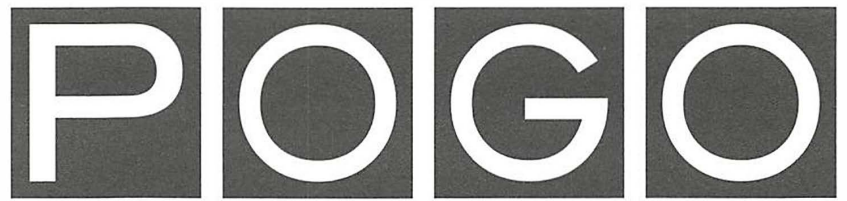


REPORT

POGO.org



PROJECT ON GOVERNMENT OVERSIGHT

Necessary and Proper:

Best Practices for Congressional Investigations

June 7, 2017

Project On Government Oversight
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POGO is a 501(c)(3) organization

“In my opinion, the power of investigation is one of the most important powers of the Congress....The manner in which that power is exercised will largely determine the position and prestige of the Congress in the future.”

—Harry S. Truman, 1944

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INTRODUCTION

A breaking national scandal, disaster, or crisis often results in a call for an independent investigation to understand the situation and the ramifications for the country. While many will want to get to the truth objectively and completely, many will also have partisan motives, and the question quickly becomes one of “who”: Who has the ability, credibility, and independence to perform an effective and fair investigation? The Administration, a federal agency such as the Department of Justice, an independent body such as a convened “blue ribbon” commission of outside experts, a committee of Congress? Decision-makers have turned to each at different times and in different circumstances during our nation’s history.

Congress plays a constitutionally important, distinct, and sometimes complementary role to executive branch investigations. Compared to Department of Justice investigations that are focused on criminal wrongdoing, Congress has a broader mandate and can unearth troubling information that may be significant, but not necessarily criminal, in nature. Congress is also uniquely positioned for considering legislative solutions to address systemic problems. Special or select Congressional committees investigated Watergate, the Iran-Contra scandal, abuses by the US intelligence community, the federal response to the Katrina disaster, the attacks on the US Embassy in Benghazi, and many other important and even historic topics. Some investigations were successful, some were not. Many of the committees developed needed reforms. While there is no perfect investigative committee, with the right strategy Congress can make the process work and get to the truth.

When it comes to Congressional committees tasked to perform major federal-level investigations, success is dependent on many factors. Some of those factors are out of the control of any investigation, such as the political, social, and historic environment. However, there are key best practices for a Congressional investigation that lead to a much better chance of success:

- True bipartisanship
- Adequate tools and resources
- Clear focus
- Congressional Leadership support

OVERVIEW OF THE TYPES OF INDEPENDENT FEDERAL INVESTIGATIONS

Many terms are used to describe independent investigations, and in the midst of a crisis or scandal, leaders, pundits, and commentators will bandy about a lot of them. Typically, one understandably hears a call for an independent investigation, especially when politically based interests or other conflicts of interest come into play. There are times when independence from the executive branch is critical for a credible and effective investigation. The types of independent federal investigations are¹:

- Special Counsel (or Special Prosecutor)
- Independent Counsel (or Independent Prosecutor or Special Prosecutor)
- Presidential Commission (also called a Blue Ribbon or Independent Commission)
- Congressional Commission (also called a Blue Ribbon or Independent Commission)
- Select Congressional Committee (also called a Special Committee)
- Standing Congressional Committee (also called a Permanent Committee)

Each has a set of overlapping investigative tools and powers. All can be effective, though each has different strengths. Many can be granted subpoena power. Some can make public policy recommendations. A couple can pursue criminal prosecutions. Each relies on dedicated staff to ferret out facts.

Special Counsels and Independent Counsels

The executive branch has institutional tools for conducting independent investigations, such as a Special Counsel (also called a Special Prosecutor) established by the Department of Justice. Special Counsels are usually focused on the important but relatively narrow question of whether criminal activity occurred. Under the Attorney General's current authority and Justice Department regulations, a Special Counsel is relatively more insulated from supervision by the Department's political leadership than are typical rank-and-file prosecutors.

During the George W. Bush administration, the Justice Department appointed Patrick Fitzgerald as Special Counsel to investigate the unauthorized disclosure of a CIA agent's identity.² A Special Counsel was deemed necessary since it was assumed early on that the investigation could lead to the White House, and political leadership at the Justice Department was of the same party as the President. Fitzgerald's probe did in fact lead to the White House, and ultimately to Vice

¹ This report is not exploring the work of the Inspectors General, or of the Congressional investigative entities such as the Government Accountability Office or the Congressional Research Service. For discussion on those entities, see *The Art of Congressional Oversight: A User's Guide to Doing It Right*.

<http://www.pogoarchives.org/m/coi/pogo-the-art-of-congressional-oversight-handbook.pdf>

² Letter from James Comey, Acting Attorney General of the US Department of Justice, to Patrick Fitzgerald, United States Attorney, appointing Fitzgerald as Special Counsel, December 30, 2003.

https://web.archive.org/web/20070215015052/http://www.justice.gov/usao/iln/osc/documents/ag_letter_december_30_2003.pdf (Downloaded May 18, 2017) For more information on the case, see "Timeline: The CIA Leak Case," National Public Radio, July 2, 2007. <http://www.npr.org/templates/story/story.php?storyId=4764919> (Downloaded May 19, 2017)

President Richard Cheney's Chief of Staff, who was convicted of perjury for lying to Justice Department investigators.

Under the Justice Department's regulations, Special Counsels are not fully independent from an Administration, and can be fired by the Attorney General or their designee "for misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Departmental policies."³ Furthermore, the Attorney General or their designee "may request that the Special Counsel provide an explanation for any investigative or prosecutorial step, and may after review conclude that the action is so inappropriate or unwarranted under established Departmental practices that it should not be pursued." In the event the Special Counsel is overruled, the Justice Department must notify Congress in writing about the decision. Congress does not have any direct involvement in the decision to appoint a Special Counsel, but in the past has leveraged the confirmation process for administration appointees to influence the decision.⁴

Another type of criminal investigative body had been the Independent Counsel. Created by law in 1978, the position was designed to be more independent than Special Counsels: they would be appointed by a three-judge panel at the request of the Attorney General, and could only be removed for cause.⁵ However, in 1999, after both major political parties criticized independent counsels for being unaccountable, Congress did not reauthorize the statute.⁶ As a result, a new law would be required before an Independent Counsel could be appointed.⁷

³ 28 CFR Part 600

⁴ Rosalind Helderman, "Here's how an independent investigation into Trump and Russia would happen," *The Washington Post*, May 10, 2017. https://www.washingtonpost.com/politics/heres-how-an-independent-investigation-into-trump-and-russia-would-happen/2017/05/10/7dc6bb8a-35a2-11e7-b373-418f6849a004_story.html; Charlie Savage, "After Comey, Here Are the Options for an Independent Russia Inquiry," *The New York Times*, May 9, 2017. <https://www.nytimes.com/2017/05/09/us/politics/trump-rosenstein-comey-special-counsel-russia.html>; Phillip Carter, "We Need a Special Counsel to Investigate the Trump Administration: Here's how Congress can make it happen," *Slate*, February 14, 2017. www.slate.com/articles/news_and_politics/jurisprudence/2017/02/how_congress_can_pressure_trump_to_appoint_a_special_counsel.html (All downloaded June 1, 2017)

⁵ 28 U.S.C. §596; Neal Katyal, "Trump or Congress can still block Robert Mueller. I know. I wrote the rules. How politics could trip up the new special counsel," *The Washington Post*, May 19, 2017. <https://www.washingtonpost.com/posteverything/wp/2017/05/19/politics-could-still-block-muellers-investigation-i-know-i-wrote-the-rules/>; Transcript of Hearing before the House Committee on the Judiciary Subcommittee on Commercial and Administrative Law on "Implementation of the U.S. Department of Justice's Special Counsel Regulation," February 26, 2008. <https://web.archive.org/web/20130306123016/http://judiciary.house.gov/hearings/printers/110th/40924.PDF> (All downloaded June 2, 2017)

⁶ Transcript of Hearings before the Senate Committee on Governmental Affairs on "The Future of the Independent Counsel Act," February 24, March 3, 17, and 24, and April 14, 1999. <http://www.hsgac.senate.gov/download/?id=F2574C55-A955-4F93-BC23-41A91E372512>; Notably, in 1999, Independent Counsel Kenneth Starr, who handled five distinct investigations involving the Clinton White House, opposed reauthorizing the independent counsel law. "Statement of Kenneth Starr before the United States Senate Committee on Governmental Affairs, Hearing on the Future of the Independent Counsel Act," April 14, 1999. <http://www.hsgac.senate.gov/download/?id=93941BE8-37B8-4412-918C-F40BE3BC5ABF> (Hereinafter Starr Testimony) (All downloaded June 1, 2017)

⁷ Congressional Research Service Legal Sidebar, *Special Counsels, Independent Counsels, and Special Prosecutors: Investigations of the Executive Branch by the Executive Branch*, May 11, 2017. <https://fas.org/sgp/crs/misc/special.pdf> (Downloaded May 18, 2017)

Investigative Commissions

Congress and the President can establish investigative commissions (sometimes called independent or blue ribbon commissions).⁸ These commissions can use only outside experts; only Members of Congress; only executive branch staff; or any combination from any of the three groups. The Congressional Research Service distinguishes Congressional commissions from other government commissions by defining it as “a multi-member independent entity that (1) is established by Congress, (2) exists temporarily, (3) serves in an advisory capacity, (4) is appointed in part or whole by Members of Congress, and (5) reports to Congress.”⁹ Between 1989 and 2017, Congress created over 100 policy or investigative commissions. Of those, seven were investigative commissions, given investigative authorities such as the power to subpoena witnesses.¹⁰

Many of these investigative commissions have proven successful in delving into complex issues, and in establishing clearly determined facts, findings, and recommendations. However, both Congressional and presidential commissions face challenges regarding independence. The challenge with Congressional commissions is that they are created by legislation and require the President’s signature, unless Congress overrides a veto. This makes a Congressional commission a difficult type of investigation to establish if the President or a majority of Congress is hostile to it. The challenge with presidential commissions is that they are sometimes seen as not sufficiently independent. The President’s Commission on CIA Activities within the United States in the 1970s was accused by the then-CIA Director of being too close to the White House and used to “prevent a full investigation” by Congress.¹¹ A recent presidential commission on “election integrity”¹² was called by the Brennan Center for Justice—which has thoroughly studied the same topic—“not independent of the White House” and “not a credible effort.”¹³

If a commission is established, though, it can be particularly insulated from politics since the membership can be made up of outside experts—many if not all of whom are not or are no longer elected officials.¹⁴ An example of a Congressional commission is the National Commission on Terrorist Attacks Upon the United States, more commonly called the 9/11 Commission,¹⁵ and an example of a presidential commission is the Presidential Commission on

⁸ Congressional Research Service, *Congressional Commissions: Overview, Structure, and Legislative Considerations* (R40076), January 3, 2017, p. 2.

https://www.everycrsreport.com/files/20170103_R40076_dca0256c139bed43d85ed970ea7abf4c9fbd40b8.pdf (Downloaded May 18, 2017) (Hereinafter CRS, Congressional Commissions)

⁹ CRS, Congressional Commissions, p. 1.

¹⁰ CRS, Congressional Commissions, p. 5.

¹¹ Kenneth Kitts, “Commission Politics and National Security: Gerald Ford’s Response to the CIA Controversy of 1975,” *Presidential Studies Quarterly*, Vol. 26, No. 4, Fall 1996, p. 1083. <https://www.jstor.org/stable/27551672>

¹² “Executive Order 13799 of May 11, 2017,” 82 Fed. Reg. 93, May 16, 2017, p. 22389.

<https://www.gpo.gov/fdsys/pkg/FR-2017-05-16/pdf/2017-10003.pdf> (Downloaded June 5, 2017)

¹³ Brennan Center for Justice, “Brennan Center: Trump Administration’s ‘Voter Integrity’ Commission a Sham,” May 11, 2017. <https://www.brennancenter.org/press-release/brennan-center-trump-administrations-voter-integrity-commission-sham> (Downloaded June 1, 2017)

¹⁴ CRS, Congressional Commissions, pp. 7-8.

¹⁵ National Commission on Terrorist Attacks Upon the United States, “About the Commission.” <http://govinfo.library.unt.edu/911/about/index.htm> (Downloaded May 19, 2017)

the Space Shuttle Challenger Accident¹⁶: both successfully determined key findings regarding the technical and management causes of these nationally significant and tragic events.

Independence from the Executive Branch?

One key point is the independence of the investigating body. A Special Counsel or commission created by the President's Attorney General or the President could face hostility from the President or the leadership of the Justice Department. No matter how competent or personally independent the Special Counsel may be, they can always ultimately be fired. This happened during the Watergate inquiry. After the Special Counsel subpoenaed White House recordings, President Nixon ordered his Attorney General to fire the Special Counsel. Similarly, a Congressional commission created by legislation needs the President's signature, so a White House hostile to an investigation may veto the legislation. By contrast, Congressional committees are under the sole purview and authority of Congress.

Congressional Investigative Committees

Congress has the ability to investigate a broad range of issues.¹⁷ As has been shown by in-depth studies of the history of Congressional investigations, the power and authority of Congress to conduct investigations has been long held and often used.¹⁸ And its powers of investigation are robust. The Supreme Court has held that Congress can investigate any issue that legitimately is in "aid of the legislative function."¹⁹ The only real limits are political. If sufficient political will within Congress exists to explore an issue, a Congressional investigation can occur and persist.

Both the US House of Representatives and Senate have the power to establish committee investigations within the existing rules of Congress. There are two types of Congressional committees that handle investigations: standing or permanent committees, and select or special committees (the terms are interchangeable).

A standing committee is any committee of Congress that is ongoing. It usually has a legislative set of duties such as drafting and reviewing bills and resolutions, reviewing and approving executive branch appointments, and authorizing or appropriating federal funds. Congressional standing committees also have the duty to oversee and review federal programs, projects, and operations. Standing committees may be tasked by Congressional leadership with a special investigation, or may at their own discretion perform an investigation. In either case, the

¹⁶ National Aeronautics and Space Administration, *Report to the President by the Presidential Commission on the Space Shuttle Challenger Accident*, June 6, 1986. <https://history.nasa.gov/rogersrep/genindex.htm> (Downloaded May 19, 2017)

¹⁷ For a comprehensive review of Congress's investigative powers, see Morton Rosenberg, *When Congress Comes Calling: A Study on the Principles, Practices, and Pragmatics of Legislative Inquiry*, Washington DC: The Constitution Project, 2017. <http://www.constitutionproject.org/wp-content/uploads/2017/05/WhenCongressComesCalling.pdf>

¹⁸ Arthur Schlesinger, Jr. and Roger Burns, *Congress Investigates: A Documented History 1792-1974*, New York: Chelsea House, 1983.

¹⁹ *Kilbourn v. Thompson*, 103 U.S. 168, 189 (1880). <https://supreme.justia.com/cases/federal/us/103/168/case.html> (Downloaded June 2, 2017)

committee performs an investigation within its normal jurisdiction. A standing committee may be granted additional resources, such as more staffing, for an investigation.

A select committee is typically established by a House or Senate resolution. The Congressional rules for establishing a select committee are flexible, and the structure can vary. The establishing resolution defines the scope of the investigation, as well as a timeline or duration of the select committee. The establishing resolution also defines powers (such as staff deposition and subpoena power) and the level of staffing.²⁰ Select committees could reside in the House or Senate, or Congress can establish a bicameral or “Joint Committee.” Congress establishes select committees on its own, and the President cannot veto the resolution for establishment.

According to the Congressional Research Service:

“Select or special committees are generally established by a separate resolution of the chamber, sometimes to conduct investigations and studies and, on other occasions, also to consider measures. Often, select committees examine emerging issues that do not fit clearly within existing standing committee jurisdictions or cut across jurisdictional boundaries. A select committee may be permanent or temporary. Select committees may have certain restrictions on member tenure or may include certain specified representatives (e.g., party leaders or certain standing committee chairs) as ex officio members. Instead of the term select, the Senate sometimes uses special committee (e.g., the Special Committee on Aging).”²¹

When performing investigations, both standing and select committees follow the normal procedures for other committee work, such as holding Congressional hearings. They also must follow the rules pertaining to all Congressional committees.²² Investigations by Congressional committees, whether an existing standing committee or a select committee, can tackle broad concerns and unearth facts, and can set the stage for additional actions such as the eventual

²⁰ “Senate Rule XXVI(1) and House Rule XI(2)(m)(1) presently empower all standing committees and subcommittees to issue subpoenas requiring the attendance and testimony of witnesses and the production of documents. Special or select committees must be specifically delegated that authority by Senate or House resolution. The rules governing issuance of committee subpoenas vary by committee. Some committees require a full committee vote to issue a subpoena while others empower the chairman to issue them unilaterally, or with the concurrence of the ranking minority member.” Congressional Research Service, *Congressional Oversight Manual* (RL30240), December 19, 2014, p. 28.

https://www.everycrsreport.com/files/20141219_RL30240_802f6b3930c5e21fc8616b1e2ee5963f1a4822bb.pdf (Downloaded May 18, 2017) (Hereinafter CRS, *Congressional Oversight Manual*)

²¹ Congressional Research Service, *Committee Types and Roles* (CRS 98-241), May 2, 2017, pp 1-2.

https://www.everycrsreport.com/files/20170502_98-241_c52611f19d487a44b3c3c3b335bebd1d84390697.pdf (Downloaded May 18, 2017)

²² “The Senate imposes some general procedural requirements and prohibitions on its committees, but, in general, the Senate’s rules allow each of its standing committees to decide how to conduct its business. Most of the chamber’s requirements for committees are found in Senate Rule XXVI. Because the committees are agents of the Senate, they are obligated to comply with all Senate directives that apply to them.” Congressional Research Service, *Senate Rules Affecting Committees* (CRS 98-311), March 24, 2015, p. 2.

https://www.everycrsreport.com/files/20150324_98-311_15a772ddfba5ebfa9c35d55fed5087ee8161c479.pdf (Downloaded May 18, 2017)

introducing of legislation, referring the case to the Justice Department for possible prosecution, or referring it to other agencies for other types of action.

| Branches Needed to Create Oversight Body | | | |
|--|-------------|-----------|----------|
| Oversight Body | Legislative | Executive | Judicial |
| Special Counsel | | ✓ | |
| Independent Counsel | ✓ | ✓ | ✓ |
| Presidential Commission | | ✓ | |
| Congressional Commission | ✓ | ✓ | |
| Select Congressional Committee | ✓ | | |
| Standing Congressional Committee | ✓ | | |

BEST PRACTICES FOR CONGRESSIONAL INVESTIGATIVE COMMITTEES

History provides many examples of successful Congressional investigations that resulted in important findings, recommendations, and government reforms. Congressional investigations regarding Watergate, the Iran-Contra scandal, abuses by the US intelligence community, and the federal response to the Katrina disaster resulted in helpful conclusions.

On the other hand, some Congressional investigations ended without determining a credible or useful understanding of an issue or situation. Few remember the results of the “Koreagate” investigation into the attempted bribery by South Korea of more than 100 Members of Congress conducted by the House Committee on Standards of Official Conduct in 1977, which ended “in a bang of hyperbole, a whimper of opprobrium and a mass of uncertainties about the future of the House ethics process.”²³ Other investigations got the attention of the public, but devolved into partisan disagreements with little long-lasting outcomes.²⁴

Why is it that some investigations find themselves without useful results? What would make it more likely that a Congressional investigation will lead to uncovering the truth? There is no magic answer. However, there are four key best practices that can improve the chances of success.

- **True bipartisanship.** When both parties work together, the likelihood of success greatly increases. This usually means formal power-sharing between the Majority and Minority members of the committee, including sharing investigative documents, co-authoring committee reports, and bipartisan decision-making about hearing witnesses.

²³ “Congress Ends ‘Koreagate’ Lobbying Probe.” In *CQ Almanac* 1978, 34th ed. Washington, DC: Congressional Quarterly, 1979, pp. 803-13. <http://library.cqpress.com/cqalmanac/cqal78-1237310> (Downloaded May 19, 2017)

²⁴ For an analysis of federal investigations and their impacts, see: Paul Light, *Investigations Done Right and Wrong: Government By Investigation 1945 – 2012*, Brookings, December 2013. <https://www.brookings.edu/wp-content/uploads/2016/06/LightPaperDec2013.pdf> (Downloaded June 7, 2017)

- **Adequate tools and resources.** Robust investigations need adequate numbers of staff with subpoena and deposition authority.
- **Clear focus.** A well-defined mission and realistic time frame will focus the investigation.
- **Congressional leadership support.** Strong investigations will usually ruffle feathers. Congressional leaders from both parties will have to back the investigations and seek common ground.

True Bipartisanship

Bipartisanship is more than a theory or ephemeral feeling. Statements by a Chair that an investigation will proceed with the Minority party are all well and good and help to set a tone, but the sharing of power should also have concrete foundations and specific rules to follow. Hallmarks of bipartisan investigations include: the Majority and Minority working together at the outset of an investigation to determine its scope, document requests, and who will be interviewed; issuing joint press statements; working together to determine a reasonable hearing schedule; and achieving substantial agreement on final report findings.

The membership of typical Congressional committees is divided between the Majority and Minority parties, with different staff assigned to each (and with the Majority party usually having more of each). Select committees are often established with the same stark separation by party. Under a structure where staff are separated by party control, communication between the two sides can be stifled, and even the sharing of investigative documents between the staff of each party can be lacking. At the worst, the Majority and Minority can end up actually conducting two competing or contradictory investigations where even basic facts are disputed.

Alternatively, a committee investigation can share power and resources. For example, the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, better known as the Church Committee, after its chairman, is seen as a good model for a bipartisan Congressional investigation. In 1975 and 1976 the committee investigated whether “illegal, improper, or unethical” activities had been undertaken by individuals or agencies in the US intelligence community and whether legislation or other changes were needed to improve oversight. Chairman Frank Church (D-ID) sought to include Vice Chairman John Tower (R-TX) in committee decision-making,²⁵ and the committee was split almost evenly between members of the two parties, with six Democrats and five Republicans.²⁶ Both of those decisions were strategic choices that went against reigning traditions of the day, according to Fritz Schwarz, Jr., the chief counsel to the committee. At that time the normal ratio for an eleven-person committee would have been seven Democrats and four Republicans.²⁷ Following standard procedure, Tower

²⁵ Frank J. Smist, Jr., *Congress Oversees the United States Intelligence Community, 1947-1994*, Knoxville: University of Tennessee Press, 1994, p. 36. (Hereinafter Frank Smist Jr.)

²⁶ Frank Smist Jr., p. 29.

²⁷ Andrea Peterson, “Investigation Pro-Tips from the Church Committee’s Chief Counsel,” Project On Government Oversight, May 23, 2017. <http://www.pogo.org/blog/2017/05/investigation-pro-tips-from-church-committee-counsel.html> (Hereinafter POGO, Pro-Tips from the Church Committee)

would have been given the largely ceremonial title of “ranking member” rather than the more substantive Vice Chairman role, Schwarz noted.

The only major partisan splits were regarding whether to conduct open hearings or closed ones on certain intelligence topics.²⁸

The Church Committee produced 14 groundbreaking reports on the intelligence community, most notably two final reports issued in 1976 dealing respectively with foreign and domestic intelligence. “Intelligence agencies have undermined the constitutional rights of citizens,” the final report on domestic intelligence concluded, “primarily because checks and balances designed by the framers of the Constitution to assure accountability have not been applied.”²⁹ The committee’s work had impact and created pressure for substantial policy changes, including The Foreign Intelligence Surveillance Act of 1978, the establishment of the Senate Select Committee on Intelligence, President Ford’s Executive Order 11905 that created intelligence reforms and banned political assassinations (which was later strengthened in 1978 by President Carter), new FBI guidelines, and a limit on the FBI Director’s term.³⁰

A second example of strong bipartisanship was the Congressional investigation of the Iran-Contra scandal. In January 1987, the Senate passed a resolution creating a select committee to investigate arms sales to Iran, diversion of funds to the Contras, violation of federal law, and involvement of the National Security Council in foreign affairs. The House followed suit the next day, creating its own select committee to investigate the same issues. The chambers merged their investigations, sharing all information, holding joint televised hearings, and issuing a joint report.³¹ Senate Majority Leader Robert Byrd (D-WV) chose Senator Daniel Inouye (D-HI) to lead the Senate effort, and Inouye selected Senator Warren Rudman (R-NH) as vice chairman. House Speaker Jim Wright (D-TX) named Representative Lee Hamilton (D-IN) as chair of the House committee, and Representative Dick Cheney (R-WY) as his lieutenant. Despite the potential for political point-scoring resulting from a Democratic Congress investigating a Republican president, committee leaders made clear they wanted the committee to focus on fact-finding rather than putting the president on trial.³² “A public, bipartisan investigation such as this one helps to ensure that the principle of accountability is enforced for all officials and policies,” stated the preface to the report, released in November 1987.

²⁸ Frank Smist Jr., p. 43.

²⁹ Senate Select Committee to Study Governmental Operations, *Book 2: Intelligence Activities and the Rights of Americans*, April 26, 1976, p. 289.

³⁰ Frank Smist Jr., pp. 77-79.

³¹ United States Congress, *Report of the Congressional Committees Investigating the Iran-Contra Affair: With Supplemental, Minority, and Additional Views* (Senate Report No. 216, 100th Congress), November 13, 1987. <https://archive.org/details/reportofcongress87unit> (Downloaded May 18, 2017) (Hereinafter Congress, Iran-Contra Report)

³² Seymour Hersh, “The Iran-Contra Committees: Did They Protect Reagan?” *The New York Times*, April 29, 1990. <http://www.nytimes.com/1990/04/29/magazine/the-iran-contra-committees-did-they-protect-reagan.html?pagewanted=all&src=pm> (Downloaded May 19, 2017)

The joint committee operated from the start in a bipartisan manner,³³ with the naming of a vice chairman instead of a ranking member, and with staff from both parties working together. In the end, the final report won the support of both the Democratic Chairman and the Republican Vice Chairman. It concluded that administration officials secretly shipped weapons to Iran to free American hostages in Lebanon and to covertly raise funds for rebel forces in Nicaragua; Congress was not informed of covert actions, in violation of a law requiring that Congress be notified in a timely fashion; and administration officials repeatedly lied to Congress and the public.³⁴ The report led to several new laws imposing criminal penalties on government employees who transfer weapons to countries that support terrorism, and creating a statutory Inspector General at the CIA.³⁵

By contrast, some Congressional investigations become mired in partisanship and disagreements. When this happens, even if the investigation is thorough and has significant findings, the findings may not be seen as credible by a substantial portion of the public. In an even worse situation, the Majority party can force through unfair findings on party-line votes.

The Senate Select Committee on Intelligence, for instance, conducted an investigation into the CIA's detention and interrogation program and its use of various forms of torture (euphemistically called "enhanced interrogation techniques") on detainees between 2001 and 2006. The investigation was prompted by the revelation in 2005 that the CIA destroyed video recordings of interrogations conducted in 2002. In December 2014, the Democratic-majority SSCI publicly released a 525-page summary of its final report. The 6,700-page final report, which remains classified, was approved by a vote of 9 - 6, with 7 Democrats, 1 Independent, and 1 Republican voting in favor of publication and 6 Republicans voting in opposition. The six dissenters, including SSCI's Ranking Member, released their own report, which criticized both the process and the conclusions of the investigation. Senate Republicans widely denounced the Majority's report as "partisan."³⁶ As a sign of the low credibility of the committee's report, a *Washington Post-ABC* poll found that 47 percent of the public viewed the report as "unfair," and 52 percent thought it should not have been released.³⁷

Another example of how a lack of bipartisanship can raise doubts about credibility is one of the investigations into the attack on the US Embassy in Benghazi. On September 11-12, 2012, Islamic extremists attacked a US diplomatic mission and a CIA compound in Benghazi, Libya.

³³ Richard A. Arenberg, "What the Iran-Contra Investigation Can Teach Us About Russian Probe," April 3, 2017. <http://thehill.com/blogs/pundits-blog/the-administration/326956-what-the-iran-contra-investigation-can-teach-us-about> (Downloaded June 6, 2017)

³⁴ Congress, Iran-Contra Report

³⁵ David Scheffer, "Iran-contra: A legacy in new laws," *Chicago Tribune*, December 12, 1989, Section 1, p. 23. <http://archives.chicagotribune.com/1989/12/12/page/23/article/iran-contra-a-legacy-in-new-laws> (Downloaded June 5, 2017)

³⁶ Emmarie Huetteman, "Senate Panel's Republicans Dismiss Torture Report as 'Partisan'," *The New York Times*, December 9, 2014. <https://www.nytimes.com/politics/first-draft/2014/12/09/senate-panels-republicans-dismiss-torture-report-as-partisan/> (Downloaded June 5, 2017)

³⁷ Washington Post and ABC News, "Majority says CIA harsh interrogations justified," *The Washington Post*, January 4, 2015. https://www.washingtonpost.com/page/2010-2019/WashingtonPost/2014/12/16/National-Politics/Polling/release_376.xml (Downloaded June 6, 2017)

In the weeks that followed, questions arose about the Obama administration's preparation for and response to the incident.

Almost two years after the attack, in May 2014, the House established the Select Committee on Benghazi despite the fact that the House Permanent Select Committee on Intelligence (HPSCI) was in the process of conducting an investigation and that several previous investigations, including a bipartisan one from the Senate Homeland Security Committee and one conducted by House Republicans from multiple committees, had already been completed within a year of the attacks.³⁸ The founding resolution that created the Select Committee failed to include any of the features that would ensure bipartisan processes.³⁹ Ranking Member Elijah E. Cummings (D-MD) raised concerns from the very beginning. "I also do not believe the Select Committee rules proposed by the Speaker are fair, open, or designed to conduct a neutral, reasoned, fact-based inquiry," he stated.⁴⁰ Perhaps unsurprisingly, the entire effort, despite the success in uncovering Secretary Clinton's private email server, devolved into partisan name calling and, ultimately, to challenges from the left to the credibility of the effort. The poor bipartisan working relationship on the committee was evidenced by the Minority refusing to attend witness interviews, and the Majority regularly using the phrase "Dishonest Democrats" in official news releases.⁴¹ Ranking Member Cummings also sent multiple press releases calling the Majority's committee report partisan, and strongly criticizing the committee's activity, findings, and final report.⁴²

Despite any impact of the investigation, its findings very often were seen in a partisan context. In fact, while polls varied, they routinely showed a vast partisan split on the investigation, and that the findings were not seen as credible by most Democrats and many independents.⁴³

³⁸ Senate Select Committee on Intelligence, *Review of the Terrorist Attacks on U.S. Facilities in Benghazi, Libya, September 11-12, 2012*, January 15, 2014. <https://www.intelligence.senate.gov/sites/default/files/press/benghazi.pdf>; House Republican Conference, *Interim Progress Report*, April 23, 2013. <http://www.speaker.gov/sites/speaker.house.gov/files/documents/libya-progress-report.pdf> (All downloaded May 18, 2017)

³⁹ US House of Representatives, "Providing for the Establishment of the Select Committee on the Events Surrounding the 2012 Terrorist Attack in Benghazi," (H. Res. 567), Introduced May 6, 2014, by Representative Pete Sessions. <https://www.congress.gov/113/bills/hres/567/BILLS-113hres567eh.pdf> (Downloaded June 7, 2017)

⁴⁰ House Committee on Oversight and Government Reform, "Statement of Representative Elijah E. Cummings: Press Conference with Leader Pelosi Announcing Democratic Appointees to the House Select Committee on Benghazi," May 21, 2014. <https://democrats-oversight.house.gov/news/press-releases/cummings-on-select-committee-we-need-someone-in-that-room-to-defend-the-truth> (Downloaded June 7, 2017) (Hereinafter Ranking Member Cummings' Statement)

⁴¹ Select Committee on the Events Surrounding the 2012 Terrorist Attack in Benghazi, "Rep. Westmoreland: No Democrat Members Attended Yesterday's Witness Interviews," June 10, 2016. <https://benghazi.house.gov/news/press-releases/rep-westmoreland-no-democrat-members-attended-yesterday-s-witness-interviews>; Select Committee on the Events Surrounding the 2012 Terrorist Attack in Benghazi, "The Numbers Don't Lie: Democrats Focused on Politics," July 1, 2016. <https://benghazi.house.gov/news/press-releases/the-numbers-dont-lie-democrats-focused-on-politics>; Select Committee on the Events Surrounding the 2012 Terrorist Attack in Benghazi, "#DishonestDems can't keep their misleading claims straight," June 10, 2016. <https://benghazi.house.gov/news/blog/dishonestdems-can-t-keep-their-misleading-claims-straight> (All downloaded May 18, 2017)

⁴² Ranking Member Cummings' Statement

⁴³ Emily Swanson, "AP-GfK Poll: Republicans disapprove of Clinton on Benghazi, but Democrats largely indifferent," Associated Press, October 22, 2015. <http://ap-gfkipoll.com/uncategorized/our-latest-poll-findings-42>; Jennifer Agiesta, "Poll: 3-in-4 say Benghazi Panel Politically Motivated," *CNN*, October 22, 2015.

When there are disagreements, a committee's approach to its investigative findings need not be binary: agree or disagree. By providing members the ability to give additional views, Congressional investigative committees can allow for disagreement, yet still achieve consensus on core issues.

One example is the investigation into "Billygate." President Jimmy Carter's brother, Billy Carter, became a highly paid lobbyist for the government of Libya while President Carter held office. Libya also held out "the prospect of a highly lucrative oil commission arrangement and a large loan," according to a Senate report.⁴⁴ Despite contacting government officials regarding Libya while receiving financial benefits from the country, Billy Carter had not registered under the Foreign Agents Registration Act in a timely manner, although he did eventually do so.⁴⁵ His activities came under intense Senate scrutiny during the 1980 presidential election.

The Senate Judiciary Committee created a bipartisan special investigating subcommittee to examine the matter. According to the subcommittee's final report, "The Senate envisaged that the Subcommittee would proceed in a nonpartisan manner."⁴⁶ Subcommittee membership was structured so that there was a nearly even split between the Majority (five Democratic Senators) and the Minority (four Republican Senators). Furthermore, the subcommittee's Ranking Member was made Vice Chairman. Subpoenas required either both the Chairman and Vice Chairman's signatures or either of their signatures if they could obtain a majority of the subcommittee's votes. Both of these practices resulted in shared power with the Minority party. "The Chairman and Vice Chairman were able to agree on the issuance of all subpoenas," the report said, spotlighting the high degree of bipartisan cooperation.⁴⁷

The special subcommittee unanimously reached a number of important conclusions, which it detailed in its report in October 1980, including "Billy Carter was repeatedly advised about the duty of a foreign agent to register, yet he failed to register. His conduct was contrary to the interests of the President and the United States and merits severe criticism."⁴⁸

However, Senators on the subcommittee on both sides of the aisle had other thoughts on Billygate beyond the report's conclusions. "As may be expected, a number of individual members have additional views on the difficult issues considered by the Subcommittee. As the Chairman and Vice Chairman of the Subcommittee, we are confident, nonetheless, in our conviction that the agreement to the conclusions which follow is a significant achievement of the Subcommittee," stated the report.⁴⁹ The report included 25 pages of those additional views from

<http://www.cnn.com/2015/10/22/politics/benghazi-committee-hillary-clinton-poll/index.html> (All downloaded June 7, 2017)

⁴⁴ Subcommittee to Investigate Individuals Representing the Interests of Foreign Governments of the U.S. Senate Committee on the Judiciary, *Inquiry into the Matter of Billy Carter and Libya: Report*, October 2, 1980, p. 60. <https://www.intelligence.senate.gov/sites/default/files/961015.pdf> (Downloaded June 7, 2017) (Hereinafter Senate, Billy Carter Report)

⁴⁵ Senate, Billy Carter Report, pp. 14-15.

⁴⁶ Senate, Billy Carter Report, p. v.

⁴⁷ Senate, Billy Carter Report, p. v.

⁴⁸ Senate, Billy Carter Report, pp. 60-69.

⁴⁹ Senate, Billy Carter Report, p. vi.

eight of the nine Senators on the subcommittee. This underscores that Congressional investigative bodies can reach bipartisan—even unanimous—findings and still disagree on other matters.

Adequate Tools and Resources

Any successful project needs adequate tools and resources. Congressional investigations are no exception.

The establishing resolution of a select committee determines the level of financial resources to hire staff and to provide for other needs. There must be dedicated full-time committee staff, consisting of an adequate number of investigators, legal counsel, assistants, and other professionals who can move the investigation forward. On the upper end, the comparatively large and successful Iran-Contra and Church Committees had support staffs of 181 and 133 employees, respectively.⁵⁰ Other large, successful select committees had staff levels measured in the dozens. The number of employees should be set by the scope of the work that the committee investigation faces.

Standing committees that conduct investigations can also have increases in staff and other resources to handle the investigations. For example, when the Senate Judiciary Subcommittee on Terrorism, Technology and Government Information, established by a Republican-controlled Senate during the Clinton Administration, examined the Ruby Ridge shooting, four bipartisan staff were added specifically to handle the investigation. This allowed the Committee to hold 16 days of hearings involving more than 60 witnesses.⁵¹

Second, investigators need tools—formal powers that grant the authority to effectively access documents and sources. Subpoena power is critical, and usually granted for select investigative committees. The ability to call witnesses, including recalcitrant or hostile ones, allows investigations to gather information. Similarly, select committees are typically granted staff deposition authority. Standing committees typically are able to subpoena witnesses.

The Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina is an example where Congress provided an investigative body with the tools it needs to be successful.⁵² Most everyone at the time agreed that there was need for improvement in emergency responses. However, we cannot forget the political finger pointing at the Bush

⁵⁰ Reuters, “U.S. Senate’s Russia investigation smaller than previous inquiries.”

<http://fingfx.thomsonreuters.com/gfx/rngs/USA-RUSSIA-SENATE-INVESTIGATION/010040SF1Q6/index.html> (Downloaded May 19, 2017)

⁵¹ Subcommittee on Terrorism, Technology and Government Information of the U.S. Senate Judiciary Committee, Examining Certain Federal Law Enforcement Action With Regard To The 1992 Incident At Ruby Ridge, ID, (J-104-41), September-October, 1995; Victoria Bassetti, former Minority Counsel for the Senate Judiciary Subcommittee on Terrorism, Technology, and Government Information, email message to POGO Investigator Peter Tyler, “Couple Questions on Ruby Ridge Investigation,” May 23, 2017.

⁵² House Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina, *A Failure of Initiative: Final Report by the Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina*, February 15, 2006. <https://www.gpo.gov/fdsys/pkg/CRPT-109hrpt377/pdf/CRPT-109hrpt377.pdf> (Downloaded May 19, 2017) (Hereinafter House Katrina Report)

Administration, and particularly at the Federal Emergency Management Agency and its Director Michael Brown, which became symbols of what was wrong with the federal government's response to Hurricane Katrina.

The establishing resolution provided the resources and three major tools that allowed the Katrina Committee to conduct a full and complete investigation into emergency response plans, the preparation for a disaster, and the local, State, and Federal government response.⁵³ The Committee was provided the authority to subpoena witnesses and documents, the Minority was guaranteed witnesses, and adequate staff was detailed to support the Committee's work.⁵⁴ In fact, according to its final report, 34 staffers are listed as working for the 16-Member Committee, including House staffers, a Coast Guard fellow, and 2 staff on detail from the Government Accountability Office.⁵⁵

Because it was able to call witnesses, subpoena Department of Defense communications, and receive briefings from White House personnel, the Committee concluded its investigation in five months. In addition to producing a final report highlighting organizational and societal failures, numerous post-Katrina laws were passed by Congress to improve federal emergency management actions in the future.⁵⁶

Another example of adequate resources and tools was the Senate Special Committee to Investigate the National Defense Program, also known as the Truman Committee, which was established in March 1941 to find and correct problems involving US production of war materials.⁵⁷ Over the next seven years, the Committee investigated a range of important issues such as defective military parts and supplies, waste, fraud, and inefficiency in military housing projects, and inefficiencies in the structure and organization of the defense bureaucracy.

The Committee had subpoena power for witnesses and documents and, later on, the power to examine federal income tax returns; its bipartisan membership eventually grew to 20 Senators—11 Democrats and 9 Republicans; its support staff consisted of 3 lawyers, 10 investigators, and 10 administrative assistants; and its annual budget grew from roughly \$15,000 (approximately \$250,000 in today's dollars) to \$360,000 (approximately \$6 million).

⁵³ US House of Representatives, "Resolution establishing the Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina" (H. Res 437), Introduced September 14, 2005, by Representative David Dreier. <https://www.congress.gov/109/bills/hres/437/BILLS-109hres437eh.pdf> (Downloaded May 19, 2017) (Hereinafter Katrina Committee Resolution)

⁵⁴ Katrina Committee Resolution, Section 4(1), Section 5.

⁵⁵ House Katrina Report

⁵⁶ Congressional Research Service, *Federal Emergency Management Policy Changes After Hurricane Katrina: A Summary of Statutory Provisions*, November 15, 2006. https://training.fema.gov/hiedu/docs/federal_em_policy_changes_after_katrina.pdf (Downloaded May 19, 2017)

⁵⁷ US Senate, "Resolution for the appointment of a special committee to investigate the national-defense program and the handling of contracts" (S. Res. 71, 77th Congress), Introduced February 13, 1941, by Senator Harry Truman. https://www.senate.gov/artandhistory/history/common/investigations/pdf/TrumanCommittee_SRes71March1.pdf (Downloaded May 19, 2017)

The investigation was highly successful. The Committee held 432 public hearings, conducted field inspections and site visits throughout the country, took testimony from 1,798 witnesses, and published almost 2,000 pages of reports—and every report was unanimous, with bipartisan support.

The Committee was credited with saving an estimated \$10 billion – \$15 billion (in then-year dollars) in military spending and the lives of thousands of US servicemen during World War II. In 1948, the Senate made the Truman Committee permanent in the form of the Permanent Subcommittee on Investigations of the Governmental Affairs Committee.⁵⁸

Clear Focus

Carefully defining the focus or mandate of an investigation is critical for success. Typically, for a select committee, the establishing resolution will provide some guidance. This will include the duration of the investigation and the types and timing of reporting. Good planning contributes greatly to the success and credibility of the investigative process.

Many of the best Congressional investigations use fact-finding to spotlight significant wrongdoing or questionable actions in order to build a case for systemic reforms, often including legislative proposals. A Congressional committee that views its investigation through the lens of reform and preventing future problems by identifying the root causes that led to a scandal or disaster helps keep the investigation properly focused and sufficiently bipartisan.

The House of Representatives select committee investigation into the Hurricane Katrina response⁵⁹ showed the importance of good scoping.⁶⁰ Not only was the investigation well resourced, the scope allowed success despite some political challenges. The House Katrina Committee's scope was limited to investigating the "development, coordination, and execution by local, State, and Federal authorities of emergency response plans and other activities in preparation for Hurricane Katrina; and the local, State, and Federal government response" to Katrina. As a result, the Committee didn't veer off path or turn the investigation into a headhunting mission, and the final report was primarily focused on what went wrong at all levels of government during and after the catastrophe and on how to correct those deficiencies.

Another example of an investigation that benefitted from a clearly defined mandate is HPSCI's examination of the Benghazi crisis. The investigation focused on the activities of the intelligence community before, during, and after the attack. During thousands of hours of investigation, the

⁵⁸ Donald H. Riddle, *The Truman Committee: a Study in Congressional Responsibility*, New Brunswick, N.J.: Rutgers University Press, 1964.

⁵⁹ There were multiple examinations into the federal government's post-Katrina response. In addition to the House Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina, the House Government Reform Committee Minority staff, the Senate Committee on Homeland Security and Governmental Affairs, the White House, the President's Council on Integrity and Efficiency, the Executive Council on Integrity and Efficiency, the Government Accountability Office, the Defense Contract Audit Agency, and numerous Inspectors General published hundreds of reports assessing the federal response and spending related to Katrina and Hurricane Rita.

⁶⁰ House Katrina Report

Committee reviewed thousands of pages of intelligence assessments, cables, notes, and emails; held 20 events and hearings; and conducted interviews with senior intelligence officials and witnesses. The Committee concluded its investigation in November 2014, nearly two years after the investigation was initiated, and released a bipartisan report.⁶¹ Under Chairman Mike Rogers's (R-MI) leadership, the Committee's investigation was praised as balanced and clear without falling into over-politicized statements.⁶²

On the other hand, the House Un-American Activities Committee (HUAC) is a case study of an irresponsible Congressional investigation with poor scope and focus. Created to unearth internal threats to American democracy, it became one itself.

In 1938, the House created HUAC as a select investigating committee. Its mandate was "to investigate alleged disloyalty and subversive activities on the part of private citizens, public employees, and those organizations suspected of having Communist ties."⁶³ It was made a standing committee in 1945 and finally shut down in 1975. Abe Fortas, a Supreme Court justice from 1965 to 1969, wrote that HUAC and other investigating committees such as the Senate Committee on Government Operations when chaired by Senator Joe McCarthy created:

"...a dangerous trend towards circumvention of the courts and the executive processes of government. Our danger does not come from mob violence. It comes from a few investigating committees of the Congress, or more accurately, their chairmen. The result of these practices is not only to injure and intimidate many blameless persons; it is also to imperil our public service and our national reputation, and to endanger the effectiveness of our police and intelligence work."⁶⁴

Fortas identified several fundamental reasons HUAC and other efforts like it were so abusive, namely the "lack of judicial temper" and "a distortion of the functions of Congressional investigating committees." HUAC investigations stopped shedding light on the broader workings of government, ran roughshod over individual due process rights and civil liberties, and engaged in disreputable investigative and rhetorical tactics. "Certainly, the line is difficult to draw between an investigation of a problem and a trial of individuals," as Fortas wrote, but "the time is long since past when these committees can convincingly claim that their hearings serve a legislative purpose, or any purpose beyond the denunciation of individuals claimed to be subversive."⁶⁵

⁶¹ House Permanent Select Committee on Intelligence, *Investigative Report on the Terrorist Attacks on U.S. Facilities in Benghazi, Libya, September 11-12, 2012*, (HPSCI 2014-2583), November 21, 2014.

<https://intelligence.house.gov/sites/intelligence.house.gov/files/documents/benghazi%20report.pdf> (Downloaded June 5, 2017)

⁶² Todd Spangler, "Mike Rogers' departure could fracture intelligence panel," *Detroit Free Press*, December 5, 2014. <http://www.freep.com/story/news/local/2014/12/05/rogers-leaving-congress/19950329/> (Downloaded June 5, 2017)

⁶³ The Eleanor Roosevelt Papers Project at George Washington University, "House Un-American Activities Committee." <https://www2.gwu.edu/~erpapers/teaching/glossary/huac.cfm> (Downloaded May 18, 2017)

⁶⁴ Abe Fortas, "Abusive Practices of Investigating Committees: Methods of Committees Investigating Subversion--A Critique," *Notre Dame Law Review*, Vol. 29, Issue 2, February 2, 1954, pp. 192-211.

<http://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=3679&context=ndlr> (Downloaded May 18, 2017)

⁶⁵ Fortas, pp. 205-206.

While there were a number of problems with HUAC, a primary one was the meandering scope of its investigations. As a result, the investigations strayed far from any legitimate connection to systemic reforms, especially potential legislation.

Congressional Leadership Support

Support by the Congressional leadership can affect a Congressional investigation's chances of success in many ways, both at the outset and throughout the course of the investigations, especially when problems arise.

At its most basic, Congressional leadership will arrange for House and Senate Floor action to approve the resolution establishing a select committee. Leadership is also critical for providing the resources for select committees, and additional resources for standing committees.

Congressional leaders also pick the membership of select committees and can assist on other issues, such as relationships and jurisdictional issues with other Congressional committees.

Leadership support is also important when executive branch officials and other individuals refuse to provide documents or testify before an investigative committee. Leadership can support the committee request through formal letters or other actions. Congress also has the rarely used but important ability to vote on whether an individual or agency is in contempt of Congress for refusing to comply with an investigative committee's subpoena. Leadership has to schedule Floor action to seek approval of a resolution to that effect.

One of the best examples of leadership support can be found in the Church Committee. Fritz Schwarz, the Church Committee's chief counsel, credited leadership support with setting up the investigation for success. Decisions made by Majority Leader Mike Mansfield (D-MT) about the structure and membership of the committee helped create a functionally bipartisan foundation for action, he said.⁶⁶

Mansfield involved the Minority from the very beginning. After the Senate voted 82 to 4 on the resolution to establish the Church Committee, Mansfield and Senate Minority Leader Hugh Scott (R-PA) worked together to recruit members of the committee. Overall, Mansfield and Scott included members who represented the ideological diversity of the Senate, and who had prior experience in matters relevant to investigating intelligence community abuses.⁶⁷ For instance, Majority Leader Mansfield had previously introduced other resolutions to investigate the intelligence community and had recruited Senate Republican Charles Mathias to co-sponsor his efforts. Mathias became a member of the committee.

Mansfield also clearly supported the committee's mandate during a Senate Floor speech for passage of the resolution that established the committee:

"The select committee's task is precise. Neither witch hunt nor whitewash will be here conducted; and there will be no wholesale dismantling of our intelligence community.

⁶⁶ POGO, Pro-Tips from the Church Committee

⁶⁷ Frank Smist Jr., pp. 25, 30-33.

What we hope to obtain is a full and objective analysis of the role of intelligence-gathering in a free society today measured against current laws, practices, and policies in the intelligence community. It is a task that is long overdue.”⁶⁸

A more recent example highlighting the importance of Congressional leadership is House Speaker John Boehner’s (R-OH) legal support for the House Oversight and Government Reform Committee’s investigation of Operation Fast and Furious.

The Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), a component of the Justice Department, was accused by whistleblowers of allowing large amounts of firearms purchased by the Bureau as part of a gun-trafficking investigation to end up in the hands of drug cartels and other criminals in Mexico. The House investigation ran into major roadblocks as the Obama Justice Department resisted turning over requested documents. President Obama asserted executive privilege over certain Justice Department documents that the committee subpoenaed.⁶⁹

According to the Congressional Research Service, the House General Counsel reports directly to the Speaker’s office and its actions have to be authorized by either the House Speaker alone or a group representing House leadership. All subpoenas go out under the seal of the House General Counsel, and the House General Counsel represents the chamber in court.⁷⁰

House leadership supported the committee’s showdown with the executive branch by working with the committee on its subpoena and by taking the case to court, with the House prevailing over the executive branch.⁷¹

CONCURRENT CONGRESSIONAL AND EXECUTIVE BRANCH CRIMINAL INVESTIGATIONS

Concurrent Congressional and executive branch investigations of the same set of issues often have proven complementary. The history of Congressional investigations shows the benefits of both branches examining the same scandals or events at the same time using different methods. Investigations led by a Special Counsel can play a critical role in developing a criminal case, but they also have limits in scope, are not public, and often taken much longer than Congressional investigations.

⁶⁸ Frank Smist Jr., p. 50.

⁶⁹ Congressional Research Service, *Congressional Investigations of the Department of Justice, 1920-2012: History, Law, and Practice* (R42811), November 5, 2012, p. 16. <https://fas.org/sgp/crs/misc/R42811.pdf> (Downloaded June 1, 2017) (Hereinafter CRS, Investigations of DOJ)

⁷⁰ Congressional Research Service, *Investigative Oversight: An Introduction to the Law, Practice and Procedure of Congressional Inquiry* (95-464), April 7, 1995, pp. 47-48. <https://fas.org/sgp/crs/misc/95-464.pdf> (Downloaded June 1, 2017) (Hereinafter CRS, Investigative Oversight)

⁷¹ *Committee on Oversight and Government Reform, United States House of Representatives v. Loretta E. Lynch*, District Of Columbia District Court, 1:12-cv-01332-ABJ. https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2012cv1332-117 (Downloaded June 5, 2017)

“When a scandal is eroding public confidence, speedy disclosure is preferable to slow justice,” as former Independent Counsel Kenneth Starr said in Congressional testimony. “Citizens’ political and policy judgments will be shaped, quite properly, by an unfolding Congressional investigation. The American people can get that information in a timely manner from a Congressional investigation. Not so with a grand jury investigation....When Congress defers to the criminal justice system, presidential accountability thus may suffer.”⁷²

Moreover, Congressional investigations can better delve into the non-criminal elements and provide important policy recommendations. Congress’s role is distinct from the Justice Department’s. There may be significant information that the public needs to know that may or may not be criminal in nature while an executive branch law enforcement investigation into the same matter is ongoing. Congressional investigations may have a scope more broad, complimentary, or on a quicker pace than law enforcement investigations of the executive branch. At times, Congress’s investigative work has sparked or assisted law enforcement investigations.

Understandable concerns are often raised that Congressional investigations could lead to tainted evidence, compromised prosecutorial investigative techniques, and undermined criminal proceedings.⁷³ When multiple investigations with different aims are running at the same time, there is always the risk that one group of investigators might inadvertently injure the efforts of another. However, properly handled, the concurrent investigations need not harm each other.

According to the Supreme Court, “a Congressional committee which is engaged in a legitimate legislative investigation need not grind to a halt whenever responses to its inquiries might potentially be harmful to a witness in some distinct proceeding ... or when crime or wrongdoing is exposed.”⁷⁴

There are a number of examples where Congress and the Justice Department successfully investigated matters concurrently, including high-profile issues involving senior administration officials and the President.

⁷² Starr Testimony

⁷³ “Congressional oversight may involve the criminal investigation process in three different ways. First, Congress may investigate a matter that is simultaneously being investigated by the DOJ. This type of oversight may raise concerns about the due process rights of the accused and the potential for interference with the criminal investigation and subsequent trial of suspected criminals. Second, Congress may investigate allegations of prosecutorial misconduct by DOJ officials. These types of investigations focus on the way in which the DOJ might violate the constitutional rights of the accused or use excessive force in responding to alleged criminal activity. These types of investigations may raise concerns that are similar to those in other executive privilege disputes, in particular, the concern that disclosure of deliberative information will discourage DOJ officials from expressing their views freely. Third, Congress may seek information concerning the failure of the DOJ to investigate or prosecute particular types of crime or specific allegations of criminal misconduct against identified suspects. This third type of investigation raises the same concerns about the deliberative process as the second category, but it also creates problems related to the potential for undue congressional influence over the decision to investigate or prosecute specific individuals.” Todd David Peterson, “Congressional Oversight of Open Criminal Investigations,” *Notre Dame Law Review*, Vol. 77, Issue 5, October 1, 2002, pp. 1373-1448.

⁷⁴ *Hutcheson v. United States*, 369 U.S. 599, 617 (1962).

<https://supreme.justia.com/cases/federal/us/369/599/case.html> (Downloaded June 2, 2017)

Teapot Dome

In the early 1920s, Secretary of the Interior Albert Fall leased the US naval petroleum reserve at Wyoming's Teapot Dome to oil companies without competitive bidding. At the same time, he secretly received gifts and a no-interest loan from executives of those companies that would be worth millions in today's dollars.

The Senate Committee on Public Lands launched an investigation into this matter in 1922. The Senate Historian's Office wrote, "Expecting this to be a tedious and probably futile inquiry, the committee's Republican leadership allowed the panel's most junior Minority member, Montana Democrat Thomas Walsh, to chair the panel. Preeminent among the many difficult questions facing him was, 'How did Interior Secretary Albert Fall get so rich so quickly?'"⁷⁵

Walsh's investigation uncovered the secret loan to Fall, which was revealed during Congressional hearing testimony by the oil company executive who gave the bribe. When President Warren G. Harding died in 1923, his successor, Calvin Coolidge appointed two special prosecutors—one Republican and one Democrat—to investigate because of the troubling information unearthed by Walsh's investigation. In 1929, in the only guilty verdict to come out of the scandal, Fall was convicted of taking a bribe from the oil executive. He was "the first Cabinet member convicted of a crime committed while in office," according to a history of the scandal.⁷⁶

The Senate also convened a select committee to investigate the Department of Justice itself, specifically charges that it mishandled the Teapot Dome investigation.⁷⁷

The select committee ran into roadblocks when the brother of the Attorney General refused a subpoena. The committee had wanted to know why Attorney General Harry Daugherty failed to prosecute cases connected to the Teapot Dome scandal, and subpoenaed his brother, who was the president of a bank, to appear before the Senate and to produce bank records to potentially shed light on the brothers' dealings with oil companies. The issue ultimately wound up at the Supreme Court where, for the first time, Congress's authority to investigate matters and to compel witnesses and testimony was explicitly recognized. The Court also found that the possibility that a crime could be uncovered during a Congressional investigation is not a "valid objection to such investigation."⁷⁸

⁷⁵ US Senate, "Senate Investigates the 'Teapot Dome' Scandal."

https://www.senate.gov/artandhistory/history/minute/Senate_Investigates_the_Teapot_Dome_Scandal.htm
(Downloaded June 2, 2017)

⁷⁶ Robert W. Cherny, "Graft and Oil: How Teapot Dome Became the Greatest Political Scandal of Its Time," *History Now*. <https://www.gilderlehrman.org/history-by-era/roaring-twenties/essays/graft-and-oil-how-teapot-dome-became-greatest-political-scand> (Downloaded June 2, 2017)

⁷⁷ CRS, Investigations of DOJ, p. 16.

⁷⁸ *McGrain v. Daugherty* 273 U.S. 135, 136 (1927). <https://supreme.justia.com/cases/federal/us/273/135/case.html>
(Downloaded June 2, 2017)

Watergate

The Senate Select Committee on Presidential Campaign Activities, better known as the Watergate Committee, was established in February 1973 to examine campaign activities during the 1972 presidential election. A break-in at the Democratic National Campaign headquarters at the Watergate Hotel in June 1972 began a chain of events that led to the resignation of President Richard Nixon in August 1974. The committee investigation focused on “the break-in and any subsequent cover-up of criminal activity, as well as all other illegal, improper, or unethical conduct occurring during the Presidential campaign of 1972, including political espionage and campaign finance practices.”⁷⁹ The committee’s work led to the passage of improved campaign finance laws and other reform legislation.

The Watergate Committee’s work occurred while the Justice Department conducted its own probe into the matter, led by Special Counsel Archibald Cox beginning in May 1973. Nixon ordered Cox fired in October 1973 for refusing to back down on a subpoena for tapes in the White House, which led to the resignation of the Attorney General and Deputy Attorney General. A new Special Counsel was named, but the firing of Cox only “encouraged lawyers in the special prosecutor’s office to aggressively pursue the tapes. Their arguments convinced the Supreme Court that in a criminal case, every citizen — even a president — must comply with a subpoena, and the tapes were released,” according to Scott Armstrong, a staffer with the Watergate Committee.⁸⁰ This case, *United States v. Nixon*, put limits on presidential claims of executive privilege.⁸¹

The Special Counsel and the Watergate Committee “overcame partisan and jurisdictional conflicts to bring about the president’s resignation—and their work offers a valuable lesson for today, when hyper-partisanship dominates,” according to Armstrong. “While prosecutors prefer not having congressional competition, a mature special prosecutor and a well-led congressional inquiry can coordinate over issues like witness immunity.”

Armstrong adds:

“Two lessons emerge. First: Congressional committees are powerful tools for investigating the full range of abuse of power by a president and for passing reforms to avoid repetitions of those abuses. (Unfortunately, reforms enacted after Watergate were eroded over subsequent decades.) But committees have limited power to compel presidential compliance with demands for evidence.

“Second, prosecutors can often obtain the critical evidence that committees can’t. But their job is to prosecute crimes. They are less likely to get to the bottom of executive abuses or to prevent their repetition. Most tellingly, special prosecutors, as part of the

⁷⁹ US Senate, “Select Committee on Presidential Campaign Activities.”

<https://www.senate.gov/artandhistory/history/common/investigations/Watergate.htm> (Downloaded June 2, 2017)

⁸⁰ Scott Armstrong, “What to Remember About Watergate,” *The New York Times*, May 20, 2017.

<https://www.nytimes.com/2017/05/20/opinion/sunday/trump-nixon-watergate-congress.html> (Downloaded June 2, 2017) (Hereinafter NYT, What to Remember About Watergate)

⁸¹ *United States v. Nixon*, 418 U.S. 683 (1974). <https://supreme.justia.com/cases/federal/us/418/683/> (Downloaded June 2, 2017)

executive branch, can be dismissed by the president, while congressional committees are protected by the constitutional separation of powers.”⁸²

Iran-Contra

In 1987, the Senate and House launched a special joint investigation into allegations that senior officials in the Reagan administration secretly facilitated arms sales to Iran in violation of an arms embargo, with the proceeds used to covertly fund Contra rebels in Nicaragua. Simultaneously, an Independent Counsel investigated the case for potential criminal acts. Although the counsel obtained two convictions, these convictions were both reversed on appeal because of complications arising from grants of immunity during the Congressional investigation.⁸³ Congress had made the decision that learning key information from witnesses outweighed potential harm to a criminal case against two individuals. The committee’s investigation resulted in important policy findings. When Congress simultaneously investigates a matter while law enforcement is conducting a probe, communication between both is essential. Congress may determine that its priorities are more important than prosecution. As Iran-Contra Independent Counsel Lawrence E. Walsh observed, “[t]he legislative branch has the power to decide whether it is more important perhaps even to destroy a prosecution than to hold back testimony they need. They make that decision. It is not a judicial decision or a legal decision but a political decision of the highest importance.”⁸⁴

In commentary on the dilemma, Congressional Research Service legal analyst Mort Rosenberg similarly wrote:

“It has been argued that the constitutional dimensions of the crisis created by the Iran-Contra affair required the type of quick, decisive disclosures that could result from a Congressional investigation but not from the slower, more deliberate criminal investigation and prosecution process. Under this view, the demands of a national crisis may justify sacrificing the criminal prosecution of those involved in order to allow Congress to uncover and make public the truth of the matter at issue. The role of Congress as overseer, informer, and legislator arguably warrants this sacrifice. The question becomes more difficult as the sense of national crisis in a particular circumstance is less acute, and the object is, for example, to trade-off a lesser figure in order to reach someone higher up in a matter involving ‘simple’ fraud, abuse or maladministration at an agency. In the end, case-by-case assessments by Congressional investigators will be needed, guided by the sensitivity that these are political judgments.”⁸⁵

⁸² NYT, What to Remember About Watergate

⁸³ CRS, Investigative Oversight, pp. 7-10.

⁸⁴ CRS, Congressional Oversight Manual; Lawrence E. Walsh, “The Independent Counsel and the Separation of Powers,” *Houston Law Review*, Vol. 25, No. 1, 1988, p. 9.

⁸⁵ CRS, Investigative Oversight, p. 10.

1996 Campaign Finance Investigations

In the wake of the 1996 presidential election, serious allegations emerged that the Chinese government had attempted to gain influence in the US government through illegal donations to political campaigns, including that of President Bill Clinton, and to the Democratic National Committee. The Senate Governmental Affairs Committee launched an investigation in 1997, which ended in 1998.⁸⁶ The Justice Department convened a Campaign Finance Task Force in 1996 that wound down in 1999.⁸⁷

The Congressional and Justice Department investigations examined much of the same ground: whether foreign money illegally made its way into the coffers of candidates and political parties. The Senate's investigation established that this was the case in several of the instances it examined, all while the Justice Department successfully obtained convictions and guilty pleas to campaign finance violations and related charges involving many of the same individuals under Congressional scrutiny. For instance, John Huang, Charlie Trie, and John Chung all pleaded guilty in 1999. They were each investigated by the Senate and named in its final 1998 report.⁸⁸

CONCLUSION

There is no surefire way to establish a successful Congressional investigation. Even the best-designed investigation can face great odds beyond the control of the Congressional committee: the political climate during an investigation could prove an overriding factor, despite the best intentions to operate in a bipartisan manner; the temptation to leak documents to score points in the media or promote an agenda that undermines the integrity of the investigation can become overwhelming; or opportunities to grab media and public attention can veer investigations into dead ends and distractions. Similarly, investigations may not get the resources, tools, or backing of leadership needed to ensure a strong investigation. Competing priorities during busy Congressional sessions facing other major crises can starve a committee investigation of the attention it deserves.

But when Members see themselves as representing a separate, but equal, branch of government performing its duty of independent oversight—not just as part of a political party—they can overcome a partisan climate and truly serve the best interests of the country. History shows that Congress can convene and run exceptionally good investigations resulting in important findings and useful recommendations for righting wrongs. With the proper leadership, and by following key investigative best practices, Congress can greatly improve its chances of success.

⁸⁶ CRS, Investigations of DOJ; Senate Committee on Governmental Affairs, *Final Report on Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns, Vol. 1*, March 10, 1998.

<https://www.gpo.gov/fdsys/pkg/CRPT-105srpt167/pdf/CRPT-105srpt167-pt1.pdf>; "Campaign Finance Probe Fizzles," CQ Almanac 1997, 53rd ed., Washington, DC: *Congressional Quarterly*, 1998.

<http://library.cqpress.com/cqalmanac/cqal970000181143> (All downloaded June 2, 2017)

⁸⁷ "Campaign Finance Special Report Key Stories," *The Washington Post*. <http://www.washingtonpost.com/wp-srv/politics/special/campfin/background.htm> (Downloaded June 2, 2017)

⁸⁸ Roberto Suro, "Campaign Fund Probe Winds Down," *The Washington Post*, May 30, 1999, p. A5.

<http://www.washingtonpost.com/wp-srv/politics/special/campfin/stories/finance053099.htm> (Downloaded June 2, 2017)

APPENDIX

TYPES OF INDEPENDENT INVESTIGATIONS

Special Counsel (or Special Prosecutor)

A special counsel (also called special prosecutor) is an individual appointed by the Attorney General to handle the investigation and/or prosecution of sensitive matters where there is the possibility for a conflict of interest or bias.¹ A special counsel has the ability to, working through the FBI and other DOJ agencies, subpoena documents, interview witnesses, and pursue criminal prosecution. A special counsel is not fully independent, and can be fired by the Attorney General or the President. Congress does not have any direct involvement in the decision to appoint a special counsel, but in the past has leveraged the confirmation process to influence the decision.²

Independent Counsel (or Independent Prosecutor or Special Prosecutor)

The position of independent counsel was created by law in 1978; the law expired in 1999.³ Upon the discovery of credible evidence of misconduct by high-ranking government officials, the Attorney General would nominate an individual to head an investigation, who would then be confirmed/appointed by a panel of federal judges. The independent counsel could only be fired by those judges, and only for “good cause.” The independent counsel had an unlimited budget and incredibly broad powers to pursue and prosecute the investigation. The independent counsel’s reports were presented to Congress, but Congress had no authority over the position. Originally, the title of the position was “special prosecutor,” but it was later changed to “independent counsel.” “Special prosecutor” now more commonly refers to the similar but less independent position of “special counsel.”⁴

Presidential Commission (or Blue Ribbon or Independent Commission)

A Presidential Commission (also called a Blue Ribbon Commission) is created by the executive branch and usually consists of subject-matter experts or other individuals with legitimacy and

¹ 5 U.S.C. § 1211 et seq.

² Rosalind Helderman, “Here’s how an independent investigation into Trump and Russia would happen,” *The Washington Post*, May 10, 2017. https://www.washingtonpost.com/politics/heres-how-an-independent-investigation-into-trump-and-russia-would-happen/2017/05/10/7dc6bb8a-35a2-11e7-b373-418f6849a004_story.html; Charlie Savage, “After Comey, Here Are the Options for an Independent Russia Inquiry,” *The New York Times*, May 9, 2017. <https://www.nytimes.com/2017/05/09/us/politics/trump-rosenstein-comey-special-counsel-russia.html> (All downloaded May 18, 2017)

³ US Congress, “Ethics in Government Act of 1978” (PL 95-521), issued October 26, 1978. <https://www.gpo.gov/fdsys/pkg/STATUTE-92/pdf/STATUTE-92-Pg1824.pdf> (Downloaded May 18, 2017)

⁴ Congressional Research Service Legal Sidebar, “Special Counsels, Independent Counsels, and Special Prosecutors: Investigations of the Executive branch by the Executive Branch,” May 11, 2017. <https://fas.org/sgp/crs/misc/special.pdf>; Jim Mokhiber, “Secrets of an Independent Counsel,” *PBS Frontline*, May 1998. <http://www.pbs.org/wgbh/pages/frontline/shows/counsel/office/history.html> (All downloaded June 5, 2017)

relevance. It serves an advisory role and its main goal is usually the issuing of a report with a set of findings and/or recommendations regarding a specific situation or problem. Because any such commission is created, filled, and can be terminated by the executive branch, it can lose credibility when investigating issues involving a current Administration.

Congressional Commission (or Blue Ribbon or Independent Commission)

A Congressional Commission (or Independent Commission) is created by law, and is generally composed of subject-matter experts or other individuals considered to have legitimacy and relevance who are not currently employed by the government. The Congressional commission's powers, structure, and authority are all determined by Congress, although Congress cannot give a commission the power to conduct criminal prosecutions. Congressional commissions can sometimes issue subpoenas, hold public hearings, and publish reports. The length of a commission and how its members are chosen or removed is determined by Congress. Congressional commissions are created by legislation, and therefore require the President's signature unless Congress overrides a veto.⁵

Select Congressional Committee (or Special Committee)

A select Congressional committee (also referred to at times as a special committee) is established to investigate a specific topic or event, and is generally dissolved after issuing a final report. Select committees are generally formed via a resolution in either the House or Senate; joint committees that include both the House and Senate are possible, but rare. A select committee is made up of Members of Congress. A select committee's structure and powers are determined by the establishing resolution, and typically are similar to those of standing or permanent committees, such as holding Congressional hearings. Like standing committees, select committees lack prosecutorial authority, but can make referrals to the DOJ. Some are mandated to propose legislation. The Congressional resolution establishing a select committee does not require the President's signature.

Standing Congressional Committee (or Permanent Committee)

A standing Congressional committee (or permanent committee) has the power to conduct oversight of issues within its jurisdiction. Each committee or subcommittee can conduct investigations and hold hearings, but the rules and procedures governing subpoena authority and other powers vary. There are some "select" or "special" committees that have become permanent, such as the Senate Select Committee on Intelligence.

⁵ Congressional Research Service, *Congressional Commissions: Overview, Structure, and Legislative Considerations* (R40076), January 3, 2017, p. 2.

https://www.everycrsreport.com/files/20170103_R40076_dca0256c139bed43d85ed970ea7abf4c9fbd40b8.pdf
(Downloaded May 18, 2017)