, 374 U.S. 109, 111-12 (1963).

[156] *Id*. at 113-14.

[157] *Id*. at 114. The committee rule provided: "If a majority of the Committee or Subcommittee … believes that the interrogation of a witness in a public hearing might endanger national security or unjustly injure his reputation, or the reputation of other individuals, the Committee shall interrogate such witness in an Executive Session for the purpose of determining the necessity or advisability of conducting such interrogation thereafter in a public hearing." *Id*. at 114-15.

[158] *Id*. (citing Christoffel v. United States, 338 U.S. 84 (1949)).

[159] *Id*.

[160] Gojack v. United States, 384 U.S. 702, 703-04 (1966).

[161] *Id*. at 706.

[162] *Id*. at 712.

[163] *See, e.g.*, CONGRESS INVESTIGATES: A CRITICAL AND DOCUMENTARY HISTORY (Roger A. Bruns, David L. Hostetter & Raymond W. Smock eds., 2011).

and contacts and voluntary compliance with document and briefing requests.[164] In many ways, these informal and voluntary tools represent the unseen but predominant components of congressional investigations.

Committees also have more formal mechanisms for collecting necessary testimony from relevant witnesses. Chief among these tools are hearings and, when authorized, depositions.

Hearings

As previously noted, standing committees of the House and Senate are authorized to hold hearings for purposes of receiving testimony.[165] This testimony is often, but not always, received under oath.[166]

Both the House and the Senate, as well as individual committees, have adopted a variety of rules governing the conduct of hearings. These rules include quorum requirements, basic procedural constraints, and witness and minority protections.[167] For example, both chambers permit a reduced quorum for taking testimony and receiving evidence. House committees are required to have at least two Members present to take testimony.[168] Senate rules allow the taking of testimony with only one Member in attendance.[169] Most committees have adopted the minimum quorum requirement, and some require a higher quorum for sworn rather than unsworn testimony.[170]

Senate and House rules also limit the authority of their committees to meet in closed session.[171] For example, the House requires testimony to be held in closed session if a majority of a committee or subcommittee determines it "may tend to defame, degrade, or incriminate any person."[172] 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 oversight and investigative hearings, the chair usually makes an opening statement. In the case of an investigative hearing, the opening statement can be an important means of defining the subject matter of the hearing and thereby establishing the pertinence of questions asked the witnesses.[173] A witness does not have the right to make a statement before being questioned, but

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[164] A congressional committee "gathers information through formal investigations, but also obtains information in a number of other ways, including through requests made to relevant Federal agencies, to lobbyists with expertise in a particular field, and to stakeholders." SEC v. Comm. on Ways & Means of the United States House of Representatives, 161 F. Supp. 3d 199, 230 (S.D.N.Y. 2015).

[165] House Rule XI(m)(1); Senate Rule XXVI(1).

[166] Many committees leave the swearing of witnesses to the discretion of the chair, while others require that all witnesses be sworn. *Compare* House Comm. on Agriculture, Rule VII(b) ("The Chairman of the Committee, or any member of the Committee designated by the Chairman, may administer oaths to any witnesses.), *with* Senate Special Comm. on Aging, Rule II(4) ("All witnesses who testify to matters of fact shall be sworn unless the Committee waives the oath.").

[167] As a general matter, House Rule XI and Senate Rule XXVI govern committee hearing procedures.

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

[169] Senate Rule XXVI(7)(a)(2).

[170] *See, e.g.*, House Comm. on the Judiciary Rule II; Senate Comm. on Appropriations Rule II(3).

[171] House Rule XI(2)(k)(5); Senate Rule XXVI(5)(b).

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

[173] *See Watkins*, 354 U.S. at 209 ("There are several sources that can outline the 'question under inquiry' in such a way that the rules against vagueness are satisfied. The authorizing resolution, the remarks of the chairman or members of the committee, or even the nature of the proceedings themselves, might sometimes make the topic clear.").

the opportunity is usually accorded. Committee rules may prescribe the length of such statements and also require that written statements be submitted in advance of the hearing.[174] Questioning of witnesses may be structured so that Members alternate for specified lengths of time.

A congressional investigative hearing is unique and generally should not be analogized to a criminal proceeding as the same constitutional rights do not attach. Because the Constitution is generally applicable to all forms of government action, most provisions of the Bill of Rights apply to Congress's investigative activities as they do to congressional legislation.[175] For example, witnesses in a committee hearing may assert their Fifth Amendment right against self-incrimination.[176] But not all constitutional rights are applicable to congressional investigations.[177] Consider, for example, a criminal defendant's Sixth Amendment rights to present one's own evidence and to confront and cross-examine witnesses.[178] The D.C. Circuit has held that "the distinguishing factors" between a legislative investigation and a criminal proceeding "cause" congressional investigations "to be outside the guarantees of the … the confrontation right guaranteed in criminal proceedings by the Sixth Amendment."[179] A witness in a committee hearing therefore has no right to offer his or her own evidence or cross-examine other witnesses, though a committee may, at its discretion, afford a witness such an opportunity.[180] The application of another Sixth Amendment right, the right to effective assistance of counsel, also may not apply in a congressional investigation.[181] Nevertheless, House, Senate, and committee rules afford witnesses a limited form of that right. Under House rules, the role of counsel is restricted to advising a witness of his or her "constitutional rights,"[182] and some committees have adopted rules specifically prohibiting counsel from "coaching" witnesses during their testimony.[183]

Deposition Authority

Authorized congressional committees may also use depositions as a tool for gathering testimony during an investigation. A deposition is a formalized interview, taken under oath, generally

[174] *See, e.g.,* House Comm. on Foreign Affairs Rule 6; Senate Comm. on Agriculture, Nutrition, and Forestry Rule 3.

[175] *See Mazars*, 140 S. Ct. 2019, 2032 (2020) (noting that "recipients of legislative subpoenas retain their constitutional rights throughout the course of an investigation"). For a discussion of constitutional and other limitations on congressional investigations *see infra* "Constitutional Limitations".

[176] *See* Quinn v. United States, 349 U.S. 155, 161-62 (1995); Emspak v. United States, 349 U.S. 190, 197-98 (1955); Bart v. United States, 349 U.S. 219, 221, 223 (1955).

[177] *See* United States v. Fort, 443 F.2d 670, 678 (D.C. Cir. 1970) ("[W]hich constitutional rights are applicable depends on the nature and consequences of the governmental action.").

[178] *Id*.

[179] *Id. at* 679.

[180] Hannah v. Larche, 363 U.S. 420, 444-45 (1960) ("The procedures adopted by legislative investigating committees have varied over the course of years. Yet, the history of these committees clearly demonstrates that only infrequently have witnesses appearing before congressional committees been afforded the procedural rights normally associated with an adjudicative proceeding. In the vast majority of instances, congressional committees have not given witnesses detailed notice or an opportunity to confront, cross-examine and call other witnesses."). These rights are, however, often afforded in impeachment investigations. *See* CRS Report R45983, *Congressional Access to Information in an Impeachment Investigation*, by Todd Garvey at 15.

[181] *See generally*, Andrew McCanse Wright, *Congressional Due Process*, 85 MISS. L.J. 401, 434-36 (2016).

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

[183] *See, e.g.*, Senate Perm. Subcomm. On Investigations of the Comm. on Homeland Sec. and Gov't Affairs Rule 8 (providing that Subcommittee rules should not be "construed as authorizing counsel to coach the witness or answer for the witness").

transcribed or recorded, and governed by chamber and committee rules.[184] The standing rules of the House authorize only the Committee on Oversight and Reform to take depositions.[185] In recent Congresses, however, the House has provided deposition authority to additional committees through resolution. For example, in the 117th Congress, the House authorized *all* standing committees other than the Committee on Rules to take depositions.[186] 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 some form of deposition authority.[187]

The House Committee on Rules has previously adopted a number of procedural rules governing the conduct of depositions in the House.[188] Among other requirements, these rules establish that

- depositions may be taken by committee counsel without a committee member present;
- witnesses may be accompanied by nongovernmental counsel "to advise them of their rights;"
- questioning of the witness occurs in rounds, with equal time provided to both the majority and minority;
- objections are ruled upon by the committee chair, with appeal available to the full committee; and
- the chair and ranking member "shall consult regarding the release of deposition testimony," with disagreements referred to the full committee for resolution.[189]

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. Depositions also occur in private, which may be more conducive to candid responses than public hearings. Depositions also provide committees with an opportunity to verify witness statements that might defame or tend to incriminate third parties before they are repeated publicly and prepare for hearings by screening witness testimony in advance, which may obviate the need to call other witnesses. Congress has also enhanced the efficacy of the staff deposition process by establishing

[184] *See Hearing on H. Res. 836* Before the H. Comm. on Rules, 110th Cong. 23-24 (2007) (statement of T.J. Halstead) (generally describing a deposition as a "discovery device commonly used in litigation that typically involves the oral questioning of a witness (the deponent) by an attorney for one party, outside the courtroom, and out of public view. A deposition is taken following notice to the deponent, and is sometimes accompanied by a subpoena. The deposition testimony is given under oath or affirmation and a transcript is made an authenticated.").

[185] House Rule X(4)(c)(3).

[186] *See* H.Res. 8 §3(b) 117th Cong. (2021) ("During the One Hundred Seventeenth Congress, the chair of a standing committee (other than the Committee on Rules), and the chair of the Permanent Select Committee on Intelligence, upon consultation with the ranking minority member of such committee, may order the taking of depositions, including pursuant to subpoena, by a member or counsel of such committee.").

[187] *See* U.S. Congress, Senate, Authority and Rules of Senate Committees, 2019-2020, 116th Congress, 1st session, July 19, 2019, S. DOC. NO. 116-6 (2019).

[188] *See* 167 Cong. Rec. H41 (daily ed. Jan. 4, 2021) (117th Congress Regulations for Use of Deposition Authority).

[189] *Id.* /

the applicability of criminal prohibition against false statements to statements made during congressional proceedings, including the taking of depositions.[190]

In the House, neither the Rules Committee deposition rules nor the Committee on Oversight and Reform's own rules provide a government witness with a right to be accompanied by agency counsel. A deponent is instead entitled to be accompanied only by private, nongovernmental counsel.[191] This restriction has led to some conflict with the executive branch, which has asserted that a "congressional committee may not constitutionally compel an executive branch witness to testify about potentially privileged matters while depriving the witness of the assistance of agency counsel."[192] Denying agency counsel access to the deposition would, in the executive branch's view, "compromise the President's constitutional authority to control the disclosure of privileged information and to supervise the Executive Branch's communications with congressional entities."[193] The House has rejected this argument, concluding instead that the rule "ensures that the Committee is able to depose witnesses in furtherance of its investigations without having in the room representatives of the agency under investigation."[194] Moreover, the House notes, the rule "protects the rights of witnesses by allowing them to be accompanied by personal counsel" and permits the executive branch—"[t]o the extent [it] believes that an issue that would be raised at the deposition may implicate a valid Privilege"—to protect its prerogatives by raising the privilege with the committee.[195] Although the executive branch and congressional committees have often resolved these disputes through the accommodations process, that was not the case in the 116th Congress. Conflicts between the House and various executive branch officials resulted in directives from executive branch leadership—including the Attorney General—that officials not comply with deposition subpoenas unless accompanied by executive branch counsel.[196] The House responded by holding the Attorney General in contempt of Congress.[197]

The Subpoena Power

When possible, committees generally seek to obtain voluntary compliance with their requests for documents, testimony, and other information.[198] Such an approach tends to be more efficient, as many voluntary requests are complied with either in part or in full. Even when a request is met with resistance, the disagreement may initiate the accommodations process, a long-standing

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[190] The false statement provision was amended in 1996 to apply to statements made during "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 or Senate." 18 U.S.C. § 1001.

[191] 165 Cong. Rec. H1216 (daily ed. Jan. 25, 2019) ("Witnesses may be accompanied at a deposition by personal, nongovernmental counsel to advise them of their rights."); H. Comm. on Oversight and Reform Rule 15(e) ("Witnesses may be accompanied at a deposition by counsel to advise them of their rights.… Observers or counsel for other persons, or for agencies under investigation, may not attend.").

[192] *Attempted Exclusion of Agency Counsel from Congressional Depositions of Agency Employees*, 43 Op. O.L.C. 1, 2 (2019).

[193] *Id*. at 3. The President's position derives from the separation of powers and the executive branch's need to protect privileged information rather than from the witness's Sixth Amendment's right to effective assistance of counsel.

[194] H. REP. NO. 116-125, at 33 (2019).

[195] *Id*.

[196] *See* Jonathan Shaub, *Masters From Two Equal Branches of Government: Trump and Congress Play Hardball*, LAWFARE (Apr. 27, 2019).

[197] *See* H.Res. 497, 116th Cong. (2019).

[198] *See, e.g.*, Todd David Peterson, *Contempt of Congress v. Executive Privilege*, 14 U. PA. J. CONST. L. 77, 105 (2011) (noting that "Congress routinely obtains massive amounts of information from the executive branch on a daily basis," often through "informal requests from congressional staffers for information from a particular staffer.")

practice by which negotiations between the committee and the executive agency generally lead to a resolution acceptable to both parties.[199] Nevertheless, the Supreme Court has observed, "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."[200] Thus, when Congress finds an inquiry blocked by the withholding of information, or where the traditional process of negotiation and accommodation[201] is considered inappropriate or unavailing, a subpoena—for either testimony or documents—may be used to compel compliance with congressional demands.[202]

The subpoena is a well-established component of Congress's oversight and investigative authority.[203] In particular, the Court has repeatedly characterized the subpoena, and the process to enforce it, as a "necessary and appropriate attribute of the power to legislate."[204] In *Watkins*, the Supreme Court described the obligations that attach to a congressional subpoena as follows:

> It is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action. It is their unremitting obligation to respond to subpoenas, to respect the dignity of the Congress and its committees and to testify fully with respect to matters within the province of proper investigation.[205]

As such, an individual—whether a member of the public or an executive branch official—has a legal obligation to comply with a duly issued and valid congressional subpoena unless a valid and overriding privilege or other legal justification excuses that compliance.[206]

A properly authorized subpoena issued by a committee or subcommittee that has been delegated that authority by the parent chamber has the same force and effect as a subpoena issued by the House or Senate itself. 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

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[199] The D.C. Circuit has suggested that Congress and the executive branch have an "implicit constitutional mandate" to accommodate each other's needs during a conflict. United States v. AT&T Co., 567 F.2d 121, 127 (D.C. Cir. 1977) ("Each branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation. This aspect of our constitutional scheme avoids the mischief of polarization of disputes."). *See also* Memorandum from Ronald Reagan, President of the United States, to the Heads of Executive Departments and Agencies on Procedures Governing Responses to Congressional Requests for Information (Nov. 4, 1982), *reprinted in* H. REP. NO. 99-435, pt. 2, at 1106 (1986) (noting that the "tradition of accommodation should continue as the primary means of resolving conflicts between the Branches.").

[200] McGrain v. Daugherty, 273 U.S. 135, 175 (1927).

[201] *See* United States v. AT&T Co., 567 F.2d 121, 127 (D.C. Cir. 1977) (noting that the Framers relied "on the expectation that where conflicts in scope of authority arose between the coordinate branches, a spirit of dynamic compromise would promote resolution of the dispute in the manner most likely to result in efficient and effective functioning of our governmental system").

[202] *Id*. Each standing committee has been delegated subpoena power by House or Senate rule. *See* House Rule XI (2)(m)(3); Senate Rule XXVI(1).

[203] The Supreme Court has determined that the "[i]ssuance of subpoenas … has long been held to be a legitimate use by Congress of its power to investigate." Eastland v. United States Servicemen's Fund, 421 U.S. 491, 504 (1975).

[204] *McGrain*, 273 U.S. at 175; *see also* Buckley v. Valeo, 424 U.S. 1, 138 (1976) (per curiam); *Eastland*, 421 U.S. at 504-505 ("Issuance of subpoenas … has long been held to be a legitimate use by Congress of its power to investigate.").

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

[206] *Id*.

testimony of witnesses and the production of documents.[207] All standing committees in the House and some standing committees in the Senate may also issue a subpoena for a deposition.[208]

The rules governing issuance of committee subpoenas vary by committee. In the House, the vast majority of committees now permit the committee chair to unilaterally issue a subpoena, usually after giving notice to or consulting with the ranking member.[209] In contrast, only the Permanent Subcommittee on Investigations in the Senate currently permits the chair to issue a subpoena without the consent of the ranking member.[210]

Limitations on Challenging a Subpoena

The Supreme Court has ruled that the separation of powers and the Speech or Debate Clause restrict both a witness's ability to mount a legal challenge to the subpoena's validity and the judiciary's ability to enjoin a subpoena's issuance.[211] For example, the recipient of a congressional subpoena generally may not challenge that subpoena's validity prior to its enforcement. Instead, the recipient may refuse to comply, risk being cited for criminal contempt or becoming the subject of a civil enforcement lawsuit (discussed below), and then raise the objections in the civil case or as a defense in the criminal prosecution.

Courts have been more amenable to third-party, pre-enforcement subpoena challenges. Such lawsuits generally arise when a committee issues a subpoena for documents not to the target of the investigation but rather to a third-party custodian of records.[212] In such a scenario the party with a personal interest in the records is "not in a position to assert its claim of constitutional right by refusing to comply with a subpoena"[213] and may instead bring suit against the neutral third party to block compliance with the subpoena. The Supreme Court has suggested that the Constitution "does not bar the challenge so long as members of the [issuing committee or subcommittee] are not, themselves, made defendants in a suit to enjoin implementation of the subpoena."[214]

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[207] Special or select committees may issue subpoenas when specifically delegated that authority by Senate or House resolution. *See infra* "Specialized Investigations." In the 117th Congress, the House amended Rule XI to clarify the scope of committee subpoena power:

> Subpoenas for documents or testimony may be issued to any person or entity, whether governmental, public, or private, within the United States, including, but not limited to, the President, and the Vice President, whether current or former, in a personal or official capacity, as well as the White House, the Office of the President, the Executive Office of the President, and any individual currently or formerly employed in the White House, Office of the President, or Executive Office of the President.

H.Res. 8, 117th Cong. (2021).

[208] *See* "Deposition Authority" *supra*.

[209] House rules provide that "[t]he power to authorize and issue subpoenas … may be delegated to the chair of the committee under such rules and under such limitations as the committee may prescribe." House Rule XI(2)(m).

[210] *See* Permanent Subcommittee on Investigations, Rule 2 ("Subpoenas for witnesses, as well as documents and records, may be authorized and issued by the Chairman, or any other Member of the Subcommittee designated by him or her, with notice to the Ranking Minority Member.").

[211] U.S. CONST. art. I, § 6, cl. 1. *Eastland*, 421 U.S. at 503-07 (holding that the Speech or Debate Clause of the Constitution provides "an absolute bar to judicial interference" with such compulsory process).

[212] The Supreme Court's decision in Trump v. Mazars USA, LLP, 140 S. Ct. 2019 (2020) is an example of a third-party lawsuit.

[213] United States v. AT&T Co., 567 F.2d 121, 129 (D.C. Cir. 1977).

[214] *Eastland*, 421 U.S. at 501. *But see*, *AT&T Co.*, 567 F.2d at 123-25 (D.C. Cir. 1977).

Responding to Non-Compliance: Subpoena Enforcement

Ultimately, the subpoena is only as effective as the means by which it is enforced. Without a process by which Congress can coerce compliance or deter non-compliance, the subpoena would be reduced to a formalized request rather than a constitutionally based demand for information.[215]

If a witness is initially reluctant to comply with a committee subpoena, Congress can sometimes use the application of various forms of legislative leverage, along with an informal political process of negotiation and accommodation, to obtain what it needs.[216] With regard to executive branch officials, Congress exercises substantial influence through the legislative control of agency authority, funding, and, in the case of the Senate, confirmation of certain agency officials.[217] The use or threatened use of these powers in a way that would impose burdens on an agency can encourage compliance with subpoenas (or make it more likely that requested information will be provided without need to issue a subpoena) and solidify Congress's position when trying to negotiate a compromise during an investigative dispute with the executive branch.[218]

Besides leveraging its general legislative powers, Congress currently employs an ad hoc combination of methods to directly enforce its subpoenas. The two predominant methods rely on the authority and participation of another branch of government. First, the *criminal contempt* statute permits a single house of Congress to certify a contempt citation to the executive branch for the criminal prosecution of an individual who has willfully refused to comply with a committee subpoena.[219] Once the contempt citation is received, any later prosecution lies within the control of the executive branch.[220] Second, Congress may try to enforce a subpoena by

[215] *McGrain*, 273 U.S. at 174 (observing that the "process to enforce" the investigatory power is "essential" to the "legislative function").

[216] *See* Neal Devins, *Congressional-Executive Information Access Disputes: A Modest Proposal—Do Nothing,* 48 ADMIN L. REV. 109, 114 (1996) (arguing in 1996 that "Congress rarely makes use of its subpoena power" partly because of the "benefits that each branch receives by cooperating with the other"). The D.C. Circuit has suggested that Congress and the executive branch have an "implicit constitutional mandate" to accommodate each other's needs during a conflict. *AT&T Co.*, 567 F.2d at 127 (D.C. Cir. 1977) ("Each branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation. This aspect of our constitutional scheme avoids the mischief of polarization of disputes.").

[217] CRS Report R45442, *Congress's Authority to Influence and Control Executive Branch Agencies,* by Todd Garvey and Daniel J. Sheffner (discussing various tools that Congress may use to compel or incentivize agency compliance with congressional demands).

[218] *See* Andrew McCanse Wright, *Constitutional Conflict and Congressional Oversight*, 98 MARQ. L. REV. 881, 931 (2014) ("Congress may use legislative authorizations and appropriations as leverage against the Executive Branch to obtain requested information."); Louis Fisher, *Congressional Access to Information: Using Legislative Will and Leverage,* 52 DUKE L.J. 323, 325 (2002) (noting that oversight disputes are often "decided by the persistence of Congress and its willingness to adopt political penalties for executive noncompliance. Congress can win most of the time—if it has the will—because its political tools are formidable.").

[219] 2 U.S.C. §§ 192, 194.

[220] Although the criminal contempt statute provides that "it shall be" the U.S. Attorney's "duty … to bring the matter before the grand jury for its action," the executive branch has asserted discretion in whether to present the matter to the grand jury. *See, e.g.*, Letter from Ronald C. Machen Jr., United States Attorney, U.S. Dep't of Justice, to John A. Boehner, Speaker, U.S. House of Representatives (Mar. 31, 2015); *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 102 (1984) [hereinafter *Olson Opinion*].

seeking a civil judgment declaring that the recipient is legally obligated to comply.[221] This process of *civil enforcement* relies on the help of the courts to enforce congressional demands.

Criminal Contempt of Congress

The criminal contempt of Congress statute, enacted in 1857 and only slightly modified since, makes the failure to comply with a duly issued congressional subpoena a criminal offense.[222] The statute, now codified under 2 U.S.C. § 192, provides that any person who "willfully" fails to comply with a properly issued committee subpoena for testimony or documents is guilty of a misdemeanor, punishable by a substantial fine and imprisonment for up to one year.[223]

The criminal contempt statute outlines the process by which the House or Senate may refer the non-compliant witness to the DOJ for criminal prosecution. Under 2 U.S.C. § 194, once a committee reports the failure to comply with a subpoena to its parent body, the President of the Senate or the Speaker of the House is directed to "certify[] the statement of facts … to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action."[224] The statute does not expressly require approval of the contempt citation by the committee's parent body, but both congressional practice and judicial decisions suggest that approval may be necessary.[225]

A successful contempt prosecution may lead to criminal punishment of the witness in the form of incarceration, a fine, or both.[226] Because the criminal contempt statute is punitive, its use is mainly as a deterrent. In other words, while the threat of criminal contempt can be used as leverage to encourage compliance with a specific request, a conviction does not necessarily lead to release of the information to Congress.[227]

Although approval of a criminal contempt citation under § 194 appears to impose a mandatory duty on the U.S. Attorney to submit the violation to a grand jury, the executive branch has

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[221] *See* 2 U.S.C. §§ 288b, 288d; 28 U.S.C. § 1365; Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53, 94 (D.D.C. 2008) ("The Court concludes that the Committee has an implied cause of action derived from Article I to seek a declaratory judgment concerning the exercise of its subpoena power."). *See also* CRS Report RL34097, *Congress's Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure*, by Todd Garvey (discussing the two predominant subpoena enforcement mechanisms).

[222] Act of Jan. 24, 1857, ch. 19, § 1, 11 STAT. 155 (now codified at 2 U.S.C. § 192).

[223] 2 U.S.C. § 192. The subpoena that gives rise to the contempt must have been issued for a legislative purpose, be pertinent to the matter under inquiry, and relate to a matter within the House or Senate committee's jurisdiction. *See* Senate Perm. Subcomm. on Investigations v. Ferrer, 199 F. Supp. 3d 125, 134–38 (D.D.C. 2016).

[224] 2 U.S.C. § 194. The DOJ has previously obtained convictions under 2 U.S. C. § 192 against executive branch officials pursuant to plea deals without a vote of the House or Senate. *See Prosecution of Contempt of Congress: Hearing Before the Subcomm. on Admin. Law and Gov'tl Relations of the H. Comm. on the Judiciary*, 98th Cong. 23-4 (1983).

[225] *See* HOUSE PRACTICE, ch. 17 § 2; Wilson v. United States, 369 F.2d 198, 201–02 (D.C. Cir. 1966) ("It has been the consistent legislative course that the Speaker is not under a 'mandatory' duty to certify the report of the committee, but on the contrary that the committee's report is subject to further consideration on the merits by the House involved. When the House is in session the Speaker does not automatically transmit the report of alleged contempt to the United States Attorney. Instead as a matter of routine a member of the committee offers a resolution for the consideration of the House involved.").

[226] 2 U.S.C. § 192.

[227] For example, during an investigation into the White House Travel Office, contested documents were turned over to Congress on the day a contempt resolution against the White House Counsel was scheduled for a floor vote. *See* H. REP. NO. 104-874, at 47 (1997).

repeatedly asserted that it retains the discretion to determine whether to do so.[228] As a result, efforts to punish an executive branch official for non-compliance with a committee subpoena through the criminal contempt of Congress statute will likely prove unavailing in certain circumstances. For example, when the President directs or endorses the non-compliance of the official, such as when the official refuses to disclose information pursuant to the President's decision that the information is protected by executive privilege, past practice suggests that the DOJ is unlikely to pursue a prosecution for criminal contempt.[229] As a result, it would appear that there is not currently a credible threat of prosecution for violating 2 U.S.C. § 192 when an executive branch official refuses to comply with a congressional subpoena at the direction of the President.[230]

Even when the official is not acting at the clear direction of the President, the executive branch has contended that it retains the authority to make an independent assessment of whether the official (or former official) has in fact violated the criminal contempt statute.[231] If the executive branch determines either that the statute has not been violated or that a defense is available that would bar the prosecution, then it may—in an exercise of discretion—leave a congressional citation unenforced. The criminal contempt statute, therefore, may have limited utility as a deterrent to non-compliance with congressional subpoenas by executive branch officials faced with similar circumstances.[232]

Civil Enforcement of Subpoenas

Both the House and Senate have also enforced subpoenas through a civil suit in the federal courts by a process known as civil enforcement. Under this process, either chamber may unilaterally authorize one of its committees or another legislative entity to file a suit in federal district court seeking a court order declaring that the subpoena recipient is legally required to comply with the demand for information.[233]

A successful civil enforcement suit generally has the benefit of securing compliance with the congressional subpoena—meaning the committee may obtain the information it seeks. If the court orders compliance with the subpoena and disclosure of the information, generally after finding both that the subpoena is valid and that the individual has not invoked an adequate privilege justifying non-compliance, continued defiance may lead to contempt of court as opposed to contempt of Congress.[234]

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[228] *See, e.g.*, Letter from Ronald C. Machen Jr., United States Attorney, U.S. Dep't of Justice, to John A. Boehner, Speaker, U.S. House of Representatives (Mar. 31, 2015) (declining to present criminal contempt citation to a grand jury); *Olson Opinion*, *supra* note 220, at 102.

[229] *See* Letter from James M. Cole, Deputy Attorney General, to John Boehner, Speaker of the House (June 28, 2012); Olson Opinion, *supra* note 572, at 102.

[230] *See* Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. CHI. L. REV. 1083, 1146 (2009) ("As the president is unlikely to authorize one of his subordinates (the United States Attorney) to file charges against another of his subordinates who was acting according to his orders, it is safe to assume that the executive branch will generally decline to prosecute an executive branch official for criminal contempt of Congress.").

[231] *See* Letter from Ronald C. Machen Jr., United States Attorney, U.S. Dep't of Justice, to John A. Boehner, Speaker, U.S. House of Representatives (Mar. 31, 2015).

[232] *But see* Fisher, *supra* note 218, at 347-59 (describing instances from 1975-2000 in which committee action on a criminal contempt citation was effective in obtaining compliance with a congressional subpoena).

[233] *See* 2 U.S.C. §§ 288b, 288d; 28 U.S.C. § 1365; Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53, 94 (D.D.C. 2008).

[234] 18 U.S.C. §§ 401–402.

Although the executive branch has at times disputed Congress's authority to bring civil enforcement lawsuits, at least against current or former executive branch officials, a handful of cases dating back to the Nixon era have upheld House and Senate authority to bring such lawsuits.[235] Nevertheless, the scope of Congress's authority to enforce subpoenas in court, especially by the House, remains the subject of continued litigation.

In the past, authorization for a subpoena enforcement lawsuit has typically been provided through a simple House or Senate resolution.[236] In the Senate, the adoption of an authorizing resolution is part of the existing statutory framework governing that chamber's enforcement of subpoena in court.[237] The House, however, clarified during the 116th Congress that even in the absence of a specific authorizing resolution, the chair of each standing committee also "retains the ability to initiate … any judicial proceeding before a Federal court … affirming the duty of the recipient of any subpoena duly issued by that committee to comply with that subpoena" when authorized to do so by the Bipartisan Legal Advisory Group (BLAG).[238] The House further explained that authorization from BLAG in the subpoena enforcement context "is the equivalent of a vote of the full House of Representatives."[239]

A federal statute provides the jurisdictional basis for the Senate's exercise of its civil enforcement power.[240] Under 28 U.S.C. § 1365, the U.S. District Court for the District of Columbia (D.C. District Court) has jurisdiction "over any civil action brought by the Senate or committee or subcommittee of the Senate to enforce … any subpoena."[241] The law, however, makes clear that the grant of jurisdiction is limited and "shall not apply" to an action to enforce a subpoena issued to an executive branch official acting in his or her official capacity who has asserted a "governmental privilege."[242] Yet at least one district court has suggested that the limitation found

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[235] *See generally* Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974); Committee on Oversight and Government Reform, U.S. House of Representatives v. Holder, 973 F. Supp. 2d 1 (D.D.C. 2013); Committee on Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53 (D.D.C. 2008). The D.C. Circuit is currently considering the question in pending litigation. *See* notes 174-79 *infra*.

[236] *See, e.g.*, H.Res. 706, 112th Cong. (2012) (Holder); H. Res. 980 110th Cong. (2008) (Miers and Bolten); S.Res. 377, 114th Cong. (2016) (Ferrer).

[237] 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 on various occasions, but never against executive branch officials. *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).

[238] H.Res. 430, 116th Cong. (2019).

[239] *Id*. *See* House Rule II (establishing that the BLAG "speaks for, and articulates the institutional position of, the House in all litigation matters."); 165 CONG. REC. H30 (daily ed. Jan. 3, 2019) (statement of Rep. McGovern) ("If a Committee determines that one or more of its duly issued subpoenas has not been complied with and that civil enforcement is necessary, the BLAG, pursuant to House Rule II(8)(b), may authorize the House Office of General Counsel to initiate civil litigation on behalf of this Committee to enforce the Committee's subpoena(s) in federal district court."). *See also* CRS Report R45636, *Congressional Participation in Litigation: Article III and Legislative Standing*, by Kevin M. Lewis at 43, n. 429.

[240] 2 U.S.C. §§ 288b, 288d; 28 U.S.C. § 1365.

[241] 28 U.S.C. § 1365.

[242] *Id*. § 1365(a) ("This section shall not apply to an action to enforce, to secure a declaratory judgment concerning the validity of, or to prevent a threatened refusal to comply with, any subpoena or order issued to an officer or employee of the executive branch of the Federal Government acting within his or her official capacity, except that this section shall apply if the refusal to comply is based on the assertion of a personal privilege or objection and is not based on a governmental privilege or objection the assertion of which has been authorized by the executive branch of the Federal Government.").

within § 1365 does not necessarily bar the courts from exercising jurisdiction over Senate claims to enforce a subpoena against an executive official under other jurisdictional provisions.[243]

The House has no corresponding statutory framework but has previously, and successfully, authorized its committees to enforce their subpoenas in court.[244] Nevertheless, the House's authority in this regard has been subject to some debate. The D.C. Circuit, for example, has been wrestling with that question of civil enforcement in the pending case of *Committee on the Judiciary v. McGahn*. In *McGahn*, the House initiated a suit to enforce a committee subpoena for testimony from former White House Counsel Don McGahn. A three-judge panel initially dismissed the case. Breaking from prior district court decisions, the opinion held that the judiciary "lack[ed] authority to resolve disputes between the Legislative and Executive Branches until their actions harm an entity 'beyond the [Federal] Government.'"[245] That opinion, however, was reversed on appeal, with the full D.C. Circuit holding en banc that neither the separation of powers nor principles of standing barred the courts from hearing the House's lawsuit.[246] On remand, however, the three-judge panel again rejected the House's lawsuit, this time holding that the House lacked a cause of action.[247] In reaching that decision, the panel relied partly on the fact that "Congress has granted an express cause of action to the Senate—but not to the House."[248] That judgment has been vacated and is pending appeal back to the full D.C. Circuit.[249]

The Historical Process: Inherent Contempt

Historically, the House and Senate relied on their own institutional power to not only enforce congressional subpoenas but also to respond to other actions that either house viewed as obstructing its legislative processes or prerogatives.[250] Indeed, the criminal contempt statute was not enacted until 1857, and the courts do not appear to have entertained a civil action to enforce a

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[243] *See Miers*, 558 F. Supp. 2d at 86–87 ("In any event, the fact that § 288d may create an independent cause of action for the Senate does not establish that the Senate (or the House) could not proceed under the [Declaratory Judgment Act (DJA)]. Section 288d can simply be viewed as a more specific application of the general relief made available by the DJA…. That conclusion is consistent with statements found in a contemporaneous Senate Report indicating that 'the statute is not intended to be a congressional finding that the federal courts do not now have the authority to hear a civil action to enforce a subpoena against an officer or employee of the federal government.'") (citing S. REP. NO. 95-170, at 91–92).

[244] *See* H.Res. 706, 112th Cong. (2012) (Holder); H.Res. 980, 110th Cong. (2008) (Miers and Bolten). *See Miers*, 558 F. Supp. 2d, at 78–88; *Holder*, 979 F. Supp. 2d, at 3.

[245] Comm. on the Judiciary of the United States House of Representatives v. McGahn, 951 F.3d 510, 516 (D.C. Cir. 2020).

[246] Comm. on the Judiciary of the United States House of Representatives v. McGahn, 968 F.3d 755, 760-61 (D.C. Cir. 2020).

[247] Comm. on the Judiciary v. McGahn, 973 F.3d 121, 123 (D.C. Cir. 2020).

[248] *Id*. The conference report accompanying the legislation that established the Senate procedure explained that the relevant House committees had not yet considered the proposal for judicial enforcement of House subpoenas. H. REP. NO. 95-1756, 95th Cong., at 80 (1978). The Senate had authorized its committees to bring lawsuits for some time before enactment of the 1978 law. *See* S. Res. 262, 70th Cong. (1928) (providing that "any committee of the Senate is hereby to bring suit … in any court of competent jurisdiction if the committee is of the opinion that the suit is necessary to the adequate performance of the powers vested in it").

[249] Comm. on the Judiciary of the United States House of Representatives v. McGahn, No. 19-5331, 2020 U.S. App. LEXIS 32573 (D.C. Cir. Oct. 15, 2020).

[250] Congress first exercised its inherent contempt authority in 1795 when the House detained two private citizens for attempted bribery of Members of the House. 2 ASHER C. HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 1599 (1907) [hereinafter HINDS' PRECEDENTS OF THE HOUSE]. The Supreme Court first affirmed Congress's use of the inherent contempt power in the 1821 decision of *Anderson v. Dunn*, 19 U.S. 204 (1821).

congressional subpoena against an executive official until the Watergate era.[251] For much of American history the House and Senate instead used what is known as the inherent contempt power to enforce their investigative powers.

The inherent contempt power is a constitutionally based authority given to each house to unilaterally arrest and detain an individual found to be "obstruct[ing] the performance of the duties of the legislature."[252] The power is therefore broader in scope than the criminal contempt statute in that it may be used not only to combat subpoena non-compliance but also in response to other actions that could be viewed as "obstructing" or threatening either house's exercise of its legislative powers.[253]

In practice, the inherent contempt power has been exercised using a multi-step process. Upon adopting a House or Senate resolution authorizing the execution of an arrest warrant by that chamber's Sergeant at Arms, the individual alleged to have engaged in contemptuous conduct is taken into custody and brought before the House or Senate.[254] A hearing or "trial" follows in which allegations are heard and defenses raised.[255] Although generally occurring before the full body, it would appear likely that the contempt hearing could also permissibly take place before a congressional committee who reports its findings to the whole House or Senate.[256] If judged guilty, the House or Senate may then direct that the witness be detained or imprisoned until the

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[251] *See*, *e.g*., Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974). In 1928, members of a Senate special investigative committee brought suit to obtain documents associated with a disputed Senate election, but the Supreme Court dismissed that claim on jurisdictional grounds due to a lack of Senate authorization for the suit. Reed v. Delaware Cty. Comm., 277 U.S. 376, 389 (1928). JAMES HAMILTON, THE POWER TO PROBE: A STUDY OF CONGRESSIONAL INVESTIGATIONS 197 (1976) (noting that the Senate Select Committee on Presidential Campaign Activities' lawsuit to enforce the subpoena issued to President Nixon was "the first civil action to enforce a congressional subpoena issued to the executive").

[252] Jurney v. MacCracken, 294 U.S. 125, 147–48 (1935) ("No act is so punishable unless it is of a nature to obstruct the performance of the duties of the legislature.").

[253] *See* Marshall v. Gordon, 243 U.S. 521, 543 (1917) (noting that inherent contempt has been used to "deal with either physical obstruction of the legislative body in the discharge of its duties, or physical assault upon its members for action taken or words spoken in the body, or obstruction of its officers in the performance of their official duties, or the prevention of members from attending so that their duties might be performed, or finally with contumacy in refusing to obey orders to produce documents or give testimony which there was a right to compel").

[254] The procedure followed by the House in the contempt citation that was at issue in *Anderson v. Dunn*, 19 U.S. 204 (1821), is typical of that employed in the inherent contempt cases. Thomas L. Shriner, Jr., *Legislative Contempt and Due Process: The* Groppi *Cases*, 46 IND. L. J. 480, 491 (1971) ("The House adopted a resolution pursuant to which the Speaker ordered the Sergeant-at-Arms to arrest Anderson and bring him before the bar of the House (to answer the charge). When Anderson appeared, the Speaker informed him why he had been brought before the House and asked if he had any requests for assistance in answering the charge. Anderson stated his requests, and the House granted him counsel, compulsory process for defense witnesses, and a copy, of the accusatory letter. Anderson called his witnesses; the House heard and questioned them and him. It then passed a resolution finding him guilty of contempt and directing the Speaker to reprimand him and then to discharge him from custody. The pattern was thereby established of attachment by the Sergeant-at-Arms; appearance before the bar; provision for specification of charges, identification of the accuser, compulsory process, counsel, and a hearing; determination of guilt; imposition of penalty.").

[255] *Id*. The subject of a trial for contempt of Congress is not afforded the same procedural protections as a defendant in a criminal trial. *See* Groppi v. Leslie, 404 U.S. 496, 500–01 (1972) ("The past decisions of this Court strongly indicate that the panoply of procedural rights that are accorded a defendant in a criminal trial has never been thought necessary in legislative contempt proceedings. The customary practice in Congress has been to provide the contemnor with an opportunity to appear before the bar of the House, or before a committee, and give answer to the misconduct charged against him.").

[256] The House has previously adopted resolutions authorizing a select committee to investigate contempt allegations and then report its findings to the House. *See* 3 HINDS' PRECEDENTS OF THE HOUSE, *supra* note 602, §1630 (citing CONG. GLOBE, 38th Cong., 2nd Sess., 371 (1865).

obstruction to the exercise of legislative power is removed.[257] Although the purpose of the detention may vary, for subpoena non-compliance the use of the power has generally not been punitive.[258] Rather, the goal is to detain the witness until he or she discloses the information sought but not beyond the end of the Congress.[259]

Despite its title, "inherent" contempt is more accurately characterized as an *implied* constitutional power.[260] The Supreme Court has repeatedly held that although the contempt power is not specifically granted by the Constitution, it is still "an essential and appropriate auxiliary to the legislative function" and thus implied from the general vesting of legislative powers in Congress.[261] The Court has viewed the power as one rooted in self-preservation, concluding that the "power to legislate" includes an "implied right of Congress to preserve itself" by dealing "with direct obstructions to its legislative duties" through contempt.[262]

Despite its potential reach, some observers have described the inherent contempt power as cumbersome, inefficient, and "unseemly."[263] Presumably for these reasons, it does not appear that either house has exercised its inherent contempt power to enforce subpoenas or to remove any other obstruction to the exercise of the legislative power since the 1930s.[264] Even so, the mere threat of arrest and detention by the Sergeant at Arms can be used to encourage compliance with congressional demands. For example, Senator Sam Ervin, when serving as chair of the Senate Select Committee on Presidential Campaign Activities, invoked the inherent contempt power several times to encourage compliance with the committee's requests for information during its

[257] *See* 3 HINDS' PRECEDENTS OF THE HOUSE, *supra* note 602, §§1666, 1669, 1693.

[258] Marshall v. Gordon, 243 U.S. 521, 544 (1917) (noting that the Court had discovered "no single instance where in the exertion of the power to compel testimony restraint was ever made to extend beyond the time when the witness should signify his willingness to testify"). Indeed, the Court has suggested that the power "does not embrace punishment for contempt as punishment." *Id.* at 542. *But see* Jurney v. MacCracken, 294 U.S. 125, 148 (1935) (affirming exercise of contempt power even after the obstruction to the legislative process had been removed).

[259] Watkins v. United States, 354 U.S. 178, 207 n.45 (1957); *Anderson*, 19 U.S. at 231.

[260] The contempt power is an implied aspect of the legislative power. *Marshall*, 243 U.S. at 537 (noting that "it was yet explicitly decided that from the power to legislate given by the Constitution to Congress there was to be implied the right of Congress to preserve itself, that is, to deal by way of contempt with direct obstructions to its legislative duties."). As opposed to an inherent power, which may not be tethered to a textual grant of authority, an implied power is derived by implication from an enumerated power. *See* Scott C. Idleman, *The Emergence of Jurisdictional Resequencing in the Federal Courts*, 87 CORNELL L. REV. 1, 42–43 (2001).

[261] McGrain v. Daugherty, 273 U.S. 135, 173–74 (1927); ("[T]he two houses of Congress, in their separate relations, possess not only such powers as are expressly granted to them by the Constitution, but such auxiliary powers as are necessary and appropriate to make the express powers effective….").

[262] *Marshall*, 243 U.S. at 537; *Anderson*, 19 U.S. at 228 (holding that in the absence of a contempt power the House would be "exposed to every indignity and interruption that rudeness, caprice, or even conspiracy, may meditate against it").

[263] *See* Rex E. Lee, *Executive Privilege, Congressional Subpoena Power, and Judicial Review: Three Branches, Three Powers, and Some Relationships*, 1978 BYU L. REV. 231, 254 (writing that "[t]here is something unseemly about a House of Congress getting into the business of trial and punishment"); S. REP. NO. 95-170, at 97 (1977) (describing Congress's inherent contempt power, which requires a trial in the House or the Senate, as "time consuming and not very effective").

[264] CONGRESSIONAL QUARTERLY'S GUIDE TO CONGRESS 163 (3rd ed. 1982).

investigation of the Nixon Administration.[265] Although the power has long lain dormant, it remains a tool that Congress may use to enforce subpoenas.[266]

Criminal Provisions Protecting the Investigative Power

Along with the criminal contempt statute already discussed, Congress has enacted various criminal provisions to protect the integrity of congressional investigations. These provisions generally seek to deter witnesses from misleading or obstructing a congressional committee in its exercise of the investigative power. But congressional committees are not empowered to enforce, or even trigger executive branch enforcement of these provisions. Instead, enforcement—as with all criminal provisions—is carried out by the executive branch. A committee may refer a possible offense to the DOJ with a recommendation that an investigation be initiated, but the ultimate decision on prosecution is retained by the executive branch.[267]

Testimony Under Oath

A witness under oath before a congressional committee who willfully gives false testimony is subject to prosecution for perjury under 18 U.S.C. § 1621. The false statement must be "willfully" made before a "competent tribunal" and involve a "material matter."[268] A quorum must be present for a legislative committee to be competent for perjury purposes.[269] Both houses have adopted rules establishing less than a majority of members as a quorum for taking testimony, normally two members for House committees[270] and one member for Senate committees.[271] The requisite quorum must be present at the time the alleged perjurious statement is made, not merely at the time the session convenes.[272] No prosecution for perjury will lie for statements made only in the presence of committee staff unless the committee has deposition authority and has taken formal action to allow it.[273]

Unsworn Statements

Most statements made to congressional committees at both the investigatory and the hearing phases of oversight are unsworn. Even when not under oath, providing willfully false testimony is

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[265] *See* Hamilton, *supra* note 251, at 96–97 (describing Chairman Ervin using a threat of inherent contempt to obtain the testimony of White House aide Alexander Butterfield); *id*. at 160 (noting that President Nixon was "determined to prohibit his top aides" from testifying before Congress until Chairman Ervin "threatened to dispatch the Senate sergeant at arms to transport them to the Senate").

[266] *Id*. at 95 ("[T]he self-help powers of Congress remain an alternate method to nudge intransigent witnesses into giving evidence to Congressional bodies.").

[267] *See* CRS Report R45653, *Congressional Subpoenas: Enforcing Executive Branch Compliance*, by Todd Garvey at 17-20.

[268] 18 U.S.C. § 1621(a).

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

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

[271] 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.

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

[273] Perjury requires that the false statement be made under "an oath authorized by law" and before a "competent tribunal." Unless expressly authorized to take a deposition under oath, conversations with committee staff generally do not fall within the scope of the perjury statute. *See*, *e.g.*, United States v. Weissman, S2 94 Cr. 760, 1996 U.S. Dist. LEXIS 19125 (S.D.N.Y. 1996).

still a criminal offense.[274] Under 18 U.S.C. § 1001, 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.[275] Given the breadth, the statute would appear to apply to false statements made not only in hearings and depositions but also other interviews with committee staff.

Obstruction of a Congressional Proceeding

Federal law also criminalizes certain acts that would obstruct a congressional investigations. Under 18 U.S.C. § 1505 it is unlawful to "corruptly" obstruct or attempt to obstruct the "due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress."[276] "Corruptly," for purposes of the statute means "acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information."[277]

Limitations on Congressional Authority

The previous section established the scope of Congress's investigatory power. This section briefly addresses how the exercise of this power may be constrained by the Constitution, the common-law tradition, or federal statute.

Constitutional Limitations

As discussed, a congressional investigation must have a legislative purpose to be a valid exercise of Congress's authority under Article I of the Constitution.[278] But the investigatory power is also limited by constraints found elsewhere in the text and structure of the Constitution. The Supreme Court has observed that when demanding information, "Congress, in common with all branches of the Government, must exercise its powers subject to the limitations placed by the Constitution on governmental action" including "the relevant limitations of the Bill of Rights."[279] As a result, "recipients of legislative subpoenas "retain their constitutional rights throughout the course of an investigation."[280]

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 First Amendment also restricts Congress in conducting oversight and investigations.[281] In *Barenblatt v. United States*, the Court stated that "where First

[274] 18 U.S.C. § 1001.

[275] *Id*.

[276] *Id*. § 1505.

[277] *Id*. § 1515(b).

[278] *See* "The Constitutional Scope of the Investigative Power: Legislative Purpose" *supra*.

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

[280] Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2032 (2020).

[281] Watkins v. United States, 354 U.S. 178, 197 (1957). *See also*, Senate Permanent Subcomm., on Investigations v. Ferrer, 199 F. Supp. 3d 125, 138 (D.D.C. 2016) ("The underlying rationale of this precept is that 'investigation is part

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."[282] In balancing the personal interest in privacy against the congressional need for information, the Court has declared that "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."[283] When evaluating Congress's interest in cases involving the First Amendment, the Court has generally 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.[284]

Though finding the First Amendment applicable to congressional investigations, the Supreme Court has never relied on the First Amendment to invalidate a congressional subpoena or to reverse a criminal contempt of Congress conviction. And unlike the Fifth Amendment privilege against self-incrimination, it is clear that the First Amendment does not give a witness an absolute right to refuse to respond to congressional demands for information.[285]

Nevertheless, First Amendment concerns can inform Congress's deliberations on whether to hold a non-cooperative witness 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.[286] 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.[287] After extensive debate, the House failed to adopt the committee report, voting instead to recommit the matter to the committee.[288] During the debate, several Members expressed concern that approval

of lawmaking' and the 'First Amendment may be invoked against infringement of the protected freedoms by law or by lawmaking.'") (citing *Watkins*, 354 U.S. at 197).

[282] *Barenblatt*, 360 U.S. at 126 (1959).

[283] *Watkins*, 354 U.S. at 198. A balancing test was also used in *Branzburg v. Hayes*, 408 U.S. 665 (1972), which involved the claimed privilege of newsmen not to respond to demands of a grand jury for information. 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." *Id*. at 699-700; *see also* Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 546-47 (1963) (applying the compelling interest test in a legislative investigation).

[284] *See, e.g.*, *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).

[285] *Barrenblatt*, 360 U.S. at 126. For a recent rejection of a First Amendment defense asserted in response to a congressional subpoena see Senate Permanent Subcomm., on Investigations v. Ferrer, 199 F. Supp. 3d 125, 138-44 (D.D.C. 2016).

[286] 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.

[287] H. REPT. 92-349 (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. *Id*. at 9.

[288] *See* 117 CONG. REC. 23922-23926, 24603-24659, 24720-24753 (1971).

of the contempt citation would have a "chilling effect" on the press and would unconstitutionally involve the government in the regulation of the press.[289]

Fourth Amendment

The Fourth Amendment primarily protects congressional witnesses against subpoenas that are unreasonably broad or burdensome.[290] However, the extent of this protection is not clear and has received little attention in the courts. In one of the few cases addressing the issue, the Supreme Court held in the 1960 case *McPhaul v. United States* that a congressional subpoena seeking "all records, correspondence, and memoranda" of an organization was *not* unreasonably broad. As the Court explained:

> "Adequacy or excess in the breath of the subpoena are matters variable in relation to the nature, purposes, and scope of the inquiry." The subcommittee's inquiry here was a relative1y broad one … and the permissible scope of materials that could reasonably be sought was necessarily equally broad. It is not reasonable to suppose that the subcommittee knew precisely what books and records were kept by the [organization], and therefore the subpoena could only "specify … with reasonable particularity, the subjects to which the documents … relate…." The call of the subpoena for "all records, correspondence and memoranda" of the [organization] relating to the specified subject describes them "with all of the particularity the nature of the inquiry and the [subcommittee's] situation would permit…. "The description contained in the subpoena was sufficient to enable [organization] to know what particular documents were required and to select them adequately."[291]

As such, the permissible breadth of a subpoena should be considered in relation to the nature of the committee investigation.

Fifth Amendment Privilege Against Self-Incrimination

The privilege against self-incrimination afforded by the Fifth Amendment is available to a witness in a congressional investigation.[292] As such, a witness generally cannot be compelled to provide personally incriminating testimony to a committee.[293]

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[289] *See* 117 CONG. REC. 24731-24732 (1971).

[290] 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). Following *Carpenter v. United States*, 138 S. Ct. 2206, it is conceivable that congressional subpoenas to a third-party information holder could face new Fourth Amendment scrutiny. *See id*.at 2260-61 (2018) (Alito, J., dissenting) (noting that one possible consequence of applying the "broad principles that the Court seems to embrace" may be that "[a]ll subpoenas duces tecum … compelling the production of documents will require a demonstration of probable cause, and individuals will be able to claim a protected Fourth Amendment interest in any sensitive personal information about them that is collected and owned by third parties"); *id*. at 2234 (Kennedy, J., dissenting) (asserting that "by invalidating the Government's use of court-approved compulsory process in this case, the Court calls into question the subpoena practices of federal and state grand juries, legislatures, and other investigative bodies").

[291] *McPhaul*, 364 U.S. at 382 (internal citations omitted).

[292] Watkins v. United States, 354 U.S. 178 (1957); Quinn v. United States, 349 U.S. 155 (1955). For further discussion, see CRS Legal Sidebar WSLG1813, *The Fifth Amendment in Congressional Investigations*, by Todd Garvey.

[293] 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

The Supreme Court has recognized that witnesses may invoke the Fifth Amendment privilege during a congressional investigation only with regard to disclosures that are:

1. testimonial ("relate a factual assertion or disclose information"),[294]
2. self-incriminating (any disclosures that tends to show guilt or that furnishes any "link in the chain of evidence" needed to prosecute),[295] and
3. compelled (not voluntarily given).[296]

Oral testimony given pursuant to a subpoena and in response to committee questioning generally qualifies as testimonial and compelled. Therefore, the central inquiry in a congressional investigation setting is typically whether the responsive testimony would be "incriminating." The Supreme Court has taken a broad view of what constitutes incriminating testimony, reasoning that the privilege protects any statement "that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might so be used."[297] Even a witness who denies any criminal wrongdoing can refuse to answer questions to avoid being "ensnared by ambiguous circumstances."[298]

The scope of the privilege differs significantly when a committee is demanding that the witness produce documents. The Supreme Court has made clear that the mere fact that the *contents* of a document may be incriminating does not mean that the document itself is protected from disclosure under the Fifth Amendment.[299] It is only when the act of *producing* the documents is itself incriminating that the Fifth Amendment is triggered. That "act of production" is the only compelled act and "may have testimonial aspects and an incriminating effect" because a witness would in fact be admitting that "the papers existed, were in his possession or control, and were authentic."[300]

This "act of production" doctrine creates no bright-line rules, but the Court has previously reasoned that where the existence and location of a document is a "foregone conclusion," the witness "adds little or nothing to the sum total of the government's information by conceding that he in fact has the papers."[301] In such a scenario, the privilege against self-incrimination is not triggered because "[t]he question is not of testimony but of surrender."[302] To the contrary, it would

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> 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.

United States v. Jaffee, 98 F. Supp. 191, 193-94 (D.D.C. 1951). The privilege is personal in nature and may not be invoked on behalf of a corporation, *Hale v. Henkel*, 201 U.S. 43 (1906), small partnership, *Bellis v. United States*, 417 U.S. 85 (1974), labor union, *United States v. White*, 322 U.S. 694 (1944), or other "artificial" organization, *Bellis*, 417 U.S. at 90.

[294] Doe v. United States, 487 U.S. 201, 210 (1988).

[295] Hoffman v. United States, 341 U.S. 479, 486 (1951).

[296] Fisher v. United States, 425 U.S. 391, 396 (1976).

[297] Kastigar v. United States, 406 U.S. 441, 445 (1972).

[298] Ohio v. Reiner, 532 U.S. 17, 21 (2001) ("[W]e have emphasized that one of the Fifth Amendment's 'basic functions … is to protect innocent men … 'who otherwise might be ensnared by ambiguous circumstances.'"') (quoting Grunewald v. United States, 353 U. S. 391, 421 (1957)). *But see* 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).

[299] *Doe*, 487 U.S. at 610 ("Where the preparation of business records is voluntary, no compulsion is present.").

[300] *Id*. at 612.

[301] *Fisher*, 425 U.S. at 411.

[302] *In re* Harris, 221 U.S. 274, 279 (1911).

appear that where a committee has no "prior knowledge of either the existence or the whereabouts" of the documents, the act of production will be testimonial in nature and therefore potentially privileged.[303]

There is no required verbal formula for invoking the privilege. Instead, courts have suggested that a committee should recognize any reasonable indication that the witness is asserting his privilege.[304] Where a committee is uncertain whether the witness is 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.[305] The committee retains the right to review the assertion of the privilege by a witness to determine its validity, but the witness is not required to provide further explanation if that explanation would put him or her in peril of self-incrimination. In addition, the privilege will be recognized as waived if the waiver is made "intelligently and unequivocally."[306]

Even a proper invocation of the Fifth Amendment does not necessarily mean that a committee will be unable to obtain the testimony or documents that it seeks. Under federal statute, when a witness asserts the privilege, the full house or the committee conducting the investigation may seek a court order that (1) directs the witness to testify and (2) grants the witness immunity against the use of his or her testimony, or other evidence derived from this testimony, in a subsequent criminal prosecution.[307] To preserve the witness's Fifth Amendment rights, 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.[308] However, the witness may be convicted of the crime (the "transaction") on the basis of other evidence.[309]

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.[310] 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.[311] Although the order to testify may be issued before the witness's appearance,[312] it does not become legally effective until the witness has been asked a question, has invoked privilege, and has been presented with the court order.[313] The court's role in issuing

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[303] United States v. Hubbell, 530 U.S. 27, 45 (2000).

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

[305] Emspak v. United States, 349 U.S. 190 (1955); *see also*, Joint Comm. on Cong. Operations, 94th Cong., LEADING CASES ON CONGRESSIONAL INVESTIGATORY POWER 63 (Comm. Print 1976).

[306] *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).

[307] 18 U.S.C. §§ 6002, 6005.

[308] *Id*. § 6002(3).

[309] 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).

[310] 18 U.S.C. § 6005(a).

[311] The DOJ may waive the notice requirement. Application of the Senate Permanent Subcomm. on Investigations, 655 F.2d 1232, 1236 (D.C. Cir. 1980).

[312] *Id*. at 1237.

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

the order has been viewed as 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.[314]

Fifth Amendment Due Process Rights

A witness or participant in a congressional investigation need not be accorded the same procedural rights and protections that are commonly seen in adjudicative proceedings. While the procedural protections of the Fifth Amendment's Due Process Clause may apply to congressional proceedings in some limited manner, the precise "process" that is "due" to participants depends on the nature of the proceeding.[315] A congressional investigation, whether conducted for legislative or oversight purposes, is not a judicial or adjudicative proceeding but is instead an "inquest" or fact-finding proceeding. As the Supreme Court has noted, "when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used."[316] The D.C. Circuit, for example, has explicitly stated that "the distinguishing factors" between a legislative investigation and a criminal proceeding "cause" congressional investigations "to be outside the guarantees of the due process clause of the Fifth Amendment…."[317]

The Due Process Clause has been interpreted to establish a pertinency or relevancy requirement in contempt of Congress prosecutions. The Supreme Court has held that to punish a witness for failure to comply with a congressional subpoena, the relationship of the question posed to the matter under inquiry "must be brought home to the witness at the time the questions are put to him."[318] "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."[319] Additionally, in a contempt proceeding, to satisfy both the requirement of due process as well as the statutory requirement that a refusal to answer be "willful," a witness should be informed of the committee's ruling on any objections raised or privileges asserted.[320]

Common-Law Privileges

Congress has generally drawn an important distinction between those privileges that derive from the Constitution and those that arise from the common law.[321] Whereas committees must recognize and accept properly asserted constitutional privileges during an investigation, it has

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[314] Application of the U.S. Senate Select Comm. on Presidential Campaign Activities, 361 F. Supp. 1270 (D.D.C. 1973). In non-binding dicta, however, the court referred to the legislative history of the statutory procedure. That history, in the court's view, suggested that although a court lacks power to review the advisability of granting immunity, it 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 id.* at 1278-79.

[315] Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (concluding that the concept of Due Process is "flexible and calls for such procedural protections as the particular situation demands").

[316] Hannah v. Larche, 363 U.S. 420, 442 (1960).

[317] United States v. Fort, 443 F.2d 670, 679 (D.C. Cir. 1970).

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

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

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

[321] *See generally* TELFORD TAYLOR, GRAND INQUEST: THE STORY OF CONGRESSIONAL INVESTIGATIONS 227-28 (1974).

generally been the congressional view that investigative committees are not bound by court-created common-law privileges.[322] Although in practice committees at times choose to recognize common-law privileges,[323] the House especially has treated the decision as a discretionary one to be made by the committee by "weighing the legislative need for disclosure against any possible resulting injury."[324] The underlying rationale for this position has been that Congress's exercise of its constitutionally based investigative powers cannot be impeded by court-created, common-law limitations and that each chamber's exclusive power to determine the rules of its own proceedings includes the authority to establish investigative and hearing procedures that govern the treatment of certain privileges within those proceedings.[325]

The Supreme Court recently made a statement that may be in some tension with this congressional practice. In non-binding dicta, the Court stated in the 2020 case of *Trump v. Mazars* that, in addition to retaining their constitutional rights, recipients of a committee subpoena "have long been understood to retain *common law and constitutional privileges* with respect to certain materials…."[326] The import of this passage is unclear. A few observers have interpreted it to indicate that the Court may view common-law privileges as applicable in a congressional proceeding.[327] That may be so, but the Court did not go so far as to state that common-law privileges can be used to shield information from Congress. Nor is it clear how a nonconstitutional, common-law privilege could be a legal constraint upon Congress's exercise of its implied Article I powers.[328] Instead, the passage only suggests that witnesses have been

[322] *See, e.g.,* H. REP. NO 116-125 at 31 (2019) (concluding that "common law privileges … are not valid reasons to withhold documents subject to a valid subpoena from Congress, which derives its investigative authority from the Constitution.) *Id*. (citing Letter from Chairman Jason Chaffetz. et al., Committee on Oversight and Government Reform to Huban Gowadia, Acting Administrator, Transportation Security Administration (May 2, 2017)) ("The House of Representatives derives its authority from the United States Constitution and is bound only by the privileges derived therefrom … neither the Committee nor the United States House of Representatives recognizes purported non-disclosure privileges associated with the common law…."); S REP. NO 105-167 at 586 (1998) ("There is no binding authority that the Senate and its committees are legally required to recognize common-law privileges such as the attorney-client or work-product privilege. As a separate and equal branch of government, Congress is constitutionally authorized to establish its own rules of procedure, so long as they do not contravene the express provisions of the Constitution. Both the attorney-client and work-product privileges are common-law privileges established by the courts; they have no constitutional standing (although attorney-client privilege is implicated in some of the Constitution's provisions). The Senate is under no obligation to recognize the attorney-client and work-product privileges."); H. REP. NO. 105-792 (1998) ("The historic position of the House of Representatives is that committees of Congress are not bound to recognize any non-Constitutional privilege, such as the attorney-client privilege.")

[323] For example, in rejecting a 1955 bill that would have made common-law privileges applicable in committee investigations, the Senate stated, "With few exceptions, it has been committee practice to observe the testimonial privileges of witnesses with respect to communications between clergyman and parishioner, doctor and patient, lawyer and client, and husband and wife." S. REP. NO. 84-2, at 27-28 (1955).

[324] *See* H. Comm. on Nat. Resources, Rule IV ("Claims of common-law privileges made by witnesses in hearings, or by interviewees or deponents in investigations or inquiries, are applicable only at the discretion of the Chair, subject to appeal to the Committee."); H. Comm. on Science, Space, and Tech., Rule III ("Claims of common-law privileges made by witnesses in hearings, or by interviewees or deponents in investigations or inquiries, are applicable only at the discretion of the Chair, subject to appeal to the Committee."); 1 *International Uranium Control: Hearing Before the Oversight and Investigations Subcomm. of the House Comm. on Interstate and Foreign Comm*., 95th Cong. 60 (1977).

[325] U.S. CONST. art. 1, § 5, cl. 2.

[326] Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2032 (2020) (emphasis added).

[327] *See, e.g.,* Robert Kelner and Perrin Cooke, *The Supreme Court's Mazars Decision Contains a Significant Suggestion That Congress May Be Bound by the Attorney-Client Privilege in Congressional Investigations*, INSIDE POLITICAL LAW (July 9, 2020), https://www.insidepoliticallaw.com/2020/07/09/the-supreme-courts-mazars-decision-contains-a-significant-suggestion-that-congress-may-be-bound-by-the-attorney-client-privilege-in-congressional-investigations/.

[328] U.S. CONST. art. VI ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof … shall be the supreme Law of the Land").

"understood" to "retain" certain common-law privileges. This may have been a reference to what could be described as an informal understanding—arising from House and Senate practice—that committees at times choose to recognize and accept common-law privileges, especially the attorney-client privilege. To the extent, however, that the Court was suggesting the existence of a legal obligation, it would appear that neither the House nor the Senate has historically "understood" common-law privileges to limit the power of inquiry.[329]

Attorney-Client Privilege

The attorney-client privilege, which protects confidential communications made with an attorney to obtain legal advice or assistance, is one of the oldest common-law exceptions to the normal principle of full disclosure in the judicial process.[330] 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"[331] to the witness.[332] On a case-by-case basis, a committee can consider, among other factors:

- the strength of a claimant's assertion in light of the pertinence 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 by the committee. Doubt as to the validity of the asserted claim, however, may diminish the force of such a claim.[333]

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[329] In the historical example referenced by the Court for support of the proposition that witnesses are understood to retain certain common-law privileges in congressional investigations, the committee chair stated in the course of considering an attorney-client claim that "[i]t is well-established by congressional precedent and practice that acceptance of a claim of attorney-client privilege rests in the sole and sound discretion of Congress, and cannot be asserted as a matter of right." *See* LOUIS FISHER, THE POLITICS OF EXECUTIVE PRIVILEGE 106 (2004). *See also* Michael D. Bopp and Delisa Lay, *The Availability of Common Law Privileges for Witnesses in Congressional Investigations*, 35 HARV. J.L. & PUB. POL'Y 897, 905 (2012) (noting that "common law privileges are not constitutionally protected and thus do not apply to Congress").

[330] Upjohn v. United States, 449 U.S. 383, 389 (1981); Westinghouse Electric Corp. v. Republic of the Philippines, 951 F.2d 1414, 1423 (3d Cir. 1991). *See also* United States v. Bisanti, 414 F.3d 168, 171 (1st Cir. 2005) ("The essential elements of the claim of attorney-client privilege are as follows: (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his insistance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.").

[331] *International Uranium Control*, *supra* note 324, at 60.

[332] 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 ("[E]ach standing committee of the Senate and the House of Representatives 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.").

[333] *See*, *e.g.*, H. REP. NO. 105-792 (FRANKLIN L. HANEY), at 11-15 (1988); H. REP. NO. 104-598 (JOHN M. QUINN, DAVID WATKINS, AND MATTHEW MOORE), at 40-54 (1996); S. REP. NO. 104-191 (WILLIAM H. KENNEDY III), at 9-19 (1995); H. REP. NO. 99-462 (RALPH AND JOSEPH BERNSTEIN), at 13-14 (1986); *International Uranium Control*, note 324, 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.[334] Congressional committees have not viewed themselves as legally required to allow a witness to decline to testify on the basis of these and similar testimonial privileges.[335] And as previously noted, 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.[336]

Executive Privilege

Various executive privileges are sometimes invoked as a reason not to comply with congressional requests for information. The foundation for these privileges is not always clear, as some derive from the Constitution, others from the common law, and still others from a combination of both.[337]

There is not a single "executive privilege." Instead, there exists a suite of distinct privileges, each possessing a different—though sometimes overlapping—scope.[338] The political branches, in support of their often competing interests and priorities, have adopted somewhat divergent views on these different component privileges. Whereas Congress has generally interpreted executive privilege narrowly, limiting its application to the types of presidential, national security, and diplomatic communications referenced by the Supreme Court in the seminal decision of *United States v. Nixon*,[339] the executive branch has historically viewed executive privilege more broadly, providing protections to a number of different categories of documents and communications that implicate executive branch confidentiality interests.[340] Under the executive branch's interpretation, these privileges include:

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[334] FED. R. EVID. 501.

[335] *See generally* ATTORNEY-CLIENT PRIVILEGE: MEMORANDA OPINIONS OF THE AMERICAN LAW DIVISION, LIBRARY OF CONGRESS, SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE HOUSE COMM. ON ENERGY AND COMM. 98th Cong. (Comm. Print 1983).

[336] United States v. Fort, 443 F.2d 670 (D.C. Cir. 1970) (citing Hannah v. Larche, 363 U.S. 420 (1960)).

[337] *See infra* notes 349-57 and accompanying text.

[338] *In re* Sealed Case, 121 F.3d 729, 736 (D.C. Cir. 1997) (noting that "executive officials have claimed a variety of privileges to resist disclosure of information"). *See also* John E. Bies, *Primer on Executive Privilege and the Executive Branch Approach to Congressional Oversight*, LAWFARE (June 16, 2017) ("[A] review of executive branch practice identifies a number of categories of information that the executive branch, at least, believes may be protected by an invocation of the privilege.").

[339] *See* H. COMM. ON OVERSIGHT AND GOV'T REFORM, 110TH CONG., REP. ON PRESIDENT BUSH'S ASSERTION OF EXECUTIVE PRIVILEGE IN RESPONSE TO THE COMMITTEE SUBPOENA TO ATTORNEY GENERAL MICHAEL B. MUKASEY 8 (Comm. Print 2008) ("The Attorney General's argument that the subpoena implicates the 'law enforcement component' of executive privilege is equally flawed. There is no basis to support the proposition that a law enforcement privilege, particularly one applied to closed investigations, can shield from congressional scrutiny information that is important for addressing congressional oversight concerns. The Attorney General did not cite a single judicial decision recognizing this alleged privilege."); H.R. REP. NO. 105-728, at 16 n. 43 (1998) ("As the D.C. Circuit has recently held, the doctrine of executive privilege which arises from the constitutional separation of powers applies only to decisionmaking of the President. Since the subject of the Committee's subpoena is not one that does (or legally could) involve Presidential decisionmaking, no constitutional privilege could be invoked here.") (citations omitted).

[340] *See Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 116 (May 30, 1984) ("The scope of executive privilege includes several related areas in

- the state-secrets privilege, which protects certain military, diplomatic, and national security information;[341]
- the presidential communications privilege, which generally protects confidential communications between the President and his advisors that relate to presidential decisionmaking, as well as a certain subset of communications not involving the President but that are nonetheless made for purposes of advising the President;[342]
- the deliberative process privilege, which protects predecisional and deliberative communications within executive branch agencies;[343] and
- the law enforcement privilege, which protects the contents of open (and sometimes closed) law enforcement files, including communications related to investigative and prosecutorial decisionmaking.[344]

The executive branch has tended to consolidate these various privileges into one "executive privilege," particularly when responding to congressional investigative requests.[345] Congressional committees, on the other hand, have typically distinguished between the different individual privileges.[346]

There are various reasons the executive privileges may appropriately be treated as distinct. They protect different types of communications and appear to arise from different sources of law (e.g., the Constitution, judicial common law, or history and practice) with some more firmly established in judicial precedent than others. As a result, the privileges apply with different strengths and are balanced against judicial or congressional needs in different ways. For example, when faced with a dispute over compelled disclosure, courts have "traditionally shown the utmost deference" to presidential claims of a need to protect military or diplomatic secrets.[347] The President's more generalized interest in the confidentiality of his other communications (the presidential communications privilege), though also arising implicitly from the Constitution, has not been "extended this high degree of deference"[348] and may be overcome by Congress when access is "demonstrably critical to the responsible fulfillment of the Committee's function."[349] The other privileges have been given less weight and must be assessed differently in the face of an exercise of Congress's investigative powers. For example, when compared to the presidential communications privilege, the deliberative-process privilege is more easily overcome by Congress and "disappears altogether when there is any reason to believe government misconduct

which confidentiality within the Executive Branch is necessary for the effective execution of the laws.").

[341] *See Congressional Requests for Confidential Executive Branch Information*, 13 Op. O.L.C. 153, 154 (June 19, 1989).

[342] *See Assertion of Executive Privilege Regarding White House Counsel's Office Documents*, 20 Op. O.L.C. 2 (May 23, 1996).

[343] *See Assertion of Executive Privilege Over Documents Generated in Response to Congressional Investigation into Operation Fast and Furious*, 2012 OLC LEXIS 4 (June 29, 2012).

[344] *See Protective Assertion of Executive Privilege Over Unredacted Mueller Report and Related Investigative Files*, 43 Op. O.L.C. 374 (Nov. 30, 1982).

[345] *See* 8 Op. O.L.C. 101, *supra* note 340, at 116 (reasoning that "[t]he scope of executive privilege includes several related areas"); 13 Op. O.L.C. 153, *supra* note 341, at 154 (reasoning that "the executive branch's interest in keeping the information confidential" is "usually discussed in terms of "'executive privilege'").

[346] *See supra* note 339.

[347] United States v. Nixon, 418 U.S. 683, 710 (1974).

[348] *Id*. at 711.

[349] Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 731 (D.C. Cir. 1974).

occurred."[350] The legal source of the deliberative-process privilege also appears to be different from the presidential communications privilege, as the former arises "primarily" from the common law[351] but may have a "constitutional dimension,"[352] whereas the latter is "inextricably rooted in the separation of powers."[353] Least potent are those executive privileges that arise purely from historical practice or reflect the judicial common law. These have generally been viewed, at least by Congress, as legally insufficient to justify non-compliance with a congressional subpoena.[354]

Of the various executive privileges, the deliberative-process privilege is most frequently implicated in congressional oversight investigations because it gives protection to the very decisionmaking process that Congress is often intent on understanding.[355] The purpose underlying the privilege is to protect the "'quality of agency decisions' by allowing government officials freedom to debate alternative approaches in private."[356] But the deliberative-process privilege applies only to those documents and communications that are *predecisional*, meaning they are created prior to the agency reaching its final decision, and *deliberative*, meaning they relate to the thought process of executive officials and are not purely factual.[357] The privilege does not protect entire documents. Rather, the executive branch must disclose non-privileged factual information that can be reasonably segregated from privileged information in the requested documents. And like the other executive privileges,[358] the deliberative-process privilege is overcome by an adequate showing of need.[359]

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[350] *In re Sealed Case*, 121 F.3d at 746.

[351] In *In re Sealed Case*, the D.C. Circuit determined that "the deliberative process privilege is primarily a common law privilege" but that "[s]ome aspects of the privilege, for example the protection accorded the mental processes of agency officials, have roots in the constitutional separation of powers." 121 F.3d at 745, 737 n.4. Later, in *Committee on Oversight & Gov't Reform v. Lynch*, a district court "determined that there is an important constitutional dimension to the deliberative process aspect of the executive privilege, and that the privilege could be properly invoked in response to a legislative demand." *See* 156 F. Supp. 3d 101, 104 (D.D.C. 2016).

[352] The scope and source of the law enforcement privilege is unclear, particularly when asserted in the context of congressional investigations where committees have voiced consistent objections to its use. The executive branch asserts that the law enforcement privilege is constitutionally based, deriving from both the President's responsibility to "faithfully execute the law" under Article II and constitutionally rooted individual trial and privacy rights. *See* Congressional Subpoenas of Department of Justice Investigative Files, 8 Op. O.L.C. 252 (Oct. 17, 1984). Committees, on the other hand, have previously viewed the executive branch's position on the confidentiality of law enforcement information as a nondisclosure "policy" rather than a constitutionally based privilege. *See* H. COMM. ON OVERSIGHT AND GOV'T REFORM, 110TH CONG., REP. ON PRESIDENT BUSH'S ASSERTION OF EXECUTIVE PRIVILEGE IN RESPONSE TO THE COMMITTEE SUBPOENA TO ATTORNEY GENERAL MICHAEL B. MUKASEY 8 (Comm. Print 2008).

[353] *Nixon*, 418 U.S. at 708.

[354] *See supra* notes 341-50 and accompanying text.

[355] Given its broad scope, the deliberative-process privilege is "the most frequent form of executive privilege raised." *In re Sealed Case*, 121 F.3d at 737.

[356] *Id*. at 737 (quoting NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975)).

[357] *See* Assassination Archives & Research Ctr. v. CIA, No. 18-5280, 2020 U.S. App. LEXIS 40001, at *5-6 (D.C. Cir. Dec. 21, 2020) ("The privilege covers information that is both 'predecisional' and 'deliberative.' Documents are predecisional if they were 'generated before the adoption of an agency policy,' and deliberative if they 'reflect[] the give-and-take of the consultative process.'") (quoting Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980).

[358] *See Nixon*, 418 U.S. at 707 (holding that the presidential communications privilege is not "absolute" or "unqualified"); *Senate Select*, 498 F.2d at 731.

[359] *See* Comm. on Oversight & Gov't Reform v. Lynch, 156 F. Supp. 3d 101, 112-14 (D.D.C. 2016) (finding that a congressional committees need for deliberative materials outweighed the executive branch's interest in confidentiality).

Statutory Limit on Congressional Access to Information

In rare circumstances, Congress has chosen to enact laws that limit its own ability to access specific types of information. One example of such self-limiting action is 26 U.S.C. § 6103(f), under which 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.[360] For any other committee to receive such information, the House or Senate must pass a resolution[361] specifying the purpose for which the information is to be furnished and that the requested information cannot be reasonably obtained from any other source.[362] The information is to be provided only when the requesting committee is sitting in closed executive session.[363]

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"[364] generally. It requires that the President ensure that congressional intelligence committees are "fully and currently informed" of intelligence activities[365] and "promptly" notified of illegal intelligence activities.[366] 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.[367]

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

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[360] 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." *Id*.

[361] In the case of other joint or special committees, a concurrent resolution is required. *Id*.

[362] *Id*. § 6103(f)(3).

[363] *Id*.

[364] *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 Fed. Reg. 59941 (Dec. 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 Cong., § 14(a); House Rule X(11).

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

[366] 50 U.S.C. § 3091(a).

[367] 50 U.S.C. §§ 3092(a), 3093(b).

congressional requestor is not considered to be a disclosure to the general public.[368] In addition, many confidentiality statutes contain explicit exceptions for disclosure to Congress.[369]

From time to time the President and other executive branch entities, as well as 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 nondisclosure 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."[370] A review of the Trade Secrets Act's legislative history, however, provides no indication that it was ever intended to apply to Congress, its employees, or any legislative branch agency or its employees.[371]

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.

Classified Material

How Are Materials Classified?

The standards for classifying and declassifying information are contained in Executive Order 13526 (Executive Order).[372] 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.[373] 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.[374]

[368] *See, e.g.*, 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); Ashland Oil Co., Inc. v. F.T.C., 548 F.2d 977, 979 (D.C. Cir. 1976).

[369] *See, e.g.*, 5 U.S.C. § 552a(b)(9); 6 U.S.C. § 673.

[370] 18 U.S.C. § 1905.

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

[372] Executive Order 13526, 75 Fed. Reg. 707 (Jan. 5, 2010).

[373] *Id*. § 1.3. The unauthorized disclosure of foreign government information is presumed to damage national security. *Id*. § 1.1(b).

[374] *Id*. § 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 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. *Id*. §§ 2.1-2.2.

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.[375] 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.[376] 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.[377] The deadline for declassification can be extended if the threat to national security still exists.[378]

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."[379]

The information being accessed may not be removed from the controlling agency's premises without permission.[380] Each agency is required to establish systems for controlling the distribution of classified information.[381]

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 receive security clearances as such, but are instead presumed to be trustworthy," thereby fulfilling the first requirement to access classified materials.[382] Members of Congress still face the "need to

[375] *Id*. §1.2.

[376] *Id*. 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. *Id*. § 1.7(a).

[377] *Id*. § 1.5.

[378] *Id*. § 1.5(c).

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

[380] *Id*. § 4.1.

[381] *Id*. § 4.2.

[382] *Access to Classified Information*, 20 Op. Off. Legal Counsel 402, 406 (1996).

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.[383] 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.[384]

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,[385] 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 a presidential 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 Members or staff to review certain material, or opt to hold non-public meetings, briefings, and hearings where classified information will be discussed. None of these measures is legally required, but all are within the investigating entity's discretion and may assist in facilitating the disclosure of materials sought during the investigation.

Controlled Unclassified Information

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 "controlled unclassified information" (CUI)[386] can present access issues for congressional committees. The fact that information is CUI does not alone provide a basis for withholding it from duly authorized jurisdictional committees of Congress.[387] However, there may be political and policy reasons why an agency's classification of information as CUI should be afforded due deference.

CUI material can take numerous forms.[388] Some categories are statutorily authorized, while others are creations of the agency that authored or is holding the requested information. All such classifications fall under the oversight of the National Archives and Records Administration as

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[383] *See id*.

[384] *See* CRS Report R43216, *Security Clearance Process: Answers to Frequently Asked Questions*, by Michelle D. Christensen, at 5.

[385] *See* 50 U.S.C. § 3163 (exempting Members of Congress from requirements for accessing classified information).

[386] Executive Order 13556, 75 Fed. Reg. 68675 (Nov. 4, 2010).

[387] *See* 32 C.F.R. § 2002.16(a)(7) (providing that "[a]gencies need not enter a written agreement when they share CUI with … Congress, including any committee, subcommittee, joint committee, joint subcommittee, or office thereof").

[388] CUI is defined as

> information the Government creates or possesses, or that an entity creates or possesses for or on behalf of the Government, that a law, regulation, or Government-wide policy requires or permits an agency to handle using safeguarding or dissemination controls. However, CUI does not include classified information … or information a non-executive branch entity possesses and maintains in its own systems that did not come from, or was not created or possessed by or for, an executive branch agency or an entity acting for an agency.

Id. § 2002.4(h).

executive agent for the CUI Program,[389] which maintains a registry of CUI categories.[390] The Executive Order does not supersede statutorily created protections.[391]

One example of a statutorily authorized CUI 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.[392]

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 authorized to have the information."[393] Pursuant to this statute, TSA promulgated regulations defining *sensitive security information* (SSI)—defined generally as "information obtained or developed in the conduct of security activities"—and restrictions on its disclosure.[394] 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.[395] 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."[396]

Many agencies have developed their own CUI protection regimes in accordance with federal regulation[397] that may be cited in response to congressional requests. Agencies are encouraged to enter into written agreements or arrangements when disseminating CUI outside the executive branch.[398] However, agencies may provide CUI to Congress without a formal agreement.[399]

Individual Member Authority to Conduct Oversight and Investigations

Individual members of a legislative body may conduct investigatory oversight on their own initiative. However, absent the support of the body or a committee, such an investigation will

[389] Executive Order 13556 § 2(c).

[390] The list is available at National Archives, Controlled Unclassified Information, CUI Categories, https://www.archives.gov/cui/registry/category-list.

[391] Executive Order 13556 § 6(a).

[392] 49 U.S.C. § 114(r)(1).

[393] *Id*. § 114(r)(2).

[394] 49 C.F.R. § 1520.5.

[395] *See id*. § 1520.7 (providing 13 specific categories of "covered persons").

[396] *Id*. § 1520.15(c).

[397] 32 C.F.R. Part 2002.

[398] *Id*. § 2002.2(c). Agreements or arrangements are defined as "any vehicle that sets out specific CUI handling requirements for contractors and other information-sharing partners when the arrangement with the other party involves CUI [including] contracts, grants, licenses, certificates, memoranda of agreement/arrangement or understanding, and information- sharing agreements or arrangements."

[399] *Id*. § 2002.16(a)(7)(i).

generally not be supported by the same compulsory legal authorities that are available during committee investigations, including the power to issue subpoenas.[400]

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.[401] The most important of these rules are those that effectively allow unlimited debate on a bill or amendment unless a supermajority votes to invoke cloture.[402] 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. § 2954: The "Rule of Seven" Statute

Another potential tool for minority or small group participation in oversight is 5 U.S.C. § 2954, commonly known as the "rule of seven."[403] 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 jurisdictions, which the agencies "shall" provide.[404] While the statute confers a right of access upon this group of Members, it is not clear whether the Members—in the case of an agency refusal—can enforce their request in the courts. A recent D.C. Circuit decision has recognized that Members who invoke § 2954 have standing to enforce their right,[405] but whether they also possess the necessary cause of action for a court to entertain an enforcement lawsuit remains the subject of litigation.[406]

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[400] 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 chair 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).

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

[402] Senate Rule XXII.

[403] 5 U.S.C. § 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."

[404] 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.

[405] Maloney v. Murphy, 984 F.3d 50, 54 (D.C. Cir. 2020). A federal district court in California previously came to an opposing conclusion on the standing question. *See* Waxman v. Thompson, Case No. CV 04-3467 MMM, 2006 U.S. Dist. LEXIS 102688, at *29 (C.D. Cal. July 24, 2006).

[406] *Maloney*, 984 F.3d at 70 ("This decision resolves only the standing question decided by the district court. To the extent the GSA's argument or the district court's reasoning implicate the existence of a cause of action, the appropriate

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 President, 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.

exercise of equitable discretion, or the merits of the Requesters' claims, those issues remain to be resolved by the district court in the first instance.").

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 Explicitly Provided to 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) S.Res. 194, 93rd Cong. (1973) 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) S.Res. 377, 94th Cong. (1976)	Yes	Yes	No	No
House Select Committee on Assassinations	H.Res. 1540, 94th Cong. (1976) H.Res. 222, 95th Cong. (1977) H.Res. 433, 95th Cong. (1977)	Yes	Yes	No	Yes
Koreagate	H.Res. 252, 95th Cong. (1977)	No	Yes	No	Yes

Investigation	Authorizing Resolution(s)	Staff Deposition Authority	International Information Gathering Authority	Tax Information Access Authority	Authority to Participate in Judicial Proceedings
Billy Carter Investigation	126 Cong. Rec. 19544-46 (1980) (unanimous consent agreement); S.Res. 495, 96th Cong. (1980) S.Res. 496, 96th Cong. (1980)	Yes	No	Yes	No
ABSCAM (House)	H.Res. 67, 97th Cong. (1981)	No	Yes	No	Yes
ABSCAM (Senate)	S.Res. 350, 97th Cong. (1982) 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) 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) 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

Investigation	Authorizing Resolution(s)	Staff Deposition Authority	International Information Gathering Authority	Tax Information Access Authority	Authority to Participate in Judicial Proceedings
2012 Terrorist Attack in Benghazi	H.Res. 567, 113th Cong. (2014) H.Res. 5, 114th Cong. (2015)	Yes	No	No	No
President Trump Impeachment	H.R. 660, 116th Cong. (2019)	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 but are stated in broad subject terms. 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 (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 typically 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 typically be useful for both routine oversight hearings and 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 witnesses 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.[407]

[407] 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.

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.[408]

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.[409] 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.[410]

Performance audits may be undertaken by independent 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.[411]

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

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[408] 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.

[409] 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.

[410] 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.

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

- 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?
- 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*

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.

Monitoring the *Unified Agenda*

The Unified Agenda of Federal Regulatory and Deregulatory Actions is a government-wide publication of rulemaking actions that agencies expect to take in the coming 6-12 months. The Unified Agenda, which is generally published twice each year, lists upcoming regulatory actions (i.e., new proposed and final regulations) and deregulatory actions (i.e., reductions in or elimination of current regulations). The Unified Agenda provides Congress transparency into

federal agencies' upcoming rulemaking activities—which can be particularly useful given that most regulatory activities are not made public until they are published in the *Federal Register*. The Unified Agenda is available on the website www.Reginfo.gov (https://www.reginfo.gov/public/do/eAgendaMain), which is published by the General Services Administration's Regulatory Information Service Center. Separate from the Unified Agenda, Reginfo.gov also has information about Office of Management and Budget (OMB) review of regulations under Executive Order 12866 and information collection requests under the Paperwork Reduction Act.

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.[412] 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.[413]

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

[412] See "Oversight Information Sources and Consultant Services" section (discussing the capabilities of CRS, GAO, and CBO).

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

Members maintain one or more social media accounts and use their institutional websites to help communicate with constituents and publicize issues.[414]

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.[415]

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**.

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.

Resolutions of Inquiry

The House of Representatives can call upon the executive branch for factual information through resolutions of inquiry (House Rule XIII, clause 7).[416] 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 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.

[414] For more information, see CRS Report R45337, *Social Media Adoption by Members of Congress: Trends and Congressional Considerations*, by Jacob R. Straus.

[415] 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.

[416] 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.

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 modern 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 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 generally 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."[417] Limitations can be an

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

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 so-called Holman rule, rarely used in modern practice).

An Appropriations Limitation

The Hyde Amendment: Consolidated Appropriations Act, 2020, P.L. 116-93, 133 Stat. 2412, Title II, §202(2019): "None of the funds appropriated by this title shall be available to pay for an abortion, except where the life of the mother would be endangered if the fetus were carried to term, or in the case of rape or incest: Provided, That should this prohibition be declared unconstitutional by a court of competent jurisdiction, this section shall be null and void."

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 Manual, Sections 1044(b), 1053-62.

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.

An Appropriations Rider

Department of Homeland Security Appropriations Act, 2007, P.L. 109-295 §550, 120 Stat. 1388 (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,[418] 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, in *INS v. Chadha*, 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.[419] Despite this ruling, Congress 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

[418] Legislative Appropriations Act, 1933, 47 Stat. 382, 414.

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

from the relevant authorization and appropriations committees and the bipartisan leadership of Congress.[420]

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 branch 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."[421]

A Report-and-Wait Provision

Iran Nuclear Agreement Review Act of 2015, P.L. 114-17 §135(b): "During the 30-calendar day period following transmittal by the President of an agreement pursuant to subsection (a), the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives shall, as appropriate, hold hearings and briefings and otherwise obtain information in order to fully review such agreement … and during the period for congressional review provided in paragraph (1), including any additional period as applicable under the exception provided in paragraph (2), the President may not waive, suspend, reduce, provide relief from, or otherwise limit the application of statutory sanctions with respect to Iran under any provision of law or refrain from applying any such sanctions pursuant to an agreement described in subsection (a)."

Independent Counsel[422]

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* and reauthorized in 1983, 1987, and 1994. The authority 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

[420] *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.

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

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

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.

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 the 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*.[423]

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

[423] 487 U.S. 654 (1988).

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 confidential, the statute stated that "information adequate to justify the expenditures that the office of the independent counsel has made" should be provided.[424]

The conduct of an independent counsel was subject to congressional oversight, and an independent counsel was required to cooperate with that oversight.[425] 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.[426] 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); 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 for conviction 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.[427] 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 recently applied in part 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"[428] and on October 19, 2020, when Attorney General William P. Barr appointed John Durham, then-United States Attorney for the

[424] 28 U.S.C. § 595(a)(2).

[425] 28 U.S.C. § 595(a)(1).

[426] 28 U.S.C. § 595(c).

[427] 28 C.F.R. Part 600.

[428] Office of Deputy Attorney General, 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/pr/appointment-special-counsel.

District of Connecticut, to investigate "intelligence and law-enforcement activities surrounding the 2016 presidential election."[429]

Reporting, Testimonial, Notice, and Consultation, Requirements

Congressional oversight of the executive branch is dependent to a large degree upon information supplied by the agencies being overseen. Reporting requirements, obligations to provide testimony or notice of certain actions and decisions, 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.[430]

Concerns about unnecessary, duplicative, and wasteful reports have prompted efforts to reexamine these requirements.[431] 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 that allows executive agencies and the President to more systematically propose the elimination or modification of reporting requirements.[432]

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.[433] 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 one or more agencies, commissions, or officers to:

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

[429] Office of Attorney General, Order No. 4878-2020, Appointment of Special Counsel to Investigate Matters Related to the Intelligence Activities and Investigations Arising Out of the 2016 Presidential Campaigns (Oct. 19, 2020), https://www.justice.gov/file/1370931/download.

[430] 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.

[431] 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.

[432] Ibid.

[433] For more information, see CRS Report R46661, *Strategies for Identifying Reporting Requirements and Submitted Reporting to Congress*, by Kathleen E. Marchsteiner.

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 support for air carriers in the Coronavirus Aid, Relief, and Economic Security Act:

> "(a) REPORT.—Not later than November 1, 2020, the Secretary shall submit to the Committee on Transportation and Infrastructure and the Committee on Financial Services of the House of Representatives and the Committee on Commerce, Science, and Transportation and the Committee on Banking, Housing, and Urban Affairs of the Senate a report on the financial assistance provided to air carriers and contractors under this subtitle, including a description of any financial assistance provided.
>
> (b) UPDATE.—Not later than the last day of the 1-year period following the date of enactment of this Act, the Secretary shall update and submit to the Committee on Transportation and Infrastructure and the Committee on Financial Services of the House of Representatives and the Committee on Commerce, Science, and Transportation and the Committee on Banking, Housing, and Urban Affairs of the Senate the report described in subsection (a)." (134 Stat. 501 (2020)).

Testimony Requirements

While relatively uncommon, Congress has also established statutory requirements for certain executive branch officials to appear and provide testimony before identified committees.[434] At least two such provisions date to 1976,[435] and many testimony requirements have been enacted since 2007, particularly in legislation responding to the financial crisis.[436] Most recently, the Coronavirus Aid, Relief, and Economic Security (CARES) Act[437] included requirements that the Secretary of the Treasury and the chair of the Federal Reserve Board testify on a quarterly basis before the Senate Committee on Banking, Housing, and Urban Affairs and the House Committee on Financial Services.[438]

Notice and Prior Consultation

Congress sometimes includes provisions in law or in committee report language that require or direct agencies to consult with Congress or nonfederal stakeholders before taking certain actions. Provisions such as 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

[434] CRS is aware of approximately 25 such requirements under current law.

[435] Title 7, Section 228(c), of the *U.S. Code* requires the Secretary of Agriculture to testify annually on the department's budget before the Agriculture Committees, and Title 39, Section 2401(e), requires the U.S. Postal Service (USPS)—the specific official is not identified—to appear annually before the Senate Committee on Homeland Security and Governmental Affairs and the House Committee on Oversight and Reform regarding the agency's annual budget.

[436] For example, Title 12, Section 5496(a), requires the director of the Consumer Financial Protection Bureau to appear before the Senate Committee on Banking, Housing, and Urban Affairs and the House Committee on Energy and Commerce on a semiannual basis.

[437] P.L. 116-136.

[438] Ibid. §4026.

agency's decisionmaking in areas such as reallocation of budgetary resources through reprogramming,[439] notice-and-comment rulemaking,[440] and establishment of goals.[441]

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).

Statutory Oversight Enablers

Congress has passed a number of laws, especially in the past half-century, designed to provide additional information to Congress (and the public) on the operations of the executive branch and to add controls that may reduce the demands on Congress's time by shifting responsibility for some routine monitoring to professionals in the executive branch.

Many such 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.[442]

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 branch and Congress 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)

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

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

[441] 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.

[442] 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.

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 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 consider legislation to disapprove federal rules and regulations.[443] 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.

[443] 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.

- "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 Office of Information and Regulatory Affairs (OIRA). The office is authorized to develop and administer uniform information policies 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.

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.[444]

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 CFO Act (P.L. 101-576), which calls upon the director of OMB to submit a financial management status report to appropriate congressional committees.[445] 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 General Services Administration (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.[446] 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

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[444] For an expanded introduction to federal financial management, see CRS In Focus IF11610, *Federal Financial and Budgetary Reporting: A Primer*, by Dominick A. Fiorentino; and CRS In Focus IF11620, *The Office of Federal Financial Management: An Overview*, by Dominick A. Fiorentino.

[445] *See* CRS Insight IN11495, *The Chief Financial Officers (CFO) Act of 1990: 30th Anniversary and Potential Issues for Congress*, by Dominick A. Fiorentino and Clinton T. Brass.

[446] For more information, see CRS Report R44253, *Federal Advisory Committees: An Introduction and Overview*, by Meghan M. Stuessy.

review of agency federal advisory committees to the President and Congress. Since 1998, 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.[447] 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.[448] 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.

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.[449] To execute their missions, offices of inspector general (OIGs) conduct and publish audits and investigations, among other duties. Established by public law as nonpartisan, independent offices, 75 statutory OIGs exist in more than 70 federal entities, including departments, agencies, boards, commissions, and government-sponsored enterprises.[450]

[447] For a more detailed discussion see CRS Report R40957, *Unfunded Mandates Reform Act: History, Impact, and Issues*, by Robert Jay Dilger.

[448] 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.

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

[450] 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.

Inspector General Act of 1978

The majority of IGs are governed by the Inspector General Act of 1978, as amended (hereinafter IG Act).[451] The IG Act originally created OIGs in 12 "federal establishments" and provided the blueprint for IG authorities and responsibilities.[452] The IG Act has been substantially amended three times since its enactment, as described below.

- **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.
- **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.
- **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

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 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.[453]

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

[451] 5 U.S.C. Appendix (IG Act).

[452] 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).

[453] 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.

- 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.[454]

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.[455]

Types and Categories

Currently, 75 statutory IGs exist in the federal government.[456] Of these IGs, 65 are governed by the IG Act, and the remaining 10 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.[457] Each type is described in more detail below.

- **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.[458]

[454] 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.

[455] 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.

[456] 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.

[457] IGs can be grouped in a variety of ways based on several criteria. IGs could be categorized into types other than those listed here based on a different set of criteria.

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

- **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.[459]
- **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.** Three temporary offices with sunset dates operate under statutes outside of the IG Act: (1) the Special IG for the Troubled Asset Relief Program (SIGTARP; P.L. 110-343),[460] (2) the Special IG for Afghanistan Reconstruction (SIGAR; P.L. 110-181),[461] and the Special IG for Pandemic Recovery (SIGPR; P.L. 116-136).[462] The SIGTARP and SIGPR are appointed by the President with the advice and consent of the Senate and are removable by the President.[463] 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.

Authorities and Responsibilities

As mentioned previously, the IG Act vests establishment IGs and DFE IGs with many authorities and responsibilities to carry out their respective missions. Several of these authorities and responsibilities are described in more detail below.[464]

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

[460] Codified at 12 U.S.C. §5231.

[461] See 5 U.S.C. Appendix (IG Act) §8G note.

[462] Codified at 15 U.S.C. §9053.

[463] 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.

[464] In general, the authorities and responsibilities of IGs operating outside of the IG Act are beyond the scope of this

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, one IG operates for multiple federal entities.[465] 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.[466] In other cases, multiple IGs operate for a single federal entity. For example, two statutory IGs operate for the Department of the Treasury—one IG to oversee department-wide programs and operations and one IG (U.S. Treasury Inspector General for Tax Administration) 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.[467] 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.[468] 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.[469] 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.[470] The majority of statutory IGs have also elected to participate in Oversight.gov, a central repository for OIG reports that was established in 2017.[471]

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.[472] IGs have broad authorities and protections to support and reinforce their independence, such as the authority to hire their own

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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.

[465] 5 U.S.C. Appendix (IG Act) §§2, 8G(g)(1), 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.

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

[467] 5 U.S.C. Appendix (IG Act) §4(d).

[468] 5 U.S.C. Appendix (IG Act) §5(a), (b).

[469] 5 U.S.C. Appendix (IG Act) §5(c).

[470] 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).

[471] 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.

[472] 5 U.S.C. Appendix (IG Act) §§3(a), 8G(c).

staff and access all records related to the programs and operations of their affiliated entities.[473] 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.[474] 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.[475]

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.[476] 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.[477]

This process arguably provides a level of budgetary independence from their affiliated entities by allowing Congress to see any differences among the budgetary perspectives of IGs, their affiliated agencies, and 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.[478] This requirement provides an additional level of budgetary independence

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

[474] The heads of eight agencies—the Departments of Defense, Homeland Security, Justice, and the Treasury, plus the 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),8I(a); 50 U.S.C. §§3033(f)(1), 3517(b)(3). When exercising this power, the governing statute generally provides for congressional notification of the exercise of such authority.

[475] 5 U.S.C. Appendix (IG Act) §§3(a), 8G(d).

[476] 5 U.S.C. Appendix (IG Act) §§6(g), 8G(g)(1).

[477] 5 U.S.C. Appendix (IG Act) §§6(g), 8G(g)(1).

[478] 31 U.S.C. §1105(a)(25).

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.[479]

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.[480]

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.[481] 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.[482] 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.[483] The U.S. Postal Service (USPS) 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.[484]

Presidential Removal of Inspectors General

The President has been authorized to remove presidentially appointed IGs since the creation of the IG system in 1978 (Inspector General Act, P.L. 95-452). Prior to 2008, there were no statutory conditions on the President's exercise of this authority. The Inspector General Reform Act of 2008 (P.L. 110-409) requires the President to provide notice to Congress 30 days prior to the removal of an IG. While this provision gives Congress early notice and an opportunity to respond to the removal of an IG, it does not create any special mechanism for Congress to overturn the President's decision. While IG removal has been an issue in the past (for instance in 2009 when President Obama removed the IG for the Corporation for National and Community Service, Gerald Walpin) it received renewed attention in spring 2020 when President Trump removed the IGs for the Intelligence Community and Department of State and replaced the acting IGs for the Departments of Defense and Transportation with other agency officials.

Sources: CRS Legal Sidebar LSB10476, *Presidential Removal of IGs Under the Inspector General Act*, by Todd Garvey; and CRS In Focus IF11546, *Removal of Inspectors General: Rules, Practice, and Considerations for Congress*, by Ben Wilhelm.

[479] 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.

[480] 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.

[481] 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.

[482] 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.

[483] 5 U.S.C. Appendix (IG Act) §8G(e)(1).

[484] 39 U.S.C. §202(e)(3).

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:

- **CIGIE.** CIGIE is the primary coordinating body for statutory IGs.[485] Among other things, CIGIE is intended to aid in coordination among IGs and maintain programs and resources to train and professionalize OIG personnel.[486] 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.[487] The CIGIE chair is an IG chosen from within its ranks, while the executive chair is the OMB deputy director of management.[488]
- **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.[489] 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.[490]
- **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.[491] Further, Congress established a Council of Inspectors General on Financial Oversight to facilitate information sharing among them and develop ways to improve financial oversight.[492] 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.[493]

The Pandemic Response Accountability Committee

The Pandemic Response Accountability Committee (PRAC) was created by Section 15010 of the CARES Act (P.L. 116-136). The members of the PRAC are IGs working in agencies that are playing a significant role in the federal government's pandemic response. Congress tasked the PRAC with three duties related to the federal response to

[485] 5 U.S.C. Appendix (IG Act) §11.

[486] 5 U.S.C. Appendix (IG Act) §11(c)(E).

[487] 5 U.S.C. Appendix (IG Act) §11(b)(1).

[488] 5 U.S.C. Appendix (IG Act) §11(b)(2).

[489] 5 U.S.C. Appendix (IG Act) §11(d).

[490] 5 U.S.C. Appendix (IG Act) §11(d)(2).

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

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

[493] 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.

the COVID-19 pandemic: promoting transparency, conducting oversight, and supporting oversight being conducted by IGs across the federal government. The PRAC's primary function, the coordination of oversight activities related to the pandemic, reflects Congress's view of the complexity, scope, and importance of the federal response to COVID-19 and the value of having a single source for information on that response.

Source: CRS Insight IN11343, *The Pandemic Response Accountability Committee: Organization and Duties*, by Ben Wilhelm.

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 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.

Congressional Research Service

CRS[494] 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.[495]

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 and markups; 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.

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

[495] 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.

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 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."[496]

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/).[497] The confidentiality of congressional requests or responses (such as confidential memoranda) remains unchanged, and these confidential communications may be released only by Congress.

Congressional Budget Office

Since its founding in 1974,[498] 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.[499]

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.

[496] 2 U.S.C. §166.

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

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

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

The Congressional Budget and Impoundment Control Act of 1974 specifies that CBO's director is to be chosen without regard to political affiliation.

Government Accountability Office

The Government Accountability Office (GAO), formerly known as the General Accounting Office, was established by the Budget and Accounting Act of 1921 as an independent auditor of government agencies[500] and has statutory authority to gather information from and investigate agencies.[501] 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.[502] GAO's reports typically support congressional oversight through focusing on:

- 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,[503] 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*[504]) 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.

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

[501] 31 U.S.C. §716.

[502] GAO publications are available at https://www.gao.gov.

[503] http://watchdog.gao.gov/.

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

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 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"[505] in the Ethics in Government Act of 1978.[506]

Statutory duties of the office include defensive legal representation of the Senate, its committees, members, officers, and employees;[507] representation in legal proceedings to aid investigations by Senate committees;[508] 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;[509] providing legal advice and assistance to Senators;[510] and performing such other duties consistent with the nonpartisan purposes and limitations of Title VII of the Ethics Act as the Senate may direct.[511]

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.[512] Additionally, a

[505] S. REPT. NO. 95-170, 95th Congress, 2nd session (1978) at 84.

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

[507] 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.

[508] 2 U.S.C. §288d.

[509] 2 U.S.C. §288e.

[510] 2 U.S.C. §288g.

[511] 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.

[512] The procedure for directing the Senate legal counsel to bring a civil action to enforce a subpoena is detailed in

committee may direct the Senate legal counsel to represent it or any of its subcommittees in an application for an immunity order.[513]

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.[514]

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 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.[515]

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 nonpublic 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.

statute. See 2 U.S.C. §§288d; 28 U.S.C. §1365.

[513] 2 U.S.C. §§288b(d)(2), 288f.

[514] 2 U.S.C. §288g(a)(5)- (6).

[515] 2 U.S.C. §288(a)(2).

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.

Office of Management and Budget

The Office of Management and Budget (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.[516] In practice, OMB's major responsibilities include

- 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,[517] the Clinger-Cohen Act of 1996,[518] 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;

[516] For more detailed information on OMB, see CRS Report RS21665, *Office of Management and Budget (OMB): An Overview*, coordinated by Taylor N. Riccard.

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

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

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

Legislative Coordination and Clearance, Circular A-19, and OMB

Federal agencies, while organizationally part of the executive branch and subject to the President's program, communicate with and rely upon Congress to enact legislation and provide appropriations. An example of this institutional tension between federal agencies, Congress, and the presidential Administration is found in the legislative coordination and clearance procedures described in OMB's Circular No. A-19.

Circular No. A-19 prescribes the process for agency recommendations on proposed, pending, and enrolled legislation. To create a singular Administration voice, OMB's legislative coordination and clearance process centralizes the development of the Administration's position on legislation and communicates that position to Congress and the agencies. This allows for consideration of various issues including the effect of the Administration's position on agencies, existing laws, and future policy goals. This process is followed in the creation of Statements of Administration Policy (SAPs), draft legislation, agency testimony, and agency reports.

Through the process, OMB and White House officials decide which agency views shall be accepted and which shall be discarded in forming the Administration's view on a matter at hand. As a practical matter, not all agency positions will be included. These deliberations are typically not visible to Congress. However, in practice, agencies may reach out to Members of Congress or committee staff about the agency's policy preferences.

Sources: OMB, "1. Purpose," in *Circular No. A-19*, https://www.whitehouse.gov/omb/circulars_a019/#purpose; and CRS Report R44539, *Statements of Administration Policy*, by Meghan M. Stuessy.

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 control through the annual appropriations process, accounts for about one-third of federal spending.

Other House and Senate committees, particularly the House Committee on Ways and Means and the Senate Committee on Finance, oversee more than $2 trillion in spending through reauthorizations, direct spending measures, and reconciliation legislation. In addition, the latter two committees 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 the present. To the extent feasible, the data have been adjusted to provide consistency with the budget and to provide comparability over time.

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 submission of the budget (typically in early February) and usually include a series of budget amendments and supplementals, the Mid-Session Review, 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 the Government Publishing Office 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. 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.

Nonfederal Information Resources

Committees and Members can acquire useful information about executive branch programs and performance from nonfederal 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.

Nongovernmental 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 policymaking. 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."[519]

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.

[519] 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, 19 98

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..... .....

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.....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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