2025 Edition

When Congress Comes Calling

A Study on the Principles, Practices, and Pragmatics of Legislative Inquiry

POGO
PROJECT ON GOVERNMENT OVERSIGHT

JENNER&BLOCK

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Preface

The lawyers in Jenner & Block's Congressional Investigations practice are proud to have had the opportunity to partner with POGO to update *When Congress Comes Calling*—the seminal manual on congressional oversight and investigations.

When Congress Comes Calling has served as a critical resource for congressional investigators since it was first published in 2009 by Congressional Research Service expert Morton Rosenberg and The Constitution Project. Indeed, many of us relied on the first and second iterations of this manual when we served in Congress and the executive branch, participating in some of the interbranch engagements that are covered in the pages that follow.

Mort passed away on May 5, 2025, after a long and distinguished career of significant contributions to Congress and to the legal profession. This update is a testament to him, and this manual remains very much his work and his legacy. To that end, we have not reviewed or sought to edit any of Mort's original text, except where a new legal development made that manifestly necessary.

It is a privilege to have been trusted to lead this effort, and we are deeply grateful to all those who contributed.

Ashley Callen
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and Senior Counselor to the Attorney General
Former Senate Chief of Staff

Acknowledgments:

This is the second major update of Mort Rosenberg and The Constitution Project's seminal study on congressional investigative oversight, and the first since Mort's passing. The 2017 edition added six new chapters that covered discrete but vital subject matters related to congressional oversight. In addition to updating the 2017 edition as necessary, we have added a new chapter on the defenses that the executive branch and private parties may raise in response to congressional requests for documents and information. We hope this chapter will help readers anticipate and understand how these actors view the precedents—new and old—that guide these types of engagements.

This undertaking would not have been possible without the contributions of the community of seasoned oversight practitioners around Washington, D.C., many of whom consulted with Mort during his 35 years of service as a specialist in American Law at the Congressional Research Service (CRS). In particular, we wish to thank the guest editors who generously reviewed draft chapter updates and provided us with their insightful feedback. Your collective experience and expertise have enriched these chapters.

- **Michael Bopp**, former Staff Director and Chief Counsel of the Senate Committee on Homeland Security and Governmental Affairs

- **Krista Boyd**, former Inspector General, Office of Personnel Management and former Chief Counsel for Oversight and Policy of the House Committee on Oversight and Government Reform
- **Machalagh Carr**, former General Counsel and Chief of Staff to the Speaker of the House
- **Neil Eggleston**, former White House Counsel
- **Mark Epley**, former General Counsel to the Speaker of the House
- **Kimberly Hamm**, former General Counsel to the Speaker of the House, Chief Counsel to the Chairman of the Securities and Exchange Commission, and Associate General Counsel in the House Office of General Counsel
- **Thomas G. Hungar**, former General Counsel to the House of Representatives
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- **Sara Zdeb**, former Chief Counsel for Oversight of the Senate Committee on the Judiciary and former Deputy Assistant Attorney General in the Department of Justice's Office of Legislative Affairs

Finally, we wish to thank POGO, which The Constitution Project joined in 2017, for entrusting the team at Jenner & Block to update Mort's extraordinary work, and to thank the Jenner & Block attorneys and staff who worked over the past several months to make this 2025 edition of *When Congress Comes Calling* possible. In particular, we are grateful for the tireless efforts of our Jenner & Block colleagues: Sophia Arbess, Caroline Cease, Miroslava Becerra Garcia, Lily Hopwood, Hilary Ledwell, David Manners-Weber, Cheryl Olson, Bradley Pough, Krister Rasmussen, Noah Rosenberg, Samuel Ungar, and Adam Weidman. We also thank Leslie Garvey, Tim Stretton, Scott Amey, and David Janovsky at POGO.

Note from the authors of the 2025 updates:

The contributors to this update—all of whom previously served in the legislative and executive branches conducting and responding to congressional oversight—share a deep respect for Mort's advocacy for a muscular Article I oversight function. As a tribute to him, and in keeping with our commitment to honor his work, we have only made updates to his original words in Part I where new legal developments absolutely require it. The original versions of the case studies in Part II of the 2017 update—which were not edited for this update—are exclusively available in the online version of *When Congress Comes Calling*. The views and interpretations of the law expressed in Parts I and II of this study, therefore, may not necessarily reflect those of the authors and guest editors.

Note from the authors of the 2017 updates:

Since its founding nearly 20 years ago, The Constitution Project has worked to protect our constitutional system of checks and balances. We have done so in a variety of ways and contexts, from advocacy to reduce secrecy around national security programs, to efforts to protect the legitimacy and independence of the federal courts, to public education about the proper use and scope of presidential signing statements.

In 2009, we partnered with Morton Rosenberg—who served for over 35 years as a researcher and Specialist in American Law at the Congressional Research Service (CRS)—to produce a handbook specifically on congressional oversight and investigation. The result was the first iteration of *When Congress Comes Calling*, which this study now replaces.

We are extremely lucky again to have had the opportunity to work with Mort, who authored the vast majority of what follows. He is a lion in the field of congressional oversight and investigation, and his work on this project has been truly extraordinary.

This study would not have been possible without the tireless efforts of TCP Program Assistant David Janovsky, Senior Counsel Katherine Hawkins, and our indefatigable interns Sierra Brummett, Alyssa Dunbar, Carly Fabian, Rachel Margolis, Andrew Oppong, Erin Quinnan, and Lauren Weiss. We sincerely thank each of them.

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Virginia Sloan
President

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Note from Mort Rosenberg:

First, and foremost, I must acknowledge the unstinting patience, support and understanding of my wife, Aileen, for this two-year delay of my full retirement that allowed me to undertake this important project. Of course my utmost appreciation goes out to The Constitution Project and the Hewlett Foundation for the confidence they have demonstrated in my ability to present the essentials of this consequential topic. My particular thanks go to Scott Roehm for his tireless efforts, legal perceptiveness, editing prowess and infinite patience that translated my rambling legalese into readable and usable expositive prose. Finally, I would be remiss in not giving full recognition, appreciation and credit to the literally uncountable number of congressional members and staff that allowed me a Zelig-like presence in their oversight and investigative activities for over 35 years that provided me with the hands-on experiences and insights that I am attempting to pass on in this study.

Morton Rosenberg

May 2017

Foreword

The years since the last update to *When Congress Comes Calling* in 2017 have marked a period of significant developments across the congressional oversight landscape. Much of this is detailed in the chapters that follow, but it is worth noting three emerging trends at the start:

First, the muscular use of congressional oversight authority has continued to accelerate: a congressional majority will loosen a self-imposed constraint on the exercise of its oversight authorities, often in the face of criticism from the minority. Then the minority will come into power and keep or expand the practice they had previously decried.

For example, upon taking control in 2015, House Republicans expanded unilateral subpoena power to 14 separate House committee chairs, which generally meant that committee chairs could issue subpoenas without a committee vote and without concurrence from the minority party.[1] Previously, only the Chairman of the House Oversight Committee had such authority.[2] While many House Democrats had roundly criticized this change at the time,[3] they kept it in place when they returned to the majority in 2019. It has now become established practice that most House committees empower the chair to issue subpoenas unilaterally.[4] One analysis showed that the Chairman of the House Judiciary Committee issued at least 91 subpoenas between January 2023 and August 2024 alone.[5] The Senate, too, has seen an expansion of unilateral subpoena authority. Historically, only the chair of the Permanent Subcommittee on Investigations (PSI) had such authority. In the 119th Congress, however, this power was extended to the chair of PSI's parent committee, the House Security and Governmental Affairs Committee (HSGAC).

Similarly, in 2017, the Republican House majority gave wider deposition authority to committees, including by allowing staff attorneys to take depositions without the presence of any members on days when the House was out of session. Given the demands on members' time, the requirement that at least one member be present for a deposition had been a significant limiting factor in the committees' ability to

[1] *See* Emily M. Loeb & Andrew C. Noll, *House Rules Changes Suggest More Liberal Use of Deposition Authority in New Congress*, Jenner & Block (2019), https://www.jenner.com/a/web/2tNbmQvp6vwNPZUSXfi3Q4/4HRMZQ/House%2520Rule%2520Changes%2520Suggest%2520More%2520Liberal%2520Use%2520of%2520Deposition%2520Authority%2520in%2520New%2520Congress.pdf?1548277525 [hereinafter "Loeb & Noll, *House Rules Changes*"].

[2] *See id.*

[3] Lauren French, *Dems Blast House GOP Subpoena Rules Change*, Politico (Feb. 20, 2015) https://www.politico.com/story/2015/02/democrats-criticize-house-gop-subpoena-rules-115068 (describing a letter from 16 Democratic ranking members characterizing the change as "an abusive model embraced only by Senator Joe McCarthy, former Rep. Dan Burton, and Rep. Darrell Issa").

[4] *See, e.g.*, Jane A. Hudiburg, Cong. Rsch. Serv., R44247, A Survey of House and Senate Committee Rules on Subpoenas 1 (updated Nov. 12, 2021) (assessing the 117th Congress and concluding that "[m]ost House committees have … delegated to their chair the power to authorize subpoenas").

[5] Michael Sozan & Alice Lillydahl, *Despite Defying His Own Lawful Subpoena, Rep. Jim Jordan Has Issued At Least 91 Subpoenas to Others*, Ctr. Am. Progress (Aug. 1, 2024), https://www.americanprogress.org/article/despite-defying-his-own-lawful-subpoena-rep-jim-jordan-has-issued-at-least-91-subpoenas-to-others. This tally includes subpoenas to both private parties and the executive branch.

schedule depositions[6] and ultimately the number of depositions palatable to the committee. Now these staff-only depositions could be scheduled for days when the House was out of session.[7]

The then-Ranking Democratic Member of the House Rules Committee said at the time, "Freely handing out the power to compel any American to appear, sit in a room, and answer staff's invasive questions on the record—without members even being required to be present—is truly unprecedented, unwarranted, and offensive."[8] The spokesperson for then-Minority Leader Nancy Pelosi called it a "shocking continuation and expansion of House Republicans' abusing of congressional processes to intimidate private citizens."[9] But when Democrats retook the majority in 2019, under then-Speaker Pelosi's leadership, they expanded staff deposition authority still further, empowering staff to conduct depositions without members even on days when the House was in session.[10] That rule remains in effect in the 119th Congress.

In the 117th Congress, the Democrat-led House Select Committee to Investigate the January 6 Attack on the United States Capitol requested—and received consent—from many witnesses for interviews to be not just transcribed, but videotaped, and then leveraged excerpts from these recordings to make its public case during hearings. Previously, congressional interviews and depositions were rarely recorded via video. Unsurprisingly, the practice is now becoming more common. Said one Republican member once back in the majority: "In a way they blazed a trail and showed us how to get all this stuff, right? It was a double-edged sword when they did all that."[11]

Similarly, both parties have continued to insist on the institutional prerogative of Congress to exclude agency counsel from depositions. Since Mort's last update, Republican and Democratic administrations have relied on a series of opinions by the Office of Legal Counsel to insist that executive branch counsel be allowed to attend when committees depose executive branch witnesses. A rule that prohibited executive branch counsel from attending depositions conducted by the House Committee on Oversight and Government Reform that was first adopted[12] in 1998 under Chairman Dan Burton was applied House-wide by the Democratic Rules Committee Chair in 2019.[13] The Republican-led House of Representatives preserved the categorical prohibition on executive branch counsel from attending

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[6] Loeb & Noll, *House Rules Changes*, *supra* note 1.

[7] *New House Provision Provides Additional Staff Deposition Authority Without Members of Congress Being Present*, McDermott Will & Schulte (Jan. 17, 2017), https://www.mwe.com/insights/house-provision-staff-deposition-authority ("The upshot of this rule change is that congressional staffers are now empowered to schedule depositions on days in which the House is not in session, enabling them to run such depositions without the presence of a member.").

[8] Billy House, *House GOP Gives Staff Broader New Powers to Grill Witnesses*, Bloomberg (Jan. 4, 2017), https://www.bloomberg.com/news/articles/2017-01-04/house-gop-gives-staff-broader-new-powers-to-grill-witnesses.

[9] *Id.*

[10] Loeb & Noll, *House Rules Changes*, *supra* note 1.

[11] Michael Macagnone, *Jan. 6 Panel's Video Depositions Become Tantalizing Tool for Probes*, Roll Call (Mar. 22, 2023), https://rollcall.com/2023/03/22/video-depositions-emerge-as-tantalizing-tool-for-panel-probes/.

[12] Rule 20, Rules of the H. Comm. on Oversight and Gov't Reform, 105th Cong., https://www.govinfo.gov/content/pkg/CPRT-105HPRT49381/pdf/CPRT-105HPRT49381.pdf#page=9.

[13] *See* 116th Congress Regulations for Use of Deposition Authority, *reprinted at* 116 Cong. Rec. H1216-17 (daily ed. Jan. 25, 2019), https://www.congress.gov/116/crec/2019/01/25/CREC-2019-01-25-pt1-PgH1216-2.pdf

depositions in the rules packages for the 118th and 119th Congresses[14]—even as the executive branch has categorically rejected the rule as unconstitutional.

Second, Congress has more frequently been willing to use its most coercive tools aggressively to conduct oversight of private parties—no longer reserving these tools for the executive branch, which has historically been the focus of congressional oversight. For example, in 2024, after the CEO of a health care company defied a Senate Health, Education, Labor, and Pensions (HELP) Committee testimonial subpoena—the first subpoena issued by that Committee in more than forty years—the HELP Committee voted unanimously to hold the CEO in criminal contempt.[15] The full Senate then voted unanimously to do the same.[16] It was the first time the Senate had held anyone in criminal contempt ***in more than fifty years***.[17] And the House Judiciary Committee has wielded the threat of criminal contempt to pressure a private party into a more cooperative posture, scheduling a 2023 criminal contempt vote against the CEO of Meta—which the Chairman postponed after the company produced additional documents.[18]

Third, we have seen the White House take an increasingly muscular approach to challenging congressional oversight authority in cases that directly implicate the President. Amidst a highly polarized political climate, Congress has responded in part by determining, in some cases, that formally launching an impeachment inquiry—where the legislative branch has enhanced investigative authority[19]—is the appropriate next step.[20] Indeed, since Mort's last update, we have seen two presidential impeachments and a third presidential impeachment inquiry by the House[21]—prior to 2019 there had been only three presidential impeachments in the over 240-year history of our country.

A 2019 investigation related to freezing aid to Ukraine by the Democratic-controlled House of Representatives quickly escalated to an impeachment inquiry. Rather than engage in the traditional

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[14] H. Rep. Res. 5 – Adopting the Rules of the House of Representatives for the One Hundred Eighteenth Congress, and for Other Purposes, 118th Cong. (2023), https://www.congress.gov/bill/118th-congress/house-resolution/5.

[15] *HELP Committee Votes to Hold Steward Health CEO in Contempt for Failure to Comply with Congressional Subpoena*, S. Comm. on Health, Educ., Lab. & Pensions (HELP) (Sept. 19, 2024), https://www.help.senate.gov/rep/newsroom/press/help-committee-votes-to-hold-steward-health-ceo-in-contempt-for-failure-to-comply-with-congressional-subpoena.

[16] Nate Raymond & Dietrich Knauth, *US Senate Votes to Hold Steward Health CEO in Criminal Contempt*, Reuters (Sept. 26, 2024), https://www.reuters.com/world/us/us-senate-votes-hold-steward-health-ceo-criminal-contempt-2024-09-25.

[17] House, *House GOP Gives Staff Broader New Powers*, *supra* note 8.

[18] Rebecca Kern, *Jim Jordan Pauses Mark Zuckerberg's Contempt of Congress Vote*, Politico (July 27, 2023), https://www.politico.com/news/2023/07/27/jordan-postpones-zuckerberg-contempt-of-congress-vote-00108570.

[19] Laurence Tribe & Joshua Matz, To End a Presidency: The Power of Impeachment 129 (2018) ("Congress's investigatory powers are at their zenith in the realm of impeachment").

[20] *See* Scott Wong et al., *House Republicans Vote to Authorize Their Impeachment Inquiry into Joe Biden*, NBC News (Dec. 13, 2023), https://www.nbcnews.com/politics/congress/house-vote-authorize-impeachment-inquiry-president-joe-biden-rcna129377 (describing "reluctant moderate Republicans" supporting impeachment inquiry resolution against President Biden "to help House investigators enforce their subpoenas and obtain the information they need to complete their probe").

[21] *See* H. Rep. Res. 755 – Impeaching Donald John Trump, President of the United States, for High Crimes and Misdemeanors, 116th Cong. (2019) (impeachment of Donald Trump for soliciting Ukrainian interference in the 2020 presidential election and for obstruction of Congress); H. Rep. Res. 24 – Impeaching Donald John Trump, President of the United States, for High Crimes and Misdemeanors, 117th Cong. (2021) (impeachment of Donald Trump for incitement of the January 6 insurrection and associated attempts to overturn the results of the 2020 presidential election); H. Rep. Res. 918 – Directing Certain Committees to Continue their Ongoing Investigations as part of the Existing House of Representatives Inquiry into Whether Sufficient Grounds Exist for the House of Representatives to Exercise its Constitutional Power to Impeach Joseph Biden, President of the United States of America, and for Other Purposes, 118th Cong. (2023) (inquiry into alleged criminal activity by Joseph Biden and his family).

accommodations process, or assert some form of executive privilege, the White House declared the inquiry "constitutionally invalid" and simply refused to participate.[22]

In 2023, when the White House resisted Republican-led investigations into President Biden and his family's business dealings, Speaker Kevin McCarthy and the relevant committee chairs proceeded to bring their ongoing probes under the umbrella of an impeachment inquiry. Speaker McCarthy explained that an impeachment inquiry "provides Congress the apex of legal power to get all the information they need."[23] The White House called the impeachment inquiry "illegitimate."[24]

Considered collectively, these three trends—the one-way rules ratchet, the increasing use of coercive tools against private parties, and the use of the House's sole power to impeach—represent major developments in Congress's use of its oversight authorities. They also arguably reflect the congressional perspective that it needs to push back against a persistent expansion of the doctrine of executive privilege, more aggressively wielding its tools against the executive branch, and expanding its reach into the more fertile soil of private sector oversight where there are fewer constitutional defenses.[25]

Further, one could view Congress's recent strategy of seeking executive branch information from third parties as an executive privilege workaround. Since Mort's last update, we have seen subpoenas issued to third parties for the purpose of obtaining records that relate to investigations of the President, the White House, and executive departments and agencies. For instance, in 2019, several Democratic-led House committees issued subpoenas for President Trump's tax returns and other confidential financial documents—not to the President, but to banks and an accounting firm. More recently, the Republican-led House Judiciary Committee sought and obtained records from several social media companies to support its investigation of alleged government censorship during the Biden administration (a practice often referred to as "jawboning").

Perhaps as a corollary to the rising friction between the branches and the rising pressure on private parties, litigation related to congressional oversight is on the rise as well. [26] In both the Trump and Biden

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[22] Letter from Pat A. Cipollone, Counsel to the President, to the Hon. Nancy Pelosi, Speaker of the House of Representatives, et al., at 2 (Oct. 8, 2019), https://www.nytimes.com/interactive/2019/10/08/us/politics/white-house-letter-impeachment.html.

[23] Summer Concepcion, *Kevin McCarthy: House Impeachment Inquiry into Biden Is a "Natural Step Forward"*, NBC News (Aug. 27, 2023, updated Aug. 28, 2023), https://www.nbcnews.com/politics/joe-biden/kevin-mccarthy-biden-impeachment-inquiry-natural-step-forward-rcna102050.

[24] Rebecca Shabad, *White House Says Impeachment Inquiry "Illegitimate," Headed Down a "Path of Failure"*, NBC News (Dec. 5, 2023), https://www.nbcnews.com/politics/white-house/white-house-says-impeachment-inquiry-illegitimate-headed-path-failure-rcna128087.

[25] For instance, OLC in 2019 took the position that the practice of prohibiting agency counsel from attending depositions impaired the president's constitutional authority to assert executive privilege where appropriate. *Attempted Exclusion of Agency Counsel from Congressional Depositions of Agency Employees*, 43 Op. O.L.C. 131 (2019), https://www.justice.gov/olc/media/1385441/dl?inline. And the 2019 and 2023 impeachment inquiries were intended in part to strengthen the House's ability to overcome executive privilege assertions. *See, e.g.*, Cong. Rsch. Serv., LSB11083, Impeachment Investigations, Part II: Access (updated Dec. 15, 2023), https://www.congress.gov/crs_external_products/LSB/HTML/LSB11083.web.html ("An impeachment investigation may also improve the likelihood that a committee will be able to overcome executive privilege assertions made in response to committee subpoenas. . . . The House has viewed the need for information in an impeachment investigation as superseding the President's need to maintain the confidentiality of executive branch deliberations.").

[26] By way of one imperfect but potentially illustrative measure, a review of decisions that Westlaw identifies as related to "Congressional investigations, commissions, and committees" shows a material increase in such decisions when comparing 2016-2024 against 2006-2015. *See* Westlaw, West Key Number 393(B)228.

administrations, Congress repeatedly brought suit against the executive branch for not complying with its demands.[27] Private parties have sought to challenge the validity of congressional subpoenas in court, although such suits have often run headlong into congressional immunity under the Constitution's Speech or Debate clause.[28] And two former presidential advisors have been jailed for criminal contempt of Congress.[29]

With these trends likely to continue, it is likely that there will be more litigation in the years ahead as private parties resist and the branches continue to clash. And through those years we hope this work remains a useful guide for those interested in understanding Congress's oversight powers.

[27] *See, e.g.*, Comm. on Ways & Means v. U.S. Dep't of the Treasury, 575 F. Supp. 3d 53, 60 (D.D.C. 2021), *aff'd*, 45 F.4th 324 (D.C. Cir. 2022) (litigation over release of Trump tax returns); Comm. on the Judiciary v. McGahn, 968 F.3d 755, 761 (D.C. Cir. 2020) (litigation over alleged obstruction of justice by Trump admin officials in connection with Robert Mueller investigation); Complaint, Comm. on the Judiciary v. Chan, No. 1:24-cv-344 (D.D.C. Feb. 6, 2024) (suit challenging DOJ refusal to permit deposition of FBI agent Elvis Chan unless agency counsel could attend, contrary to House rules); Complaint, Comm. on the Judiciary v. Daly, No. 1:24-cv-815 (D.D.C. Mar. 21, 2024) (suit challenging DOJ refusal to permit deposition of tax agents unless agency counsel could attend, contrary to House rules); Complaint, Comm. on the Judiciary v. Garland, No. 1:24-cv-01911 (D.D.C. July 1, 2024) (suit to compel release of tapes of Special Counsel Robert Hur interview with President Joseph Biden).

[28] *See, e.g.*, De la Torre v. Sanders, No. 1:24-cv-02776 (D.D.C. Sept. 16, 2025) (dismissing action challenging validity of subpoenas issued by HELP Committee as barred by Speech or Debate Clause) *appeal docketed*, No. 25-5353 (D.C. Cir. Oct. 7, 2025); Meadows v. Pelosi, 639 F.Supp.3d 62 (D.D.C. 2022) (dismissing action challenging validity of subpoenas issued by January 6 Committee as barred by Speech or Debate Clause); Republican Nat'l Comm. v. Pelosi, 602 F. Supp. 3d 1, 18 (D.D.C. 2022) (ordering the dismissal of House defendants in challenge to subpoena because of the Speech or Debate Clause), *vacated*, No. 22-5123, 2022 WL 4349778 (D.C. Cir. Sept. 16, 2022) (vacated on mootness grounds); *but see* Bedi et al. v. House Education and Workforce Committee (Northwestern University), Levin Ctr., https://levin-center.org/congressional-lawmakers/congressional-oversight-resources/oversight-case-law/case-list/bedi-v-house-ed/ (last accessed Nov. 6, 2025) (describing legal challenge to House Education and Workforce Committee investigative letter on First, Fifth, and Sixth Amendment grounds, and Committee withdrawing letter soon after).

[29] *See* Sara Murray et al., *Steve Bannon Begins Serving 4-Month Sentence in Federal Prison for Defying Congressional Subpoena*, CNN (July 1, 2024), https://www.cnn.com/2024/07/01/politics/steve-bannon-report-to-prison; Tierney Sneed & Katelyn Polantz, *Ex-Trump Aide Peter Navarro Begins Serving Prison Sentence After Historic Contempt Prosecution*, CNN (Mar. 19, 2024), https://www.cnn.com/2024/03/19/politics/peter-navarro-jail-contempt-of-congress.

Part I

1. Introduction: Updating the Study of Legislative Inquiry and Adapting it to the Changed Climate of Congressional Oversight

> *[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; to censure them if found condemnable, and, if the men who compose the government abuse their trust … to expel them, and either expressly or virtually appoint their successors. –John Stuart Mill*[1]

Throughout its history, Congress has engaged in oversight of the executive branch—the review, monitoring, and supervision of the implementation of public policy. Congress's right of access to executive branch information is constitutionally based and is critical to the integrity and effectiveness of our scheme of separated but balanced powers. The first several Congresses inaugurated such important oversight techniques as special investigations, reporting requirements, resolutions of inquiry, and use of the appropriations process to review executive activity. In the face of executive challenges to its authority, the legislature's capacity and capabilities to check on and check the executive have increased over time. Supreme Court and lower court rulings have recognized the institutional importance and necessity for its broad inherent authorities of information gathering and self-protection against aggrandizement by the coordinate branches. Public laws, congressional rules, and historical practices have measurably enhanced Congress's implied power under the Constitution to conduct oversight.

In 2009, Mort Rosenberg, who spent 35 years at the Congressional Research Service advising the legislative branch during the major interbranch disputes of that era, released the original version of this handbook. Mort consolidated his and his CRS colleagues' reports on the history and the major constitutional questions related to congressional oversight to assist practitioners inside and outside of the government. At the time, Mort summarized its purpose:

> As the title of this handbook suggests, it is designed to be an introduction to the legislative investigatory process. It is intended to shed some light on this aspect of the arcane, sometimes impenetrable, and often seemingly bizarre "Law of Congress" that can confound the most sophisticated legal practitioners representing government and private clients before an inquiring committee, and which may even elude the members and staff of committees conducting such inquiries. The law of congressional investigation consists of a complex combination of constitutional rulings and principles, statutory provisions, Byzantine internal rules adopted by the House and Senate and individual committees, informal practices, and folkways. Although there is no black letter guide for the uninitiated, we hope that this handbook will provide a first step in that direction.

In 2017, Mort and The Constitution Project updated and expanded the 2009 handbook to include practical guidance for members and staff on the conduct of congressional oversight, and on the scope and limitations of the respective powers of Congress, the executive branch, and the judiciary. The expanded version contained six new chapters on offices of inspectors general, Speech or Debate principles, investigations in foreign jurisdictions, oversight of agency decision-making, the Congressional Review Act, and oversight

[1] Considerations on Representative Government 42 (1875).

of the judiciary. The 2017 update also detailed the rules and tools of oversight available to congressional committees and when and how they may use them. It also assessed the limited abilities of the executive branch and members of the public to resist such inquiries, and of the courts to resolve such inter-branch conflicts. Finally, it described the then-recent executive branch challenges to congressional oversight and suggested ways to address those disputes. They cited a series of developments that had disturbed the balance of power between the branches and caused challenges to Congress's Article I authority to conduct oversight.[2]

The years since the last update of this study have been eventful, and the landscape for congressional oversight has evolved in significant ways. This update covers the major developments in caselaw and in practice, including the implications of the Court's opinion in *Trump v. Mazars USA, LLP* and an unprecedented surge in contempt and impeachment proceedings. To further assist practitioners in the legislative branch, this update also includes a new chapter on the responses they are likely to hear from their executive branch counterparts in the course of conducting oversight.

This update reflects contributions from a community of lawyers who have seen every side of the oversight process. We hope these revisions to Mort's invaluable handbook help readers better understand the current state of the system of checks and balances that the Constitution's Framers envisioned.

[2] The authors cited: "an unlawful FBI raid on a Member's congressional office to obtain alleged incriminating documents; Department of Justice (DOJ) criminal prosecutions of Members that have successfully denied Members' Speech or Debate protections for legislative actions; the presidential cooption of legislative oversight of agency rulemaking; refusals to ensure the faithful execution of enacted statutory directions; an attempted usurpation of the Senate's exclusive confirmation prerogative; failures to submit timely nominations for vacant Inspector General positions, thereby allowing unconfirmed acting officials to hold such sensitive positions, often for years; the issuance of a DOJ Office of Legal Counsel (OLC) opinion that authorizes heads of agencies and departments to decline Inspector General requests for information necessary to perform their investigative and audit authorities; OLC opinions asserting expanded presidential control over agency decision making through broad interpretations of the concept of a unitary executive and of the traditional understandings of the scope of executive privilege claims, opinions which have been utilized by departments and agencies to delay or deny congressional access to requested information; and the Supreme Court and federal Courts of Appeals altering the balance between Congress and the executive branch and opining on the scope of congressional oversight authority in a number of significant opinions."

2. The Institutional Framework of Congressional Oversight: Purposes, Powers, Limitations and Practicalities

The law of congressional investigation consists of a complex combination of constitutional rulings and principles, statutory provisions, byzantine internal rules adopted by the House and Senate and individual committees, informal practices, and folkways. Although there is no black letter guide for the uninitiated, we hope that this study will provide a first step in that direction. To that end, this chapter sketches the purposes of oversight, the legal authorities to accomplish it, and the obstacles that congressional overseers face, both internal and external.

A. The Purposes and Powers of Congressional Oversight

Congressional oversight of the executive is designed to fulfill a number of important purposes and goals, including to:

- ensure executive compliance with legislative intent;
- improve the efficiency, effectiveness, and economy of governmental operations;
- evaluate program performance;
- prevent executive encroachment on legislative powers and prerogatives;
- investigate alleged instances of poor administration, arbitrary and capricious behavior, abuse, waste, fraud, and dishonesty;
- assess agencies' or officials' ability to manage and carry out program objectives;
- assess the need for new federal legislation;
- review and determine federal financial priorities;
- protect individual rights and liberties; and
- inform the public about how its government is performing its public duties.

Legislative oversight is most commonly conducted through congressional budget authorizations, appropriations, confirmations, and investigative processes, and, in rare instances, through impeachment. All legislative oversight serves the purpose of informing Congress so that it may effectively develop legislation, monitor the implementation of public policy, and disclose to the public how its government is performing. Oversight conducted through authorization, appropriations, or confirmation exercises tends to be more routine, whereas congressional investigations are often adversarial, confrontational, and sometimes high profile.

Beyond the traditional purposes of oversight, the inquisitorial process also sustains and vindicates Congress's role in our constitutional scheme of separated powers and checks and balances. There is a rich history of congressional investigations from the first examining of the failed St. Clair expedition in 1792

through those assessing the Teapot Dome scandal, Watergate, Iran-Contra, the excesses of domestic intelligence activities exposed by the Church Committee, Whitewater, informant corruption in the FBI's Boston Regional Office and, more recently, the removal and replacement of U.S. Attorneys and the cover-up of unlawful gun-walking to Mexican gang cartels. These investigations have established, in law and practice, the nature and scope of the tools upon which Congress may rely to maintain its role in our constitutional scheme.

Congress's right of access to executive branch information has been recognized by innumerable Supreme Court and lower federal court decisions. These precedents establish a broad and encompassing power in the Congress to engage in oversight and investigations that reach all sources of information so that Congress can carry out its legislative functions. In turn, congressional committees have been granted a formidable array of tools to ensure access. Committees can: issue subpoenas; grant immunity to force testimony of witnesses invoking their Fifth Amendment privilege against self-incrimination; provide for staff deposition authority to more efficiently screen potential witnesses and set the stage for public hearings; establish rules for the conduct of hearings which may provide less protection for witness rights than is provided in court proceedings; and hold recalcitrant witnesses in contempt of Congress and subject them to criminal prosecution or an inherent contempt proceeding that may result in imprisonment and/or fines.

B. The Power of Congress over Executive Branch Agencies

The Constitution is silent about the administrative bureaucracy and its operation. There is scant mention of departments and agencies. But it is apparent from the constitutional text that Congress has the power to create agencies and offices and can select the manner of appointment of officials.[3] And although the Constitution says nothing on such issues as the removal of officers or who controls the decision-making of the agencies—the President or Congress—the Supreme Court has recognized the legislature's primacy in establishing the nation's policy directions and, in appropriate circumstances, may even limit presidential at-will removal authority.

In historical practice, Congress creates, locates, and abolishes agencies and offices. Congress also sets qualifications for officeholders, as well as the terms of their tenure and compensation, and other incidents of office. Congress is also the sole source of agency powers, functions, and funding. It defines the missions of agencies and provides the authorities of the agencies to carry out those missions. Most often, these powers are given to agency heads, not to the President. In short, Congress can tailor the offices of government in virtually any way it deems necessary to accomplish its legislative designs.

Also in historical practice, the President normally has authority to appoint and remove and to supervise and coordinate the actions of executive branch officers. However, such presidential supervision and coordination as to how subordinates will carry out their missions, which derives from Article II's investiture in the President of all the "executive power," is clearly limited by Supreme Court and lower federal court precedent holding that the Take Care Clause[4] does not provide the President with the power to decide whether or which laws should be carried out, but rather creates an obligation that the President

[3] The Constitution, in Art. I, §8, cl. 18, provides for Congress "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof." Art. II, §2, cl. 2 provides that the Senate shall advise and consent to all superior officers of the United States "which shall be established by law, but Congress may by law vest appointment of such inferior officers, as they think proper, in the president alone, in the courts of law, or in the heads of departments."

[4] Art. II, § 3 ("[The President] shall take Care that the Laws be faithfully executed.").

is to ensure that executive branch officials carry them out as Congress has ordered.[5] But it is also manifest from Supreme Court precedent that Congress is forbidden from appointing executive branch officers or removing them, from granting the power to administer laws to legislative branch officers, or from unduly limiting the presidential removal power.[6]

C. Barriers to Effective Oversight

In short, with these powers and legal precedents, shouldn't Congress win most of its disputes with the executive branch over access to information? Absolutely. Does it? Mostly, but "it depends" is the honest answer. On what? On how badly Congress wants to protect its institutional interests, the political will necessary to protect those interests, the sufficiency of the informational access resources it provides its committees, and on how skilled and determined the committees are in utilizing the powers, rules, tools and informational resources available to them.

Experience has shown that in order to engage in successful oversight, committees must establish their credibility with the executive departments and agencies they oversee early, often, consistently, and in a manner that evokes respect, if not fear. A request to an agency for information, documents, or briefings from either a committee chair or staff should be immediately respected by the agency. Agency leadership and staff should automatically understand that if the request is not answered and there is no legitimate explanation, Congress will follow up with more formal, uncomfortably public processes.

But effective oversight is a hard task even in the best of times, and recent years have not been the best of times for accommodative relations between the legislative and executive branches. For over four decades, the executive has consistently advocated an expansive view of presidential power under the rubric of "the unitary executive" theory and has taken bold steps to make it an operative reality. This has included an expanded notion of the bounds of presidential executive privilege and prerogatives and efforts to block assertions of legislative powers to access essential information. Similar incursions have taken place with respect to the oversight and control of agency rulemaking,[7] member protections under the Speech or

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[5] *See, e.g.*, Kendall v. United States ex rel. Stokes, 37 U.S. 524, 610 (1838) (holding that where a valid duty is imposed on an executive official by Congress, "the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President."); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952) (holding that the president does not have the inherent power to take possession of private property in order to keep labor disputes from stopping steel production necessary for the war effort); Medellin v. Texas, 552 U.S. 491, 532 (2008) (rejecting the argument that under the Take Care Clause the president can issue an order that pre-empts established state law by relying on a non-self-executing treaty which does not establish domestic law unless Congress acts to make it so. The president's order was held an attempt to legislate, not execute, the law.); Lear Siegler Inc. v. Lehman, 842 F. 2d 1102, 1124 (9th Cir. 1988) (holding that once the president puts his signature to a law it "becomes part of the law of the land and the president must 'take care that [it] be faithfully executed'" and has no authority to "employ a so-called 'line item veto' and excise or sever provisions of a bill with which he disagrees."); NTEU v. Nixon, 492 F. 2d 587, 604 (D.C. Cir. 1974) (holding that the Take Care Clause does not permit the president to refrain from executing duly enacted laws"); Ameron, Inc. v. U.S. Army Corps of Engineers, 610 F. Supp. 750, 755 (D. N.J. 1985), (aff'd 809 F. 2d 1986) (holding that a presidential direction to agencies not to comply with an enacted provision of law "flatly violates the express instruction of the Constitution that the president shall "take care that the laws be faithfully executed."); *see also, e.g.*, Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 Vand. L. Rev. 671 (2014).

[6] *See, e.g.*, Myers v. United States, 272 U.S. 52 (1926) (Congress cannot require Senate approval for removal of presidential appointee); Buckley v. Valeo, 424 U.S. 1, 128-1310 (1976) (congressional appointments to executive positions are prohibited); INS v. Chadha, 462 U.S. 919, 944-45 (1983) (Congress may not control execution of the laws except through Article I procedures holding legislative vetoes unconstitutional); Bowsher v. Synar, 478 U.S. 714, 736 (1986) (Congress may not delegate executive functions to an official, the comptroller general, who is removable by Congress); Free Enterprise Fund v. PCAOB, 561 U.S. 577 (2010) (holding that "dual for-cause" limitations on the removal of Board members contravened separation of powers limitations).

[7] *See* Chapter 12 *infra.*

Debate Clause,[8] and the temporary filling of vacant advice and consent positions,[9] among others. The pendulum has swung seemingly inexorably further toward increased presidential power, in large measure due to the acquiescence of the Congress itself and its failure to effectively assert its own powers and prerogatives in response to such encroachments.

At the same time, Congress has neglected the very serious problem of insufficient resources to conduct effective oversight. Congressional committees lack staff with expertise and incentives to stay on board for extended periods, and the ability to call upon adequately funded, reliable, and nonpartisan legislative research, analysis and informational support organizations for assistance. Accomplishing the ten oversight goals set forth above would be difficult under optimal circumstances. It is next to impossible with the self-imposed restraints Congress has placed on its oversight capabilities.

At the time this handbook was last updated in 2017, Congress confronted, oversaw and contained an executive branch for which it had created 180 agencies, staffed by 4.1 million civilian and military employees, with a budget of $3.9 trillion per year. Today, there are approximately 4.8 million executive branch employees, and the federal government spent more than $7 trillion in fiscal year 2025. The executive branch encompasses an ever-expanding and divergent social, economic and legal context and agenda, with continuing, insistent public demands for more government involvement. The legislative branch, in contrast, consists of a relative handful of agencies, has about 31,000 employees and is funded at about $7 billion per year. The 118th Congress passed approximately 150 bills from 2023 to 2025, one of the lowest numbers on record, and relatedly, executive agencies issued over 3,000 substantive rules in 2024 alone. It remains to be seen how the Court's opinion in *Loper Bright Enterprises v. Raimondo* will affect that balance going forward, but the recent preponderance of Article II rulemaking has placed an even greater burden on congressional oversight practitioners.

In the past, when Congress has recognized executive intrusions, it has answered with appropriate measures. Following the experiences of the Great Depression and World War II, Congress acted in response to growing concerns respecting its ability to understand and control emergent social and economic issues and the unchecked growth of executive power. The 1946 Legislative Reorganization Act rationalized committee structures and added permanent staff to committees as well as to support agencies like the Legislative Reference Service (the future Congressional Research Service), Congress's in-house think tank.

Then, in the 1970s—in reaction to executive forays in the Vietnam War, presidential impoundments of funded projects, Watergate, and revelations of secret domestic and foreign intelligence activities by the Church and Pike inquiries, Congress enacted a series of historic reforms that were specifically aimed at bulking up and professionalizing the committee staffs and those of existing and newly created support agencies. It dramatically increased staff for committees, the Congressional Research Service (CRS), and the General Accounting Office (now the Government Accountability Office) (GAO). Congress also expanded GAO's responsibilities from simply performing an agency auditing function to providing analyses of agency policy effectiveness. Congress also expanded its policy development capacity by creating two new in-house think tanks: the Office Technology Assessment (OTA), established in 1972 to help Congress become up-to-date on emerging technologies; and the Congressional Budget Office (CBO), created in 1974 in the wake of the Nixon budget impoundment crisis, to provide the legislature with foundational information and analysis with respect to the budget process. By 1979, committee and policy support staffing levels had tripled (with legislative staff peaking at 4,337, and GAO and CRS rising

[8] *See* Chapter 10 *infra.*

[9] *See* Chapter 9 *infra.*

to 5200 and 825 staff, respectively).[10] Two developments further buoyed the need for additional congressional staff: First, the 1975 House decision to abandon the full committee seniority system and to decentralize legislative authority among newly created subcommittees; and second, the establishment by both houses for the first time of standing committees to oversee the intelligence community.

The result was one of the great eras of congressional oversight, which lasted until the mid-1990s despite a flatlining of legislative staff expansion after 1980. Subcommittees gained increased capacity to acquire, process and analyze information—often with overlapping jurisdictions—and were operating in a decentralized legislative environment. This stimulated competition among individual members to undertake diverse legislative actions, often bipartisan in nature, and encouraged them to pursue in-depth examinations of emergent oversight concerns.

This all dramatically changed in 1995 with the advent of the first House Republican majority in 40 years. The new Republican leadership, led by Speaker Newt Gingrich, cut committee staff by a third, immediately reduced legislative support staff at GAO by a third, failed to increase CRS funding beyond incremental inflation rises, and abolished the Office of Technology Assessment.[11] Today, GAO and CRS operate at about 80% of their 1979 professional personnel capacity.[12] In 2011, when the Republicans

[10] The House and Senate figures do not include personal member or leadership staffs but do include CBO and OTA.

[11] Glastris, *supra* note 8; Drutman, *supra* note 8. That year Congress also defunded the Administrative Conference of the United States (ACUS), an independent think tank established by Congress in 1964 devoted to research and analysis of the ways and means to make government agencies' decision-making processes more efficient, effective and fair. Over the course of its existence until 1995, ACUS issued over 200 recommendations, the majority of which were at least partially implemented by congressional enactments or agency adoptions. The recommendations generally enjoyed broad support across the political spectrum, the three branches of the federal government, and the academic and private sector legal communities. In monetary terms, the savings resulting from ACUS's recommendations was often estimated at multiple times its annual appropriation, which in 1995 was $2.1 million. The story of the 14-year effort to revive ACUS, that included the historic appearances of Supreme Court Justices Antonin Scalia and Stephen Breyer at two hearings in support of refunding, is ably related in Susan Jensen, *An Informal Legislative History of the Reauthorization of the Administrative Conference of the United States*, 83 Geo. Wash. L. Rev. 1410 (2015).

[12] The decline in expert senior analytic personnel at CRS has been particularly disturbing. CRS's enabling legislation clearly anticipates the appointment of "Specialists and Senior Specialists" in at least 22 explicitly enumerated broad fields of congressional interest. They are to be selected "without regard to political affiliation, and solely on the basis of fitness to perform the duties of the position" and are to be paid at "not less than the grade in the executive branch of the Government to which research analysts and consultants, without supervisory responsibility, are currently assigned." That grade has long been pegged at the Executive Level III. *See* 2 U.S.C. § 166 (c)(2)(A)(B), (e). The intent was to create a cadre of nationally recognized, independent area experts with no supervisory duties. In 1989 there were 18 such senior specialists and 38 specialists—a total of 54—to cover the 22 area categories. There has been no competitive selection for either category of specialist since 1989. As of the end of 2016, three senior specialists and three specialists remained, all at retirement age. At the same time, CRS management began to assign the titles (and pay) of these senior positions to administrative officials with none of the necessary qualifying credentials, or even with research responsibilities, thus creating a top-heavy management structure. All this was done with the apparent tacit consent of CRS's jurisdictional oversight committees, which in recent years have denied increases in its annual budget. The situation has led to more rapid turnover of professional analysts. CRS was even forced to hire a prominent law academic as a *consultant* to edit the renowned Constitution Annotated, which had traditionally been edited by a resident senior specialist in constitutional law who was always available for congressional consultation. The most recent rejection of a CRS request for increased funding for new hires was anomalously denied by the Senate Appropriations Committee, stating, "[I]t is not clear how CRS plans to modernize in a resource constrained environment while fulfilling the priority needs of Congress. While the increase requested in fiscal 2017 includes support for 22 additional full-time equivalents that purports to improve service to Congress, bringing on board new employees may not be a practical, cost effective solution to optimize service. The Committee directs CRS to examine ways in which the internal structure of the organization may be improved to meet the challenges of the ever-changing Congressional environment and provide a report to the Committee on a proposed restructuring within 120 days of enactment of this act. The report should include recommended changes to staffing, pay levels, the management structure, technology, and research priorities in order to create and support work flow, products and services that best meet Congress' needs." S. Rep. No. 114-258, at 40 (2016). *See also*, Louis Fisher, Defending Congress and the Constitution 287-90 (2011).

regained their House majority, they cut the House budget by an across-the-board 20%.[13] At the same time, policy decision-making—including control of the initiation of sensitive investigative inquiries—became centralized in the political leadership of both houses.[14]

As of 2017, scholarship and commentary posit that if current trends in congressional staffing and organization continue, serious consequences will ensue—for the integrity of the legislative process generally and for effective congressional oversight in particular. There is real concern that Congress is losing its capacity to collect and process the information it needs in order to effectively develop policy alternatives or conduct oversight inquiries.[15] In the modern era, legislative and political issues have become extraordinarily complex and the demands for knowledge have grown exponentially. Budget cuts have led to insufficient staffing, both on committees and in personal offices. There is also a growing experience gap: staff turn over rapidly because of both low pay and term limits on committee chairs (when chairs depart staff typically depart, too, which wipes out essential expertise and institutional memory). Often, while under constant pressure, staff lacking the deep expertise necessary to understand a policy area—particularly when economic, regulatory or technology issues are involved—must seek information from outside sources. With the similar budget constraints imposed on neutral resources like GAO and CRS, almost all that information will come from outside interested parties. By an overwhelming margin, those outside parties are business and special interest lobbyists who can provide detailed justifications for their perspectives, often presented by extremely savvy and experienced lawyers and lobbyists who can supply draft legislation along with action plans to get it passed. Reported lobbying expenditures in 2024 were $4.5 billion.

The current extended period of congressional dysfunction and its effect on the oversight process demands legislative attention. The seemingly obvious, straightforward solution is to expand the House and Senate budgets for committees where more of the policy development and oversight work takes place—so that they can hire new, qualified personnel with both pay and security incentives to foster long-term employment. A core of the new committee cadre could be employed by the committee itself, rather than by the chair or individual members, to further encourage extended service. This could be accompanied by a similar expansion of funding at GAO and CRS to allow them to bring on new, experienced hires. But even this solution is problematic in light of the notion that impelled the diminishment of legislative branch funding in the first place: that cuts in the funding of "big government" should start at home to show the seriousness of its resolve.

D. How to Conduct Effective Oversight

Notwithstanding the afore-described external and internal impediments, congressional oversight can and must go on. It should be kept in mind that the obstacles raised by the Justice Department with respect to committee subpoena enforcement do not apply to subpoenas issued to private sector parties subject to inquiries. Moreover, with the threat of potential agency appropriation cuts for serious noncooperation, accommodation at some point is likely. The question is, then, how is effective oversight accomplished? The chapters that follow detail the tools of oversight and the applicable legal doctrines that sustain the process. But, first, it is important to set forth a few broad principles:

Oversight Should Be a Leadership Priority: The leadership of the House and Senate must send the message to committee chairs that oversight, and in particular operational oversight, is a priority, and that

[13] Glastris, *supra* note 8.

[14] Drutman, *supr*a note 8.

[15] *See* Clark, *supra* note 8.

they will fully support oversight decisions, strategies, and enforcement no matter who is in the White House. Even—or especially—when the President is of the same party as the one in control of Congress, it is critical to our system of checks and balances that Congress conduct effective oversight. Every standing committee should be encouraged to establish a subcommittee on oversight. Committee chairs should take care in selecting competent, dedicated, and experienced staff who are familiar with the rules and the oversight powers available to Congress.

Develop Good Working Relationships with the Executive Branch: Staff should be encouraged to develop effective, ongoing, informal relations with key agency personnel. Committees should create and keep open lines of communication with agency personnel no matter how much they disagree with or distrust them. Informal, regular contact with key staff can be vital. It is useful to encourage a sense in the agency that it is better to give the committee a "heads up" about a problem before the committee reads about it in The Washington Post or The New York Times. The development of interbranch relationships founded on mutual respect, if not actual trust, is necessary, though difficult and time consuming.

Prepare, Prepare, and Prepare Some More: Intensive preparation is the first rule of successful oversight. Rarely should an inquiry begin with a subpoena for documents or testimony at a hearing. Formal compulsory process should be the product of urgent need after a sufficient period of fact gathering and fact checking. If the purpose of a document subpoena is to preserve material from possible destruction, that goal can be legally accomplished by a letter from the chair. The letter should announce the initiation of an inquiry pursuant to the committee's authority, describe its purpose and scope, and request documents in categories that are relevant to the inquiry. Such a letter should be sufficient to provide the notice necessary to invoke the federal criminal law prohibition of obstruction of a congressional proceeding.

Staff Must Pay Attention to Details: Every letter, every phone call, every meeting, and every hearing should have some well-defined purpose. "How am I furthering understanding or resolving the matter before the committee?"—should be the question at every step of an ongoing investigation. An oversight inquiry should be viewed as a "staged process." That is, it should be understood that you are going from one level of persuasion or pressure to the next to find out the "who, what, when, where, and why" of a situation.

Cooperate During the Investigation Whenever Possible: Normally, a subpoena should not be served out of the blue. Rather, it should follow only after the parties have reached an impasse. Even at impasse, if the votes for a subpoena are available, a quite effective tactic is to grant the chair authority to issue the subpoena for a definite period, or even indefinitely. Past experience has shown that the threat of a subpoena is often sufficient to spur reconsideration of previously adamant refusals (or to demonstrate that the committee was not just bluffing). This most often leads to further negotiation and accommodation.

When to Hold a Hearing: Hearings are most effective when there is a compelling horror story, a smoking gun to reveal, or an important point to make publicly. When hearings are held, the committee should clearly and explicitly advise all witnesses of the subjects to be discussed and of what materials they should bring with them. Failure to be precise invites the response, "Gee, I didn't anticipate that. We'll get back to you with the answer in writing soon." After a hearing concludes, there must be prompt follow-up, or the advantage of the hearing is quickly lost.

Involving the Minority: If at all possible, investigative staff should involve the minority in the process. Bipartisan support for an oversight proceeding can greatly enhance the chances of its success. Members and staff can be sure the agency or the private sector subjects of the investigation will contact supporters in Congress, especially if the White House is controlled by a different party than the one in control of one or both houses of Congress. Holding periodic staff meetings with other members and staff of the

committee to inform them about the nature of and reason for the investigation can help in more easily garnering support for future enforcement efforts.

Rely Upon, Use, and Protect Information Sources and Outlets: Whistleblowers are often the most useful committee informants. They must be protected. The word will get out if a committee leaves them hanging or allows them to be targets for retaliation, and these invaluable sources of information will then dry up. Staff should become familiar with federal and state whistleblower protection laws, so they can properly advise and protect these witnesses. It can also be helpful for the chair to send a firm letter to an agency head making clear that retaliation will not be tolerated if evidence of such action appears.

Using the Media: The media can be useful in bringing pressure on agencies or private sector targets of the investigation, and in garnering public support for the inquiry. Media coverage of an investigation can also assist in attracting whistleblowers to come forward.

Provide Proper Training for Staff and Rely on Existing Expertise: Finally, committees must address the problem of staff expertise. Learning on the job may be the only alternative in light of high rates of staff turnover on Capitol Hill. Teaming an experienced investigator with a less experienced colleague can provide fresh ideas and be helpful to both staff members. Periodic "brainstorming" sessions among the investigative staff can enhance the sharing of experience. CRS has presented periodic oversight workshops that have provided valuable introductions.[16] CRS analysts can provide useful support at all stages of an investigation with respect to legal advice, hearing procedure, and background information on policy and programmatic issues. GAO can provide investigative backup as well as program evaluations. Offices of Inspectors General can be enlisted to probe questionable agency activities. The Project on Government Oversight (POGO) has for some time been holding luncheon seminars and multi-day courses for congressional staff and presenting experienced authorities on timely topics of oversight.[17]

Learning From Past Inquiries: Perhaps the most valuable resource is the study of past investigations. There are several useful studies of past inquires.[18] For example, CRS has issued a report, which it periodically updates, on important Justice Department investigations since 1920. Through detailed descriptions of these probes, the report reveals the broad parameters of inquiry available to committees when investigating any executive branch agency.[19] Reading the published hearing transcripts and reports on such investigations can also provide valuable insight on strategy, and the reports often contain copies of the correspondence between the committees and the subject agencies and organizations that show the parries and thrusts as the proceeding develops.[20]

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[16] *See e.g.*, H. Comm. Project on Rules, 106th Cong., Congressional Oversight: A 'How-To' Series of Workshops (Comm. Print June 26, July 12 and 26, 1999) (Sponsored by the Speaker and Chair of the House Rules Committee and organized and conducted by CRS).

[17] POGO has also published an invaluable practical introductory guidebook entitled The Art of Congressional Oversight: A Users Guide to Doing It Right (2d ed. 2015).

[18] *E.g.*, Roger A. Bruns & David L. Hostetter, Congress Investigates: A Critical and Documentary History (Raymond W. Smock ed. 2011) (detailing major inquiries between 1792 and 2006).

[19] Cong. Research Serv., RL34197, Congressional Investigations of the Department of Justice, 1920-2012: History, Law and Practice.

[20] *See, e.g.*, Staff of the H. Subcomm. on Oversight and Investigations, Energy and Commerce Comm. 103d Cong., Damaging Disarray: Organizational Breakdown and Reform in the Justice Department Environmental Crime Program, (Comm. Print 103T, 1994) (containing a description and analysis of the Subcommittee's two year probe, including a 342 page chronological compilation of all documents, correspondence and research sent and received by it).

For discussions of classic investigations which illustrate the tactics, strategies, and obstacles involved in complex and contentious inquiries, see the following case studies, by three prominent oversighters, in the online version of this handbook:

Elise J. Bean: *Investigating the Financial Crisis*

Debra Jacobson: *1992-1994 Investigation of the Justice Department's Environmental Crimes Program*

Michael L. Stern: *Henry Waxman and the Tobacco Industry: A Case Study in Congressional Oversight*

3. The Powers and Tools Available to Congress for Conducting Investigative Oversight

A. Congress's Power to Investigate

1. The Breadth of the Investigatory Power

Congress possesses broad and encompassing powers to engage in oversight and conduct investigations reaching all sources of information necessary to carry out its legislative functions. In the absence of a countervailing constitutional privilege, a self-imposed restriction upon its authority, or a separation of powers consideration, Congress and its committees have virtually plenary power to compel production of information needed to discharge their legislative functions. This applies whether the information is sought from executive agencies, private persons, or organizations. Within certain constraints, the information so obtained may be made public.

These powers have been recognized in numerous Supreme Court cases, and the broad legislative authority to seek information and enforce demands was established in two Supreme Court rulings arising out of the 1920s Teapot Dome scandal. In *McGrain v. Daugherty*,[1] which considered a Senate investigation of the Justice Department, the Supreme Court described the power of inquiry, with accompanying process to enforce it, as "an essential and appropriate auxiliary to the legislative function." The Court explained:

> 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 possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such information 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.[2]

The Court also pointed out that the target of the Senate investigations, the Department of Justice (DOJ), like all other executive departments, is a creation of Congress and subject to its plenary legislative and oversight authority. Congress has clear authority to investigate whether and how agencies are carrying out their missions.[3]

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[1] 273 U.S. 135 (1927).

[2] 273 U.S. at 174-75.

[3] "[T]he subject to be investigated was the administration of the Department of Justice—whether the 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 in respect of the institution and prosecution of proceedings to punish crimes and enforce appropriate remedies against the wrongdoers; specific instances of alleged neglect being recited. Plainly the subject is one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit. This becomes manifest when it is reflected that the functions of the Department of Justice, the powers and duties of the Attorney General and the duties of his assistants, are all subject to regulation by congressional legislation, and that the department is maintained and its activities are carried on under such appropriations as in the judgment of Congress are needed from year to year." 273 U.S. at 177-78.

In another Teapot Dome case that reached the Supreme Court, *Sinclair v. United States*,[4] a different witness at the congressional hearings refused to provide answers and was prosecuted for contempt of Congress. Based on a separate lawsuit between the government and the Mammoth Oil Company, the witness had declared, "I shall reserve any evidence I may be able to give for those courts and shall respectfully decline to answer any questions propounded by your committee."[5] The Supreme Court upheld the witness' conviction for contempt of Congress. The Court considered and rejected in unequivocal terms the witness' contention that the pending lawsuits provided an excuse for withholding information. Neither the laws directing that such lawsuits be instituted, nor the lawsuits themselves, "operated to divest the Senate, or the committees, of the power further to investigate the actual administration of the land laws."[6] The Court further explained: "It may be conceded that Congress is without authority to compel disclosures for the purpose of aiding the prosecution of lawsuits; but the authority of the body in aid of its own constitutional power is not abridged because the information sought to be elicited may also be of use in such suits."[7]

Subsequent Supreme Court rulings have consistently reiterated and reinforced the breadth of Congress' investigative authority. For example, in *Eastland v. U.S. Servicemen's Fund*, the Court explained that "[t]he scope of [Congress'] power of inquiry is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."[8] In addition, the Court, in *Watkins v. United States*, stated that the broad power of inquiry "encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes."[9] Congress' investigative power is at its peak when the subject is alleged waste, fraud, abuse, or maladministration within a government department.[10]

A forceful reiteration of Congress's broad right-of-access to information, and the means to enforce that right, appears in *House Committee on the Judiciary v. Miers*.[11] In that ruling, the district court upheld the authority of the House Judiciary Committee to subpoena a former presidential aide. The Court rejected a presidential assertion that a claim of executive privilege bestowed an absolute immunity on any present or former presidential aide from ever appearing before the committee in response to the subpoena. The Court also rejected the executive's claims that the case could not be contested in the Courts, finding it had jurisdiction to hear the case. Additionally, the Committee had both standing, or a right to sue, and an implied cause of action because Congress possesses "the power of inquiry" under Article I. The district court concluded, "In short, there can be no question that Congress has a right—derived from its Article I legislative function—to issue and enforce subpoenas, and a corresponding right to the information that is the subject of such subpoenas." The ruling reflected prior appellate and district court decisions recognizing the constitutional basis of each house's capacity to protect its core prerogatives and has been

[4] 279 U.S. 263 (1929).

[5] 279 U.S. at 290.

[6] *Id.* at 295.

[7] *Id.*

[8] 421 U.S. 491, 504, n. 15 (1975) (quoting Barenblatt v. United States, 360 U.S. 109, 111 (1959)).

[9] 354 U.S. 178, 187 (1957).

[10] The investigative power, the Court stated, "comprehends probes into departments of the Federal Government to expose corruption, inefficiency, or waste." *Id.* Accordingly, the Court now clearly recognizes "the power of the Congress to inquire into and publicize corruption, maladministration, or inefficiency in agencies of the Government." *Id.* at 200 n. 33; *see also* Morrison v. Olson, 487 U.S. 654, 694 (1988) (noting that Congress' role under the Independent Counsel Act of "receiving reports or other information and oversight of the independent counsel's activities … [are] functions that we have recognized generally as being incidental to the legislative function of Congress") (citing McGrain v. Daugherty, 273 U.S. 135 (1927)).

[11] 558 F. Supp. 2d 53 (D.D.C. 2008).

relied on in subsequent analogous judicial determinations.[12] In the spring of 2009, the parties settled the *Miers* case before an appeal was heard. The settlement provided that the subpoenaed officials would testify, certain documents would be disclosed, the government's appeal would be withdrawn, and the district court's opinion would be allowed to stand.

Since January 6, 2021, the lower federal courts have confirmed the scope of Congress's investigative authority. In *Trump v. Thompson*, the D.C. Circuit affirmed that the House of Representatives Select Committee to Investigate the January 6 Attack on the United States Capitol ("January 6 Committee") served a "plainly" legislative purpose because its "inquiry concerns a subject on which legislation could be had."[13] In *Meadows v. Pelosi*, the U.S. District Court for the District of Columbia upheld the Committee's subpoena to President Trump's former chief of staff.[14] The Court noted "[t]he power to conduct investigations is not explicitly granted to Congress in the Constitution's text," but is "inherent in the legislative process."[15] In that case, the Department of Justice advanced a novel position: a "former adviser to a former President" enjoys only qualified—not absolute—immunity from a congressional subpoena, because "the relevant constitutional concerns are lessened."[16] Yet the Court never reached the merits of Meadows's absolute-immunity claim or the Department's qualified-immunity argument. It dismissed the case on jurisdictional grounds under the Speech or Debate Clause; the subpoena thus remained enforceable on its face.[17] Meadows's motion for reconsideration was denied on November 22, 2022,[18] and no appeal followed. These cases reinforce Congress's broad, inherent investigative powers, particularly when grounded in a permissible legislative purpose.

2. The Limits of the Investigatory Power

But while the congressional power of inquiry is broad, it is not unlimited. The Supreme Court has admonished that the power to investigate may be exercised only "in aid of the legislative function"[19] and cannot be used to expose for the sake of exposure alone. In the Court's words: "There is no general

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[12] *Id*. at 84. Obstruction of congressional access to information, the court held, is an injury to its core constitutional prerogative to inform itself, an injury that it declared is redressable by the judiciary. Appellate and district courts have consistently upheld the House's right to seek judicial enforcement of its constitutionally-based investigative prerogative. *See, e.g.* United States v. AT&T, 551 F. 2d 384, 388-89, 391 (D.C. Cir. 1976) (finding it "clear that the House as a whole has standing to assert its investigatory power, and can designate a member to act on its behalf."); Comm. on Oversight and Gov't Reform v. Holder, 979 F. Supp. 2d 1, 4 (D.D.C. 2013)("The Committee and several supporting *amici* are correct that AT&T[] is on point and establishes that the Committee has standing to enforce its duly issued subpoena through a civil suit); House of Representatives v. Dep't of Commerce, 11 F. Supp. 2d 76, 85 (D.D.C. 1988) ("[T]he court finds that the [House of Representatives] has properly alleged a judicially cognizable injury through its right to receive information by statute and through the institutional interest in its lawful composition…."). Most recently, in *U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d 53, 81 (D.D.C. 2015), a district court held that the House "has standing to pursue allegations that the Secretaries of Health and Human Resources and the Treasury violated Article I, §9, cl. 7 of the Constitution when they spent public monies that were not appropriated by the Congress." In a subsequent ruling on the merits, that court held that a cost-sharing provision of the Affordable Care Act had not been unambiguously funded and that the expenditures were unlawful. U.S. House of Representatives v. Burwell, 2016 U.S. Dist LEXIS 62646 (D.D.C. May 12, 2016). The case is on appeal before the D.C. Circuit.

[13] Trump v. Thompson, 20 F.4th 10, 41 (D.C. Cir. 2021) (cleaned up and internal quotations omitted).

[14] Meadows v. Pelosi, 639 F. Supp. 3d 62 (D.D.C. 2022); *see also* Ward v. Thompson, 630 F. Supp. 3d 1140 (D. Ariz. 2022) (holding that the Committee had a valid legislative purpose in investigating a medical services professional corporation following January 6).

[15] *Id.* at 74.

[16] *Meadows*, 639 F. Supp. 3d at 1-2 (Statement of Interest of the U.S.).

[17] *Meadows*, 639 F. Supp. 3d at 79.

[18] Mot. for Reconsideration at 5, Meadows v. Pelosi, No. 1:21-cv-03217 (D.D.C. Nov. 22, 2022) (ECF #55).

[19] Kilbourn v. Thompson, 103 U.S. 168, 189 (1880).

authority to expose the private affairs of individuals without justification in terms of the functions of the Congress … [n]or is the Congress a law enforcement or trial agency. [An] inquiry must be related to, and in furtherance of, a legitimate task of the Congress."[20] Moreover, an investigating committee has only the power to inquire into matters within the scope of the authority delegated to it by the full House or Senate.[21] But once having established its jurisdiction and authority, and the pertinence of the matter under inquiry to its area of authority, a committee's investigative purview is substantial and wide-ranging.[22] Only very recently, in *Trump v. Mazars*, did the Court impose some limits where the President's papers were in question. Below is additional information on that case.

B. Congress's Ability to Investigate the President

Congressional probes of the President must respect separation-of-powers limits. For instance, Congress cannot demand information from the President "if other sources could reasonably provide Congress the information it needs in light of its particular legislative objective."[23] *Trump v. Mazars* marked the Supreme Court's first encounter with a congressional subpoena for a President's personal financial records.[24] In its 2020 *Mazars* decision, the Supreme Court held that presidents are not immune to congressional subpoenas, yet faulted the lower courts for slighting separation-of-powers concerns.[25] Congress, it stressed, had "fail[ed] to take adequate account of the significant separation of powers issues raised by congressional subpoenas for the President's information."[26] Executive privilege shields only "sensitive Executive Branch deliberations"; it does not extend to "nonprivileged, private information," such as personal financial records.[27] Nevertheless, the Court held that "[c]ongressional subpoenas for the President's personal information implicate weighty concerns regarding the separation of powers"[28] and require courts to examine a number of factors when evaluating such a subpoena, including whether Congress's legislative purpose justifies a subpoena to the President, whether the subpoena is appropriately tailored, the nature of the evidence Congress proffers to support the existence of a legislative purpose, and the burdens the subpoena places on the President.[29]

In *Trump v. United States*, the Supreme Court held that Congress may not regulate the President's exclusive constitutional powers—and the President enjoys absolute immunity from criminal prosecution for conduct within that core sphere.[30] The Court stated the principle plainly: "[W]hen the President acts pursuant to his exclusive constitutional powers, Congress cannot—as a structural matter—regulate such actions, and courts cannot review them."[31] Absolute immunity ends at that core. For official acts on the outer perimeter—where authority overlaps with Congress—only presumptive immunity applies. For

[20] Watkins v. United States, 354 U.S. at 187.

[21] United States v. Rumely, 345 U.S. 41, 42, 44 (1953); Watkins v. United States, 354 U.S. at 198.

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

[23] Trump v. Mazars USA, LLP, 591 U.S. 848, 869-70 (2020).

[24] 591 U.S. 848 (2020).

[25] *Id.* at 850.

[26] *Id*. at 866.

[27] *Id*. at 864.

[28] *Id.* at 869.

[29] *Id.* at 871.

[30] Trump v. United States, 603 U.S. 593 (2024).

[31] *Id*. at 636.

unofficial acts, immunity vanishes.[32]

C. Congress's Ability to Obtain Documents and Witness Testimony

1. The Subpoena Power

A critical tool for congressional investigations is the subpoena power because "[e]xperience 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."[33] A properly authorized subpoena issued by a committee or subcommittee has the same force and effect as a subpoena issued by the parent house itself.

a. The Power to Issue a Subpoena

Issuance: To validly issue a subpoena, committees or subcommittees must be delegated the authority and follow the rules established by each house and the individual committees, as outlined below:

- **Standing committees and subcommittees**: Senate Rule XXVI(1) and House Rule XI.2(m)(1) presently empower all standing committees and subcommittees to require the attendance and testimony of witnesses and the production of documents.

- **Special or select committees**: These committees must receive specifically delegated subpoena authority by Senate or House resolution.

- **Rules of standing committees**: The rules or practices of standing committees may restrict the issuance of subpoenas only to full committees or in certain instances allow issuance by a committee chairman alone, with or without the concurrence of the ranking minority member. During the 114th Congress, 14 standing House committees empowered their chairpersons to unilaterally issue subpoenas, double the number so authorized in the 113th Congress.[34] The ranking minority member of these committees cannot block the subpoena but usually must either be consulted or given notice prior to the issuance of the subpoena. In the 119th Congress, at least one subcommittee of the House Oversight and Government Reform Committee utilized House Rule XI, clause 2(k)(6) to require the full Committee Chairman to issue subpoenas. In the Senate, five standing committees permit the chairperson to issue a subpoena so long as the ranking member does not object within a specified period of time.[35] Only the Senate Permanent Subcommittee on Investigations permits the chairperson to issue a subpoena without the consent of the ranking minority member. One committee requires a

[32] *Id*. at 615.

[33] McGrain v. Daugherty, 273 U.S. at 175.

[34] They are the House Committees on Agriculture, Education and the Workforce, Energy and Commerce, Financial Services, Foreign Affairs, Homeland Security, Judiciary, Natural Resources, Oversight and Government Reform, Rules, Science, Space and Technology, Select Intelligence, Transportation and Infrastructure, and Ways and Means. For a general overview of committee subpoena authority, see Michael L. Koempel, Cong. Research Serv., R44247, A Survey Of House And Senate Committee Rules On Subpoenas (March 16, 2017).

[35] They are the Senate Committees on Agriculture, Nutrition and Forestry; Commerce, Science and Technology; Homeland Security and Governmental Affairs; Small Business and Entrepreneurship; and Veterans Affairs. Also, despite the provision of Senate Rule XXVI, cl. 1, authorizing subcommittee subpoenas, the rules of at least one committee expressly prohibits subcommittee subpoenas (Small Business).

quorum of seven members, at least two of whom are members of the minority party, to authorize the issuance of a subpoena.[36]

- **Vetting subpoenas:** House Rule II.2(d)(1) requires that House committees may only issue subpoenas under the seal of the Clerk of the House. In practice, every subpoena issued by a committee is reviewed by the House General Counsel for substance and form. There is no equivalent rule in the Senate, but the Senate Legal Counsel performs a subpoena vetting function informally.

- **Service:** In practice, congressional subpoenas are most frequently served by committee staff, or less frequently, by the U.S. Marshals Service or the Senate or House Sergeants-at-Arms. Service may be effected anywhere in the United States. The subpoena power reaches non-citizens in the United States. Securing compliance of people living in foreign countries presents more complex problems.[37]

Challenges: A witness seeking to challenge the legal sufficiency of a subpoena has only limited remedies to raise objections. The Supreme Court has ruled that courts may not block or quash a congressional subpoena, holding that the Speech or Debate Clause of the Constitution[38] provides "an absolute bar to judicial interference" with such compulsory process.[39] As a consequence, a witness's sole remedy generally is to refuse to comply, risk being cited for contempt, and then raise the objections as a defense in a contempt prosecution.[40] In the alternative, an affected party can seek to enjoin a third party's compliance with the subpoena as President Trump did in *Mazars*. There, the object of the suit was to block Mazars, his accounting firm, from complying with congressional subpoenas.[41] In the Supreme Court's ruling in *Mazars*, it also noted *in dicta* that recipients of congressional subpoenas retain longstanding common law and constitutional privileges against compelled disclosures.[42]

Challenges to the legal sufficiency of subpoenas must overcome formidable judicial obstacles. The standard for whether the congressional investigating power has been properly asserted was articulated in *Wilkinson v. United States*:[43] (1) the committee's investigation of the broad subject matter area must be authorized by Congress; (2) the investigation must be pursuant to "a valid legislative purpose"; and (3) the specific inquiries must be pertinent or relevant to the broad subject matter areas which have been authorized by Congress.

b. The Permissible Scope of a Subpoena

A congressional committee is a creation of its parent house and only has the power to inquire into matters within the scope of the authority that has been delegated to it by that body. Therefore, the enabling rule or resolution that gives the committee life or particular direction is the charter that defines the grant and the

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[36] Senate Environmental and Public Works Committee, Rule 2(a).

[37] *See* discussion *infra*, Chapter 11.

[38] U.S. Const. Art. I, Sec. 6, cl. 1.

[39] Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 503–07 (1975).

[40] *See* United States v. Bannon, 101 F.4th 16 (D.C. Cir. 2024) (holding that contempt of Congress does not require that the defendant "deliberately and intentionally" refused to comply with a subpoena but only "willfully" refused to comply).

[41] *Mazars*, 591 U.S. at 856.

[42] *Id*. at 863. In dicta, the Court explained that "recipients have long been understood to retain common law and constitutional privileges with respect to certain materials, such as attorney-client communications [.]" Although non-binding, this point undermines the House's traditional stance against recognizing attorney-client privilege in oversight probes.

[43] 365 U.S. at 408–09 (1961).

limitations of the committee's power.[44] In deciding whether a subpoena's scope is permissible, the Supreme Court looks first to the words of the resolution itself, and then, if necessary, to the usual sources of legislative history, including floor statements, reports, and past committee practice.[45]

Subpoenaed persons often attack subpoenas as overbroad or nothing more than a "fishing expedition." However, the courts have not limited a congressional inquiry to an initial stated scope, understanding that historically, such investigations evolve, and, akin to grand jury probes, must be allowed to develop in order to be effective. In *Eastland v. United States Servicemen's Fund*, the Supreme Court recognized that a congressional investigation may lead "up some 'blind alleys' and into non-productive enterprises. To be a valid legislative inquiry there need be no predicable end result."[46]

Permitting the scope of inquiry to evolve: The scope of an inquiry is permitted to evolve as the investigation proceeds. In *Senate Select Committee on Ethics v. Packwood*,[47] the Court rejected a claim that a subpoena for a senator's personal diaries was overbroad, holding that the Committee's investigation was not limited in its investigatory scope to its original demand "even though the diaries might prove compromising in respects the Committee has not yet foreseen." The Court noted the long judicial acceptance of the breadth of congressional subpoenas and the analogy of a legislative inquiry to a grand jury:

> In determining the proper scope of a legislative subpoena, this Court may only inquire as to whether the documents sought by the subpoena are "not plainly incompetent or irrelevant to any lawful purpose [of the subcommittee] in the discharge of [its] duties." *McPhaul v. United States*, 364 U.S. 374, 381, 81 S.Ct. 138, 143, 5 L. Ed. 2d 36 (1960) (quoting *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509, 63 S. Ct. 339, 343, 87 L. Ed. 424 (1943)). … Senator Packwood's principal apprehension appears to be that somewhere within the diaries will be found evidence of other conduct presently not within anyone's contemplation (other than perhaps his own) that the Ethics Committee will deem to be senatorial misbehavior. Yet where, as here, an investigative subpoena is challenged on relevancy grounds, the Supreme Court has stated that the subpoena is to be enforced "unless the district court determines that there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the … investigation." *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 301, 111 S. Ct. 722, 727, 12 L. Ed. 795 (1997). … At this stage of its proceedings, the Ethics Committee is performing the office of a legislative branch equivalent of a grand jury, in furtherance of an express constitutional grant of authority to Congress to keep its own house in order. … "The function of the grand jury is to inquire about all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred." *R. Enterprises, Inc.*, 498 U.S. at 297, 111 S. Ct. at 726.[48]

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[44] *Rumely*, 345 U.S. at 44; *Watkins*, 354 U.S. at 201; Gojak v. United States, 384 U. S. 702, 708 (1966).

[45] As explained by the Court in Barenblatt v. United States, "Just as legislation is often given meaning by the gloss of legislative reports, administrative interpretation, and long usage, so the proper meanings of an authorization to a congressional committee is not to be derived alone from its abstract terms unrelated to the definite content furnished them by the course of congressional actions." 360 U.S. 109, 117 (1959). *See also Watkins*, 354 U.S. at 209–215.

[46] 421 U.S. at 509.

[47] 845 F. Supp. 17, 20–21 (D.D.C. 1994), *stay pending appeal denied*, 510 U.S. 1319 (1994).

[48] *See also* Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 209 (1946) (holding that determining whether a subpoena is overly broad "cannot be reduced to formula; for relevancy and adequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes, and scope of the inquiry").

c. The Necessary Legislative Purpose for a Subpoena

Although a subpoena must be issued for a valid legislative purpose, the Supreme Court has made it clear that Congress does not have to state explicitly what it intends to do as a result of an investigation. In *In re Chapman*,[49] the Court upheld a resolution authorizing an inquiry into charges of corruption against certain senators, despite the fact that it was silent as to what might be done when the investigation was completed. The Court stated: "it was certainly not necessary that the resolutions should declare in advance what the Senate meditated doing when the investigation was concluded."[50]

The subpoena may simply include an open-ended statement that it seeks information that may provide a basis for whatever legislation Congress deems appropriate. For example, in the Senate investigation into the Teapot Dome affair in the 1920s, the original authorizing resolution made no mention of a legislative purpose. A subsequent resolution regarding a recalcitrant witness declared that his testimony was sought for the purpose of obtaining "information necessary as a basis for such legislative and other action as the Senate may deem necessary and proper." The Court found that the investigation was presumptively ordered for a legitimate object. It wrote: "An express avowal of the object would have been better; but in view of the particular subject matter was not indispensable."[51]

It can be helpful to include in the statement of purpose a reference to "specific problems which in the past have been, or in the future could be, the subjects of appropriate legislation."[52] In the past, the types of legislative activity which have justified exercising the power to investigate have included: the primary functions of legislating and appropriating;[53] the function of deciding whether or not legislation is appropriate;[54] oversight of the administration of the laws by the executive branch;[55] and the essential congressional function of informing itself in matters of national concern.[56]

During the impeachment inquiry into President Biden, the House Committees on Oversight and Accountability, the Judiciary, and Ways and Means invoked both their constitutional impeachment authority and their legislative oversight power. To ensure compliance with limits on legislative subpoenas, the committees articulated a legislative purpose. For one witness, two committees explained that they sought information to craft legislation addressing "deficiencies … in the current legal framework regarding ethics laws and the disclosure of financial interests related to the immediate family members of Vice Presidents and Presidents—deficiencies that may place American national security and interests at risk."[57] They added that they intended "to craft legislation that would strengthen reporting requirements related to certain foreign transactions involving senior elected officials' family members and that would implement robust financial disclosure requirements that shed light on ownership of opaque corporate

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[49] 166 U.S. 661 (1897).

[50] McGrain v. Daugherty, 273 U.S. 135, 178 (1927).

[51] McGrain v. Daugherty, 273 U.S. 135, 178 (1927).

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

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

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

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

[56] *Rumely*, 345 U.S. at 43, 45; *Watkins*, 354 U.S. at 209 n.3.

[57] *See* Letter from Hon. James Comer and Hon. Jim Jordan, Chairmen, H. Oversight & Gov't Reform Comm. & H. Judiciary Comm. to William Pittard (Nov. 9, 2023), https://oversight.house.gov/wp-content/uploads/2023/11/Letter-to-Berges-11.9.23.pdf.

entities"[58] which Oversight Committee Chair Comer introduced in the 118th Congress.[59]

d. The Pertinency of the Subpoena to the Investigation

The congressional contempt statute, 2 U.S.C. § 192, provides that a committee's questions or subpoena requests must be "pertinent to the subject under inquiry." However, the standard is very broad and permits a wide range of questions relevant to an investigation. In deciding whether a subpoena is pertinent, the courts have required only that the specific inquiries be reasonably related to the subject matter under investigation.[60]

Comparison to rules of evidence in court proceedings: Because of the breadth of congressional investigations, the courts have long recognized that pertinency in the legislative context is broader than that of relevance under the law of evidence applicable in court. "A legislative inquiry may be as broad, as searching, and as exhaustive as is necessary to make effective the constitutional powers of Congress … A judicial inquiry relates to a *case*, and the evidence to be admissible must be measured by the narrow limits of the pleadings. A legislative inquiry anticipates *all possible cases* which may arise thereunder and the evidence admissible must be responsive to the scope of the inquiry which generally is very broad."[61]

The standard: The Supreme Court has warned that a witness "acts at his peril" in deciding not to respond to a committee's questions or subpoena demands on grounds of pertinency. However, to help them decide whether to comply with a subpoena, witnesses are entitled to receive a description of the investigation's scope "with the same degree of explicitness and clarity that the Due Process Clause requires in the expression of any element of a criminal offense."[62] The subject matter of an investigation may be shown through a variety of sources: (1) the declaration of the question under inquiry found in the authorizing rule or resolution of the committee or subcommittees, (2) the introductory remarks of the committee Chair or other members, (3) the response of the Chair to the witness' pertinency objection, (4) the question itself, or (5) the "nature of the proceedings."[63]

The Supreme Court has distinguished cases in which the pertinency standard is met from those in which it is not. For example, an inquiry is *not* pertinent where "the question under inquiry had not been disclosed in any illuminating matter; and the questions asked were not only amorphous on their face, but in some instances clearly foreign to the alleged subject matter of the investigation," whereas an inquiry *is* pertinent when "[t]he subject matter of the inquiry had been identified at the commencement of the investigation as Communist infiltration into the field of education" and the scope of the particular hearing "had been announced as 'in the main communism in education and the experiences and background in the party by Frances X. T. Crowley.'"[64] Additionally, a facially valid subpoena cannot be defeated by alleging improper motives.[65]

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[58] *Id*.

[59] Presidential Ethics Reform Act, H.R. 8489, 118th Cong. (2024).

[60] *Rumely*, 345 U.S. 41, 43, 45; *Watkins*, 354 U.S. at 200 n.3

[61] Townsend v. United States, 95 F.2d 352, 361 (D.C. Cir.), *cert. denied*, 303 U.S. 665 (1938) (emphasis added).

[62] Watkins v. United States, 354 U.S. at 209.

[63] *Barenblatt*, 360 U.S. at 117–18.

[64] *Id.* at 123–124.

[65] *Bannon*, 101 F.4th at 25 (citing Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 508 (1975) ("[I]n determining the legitimacy of a congressional act [,] we do not look to the motives alleged to have prompted it.'')).

2. Staff Deposition Authority

a. Express Authorization of Staff Deposition Authority Is Necessary

Congress grants staff deposition authority only by express rule.[66] In the 119th Congress, the rules of the House grant this power to the Permanent Select Committee on Intelligence and every standing committee except the Committee on Rules. The Select Committee on the Strategic Competition Between the United States and the Chinese Communist Party holds similar powers.[67] A committee chair may issue a subpoena for a deposition only after consulting the ranking minority member and providing three calendar days' notice (excluding weekends and holidays unless the House is in session), together with a copy of the subpoena if issued.[68] When exercising this authority, committees typically adopt rules governing notice, transcription, counsel's presence (which the committee may limit or exclude), and objection procedures.[69] The House publishes these regulations in the Congressional Record each Congress.[70] In recent years—starting with the January 6 Committee—committees have also video-recorded depositions for hearings or public release.[71] In the House, staff deposition authority is included in the rules adopted by each committee.[72] The Congressional Record documents their adoption.

The Senate operates differently. Its rules do not authorize committees to subpoena witnesses for staff depositions.[73] Several committees, however, have gained this power through resolutions or rules. Among them, the Committees on Ethics;[74] Commerce, Science, and Transportation; Foreign Relations; the Judiciary; the Special Committee on Aging[75]; Homeland Security and Governmental Affairs; and the Permanent Subcommittee on Investigations expressly allow staff depositions.

b. The Utility of Staff Depositions

Congressional committees are more frequently authorizing and utilizing staff-conducted transcribed interviews as a tool for gathering information in preparation for investigative hearings. Staff depositions

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[66] H. Res. 5, § 3(t)(1), 119th Cong. (2025).

[67] H. Res. 11, 118th Cong. (2023) (establishing the Select Committee with powers identical to standing committees under House Rule XI).

[68] H. Res. 5, § 3(t)(2).

[69] *See, e.g.*, 169 Cong. Rec. H18 (daily ed. Jan. 9, 2023) (deposition regulations for standing committees).

[70] *Id*.

[71] *See, e.g.*, Select Comm. to Investigate the January 6th Attack on the U.S. Capitol, *Deposition of Cassidy Hutchinson*, 117th Cong. 52 (2022) (video released Dec. 22, 2022).

[72] *See, e.g.*, H. Comm. on Oversight & Accountability, Rule 15, 119th Cong. (2025); H. Comm. on the Judiciary, Rule XI, 119th Cong. (2025).

[73] Standing Rules of The Senate, S. Doc. 113-18, Rule XXVI (2013).

[74] Rules of the S. Select Cmte. on Ethics § 3(a)(4), (6), S. Res. 338, 88th Cong., 2d Sess. (1964), as amended by S. Res. 222, 106th Cong., 1st Sess. (1999) ("The Select Committee is authorized to … require by subpoena or otherwise the attendance of such witnesses and the production of such correspondence, books, papers, and documents; [and] … take such testimony orally or by deposition ... as it deems advisable."); *see also* Supplementary Procedural Rules of the S. Select Cmte. on Ethics, Rule 6 ("Subpoenas and Depositions"), 169 Cong. Rec. S382, S390 (daily ed. Feb. 14, 2023).

[75] Jurisdiction & Authority of the S. Special Cmte. on Aging (C), S. Res. 4, § 104, 95th Cong., 1st Sess. (1977), as amended ("[T]he special committee is authorized, in its discretion … (F) to require, by subpoena or otherwise, the attendance of witnesses and the production of correspondence, books, papers, and documents, [and] (G) to take depositions and other testimony.").

which are less frequent, afford a number of significant advantages over public hearings for committees engaged in complex investigations:

- Staff depositions may assist committees in obtaining 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 are conducted in private and may be more conducive to candid responses than would be the case in a public hearing. Statements made by witnesses that might defame or even tend to incriminate third parties can be verified before they are repeated in an open hearing.
- Depositions can prepare a committee for the questioning of witnesses at a hearing or provide a screening process that can obviate the need to call some witnesses.
- The deposition process also allows questioning of witnesses outside of Washington, D.C., thereby avoiding the inconvenience of conducting field hearings requiring the presence of members of Congress.
- Congress has enhanced the efficacy of the staff deposition process by re-establishing the applicability of 18 U.S.C. § 1001 to its proceedings. This statute makes false statements made during congressional proceedings, including depositions, subject to criminal prosecution.[76]

There are also certain disadvantages to relying upon staff depositions. Unrestrained staff may be tempted to engage in tangential inquiries. Depositions also demand skilled, trained counsel to extract information thoroughly—especially from well-represented or sophisticated witnesses. Witnesses and counsel are more willing to raise privileges in depositions. The Chair, however, is the arbiter of disputes and, in the moment, the staff taking the deposition make decisions on objections. Members typically do not attend, hindering their ability to comment publicly on investigative findings.

Post-COVID, committee chairs may authorize remote transcribed interviews—via Zoom, Webex, or similar platforms—at their sole discretion.[77]

3. Congressional Grants of Immunity

a. A Committee May Override a Witness's Claim of Self-Incrimination Privilege

The Fifth Amendment to the Constitution provides in part that "no person shall be compelled in any criminal case to be a witness against himself." This privilege against self-incrimination is available to witnesses in congressional investigations.[78] However, a witness's Fifth Amendment privilege can be restricted if the government chooses to grant immunity. When a witness asserts his or her constitutional privilege, the committee may obtain a court order that compels the witness to testify and grants immunity against the use of this testimony, and information derived from it, in a subsequent criminal prosecution. The witness may still be prosecuted on the basis of other evidence.

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

[77] 171 Cong. Rec. H147 (daily ed. Jan. 14, 2025).

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

Immunity provides the witness with the constitutional equivalent of his or her Fifth Amendment privilege.[79] Immunity grants may be required in the course of an investigation because "many offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime."[80] Such grants may be desirable when a committee is convinced that the witness will describe new or vital facts that would otherwise be unavailable or implicate persons of greater rank or authority. Grants of immunity have figured prominently in a number of major congressional investigations, including Watergate (John Dean and Jeb Magruder) and Iran-Contra (Oliver North and John Poindexter).

b. How a Committee Grants Immunity

The scope of the immunity that is granted and the procedure to be employed are outlined in 18 U.S.C. §§ 6002, 6005. If a witness before the House, Senate, or a committee or subcommittee of either body asserts this privilege, or if a witness who has not yet been called is expected to assert this privilege, an authorized representative of the relevant house or committee may apply to a federal district court for an order directing the individual to testify or provide other information sought by Congress.[81] If the testimony is to be before the full House or Senate, the request for the court order must be approved by a majority of the members present. If the testimony is to be given before a committee or subcommittee, the request for the order must be approved by an affirmative vote of two-thirds of the members of the full committee.[82]

At least ten days prior to applying to the court, Congress must notify the Attorney General of its intent to seek the order,[83] and issuance of the order will be delayed by the court for as much as 20 additional days at the request of the Attorney General.[84] Notice to the Attorney General is required so that he or she can identify any information in Justice Department files that would provide an independent basis for prosecuting the witness and place that information under seal.[85] The Attorney General does not have a right to veto a committee's application for immunity.[86]

The role of the court in issuing the order is ministerial and, therefore, if the procedural requirements under the statutes are met, the court may not refuse to issue the order or impose conditions on the grant of immunity.[87] However, the court does have power to determine whether the testimony and information sought is within the jurisdiction of the particular committee and relevant to the committee's inquiry.[88]

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[79] *See generally* Kastigar v. United States, 406 U.S. 441 (1972).

[80] *Id.* at 446.

[81] 18 U.S.C. § 6005(a); *See also* Application of Senate Permanent Subcommittee on Investigations, 655 F.2d 1232 (D.C. Cir.), *cert. denied*, 454 U.S. 1084 (1981).

[82] 18 U.S.C. § 6005(b).

[83] 18 U.S.C. § 6005(b). The Justice Department may waive the notice requirement. *Application of Senate Permanent Subcommittee on Investigations*, 655 F.2d at 1236.

[84] 18 U.S.C. § 6005(c).

[85] *See* H.R. Rept. No. 91-1549, 91st Cong., 2d Sess. 43 (1970).

[86] *See* H.R. Rept. No. 91-1549, 91st Cong., 2d Sess. 43 (1970).

[87] *Id. See also* S. Rept. No. 91-617, 91st Cong., 1st Sess. 145 (1969); Application of U.S. Senate Select Committee on Presidential Campaign Activities, 361 F. Supp. 1270 (D.D.C. 1973).

[88] *Application of U.S. Senate Select Committee*, 361 F. Supp. at 1278–79.

c. Scope of the Immunity Granted

After an immunity order has been issued by the court and communicated to the witness by the chair, the witness can no longer decline to testify on the basis of the Fifth Amendment privilege, "but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."[89]

The immunity that is granted is "use" immunity, not "transactional" immunity.[90] That is, neither the immunized testimony that the witness gives to the committee, nor information derived from that testimony, may be used against him or her in a subsequent criminal prosecution, except a prosecution for false testimony or for contempt charges. However, the witness may be convicted of the underlying crime (the "transaction") on the basis of evidence independently obtained by the prosecution and sealed before the congressional testimony, and/or on the basis of information obtained after the witness' congressional appearance but which was not derived, either directly or indirectly, from congressional testimony.

d. Impact of Immunity Grants on Future Prosecutions

In determining whether to grant immunity to a witness, a committee must consider the trade-offs involved. The committee must weigh its need for the testimony in order to perform its legislative, oversight, and informing functions against the possibility that the witness's immunized congressional testimony could jeopardize a successful criminal prosecution against the witness. If a witness is prosecuted after giving immunized testimony, the burden is on the prosecutor to establish that the case was not based on the witness's previous testimony or evidence derived therefrom.[91] In high profile cases, this burden may be extremely difficult to meet. In these instances, Congress must carefully evaluate whether the public interest is better served by a prompt congressional hearing to uncover the truth or by a criminal prosecution.

The Iran-Contra controversy during President Reagan's administration provides a clear illustration of this choice. Congress investigated allegations that the Reagan administration had sold military equipment to Iran and then used the proceeds to fund the Contras, anti-communist rebels in Nicaragua. High-level administration officials, including Lt. Colonel Oliver North and National Security Advisor John Poindexter, were granted use immunity and were compelled to testify before Congress. The hearings were televised and highly publicized. Simultaneously, an independent counsel was assigned to investigate and conduct prosecutions as warranted. Although both North and Poindexter were convicted on various counts of conspiracy and obstruction of justice, these convictions were reversed on appeal due to concerns that prosecutors had relied inappropriately on immunized testimony to Congress.

Indeed, the appellate court decisions in 1990 reversing the convictions of North[92] and Poindexter[93] appeared to make the prosecutorial burden substantially more difficult, if not insurmountable, in high-profile cases. The Independent Counsel and his staff made extraordinary efforts to avoid being exposed to any of North's or Poindexter's immunized congressional testimony, and they submitted sealed packets of

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[89] 18 U.S.C. § 6002.

[90] The constitutionality of granting a witness only use immunity, rather than transactional immunity, was upheld in *Kastigar v. United States.*

[91] Kastigar v. United States, 406 U.S. at 460.

[92] United States v. North, 910 F.2d 843 (D.C. Cir.), *modified*, 920 F.2d 940 (D.C. Cir. 1990) *cert. denied*, 111 S. Ct. 1344 (1991).

[93] 951 F.2d 369 (D.C. Cir. 1991).

evidence to the district court to show that the material was obtained independently of any immunized testimony to Congress. Nonetheless, the appeals court remanded both cases to the trial court for a further determination of whether the prosecution had directly or indirectly used immunized testimony. Upon remand in both cases, the Independent Counsel determined that he could not meet the strict standards set by the appeals court and moved to dismiss the prosecutions.

While the *North* and *Poindexter* rulings in no way diminish Congress's authority to immunize testimony, they do alter the calculus as to whether to seek such immunity. 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.[94] 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 publicize the truth. The role of Congress as overseer, informer, and legislator arguably warrants this sacrifice. The question becomes more difficult when there is not a sense of national crisis, or where the object is 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.

A committee decision not to grant immunity to a witness in a high-profile investigation demonstrates the difficulties of making the proper calculus, particularly if the key premise of the immunity granting authority is mistaken. The question arose during the contentious 2015-16 inquiry of the House Select Committee on the Events Surrounding the 2012 Terrorist Attack in Benghazi. A major focus of the proceeding was the propriety of former Secretary of State Hillary Clinton's establishment and use of a private email account during her tenure at the State Department. At the same time a parallel probe was being conducted by the Federal Bureau of Investigation to determine whether the handling of State Department email traffic created a security violation or involved criminal offenses. It was revealed that a former State Department employee, Bryan Pagliano, set up Clinton's private email server in her New York home in 2009. In September 2015, upon learning of the interest of the Benghazi and Senate Judiciary and Homeland Security Committees in taking his testimony, Pagliano's counsel advised the Committees that he would invoke his Fifth Amendment privilege against self-incrimination if forced to appear, citing the ongoing FBI probe as the basis of his fear.

The Senate Committees expressed a predilection to grant immunity, but the Chairman of the Benghazi committee, a former federal prosecutor, demurred, arguing that a congressional grant of immunity might interfere with the FBI investigation, so the Justice Department should be the one to make the immunity determination, stating, "The entity with the best investigatory tools, greatest access to information and largest jurisdiction should consider the immunity grant—that is the executive branch in all regards now. Perhaps it's my background, but the legislative branch should not do anything to jeopardize an ongoing executive branch investigation."[95] Six months later, after inconclusive public hearings, Pagliano accepted an immunity offer from the Justice Department.

At the time of the Benghazi Committee's consideration of immunity, many observers did not believe Pagliano faced a serious threat of prosecution nor was he a senior or central figure in the investigation. It was known that he personally assisted in setting up the system and therefore could have shed light on how and why it was created in the first place, who else was involved and whether security precautions were

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[94] Michael Gilbert, *The Future of Congressional Use Immunity After United States v. North,* 30 Amer. Crim.L.Rev. 417, 430–31 (1993). *See also* Arthur L. Limon and Mark A. Belnick, "Congress Had to Immunize North," *Wash. Post,* July 29, 1990, at p. C7.

[95] Rachel Bade, GOP Debates Immunity for former Clinton Staffer, http://www.politico.com/story/2015/09/immunity-debate-213449.

taken into account. He was a near-quintessential type witness to receive an immunity offer.[96] Since the Justice Department had to be informed of the proposed immunity grant before it was filed, there would have been an opportunity for Justice to advise the Committee of any serious dangers to an imminent prosecution. But even assuming an equipoise of considerations, it may be seen as an error of judgment, both legal and political, for the Chairman to have apparently publicly conceded that an investigative committee must automatically defer to the Justice Department whenever there is a parallel, on-going criminal investigation. That was exactly why the immunity statute was installed: to give an investigative committee unfettered discretion to gain access to information that is in the public's interest to be aware of, even if it means making a future prosecution more difficult. That was why immunity for John Dean, John Poindexter and Oliver North, among others, was acceptable. The proper understanding of the guiding rationale of the immunity statute was provided by the Iran-Contra Independent Counsel: "The legislative branch has the power to decide whether it is more important perhaps 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."[97]

e. Frequency of Issuance of Immunity Grants

It is not entirely clear whether, as a consequence of the *North* and *Poindexter* rulings, congressional committees have been any more reluctant to issue immunity grants. Since the enactment of the statute in 1970, congressional committees have obtained approximately 350 immunity orders. Of these, about 70% (247) were obtained in connection with four investigations: the 1978 investigation into the assassinations of President Kennedy and Martin Luther King, Jr. (165), the investigation of Watergate by the Senate Watergate Committee (28), the investigations by the House and Senate Iran-Contra Committees (28), and the 1989 investigation by the Special Committee on Investigations of the Senate Select Committee of Indian Affairs (26). Since the Iran-Contra rulings in 1990, House committees have obtained 32 immunity orders, and Senate committees have obtained 20. However, the most recent such grant occurred during the House Judiciary Committee's 2007 hearings on the forced resignations of nine U.S. Attorneys. Since the 2007 investigation into the dismissal of nine U.S. Attorneys under Attorney General Alberto Gonzales, Congress has issued no public use immunity orders. Public reports confirm that the January 6 Committee considered immunity for witnesses but granted none.[98]

4. Special Investigatory Powers Authorized in Extraordinary Inquiries

Special panels of inquiry established since Watergate have been granted investigative authorities not ordinarily available to standing committees. Staff deposition authority is given in almost all such instances. Depending on the particular circumstance of the inquiry, special panels have also been vested with authority to gain access to tax information, seek international assistance in information gathering abroad, and participate in judicial proceedings. For example, both the House and Senate committees jointly investigating the Iran-Contra matter had the full panoply of special powers because of the international scope of the inquiry. Similarly, the House committee investigating the propriety of undercover activities of the FBI and other Justice Department components known as ABSCAM was

[96] Michael Stern, *Why Wouldn't Congress Give Pagliano Immunity*, http://.pointoforder.com/2015/09/03/why-wouldnt-congress-give-pagliano-immunity/; Charles Tiefer, *Immunity for Bryan Pagliano Will Help End the Hillary Clinton Email Inquiry*, http://www.forbes.com/cites/charlestiefer/2016/03/02/immunity-for-bryan-pagliano-will-help-end-the-hillary-clinton-email-inquiry.

[97] Lawrence E. Walsh, "The Independent Counsel and the Separation of Powers," 25 Hous. L.Rev. 1,9 (1988).

[98] Kyle Cheney & Nicholas Wu, *Jan. 6 Committee Prepares Legal Arsenal for Likely Subpoena Fights*, Politico (Sept. 29, 2021), https://www.politico.com/news/2021/09/29/jan-6-committee-subpoenas-514578.

provided all the powers except tax access.[99] Some of the most notable select committees established in the House in recent years include:

- In the 113th and 114th Congresses, the Select Committee on the Events Surrounding the 2012 Terrorist Attack in Benghazi.
- In the 116th through the 117th Congresses, the House established the Select Subcommittee on the Coronavirus Crisis. The 118th Congress renamed it the Select Subcommittee on the Coronavirus Pandemic.
- In the 117th Congress, the House established the Select Committee to Investigate the January 6 Attack on the United States Capitol.
- In the 118th Congress, the House established the Select Committee on the Strategic Competition Between the United States and the Chinese Communist Party.
- In the 118th Congress, the House also established the Task Force on the Attempted Assassination of Donald J. Trump, granting it all investigative authorities of a standing committee.

Only investigative jurisdiction—no legislative authority—was granted to the January 6 Committee and the Select Committee on the Strategic Competition Between the United States and the Chinese Communist Party.

D. Enforcement of the Investigation Power

1. Courts Have Recognized the Need for Effective Enforcement Mechanisms

As a result of the current uncertainty raised by executive challenges respecting congressional authority to exercise traditional coercive authorities to gain timely and full access to information from the executive necessary to fulfill its legislative functions and responsibilities, it is imperative to understand and appreciate the arguably unchallengeable legal and historic basis and need for those mechanisms.

While the threat or actual issuance of a subpoena for testimony or documents in the past has normally provided sufficient leverage to ensure compliance, it is through the contempt power, or its threat, that Congress may act with ultimate force. The contempt power may be used in response to actions that obstruct the legislative process in order to command compliance with the subpoena and punish the person violating the order. The Supreme Court early on recognized the power as an inherent attribute of Congress's legislative authority, reasoning that if it did not possess this power, it would be "exposed to every indignity and interruption that rudeness, caprice or even conspiracy may mediate against it."[100]

There are three different kinds of contempt proceedings. Both the House and Senate may cite a witness for contempt under their inherent contempt power or under a statutory criminal contempt procedure. The Senate also has a limited third option, enforcement by means of a statutory civil contempt procedure.

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[99] Comprehensive compilations of authorities and rules of Senate and House special investigatory committees may 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 Cong. 1st Sess. (1998) and in CRS Report RL30240, *Congressional Oversight Manual* (hereinafter *CRS Oversight Manual*) (accessible at http://www.fas.org/sgp/crs/misc/RL30240.pdf).

[100] Anderson v. Dunn, 19 U.S. 204 (1821).

Similarly, district courts have recently recognized the authority of the House of Representatives to authorize civil enforcement by a standing committee by passage of a House resolution.[101]

2. The Inherent Contempt Power

a. The Source, Nature, and Objectives of Inherent Contempt

Congress's inherent contempt power is not specifically granted by the Constitution, but is considered necessary for Congress to investigate and legislate effectively. The validity of the inherent contempt power was upheld in the early Supreme Court decision in *Anderson v. Dunn* and reiterated in *McGrain v. Daugherty*. Under the inherent contempt power, the individual is brought before the House or Senate by the Sergeant-at-Arms, tried in the House or Senate chamber, and then can be imprisoned upon conviction. The purpose of the imprisonment or other sanction may be either punitive[102] or coercive.[103] Thus, the witness can be imprisoned for a specified period of time as punishment, or for an indefinite period until he or she agrees to comply. In the House, however, this period may not extend beyond the end of a session of the Congress.

b. Rights of a Person Cited for Contempt

When a witness is cited for contempt under the inherent contempt process, the witness may obtain prompt judicial review through a petition for a writ of *habeas corpus.*[104] The writ of *habeas corpus* is a right recognized in the Constitution, and it provides a means for anyone imprisoned to challenge the legal basis for the detention.

In a *habeas* proceeding for a contempt case, the issues decided by the court might be limited to (a) whether the House or Senate acted in a manner within its jurisdiction,[105] and (b) whether the contempt proceedings complied with minimum due process standards.[106] While Congress would not have to afford a person cited for contempt the whole panoply of procedural rights available to a defendant in criminal proceedings, it would have to grant notice and an opportunity to be heard.[107] Also, some of the requirements imposed by the courts under the statutory criminal contempt procedure (e.g., pertinency of the question asked to the committee's investigation) might be mandated by the Due Process Clause.

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[101] *See* House Committee on the Judiciary v. Miers, 558 F. Supp. 2d 53 (D.D.C. 2008); House Committee on Oversight and Government Reform v. Holder, 979 F. Supp. 2d 1 (D.D.C. 2013). For a comprehensive treatment of the history and legal development of the congressional contempt power *see* CRS Report RL34097, *Congress's Contempt Power and the Enforcement of Subpoenas: Law, History, Practice, and Procedure* (hereinafter CRS Contempt Report) (accessible at http://www.fas.org/sgp/crs/misc/RL34097.pdf).

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

[103] McGrain v. Daugherty, 273 U.S. at 161.

[104] *See* Marshall v. Gordon, 243 U.S. 521 (1917); *see* also United States v. Fort, 443 F.2d 670, 676 (D.C. Cir. 1970); Theodore Sky, *Judicial Review of Congressional Investigations: Is There an Alternative to Contempt*, 31 Geo. Wash. L. Rev. 399, 400, n.3 (1962) (hereinafter Sky).

[105] Jurney v. MacCracken, 294 U.S. 125, 147 (1935); *see also* Kilbourn v. Thompson, 103 U.S. 168, 196 (1880); Ex Parte Nugent, 1 Hay. & Haz. 287, 18 F.Cas.471 (C.C.D.C. 1848).

[106] Groppi v. Leslie, 404 U.S. 496 (1972).

[107] *Id.*

c. Fines as an Alternative to Imprisonment for Inherent Contempt

Although most of the court decisions reviewing use of the inherent contempt power have involved incarceration, Congress, utilizing the House's internal rulemaking authority,[108] would be able to impose monetary fines as an alternative to imprisonment that would automatically reduce the pay of the official held in contempt. Such a fine would potentially have the advantage of avoiding a court proceeding through a *habeas corpus* petition, since the person held in contempt would never be detained or incarcerated. Drawing on the analogous inherent authority that courts possess to impose fines for contemptuous behavior,[109] it appears that Congress, in its exercise of a similar inherent function, will be able to impose fines rather than incarceration.

d. Inherent Contempt Does Not Require Judicial Enforcement Assistance

Unlike criminal and civil contempt proceedings, Congress's inherent contempt power may be used without the cooperation or assistance of either the executive or judicial branches. Under the traditional, historic practice, the House or Senate can, on its own, conduct summary proceedings and cite the offender for contempt, which would lead to incarceration. However, although the person cited can seek judicial review by means of a petition for a writ of *habeas corpus*, the scope of such review may be relatively limited[110] compared to the plenary review accorded by the courts in cases of conviction under the criminal contempt statute.

e. The Perceived Limitations of the Inherent Contempt Mechanism

There are also certain limitations on the inherent contempt process. Although the person cited can be incarcerated until he or she agrees to comply with the subpoena, imprisonment may not extend beyond the end of the current session of Congress.[111] Moreover, inherent contempt has been described as "unseemly," cumbersome, time-consuming, and relatively ineffective, especially for a modern Congress with a heavy legislative workload that would be interrupted by a trial in the House or Senate chamber.[112] Because of these drawbacks, the inherent contempt process has not been used by either body since 1935.[113] When a former presidential aide sued to block a congressional subpoena, the district court dismissed the case as moot. The House had repeatedly disavowed intent to use inherent contempt, and the court stated the "practical reality of [the House] doing so is—to say the least—extremely unlikely."[114] One year later, the D.C. Circuit underscored the practical barriers to using inherent contempt against

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[108] See Art. I, §5, cl. 2, "Each House may determine the rules of its proceedings."

[109] *See, e.g.*, United States v. United Mine Workers, 330 U.S. 258 (1947) (upholding a $700,000 fine against a labor union as punishment for disobedience of a preliminary injunction preventing it from continuing a worker strike and approving the imposition of a $2.8 million fine if the union did not end the strike within five days).

[110] *See Jurney v. MacCracken*, 243 U.S. at 152.

[111] Watkins v. United States, 354 U.S. 178, 207, n. 45 (1957); Anderson v. Dunn, 19 U.S. 204, 231 (1821).

[112] *See* S. Rept. No. 95-170, 95th Cong., 1st Sess., 97 (1977); *see also* Rex E. Lee, *Executive Privilege, Congressional Subpoena Power, and Judicial Review: Three Branches, Three Powers, and Some Relationships*, 1978 B.Y.U. L. Rev. 231, 255 n. 71 (1978) (hereinafter Lee). In *House Committee on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 91–92 (D.C. Cir. 2008), the Court commented that arrest of a close presidential advisor would be particularly inappropriate. No executive official has ever been subject to an inherent contempt proceeding.

[113] 4 Deschler's Precedents of the U.S. House of Representatives, ch. 15 § 17, 139 n.7 (1977) (hereinafter Deschler's Precedents); *see also Lee*, *supra* note 79 at 255.

[114] Kupperman v. U.S. House of Representatives, 436 F. Supp. 3d 186, 194 (D.D.C. 2019) ("After all, the House has not used its inherent contempt authority in nearly a century.").

White House Counsel Don McGahn.[115] The court cited Office of Legal Counsel ("OLC") opinions arguing that Congress cannot constitutionally arrest an executive official who withholds information under a valid claim of executive privilege.[116]

Proceedings under the inherent contempt power might be facilitated, however, if the initial fact-finding and examination of witnesses were to be held before a special committee—which could be directed to submit findings and recommendations to the full body—with only the final decision as to guilt being made by the full House or Senate.[117] As suggested above, the penalty for conviction could be limited to fines, with no incarceration. With such modifications, the process might be a more attractive option for members of Congress to pursue.

In the 118th Congress, Representative Anna Paulina Luna introduced two privileged inherent contempt resolutions against Attorney General Merrick Garland, which bypass committee review.[118] The first, H. Res. 1205, would have authorized a warrant for the Attorney General's arrest by the House Sergeant at Arms; it was never voted upon. The second resolution, H. Res. 1344, proposed fining Garland $10,000 each day for refusing to produce audio recordings of President Biden's interview with Special Counsel Robert Hur. It failed by a 204-210 vote. Instead, the House authorized a civil contempt action against the Attorney General.[119] But OLC concluded Attorney General Garland could not be held in inherent contempt if he was following the President's direction to assert executive privilege.[120] Though inherent contempt remains a congressional tool, its effectiveness is uncertain due to legal and practical constraints, as this episode illustrates.

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[115] Comm. on Judiciary of United States House of Representatives v. McGahn, 968 F.3d 755, 776 (D.C. Cir. 2020) (*en banc*). Although it is mentioned here as a valuable consideration of the inherent contempt power, it must be noted that *McGahn* is not binding precedent. The judgment in *McGahn* was vacated pending *en banc* review, *see Comm. On the Judiciary of the U.S. House of Representatives v. McGahn*, No. 19-5331, 2020 U.S. App. LEXIS 32573, at *5–6 (D.C. Cir. Oct. 15, 2020) (per curiam). Later, the opinion was also vacated, *see Comm. on the Judiciary of the U.S. House of Representatives*, No. 19-5331, 2021 U.S. App. LEXIS 20759, at *1 (D.C. Cir. July 13, 2021) (per curiam); that vacatur was in response to a joint consent motion by the parties that expressly aimed "to remove any doubt that th[e] opinion is not the binding law of this Circuit," Consent Mot. Vacate Panel Op. at 3, *Comm. on the Judiciary of the U.S. House of Representatives*, No. 19-5331, 2021 U.S. App. LEXIS 20759, at *1 (D.C. Cir. June 10, 2021) (per curiam), ECF No. 1902017.

[116] *McGahn*, 968 F.3d at 776 (citing Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act, 10 Op. O.L.C. 68 (1986) & Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege, 8 Op. O.L.C. 101 (1984)).

[117] *See* Nixon v. United States, 506 U.S. 224 (1993) (upholding the power of the Senate to establish its own rules for the conduct of any impeachment, in this case the appointment of a special committee to make findings of fact and recommendations).

[118] *Finding that Merrick Garland, Attorney General of the United States, is in contempt of the House of Representatives for disobeying a certain subpoena*, H.R. Res. 1205, 118th Cong. (2024); *Finding that Merrick Garland, Attorney General of the United States, is in contempt of the House of Representatives for disobeying a certain subpoena*, H.R. Res. 1344, 118th Cong. (2024).

[119] H. Res. 1292, 118th Cong. (2024).

[120] *See* Memorandum for Merrick Garland, Attorney General, from Christopher Fonzone, Assistant Attorney General, Office of Legal Counsel, *Re: Whether Congress May Use Its Inherent Contempt Authority to Arrest Executive Branch Officials Who Withhold Subpoenaed Materials Based on an Assertion of Executive Privilege by the President* at 4-5 (June 24, 2024) (concluding that Congress may not constitutionally use its inherent contempt authority to arrest or imprison an Attorney General who withholds subpoenaed materials under a presidential assertion of executive privilege); Memorandum for Merrick Garland, Attorney General, from Christopher Fonzone, Assistant Attorney General, Office of Legal Counsel, *Re: Whether Congress May Use Its Inherent Contempt Authority to Fine Executive Branch Officials Who Withhold Subpoenaed Materials Based on a Presidential Assertion of Executive Privilege* at 2 (July 10, 2024) (determining that Congress may not constitutionally impose monetary fines via inherent contempt on an executive official withholding materials under a valid presidential assertion of executive privilege).

Finally, it is interesting and important to note that despite the enactment of the criminal contempt statute in 1857, inherent contempt remained the almost exclusive, and highly successful, congressional enforcement vehicle until 1934. A detailed history of its usage during that period indicates that in at least 28 instances witnesses who were either threatened with, or actually charged with, contempt of Congress purged their citations by either testifying or providing documents to the inquiring congressional committees.[121] In addition, two executive branch officials were arrested pursuant to contempt citations, indicating an early understanding of the availability of the inherent contempt option against executive officials.[122] Also noteworthy is that the Supreme Court's landmark 1927 ruling that defined the breadth of contemporary legislative investigative authority, *McGrain v. Daugherty*, emerged from an inherent contempt citation.[123] Any House member seeking to utilize this method should work within the committee and leadership structure in the House.

3. Statutory Criminal Contempt

a. The Origin and Nature of the Criminal Contempt Statute

Congress long ago recognized the problem raised by its inability to punish a person cited for contempt beyond the adjournment of a congressional session. In 1857, Congress enacted a statutory criminal contempt procedure as an alternative to the inherent contempt procedure that, with minor amendments, is codified today at 2 U.S.C. §§ 192 and 194. A person who has been subpoenaed to testify or produce documents before the House or Senate or a committee and who fails to do so, or who appears but refuses to respond to questions, is guilty of a misdemeanor, punishable by a fine of up to $100,000 and imprisonment for up to one year. A contempt citation must be approved by the subcommittee (if that was where the contempt initially occurred), the full committee, and then by the full House or Senate (or by the presiding officer if Congress is not in session). The statute provides that after a contempt citation has been certified by the President of the Senate or the Speaker of the House, it is the "duty" of the U.S. Attorney "to bring the matter before the grand jury for its action."

b. Congressional Use of Criminal Contempt against Executive Officials

The criminal contempt procedure was rarely used until the twentieth century, but since 1935 it has been essentially the exclusive vehicle for punishment of contemptuous conduct. Prior to Watergate, no executive branch official had ever been the target of a criminal contempt proceeding. Between 1975 and 1998, however, ten cabinet-level or senior executive officials were cited for contempt for failure to produce subpoenaed documents by a subcommittee, a full committee, or a house of Congress.[124] In each instance the contempt citation led to substantial or full compliance with the document demands before it was necessary to initiate criminal proceedings.

Although such citations, in most cases, have led to compliance without need for an actual criminal prosecution, the executive branch has not always agreed that compliance is required. For example, in

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[121] See Carl Beck, Contempt of Congress: A study of Prosecutions Initiated by the Committee on Un-American Activities, 1945-1957, 191-214 (1959).

[122] Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. Chic. L. Rev. 1083, 1137-38 (2010).

[123] *Id*.

[124] The ten officials are as follows: Secretary of State Henry Kissinger (1975); Secretary of Commerce Rogers C. B. Morton (1975); Secretary of Health, Education, and Welfare Joseph A Califano, Jr. (1978); Secretary of Energy Charles Duncan (1980); Secretary of Energy James B. Edwards (1981); Secretary of the Interior James Watt (1982); EPA Administrator Anne Gorsuch Burford (1983); Attorney General William French Smith (1983); White House Counsel John M. Quinn (1996); and Attorney General Janet Reno (1998).

1982, the Justice Department filed a lawsuit to block enforcement following the House's vote of contempt of EPA Administrator Anne Gorsuch Burford. The Department filed suit seeking to prevent referral of the contempt citation to the U.S. Attorney for grand jury action on the grounds that the House action unconstitutionally imposed an "unwarranted burden on executive privilege" and "interferes with the executive's ability to carry out the laws." A district court dismissed the suit as premature because settlement opportunities had not been exhausted and noted that resolution of the privilege claims could only occur during a criminal trial for contempt.[125] The Department of Justice did not appeal the ruling, opting instead to resume negotiations, which resulted in full disclosure of the documents to Congress. Throughout the litigation, the U.S. Attorney refused to present the contempt citation to a grand jury. Subsequent DOJ Office of Legal Counsel opinions reiterated the executive's opposition to use of the contempt process against executive branch officials.[126]

In 2022 and 2023, Steve Bannon and Peter Navarro became the first individuals in decades to face indictment and conviction under 2 U.S.C. § 192 for defying congressional subpoenas. Both advised President Trump during his first term. After the House held them—and former chief of staff Mark Meadows and deputy chief of staff Dan Scavino—in contempt, prosecutors secured convictions against Bannon (July 2022) and Navarro (September 2023) in Washington, D.C. The cases receive fuller treatment below.

c. The Uncertainty Whether Executive Officials Are Subject to Inherent or Criminal Contempt Proceedings

While the U.S. Attorney has a "duty" under 2 U.S.C. § 194 to present contempt citations to a grand jury, enforcement is rare in practice. Despite the statutory language, the executive branch claims—and exercises—discretion to decline.[127] Criminal contempt prosecutions against executive officials are rare. From 2008 to 2014, the House held four current or former officials in contempt for defying subpoenas. In each case, DOJ refused to bring charges before a grand jury. These refusals highlight the statute's ineffectiveness when the President directs noncompliance or asserts executive privilege.[128] Congress faced further frustration when DOJ declined to prosecute even when a former official invoked personal privilege, not executive privilege, as grounds for refusal.[129]

Among those cases from 2008 to 2014 were two that arose from investigations in the 110th Congress, where incumbent and former White House aides were directed to refuse to appear in response to testimonial and document subpoenas, and the Bush administration relied upon Justice Department opinions to support the refusals to testify. Similarly, the Attorney General ordered the U.S. Attorney for the District of Columbia not to submit contempt of Congress citations against these witnesses for grand jury consideration. That action forced the House of Representatives to take the historic action of seeking

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[125] United States v. U.S. House of Representatives, 556 F. Supp. 150 (D.D.C. 1983).

[126] The Justice Department's articulation of its position that the use of the inherent and statutory contempt mechanisms against executive branch officials is unconstitutional appears in Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted A Claim of Executive Privilege, 8 Op. O.L.C. 101 (1984), and Response to Congressional Requests for Information Made Under the Independent Counsel Act, 10 Op. OLC 68 (1986).

[127] *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).

[128] *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.").

[129] 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).

civil enforcement of the subpoenas, a subject to which we now turn as there have been significant updates in the past four years.

4. Civil Contempt

a. In the Senate

i. The Origins, Purposes, and Procedures of the Senate Civil Contempt Statute

As an alternative to both the inherent contempt power of each house of Congress and the criminal contempt statute,[130] in 1978 Congress enacted a civil contempt procedure,[131] which is applicable only to the Senate.[132] The statute authorizes the Senate to file a lawsuit in the U.S. District Court for the District of Columbia to enforce subpoenas issued by the Senate or a committee or subcommittee. This includes authority to seek a "declaratory judgment" confirming the validity of a subpoena and an order requiring compliance when a witness has refused or threatened to refuse to comply. Generally, such a suit will be brought by the Senate Legal Counsel on behalf of the Senate or a Senate committee or subcommittee.[133] The statute does not apply in the case of a subpoena to officers or employees of the executive branch acting in their official capacities.[134]

Pursuant to the statute, the Senate may "ask a court to directly order compliance with [a] subpoena or order, or they may merely seek a declaration concerning the validity of [the] subpoena or order. By first seeking a declaration, [the Senate would give] the party an opportunity to comply before actually [being] ordered to do so by a court."[135] It is solely within the discretion of the Senate whether to use such a two-step enforcement process.[136]

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[130] The perceived deficiencies of the inherent and criminal contempt procedures had been recognized by the Congress itself, the Courts, and by students of the subject. *See, e.g., Representation of Congress and Congressional Interests In Court*, Hearings before the Senate Judiciary Subcommittee on Separation of Powers, 94th Cong, 2d *Sess.*, 556–68 (1976); United States v. Fort, 443 F.2d 670, 677-78 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 932 (1971); Tobin v. United States, 306 F.2d 270, 275–76 (D.C. Cir. 1962), *cert. denied*, 371 U.S. 902 (1962); Sky, *supra* note 72.

[131] Ethics in Government Act of 1978, P.L. 95-521, §§ 703, 705, 92 Stat. 1877–80 (1978) (codified as amended at 2 U.S.C. §§ 288b(b) 288d, and 28 U.S.C. § 1365 (2000)).

[132] The conference report accompanying the legislation, which established the procedure, explained that the relevant House committees had not yet considered the proposal for judicial enforcement of House subpoenas. H. Rept. 95-1756, 95th Cong., 2d Sess., 80 (1978).

[133] Although the Senate or the committee may be represented by any attorney designated by the Senate, in most cases such an action will be brought by the Senate Legal Counsel after an authorizing resolution has been adopted by the Senate. 2 U.S.C. § 288b(b) (2000). *See* 28 U.S.C. § 1365(d) (2000). A resolution directing the Senate Legal Counsel to bring an action to enforce a committee or subcommittee subpoena must be reported by a majority of the members voting, a majority being present, of the full committee. The report filed by the committee must contain a statement of (a) the procedure employed in issuing the subpoena; (b) any privileges or objections raised by the recipient of the subpoena; (c) the extent to which the party has already complied with the subpoena; and (d) the comparative effectiveness of the criminal and civil statutory contempt procedures and a trial at the bar of the Senate. 2 U.S.C. § 288(c) (2000).

[134] 28 U.S.C. § 1365(a) (2000).

[135] S. Rept. No. 95-170, 95th Cong., 1st Sess., 89 (1977).

[136] *Id.* at 90.

This statute gives the Senate the option of a civil action to enforce a subpoena,[137] but does not eliminate its ability to rely on the inherent contempt power or institute criminal contempt proceedings as described above.[138] Civil contempt might be employed when the Senate is more concerned with securing compliance with the subpoena or with clarifying legal issues than with punishing the objecting witness. Unlike criminal contempt, in a civil context, sanctions such as imprisonment and/or a fine can be imposed until the subpoenaed party agrees to comply. This creates an incentive for compliance to end the punishment.[139] Since the statute's enactment in 1979, the Senate has authorized the Office of Senate Legal Counsel to seek civil enforcement of a subpoena for documents or testimony at least seven times, most recently in 2016.[140]

ii. The Benefits of the Senate Civil Contempt Mechanism

The Senate civil contempt process has been generally found to be faster than a criminal proceeding, where a court may more closely scrutinize congressional procedures and give greater weight to the defendant's constitutional rights. The civil contempt procedure also provides an element of flexibility, allowing the subpoenaed party to raise possible constitutional and other defenses (e.g., the privilege against self-incrimination, lack of compliance with congressional procedures, or an inability to comply with the subpoena)[141] without risking a criminal prosecution.

iii. The Senate Civil Contempt Mechanism Cannot be Used Against Executive Branch Officials

The Senate civil contempt process, however, has limitations. Most notable is that the statute granting jurisdiction to the Courts to hear such cases is, by its terms, inapplicable in the case of a subpoena issued to officers or employees of the federal government acting in their official capacities.[142] A report from the

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[137] For a more detailed analysis of the civil contempt procedure and a comparison with the other options available to the Senate when faced with a contempt, *see* S. Rept. No. 95-170, 95th Cong., 1st Sess., 16–21, 40–41, 88–97; *see also* Hearings Before the Senate Committee on Governmental Affairs on S. 555, 95th Cong., 1st Sess. 59–62, 69 et seq. (1977) (hereinafter Civil Contempt Hearing) (statement of Senator Abourezk and attachments); 123 Cong. Rec. 20,956–21,019 (June 27, 1977).

[138] Not only do the inherent and criminal contempt procedures remain available as an alternative to the civil contempt mechanism, but the legislative history indicates the understanding that the civil and criminal statutes could both be employed in the same case. "Once a committee investigation has terminated, a criminal contempt of Congress citation under 2 U.S.C. § 192 might still be referred to the Justice Department if the Congress finds this appropriate. Such prosecution for criminal contempt would present no double jeopardy problem." S. Rept. No. 95-170, 95th Cong., 1st Sess., 95 (citations omitted); *see also* Civil Contempt Hearing, *supra* note 92 at 798–800.

[139] The Act specifies that "an action, contempt proceeding, or sanction … shall not abate upon adjournment *sine die* by the Senate at the end of a Congress if the Senate or the committee or subcommittee … certifies to the Court that it maintains its interest in securing the documents, answers, or testimony during such adjournment." 28 U.S.C. § 1365(b) (2000). In the first case brought under the new procedure, the witness unsuccessfully argued that the possibility of "indefinite incarceration" violated the due process and equal protection provisions of the Constitution, and allowed for cruel and unusual punishment. Application of the U.S. Senate Permanent Subcommittee on Investigations, 655 F.2d 1232 (D.C. Cir.), *cert. denied*, 454 U.S. 1084 (1981).

[140] *See* Senate Permanent Subcommittee on Investigations v. Ferrer, 2016 U.S. Dist. LEXIS 103143 (D.D.C. Aug. 5, 2016).

[141] S. Rept. No. 95 170, 95th Cong., 1st Sess., 93 (1977).

[142] 28 U.S.C. § 1365(a) (2000). The statutory exception was explained in the Senate's Report as follows:

> This jurisdictional statute applies to a subpoena directed to any natural person or entity acting under color of state or local authority. By the specific terms of the jurisdictional statute, it does not apply to a subpoena directed to an officer or employee of the Federal Government acting within his official capacity. In the last Congress there was pending in the Committee on Government Operations legislation directly addressing the problems associated with obtaining information from the executive branch. (*See* S. 2170, "The Congressional Right to Information Act"). This exception in the statute is not intended to be a congressional finding that the

House Judiciary Committee in 1988 stated that the exclusion was to apply only in cases in which the President had directed the recipient of the subpoena not to comply with its terms.[143] Therefore, the procedure may only be used in investigations of private companies and individuals, and Senate members, officials, and employees subject to internal inquiries. The Senate has yet to directly face the problem of an executive refusal to comply with a subpoena demand.

b. In the House of Representatives

i. Past House Resolutions Authorizing Special Committee Actions

While the House of Representatives cannot pursue actions under the Senate's civil contempt statute just discussed, as an alternative, the House has frequently created special investigatory panels. There are numerous examples of the House, by resolution, providing special investigatory committees with authority not ordinarily available to its standing committees. These extra powers have included staff deposition authority, the authority to obtain tax information, and the authority to seek international assistance in information-gathering efforts abroad.[144] In addition, at least six special panels have been specifically granted the power to seek judicial orders and participate in judicial proceedings.[145]

Before the 110th Congress, the House of Representatives never directly sought civil enforcement of a subpoena in federal court by filing its own lawsuit, but had only sought to participate in cases brought by others. There were several situations in which the House by resolution authorized *intervention* by counsel representing a House committee into litigation involving congressional committees.[146] The House's authority to file such lawsuits has been recognized by the Justice Department. Several opinions of DOJ's Office of Legal Counsel argued that civil enforcement proceedings were a proper means to resolve interbranch information access disputes, rather than inherent or statutory criminal contempt proceedings.[147]

ii. Approval of House Resolution Authorizing Court Enforcement of a Committee Subpoena

In the 110th Congress, the House of Representatives directly sought enforcement of a subpoena in federal court authorized solely by resolution of the House. This action came in connection with the investigation during President George W. Bush's administration of the firings of nine U.S. Attorneys. When former Bush administration officials Harriet Miers and Joshua Bolten refused to appear and testify before Congress on the matter, the House passed a resolution authorizing a lawsuit to enforce the subpoenas.

> 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. However, if the federal courts do not now have this authority, this statute does not confer it.
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> S. Rept. No. 95 170, 95th Cong., 1st Sess., 91–92.

[143] H. Comm. on the Judiciary, Clarifying the Investigatory Powers of the United States Congress, H.R. Rep. No. 100-1040 at 2 (1988).

[144] *See Congressional Oversight Manual supra* note 43.

[145] *Id.*

[146] *See* United States v. AT&T, 551 F.2d 384, 385 (D.C. Cir. 1976): Ashland Oil v. FTC, 409 F. Supp. 297, 301 (D.D.C. 1976), *affd*. 548 F.2d 977, 979 (D.C. Cir. 1976).

[147] The OLC opinions conceded such disputes created federal question jurisdiction under 28 U.S.C. § 1331. *See Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted A Claim of Executive Privilege*, 8 Op. OLC 101 (1984); *Response to Congressional Requests for Information Made Under the Independent Counsel Act*, 10 Op. OLC 68 (1986).

More specifically, the litigation involved President Bush's claim of executive privilege, and his assertion that this claim bestowed absolute immunity on the aides, which protected them from even responding to the subpoenas. The House passed two resolutions. The first one directed the Speaker to certify the contempt of the House Judiciary Committee to the U.S. Attorney for presentation to a grand jury. Since the House anticipated that the U.S. Attorney would refuse, a second resolution authorized the Chair of the Judiciary Committee to initiate civil proceedings in federal court to seek a declaratory judgment affirming the duty of the subpoenaed individuals to comply with the subpoenas, and court orders requiring compliance. Attorney General Mukasey directed the U.S. Attorney not to present the citation, and the suit was filed.

In 2008, the federal district court hearing this subpoena enforcement case, *House Committee on the Judiciary v. Miers,*[148] ruled that the House subpoenas must be enforced. Under the district court decision, a one-House authorization in such subpoena enforcement cases is sufficient to provide the necessary jurisdiction and standing. Although the case was settled in March 2009, after the change in administration and before the appeal was heard, the settlement provided that the district court decision rejecting both the executive's broad privilege claims and its assertions that the case could not be heard by the court would stand as precedent.

The district court's lengthy opinion principally dealt with the executive's claims that the suit should be dismissed because the Committee: (1) lacked standing or a right to sue, (2) had not stated a cause of action authorizing the suit, and (3) inappropriately involved the court in a dispute between the political branches that should be resolved by negotiation and accommodation by the parties. The court rejected the executive's first two claims, finding that Article I of the Constitution, which provides that Congress possesses "the power of inquiry," was sufficient to provide a basis for the suit—both standing and an implied cause of action. The court observed that the Supreme Court had consistently recognized that the power carries with it the "'process to enforce it,'" which is "'an essential and appropriate auxiliary to the legislative function'" and that "'issuance of a subpoena pursuant to an authorized investigation is … an indispensable ingredient of lawmaking.'"[149]

The trial court also rejected the suggestion that the court dismiss the suit so as to avoid involvement in a political dispute between the branches. The court noted that since the initial Watergate rulings, many courts had considered subpoena disputes raising privilege and immunity questions in both civil and criminal contexts, and often only judicial intervention could prevent "a stalemate that could result in a paralysis of government." The court particularly relied on the lesson of the House's authorization to a subcommittee Chair to intervene in an earlier landmark appeals court ruling[150] in commenting: "Two parties cannot negotiate in good faith when one side asserts legal privileges but insists that they cannot be tested in court in the traditional manner. That is true whether the negotiating parties are private firms or the political branches of the federal government."[151]

The *Miers* litigation extended for almost two years and was settled only because of change in political party control of the presidency in 2009.

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[148] 558 F. Supp. 2d 53 (D.D.C. 2008).

[149] *Miers*, 558 F. Supp. 2d at 75 (citing *McGrain*, 273 U.S. at 174 and *Eastland*, 421 U.S. at 505).

[150] *See AT&T*, 551 F.2d at 392 (rejecting the Executive's claim that its assertion of privilege with respect to national security information being sought by a congressional committee was absolute and could not be adjudicated by a court).

[151] *Miers*, 558 F. Supp. 2d at 99. For an in-depth discussion of the implications and importance of the court's justiciability rulings, *see* CRS CONTEMPT REPORT, *supra* note 67.

The next such case, *House Committee on Oversight and Government Reform v. Lynch*,[152] arose out of an investigation of DOJ's Bureau of Alcohol, Tobacco, Firearms and Explosives' (ATF) "Operation Fast and Furious." In this operation, the ATF knowingly allowed firearms purchased illegally in the United States to be unlawfully transferred to third parties and transported into Mexico, so as to enable ATF to follow the flow of the firearms to the Mexican drug cartels that purchased them.

On February 4, 2011, in response to Congress's initial inquiries, a DOJ Assistant Attorney General flatly denied that the agency had ever "sanctioned or otherwise knowingly allowed the sale of assault weapons to a straw purchaser." In December of 2011, however, DOJ withdrew its February 4 letter, conceding that it had contained "inaccurate information" about the depth of DOJ's knowledge of ATF's actions, and that the operation itself was fundamentally flawed.

The House Committee on Oversight and Government Reform (COGR)[153] shifted the focus of its investigation to how and why DOJ had provided Congress with such inaccurate information; why it took almost ten months to correct the mistake; and whether the agency had sought to obstruct the Committee's inquiry by providing misleading information. COGR then narrowed its attention to documents created after the February 4 letter relating to DOJ's response to COGR's investigation. There followed subpoenas, negotiations and an ultimate refusal by then-Attorney General Eric Holder to turn over key documents he claimed were protected by the deliberative process privilege (DDP). The full House voted Holder in contempt on June 28, 2012. DOJ informed the House that, as in *Miers*, no action would be taken to prosecute the Attorney General.

Following a House resolution authorizing it, COGR brought a civil suit on August 13, 2012. A central issue was whether the government's asserted DDP was constitutionally based, or solely a common law creation which Congress could override if necessary for its investigation. (Congress had long taken the latter view). The U.S. District Court for the District of Columbia in 2014 rejected "the Committee's contention that the privilege cannot be asserted at all if it is Congress that is making the request."[154] Judge Jackson determined "that there is a constitutional dimension to the deliberative process aspect of the executive privilege, and that the privilege [therefore may] be properly invoked in response to a legislative demand." She also found, however, that DOJ's "blanket assertion" of privilege was insufficient, and ordered DOJ to review all the withheld documents and either produce them or provide a detailed privilege log. Both DOJ and the House appealed the rulings to the D.C. Circuit Court.

Sixteen months later, the Court ruled on the Committee's motion to compel production of the withheld documents. With respect to the thousands of documents over which DOJ had invoked the DDP, the Court reiterated its prior holding that the executive could invoke the privilege against Congress, but determined

[152] Committee on Oversight and Government Reform v. Lynch, 156 F. Supp. 3d 101 (D.D.C. Jan.9, 2016). The original defendant, former Attorney General Eric Holder, left office and his successor was substituted as the defendant of record.

[153] The House Committee on Oversight and Government Reform has gone under various other names in the past. It began in 1927 as the "Committee on Expenditures in the Executive Departments" and changed to the "Committee on Government Operations" in 1952; after becoming the "Committee on Government Reform and Oversight" in 1995, the committee has iterated through several names focused on "oversight" and/or "reform." *See* Committee Name History, U.S. Congress, https://www.congress.gov/help/committee-name-history (last visited Oct. 15, 2025). Despite the changes in name, the committee has remained the same body for all intents and purposes.

[154] Order on Motion for Summary Judgement at 5, Committee on Oversight and Government Reform v. Holder, No. 12-cv-1332 (D.D.C. Aug. 20, 2014), ECF No. 81.

that because of a parallel DOJ Inspector General investigation "any harm that would flow from the disclosures sought here would be merely incremental, [and] the records must be produced."[155]

The unusual ruling perhaps reflects second thoughts on the judge's part about her initial DDP ruling and an attempt to foreclose an appeal (since the Committee would have gotten all it originally asked for and DOJ gained an important precedent that agencies could rely on going forward). At the Committee's urging, however, the Court issued a final appealable order on February 8, 2016. Both DOJ and the House appealed to the D.C. Circuit. The parties opened settlement talks in January 2017, during the 115th Congress, and, after reaching a settlement, in 2018, they asked the D.C. Circuit to vacate the district court's prior rulings and dismiss the case with prejudice. But the district court refused to vacate its rulings. DOJ and the Committee finally settled in April 2019—nearly seven years after the House authorized the suit. On May 8, 2019, they jointly notified the D.C. Circuit of the settlement, waived any precedential effect of the lower-court orders, and voluntarily dismissed the appeal with prejudice. No proceedings remain.[156]

Following the mixed outcomes in *Miers* and *Holder*—where district courts affirmed standing but dismissed on executive privilege and mootness—the D.C. Circuit definitively endorsed a House committee's Article III standing to seek civil subpoena enforcement.[157] A 7-2 *en banc* majority reversed the initial panel's dismissal for lack of standing. It explained that a committee's injury was the deprivation of subpoenaed information essential to its legislative, oversight, and impeachment functions. That injury "is concrete," "particularized," and sufficiently "direct" to satisfy standing requirements because a committee's exercise of its subpoena power is on behalf of the full House.[158] The Court noted the harm was traceable to the subpoena target's noncompliance and redressable via favorable judicial decision-making.[159] The Court also ruled that recognizing a committee's Article III standing would not arrogate congressional power, at the executive branch's expense.[160] Nor would it disrupt the historical practice of accommodation,[161] or empower the judiciary at the other branches' expense.[162]

Building on the executive resistance in earlier disputes like *Miers* and *Fast and Furious*, the *en banc* *McGahn* ruling has enduring implications for congressional investigations, reinforcing committees' ability to turn to the courts when executive resistance blocks access to information. As a result, *McGahn* strengthens the House's civil enforcement options, particularly in polarized environments, and has influenced later cases without drawing Supreme Court review to date.

The *en banc* D.C. Circuit Court, however, did remand the case to the panel to consider other threshold pre-merits objections, including a lack of subject-matter jurisdiction and lack of an applicable cause of action.[163] On remand, the panel concluded that the Committee did not have a cause of action authorizing

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[155] Committee on Oversight and Government Reform v. Lynch, 156 F. Supp. 3d 101 (D.D.C. 2016).

[156] House Comm. on Oversight & Gov't Reform v. Barr, 2019 WL 2158212 (D.C. Cir. May 14, 2019).

[157] *McGahn*, 968 F.3d at 778. Judge Katsas and Judge Rao did not participate in this matter.

[158] *Id*. at 764-68.

[159] *Id*. at 768.

[160] *Id*. at 771.

[161] *Id*. at 772.

[162] *Id*. at 772–74.

[163] *Id*. at 778.

judicial enforcement.[164] The panel also rejected the Committee's argument for an implied cause of action under Article I and 28 U.S.C. § 1331, reasoning that Congress had not enacted legislation expressly permitting such suits.[165] As a result, courts should not infer a cause of action given the separation-of-powers sensitivities involved.[166] It also held that neither the Declaratory Judgment Act nor courts' traditional equitable powers supplied an alternative basis for relief because those provisions do not create substantive rights or causes of action.[167]

The D.C. Circuit granted rehearing *en banc*, but the parties reached an accommodation for Mr. McGahn to appear before the Judiciary Committee for a transcribed interview without asserting testimonial immunity.[168] The case was dismissed following the joint request of the parties to do so.[169] Because the panel opinion was vacated,[170] no binding precedent establishes that the House—or its committees—have a judicially cognizable cause of action to enforce subpoenas. That said, the panel's reasoning, along with the separate opinions throughout the *McGahn* litigation, continues to shape the discussion of Congress's enforcement tools and scope of judicial involvement in interbranch disputes. *McGahn* frames both the opportunities and limits of judicially enforceable congressional oversight moving forward.

iii. Recent Prosecutions for Contempt

In 2022 and 2023, juries convicted Steve Bannon and Peter Navarro on two counts each of contempt of Congress under 2 U.S.C. § 192 for defying subpoenas from the January 6 Committee. The subpoenas demanded testimony and documents from the two Trump first-term advisors on the 2020 election and January 6 events. Neither produced documents nor appeared. The Committee recommended contempt; the full House approved on October 21, 2021 (Bannon) and April 19, 2022 (Navarro). Both received four-month prison sentences.

The Committee subpoenaed Bannon on September 23, 2021. He ignored it entirely. After being convicted July 22, 2022, Bannon appealed, arguing that "willfully" requires bad faith. On May 10, 2024, the D.C. Circuit rejected that view—willful means deliberate noncompliance—and affirmed the conviction. The Supreme Court denied review on October 7, 2024. Bannon served his sentence from July 1 to October 29, 2024.[171]

Navarro faced parallel facts. He defied a subpoena from the same committee by refusing to provide testimony and documents. He moved to dismiss the charges, claiming testimonial immunity as a defense to § 192 contempt. The district court denied the motion without addressing merits. Like Bannon, Navarro argued that absolute immunity shielded presidential advisors from compelled congressional testimony and that Trump had invoked executive privilege. The court disagreed: even assuming testimonial immunity applied, Navarro needed evidence of a formal privilege assertion—such as an affidavit or testimony—

[164] *McGahn*, 973 F.3d at 123 (D.C. Cir. 2020).

[165] *Id*.

[166] *Id*.

[167] *Id*. at 123-25.

[168] Joint Mot. to Dismiss Appeal and Consent Mot. To Vacate Panel Opin., Comm. on Judiciary of United States House of Representatives v. McGahn, No. 19-5331 (D.C. Cir. June 10, 2021).

[169] *Id.* at 7 ("Vacating the panel opinion here ensures that the Executive Branch continues to have the same incentive to cooperate with Congress in informational disputes that has helped to foster interbranch cooperation for many decades.").

[170] Comm. on the Judiciary v. McGahn, No. 19-5331, 2021 U.S. App. LEXIS 20759 (D.C. Cir. July 13, 2021).

[171] *Bannon*, 101 F.4th 16.

which he could not provide.[172]

The Select Committee—and the full House—also held former White House advisors Mark Meadows and Dan Scavino in contempt of Congress for refusing to testify. Unlike Bannon and Navarro, Meadows and Scavino negotiated with the Committee over testimony terms. Meadows even produced more than 9,000 subpoenaed documents before halting cooperation. On June 3, 2022, U.S. Attorney for the District of Columbia Matthew M. Graves notified the House that DOJ would not prosecute either, citing their partial cooperation and stronger executive-privilege claims as senior West Wing advisers. The Committee's Chair and Vice Chair decried the decision, insisting that "Meadows's claim that he is entitled to absolute immunity is not correct or justified."[173]

Bannon and Navarro became the first individuals in decades to face DOJ prosecution for defying congressional subpoenas. Their convictions partly vindicated Congress's criminal contempt authority. Yet DOJ's refusal to prosecute Meadows and Scavino revived long-standing legislative frustration over the Department's pattern, under Presidents of both parties, of shielding executive officials who withhold information at a president's direction.

As Elise Bean—former staff director and chief counsel to the Senate Permanent Subcommittee on Investigations and director of the Levin Center for Oversight and Democracy—observed in June 2022: "When Congress has referred cases to the Department of Justice under the law requiring presentation to a grand jury, the Department has routinely declined to prosecute executive branch officials who are following presidential instructions to withhold information. Essentially, the Department hasn't chosen to prosecute officials from its own administration. The change in pattern in the Bannon and Navarro cases may have occurred in part because the Biden Justice Department was asked to prosecute people associated with the Trump administration."[174]

Most recently, Congress has directed its tools for enforcing its subpoenas via the contempt process at private individuals, in the context of committee investigations into corporate behavior. Those cases have generated bipartisan support for preserving Congress's institutional prerogatives as they relate to obtaining information from the private sector, and accordingly, do not implicate the same political and constitutional questions. In September 2024, Senate Democrats and Republicans voted to unanimously refer the CEO of Steward Health Care, Ralph de la Torre, for criminal prosecution after he refused to appear at a hearing.[175] Following the Senate's action, de la Torre resigned as CEO and sued to block subpoena enforcement. On September 16, 2025, the district court dismissed the case, citing lawmakers' immunity under the Speech or Debate Clause. De la Torre appealed to the D.C. Circuit.[176]

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[172] United States v. Navarro, 651 F. Supp. 3d 212, 222 (D.D.C. 2023).

[173] Josh Gerstein, Kyle Cheney, & Nicholas Wu, *DOJ declines to charge Meadows, Scavino with contempt of Congress for defying Jan. 6 committee*, Politico (June 3, 2022), https://www.politico.com/news/2022/06/03/doj-declines-to-charge-meadows-scavino-with-contempt-of-congress-for-defying-jan-6-committee-00037230.

[174] Elise J. Bean, *Jury convictions of Bannon and Navarro for refusing congressional subpoena may energize lawmakers' ability to hold powerful people accountable*, Conversation, Nov. 16, 2023, The-Conversation_11.16.2023_Jury-convictions-of-Bannon-and-Navarro-for-refusing-congressional-subpoena-may-energize-lawmakers-ability-to-hold-powerful-people-accountable.pdf.

[175] Emily Loeb, Sam Ungar, & Michael Brady, *Steward Health CEO Saga Signals Escalation of Coercive Congressional Oversight Against Private Parties*, Corporate Counsel (Nov. 15, 2024), https://www.jenner.com/a/web/chsYVx7V7p8YSGBhFzgpyq/steward-health-lawcom.pdf.

[176] Notice of Appeal, De la Torre v. Sanders, No. 1:24-cv-02776 (D.D.C. Oct. 1, 2025), ECF No. 28.

5. Alternatives to Contempt

When an executive branch official refuses to comply with a congressional subpoena and the dispute cannot be resolved by negotiation and compromise, none of the three types of contempt proceedings just described may be completely satisfactory. The statutory civil contempt procedure in the Senate is inapplicable in the case of a subpoena to an executive branch official. The House's experience with its current civil contempt suits have not been as expeditious as anticipated. Inherent contempt is described as "unseemly" in such situations and cumbersome as well. And if the criminal contempt route is taken, a committee faces the almost certain prospect that the U.S. Attorney may decline to prosecute. The U.S. Attorney may rely on the doctrine of prosecutorial discretion to refuse to present the contempt citation or to sign a grand jury indictment if one is handed up, or, alternatively, he or she may be directed by the President not to file the citation on the basis of a claim of executive privilege.

In the absence of a direct court challenge to the validity of the executive's refusal to present and prosecute contempt citations of executive officials, as suggested in Chapter 1, there are various alternatives to the three modes of contempt in the case of an executive branch official: the appropriations for the agency or department, , or even the salary of a specific executive branch official involved in obstructing Congress's oversight (in the House, colloquially known as the Holman Rule)[177] involved in obstructing Congress' oversight can be cut off or reduced when requested information is not supplied; a hold can be placed by a Senator on agency nominees until the information is released; the inherent contempt process can be streamlined by having the fact-finding and recommendation stage of the proceeding performed by a committee before the trial on the floor, and by limiting the penalty for conviction to fines through the exercise of each house's internal rulemaking power; a law might be passed modeled after the now expired Independent Counsel Act that requires a special court to appoint an independent advocate to prosecute contempt of Congress cases when a U.S. Attorney refuses, or is directed not to present a proper citation to a grand jury; and in an exceptional case, the official might be impeached.

Apart from making the inherent contempt process more "seemly" and expeditious, a long-term solution that can be affected by internal rulemaking processes alone, the other remedies do not present the direct, precise or immediate threat that is needed in the investigative context. Appropriations cuts likely would come well after time they are needed and are blunt instruments that may cause unintended consequences to necessary programs. Riders cannot be too precise or they may run the risk of failing as a bill of attainder. Senate holds may have to await an appropriate agency specific nomination and even then the broad power given presidents to make lengthy temporary appointments under the Federal Vacancies Reform Act while a nomination is pending can moot a hold threat. Also, it is unlikely that any President will sign any revival of the independent counsel model or that an override of a presidential veto would succeed. Finally, an impeachment proceeding is too onerous and heavy-handed to be considered seriously for most agency withholding situations that don't implicate impeachable official conduct.

6. Perjury, False Statements, and Obstruction Prosecutions

a. Testimony Under Oath

A witness under oath before a congressional committee who willfully gives false testimony is subject to prosecution for perjury under Section 1621 of Title 18 of the U.S. Code. The false statement must be "willfully" made before a "competent tribunal" and involve a "material matter." For a legislative

[177] *House Practice: A Guide to the Rules, Precedents, and Procedures of the House*, Ch. 4, § 46 (2024), https://www.govinfo.gov/content/pkg/GPO-HPRACTICE-118/pdf/GPO-HPRACTICE-118.pdf.

committee to count as a competent tribunal for perjury purposes a quorum must be present.[178] The quorum problem has been ameliorated in recent years with the adoption of rules establishing less than a majority of members as a quorum for taking testimony: normally two members for House committees[179] and one member for Senate committees.[180] The requisite quorum must be present at the time the alleged perjurious statement is made, not merely at the time the session convenes. No prosecution for perjury will be permitted for statements made only in the presence of committee staff unless the committee has deposition authority and has taken formal action to allow prosecution.[181]

b. Unsworn Statements

Most statements made before Congress, at both the investigatory and hearing phases of oversight, are unsworn.

The practice of swearing in all witnesses at hearings is infrequent. However, prosecutions may be brought to punish congressional witnesses for giving willfully false testimony not under oath. 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.[182]

c. Obstruction of a Congressional Proceeding

Section 1505 of Title 18 makes it a crime for a person to "corruptly" or through the use of "any threatening letter or communication influence, obstruct, or impede, or endeavor to obstruct or impede" the "due and proper exercise of the power of inquiry under which any inquiry or investigation is being held by either House, or any committee of either House or any joint Committee of the Congress." The statute makes it a criminal matter for any obstruction or impeding conduct in relation to a committee inquiry of the House or Senate. Conviction can result in imprisonment for up to five years or a fine.[183]

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[178] Christoffel v. United States, 338 U.S. 84, 89 (1949).

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

[180] 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.

[181] *See* Charles Doyle, Cong. Rsch. Serv. 98-808, *Perjury Under Federal Law*, (Oct. 8, 2024), https://www.congress.gov/crs_external_products/RL/PDF/98-808/98-808.13.pdf .

[182] *Id.*

[183] *See* Charles Doyle, Cong. Rsch. Serv., RL34303 *Obstruction of Justice: An Overview of Some Federal Statutes That Prohibit Interference with Judicial, Executive, or Legislative Activities*, (Apr. 17, 2014), https://www.congress.gov/crs-product/RL34303.

4. The Process of Conducting Investigative Oversight Proceedings

A. The Nature of an Investigative Hearing

A congressional investigative hearing is part of the political process. It is not a judicial fact-finding proceeding reaching for the truth; nor is it an administrative agency's attempt to create a record. It is a proceeding often driven by political considerations. If a proposed investigation is within the scope of a committee's assigned jurisdiction, the manner of conducting the inquiry is subject to the discretion of the Chair. All committees must adopt rules for the conduct of investigatory hearings, which must be followed to the letter.

The rules governing investigative hearings demonstrate that they are very different from court proceedings. For example, in congressional hearings:

A witness is entitled to consult with an attorney, but counsel's overall role is circumscribed.

Familiar courtroom rules of evidence do not apply. Thus, no foundation need be laid for a question, and hearsay testimony may be used.

Witnesses have no right to cross-examine other witnesses or view the materials relied upon to develop committee questions.

Counsel cannot make objections except in the most egregious circumstances and are subject to a chairperson's plenary power to control the conduct and integrity of a hearing, which can include the expulsion of counsel.

B. Jurisdiction and Authority

If a person does not comply with a committee's investigative demands, the committee may hold the person in contempt. However, a contempt conviction will not be upheld if the committee's investigation has not been clearly authorized by the full House or Senate.[1] Both the investigation itself and the specific questions posed must be within the scope of the committee's jurisdiction.[2] A committee cannot issue a subpoena for a subject outside the scope of its jurisdiction, and subpoena enforcement will fail if the committee cannot clearly demonstrate that link and its legislative purpose. The required authorization from the full House or Senate may take the form of a statute,[3] a resolution,[4] or a standing rule of the House or Senate.[5] In the case of a subcommittee investigation, the subject matter must fall within the

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[1] United States v. Rumely, 345 U.S. 41 (1953); Tobin v. United States, 306 F.2d 270 (D.C. Cir. 1962), *cert. denied*, 371 U.S. 902 (1962); United States v. Patterson, 206 F.2d 433 (D.C. Cir. 1953).

[2] *Id; see also* Trump v. Mazars, 591 U.S. 848, 862-63 (2020) (stating that a congressional subpoena must serve a valid legislative purpose).

[3] *Eg.*, 26 U.S.C. §§ 8021, 8022 (2010) (Joint Committee on Taxation).

[4] Resolutions are generally used to establish select or special committees and to delineate their authority and jurisdiction. *See* 4 Deschler's Precedents of the U.S. House of Representatives, ch. 17, 56 (1977); *see also, e.g.*, S. Res. 23, 100th Cong. (1987) (Iran-Contra); S. Res. 495, 96th Cong. (1980) (Billy Carter/Libya); H.R. Res. 12, 100th Cong. (1987) (Iran-Contra).

[5] This mode is the most common today. Both the House and the Senate authorize standing committees to initiate investigations within their jurisdiction, and permit such committees and their subcommittees to issue subpoenas. *See* H.R. House Rules Manual, H.R. Doc. No. 108-241, Rule XI, cl. l (b) and cl. 2 (m) (2005); Manual, S. Doc. No. 98-1, Rule XXVI, cl. 1 (1984).

scope of authority granted by the full committee.[6] Investigations may be conducted, and subpoenas issued, pursuant to a committee's legislative or oversight jurisdiction.[7]

In construing the scope of a committee's authorizing rule or resolution, the Supreme Court has adopted a mode of analysis that resembles the analysis the Court uses in determining the meaning of a statute: it looks first to the words of the resolution, and then, if necessary, to the usual sources of legislative history, including floor statements, reports, and past committee practice. It appears that the clear articulation of committee jurisdiction in both the House and Senate rules, combined with the express authorization of special committees by resolution, has effectively eliminated the lack of jurisdiction defense in contempt proceedings.[8]

C. Initiation of an Investigation

1. Committees and Chairpersons Have Broad Authority to Commence Proceedings

House and Senate rules have vested broad powers in committees and their chairs to conduct oversight and investigative proceedings. House Rule X 2 directs that "[e]ach standing committee … shall review and study on a continuing basis, the application, administration, and effectiveness of those laws, or parts of laws, the subject matter of which is within the jurisdiction of that Committee in order to determine whether such laws and the programs thereunder are being implemented and carried out in accordance with the intent of Congress and whether such programs should be continued, curtailed, or eliminated." House Rule XI 1(b) (1) provides that "[e]ach Committee is authorized at any time to conduct such investigations and studies as it considers necessary and appropriate in the exercise of its responsibilities under Rule X."

The various House committees and subcommittees have their own rules, procedures, and practices. Different committees' inquiries may follow their own individual paths. Committees decide among themselves, by precedent or newly devised procedures, how to conduct any particular inquiry.

a. Requiring Votes, Concurrence, or Consultation Before an Investigation

A committee can adopt rules requiring committee votes before initiating major inquiries, as the House Un-American Activities Committee (HUAC) did in the 1960s.[9] If such a rule is adopted, "it must be

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[6] Gojack v. United States, 384 U.S. 702, 706 (1966). The case involved a rule of the former House Committee on Un-American Activities, which stated that "no major investigations shall be initiated without the approval of a majority of the Committee." The Court reversed the contempt conviction in *Gojack* because the subcommittee's investigation, which resulted in the contempt citation, had not been approved by the committee as its rules required.

[7] A leading study of Senate committee jurisdiction noted that "oversight jurisdiction necessarily flows from specific legislative enactments, but it also emanates from broader and more vaguely defined jurisdiction which committees may exercise in particular subject matter areas." Staff of Temporary Select Comm. to Study the S. Comm. System, 94th Cong., The S. Comm. System: Jurisdictions, Referrals, Numbers and Sizes, and Limitations of Membership 104 (Comm. Print 1976) *see also* United States v. Kamin, 136 F. Supp. 791, 801 (D. Mass. 1956) (providing a judicial application of oversight jurisdiction in the investigatory context).

[8] However, while House and Senate rules make committee jurisdiction clear, this does not mean that a committee's failure to follow its rules cannot be a successful defense in a contempt proceeding. *See* Liveright v. United States, 347 F.2d 473 (D.C. Cir. 1965) (holding a subpoena was invalid where a subcommittee's rules required the whole subcommittee to issue subpoena, but the subpoena was issued only by the Chair, without consulting the rest of the subcommittee); Shelton v. United States, 327 F.2d 601 (D.C. Cir. 1963) (finding a subpoena invalid where committee rules permitted a chairman to delegate "ministerial responsibility" but did not authorize delegation of discretionary function of calling witnesses "it deem[ed] advisable"; "[s]ince the Subcommittee did not authorize the issuance of the subpoena to Shelton, the subpoena was invalid").

[9] *Gojack*, 384 U.S. at 706 ("Rule I of the Rules of Procedure of the House Committee on Un-American Activities provides that 'No major investigation shall be initiated without approval of a majority of the Committee.'").

strictly observed."[10] Both committees had special reasons for adopting such a rule—HUAC's stemming from the controversial nature of its investigations, and HPSCI's because of the sensitivity of its inquiries.

But the vast majority of committees have not adopted such rules, particularly recently.[11] For example, neither the rules for the Select Committee to Investigate the January 6 Attack on the United States Capitol nor the Select Committee on the Strategic Competition Between the United States and China require committee votes to commence an investigation.[12]

More common are committee rules that require either concurrence or consultation with the ranking minority member before the chairperson initiates a formal investigation.[13] House standing committees are also authorized to establish task forces, special subcommittees, or sub-units to assist in carrying out their oversight functions.[14] The full House may authorize a task force and endow it with all the authorities of a select committee as was done in the case of the 118th Congress with H.Res. 1367, establishing the Task Force on the Attempted Assassination of Donald J. Trump.

Committee chairs may commence informal, preparatory inquiries through inquiry letters, scheduling of hearings, or staff studies and interviews without committee votes or minority party participation. In accordance with the responsibility to engage in continuous oversight, chairs of committees and subcommittees have traditionally initiated preliminary reviews and studies (i.e., "preliminary investigations" to be undertaken by the chair and subject to the ultimate control and direction of the committee).

2. Preliminary Inquiries Can Be Protective of Important Evidence

In certain circumstances, a chairperson's preliminary inquiry can be essential to minimizing the possibility that documents are destroyed before formal investigations begin. In this regard, the courts have held that the legal obligation to surrender documents requested by the committee chair arises at the time of the official request.[15] The courts have construed 18 U.S.C. § 1505, a statute proscribing the obstruction of congressional proceedings, to cover obstructive acts in anticipation of a subpoena.[16]

For example, in *United States v. Mitchell*, the appeals court upheld a conviction for obstructing an investigation by the House Committee on Small Business. The court said of the obstruction statute, "[t]o give §1505 the protective force it was intended, corrupt endeavors to influence congressional investigations must be proscribed even when they occur prior to formal committee authorization."[17] The appeals court clearly approved the notion that a chairperson can initiate a proper committee investigation without official committee sanction and identified two classic indications of this: the writing of an official

[10] *Gojack*, 384 U.S. at 708.

[11] Senate rules are comparable. *See* S. Standing Rule XXVI, §§ 1 and 8(a).

[12] See H.R. Res. 503, 117th Cong. (2021); H.R. Res. 11, 118th Cong. (2023).

[13] *See, e.g.*, S. Banking Comm., Rule 2 (concurrence); H.R. Comm. on Resources, Rule 7 (consultation).

[14] *See* H.R. Rule X(5)(b)(2)(C). The duration of such task forces may be limited to less than six months so that member assignments do not count against the limitation on subcommittee service under the rule.

[15] *See, e.g.*, Ashland Oil v. FTC, 548 F.2d 977, 997–81 (D.C. Cir. 1976).

[16] *See, e.g.*, United States v. Mitchell, 877 F.2d 294, 300–01 (4th Cir. 1989); United States v. Tallant, 407 F. Supp. 878, 888 (N.D. Ga. 1975).

[17] 877 F.2d at 301.

letter and the handling of the investigation by a committee staffer (the "chief investigator of the Small Business Committee").

The U.S. District Court for the District of Columbia upheld chairman-initiated inquiries in a series of Iran-Contra cases. In 1985 and 1986 the Chairmen of the HPSCI and the House Subcommittee on Western Hemisphere Affairs sent inquiry letters to the National Security Council (NSC) seeking documents and other information regarding allegations in press stories about NSC activities. Those letters were sent without prior committee or subcommittee votes, and the inquiries occurred without the more formal procedures of subpoenas to witnesses, or witnesses under oath. Despite the absence of such prior votes or other formal procedure, members of the NSC staff were indicted for obstructing the inquiries, destroying records, and providing false answers. The Court rejected the defendants' challenges to the indictment, holding that the defendants' acts constituted the felony offenses of obstruction of Congress and of making false statements, even though the inquiry letters and responses occurred in the absence of votes, subpoenas, and oaths.[18] As in *Mitchell*, the Court emphasized that the inquiry letters of the Chairmen were clearly written in their official capacities and identified.[19]

In sum, in the absence of a prohibitive committee rule, there appears to be an inherent authority in committee chairpersons, derived from the duty to engage in continuous oversight, to initiate preliminary inquiries that do not require the concurrence or participation of committee members. Such chair-initiated actions will be deemed by the courts as official committee acts that trigger the proscriptions of federal criminal laws protecting against the obstruction of congressional proceedings.[20]

D. Rules Applicable to Hearings

1. Committees Must Adopt and Publish Their Rules of Procedure

House Rule XI.2(a) and Senate Rule XXVI(2) require that committees adopt written rules of procedure and publish them in the Congressional Record.[21] Once properly issued, such rules are judicially recognized by courts and must be strictly observed. The failure to publish committee rules has resulted in the invalidation of a perjury prosecution.[22] The House and many individual Senate committees require that each witness be given a copy of a committee's rules.

[18] *See* United States v. North, 708 F. Supp. 372, 374 notes 3 and 4 (D.D.C. 1988); United States v. North, 708 F. Supp. 380, 381–82 (D.D.C. 1988).

[19] The subsequent histories of the trials, appeals and ultimate reversals of the convictions of Oliver North and John Poindexter involved other unrelated legal grounds.

[20] Interestingly, in the 114th Congress the Senate Committee on Energy and Natural Resources amended its rules to authorize either the chairman *or* ranking member to direct a preliminary inquiry "to determine whether there is substantial credible evidence" to warrant a formal committee investigation. Rule 10 (c). The chair and ranking member still must both agree to a formal investigation.

[21] United States v. Reinecke, 524 F.2d 435 (D.C. Cir. 1975) (failure to publish committee rule setting one senator as a quorum for taking hearing testimony held a sufficient ground to reverse a perjury conviction); *See* Gibson Dunn, *Table of Authorities of House and Senate Committees 119th Congress*, https://www.gibsondunn.com/wp-content/uploads/2025/07/congressional-investigations-table-of-authorities-119th-congress.pdf.

[22] Yellin v. United States, 374 U.S. 109 (1963).

2. Advance Notice of Hearings Must Be Published

Absent good cause, House and Senate rules require committees to provide at least one week's public notice for the holding of a hearing.[23] In addition to the date, time, and location of the hearing, there must be a description of the subject matter. Individual committee rules provide a separate minimum notice for witnesses. Non-governmental witnesses in the House must include their curriculum vitae in their written statements. They must also include a disclosure of the amount and source (by agency program) of each federal grant or contract received in the current and preceding two fiscal years by the witness or the entity represented by the witness.

3. Quorum Requirements for Certain Investigative Actions

Both the House and the Senate have adopted rules permitting a reduced quorum for taking testimony and receiving evidence. House hearings may be conducted if at least two members are present; most Senate committees permit hearings with only one member in attendance. Some committees require a higher quorum for sworn rather than unsworn testimony. For perjury purposes, the quorum requirement must be met at the time the allegedly perjured testimony is given, not at the beginning of the session.

Reduced quorum requirement rules do not apply, however, to authorizations for the issuance of subpoenas. For subpoenas, Senate rules require a one-third quorum, while the House requires a quorum of a majority of the members, unless a committee delegates authority for subpoena issuance to its Chairperson, which most House committees do at this point.[24]

4. Closed Sessions

Senate and House rules limit the authority of their committees to meet in closed session. A House rule provides that testimony "shall" be held in closed session only if a majority of a committee or subcommittee determines that public testimony "would endanger national security, would compromise sensitive law enforcement information," or "would tend to defame, degrade, or incriminate any person."[25] 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.[26] However, confidential material not obtained in closed sessions is not so protected.

5. Audio and Visual Coverage of Open Hearings

House and Senate hearings open to the public are required to allow audio and visual coverage subject to implementing rules.[27] Neither house permits a subpoenaed witness the right to demand that television, radio, or still photographic coverage cease during his or her testimony.

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[23] H.R. Rule XI(2)(g)(3); S. Rule XXVI(4)(a). The House Rules also permit an exception to the one-week notice requirement based on committee vote. H.R. Rule XI(2)(g)(3).

[24] S. Rule XXVI(7)(a)(1); H.R. Rule XI(2)(m)(3).

[25] H.R. Rule XI(2)(K)(5); H.R. Rule XI(2)(K)(7). Many Senate committees have adopted a similar rule.

[26] H.R. Rule XI(2)(k)((7). Many Senate committees have adopted a similar rule.

[27] H.R. Rule IX(4)(e) and (f).

E. Conduct of Hearings

1. Opening Procedures

The chair usually makes an opening statement to define the subject matter of the hearing and establish the pertinence of questions put to the witnesses. Not all committees swear in their witnesses; a few committees require that all witnesses be sworn. Most committees leave the swearing of witnesses to the discretion of the chair. If a committee wishes the potential sanction of perjury to apply, it should, in accordance with the statute, administer an oath and swear in its witnesses. It should be noted that false statements not under oath are also subject to criminal sanctions.[28]

2. Rights of Witnesses and the Role of Counsel

Absent an explicit committee rule, or the applicability of a limitation under the Constitution, witnesses' rights at an investigative hearing are at the sufferance of the committee. Indeed, courts have deemed congressional investigatory proceedings the "legislative branch equivalent of a grand jury,"[29] a proceeding in which witness's rights are highly circumscribed.

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

House Rules and Senate committee rules recognize a witness's right to be accompanied by counsel.[30] The House rule limits the role of counsel as solely "for the purpose of advising [witnesses] concerning their constitutional rights."[31] Some committees have adopted rules specifically prohibiting counsel from "coaching" witnesses during their testimony.[32] Oral arguments and counsel objections to member questions and chair rulings can be deemed out of bounds. Many Senate committees have adopted more lenient rules in allowing counsel advice with respect to the witness's "legal rights." Both houses have rules that authorize chairs to maintain the decorum and integrity of a hearing,[33] and a few committees have adopted rules that explicitly allow chairs to exclude counsel for improper conduct or for apparent conflicts of interest that would preclude candid, unintimidated witness testimony.[34] House Rule XI.2(k)(4) provides that "[t]he chairman may punish breaches of order and decorum, and of professional

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[28] 18 U.S.C. § 1001. See supra discussion in Chapter 3, section 6.b. "Unsworn Statements.".

[29] *See* S. Select Comm. on Ethics v. Packwood, 845 F. Supp. 17, 21 (D.D.C. 1994), *stay pending appeal denied*, 510 U.S. 1319 (1994).

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

[31] House Rule XI, (2)(k)(3).

[32] *See, e.g.,* S. Permanent Subcomm. on Investigations, Rule 8.

[33] H.R. Rule XI(2)(k)(4) provides that "[t]he chair may punish breaches of order and decorum, and of professional ethics on the part of counsel, by censure and exclusion from the hearings; and the committee may cite the offender to the House for contempt."

[34] *See, e.g.*, Senate Homeland Security and Governmental Affairs Comm., Rule 5D; S. Permanent Subcomm. on Investigations, Rule 8.

ethics on the part of counsel, by censure or exclusion from the hearings; and the Committee may cite the offender for contempt." Some Senate committees have adopted similar rules.[35]

There is no right to cross-examine adverse witnesses, or to discovery of materials utilized by a committee as the basis for questions.[36] Witnesses are entitled to a range of constitutional protections, but their access to privileges traditionally recognized in court proceedings can be limited. Indeed, the Supreme Court has commented that "only infrequently have witnesses [in congressional hearings] been afforded the procedural rights normally associated with an adjudicative proceeding."[37]

3. Committees Have the Ultimate Say Respecting Which Agency Witnesses Shall Appear Before Them and Who Will Represent Them

As a matter of practice, committees normally allow witnesses their choice of representation and afford wide leeway with respect to their representational role. But under certain circumstances, agency witnesses raise special considerations and different concerns, particularly where the investigatory hearing involves issues of agency corruption, maladministration, abuse, or waste.

The ability of a committee to effectively carry out its oversight responsibilities requires that it be confident that the responses it obtains from officers and employees with respect to the administration of agency programs are candid, objective, and truthful. Committees have no way to ascertain with any degree of certainty whether a witness truly requested, and in fact wants, to be accompanied by agency personnel. Where a potential conflict of interest situation appears to arise, a committee will seek to insulate a witness from the presence of agency personnel during a staff interview, deposition, or hearing testimony. For example, if the chairperson determines that a witness's agency-selected counsel raises a potential conflict of interest, or might chill the witness's candor, that counsel can be excluded from a hearing or deposition. The determination stems from the need to ensure effective oversight of agency activities while protecting witnesses from the possibility of abuse, threats, or coercion.

In addition to the possibility that the mere presence of agency counsel would have a chilling effect on employees' testimony, counsel for the executive branch have at times directly instructed agency witnesses not to answer a committee's questions. To justify these instructions, counsel for the executive branch have pointed to statutes protecting the confidentiality of information gathered from private sources; the dangers of chilling the agency's deliberative processes; the prerogative of an agency to determine which agency representative should testify; and even agency-promulgated regulations forbidding employee testimony before a congressional committee.[38] These assertions have come principally from the Department of Justice, but many agencies have raised similar claims from time to time. In most cases, they proved unsuccessful in the face of determined committee engagement. The inquiring committee need only show that the information sought is within the broad subject matter of its authorized jurisdiction, is in aid of a legitimate legislative function, and is pertinent to the area of concern.

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[35] *See, e.g.,* Senate Aging Comm., Rule V. 8; S. Permanent Subcomm. on Investigations, Rule 7.

[36] United States v. Fort, 443 F.2d 670 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 932 (1971).

[37] Hannah v. Larche, 363 U.S.420, 445 (1960).

[38] Majority Staff of H. Comm. on Energy and Commerce and H. Comm. on Ways and Means, *Joint Congressional Investigative Report Into the Source of Funding for the ACA's Cost Sharing Reduction Program* (2016), *Joint Congressional Investigative Report of Funding for the ACA's Cost Sharing Reduction Program 89-156*. The report describes at length the tactics employed by attorneys from the Departments of the Treasury, Health and Human Services, and the Office of Management and Budget to obstruct compliance with the Committees' information requests, which included instructions to present and former agency employees to limit their testimony.

Since the 2017 update to this handbook, Republican and Democratic administrations alike have relied on a series of opinions by the Office of Legal Counsel to insist that executive branch agency counsel be allowed to attend when committees depose government witnesses. A rule that prohibited agency counsel from attending depositions conducted by the House Committee on Oversight and Government Reform that was first adopted[39] in 1998 under Chairman Dan Burton was applied House-wide by the Democratic Rules Committee chair in 2019.[40] The Republican-led House of Representatives preserved the categorical prohibition on executive branch counsel from attending depositions in the rules packages for the 118th and 119th congresses[41]—even as the executive branch has categorically rejected the rule as unconstitutional.[42]

The issue came to a head in 2024, when the House Judiciary Committee filed a motion in federal district court seeking to compel an executive branch witness's testimony—without agency counsel—after his employer, the Department of Justice, had instructed him not to appear because agency counsel would have been excluded from the deposition. DOJ contended that a subpoena compelling testimony about an agency employee's official duties, without agency counsel present, is unconstitutional and thus unenforceable, notwithstanding the House Rule that barred agency counsel from attending.[43] The House Judiciary Committee ultimately voluntarily dismissed the case for unknown reasons.[44] Because the court did not resolve the merits of that argument, so it remains an open question whether a committee can lawfully exclude agency counsel.

4. Effect on Investigative Proceedings of a Final Adjournment of a Chamber at the End of a Legislative Session

House and Senate rules allow for the continuation of investigative proceedings when each house votes to end a legislative session and reconvene on a specified date in the next session.[45] This is commonly called *sine die* adjournment. Committees are authorized to continue or initiate investigations, hold hearings, and issue and enforce subpoenas during the *sine die* recess. Also, under the criminal contempt statute, committees can recommend a resolution to the Speaker of the House or President of the Senate, who may certify a contempt of Congress citation to the U.S. Attorney for presentation to a grand jury.

The recess period may be for days, weeks, or even months, so authorization to continue all legislative functions other than lawmaking is necessary to maintain continuity and efficiency. When the next session of Congress is the first session of a new Congress, House committees must take additional actions to

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[39] Rule 20, Rules of the H. Comm. on Oversight and Gov't Reform, 105th Cong., https://www.govinfo.gov/content/pkg/CPRT-105HPRT49381/pdf/CPRT-105HPRT49381.pdf#page=9.

[40] *See* 116th Congress Regulations for Use of Deposition Authority, 116th Cong., https://www.congress.gov/116/crec/2019/01/25/CREC-2019-01-25-pt1-PgH1216-2.pdf

[41] H. Rep. Res. 5 – Adopting the Rules of the House of Representatives for the One Hundred Eighteenth Congress, and for Other Purposes, 118th Cong. (2023).

[42] Attempted Exclusion of Agency Counsel from Congressional Depositions of Agency Employees, 43 Op. O.L.C. 131, 132 (2019) ("Faced squarely with the constitutional question here, we concluded that Congress may not compel an Executive Branch witness to appear without agency counsel and thereby compromise the President's constitutional authority to control the disclosure of privileged information and to supervise the Executive Branch's communications with congressional entities.").

[43] *See* Complaint, Committee on the Judiciary v. Chan, No. 1:24-cv-00344 (D.D.C. Feb. 6, 2024), ECF No. 1.

[44] Notice of Voluntary Dismissal, Committee on the Judiciary v. Chan, No. 1:24-cv-00344 (D.D.C. Feb. 6, 2024), ECF No. 1.

[45] H.R. Rule XI.2(m)(1); Standing S. Rule XXVI (1).

continue investigations; investigations must be reauthorized in the House Rules and subpoenas reissued.[46] Since the Senate is a continuing body, its committee investigations may continue into the next session of a new Congress. As a measure of precaution, some Senate committees certify a "continuing interest" in the investigation and in any subpoenas that had been issued.

[46] H.R. Rule X(1).

5. The Breadth of Congress's Authority to Access Information in Our Scheme of Separated Powers

Overview

Congress's broad investigatory powers are constrained both by the structural limitations imposed by our constitutional system of separated and balanced powers and by the individual rights guaranteed by the Bill of Rights. Thus, the President, subordinate officials, and individuals called as witnesses can assert various privileges, which enable them to resist or limit the scope of congressional inquiries. These privileges, however, are also limited.

The Supreme Court has recognized the President's constitutionally based privilege to protect the confidentiality of documents or other information that reflects presidential decision-making and deliberations. This presidential executive privilege, however, is qualified. Congress and other appropriate investigative entities may overcome the privilege by a sufficient showing of need and the inability to obtain the information elsewhere. Moreover, neither the Constitution nor the courts have provided a special exemption protecting the confidentiality of national security or foreign affairs information. But self-imposed congressional constraints on information access in these sensitive areas have raised serious institutional and practical concerns as to the current effectiveness of oversight of executive actions in these areas.

With regard to individual rights, the Supreme Court has recognized that individuals subject to congressional inquiries are protected by the First, Fourth, and Fifth Amendments, though in many important respects those rights may be qualified by Congress's constitutionally rooted investigatory authority.

A. Executive Privilege

While the precise contours of executive privilege are contested, the term "is generally used to refer to a wide variety of evidentiary and substantive privileges that the courts accord to the executive branch."[1] Broadly speaking, the doctrine is based upon constitutional principles of separation of powers, and it is designed to enable the President to receive candid advice from advisers, as well as to safeguard information the disclosure of which might threaten national security.

At the time this handbook was drafted in 2009, and when it was last updated in 2017, the caselaw was somewhat more favorable to the legislative branch's narrower interpretation of the scope of the privilege. The summary and timeline of cases below reflects the evolution of the courts' interpretation, with updates to account for the most recent decisions that have further clarified the bounds of executive privilege.

1. The Presidential Communication Privilege: A Summary of the State of the Law

The presidential communications privilege is a subcategory of executive privilege that protects the core communications of advisers closest to the President. There is a great deal of confusion about the actual scope of the presidential communications privilege. Various opinions and pronouncements from the Justice Department's Office of Legal Counsel and the White House Counsel's Office have described a

[1] In re Sealed Case (Espy), 121 F.3d 729, 735 n.2 (D.C. Cir. 1997).

very broad scope and reach of the presidential privilege, particularly immediately following January 6, 2021.[2] Aggressive assertions of executive privilege have left Congress to turn to the courts to protect its oversight role; recent court opinions reflect a relatively narrow understanding of the privilege, and no judicial ruling on the merits has upheld a claim of presidential privilege since the Supreme Court's 1974 ruling in *United States v. Nixon*, which recognized the qualified privilege but denied its efficacy in that case. In practice, many claims of executive privilege have been withdrawn in the face of adamant congressional resistance and courts have encouraged "a spirit of dynamic compromise" to resolve interbranch informational disputes.[3]

The state of the caselaw that defined the presidential communications privilege at the time of the last update to this handbook may be briefly summarized by the bullet points below, and the relevant cases are described more fully in this section. More recent cases, however, have redefined the scope of the privilege in a way that more closely aligns with the view of the executive branch.

- The constitutionally based presidential communications privilege is presumptively valid when asserted.

- There is no requirement that the president must have seen or even been aware of the documents over which he or she claims this privilege.

- The communication(s) in question must relate to a "quintessential and non-delegable presidential power" that requires direct presidential decision-making.

- The privilege is limited to the core constitutional powers of the president, such as the power to appoint and remove executive officials, the commander-in-chief power, the sole authority to receive ambassadors and other public ministers, and the pardon power.

- The privilege does not cover matters handled within the broader executive branch beyond the Executive Office of the President. Thus, it does not cover decision-making regarding the implementation of laws that delegate policymaking authority to the heads of departments and agencies, or which allow presidential delegations of authority.

- The subject communication must be authored or "solicited and received" by the President or a close White House adviser. The adviser must be in "operational proximity" to the President, which effectively limits coverage of the privilege to the administrative boundaries of the Executive Office of the President and the White House.

- The privilege remains a qualified privilege that may be overcome by a showing that the information sought "likely contains important evidence" and is unavailable elsewhere to an appropriate investigatory authority. The President may not prevent such a showing of need by granting absolute immunity to witnesses who would otherwise provide the information necessary to show that "important" evidence exists.

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[2] *See, e.g.*, Congressional Oversight of the White House, 45 Op. O.L.C (Jan. 8, 2021) (slip op. at 36) (opining that "communications within the White House and between White House staff and other [Executive Office of the President] components that concern possible presidential decision-making will normally fall under the presidential communications component of executive privilege").

[3] United States v. AT&T, 567 F.2d 121, 127 (D.C. Cir. 1977).

2. Evolution of the Law of Executive Privilege and Helpful Guidance from the Cases

Presidential claims of a right to preserve the confidentiality of information and documents in the face of legislative demands have figured prominently, though intermittently, in executive-congressional relations since at least 1792. In that year, President Washington discussed with his cabinet how to respond to a congressional inquiry into the military debacle that befell General St. Clair's expedition.[4] Few such inter-branch disputes over access to information have reached the courts. The vast majority of such disputes are usually resolved through political negotiation.[5] In fact, it was not until the Watergate-related lawsuits in the 1970s seeking access to President Nixon's tapes that the existence of a presidential confidentiality privilege was recognized by the Supreme Court.[6] It then became judicially established as necessary to protect the President's status in our constitutional scheme of separated powers.

a. Nixon and Post-Watergate Rulings

The *Nixon* and post-Watergate cases established the broad contours of the presidential communications privilege. Under those precedents, the President can invoke the privilege, which is constitutionally rooted, when asked to produce documents or other materials or information that reflect presidential decision-making and deliberations that the President believes should remain confidential. If the President does so, the materials become presumptively protected from disclosure. The privilege, however, is qualified, not absolute, and can be overcome by an adequate showing of need. Finally, while reviewing courts have expressed reluctance to balance executive privilege claims against a congressional demand for information, they have acknowledged they will do so if the political branches have tried in good faith but failed to reach an accommodation.

Nixon and related post-Watergate rulings left important gaps in the law of presidential privilege. The significant issues left open included:

Does the President need to have actually seen or been familiar with the disputed matter?

Does the presidential privilege encompass documents and information developed by, or in the possession of, officers and employees in the departments and agencies of the executive branch?

Does the privilege encompass all communications with respect to which the President may be interested, or is it confined to actual presidential decision-making? And, if the latter, is it limited to any particular type of presidential decision-making?

Precisely what demonstration of need must be shown to justify release of materials that qualify for the privilege?

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[4] *See* Archibald Cox, *Executive Privilege*, 122 U. Pa. L. Rev. 1383, 1395–1405 (1979). *See generally* Mark J. Rozell & Mitchel A. Sollenberger, *Executive Privilege: Presidential Powers, Secrecy, and Accountability* (2d ed., Revised 2002); Mark J. Rozell, *Executive Privilege and Modern Presidents: In Nixon's Shadow*, 83 Minn. L. Rev. 1069 (1999); *Portraits in Oversight: General St. Clair's Defeat*, Levin Ctr., https://www.levin-center.org/congress-first-investigation-general-st-clairs-defeat/ (last visited Oct. 15, 2025).

[5] See Neil Devins, Congressional-Executive Information Access Disputes: A Modest Proposal-Do Nothing, 48 Adm. L. Rev. 109 (1996).

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

The Court of Appeals for the D.C. Circuit has addressed these issues in *In re Sealed Case (Espy)*,[7] *Judicial Watch v. Department of Justice*,[8] and *Loving v. Department of Defense*.[9] Multiple district court decisions in *House Committee on the Judiciary v. Miers*[10], and *United States v. Navarro*[11] provided further guidance on the scope of the privilege and requirements for invocation. Taken together, these decisions narrowed and clarified the limits of the privilege and substantially altered the legal playing field in resolving such disputes.

b. Espy

The *Espy* case arose out of an Office of Independent Counsel (OIC) investigation of former Agriculture Secretary Mike Espy. When allegations of improprieties by Espy surfaced in March 1994, President Clinton ordered the White House Counsel's office to investigate. That office prepared a report for the President, which was publicly released in October 1994. The President never saw any of the documents underlying or supporting the report.

Separately, a special panel of the D.C. Circuit, at the request of the Attorney General, appointed an independent counsel, and a grand jury issued a subpoena for all documents that were accumulated or used in preparation of the White House Counsel's report. In response, the President withheld 84 documents, claiming both the executive and deliberative process privileges for all documents. In ruling on the independent counsel's motion to compel, the district court upheld the privilege claims and quashed the subpoena. In its written opinion the Court did not discuss the documents in any detail and provided no analysis of the grand jury's need for the documents. The appeals court panel vacated the district court's decision.

i. The Presidential Communications Privilege Is Constitutionally Based, but Qualified, and May Be Overcome by a Substantial Showing of Need and Unavailability

At the outset, the D.C. Circuit's opinion carefully distinguished between the "presidential communications privilege" and the "deliberative process privilege." Both, the Court observed, are executive privileges designed to protect the confidentiality of executive branch decision-making. But the deliberative process privilege (discussed in detail in Chapter 6) applies to executive branch officials generally and is a qualified privilege. It, therefore, can be overcome with a lesser showing of need and "disappears altogether when there is any reason to believe government misconduct [has] occurred."[12]

On the other hand, the Court explained, the presidential communications privilege "is rooted in constitutional separation of powers principles and the President's unique constitutional role" and applies only to "direct decision-making by the President."[13] The privilege may be overcome only by a substantial

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[7] 121 F.3d 729 (D.C. Cir. 1997).

[8] 365 F.3d 1108 (D.C. Cir. 2004).

[9] 550 F.3d 32 (D.C. Cir. 2008).

[10] 558 F. Supp. 2d 53 (D.D.C. 2008).

[11] 651 F. Supp. 3d 212 (D.D.C. 2023).

[12] 121 F.3d at 745-46. *See also id.* at 737-38 ("[W]here there is reason to believe the documents sought may shed light on government misconduct, 'the [deliberative process] privilege is routinely denied' on the grounds that shielding internal government deliberations in this context does not serve 'the public interest in honest, effective government.'").

[13] *Id.* at 745, 752. *See also id.* at 753 ("… these communications nonetheless are intimately connected to his presidential decision-making"). The *Espy* court's standard is consistent with the showing required by *United States v. Nixon*, though somewhat more

showing that "the subpoenaed materials likely contain[] important evidence" and that "the evidence is not available with due diligence elsewhere."[14] The presidential communications privilege applies to all documents in their entirety[15] and covers final and post-decisional materials as well as pre-deliberative ones.[16]

ii. The President Need Not Have Seen or Known of the Documents in Question, but They Must Have Been Received by a Close Adviser; Agency Head Review is Not Sufficient.

The presidential communications privilege must cover communications made or received by presidential advisers in the course of preparing advice for the President, even if those communications are not made directly to the President. The Court rested its conclusion on "the President's dependence on presidential advisers" and "the need to provide sufficient elbow room for advisers to obtain information from all knowledgeable sources."[17] Thus, the privilege applies "both to communications which these advisers solicited and received from others as well as those they authored themselves, though defendants must present evidence that the President has made a "formal claim of privilege" after "personal consideration."[18] The privilege must also extend to communications authored or received in response to a solicitation by members of a presidential adviser's staff."[19]

However, the privilege does not extend beyond close presidential advisers to reach communications with heads of agencies or their staffs. The Court emphasized:

> Not every person who plays a role in the development of presidential advice, no matter how remote and removed from the President, can qualify for the privilege. In particular,

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specific. It is inconsistent with the standard enunciated by *Senate Select Committee v. Nixon*, a court of appeals case decided several months before *United States v. Nixon*. There the panel held that the committee, which sought five tape recordings of presidential conversations relating to the Watergate break-in, had not met its burden of showing that "the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the Committee's function." 498 F. 2d at 730–31. It reasoned that since the House impeachment committee already had the tapes, "the Select Committee's immediate oversight need for the subpoenaed tapes is, from a congressional perspective, merely cumulative." *Id*. at 732. The court did not feel that the materials were "critical to the performance of [its] legislative functions" because "no specific legislative decision" can "responsibly be made without access to the materials …" *Id*. at 733. The court's statement that the Watergate Committee's need for the tapes was "merely cumulative" has since been utilized by the executive as the basis for arguing that Congress's need for executive information is less compelling when a committee's function is oversight rather than when it is considering legislative proposals. *See* Todd Garvey & Alissa M. Dolan, Cong. Rsch. Serv., R42670, Presidential Claims of Executive Privilege: History, Law, Practice and Recent Developments 3 n. 20 (2014), https://www.congress.gov/crs_external_products/R/PDF/R42670/R42670.5.pdf. The appeals court made it clear, however, that its ruling was limited to the unique nature of the case's factual and historical context: The committee was solely an investigative and reporting body with no legislative or impeachment authority; transcripts of the tapes had been publicly released; and the House impeachment committee already had copies of the tapes. The Court concluded that "the need demonstrated by the Select Committee in the particular circumstances of this case, including the subsequent and on-going investigation of the House Judiciary Committee, is too attenuated and too tangential to permit a judicial judgment that the President is required to comply with the committee's subpoena." The Supreme Court has never made a distinction between Congress's right to executive branch information to use in support of its oversight function versus its responsibility to enact, amend, and repeal laws. *Id.* at 2-5.

[14] *In re Sealed Case* (Espy), 121 F.3d at 754, 757.

[15] In contrast, the deliberative process privilege does not protect documents that simply state or explain a decision the government has already made, or material that is purely factual, unless the material is inextricably intertwined with the deliberative portions of the materials so that disclosure would effectively reveal the deliberations. *In re Sealed Case (Espy)*, 121 F.3d at 737.

[16] *Id.* at 745.

[17] *Id.* at 752.

[18] Navarro, 651 F. Supp. 3d at 221.

[19] In re Sealed Case (Espy), 121 F.3d at 752.

> the privilege should not extend to staff outside the White House in executive branch agencies …. The presidential communications privilege should never serve as a means of shielding information regarding governmental operations that do not call ultimately for direct decision-making by the President.[20]

iii. The Privilege Applies Only to the "Quintessential and Non-Delegable" Powers of the President

The presidential communications privilege is limited to "direct decision-making by the President" and decisions regarding quintessential and non-delegable Presidential power."[21] The *Espy* case itself concerned the president's Article II appointment and removal power. The court's opinion distinguishes this specific appointment and removal power from general "presidential powers and responsibilities" that "can be exercised or performed without the President's direct involvement, pursuant to a presidential delegation of power or statutory framework."[22] This suggests that only powers that require direct presidential involvement would be considered "quintessential and non-delegable" under *Espy*.

This category of "quintessential and non-delegable" powers includes Article II powers such as the commander-in-chief power, the sole authority to receive ambassadors and other public ministers, the power to negotiate treaties, and the power to grant pardons and reprieves. Importantly, *Espy* does not state that all Article II powers would be considered "quintessential and non-delegable." Additionally, the privilege would seem not to cover decision-making based upon powers granted to the president by a statute, or decisions required by law to be made by agency heads.

Thus, communications regarding such matters as rulemaking, environmental policy, consumer protection, workplace safety, securities regulation, and labor relations would not be covered. Of course, the President's role in supervising and coordinating decision-making in the executive branch remains unimpeded. But the President's communications in furtherance of such activities would not be protected from disclosure by this constitutional privilege.

c. Judicial Watch

These limits in the scope of the presidential communications privilege were further clarified in the D.C. Circuit's 2004 decision in *Judicial Watch, Inc. v. Department of Justice.*[23] *Judicial Watch* involved requests for documents concerning pardon applications and grants reviewed by the Justice Department for President Clinton.[24] The President withheld approximately 4,300 documents on the grounds that they were

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[20] *Id.* (footnote omitted).

[21] *Id.* at 752.

[22] *Id.* at 752–53. The reference the court uses to illustrate the latter category is the president's Article II duty "to take care that the laws are faithfully executed," a constitutional direction that the courts have consistently held not to be a source of presidential power but rather an obligation on the President to see to it that the will of Congress is carried out by the executive bureaucracy. *See, e.g.*, Kendall v. United States ex rel. Stokes, 37 U.S. 524, 612–13 (1838); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952); Myers v. United States, 272 U.S. 52, 177 (1926) (Holmes, J., dissenting); National Treasury Employees Union v. Nixon, 492 F.2d 587, 604 (D.C. Cir. 1974).

[23] 365 F.3d 1108 (D.C. Cir. 2004). The panel split 2-1, with Judge Rogers writing for the majority and Judge Randolph dissenting.

[24] The president has delegated the formal process of review and recommendation of his pardon authority to the attorney general, who, in turn, has delegated it to the deputy attorney general. The deputy attorney general oversees the work of the Office of the Pardon Attorney.

protected by the presidential communications and deliberative process privileges. The district court held that because the materials sought had been produced for the sole purpose of advising the President on a "quintessential and non-delegable Presidential power"—namely, the exercise of the President's constitutional pardon authority—they were protected from disclosure.[25] However, the appeals court reversed on the grounds that the review did not involve the President or close White House advisers.

i. Agency Documents Not Solicited or Received by Close Presidential Advisers Are Not Covered by the President's Privilege

In rejecting the claim of presidential communications privilege in *Judicial Watch*, the D.C. Circuit held that "internal agency documents that are not 'solicited and received' by the President or his Office are instead protected against disclosure, if at all, by the deliberative process privilege."[26] The Court emphasized that the "solicited and received" limitation from the *Espy* case "is necessitated by the principles underlying the presidential communications privilege, and a recognition of the dangers of expanding it too far."[27] In rejecting the government's argument that the privilege should be applicable to all departmental and agency communications related to the pardon recommendations for the President, the Court held that:

> Communications never received by the President or his Office are unlikely to 'be revelatory of his deliberations' … nor is there reason to fear that the Deputy Attorney General's candor or the quality of the Deputy's pardon recommendations would be sacrificed if the presidential communications privilege did not apply to internal agency documents.[28]

The *Judicial Watch* decision makes it clear that cabinet department heads will not be treated as part of the President's immediate personal staff or as some unit of the Executive Office of the President.[29] This requirement of proximity to the President confines the potentially broad scope of the privilege. Thus, for the privilege to apply, not only must the presidential decision at issue involve a non-delegable, core presidential function, but the operating officials must also be sufficiently close to the President and senior White House advisers.[30]

d. Loving

In *Loving v. Department of Defense*, the D.C. Circuit affirmed the distinction between the deliberative process privilege and the presidential communications privilege that had been carefully delineated in *Espy* and *Judicial Watch*.[31] Loving had been court-martialed, convicted of murder, and sentenced to death. By law, the President must approve all such death sentences. Loving filed a FOIA request seeking disclosure of documents including a Defense Department memorandum containing recommendations to the President about his case and sentence. The *Loving* court held that the presidential communications

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[25] *Judicial Watch*, 365 F.3d at 1109–12.

[26] *Id.* at 1112, 1114, 1123.

[27] *Id.* at 1114–15.

[28] *Id*. at 1117.

[29] *Id*. at 1121–22.

[30] *Id.* at 1118–24. In *Judicial Watch*, the deliberative process privilege was also found insufficient and the appeals court ordered the disclosure of the 4,300 withheld documents.

[31] 550 F.3d 32 (D.C. Cir. 2008).

privilege applies only where documents or communications "directly involve the President" or were "solicited and received" by White House advisers.[32] After noting the two distinct versions of the privilege,[33] the appeals court determined that the documents in question fell "squarely within the presidential communications privilege because they 'directly involve' the President."[34] The court also clarified that communications that "directly involve" the President need not actually be "solicited and received" by him or her. The mere fact that the documents were viewed by the President was sufficient to bring them within the ambit of the privilege.[35]

e. Miers

The 2008 district court ruling in *House Committee on the Judiciary v. Miers*[36] sheds further light on the limits of the executive branch's ability to shield presidential advisors from congressional oversight. The case involved subpoenas issued by the House Judiciary Committee to compel testimony by close presidential advisers in an investigation of the removal and replacement of nine U.S. Attorneys. The Bush administration had invoked executive privilege and ordered the advisers not to appear, testify, or provide documents in response to the subpoenas. The district court decision rejected the executive's broad claim that senior presidential aides were absolutely immune from congressional process.[37]

As discussed in Chapter 3,[38] the district court rejected the executive's initial attempts to dismiss the case, finding that the House had the right to bring the lawsuit (the Committee had both "standing" and an "implied cause of action") based upon Article I of the Constitution granting Congress the "power of inquiry." The court found that this power carries with it the "process to enforce it," and that "'issuance of a subpoena pursuant to an authorized investigation is … an indispensable ingredient of lawmaking.'"[39]

f. Trump v. Thompson

On June 30, 2021, the House of Representatives established a Select Committee "to investigate and report upon the facts, circumstances, and causes" of the events of January 6, 2021.[40] The Select Committee subpoenaed a number of President Trump's advisors and sent requests to the National Archives and Records Administration (NARA) for records from the Trump White House.[41] President Trump—in his

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[32] *Id.* at 37.

[33] *Id.* ("[T]wo executive privileges [] are relevant here: the presidential communications privilege and the deliberative process privilege."

[34] *Id*. at 39.

[35] *Id.* at 40.

[36] 558 F. Supp. 2d 53 (D.D.C. 2008).

[37] *Id.* at 105-06 ("The Court holds only that Ms. Miers (and other senior presidential advisors) do not have absolute immunity from compelled congressional process in the context of this particular subpoena dispute. There may be some instances where absolute (or qualified) immunity is appropriate for such advisors, but this is not one of them."). The D.C. Circuit subsequently granted a stay of the decision pending appeal, *see Committee on the Judiciary v. Miers*, No. 08-5357 (D.C. Cir. Oct. 6, 2008), and the case was ultimately settled in 2009 with Ms. Miers' testimony. https://www.politico.com/story/2009/03/rove-miers-to-testify-019631.

[38] *See* discussion *supra* Ch. III.

[39] *Miers*, 558 F. Supp. 2d at 75, 77 (citing *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927), and *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 505 (1975)).

[40] H. Res. 503, 117th Cong. (2021).

[41] Jonathan Shaub, Executive Privilege and the Jan. 6 Investigation, Lawfare (Sept. 29, 2021), https://www.lawfaremedia.org/article/executive-privilege-and-jan-6-investigation

capacity as the former President—had asserted executive privilege with regard to the documents requested from NARA, but incumbent President Biden refused to assert the privilege because, he determined, it was "not in the best interests of the United States."[42] White House Counsel Dana Remus expounded on this, stating:

> Congress has a compelling need in service of its legislative functions to understand the circumstances that led to … the most serious attack on the operations of the Federal Government since the Civil War …. Constitutional protections of executive privilege should not be used to shield, from Congress or the public, information that reflects a clear and apparent effort to subvert the Constitution itself."[43]

President Trump promptly filed suit in D.C. District Court, arguing that the Committee's request was politically motivated and that former presidents retain the prerogative to assert executive privilege.[44] The Court rejected those arguments, holding that a former President's assertion of executive privilege is outweighed by an incumbent President's judgment not to assert the privilege.[45] The Court reasoned that the privilege exists "to protect the executive branch, not an individual."[46] This ruling was affirmed by the D.C. Circuit.[47] The Supreme Court did not decisively resolve the merits; however, it did note that, because the D.C. Circuit concluded that President Trump's claim of privilege would have failed even if he were the incumbent, the D.C. Circuit's discussion of President Trump's status as a former President was nonbinding dicta.[48] It thus remains an open question whether a former President's invocation of privilege can overcome an incumbent's decision not to assert privilege.

g. United States v. Navarro

At the same time, Peter Navarro, one of President Trump's subpoenaed former advisors, refused to comply with a subpoena issued by the Select Committee, resulting in two counts of criminal contempt of Congress. Navarro claimed that President Trump had privately instructed him to assert privilege, but the Court refused to allow him to assert executive privilege as a defense on this basis.[49] Instead, the Court determined, defendants bear the evidentiary burden of presenting at least some evidence that a President made a formal claim of executive privilege after personal consideration.[50] Absent such a showing,

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[42] Letter from Dana A. Remus, Couns. to the President, to David S. Ferriero, Archivist of the U.S. (Dec. 23, 2021), https://www.archives.gov/files/foia/remus-letter-to-ferriero-re-january-6-notification.12.23.2021.pdf

[43] *Id.* (quoting Letter from Dana A. Remus, Couns. to the President, to David S. Ferriero, Archivist of the U.S. (Oct. 8, 2021), https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2021/10/12/letter-from-dana-a-remus-counsel-to-the-president-to-david-ferriero-archivist-of-the-united-states-dated-october-8-2021/).

[44] Trump v. Thompson, 573 F. Supp. 3d 1 (D.D.C. 2021), aff'd, 20 F.4th 10 (D.C. Cir. 2021).

[45] *Id.* at 17 ("The court therefore holds that Plaintiff's assertion of privilege is outweighed by President Biden's decision not to uphold the privilege, and the court will not second guess that decision by undertaking a document-by-document review that would require it to engage in a function reserved squarely for the Executive.").

[46] *Id*. at 13.

[47] Trump v. Thompson, 20 F.4th 10 (D.C. Cir. 2021), cert. denied, 142 S. Ct. 1350 (2022).

[48] Trump v. Thompson, 142 S.Ct. 680 (Mem.) (2022).

[49] United States v. Navarro, 641 F. Supp. 3d 212, 224 (D.D.C. 2023).

[50] *Id.* at 223-34.

Navarro could not use the privilege as a shield from testifying. The Navarro case is described in greater detail in Chapter 3 (D)(4)(b)(iii), above.

i. A Presidential Claim of Privilege Cannot Provide Absolute Immunity to Congressional Subpoenas

The executive argued to the District Court that present and past senior advisers to the President are absolutely immune from compelled congressional process. The District Court unequivocally rejected this position:

> The Executive cannot identify a single judicial opinion that recognizes absolute immunity for senior presidential advisors in this or any other context .... In fact, there is Supreme Court authority that is all but conclusive on this question and that powerfully suggests that such advisors do not enjoy absolute immunity. The Court therefore rejects the Executive's claim of absolute immunity for senior presidential aides.[51]

The Court pointed out that the effect of a claim of absolute privilege for close advisers would be to enable the President to judge the limits of his or her own qualified privilege: "Permitting the Executive to determine the limits of its own privilege would impermissibly transform the presumptive privilege into an absolute one."[52]

More recently, relying on *Miers*, then-Judge Ketanji Brown Jackson resoundingly rejected another former presidential advisor's claim of absolute immunity,[53] and that advisor ultimately provided testimony to the Congress.

3. The Essential Elements of the Presidential Communications Privilege

The executive branch has tended to view the scope of executive privilege to include the presidential communications privilege and several others, such as the deliberative process privilege. Congressional committees, however, tie executive privilege more narrowly to a presidential communications privilege, and consider the following elements to be relevant to the strength of a such a claim by an incumbent or former President:

- *The protected communication must relate to a "quintessential and non-delegable presidential power." Espy* and *Judicial Watch* involved the appointment and removal and the pardon powers, respectively. In the *Nixon* cases, the Court defined privileged communications as those made "'in performance of [a President's] responsibilities,' 'of his office,' and made 'in the process of shaping policies and making decisions.'"[54] This category does not include decision-making where laws delegate policymaking and administrative implementation authority to the heads of agencies.

[51] 558 F. Supp. 2d at 99.

[52] *Id*. at 103.

[53] Comm. on the Judiciary v. McGahn, 415 F. Supp. 3d 148, 173 (D.D.C. 2019) ("Luckily for this Court, an existing precedent that is on all fours with the instant matter (Miers) already systematically dismantles the edifice that DOJ appears to have erected over the years to enshrine the proposition that a President's senior-level aides have absolute immunity with respect to legislative subpoenas that Congress issues in the course of its investigations."), *aff'd in part en banc sub nom.* Comm. on the Judiciary of the U.S. House of Representatives v. McGahn, 968 F.3d 755 (D.C. Cir. 2020).

[54] Nixon v. Adm'r of Gen. Servs., 433 U.S. at 449 (1977).

- *The communication must be authored or "solicited and received" by a close White House adviser or the President.* The courts have not explicitly defined who qualifies as a "presidential adviser," other than to say in a 1997 case that the White House counsel is one such official.[55] The courts have been clear, however, that "not every person who plays a role in the development of presidential advice … can qualify for the privilege. In particular, the privilege should not extend to staff outside the White House in executive branch agencies."[56] In other words, an adviser must be in "operational proximity" to the President.[57] Internal agency documents that are not "solicited and received" by the President or a close adviser are instead protected against disclosure, if at all, by other purported privileges such as the deliberative privilege.[58]

- *The presidential communications privilege remains a qualified privilege that may be overcome.* The privilege can be overcome by showing that the information sought "likely contains important evidence," is sought by an appropriate investigating authority, and is unavailable elsewhere. The *Espy* court found an adequate showing of need by the independent counsel, and *Miers* held that privilege does not provide absolute immunity to enable the President to block witnesses from showing that "important" evidence exists. The courts have also affirmed that former Presidents retain the ability to assert the privilege over communications that occurred during the term of office, but whether that claim is supported by the sitting President affects the strength of that claim.

4. Presidents are Subject to Compulsory Process: Presidential Appearances Before Judicial Tribunals and Congressional Committees

The President and his close advisers are subject to subpoenas and court enforcement of subpoenas. This was demonstrated in the *Miers* case involving subpoenas by the House Judiciary Committee for close presidential advisers to testify. The court in *Miers* noted, first, that enforcement of a subpoena is "a routine and quintessential judicial task"; second, that the Supreme Court has held that the judiciary is the final arbiter of executive privilege; and third, that court enforcement of compulsory process is deeply rooted in the common law tradition going back to Chief Justice Marshall's 1807 opinion in *United States v. Burr*.[59] The *Miers* court commented that "federal precedent dating back as far as 1807 contemplates that even the Executive is bound to comply with duly issued subpoenas. The Supreme Court emphatically reaffirmed that proposition in *United States v. Nixon* in 1974."[60] And it was again reaffirmed more recently in the McGahn case, where the district court held that "Executive branch officials are not

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[55] In re Sealed Case, 121 F.3d 729, 734-36 (D.C. Cir. 1997).

[56] *Id*. at 751-52. With regard to member of an "adviser's staff" the Privilege covers only those "who have broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate." *Id*. at 752.

[57] Ass'n of Am. Physicians & Surgeons v. Clinton, 997 F.2d 910 (D.C. Cir. 1993).

[58] *Judicial Watch*, 365 F.3d at 1112.

[59] 25 F. Case 30 (C.C. Va. 1803). The question before the court in *Burr* was the enforceability of Burr's subpoena for documents against President Jefferson. The chief justice explained that "the obligation [to comply with a subpoena] … is general; and it would seem that no person could claim exemption from [it]." *Id*. at 34. "The guard" that protects the president "from vexatious and unnecessary subpoenas," in Chief Justice Marshall's view, "is … the conduct of the Court after these subpoenas have issued; not any circumstance which is to precede them being issued." *Id*. Any claim that compliance with a subpoena would jeopardize national security or privileged presidential information "will have its due consideration on the return of the subpoena," Marshall noted. *Id*. at 37.

[60] *Miers*, 558 F. Supp. 2d at 72. *See also* Clinton v. Jones, 520 U.S. 681, 695 n.23 (1997) ("[T]he prerogative [President] Jefferson claimed [in Burr] was denied him by the Chief Justice in the very decision Jefferson was protesting and this Court has subsequently reaffirmed that holding").

absolutely immune from compulsory congressional process—no matter how many times the Executive branch has asserted as much over the years—even if the President expressly directs such officials' non-compliance."[61]

The late professor Ronald D. Rotunda and John E. Nowak have compiled a list of historical investigations in which sitting or former Presidents have been subpoenaed and involuntarily appeared or produced evidence in judicial forums or before congressional committees.[62] These included Presidents Thomas Jefferson (1807), James Monroe (1818), John Quincy Adams and John Tyler (1846), Richard M. Nixon (1975, 1976, 1982), Gerald R. Ford (1975), Ronald Reagan (1990), and William J. Clinton (1996, 1998). President Harry S. Truman was subpoenaed by the House Un-American Activities Committee in 1953 after he had left office. Truman refused to comply and went on national television and radio to rebut the charges made by the Committee. The Committee never sought to enforce the subpoena.[63] In addition to those listed above, on October 21, 2022, the House Select Committee to Investigate the January 6 Attack on the United States Capitol issued a subpoena to President Trump demanding documents and testimony.[64] President Trump filed a lawsuit,[65] but the Committee withdrew the subpoena shortly thereafter, mooting the case.[66]

Ten sitting or former Presidents have made voluntary appearances in judicial forums and before congressional committees: Presidents Abraham Lincoln (1862), Ulysses S. Grant (1875), Theodore Roosevelt (1911, 1912), Woodrow Wilson (1919), William H. Taft (1919–1928), Harry S. Truman (1955), Richard M. Nixon (1980), Gerald R. Ford (1975, 1988), Jimmy E. Carter (1977, 1979, 1981), and William J. Clinton (1995).[67] In 2004, President Bush was interviewed in the Oval Office by federal prosecutors as part of an investigation into the leak of the identity of an undercover C.I.A. officer.[68]

In December 2008, then President-elect Barack Obama voluntarily appeared for an interview with a U.S. Attorney conducting a grand jury investigation of the Illinois governor's alleged attempt to "sell" the appointment to fill Obama's vacated Senate seat.[69] On October 8 and 9, 2023, President Biden participated in an interview by Special Counsel Robert Hur as part of Hur's investigation into classified documents found at President Biden's home, at the Penn Biden Center, and amidst his Senate papers at

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[61] *McGahn*, 415 F. Supp. 3d at 215.

[62] *See generally* Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law: Substance and Procedure, (4th ed. 2007).

[63] *Id.* at 949–51.

[64] Subpoena at 7, Donald J. Trump v. Select Comm. to Investigate the January 6th Attack on the United States Capitol, No. 9:22-cv-81758 (S.D. Fla. Nov. 11, 2022), ECF No. 1-1.

[65] Complaint, Donald J. Trump v. Select Comm. to Investigate the January 6th Attack on the United States Capitol, No. 9:22-cv-81758 (S.D. Fla. Nov. 11, 2022), ECF No. 1.

[66] Order of Dismissal at 1, Donald J. Trump v. Select Comm. to Investigate the January 6th Attack on the United States Capitol, No. 9:22-cv-81758 (S.D. Fla. Jan. 4, 2023), ECF No. 9.

[67] *See* Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* 941–44 (4th ed. 2007); Senate Historical Office & Senate Library, *Instances of Sitting and Former Presidents & Sitting Vice Presidents Who Have Testified Before Congressional Committees*, U.S. Senate, https://www.senate.gov/committees/SittingPresidentsVicePresidentsWhoHaveTestifiedBeforeCongressionalCommittees.htm.

[68] *See* Richard W. Stevenson & David Johnston, *Bush Interviewed in Leak of C.I.A. Name*, N.Y. Times (June 25, 2004), https://www.nytimes.com/2004/06/25/us/bush-interviewed-in-leak-of-cia-name.html

[69] *See* Peter Baker, *Obama Follows Tradition Testifying for Prosecutors*, N.Y. Times (Dec. 25, 2008), https://www.nytimes.com/2008/12/26/us/politics/25web-baker.html.

the University of Delaware.[70] A Congressional Research Service report indicates that between 1973 and 2007, at least 70 senior advisers to the President who were subject to subpoenas have testified before congressional committees.[71] A more recent study reveals that over 90 White House officials from the Nixon, Carter, Reagan, H.W. Bush, Clinton, W. Bush, Obama, and Trump administrations have testified before Congress in hearings, depositions, or transcribed interviews.[72]

B. Presidential Claims of Constitutional Authority to Limit Congressional Access to National Security-Related Material

1. Congress's Constitutionally Based Oversight and Investigative Prerogatives Apply in Full Measure to Executive Action Regarding National Security, Intelligence, and Foreign Affairs

Under the Constitution, Congress is entitled to seek and obtain any information from any executive branch entity that it deems necessary to carry out its core responsibilities: to make laws, appropriate funds, and engage in oversight of the executive's implementation of those laws and appropriations. This authority and duty encompasses all matters related to the areas of national security, intelligence, and foreign affairs activities.[73] Presidents have asserted a unilateral presidential authority to withhold information from Congress with respect to these areas, but no court has expressly recognized such an authority.[74]

The Supreme Court has limited exercises of presidential war powers.[75] Recently, the Court emphatically rejected the long-bruited executive notion that the President is the "sole organ of the nation in its external

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[70] U.S. Dep't of Justice, Special Counsel's Report on the Investigation into President Joseph R. Biden's Handling of Classified Materials (Feb. 8, 2024), https://www.justice.gov/storage/report-from-special-counsel-robert-k-hur-february-2024.pdf.

[71] Harold C. Relyea & Todd B. Tatelman, Cong. Rsch.Serv., RL31351, *Presidential Adviser' Testimony Before Congressional Committees: An Overview* (2007), http://www.fas.org/sgp/crs/misc/RL31351.pdf.

[72] White House Aide Testimony, Co-Equal (updated Mar. 2024), https://www.co-equal.org/guide-to-congressional-oversight/white-house-aides.

[73] *See generally*, Vicki Divoll, *The "Full Access Doctrine": Congress's Constitutional Entitlement to National Security Information From the Executive*, 34 Harv. J. L. & Pub. Pol'y 493 (2011). *See also* Heidi Kitrosser, *Congressional Oversight of National Security Activities: Improving Information Funnels*, 29 Cardozo L. Rev. 1049, 1061-63 (2008); Frederick A.O. Schwarz Jr. &Aziz Z. Huq, Unchecked and Unbalanced: Presidential Power in a Time of Terror 167-186 (2008). The executive's contrary stance of exclusive control over congressional access to national security and foreign affairs information is reflected in numerous opinions of the Justice Department's Office of Legal Counsel that are detailed and discussed immediately below in Section B.2. For a critical, pragmatic assessment of Congress's proper role in the oversight of intelligence community activities in light of the Senate Intelligence Committee's investigation of the CIA's detention and "enhanced interrogation" program, written from the point of view of a former director of the CIA Counterterrorism Center, *see* Robert L. Grenier, *From Truth and Reconciliation to Lies and Obfuscation: The Senate RDI Report*, Huffington Post, August 10, 2014.

[74] In *United States v. Nixon*, the Court noted in dicta that the president "does not place his claim of privilege on the ground they are military or diplomatic secrets. As to these areas of Art. II duties the Courts have traditionally shown the utmost deference to Presidential responsibilities." 418 U.S. at 706. But as discussed throughout this chapter, the Courts have also recognized Congress's considerable responsibility and authority regarding national security and foreign affairs.

[75] *See* Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (holding that the government may not detain a United States citizen captured as an enemy combatant indefinitely for purposes of interrogation without giving him or her an opportunity to offer evidence that he or she was not an enemy combatant); Rasul v. Bush, 542 U.S. 466 (2004) (rejecting government argument that foreign prisoners being held at Guantanamo Bay, Cuba, were outside of federal court jurisdiction and entitled to *habeas corpus* considerations); Hamdan v. Rumsfeld, 548 U.S. 557 (2006), 126 S. Ct. 2749, 2759, 2800 (2006) (holding "that the military commission convened [at the President's direction at Guantanamo Bay, Cuba] to try Hamdan lacks power to proceed because its structure and procedures violate [the Uniform Code of Military Justice]." Justice Kennedy noted that "the President has acted in a field with a history of congressional participation and regulation.").

relations"[76] with "'exclusive authority to conduct diplomatic relations along with 'the bulk of foreign-affairs powers.'"[77] The Court has made it clear that the "Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs is at issue"[78] and that it does not question the substantial powers of Congress over foreign affairs in general.[79] The Court stated: "[W]hether the realm is foreign or domestic, it is still the Legislative Branch, not the Executive Branch, that makes the law." As a matter of historical practice, congressional committees have investigated secret executive matters since the birth of the Republic.[80] When oversight extends to matters of national security, access to documents and testimony may be constrained, under certain narrow circumstances, by constitutionally rooted prerogatives possessed and asserted by the President. But the executive's privilege claim is still a qualified one subject to rebuttal.

a. The AT&T Case

The nature of the balancing effort between Congress and the President was illustrated by one of the few inter-branch investigations involving national security matters to have reached the courts. That case arose out of an inquiry in the 1970s by a House subcommittee into allegations that the FBI used AT&T's resources to conduct improper domestic intelligence-gathering and wiretapping. The investigation resulted in a three-way conflict between the subcommittee, the Justice Department, and AT&T, with the subcommittee seeking to subpoena evidence from AT&T and the Justice Department seeking to forestall AT&T's compliance. The appeals court carefully addressed and rejected the claims of absolute rights asserted by Congress and the executive branch,[81] noting that Supreme Court precedent does "not establish judicial deference to executive determinations in the area of national security when the result of that deference would be to impede Congress in exercising its legislative powers."[82] As a consequence, the Court directed the parties to continue negotiating and never decided the case on the merits of the legal dispute, even after the case reached the Court a second time.[83] Ultimately, the branches negotiated a settlement, and the case was dismissed.

Today, the *AT&T* case can be read to stand for the proposition that neither executive claims of control over national security documents nor congressional assertions of access are absolute. Rather, both claims are qualified and are, therefore, subject to judicial review. However, a judicial determination is available only after every attempt to resolve inter-branch differences has been exhausted. As a result, Congress and

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[76] Zivotofsky ex rel. Zivotofsky v. Secretary of State, 135 S. Ct. 2076, 2089-90 (2015) (rejecting the *dicta* in United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 316 (1936)).

[77] 135 S. Ct. at 2089.

[78] *Id.* at 2090

[79] *Id.* at 2096.

[80] *See* Alissa M. Dolan & Todd Garvey, Cong. Rsch.Serv., R42811, Congressional Investigations of the Department of Justice, 1920-2012: History, Law, and Practice (2012), https://digital.library.unt.edu/ark:/67531/metadc820852/(detailing 20 sensitive congressional investigations of DOJ) (periodically updated); Paul C. Light, Government by Investigation: Congress, Presidents, and the Search for Answers, 1945-2012 (2013) (analyzing 112 investigations since 1945); Roger A. Bruns et al., Congress Investigates: A Critical and Documentary History (rev. ed. 2011) (describing 29 investigations from 1792 to 2006); Frank J. Smist Jr., Congress Oversees the United States Intelligence Community, 1947-1994 (2d ed. 1994).

[81] Relying on both *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491 (1975) and *United States v. Nixon*, 418 U.S. 683 (1973), the Court concluded that while generally congressional subpoena power cannot be interfered with by the courts, the "Eastland immunity is not absolute in the context of a conflicting constitutional interest by a coordinate branch of the government." United States v. AT&T, 551 F. 2d 384, 391 (D.C. Cir. 1976).

[82] *Id.* at 392.

[83] United States v. AT&T, 567 F. 2d 121, 128 (D.C. Cir. 1977).

the executive branch share an obligation to negotiate the possible terms and conditions of such disclosures.

2. The Executive Branch's Claims of Legal Authority to Withhold National Security Information from Congress

Past and present administrations have taken the position that the executive branch has exclusive control over Congress's access to information the executive considers classified for national security reasons. Through a series of opinions of the Justice Department's Office of Legal Counsel (OLC), they have expressed the view that Congress may not, by law, legislative rule, or the exercise of investigative authority, bypass the procedures that the President establishes to authorize disclosure to Congress of classified, privileged, or even non-privileged information.

A 1969 opinion co-authored by OLC and the State Department Legal Advisor stated that "the President has the power to withhold from the Senate information in the field of foreign relations or national security if in his judgment disclosure would be incompatible with the public interest."[84] A 1989 OLC opinion acknowledged that "[t]here is no decided case on the constitutional authority of the President to assert an absolute privilege for state secrets against a coordinate branch of government."[85] It argued, though, that *dicta* in related cases and the "powers and responsibilities conferred on the Executive by the Constitution" supported an absolute privilege. Moreover, OLC stated that "[t]he Executive has long asserted the right to an absolute privilege. The Congress has long acquiesced in that assertion." But the *AT&T* case demonstrates that Congress has not always acquiesced and is not required to do so.

A 1996 OLC memo advised the CIA General Counsel that federal employees did not have a legal right to reveal classified information to members of Congress without authorization from their superiors, and any statute that conferred such a right would be unconstitutional. OLC continued that under the President's executive order governing the classification of information, with respect to any "disseminations that would be made to Congress or its Members … the decision whether to grant access to the information must be made by someone who is acting in an official capacity on behalf of the President, and who is ultimately responsible, perhaps through intermediaries, to the President."[86] That opinion also emphasized that "the longstanding practice under Executive Order 12356 (and its successor) has been that the 'need to know' determination for disclosures of classified information to Congress is made through established discretionary channels at each agency."[87]

In a 2003 opinion, OLC wrote that "if the President finds that the information is sufficiently sensitive, that disclosure [to Congress] could harm the national security, the President's constitutional responsibilities require a construction of the relevant reporting statutes under which disclosure is not required."[88] Failure

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[84] Memorandum from John R. Stevenson, Legal Adviser, Department of State, and William H. Rehnquist, Assistant Attorney General, OLC (Dec. 8, 1969).

[85] Memorandum from J. Michael Luttig, Principal Associate Deputy Attorney General, OLC, to C. Boyden Gray, Counsel to the President, at 3 (Dec. 21, 1989), https://www.justice.gov/sites/default/files/olc/pages/attachments/2014/12/30/1989-12-21_-_pdaag_luttig_-_cong_access_to_pres_communi- cations_ocr.pdf.

[86] Access to Classified Information, 20 Op. O.L.C. 402, 404 (November 26, 1996), https://www.justice.gov/sites/default/files/olc/opinions/1996/11/31/op-olc-v020-p0402.pdf.

[87] Id.

[88] Memorandum from John C. Yoo, Deputy Assistant Attorney General, OLC, to Alberto Gonzales, White House Counsel at 5 (Jan. 27, 2003,) https://fas.org/irp/agency/doj/olc/nsi.pdf. The 2003 memo references a still-secret November 1, 2002 OLC memo from Yoo to Gonzales regarding "Congressional Notification for Certain Special Operations." *Id.*

to comply with a reporting statute, unlike an invocation of privilege in response to a subpoena, would not necessarily be apparent to members of Congress.[89]

In 2004, OLC reaffirmed its view that the executive branch could forbid employees from disclosing certain information to Congress. According to the OLC, under the precepts of executive privilege and the unitary executive, requirements for reporting to Congress are "limited by a constitutional restraint—the executive branch's authority to control the disclosure of information when necessary to preserve the executive's ability to perform its constitutional responsibilities."[90] OLC opinions are themselves routinely withheld from Congress on grounds of national security, claims of privilege or both. After 9/11, OLC issued classified legal opinions that provided the purported legal basis for the secret presidential orders setting in motion the National Security Agency's (NSA) warrantless communications surveillance and the Central Intelligence Agency's rendition and torture programs, among others. These opinions, as well as similar opinions on the legal basis for the U.S.'s targeted killing program, were withheld from Congress for years.

3. Congressional Notification Requirements and Procedures

Congress has the constitutional authority to structure, empower, fund, and, where necessary, constrain the operations of the intelligence community, and to require the disclosure of information respecting its activities to allow assessment and evaluation of their efficacy. But Congress has accepted limitations on its own access to information. In practice, often only a limited number of intelligence committee members and congressional leadership officials receive sensitive information, and often in a manner that can result in ineffective institutional action or none at all.[91]

a. The National Security Act of 1947

The National Security Act of 1947, as amended and codified starting at 50 U.S.C. §3001, provides the statutory framework for the U.S. intelligence community. Section 3092 of that law requires the intelligence agencies to "keep the congressional intelligence committees fully and currently informed of all intelligence activities other than a covert action … carried out for or on behalf of, any department, agency or entity of the United States Government."[92] It also requires that the intelligence community furnish the congressional intelligence committees any information or material concerning intelligence activities (including the legal basis under which the intelligence activity is being or was conducted), other than covert actions, which is within their custody or control, and which is requested by either of the congressional intelligence committees in order to carry out its authorized responsibilities.[93]

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[89] *But see* 50 U.S.C. § 3107 (National Security Act provision requiring the head of each element of the intelligence community to annually certify its full compliance with the Act's reporting provisions and provide an explanation for any departure from the Act's requirements).

[90] *See* Letter from Jack L. Goldsmith, III, Assistant Attorney General, OLC, to the Honorable Alex M. Azar II, General Counsel, Department of Health and Human Services (May 21, 2004).

[91] Marshall Curtis Erwin, Cong. Rsch. Serv., R40691, *Sensitive Covert Action Notifications: Oversight Options for Congress* (2013); Marshall Curtis Erwin, Cong. Rsch. Serv., R40698, "Gang of Four" Congressional Intelligence Notifications (2013).

[92] 50 U.S.C. § 3092.

[93] *Id.*

Section 3092 states, however, that these requirements apply only "to the extent consistent with due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters."[94]

Section 3093 requires all covert actions to be authorized by a written presidential finding and provides for congressional notification regarding covert actions in language that largely duplicates Section 3092's requirements for other intelligence activities. Section 3093(c) specifies that presidential findings "shall be reported in writing to the congressional intelligence committees as soon as possible" after presidential approval and "before the initiation of the covert action authorized by the finding."[95] But it also explicitly authorizes the President to limit notification of covert actions to eight members of Congress if he or she "determines that it is essential to limit access the finding to meet extraordinary circumstances affecting vital interests of the United States."[96] In those cases, the finding may be reported to the Chairmen and Ranking Minority Members of the congressional intelligence committees, the Speaker and Minority Leader of the House of Representatives, the Majority and Minority Leaders of the Senate, and such other member or members of the congressional leadership as may be included by the President.[97]

This group is known as the "Gang of Eight." In cases where congressional notification is delayed or limited to the "Gang of Eight," the statute requires the President to provide a written statement of the reasons for limiting access and to provide the finding to the full committee in 180 days or explain his failure to do so. Section 3093(d) requires the President to notify the intelligence committees of "any significant change in a previously approved covert action, or any significant undertaking pursuant to a previously approved finding" in the same manner as a new covert action finding.[98] Finally, Section 3094 states that appropriations for covert actions and intelligence activities are contingent on compliance with the statute's requirements for written findings and notifications to the intelligence committees.[99]

b. "Gang of Four" and "Gang of Eight" Notification in Practice

The amendments to the National Security Act providing for advance notice of covert actions to the "Gang of Eight" were passed in 1980, in response to President Jimmy Carter's failure to give advance notice of an abortive covert effort to rescue U.S. hostages held in Iran. Before 1980, the executive branch provided notice of covert actions and other particularly sensitive intelligence activities to the "Gang of Four," the Chairs and Ranking Members of the House and Senate intelligence committees. The use of the Gang of Four notification procedure predates the establishment of the congressional intelligence committees and has no basis in statute or in the internal rules of either committee.[100] According to the Congressional

[94] *Id.*

[95] 50 U.S.C. § 3093.

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] 50 U.S.C. § 3094.

[100] Before 1974, the intelligence community generally provided "Gang of Four" notice to the chair and ranking member of the armed services subcommittees on intelligence. *See* Loch Johnson, National Security Intelligence (2012).

Research Service, however, the procedure "has been generally accepted by the leadership of the intelligence committee" and continues for certain intelligence activities (as opposed to covert actions).[101]

Notifications before 1980 were oral. No notes could be taken, and limited or no expert staff or legal counsel could be present. There could be no communication respecting the notification with committee members, and any objections had to be voiced privately to the President. But in the President's discretion, not all sensitive operations were so reported.[102] These limitations are still commonly applied to both Gang of Eight and Gang of Four notifications today.

There are intelligence operations so sensitive that secrecy is essential, and Congress's willingness to limit notification is understandable, particularly for a short period. But the risks of disclosure to the full intelligence committee should not be overstated. There is a limited number of congressional intelligence committee members and staff—particularly when compared with the over 1.2 million executive branch employees and contractors with top secret clearance—and they are subject to strict security rules (discussed further below).

Moreover, by acquiescing to Gang of Eight and Gang of Four notice, Congress has allowed itself to be backed into a situation in which it can be said to have known about what turned out to be controversial or even unlawful actions, but in a way in which it could not do anything in a timely, effective way. As described by the former chief counsel for the Church Committee, Frederick A.O. Schwarz:

> Technically, gang members are *notified* of something. But in reality, they are not *informed.* When matters covered by a secret, oral briefing become public …. the informal nature of the gang process and human nature inevitably lead to conflicting accounts about what was actually revealed.[103]

This was dramatically evidenced by the use of Gang of Four and Gang of Eight notification regarding the NSA's warrantless wiretapping program, the CIA "black site" detention centers, and the DOJ's Office of Legal Counsel's authorization of "enhanced interrogation" of suspected terrorists. After both programs and the congressional briefings became public, intelligence officials, White House officials, and members of Congress who were present gave dramatically contradictory accounts of what was revealed and of how legislators reacted.[104]

Gang of Four and Gang of Eight members who had concerns about the programs considered themselves bound by the intelligence community's restrictions on the briefings and had no effective response. Jane Harman, former Ranking Member of the House Permanent Select Committee on Intelligence (HPSCI), wrote a classified letter to the General Counsel of the CIA in February 2003 expressing some reservations

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[101] Marshall Curtis Erwin, Cong. Rsch. Serv., R40698, *"Gang of Four" Congressional Intelligence Notifications* (2013), https://www.everycrsreport.com/files/20130416_R40698_a9b599301af357c88c5f77be971998e8b15cc270.pdf.

[102] *Id.*; *See also* Vicki Divoll, The "Full Access Doctrine": Congress's Constitutional Entitlement to National Security Information from the Executive, 34 Harv. J. L. & Pub. Pol'y 493, 535-36 (2011).

[103] Frederick A.O. Schwarz Jr., *Democracy in the Dark: The Seduction of Government Secrecy* 192 (2015).

[104] *See* Constitution Project, *Report of The Constitution Project's Task Force on Detainee Treatment* 340 (2013), http://detaineetaskforce.org/pdf/Full-Report.pdf.

about the CIA's "enhanced interrogation program."[105] She received only a cursory reply[106] but did not attempt to raise the issue with the full committee. Harman later told The Washington Post, "When you serve on [the] intelligence committee you sign a second oath—one of secrecy. I was briefed, but the information was closely held to just the Gang of Four. I was not free to disclose anything."[107]

Senate Select Committee on Intelligence (SSCI) Vice Chair Jay Rockefeller sent a handwritten, classified letter to Vice President Cheney in July 2003 regarding a briefing Cheney, the NSA director, and the CIA director had delivered on the NSA's terrorist surveillance program. Rockefeller's letter said: "Without more information and the ability to draw on any independent legal or technical expertise, I simply cannot satisfy lingering concerns raised by the briefing we received." He noted that he was placing a copy in the SSCI safe in addition to sending a copy to Cheney.[108] Cheney later derided the note as a "CYA."[109]

Harman and SSCI Vice Chair Jay Rockefeller also wrote a letter to Vice President Cheney regarding the CIA detainee program on March 11, 2005, and Rockefeller formally sought to begin a full committee investigation into the program at the same time. These efforts were also rebuffed. The full intelligence committees were not briefed on the program until hours before it was publicly disclosed. Even then, staff attendance was limited to the minority and majority staff directors.[110]

c. Committee Security Procedures

Both the SSCI and the HPSCI[111] have established rules and procedures for handling classified and sensitive material and for dealing with unauthorized disclosures by members and staff. Special investigative panels that anticipate receiving classified materials have adopted similar rules and procedures.[112] Such rules provide safeguards to ensure that sensitive materials will not be disclosed. Thus the House and Senate intelligence committees conduct their business in a "Secure Compartmentalized Information Facility" (SCIF). The classified materials the executive entrusts to Congress are kept in vaults within the SCIF, and professional security staff monitors them. Any member of Congress who wishes to read classified material must do so in a committee SCIF under the supervision of security personnel.[113]

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[105] Letter from Rep. Jane Harman to Scott Muller, CIA General Counsel (Feb. 10, 2003), http://www.cfr.org/terrorism-and-the-law/representative-jane-harmans-letter-cia-general-counsel-muller/p1516.

[106] Letter from CIA General Counsel Scott Muller to Rep. Jane Harman (Feb. 28, 2003), http://www.cfr.org/terrorism-and-the-law/representative-jane-harmans-letter-cia-general-counsel-muller/p1516.

[107] Joby Warrick and Dan Eggen, *Hill Briefed on Waterboarding in 2002*, Wash. Post (Dec. 9, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/12/08/AR2007120801664.html.

[108] Letter from Senator John D. Rockefeller to Vice President Dick Cheney (July 17, 2003), http://www.fas.org/irp/news/2005/12/rock121905.pdf. *See also* Charles Babington and Dafna Linzer, *Senator Sounded Alarm in '03*, Wash. Post (Dec. 19, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/12/19/AR2005121901641.html.

[109] Live Television Interview of Vice President Dick Cheney by Bob Schieffer, *Face the Nation* (Jan. 4, 2009), https://georgewbush-whitehouse.archives.gov/news/releases/2009/01/20090104.html.

[110] S. Rep. No. 113-288, Report of the Senate Select Committee on Intelligence of the Committee Study of the Central Intelligence Agency's Detention and Interrogation Program at 441, 446-47 (2014).

[111] *See* Senate Standing Order 79.13 and House Rule X (11)(e), (f), and (g)(4)(5).

[112] *See, e.g.*, Rule 7 of the Senate Select Committee on Secret Military Assistance to Iran, reprinted in Senate Document 105-16 at 77–86, 105th Cong. 1st Sess. (1988).

[113] *See* Divoll, *supra* note 73, at 505.

Members of Congress, like the President and federal judges, are considered exempt from the general security clearance investigation process by virtue of their position and protected from criminal prosecution for disclosure of classified information in official congressional proceedings. Nonetheless, committee rules and chamber rules forbid disclosure of classified information. Members can be formally investigated and sanctioned by their chambers' ethics committees for unauthorized disclosures.[114] They can also be penalized by House and Senate leadership by loss of their committee seats.

Congressional staff members who handle classified information in the performance of their duties are subject to the same clearance process as officials of the executive branch. HPSCI and SSCI staff are also subject to additional nondisclosure requirements imposed by committee rules, which strictly forbid disclosure of classified information and also limit disclosure of unclassified material discussed at closed hearings.[115]

d. The Intelligence Committees' Jurisdiction Is Not Exclusive

The obligation for the executive branch to inform Congress on matters relating to national security requires informing all congressional committees with jurisdiction. The Justice Department—as demonstrated by its response to the House Judiciary Committee in the investigation of the NSA surveillance program—has argued that its legal obligation to provide Congress with information extends only to fully informing the House and Senate intelligence committees. However, the House Rules do not provide the HPSCI with exclusive jurisdiction over either intelligence or intelligence-related matters. House Rule X(11)(b)(3)-(4), which establishes HPSCI's jurisdiction, provides:

> (3) Nothing in this clause shall be construed as prohibiting or otherwise restricting the authority of any other committee to study and review an intelligence or intelligence-related activity to the extent that such activity directly affects a matter otherwise within the jurisdiction of that committee.
>
> (4) Nothing in this clause shall be construed as amending, limiting, or otherwise changing the authority of a standing committee to obtain full and prompt access to the product of the intelligence and intelligence-related activities of a department or agency of the Government relevant to a matter otherwise within the jurisdiction of that committee.

Senate Resolution 400 contains a similar procedure. When the intelligence committees were created in 1977, these clauses were deliberately drafted to ensure that the intelligence committees did not obtain sole jurisdiction over intelligence matters. The standing committees were willing to cede primary jurisdiction over the CIA to the new intelligence committees, but they wanted to retain jurisdiction over intelligence activities within agencies over which they then had jurisdiction.[116]

In short, Congress determines which of its committees has oversight over any particular subject matter, and the President cannot pick and choose between committees with overlapping jurisdictions. But in practice, the executive has often attempted to do so.

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[114] *See* Rules 12, 13, and 14 of the House Permanent Select Committee on Intelligence, http://intelligence.house.gov/sites/intelligence.house.gov/files/ documents/hpscirules114th.pdf; Rules 9 and 10 of the Senate Select Committee on Intelligence, http://www.intelligence.senate.gov/about/rules-procedure.

[115] *Id.*

[116] *See* S. Select Comm. on Intelligence, 103d Cong., Report on the Legislative Oversight of Intelligence Activities: The U.S. Experience, 4-19 (Comm. Print, 1994). Senate Standing Order 79.13, secs. 3(c) and (d) contains the same language denying the jurisdictional exclusivity of the Senate Select Committee on Intelligence.

e. The NSA Surveillance Program Example

Following public disclosure of the National Security Agency's controversial Terrorist Surveillance Program (TSP) at the end of 2005, several congressional committees sought to investigate the program. In early 2007, as Congress considered various possible amendments to the Foreign Intelligence Surveillance Act (FISA) designed to legalize the surveillance program, it was disclosed that a judge at the Foreign Intelligence Surveillance Court (FISC) had granted the Justice Department's request for orders authorizing the collection of information under a new interpretation of FISA. The House Judiciary Committee, which has jurisdiction over the FISC, asked for classified briefings for all members and selected staff with appropriate security clearances with respect to the Court's authorization.

The Justice Department responded that the President had decided that only members of the House and Senate Intelligence Committees would be "read into"[117] the TSP program; that those Committees had been fully briefed on the FISC's new orders "consistent with their oversight authority relating to intelligence matters and the National Security Act"; and that those Committees had received classified copies of DOJ's applications. But only the Chair and Ranking Member of the House Judiciary Committee would be permitted to review the documents at the Intelligence Committee's offices and would not be "read into" the program. The Chairman and Ranking Member refused to accede to the limited document access. Ultimately, Congress passed legislation amending FISA without fully contesting these executive branch assertions.

4. Congress's Role in Classification and Declassification

a. Congress May Establish Classification Standards and Procedures by Law, but Has Imposed Few Restraints on Executive Secrecy

Both Congress and the President have power to establish classification procedures. Contrary to Justice Department assertions, the President does not possess the sole authority to classify information and "read into" programs only those persons he or she determines have a "need to know."

In support of the theory of exclusive executive classification authority, the Justice Department has cited a statement by the Supreme Court that the role of commander-in-chief provides the President with the "authority to classify and control access to information bearing on national security and exists quite apart from any explicit congressional grant."[118] But the Supreme Court stated in the same decision that courts "have been reluctant to intrude upon the authority of the Executive in military and national security affairs *unless Congress specifically has provided otherwise*," strongly implying that the President's authority is

[117] The phrase "read into" generally refers to the selective granting of access to the most sensitive information. In these situations, it is determined that a person with the appropriate security clearance has a "need to know" and has gone through proper procedures and has signed the related paperwork for access to such material. Not everyone with such clearance may be "read into" specific programs; rather, there may be a finite number of people within the larger world of those with appropriate clearance who are "read into" a given program.

[118] Department of the Navy v. Egan, 484 U.S. 518, 527 (1988). *Egan* involved a question of statutory construction: whether the denial of a security clearance to a naval employee was subject to review by the Merit Systems Protection Board. It was not a dispute between Congress and the executive over access to intelligence information. DOJ has relied upon it as the only case in support of its presidential exclusivity contention. Its use has been critically assessed in Louis Fisher, *The Politics of Executive Privilege*, 241–43, (2004). Fisher notes that the oft-quoted language of the *Egan* opinion was qualified by the Court when it later stated that courts "traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs *unless Congress specifically has provided otherwise."* 489 U.S. at 530 (emphasis added).

not exclusive.[119] The Supreme Court has also stated in another case that "Congress could certainly [provide] that the Executive Branch adopt new [classification] procedures or it could [establish] its own procedures—subject only to whatever limitations the Executive privilege may be held to impose upon such congressional ordering."[120]

In practice, Congress has enacted legislation governing classification, but it has generally sought to enhance rather than restrict executive secrecy. For example, in the Atomic Energy Act, it established a separate regime for the protection of nuclear-related "restricted data."[121]

Further, Congress has acted on numerous occasions to reinforce the classification schemes established by executive orders. These statutes have criminalized the unauthorized disclosure of classified information, provided civil penalties for violations, and authorized administrative measures designed to deter government contractors and their employees from unauthorized disclosures.[122]

b. Procedures for Publication of Classified Material

SSCI and HPSCI have procedures for publishing classified information when they consider doing so to be in the public interest. But despite substantial disputes between Congress and the executive branch regarding classification, the procedure has never been used.[123]

The official process for congressional publication of classified information is set forth in Section 8 of Senate Resolution 400 and in House Rule X(11)(g).[124] The House and Senate procedures are very similar, but not precisely identical. For the purposes of simplicity, the following discussion focuses on the Senate procedure.

At the outset, the Senate intelligence committee must make a determination, by a formal vote, "that the public would be served by such a disclosure." If a committee is seeking public interest disclosure of classified material, it must formally notify the President of its vote to release the information. Section 8(b) of Senate Resolution 400 requires SSCI, prior to providing formal notice to the President, to notify and consult with the Senate Majority and Minority Leaders regarding the vote to disclose classified

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[119] *Id.* at 530 (emphasis added). *See also* Louis Fisher, The Politics of Executive Privilege, 241–43 (2004); David J. Barron &Martin S. Leder- man & David Barron, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 Harv. L. Rev. 941, 1084, n. 595 (2008).

[120] EPA v. Mink, 410 U.S. 73, 83 (1973).

[121] *See* 42 U.S.C. §§ 2011 et seq. (2000). In addition, Congress has enacted the Investor Security Act, which authorizes the commissioner of patents to keep secret patents on inventions that the government has an ownership interest in and where widespread knowledge of such invention would, in the opinion of the interested agency, harm national security. 35 U.S.C. §§ 181 et seq., (2000).

[122] Jennifer Elsea, Cong. Rsch. Serv., RL33502, *Protection of National Security Information* (updated Dec. 26, 2006) (detailing congressional efforts to criminalize unauthorized disclosures of classified information and provide for civil deterrents), https://fas.org/sgp/crs/secrecy/RL33502.pdf; Jennifer Elsea, Cong. Rsch. Serv., RS21900, *The Protection of Classified Information, The Legal Framework* (updated Feb. 2, 2023), https://fas.org/sgp/crs/secrecy/RS21900.pdf (providing an overview of the relationship between executive and legislative authority over national security information and a summary of current laws and regulations that form the legal framework for protecting classified information)

[123] Because of the intelligence committees' secrecy regarding their own hearings and meetings, it is not possible to confirm whether the committee has ever attempted to call a vote to begin the process. It is clear that there has never been a referral to the full Senate.

[124] S. Res. 400, 94th Cong., 2d Sess. (1976), http://www.intelligence.senate.gov/about/rules-procedure; H.R. R. X(11)(g), http://clerk.house.gov/legislative/house-rules.pdf (H.R. R. X(11)(g) of the House Rules begins on page 15).

information. The purpose of this step is presumably to afford the Senate leadership an opportunity to resolve the situation before formal notice to the President is given.

Once the vote is taken and the President is notified, a five-day clock starts ticking. After five days have expired, SSCI may publicly disclose the information that was the subject of the vote, unless the President properly objects during this period. To do so, he must, "personally" and "in writing," notify SSCI of his objection to disclosure, provide his reasons therefor, and certify "that the threat to the national interest of the United States posed by such disclosure is of such gravity that it outweighs any public interest in the disclosure." If the President does object within five days, the question of disclosure may be referred to the Senate for consideration. Such referral may be made by SSCI itself, acting upon a majority vote, or by the Majority and Minority Leaders, acting jointly. There is no requirement that the matter be referred to the Senate, nor any time period within which the referral must be made.

If the matter is referred to the Senate, however, strict time limits apply. Under Section 8(b)(5), the Senate must go into closed session to consider the disclosure issue one hour after it convenes on the fourth day following the referral. The Senate must conclude its consideration of the matter by the end of the ninth day following the referral. At that time, "the Senate shall immediately vote on the disposition of such matter in open session, without debate, and without divulging the information with respect to which the vote is being taken." In voting to dispose of the matter, the Senate can choose to approve or disapprove the public release of some or all of the information in question, or it can choose to send all or any portion of the matter back to SSCI for final determination.

The Senate Resolution 400 process and the equivalent House process would impose substantial burdens on the intelligence committees, the President, and the full Senate or House. It obviously was not meant to be a first resort. But the procedure has sufficient intermediate stages to increase the pressure for accommodation. It requires the President to take personal responsibility for a decision to maintain the secrecy of documents over the intelligence committee's objections, and to provide an explanation for that decision.

Nonetheless, neither intelligence committee has chosen to invoke the provision—even during a recent high-profile confrontation between SSCI, the intelligence community, and the White House over the classification of the executive summary of the committee's study of the CIA detention and interrogation program.

c. Declassification of the Executive Summary of the Senate "Torture Report"

In December 2012, SSCI adopted by a 9-6 vote a 6,300-page study of the CIA's detention and interrogation program (commonly known as the "torture report"). In April 2014, SSCI voted 11-3 to submit the study's findings, conclusions, and executive summary to the executive branch for declassification.

The declassification vote occurred only weeks after then-SSCI Chairman Dianne Feinstein delivered a speech on the Senate floor accusing the CIA of improperly interfering with the Committee's investigation. Senator Feinstein accused the CIA of unlawfully searching intelligence committee staffers' computers and filing an unfounded "crimes report" against Senate staff with the Department of Justice.[125] (A subsequent investigation by the CIA Inspector General's office confirmed these allegations.[126] The

[125] Transcript available at http://www.feinstein.senate.gov/public/index.cfm/2014/3/feinstein-statement-on-intelligence-committee-s-cia-detentioninterrogation-report.

[126] CIA Office of the Inspector General, *Report of Investigation: Agency Access to the SSCI Shared Drive on RDINet*, July 18, 2014, https://www.cia.gov/ library/reports/Redacted-July-2014-CIA-Office-of-Inspector-General-Report.pdf.

CIA's search and criminal referral are discussed in more detail in Chapter 10.) Despite the tensions between the Committee and the agency, SSCI did not attempt to trigger the Senate Resolution 400 process, either in April or in the months that followed.

Senator Feinstein asked the White House to lead the declassification effort, but according to former Senator Carl Levin, "[t]he White House declined to lead the declassification effort, and instead gave the declassification review to the very agency, the CIA, that the Senate committee was investigating."[127] On August 1, the CIA delivered its proposed redactions of the report to the Committee.

Chairman Feinstein responded that the redactions were unacceptable, because they "eliminate[d] or obscure[d] key facts that support[ed] the report's findings and conclusions."[128] But she did not attempt to trigger Senate Resolution 400, or threaten do so. It is not clear whether a majority of the Committee would have voted to begin the process, and in any case the Senate had departed for its August recess. Instead, the Committee began a series of negotiations with the CIA and the White House regarding the redactions, which continued until December 2014.

The lead investigator for the Senate report, Daniel Jones, later described the negotiations to a reporter.[129] Jones said that White House Chief of Staff Denis McDonough personally oversaw the process, which included a paragraph-by-paragraph review of the executive summary. According to the news report, "Jones cannot recall a single issue on which McDonough or his team backed the Senate, and only when the agency would agree to relent would McDonough concur."[130] The negotiations were eventually cut short by the Democrats' loss in the midterm elections and Feinstein's impending loss of the SSCI chairmanship to an opponent of the report's release.

Despite these obstacles, SSCI did eventually succeed in negotiating release of many crucial details about the CIA program that the agency had originally blacked out. But other important details remained obscure. The Committee's full, classified report has remained locked in a few executive branch safes, despite repeated requests from Senator Feinstein for the executive branch to review the full report and use it to guard against future abuses by the intelligence community. Invoking Senate Resolution 400 would not have eliminated the need for negotiation, but it might have strengthened the Committee's bargaining position.

A similar struggle between the branches occurred during the drafting and publication of the five volume SSCI report on Russian interference in the 2016 election.[131] In that case, the debate was between the Committee and the Office of the Director of National Intelligence.

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[127] Spencer Ackerman, *"A Constitutional Crisis": The CIA Turns on the Senate*, The Guardian, September 10, 2016, https://www.theguardian.com/usnews/2016/sep/10/cia-senate-investigation-constitutional-crisis-daniel-jones.

[128] Senator Dianne Feinstein, Feinstein Statement on Redactions in Detention Interrogation Study, August 5, 2014, http://www.feinstein.senate.gov/ public/index.cfm/press-releases?ID=d574da86-1171-4bd9-b87f-707e96fa088d.

[129] Ackerman, *Supra* note 98.

[130] *Id.*

[131] Sen. Select Comm. on Intelligence, S. Rep. No. 116-290, Russian Active Measures Campaigns and Interference in the 2016 U.S. Election, Vols. I-V (2020).

C. Fifth Amendment Privilege against Self-Incrimination

1. The Privilege Is Applicable to Congressional Investigations but is Subject to Established Limitations

The Fifth Amendment of the Constitution protects individuals from being compelled to testify against themselves in a criminal case. Although it has never been necessary for the Supreme Court to decide the issue, the Court has made it clear that the privilege against self-incrimination applies to witnesses in congressional investigations.[132] The privilege is personal in nature[133] and may not be invoked on behalf of a corporation,[134] small partnership,[135] labor union,[136] or other "artificial" organization.[137] The privilege protects a witness against being compelled to testify, but it generally does not protect against a subpoena for existing documentary evidence.[138] However, where compliance with a subpoena asking for documents would effectively serve as testimony to authenticate the documents produced, the privilege may apply.[139] On the other hand, the Supreme Court has held that a directive to a witness to authorize foreign banks to produce records *if* they existed is not testimonial in nature and, therefore, not incriminating.[140]

2. No Special Combination of Words Is Necessary for Invocation

There is no required verbal formula for invoking the Fifth Amendment privilege. Similarly, there does not appear to be a requirement that the congressional committee inform a witness of his or her Fifth Amendment rights.[141] However, a committee should recognize any reasonable indication, such as the witness saying "the Fifth Amendment," as a sign that the witness is asserting the privilege.[142] Where a committee is uncertain whether the witness is in fact invoking the privilege against self-incrimination or is claiming some other basis for declining to answer, the committee should direct the witness to specify the nature of the objection.[143]

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[132] *See* Watkins v. United States, 354 U.S. 178 (1957); *See also* Quinn v. United States, 349 U.S. 155, 162 (1955).

[133] *See* McPhaul v. United States, 364 U.S. 372 (1960); *see also McCormick, Evidence*§ 120 (Cleary ed. 1984) [hereinafter McCormick].

[134] *See* Hale v. Henkel, 201 U.S. 43 (1906).

[135] *See* Bellis v. United States, 417 U.S. 85 (1974).

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

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

[138] *See* Fisher v. United States, 425 U.S. 391, 409 (1976); Andresen v. Maryland, 427 U.S. 463 (1976). The cases concerned business records, and there may be some protection available in the case of a subpoena for personal papers. *See* McCormick, *supra* note 103 at §§ 126, 127.

[139] *See* United States v. Doe, 465 U.S. 605 (1984); *Fisher*, 425 U.S. at 391; *see also* Curcio v. United States, 354 U.S. 118 (1957); McCormick, *supra* note 103, at § 126.

[140] *See* Doe v. United States, 487 U.S. 201 (1988).

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

[142] *Quinn*, 349 U.S. at 155.

[143] Emspak v. United States, 349 U.S. 190 (1955).

3. Grounds for the Assertion of the Privilege

Witnesses may invoke the Fifth Amendment privilege during a congressional investigation with regard to testimony or documents that are (1) testimonial that is, it "relate[s] to a factual assertion;"[144] (2) self-incriminating, in that its disclosure would tend to show guilt or furnish a "link in the chain of evidence" needed to prosecute;[145] and (3) compelled that is, not voluntarily given. Oral testimony given pursuant to a subpoena and in response to questioning almost always would be testimonial and compelled. The remaining, critical inquiry, then, is whether the responsive testimony would be "incriminating." The Supreme Court has taken the broad view of what constitutes incriminating testimony, holding that the privilege protects any statement "that the witness reasonably believes could be used in criminal prosecution or could lead to other evidence that might be so used."[146] Even a witness who denies wrongdoing can refuse to answer questions on the grounds that he or she might be "ensnared by ambiguous circumstances."[147]

4. The Necessary Elements for a Contempt Citation

In 1955 the Supreme Court announced, in a trilogy of rulings, that in order to establish a proper legal foundation for a contempt prosecution, a jurisdictional committee must disallow a witness's constitutional privilege and clearly apprise the witness that an answer is demanded. In *Quinn v. United States* and *Empsak v. United States*, the Court held that a witness cannot be forced to guess whether or not a committee has accepted his or her objection. If the witness is not able to determine "with a reasonable degree of certainty that the committee demanded his answer despite his objection," and thus is not presented with a "clear-cut choice between compliance and non-compliance, between answering the question and risking the prosecution for contempt," no prosecution for contempt may lie.[148]

Similarly, in *Bart v. United States*,[149] the Court found that at no time did the Committee overrule the petitioner's claim of self-incrimination or lack of pertinence, nor was he indirectly informed of the Committee's position through a specific direction to answer. A Committee member's suggestion that the Chairman advise the witness of the possibility of contempt was rejected. The Court concluded that the consistent failure to advise the witness of the Committee's position as to his objections left him to speculate about this risk of possible prosecution for contempt and did not give him the clear choice between standing with his objection and compliance with a committee ruling. Citing *Quinn v. United States*, the Court held that this defect in laying the necessary constitutional foundation for a contempt citation required reversal of the petitioner's conviction.

5. Waiver of the Privilege

The privilege against self-incrimination may be waived by failure to assert it, specifically disclaiming it, or previously testifying on the same matters as to which the privilege is later asserted. However, because of the importance of the Fifth Amendment privilege, a court will not construe an ambiguous statement by

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[144] *Doe*, 487 U.S. at 210.

[145] Hoffman v. United States, 341 U.S. 479, 486-87 (1951).

[146] Kastigar v. United States, 406 U.S. 441, 444-45 (1972).

[147] Ohio v. Reims, 532 U.S. 17 (2001).

[148] *Quinn*, 349 U.S. at 177; *Emspak*, 349 U.S. at 202.

[149] Bart v. United States, 349 U.S. 219 (1955).

a witness before a committee as a waiver;[150] and where witnesses do not offer substantive testimony, and instead merely make general denials or summary assertions, federal courts have been unwilling to infer a waiver of the Fifth Amendment privilege.[151] At times, though, a waiver dispute can engender an acrimonious compounding of complex legal, constitutional, ethical, and political issues. This was the case with the House Oversight and Government Reform Committee's investigation of allegations that the Internal Revenue Service (IRS) for a number of years had been engaging in the targeting of conservative groups seeking tax-exempt status by using tougher-than-normal applicant scrutiny.[152] It presents an illuminating examination of legislative committee coercive investigatory tactics and processes and the potential pitfalls for all parties.

a. The Contempt of Congress Citation of Lois Lerner

In May 2013, the U.S. Treasury Inspector General (IG) for Tax Administration issued a report finding that the Internal Revenue Service's Division of Exempt Organizations used inappropriate criteria to identify conservative organizations applying for tax-exempt status and then targeted them in a manner distinct from and more intrusive than other applicants. The practice had been ongoing since 2010. During this period Lois Lerner was the director of the division. Following issuance of the IG's report, the House Committee on Oversight and Government Reform commenced an investigation and subpoenaed Lerner. Her attorney wrote Chairman Issa, advising him that Lerner would be invoking the Fifth Amendment and requesting that she be excused, "since the only purpose of having her appear would be to embarrass or burden her." The Chairman refused, asserting that her appearance was required "because of the possibility that she will waive or choose not to assert the privilege as to at least certain questions of interest to the Committee; the possibility that the Committee will immunize her testimony and the possibility that the Committee will agree to hear her testimony in executive session."[153]

When Lerner appeared before the Committee, she took the oath and then presented an opening statement in which she described her professional background, her knowledge of the Inspector General's report and

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[150] *See Emspak*, 349 U.S. at 190 (1955); *see also* Johnson v. Zerbst, 304 U.S. 458, 464 (1938); Rogers v. United States, 340 U.S. 367, 371 (1951).

[151] *See, e.g.*, Isaacs v. United States, 256 F. 2d 654, 656-57, 660-61 (8th Cir. 1958) (witness before grand jury who repeatedly stated that he had committed no crime did not waive his Fifth Amendment privilege); Ballantyne v. United States, 237 F. 2d 657., 665 (5th Cir. 1956) (concluding that "the United States Attorney could not, by thus skillfully securing from appellant a general claim of innocence, preclude him from thereafter relying upon his constitutional privilege when confronted with specific withdrawals"); United States v. Hoag, 142 F. Supp. 667, 669 (D.D.C. 1956) (witness who generally denied being a spy or a saboteur before a congressional committee did not waive the Fifth Amendment privilege). *See also*, McCarthy v. Arndstein, 262.

[152] *See* H. R. Rep. No. 113-415, 113th Cong., 2d Sess. (2014), of the Committee on Oversight and Government Reform, recommending holding Lois Lerner in contempt of Congress [hereinafter *Lerner Contempt Report*]. The report also includes a section on minority views that presents rebuttal arguments of the minority members and 31 opinions of non-congressional legal professionals. *See Id.* at 337-436.

[153] *Lerner Contempt Report*, *supra* note 122 at 9. The chairman's response was carefully couched to avoid D.C. Legal Ethics Opinion 31 (1977), as modified by Opinion 358 (January 2011), which makes it a violation of the D.C. Rules of Professional Responsibility for a congressional staff attorney to require a witness to appear before a congressional committee when the committee has been informed that the witness will invoke his or her Fifth Amendment privilege and where the summons serves no substantial purpose "other than to embarrass, delay, or burden" the witness. For a critique of the congressional practice of compelling a witness to assert the privilege at a public hearing after advising a committee beforehand of that intention, see Daniel Cubelo Zeidman, *Note, To Call or Not to Call: Compelling Witnesses to Appear Before Congress*, 42 Fordham Urb. L. J. 569, 606 (2014) (asserting that "Opinion 358 is at odds with other relevant opinions because it effectively allows a member of Congress to compel any witness to appear before a committee so long as the sole purpose of compelling the witness is not to pillory him or her. Opinion 358 provides that one legitimate reason for compelling a witness is to determine whether the witness will actually assert his or her right. This determination will always allow a committee to force a witness to appear before a committee because the only way to definitively prove that a witness will invoke the right against self-incrimination is by forcing the witness to do so publically.").

an ensuing FBI investigation, and her authentication of written responses to questions put to her by the Inspector General's office. She also said: "I have done nothing wrong. I have not broken any laws. I have not violated any IRS rules and regulations, and I have not provided false information to this or any other congressional committee."[154]

Lerner then invoked the privilege and refused to answer any further questions. The Chairman and Rep. Gowdy, a former federal prosecutor, commented that they believed her opening statement may have waived her Fifth Amendment rights. At the close of the session Lerner was excused by the Chairman "subject to a recall; I am looking into the possibility of recalling her and insisting that she answer questions in light of a waiver."[155] At a public Committee meeting convened a month later, after receiving a legal opinion from Lerner's attorney on the waiver issue, as well as other informal legal advice, the Committee voted 22-17 for a resolution that it had "determine[d] that the voluntary statement offered by Ms. Lerner constituted a waiver of her Fifth Amendment privilege against self-incrimination." Still subject to the subpoena, Lerner was recalled to testify. Before questioning her, the Chairman stated that "[a]t a business meeting on June 28, 2013, the Committee approved a resolution rejecting Ms. Lerner's claim of Fifth Amendment privilege based on her waiver. If Ms. Lerner continues to refuse to answer questions from our members while she is under subpoena, the Committee may proceed to consider whether she should be held in contempt."[156] During subsequent questioning she refused to acknowledge the waiver and continued to refuse to answer based on her constitutional privilege. The Chairman never specifically rejected or warned her of the consequence of each refusal to answer, as is seemingly required by Supreme Court rulings.

Lerner was voted in contempt of Congress on May 7, 2014,[157] and the citation was sent by the Speaker to the United States Attorney for the District of Columbia for presentation to a grand jury. On March 31, 2015, the United States Attorney advised the Speaker that it had concluded that Lerner had not waived her Fifth Amendment protections in her opening statement "because she made only general claims of innocence. Thus, the Fifth Amendment to the Constitution would provide Ms. Lerner with an absolute defense should she be prosecuted under Section 192 for her refusal to testify."[158] The U.S. Attorney did find, however, that the Committee did properly give the notices required by the Supreme Court's 1995 trilogy. But, disturbingly, the opinion concluded that DOJ practice and precedent accorded U.S. Attorneys the absolute constitutional discretion to determine whether or not to decline a contempt prosecution of a federal officer, even if the chief executive has not asserted or cannot assert his or her presidential communications privilege.[159]

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[154] *Id*. at 9-10.

[155] *Id*. at 10-11.

[156] Emphasis supplied. The resolution only declared a waiver. *See id*. at 11-12.

[157] H. R. Res. 574, 113th Cong. (2014).

[158] Letter from Ronald C. Machen, Jr. United States Attorney, District of Columbia, to the Honorable John A. Boehner, Speaker, U.S. House of Representatives, March 31, 2015.

[159] *See generally*, Jason Kornfeld, Waiver of the Privilege Against Self-Incrimination in Congressional Investigations: What Congress, Witnesses and Lawyers Can Learn From the IRS Scandal, 50 NYU J. of Legis. & Pub. Policy Quorum 48 (2015) (suggesting lawyers should be more careful in what to allow clients to testify to in analogous situations; that Congress should not subpoena witnesses who will certainly claim privilege; and if they do, witnesses should be advised that any opening statement will be deemed a waiver by a committee).

6. Congress May Grant a Witness Immunity to Obtain Testimony

As discussed in detail in Chapter 3, when a witness asserts the privilege against self-incrimination, Congress may choose to grant the witness immunity and compel the witness's testimony. Specifically, the full House or Senate or the committee conducting the investigation may seek a court order, which (a) directs the witness to testify and (b) grants the witness immunity against the use of this testimony, or other evidence derived from the testimony, in a subsequent criminal prosecution.[160] The immunity that is granted is "use" immunity, not "transactional" immunity. Neither the immunized testimony that the witness gives, nor evidence derived therefrom, may be used against the witness in a subsequent criminal prosecution, except one for perjury or contempt relating to the testimony. However, the witness may be convicted of the crime (the "transaction") on the basis of other, independently obtained evidence.[161]

As set forth in Chapter 3, the application for the judicial immunity order must be approved by a majority of the House or Senate or by two-thirds of the full committee seeking the order.[162] The Attorney General must be notified at least ten days prior to the request for the order, and he or she can request a delay of 20 days in issuing the order.[163] Although the order to testify may be issued before the witness's appearance,[164] it does not become legally effective until the witness has been asked the question, invoked the privilege, and been presented with the court order.[165] The role of the court in issuing the order has been held to be ministerial, and thus, if the procedural requirements under the immunity statute have been met, the court may not refuse to issue the order or impose conditions on the grant of immunity.

D. First Amendment

1. The First Amendment Is Applicable to Congressional Investigations

The First Amendment protects the freedoms of speech, press, assembly, religion, and petitioning the government. The amendment prohibits government conduct that unduly "chills" the exercise of these rights or inhibits the operation of a free press. The Supreme Court has held that the First Amendment restricts Congress in conducting investigations.[166] In *Barenblatt v. United States*,[167] the Court held that "[w]here First Amendment rights are asserted [by a witness] to bar governmental 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." Thus, unlike the Fifth Amendment privilege against self-incrimination, the First Amendment does not give a witness an absolute right to refuse to respond to congressional demands for information.[168]

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[160] 18 U.S.C. §§ 6002, 6005 (2000). *See* discussion in Chapter 3.B.3.b (How a Committee Grants Immunity).

[161] Kastigar v. United States, 406 U.S. 441 (1972) (upholding the constitutionality of granting a witness only use immunity rather than transactional immunity).

[162] 18 U.S.C. § 6005(a) (2000).

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

[164] *Id.* at 1257.

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

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

[167] 360 U.S. 109, 126 (1959).

[168] *Id.*

2. The Degree of Protection Afforded by the First Amendment Is Uncertain

First Amendment issues often arise when members of the press seek to protect the confidentiality of their sources and cite freedom of the press in response to congressional inquiries. The Court has held that in balancing personal privacy interests against the congressional need for information, "[t]he critical element is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosures from an unwilling witness."[169] To protect the First Amendment rights of witnesses, the courts have emphasized the requirements discussed above concerning authorization for the investigation, delegation of power to investigate to the committee involved, and the existence of a legislative purpose.[170]

The Supreme Court has never relied on the First Amendment as grounds for reversing a criminal contempt of Congress conviction.[171] However, the Court has narrowly construed the scope of a committee's authority so as to avoid reaching First Amendment issues.[172] In addition, the Court has ruled in favor of a witness who invoked his First Amendment rights in response to questioning by a state legislative committee.[173]

3. Committees Often Tread Lightly When First Amendment Rights Are Implicated

When First Amendment rights and access to press sources are at issue, members of Congress are often careful not to press their inquiries as vigorously. A good example is the 1976 investigation by the House Committee on Standards of Official Conduct (House Ethics Committee) of the unauthorized publication of the draft final report of the House Select Committee on Intelligence. The leaked draft report described the results of the Select Committee's yearlong inquiry into the organization, operations, and oversight of the CIA and other components of the intelligence community. The report contained classified information not cleared for public release, as required by the Select Committee's charter, including a discussion of

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[169] *Watkins*, 354 U.S. at 198. A balancing test was also used in Branzburg v. Hayes, 408 U.S. 665 (1972), which involved the issue of the claimed privilege of newsmen not to respond to demands of a grand jury for information. In its decision, the Court concluded that the need of the grand jury for the information outweighed First Amendment considerations, but there are indications in the opinion 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 Committee, 372 U.S. 539 (1963) (applying the compelling interest test in a legislative investigation).

[170] *See, e.g.*, Barenblatt, 360 U.S. at 109; Watkins, 354 U.S. at 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,.

[171] Leading Cases on Congressional Investigatory Power 42 (Comm. Print 1976); James Hamilton, The Power to Probe: A Study of Congressional Investigations 234 (1977). Although it was not in the criminal contempt context, one court of appeals has upheld a witness's First Amendment claim. In *Stamler v. Willis*, the Seventh Circuit Court of Appeals ordered to trial a witness's suit for declaratory relief against the House Un-American Activities Committee in which it was alleged that the committee's authorizing resolution had a "chilling effect" on plaintiff 's First Amendment rights. 415 F.2d 1365 (7th Cir. 1969), *cert. denied*, 399 U.S. 929 (1970). In other cases for declaratory and injunctive relief brought against committees on First Amendment grounds, relief has been denied, though the Courts indicated that relief could be granted if the circumstances were more compelling. *See, e.g.*, Sanders v. McClellan, 463 F.2d 894 (D.C. Cir. 1972); Davis v. Ichord, 442 F.2d 1207 (D.C. Cir. 1970); Ansara v. Eastland, 442 F.2d 751 (D.C. Cir. 1971). However, in *Eastland v. U.S. Servicemen's Fund*, the Supreme Court held that the Constitution's Speech or Debate Clause (Art. I, sec. 6, cl. 1) generally bars suits challenging the validity of congressional subpoenas on First Amendment or other grounds. Thus, a witness generally cannot raise his constitutional defenses until a subsequent criminal prosecution for contempt, unless, in the case of a Senate committee, the statutory civil contempt procedure is employed. 421 U.S. 491 (1975); *see also* United States v. House of Representatives, 556 F. Supp. 150 (D.D.C. 1983).

[172] *See Rumely*, 345 U.S. at 41.

[173] *See* Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963). In the majority opinion, Justice Goldberg observed that "an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition [is] that the State convincingly show a substantial relation [or nexus] between the information sought and a subject of overriding and compelling state interest." *Id.* at 546.

CIA covert activities. The Ethics Committee subpoenaed four news media representatives, including Daniel Schorr.[174] The Committee concluded that Mr. Schorr had obtained a copy of the select committee's report from an undisclosed person on the Select Committee and then made it available for publication. Although the Ethics Committee found that "Mr. Schorr's role in publishing the report was a defiant act in disregard of the expressed will of the House of Representatives to preclude publication of highly classified national security information," and it further found "his actions in causing publication of the report to be reprehensible," it declined to cite him for contempt for his refusal to disclose his source.[175] The desire to avoid a clash over First Amendment rights apparently was a major factor in the Committee's decision on the contempt matter.[176]

In another First Amendment dispute, the Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce investigated allegations that deceptive editing practices were employed in the production of the television news documentary program, "The Selling of the Pentagon." In the course of its investigation, the Committee subpoenaed Frank Stanton, the president of CBS, directing him to deliver to the Subcommittee the "outtakes" relating to the program.[177] When Stanton declined to provide the subpoenaed materials, the Subcommittee unanimously voted a contempt citation, and the full Committee recommended to the House that Stanton be held in contempt.[178] After extensive debate, the House failed to adopt the Committee report, voting instead to recommit the matter to the Committee.[179] During the debate, several members expressed concern that approval of the contempt citation would have a "chilling effect" on the press and would unconstitutionally involve the government in the regulation of the press.[180]

Next came the 1991 confirmation hearings on Justice Clarence Thomas's nomination to serve on the Supreme Court. A confidential affidavit given to the Senate Judiciary Committee by Professor Anita Hill, which alleged sexual harassment by the nominee, was leaked to National Public Radio reporter Nina Totenberg. The allegations raised a political storm that made the hearings highly contentious. After Justice Thomas was confirmed by a close vote, the Senate passed a resolution directing the Senate Committee on Rules and Administration to appoint an independent counsel to investigate the source of the leak.[181] Counsel subpoenaed Totenberg but she refused to comply, claiming a reporter's privilege under the First Amendment. Counsel recommended that the Senate committee hold her in contempt of Congress. The Chair and Ranking Member, who had authority under the Senate resolution to rule on

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[174] Investigation Pursuant to House Resolution 1042 Concerning Unauthorized Publication of Report of Select Committee on Intelligence, H. R. Rep. No. 94-1754, 94th Cong. 2d Sess., 6, 19–23 (1976).

[175] *Id.* at 38–40, 42–43. In addition to releasing Schorr and the three other media persons from their obligations under the Ethics Committee's subpoenas, the committee passed a motion stating that "in taking such action … the committee makes no finding and establishes no precedent regarding the validity of any claim of privilege by said Daniel Schorr or Aaron Latham to refuse to answer questions put to them by counsel of the [Ethics Committee] in public session on September 15, 1976, under said subpoenas …." *Id.* at 39.

[176] *Id.* at 47–48 (additional views of Representatives Spence, Teague, Hutchinson, and Flynt).

[177] 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.

[178] H. R. Rep. No. 92349, 92d Cong., 1st Sess. (1971). The legal argument of CBS 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.

[179] *See* 117 Cong. Rec. 23922–26, 24603–59, 24720–53 (1971).

[180] *Id.* at 24731–32.

[181] The final report on the inquiry was due 120 days after appointment of the counsel. See S. Res. 202, 102d Cong., 1st Sess. (1991).

privilege claims, denied the request. The Chair stated that holding her in contempt "could have a chilling effect on the media" and "could close a door where more doors need opening." The Ranking Member said that "[t]here is no legal precedent dealing with the apparent conflict between the freedom of the press guaranteed in the First Amendment and Congress's inherent constitutional power to compel testimony and documents in the pursuit of an investigation."[182]

More recently, the prosecution of Backpage executives demonstrated how courts weigh First Amendment protections against legitimate congressional oversight prerogatives.[183] There, Backpage.com and its executives were prosecuted for allegedly facilitating sex trafficking through advertising on its website. While Backpage argued that it was not liable, under Section 230 of the Communications Decency Act, for its ads, courts have rejected this defense, pointing to their knowing illegality.[184] Separately, the Senate Permanent Subcommittee on Investigations subpoenaed Carl Ferrer, CEO of Backpage, to obtain thousands of pages of documents relating to Backpage's corporate operations, data retention and moderation policies, and interactions with law enforcement.[185] Ferrer challenged the subpoena on various grounds, including as an intrusion on First Amendment protected speech. Specifically, Ferrer objected to the subpoena as an overbroad and unduly burdensome abuse of the investigative process that would chill protected editorial speech.[186] Ferrer argued these constitutional infirmities obviated not only the need to produce entire categories of responsive documents, but also the need to conduct a comprehensive search for such documents or to file a privilege log.[187]

Balancing Ferrer's interests against the Subcommittee's, the district court rejected these First Amendment challenges, concluding the First Amendment did not categorically insulate Ferrer from producing, or searching for, responsive documents. The court recognized that some of Backpage's activities might involve constitutionally protected editorial decision-making, but found that some of the subpoenaed documents could contain unprotected information about suspected illegal sex trafficking, such that Backpage had "no basis" to argue that its documents were categorically shielded from disclosure.[188] Rather than asserting blanket protection, Ferrer would need to perform the "customary duties associated with a subpoena," by searching for and producing responsive unprivileged documents and providing a privilege log with an explanation for any withheld material.[189] In contrast to the unsubstantiated breadth of Ferrer's First Amendment claim, the Subcommittee had subpoenaed only documents relating to suspected illegal activity, and had permitted the redaction of personally identifying information on subscribers and advertisers, such that any impact on Ferrer's First Amendment freedoms was "incidental and minimal."[190]

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[182] *See* Report of the Temporary Special Independent Counsel Pursuant to Senate Resolution 202, S. Doc. No. 102-20, 102d Cong., 2d Sess. 6–8, 30 (1992); Editorial, *Misguided Business: Senate Committee decides to Quit Abusing Reporters, Hous. Chron.*, Mar. 28, 1992, at B10.

[183] *See* Paul Demko, *The Sex-Trafficking Case Testing the Limits of the First Amendment*, Politico (July 29, 2018), https://www.politico.com/magazine/story/2018/07/29/first-amendment-limits-backpage-escort-ads-219034/.

[184] *See, e.g.* Order Denying Motion to Dismiss Defendants Lacey et. al. at 14, United States v. Lacey et. al., No. 2:18-cr-00422 (D. Ariz. Oct. 24, 2019), ECF No. 793.

[185] Senate Permanent Subcomm. v. Ferrer, 199 F. Supp. 3d 125, 133 (D.D.C. 2016), *vacated as moot sub nom.* Senate Permanent Subcomm. on Investigations v. Ferrer, 856 F.3d 1080 (D.C. Cir. 2017).

[186] *Ferrer*, 199 F. Supp. 3d at 138.

[187] *Id.* at 139.

[188] *Id.* at 139–40.

[189] *Id.* at 140.

[190] *Id.* at 140–41, 143–44.

Finally, the subpoena was not unconstitutionally overbroad or burdensome on its face, because it was issued "pursuant to a lawful purpose" to which the requested documents were relevant (i.e., the possibility of legislating with respect to sex trafficking)—where that is so, the subpoenaed party bears the difficult burden of showing that a request is unreasonable.[191]

Former President Trump also raised a First Amendment objection to a subpoena issued by the House Select Committee to Investigate the January 6 Attack on the U.S. Capitol. The subpoena covered both documents and testimony;[192] the former president filed a complaint in federal court to quash the subpoena on the grounds that the subpoena violated his First Amendment rights (among others) by threatening to "force President Trump to reveal the inner workings of his Presidential campaign, including his political beliefs, strategy, and fundraising" and infringing upon his rights "to hold whatever political views he would like, to express those views—especially including criticism of government actions like the conduct of elections—and to associate with whomever he chooses."[193] On December 28, 2022, the Select Committee withdrew the subpoena rendering the case moot.[194]

In 2022 the House Select Committee to Investigate the January 6 Attack on the U.S. Capitol also subpoenaed cell phone record data from Arizona Republican Party Chair Kelli Ward.[195] Ward filed suit in federal district court seeking to block enforcement of the subpoena, arguing that disclosure of the cell phone data would unconstitutionally chill her First Amendment associational rights by causing her to "become implicated in the largest criminal investigation in U.S. history" and by exposing her to harassment from the Committee.[196] The court rejected Ward's First Amendment claim, finding she had failed to make a showing of harassment or discouragement of membership sufficient to state a First Amendment defense to subpoena enforcement.[197] The court found the subpoena had been issued pursuant to a valid legislative purpose (investigating the events of January 6), and that alleged rival party control of the Committee was an unduly speculative basis for claiming that harassment would result from enforcing the subpoena.[198]

The House Select Committee also subpoenaed Salesforce for communications from both former President Trump and the Republican National Committee ("RNC") sent to their supporters during the period leading to the events of January 6, as well as communications between former President Trump, the RNC, and Salesforce.[199] The RNC filed suit in federal court seeking to block enforcement of the subpoena, arguing that the subpoena violated its First Amendment associational rights by compelling disclosure of

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[191] *Id.* at 143–44.

[192] Subpoena at 7, Donald J. Trump v. Select Comm. to Investigate the January 6th Attack on the United States Capitol, No. 9:22-cv-81758 (S.D. Fla. Nov. 11, 2022), ECF No. 1-1.

[193] Donald J. Trump v. Select Committee to Investigate the January 6th Attack on the United States Capitol, Case No. 9:22-cv-81758, Complaint at 32.

[194] Order of Dismissal at 1, Donald J. Trump v. Select Comm. to Investigate the January 6th Attack on the United States Capitol, No. 9:22-cv-81758 (S.D. Fla. Jan. 4, 2023), ECF No. 9.

[195] *Ward v. Thompson*, 630 F. Supp. 3d 1140, 1147 (D. Ariz. 2022).

[196] *Id.* at 1153 (cleaned up).

[197] *Id.*

[198] *Id.* Ward requested an injunction against enforcement pending appeal from the Ninth Circuit Court of Appeals, which denied the injunction. *Ward v. Thompson*, No. 22-16473, 2022 WL 14955000, at *3 (9th Cir. Oct. 22, 2022). Ward then appealed to the United States Supreme Court seeking a stay of the lower court order and an injunction against enforcing the subpoena, but the Supreme Court denied the request. *Ward v. Thompson*, 143 S.Ct. 439 (2022).

[199] Republican National Comm. v. Pelosi, 602 F. Supp. 3d 1, 12 (D.D.C. 2022), *vacated as moot*, 2022 WL 4349778 (D.C. Cir. 2022).

confidential, strategic information.[200] The district court rejected the RNC's argument, finding it carried "some force, especially given that the Select Committee is dominated by members of the Democratic Party," but concluding that the potential competitive harm to the RNC from disclosure of its strategic decision-making was "too logically attenuated and speculative" compared to the Committee's "uniquely weighty and vital" interest in investigating the events of January 6.[201] The RNC filed an appeal, and the D.C. Circuit granted an injunction precluding enforcement of the subpoena pending appeal.[202] While the appeal was pending, the Committee withdrew the subpoena, mooting the case.[203]

E. Fourth Amendment

1. The Fourth Amendment Applies to Congress

Several opinions of the Supreme Court suggest that the Fourth Amendment's prohibition against unreasonable searches and seizures applies to congressional committees; however, there has not been an opinion directly addressing the issue.[204] The Fourth Amendment protects a congressional witness against a subpoena that is unreasonably broad or burdensome.[205]

Therefore, there must be a legitimate legislative or oversight-related basis for the issuance of a congressional subpoena.[206]

2. The Courts Have Given Congress Wide Latitude in This Area

The Supreme Court has outlined the standard to be used in judging the reasonableness of a congressional subpoena:

> '[A]dequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes, and scope of the inquiry' …. '[T]he description contained in the subpoena was sufficient to enable [the petitioner] to know what particular documents were required and to select them accordingly.'[207]

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[200] *Id.* at 33.

[201] *Id.* at 32, 36–38.

[202] Republican National Comm. v. Pelosi, No. 22-5123 (D.C. Cir. May 25, 2022).

[203] Republican National Comm. v. Pelosi, No. 22-5123, 2022 WL 4349778, at *1 (D.C. Cir. Sept. 16, 2022).

[204] *See Watkins*, 354 U.S. at 188; *see also* McPhaul v. United States, 364 U.S. 372 (1960).

[205] *McPhaul*, 364 U.S. at 372; *see also* Shelton v. United States, 404 F.2d 1292 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1024 (1969).

[206] A congressional subpoena may not be used in a mere "fishing expedition." *See* Hearst v. Black, 87 F.2d 68, 71 (D.C. Cir. 1936) (quoting Federal Trade Commission v. American Tobacco Co., 264 U.S. 298, 306 (1924) (stating that "[i]t is contrary to the first principles of justice to allow a search through all the respondents' records [sic], relevant or irrelevant, in the hope that something will turn up.")). But see Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 509 (1975) (recognizing that an investigation may lead "up some 'blind alleys' and into nonproductive enterprises. To be a valid legislative inquiry there need be no predictable end result"); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 209 (1946) (holding that determining whether a subpoena is overly broad "cannot be reduced to formula; for relevancy and adequacy of excess in the breadth of the subpoena are matters variable in relation to the nature, purposes and scope of the inquiry").

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

3. The Burden Is on the Witness to Inform a Committee of Objections to a Subpoena

If a witness has a legal objection to a subpoena *duces tecum* (one seeking documents) or is, for some reason, unable to comply with a demand for documents, the witness must give the grounds for the objection upon the return of the subpoena. The Supreme Court has stated: "If petitioner was in doubt as to what records were required by the subpoena, or found it unduly burdensome, or found it to call for records unrelated to the inquiry, he could and should have so advised the Subcommittee, where the defect, if any, 'could easily have been remedied.'"[208]

Where a witness is unable to produce documents, the witness will not be held in contempt "unless he is responsible for their unavailability … or is impeding justice by not explaining what happened to them."[209]

4. Applicability of the Fourth Amendment's Exclusionary Rule Is Uncertain

In judicial proceedings, if evidence has been obtained in violation of a criminal defendant's Fourth Amendment rights, the exclusionary rule prohibits the prosecution from introducing that evidence at trial. The application of the exclusionary rule to congressional committee investigations depends on the precise facts of the situation. Documents that were unlawfully seized at the direction of a congressional investigating committee may not be admitted into evidence in a subsequent, unrelated criminal prosecution because of the command of the exclusionary rule.[210] In the absence of a Supreme Court ruling, it remains unclear whether a congressional subpoena that was issued on the basis of documents obtained through an unlawful seizure by another investigating body (such as a state prosecutor) is valid. If the exclusionary rule applies, it would bar reliance on the unlawfully obtained evidence, and also on the subpoena itself.[211]

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[208] *Id*. (quoting *United States v. Bryan*, 339 U.S. 323, 333 (1950)).

[209] *Id.* at 378.

[210] *See* Nelson v. United States, 208 F.2d 505 (D.C. Cir.), *cert. denied*, 346 U.S. 827 (1953).

[211] In United States v. McSurely, 473 F.2d 1178, 1194 (D.C. Cir. 1972), the court of appeals reversed contempt convictions where the subcommittee subpoenas were based on information "derived by the Subcommittee through a previous unconstitutional search and seizure by the [state] officials and the Subcommittee's own investigator." The decision of the court of appeals in the contempt case was rendered in December 1972. In June 1973, in a civil case brought by the criminal defendants, Alan and Margaret McSurely, against Senator McClellan and the subcommittee staff for alleged violations of their constitutional rights by the transportation and use of the seized documents, the federal district court denied the motion of the defendants for summary judgment. While the appeal from the decision of the district court in the civil case was pending before the court of appeals, the Supreme Court held in Calandra v. United States, 414 U.S. 338 (1974), that a grand jury is not precluded by the Fourth Amendment's exclusionary rule from questioning a witness on the basis of evidence that was illegally seized. A divided court of appeals subsequently held in McSurely v. McClellan, 521 F.2d 1024, 1047 (D.C. Cir. 1975), that under Calandra "a congressional committee has the right in its investigatory capacity to use the product of a past unlawful search and seizure."

The decision of the three-judge panel in the civil case was vacated. On rehearing by the full District of Columbia Circuit, five judges were of the view that Calandra was applicable to the legislative sphere. Another five judges found it unnecessary to decide whether Calandra applies to committees, but indicated that even if it does not apply to the legislative branch, the exclusionary rule may restrict a committee's use of unlawfully seized documents if it does not make mere "derivative use" of them but commits an independent Fourth Amendment violation in obtaining them. McSurely v. McClellan, 553 F.2d 1277, 1293-94, 1317-25 (D.C. Cir. 1976) (*en banc*). The Supreme Court granted certiorari in the case, 434 U.S. 888 (1977), but subsequently dismissed certiorari as improvidently granted, with no explanation for this disposition of the case. *See* McAdams v. McSurely, 438 U.S. 189 (1978). Jury verdicts were eventually returned against the Senate defendants, but were reversed in part on appeal. *See* 753 F.2d 88 (D.C. Cir. 1985), *cert. denied*, 474 U.S. 1005 (1985).

F. Sixth Amendment

The Sixth Amendment right of a criminal defendant to cross-examine witnesses and call witnesses on his or her behalf has been held inapplicable to a congressional hearing.[212]

G. Tenth Amendment

The Tenth Amendment provides that any constitutional powers not delegated to the federal government, nor prohibited to the states, are reserved to the states or to the people.[213] State officials have argued that the Tenth Amendment reflects a principle of federalism that may serve as a shield against congressional investigations.

In July 2016, the Chairman of the House Committee on Science, Space, and Technology issued subpoenas to New York Attorney General Eric Schneiderman and Massachusetts Attorney General Maura Healey, seeking documents related to putative "coordinated efforts" by those state attorneys general "to deprive companies, nonprofit organizations, scientists and scholars of their First Amendment rights."[214] The state attorneys general refused to comply, asserting that the subpoenas intruded on states' sovereign prerogatives in the domain of investigations and law enforcement.[215] A coalition of 14 state Attorneys General, together with the D.C. Attorney General, joined in denouncing the Committee subpoena.[216]

Congress prevailed, however, in a later such attempt. In March 2023, the House Judiciary Committee opened an investigation into the use of the justice system against former President Trump, focused on the New York State charges brought, and conviction secured, by Manhattan District Attorney Alvin Bragg.[217] As part of this investigation, the Committee subpoenaed former Manhattan Special Assistant District Attorney Mark Pomerantz;[218] Bragg challenged the subpoena in federal district court, but the court

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[212] *See* United States v. Fort, 443 F.2d 670 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 932 (1971); *see also* Hannah v. Larche, 363 U.S. 420 (1960); Moran v. Burbine, 475 U.S. 412, 430 (1986) (Sixth Amendment is not a source for attorney-client privilege).

[213] U.S. Const. amend. X.

[214] *See Smith Subpoenas MA, NY Attorneys General, Environmental Groups*, H.R. Cmte. on Space, Sci. & Tech. (July 13, 2016), https://science.house.gov/2016/7/smith-subpoenas-ma-ny-attorneys-general-environmental-groups.

[215] *See, e.g.*, Letter from Eric Schneiderman, N.Y. Att'y Gen., to the Hon. Lamar Smith, Chairman, H.R. Cmte. On Space, Science, & Technology (Mar. 1, 2017), https://ag.ny.gov/sites/default/files/nyoag_objections_to_feb_16_2017_subpoena-signed.pdf.

[216] *See Attorney General Racine and Colleagues from 14 States Urge End to Congressional Interference with Exxon Investigation*, Office of the D.C. Att'y Gen. (Mar. 1, 2017), https://oag.dc.gov/release/attorney-general-racine-and-colleagues-14-states

[217] *Jordan, Comer, Steil Demand Communications, Documents, and Testimony from Manhattan DA Alvin Bragg*, H. Comm. on the Judiciary (Mar. 20, 2023), https://judiciary.house.gov/media/press-releases/jordan-comer-steil-demand-communications-documents-and-testimony-manhattan-da.

[218] Complaint at 16, Bragg v. Jordan, 1:23-cv-3032 (S.D.N.Y. Apr. 11, 2023), ECF No. 1.

declined to issue a TRO, finding that the subpoena was issued with a "valid legislative purpose" and did not implicate any state sovereign interests.[219] Bragg voluntarily dismissed the case shortly afterward.[220]

[219] *See* Opinion and Order Denying Temporary Restraining Order, Bragg v. Jordan, 1:23-cv-3032 (MKV) (S.D.N.Y. Apr. 19, 2023).

[220] Notice of Dismissal, Bragg v. Jordan, 1:23-cv-3032 (S.D.N.Y. Apr. 24, 2023), ECF No. 51.

6. Common Law Privileges Available in Court May Not Shield Witnesses from Complying with Committee Information Demands

Overview

In court proceedings, there are a variety of "testimonial privileges" recognized by our legal system that enable witnesses to refuse to testify on certain subjects or about conversations with particular people. The most common of these is the attorney-client privilege, which protects conversations between lawyer and client as secret, and thus allows people to seek legal advice in confidence. In congressional proceedings, a committees retain discretion to determine, on a case-by-case basis, whether to accept or reject common law testimonial privileges. It can deny a witness's request to invoke privilege when the committee concludes it needs the information sought to accomplish its legislative functions.[1] In practice, however, congressional committees have followed the courts' guidance in assessing the validity of a common law privilege claim.

Examples of common law testimonial privileges include the attorney-client, work-product, and deliberative process privileges. The application of each of these doctrines in congressional hearings is discussed below.

A. The Attorney-Client Privilege and Work-Product Doctrine

1. Defining the Attorney-Client Privilege and the Work-Product Doctrine

As noted above, the attorney-client privilege enables people to seek confidential legal advice by protecting the secrecy of conversations between attorney and client. To prove that the attorney-client privilege should apply, the person claiming the privilege must establish: (1) a communication, (2) made in confidence, (3) to an attorney, (4) by a client, and (5) for the purpose of seeking or obtaining legal advice.[2] The party asserting attorney-client privilege has the burden of conclusively proving each element,[3] and courts strongly disfavor blanket assertions of the privilege[4] as "unacceptable."[5] In addition, the mere fact that an individual communicates with an attorney does not make the communication privileged.

Courts have consistently emphasized that one of the essential elements of the attorney-client privilege is that the attorney be acting as an attorney and that the communication be made to secure legal services.

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[1] Glenn A. Beard, *Congress v. The Attorney-Client Privilege: A 'Full and Frank' Discussion*, 35 Am. Crim. L. Rev., 119 (1997); Morton Rosenberg, Cong. Research Serv., 95-464, Investigative Oversight: An Introduction to the Law, Practice, and Procedure of Congressional Inquiry (1995).

[2] *See, e.g.*, 8 Wigmore, Evidence § 2292, at 554 (McNaughton rev. ed 1964); United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358–59 (D. Mass. 1950).

[3] *See, e.g.*, In re Grand Jury Investigation No. 83-2-35, 723 F.2d 447, 450–51 (6th Cir. 1983).

[4] United States v. White, 970 F.2d 328, 334 (7th Cir. 1992) ("A blanket claim of privilege that does not specify what information is protected will not suffice.").

[5] SEC v. Gulf & Western Industries, Inc., 518 F. Supp. 675, 682 (D.D.C. 1981).

The privilege, therefore, does not apply to legal advice given by an attorney acting outside the scope of his or her role as attorney.[6] The courts, when determining the underlying purpose of a communication, will take into account the difference between *outside* counsel retained with limited responsibilities to a corporate client and *in-house* counsel who have duties to provide both business and legal advice.[7] Courts have also invited privilege logs as an acceptable means of establishing a valid claim of privilege, but such logs must be sufficiently detailed and specific in their description to prove each element of the claimed privilege.[8]

The work-product doctrine is a related concept that protects the confidentiality of certain documents created by an attorney as part of his or her representation of a client. The doctrine was recognized by the Supreme Court in 1947,[9] and codified as Rule 26(b)(3) of the Federal Rules of Civil Procedure, and grants limited immunity to an attorney's work product from requests for disclosure. The rule allows for qualified immunity from civil discovery when the materials are: 1) "documents or tangible things," 2) "prepared in anticipation of litigation or trial," and 3) "by or for another party or for that other party's representative." To overcome the privilege, the party seeking the materials must show a substantial need and an inability to obtain the substantial equivalent without undue hardship.

On its face, the definition would not apply to Congress, which is not a court or administrative tribunal, or to a congressional investigative hearing, which does not afford witnesses the same discovery rights afforded during litigation in court. No court has held that the work-product doctrine applies to a legislative hearing, and pertinent federal court rulings support the proposition that it does not apply.[10]

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[6] "Acting as a lawyer encompasses the whole orbit of legal functions. When he acts as an advisor, the attorney must give *predominantly* legal advice to retain his client's privilege of non-disclosure, not solely, or even largely, business advice." Zenith Radio Corp. v. Radio Corp. Of America, 121 F. Supp. 792, 794 (D. Del. 1954) (emphasis added).

[7] The courts have recognized that the dual responsibilities of in-house counsel may overlap significantly and the purpose of various communications with others may begin to blur. Thus, courts have closely scrutinized communications to and from in-house counsel and held that they may be sheltered by the attorney-client privilege "only upon a clear showing that [in-house counsel] gave [advice] in a professional legal capacity." In order to ascertain whether an attorney is acting in a legal or business advisory capacity, the courts have held it proper to question either the client or the attorney regarding the general nature of the attorney's services to his client, the scope of his authority as agent, and the substance of matters which the attorney, as agent, is authorized to pass along to third parties. Colton v. United States, 306 F.2d 633, 636, 638 (2d Cir. 1962); United States v. Tellier, 255 F.2d 441 (2d Cir. 1958); J.P. Foley & Co., Inc. v. Vanderbilt, 65 FRD 523, 526-27 (S.D.N.Y. 1974). Indeed, proper invocation of the privilege may be predicated on revealing facts tending to establish the existence of an attorney-client relation. *See, e.g.*, In re John Doe, Esq., 603 F. Supp. 1164, 1167 (E.D.N.Y. 1985) and In re Arthur Treacher's Franchise Litigation, 92 FRD 429 (E.D. Pa. 1981), cases illustrating how probing the questioning may be to determine whether an attorney was in fact "acting as a lawyer."

[8] Bowne of New York City v. AmBase Corp, 150 F.R.D. 465 (S.D.N.Y. 1993). *See also* United States v. Construction Products Research, 73 F.3d 464, 473-74 (2d Cir. 1996) (logs with cursory descriptions of, and comments on, documents "simply do not provide enough information to support the privilege claim, particularly in the glaring absence of any supporting affidavits or other documentation"); von Bulow v. von Bulow, 811 F.2d 136, 146-47 (2d Cir. 1987), *cert. denied*, 107 S.Ct. 1891 (1988) (logs which rely on conclusory or *ipse dixit* assertions are normally required to be supported by affidavits from individuals with personal knowledge of the relevant facts); International Paper Co v. Fibreboard Corp., 63 FRD 88, 94 (D. Del. 1974) (Such affidavits must "show sufficient *facts* to bring the identified and described document within the narrow confines of the privilege.") (emphasis in original).

[9] Hickman v. Taylor, 329 U.S. 495 (1947).

[10] *See* In re Grand Jury Subpoenas Duces Tecum, 112 F.3d 910, 924–25 (8th Cir. 1997), *cert. denied sub. nom.* Office of the President v. Office of the Independent Counsel, 521 U.S. 1105 (1997) (claims of first lady of work product immunity with respect to notes taken by white house counsel attorneys rejected as inapplicable because the possibility of a congressional investigation did not satisfy the element of anticipation of litigation and trial); In re Grand Jury Proceeding, 5 F. Supp. 2d 21, 39 (D.D.C. 1998), *aff'd on other grounds, sub. nom.* In re Bruce R. Lindsey, 158 F.3d 1263 (D.C. Cir. 1998), *cert. denied sub. nom.* Office of the President v. Office of the Independent Counsel, 525 U.S. 996 (1998) (dismissing claim of work product immunity

In one recent case, a congressional committee sought documents and e-mails written by an attorney for one of the former President's attorneys via a subpoena to Chapman University, where the attorney—John Eastman—worked as a law professor. Prof. Eastman sued to prevent his records from being turned over to the House Select Committee and argued the records were protected by the attorney-client and work-product privileges.[11] The Select Committee obtained most of the records it sought because the courts agreed with the Committee's argument that many of the records were subject to the "crime-fraud" exception to the attorney-client and work-product privileges.

2. Legal Basis for Denying Attorney-Client and Work-Product Privilege Claims

Other than private persons, entities that often invoke claims of common law privilege include departments and agencies, the White House, and private organizations. However, their assertion of privilege does not necessarily provide a shield from congressional inquiry.

Until recently, Congress had assumed an "untested position" that is not required to respect common law privileges like the work product privilege.[12] The legal basis for Congress' right to refuse to recognize assertions of attorney-client privilege comes from its inherent constitutional authority to investigate and the constitutional authority of each chamber to determine the rules of its proceedings.[13] When this handbook was last updated in 2017, the Supreme Court had not definitively ruled on the issue, and that is still the case today. In July of 2020, in *Trump v. Mazars*, however, the Chief Justice noted, *in dicta*, that recipients of legislative subpoenas "have long been understood to retain common law and constitutional privileges with respect to certain materials, such as attorney-client communications and governmental communications protected by executive privilege."[14]

In light of the *dicta* in the *Mazars* opinion, subpoena recipients may be more likely to challenge Congress's position that it is under no obligation to recognize common law privileges.[15] One commentator and expert in congressional investigations, however, has argued that *Mazars* should not be read to support that conclusion, because Congress's oversight power is constitutionally grounded and so could not be limited by (judge-made) common law.[16]

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of a counsel to the president on the ground that preparation for a possible congressional investigation was not in anticipation of an adversarial proceeding).

[11] Eastman v. Thompson, 594 F. Supp. 3d 1156, 1186 (C.D. Cal. 2022).

[12] *See* Michael D. Bopp, Thomas G. Hungar & Chantalle Carles Schropp, *How President Trump's Tangles with Committees Have Weakened Congress's Investigative Powers*, 37 J. L. & Pol. 1 (2021)

[13] U.S. Const., I, § 5, cl. 2.

[14] Trump v. Mazars USA, LLP, 591 U.S. 848, 863 (2020).

[15] Michael D. Bopp, Thomas G. Hungar & Chantalle Carles Schropp, *How President Trump's Tangles with Committees Have Weakened Congress's Investigative Powers*, 37 J. L. & Pol. 1 (2021).

[16] *See* David Rapallo, *House Rules: Congress and the Attorney-Client Privilege*, 100 Wash. U. L. Rev. 455 (2022).

3. The Rationale for Congressional Discretionary Authority to Deny Attorney-Client Claims

The attorney-client privilege is not a constitutionally based privilege. Rather, it is a judge-made exception to the general evidentiary principle of full disclosure in the context of court proceedings.[17] The historic congressional discretionary practice is reflective of the widely divergent nature of the judicial and legislative forums. The attorney-client privilege is the product of a judicially developed public policy designed to foster an effective and fair adversary system. Courts view the privilege as a means to foster client confidence and encourage full disclosure to an attorney. Free communication, the argument goes, facilitates justice by promoting proper case preparation.[18] Full factual disclosure can also help an attorney more accurately assess the strength of a client's case, and discourage frivolous litigation when the case is weak.[19]

It is critically important to remember that the attorney-client privilege is designed for, and properly confined to, the adversary process: the adjudicatory resolution of conflicting claims of individual obligations in a civil or criminal proceeding. The need to protect individual interests is less compelling in an investigatory setting where a legislative committee is not empowered to adjudicate a witness's liberty or property. Indeed, several courts have recognized that "only infrequently have witnesses … [in congressional hearings] been afforded rights normally associated with an adjudicative proceeding."[20]

Congress's institutional position rejects as contrary to the separation of powers the claim that congressional investigatory authority is subject to non-constitutional, common law rules developed by the judicial branch to govern Congress's proceedings. Per Congress's position, to take the contrary view would, in effect, permit the judiciary to determine congressional procedures, which is difficult to reconcile with the constitutional authority granted to each house of Congress to determine its own rules. This was dramatically underlined in *NLRB v. Noel Canning*,[21] where the Supreme Court rejected the President's attempt to determine unilaterally when the Senate was in recess. The Court held that "for purposes of the Recess Appointments Clause, the Senate is in session when it says it is, provided that, under its own rules, it retains the capacity to transact Senate business."

Moreover, importing the judiciary's privileges and procedures is likely to have a paralyzing effect on the investigatory process. At the time of the 2017 update to this handbook, the authors observed that the district court's ruling in the Fast and Furious litigation that agencies can validly invoke the common law deliberative process privilege in challenges to committee civil enforcement proceedings had significantly

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[17] Westinghouse Electric Corp. v. Republic of the Philippines, 951 F.2d 1414, 1423 (3d Cir. 1991) ("Because the attorney-client privilege obstructs the truth-finding process, it is construed narrowly."); Moran v. Burbine, 475 U.S. 412, 430 (1986) (Sixth Amendment not a source for attorney-client privilege); Fisher v. United States, 425 U.S. 391, 396-97 (1976) (compelling an attorney to disclose client communications does not violate the client's Fifth Amendment privilege against self-incrimination); Hannah v. Larche, 363 U.S. 420, 445 (1960) ("[O]nly infrequently have witnesses [in congressional hearings] been afforded the procedural rights normally associated with an adjudicative proceeding."); United States v. Fort, 443 F.2d 670 (1970) (rejecting contention that the constitutional right to cross-examine witnesses applied to congressional investigations). With respect to court treatment of other common law privileges, *see, e.g.*, In re Sealed Case (Espy), 121 F.3d 729 (D.C. Cir. 1997) (The deliberative process privilege is a common law privilege which, when claimed by executive officials, is easily overcome, and "disappears" altogether upon the reasonable belief by an investigating body that government misconduct has occurred.).

[18] *See*, e.g., Upjohn v. United States, 449 U.S. 382, 389 (1981).

[19] *Id.*

[20] *Hannah*, 363 U.S. at 425; *see also Fort*, 443 F. 2d at 670.

[21] 134 S. Ct. 2550 (2014).

delayed committees' access to information. Such judicialization is also antithetical to the consensus, interest-oriented goal of policy development in the legislative process.

Finally, concerns that denying the privilege in the congressional setting would undermine it elsewhere appear over-exaggerated. Parliament's rule has not impaired the practice of law in England, nor has its limited use here inflicted any apparent damage on the practice of the profession. Congressional investigations in the face of claims of executive privilege or the revelation of trade secrets have not diminished the general utility of these privileges nor undermined the reasons they continue to be recognized by the courts. Moreover, the assertion implies that current law is an impregnable barrier to the disclosure of confidential communications when, in fact, the privilege is riddled with qualifications and exceptions, and has been subject as well to the significant current development of the waiver doctrine. Thus, there can be no absolute certainty that communications with an attorney will not be revealed.

Private sector opponents of discretionary committee refusals to accept claims of attorney-client privilege, however, routinely reject Congress's institutional position as a matter of practice, and even more so post-*Mazars*. But critical commentary has focused on how to live with the reality of the assumed congressional authority, utilizing the understanding that committees need information sooner rather than later and that criminal and civil enforcement processes take too much time. Negotiating tactics are the theme of such commentary. Nonetheless, as the original authors of this handbook observed, there has been no definitive court ruling on the issue because no objector as yet has been willing to be the subject of a criminal prosecution as a matter of principle. In light of the *dicta* in *Mazars*, congressional committees may similarly be content with the status quo.

4. How Congress Has Traditionally Weighed the Attorney-Client Privilege

In practice, all committees that have denied claims of privilege have considered numerous factors before doing so. In favor of disclosure, committees consider (1) legislative need, (2) public policy, and (3) the ever-present statutory duty to oversee the application, administration, and execution of all laws within Congress' jurisdiction. They balance these considerations against any possible injury to the witness. Committees also consider whether a court would have recognized the claim in the judicial forum,[22] and invite the submission of privilege logs to support the validity and weight of the claims.

In February 1999, the Legal Ethics Committee of the District of Columbia Bar issued an advisory opinion regarding attorney-client privilege in the context of a congressional investigation.[23] It directly addressed the limits of an attorney's ethical duty of confidentiality to a client when the attorney is faced with a congressional subpoena for documents that would reveal client confidences.[24] The opinion urges attorneys

[22] *See, e.g.*, H. Comm. on Commerce, Contempt of Congress Against Franklin L. Haney, H.R. Doc. No. 105-792, at 11-16 (1998); H. Comm. on Gov't Reform, Proceedings Against John. M. Quinn, David Watkins, and Matthew Moore, H.R. Rep. No. 104-598, at 50-54 (1996); Refusal of William H. Kennedy, III to Produce Notes Subpoenaed by the Special Comm. to Investigate Whitewater Dev. Corp. and Related Matters, S. Rep. No. 104-191, at 9-19 (1995); H. Comm. on Foreign Aff., Proceedings Against Ralph Bernstein and Joseph Bernstein, H.R. Rep. No. 99-462, at 13-14 (1986); *International Uranium Control: Hearing Before the Subcomm. on Oversight and Investigations, H. Comm. on Interstate and Foreign Commerce*, 95th Cong. 60, 123 (1977). *See also* H. Comm. on Energy and Commerce, 98th Cong., Attorney-Client Privilege (Comm. Print 98-1, 1983) (dealing with two separate instances of rejections of privilege claims by the House Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, one invoked by the general counsel of the Securities and Exchange Commission, the other by a corporation).

[23] District of Columbia Bar Legal Ethics Comm., Op. No. 288, Compliance with Subpoena from Congressional Committee to Produce Lawyers' Files Containing Client Confidences or Secrets (Feb. 16, 1999).

[24] The occasion for the ruling arose because of an investigation of a subcommittee of the House Commerce Committee into the circumstances surrounding the planned relocation of the Federal Communications Commission to the Portals office complex. *See*

to press every appropriate objection to the subpoena until no further avenues of appeal are available, and even suggests that clients might be advised to retain other counsel to file a separate lawsuit to prevent compliance with the subpoena.[25] But it does allow the attorney to relent and comply with the subpoena at the earliest point when he or she is in danger of being held in criminal contempt of Congress.

According to the D.C. Bar's ethics committee, an attorney acting under the D.C. Code of Professional Conduct[26] facing a congressional subpoena that would reveal client confidences or secrets must "seek to quash or limit the subpoena on all available legitimate grounds to protect confidential documents and client secrets."

> If, thereafter, the Congressional subcommittee overrules these objections, orders production of the documents and threatens to hold the lawyer in contempt absent compliance with the subpoena, then, in the absence of a judicial order forbidding the production, the lawyer is permitted, but not required, by the D.C. Rules of Professional Conduct to produce the subpoenaed documents. A directive of a Congressional subcommittee accompanied by a threat of fines and imprisonment pursuant to federal criminal law satisfies the standard of 'required by law' as that phrase is used in D.C. Rule of Professional Conduct 1.6(d)(2)(A).

The opinion represents the first and thus far the only bar in the nation to directly and definitively address this question. Its publication aroused a good deal of debate.[27] However, there is no evidence that congressional committees have been more aggressive in attempting to overrule privilege claims since the issuance of the opinion. Rather, Congress has been sparing in its attempts to challenge claims of attorney-client privilege.[28] Interestingly, none of the writings in opposition to committee exercise of the discretionary authority reference or discuss the D.C. Bar opinion.

H.R. Rep. No. 105-792, at 1-8, 15-16. During the course of the inquiry, the subcommittee sought certain documents from the Portals' developer, Mr. Franklin L. Haney. Mr. Haney's refusal to comply resulted in subpoenas for those documents to him and the law firm representing him during the relocation efforts. Haney and the law firm asserted attorney-client privilege in their continued refusal to comply. The law firm sought an opinion from the D.C. Bar's Ethics Committee as to its obligations in the face of the subpoena and a possible contempt citation, but the Bar Committee notified the firm that the question was novel and that no advice could be given until the matter was considered in a plenary session of the committee. *See* H. Comm. on Commerce, 105th Cong., Meeting on Portals Investigation: Authorization of Subpoenas; Receipt of Subpoenaed Documents and Consideration of Objections; and Contempt of Congress Proceedings Against Franklin L. Haney 48-50 (1998). The firm continued its refusal to comply until the subcommittee cited it for contempt, at which time the firm proposed to turn over the documents if the contempt citation was withdrawn. The subcommittee agreed to the proposal. *Id*. at 101–05.

[25] A direct suit to block a committee from enforcing a subpoena was foreclosed by the Supreme Court's decision in *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 501 (1975), but that ruling does not appear to foreclose an action against a "third party," such as the client's attorney, to test the validity of the subpoena or the power of a committee to refuse to recognize the privilege. *See, e.g.*, United States v. AT&T, 567 F.2d 121 (D.C. Cir. 1977) (entertaining an action by the Justice Department to enjoin AT&T from complying with a congressional subpoena to provide telephone records that might compromise national security matters).

[26] Under D.C. Rule of Professional Conduct 1.6(e)(2)(A), a lawyer may reveal client confidences or secrets only when expressly permitted by the D.C. rules or when "required by law or court order."

[27] *See, e.g.*, W. John Moore, *First Save All The Lawyers*, National Law Journal, July 24, 1999 at 2170.

[28] In the past, assertions of attorney-client and other common law privileges before committees often have gone unchallenged. One example occurred during the Iran-Contra hearings. Richard Secord, Albert Hakim, and Oliver North invoked the privilege as to a meeting with Secord's attorney, attended by all three, on the ground that he was acting as attorney for all at the time. In the same hearing, the committees recognized a rare assertion of the marital privilege by North on behalf of his wife who refused on that basis to testify about various funds created for the benefit of North's family from the proceeds of the Iranian arms sales. *See* Report of the Congressional Committees Investigating the Iran-Contra Affair, Rep. No. 216, H. R. Rep. No. 433, 100th Cong., 1st Sess. at 345 (1987). Privilege claims are also commonly negotiated prior to public hearings.

B. Claims of Deliberative Process Privilege and Presidential Communications Privilege

1. Definition and Purpose of the Deliberative Process Privilege

The deliberative process privilege permits government agencies to withhold documents and testimony relating to policy formulation from the courts.[29] The privilege was designed to enable executive branch officials to seek a full and frank discussion of policy options with staff without risk of being held to account for rejected proposals.

Executive branch officials often argue that congressional demands for information regarding an agency's policy development process would unduly interfere with, and perhaps "chill," the frank and open internal communications necessary for policymaking. In addition, they may also argue that the privilege protects against premature disclosure of proposed policies before the agency fully considers or adopts them. Agencies may further argue that the privilege prevents the public from confusing matters merely considered or discussed during the deliberative process with those that constitute the grounds for a policy decision. These arguments, however, do not necessarily pertain to Congress in its oversight and legislative roles.

2. Application of the Deliberative Process Privilege to Congressional Investigations

Congress's oversight process would be severely undermined were the courts or Congress to uniformly accept every agency assertion of the deliberative process privilege to block disclosure of internal deliberations. Such a broad application of the privilege would encourage agencies to disclose only materials that support their positions and withhold those with flaws, limitations, unwanted implications, or other embarrassments. Oversight would cease to become an investigative exercise of gathering the whole evidence and would become a "show and tell" performance.

Broad application of the deliberative process privilege to congressional investigations would also induce executive branch officials, including attorneys, to claim that oversight would dissuade them from giving frank opinions, or discourage others from seeking such advice. The Supreme Court dismissed that argument in *NLRB v. Sears, Roebuck & Co.*[30] It said:

> The probability that the agency employee will be inhibited from freely advising a decisionmaker for fear that his advice, if *adopted*, will become public is slight. First, when adopted, the reasoning becomes that of the agency and becomes its responsibility to defend. Second, agency employees will generally be encouraged rather than discouraged by public knowledge that their policy suggestions have been adopted by the agency.

[29] *See* Reporters Comm. for Freedom of the Press v. FBI, 3 F.4th 350, 360-63 (D.C. Cir. 2021) (holding that the deliberative process privilege may apply to the formulation of an agency's public statements as well as to policy formulation). Before *Reporters Comm.*, the D.C. Circuit had not ruled on whether the deliberative process privilege applies to the formulation of an agency's public statements (aside from only policy formulation), though district court judges had repeatedly found that it does apply in that context. Am. Center for L. & Just. v. U.S. Dep't of State, 330 F. Supp. 3d 293, 302 (D.D.C. 2018); *see also* Comm. on Oversight & Gov't Reform, U.S. House of Rep. v. Lynch, 156 F. Supp. 3d 101, 111-12 (D.D. C. 2016) (covering deliberations about how to respond to press inquiries regarding a law enforcement initiative); Judicial Watch v. DHS, 736 F. Supp. 2d 202, 208 (D.D.C. 2010) (covering documents "generated as part of a continuous process … how to respond to on-going inquiries from the press and Congress" regarding controversy surrounding a government witness's entry into the United States and grant of immunity).

[30] 21 U.S. 132 (1975).

> Moreover, the public interest in knowing the reasons for a policy actually adopted by an agency supports [disclosure].[31]

Agencies often claim the privilege to forestall inquiries while they develop substantive rules. However, an agency's rulemaking process is the prime object of legislative scrutiny; agencies may engage in substantive rulemaking only with an express grant of legislative authority. Moreover, Congress has enacted legislation determining the procedures each agency must follow[32] and retains ultimate control over each agency's rulemaking process.[33]

Finally, the integrity, even the legitimacy, of an agency's rulemaking would be damaged more by efforts to avoid oversight inquiries than it would be by the agency officials' public embarrassment over disclosure of positions taken during the policy development process. The legitimacy and acceptability of the administrative process depends on the public's perception that the legislature has some sort of ultimate control over the agencies.

3. Congress Treats Deliberative Process Privilege Claims as Discretionary

As with claims of attorney-client privilege and work-product immunity, congressional practice has been to allow committees discretion over acceptance of deliberative process claims. Moreover, a 1997 appellate court decision, discussed below, shows that the deliberative process privilege is easily overcome by an investigatory body's showing of need for the information. Other court rulings and congressional practices have recognized the overriding necessity of an effective legislative oversight process.

4. The Deliberative Process Privilege is More Easily Overcome by Congress Than the Presidential Communications Privilege

As discussed in detail in Chapter 5, the presidential communications privilege is a constitutionally based doctrine that protects communications between the President and his or her immediate advisers in the Office of the President from disclosure.[34] It also extends to communications made by presidential advisers in the course of preparing advice for the President.[35] This doctrine does not cover the entire executive

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[31] *Id*. at 161 (emphasis added). *See also* House Committee on the Judiciary v. Miers, 558 F. Supp. 2d 53, 101–02 (D.D. C. 2008) (rejecting the executive's argument that enforcing a congressional subpoena to a close adviser of the president would "chill" the candor necessary for frank and free advice to the chief executive).

[32] *See* 5 U.S.C. § 553 (2000).

[33] Congress may intervene in an agency rulemaking proceeding at any point. It is not limited to withdrawing an agency's authority or negating a particular rule by law after the fact. Where agency rulemaking is akin to the legislative process, the courts have held that "the very legitimacy of general policymaking performed by unelected administrators depends in no small part upon the openness, accessibility, and amenability of these officials to the needs and ideas of the public from whom their ultimate authority derives and upon whom their commands must fall." Sierra Club v. Costle, 657 F.2d 298, 400–401 (D.C. Cir. 1981). It is, therefore, "entirely proper for Congressional representatives vigorously to represent the interests of their constituents before administrative agencies engaged in informal, general policy rulemaking … [A]dministrative agencies are expected to balance Congressional pressure with the pressures emanating from all other sources." *Id*. at 409–10. See also Assoc. of National Advertisers, Inc. v. FTC, 627 F.2d 1151 (D.C. Cir.1979), *cert. denied*. 447 U.S. 921 (1980). For a full discussion of the legal propriety of committee interventions into agency rulemaking proceedings and other agency decision-making processes, *see* Chapter 12 *infra*.

[34] *Espy*, 121 F.3d. at 729.

[35] *Id.* Among other things, the case involved White House claims of executive and deliberative process privileges for documents subpoenaed by an independent counsel.

branch, but it applies more directly to relations between the President and his or her closest White House aides.

The 1997 D.C. Circuit's unanimous ruling in *In re Sealed Case (Espy)*[36] distinguishes between the "presidential communications privilege" and the "deliberative process privilege" and describes the severe limits of the latter as a shield against congressional investigative demands. The court of appeals held in *Espy* that the deliberative process privilege is a common law privilege that Congress can more easily overcome than the constitutionally rooted presidential communications privilege.[37] Moreover, in congressional investigations, the deliberative process privilege "disappears altogether when there is any reason to believe government misconduct occurred."[38] The court's understanding thus severely limits the extent to which agencies can rely upon the deliberative process privilege to resist congressional investigative demands. A congressional committee merely needs to show that it has jurisdiction and authority, and that the information sought is necessary to its investigation to overcome this privilege. A plausible showing of fraud, waste, abuse, or maladministration would conclusively overcome an assertion of privilege.

On the other hand, the deliberative process privilege covers a broader array of information. Whereas the presidential communications privilege covers only communications between the President and high-ranking White House advisers, the deliberative process privilege applies to executive branch officials generally. But the deliberative process privilege only protects executive branch officials' communications that are "pre-decisional" and a "direct part of the deliberative process." As a result, a court might find that a committee's need for the documents outweighs the deliberative process privilege, even where the court deems the documents to be protected by the privilege.[39]

5. Congress Has Greater Ability to Obtain Deliberative Information Than Citizens Have Under FOIA

Even before *Espy*, courts and committees consistently countered agency attempts to establish a privilege that thwarted congressional oversight efforts. Agencies often claimed that internal communications must be "frank" and "open," and that communications are a part of a "deliberative process." This is the standard under the Freedom of Information Act (FOIA), which allows an agency to withhold documents from a citizen requester.[40] It does not apply to Congress.

Congress has vastly greater powers of investigation than those of citizen FOIA requesters. Moreover, Congress carefully provided that the FOIA exemption section "is not authority to withhold information from Congress."[41] The D.C. Circuit in *Murphy v. Department of the Army*[42] explained that FOIA

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[36] *Id.* at 745-746 ("[W]hen there is reason to believe the documents sought may shed light on government misconduct, 'the [deliberative process] privilege is routinely denied' on the grounds that shielding internal government deliberations in this context does not serve the 'public interest in honest, effective government."); *id.* at 737-38.

[37] District courts in recent years have acknowledged "a constitutional dimension to the deliberative process aspect of the executive privilege." Comm. on Oversight and Gov't Reform and the U.S. House of Rep. v. Sessions, 334 F. Supp. 3d 1, 4 (D.D.C. 2018) (citing Comm. on Oversight and Gov. Reform v. Holder, 2014 WL 12662665, at * 1 (D.D.C. Sept. 9, 2014)).

[38] 5 U.S.C. § 552 (b)(5)(2010).

[39] *See* e.g., Comm. on Oversight & Gov't Reform v. Lynch, 156 F. Supp. 3d 101, 105 (D.D.C. 2020) (citing In re Sealed Case (Espy), 121 F.3d at 737-38).

[40] 5 U.S.C. § 552 (d).

[41] 613 F.2d 1151 (D.C. Cir. 1979).

[42] *Id.* at 1158.

exemptions were no basis for withholding from Congress because "Congress, whether as a body, through committees, or otherwise, must have the widest possible access to executive branch information if it is to perform its manifold responsibilities effectively."[43]

6. The Anomalous Ruling in *COGR v. Lynch*

The disquieting ruling in the Fast and Furious litigation and its immediate and long-range disruptive consequences for effective oversight demands closer, albeit somewhat repetitive, examination.

The binding law with respect to executive privilege in the D.C. Circuit was established by the Court's rulings in *Espy* (1997) and *Judicial Watch* (2004). Those decisions made an unequivocal distinction between the constitutionally-based presidential communications privilege and the common law deliberative process privilege, which the presiding judge in *COGR v. Lynch* ignored. While both have common general goals—to protect in some degree sensitive internal executive deliberations—and both are qualified privileges, the resemblance for purposes of legal significance and impact ends there. The *Espy* court's unanimous opinion emphasized the severe limits that the deliberative process privilege, as a common law privilege, would have as a shield against congressional demands since it would be more easily overcome by a showing of need. The Court twice remarked that if there is a plausible showing that government misconduct may have occurred, the privilege "disappears." At one point it stated: "[W]hen there is reason to believe the documents sought may shed light on government misconduct, 'the [deliberative process] privilege is routinely denied' on the grounds that shielding internal government deliberations in this context does not serve 'the public interest in honest, effective government.'"[44] There is no hint of any constitutional concern that would allow an agency to invoke the deliberative process privilege in such circumstances.

And yet, the *Lynch* court determined that there "is an important constitutional dimension to the deliberative process aspect of the executive privilege." This finding has serious constitutional and practical consequences for effective investigative oversight.[45]

Historically, Congress has been recognized as the *initial determiner* of its own institutional rights and prerogatives, particularly for matters directly or indirectly related to oversight. Since the 1870s—with the express acquiescence of the Justice Department—all subpoena demands by the Justice Department to members or component entities must first be processed and reviewed by House and Senate leadership and counsel. In 2006, the Justice Department decided to circumvent this initial review process by means of a search warrant executed at a member's office. FBI agents barred the House General Counsel and the member's private counsel from overseeing the search. The D.C. Circuit Court of Appeals declared the search a violation of the Constitution's Speech or Debate Clause. The Court emphasized that a critical purpose of the Clause is to prevent intrusions into the legislative process. The executive's search

[43] *Espy*, 121 F.3d at 745-46; *id*. at 737-38.

[44] One could argue that the ruling is the equivalent of holding that denying a witness the right to cross-examine other witnesses or to call witnesses on his or her behalf at a congressional hearing violates the Sixth Amendment—an argument which the Supreme Court rejected in Moran v. Burbine, 475 U.S. 412, 430 (1986)—or violates due process rights, which the Supreme Court and lower courts have also rejected. *See* Hannah v. Larche, 365 U.S. 420 (1960) and United States v. Fort, 443 F.2d 670 (D.C. Cir. 1970), cert. denied, 403 U.S. 932 (1971). The ruling is further discussed in Chapter 3 *supra* section 4.b.ii.

[45] United States v. Rayburn House Office Bldg., 497 F. 2d 654, 661-62 (D.C. Cir. 2008), *cert. denied* 552 U.S. 1295 (2008)(emphasis supplied).

procedures did just that by "den[ying] the Congressman any opportunity to identify or assert the privilege with respect to legislative materials *before* their compelled disclosure to executive agents."[46]

Previously, in the same vein, the Supreme Court ruled that courts may not block a congressional subpoena, holding that the Speech or Debate Clause provides "an absolute bar to judicial interference with such compulsory process."[47] As a consequence, a government witness' sole remedy, until recently, was to refuse to comply, risk being cited for contempt, and then raise privilege claims as a defense in a contempt prosecution.

With regard to recess appointments, most recently the Supreme Court deferred to the exercise of the Senate's internal rulemaking authority to define when it is in session for recess appointments purposes, thereby nullifying a presidential attempt to unilaterally make that determination.[48] And, finally, there has been judicial approval and general recognition of each chamber's absolute control over the initiation and conduct of investigations and hearings.[49]

The *Lynch* court's departure from both prior law and practice recognizing the legislature's primacy in establishing first responses to intrusions on its core institutional prerogatives threatens to undermine one of Congress's primary functions in our scheme of separated powers. The district court's ruling was appealed to the D.C. Circuit by DOJ and Congress, and the appeals were later voluntarily dismissed upon the sides reaching a settlement agreement.[50]

Similarly, the U.S. District Court for the Northern District of Georgia permitted state prosecutors in Fulton County to issue Senator Lindsey Graham subpoena investigating his involvement in attempts to interfere in the lawful administration of the election, but quashed the subpoena as it related to Senator Graham's "investigatory fact-finding … related to his decision to certify the results of the 2020 presidential election," a legislative act.[51] In an unsigned order rejecting an application to stay the lower court's ruling, the Supreme Court noted that this distinction adequately safeguarded the Senator's immunity under the Speech or Debate Clause.[52]

The January 6 investigations further established that the Speech or Debate privilege may extend to the Vice President's actions while serving in his role as President of the Senate. The District Court for the District of Columbia, reaching this novel conclusion, held that Vice President Mike Pence enjoyed limited Speech or Debate privilege relating to his activities while presiding over the certification of the electoral

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[46] *See* Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 503-07 (1975).

[47] NLRB v. Noel Canning, 573 U.S. 513 (2014).

[48] *See Hanna*, 365 U.S. 420 and *Fort*, 443 F.2d at 670.

[49] *See, e.g.*, FTC v. Owens-Corning Fiberglass Corp., 626 F.2d 966, 970 (D.C. Cir. 1980) (release of information to a congressional committee is not deemed to be disclosure to the general public); Exxon Corp. v. FTC, 589 F.2d 582 (D.C. Cir. 1978); Rockwell International Corp. v. U.S. Department of Justice, 235 F.3d 598, 604 (D.C. Cir. 2001) (compliance with a statutory obligation to provide Congress with information did not waive its FOIA exemption protection); Murphy v. Department of the Army, 613 F.2d 1151, 1155–59 (D.C. Cir. 1979); Florida House of Representatives v. Department of Commerce, 961 F.2d 941, 946 (11th Cir. 1992); United States v. Zolin, 809 F.2d 1411, 1415 (9th Cir. 1987), *aff'd in part, vacated in part*, 491 U.S. 554 (1989) ("When disclosure is involuntary, we will find the privilege preserved if the privilege holder has made efforts 'reasonably designed' to protect and preserve the privilege.").

[50] Comm. on Oversight & Gov't Reform of the House of Rep. v. Barr, 2019 WL 2158212 (D.C. Cir. May 14, 2019).

[51] *In re Subpoena to Non-party Lindsay O. Graham*, slip op. at 1-2, 1:22-cv-03027 (N.D. Ga. Sept. 1, 2022), ECF No. 44.

[52] Graham, v. Fulton Cty. Special Purpose Grand Jury, 143 S. Ct. 397 (Nov. 1, 2022) (mem.), https://www.supremecourt.gov/orders/courtorders/110122zr1_qol1.pdf.

count on January 6, and so could not be made to testify in response to questions about this legislative role.[53]

As of 2024, the Department of Justice has implemented a specialized procedure requiring consultation with the DOJ Public Integrity Section for any investigative steps (such as subpoenas, interviews, search warrants, or monitoring) involving a member of Congress or congressional staffer.[54]

C. Release of Attorney-Client, Work-Product, or Deliberative Process Material to Congress Does Not Waive Applicable Privileges in Other Forums

Private parties and agencies often assert that yielding to committee demands for material arguably covered by the attorney-client, work-product, or deliberative process privileges will waive those privileges in other forums. Applicable case law, however, is to the contrary. When a congressional committee compels the production of a privileged communication through a properly issued subpoena, it does not prevent the assertion of the privilege elsewhere,[55] as long as it is shown that the compulsion was in fact resisted.

For illustrations of some of the oversight powers, tools, principles, and obstacles discussed in this chapter, see the following case study in the online version of this handbook:

Todd Garvey: *The Webster and Ingersoll Investigations*

[53] *In re Grand Jury Subpoena* (Sealed Case), No. 1:23-mc-00035 (D.D.C. Mar. 27, 2023), available at https://s3.documentcloud.org/documents/23840379/penceruling1.pdf.

[54] U.S. Dep't of Just., Just. Manual § 9-85.110 (2024), https://www.justice.gov/jm/jm-9-85000-protection-government-integrity.

[55] *See* Iron Workers Union Local No. 17 Insurance Fund v. Phillip Morris, Inc., 35 F. Supp. 2d 582 (N.D. Ohio, 1999) and Commonwealth of Massachusetts v. Phillip Morris, et al., 1998 Lexis 438 (Mass. Super. Ct. July 30, 1998) (holding that the companies had failed to sufficiently resist the committee's subpoenas); FTC v. Meta Platforms, Inc., 2022 WL 4078930 (D.D.C. Sept. 6, 2022) (in the FOIA context, "an agency does not waive the privilege when it transmits to Congress 'memoranda and correspondence created as part of the [agency's] deliberative process.'").

7. Executive Branch Investigations: Lessons from Department of Justice Probes

Congress's constitutional power of inquiry extends equally to all executive departments, agencies, and establishments. Yet Congress's experience conducting oversight of the Department of Justice (Department or DOJ) has often been the most contentious, and has presented all of the issues that may arise in disputes between Congress and any executive agency. Therefore, Congress's experience with the Justice Department provides many useful lessons on how to conduct oversight of agencies.

The history of congressional investigations of DOJ covers a broad scope of congressional inquiries, including committee requests for:

- particular agency witnesses;
- proprietary, trade secret, or other sensitive information;
- documentary evidence of how an agency came to a particular decision; and
- the opinion of an agency's general counsel with respect to the legality of a course of action taken by the agency.
- In response, congressional inquiries into Justice Department operations have been frequently met with claims that such inquiries:
- interfere with the presumptive sensitivity of its principal law enforcement mission;
- intrude upon matters of national security; and
- constitute improper political and constitutional interference with deliberative prosecutorial processes that are discretionary in nature.

As a result, the Justice Department has often refused to supply internal documents or testimony sought by jurisdictional committees.

Since many other agencies have followed DOJ's examples, the resolution of such past investigative confrontations with DOJ provides useful lessons. These lessons, outlined in detail below, should guide future committees in determining whether to undertake similar probes of DOJ or other executive agencies, as well as inform them about the scope and limits of their investigative prerogatives and the practical problems of such undertakings. The outcomes of these inquiries provide formidable practice precedents which will allow committees to effectively engage uncooperative agencies.

A. Overview of Congressional Investigations of DOJ

The Congressional Research Service review of oversight of the Justice Department circa 2012 is a particularly instructive tool. This compilation and review provides summaries of 22 selected congressional investigations, from the Palmer Raids and Teapot Dome scandal in the 1920s to more recent controversies, including the revelations of the Church Committee of domestic intelligence abuse by

the FBI, ABSCAM, Iran-Contra, the misuse of informants in the FBI's Boston Regional Office, the termination and replacement of U.S. Attorneys, and the probe of Operation Fast and Furious.[1] In the years following the investigation of Fast and Furious, the House, and more specifically, the Council on Government Relations and the Committee on the Judiciary, investigated the following:

- The alleged targeting of conservative entities by the IRS and DOJ;
- Former Secretary of State Clinton's private email server;
- The DOJ and the FBI's handling of Operation Crossfire Hurricane including the Steele dossier and surveillance of President Trump's campaign;
- DOJ's handling of President Trump's call with Ukrainian President Zelensky;
- Certain events related to the January 6, 2021 riot at the U.S. Capitol;
- DOJ's role in pressuring Big Tech to censor social media;
- DOJ's investigation of Hunter Biden; and
- DOJ's investigations of improper possession of classified documents by Presidents Trump and Biden.

These various investigations demonstrate that DOJ has consistently been obligated to submit to congressional oversight related to allegations of improper administration, misfeasance and/or malfeasance. This requirement to cooperate in investigations has applied even when there is ongoing or expected litigation. A number of these investigations spawned seminal Supreme Court rulings that today provide the foundation for the broad congressional power of inquiry. All were contentious and involved Department claims that committee demands for agency documents and testimony were precluded either on the basis of constitutional or common law privilege or policy.

[1] *See*, Alissa M. Dolan & Todd Garvey, Cong. Research Serv., R42811, Congressional Investigations of the Department of Justice, 1920-2012 (Nov. 5, 2012) (periodically updated). Also useful is the two volume study Congress Investigates: A Critical and Documentary History (revised edition edited by Roger A. Bruns, David L. Hostetter, and Raymond W. Smock, 2011), which presents case studies with accompanying commentary and documentary material on 29 important congressional investigations from General St. Clair's debacle in 1792 to the Hurricane Katrina inquiry in 2005. The CRS study of the history of congressional investigations of Justice Department actions originated as a result of a request to the author for a legal analysis in September 1993 from the chief counsel of the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, chaired by Rep. John Dingell, for an assessment of the legal propriety of its requests and subpoenas for documents and testimony from line attorneys regarding certain prosecutorial decisions in which they were involved. The subcommittee was engaged in a contentious investigation of the department's Environmental Crimes Unit. At issue were Department refusals to comply. The demands were characterized as an abrupt departure from "a time honored" Department policy that shields its prosecutorial decision-making process from the political process that is based exclusively in the president as a result of the vestment in him of the constitutional duty to "take care" that the laws are faithfully executed. A statement by a former attorney general attested to that history and legal view. The memorandum I prepared was included in the subcommittee's final report following the successful conclusion of the inquiry. A detailed account of the investigation and an assessment of the oversight lessons learned is presented in a study by Deborah Jacobson, *The 1992- 1994 Investigation of the Justice Department's Environmental Crimes Program*, may be found in Part II. Subsequently, a revised version of the memorandum was published as a CRS report, which I periodically updated until my retirement in 2008. Since then the report has been ably maintained by my successors.

1. Congress's Power to Obtain Documents and Testimony

To obtain documents and testimony, an inquiring committee need only show that the information sought is:

- within the broad subject matter of the committee's authorized jurisdiction;
- in aid of a legitimate legislative function; and
- pertinent to the area of concern.

Despite objections by an agency, either house of Congress, or its committees or subcommittees, may obtain and publish information it considers essential for the proper performance of its constitutional functions. There is no court precedent that requires committees to demonstrate a substantial reason to believe wrongdoing occurred before seeking disclosures with respect to the conduct of specific criminal and civil cases, whether open or closed. Indeed, the case law is quite to the contrary.

During the inquiries covered by the CRS compilation, committees sought and obtained a wide variety of evidence, including:

- deliberative prosecutorial memoranda;
- FBI investigative reports and summaries of FBI interviews;
- memoranda and correspondence prepared while cases were pending;
- confidential instructions outlining the procedures or guidelines to be followed for undercover operations and the surveillance and arrest of subjects;
- documents presented to grand juries not protected from disclosure by Rule 6(e) of the Federal Rules of Criminal Procedure, which establishes the rules for grand jury secrecy;
- the testimony of line attorneys and other subordinate agency employees regarding the conduct of open and closed cases; and
- detailed testimony about specific instances of the Department's failure to prosecute cases that allegedly merited prosecution.

Also, those investigations encompassed virtually every component of DOJ, including its sensitive Public Integrity Section and its Office of Professional Responsibility. They also covered all levels of officials and employees in Main Justice and field offices, from attorneys general down to subordinate line personnel. Further, they delved into virtually every area of the Department's operations, including its conduct of domestic intelligence investigations.

When this handbook was last updated, there had been only four formal presidential assertions that executive privilege required withholding internal DOJ documents sought by a congressional subpoena, including the assertion described in Chapter 6, above, in the context of the Fast and Furious investigation.

More recently, the House Judiciary Committee issued a subpoena to obtain redacted grand jury materials referenced in Special Counsel Robert Mueller's report on Russian interference in the 2016 presidential election; specifically, the Committee sought those portions of the report redacted as grand jury materials

as well as underlying grand jury transcripts or exhibits related to actions of the President that the Committee was then investigating as part of its impeachment investigation. Keeping in the tradition of enabling Congress to obtain sought materials, the D.C. District Court, and later the D.C. Circuit, found that the Committee established particularized need for the grand jury materials referenced in the report.[2] The Supreme Court granted certiorari, but later deemed the matter moot after the change of the administration following the 2020 election and ordered the Circuit court to vacate its decision.[3]

Disputes between the legislative branch and DOJ over access to witnesses, and the terms of such access, have also recently escalated. On February 6, 2024, the House Judiciary Committee filed a civil lawsuit in federal court to enforce its subpoena against Elvis Chan, an FBI agent, whose testimony the Committee requested as part of its investigation into the FBI's efforts to censor Americans on Big Tech platforms.[4] In the Chan case, DOJ directed their employee, Chan, not to appear because the Committee was planning to enforce the House deposition regulation that prohibits agency counsel from attending a deposition. This case thus implicated the question of whether the House has the power to exclude agency counsel in this way.

In a separate case filed on March 21, 2024, the House Judiciary Committee filed a civil lawsuit against two DOJ tax attorneys, Mark Daly and Jack Morgan, to enforce subpoenas seeking their testimony regarding tax-related elements of the DOJ and IRS investigation of Hunter Biden.[5] In that case as well, DOJ instructed Daly and Morgan not to appear in light of House Rules that prohibit agency counsel from attending depositions. DOJ contended, as it has in prior disputes, that compelling testimony about an agency employee's official duties without agency counsel present is unconstitutional, and thus the subpoenas in question are unenforceable. The Justice Department also argued that subpoenaing "line" attorneys would be a violation of the separation of powers.[6] The judge in the case repeatedly expressed consternation with both sides, but noted the Department's separation of powers concern was "overblown."[7] The constitutional questions raised in the Chan and Daly litigation remain open, however, as neither case reached adjudication. On August 15, 2024, the Committee dismissed the Chan lawsuit without prejudice before DOJ had entered any responsive pleading.[8] And on May 24, 2025, the Committee dismissed the Daly lawsuit without prejudice due to the change in administration and the pardon of Hunter Biden.[9]

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[2] Comm. on Judiciary v. U.S. Dep't of Just. (In re Committee on the Judiciary, U.S. House of Representatives), 951 F.3d 589, 598 (D.C. Cir. 2020), vacated, 143 S. Ct. 46 (2021).

[3] Dep't of Just. v. House Comm. on the Judiciary, 142 S. Ct. 46 (2021).

[4] *See* Complaint, Committee on the Judiciary v. Chan, No. 1:24-cv-344 (D.D.C. Feb. 6, 2024), ECF No. 1.

[5] *See* Complaint, Committee on the Judiciary v. Daly, No. 1:24-cv-815 (D.D.C. Mar. 21, 2024), ECF No. 1.

[6] Josh Gerstein and Kyle Cheney, *'Are you kidding me?': Biden-appointed judge torches DOJ for blowing off Hunter Biden-related subpoenas from House GOP*, Politico, Apr. 5, 2024, https://www.politico.com/news/2024/04/05/biden-appointed-judge-torches-doj-00150884.

[7] Ryan Tarinelli, *Judge pauses court fight over House committee subpoenas*, Roll Call, Oct. 23, 2024, https://rollcall.com/2024/10/23/judge-pauses-court-fight-over-house-committee-subpoenas/.

[8] *See* Committee on the Judiciary v. Chan, No. 1:24-cv-344 (D.D.C. Aug. 15, 2024), ECF No. 18.

[9] *See* Notice of Voluntary Dismissal, Committee on the Judiciary v. Daly, No. 1:24-cv-815 (D.D.C. May 23, 2025), ECF No. 29.

2. DOJ's Assertion of Executive Privilege to Avoid Subpoena Compliance

Although there have been multiple formal presidential assertions that executive privilege required withholding internal DOJ documents sought by a congressional subpoena,[10] recent Supreme Court and appellate court rulings covering the presidential communications privilege and the Take Care Clause of the Constitution[11] suggest that a claim of executive privilege to protect internal deliberations would be unlikely to succeed.

3. Weighing Pragmatic Considerations When Seeking Disclosures

The consequences of these historic inquiries at times have been profound and far-reaching. They have led directly to important legislation and the promulgation of internal administrative rules to remedy problems discovered and to the resignations (Harry M. Daugherty, J. Howard McGrath, Alberto R. Gonzales) and convictions (Richard Kleindienst, John Mitchell) of five attorneys general. Despite the broad extent of their constitutional power to access deliberative processes, committees have generally limited themselves due to prudential considerations. Congressional committees typically weigh legislative need, public policy, and the statutory duty of committees to conduct oversight, against the potential burdens imposed on an agency if deliberative process matter is publicly disclosed. In particular, Congress has considered the sensitive law enforcement concerns and duties of the Justice Department and has, therefore, declined to seek disclosure of the agency's deliberative processes in the absence of a reasonable belief that government misconduct has occurred. Over time, Congress has been generally faithful to these prudential considerations.

B. The Justice Department's Responses to Congressional Inquiries

The reasons advanced by the executive branch for declining to provide information to Congress about open and closed civil and criminal proceedings have included:

- avoiding prejudicial pre-trial publicity;
- protecting the rights of innocent third parties;
- protecting the identity of confidential informants;
- preventing disclosure of the government's strategy in anticipated or pending judicial proceedings;

[10] One of the claims, which was ultimately abandoned, involved subpoenaed documents sought in the 1981 investigation of the Environmental Protection Agency enforcement of the Superfund law which were all released following a negotiated settlement. H.R. Rep. No. 97-968, at 18, 28–29 (1982). Another concerned documents sought in the Boston FBI matter, which were all internal DOJ materials. A third claim of presidential privilege was invoked on July 16, 2008, in response to a subpoena by the House Oversight and Government Reform Committee seeking documents concerning DOJ's investigation by a special counsel of the disclosure of the identity of a CIA agent. The documents sought and withheld included FBI reports of the Special Counsel's interviews with the Vice President and senior White House staff; handwritten notes taken by the Deputy National Security advisor during conversations with the Vice President and senior White House officials; and other documents provided by the White House to the Special Counsel during the investigation. The documents were not pursued after the close of the legislative session. Another claim was invoked in response to the threatened contempt of former Attorney General Holder for withholding subpoenaed documents during the investigation of Operation Fast and Furious. A district court ruled that since the deliberative process privilege contains a constitutional element it may be raised against a congressional subpoena demand. That ruling was appealed by both DOJ and the House, and a settlement was ultimately reached. Presidential Claims of Executive Privilege: History, Law, Practice, and Recent Developments, at 30–32, 36–39 (periodically updated).

[11] The Take Care Clause of the Constitution states that the president "shall take Care that the Laws be faithfully executed." U.S. Const., art. II, § 3.

- avoiding the potentially chilling effect on the exercise of prosecutorial discretion by DOJ attorneys; and

- preventing interference with the President's constitutional duty to faithfully execute the laws.[12]

Historically, DOJ has continued to assert such objections. For example, in the 2001–2002 House Oversight and Government Reform Committee investigation of the FBI's misuse of informants, the Department resisted producing internal deliberative prosecutorial documents. In a February 1, 2002 letter to Chairman Dan Burton, the DOJ Assistant Attorney General for Legislative Affairs explained that: "the public interest in avoiding the polarization of the criminal justice process required greater protection of those documents … This is not an 'inflexible position,' but rather a statement of a principled interest in ensuring the integrity of prosecutorial decision-making."[13]

During the George W. Bush administration, agencies asserted broader and more strenuous opposition to providing evidence and testimony to Congress through presidential signing statements,[14] executive orders,[15] and opinions of the Department of Justice's Office of Legal Counsel (OLC). In OLC's view, under the precepts of executive privilege and the unitary executive, Congress may not bypass the procedures the President establishes to authorize disclosure to Congress of classified, privileged, or even non-privileged information. Thus, the executive branch has resisted congressional efforts to seek testimony by lower-level officers or employees without presidential authorization. OLC has declared that "right of disclosure" statutes "unconstitutionally limit the ability of the President and his or her appointees to supervise and control the work of subordinate officers and employees of the Executive Branch."[16] However, the OLC assertions of these broad notions of presidential prerogatives have not been supported by any authoritative judicial citations.

The political climate surrounding the 2016 and 2020 elections ushered in a new era of powerplay between the Justice Department and Congress. The House Judiciary Committee, in particular, has undertaken high-profile investigations and enforcement actions against DOJ officials in response to mounting executive

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[12] These reasons were most famously articulated by then Attorney General Robert Jackson in 1941, who stated that all would "seriously prejudice law enforcement." *See* 40 Op. Att'y Gen. 45, 46–47 (1941). *See also* Letter from William French Smith, Att'y Gen., to Hon. John D. Dingell, Chair, House Subcomm. on Oversight & Investigation, Comm. on Energy and Commerce (Nov. 30, 1982), *reprinted in* H.R. Rep. No. 97-968 at 37–38.

[13] *See* House Comm. on Gov't Reform, Everything Secret Degenerates: The FBI's Use of Murderers as Informants, H. Rep. No. 108-414, vol. 1 at 132 (2004). *See also*, Dolan & Garvey, *supra* note 1, at app. A.

[14] *See* T.J. Halstead, Cong, Research Serv., RL33667, Presidential Signing Statements: Constitutional & Institutional Implications (updated Sept. 17, 2007), http://www.fas.org/sgp/crs/natsec/RL33667.pdf.

[15] *See, e.g.*, Executive Order 13233 issued by President Bush on November 1, 2001, which gave current and former presidents and vice presidents broad authority to withhold presidential records and delay their release indefinitely. It vested former vice presidents, and the heirs or designees of disabled or deceased presidents, the authority to assert executive privilege, and expanded the scope of claims of privilege. Hearings held by the House Committee on Government Reform in 2002 raised substantial questions as to the constitutionality of the order and resulted in the reporting of legislation (H.R. 4187) in the 107th Congress that would have nullified the order and established new processes for presidential claims of privilege and for congressional and public access to presidential records. H.R. Rep. No. 107-790 (2002). Substantially the same legislation (H.R. 1225) passed the House on March 14, 2007. *See* H.R. Rep. No. 110-44 (2007), and was reported out of the Senate Committee on Homeland Security and Governmental Affairs on June 20, 2007, without amendment and with no written report. President Obama revoked Executive Order 13233 by an executive order issued on January 21, 2009. *See generally*, Jonathan Turley, *Presidential Papers and Popular Government: The Convergence of Constitutional and Property Theory in Claims of Ownership and Control of Presidential Records*, 88 Cornell L. Rev. 651, 666–96 (2003).

[16] *See* Letter dated May 21, 2004 to Hon. Alex M. Azar, II, General Counsel, Department of Health and Human Services from Jack L. Goldsmith III, Assistant Attorney General, Office of Legal Counsel, Department of Justice, at 3, available at, [http://www.usdoj.gov/olc/crsmemoresponsese.html]. This broad view of presidential privilege was repeated in Attorney General Mukasey's request to the president that he claim executive privilege with respect to a House committee subpoena for DOJ documents in an investigation by a DOJ special counsel into the revelation of a CIA agent's identity. *See* Letter from Michael Mukasey, Att'y Gen., to the President (July 15, 2008) (on file with author).

resistance to congressional requests. For instance, in *Committee on the Judiciary v. Daly*, as previously noted, the Committee sued to compel testimony and documents from DOJ and IRS officials related to the investigation of Hunter Biden after alleged failures to comply with congressional subpoenas.[17] In that case, as noted above, the Justice Department argued that subpoenaing "line" attorneys would be a violation of the separation of powers.[18] The judge noted the Department's separation of powers concern was "overblown."[19]

In a similar vein, the Committee sought to compel Attorney General Merrick Garland to release audio recordings of Special Counsel Hur's interview of President Biden and Mark Zwonitzer, who assisted the president with his memoir.[20] DOJ provided only written transcripts, and the Committee asserted that the audio recordings were necessary to provide critical additional evidence and context. DOJ contended that the recordings were unnecessary in light of the written transcripts, and that releasing audio from the Special Counsel's witness interviews could make individuals more reluctant to provide interviews in the future. President Biden asserted executive privilege, and the Committee filed a complaint in District Court on July 1, 2024 to obtain the recordings. The Trump administration released the recordings in May 2025, and the Committee and DOJ immediately entered into a joint stipulation voluntarily dismissing the case.

Though neither was litigated through the merits, the *Daly* and *Garland* cases highlight the ongoing potential for tension in high profile investigations between the executive and Congress with respect to access to witnesses and evidence.[21]

C. Lessons from Prior Investigations of DOJ

1. Oversight May Proceed Despite Pre-Trial Publicity, Due Process, and Concurrent Investigations Concerns

The Supreme Court has repeatedly reaffirmed the breadth of Congress's right to investigate the government's conduct of criminal and civil litigation.[22] Congress must be given access to agency documents, even in situations where the inquiry may result in pre-trial publicity and the exposure of criminal corruption or maladministration of agency officials. The Supreme Court has noted that a committee's 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 disclosed."[23]

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[17] Complaint, Committee on the Judiciary v. Daly, No. 1:24-cv-815 (D.D.C. Mar. 21, 2024), ECF No. 1.

[18] Josh Gerstein and Kyle Cheney, *'Are you kidding me?': Biden-appointed judge torches DOJ for blowing off Hunter Biden-related subpoenas from House GOP*, Politico, Apr. 5, 2024, https://www.politico.com/news/2024/04/05/biden-appointed-judge-torches-doj-00150884.

[19] Ryan Tarinelli, *Judge pauses court fight over House committee subpoenas*, Roll Call, Oct. 23, 2024, https://rollcall.com/2024/10/23/judge-pauses-court-fight-over-house-committee-subpoenas/.

[20] Complaint, Committee on the Judiciary, U.S. House of Representatives v. Garland, No. 24-cv-1911 (D.D.C. July 1, 2024).

[21] *See also* Press Release, Comm. on Oversight & Gov't Reform, *Comer, Jordan, Smith: Congress Investigating DOJ & IRS Misconduct with Respect to Hunter Biden Allegations* (June 28, 2023), https://oversight.house.gov/release/comer-jordan-smith-congress-investigating-doj-irs-misconduct-with-respect-to-hunter-biden-allegations%EF%BF%BC/#:~:text=today%20issued%20the%20following%20statement,American%20people%20demand%20and%20deserve.%E2%80%9D; Press Release, House Comm. on the Judiciary, *Ranking Member Raskin Opens Probe Into DOJ's Efforts to Chill Congressional Oversight by Charging Rep. McIver* (June 3, 2025), https://democrats-judiciary.house.gov/media-center/press-releases/ranking-member-raskin-opens-probe-into-doj-s-efforts-to-chill-congressional-oversight-by-charging-rep-mciver.

[22] *See* Chapter 2.

[23] Hutcheson v. United States, 369 U.S. 599, 617 (1962).

Despite the existence of pending litigation, Congress may investigate facts that have a bearing on that litigation where the information sought is needed to determine what, if any, legislation should be enacted to prevent further ills.[24]

Although several lower court decisions have recognized that congressional hearings may have the result of generating prejudicial pre-trial publicity, they have not suggested that there are any constitutional or legal limitations on Congress's right to conduct an investigation while a court case is still proceeding. Instead, the courts have granted additional time or a change of location for a trial to deal with the publicity problem.[25] For example, the Court in one of the leading cases, *Delaney v. United States,* entertained "no doubt that the committee acted lawfully, within the constitutional powers of Congress duly delegated to it," but went on to note that the Justice Department must accept the consequence that the judicial department, charged with the duty of assuring the defendant a fair trial before an impartial jury, may find it necessary to postpone the trial until by lapse of time the danger of the prejudice may reasonably be thought to have been substantially removed.[26]

Thus, the courts have recognized that the cases pose a choice for the Congress: congressionally generated publicity may result in harming the prosecutorial effort of the executive; but access to information under secure conditions can fulfill the congressional power of investigation. Courts have recognized that this remains a choice that is solely within Congress's discretion to make irrespective of the consequences. As the Iran-Contra Independent Counsel observed: "The legislative branch has the power to decide whether it is more important perhaps 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."[27]

2. Probes of Government Strategies, Methods, or Operational Weaknesses Should Not Be Limited

Attorney General and OLC opinions have raised concerns that congressional oversight that calls for information that reflects the executive branch's strategy or its methods or weaknesses is somehow inappropriate. However, if this concern were permitted to block congressional inquiries, this would prevent Congress from performing a major portion of its constitutionally mandated oversight. Congressional inquiries into foreign affairs and military matters call for information on strategy and assessment of weaknesses in national security matters; congressional probes into waste, fraud, and inefficiency in domestic operations call for information on strategy and weaknesses. For Congress to forego such inquiries would be an abandonment of its oversight duties. The best way to correct either bad law or bad administration is to closely examine the methods and strategies that led to the mistakes. The

[24] Sinclair v. United States, 279 U.S. 263, 294 (1929).

[25] *See e.g.*, Delaney v. United States, 199 F.2d 107 (1st Cir. 1952); United States v. Mitchell, 372 F. Supp. 1259, 1261 (S.D.N.Y. 1973). For discussion of issues in addition to prejudicial publicity that have been raised in regard to concurrent congressional and judicial proceedings, including allegations of violation of due process, *see* Contempt of Congress, H.R. Rep. No. 97-968, at 58 (1982).

[26] Delaney v. United States, 199 F.2d 107, 114 (1st Cir. 1952). The Court did not fault the committee for holding public hearings, stating that if closed hearings were rejected "because the legislative committee deemed that an open hearing at that time was required by overriding considerations of public interest, then the committee was of course free to go ahead with its hearing, merely accepting the consequence that the trial of Delaney on the pending indictment might have to be delayed." *Id.* at 114–15. It reversed Delaney's conviction because the trial court had denied his motion for a continuance until after the publicity generated by the hearing, at which Delaney and other trial witnesses were asked to testify, subsided. *See also* Hutcheson, 369 U.S. at 613 (upholding contempt conviction of person who refused to answer committee questions relating to activities for which he had been indicted by a state grand jury, citing *Delaney*).

[27] Lawrence E. Walsh, *The Independent Counsel and the Separation of Powers*, 25 Hous. L. Rev. 1, 9 (1988).

many examples of congressional probes recounted in the CRS compilation demonstrate how important and effective proper congressional oversight can be.

a. The Revelations of the Cover-Up of Investigative Findings of Misconduct at Ruby Ridge

The DOJ Office of Professional Responsibility (OPR), which monitors the conduct of Department personnel, is notable for its revelations of a number of sensitive, previously undisclosed internal investigations in the face of extraordinary agency resistance. One such instance occurred during the 1995 investigation by the Senate Judiciary Committee's Subcommittee on Terrorism, Technology, and Government Information of allegations that several branches of DOJ and the Department of the Treasury had engaged in serious criminal and professional misconduct in the investigation, apprehension, and prosecution of Randall Weaver and Kevin Harris at Ruby Ridge, Idaho. The Subcommittee, chaired by Senator Arlen Specter, held 14 days of hearings in which it heard testimony from 62 witnesses, including DOJ, FBI, and Treasury officials, line attorneys and agents, obtained various internal reports from these agencies,[28] and issued a final report.[29]

The Subcommittee's hearings revealed that the federal agencies involved conducted at least eight internal investigations into charges of misconduct, none of which had ever been publicly released.[30] DOJ expressed reluctance to allow the Subcommittee to see any documents out of a concern they would interfere with the ongoing investigation but ultimately supplied some of them under agreed-upon conditions regarding their public release. The most important of these documents was the report of the Ruby Ridge Task Force.[31]

The Task Force submitted a 542-page report to OPR on June 10, 1994, which described numerous problems with the conduct of the FBI, the U.S. Marshals, and the U.S. Attorney's Office in Idaho, and made recommendations for institutional changes to address the problems it found. It also concluded that portions of the rules of engagement issued by the FBI during the incident were unconstitutional under the circumstances, and that the second of two shots fired by a member of the FBI's Hostage Rescue Team (HRT), which resulted in the death of Vicki Weaver, was not reasonable. The Task Force recommended that the matter be referred to a prosecutorial component of the department for a determination as to whether a criminal investigation was appropriate.

OPR reviewed the Task Force report and transmitted the report to the Deputy Attorney General with a memorandum that dissented from the recommendation that the shooting of Vicky Weaver by the HRT member be reviewed for prosecutorial merit. The dissent was based on the view that the agent's actions were not unreasonable considering the totality of the circumstances. The Deputy Attorney General referred the Task Force recommendations for prosecutorial review to the criminal section of the civil rights division, which concluded that there was no basis for criminal prosecution.

The Task Force report was the critical basis for the Subcommittee's inquiries during the hearings and the discussion and for the conclusion in its final report that "With the exception of the [Ruby Ridge] Task Force report, which was partially disavowed by the Department, and the April 5, 1995 memorandum of

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[28] *The Federal Raid on Ruby Ridge, Idaho: Hearings before the Senate Subcommittee on Terrorism, Technology and Government Information, Committee on the Judiciary*, 104th Cong. (1995) [hereinafter *Ruby Ridge Hearings*].

[29] *Ruby Ridge: Report of the Subcommittee on Terrorism, Technology and Government Information of the Senate Committee on the Judiciary* [hereinafter *Ruby Ridge Report*]. The 154-page report appears not to have been officially reported by the full committee. A bound copy may be found in the United States Senate Library, catalogue number HV 8141.U56 1995.

[30] *Id.* at 1; *Ruby Ridge Hearings*, *supra* note 15, at 722, 954, 961.

[31] *See generally*, *Ruby Ridge Report*, *supra* note 16.

Deputy Attorney General Jamie Gorelick, it appeared to the Subcommittee that the authors of every report we read were looking more to justify agency conduct than to follow the facts wherever they lead."[32]

3. Prosecutorial Discretion is Not a Core Presidential Power Justifying a Claim of Executive Privilege

In the past, the executive frequently has made the broad claim that prosecution is an inherently executive function and that congressional access to information related to the exercise of that function is thereby limited. Under this view, matters of prosecutorial discretion are off-limits to congressional inquiry, and access demands are viewed as interfering with the discretion traditionally enjoyed by the prosecutor. However, court decisions have not upheld this view and have permitted congressional inquiries into prosecutorial decisions.

a. Morrison v. Olson: Prosecutorial Discretion is Not Central or Unique to the Executive Branch

The Supreme Court has rejected the notion that prosecutorial discretion in criminal matters is an inherent or core executive function. In *Morrison v. Olson,*[33] the Court recognized that while the executive regularly exercises prosecutorial powers, the exercise of prosecutorial discretion is in no way "central" to the functioning of the executive branch.[34] The Court therefore rejected a challenge to a statutory provision exempting the independent counsel from at-will presidential removal. The Court held that insulating the independent counsel in this way did not interfere with the President's duty to "take care" that the laws be faithfully executed.[35]

The *Morrison* court reiterated that Congress's oversight functions of "receiving reports or other information and to oversight of the independent counsel's activities ... [are] functions that have been recognized generally as being incidental to the legislative function of Congress."[36] Arguments that only the executive branch has the power to prosecute violations of the law also have been soundly rejected outside the realm of congressional investigations. In *United States ex rel. Kelly v. Boeing Co.*,[37] the Ninth Circuit upheld the constitutionality of *qui tam* provisions of the False Claims Act allowing private parties to bring enforcement actions against federal agencies, holding that: "[W]e reject Boeing's assertion that *all* prosecutorial power of any kind belongs to the Executive Branch."[38]

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[32] *See Ruby Ridge Hearings*, supra note 15, at 719-37, 941-85; *Ruby Ridge Report*, supra note 16, at 10-11, 61-69, 115, 122-23, 34-35, 139, 145-49; *see also* David Johnston, *Idaho Siege Report Says FBI Violated Procedure*, N.Y. Times, Dec. 14, 1994.

[33] Morrison v. Olson, 487 U.S. 654 (1988).

[34] *Id.* at 691–92.

[35] Any doubt that this is the intended, clear ruling of the majority opinion may be dispelled by a reading of Justice Scalia's famous lone dissent. *Morrison*, 487 U.S. at 703-715. "It effects a revolution in our constitutional jurisprudence for the Court, once it has determined that (1) purely executive functions are at issue here and (2) those functions have been given to a person whose actions are not fully within the supervision and control of the President, nonetheless to proceed further to sit in judgment of whether 'the President's need to control the exercise of [the independent counsel's] discretion is '*so central* as to the functioning of the Executive Branch', as to require complete control, ante at 487 U,S, at 691, (emphasis added), whether the conferral of his powers upon someone else '*sufficiently* deprives the President of control over the independent counsel to interfere with [his] constitutional obligation to ensure the faithful obligation of the laws', ante at 487 U.S. at 696." *Id.* at 708-09. "It is not for us to determine, and we have never presumed to determine, how much of the purely executive powers must be within the full control of the President. The Constitution prescribes that they *all* are." *Id.* at 709 (emphasis in original text).

[36] *Id.* at 658, 694 (citing McGrain v. Daugherty, 273 U.S. 135 (1927)).

[37] United States ex rel. Kelly v. Boeing Co., 9 F.3d 743 (9th Cir. 1993).

[38] *Id.* at 751 (emphasis in original). *See also,* Vermont Agency of National Resources v. United States ex rel. Stevens, 529 U.S. 765 (2000) (holding that *qui tam* relators meet Article III standing requirements).

Prosecution is not a core or exclusive function of the executive, but oversight is a constitutionally mandated function of Congress; therefore, a claim of executive privilege to protect the ability to prosecute a case would likely fail. Additionally, congressional oversight and access to documents and testimony, unlike the action of a court, cannot stop a prosecution or set limits on the management of a particular case. Access to information by itself would not seem to disturb the authority and discretion of the executive branch to decide whether to prosecute a case.

Given the legitimacy of congressional oversight of the law enforcement agencies of government, and the need for access to information pursuant to such activities,[39] a claim of prosecutorial discretion by itself is unlikely to defeat a congressional need for information. The congressional action itself does not and cannot dictate prosecutorial policy or decisions in particular cases.

b. Other Court Rulings Further Undermine Presidential Claims of Prosecutorial Prerogatives

Judicial rulings over the past two decades in other contexts have rejected various assertions of presidential privilege that might be raised in attempts to deny congressional access to agency information. The Supreme Court's ruling in *Morrison v. Olson* casts significant doubt on whether prosecutorial discretion is a core presidential power, a doubt that has been magnified by the appellate court rulings in *Espy*[40] and *Judicial Watch.*[41] In those later decisions, assertion of the presidential communications privilege was held to be limited to "quintessential and non-delegable presidential power" and confined to communications with advisers in "operational proximity" to the resident.

Those decisions indicate that core powers include only decisions that the President alone can make under the Constitution: appointment and removal, pardoning, receiving ambassadors and other public ministers, negotiating treaties, and exercising powers as commander-in-chief. As discussed in Chapter 5, *Espy* strongly hinted, and *Judicial Watch* made clear, that the protection of the presidential communications privilege extends only to the boundaries of the White House and the executive office complex and not to the departments and agencies. Even if the actions at an agency related to a core power, unless the subject documents are "solicited and received" by a close White House adviser or the President, they are not

[39] The district court ruling in *House Committee on the Judiciary v. Miers*, in rejecting a claim of lack of standing of the House Judiciary Committee to challenge an executive assertion of absolute immunity from compulsory congressional process, reiterated that prior Supreme Court rulings in *McGrain v. Daugherty, Eastland v. U.S. Servicemen's Fund,* and *Barenblatt v. United States,* among others, had firmly established that Congress's power and authority to seek and compel information from executive agencies in criminal and civil enforcement contexts is constitutionally based. In denying the claim by the executive that a jurisdictional committee charged with oversight of the Justice Department could not permissibly employ its investigative resources to determine the reasons for the forced resignations and replacement of nine U.S. attorneys, the Court stated that "Given its 'unique ability to address improper partisan influence in the prosecutorial process ... [n]o other institution will fill the vacuum if Congress is unable to investigate and respond to this evil.' ... With the legitimacy of its investigation established, there is no need to belabor the argument concerning informational standing—non-compliance with a duly issued subpoena is a quintessential informational injury .... Thus, the Committee filed this suit to vindicate both its right to the information that is the subject of the subpoena and its institutional prerogative to compel compliance with its subpoenas. A harm to either interest satisfies the injury-in-fact standing requirement." House Committee on the Judiciary v. Miers, 558 F. Supp. 2d 53, 78 (2008). The Court also remarked: "The exercise of Congress's investigative 'power,' which the Executive concedes that Congress has, *creates* rights. For instance, by utilizing its power to issue subpoenas and proceed with an investigation via compulsory process, Congress creates a *legal right* to the responsive information that those subpoenas will yield. To hold that Congress's ability to enforce its subpoenas in federal court turns on whether its investigative function and accompanying authority to utilize subpoenas are properly labeled as 'powers' or 'rights' would elevate form over substance. The Court declines to do so." *Id.* at 91. (emphasis in original). Subsequent district court rulings have reiterated and relied on the *Miers* rationale to uphold legal actions to protect core constitutionally-based institutional prerogatives. *See, e.g.*, United States House of Representative v. Burwell, 130 F. Supp. 3d 53, 81 (D.D.C. 2015) (power of the purse)*;* Committee on Oversight and Government Reform v. Holder, 979 F. Supp. 2d 1, 4 (D.D.C. 2013) (document subpoena enforcement).

[40] In re Sealed Case (Espy), 121 F. 3d 279 (D.C. Cir. 1997).

[41] Judicial Watch v. Dep't of Just., 365 F.3d 1108 (D.C. Cir. 2004).

covered by the privilege. *Judicial Watch*, which dealt with pardon documents in DOJ that had not been "solicited and received" by a close White House adviser, determined that "the need for the presidential communications privilege becomes more attenuated the further away the advisers are from the President ... [which] affects the extent to which the contents of the President's communications can be inferred from predecisional communications."[42] Of course, these rulings did not involve congressional requests, and they are rulings by the U.S. Court of Appeals for the D.C. Circuit, not decisions by the Supreme Court. However, they provide helpful guidance, especially since the D.C. Circuit is the court most likely to hear and rule on future claims of presidential privilege.[43]

c. Trump v. United States Calls These Precedents Into Question

Although the Court's position in *Morrison* remains formally untouched, its recent decision in *Trump v. United States* raises legitimate questions about whether prosecutorial discretion remains outside the ambit of core presidential powers for the purpose of a congressional investigation. As described in more detail in a following Chapter, in that case, while examining the scope of presidential immunity from prosecution, the Court stated that "Congress cannot act on, and courts cannot examine, the President's actions on subjects within his 'conclusive and preclusive' constitutional authority."[44] As part of this discussion, the Court opined that the executive branch "has 'exclusive authority and absolute discretion' to decide which crimes to investigate and prosecute"; that President Trump's "threatened removal of the Acting Attorney General … implicates 'conclusive and preclusive' Presidential authority"; and that the President had "exclusive authority over the investigative and prosecutorial functions of the Justice Department and its officials." [45] While the Court made the observations in the course of determining the reach of Congress's *legislative* powers, this conclusion has clear implications for its investigative authority and will likely undergird future presidential efforts to rebuff perceived Congressional incursions into prosecutorial decisions.

d. Although Committees Enjoy Significant Investigative Powers, They Carefully Weigh Agency Interests When Seeking Information

The fact that presidential claims of privilege are often unsuccessful does not mean that DOJ policy arguments in particular situations should be immediately dismissed. A review of the historical record of congressional inquiries and experiences with committee investigations of DOJ reveals that committees normally have been restrained by prudential considerations. Members of Congress typically weigh the considerations of legislative need, public policy, and the statutory oversight duties of congressional committees against the potential burdens and harms that may be imposed on the agency if deliberative process matter is publicly disclosed. If a jurisdictional committee lacks a reasonable belief that the government has engaged in misconduct, a committee generally will give substantial weight to sensitive law enforcement concerns regarding an agency's internal deliberations. However, the oft-repeated claim that the Department never has allowed congressional access to open or closed litigation files or other

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[42] *Id.* at 1123.

[43] It may be noted that the district court ruling in *House Committee on the Judiciary v. Miers*, however, did involve a direct confrontation between a congressional committee and the executive over demands for testimony and documents from present and past senior advisers to the president, and that the court's opinion approvingly cited the *Espy* ruling five times with respect to doctrinal trends and interpretations concerning the presidential communications privilege. *See Miers*, 558 F. Supp. 2d at 73, 74 n.15, 103 n.35, and 105 n.37. Arguably, these references reinforce the notion that *Espy* is the controlling law in the District of Columbia Circuit with respect to the applicability of the privilege and its nature and scope.

[44] *Id.* at 609.

[45] *Id.* at 620-21.

"sensitive" internal deliberative process matters is simply not accurate. Under the appropriate circumstances, committees fully and properly have exercised their well-established congressional oversight authority.

4. Neither Agencies Nor Private Parties Can Deny Committee Access to Proprietary, Trade Secret, Privacy, and Other Sensitive Information

a. The Broad Right of Congressional Access and Disclosure

Generally speaking, Congress's authority and power to obtain information, including but not limited to proprietary or confidential information, is extremely broad.[46] Upon occasion, Congress has found it necessary and appropriate to limit its access to information it would normally be able to obtain by exercise of its constitutional oversight prerogatives.[47] But where a statutory confidentiality or nondisclosure provision is not made explicitly applicable to the Congress, the courts have consistently held that agencies and private parties may not deny Congress access to such information on the basis of such provisions.[48] Ambiguities in such statutes as the Trade Secrets Act and the Privacy Act have been resolved in a committee's favor.[49] The courts have also held that the release of information to a congressional requester is not considered to be disclosure to the general public.[50] Once documents are in congressional control, the courts will presume that committees of Congress will exercise their powers responsibly and with proper regard to the rights of the parties.[51] Moreover, it would appear that courts may not prevent congressional disclosure at least when such disclosure would serve a valid legislative purpose.[52]

Two early instances in which committees used the contempt power to successfully overcome agency claims that general confidentiality provisions in their enabling legislation prohibited disclosures to Congress are important precedents. The first involved a 1975 investigation by the Subcommittee on Oversight and Investigations of the then-House Interstate and Foreign Commerce Committee, chaired by Rep. John Moss, seeking to learn the degree to which Arab countries had asked U.S. companies to refuse to do business with Israel. It requested the Commerce Department to disclose to it all boycott requests filed by U.S. companies under the Export Administration Act of 1969. Secretary Rogers C.B. Morton refused on the ground that a broad confidentiality provision of the act, which did not expressly mention Congress, precluded such disclosure. The Subcommittee subpoenaed the documents but the Secretary

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[46] Proprietary information is commonly understood to encompass both trade secrets and confidential business information.

[47] *See, e.g.*, 1 U.S.C. § 112b (limiting congressional access to international agreements, other than treaties, where, in the opinion of the president, public disclosure would be prejudicial to the national security, to the foreign relations committees of each House under conditions of secrecy removable only by the president); 26 U.S.C. §§ 6103(d), 6104(a)(2) (limiting inspection of tax information to the Senate Finance Committee, House Ways and Means Committee, and the Joint Committee on Taxation, or any committees "specifically authorized by a resolution of the House or Senate"); 10 U.S.C. § 1582 (which provides that in reporting to Congress on certain sensitive positions created in the Defense Department, "the Secretary may omit any item if he considers a full report on it would be detrimental to national security"); and under 50 U.S.C. § 403j (b), the Congress' ability to obtain information about the CIA, particularly with regard to expenditures, is very limited.

[48] *See, e.g*., F.T.C. v. Owens-Corning Fiberglass Corp., 626 F.2d 966, 970 (D.C. Cir. 1980); Exxon Corp. v. F.T.C., 589 F.2d 582, 585–86 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 943 (1979); Ashland Oil v. F.T.C., 548 F.2d 977, 979 (D.C. Cir. 1976).

[49] *See, e.g*., Devine v. United States, 202 F.3d 547, 551 (2d Cir. 2000); *Owens-Corning Fiberglass Corp.*, 626 F.2d at 970; *Exxon Corp.*, 589 F.2d at 585–86; *Ashland Oil*, 548 F.2d at 979.

[50] *See, e.g., Owens-Corning Fiberglass Corp.*, 626 F.2d at 970; *see also Exxon Corp.* 589 F.2d at 589; *Ashland Oil,* 548 F.2d at 979; Moon v. CIA, 514 F. Supp 836, 840–41 (S.D.N.Y. 1981).

[51] *See, e.g., Owens-Corning Fiberglass Corp.*, 626 F.2d at 974; *see also Exxon Corp.* 589 F.2d at 589; *Ashland Oil,* 548 F.2d at 979; *Moon*, 514 F. Supp at 849–51.

[52] *See* Doe v. McMillan, 412 U.S. 306 (1973); *Eastland*, 421 U.S. at 491; *see also Owens-Corning Fiberglass Corp*. 626 F.2d at 970.

again refused to comply and was supported by an Attorney General opinion that declared that the confidentiality provision did apply to Congress. The Subcommittee voted the Secretary in contempt after rejecting his proffer of information reflecting the number of such reports filed and other statistical information, but without revealing the names of the companies. The Subcommittee had noted that there were at least 120 confidentiality provisions in various laws and that acceptance of their applicability to Congress would substantially undermine legislative oversight. The day prior to a scheduled vote by the full committee on contempt an agreement was reached under which the Chairman of the Subcommittee agreed to receive the documents in executive session and not make them public.[53]

The second instance occurred during a 1978 investigation by the same House Subcommittee which was dealing with allegations that a number of drug companies put their trade names on drugs actually manufactured by generic drug companies. The Subcommittee requested pertinent company documents held by the Food and Drug Administration (FDA) that the companies were required to file. Refusals after negotiations failed resulted in a subpoena to Health, Education and Welfare Secretary Joseph A. Califano. The Secretary, supported by another Attorney General opinion, refused to comply, again on the ground that a general confidentiality provision in its enabling legislation precluded disclosure to Congress. The Subcommittee rejected the contention and voted to cite the Secretary for contempt. The matter was resolved by the release of the documents prior to full committee consideration.[54]

b. Release of Proprietary, Trade Secret, or Privacy Information to Congress Does Not Waive Available Privileges in another Forum

Agencies, and private party submitters of sensitive information to agencies, often claim that acquiescing in a committee demand will waive agency rights under exemption 5 of the Freedom of Information Act (FOIA) as well as other privileges that they might assert in any subsequent court litigation. Exemption 5 of FOIA covers all the privileges against disclosure that would be provided under court rules governing civil litigation. While agencies have a legitimate interest in preserving these privileges, there should be no fear of waiver. "Waiver is the voluntary relinquishment of a known right or privilege."[55] It is well established that acquiescence in a valid, official request from a jurisdictional committee to a subject agency does not constitute a waiver of applicable nondisclosure privileges elsewhere.[56]

In *Rockwell International Corp. v. U.S. Department of Justice*,[57] the court acknowledged that the existence of statutory obligations to comply with congressional information requests is sufficient to demonstrate that compliance was not voluntary. *Rockwell* dealt with an assertion by the company that the Justice Department had waived the company's claim of FOIA Exemption 5 protection with respect to internal deliberative documents by giving the documents to a congressional investigating subcommittee at the subcommittee's request. The appeals court rejected the waiver claim, remarking that since the Justice Department had given "the documents to the Subcommittee only after the Subcommittee expressly agreed not to make them public," this indicated that "far from intending to waive the attachments'

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[53] *See Contempt Proceedings against Secretary of Commerce Rogers C.B. Morton: Hearing Before the Subcomm. on Oversight and Investigations, H. Comm. on Interstate and Foreign Commerce*, 94th Cong. 1st Sess. (1975); Paul C. Rosenthal and Robert S. Gressman, *Congressional Access to Confidential Information Collected by Agencies*, 15 Harv. J. On Legis. 74, 82-83 (1977).

[54] *See Contempt Proceedings Against Secretary of HES Joseph A. Califano, Jr.: Business Meeting of the Subcomm. on Oversight and Investigations, H. Comm. in Interstate and Foreign Commerce*, 95th Cong., 2d Sess. (1978) (Comm. Print No. 95-76, 1978).

[55] Florida House of Representatives v. U.S. Department of Commerce, 961 F.2d 941, 946 (11th Cir. 1992).

[56] Murphy v. Dep't of the Army, 613 F.2d 1151, 1155–59 (D.C. Cir. 1979); *Florida House of Representatives*, 961 F.2d at 946. *See also Owens-Corning Fiberglass Co.*, 626 F.2d at 970; *Ashland Oil*, 548 F.2d at 979, 980–81 (Release of confidential information to a congressional requester is not deemed to be disclosure to the public generally, and the legal obligation to surrender requested documents arises from the official request).

[57] Rockwell Int'l Corp. v. Dep't of Justice, 235 F.3d 598 (D.C. Cir. 2001).

confidentiality, the Justice Department attempted to preserve it. Under those circumstances, we find no Exemption 5 waiver."[58]

It is also well established that when the production of privileged communications is compelled, either by a court or a congressional committee, compliance with the order does not waive the applicable privilege in other litigation, as long as it is demonstrated that the compulsion was resisted.[59] Some courts have even refused to find waiver when the client's production, although not compelled, is pressured by the court.[60]

Two court rulings involving the House Energy and Commerce Committee confirm that turning over documents to a committee does not necessarily waive claims of privilege. However, the rulings also highlight the importance of sufficiently challenging a subpoena to demonstrate that the turnover was, indeed, involuntary. Both cases involved claims in judicial forums that the Energy and Commerce Committee's receipt and dissemination of documents from tobacco companies waived claims of privilege asserted in those courts. Both courts agreed that there would be no waiver if the document turnover had been involuntary. Both courts found, however, that the companies had failed to sufficiently challenge the Chairperson's subpoenas: "In short, a party must do more than merely object to Congress' ruling. Instead a party must risk standing in contempt of Congress."[61]

c. The Speech or Debate Clause Protects Committee Release of Proprietary, Trade Secret, and Other Sensitive Information

The public release of proprietary, trade secret or other sensitive information, either through inclusion in a hearing record or via the Congressional Record, is protected by the Speech or Debate Clause. Moreover, because such information does not normally include classified material, it is unlikely that release or publication would be deemed to violate the ethics rules of the House. The Speech or Debate Clause of the Constitution[62] protects "purely legislative activities," including those considered inherent in the legislative

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[58] *Id.* at 604.

[59] *See, e.g.*, United States v. de la Jara, 973 F.2d 746, 749–50 (9th Cir. 1992) ("In determining whether the privilege should be deemed to be waived, the circumstances surrounding the disclosure are to be considered," citing Transamerica Computer Corp. v. IBM, 573 F.2d 646, 652 (9th Cir. 1978)); United States v. Zolin, 809 F.2d 1411, 1415 (9th Cir. 1987), *aff'd in part, vacated in part*, 491 U.S. 554 (1989) ("When the disclosure is involuntary, we will find the privilege preserved if the privilege holder has made efforts 'reasonably designed' to protect and preserve the privilege. *See Transamerica Computer*, 573 F.2d at 650."); Westinghouse Electric Corp. v. Republic of the Philippines, 951 F.2d 1414, 1427 n. 14 (3d Cir. 1991) ("We consider Westinghouse's disclosure to the DOJ to be voluntary even though it was prompted by a grand jury subpoena. Although Westinghouse originally moved to quash the subpoena, it later withdrew the motion and produced the documents pursuant to the confidentiality agreement. *Had Westinghouse continued to object to the subpoena and produced the documents only after being ordered to do so, we could not consider its disclosure of those documents to be voluntary.*") (emphasis added); Jobin v. Bank of Boulder (In re M&L Business Machines Co.), 167 B.R. 631 (D. Colo. 1994) ("Production of documents under a grand jury subpoena does not automatically vitiate the attorney-client privilege, much less in an unrelated civil proceeding brought by a non-government entity. This is especially true in a case such as this, where the record demonstrates that the Bank has consistently sought to protect its privilege.").

[60] *Transamerica Computer*, 573 F.2d at, 651. Similarly, another court found that a client's voluntary production of privileged documents during discovery did not effect a waiver because it was done at the encouragement of the presiding judge. Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1163 (S.D.S.C. 1974) (finding no waiver "where the voluntary waiver of some communications was made upon the suggestion of the court during the course of the in camera proceedings."). Moreover, a number of federal appeals and district courts similarly have held that disclosures to congressional committees do not waive claims of privilege elsewhere. *See* Florida House of Representatives, 961 F.2d at 946; Murphy, 613 F.2d at 1155 (D.C. Cir. 1979); In re Sunrise Securities Litigation, 109 B.R. 658 (D.C. E.D. Pa. 1990); In re Consolidated Litigation Concerning International Harvester's Disposition of Wisconsin Steel, 1987 U.S. Dist. Lexis 10912 (N.D. Ill. E.D. 1987).

[61] *See I*ron Workers Local Union No. 17 Insurance Fund v. Phillip Morris, Inc., 35 F. Supp. 2d 582 (N.D. Ohio, E.D. 1999); Massachusetts v. Phillip Morris, Inc. et al., 1998 Lexis 438 (Mass. Super. Ct. July 30, 1998).

[62] U.S. Const. art. 1, § 6, cl. 1 (providing that "for any Speech or Debate in either House, [Members] shall not be questioned in any other place").

process.[63] The protection afforded by the Clause covers not only the words spoken during debate but also "[c]ommittee reports, resolutions, and the act of voting are equally covered, as [these] are 'things generally done in a session of the House by one of its members in relation to the business before it.'"[64] Finally, the Clause has been held to encompass such activities integral to the lawmaking process as the circulation of information to other Members, as well as participation in committee investigative proceedings and reports.[65]

The Speech or Debate Clause's protections, however, do not extend to activities only casually or incidentally related to legislative affairs.[66] For example, newsletters, press releases, or the direct distribution of reports containing information or quotes will likely not be shielded, because they are considered "primarily means of informing those outside the legislative forum."[67] On the other hand, the distribution of such documents to members of a committee and/or their staff, or the inclusion of such information or reports in the public record of hearings or the Congressional Record, are likely to be considered "integral" and, therefore, protected by the Clause. The key consideration is such cases appears to be the act, not the actor.

d. The Privacy Act is Inapplicable to Disclosures to Congress

Agencies often contend that the Privacy Act[68] prevents them from disclosing certain information to Congress in response to an official congressional inquiry. However, a review of the relevant statutory provisions, judicial interpretations, and congressional practice indicates that there is no such barrier.

The Privacy Act safeguards individuals against invasions of personal privacy by requiring government agencies to maintain accurate records and by providing individuals with more control over the gathering, dissemination, and accuracy of government information about themselves. To secure this goal, the Act prohibits an agency from disclosing information in its files to any person or to another agency without the prior written consent of the individual to whom the information pertains.[69] This broad prohibition is subject to 12 exceptions, one of which specifically allows disclosures to Congress and its committees. Section 552a(b)(9) permits disclosure of covered information without the consent of the individual "to either House of Congress, or to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any joint committee." A 2000 court of appeals ruling held that this provision "unambiguously permits federal agencies to disclose personal information about an individual without the individual's consent to a Congressional subcommittee that has jurisdiction over the matter to which the information pertains."[70]

Similarly, DOJ's Office of Legal Counsel has agreed that the section (b)(9) exception applies "where the Senate or House exercises its investigative and oversight authority directly, as is the case with a resolution of inquiry adopted by the Senate or House, each House of Congress exercises its investigative authority

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[63] *See id.*; *see also* United States v. Swindall, 971 F.2d 1531, 1534 (11th Cir. 1992); Chastain v. Sundquist, 833 F.2d 311, 314 (D.C. Cir. 1987), *cert denied* 487 U.S. 1240 (1988) (quoting United States v. Brewster, 408 U.S. 501, 512 (1972)).

[64] Powell v. McCormack, 395 U.S. 486, 502 (1969).

[65] *See, e.g., McMillan*, 412 U.S. at 311–12; Gravel v. United States, 408 U.S. 606, 625 (1972); Dombrowski v. Eastland, 387 U.S. 82 (1967); Tenney v. Brandhove, 341 U.S. 367, 376–77 (1951).

[66] *See* Walker v. Jones, 733 F.2d 923, 929 (1984)(holding that activities integral to the legislative process may not be examined, but peripheral activities not closely connected to the business of legislating do not get protection under the Clause). For an in-depth discussion of the Speech or Debate Clause *see* Chapter 10.

[67] Hutchinson v. Proxmire, 443 U.S. 111 (1979).

[68] 5 U.S.C. § 552a (2000).

[69] *See* 5 U.S.C. § 552a(b).

[70] Devine v. United States, 202 F.3d 547, 551 (2d Cir. 2000).

through delegations of authority to its committees, which act either through requests by committee Chairs, speaking on behalf of the committee, or through some other action by the committee itself."[71] More recently, a Department of Justice official agreed that based upon this Privacy Act exception, the Department was permitted to disclose to Congress details from nine U.S. Attorneys' personnel files in connection with the investigation of the removal of these U.S. Attorneys. The official was testifying before the investigating congressional committee, and he explained in detail the Department's position that the U.S. Attorneys were removed for purely personnel-related reasons.[72]

5. Access to Grand Jury Materials

Rule 6(e) of the Federal Rules of Criminal Procedure provides that members of the grand jury and those who attend grand jury proceedings may not "disclose matters occurring before the grand jury, except as otherwise provided in these rules."[73] The prohibition does not ordinarily extend to witnesses.[74] Violations are punishable as contempt of court.[75]

There is some authority for the proposition that Rule 6(e), promulgated as an exercise of congressionally delegated authority and reflecting pre-existing practices, is not intended to address disclosures to Congress.[76] As a general rule, however, neither Congress nor the courts have accepted that proposition.

But not all matters presented to a grand jury are covered by the secrecy rule. Rather, according to the courts, the aim of the rule is to "prevent disclosure of the way in which information is presented to the grand jury, the specific questions and inquiries of the grand jury, the deliberations and vote of the grand jury, the targets upon which the grand jury's suspicions focuses, and specific details of what took place before the grand jury."[77] But, "when testimony or data is sought for its own sake—for its intrinsic value in the furtherance of a lawful investigation—rather than to learn what took place before the grand jury, it is not a valid defense to disclosure that the same information was revealed to a grand jury or that the same documents had been, or were presently being, examined by a grand jury."[78] Congressional committees have gained access to documents under this theory, the courts ruling that the committee's interest was in the documents themselves and not in the events that transpired before the grand jury.[79] However, Rule 6(e) bars congressional access to matters that "reflect exactly what transpired in the grand jury," such as

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[71] Letter from Jay S. Bybee, Assistant Atty Gen., Off. of Legal Counsel, Dept of Justice, to David D. Aufhauser, Esq., General Counsel, Department of the Treasury (December 5, 2001).

[72] *See H.R. 580, Restoring Checks and Balances to the Confirmation Process of U.S. Attorneys*: *Hearing before the Subcomm. on Commercial and Admin. Law*, 110th Cong. 1st Sess. (Mar. 6, 2007) (Testimony of Principal Associate Deputy Attorney General William F. Moschella).

[73] *See id.*

[74] United States v. Sells Engineering, 463 U.S. 418, 425 (1983); In re Sealed Motion, 880 F.2d 1367, 1373 (D.C. Cir. 1989).

[75] Fed. R. Crim. Pro. 6(e)(2).

[76] *See* In re Grand Jury Proceedings of Grand Jury No. 81-1 (Miami), 669 F. Supp. 1072, 1074–75 (S.D. Fla. 1987), *aff'd on other grounds*, 833 F.2d 1438 (11th Cir. 1987); In re Report and Recommendation of June 5, 1972 Grand Jury Concerning Transmission of Evidence to the House of Representatives, 370 F. Supp. 1219, 1230 (D.D.C. 1974), *petitions for writs of prohibition and mandamus den'd sub nom.*, Haldeman v. Sirica, 501 F.2d 714 (D.C. Cir. 1974); In re Grand Jury Investigation of Ven-Fuel, 441 F. Supp. 1299, 1304–08 (M.D. Fla. 1977).

[77] *In re Grand Jury Investigation of Yen-Fuel*, 441 F. Supp. at 1302-03 (citing United States v. Interstate Dress Carriers, 280 F. 2d 52, 54 (2d Cir. 1960)).

[78] Interstate Dress Carriers v. Dress Carriers, 280 F.2d 52, 54 (2d Cir. 1960). *See also* SEC v. Dresser Industries, 628 F.2d 1368 (D.C. Cir. 1980); In re Grand Jury Investigation (New Jersey State Commission of Investigation), 630 F.2d 996 (3rd Cir. 1980); Davis v. Romney, 55 F.R.D. 337 (E.D. Pa. 1972); In re Senate Banking Committee Hearings, 19 F.R.D. 410, 412 ((N.D. Ill. 1956).

[79] In re Grand Jury Impaneled October 2, 1978, 510 F. Supp. 112, 115 (D.D.C. 1981); In re Grand Jury Proceedings, Newport News Drydock & Shipbuilding Co., Mem. Opinion (E.D. Va. Nov. 12, 1984); In re Senate Banking Committee Hearings, 19 F.R.D. 410 (N.D. Ill. 1956).

transcripts of witness testimony.[80] Congressional committees have also argued, with some success, that the 6(e) exception permitting disclosure of grand-jury materials for purposes of a "judicial proceeding" applies to documents sought in connection with a potential Senate impeachment trial.[81]

The case law indicates that Rule 6(e) would not prevent disclosure to Congress of the following types of documents:

- Documents within the possession of the Department of Justice concerning a particular case or investigation, other than transcripts of grand jury proceedings and material indicating "the identities of witnesses or jurors, the substance of testimony, the strategy or direction of the investigation, the deliberations or questions of jurors, and the like." Material that would not otherwise be identifiable as grand jury material does not become secret simply through Department of Justice identification.[82]

- Immunity letters, draft pleadings, target letters, and draft indictments.[83]

- Plea agreements as long as particular grand jury matters are not expressly mentioned.[84]

- Third party records which pre-exist the grand jury investigation even if they are in the possession of the Department of Justice as custodian for the grand jury.[85]

- Memoranda, notes, investigative files, and other records of FBI agents or other government investigators except to the extent those documents internally identify or clearly define activities of the grand jury.[86]

6. Committees Cannot be Denied Access to Subordinate Agency Personnel

a. Asserted Basis of Agency Refusals

Investigatory committees often reach a point where it becomes vital to interview or call as witnesses subordinate personnel who have unique, hands-on knowledge of events or operational details that are the subject of legislative scrutiny. Agency refusals of requests to provide particular employees typically rest on the grounds that:

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[80] In re Grand Jury Investigation Uranium Industry, 1979 WL 1661 at 4 (D.D.C. (1979); In re Grand Jury Impaneled October 2, 1978, 510 F. Supp. 112 (D.D.C. 1981).

[81] The House Judiciary Committee made this argument in seeking unredacted versions of Special Counsel Robert Mueller's report on Russian interference in the 2016 election. The D.C. Circuit accepted the argument. *See* In re Committee on the Judiciary, U.S. House. of Reps., 951 F.3d 589 (D.C. Cir. 2020). However, the Supreme Court granted certiorari to review the circuit court's decision, which casts doubt on its conclusions. *See* Dep't of Just. v. House Comm. on the Judiciary, 141 S. Ct. 185, 207 L. Ed. 2d 1114 (2020). The decision was ultimately vacated as moot in 2021, because Trump had left office and was to that extent no longer subject to a House impeachment investigation. *See* Dep't of Just. v. House Comm. on the Judiciary, 142 S. Ct. 46, 210 L. Ed. 2d 985 (2021).

[82] Senate of Puerto Rico v. U.S. Department of Justice, 823 F.2d 574, 583 n. 30 (D.C. Cir. 1987); In re Grand Jury Impaneled October 2, 1978 (792), 510 F. Supp. 112, 114–15 (D.D.C. 1981).

[83] In re Harrisburg Grand Jury 83-2, 638 F. Supp. 43, 47 n.4 (M.D. Pa. 1986); In re Grand Jury Matter (Catania), 682 F.2d 61, 64 n.4 (3d Cir. 1982).

[84] Washington Post v. Robinson, 935 F.2d 282, 29091 (D.C. Cir. 1991).

[85] SEC v. Dresser Industries, Inc., 628 F.2d at 1382–83; United States ex rel Woodard v. Tynan, 757 F.2d 1085, 1087–88 (10th Cir. 1985).

[86] Anaya v. United States, 815 F.2d 1373, 1380–81 (10th Cir. 1987).

- Permitting such an appearance would undermine the agency's ability to ensure that such agents would be able to exercise the independent judgment essential to the integrity of law enforcement, prosecutorial, or regulatory functions and to public confidence in their decisions.

- It is more appropriate that committees question supervisors or political appointees, which will satisfy a committee's oversight needs without undermining the independence of line agents and without raising the appearance of political interference in investigational, prosecutorial, or policymaking decisions.

Such claims are made even in the face of subpoenas to the requested agency witnesses, or to a head of the agency to supply the named witnesses. At that point, the identified witness is placed between a rock and a hard place: in a test of wills between the committee and the agency. Allowing the designated agency employees to appear but only if accompanied by an agency attorney is a common alternative offered by agencies.

b. A Committee Sets the Terms and Conditions for Agency Witnesses

If the requesting committee has jurisdiction over the agency, and has the authority to initiate and conduct investigations and issue subpoenas, the witness must be allowed to appear. An agency has no authority to determine who from the agency shall or shall not appear before a requesting committee or to set the terms and conditions of such appearances.[87] Indeed, an agency official who blocks the appearance of a witness may be subject to criminal sanctions for obstruction of a congressional proceeding,[88] loss of pay,[89] or a citation for contempt of Congress.[90]

i. The Example of the Rocky Flats Investigation

Whether a witness access dispute ratchets up to a full-blown interbranch controversy depends on political factors. Illustrative is a 1992 inquiry of the Subcommittee on Investigations and Oversight of the House Committee on Science, Space, and Technology. The Subcommittee investigated the plea bargain settlement of the prosecution of Rockwell International Corporation for environmental crimes committed in its capacity as manager and operating contractor at the Department of Energy's (DOE) Rocky Flats nuclear weapons facility.[91] The settlement was a culmination of a five-year investigation of environmental crimes at the facility, conducted by a joint government task force involving the FBI, the Department of Justice, the Environmental Protection Agency (EPA), EPA's National Enforcement Investigation Centers, and the DOE Inspector General.

The Subcommittee was concerned with several issues:

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[87] *See* Chapter 4 (section E.3.) for a discussion of a committee's prerogative to determine which agency witnesses shall appear before it and the conditions of such appearances, including limitations on attorney representation and the attendance of agency representatives during the testimony.

[88] 18 U.S.C. § 1505.

[89] P.L. 109-115, § 818, Transportation Treasury and Independent Agency Appropriations, 2005 (November 30, 2006) (carried over to date by continuing resolutions).

[90] 2 U.S.C. §§ 192, 194, or if no subpoena has been issued, under each House's inherent contempt power.

[91] *See Environmental Crimes at the Rocky Flats Nuclear Weapons Facility: Hearings Before the Subcomm. on Investigations and Oversight of the House Comm. on Science, Space & Technology*, 102d Cong., 2d Sess., vols. I and II (1992) [hereinafter *Rocky Flats Hearings*]; *Meetings: To Subpoena Appearance by Employees of the Department of Justice and the FBI and To Subpoena Production of Documents From Rockwell International Corporation, Before the Subcomm. on Investigations and Oversight of the House Comm. on Science, Space, and Technology*, 102d Congress, 2d Sess., (1992) [Hereinafter *Subpoena Hearings*].

- the small size of the agreed-upon fine relative to the profits made by the contractor and the damage caused by inappropriate activities;

- the lack of personal indictments of either Rockwell or DOE personnel despite a DOJ finding that the crimes were "institutional crimes" that "were the result of a culture, substantially encouraged and nurtured by DOE, where environmental compliance was a much lower priority than the production and recovery of plutonium and the manufacture of nuclear 'triggers'";

- and that expense reimbursements provided by the government to Rockwell and the contractual arrangements between Rockwell and DOE may have created disincentives for environmental compliance and aggressive prosecution of the case.

The Subcommittee held ten days of hearings, seven in executive session, in which it took testimony from the U.S. Attorney for the District of Colorado; an assistant U.S. Attorney for the District of Colorado; a DOJ line attorney from Main Justice; and an FBI field agent. It also received voluminous FBI field investigative reports and interview summaries, and documents submitted to the grand jury not subject to Rule 6(e).[92]

At one point in the proceedings, all the witnesses who were under subpoena, upon written instructions from the Acting Assistant Attorney General for the Criminal Division of the Justice Department, refused to answer questions concerning internal deliberations about the investigation and prosecution of Rockwell, the DOE, and their employees. Two of the witnesses advised that they had information and, but for the DOJ directive, they would have answered the Subcommittee's inquiries. The Subcommittee members unanimously authorized the Chairperson to send a letter to President Bush requesting that he either personally assert executive privilege as the basis for directing the witnesses to withhold the information or direct DOJ to retract its instructions to the witnesses. The President took neither course and DOJ subsequently reiterated its position that the matter sought would chill department personnel. The subcommittee then moved to hold one of the witnesses in contempt of Congress.

A last-minute agreement forestalled the contempt citation. Under the agreement:

- DOJ issued a new instruction to all personnel under subpoena to answer all subcommittee questions, including those relating to internal deliberations about the plea bargain. Those instructions applied to all department witnesses, including FBI personnel, who might be called in the future. Those witnesses were advised to answer all questions fully and truthfully, and were specifically instructed that they were allowed to disclose internal advice, opinions, or recommendations connected to the matter.

- Transcripts were made of all interviews and provided to the witnesses. They were not to be made public except to the extent they needed to be used to refresh the recollection or impeach the testimony of other witnesses called before the subcommittee in a public hearing.

- Witnesses were required to be interviewed by staff under oath.

[92] *Rocky Flats Hearings, supra* note 75, at vol. I, 389–1009, 1111–1251, vol. II.

- The subcommittee reserved the right to hold further hearings in the future, at which time it could call other department witnesses who would be instructed by the department not to invoke the deliberative process privilege as a reason for refusing to answer subcommittee questions.[93]

Key to the success of the investigating committee was the support of the Chairperson by the Ranking Minority Member throughout the proceeding and the perception that there were sufficient votes on the full committee for a contempt citation. Media attention to the dispute also helped, particularly coverage of grand jury members who complained about not being allowed to hand up indictments of Energy Department and Rockwell officials.

c. A Committee May Reject an Agency-Designated Attorney Appearing with an Agency Witness

Often as an alternative, an agency may offer to allow a subordinate official or employee to be interviewed or to testify if the witness is accompanied by agency counsel. Under certain circumstances, however, this may raise conflict-of-interest problems, particularly where the investigatory hearing involves issues of agency corruption, maladministration, abuse, or waste. In such instances, the agency attorney or other official may have a conflict of interest in representing both the interests of the employee-witness and those of the agency. Moreover, the presence of such an agency official may inhibit the witness from testifying fully. Thus, both pragmatic and legal concerns caution strongly in favor of limiting a witness' choice of counsel to someone who does not present the potential conflict of interest or pressure on the witness.

To be effective, a committee must be confident that the responses it obtains from officers and employees with respect to the administration of agency programs are candid, objective, and truthful. Committees have no way to ascertain whether a witness' statement that he or she personally requested to be accompanied by agency personnel is, in fact, based solely on the employee's personal wishes. Where a potential conflict-of-interest situation appears to arise, a committee should seek to insulate the witness from the presence of agency personnel during a staff interview, deposition, or hearing testimony.

Under House Rule XI.2(k)(4), each committee chair has the express authority to maintain order and decorum in the conduct of hearings and the inherent authority to preserve the integrity of the investigative process. Thus, a determination by a chair that agency-selected counsel for a witness raises a potential conflict of interest, or might chill the candor of the witness' testimony, may be treated as an obstruction of the investigatory process or a breach of decorum or order of a hearing. This may be remedied by exclusion of the agency counsel or punishment by the contempt process of the House. The witness would not be excused from testifying, but the choice of the witness' counsel could be circumscribed. In the 118th Congress, the House Judiciary Committee filed a lawsuit in federal court because DOJ insisted on the presence of agency counsel at the deposition of FBI agent Elvis Chan. This case would have provided the first opportunity for a federal court to opine on the House deposition regulations, which provides for the exclusion of agency counsel, if the chair of the committee determines that is necessary and appropriate to ensure candor from the witness. In August 2024, the Chan case was dismissed pursuant to Federal Rule of Civil Procedure 41.

d. An Agency May Direct its Designated Counsel to Solely Represent the Witness

An effective compromise to such situations is for the agency to direct its attorney to represent only the employee-witness' interests. This solution was employed by the Department of Health and Human Services (HHS) and House Energy and Commerce Committee in the 1990s. The Secretary of HHS

[93] *Rocky Flats Hearings*, *supra* note 75, at vol. I, 9–10, 25–31, 1673–1737; *Subpoena Hearings* at 1–3, 82–86, 143–51.

authorized a Department attorney to represent an employee subpoenaed to testify before the Committee, without reporting back to the department. The agreement reflected DOJ regulations authorizing personal representation by a DOJ attorney or private counsel of a government employee subpoenaed to testify about actions occurring during the course of the person's official duties.[94] The agreement solved the conflict of interest problem and removed the financial burden for subpoenaed government witnesses who no longer needed to pay substantial fees for private legal representation.[95]

i. The Investigation of the DOJ Attempt to Block Enforcement of the Contempt Citation of Anne Burford

The end of the 97th Congress saw a dramatic illustration of the techniques and authorities just described. DOJ investigations grew out of the highly charged confrontation concerning the refusal, at the direction of President Ronald Reagan, of Environmental Protection Agency (EPA) Administrator Anne Gorsuch Burford to comply with House subcommittee subpoenas requiring the production of documentation about EPA's enforcement of the legislation requiring the cleanup of hazardous wastes (Superfund). The dispute culminated in the House of Representatives' citation of Burford for contempt of Congress, the first head of an executive branch agency ever to have been so cited. It also resulted in an unprecedented legal action by DOJ against the House to obtain a judicial declaration that Burford had acted lawfully in refusing to comply with the subpoena at the behest of the President.

Ultimately the lawsuit was dismissed, all the documents sought were provided to the subcommittees, and the contempt citation was dropped. However, a number of questions about the role of the Justice Department during the controversy remained: whether DOJ, not EPA, had made the decision to persuade the President to assert executive privilege; whether the department had directed the United States Attorney for the District of Columbia not to present the contempt citation to the grand jury and made the decision to sue the House; and, generally, whether there was a conflict of interest in the department's simultaneously advising the President, representing Burford, investigating alleged executive branch wrongdoing, and not enforcing the congressional contempt statute. These and other related questions raised by DOJ's actions became the subject of an investigation by the House Judiciary Committee beginning in early 1983. The Committee issued a final report in December 1985.[96]

Although the Judiciary Committee was able to gain access to virtually all the documentation and other information it sought from DOJ, in many respects the investigation proved as contentious as the earlier controversy. Among other clashes between DOJ and the Judiciary Committee, there was disagreement about the access that would be provided for DOJ staff interviews. DOJ demanded that any such interviewees be accompanied by DOJ lawyers. Ultimately DOJ agreed to permit interviews to go forward without its attorneys present, and if an employee requested representation, DOJ paid for a private attorney. In all, Committee staff interviewed 26 current and former department employees, including four assistant attorneys general.

Partly as a result of these interviews, as well as from the handwritten notes initially withheld, the Committee determined it needed access to Criminal Division documents respecting the origins of former EPA Assistant Administrator Rita Lavelle in order to determine whether department officials had deliberately withheld the documents in an attempt to obstruct the Committee's investigation. The

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[94] *See* General Powers of Special Counsel, 28 C.F.R. § 600 (delineating the process for DOJ appointment of special counsel).

[95] *See* Staff of Subcomm. on Oversight and Investigations, H. Comm. on Energy and Commerce, 103rd Cong., Damaging Disarray: Organizational Breakdown and Reform in the Justice Department's Environmental Crimes Program 54-6 (Comm. Print No. 103-T, 1994).

[96] *See*, Report of the H. Comm. on the Judiciary on Investigation of the Role of the Dep't of Justice in the Withholding of EPA Documents From the Cong. in 1982-83, H.R Rep. No. 99-435 (1985) [hereinafter EPA Withholding Report].

Department first refused to provide the documents relating to the Lavelle investigation "[c]onsistent with the longstanding practice of the Department not to provide access to active criminal files."[97] The Department also refused to provide the Committee with access to documents related to the Department's handling of its inquiry, objecting on the ground of the Committee's "ever-broadening scope of ... inquiry."[98] After a delay of almost three months the Department produced both categories of documents.[99]

The Committee's final report asked for the Attorney General to appoint an independent counsel pursuant to the Ethics in Government Act to investigate its allegations of obstruction of congressional proceedings. That appointment of an independent counsel and her subsequent inquiry led to the Supreme Court's landmark ruling in *Morrison v. Olson* which sustained the validity of the law creating the office and its function, held that prosecutorial discretion is not a core presidential power, and directly reaffirmed Congress's broad constitutionally-based oversight and investigatory authority.[100]

e. Congress Has Enacted Witness Protection Laws

Congress has enacted legislation to protect its vital interest in receiving information about the performance of executive agencies, both through permanent statutory provisions and provisions in yearly appropriations laws. These statutes ensure that federal employees have the right to communicate with and provide information to the U.S. Congress, or to a member or committee of Congress, and that this right may not be interfered with or impeded. A current provision, originally enacted as part of the Lloyd-LaFollette Act, states as follows at 5 U.S.C. § 7211:

> The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied.

This so-called "anti-gag rule" statute was adopted by Congress in the face of the Taft and Theodore Roosevelt administrations' attempts to "gag" or restrain employees from speaking or providing information to Congress without the consent of the employees' heads of departments.[101] With such "gag rules" in place requiring departmental clearance for employees to speak to Congress or respond to members, Congress was specifically concerned that it would hear only the point of view of cabinet officials and not the views of the rank-and-file experts in the departments.[102] The anti-gag rule law has no enforcement mechanism.

But the provisions and the underlying policy of the "anti-gag rule" statute have been reaffirmed, strengthened, and clearly reasserted in recent appropriations laws. Repeatedly, Congress has expressly provided that no funds appropriated in *any* act of Congress may be spent to pay the salary of one who prohibits or prevents an employee of an executive agency from providing information to the Congress, or to any member or committee of Congress, when such information concerns relevant official matters. Similarly, current appropriations provisions also provide that no funds may be spent to enforce any

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[97] *Id*. at 1265.

[98] *Id*. at 1266.

[99] *Id.* at 1270.

[100] *Morrison*, 487 U.S. at 691-92, 694.

[101] Postal Service Appropriations Act of 1912, § 6, Pub. L. No. 62-336, 37 Stat. 539, 555 (1912). For history of the gag rules and anti-gag rule law, *see generally* Louis Fisher, *Invoking Executive Privilege: Navigating Ticklish Political Waters*, 8 Wm. & MARY BILL RTs. J. 583, 623–625 (2000), and *Congres-sional-Executive Struggles Over Information: Secrecy Pledges*, 42 Adm. L. Rev. 89, 98–100 (1990). For the text of the Taft and Roosevelt gag orders, *see* 48 Cong. Rec. 4513 (Apr. 9, 1912).

[102] 48 Cong. Rec. 4656–57 (Apr. 12, 1912).

agency nondisclosure policy, or any nondisclosure agreement with an officer or employee, without expressly providing an exemption for information provided to the Congress. In support, these provisions specifically cite the anti-gag rule law and other whistleblower protection provisions.[103] In discussing the latter provision when it was first added to appropriations laws in 1987, the House conference report stated clearly that the effect of the law was to reduce the potential that an overbroad nondisclosure agreement or agency nondisclosure policy might produce a "chilling effect on the first amendment rights of government employees, *including their ability to communicate directly with members of Congress*."[104]

Congress has also passed other provisions of law, such as the Whistleblower Protection Act of 1988, and in 2012 the Whistleblower Protection Enhancement Act,[105] to assure the free and unfettered passage of information from executive agency employees to, among others, the Congress, to assure the fair and honest administration of the laws of the nation.[106] The Senate report on the legislation noted that in large bureaucracies it is not difficult to conceal evidence of waste or mismanagement "provided that no one summons the courage to disclose the truth."[107] The Whistleblower Act expressly protects employees from reprisals for the disclosure of certain information regarding waste, fraud, or abuse in federal programs. Although the act limits the right to disclose *publicly* certain confidential or secret information relating to national security or defense, it expressly allows the disclosure to the Congress of any and all such information: "This subsection shall not be construed to authorize the withholding of information from the Congress or the taking of any personnel action against an employee who discloses information to the Congress."[108]

While the Whistleblower Act is generally used as a defense to personnel actions taken against covered employees for making protected disclosures, it clearly demonstrates Congress' continued policy of preserving open communications to the Congress from federal employees. Similarly, the Military Whistleblower Protection Act of 1989[109] provides that "No person may restrict a member of the armed forces in communicating with a member of Congress or an Inspector General" and prohibits any retaliatory personnel action against a member of the armed forces for making or preparing a communication to a member of Congress.[110]

Finally, the provisions of 18 U.S.C. § 1505 provide a criminal penalty for one who "corruptly," or through the use of "any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct or impede," 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. …" This statute makes it a criminal violation for anyone to use such

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[103] *See* Transportation, Treasury, and Independent Agency Appropriations, 2005, Pub. L. No. 109–115 §§ 818, 820 (Nov. 30, 2006). These provisions have been carried over to the current fiscal year by subsequent continuing resolutions.

[104] H.R. Rep. No. 100-498, at 1179 (1987) (emphasis added).

[105] Pub. L. No. 101-12 and Pub. L. No. 112-199, *codified as amended at* 5 U.S. §§ 2301-2306, 1201-1222.

[106] 5 U.S.C. § 2302(b)(8).

[107] S. REP. No. 95-969, at 8 (1978).

[108] 5 U.S.C. § 2302(b). For an overview of the federal laws providing safeguards for whistleblowers see Jon O. Shimabukuro & L. Paige Whitaker, Cong. Research Serv., R42727, Whistleblower Protections Under FederalLaws (periodically updated). See also the Supreme Court's recent ruling in *Dep't of Homeland Sec. v. MacLean*, 135 S. Ct. 913 (2015), holding that an agency regulation allowing retaliation for a legitimate whistleblower does not displace the protections of the act.

[109] 10 U.S.C. § 1034 (2000).

[110] 10 U.S.C. § 1034 (a)(1), (b).

threatening means to obstruct or impede a committee inquiry, or other such inquiry of the House or Senate.[111]

[111] United States v. Mitchell, 877 F.2d 294 (4th Cir. 1989); United States v. Poindexter, 725 F. Supp. 13 (D.D.C. 1989) (a committee inquiry, however, need not be formally authorized, and may be a preliminary inquiry). The Supreme Court interpreted a parallel prohibition on "obstructing an official proceeding," 18 U.S.C. § 1512, in reviewing the prosecutions following the January 6 insurrection. Fischer v. United States 603 U.S. ___ (2024). Prosecutors had secured numerous convictions of J6 rioters under this statute based on their violent conduct on the day of the Capitol attack, but the Supreme Court vacated many of these convictions, holding that they could not be supported without improperly separating the "obstruction" language of the statute from preceding language referring to "document[s], record[s], or other objects." In other words, a valid prosecution under this section requires that the obstruction in question have some nexus with tangible documents, records, or similar—it is not enough simply to pose some impediment to the proceedings. Similar logic could apply to § 1505, which also makes reference to documentary materials.

8. The Rights and Role of the Minority Party and Individual Members in the Investigatory Process

Overview

In general, individual members of Congress may initiate inquiries, collect information, and conduct investigations, but their ability to compel compliance with otherwise voluntary requests is extremely limited. Each house defines the scope of powers its members may use in enforcing investigative demands, and unless authorized by those rules or by a separate statute, enforcement powers are limited to the House or Senate acting as a body or to a committee or committee chair acting pursuant to the rules of that body. Senate rules generally provide more leverage for individual Senators, although the House also has unique procedures that may be invoked by the minority.

Over the years, members have, for the most part, unsuccessfully attempted to rely on lawsuits to obtain documents from agencies unwilling to provide them voluntarily. Supported by such court rulings, the Justice Department, as a matter of executive branch policy, treats requests for agency documents by *individual* s of Congress—other than the chairs of committees and subcommittees—in essentially the same way as it treats requests by private individuals seeking information under the Freedom of Information Act (FOIA), with some additional considerations. But organized, persistent informal "back bench actions" by the minority and individual members, such as those engaged in by Rep. Henry Waxman in his days as a Ranking Minority Committee Member, provide a model for potentially effective actions.

A. Rights of Individual Members of the House

The role of members of the minority party in the investigatory process in the House of Representatives is governed by the Rules of the House and its committees. The House grants all members certain rights relating to investigative functions, such as the rights to question witnesses at hearings and to make motions to issue subpoenas.[112] Minority members in the House also are specifically accorded some additional rights.[113] However, no ranking minority members or individual members can start official committee investigations, hold official hearings, or issue subpoenas by themselves, although they have other tools, as discussed below. House Rules and practice provide a procedure for individual members to file "resolutions of inquiry," the passage of which expresses an official, non-binding request of the full House for particular information from the President or the head of a department. Individual members may also seek the voluntary cooperation of agency officials or private persons. But no judicial precedent has

[112] House Rule XI.2(j)(2)(A) (questioning witnesses); House Rule XI.2(k)(6) (motion to subpoena).

[113] Whenever a hearing is conducted on any measure, the minority may, upon written request of a majority of the minority members to the chair before the completion of the hearing, call witnesses selected by the minority to testify during at least one day of the hearing (House RuleXI.2(j)(1)). Minority members are authorized to vote to issue subpoenas (unless the committee vests subpoena issuance authority in the chair alone) and to vote to enforce subpoenas. Minority members are allowed to participate in actions requiring quorums and to go into closed sessions, and minority members may file supplemental, minority, or additional views for inclusion in committee reports (House Rule XI.1(I)).

recognized a right in an individual member, other than the Chair of a committee,[114] to exercise the authority of a committee in the oversight context.

B. Long-Standing Executive Branch Policy Treats Member Information Inquiries as FOIA Requests from Non-Governmental Persons

Members of Congress are constitutional officers who "may conduct investigatory oversight on their own initiative."[115] However, to enforce investigative demands or compel compliance with otherwise voluntary requests, they generally must rely, with some exceptions discussed below, on the process for obtaining subpoenas through committees, which requires a majority vote or, in some cases, the willingness of a committee chair with unilateral subpoena power.

In the 1979 case of *Murphy v. Dep't of the Army*, the D.C. Circuit Court stated: "All Members have a constitutionally recognized status entitling them to share in general congressional powers and responsibilities, many of them requiring access to executive information."[116] In that case, the Court found that an agency did not waive the deliberative process exemption under FOIA when a private party sought access to a document the agency voluntarily provided to a member of Congress. However, the case did not address whether individual members themselves have a judicially enforceable right to access documents if an agency refuses to provide them.

Soon after this ruling, the Department of Justice, in 1984, issued guidelines in which it declared "unequivocally, as a matter of Department of Justice FOIA policy," that agencies should:

> Distinguish between requests made by a House of Congress as a whole (including through its committee structure), on one hand, and requests from individual Members of Congress on the other. Even when a FOIA request is made by a Member clearly acting in a completely official capacity, such a request does not properly trigger the special access rule of [5 U.S.C. § 552(d)] unless it is made by a committee or subcommittee chairman, or otherwise under the authority of a committee or subcommittee.[117]

The special-access rule referred to above requires agencies to submit information to Congress even if the terms of a FOIA exemption would otherwise apply and permit the agency to withhold that information.[118] The Justice Department policy statement narrows this special-access rule to apply only to official requests by a congressional committee or its chair, and not to require disclosure when an individual member of Congress is acting outside the committee process. All agencies since then have issued rules relegating individual member requests for information to

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

[115] Ben Wilhelm Et Al., Cong. Rsch. Serv., RL30240, Congressional Oversight Manual (updated Dec. 22, 2022), at 71.

[116] 613 F.2d 1151, 1157 (D.C. Cir. 1979) (also noting that each member "participates in the law-making process; each has a voice and a vote in that process; and each is entitled to request such information from the executive agencies as will enable him to carry out the responsibilities of a legislator").

[117] *See* 5 Office of Information Policy, U.S. Dep't of Justice, FOIA Update: OIP Guidance: Congressional Access Under FOIA 3-4 (1984), https://www.justice.gov/oip/blog/foia-update-oip-guidance-congressional-access-under-foia. The policy is reiterated by DOJ in Office of Information Policy, U.S. Dep't of Justice, Freedom of Information Act Guide 63 (2007).

[118] 5 U.S.C. § 552(d) ("This section is not authority to withhold information from Congress.").

the status of private citizen requests under FOIA. An agency denial of a member's request for information may be challenged in court, but this process could take years to resolve.

The Justice Department's 1984 guidelines made clear that the executive branch may provide information to individual members beyond the requirements of FOIA and should give careful consideration to such requests, with the possibility of discretionary disclosures.[119] In fact, the 1984 guidelines specifically stated that the special-access rule does not preclude agencies from exercising "discretion to make broad FOIA disclosures to individual Members of Congress under appropriate circumstances."[120]

In 2017, an Office of Legal Counsel (OLC) opinion purported to claim that individual members have no constitutional authority to seek information as part of their legislative duties.[121] Senator Chuck Grassley, then Chairman of the Senate Judiciary Committee, sent a letter to President Trump challenging the opinion and reasserting the congressional view that "*all* members" need access to information to fulfill their constitutional duties.[122] In response, President Trump's nominee to lead OLC confirmed that individual members are in fact authorized to seek information in their roles as constitutional officers.[123] He also wrote that the executive branch would strive to fulfill the legislative needs of members by providing information "that goes beyond the requirements of the FOIA statute."[124] The White House confirmed to Senator Grassley that the 2017 OLC opinion was not administration policy,[125] and OLC issued a new policy in 2019 referencing *Murphy*, acknowledging that individual members have legitimate interests in obtaining information from agencies, and committing to using their "best efforts" to provide information beyond the requirements of FOIA as a matter of comity.[126]

C. Members Have Had Limited Success in Persuading Courts to Recognize Individual Investigative Prerogatives

Individual members and groups of members have attempted to file lawsuits in order to obtain information that agencies have denied them. Those suits have generally been unsuccessful. Unless based on a statutory or other requirement, they have been dismissed as non-justiciable attempts to involve the courts in political disputes that members have lost with their colleagues. In addition, courts have found that members of Congress lack standing or a right to sue when the "injury" they have suffered is "institutional"—one based on their role as legislators, rather than a personal injury.

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[119] *Id.*

[120] *See* 5 Office of Information Policy, U.S. Dep't of Justice, FOIA Update: OIP Guidance: Congressional Access Under FOIA 3-4 (1984), https://www.justice.gov/oip/blog/foia-update-oip-guidance-congressional-access-under-foia. (citing *Accord Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979) (FOIA exemptions are discretionary, not mandatory)).

[121] Auth. of Individual Members of Cong.to Conduct Oversight of the Exec. Branch, 41 Op. O.L.C. 76 (2017).

[122] Letter from Chairman Charles E. Grassley, S. Comm. on the Judiciary, to President Donald J. Trump (June 7, 2017), at 1 (emphasis in original).

[123] Letter from Steven A. Engel to Charles E. Grassley, Chairman, S. Comm. on the Judiciary (June 23, 2017), 1-2.

[124] Letter from Steven A. Engel to Charles E. Grassley, Chairman, S. Comm. on the Judiciary (July 12, 2017), 1, 4.

[125] Letter from Marc Short, White House Director of Legis. Affs., to Chairman Charles E. Grassley, S. Comm. on the Judiciary (July 20, 2017), 2.

[126] *Requests by Individual Members of Congress for Executive Branch Information*, 43 Op. O.L.C. 42 (2019).

1. Attempts to Obtain Information Pursuant to Generally Applicable Law

Suits by individual members of Congress to seek judicial enforcement of requests for information generally have been unsuccessful absent statutory or other authorization. For example, like any member of the public, individual members may sue to obtain documents that agencies have improperly withheld under FOIA, but they have been unsuccessful in seeking judicial enforcement of demands for documents properly withheld under FOIA exemptions.[127]

In *Lee v. Kelley*[128] the court dismissed a motion filed by Sen. Jesse Helms to intervene in an ongoing suit to unseal FBI tapes and transcripts concerning Martin Luther King, Jr. The court concluded that Helms' action was an effort to enlist the court in his dispute with fellow legislators. The district court ruled that "[It] was not for this court to review the adequacy of the deliberative process of the Senate leadership …. [T]o conclude otherwise would represent an obvious intrusion by the judiciary into the legislative arena." The appeals court affirmed on the ground that Helms lacked standing to sue because he had not asserted any interest protected by the Constitution, and that his complaint was actually with his fellow senators.

And in *Leach v. Resolution Trust Corporation*,[129] the then-Ranking Minority Member of the House Banking (now Financial Services) Committee sought documents relating to the Madison Savings & Loan Association from two agencies that treated his request as made pursuant to FOIA. Defendants produced more than 8,000 pages, but withheld others as exempt from public disclosure under FOIA. The court invoked the doctrine of remedial discretion to decline to review Leach's claim that he was also entitled to documents pursuant to FOIA's special-access rule for Congress.[130] The court held that the case was one "in which a congressional plaintiff's dispute is primarily with his or her fellow legislators."[131]

That court also suggested that a "collegial remedy" for the minority already exists: 5 U.S.C. § 2954. Under this law, small groups of members of the House Government Reform (now Oversight and Government Reform) and Senate Governmental Affairs (now Homeland Security and Government Affairs) Committees can request information from executive agencies without formal committee action.[132] However, as discussed below, the scope of this provision is uncertain and a recent district court opinion casts doubt on its enforceability by a court.

2. Attempts to Obtain Information Pursuant to Section 2954

Sometimes referred to in the House as the "Seven Member Rule" and the Senate as the "Rule of Five," Section 2954, codified at 5 U.S.C. § 2954,[133] requires executive branch agencies to comply with document requests by certain small groups of members of Congress. The provision only covers requests from

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[127] *See* Environmental Protection Agency v. Mink, 410 US 73 (1973); Aspin v. Department of Defense, 491 F 2d 24 (D.C. Cir. 1973).

[128] 99 FRD 340 (D.D.C. 1983), *aff'd sub nom.* Southern Christian Leadership Conference v. Kelley, 747 F.2d 777 (D.C. Cir. 1977).

[129] 860 F. Supp. 868 (D.D.C. 1994).

[130] *Id.* at 870 (quoting 5 U.S.C. § 552(d)).

[131] *Id.* at 874.

[132] *Id.* at 876 n.7.

[133] Section 2954 provides: "An Executive agency, on request of the Committee on Government [Reform] of the House of Representatives, or any seven members thereof, or on request of the Committee on [Homeland Security and] Governmental Affairs 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."

members of the House Oversight and Government Reform Committee and the Senate Homeland Security and Government Affairs Committee, because the language is derived from 1920s legislation which originally referred to the current Committees' predecessors: the House and Senate Committees on Expenditures in the Executive Departments.[134] The limited purpose of this legislation was to enable individual members of Congress to seek information from agencies without need for an official congressional inquiry.[135] Based on the previous and current organization of these Committees, the number of members of the minority party is sufficient to make such a request without requiring the participation of the majority.

However, the provision lacks an explicit enforcement mechanism. If an agency refuses to comply, it may be unlikely (although not impossible) that a majority of members would support a motion by the minority for a subpoena. Over the past several decades, efforts to pursue a civil suit to compel production have had mixed results, as discussed below. Further, the provision applies only to the named Committees; thus, members of all other committees may not utilize the statute and would still face the problem cited in the *Leach* case: courts would likely view the dispute as a political one between members of Congress. Moreover, the House of Representatives recently amended its rules to require that, contrary to the statute, one of the seven requestors under this provision must be the Chairman of the Oversight Committee.[136] It is unclear whether a court would be bound to follow a unicameral House rule rather than a statute passed through bicameralism and presentment.

Finally, even members of the named Committees still would have to persuade a court that it has jurisdiction to hear the suit, and that Committee members have standing to sue within the narrow parameters set by the Supreme Court in *Raines*.[137] While some courts (notably the D.C. Circuit in *Murphy*) have concluded that Section 2954 vests an individual right to information, and thus standing to assert that right, the Supreme Court's grant of certiorari in *Murphy* suggests that that view would not be shared by the high court.

3. Waxman v. Evans

The first attempt to secure court enforcement of a document demand under Section 2954 was brought in a federal district court in 2001 by 16 members of the House Government Reform Committee seeking census data.[138] The congressional plaintiffs argued that the plain language of Section 2954 unambiguously directs agencies to comply with information requests. They also claimed that legislative history supported their position. In addition, the plaintiffs argued that they were entitled to judicial relief because the agency had refused to provide access to information that was specifically granted to them by law.

The district court ordered the release of the requested census data on the basis of the "plain language" argument. The government thereafter moved for reconsideration, raising for the first time the questions

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[134] 45 Stat. 996 (1928). *See also* H.R. Rep. No. 70-1757 (1928) (citing a study of the Bureau of Efficiency recommending the elimination of 128 specified required reports as unnecessary); and S. REP. No. 70-1320 (1928).

[135] S. Rep. No. 70-1320, *supra* note 10, at 4; H.R. Rep. No. 70-1757, *supra* note 10, at 6; *See also* 69 Cong. Rec. 9413-17, 10613-16 (House and Senate debates). In codifying Title 5 in 1966, Congress made it clear that it was effecting no substantive changes in existing laws: "The legislative purpose in enacting Sections 1-6 of this act is to restate, without substantive change, the laws replaced by those sections on the effective date of this act." PUB. L. No. 89-554, § 7(a).

[136] H.R. Res. 5, §3(i) (Jan. 9, 2023).

[137] In *Raines v Byrd*, 523 U.S. 811, 829 (1997), a suit challenging the Line Item Veto Act, the Supreme Court held that members of Congress lack standing where they fail to allege any "injury to themselves as individuals" and "the institutional injury they allege is wholly abstract and widely dispersed."

[138] Complaint, Waxman, et al. v. Evans, Civ. Action No. 01-14530-LGB (A)(AJWx) (C.D. Cal., May 21, 2001).

whether plaintiffs, as individual legislators, lacked standing to sue because they were claiming "institutional injuries," and whether the plaintiffs had a right of action under Section 2954. The court declined to reconsider its opinion and address these new arguments.[139] The decision was later vacated on other grounds on appeal to the Ninth Circuit.[140]

4. Waxman v. Thompson

A second attempt to enforce a Section 2954 document demand in the same district court was decisively rejected. *Waxman v. Thompson*[141] was a suit by 19 members of the House Government Reform Committee to compel release of a Department of Health and Human Services document. In addition to asserting a right of access under Section 2954, the congressional plaintiffs alleged a violation of 5 U.S.C. § 7211, which provides that "[t]he right of employees … to furnish information to either House of Congress, or to a committee or member thereof, may not be interfered with or denied." The executive branch opposed the claims, raising the issues of standing, jurisdiction of the court to enforce the statutes, and the doctrine of "equitable discretion."[142]

On July 24, 2006, the district court, applying the guiding principles established by the Supreme Court in *Raines v. Byrd*, ruled that the congressional plaintiffs did not have standing to sue. Accepting that it was bound by that Supreme Court precedent, the district court concluded that when the secretary refused to produce the documents requested pursuant to Section 2954, plaintiffs did not suffer a personal injury. Rather, Congress, on whose behalf the plaintiffs acted, suffered an institutional injury; namely, that its ability to assess the merits of the bill in question was impeded or impaired.[143]

Quoting the Supreme Court, the district court noted that the plaintiffs were "not … singled out for specially unfavorable treatment as opposed to other Members of their respective bodies." As such, they could not "claim that they have been deprived of something to which they *personally* are entitled," since the alleged injury "runs (in a sense) with the Member's seat, a seat which the Member holds (it might be quite arguably be said) as trustee for his constituents, not as a prerogative of personal power." A violation of Section 2954, the Court concluded, raises no personal or particularized injury to the plaintiffs, but at most, creates a type of institutional injury, which necessarily damages all members of Congress and both houses of Congress equally.[144]

The Court also noted that no jurisdictional committee had issued either an official request for the documents or a subpoena, nor did the legislative history of the provision imply intent to delegate authority

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[139] Waxman, et al. v. Evans, No. CV014530LGB(AJWX), 2002 WL 32377615 (C.D. Cal. Jan. 18, 2002).

[140] Waxman v. Evans, 52 F. App'x 84 (9th Cir. 2002). On appeal to the Ninth Circuit, the case was argued together with a separate Freedom of Information Act suit for the same census data brought by two Washington State legislators. Carter v. U.S. Dep't of Com., 307 F.3d 1084 (9th Cir. 2002). After oral argument, the appeals court withdrew the submission of *Waxman v. Evans*, deferring the case pending its decision in the FOIA suit. The appeals court ruled in favor of the legislative plaintiffs in the FOIA case on October 8, 2002, and declared the action in *Waxman* was mooted by its FOIA decision. 52 App'x at *1. The appeals court issued an order reversing and vacating the district court's ruling, and sent the case back to the district court with instructions to dismiss. *Waxman v. Evans*, No. 02-55825 (9th Cir. 2002). On motion of the plaintiffs, the court of appeals modified this order on January 9, 2003, striking its reversal of the district court's ruling, but leaving in effect its order to dismiss, thereby opening the door to another round of litigation.

[141] Complaint, Waxman v. Thompson, No. CV-04-3467MMM(Manx) (C.D. Cal., May 17, 2004).

[142] Waxman v. Thompson, No. CV043467MMMMANX, 2006 WL 8432224, at *3 (C.D. Cal. July 24, 2006).

[143] *Id*. at *16.

[144] *Id*. at *12, *16.

to the requisite number of members of the covered committees to seek to enforce its provisions judicially.[145] The House plaintiffs did not appeal the district court's ruling.

5. Maloney v. Carnahan

In 2018, 17 minority members of the House Oversight and Government Reform Committee sued to enforce Section 2954 against the General Services Administration in an effort to obtain documents relating to the government's lease agreement with the Trump Organization for the Old Post Office building in Washington D.C. Applying *Raines*, the district court dismissed the case for lack of standing.[146]

The D.C. Circuit reversed, ruling in favor of the members of Congress on the grounds that they had been harmed individually. According to the court, the statute specifically entitled them to information, the informational injury ran to them as individual legislators, and the denial of information "befell them and only them" rather than an injury running to the institution of Congress as a whole."[147]

The Supreme Court granted certiorari, but the members of Congress withdrew their suit after a change in presidential administrations resulted in the production of the majority of records that had been withheld. This led the Supreme Court to vacate the D.C. Circuit decision without issuing an opinion and remand the case with instructions for the district court to dismiss.[148] Though vacated as moot, this opinion remains the only appellate decision on the merits of this issue.

D. Attempts to Obtain Information Pursuant to GAO's Statutory Authority

Individual members can request that the Government Accountability Office (GAO) examine a wide range of agency actions. Under the law establishing GAO, agencies must provide information necessary for its investigations.[149] In 1980, Congress created a statutory process to resolve impasses between GAO and federal agencies.[150] This law authorized GAO to "bring a civil action in the district court of the United States for the District of Columbia."[151]

Despite this explicit authority, in 2002 a district court found in *Walker v. Cheney*[152] that GAO lacked standing to bring a case under the statute. The court noted that the House had not passed a subsequent resolution authorizing GAO's suit and that the members had an "alternate remedy" of seeking a subpoena instead of GAO using its statutory remedy. GAO decided not to appeal the decision.

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[145] *Id.* at *11. The ruling in *Miers,* 558 F. Supp. at 68, appears to make it clear that, while a refusal by an agency to comply with a subpoena issued by a jurisdictional committee for information provides a cognizable institutional injury that raises an implied, constitutionally based cause of action, it may only be exercised by means of a civil action that is authorized by a full house of the Congress. Section 2954 requests lack that constitutional component.

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

[147] Maloney v. Murphy, 984 F.3d 50 (D.C. Cir. 2020) (Tatel, J. and Millet, J., with Ginsburg, J. dissenting).

[148] Carnahan v. Maloney et al., 143 S.Ct. 2653 (2023) (vacating D.C. Circuit Court ruling).

[149] 31 U.S.C. § 716(a)(2).

[150] Pub. L. No. 96-226, General Accounting Office Act of 1980, §102 (Apr. 3, 1980).

[151] 31 U.S.C. § 716(a)(1).

[152] 230 F. Supp.2d 51 (D.D.C. 2002).

In response to *Walker*, Congress passed the GAO Access and Oversight Act of 2017, granting GAO standing to bring suit without additional subsequent action by Congress or a committee.[153]

E. House Resolutions of Inquiry

Under the rules and precedents of the House, a "resolution of inquiry" allows the House to request information from the President or direct the head of a department to provide such information. According to the leading procedural guidebook:

> [It is a] simple resolution making a direct request or demand of the President or the head of an executive department to furnish the House of Representatives with specific factual information in the possession of the executive branch. The practice is nearly as old as the republic, and is based on principles of comity between the executive and legislative branches rather than on any specific provision of the Constitution that a federal court may be called on to enforce.[154]

Such resolutions, therefore, are not enforceable through the compulsory processes available to the House. However, they have been useful at times in eliciting the information or providing a springboard for more formal House actions.[155]

A resolution of inquiry is thus a type of expedited procedure for seeking information. Requesting members of Congress do not need to seek a "rule" or permission from the Rules Committee before proceeding to the floor for House consideration, and therefore, the process is not subject to the delays usually facing most legislative actions. A resolution of inquiry may be introduced by one or more members of the House. Once introduced it is considered "privileged." Clause 7 of House Rule XIII provides that if the committee to which it is referred does not act on the resolution within 14 legislative days, the resolution may then be considered on the House floor despite the lack of committee action. If the committee does seek to act within the 14-day period, it may vote on the resolution of inquiry without amendment; report it with amendments; or report it favorably, adversely or without recommendation.

The committee could, in the alternative, ask the executive to comment upon the information request during the 14-day period. The executive's response during this period could provide enough information to satisfy the purpose of the resolution of inquiry, or the response could convince the committee not to proceed based upon the sensitivity of the information sought or because of competing executive investigations. Thus, an adverse report by a committee may not actually indicate opposition.

On several occasions, resolutions of inquiry have successfully revealed important information or have spurred more formal committee inquiries. Such instances have included revelations of military operations in Vietnam, information about the 1995 Mexico rescue package, and Iraq's 2002 declaration to the United

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[153] Pub. L. No 115-3 (Jan. 31, 2017) ("In reviewing a civil action under this section, the court shall recognize the continuing force and effect of the authorization in the preceding sentence until such time as the authorization is repealed pursuant to law."). *See also* 163 Cong. Rec. S333 (Jan. 17, 2017) (Senator Ben Sasse explaining that the bill "clarifies that GAO does have standing in court to fight for Federal records the next time a Federal agency tries to deny the GAO—and therefore us—access to that data").

[154] 7 Deschler's Precedents of the House of Representatives Ch. 24 § 8. *See also* 49 WM. Holmes Grown & Charles W. Johnson, House Practice: A Guide to the Rules, Precedents, and Procedures of the House 817-22 (2003).

[155] For a thorough examination of the history, practice and procedures of such resolutions, and an evaluation of their practical utility, *see* Christopher M. Davis, Cong. Research Serv., Rl 31909, House Resolutions of Inquiry (2009); Christopher M. Davis, Cong. Research Serv., R40879, Resolutions of Inquiry: An Analysis of Their Use in the House, 1947-2017 (2017).

Nations on its weapons of mass destruction.[156] Not all such attempts have been successful, however. For example, attempts during the 109th Congress to use resolutions of inquiry to seek information from the President, the Attorney General, and the Secretary of Defense regarding the terrorist surveillance program resulted in apparently partisan votes to reject the resolutions.[157] Despite the absence of enforcement mechanisms, members may turn to resolutions of inquiry for a variety of reasons. They may not be well-positioned within a jurisdictional committee to seek information through normal investigatory processes; or, they may find that such resolutions provide a useful way to draw public attention to an issue and instigate formal investigations.

House resolutions of inquiry have historically been a relatively effective means of obtaining factual material from the executive branch. In the past, even when committees report the resolutions adversely or succeed in tabling them on the House floor, a substantial amount of information has usually been released to Congress. In fact, an argument that the executive has complied substantially with a resolution is frequently the reason for reporting a resolution adversely and tabling it. On occasion, a resolution of inquiry is reported adversely because it competes with other investigations (either in Congress or in the executive branch) that are considered the more appropriate avenue for inquiry. In some situations, resolutions of inquiry have been instrumental in triggering other congressional methods of obtaining information, such as through supplemental hearings or alternative legislation.

Resolutions of inquiry have been used increasingly as tools of the minority when the majority declines to seek information from the executive branch. For example, in March 2025, the House Ways and Means Committee held a markup to defeat two resolutions of inquiry seeking information about Department of Government Efficiency access to IT systems at the Department of the Treasury and the Social Security Administration.[158] In other cases, the majority may prefer not to have its members cast votes against resolutions of inquiry. For example, in April 2025, the House Armed Services Committee declined to vote on resolutions of inquiry seeking information about the Secretary of Defense's use of Signal to discuss classified military strikes.[159] Majorities of both parties have restricted the use of resolutions of inquiry, including the Democratic majority in 2021 and the Republican majority in 2025.[160] The Senate has never established comparable formal procedures for the consideration and passage of resolutions of inquiry.

F. Rights of Individual Members of the Senate

The Rules of the Senate, particularly the ability to delay action through extended debate, provide individual senators, including minority-party members, far more leverage to influence oversight objectives than afforded to their House counterparts. Senate rules emphasize the rights and prerogatives

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[156] *See id.* at 15-18, 20-21; *see also* Louis Fisher, the Politics of Executive Privilege, 150-59 (2004) (recounting successful utilization of such resolutions).

[157] *See, e.g.*, H.R. Rep. No. 109-382 (2006) (adversely reporting H. Res. 643, directed at the attorney general for documents concerning warrantless surveillance by the National Security Agency); H.R. Rep. No. 109-384 (2006) (adversely reporting H. Res. 645 directed at the president and secretary of defense for information about the terrorist surveillance program). Neither resolution reached the floor.

[158] Matt Bracken, *GOP Lawmakers Brush Back Inquiries on DOGE Access to Treasury, SSA Systems*, FedScoop (March 12, 2025).

[159] Jordain Carney & Meredith Lee Hill, *House GOP Leaders Move to Forestall Potential Signalgate*, Politico (April 28, 2025).

[160] Melanie Zanona & Manu Raju, *Democrats Quietly Limit House GOP Effort to Press for Probes into Biden Administration*, CNN (September 23, 2021); Michael Gold, *Republicans Freeze House Efforts to Compel Information From Trump*, N.Y. Times (April 29, 2025).

of individual senators and, therefore, minority groups of senators.[161] The most important of these rules are those that effectively allow unlimited debate on a bill or amendment unless an extraordinary majority votes to invoke "cloture."[162] Unless or until there are 60 votes in favor of ending debate through cloture, senators can use their right to filibuster, or simply the threat of filibuster, to delay or prevent the Senate from engaging in certain legislative business.

The Senate's rules also are a source of other minority rights that can directly or indirectly aid the minority in gaining investigatory rights.[163] For example, the right of extended debate applies in committee as well as on the floor, with one crucial difference: the Senate's cloture rule may not be invoked in committee. Each Senate committee decides for itself how it will control debate, and therefore, a filibuster opportunity in a committee may be even greater than on the floor. In addition, the Senate Environment and Public Works Committee has adopted a quorum rule that requires the presence of at least two minority party members for a vote on the issuance of a subpoena.[164]

Even beyond the 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. These include the processes dealing with floor recognition, committee referrals, and the amending process.[165]

G. Back Bench Oversight: The Waxman Model

Although minority members of Congress may support majority actions they agree with or oppose majority actions based on principled disagreement, there is frequently a trend among minority party committee members to reflexively oppose their majority party counterparts' actions, with the object of maintaining the status quo until political fortunes put them back in control. Lacking formal investigative and compulsory information gathering power, minority members often rely on limited procedural tools such as speeches, press releases, and dissents in final reports. Former Representative Henry A. Waxman demonstrated throughout his time in Congress that a more strategic approach can be far more effective.

For Waxman, public engagement was key to successful oversight. Achieving a legislative or public policy objective required building a public record that would eventually create sufficient momentum for change, both in Congress and among the American people.[166] And while "hard" formal investigative powers—

[161] Judy Schneider, Cong. Research Serv., RL30850, Minority Rights and Senate Procedures 8-11 (2005).

[162] S. Rules XIX and XXII.

[163] For a recent survey of minority investigative rights, see David Rapallo, Mapping Minority Investigative Powers in Congress, 63 Harv. J. on Legis. __ (2026) (forthcoming).

[164] Senate Committee on Environment and Public Works Committee Rule 2(a) (requiring a quorum of seven members, with at least two minority members, to vote for the issuance of subpoenas).

[165] Schneider, *supra* note 22, at 8-11.

[166] Michael L. Stern, *Henry Waxman and the Tobacco Industry: A Case Study in Congressional Oversight*, at Part II; *see also* Henry A. Waxman & Joshua Green, *The Waxman Report: How Congress Really Works* (2009); and Minority Staff of H.R. Comm. on Energy and Commerce, 113th Cong., *Rep. Henry A. Waxman's Record of Accomplishment* (2014) [hereinafter Record of Accomplishments].

such as subpoenas, depositions, hearings, and contempt proceedings[167]—are effective tools toward that end, Waxman understood that they are not the only tools.

During his 14 years as the Ranking Minority Member of the House Oversight and Government Reform Committee, Waxman employed a variety of non-official, non-compulsory approaches to access and disseminate information in service of his oversight objectives. Using the limited funding allocation for the Committee's minority operations[168] and the energy of an experienced, dedicated and long-serving holdover staff, he sent thousands of information requests—to the White House, to agency officials and to targeted private sector parties. Waxman released these letters to the media, which often drew wide attention to a particular issue. Some received official responses, others did not[169] But Waxman also made clear that he welcomed information from whistleblowers and other cooperative sources, and would protect their confidentiality. A toll-free tip line was established, which was well-used.

In addition, Waxman formed a Special Investigations Division (SID) that interviewed whistleblowers, studied obscure government databases, and sometimes did undercover work. In 12 years, SID produced more than 1000 reports on a wide range of issues that laid the groundwork for landmark legislation and revelations of fraud, abuse of power and maladministration. SID began with reports on the high cost of drugs in comparison to prices in Canada, which ultimately led to legislation to create a Medicare prescription drug benefit. A host of inquiries followed—on classroom overcrowding; nursing home abuses; the involuntary incarceration of mentally ill youths; online file-sharing programs that bombarded children with pornography; government secrecy; pre-Iraq war claims about weapons of mass destruction; politicization of science; waste, fraud and abuse in private no-bid and limited competition private procurement contracts worth over $1 trillion; vast overcharges for goods and services for Iraq by Halliburton Corporation; and steroid use in professional sports, among others.[170] Finally, Waxman's actions after the disclosures of his 1994 tobacco hearing are notable. As indicated in Michael Stern's case study of the tobacco industry inquiry,[171] the revelation of internal industry documents conceding the long-known ill effects of nicotine shifted momentum against the tobacco companies. State Attorney General and private plaintiff lawsuits against the industry quickly proliferated, to the point that the industry offered a settlement deal that would have insulated the companies from further legal liability.

Waxman, who by then was the Ranking Minority Member as a result of the 1994 midterm elections, determined to scuttle the settlement. Because he could not force an official hearing to demonstrate the inadequacy of the settlement terms, he and other congressional colleagues created a "shadow committee" called the Advisory Committee on Tobacco Policy and Public Health. It was co-chaired by former Food and Drug Commissioner David Kessler and former Surgeon General C. Everett Koop, both respected former public officials and anti-smoking advocates. The panel was asked to hold hearings to study the proposed agreement and recommend public policy through a series of public hearings. The panel found the proposed agreement "unacceptable" and detailed a stronger plan to curb smoking. The committee's

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[167] *See* Josh Chafetz, *Congress's Constitution*, 160 U. Pa. L. Rev. 715, 722 (2012) (distinguishing between the nature and utility of committee actions in different oversight situations of "hard" compulsory powers to access information and the availability of "soft" powers through the engagement of the media and the general public with a continuing narrative of relevant information produced by a particular inquiry).

[168] The minority is allocated one-third of the committee's budget.

[169] Waxman & Green, *supra* note 26, at 152-53.

[170] *Id.*, at 157-59, 201-16; Record of Accomplishments, *supra* note 26, at 20-21, 24-27.

[171] Stern, *supra* note 26.

conclusion caused the White House to distance itself from the original settlement and the Senate to consider strong ameliorative legislation.

Momentum continued to shift against the industry. Incremental legislation passed over the next few years, but it was not until the 2009 Family Smoking and Tobacco Smoking Control Act—passed under Waxman's aegis—that the FDA was finally given the authority to regulate tobacco products and to ensure that tobacco is not advertised or sold to children.[172]

The efficacy of the persistent Waxman back bench model was demonstrated during the 114th Congress by the institution of bipartisan investigations in both houses as a result of minority prodding. In one instance in 2014, it began with letters from Rep. Elijah Cummings and Sen. Bernie Sanders to 17 drug companies respecting allegations of excessive generic drug pricing that were made public and was followed by proposed legislation in 2015. Further, House Democrats formed the Affordable Care Drug Pricing Task Force in 2015 in an effort to spotlight the issue and gain the attention of the chairs of oversight jurisdictional committees such as the Senate Special Committee on Aging and the House Committee on Oversight and Government Reform. The efforts were successful as both committees subjected the issue to careful examination in a series of public hearings.[173]

There are a number of lessons to be learned from Waxman's efforts. Successful oversight can take time and requires perseverance. It is vital to have a chair willing to devote the time and effort to the task and to be supported by long-term, experienced, and dedicated staff. The blunderbuss of formal compulsory processes may not be necessary, but the communication with and support of the media, public interest organizations and, ultimately, the general public, is essential.

During Rep. Waxman's tenure in the minority, it was not clear whether the Inspector General Act of 1978 afforded individual members the right to request IG investigations or evaluations of agencies, to receive information about information gathered, or to see the IG's recommendations to the agencies for remedial action. The Inspector General Empowerment Act of 2016, discussed in the following chapter, appears to have clarified these questions in a manner that may provide another effective back benching tool.

For illustrations of some of the oversight powers, tools, principles, and obstacles discussed in this chapter, see the following case study in the online version of the handbook:

Michael L. Stern: Henry Waxman and the Tobacco Industry: A Case Study in Congressional Oversight

[172] Waxman & Green, *supra* note 26, 171-200.

[173] This and other examples of successful minority oversight initiatives in the 114thCongress are related in Margaret Krawiec and Thomas Panham, *Why Minority-Initiated Investigations Can Be As Dangerous As Majority-Initiated Investigations*, Bloomberg BNS's Daily Report (Dec. 9, 2016).

9. The Offices of Inspectors General: Congress's Indispensable Eyes and Ears Inside the Departments and Agencies of Government

Overview

The Inspector General Act of 1978 (IG Act)[1] created the initial scheme of 12 Offices of Inspectors General (OIGs) within federal agencies and entities.[2] The IG Act represented a significant reorganization of the way federal agencies handled audit and investigative work, so as to ensure that these responsibilities were prioritized. It was passed in response to evidence of "clear … fraud, abuse and waste in the operation of federal departments and agencies and in federally-funded programs [that had] reach[ed] epidemic proportions."[3] The purpose of the IG Act was to create independent, objective IGs whose responsibility is to prevent and detect waste, fraud and abuse, and to promote economy, efficiency and effectiveness in each agency's operations. From the outset, the IG scheme has reflected Congress's understanding of oversight committees' limited ability to effectively monitor and assess agency programs and enforcement responsibilities in a timely, on the spot manner. To shore up this weak spot, Congress imposed a dual reporting requirement on IGs to keep both agency heads and Congress (including committees and individual members) "fully and currently informed" about problems and deficiencies relating to agency programs and operations.

Since 1978, Congress has evidenced a continuing, bipartisan interest in maintaining the effectiveness of IG offices as vital adjuncts to the performance of its constitutional responsibility to oversee execution of its legislative actions and directions. As government has grown, the IG Act has been amended numerous times to establish an IG presence in virtually every important federal entity, and to provide IGs with the appropriate authorities to deal with their oversight duties and challenges. At present, there are 73 federal IGs.[4] About half are appointed by the President subject to Senate confirmation (Establishment IGs) and half (called Designated Federal Entities or DFE IGs) are appointed by the head of an agency, which can be an individual, a board, or a commission.

In light of the considerable expansion in the number of IG offices, Congress determined there was need for an independent coordinating and policing entity for OIGs. Accordingly, in 2008, it passed legislation establishing the Council of the Inspectors General on Integrity and Efficiency (CIGIE).[5] CIGIE's mission is to address integrity, economy, and effectiveness issues that transcend individual government entities. Thus, CIGIE coordinates cross-cutting projects among IGs on issues that span multiple agencies. CIGIE

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[1] Pub. L. No. 95-452, 92 Stat. 1101 (1978), as amended, *codified at* 5 U.S.C. App. §§ 1-13 (IG Act).

[2] For valuable and informative resources on the history and operation of the OIG scheme, *see* Wendy Ginsberg and Michael Green, Cong. Rsch. Serv., R43814, Federal Inspectors General: History, Characteristics, and Recent Congressional Actions (June 2, 2016) [hereinafter *CRS OIG Report*]; Wendy Ginsberg, Cong. Rsch. Serv., R43722, Offices of Inspectors General and Law Enforcement Authority (2014) [Hereinafter *CRS on OIG Law Enforcement Authority*]; Council of the Inspectors General on Integrity and Efficiency, Presidential Transition Handbook: The Role of Inspectors General and the Transition to a New Administration (2016) [hereinafter *CIGIE on Role of IGs*].

[3] Report of the S. Comm. on Governmental Aff., No., to Accompany H.R. 8588, S. Rept. No. 85-1071, at 4 (1978).

[4] The Inspector General Act Amendments of 1988, Pub. L. 100-504, 102 Stat. 2515, created the first set of DFE IGs, which have usually been at smaller federal entities. The 1988 Act also added to the reporting obligations of all IGs and agency heads, among other things.

[5] Pub. L. No. 110-409, 122 Stat. 4302 (Oct. 14, 2008).

also seeks to increase the professionalism and effectiveness of OIG personnel by developing policies, standards and common approaches among OIGs. In this regard, CIGIE has established a Training Institute—which includes an Audit, Inspection & Evaluation Academy, an Inspector General Criminal Investigator Academy, and a Leadership and Mission Support Academy—which trains employees from throughout the OIG community. To promote accountability in the IG community, Congress mandated the establishment of the CIGIE Integrity Committee, which is responsible for investigating allegations against IGs, their senior staff, and OIG employees acting with knowledge of the IG or whose alleged misconduct is related to an allegation against an IG.[6] CIGIE also oversees periodic peer reviews of the OIGs' investigations and audits by another IG to ensure that these activities are conducted in accordance with professional standards. It also must report to Congress OIG allegations of wrongdoing or recommendations for corrective action and what was done about them. Finally, CIGIE coordinates and communicates OIG positions on potential congressional legislation affecting the IG community.[7]

This chapter will briefly describe the purposes Congress intended OIGs to accomplish; the appointment and tenure of IGs; the authorities provided IGs to fulfill the congressional design; the nature and scope of the independence accorded IGs; the requirements imposed on IGs to report to agency heads, the Attorney General, CIGIE, Congress and the public; the practical value attributed to OIG efforts; and the challenges presented by executive branch efforts to delay or obstruct the performance of the IGs' statutory mission and Congress's definitive responses. The legislature's passage of the landmark Inspector General Empowerment Act of 2016 (Empowerment Act),[8] addressing the most recent executive challenges, is discussed in detail.

A. The OIG Mission and Purposes

The mission of OIGs is to promote economy, efficiency and effectiveness in the programs and operations of the federal departments, agencies and entities with which they are affiliated. OIGs accomplish this mission by conducting independent and objective audits, inspections, investigations and evaluations. The findings from the work of the OIGs are intended to help the affiliated entities improve operations and programs; to prevent and detect fraud, waste, abuse and mismanagement; and to inform Congress about those findings to enable it to determine whether any legislative remedial action is necessary. In most cases, OIGs produce reports, often made available to the public, that provide the findings and recommendations to their affiliated entities. Commonly, these recommendations find ways to increase federal efficiency or examine allegations of misconduct.

Generally, an audit, inspection or evaluation is conducted to examine organizational program performance and operations or financial management matters, typically of a systemic nature. In contrast, an investigation is conducted to address and resolve specific allegations, complaints or information concerning possible violations of law, regulation or policy. Investigations may involve a variety of matters, including allegations of fraud with respect to grants and contracts, improprieties in the administration of programs and operations, and serious allegations of employee misconduct. Together with the U.S. Office of Special Counsel (OSC), OIGs investigate alleged reprisals against whistleblowers. OIG sources for the initiation of investigations include referrals from OIG hotlines; referrals from the affiliated entity, the Government Accountability Office, and the Department of Justice; congressional committee and member requests; and proactive oversight by the OIG.

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[6] *Id.*

[7] The 2008 Reform Act also amended reporting obligations, and salary, bonus and award provisions; amended removal requirements; and added budget protections, including requiring that Congress be provided with IGs' unaltered original budget requests.

[8] Pub. L. No. 114-317, 130 Stat. 1595 (December 16, 2016).

B. Appointment and Tenure of IGs

Establishment IGs include the 15 cabinet departments and larger federal agencies. Each such IG is appointed by the President with the advice and consent of the Senate and can be removed only by the President. Designated Federal Entity IGs, which include the usually smaller boards, commissions, foundations and government entities, are appointed and removable by the heads of the entities. Neither category of IG has a term of office,[9] and, unlike other political or high level appointees, IGs typically remain in office when presidential administrations change.[10],[11] But the IG Act contains congressional notification procedures regarding the removal of IGs. Under the original IG Act, if the President intends to remove or transfer an Establishment IG, or an agency head intends to remove a DFE IG, they must communicate the reasons for the action in writing to both houses of Congress at least 30 days before the removal or transfer.[12] This provision has been invoked three times: once by President Obama,[13] and twice in President Trump's first term.[14]

In President Trump's first term, he removed a number of IGs,[15] prompting controversy and the passage of a new amendment to the IG Act, the Securing Inspector General Independence Act of 2022.[16] Under this new law, the President must notify Congress 30 days prior to removal of an IG not just with "reasons," as before, but with the "substantive rationale, including detailed and case-specific reasons" for removal.[17] The law also attempted to prevent President Trump's approach of placing IGs on administrative leave, allowing him to nominate acting temporary replacements, thus circumventing the 30-day notice requirement. The law requires the President to provide 15-day notice to Congress before changing an IG to "non-duty status" that includes the substantive rationale for the change. The law also prohibits an IG from being placed on non-duty status during the 30 days prior to their removal unless the President

[9] There are two exceptions. The U.S. Postal Service IG has a seven-year term, and the U.S. Capitol Police IG has a five-year term and may be reappointed for not more than two additional terms.

[10] The first presidential administration changeover after the passage of the IG Act occurred in 1980 with the election of President Reagan. On taking office in 1981, he asked for the resignation of all presidential appointees, including the incumbent IGs who were then dismissed. This caused a congressional firestorm of protest that the Act was an attempt to politicize offices intended to be independent and nonpartisan. In response, President Reagan partially backed off by reappointing several of the dismissed IGs. *See* Robert Pear, *Ouster Of all Inspectors General By Reagan Called Political Move*, N.Y. Times (February 3, 1981); Francis X. Clines, *Reagan Reappoints Five to be Inspectors General*, N.Y. Times (March 27, 1981); *CIGIE on Role of IGs*, *supra* note 2, at 16. Since that time, every president has exempted OIGs as a group from the requirement that political appointees resign on the change of administration.

[11] Although President Trump did not require the blanket resignation of IGs, he did fire more than a dozen IGs during the first week of his second term on account of "changing priorities." These IGs brought suit alleging that their removal violated the IA Act because President Trump failed to give proper notice to Congress. Storch v. Hegseth, 2025 WL 2758238 (D.D.C. Sept. 24, 2025).

[12] IG Act, § 3(b).

[13] *Obama Fires AmeriCorps' Inspector General*, NBC (June 12, 2009), https://www.nbcnews.com/id/wbna31325894.

[14] Bob Bauer, *Inspector General Reform in the NDAA*, Lawfare (Dec. 23, 2022), https://www.lawfaremedia.org/article/inspector-general-reform-ndaa.

[15] *Id.*

[16] The Securing Inspector General Independence Act of 2022, Pub. L. No. 117-263, 136 Stat. 395. This act does not appear fully integrated into the current U.S. Code because Pub. L. No. 117-286 moved the location of this code from 5 U.S.C. App. and Congress subsequently amended the language of 5 U.S.C. § 403 without regard for the amendments made by Pub. L. No. 2395, Pub. L. No. 117-263. The Office of the Law Revision Counsel of the U.S. House of Representatives has prepared a draft bill (and accompanying explanation) to address this issue.

[17] 5 U.S.C. § 403(b).

determines and explains to Congress that the IG poses a workplace threat. President Biden dismissed one IG using this new process.[18]

In 2025, the constitutionality of the process proscribed by the IG Act was challenged after President Trump fired 17 agency Inspectors General just days after taking office, and without notifying Congress as required by law. Bipartisan concerns were raised about President Trump's actions to remove the IGs. For example, Senators Chuck Grassley and Dick Durbin, the Chair and Ranking Member of the Senate Judiciary Committee, sent a letter to President Trump on January 18, 2025, that stated:

> While IGs aren't immune from committing acts requiring their removal, and they can be removed by the president, the law must be followed. The communication to Congress must contain more than just broad and vague statements, rather it must include sufficient facts and details to assure Congress and the public that the termination is due to real concerns about the Inspector General's ability to carry out their mission.
>
> This is a matter of public and congressional accountability and ensuring the public's confidence in the Inspector General community, a sentiment shared more broadly by other members of Congress. IGs are critical to rooting out waste, fraud, abuse, and misconduct within the Executive Branch bureaucracy, which you have publicly made clear you are also intent on doing.[19]

Several IGs sued, and the judge who considered the case recognized in her opinion that "President Trump violated the IGA. That much is obvious," but added that the "president does have the power to remove an IG."[20] The IGs were not reinstated to their positions. The judge found that the plaintiff IGs failed to establish "an irreparable injury that cannot be compensated with remedies available at law." The court did not decide whether to grant additional remedies such as back pay and stayed the case pending the Supreme Court's decision in another case.[21]

C. OIG Authorities

To fulfill their mission, IGs are granted broad authorities. Among other powers, IGs are generally authorized to:

- Obtain access to all information and documents within their agency in relation to any program or operations over which the IG has responsibility, including grand jury information, unless otherwise explicitly prohibited by law;
- Share such information with congressional committees and individual members of Congress;
- Request information or assistance from any federal, state, or local agency;
- Subpoena records and documents from any non-federal entity or individual;

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[18] Alex Gangitano, *Biden Fires Longtime Railroad Official After Probe Into Toxic Work Environment*, The Hill (Mar. 29, 2024), https://thehill.com/homenews/administration/4563662-biden-fires-railroad-official-probe-toxic-work-environment.

[19] Letter from Charles E Grassley, Chairman, and Richard J. Durbin, Ranking Member, S. Comm. on the Judiciary, to President Donald J. Trump (Jan. 28, 2025), https://www.judiciary.senate.gov/press/rep/releases/grassley-durbin-seek-presidential-explanation-for-ig-dismissals.

[20] *Storch v. Hegseth*, Civil Action No. 25-cv-415 (ACR), Memorandum Opinion at 3.

[21] *Id.*at 19 – 20.

- Exercise law enforcement powers if it is deemed necessary. These powers include the ability to carry firearms while engaging in official duties; to make arrests without a warrant; and to seek and execute warrants for arrests, searches of premises and seizures of evidence;

- Take statements under oath;

- Have direct and prompt access to the agency head for any purpose pertaining to the IG's responsibilities;

- Select, appoint, and employ officers and employees as necessary to carry out the functions, powers and duties of the IG;

- Receive and respond to complaints from agency employees, whose identity is to be protected; and

- Implement the cash inventive award program in their agency for employee disclosures of waste, fraud and abuse.[22]

Despite these broad powers, IGs are not authorized to take corrective actions themselves or compel agency management to implement recommendations. The IG Act prohibits the transfer of "program operating responsibilities" to an IG. But the agency is required to respond to each IG recommendation and state whether it agrees or disagrees with the recommendation. The status of IG recommendations must be included in each IG's semi-annual report to Congress and also to CIGIE.

IGs are also generally not authorized to subpoena department or agency employees or private sector individuals for testimony, with the exception of the IGs at the Departments of Defense and Veterans Affairs, and the Pandemic Response Accountability Committee (PRAC).[23] The IGs have asked Congress in recent years to provide similar authority across the IG community. While Congress has not passed such legislation, it has considered proposals to do so and may do so again in the future.

D. The Elements of OIG Independence

The independent status of IGs is evidenced and reinforced in a variety of ways:

- Each OIG is to be considered a separate agency and the IG who is the head of the office has the functions, powers, and duties of an agency head.

- An IG has sole discretion in initiating, carrying out, or completing any audit or investigation, or issuing subpoenas, which may not be interfered with by an agency head except in very limited circumstances.[24]

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[22] IG Act, §§ 6(a), 6(c), 6(e), 6(f), 6(h) and 7; 5 U.S.C. § 4512.

[23] The Inspector General at the Department of Defense was granted testimonial subpoena authority in the IG Empowerment Act of 2016, Pub. L. No. 117-286, 136 Stat. 4224 (codified in 5 U.S.C. § 408(i)(1)). In June 7, 2022, President Biden signed the Strengthening Oversight for Veterans Act of 2021 (P.L. 117- 136). This law authorized the Department of Veterans Affairs Office of Inspector General to issue subpoenas for testimony to support the office's oversight activities.

[24] Under the IG Act, the heads of seven agencies (the Departments of Defense, Homeland Security, Justice, and Treasury; and the Federal Reserve Board, the Consumer Financial Protection Bureau, and the U.S. Postal Service) may prevent their respective IGs from taking such actions, but only for reasons specified in the IG Act. *See, e.g.*, IG Act, §8. These reasons include, among others, preserving national security interests, protecting ongoing criminal prosecutions, or limiting the disclosure of information that

- IGs determine the priorities and projects for their office without outside direction in most instances. IGs may decide to conduct a review requested by the agency head, the President, legislators, employees, or members of the public, but are not obligated to do so unless it is called for in law.

- IGs have the sole 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.

- An OIG responds directly to requests from congressional committees, members of Congress, and to invitations to testify at congressional hearings or to provide briefings.

- Under the IG Act, an IG's own budget requests must be separately identified within their agency's budget request when submitted to the Office of Management and Budget (OMB), and by OMB to Congress. IGs may comment to Congress on the sufficiency of their budgets if the amount in the President's budget would "substantially inhibit the [IG] from performing the duties of the office."[25]

- IGs are required by law to obtain legal counsel independent from their affiliated agencies. Such counsel must report directly to the IG or to another IG and may come from the CIGIE.

- The IG must have access to all records and other materials available to the affiliated agency which are necessary to accomplish its statutory tasks.

- An OIG may request information and assistance from any federal, state or local agency and federal laws limiting the sharing of information are inapplicable to such requests.

- All affiliated agency personnel are required to cooperate with the OIG in all audits, inspections, evaluations, and investigations and the agency is prohibited from retaliating against them for their cooperation.

The IG Act directs that each IG "shall report to and be under the general supervision of the head of the establishment involved or, to the extent such authority is delegated, the officer next in rank below such head, but shall not report to, or be subject to supervision by, any other officer of such establishment."[26] This "general supervision" provision is not defined in the IG Act. An appellate court ruling reviewing the legislative history of the act concluded that an agency head's supervisory authority over an IG was "nominal."[27] Any doubt that this "supervision" is limited and may not be exercised in a way that inhibits IGs' discretion to perform their mission, to undertake an audit or investigation, or to see these matters through to conclusion, has been put to rest by the provisions and legislative history of the Empowerment Act, discussed below as well as the most recent reforms to the IG Act enacted in 2022.

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could significantly influence the economy or market behavior. If agency heads invoke this power, they must send an explanatory statement to specified congressional committees within 30 days.

[25] Some IGs authorized under statutes other than the IG Act do not have independent budget authority and must rely on the budget of the agency. Congress addressed this issue with regard to the GAO IG in 2025 as part of the GAO Inspector General Parity Act, Pub. L. No. 118-131 (2024).

[26] IG Act, § 3(a).

[27] United States Nuclear Regulatory Commission v. Federal Labor Relations Authority, 25 F. 3d 229, 235 (4th Cir. 1994).

E. Reporting Requirements of IGs

Transparency is a key attribute of the IG scheme. IGs and the CIGIE have various reporting requirements to Congress, the Attorney General, agency heads, and the public that provide invaluable insights into agency actions and inactions. IGs must report suspected violations of federal criminal law directly and expeditiously to the Attorney General.[28] IGs are also required to report semi-annually in detail about the activities of the office with respect to the agency, and the agency head must submit the IG's report to the Congress within 30 days.[29] The IG's report must include, among other items:

- descriptions of significant problems, abuses, and deficiencies relating to the administration of programs and operations of the agency during the reporting period, the recommendations made for corrective action, and whether responsive action was taken;

- identification of proposed corrective actions from previous reporting periods that have not been completed;

- a listing and summary of each significant audit, inspection, and evaluation report issued during the period for which there has been no management decision or comment, including whether a management decision has been made by the end of the reporting period;

- a report of each investigation conducted by the office involving a senior government employee, where allegations of misconduct were substantiated, that contains a detailed description of the circumstances of the matter and its current status and disposition; and

- detailed descriptions of any instances of whistleblower retaliation, of any attempt by the agency to interfere with the independence of the office, and of the particular circumstances of each inspection, evaluation and audit conducted by the office that is closed and was not disclosed to the public.[30]

The agency head's submission to Congress must provide the IG's report unaltered, but may include comments from the agency head. These reports are to be made available to the public in another 60 days.[31] IGs are also to report "particularly serious or flagrant problems" immediately to the agency head, who must submit the IG report (unaltered but with his or her comments) to Congress within seven days.[32] Information in such IG reports that would otherwise by law be prohibited from public disclosure "may be provided to any member of Congress upon request."[33] Some appropriations statutes include a prohibition on agencies using funds to deny IGs "timely access" to information. Covered IGs are required to report agency failures to comply to the House and Senate Appropriations Committees within five calendar days.[34]

The spirit of transparency was applied in Congress's vestment in the CIGIE of policing duties over the IG community. The IG Act directed the CIGIE to establish an Integrity Committee which would "receive, review, and refer for investigation allegations of wrongdoing that are made against Inspectors General and

[28] IG Act, § 4(d).
[29] *Id.* § 5(a), (b).
[30] *Id.* § 5(a)(1)-(22). Sections 10(a) and (b)17-22 were added by the IG Empowerment Act of 2016.
[31] *Id.* § 5(c).
[32] *Id.* § 5(d).
[33] *Id.* § 5(e)(4). This section was added by the IG Empowerment Act of 2016.
[34] *See* Further Consolidated Appropriations Act, 2024, Division B, § 623 Pub. L. No. 118-47 (2023).

staff members of the various Offices of Inspector General."[35] For each investigation of allegations referred to the Integrity Committee, the chairperson of the Committee must submit a report to the members of the Committee and the chairperson of the council containing the results of the investigation. The congressional committees of jurisdiction are to be supplied with any such report as is any member of Congress who requests it.[36]

In addition to the semi-annual report to Congress, IGs have other mandatory reporting requirements, such as annual audits of agency financial statements, annual evaluations of information security programs and practices, annual discussions of top management challenges in their agencies, and annual reports on agency improper payments.[37]

F. Practical Value of OIG Efforts

In a time of congressional concern over growing budget deficits that have inspired across-the-board executive agency funding sequestrations, pay freezes, and personnel reductions, even at OIGs, it appears counter-intuitive that a 2015 Brookings Institution study could conclude "that most OIGs are revenue-positive institutions." The study explains that "OIGs conduct audits, investigations and other administrative and enforcement actions that allow the government to recoup money it is owed, ensure that money is spent more efficiently, and avoid future misappropriations of funds. The result is that most OIGs save the government far more money than they cost to operate. In this sense, OIGs—as well as other agency-level enforcement divisions—offer government a unique benefit that is more often associated with private enterprise or financial markets: a positive return on investment."[38]

The authors selected the 15 cabinet level agencies, in which the average OIG office cost $103 million in 2014, plus three independent agencies active in fund recovery: the Environmental Protection Agency, the Office of Personnel Management, and the Social Security Administration. To obtain a Return on Investment ratio (ROI) they compared data on receivables (the funds that an OIG returns to an agency through audits and investigations or prevents the agency from spending unnecessarily) with operating costs of each OIG and independent agency over a five-year period (2010 to 2014). In most years, almost every OIG had a positive ROI. The mean annual ROI for OIGs was $13.41; the median was $6.38. The consistently highest was SSA at $43.60 followed by the VA ($38.00), HUD ($29.59), and DOT ($25.59). Those with the highest ROIs oversee agencies that are more distributive in nature, i.e., those focused on grants, loans, contracts and direct payments face serious public concerns over waste, fraud, and abuse and have been effective.[39]

The IG Act's semi-annual report requires submission of the values of each listed audit, inspection, and evaluation report and an estimation of the total value of questioned costs, including a separate category for the dollar value of unsupported costs.[40] Submissions tend to present more subjective values, but CIGIE

[35] IG Act, § 11(d).

[36] *Id.* § 7(B)(iii).

[37] A list of important mandatory and recurring reporting requirements may be found in the appendix to *CIGIE on Role of IGs*, *supra* note 2.

[38] John Hudak & Grace Wallack, Sometimes Cutting Budgets Raise Deficits: The Curious Case of Inspectors General Return on Investment 2 (2015).

[39] *Id.* at 5-8.

[40] IG Act, §§ 5(a), (6) and (8).

and individual OIG reports have not been so far from the Brookings findings to dismiss them as exaggerated or self-promotions.

In 2024, during a House Oversight and Government Reform Committee, Subcommittee on Government Operations and the Federal Workforce hearing entitled "Oversight of the Council of the Inspectors General on Integrity and Efficiency (CIGIE)," then-CIGIE Chair Mark Lee Greenblatt testified:

> The IG community's effectiveness is reflected in its results. In fiscal year (FY)2023, OIGs' work resulted in potential savings totaling approximately $93.1 billion. With the OIG community's aggregate FY 2023 budget of approximately $3.5 billion, these potential savings represent an approximate return of $26 for every dollar invested in OIGs through their appropriations.[41]

IGs have increasingly focused attention on proactive efforts to prevent fraud before it happens primarily through the use of data analytics.

G. Executive Challenges to IG Oversight and Congress's Institutional Responses: The Exemplar of the Inspector General Empowerment Act of 2016

Since its founding, the IG scheme has been the object of executive challenge, most prominently spurred by the Justice Department and its Office of Legal Counsel (OLC). Over the years Congress has consistently responded with numerous enactments, from expansion of the number of OIGs to explicit clarifications of the nature and scope of IG authorities and responsibilities and the compliance duties of executive agencies. Timely congressional hearings have also sent clear messages of dissatisfaction that have resulted in remedial responses.

As noted, on taking office in 1981 President Reagan presumed the initial cadre of 15 IGs were typical political appointees who could be dismissed unilaterally with a change in presidential administration and fired them all. The immediate political backlash prompted the reappointment of five of those dismissed, and set an unwritten precedent that no incoming President was tempted to ignore for some 40 years. In 1989, the OLC issued an opinion with respect to the authority of IGs to provide Congress with confidential information they have received about open criminal investigations in response to a congressional committee request pursuant to its oversight authority. It concluded that "as a matter of statutory construction … Congress did not intend [the reporting] provisions [of the IG Act] to require the production of confidential information about open criminal cases. Accordingly, IGs are under no obligation under the Act to disseminate confidential law enforcement information."[42] Congress and the Congressional Research Service challenged this reading of the language of the act and its legislative history. For some time, the opinion sowed doubt and confusion among some IGs as to their reporting responsibilities to committees until, by practice and acquiescence, DOJ appeared to relent. Throughout this period, though, DOJ had never raised a question about the authority of OIGs to request and receive confidential law enforcement information. Indeed, by 2010 Attorneys General Reno and Ashcroft had expanded the DOJ-OIG's jurisdiction to include oversight authority over all DOJ law enforcement components, including the FBI and the Drug Enforcement Administration.

Beginning in 2010, however, the FBI began to question the legal validity of the DOJ-OIG's access to certain categories of information, such as grand jury, wiretap, and credit information, as well as other categories. Similar refusals were made by the DEA. In most instances access was ultimately obtained, but

[41] Committee on Oversight and Accountability Subcommittee on Government Operations and the Federal Workforce, Hearing on Oversight of the Council of the Inspectors General on Integrity and Efficiency (July 23, 2024).

[42] Cong. Requests for Info. From Inspectors Gen. Concerning Open Criminal Investigations, 13 Op. O.L.C. 77, 78, 83-87 (1989).

only after lengthy delay and often first requiring permission from agency leadership—an apparent denial of the IGs' independence and the IG Act's unequivocal direction to allow access to "all" needed documents. Refusals and delays respecting IG information requests soon spread to other agencies such as the Peace Corps, the Treasury Department, the Commerce Department, and the Chemical Safety and Hazard Protection Safety Board.

In May 2014, the then-Deputy Attorney General decided to ask OLC for a legal opinion on the legal objections raised by the FBI to providing the DOJ-OIG access to grand jury, Title III electronic wiretap, and Fair Credit Reporting Act (FCRA) information.

In August 2014, 47 Inspectors General signed a letter to Congress noting that meaningful oversight depends on complete and timely access to all agency materials and data, and that agency actions that limit, condition or delay access have profoundly negative consequences for their work. The letter noted how such actions make OIGs less effective, encourage other agencies to take similar actions in the future, and erode the morale of the dedicated professionals that make up the staff. The IGs asked for legislative remedial action.[43]

In December 2014, in response to both the public concerns expressed by the DOJ-IG and the IG letter, the House and Senate Appropriations Committees included a provision (Section 218) in the Justice Department's fiscal 2015 appropriation that was designed to improve OIG access to department documents and information. It unequivocally provided that:

> No funds provided in this Act shall be used to deny the Inspector General of the Department of Justice timely access to all records, documents, and other material in the custody of the Department or to prevent or impede the Inspector General's access to such records, documents and other materials, unless in accordance with an express limitation of section 6 (a) of the Inspector General Act, as amended, consistent with the plain language of the of the Inspector General Act, as amended.

Despite Congress's unequivocal support for the OIG's access to documents, the FBI continued to maintain its position that OIG was not legally entitled to review certain records. The OIG reported four instances where the FBI had failed to provide the OIG with timely access to information, including two involving FBI whistleblowers.

The House and Senate jurisdictional committees, which had been conducting hearings on the access issue since the beginning of the 113th Congress, did not wait for the OLC opinion. Both reported bills**,** together with the Section 218 appropriations limitation, that made clear the understanding that IGs can gain access to all information from all sources unless such access is expressly precluded.[44]

On July 20, 2015, the OLC issued its opinion, which concluded that Section 6(a) of the IG Act does not entitle the DOJ-OIG to obtain independent access to grand jury, wiretap, and credit information in the department's possession. The opinion argued that neither the IG Act's language authorizing an IG to have "access to all records," nor its legislative history or its general purpose, overrides the nondisclosure

[43] The IG letter of August 3, 2014, together with CIGIE letters to OLC dated October 7, 2011 (objecting to DOJ refusals of access by the DOJ-OIG to Federal Rule of Criminal Procedure 6(e) material) and June 24, 2014 (submitting the CIGIE's views on DOJ's limiting the DOJ-OIG access to information protected by statutory nondisclosure provisions) are appended to the testimony presented by DOJ-OIG Michael E. Horowitz in a hearing before the Senate Committee on the Judiciary on August 5, 2015 examining "Inspector General Access to All Records Needed For Independent Oversight."

[44] *See* H.R. Rep. No. 114-210 (2015); S. Rep. No. 114-36 (2015).

provisions of the governing statutes of grand jury,[45] Title III,[46] and FCRA information.[47] Also, OLC concluded that Section 218 did not abrogate the specific limitations found in the grand jury, wiretap, and credit laws. Because Section 218 did not expressly "repeal" these nondisclosure provisions, the appropriators did not "provide a clear statement that the IG Act should be interpreted to override the limitations on disclosure." In other words, OLC found that the admonition "all" in the IG Act does not mean "all."

The OLC opinion stoked the already simmering congressional criticism. The understanding that the opinion was not limited to the DOJ-IG but applied to all IG offices, coupled with revelations that obstruction continued at DOJ and was becoming endemic throughout the executive agencies, fueled it further. Exacerbating the situation was the fact there were perhaps 1,000 nondisclosure provisions in force in laws that might be relied on by agencies to obstruct IG information gathering. In an attempt to tamp the situation down the Obama administration offered to restore full access for the DOJ-IG but not for the other 71 IGs, which was rejected by the IG community and House and Senate leaders from both parties.[48]

Further compounding the ability of OIGs to fully accomplish their missions during this period were a number of other less prominent but no less important administration and agency actions, as well as certain CIGIE procedures, that raised issues that garnered the attention of the congressional oversight committees. They may be briefly summarized as follows:

Computer Matching and Information: The Computer Matching Protection Act of 1998 (CMPPA)[49] prevents unregulated access to personal records for purposes unrelated to the reasons for which the records were collected. Computer matching of data is used by IGs to identify improper payments and potential fraud especially in federal benefit programs. The CMPPA requires a time-consuming approval process and included a possible appeal to the Office of Management and Budget (OMB). Similarly, the Paperwork Reduction Act[50] requires approval of a senior official at an agency and from OMB for an information collection, such as a survey, in its area—also a lengthy process that has proved time consuming. The House and Senate committees proposed to grant exemptions.

Prolonged Vacancies in IG Positions: The Project on Government Oversight (POGO) has long spotlighted the length of time it takes to fill vacant IG positions and the dangers of allowing an acting to serve for an indefinite period of time. Much of the time the vacancy is caused by the failure of the President to make a nomination, sometimes for years, and opens the potential for an acting not to perform in the best interests of the agency out of a self-interest in being nominated him/herself (and thus a reluctance to exercise the full powers of the position). Presidents cannot be forced to make nominations and the Senate can refuse to act on a nomination.[51]

Testimonial Subpoena Power for IGs Over Non-Governmental Persons: IGs presently can subpoena non-governmental persons for document disclosures but not for testimonial purposes. That means IGs can

[45] Fed. R. Crim. P. 6(e).

[46] Federal Wiretap Act, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. §§ 2510-2522.

[47] 15 U.S.C. § 1681 (2012).

[48] *See, e.g.*, Eric Lichtblau, *Tighter Lid on Records Threatens to Weaken Government Watchdogs*, N.Y. Times (Nov. 27, 2015).

[49] 5 U.S.C. § 552a(a) (2012).

[50] 44 U.S.C. § 35 (2012).

[51] *See* H.R. Rep. No. 114-210, at 11 (2015); S. Rep. No. 114-36, at 6-7 (2015).

face challenges in investigating government contractors or grant recipients or federal employees who quit federal employment.

Availability of Information in Required Reports to All Members: OIGs are required to provide semi-annual reports on their activities to jurisdictional committees on specified topics. For years some committees have made special arrangements with OIGs to report on particular sensitive topics that are not statutorily required and are therefore not shared with all members of Congress. They include such matters such as closed investigations or audits by IGs that were not disclosed to the public; unimplemented IG recommendations; investigation of high-level employees engaged in misconduct but not prosecuted; and attempts by agencies to interfere with IG independence or resist or delay access to documents and reports that are not reported to the public, among others.

Assuring That IG Audits Are Timely Posted: The IG Act requires that IG audits or reports be posted no later than three days after any report is made publicly available. The difficulty with this position was exposed when a Veterans Affairs OIG did not make 140 reports public over a number of years and it was revealed that many contained substantiated allegations of mistreated patients. The committees suggested the three-day clock begins running when the audit or report is submitted in final form.

The Need for CIGIE Investigative Guidelines: CIGIE's Integrity Committee had been found by committees to have uncertain processes for their investigations which require reorganization.

H.R. 6450, signed into law by President Obama on December 16, 2016, as the Inspector General Empowerment Act of 2016, reflects an extraordinary and important institutional achievement in the face of an historically dysfunctional political environment that pervaded the 114th Congress. Neither bill reported by the House and Senate jurisdictional committees in mid-2015 dealt directly with DOJ's refusal to supply the DOJ-IG with information protected by legislative nondisclosure provisions, presuming that the Section 218 appropriations limitation effectively settled the issue. The House report on H.R. 2395 mentioned the 2014 letter from the 47 IGs but concentrated on other issues, such as issuance of testimonial subpoenas for federal government contractors and former employees, exempting IGs from the requirements of the Computer Matching and Paperwork Reduction Acts, prolonged vacancies in IG positions, and the enhancement of CIGIE policing and reporting requirements. The Senate report on S. 579 acknowledged the IG concerns and the lack of support for the DOJ withholdings but concluded that "there does not appear to be any additional language the Committee could supply to the IG Act to make it clearer." Rather, it simply restated its belief that an agency must give IGs "prompt, unfettered access to agency documents." It did agree to strike the "supervision" language of Section 3(a) to assure that it should not be construed as giving agency heads any power to influence, control or supervise IGs. Otherwise, the report dealt with the same concerns reflected in the House report and bill.

As has been indicated, the Committee reports were issued before the announcement of OLC's opinion, which dismissed the relevance and effect of the Section 218 appropriations limitation on DOJ withholdings and which implicitly authorized all agency heads to apply available nondisclosure provisions to block or delay timely compliance with IG requests. The immediate result was widespread executive agency obstruction. A bipartisan effort that involved the majority and minority leadership of both committees and both houses ensued to meet the challenge. The compromise bill, H.R. 6450, passed both houses by unanimous consent on consecutive days.[52] Senator Grassley summarized the nature, breadth and importance of the compromise:

> We agreed to remove some provisions of the bill related to IG leave policy and IG reporting requirements. Although we disagreed on those provisions, I am glad that we

[52] *See* 162 Cong. Rec. H7527-31 (daily ed. Dec. 8, 2016); 62 Cong. Rec. S7130-31 (daily ed. Dec. 9, 2016).

> agreed to preserve the important parts of the bill. Namely, we preserved the provisions of the bill that provide inspectors general with timely access to all records of the agency that they are charged with overseeing. In addition, the bill contains numerous other provisions that strengthen IG independence and equip IGs with the necessary tools to weed out waste, fraud and abuse within the Federal Government …. It is a waste of time and money to have agencies at war with their inspectors general over access to information. The inspectors general need to spend their time identifying and helping agencies eliminate waste, fraud and abuse—not fighting for access to the information needed to do their job. The bureaucrats need to learn Congress intended for the law to mean exactly what it says. Unless a provision of law specifically mentions the inspector general and prevents access to certain kinds of documents, then those records should be provided. "All records" means "all records."[53]

The overall important legal outcome of the passage of the IG Empowerment Act is that it is now required that IGs can get all the information they need to do their jobs. Much credit goes to "old hands" that led the way for passage of the Empowerment Act. But it appears that in some way there has been a perceived need for almost 40 years for congressional preservation of an effective scheme of IG oversight that sustains and nurtures the democratic nature and goals of our administrative process. Public faith in the integrity of our governmental process is vital to its acceptance and success. The test will be great in a time when fundamental regulatory policy change is being demanded, and in many respects unilaterally implemented, by the new presidential administration. The Empowerment Act has played an important role in monitoring that change. Among the beneficial provisions of the Act, the following appear the most important:

- Access to "all" agency documents required by an IG means "all" unless a statute says otherwise.
- IGs have an exemption from all laws needing another agency's permission to access matching computerized programs and from the Paperwork Reduction Act, which will enhance the ability of IGs to identify and prevent improper or fraudulent payments and thus better facilitate efficient oversight.
- GAO has to follow and advise agencies and alert Congress about the effects of prolonged vacancies in IG positions.
- IGs are now specifically allowed to request and get grand jury information that is exempted by Federal Rule of Criminal Procedure 6(e).
- IGs are now required to report to Congress about impediments agencies put up to collecting information, retaliations against whistleblowers, and about IG reports not otherwise available to the public.
- IGs must report to Congress and publicly post recommendations they make to agencies for corrective actions that are not carried out.
- CIGIE policing of IGs is made meaningful and must be transmitted to Congress: allegations of IG wrongdoing—both their existence and what was done about the charges—have to be reported to Congress.

[53] 162 Cong. Rec. 7130, 31.

- CIGIE has been given mediating authority when conflicts occur between IGs in their overlapping investigations.

Perhaps the only important issue that was ducked was giving authority to IGs to subpoena non-government entities and persons to testify. Otherwise, the Empowerment Act was an unexpected bipartisan triumph.

Yet too often administrations of both parties did not adhere to the law requiring the President to explain any Inspector General removal to Congress 30 days prior to the removal going into effect. President Trump removed a number of Inspectors General during his first term and placed some on administrative leave as a means to evade the 30-day notice period.

In response, Congress enacted the Securing Inspector General Independence Act to strengthen protections and authorities of IGs. In addition to addressing notice requirements for removing an IG or placing an IG on non-duty status, the new reforms include several significant enhancements to the IG Act.

- The law limits who may serve as acting IG in the event of a vacancy.

- If the President fails to make a formal nomination for a vacant IG position within 210 days after a vacancy occurs or a nomination is rejected, withdrawn, or returned, whichever is later, the President must communicate to the appropriate congressional committees the reasons why a formal nomination has not yet been made and a target date for making a formal nomination. The report is required to continue to report annually as long as the vacancy persists without a nomination.

- After an IG is removed, placed on non-duty status, or transferred, the acting IG must submit to the appropriate congressional committees information on work being conducted by the OIG as of the date on which the IG was removed, placed on non-duty status, or transferred.

- The law updated the reporting requirements for inspectors general.

- IGs are required to report to Congress when information or assistance is refused or not provided by the IG's agency.

- IGs are now required to notify non-governmental organizations and business entities specifically identified in non-investigative OIG reports and provide those entities an opportunity to comment.[54]

Finally, as this chapter has discussed, executive actions to undermine or blunt IG effectiveness have persisted over time, even when Congress met each individual challenge directly to reaffirm the essentiality of the oversight mission vested in the OIGs. President Trump, in addition to removing nearly 20 IGs, has not appointed many nominees to fill the vacant IG positions and some of those he has nominated raise concerns about their abilities to be independent and apolitical.[55] The Senate Report decried such a stratagem:

[54] Securing Inspector General Independence Act of 2022, Pub. L. No. 117-263, 136 Stat. 395.

[55] *See* Faith Williams, *Assessing Inspector General Nominees*, Project on Gov't Oversight (Oct. 6, 2025), https://www.pogo.org/resources/assessing-inspector-general-nominees; Justin Doubleday, *HHS IG Nominee Pledges to Support*

> The Committee believes the absence of permanent, Senate-confirmed or agency appointed IGs impedes the ability of these offices to identify and expose waste, fraud and abuse in the federal government. In addition, acting IGs in these roles create the potential for conflicts of interest, diminish independent IG oversight, and cause instability for IG offices.[56]

Temporary, acting IGs are not secure in their positions and potentially could be vying to become permanent IGs. This could create an incentive to try to please leaders of the agency they are supposed to oversee, instead of maintaining independence. This can have a trickledown effect on the staff in those offices. The temporary nature of the job also gives acting IGs challenges for long-term planning. In the past, presidential failures to fill key administrative positions that require Senate confirmation have often had the purpose of stymying targeted programs.

When President Trump took office in January 2025, there were 15 IG vacancies.[57] Shortly after taking office, President Trump removed around 17 Inspectors General across agencies.[58] Additional IGs were removed in the following months.[59] In September 2025, OMB began withholding appropriated funding from CIGIE because, according to a White House spokesperson, "IGs have become corrupt, partisan, and in some cases, have lied to the public."[60] Bipartisan concerns about the administration's actions with respect to the IG community have been expressed by Congress including from the Chairs of the Senate Appropriations and Judiciary Committees, who successfully leveraged the administration to restore funding for CIGIE.[61] During the period when OMB withheld funds from CIGIE, numerous OIG website hosted by CIGIE's oversight.gov were offline and whistleblower hotlines were unavailable.

These actions, including firings without cause and the refusal (even temporarily) to spend appropriated funds on CIGIE, have done incalculable and perhaps permanent damage to the independence of Inspectors General. Inspectors General are a critical component of meaningful congressional oversight. Members of Congress on both sides of the aisle need to reimagine what the system of Inspectors General might look like if designed to be more independent from the executive branch, and, at the same time, push back on attempts to undermine the Inspectors General as they are currently.

Trump's Initiatives, Federal News Network (Oct. 29, 2025), https://federalnewsnetwork.com/agency-oversight/2025/10/hhs-ig-nominee-pledges-to-support-trumps-initiatives; 29, 2025), https://federalnewsnetwork.com/agency-oversight/2025/10/hhs-ig-nominee-pledges-to-support-trumps-initiatives; Sean Michael Newhouse, *Senate Democrats Grill Inspector General Nominees Over Their Independence from Trump*, Gov't Exec. (Oct. 23, 2025).

[56] S. Rep. No. 114-36, at 7 (2015); *see also* H.R. Rep. No. 114-210, at 3 (2015) ("Prolonged vacancies of Inspectors General can leave Offices of Inspectors General vulnerable and can diminish their ability to effectively conduct oversight duties.")

[57] Sean Michael Newhouse, *Trump Fires Multiple Agency Inspectors General*, Gov't Executive (Jan. 16, 2025), https://www.govexec.com/oversight/2025/01/trump-fires-multiple-agency-inspectors-general/402504/.

[58] *Trump Uses Mass Firing to Remove Inspectors General at a Series of Agencies*, Associated Press (Jan. 25, 2025), https://www.npr.org/2025/01/25/g-s1-44771/trump-fires-inspectors-general. A federal district judge has since determined that this firing failed to follow statutorily required process and violated the law but declined to reinstate the positions. *See* Storch v. Hegseth, 2025 WL 2758238 (D.D.C. Sept. 24, 2025).

[59] *Trump Fires USAID's Inspector General After His Office Released a Report Critical of the Administration*, NBC (Feb. 11, 2025), https://www.nbcnews.com/politics/politics-news/usaid-inspector-general-fired-releasing-report-trumps-downsizing-effor-rcna191790; *Trump Dismisses Another Inspector General Fueling Oversight Concerns*, New York Times (Oct. 21, 2025), https://www.nytimes.com/2025/10/21/us/politics/trump-inspectors-general.html.

[60] Meryl Kornfield and Hannah Natanson, *Trump administration revives some funding for IG group*, Wash. Post, Nov. 18, 2025, https://www.washingtonpost.com/politics/2025/11/18/trump-administration-revives-some-funding-ig-group/.

[61] Letter from Susan M. Collins, Chair, S. Comm. on Appropriations and Charles E. Grassley, Chairman, S. Comm. on the Judiciary, to Russell T. Vought, Director, Office of Management and Budget (Sept. 29, 2025).

For illustrations of some of the oversight powers, tools, principles, and obstacles discussed in this chapter, see the following case study in the online version of this handbook:

Lydia Dennett, Elizabeth Hempowicz & Justin Rood: The Roles of NGOs and Whistleblowers in the Oversight Process

10. Speech or Debate Protection

Overview

The Speech or Debate Clause of the Constitution provides that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place."[1] The Clause seeks to protect and maintain the essential autonomy and integrity of the Congress by "prevent[ing] intimidation of legislators by the Executive and accountability before a possibly hostile judiciary."[2] Its origins lie in the English Bill of Rights of 1689, the culmination of centuries of struggle for parliamentary independence against Tudor and Stuart monarchs who used criminal and civil law to suppress and intimidate critical legislators.

The Supreme Court has construed the Clause broadly, beyond matters of pure speech on the floors of both houses, to embrace all activities within the legislative sphere that are an integral part of the deliberative and communicative processes by which members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.[3]

Protected legislative acts include introducing and voting on bills or resolutions, preparing and submitting committee reports, acting at committee meetings and hearings, conducting formal and informal investigations, and issuing subpoenas.

The Supreme Court has held that, beyond legislative acts, the Clause protects against inquiries as to the motivations for such legislative acts. Its protections have also been extended to legislators' aides as "alter egos" of members for conduct that would be protected if performed by the member. The protections apply to both civil actions and criminal prosecutions. Finally, when the Clause is found to apply, its protections are absolute and not subject to qualification or balancing.

The Clause, however, does not provide a blanket of immunity for all actions related to the legislative process. The Supreme Court has found that it does not prohibit inquiry into activities that are casually or incidentally related to legislative affairs or a member's congressional duties, but are not an integral part of the legislative process itself. These activities include speaking outside of Congress, writing newsletters, issuing press releases, private book publishing, distribution of official committee reports outside the legislative sphere, and constituent services.

The Court has also held that solicitation and receipt of bribes as a *quid pro quo* for future legislative actions, and violations of any other otherwise valid criminal laws, are not part of the legislative process.[4]

Finally, the Supreme Court has acknowledged the potential costs associated with this broad constitutional protection, which include making prosecutions of legislative malefactors more difficult and creating a potential for abuse. Nevertheless, the Court has steadfastly and repeatedly held that the Clause must be

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[1] U.S. Const. Art I, § 6, cl.1.

[2] Gravel v. United States, 408 U.S. 606, 617, 624-25 (1972).

[3] *Id*; *see also* Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 504 (1975).

[4] United States v. Brewster, 408 U.S. 501, 512, 525-26 (1972); *Gravel*, 408 U.S. at 626.

broadly construed and applied because that was "'the conscious choice of the Framers' buttressed and justified by history."[5]

A. The History, Purposes and Protections of the Clause

The Speech or Debate Clause is rooted historically in 16th- and 17th-century English monarchs' suppression and intimidation of critical members of Parliament by means of criminal prosecutions.[6] Parliament opposed these attempts, and in 1689 it passed a Bill of Rights that stated unambiguously "that the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or any Place out of Parliament."[7] As a result of the English experience, "[f]reedom of speech and action in the legislature was taken as a matter of course" by the Founders, who included the Speech or Debate Clause in the Constitution with little discussion or debate at the Philadelphia convention or during the states' ratification proceedings.[8]

The Supreme Court has described the purposes of the Clause as: "to insure that the legislative function the Constitution allocates to Congress may be performed independently;"[9] to "prevent intimidation of legislators by the Executive or accountability before a possibly hostile judiciary;"[10] and "reinforcing the [scheme of] separation of powers so deliberately established by the Founders."[11] It is to be understood as a core institutional protection and "not merely for the benefit of Members of Congress."[12]

The Court has held that, when applicable, the Speech or Debate Clause provides three distinct protections:

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[5] *Eastland*, 421 U.S. at 510, quoting *Brewster*, 408 U.S. at 516.

[6] United States v. Johnson, 383 U.S. 169, 178 (1968); Tenney v. Brandhove, 341 U.S. 367, 372 (1951). *See also* Kelley M. McGuire, *Limiting the Legislative Privilege: Analyzing the Scope of the Speech or Debate Clause*, 69 Wash. & Lee L. Rev. 2125, 2154-56 (2012) (discussing the evolution of the English parliamentary speech or debate privilege).

[7] *Tenney*, 341 U.S. at 372.

[8] *Id. See also* McGuire, *supra* note 6, at 2150-53 (describing the contemporaneous understandings of the Clause by James Wilson, Thomas Jefferson and James Madison).

[9] *Eastland*, 421 U.S. at 502.

[10] *Id.*, quoting *Gravel*, 408 U.S. at 617.

[11] *Johnson*, 383 U.S. at 178. *See also* Youngblood v. DeWeese, 352 F.3d 836, 839 (3d Cir. 2003) ("Ensuring a strong and independent legislative branch was essential to the framers' notion of separation of powers …. The Speech or Debate Clause is one manifestation of this practical security for protecting the independence of the legislative branch ….").

[12] United States v. Myers, 635 F. 2d 932, 935-36 (2d Cir. 1980) ("[T]he Speech or Debate Clause…serves as a vital check upon the Executive and Judicial Branches to respect the independence of the Legislative Branch, not merely for the benefit of Members of Congress, but, more importantly, for the right of the people to be fully and fearlessly represented by their elected Senators and Congressmen."); *See also* United States v. Helstoski, 408 U.S. 477, 492 (1979); *In re Grand Jury Investigation*, 587 F.2d 589 (3d Cir. 1978); Ethan L. Carroll, *The Institutional Speech or Debate Protection: Nondisclosure as Separation of Powers*, 65 Duke L. J. 1153, 1190-91 (2014) ("The Clause's nondisclosure protection is not designed to safeguard legislators' independence …. Instead, the Clause protects democratic representation. As in other separation-of-powers contexts, the Clause's institutional protection focuses on practical control. Recognition that the Clause provides an *institutional* protection will ultimately be determinative of whether investigations of congressional criminality take place via subpoenas, which preserve the congressional right of prior assertion, or via searches, which do not.").

- an immunity from legal challenges to "actions within the 'legislative sphere,'"[13] which extends to both criminal prosecutions and civil suits;[14]

- a non-evidentiary use privilege that bars prosecutors and parties from advancing their claims against a member or aide by "[r]evealing information as to a legislative act";[15] and

- a testimonial or discovery privilege against being compelled to testify about legislative matters.[16] The Supreme Court has recently declined to address a circuit split as to whether the Speech or Debate Clause includes a nondisclosure privilege against compelled disclosure of documentary materials and records that reflect legislative activities. That issue is addressed separately below.

The Supreme Court has not drawn distinctions among the three protections in terms of their effects. Rather, it has held that when the Clause applies it is "absolute."[17] In a civil context the Court has rejected a claim that where constitutional rights are impacted by covered legislative actions, the privilege must be subject to a balancing test against constitutional intrusions on individual rights.[18]

The Court has also held that the protections of the Clause apply to a member's "aide insofar as the conduct of the aide would be a protected legislative act if performed by the Member himself."[19] The Court explained that "it is literally impossible, in view of the complexities of the modern legislative process … for Members of Congress to perform their legislative tasks without help of aides and assistants." Because "the day-to-day work of such aides is so critical to the members' performance … they must be treated as the latter's alter egos."[20] However, because a congressional aide's privilege derives from the privilege of the member or committee for whom he or she works, "[i]t follows that an aide's claim of privilege can be repudiated and thus waived" by his or her employer.[21]

A waiver of the Speech or Debate privilege of a member, if possible at all, "can be found only after explicit and unequivocal renunciation of the protection."[22] The Court has not ruled as to whether Congress or either house can waive an individual member's privilege.

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[13] Doe v. McMillan, 412 U.S. 306, 312 (1973).

[14] *Helstoski*, 442 U.S. at 477 (criminal prosecution); *Brewster*, 408 U.S. at 501 (same); *Johnson*, 383 U.S. 169 (same); *Eastland*, 421 U.S. at 502-03 (civil suit); *McMillan*, 412 U.S. at 312 (same); Dombrowski v. Eastland, 387 U.S. 82, 84-85 (1973) (same).

[15] *Helstoski*, 442 U.S. at 490; *Johnson*, 383 U.S. at 173-77.

[16] *Gravel*, 408 U.S. at 615-16.

[17] *Eastland*, 421 U.S. at 501, 503, 509-10 n.16; *Gravel*, 408 U.S. at 623 n.14. The protections of the Clause do not end when a member or aide leaves his or her position in Congress. *See, e.g.*, Miller v. Transamerican Press, Inc., 709 F. 2d 524, 529 (9th Cir. 1983).

[18] *Eastland*, 421 U.S. at 501, 503, 509-10 n.16.

[19] *Gravel*, 408 U.S. at 618.

[20] *Id. at 616; see also Eastland*, 421 U.S. at 507 (Senate committee aide covered).

[21] *Gravel*, 408 U.S. at 622 n.13. It has been held that the Clause may be asserted not only by a current member but also by a former member in an action implicating his conduct while in Congress, s*ee Brewster*, 408 U.S. at 502, and by a member's "aides insofar as the latter would be a protected legislative act if performed by a Member himself," *Gravel*, 408 U.S. at 618.The immunity applies regardless of whether the member or aide is a party to litigation or has merely been called to testify or give a deposition. *Miller*, 709 F. 2d at 529; Tavoulareus v. Piro, 93 F.R.D. 11, 18-19 (D.D.C. 1981).

[22] *Helstoski*, 442 U.S. at 491.

Finally, the Court has held that the protections of the Speech or Debate Clause apply "even though the conduct [in question], if performed in other than legislative contexts, would … be unconstitutional or otherwise contrary to criminal or civil statutes."[23] In so holding, the Court has expressly acknowledged the potential costs associated with this broad constitutional protection. It has stated that "without doubt the exclusion of [legislative act] evidence will make prosecutions more difficult,"[24] that "the broad protection granted by the Clause creates a potential for abuse,"[25] and that it "has enabled reckless men to slander and even destroy others with impunity."[26] Nevertheless, the Court steadfastly and repeatedly has held that the Clause must be broadly construed and applied because that was the "'conscious choice of the Framers' buttressed and justified by history."[27]

B. Supreme Court Case Law

The Supreme Court has construed the Speech or Debate Clause in only a few cases, the last occurring in 1979.

In the earliest cases, *Kilbourn v. Thompson*[28] and *Tenney v. Brandhove*,[29] the Supreme Court adhered to a broad, liberal interpretation of the Clause with regard to member protections, but denied coverage to non-member legislative officials or aides.

Kilbourn, decided in 1881, concerned the House of Representatives' imprisonment of Mr. Kilbourn for contempt for his alleged perjury before a House committee. Kilbourn sued members who voted for the contempt order and the House Sergeant-at-Arms who took him into custody. The Court found that members of Congress could not be punished for votes or for any of "those things generally done in a session of the House by one of its members in relation to the business before it."[30] But the Sergeant-at-Arms who had taken Kilbourn into custody pursuant to the congressional order was held not to be within the ambit of the protection and was liable for damages.[31]

Similarly, in *Tenney*, the Court held that state legislators could not be sued under a federal civil rights statute for their conduct of an investigation, based on the same principles underlying the Speech or Debate Clause. The Court noted, however, that the protections were narrower when "an official acting on behalf of the legislature" is sued.[32] In *United States v. Johnson*,[33] decided in 1966, the Court determined that a speech delivered by a Senator on the floor of Congress and the Senator's motivation for delivering it were protected by the Clause and could not form the basis of a criminal charge of conspiracy to defraud

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[23] *McMillan*, 412 U.S. at 512-13.

[24] *Helstoski*, 442 U.S. at 488.

[25] *Eastland*, 421 U.S. at 510.

[26] *Brewster*, 408 U.S. at 516 (citing *Coffin v Coffin*, 4 Mass. 1, 28 (1808).

[27] *Id.*

[28] 103 U.S. 168 (1881).

[29] 341 U.S. 367 (1951).

[30] *Kilbourn*, 103 U.S. at 204.

[31] *Id.*

[32] *Tenney*, 341 U.S. at 378.

[33] 383 U.S. 169 (1966).

the government.[34] However, the Court went on to hold that the prosecution could still proceed with the conspiracy charge on the condition that the speech itself could not constitute an overt act. This limitation, the Court assumed, would purge the prosecution of all elements offensive to the Speech or Debate Clause.[35]

The Court continued to decline extending the immunity of the Clause to the activities of legislative employees acting under the authority and direction of Congress or one of its committees in its subsequent rulings in *Dombrowski v. Eastland*[36] and *Powell v. McCormack.*[37]

Liberal rationales combined with narrow, restrictive holdings in these early cases made the precise scope of the legislative privilege unclear. None of the Court's opinions, alone or in tandem, defined with any particularity the nature of the legislative activity that would be protected by the Clause. A series of decisions in the 1970s brought more clarity, but the Court adopted a narrow view of the legislative activities the Clause protected.

In *Brewster v. United States*,[38] the Court addressed in more detail the question of what constitutes a "legislative act." *Brewster* involved criminal charges of a Senator accepting bribes in return for promises respecting postage rate legislation while a member of the Senate. He claimed immunity for those actions under the Speech or Debate Clause. The Court rejected the claim, holding that the immunity afforded by the Clause protects only inquiry into "legislative acts." It explained that although past cases had defined a legislative act "as an act generally done in Congress in relation to the business before it," the privilege is not unlimited.[39] The Court noted that there are a number of activities that are in some sense related to legislative activity but are not protected under the Clause because they are not "clearly a part of the legislative process."[40] It distinguished legislative acts from what it termed "legitimate 'errands'" such as securing government contracts or giving speeches outside the Congress. The Court stated that "[a]lthough these [errands] are entirely legitimate activities, they are political in nature rather than legislative, in the sense that term has been used by the Court in prior cases."[41] The Court emphasized that a strong link to the legislative process is necessary to prevent legislators from avoiding criminal prosecutions and concluded that Sen. Brewster's actions were not privileged because accepting bribes was in no way "part of the legislative process or function."[42] The government only needed to show that the Senator accepted a bribe. It did not have to prove he actually fulfilled the illegal bargain.[43]

Gravel v. United States,[44] decided the same day as *Brewster*, broadened the Clause's protections to include congressional staff but further narrowed the definition of what was considered a "legislative act." The case concerned a criminal investigation into Sen. Gravel's actions in disclosing and publishing top-

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[34] *Id.* at 180.

[35] *Id.* at 184-85.

[36] 387 U.S. 82 (1967)

[37] 395 U.S. 486, 505-06 (1969).

[38] 408 U.S. 501 (1972).

[39] *Id*. at 512.

[40] *Id.* at 512-13, 516.

[41] *Id.*

[42] *Id*. at 525, 528-29.

[43] *Id.* at 526.

[44] 408 U.S. 606 (1972).

secret national defense information known as the Pentagon Papers. A grand jury subpoenaed an aide to the Senator, who was privy both to the preparation for a subcommittee meeting chaired by the Senator at which the documents were read and placed in the public record, and to the arrangements for subsequent republication of the documents by a private publisher.

The Court held that the protections of the Clause apply "to [a member's] aide insofar as the conduct of the aide would be a protected legislative act if performed by the Member himself."[45] In those circumstances the aide is deemed an "alter ego" of the member. The Court explained,

> it is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without help of aides and assistants; that the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos ….[46]

However, the Court emphasized that "[l]egislative acts are not all-encompassing."[47] It then provided a test for determining which actions beyond literal speech and debate can be classified as immune legislative acts. To be privileged, a legislator's action must be "an integral part of the deliberative and communicative processes by which members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House."[48] Under this standard, the Court held that the Clause protected the events that occurred during the preparation for and conduct of the subcommittee meeting, and it prohibited questioning about "communications between the Senator and his aides during the term of their employment and related to said meeting or any other legislative act of the Senator."[49] The Court, however, refused to find that the discussions with the private publisher were "essential to the deliberations of the Senate," and therefore they were not part of the legislative process protected by the scope of the Clause. Thus, the aide could be required to testify about them before a grand jury.[50] Courts continue to apply the *Gravel* test today.[51]

In *Doe v. McMillan*[52] the Supreme Court followed the path set by *Gravel.* That case involved a suit by schoolchildren's parents against legislators and their aides who collected sensitive, derogatory information about the children which was published in a committee report. The parents claimed violations of privacy rights protected by the Constitution and local statutory law. The Court held that the investigation, the presentation of the information at committee hearings, and the referral of the report to the Speaker of the House were all privileged legislative acts.[53] The information remained privileged when it was "distributed to and used for legislative purposes by members of Congress, congressional

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[45] *Gravel*, 408 U.S. at 618.

[46] *Id.* at 616. *See also Eastland*, 421 U.S. at 507 (Senate committee aide covered).

[47] *Gravel*, 408 U.S. at 624-25.

[48] *Id.* at 625.

[49] *Id. a*t 629. *See also Eastland*, 421 U.S. at 507.

[50] *Gravel*, 408 U.S. at 626-27.

[51] *See, e.g., Nunes v. NBCUniversal Media, LLC*, 2024 WL 2048692 (S.D.N.Y. May 8, 2024) (finding that an aide to the House Permanent Select Committee on Intelligence was protected by the Speech or Debate Clause for activity at a Committee meeting, but not for administrative or logistical conversations).

[52] 412 U.S. 306 (1973).

[53] *Id.* at 312.

committees, and institutional and individual legislative functionaries."[54] The Court noted that actions within the "legislative sphere" are privileged even if in other situations they would be considered unconstitutional or a violation of local law.[55]

A final issue addressed by the *McMillan* court was whether the Clause afforded immunity to legislative officials authorized to distribute the materials that allegedly infringed upon the rights of the children. Applying the *Gravel* test, the Court held that in a private suit such as the one before it, the Clause affords no immunity to those who, at the direction of Congress, distribute actionable material to the general public. To the extent that the public printer and the superintendent of documents had printed *excess* copies of the report for use other than internally to Congress, a cause of action arose against them. The case was remanded to the district court to determine whether those defendants had acted improperly.[56] The district court granted them immunity on the basis that there had been only a limited distribution of the report,[57] in an opinion which was affirmed by the D.C. Circuit.[58] The appeals court, however, expressly reserved the question of the availability of immunity "in a case where distribution was more extensive, was made in response to specific requests rather than standing orders, or continued for a period after notice of objections was received."[59]

Eastland v. United States Servicemen's Fund[60] presented a challenge to the validity of the issuance of a subpoena for documents during the course of an authorized investigation. The Senate committee issued the subpoena to a bank to produce records of an anti-war group, the USSF, under investigation by the Committee. USSF, alleging that the contribution lists being subpoenaed were the equivalent of membership lists of their organization, sought an injunction asserting that its First and Fifth Amendment rights were in danger of being irreparably harmed. The Court applied the *Gravel* standard and determined that investigations and inquiries qualify as legislative acts because they are "an integral part of the legislative process."[61] The investigation and the subpoena were protected by the privilege because they were connected with a permissible congressional function: a topic that could be the subject of lawmaking. The Court concluded that despite the constitutional claims, the legislative privilege protected the legislators who authorized the subpoena, and it had no power to review the subpoena.[62]

The Court's last examinations of the Speech or Debate Clause occurred in its 1979 rulings in *United States v. Helstoski*[63] and *Hutchinson v Proxmire.*[64] In *Helstoski*, the government had charged that a former congressman, while a member of Congress, accepted money in return for promising to introduce (and in fact introducing) private bills to suspend the application of immigration laws. He was indicted under 18 U.S.C. § 201, which makes it a crime for a public official to corruptly ask for or accept anything of value in return for being influenced in the performance of his official duties. The government had attempted to

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[54] *Id.*

[55] *Id.* at 312-13.

[56] *Id.* at 316.

[57] Doe v. McMillan, 373 F. Supp. 1313 (D.D.C. 1974).

[58] Doe v. McMillan, 566 F. 2d 713 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 968 (1978).

[59] *Id.* at 718.

[60] 421 U.S. 491 (1975).

[61] *Id.* at 504-05.

[62] *Id.* at 506-08.

[63] 442 U.S. 477 (1979).

[64] 443 U.S. 111 (1979).

introduce evidence of past legislative acts to prove motive. Relying on prior rulings, the Court held that the Clause precludes any inquiry into acts that occur in the regular course of the legislative process and into the motive for those acts. The Court acknowledged that while "the exclusion of evidence of past legislative acts undoubtedly will make prosecutions more difficult, nevertheless, the Speech or Debate Clause was designed to preclude prosecution of members for legislative acts."[65] Adhering to its ruling in *Brewster*, the Court affirmed that "a promise to deliver a speech, to vote, or to solicit other votes is not 'speech or debate' within the meaning of the Clause, nor is a promise to introduce a bill at some future date a legislative act."[66] But the protection does extend to legislative acts already performed.[67] Also, as indicated previously, the *Helstoski* court broadly held that a member's waiver of the Clause's protections must be shown to be an "express and unequivocal" repudiation of those protections.[68]

The source of Sen. Proxmire's problems in *Hutchinson v. Proxmire* was not allegations of criminal conduct but an allegedly libelous attempt at humor. The Senator regularly bestowed "Golden Fleece" awards for public expenditures of taxpayer money he considered wasteful. The plaintiff received one for his research on anger in animals. Sen. Proxmire presented his comments in the Congressional Record and referred to the award in newsletters to his constituents and others. He also referred to the research in a television interview, and his aide contacted federal agencies that had supported the research.[69] The Court denied the Senator the support he sought under the Clause, holding that while his speech on the Senate floor was wholly protected, "neither the newsletters nor the press release was 'essential to the deliberations of the Senate' and neither was part of the deliberative process."[70] The Court acknowledged that it had given the Clause "a practical rather than a strictly literal reading" by not limiting the protection to utterances within the four walls of the chambers, but extending it to committee hearings, "even if held outside the Chambers," and to committee reports.[71] But it held that only legislative activities can be protected and the Clause reaches matters that are, quoting *Gravel*, "an integral part of the deliberative and communicative process by which members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation."[72] Though press releases and newsletters have a relation to that process, they are not part of the protected legislative function in the manner that "congressional efforts to inform itself through committee hearings are part of the legislative function."[73]

The cases described above, taken together with lower federal appellate and district court decisions following the Supreme Court's guidance, indicate that the Speech or Debate Clause absolutely protects as legislative acts: speaking on the House or Senate floor;[74] introducing and voting on bills and resolutions;[75]

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[65] *Helstoski*, 442 U.S. at 487.

[66] *Id.* at 495-96.

[67] *Id.* at 490.

[68] *Id.* at 491.

[69] 443 U.S. at 114-17.

[70] *Id.* at 130.

[71] *Id.* at 124.

[72] *Id.* at 126.

[73] *Id.* at 132-33.

[74] *Johnson*, 383 U.S. at 18-85; *Gravel*, 408 U.S. at 616, 623 n.14; *Eastland*, 421 U.S.at 501, 503, 509-10, 510 n.16.

[75] *Kilbourn*, 103 U.S. at 204 (stating that "[t]he reason for the rule is as forcible in its application to written reports presented in that body by its committees, to resolutions offered, … and to the act of voting, …); *Brewster*, 408 U.S. at 516 n. 10, 520; *Gravel*, 408 U.S. at 617 ("act of voting … covered").

the Vice President when presiding over electoral certification process on the Senate floor;[76] preparing and submitting committee reports;[77] acting at committee meetings and hearings;[78] gathering information, both through formal committee investigations and through informal fact-finding by members and staff;[79] gathering information from federal agencies and lobbyists;[80] negotiating and drafting legislative proposals;[81] and Congress's adoption of its rules and procedures governing voting and related activities.[82] It also has been held to protect analyses of information that supports, or is gathered to support, legislative

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[76] *In re Grand Jury Subpoena* (Sealed Case), No. 1:23-mc-00035 (D.D.C. Mar. 27, 2023), available at https://s3.documentcloud.org/documents/23840379/penceruling1.pdf

[77] *Kilbourn*, 103 U.S. at 204*; McMillan*, 412 U.S. at 311; *Gravel*, 408 U.S. at 617; *see also* Musgrave v. Warner, 104 F.4th 355, 358 (D.C. Cir. 2024) (committee could not be compelled to provide access to a largely classified committee report).

[78] *Kilbourn*, 103 U.S. at 204*; McMillan*, 412 U.S. at 313*; Gravel*, 408 U.S. at 628-29. In addition, some lower courts have held that the Clause bars the use of evidence of a member's committee membership. *Compare*, United States v. Swindall, 971 F. 2d 1531 (11th Cir. 1991), *rehearing denied*, 980 F. 2d 1449 (11th Cir. 1992) with United States v. McDade, 28 F.3d 283 (3d Cir. 1994), *cert. denied*, 514 U.S.1003 (1995). The D.C. Circuit has also held that the Speech or Debate Clause protects a member's conduct not just at legislative committee hearings, but also conduct arising out of legislative activity. In a 2021 case, then-Representative Adam Schiff successfully claimed that information gathering letters sent to technology companies were protected under the Speech or Debate Clause. *Ass'n of Am. Physicians & Surgeons v. Schiff*, 518 F. Supp. 3d 505, 518 (D.C.C. Feb. 2, 2021), aff'd, 23 F.4th 1028 (D.C. Cir. 2022).

[79] *Eastland*, 421 U.S. at 504 ("'A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to effect or change.'") (quoting McGrain v. Daugherty, 273 U.S.135, 175 (1927)); Graham v. Fulton Cnty Special Purpose Grand Jury, 143 S. Ct. 397 (2022) (mem.) (docket order indicating that Senator Graham may be compelled to testify but that the lower courts had held that his informal fact-finding was protected by the Speech or Debate Clause, and that protection was intact); Ass'n of Am. Physicians & Surgeons v. Schiff, 518 F. Supp. 3d 505, 518 (D.D.C. Feb. 2, 2021), aff'd, 23 F.4th 1028 (D.C. Cir. 2022 (information gathering letters sent to technology companies protected under the Speech or Debate Clause); United States v. Biaggi, 853 F. 2d 89, 103 (2d Cir. 1988) (concluding that "informal" legislative fact-finding conducted by a congressman was protected under the Speech or Debate Clause); Brown & Williamson Tobacco Corp. v. Williams, 62 F. 3d 408 (D.C. Cir. 1995) (documents voluntarily delivered to committee by private citizen protected); McSurely v. McClellan, 553 F.2d 1277, 1287 (D.C. Cir.1976) (*en banc*) ("acquisition of knowledge through informal sources is a necessary concomitant of legislative conduct and thus should be within the ambit of the [Speech or Debate] privilege…."); Gov't of the Virgin Islands v. Lee, 775 F. 2d 514, 520-21 (3d Cir. 1985) (fact-finding by individual legislator protected); Miller v. Transamerican Press, Inc. 709 F. 2d 524, 530 (9th Cir. 1983) (concluding that unofficial investigations by a single member are protected from civil discovery to the same extent as official investigations by Congress as a body); Securities and Exchange Commission v. Committee on Ways and Means, U.S. House of Representatives and Brian Sutter, 2015 U.S.Dist.LEXIS 154302 (S.D.N.Y. Nov. 13, 2015) ("[T]he applicability of the Speech or Debate Clause's protections does not hinge on the formality of the investigation….To the extent that responsive documents reflect communications from Greenberg to Sutter that are part of the subcommittee's informal information gathering concerning a matter that might be the subject of legislation, such documents need not be produced."); Webster v. Sun Co., Inc., 561 F. Supp. 1184, 1189-90 (D.D.C. 1983) (Congressional Research Service analyst's receipt of information from lobbyist protected), *vacated and remanded on other grounds*, 731 F. 2d 1 (D.C. Cir. 1983); Tavoulareas v. Piro, 527 F. Supp. 676, 680 (D.D.C. 1981) (acquisition of information by congressional staff, whether formally or informally, is an activity within the protective ambit of the Speech or Debate Clause.). *But see* Bastien v. Office of Senator Nighthorse Campbell, 390 F. 3d 1301, 1315-16 (10th Cir. 2005) (holding that clause does not protect informal information gathering by a member or his aides because such acts are not legislative acts).

[80] United States v. Dowdy, 479 F.2d 213, 223-24 (4th Cir. 1973) (clause protected congressman's meetings with federal prosecutor and federal housing agency officials where the "Congressman, who was chairman of a subcommittee investigating a complaint [against a construction company], [was] gathering information in preparation for a possible investigatory hearing."); Jewish War Veterans v. Gates, 506 F. Supp. 2d 30, 57 (D.D.C. 2007) (the Clause protects legislators' contacts with "interested organizations and members of the public," including lobbyists, "[t]o the extent that [legislators'] communications, discussions, or other contacts…constitute information gathering in connection with or in aid of [] legislative acts.").

[81] *Jewish War Veterans*, 506 F. Supp. 2d at 53 ("actual drafting of legislation [and] negotiating with other Members over it" are "indisputably legislative in nature" and therefore covered by the Speech or Debate Clause). *But see* Renzi v. United States, 651 F. 3d 1012 (9th Cir. 2011) (petitioner's conduct was found not to be actually legitimate fact-finding for negotiation over draft legislation, but was rather a criminally extortionate promise to introduce to introduce land-exchange legislation if the potential beneficiaries bought a tract of land from one of his partners who owed the petitioner money).

[82] McCarthy v. Pelosi, 5 F.4th 34, 39 (D.C. Cir. 2021) (holding that the challenged Resolution enabling Members to cast votes by proxy is "quintessentially legislative acts falling squarely within the Clause 's ambit" as it concern "core legislative acts.").

functions[83] and preparatory activities that are a normal and routine part of any hearing, speech, meeting, information-gathering effort or other legislative activity.[84]

But that case law clearly does not protect criminal conduct, such as bribery or extortion, which are not part of the legislative process.[85] Additionally, it appears the Clause provides no protection for what the Court has deemed "political" or "representational" activities, such as direct communications with the public,[86] speeches outside of Congress,[87] newsletters,[88] press releases,[89] private book publishing,[90] or even the distribution of official committee reports outside the legislative sphere.[91] According to the Court, these types of activities are not covered because they are not "an integral part of the deliberative and communicative processes" by which members participate in legislative activities.[92] Further, while the Clause protects certain contacts by members with the executive branch—such as investigations related to legislative oversight of the executive—other contacts, like assisting constituents in "securing contracts" and making "appointments with government agencies," are not protected.[93]

The Southern District of New York has also distinguished between legislative acts and promises to undertake those acts in the context of Speech or Debate protection. In 2024, Senator Robert Menendez of New Jersey and a number of co-defendants were indicted on charges of conspiracy to commit bribery, conspiracy to commit honest services fraud, conspiracy to commit extortion under color of official right,

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[83] *Gravel*, 408 U.S. at 616, 618; Pentagon Techs. Int'l Ltd. v. Committee on Appropriations, 20 F. Supp. 2d 41, 43-44 (D.D.C. 1998), *aff'd*, 194 F. 3d 174 (D.C. Cir. 1999) (clause protects analytical and investigative reports, related to a federal government program, generated by committee staff).

[84] *Gravel*, 408 U.S. at 629; *Johnson*, 383 U.S. at 173-76; MINPECO, S.A. v. Conticommodity Servs., 844 F. 2d 856, 861 (D.C. Cir. 1988).

[85] See *Brewster*, 408 U.S. at 526; *Helstoski*, 442 U.S. at 489 (holding that evidence can be introduced regarding corrupt agreements on the basis that "promises by a Member to perform an act in the future are not legislative acts").

[86] *See Brewster*, 408 U.S. at 512 (stating that "[a]lthough these are entirely legitimate activities, they are political in nature rather than legislative, in the sense the term has been used by the Court in prior cases. But it has never been seriously contended that these political matters, however appropriate, have the protection afforded by the Speech or Debate Clause.").

[87] *Id*.

[88] *Id*.

[89] *Id*.

[90] *Gravel*, 408 U.S. at 625.

[91] *McMillan*, 412 U.S. at 306.

[92] *Gravel*, 408 U.S. at 625.

[93] United States v. McDade, 28 F. 3d 283, 299-300 (3d Cir. 1994) (citing *Eastland*, 421 U.S.at 504-06), *cert. denied*, 514 U.S. 1003 (1995); *see also Brewster*, 408 U.S. at 512. A Third Circuit ruling in *United States v. Menendez*, 831 F.3d 155 (3d Cir. 2016), cast some doubt about the protections from prosecutorial use evidence of motivation in the exercise of alleged legislative activities. Senator Menendez was accused of having intervened with an executive agency on behalf of a constituent in exchange for personal gifts and campaign contributions. The Senator argued that the Speech or Debate privilege protected "any effort by a Member to oversee the Executive Branch, including informal efforts to influence it," and could not inquire into the motives behind such legislative activity. The appeals court rejected those claims, explaining that no inquiry into motivation is necessary if the act is "inherently" or "manifestly" legislative or non-legislative. But if the act is deemed by a court as "ambiguously legislative" such an inquiry into motivation is necessary to determine its legislative or non-legislative character. 831 F.3d at 166-73. The ruling raises substantial questions respecting its compatibility with above-noted Supreme Court precedents decrying inquiries into motivations. These questions remain unanswered, however, as the Supreme Court denied certiorari, *Menendez v. United States*, 580 U.S. 1198 (2017), and after the case ended in a hung jury on remand, the DOJ dismissed the charges rather than seek a retrial. Laura Jarrett et al., *Justice Dep't Won't Retry Sen. Bob Menendez*, CNN (Jan. 31, 2018), https://www.cnn.com/2018/01/31/politics/menendez-charges-dismiss.

and conspiracy for a public official to act as a foreign agent.[94] These charges stem from a scheme in which Menendez recommended a candidate for U.S. Attorney for New Jersey and steered foreign aid to Egypt.[95] Menendez argued that all four counts must be dismissed on the grounds that they violated the Speech or Debate Clause.[96]

The court found that "while Menendez's *performance* of the above-described legislative acts concerning the Egyptian Aid Scheme is protected by the Speech or Debate Clause, his *promise* to do the same is not."[97] These promises were not legislative acts, and were therefore not afforded protection under the Speech or Debate Clause. "While the Speech or Debate Clause recognizes speech, voting, and other legislative acts as exempt from liability that might otherwise attach, it does not privilege either Senator or aide to violate an otherwise valid criminal law in preparing for or implementing legislative acts."[98]

When Menendez later argued for release pending appeal on grounds that the admission of certain evidence violated the Speech or Debate Clause, the court pointed to *Renzi* to assert that violations of criminal law in the preparation for or implementation of legislative acts cannot be regarded as legislative acts that merit protection.[99] On July 16, 2024, Senator Menendez was convicted by a jury on all 16 counts. Currently, Senator Menendez is appealing the verdict on several grounds, including that the Speech or Debate Clause was not properly considered in the course of the case.

The courts also decided that the Speech or Debate Clause does not protect the House chaplain from being sued for discrimination after denying a request from a guest chaplain to deliver a secular invocation. The defendant, House Chaplain Patrick Conroy, moved to dismiss on the grounds that the chaplain lacked Article III standing and that the case was nonjusticiable under the political question doctrine and the Speech or Debate Clause. The district court rejected that argument based on a determination that selecting a guest chaplain is not a legislative act, but ultimately ruled in favor of Conroy, and the D.C. Circuit affirmed the district court's dismissal of the plaintiff chaplain's Establishment Clause claim.

C. Current Uncertainties as to the Reach of the Clause's Protections

There are at least two significant unresolved issues under the Clause. First, are the testimonial and documentary responses of a member to the investigative inquiries of the House or Senate Ethics Committees' "legislative acts" subject to absolute protection against compelled disclosure to the executive branch? Second, and most importantly, does the Clause encompass a "nondisclosure" privilege that provides an absolute protection against the compelled production of documentary materials and records that reflect legislative activities?

[94] *United States v. Menendez*, 720 F. Supp. 3d 301, 307 (S.D.N.Y. 2024).

[95] *Id.* at 308, 311.

[96] *Id.* at 306.

[97] *Id.* at 312.

[98] *Id.* (quoting *Renzi*, 651 F.3d at 1026).

[99] United States v. Menendez, 2025 WL 1212152, at *5 (S.D.N.Y. Apr. 25, 2025).

1. The Nature and Scope of the Member Privilege for Testimony before Ethics Committees

The Constitution, in providing absolute immunity for members from criminal prosecutions and civil suits for certain legislative acts, also empowers "[e]ach House [to] … punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member."[100] This authority of each house to discipline a member for "disorderly Behavior" is in addition to any civil or criminal liability that a member may incur for particular misconduct.[101] It is complementary to the Speech or Debate Clause and is an implicit suggestion that the legislature is responsible for effectively policing its protected domain.

There have been few litigated instances of attempts by prosecutors to utilize the testimony and documentary materials disclosed in committee ethics disciplinary proceedings—a total of three in the District of Columbia Circuit since 1978; but those rulings have aroused relevant academic and judicial critical attention.[102]

The initial ruling in this series was *Ray v. Proxmire*,[103] a 1978 case that arose out of a Senate Ethics Committee investigation of allegations that a Senator allowed his wife to use Senate rooms to assist her tour business.[104] In a response to the Committee Chairman's request for information regarding the claims, the Senator provided a letter that allegedly libeled the appellant and disparaged her business. The appeals court dismissed the libel claim as falling within the ambit of speech or debate protection, holding that since the Senator was "responding to a Senate inquiry into an exercise of his official powers, … [he] was engaged in a matter central to the jurisdiction of the Senate, and '[t]he claim of unworthy purpose does not destroy the privilege.'"[105] The court added "[t]hat there is no indication that that he disseminated his letter to anyone whose knowledge of its contents was not justified by legitimate legislative needs. Nor is there any suggestion that the statement objected to intimated anything not reasonably spurred by the subject of Chairman Cannon's request."[106]

The *Ray* court's reliance on the Senator's "exercise of his official powers" as the foundational rationale for its speech or debate holding was utilized to distinguish it from the situation presented in *United States v. Rose*.[107] That case involved a House Ethics Committee report on a member who borrowed money from his campaign and failed to disclose those liabilities, which violated House Rules and the Ethics in Government Act.[108] The report contained transcripts of the member's testimony detailing his explanations for each financial transaction at issue and the Committee's assessment of his explanations.[109] The *Rose* court held that the report was not protected by the Clause because "Congressman Rose was acting as a witness to facts relevant to a congressional investigation of his private conduct; he was not acting in a

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[100] U.S. Const. Art. I, Sec. 5, cl. 2.

[101] *See* Jack Maskell, Cong. Rsch. Serv., RL 31382, Expulsion, Censure, Reprimand and Fine: Legislative Discipline in the House of Representatives (2013).

[102] *See, e.g.*, United States v. Collins, 409 F. Supp. 3d 228, 253-54 (S.D.N.Y. 2019).

[103] 581 F.2d 998 (D.C. Cir. 1978) (per curiam).

[104] *Id*. at 999-1000.

[105] *Id.* at 1000, citing G*ravel and Tenney.*

[106] *Id.*

[107] 28 F.3d 181 (D.C. Cir. 1994).

[108] *Id.* at 184.

[109] *Id.* at 188.

legislative capacity."[110] The panel rejected the argument that the member's revelations, if made on the floor of the House, would have been protected, stating that "we rely not on the fact that Congressman Rose testified in a committee room but on the fact that his testimony was given in a personal capacity rather than 'in the performance of [his] official duties'; we focus on what Congressman Rose said, not where he said it."[111] *Ray* was distinguished on the grounds that since the Senator allegedly misused Senate rooms and thereby directly touched the institution of the Senate, it raised a possible violation of the Rules of the Senate. "Indeed, the *Ray* court pinned its holding on a finding that the Senate inquiry was into the 'exercise of [Sen. Packwood's] official powers.' By contrast, in this case, the House Ethics Committee was probing allegations that Rose failed to report certain personal financial transactions."[112] The *Rose* court also rejected the contention that allowing such testimony to be utilized in future executive prosecutions serves to undermine the efficacy of its constitutional mandate under the Discipline Clause because it would encourage non-cooperation of members in its investigations out of fear of providing ammunition for future lawsuits. It suggested that the possibility of such inhibitions could be avoided by declining to issue reports or by redacting portions of reports, or by amending the Ethics Act to restrict the jurisdiction of the Department of Justice (DOJ) or to exempt members of Congress from its strictures.[113]

In 2009, the District of Columbia appeals court appears to have muddled the law in this area still further. *In re Grand Jury Subpoenas*[114] concerned an investigation of a member's private funding by a lobbyist for a trip to Scotland. When media reports publicly questioned the inconsistencies in his disclosure statements, the member wrote to the House Ethics Committee to account for the irregularities and asserted that the trip was primarily for legislative fact-finding. The Committee opened an investigation and determined that the member had violated House Rules, but decided not to censure him when he agreed to donate the cost of the trip to the U.S. Treasury. Thereafter, a grand jury began an investigation of the member's conduct and issued subpoenas to the law firm and the individual lawyers who represented him before the Committee. The member intervened to quash the subpoenas on the grounds, among others, that the testimony and documents they called for were protected by the Speech or Debate Clause. The district court denied the motion to quash but an appeals court panel unanimously reversed, holding that the statements made to the Committee were protected by the Clause.

The majority of the panel rested its ruling on the *Ray* and *Rose* precedents, adopting their distinction between official and personal activity. The *Ray* situation was deemed closely analogous to the case before it because they both involved responses "directly spurred by the [Ethics Committee's] inquiry into whether [each] had abused his office."[115] The *Ray* court had found that the Senator's alleged act was an exercise of his "official powers." In contradistinction, the majority found that *Rose* dealt only with the member's "personal financial transactions" that were neither "done [nor] claimed to have been done in [the congressman's] legislative capacity," whereas in the situation before it the member's actions were either a use or abuse of his "official powers."[116] The majority therefore concluded that the Clause protected the member's testimony.[117]

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[110] *Id.*

[111] *Id.* (citing the formulation in *Brewster*, 408 U.S. at 512, rather than the broader standard put forth in *Gravel*, 408 U.S. at 625).

[112] *Id.* at 189.

[113] *Id.* at 190.

[114] 571 F.3d 1200 (D.C. Cir. 2009).

[115] *Id.* at 1203.

[116] *Id.*

[117] *Id.*

Judge Kavanaugh joined in the result of the majority opinion but issued a concurrence that was a blistering critique of its rationale. He declared that the adoption of the *Ray* and *Rose* distinctions between "official" and "personal" acts had caused "confusion" and "disarray," "distort[ed] the constitutional text" and "create[d] a host of practical and jurisprudential difficulties."[118] In his view, testifying before an ethics committee is itself the relevant act, rather than the action under investigation,[119] and therefore such testimony should always be protected.[120] Judge Kavanaugh saw the case as an intersection of the two clauses. He reasoned that the text of the Speech or Debate Clause, which protects "*any* Speech or Debate in either House," and that of the Discipline Clause, which grants expansive authority to discipline and sanction members "for violations of statutory law, including crimes; for violations of internal congressional rules; or for any conduct which the House of Representatives finds has reflected discredit upon the institution,"[121] taken together, applies to a member's statement to a congressional ethics committee as speech in an official congressional proceeding and thus falls within the protection of the Clause. Judge Kavanaugh relied heavily on *Gravel*'s statement that "[t]he heart of the Clause is speech or debate in either House,"[122] and on its formulation of the standard identifying covered legislative acts as "matters" that are "integral to the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation *or with respect to other matters which the Constitution places within the jurisdiction of either House.*"[123]

Emphasizing the "catch-all" portion of the standard, the judge concluded that a "*Member's* speech in an official House disciplinary proceeding qualifies under either prong of the *Gravel* test: Such a Member not only engages in 'Speech or Debate in either House' but also, by definition, takes part in communicative processes with respect to matters which the Constitution places within the jurisdiction of the House."[124] Judge Kavanaugh conceded that his broad reading of the Clause's protection will thwart executive investigations and prosecutions, including lying to Congress, but he countered that the Framers understood that consequence was necessary in providing for the essential structural safeguards to maintain the scheme of separated powers. He also noted that lying members do not get a free pass since they are subject to institutional punishments that include expulsion.[125]

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[118] *Id.* at 1203-04.

[119] *Id.* at 1206 ("The *Ray* court went off the rails, in my judgment, by focusing on the *subject matter* of the underlying disciplinary proceeding—and by applying a test that grants protection only when the investigation concerns a Member's official conduct, as opposed to his or her personal conduct.")

[120] *Id.* at 1207.

[121] Maskell, *supra* note 93, at 2.

[122] *Gravel*, 408 U.S. at 625.

[123] *Id.* (emphasis supplied).

[124] 571 F. 3d at 1205.

[125] *Id.* at 1206. See also, *Recent Cases, Constitutional Law-Speech or Debate Clause-D.C. Circuit Quashes Subpoenas for Congressman's Testimony to the House Ethics Committee,* 123 Harv. L. Rev. 564, 569-71 (2009) (agreeing with Judge Kavanaugh's critique of the D.C. Circuit's reliance on the "official/personal acts" distinction in dealing with the applicability of the Clause but disputing the judge's broad reading of both the texts of the Speech or Debate and Discipline Clauses and the *Gravel* test for identifying a protected legislative act).

The unresolved nature and scope of member protections under the Speech or Debate Clause for testimony and documentary material supplied during ethics committee proceedings awaits further Supreme Court guidance.[126]

2. Does the Clause Afford Members a Nondisclosure Privilege against the Compelled Production of Documentary Materials and Records?

The Supreme Court has held that, when applicable, the Speech or Debate Clause provides members and staff an absolute testimonial or discovery privilege against being compelled to testify about legislative matters.[127] The Supreme Court has never considered whether that protection extends to executive branch search or seizure of documentary materials and records that reflect legislative activities.

The application of the Speech or Debate Clause to legislative records is a matter of utmost importance to the Congress. While legislative work in 17th century England and in the early years of our republic may have been limited to floor speeches and votes, that has long since ceased to be the case. The legislative work of the House and Senate is a document-intensive process, with large volumes of written work product generated each day—including, but not limited to, drafts of legislation, reports and floor statements; analyses of legislative proposals in the form of emails and memoranda; correspondence concerning legislative and oversight matters; and materials gathered in response to congressional subpoenas.

Despite the importance of the issue and a clear circuit split, the Supreme Court has declined to review cases that raised the question of whether the Speech or Debate Clause includes a nondisclosure privilege. In *United States v. Rayburn House Office Bldg.*,[128] the D.C. Circuit squarely held that an FBI search and seizure of documents and computer hard drives from a Congressman's office ran afoul of the nondisclosure component of the Clause. This was consistent with a line of D.C. Circuit and D.C. District Court case law dating back to 1981.[129] But two other U.S. appeals courts have recently denied the availability of a documentary nondisclosure privilege: the Ninth Circuit, in *United States v. Renzi*,[130] and the Third Circuit, in *In re Fattah.*[131]

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[126] This uncertainty extends beyond the ethics committee to any committee that may have cause to investigate member activity. For instance, the January 6th Select Committee issued testimonial subpoenas to certain Members of Congress, a move with little precedent outside of the ethics committee process. *See, e.g.*, Claudia Grisales, *In an Unprecedented Move, the Jan. 6 Panel Subpoenas McCarthy and Other Republicans*, NPR (May 12, 2022), https://www.npr.org/2022/05/12/1098509467/mccarthy-jan-6-panel-subpoena-republicans.

[127] *Gravel*, 408 U.S. at 615-16.

[128] 497 F. 3d 654 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1295 (2008).

[129] *See, e.g.*, In re Grand Jury Subpoenas, 571 F. 3d 1200 (D.C. Cir. 2009) (reversing lower court order that declined to quash a subpoena for member records directed to member's lawyers); *Rayburn*, 497 F. 3d at 654 (execution of search warrant for member records violated Speech or Debate Clause); Brown & Williamson Tobacco Corp. v. Williams, 62 F. 3d 408 420 (D.C. Cir. 1995) (clause includes a documentary nondisclosure privilege); MINPECO, S.A. v. Conticommodity Servs., Inc., 844 F. 2d 856, 859-61 (D.C. Cir. 1988) (affirming lower court order quashing document subpoena to a House subcommittee); Pentagen Techs. Int'l, Ltd. v. Comm. on Appropriations, 20 F. Supp. 2d 41, 45 (D.D.C. 1988) (House committee's "investigative reports are protected from compulsory disclosure by the Speech or Debate Clause"), *aff 'd*, 194 F. 3d 174 (D.C. Cir. 1999) (per curiam); United States v. People's Temple of the Disciples of Christ, 515 F. Supp. 246, 248-49 (D.D.C. 1981) (quashing document subpoena for House committee records directed to committee chairman and clerk of the House); Order, United States v. Clemens, No. 1:10-cv-00223 D.D.C. Apr. 27, 2011) (quashing document subpoena to House committee).

[130] 651 F. 3d 1012 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012).

[131] 802 F. 3d 516 (3d Cir. 2015).

The *Rayburn* case involved the first, and, thus far, the only issuance and execution of a warrant to search and seize documents from a congressional office in the more than 135 years since the establishment of the DOJ in 1870. More commonly, the executive branch or a private party issues a subpoena for documents.

a. Congressional Response to Document Subpoenas

Congress's approach to responding to executive subpoenas has evolved over time, but even as procedures have changed, Congress has demonstrated a consistent understanding that the initial determination of Speech or Debate Clause applicability is to be made by the House or Senate itself, subject to court review. The Justice Department had long acquiesced in this understanding.[132] A brief review of the House's history and practice in responding to subpoenas is instructive.[133] While the House itself cannot expand the constitutional scope of the Clause, the *procedures* adopted to deal with the subpoenas can expand, and they were seen by the *Rayburn* court as a constitutionally appropriate alternative to the executive's execution of a search warrant that precluded the House's ability to conduct and oversee a protective review and make such initial privilege determinations.[134]

Utilizing its constitutional rulemaking power, the House, from the 1876 receipt of the first subpoena until 1980, established that subpoenas for documents were to be handled on a case-by-case basis and could be complied with only with the permission of the House by passage of a resolution to that effect.[135]

In 1980, the House adopted House Resolution 722, which created a new procedure for responding to subpoenas that remains in effect. It is currently incorporated into the House Rules as Rule VIII.

According to the legislative history that accompanied House Resolution 722,[136] the resolution was structured around two distinct, constitutionally based principles. First, compliance with properly issued subpoenas should be the ultimate goal. Second, it is the institution of the House of Representatives, through the Speaker of the House, which is to remain in control of all determinations with respect to application of the privilege and the protections it affords.[137]

By requiring written notice to the Speaker and subsequent notification to the House before refusal of compliance with a subpoena, the House has delegated much of the decision-making with respect to

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[132] *See* U.S. Dep't of Just. Manual § 9-85.000 et seq., https://www.justice.gov/jm/jm-9-85000-protection-government-integrity; Elliot Williams & Daniel Schwartz, *Newly Issued DOJ Guidance Adds Significant New Requirements for Criminal Investigations Relating to Members of Congress*, Inside Pol. L. (Nov. 10, 2023), https://www.insidepoliticallaw.com/2023/11/10/newly-issued-doj-guidance-adds-significant-new-requirements-for-criminal-investigations-relating-to-congress/.

[133] The following discussion of the evolution of House practice is not intended to imply the Senate practice is less protective. Under Senate Standing Rule XXVI.10 (a), all committee records are deemed to be the property of the Senate and may be released only by leave of the Senate by resolution. Senate response to subpoenas occurs on a case-by-case basis and is similar to the House's procedures before the latter were revised in 1980.

[134] For a detailed history of the House practice, *see* Morton Rosenberg, Jack Maskell & Todd Tatelman, Cong. Research. Serv., Legal and Constitutional Issues Raised by the Executive Branch Searches of Legislative Offices 13-22 (2006), http://electionlawblog.org/archives/Jefferson%20GD%20Memo.pdf.

[135] *See*, *e.g.*, 3 Hinds' Precedents of the House of Representatives, ch. 81 § 2661 (1907) ("Whereas the mandate of said Court is in breach of the privilege of the House: Resolved That the said committee and members thereof are hereby directed to disregard said mandate until further order of this House." In 1886 the House passed a resolution detailing the steps in a response to compulsory process that became a paradigm for future actions. *See* 17 Cong. Rec. 1295 (1886).

[136] The legislative history of the resolution consists of H. Rules Comm., H.R. Rep. No. 96-1116 (1980), as well as the extensive floor debate. 126 Cong. Rec. 25787-790 (1980).

[137] H.R. Rep. No. 96-1116 at 3, 8.

subpoenas to the House General Counsel's office.[138] These procedures ensure compliance with properly filed subpoenas, but they do not waive, impede, limit or in any way prevent the institution from asserting its position and protecting its interests with respect to intrusions by other branches of the government. Whether the institution asserts its interests through *amicus curiae* filings in the courts, or by adopting a resolution prohibiting compliance, under Rule VIII the House itself has a means of safeguarding its Speech or Debate privilege.

The above history is important context for understanding the House of Representatives' strenuous objections to the FBI's search in the *Rayburn* case, as well as the D.C. Circuit's ruling.

b. United States v. Rayburn House Office Building

In March 2005, the FBI began an investigation of Rep. William J. Jefferson to determine whether he and other persons had engaged in bribery and/or wire fraud. In May 2006, the FBI sought and obtained a warrant to search Rep. Jefferson's office in the Rayburn House Office Building. Previous warrants had been issued to search the Congressman's residences in both Florida and Washington, D.C., as well as his automobiles. A videotape of his receipt of $100,000 in marked bills from a cooperating witness led to the search of his D.C. residence, where $90,000 of the money was found in the freezer of his refrigerator. The affidavit contained statements from a Jefferson staffer that further evidence of the offenses would be found at his offices, a detailed itemization of evidence that was to be sought, and a description of the government's efforts to exhaust less intrusive approaches to obtain the documents.

No warrant to search a congressional office had ever been sought or obtained before. In apparent recognition of the unique and constitutionally sensitive action the DOJ was about to take, the supporting affidavit contained special procedures to guide and confine the search process, which were approved by the issuing judge. A search team of special agents from the FBI who had no role in the investigation (non-case agents) examine every paper document in the office and determine which were responsive to the list of documents sought. The non-case agents were forbidden from revealing any non-responsive or politically sensitive information they came across during the search. Responsive documents were then to be transferred to a "filter team" consisting of two non-prosecution team DOJ attorneys and a non-case FBI agent, who would review the documents to determine responsiveness and whether speech or debate

[138] The historical context of the 1980 rule revision is important for understanding its significance. For many years prior to 1980 Congress relied primarily on the Justice Department for its representation in litigation arising out of its constitutional powers, by statute and tradition. Starting in the late 1960s, Congress and the executive became involved in an increasing number of litigation disputes. A Senate committee estimated that between 1970 and 1977 Congress became involved in over 200 legal proceedings, many eventually requiring defense of the institution's constitutional powers. During that period the Justice Department defended members, offices, and committees of the Congress in at least 70 cases; and 60 additional legal matters arose in which the Senate Watergate Committee became involved. It became clear that the Justice Department's representation of congressional interests, and even representation by private counsel, was increasingly problematic and contrary to the effective advocacy of Congress's institutional interests. At approximately the same time, the department made it clear that in cases in which the substantive position of the Congress would, in its view, result in an infringement of presidential powers, or in which a congressional action, in its view, was clearly unsupportable, it could not, and would not, defend it. Often the department's determination of "conflicts of interest" did not occur until well after it had entered an appearance and had taken control of the litigation. These factors led to the creation of a counsel's office to represent Congress's institutional interest in both the House and Senate in the late 1970s. The history of the evolution from Congress's principal reliance on the Justice Department and private counsel for representation of institutional and member interests raised in judicial and administrative proceedings to the virtually exclusive reliance on the Offices of the House General Counsel and the Senate Legal Counsel may be found in the Senate's Report on the Public Officials Integrity Act. *See generally*, S. Rep. No. 95-170, at 8-21 (1977); *see also*, Charles Tiefer, *The Senate and House Counsel Offices: Dilemmas of Representing In Court the Institutional Client*, 61 L. & Contemp. Probs. 47 (1988); Rebecca M. Solokar, *Legal Counsel for Congress: Protecting Institutional Interests*, 20 Cong. & the Presidency 131 (1993); Frederick Taylor et. al., Cong. Rsch. Serv., RL30240, Congressional Oversight Manual 123-7 (2011).

protections could apply. Responsive documents deemed not covered by the Speech or Debate Clause were to be transferred to the prosecution team, which had to provide copies to Rep. Jefferson's attorney.

Papers potentially covered by the Clause were to be recorded in a log to be given to counsel, along with copies of the papers. According to the warrant, the potentially privileged papers were not to be supplied to the prosecution team until a court so ordered.

Finally, a special FBI forensics team would download all the electronic files from the office computers and transfer them to an FBI facility where a search would be conducted using court-approved search terms. Responsive data were to be turned over to the filter team. Responsive, potentially privileged computer documents were to be recorded in a log to be given to counsel, along with copies of the documents. The filter team would then request that the court review the potentially privileged documents.

On May 20, 2006, DOJ and FBI agents executed the search warrant at Rep. Jefferson's offices in the Rayburn Building. The search lasted approximately 18 hours and resulted in the seizure of two boxes of paper documents and the contents of every hard drive in the offices. The General Counsel of the House and Rep. Jefferson's private counsel sought entry into the offices to oversee the search, but the agents prohibited them from doing so. Rep. Jefferson immediately filed a motion for return of all the materials seized, arguing that the Speech or Debate Clause permitted him to review his files to segregate protected legislative materials before they could be perused and taken by executive agents.

The district court denied Rep. Jefferson's motion and upheld the constitutionality of the search and seizure. After an expedited appeal, the D.C. Circuit reversed. The appeals court concluded that the "compelled disclosure of privileged material to the executive during execution of the search warrant … violated the Speech or Debate Clause and the Congressman is entitled to the return of the documents that the court determines to be privileged under the Clause."[139]

In reaching its conclusion, the court rested on its previous case law emphasizing that a critical component of the Clause is the prevention of intrusions into the legislative process, and that the compelled disclosure of legislative materials is such a disruption, regardless of the proposed use of the material. The appeals panel noted the D.C. Circuit's prior holding in *Brown & Williamson Tobacco Corp. v. Williams*[140] that the Clause includes a nondisclosure privilege for both civil cases and criminal prosecutions, and it rejected the view that the testimonial immunity applies only when members or their aides are personally questioned because "[d]ocument[s] … certainly can be as revealing as oral communications … [and] indications as to what Congress is looking at provides clues as to what Congress is doing, or what it might be about to do."[141] Applying these principles to the search of Rep. Jefferson's offices, the court stated that:

> [T]his compelled disclosure clearly tends to disrupt the legislative process: exchanges between a Members of Congress and the Member's staff or among Members of Congress on legislative matters that may legitimately involve frank or embarrassing statements; the possibility of compelled disclosure may therefore chill the exchange of views with respect to legislative activity. The chill runs counter to the Clause's purpose of protecting disruption of the legislative process.[142]

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[139] *Rayburn*, 497 F. 3d at 663, 665.

[140] *Id.* at 416.

[141] *Rayburn*, 497 F.3d at 660, quoting *Brown & Williamson*, 62 F. 3d at 420.

[142] *Rayburn*, 497 F.3d at 661

The court then carefully distinguished between the lawfulness of searching a congressional office pursuant to a search warrant—which the court held was clearly permissible—and the lawfulness of the way the search was executed. It concluded that the Clause was violated because the executive's search procedures "denied the Congressman any opportunity to identify or assert the privilege with respect to legislative materials before their compelled disclosure to Executive agents."[143]

The court declined, however, to expressly delineate acceptable procedures that could avoid this violation in future searches of congressional offices, noting only that there appeared to be "no reason why the Congressman's privilege under the Speech or Debate Clause cannot be asserted at the outset of a search in a manner that also protects the interest of the Executive in law enforcement."[144] The court observed that the precise contours of these accommodations were a matter best left to negotiations between the political branches, but noted that Rep. Jefferson stated in his brief that:

> [H]e is not suggesting advance notice is required by the Constitution before Executive agents arrive at his office … Rather he contends legislative and executive interests can be accommodated without such notice, as urged, for example by the Deputy Counsel to the House of Representatives: "We're not contemplating advance notice to the member to go into his office to search his documents before anyone shows up," but rather that "[t]he Capitol [P]olice would seal the office so that nothing would go out of that office and then the search would take place with the member there."

Finally, the court declined to grant Rep. Jefferson's request for return of all of the seized documents. Instead, the court determined that its previous remand order "affords the Congressman an opportunity to assert the privilege prior to disclosure of privileged materials to the Executive" for electronic files.[145] With respect to the paper documents, the court concluded that, while the Clause's testimonial privilege prevents compelled disclosure of privileged documents, it does not prohibit "inquiry into illegal conduct simply because it has some nexus to legislative functions."[146] Rep. Jefferson was only entitled to a return of legislative documents protected by the Clause. Non-privileged materials did not have to be returned.[147] Further, the court ordered "the FBI agents who executed the search warrant to be continued to be barred from disclosing the contents of any privileged or politically sensitive and non-responsive items, and they shall not be involved in the pending prosecution or other charges arising from the investigation."[148]

Judge Henderson concurred in the majority's judgment denying Rep. Jefferson's motion to return all the seized documents, but rejected the majority's doctrinally significant holding that the FBI's review and seizure of legislative documents violated the Speech or Debate Clause. Judge Henderson charged the majority with over-reading *Brown & Williamson*, which she would have limited to situations involving civil subpoena requests for legislative documents.[149] Unlike subpoenas, she argued, search warrants do not require an affirmative act by the targeted party and therefore do not amount to the "questioning" protected under the Clause.[150] Judge Henderson thus argued that *Brown & Williamson*'s nondisclosure rule did not

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[143] *Id.* at 661-62.

[144] *Id.*

[145] *Id.* at 665-66.

[146] *Id.* at 665.

[147] *Id.*

[148] *Id.* at 666.

[149] *Id.* at 669 (Henderson, J., concurring).

[150] *Id.*

extend to criminal investigations because "it is well settled that a Member is subject to criminal prosecution and process"[151] and because a shield against all disclosure of all materials to the executive branch would "jeopardize law enforcement tools 'that have never been considered problematic.'"[152] Judge Henderson also argued that since the warrant was directed only at non-legislative documents, the creation of non-case filter teams and the requirement of judicial approval before any sharing with the prosecution team could not be seen as causing a constitutional disruption.[153]

Rep. Jefferson's specific privilege claims, based on his review of the documents pursuant to the appeals court's remand order, were evaluated by the district court. The documents for which he did not assert privilege were turned over to DOJ for review. Ultimately, Rep. Jefferson was convicted of 11 of the 16 bribery and fraud charges brought against him and received a 13-year prison sentence.[154] Ten of those 11 convictions were upheld by the Fourth Circuit in March 2012.[155]

c. United States v. Renzi

In 2009, former Rep. Richard Renzi was indicted on 48 criminal counts including extortion, money laundering, wire fraud, insurance fraud, and conspiracy related to alleged *quid pro quo* deals he orchestrated while representing Arizona's first district in the House of Representatives. Rep. Renzi was accused of promising to introduce land-swap legislation to ensure the payment of a $700,000 debt to him.

Rep. Renzi moved to dismiss the indictment on three grounds. First, he claimed that the charges were premised on legislative facts based on communications involving "negotiations" and "legislative fact-findings" protected by the Speech or Debate Clause. Second, he argued that the charges of the indictment were based on legislative acts and were the result of the government's introduction of direct or indirect legislative-act evidence in violation of the Clause that tainted the indictments. Third, Rep. Renzi argued that he was denied his right to a hearing in which the government would have the burden of proving that its evidence to support the charges against Renzi were independent of and not derived from evidence of his privileged acts. A district court denied the dismissal motions and a panel of the Ninth Circuit unanimously upheld the lower court's rulings.[156]

The appeals court rejected the contention that Rep. Renzi's "negotiations" and other interactions with parties to the proposed land-swap deals were protected "legislative acts." The court explained that his actions were merely "related to," but not an integral part of, his participation in House proceedings, noting that the Supreme Court in *Brewster* similarly declined to protect a Congressman's "negotiations with private parties," in part because extending the Clause to all matters similarly "related to the legislative process" would conceivably protect *any* activity by members of Congress and thereby "make [them] super-citizens, immune from criminal responsibility."[157] It rejected as well his argument that when it comes to land-swapping legislation, the act of negotiating with private parties "is analogous to discourse between legislators over the content of bills and must be a 'protected legislative act' under a

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[151] *Id.* at 670.

[152] *Id.* at 671.

[153] *Id.* at 669-70.

[154] United States v. Jefferson, 674 F.3d 332, 338 (4th Cir. 2012); Jerry Markon, *Ex-Rep. Jefferson (D. La), Gets 13 Years in Freezer Cash Case*, Wash. Post (Nov. 14, 2012).

[155] *Jefferson*, 674 F. 3d at 368.

[156] United States v. Renzi, 651 F.3d 1012 (9th Cir. 2011).

[157] *Id.* at 1021, quoting *Brewster*, 408 U.S. at 513-14.

broad construction of the Clause."[158] The court further concluded that in any event, since Rep. Renzi's negotiations were extortionate, they were not part of the "legislative process or function."[159]

Next, the court addressed Rep. Renzi's contention that his indictment should be dismissed because the grand jury was presented with evidence of protected legislative acts. The panel observed that normally a reviewing court does not inquire into the evidence used to support a grand jury indictment if it is valid on its face, but will do so to prevent violation of a valid privilege. The appeals court found several documents that should not have been presented but refused to dismiss the indictment because it found the protected evidence did not cause the grand jury to indict.

Finally, the court rejected the claim that Rep. Renzi was entitled to a hearing to determine whether the government used evidence protected by the Speech or Debate Clause to obtain non-privileged evidence, or whether the government could prove its case only with evidence derived from legitimate independent sources. The court recognized that Rep. Renzi's request was based on the premise that the Speech or Debate Clause provides a nondisclosure privilege that has not yet been recognized by the Supreme Court. Under that view, the appeals court noted, "it would require us to ignore the care with which the court has described the bounds of the Clause and to agree that legislative convenience precludes the Government from reviewing documentary evidence referencing 'legislative acts' even as part of an investigation into unprotected activity."[160] The court rejected that view, acknowledging that it "has its genesis" in the D.C. Circuit's ruling in *Rayburn*,[161] but stating that the court "disagree[d] with *Rayburn*'s premise and its effect and thus decline[d] to adopt its rationale."[162]

The appeals panel noted that the *Rayburn* court held that the Speech or Debate Clause provides a privilege against disclosure because allowing agents of the executive branch to review privileged materials without a member's consent would "distract" members and their staffs from legislative work. In the view of the appeals court, "distraction *alone*" cannot "serve as a touchstone for application of the Clause's testimonial privilege."[163] Instead, the court reasoned, the Clause protects against "*unnecessar*[*y*] distraction, a concern that is not at issue when the executive investigates a member for non-legislative (and therefore non-privileged) criminal activity, even if the investigation involves review of documentary legislative act evidence."[164] The appeals panel emphasized the practical consequences of a nondisclosure rule when the underlying action is not precluded by the Clause. "In that circumstance, the court has demonstrated that other legitimate interests exist, most notably the ability of the Executive to adequately investigate and prosecute corrupt legislators for non-protected activity."[165]

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[158] *Renzi*, 651 F.3d. at 1023.

[159] *Id.* at 1023-24.

[160] *Id.* at 1032.

[161] *Id.* at 1033.

[162] *Id.* at 1034.

[163] *Id.*

[164] *Id*. at 1036.

[165] *Id.*

The appeals court noted that the Supreme Court had repeatedly reviewed "legislative act" evidence, which it could not have done without the disclosure of the evidence to the judiciary. This demonstrates, the court said, "that the Clause does not incorporate a nondisclosure privilege as to any branch."[166]

The Supreme Court denied Renzi's petition for certiorari on January 12, 2012.[167] On June 11, 2013, he was convicted on 17 of the 32 felony counts charged.[168]

d. In re Fattah

Since *Renzi*, the Third Circuit has joined the Ninth Circuit in rejecting a documentary nondisclosure privilege under the Clause. In *In re Fattah*[169] the appeals court denied a motion to quash a warrant to search the personal e-mail account of Rep. Chaka Fattah, who was under investigation for fraud, extortion and bribery. The Third Circuit held that:

> [W]hile the Speech or Debate Clause prohibits hostile questioning regarding legislative acts in the form of testimony to a jury, it does not prohibit disclosure of Speech or Debate Clause privileged documents to the Government. Instead, as we have held before, it merely prohibits the evidentiary submission and use of those documents.

The court stated that recognizing a privilege against the disclosure of documents would allow members of Congress to "in effect, shield themselves from criminal investigations by simply citing to the Speech or Debate Clause. We do not believe the Speech or Debate Clause was meant to effectuate such deception. ... [I]t was meant to free 'the legislator from the executive or judicial oversight that realistically threatens to control his conduct as a legislator.'… It is clear that the purpose, however, has never been to shelter a member from potential criminal responsibility."[170]

e. Musgrave v. Warner

Shawn Musgrave, a freelance journalist, sought access to the largely classified Senate Select Committee on Intelligence report on the CIA's use of detention and interrogation in the wake of the 9/11 attacks.[171] When the Committee failed to respond to his request, Musgrave sued.[172] The district court dismissed the complaint, in part on the grounds that the Speech or Debate Clause prevents compelled disclosure of the report.[173] Musgrave conceded that the Committee reports were generally legislative documents, but argued that this report was different because its purpose was "not to aid legislative deliberation, but to create a record for the Executive Branch and the public."[174] The D.C. Circuit rejected this argument.

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[166] *Id.* at 1038.

[167] 132 S. Ct. 1097 (2012).

[168] *See* Press Release, U.S. Dep't of Justice, Former Congressman Richard G. Renzi Convicted of Extortion and Bribery in Illegal Federal Land Swap (June 11, 2013), https://www.justice.gov/opa/pr/former-congressman-richard-g-renzi-convicted-extortion-and-bribery-illegal-federal-land-swap.

[169] 802 F.3d 516 (3d Cir. 2015).

[170] *Id.* at 528-29.

[171] Musgrave v. Warner, 104 F.4th 355, 358 (D.C. Cir. 2024).

[172] *Id.*

[173] *Id.*

[174] *Id.* at 364.

Clarifying that nondisclosure privilege protects any document in congressmembers' possession by way of legislative acts, not only deliberative documents; it also found these documents deliberative.[175]

f. The Institutional Importance of a Document Nondisclosure Privilege

The D.C. Circuit's ruling in *Rayburn*, recognizing that the Speech or Debate Clause encompasses a nondisclosure privilege for documentary "legislative act" evidence amongst its absolute protections, has been rejected by two other circuits and widely criticized in the academic commentary.[176] But these arguments downplay the importance of a nondisclosure privilege in fulfilling our scheme of separation of powers. They misinterpret the Supreme Court's holdings and ignore other available vehicles and means for sanctioning members to deter them from abusing their offices. A recent incident in which the CIA searched a Senate committee's computers, discussed further below, illustrates the importance of protecting Congress's documents from executive intrusion.

i. Flaws in the Legal Arguments against a Nondisclosure Privilege

The Supreme Court has described "the central role of the Speech or Debate Clause" as "to prevent intimidation of legislators by the executive and accountability before a possibly hostile judiciary."[177] At the heart of the design is the provision of immunities for individual legislators from threats of legal retaliation for engaging in legitimate legislative activities. The Court has held that clause provides absolute protections for all activities in the legislative sphere that are "an integral part of the deliberative and communicative processes by which members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House."[178] It has ruled that

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[175] *Id.* at 365.

[176] *See, e.g.*, Jay Rothrock, *Striking a Balance: The Speech or Debate Clause's Testimonial Privilege and Policing Government Corruption*, 24 Touro L. Rev. 739, 771-75 (2008) (The Clause does not provide legislators with an absolute exemption from criminal process because that "approach severely undervalues the substantial public, and indeed governmental, interest in policing government corruption," and should be guided by the court's treatment of presidential executive privilege claims, which gave substantial weight to the interests of law enforcement because of its concern that withholding evidence in a criminal matter that is "demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic functions of the courts."); Note, *Recent Cases, D.C. Circuit Holds That FBI Search of Congressional Office Violated Speech or Debate Clause*, 121 Harv. L. Rev. 914, 918, 919 (2008) ("The [D.C. appeals] court correctly concluded that the clause confers a legislative privilege against the compelled disclosure of legislative materials to executive branch officials, but it incorrectly enshrined this privilege as absolute. Instead, the court should have better respected the separation of powers rationale underlying the Speech or Debate Clause by qualifying the nondisclosure privilege as the Supreme Court qualified the executive privilege in *United States v. Nixon* … The *Rayburn* court, ignored … the balancing concerns [the Nixon court found necessary in criminal cases] in narrowly focusing on legislative independence as an end in itself, rather than as a means toward preserving the separation of powers structure established in the Constitution."); Kelly M. McGuire, *Limiting the Legislative Privilege: Analyzing the Scope of the Speech or Debate Clause*, 69 Wash. & Lee L. Rev. 2125 (2012) ("[T]he Clause should be interpreted in a fashion that only protects as legislative actions statements that could become the basis of a libel suit or speech-based crime."); Note, Wells Harrell, *The Speech or Debate Clause Should Not Confer Evidentiary or Non-Disclosure Privileges*, 98 Va. L. Rev. 385, 385-86, (2012) (concluding that the Speech or Debate Clause intended to provide legislators only with an immunity from punishment for legislative acts and a privilege from testifying about those acts, and that the Supreme Court erred in extending an evidentiary privilege against use of such legislative acts during a bribery trial, which *Rayburn* further extended by prohibiting the discovery and disclosure of documentary materials containing mention of such acts based on the court's flawed interpretation. The court, by failing to give any "weight to the interest in anti-corruption as a matter of constitutional structure and instead overweigh[ing] the danger of legislative chilling effects," has "needlessly frustrate[d] the enforcement of anti-bribery laws which is necessary to punish and deter abuse of the public trust."); Matthew Patrick Dolan, *A Lesson in Speech or Debate Jurisprudence* (2013), http://erepository.law.shu.edu/student_scholarship/211 (arguing that in order to remain true to the constitutional text, the court should grant more deference to Congress's own disciplinary systems).

[177] *Gravel*, 408 U.S. at 617.

[178] *Id.* at 617, 624-25.

regarding such covered acts, the Clause grants members and their aides immunity from civil actions and criminal prosecutions, guarantees that they will not be subject to interrogation "in any other place" with respect to such legislative acts, and prohibits the use of testimonial/discovery evidence against them.

These rulings are similar to other structural separation of powers decisions, in which the Supreme Court has invalidated provisions of law or actions that either "accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch."[179] The salient characteristics of those rulings are that they derive from express constitutional provisions, admit of no exception, and allow no balancing of interests of need, necessity or convenience. These cases reflect the Court's concerns over "encroachment and aggrandizement that has animated our separation-of-powers jurisprudence and aroused our vigilance against the 'hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power.'"[180]

The *Renzi* and *In re Fattah* courts and Judge Henderson's dissent in *Rayburn* would retreat from those absolute protections in one instance: the discovery of documentary materials and records that reflect otherwise covered legislative activities. The rationale is that the Supreme Court did not speak to this issue when it had an opportunity to do so, and that in the absence of that guidance the lower courts must take into account an implied structural interest in the enforcement of the criminal laws of the nation before recognizing a documentary nondisclosure privilege.

But the Court in *Helstoski*, *Johnson* and *Gravel* did not discuss the question of document nondisclosure simply because it was not raised as an issue in those cases.[181] Those rulings did unequivocally acknowledge and apply the Speech or Debate Clause's absolute prohibition against the introduction of testimonial evidence of legislative acts against a member. Until the Court speaks directly to that issue, the sounder view is that its precedents, which affirm that the Clause absolutely protects members once it is determined that members are acting within the 'legitimate legislative sphere,"[182] apply to documentary disclosures. Interpreting the Clause to permit the compelled disclosures of legislative materials may also be seen as inconsistent with the Court's directive that the Clause be read "broadly to effectuate its purposes,"[183] despite the acknowledged possibility that its broad reading will allow legislative malefactors to evade sanctions.

The *Gravel* court recognized that its interpretation of the Clause must take into account "the complexities of the modern legislative process."[184] Legislators' and their aides' written communications are an integral part of that process. Both staff and cooperative information sources may become wary about their communications if they are not protected, rendering nugatory the recognized testimonial privilege.

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[179] Mistretta v. United States, 488 U.S. 361, 382 (1989).

[180] *Id*. (quoting INS v. Chadha, 462 U.S. 919, 951 (1983).

[181] *See* Securities and Exchange Commission v. House Committee on Ways and Means and Bruce Sutter, 2015 U.S. Dist. LEXIS 154302, slip op. at 61 (S.D.N.Y. Nov. 13, 2015) ("To the extent that *Renzi* asserts that *Helstoski*, *Johnson*, and *Gravel* demonstrate that no non-disclosure privilege exists under the Speech or Debate Clause, this Court disagrees. These cases do not address that issue.")

[182] *See Eastland*, 412 U.S. at 324.

[183] *See McMillan*, 412 U.S. at 311 (quoting *Johnson*, 383 U.S. at 180).

[184] *See Gravel*, 408 U.S. at 618.

ii. There Are Sufficient Alternate Institutional Measures Available to Impose Discipline and Restraint on Potentially Wayward Members

In addition, the rulings ignore the growing efficacy of internal congressional discipline, the number of successful criminal prosecutions that have not relied on evidence of a member's legislative acts, and elections, all of which monitor and punish misconduct by members. As indicated above, the Constitution provides that "each House may … punish its members for disorderly Behavior."[185] Each house has an ethics committee to investigate and apply such discipline, and since 2008, the House of Representatives has had an independent office, the Office of Congressional Ethics (OCE), responsible for its self-disciplinary process. That office is designed to carry out initial investigations of allegations against lawmakers and then recommends cases for the House Ethics Committee to pursue in formal actions. It acts almost like a grand jury handing up an indictment that would then be pursued by a prosecutor. At certain points its reviews and recommendations may be made public. It is led by a board of non-House members, is fully staffed and funded, and may consider any conduct involving rules and standards that govern members and staff. Since it began operations in 2009 there has been a dramatic increase in scrutiny and discipline of members, and a large number of cases resulted in referral and criminal prosecution without raising Speech or Debate concerns.[186] When the process reaches the public stage, there are indications that prospects for re-election may drop or that resignations may ensue. It is important for members, staff, and practitioners to understand that the OCE, now called the Office of Congressional Conduct or OCC,[187] does not have the authority to compel production. In other words, the OCC does not have subpoena authority.

Indeed, its effectiveness arguably may have been demonstrated by the political firestorm that accompanied the revelation that a provision in H. Res. 5—the package of rules that would govern the conduct of the business of the House during the 115th Congress—would have gutted the OCE's independence by placing it under the control of the House Ethics Committee and would have prohibited OCE staff from speaking publicly without Ethics Committee consent. The provision also would have prevented the office from investigating anonymous tips. The public criticism included a comment of displeasure from President-elect Trump. The provision was removed from H. Res. 5 before the January 3, 2017, vote of passage.[188]

Moreover, successful prosecutions of members are not uncommon. *Fattah* and *Renzi* are premised on the notion that the investigation and prosecution of corrupt members would be impossible if a document nondisclosure privilege were adopted.[189] But since 1901 there have been at least 88 successful prosecutions of members of Congress (81 representatives and 7 Senators).[190] In many cases the

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[185] U.S. Const., art. I § 5, cl. 2.

[186] *See* U.S. H.R. Off. of Congressional Ethics, https://oce.house.gov/. *See also* Jacob R. Straus, Cong. Research Serv., R40760, House Office of Congressional Ethics: History, Authority, and Procedures (2017).

[187] At the start of the 119th Congress, the House voted to change the name of the OCE to the Office of Congressional Conduct, stripping out the word Ethics in an attempt to avoid confusion with the House Ethics Committee, an entity that does possess subpoena authority.

[188] *See* Louis Jacobson, *The House GOP's Ethics Vote: What Was That All About, Anyway?*, PolitiFact (Jan. 3, 2017), https://www.politifact.com/trutho-meter/article/2017/jan/03/house-gops-ethics-vote-what-was-all-about-anyway/; Norm Ornstein, *The GOP's Ethics Disaster*, Atlantic (Jan. 3, 2017), https://www.the atlantic.com/politics/archive/2017/01/the-gops-ethics-disaster/512021.

[189] *See In re Fattah*, 802 F. 3d at 528; and *Renzi*, 651 F. 3d at 1036.

[190] *See* https://en.wikipedia.org/wiki/List_of_American_federal_politicians_convicted_of_crimes.

convictions were obtained (and affirmed) though the Clause operated to block the introduction of certain evidence. This occurred, for example, in the prosecutions of Rep. Thomas F. Johnson and Rep. Jefferson.

iii. The CIA's 2014 Search of the Senate Select Committee on Intelligence's Computers: An Illustration of the Importance of a Documentary Privilege

A confrontation between the Senate Select Committee on Intelligence (SSCI) and the CIA provides a dramatic example of the importance of constitutional limits on the executive branch's ability to access legislative documents. Congress's forceful defense of the documentary nondisclosure privilege is crucial for protecting congressional staff from surveillance or retaliation by the agencies they oversee.

In 2014, the CIA searched Senate Intelligence Committee computers without notice to the Committee or authorization from any court. The CIA filed a crimes report against Senate staff with the Department of Justice, falsely alleging that staffers had "exploited" a vulnerability in an agency computer system to gain unauthorized access to classified documents, in violation of the Computer Fraud and Abuse Act. In fact, staffers had used a CIA-provided search tool to search and read CIA documents relevant to a congressional investigation into the CIA's former detention and interrogation program—in other words, they conducted oversight.

SSCI Chairman Dianne Feinstein publicly disclosed the CIA's actions in a Senate floor speech in March 2014.[191] She said the CIA had improperly searched a SSCI computer network to determine how Senate staff had accessed documents called the "Panetta Review," in which the agency acknowledged "significant CIA wrongdoing" regarding its detention and interrogation program.[192] Feinstein stated,

> I have grave concerns that the CIA's search may well have violated the separation of powers principles embodied in the United States Constitution, including the Speech and Debate clause …. I have asked for an apology and a recognition that this CIA search of computers used by its oversight committee was inappropriate. I have received neither.[193]

Feinstein alleged that following the search, the CIA's Acting General Counsel had filed an unfounded crimes report against Senate staff with the Department of Justice. She said that the Acting General Counsel who filed the referral was "mentioned by name more than 1,600 times in our study" of the detention and interrogation program, which documented how he had "provided inaccurate information to the Department of Justice about the program."[194] Feinstein stated that she regarded the criminal referral "as a potential effort to intimidate this staff—and I am not taking it lightly."[195]

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[191] Press Release, Senator Dianne Feinstein, Floor Statement on Intel Committee's CIA Detention, Interrogation Report (Mar. 11, 2014), https://www.feinstein.senate.gov/public/index.cfm/2014/3/feinstein-statement-on-intelligence-committee-s-cia-detention-interrogation-report [hereinafter Feinstein Floor Statement].

[192] The "Panetta Review" was a CIA examination of the documents that the agency provided to SSCI for the committee's investigation. The CIA has characterized the review as "summaries of documents being provided to the [committee] … highlighting the most noteworthy information contained in the millions of pages of documents being made available." Senators and intelligence committee staff, however, have described it as a crucial narrative document, over 1000 pages long, in which the agency acknowledges flaws in the interrogation program it would later attempt to conceal. *See* Spencer Ackerman, *'A Constitutional Crisis': The CIA Turns on the Senate*, Guardian (Sept. 10, 2016), https://www.theguardian.com/us-news/2016/sep/10/cia-senate-investigation-constitutional-crisis-daniel-jones; Alex Rogers, *Mark Udall Outlines Secret Torture Review on Senate Floor*, Time (Dec. 10, 2014), http://time.com/3628132/mark-udall-panetta-review-torture/.

[193] Feinstein Floor Statement, *supra* note 175.

[194] *Id.*

[195] *Id.*

An investigation by the CIA Office of Inspector General (OIG) largely confirmed Feinstein's allegations. The Inspector General found that in January 2014, CIA computer technicians, acting on instructions from attorneys in the CIA General Counsel's office, had improperly searched the computer network that staffers used to review documents for the interrogation study (known as RDINet).[196] CIA personnel had "set up a user profile on RDINet that was configured with the same privileges" as a Senate staffer.[197] They used this dummy account to "run Google queries with the same permissions as a SSCI staffer to see what they were able to view in their search results" and to open some of the documents.[198]

According to the OIG report, these initial searches were conducted after CIA Director John Brennan had authorized attorneys to determine how Senate staffers had gained access to the Panetta Review, but Brennan said he did not "direct anyone to review SSCI systems."[199] Brennan later instructed CIA personnel to "stand down" on further searches until he spoke to the committee. A few days later, however, the CIA's Office of Security conducted additional searches of RDINet that included a "keyword search of all and a review of some of the emails of SSCI Majority staff members."[200]

On February 7, 2014, the CIA filed a crimes report with the Department of Justice, alleging that a SSCI staffer had violated the Computer Fraud and Abuse Act by "exploit[ing] a vulnerability" in the CIA's computer networks "to retrieve a number of CIA documents … to which he or she did not have authorized access."[201] OIG found that "there was no factual basis for the allegations made in the CIA crimes report," and that the "report was solely based on inaccurate information provided by" CIA attorneys.[202] The Justice Department declined to criminally investigate Senate staff, but has never provided an explanation for its reasoning.[203]

After receiving the Inspector General's report, Brennan apologized to Sens. Feinstein and Chambliss for the search and convened an "accountability board" to determine whether any CIA employees should be disciplined. The accountability board, however, rejected the OIG's conclusions and recommended against any form of discipline for any CIA employee.[204] It found that the CIA's actions had been "reasonable" attempts to balance the need "to ensure that a CIA system containing substantial sensitive material was secure" with the need "to safeguard the prerogatives of the Senate."[205]

The accountability board report did not mention the Speech or Debate Clause as one of these prerogatives. It is unclear what role, if any, the Clause played in DOJ's decision not to launch a full

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[196] CIA Off. of Inspector Gen., Report of Investigation: Agency Access to the SSCI Shared Drive on RDINet (July 18, 2014), https://www.cia.gov/library/reports/Redacted-July-2014-CIA-Office-of-Inspector-General-Report.pdf [hereinafter CIA OIG Report].

[197] *Id.* at 7.

[198] *Id.* at 7-8.

[199] *Id.* at 10-11.

[200] CIA Off. of Inspector Gen., Summary of Report (2014), https://www.fas.org/sgp/othergov/intel/ig-ssci.pdf.

[201] Letter from CIA Acting General Counsel to Attorney General Eric Holder (Feb. 7, 2014), https://www.cia.gov/library/reports/Redacted-July-2014-CIA-Office-of-Inspector-General-Report.pdf#page=47.

[202] CIA OIG Report, *supra* note180, at 13.

[203] *Id.*

[204] CIA, Final Report of the Rendition, Detention and Interrogation Network Agency Accountability Board (2014), https://www.cia.gov/library/reports/Redacted-December-2014-Agency-Accountability-Board-Report.pdf.

[205] *Id.* at 30.

criminal investigation. The CIA Inspector General resigned the same month that the accountability board issued its conclusions, though an agency spokesman said the timing was coincidental.[206]

Sen. Ron Wyden raised the incident with Brennan at a Committee hearing in 2016, asking Brennan: "Would you agree that the CIA's 2014 search of Senate files was improper?"[207] Brennan replied:

> Senator, as you well know, there were very unique circumstances associated with this whole affair … When it became quite obvious to CIA personnel that Senate staffers had unauthorized access to an internal draft document of the CIA, it was an obligation on the part of CIA officers who had responsibility for the security of that network to investigate to see what might have been the reason for that access that the Senate staffers had to that document.[208]

Brennan acknowledged that CIA officers had "inappropriate access … to five e-mails or so of Senate staffers" during their investigation, but he characterized this as a "de minimis" error that was "taken as a part of a very reasonable investigative action. But do not say we spied on Senate computers or your files. We did not do that. We were fulfilling our responsibilities."[209] Brennan also said that the staffers had acted "inappropriately" by accessing the Panetta Review.[210]

Wyden later said that SSCI "can't do vigorous oversight over the agency if the agency we're supposed to be overseeing is in fact secretly searching our files."[211]

This episode vividly demonstrates the potential chilling effect of executive branch access to documentary records of Congress's oversight and legislative activities, even if the documents are not introduced in court and members of Congress and their staffs are not forced to testify.

D. Recent Cases Involving Congressional Investigations and the Speech or Debate Clause

As discussed above, the Speech or Debate Clause protects both formal committee investigations and informal fact-gathering.

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[206] Mark Hosenball, *Exclusive: CIA Says Its Inspector General is Resigning*, Reuters, January 5, 2015, http://www.reuters.com/article/us-usa-cia-inspector-exclusive-idUSKBN0KE1BO20150105.

[207] *Worldwide Threats: Hearing before the S. Select Comm. on Intelligence*, 114th Cong. (2016). A video of the quoted exchange is available at https://www.wyden.senate.gov/news/press-releases/watch-wyden-questions-cia-director-on-searching-senate-files-director-of-national-intelligence-on-strongencryption.

[208] *Id.*

[209] *Id.*

[210] *Id.*

[211] Julian Hattem, *Top Dem: CIA Officials Thought Spying on Senate "Was Flat Out Wrong,"* The Hill (May 25, 2016), http://thehill.com/policy/nationalsecurity/281291-top-dem-cia-officials-thought-spying-on-senate-was-flat-out-wrong; U.S. Dep't of Just., Office of the Inspector Gen., No. 25-010, A Review of the Department of Justice's Issuance of Compulsory Process to Obtain Records of Members of Congress, Congressional Staffers, and the News Media, https://docs.reclaimthenet.org/25-010.pdf.

a. Factfinding Inquiries by Individual Members

i. In re Sealed Case (Rep. Scott Perry)

In the summer of 2022, in connection with its investigation into illegal efforts to overturn the 2020 presidential election, the Federal Bureau of Investigation seized Congressman Scott Perry's personal cell phone and created a forensic copy of its contents pursuant to a search warrant.[212] Rep. Perry subsequently filed a Motion for Nondisclosure, arguing that over 2,000 of the seized communications were privileged under the Constitution's Speech or Debate Clause.[213] After the district court ordered him to disclose the vast majority of those records, Rep. Perry appealed.[214]

Rep. Perry argued that the Speech or Debate Clause privilege protected communications on his cell phone with individuals outside the federal government and with executive branch officials because they constituted informal factfinding.[215] The D.C. Circuit held that categorizing all of these records as either protected or unprotected was incorrect because *Gravel* requires application of a fact specific test.[216] Because the district court had categorized all of these records as unprotected without proper individual inquiry, the D.C. Circuit vacated and remanded the case.[217]

On remand, the district court found that of the 2,055 documents at issue, 1,659 were not protected by the Speech or Debate Clause while 396 were protected.[218]

ii. In re Graham

In another case arising out of the 2020 election, the Northern District of Georgia granted in part and denied in part Senator Lindsey Graham's motion to quash a state court subpoena to appear before a grand jury investigating the elections in Georgia.[219] The Northern District of Georgia found that some informal factfinding inquiries by individual members of Congress.

b. Investigations by Congressional Committees

- *Ferrer*. In the Ferrer case, the Senate had conducted an extensive investigation into an Internet platform that allegedly permitted sex trafficking to occur on the platform. Over the course of the investigation, the Senate subpoenaed the platform and its CEO, Ferrer, for documents, advertisements, and other materials related to the platform.[220] The platform's CEO fought these disclosures, challenging the congressional subpoena in federal court, but during the course of the

[212] *In re Sealed Case*, 80 F.4th 355, 359-60 (D.D.C. 2023).

[213] *Id.* at 360.

[214] *Id.* at 361.

[215] *Id.* at 366.

[216] *Id.* at 367.

[217] *Id.*

[218] *In re* Search of the Forensic Copy of the Cell Phone of Rep. Scott Perry, No. 22-sc-2144, slip op. (D.D.C. Dec. 19, 2023).

[219] *In re* Graham, 625 F. Supp. 3d 1274, 1288 (N.D. Ga. 2022) *vacated as moot sub nom.* Fulton Cnty. Special Purpose Grand Jury v. Graham, 2022 WL 17881577 (11th Cir. Dec. 20, 2022).

[220] Senate Permanent Subcomm. on Investigations v. Ferrer, 856 F.3d 1080, 1083-84 (D.C. Cir. 2017).

litigation, he eventually turned over some of the documents sought.[221] The Subcommittee then completed its investigation and issued its final report. Because it no longer sought to enforce the subpoena, it argued that Ferrer's challenge had become moot.[222] Ferrer argued that the case remained live because the court could still afford him relief by "order[ing] the Subcommittee to return, destroy, or refrain from publishing the produced documents,"[223] but the D.C. Circuit held that such relief would be barred by the Speech or Debate Clause,[224] which forbids a court from "circumscribe[ing] the committee's use of material in its physical possession," which is "privileged legislative activity," *even* if the material "comes to a legislative committee by means that are unlawful or otherwise subject to judicial inquiry."

- *J6 Cases.* The investigation led by Special Counsel Jack Smith into the January 6 attack on the Capitol attempted to subpoena former Vice President Mike Pence about his role in the events of that day. (On January 6, Pence presided over the joint session of Congress during which the House and Senate received the electoral ballots cast in the 2020 presidential election.) Pence argued that the Speech or Debate Clause shielded his testimony.[225] The District Court for the District of Columbia agreed in part, holding that Pence enjoyed limited Speech or Debate privilege relating to his activities while presiding over the certification of the electoral count on January 6, and so could not be made to testify in response to questions about this legislative role.[226] The court emphasized, however, that the privilege applied only when the Vice President "performs acts integral to a legislative function," so did not shield him from the subpoena regarding, for instance, conversations in which he was urged to act unlawfully or *ultra vires*.[227]

- *De la Torre*. In 2024, the Senate Committee on Health, Education, Labor, and Pensions (HELP) subpoenaed Dr. Ralph de la Torre, who had led Steward Health Care before its unexpected bankruptcy earlier that year. De la Torre refused to testify regarding the bankruptcy and HELP ultimately held him in civil and criminal contempt.[228] De la Torre sued in response, seeking declaratory and injunctive relief based on a claim that the Committee's actions to enforce the subpoena were unlawful and violated his constitutional rights,[229] but the District Court for the District of Columbia dismissed the suit, holding that all of the actions that de la Torre challenged in his suit—the Committee's deliberations, vote, and subsequent attempts to enforce the subpoena—were core legislative conduct protected by the Speech or Debate Clause.[230]

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[221] *Id.*

[222] *Id.* at 1083.

[223] *Id.*

[224] *Id.* at 1086.

[225] *In re Grand Jury Subpoena* (Sealed Case), No. 1:23-mc-00035 (D.D.C. Mar. 27, 2023), available at https://s3.documentcloud.org/documents/23840379/penceruling1.pdf.

[226] *Id.* at 11.

[227] *Id.* at 16.

[228] De la Torre v. Cassidy, No. 1:24-cv-02776, 2025 WL 2651248, at *2 (D.D.C. Sept. 16, 2025).

[229] *Id.* at *4.

[230] *Id.* at *5.

c. Judicial Interference and Challenges to Congressional Subpoenas

The D.C. Circuit has held that the Speech or Debate Clause affords Congress the privilege to use materials within its possession without judicial interference, even when unlawful acts facilitated their acquisition.[231] The Clause in fact bars a court from ordering a subcommittee of Congress to return, destroy, or refrain from publishing subpoenaed documents.[232]

The Speech or Debate Clause typically prevents targets of an investigation or subpoena recipients from directly challenging a congressional subpoena by seeking declaratory relief or moving to quash a subpoena.[233] Instead, most challenges to the validity of a congressional subpoena would be available only as a defense to a contempt of Congress prosecution. However, to the extent the subpoena is directed at a third party in possession of a target's records (such as a bank), a lawsuit may be brought to enjoin the third-party recipient from complying. In that situation, institutional counsel for the chamber may intervene to defend the subpoena, thus negating any Speech or Debate Clause concerns.

[231] Brown & Williamson Tobacco Corp. v. Williams, 62 F.3d 408, 416 (D.C. Cir. 1995).

[232] Senate Permanent Subcomm. on Investigations v. Ferrer, 856 F.3d 1080, 1086 (D.C. Cir. 2017).

[233] *See* Meadows v. Pelosi, 639 F. Supp. 3d 62, 77 (D.D.C. 2022) ("[A]llegations of unlawfulness—including claims that legislative act violates Constitution or statute—do not abrogate Speech or Debate Clause immunity."); Jud. Watch, Inc. v. Schiff, 998 F.3d 989, 992 (D.C. Cir. 2021) ("The Permanent Select Committee's issuance of subpoenas was a legislative act protected by the Speech or Debate Clause" since "the Constitution gives the House of Representatives the sole power of impeachment."); Budowich v. Pelosi, 610 F. Supp. 3d 1, 16 (D.D.C. 2022) (holding that the House Select Committee's subpoena to a bank that sought financial records of a spokesperson for President Trump was not overbroad, did not exceed any legitimate legislative purpose, and therefore was protected under the Speech or Debate Clause).

11. Congress's Extraterritorial Investigative Powers

Overview

Enforcement of committee subpoenas for testimony and documents has been accomplished through criminal and civil court actions since 1935. Judicial assistance, however, has generally been unavailable when relevant witnesses or evidence are located abroad. The two vehicles by which U.S. courts may request assistance from foreign countries in obtaining evidence, including witness testimony, are mutual legal assistance treaties and letters rogatory (requests by domestic courts to foreign courts to take evidence from certain witnesses). Most such treaties are either expressly unavailable to assist legislative investigations or have been so construed. Similarly, although U.S. law authorizes courts to transmit letters rogatory to foreign courts (and to receive them as well), principles of international comity are often trumped by judicial determinations that compliance will not be reciprocated. As a consequence, special congressional investigating committees which have been authorized to obtain letters rogatory, and to seek other means of international assistance in gathering information in foreign countries, have in some instances had to resort to informal methods including imaginative improvisations—to obtain the information they need.

A. The Dilemma of Congressional Subpoena Enforcement in Foreign Countries

1. Letters Rogatory: Law and Practice

A letter rogatory, also known as a letter of request, is a formal request from a court in one country to the competent authority in another country asking that authority to serve process on an individual or entity located there, or to order the testimony of a witness or the production of documents or other evidence. Sections 1781 and 1782 of Title 28, United States Code, provide the current statutory framework for transmitting and receiving international requests for legal assistance and/or testimony for use in appropriate proceedings. These sections were revised in 1964 to facilitate the fair resolution of litigation arising from expanding international commerce and the proliferation of multinational corporations in the 1950s. The 1964 legislation was designed to clearly authorize the State Department to both transmit and receive letters rogatory for, among other matters, obtaining evidence and testimony abroad for use in proceedings in the United States. Section 1781 makes clear, however, that a court may transmit or receive letters rogatory without the involvement of the State Department if such a procedure is acceptable to the requested country.[1]

Section 1782 provides the basis for foreign and international tribunals to obtain discovery from individuals or entities located in the United States for use in foreign proceedings. Subsection (a) vests exclusive subject matter jurisdiction in the district court in which "a person" resides (or is found) to order the person to give testimony or to produce documentary evidence for use in a foreign tribunal. In 2004, the Supreme Court, in *Intel Corp. v. Advanced Micro Devices, Inc.*,[2] ruled that since the underlying purpose of Section 1782 is to encourage foreign countries to provide similar accommodations to U.S. courts, judicial assistance under the statute is not dependent on foreign courts' reciprocity. But the Court went on to emphasize that Section 1782 "authorizes, but does not require, a federal district court to provide assistance to a complainant," allows "a district court [to] condition relief on that person's

[1] *See, e.g.*, S. Rep. No. 88-1580 (1964); H.R. Rep. No. 88-1052 (1963).

[2] 542 U.S. 241 (2004).

reciprocal exchange of information," and sets forth factors to guide a district court's determination of whether assistance under Section 1782 is appropriate.[3] Among the factors noted is the ability of a court to "take into account the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal court judicial assistance."[4]

Important for present purposes is a principal requirement of Section 1782(a) that the requested discovery be "for use in a *proceeding* in a foreign or international *tribunal*, including criminal investigations conducted before accusation."[5] The terms "tribunal" and "proceeding" are inextricably related. The legislative history of the current version of Section 1782, enacted in 1964, makes it clear that the term "tribunal" was meant to include any official government body exercising *adjudicatory* functions. The 1964 amendments substituted the word "tribunal" for the word "court." The change, the Senate and House reports explain, was made in order to clarify that assistance under the statute is not confined to proceedings before conventional courts; it is equally available in connection with proceedings before foreign administrative and quasi-judicial agencies. But a governmental body whose primary function is to conduct investigations unrelated to judicial or quasi-judicial controversies, or which merely reports its findings to another governmental entity, would not qualify as a "tribunal."

Appeals courts have consistently followed this understanding.[6] In one instance involving a request for assistance under Section 1782 by a Canadian commission of inquiry, which was authorized to investigate and make recommendations, the court observed:

> The legislative history [of the 1964 revisions] does not indicate, however, that it was the purpose of Congress or the Administration to broaden the scope of international cooperation beyond activities of the courts and other quasi-judicial entities to encompass bodies whose primary functions are investigative … [N]othing in the foregoing [quotations from the House and Senate reports] indicates a congressional intent to include institutions whose purpose is to investigate and report to the executive or legislative branches of government. Rather, the crucial requirement is that the foreign body exercise adjudicative power with adjudicative purpose.[7]

The *Intel* court confirmed this reading of the congressional intent to cover only tribunals that engage in binding adjudicatory functions.

> As recast in 1964, Section 1782 provided for assistance in obtaining documentary and other tangible evidence as well as testimony. Notably, Congress deleted the words "in

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[3] 542 U.S. at 255, 262, 264-66.

[4] *Id.* at 264.

[5] Emphasis supplied.

[6] *See, e.g., In re* Letters Rogatory Issued by the Director of Inspection of the Government of India, 385 F.2d 1017 (2d Cir. 1967) (Section 1782 permits assistance only for proceedings before adjudicative forums; tax collector conducting a tax assessment with no adjudicative proceedings as a result is denied assistance); Fonseca v. Blumenthal, 620 F.2d 322 (2d Cir. 1980) (The Columbian Superintendent of Exchange Control is charged with protecting the country's balance of payments and is empowered to determine whether a violation has occurred and has an institutional interest in a particular result. "This interest is inconsistent with the concept of an imperial adjudication intended by the term 'tribunal.'"); *In re* letters Rogatory to Examine Witnesses from the Court of Queen's Bench for Manitoba, Canada, 488 F.2d 511 (9th Cir. 1973) (Canadian Commission of Inquiry is a governmental body whose purpose is to conduct investigations unrelated to judicial or quasi-judicial controversies and is denied Section 1782 assistance.).

[7] *In re* Letters of Request to Examine Witnesses, 59 F.R.D. 625, 628, 629 (1993), *aff'd*, 488 F.2d 511 (9th Cir. 1994).

> any judicial proceeding pending in any court in a foreign country," and replaced them with the phrase "in a proceeding in a foreign or international tribunal." … While the accompanying Senate report does not account discretely for the deletion of the word "pending," it explains that Congress introduced the word "tribunal" to ensure that "assistance is not confined to proceedings before conventional courts," but extends to "administrative and quasi-judicial proceedings." S. Rept. No. 1580, 88th Cong., 2d. Sess., p. 7 (1964); see H.R. Rept. No. 1052, 88th Cong., 1st Sess., p. 9 (1953) (same). Congress further amended Section 1782 (a) in 1996 to add, after the reference to "foreign or international tribunal," the words "including criminal investigations conducted before formal accusation."[8]

The *Intel* court took great pains to scrutinize the decisional processes of the governmental bodies involved, assuring itself that those bodies had connections with the exercise of adjudicative power or had adjudicative purposes before it accepted their argument that "'[w]hen the Commission acts on DG-Competition's final recommendation … the investigative function blur[s] into decision making.'" The court concluded: "We have no warrant to exclude the European Commission, to the extent that it acts as a first-instance decisionmaker, from Section 1782(a)'s ambit."[9] As yet, Congress has not seen fit to broaden by law the use of letters rogatory for use in aid of a legislative investigation. As a consequence, letters rogatory are typically a last resort used when no applicable mutual legal assistance treaty exists.[10]

2. Mutual Legal Assistance Treaties

Buttressing the absence of any apparent congressional intent to cover legislative investigations in its letters rogatory legislation, major international service conventions to which the United States is a party either expressly preclude their use by legislative entities or imply preclusion by their silence. For example, the United States and the United Kingdom have a mutual legal assistance treaty which provides for various forms of assistance in criminal investigations and prosecutions, including serving documents, transferring persons in custody for testimony, and, in some cases, compelling testimony.[11] Invocation of the treaty would likely be the method by which a U.S. court would seek assistance from the United Kingdom for evidence. Article 19 of the treaty defines the "proceedings" to which it applies. Specifically, it applies to a proceeding "related to criminal matters," including "any measure or step taken in connection with the investigation or prosecution of criminal offenses." In addition, it allows relevant officials, in their discretion, to "treat as proceedings for the purpose of this treaty such hearings before or investigations by any court, administrative agency or administrative tribunal with respect to the imposition of civil or administrative sanctions." Although this language might appear on its face to apply to congressional civil or contempt proceedings, the relevant proceeding would likely be considered the underlying congressional testimony rather than the contempt proceeding before a court. As such, British officials are therefore unlikely to treat a congressional committee hearing as a covered "proceeding" under the treaty.

Similarly, the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, entered into by the United States in 1975, provides in Article 1 that "[a] letter [of request] shall not be used to

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[8] *Intel Corp.*, 542 U.S. at 248-9.

[9] *Id.* at 257-58.

[10] *See* U.S. Dep't of State, *Preparation of Letters Rogatory*, https://travel.state.gov/content/travel/en/legal-considerations/judicial/obtaining-evidence/preparation-letters-rogatory.html ("Letters rogatory may be used in countries where multi-lateral or bilateral treaties on judicial assistance are not in force to effect service of process or to obtain evidence if permitted by the laws of the foreign country.").

[11] Treaty on Mutual Legal Assistance, U.S.-U.K., Jan. 6, 1994, T.I.A.S. No. 96-1202.

obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated."[12] Also, the Inter-American Convention on Letters Rogatory, entered into in 1995, provides in Article 2 that it "shall apply to matters held before the appropriate or other adjudicatory authority of the States Parties to this convention, that have as their purpose … [t]he taking of evidence and the obtaining of information abroad, unless a reservation is made in this respect."[13]

B. Illustrative Informal Actions Taken By Special Investigative Committees to Obtain Information Abroad

Since 1974 ten special congressional investigating committees have been vested with the authority to request the judicial assistance of U.S. courts in taking depositions or accessing information in foreign jurisdictions through the vehicle of letters rogatory, as well as the authority to seek other means of international assistance in gathering information in foreign countries.[14] It was well understood that the committees and their staffs were not being enabled to set up shop in foreign countries and begin subpoenaing foreign nationals or government officials to testify under oath or supply documents. Rather, such grants were designed to provide the committees with the necessary imprimatur of authority to utilize formal judicial and international treaty processes and to call on the Departments of State and Justice to provide their good offices in support of such efforts. The grants were also meant to give legitimacy to less formal ventures to obtain necessary information. Utilization of the currently available formal means under statutes or treaties has proven problematic. Resorting to informal methods has been more successful, but such *ad hoc* actions provide no precedential certainty.

In light of the foregoing legal analysis, the effect of a simple one-house resolution is unlikely to be seen by a foreign court as providing the lawful, reciprocal authority to invoke that court's cooperation with a U.S. court's letter rogatory. What little evidence there is about attempts by these panels to obtain judicial assistance does not engender much confidence in the efficacy of this route. But a close examination of the experiences of several of these inquiries indicates that a combination of persistence, artful negotiation and imaginative improvisation provided some measures of success.

1. Iran-Contra[15]

The Iran-Contra investigation illustrates the difficulties that committees may encounter in securing judicial assistance in obtaining information from abroad, and it provides a unique view of the use of unconventional tactics. The House and Senate select committees investigating the Iran-Contra matter were faced with formidable obstacles from the outset: a relatively short time frame to complete the inquiry; the parallel independent counsel investigation competing for the same evidence; witnesses and

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[12] Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, art. 1, March 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231.

[13] Inter-American Convention on Letters Rogatory, Jan. 30, 1975, 1438 U.N.T.S. 288.

[14] Nixon Impeachment Proceedings, H.R. Res. 803, 93d Cong. (1974); House Assassinations Inquiry, H. Res. 222,95th Cong. (1974); Church Committee, S. Res. 21, 94th Cong. (1974); Koreagate, H.R. REs. 252 and H.R. Res. 95th Cong. (1977); ABSCAM, H.R. REs.67 97th Cong. (1981); Iran-Contra, H.R. Res. and S. Res. 23, 100th Cong. (1987); October Surprise, H.R. Res. 258, 102d Cong. (1991); Senate Whitewater, S. Res. 120, 104th Cong. (1995); House Campaign Finance, H.R. Res. 167, 105th Cong. (1997); and Select Committee on National Security Commercial Concerns, H. Res. 463 105th Cong.(1998).

[15] The factual and legal background of the Iran-Contra committees' difficulties and successes is ably described in George W. Van Cleve & Charles Tiefer, *Navigating the Shoals of Use Immunity and Secret International Enterprises In Major Congressional Investigations: Lessons of the Iran-Contra Affair*, 55 Mo. L. Rev. 43 (1990). The authors were minority chief counsel and special deputy chief counsel, respectively, of the House select committee. *See also* Louis Fisher, *Investigating Iran-Contra*, Part II *infra*.

evidence in foreign countries with strict secrecy laws; and a hostile administration that would not cooperate in facilitating any possible diplomatic accommodations.

The independent counsel was qualified under Section 1782 and under a Swiss treaty with the U.S. to seek judicial assistance in his criminal investigation, and he did so. But the letters rogatory and treaty processes are time-consuming and, as it turned out, could not provide the independent counsel all that he needed.[16] The Committees sought a sharing agreement with the independent counsel, but he was reluctant to jeopardize his arrangements under the treaty with the Swiss government. Doubting whether they could use Section 1782, the Committees abandoned that route.

Instead, the Committees attempted to get key documentary evidence by compelling a witness to sign a consent to production which would allow them to access Swiss bank accounts. A district court found the tactic an unconstitutional attempt to compel a witness to incriminate himself. The Senate committee appealed, but the appeal was dismissed when the Committees got the desired documents by other means (described below). Ironically, a year later the Supreme Court upheld the tactic as valid because it was deemed not testimonial in nature.[17]

As a last resort, the Committees decided that in order to obtain the critical financial information, they had to grant use immunity to a principal target of the investigation in return for the records. The witness was hiding in Paris, however, and would not subject himself to U.S. jurisdiction. In order to establish their own investigative legitimacy and satisfy the witness as to the authoritativeness of the immunity grant, the Committees cloaked their chief counsel with the maximum amount of congressional authority by obtaining an order from a federal district court under Rule 28 of the Federal Rules of Civil Procedure, empowering him to obtain evidence in another country and bring it back. Finally, the House committee issued the chief counsel a commission, much like a subpoena in format, to further document his official status. Ultimately the witness turned over the financial documents and aided in deciphering and understanding them.[18] Though its legal sufficiency was never tested, the tactic proved effective and provided a major breakthrough in the inquiry.

2. House Select Committee on Assassinations

The House of Representatives Select Committee on Assassinations was established in 1976 to investigate the assassinations of President John F. Kennedy and Dr. Martin Luther King, Jr. and was given broad investigative powers, including the authority to gather information internationally.[19] The select committee made numerous applications through the courts for orders requesting international judicial assistance in various countries. It filed for letters rogatory to take the testimony of several Canadian citizens, but the Canadian government declined to honor them, asserting that it did not believe the applicable statutes empowered a congressional committee to seek them. But the Canadian government did arrange informal interviews with most of the Canadian citizens whose testimony was sought.[20] Also, one judge signed a committee request for a letter rogatory to the "appropriate official in Portugal" to assist in the conduct of a

[16] Van Cleve & Tiefer, *supra* note 15, at 75-77.

[17] *See* Doe v. United States, 488 U.S. 201 (1988).

[18] Van Cleve & Tiefer, *supra* note 15 at 78-80.

[19] *See* H.R. Res. 222, *supra* note 14.

[20] Appendix to Hearings before the Select Committee on Assassinations, 95th Cong., 2d Sess. Vol. II, 122 (1998).

deposition of a witness with respect to the assassination of Dr. Martin Luther King.[21] There is no indication in the record of whether the Portuguese government complied.

3. October Surprise

The October Surprise Task Force (Task Force), investigating allegations that there was a conspiracy to delay the release of Americans held hostage in Iran until President Carter left office, received significant cooperation from a number of countries without resort to formal processes. Only one country was totally uncooperative.

Government agencies in Great Britain and France from which the Task Force sought assistance generally complied with Task Force requests for documents, but many of the records sought could not be found. The government of Iran, contacted on numerous occasions through its permanent mission to the United Nations, denied the Task Force's request to travel to Iran to conduct interviews. Although the Task Force was able to contact several Iranian nationals while they were traveling outside of Iran, the inability to travel to Iran prevented access to many individuals who might have had knowledge relevant to the allegations.

The government of Israel also declined to allow the Task Force to travel to Israel to interview current and former government officials. The government of Israel did, however, appoint a special investigator to act as a liaison with the Task Force. The special investigator, an Israeli general, interviewed certain individuals on the Task Force's behalf. The Task Force also sought certain documents from Israel. The special investigator submitted the results of his investigation to the Task Force, and the Israeli government gave the Task Force permission to utilize these findings in its report.

The government of Germany permitted the Task Force to conduct interviews and depositions in Germany and made available its former foreign minister, Hans-Dietrich Genscher, who had played a critical role in the hostage negotiations.

The government of Algeria also provided valuable assistance to the Task Force. It invited the Task Force to Algiers and arranged for interviews. The Task Force noted in its final report that the Algerians were scrupulous in maintaining their discretion and neutrality while being generous with their time and insight. Algerian assistance was particularly useful in understanding the crucial last few months of the negotiations that ended the hostage crisis.

The Task Force—with the assistance of Spain, Interpol, Spanish police authorities, and the FBI's legal attaché in Madrid was able to obtain important hotel records. Similar cooperation was obtained directly from hotels in Paris.[22]

4. Koreagate

Of course, not all committee investigations enjoy the cooperation that the October Surprise Task Force received. One contrasting example is the investigation by the House Committee on Standards of Conduct into efforts by the Government of the Republic of Korea (ROK) to persuade members of Congress to reverse President Nixon's decision to withdraw troops from South Korea. Notwithstanding the obstacles it faced, the Committee persevered and ultimately achieved a measure of accountability.

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[21] *Id.* at 134-35.

[22] Joint Report of the October Surprise Task Force, H. Rep. No. 102-1102, 25-26 (1993).

The lead ROK operative was a Korean businessman, Tongsun Park, who was to funnel bribes and favors to the Congressmen. His chief contact was Rep. Mark Hanna. An important key to the investigation was the role played by one witness, Kim Dong Jo, a former ROK official who was not subject to compulsory committee process. In addition to the ROK government's reluctance to make the witness available, the Committee encountered difficulties with the Justice and State Departments, through which formal communications and negotiations with the ROK government had to be channeled. Those agencies had been dealing with aggravated political relations as a result of public revelations of the ROK government's alleged attempt to corrupt our political processes.

Over a period of a year, the Committee, with the assistance of the House leadership, engaged in public education, congressional pressure, negotiations, and, finally, congressional reprisal. Ultimately, an agreement was reached to submit written questions to the witness, which were delivered by the U.S. ambassador to the ROK minister of foreign affairs. The responses were returned by the minister to the U.S. ambassador. The Committee noted that the "procedure [was] designed to assure [the witness'] ability to falsify his answers with impunity and to preclude the Committee from having any ability to expose his lack of candor." The Committee recounts its efforts to obtain the testimony in its final report.[23]

Similar difficulties arose with respect to the U.S. government's request for the extradition of Tongsun Park by South Korea. Park came to the United States in April 1978 to testify before the House Committee, for which he was given full immunity. At the hearing, Park admitted to disbursing cash to 30 members of Congress. Ten members were seriously implicated. Three were censured and reprimanded by the committee; one was found not guilty after a trial for bribery, conspiracy, illegal gratuities, and tax evasion; one was found guilty of bribery; and four resigned their offices before punitive committee action could be taken.

5. The Investigation of the United Nations' Oil-for-Food Program

If the Iran-Contra investigation can be deemed a successful exercise in "imaginative improvisation," the Committee actions respecting inquiries into the United Nations' Oil-for-Food program scandal might be viewed as an example of "recognizing and taking advantage of opportunities."[24]

The Oil-for-Food program arose as part of a U.N. effort to address humanitarian concerns about the impact on the Iraqi people of the comprehensive economic sanctions that were imposed on Iraq following its invasion of Kuwait in 1990. From 1996 to 2003, the program allowed Iraq to sell oil, to have the proceeds of the oil sales deposited into a U.N. controlled account, and to use funds in that account to purchase food and other civilian goods. The program ended in 2003 with the invasion of Iraq that led to the deposing of Saddam Hussein. By 2004 numerous reports surfaced concerning corruption and other irregularities in the inception and administration of the program. Some of the issues raised concerned the conduct of U.N. Secretary-General Kofi Annan, particularly the propriety of an award of a large contract to a goods inspection company that employed Annan's son. In April 2004 Annan created an Independent Inquiry Committee (IIC), headed by former Federal Reserve Board Chairman Paul A. Volcker, to conduct an investigation of the management and administration of the program.

The IIC was structured to ensure independence from the U.N. while preserving the confidentiality, privileges and immunities attached to U.N. staff and documents. In particular, under the International

[23] *See* H.R Rep. No. 95-1817, at 88-94 (1978).

[24] The facts and circumstances that follow are essentially derived from the complaint and accompanying documents in the legal action styled *United Nations on Behalf of the Independent Inquiry Committee into the United Nations Oil-for-Food Program v. Parton*, No. 1 05CV00917RMU (D.D.C., May 9, 2005), and the Memorandum Agreement dated September 12, 2005 settling the litigation. Other fact sources will be separately noted.

Organization Immunities Act, 22 U.S.C. 288a (b)-(c), the archives of the United Nations are "inviolable" and the property and assets of the U.N. "wherever located and by whomsoever held, shall be immune from search...and confiscation." Similarly, the Convention on the Privileges and Immunities of the United Nations provides that "[t]he United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has waived its immunity."[25] Under Article VI of the convention, "experts on mission" "shall be accorded … inviolability for all papers and documents." Staff members of the IIC were designated by the U.N. as "experts on mission" and thus were immune from legal process during the course of their employment and after the termination of their employment relation.

Coincident with the establishment of the IIC, three congressional committees commenced inquiries into the Oil-for-Food program: the House International Relations Committee; the House Committee on Government Reform's Subcommittee on National Security, Emerging Threats, and International Relations; and the Senate Committee on Homeland Security and Governmental Affairs' Permanent Subcommittee on Investigations. The IIC and the Congressional Committees soon developed antagonistic relations, particularly over questions relating to Mr. Annan's personal culpability and the degree of access the Committees should be given to U.N. documents and personnel as part of their probes.[26]

In August 2004 the IIC hired Robert Parton, a former FBI agent, as a senior investigation counsel, with particular responsibilities for matters relating to the U.N.'s selection of certain contractors to conduct inspection and banking services for the Oil-for-Food program. Parton had broad access to most of the electronic records produced during the investigation. On March 29, 2005, the IIC issued its second interim report, which focused on Annan and the selection of the company that employed his son—a matter within the scope of Parton's responsibility. Two weeks later, he resigned his position. During the separation process, Parton averred that he had complied with the IIC's stringent confidentiality requirements, memorialized in a confidentiality agreement he had signed, and that he had not retained any documents. In fact, he had secreted a huge cache of documents. Shortly after he left he publicly acknowledged that his departure was the result of his disagreement with the findings of the second interim report with respect to Secretary-General Annan's culpability.

Parton hired a prominent Washington attorney who began negotiations with the House International Relations Committee. Those negotiations resulted in a "friendly" subpoena being issued by the Committee on April 29 and an immediate turnover of the documents. The IIC was not informed of the subpoena until May 4. Upon public disclosure of the subpoena service and document turnover, the House National Security Subcommittee and the Senate Permanent Subcommittee on Investigations issued and served subpoenas on Parton for the same documents. The House International Relations Committee was fully aware of the import of its actions. This is reflected in a May 4 agreement between the Committee and Parton, which gave the Committee custody of the documents and allowed Parton and his attorney to access separate, redacted, responsive, and non-responsive documents. Having custody of the documents assured that no legal action could be filed directly against the Committee for the return of the documents.[27]

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[25] 21 U.S.T. T.I.A.S. No. 6900, art. II, sec. 2 (signed Feb. 13, 1946, and ratified by the U.S. Senate on April 29, 1970).

[26] *See* Yochi J. Dreazen, *Intrigue Envelopes Competing U.N. Probes—Subpoenas. Leaks Allegations Mark Tensions Between Separate Oil-for-Food Investigations*, Wall St. J. (May 26, 2005).

[27] *See* Brown & Williamson Tobacco Corp. v. Williams, 62 F.3d 408 (D.C. Cir. 1995).

The IIC responded immediately, suing Parton to enjoin him from complying with the new House and Senate subcommittee subpoenas.[28] The court issued a temporary restraining order against compliance. All the parties commenced settlement negotiations, which concluded on September 12th with a memorandum agreement. The agreement allowed Parton to access the documents turned over to House International Relations and to select those that supported his disagreement with the IIC's Interim Report findings about Mr. Annan's culpability, as well as other matters that caused him to resign. Those documents, after being shared with the House and Senate Subcommittees, would be presented at a closed-door joint interview of Parton by the three Committees, which would be transcribed. IIC would be allowed to rebut in a subsequent joint interview without Parton or in a written rebuttal. Parton would be allowed to see a transcript of the rebuttal but would not be able to publicly reveal it. Once all the Committees had issued their final reports, which could be no later than January 15, 2006, all documents in the possession of the Committees had to be returned to the IIC. Some materials could be used in the final Committee reports subject to possible redaction by the IIC. Until all the documents were returned, each Committee was to safeguard the confidentiality of the subpoenaed documents. Upon signing the settlement, the House and Senate Subcommittees agreed to withdraw their subpoenas.

The settlement produced the information the Committees thought necessary for substantiating maladministration at the U.N. It also likely avoided an embarrassing legal determination that the House and Senate Subcommittee subpoenas were unenforceable because of the statutory and treaty immunities granted to the U.N. and its designated "experts on mission." Finally, the settlement also coincided with the IIC's final report five days prior, which effectively muted much of the substantive dispute. The report delivered a scathing rebuke of Annan's management of the humanitarian operation, but it essentially spread the blame generally to the U.N. Security Council and Annan's senior advisors. It found no evidence that Annan interceded on behalf of his son, but it revealed that the son may have obtained privileged business information from his father's personal assistant.[29]

C. Concluding Observations

The authority to obtain letters rogatory and to seek international assistance in obtaining evidence from foreign countries serves two important congressional purposes: It provides a committee with necessary authority to utilize formal judicial and international treaty processes, and it gives legitimacy to less formal ventures to obtain needed information. Even in the absence of a committee authorization, congressional investigative staff can assess policy, funding, reputational, and geopolitical leverage—along with diplomacy risks—in efforts to obtain information from extraterritorial parties who might be beyond the reach of formal legal process.[30]

Under the current state of the law, however, it is far from clear whether a foreign court would honor a request for international judicial assistance issued by a U.S. court. Because reciprocity appears to be a major element in a foreign court's decision whether or not to honor such a request, our country's court

[28] The suit raised no Speech or Debate issues since it was a third-party suit against the presumed holder of the subpoenaed documents and not against a congressional committee. *See* United States v. AT&T Co., 567 F.2d 121, 130 (D.C. Cir. 1977).

[29] *See* Colum Lynch, *Oil-for-Food Panel Rebukes Annan, Cites Corruption*, Wash. Post (Sept. 8. 2005), https://www.washingtonpost.com/archive/politics/2005/09/08/oil-for-food-panel-rebukes-annan-cites-corruption/08aaeb81-9cbc-488a-814d-27a629f51893.

[30] For example, the subcommittee majority staff report *Warlord, Inc.: Extortion and Corruption Along the Supply Chain if Afghanistan* (2010) reflects bipartisan interviews conducted in Dubai of Afghanistan-based investigative targets who did so based on expressed concern about reputational risks and continued U.S. government contracting eligibility. See also, Andrew McCanse Wright, *Extraterritorial Congressional Oversight*, 64 Wayne L. Rev. 227, 247 (2018) (noting that "American world leadership, economic globalization, and the technological revolution will generate greater extraterritorial oversight activity" and offering legislative proposals to fortify congressional efforts to obtain evidence abroad).

decisions evidencing a uniform unwillingness to enforce foreign requests that go beyond the context of judicial or quasi-judicial proceedings is likely to be insurmountable. That, combined with mutual assistance treaties that do not cover legislative requests and the absence of the cooperation or assistance of the State or Justice Departments, means that committees are often left to their own devices. A study of the efforts of the Iran-Contra committees in using subpoenas and immunity grants to obtain information disclosures; the tenacious and artful negotiations of the October Surprise Task Force; and the opportunism of congressional committees probing the U.N.'s administrative effectiveness could be instructive in appropriate future situations.

For illustrations of some of the oversight powers, tools, principles, and obstacles discussed in this chapter, see the following case study in the online version of this handbook:

Louis Fisher: *Investigating Iran-Contra*

12.
Congressional Interventions Into Agency Decision-Making

Introduction

Congressional committees frequently engage in oversight of the administrative bureaucracy. Such interventions involve varying degrees of intrusion into agency decision-making processes. On relatively rare occasions, these interventions have resulted in court actions challenging the congressional intercession as exertions of undue political influence on agency decision-makers, which violate the due process rights of participants in the proceedings in question and impugn the integrity of the agency decisional processes. Such challenges have arisen in the context of congressional intercessions into informal notice and comment rulemakings, ratemakings, informal decision-making, adjudications, and agency investigations that arguably would lead to an adjudicatory proceeding.

The courts, in balancing Congress's performance of its constitutional and statutory obligations to oversee the actions of agency officials against the rights of parties before agencies, have shown a decided preference for protecting congressional prerogatives. Where informal rulemaking or other forms of informal agency decision-making are involved, the courts will examine both the nature of the political pressure and its actual impact on the agency decision-maker, and will generally intervene only where that pressure has had the actual effect of forcing the consideration of factors that an agency's governing statutes exclude. Where agency adjudication is involved, courts apply a stricter standard, and a finding of an appearance of impropriety can be sufficient to taint the proceeding. But even here, courts generally decline to intervene unless the congressional pressure or influence is found to be directed at the ultimate decision-maker with respect to the merits of the proceeding, and does not involve legitimate oversight and investigative functions. Finally, when congressional involvement affects an agency's investigative process, courts will intervene only if it is in fact shown that an inquiry was instituted and subpoenas issued because of congressional influence, the agency knew its process was being abused, that it knowingly did nothing to prevent such abuse, and that it rigorously pursued frivolous charges.[1]

In the final analysis, judicial deference in this area appears to reflect the pragmatic conclusion that maintenance of Congress's ability to communicate as freely as possible with the administrative bureaucracy is essential to sustaining public acceptance of the modern administrative state. As one commentator has explained with relevance today as great as it was when made:

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[1] With respect to judicial standards concerning the exertion of congressional influence, *see, e.g.*, 2 Richard J. Pierce, Jr., Administrative Law Treatise §. 9.8, 675-79 (4th ed. 2002) [hereinafter Pierce Treatise] (courts should "recognize[] the need to permit political oversight with respect to policy issues Congress has entrusted to agency decision-makers."); Richard J. Pierce, Jr., *Political Control Versus Impermissible Bias In Agency Decision-making: Lessons from Chevron and Mistretta,* 57 U. Chi. L. Rev. 481 (1990) [hereinafter *Political Control*]; Note, *Judicial Restrictions on Improper Influence in Administrative Decision-making: A Defense of the Pillsbury Doctrine*, 6 J. L. & Pol. 135 (1989) (calling for imposition of "appearance of impropriety" standard in any agency proceeding involving congressional intervention); Susan Low Bloch, *Orphaned Rules in the Administrative State: The Fairness Doctrine and Other Orphaned Progeny of Interactive Regulation*, 76 Geo. L.J. 59 (1987) ("[M]embers of Congress should not be judicially constrained in their efforts to communicate with agencies" during the informal rulemaking process."); Archie Parnell, *Congressional Interference in Agency Enforcement: The IRS Experience*, 89 Yale L.J. 1360 (1980) ("The power of Congress to investigate the IRS is wide-ranging and may effectively be limited only by discretion and prudence."); Note, *Judicial Limitation of Congressional Influence on Administrative Agencies*, 73 Nw. L. Rev. 931 (1979) ("When the source [of congressional influence] is an authorized committee investigation, no administrative proceeding should be invalidated unless administrative bias as to adjudicative facts can be discerned.").

> The legitimacy and acceptability of the administrative process depends on the perception of the public that the legislature has some sort of ultimate control over the agencies. It is through the Congress that the administrative system is accountable to the public. If members of Congress 'be corrupt, others may be chosen.' The public may not, however, directly remove agency officials. The public looks to its power to elect representatives as its input into the administrative process. The public will perceive restrictions on Congress' power to influence agency action as reducing the accountability of agency officials. This will negatively affect the legitimacy of agency actions, as well as seriously erode the notion of popular sovereignty. Even administrators, who may not perceive legislative intrusions into the administrative process as being particularly desirable, recognize congressional supervision as a necessary function in a democratic society. The nature of the government requires that the legislature maintain a careful supervision over agency action.[2]

A. Case Law Regarding Congressional Influence on Agency Decision-making

Challenges to an agency's decision based on allegations of improper congressional influence rest on two foundation cases: a 1966 decision of the Fifth Circuit Court of Appeals in *Pillsbury Co.* v. *Federal Trade Commission*[3] and a 1971 ruling of the District of Columbia Circuit Court of Appeals in *D.C. Federation of Civic Associations* v. *Volpe*.[4] A relative handful of judicial rulings since then have grappled with the same set of issues. The case law makes it clear that there are limits to congressional intercession. It is often far less clear whether those limits have been breached, however, because of the relative dearth of decisions and courts' reluctance to venture beyond the factual confines of the dispute.

In determining whether Congress had an improper influence on an agency's actions, courts consider: (1) the type of proceeding involved (e.g. formal adjudication, informal decision-making, informal rulemaking, and alleged abuse of agency investigatory powers); (2) any statutory factors relevant to that type of proceeding; (3) the actual impact of congressional pressure on the agency decision-maker; and (4) the remedies that may be available.

1. Key Early Rulings

a. Pillsbury Co. v. FTC (1966)

The seminal case challenging congressional intercession into agency adjudicatory or quasi-adjudicatory proceedings is the 1966 decision of the Court of Appeals for the Fifth Circuit in *Pillsbury Co. v. Federal Trade Commission,*[5] which held a Federal Trade Commission (FTC) divestiture order invalid because the commission's decisional process had been tainted by impermissible congressional influence. At issue was a Senate subcommittee's intense interrogation of the FTC Chairman and several members of his staff on a key issue in an antitrust adjudication involving the Pillsbury Company, which was then pending before the FTC. At a subcommittee hearing, Senators expressed opinions on the issue and criticized the FTC for its interpretation of Section 7 of the Clayton Act in a previous interlocutory order in Pillsbury's favor.[6]

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[2] Comment, *Judicial Limitation of Congressional Influence on Administrative Agencies,* 73 Nw. L. Rev. 931, 941 (1979) (footnotes omitted).

[3] Pillsbury Co. v. Fed. Trade Comm'n, 354 F.2d 952 (5th Cir. 1966).

[4] D.C. Fed'n of Civic Ass'ns v. Volpe, 459 F.2d 1231 (D.C. Cir. 1971), *cert. denied* 405 U.S. 1030 (1972). (McKinnon, J., concurring in part and dissenting in part).

[5] 354 F.2d 952 (1966).

[6] Earlier in the proceeding, the FTC had issued an interlocutory order announcing it would use the rule of reason rather than a per se rule to evaluate acquisitions under the Clayton Act, 15 U.S.C. § 18 (2016).

The clear message of the Senate subcommittee's criticism was that the FTC should have ruled against Pillsbury.[7] In its subsequent final decision the commission ruled as the senators had suggested. The appeals court found the Senate inquiry to be an "improper intrusion into the adjudicatory process of the Commission," requiring the divestiture order to be vacated and remanded to the FTC. The court based its holding on the fact that the agency was acting in a judicial capacity. As a consequence, the private litigants had a "right to a fair trial" and the "appearance of impartiality" as part of the general guarantees of procedural due process when the agency is acting in a judicial or quasi-judicial capacity. The court emphasized the judicial nature of the function the agency was performing and the need to protect the integrity of that type of process. The court vacated the FTC's order because the subcommittee's action cast doubt upon the "appearance of impartiality" of the decision-makers, and not because of any finding that the commission had *actually* been influenced:

> [W]hen [a congressional] investigation focuses directly and substantially upon the mental decisional processes of a Commission in a case which is pending before it, Congress is no longer intervening in the agency's legislative function, but rather, in its judicial function. At this latter point, we become concerned with the right of private litigants to a fair trial and, equally important, with their right to the appearance of impartiality, which cannot be maintained unless those who exercise the judicial function are free from powerful external influences...
>
> To subject an administrator to a searching examination as to how and why he reached his decision in a case still pending before him, and to criticize him for reaching the "wrong" decision, as the Senate subcommittee did in this case, sacrifices the appearance of impartiality—the *sine qua non* of American judicial justice ….[8]

b. D.C. Federation of Civic Associations v. Volpe (1972)

D.C. Federation of Civic Associations v. Volpe,[9] decided by the D.C. Circuit five years later, provides an apt counterpoint to *Pillsbury*. *D.C. Federation* also involved a claim of undue congressional influence, but not within the context of a judicial or quasi-judicial proceeding, or a formal or informal rulemaking. *D.C. Federation* involved the approval by the Secretary of Transportation of construction of the Three Sisters Bridge across the Potomac River. Two issues were presented: first, whether the Secretary failed to comply with statutory requirements prior to approval of construction; and second, whether the Secretary's determinations were tainted by extraneous pressures.

With regard to the first issue, a majority of the court found that in a number of critical respects the Secretary had failed to comply with applicable statutory standards, which therefore required a remand for further agency determinations. Although this finding would have been sufficient to dispose of the case, Judge Bazelon chose to address the congressional intercession issue as well. The plaintiffs alleged that the secretary was influenced by the Chairman of the House Appropriations subcommittee's threat to deny funds for the district's proposed subway system unless the bridge project was approved. Writing for the court, Judge Bazelon stated that he was personally convinced that the impact of this was sufficient, standing alone, to invalidate the Secretary's action, stating, "Even if the Secretary had taken every formal step required by every applicable statutory provision, reversal would be required, in my opinion, because

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[7] The committee chairman's questioning of the FTC chairman, as well as that of the committee members was hostile and pointed and expressed the strongly held view that the FTC should use the per se rule. Both the senators and the FTC chairman frequently referred to the facts of the Pillsbury case to illustrate their views. *See Pillsbury*, 354 F.2d at 955-62.

[8] *Id.* at 964.

[9] *D.C. Fed'n*, 459 F.2d 1231 (1971), *cert. denied* 405 U.S. 1030 (1972).

extraneous pressure intruded into the calculus of considerations on which the Secretary's decision was based."[10]

Judge Bazelon stated that although Judge Fahy, another member of the panel, found it unnecessary to decide the case on this independent ground, he concurred that the Secretary's decision would be invalid if based in whole or in part on the pressures emanating from Representative Natcher: "Judge Fahy agrees, and we therefore hold, that on remand the Secretary must make new determinations based strictly on the merits and completely without regard to any considerations not made relevant in the applicable statute."[11]

Judge Bazelon's opinion makes it clear that the court's standard—that extraneous congressional influences actually shown to have had an impact on an agency decision will taint such administrative action[12]—was crafted for the special administrative circumstances of the situation before it: where the decisional process was neither judicial nor legislative in nature.

> [T]he underlying problem cannot be illuminated by a simplistic effort to force the Secretary's action into a purely judicial or purely legislative mold. His decision was not "judicial" in that he was not required to base it solely on a formal record established at a public hearing. At the same time, it was not purely "legislative" since Congress had already established the boundaries within which his discretion could operate. But even though his action fell between these two conceptual extremes, it is still governed by principles that we had thought elementary and beyond dispute. If, in the course of reaching his decision, Secretary Volpe took into account "considerations that Congress could not have intended to make relevant," his action proceeded from an erroneous premise and his decision cannot stand …[13]

The court appeared to view undue influence cases as classifiable on a continuum. Consistent with this approach, if a proceeding is one in which judicial or quasi-judicial functions are being exercised, then the highest standard of conduct is required, and a showing of interference with merely the "appearance of impartiality," without proof of actual partiality or other effect of the extraneous influences, is all that is necessary.[14] If the decision-making is "purely legislative" (policymaking) in nature, such as takes place in informal rulemaking, then the courts will be most deferential, even in the face of heavy extraneous pressures, to the political nature of the process. Finally, where a decisional process involves application of ascertainable legislative standards by an agency official in a situation that cannot be categorized as either judicial or legislative, i.e., informal decision-making, then a claim of impermissible interference will be sustained only on a showing of actual effect. The courts appear to have been guided by this suggested mode of analysis.

c. A Critique of Pillsbury and D.C. Federation

The rulings in *Pillsbury* and *D.C. Federation* have received surprisingly limited attention over the years, but what commentary there is has been generally critical, emphasizing both courts' failure to give proper

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[10] *D.C. Fed'n*, 459 F.2d at 1245-46.

[11] *Id.*

[12] *Id.* (Bazelon, J.) (emphasizing he believed that under the circumstances of the case, the congressional threats involved were taken into account by the Secretary: "In my view, the District Court clearly and unambiguously found as a fact that the pressure exerted by Representative Natcher and others did have an impact on Secretary Volpe's decision to approve the bridge").

[13] *Id.* at 1246-48 (footnotes omitted).

[14] The Court quite clearly accepted the Pillsbury doctrine. See id. at 1246 notes 75-78.

weight to the values of the political process in such cases.[15] An influential 1990 article by Professor Richard J. Pierce, Jr., a leading administrative law scholar, reflects practical concerns raised by the decisions.[16] Pierce agrees that the *Pillsbury* court reached a defensible result in light of the circumstances presented: the contested issues of fact were at least arguably adjudicatory in nature rather than legislative and the intense interrogation could be viewed as pressure to resolve the facts against Pillsbury, thereby creating the appearance of impropriety. Pierce's concern, however, is that the Fifth Circuit did not decide the case on this narrow ground, but announced the far broader principle that "[w]hen [a congressional] investigation focuses directly and substantially upon the mental decisional processes of a Commission in a case before it, Congress is … intervening [impermissibly] in the agency's adjudicatory function."[17] Application of such a broadly stated prohibition in future cases, Pierce asserts, could result in findings attributable to congressional pressure without regard to the actual context of the congressional proceeding and "would constitute an unjustified judicial interference with the political process of policymaking."[18]

> Whether to apply the rule of reason or a per se rule to acquisitions under the Clayton Act is purely a policy decision … Legislators should be free to express their views on this policy issue, and FTC commissioners should be free to change their minds and adopt those views. This is the political process functioning properly. It is of no consequence to the judiciary whether the FTC changes its policy because it is persuaded by the merits of the legislators' arguments, or because it fears that the legislature will retaliate … Similarly, the courts should not distinguish between policy decisions made through rulemaking and policy decisions developed in adjudicatory proceedings. To paraphrase Justice Holmes, judicial process values should trump political process values only when an agency has singled out an individual for adverse treatment.[19]

While finding *Pillsbury's* holding defensible, Professor Pierce deems *D.C. Federation* indefensible, "stand[ing] for the principle that two politically accountable branches cannot compromise their frequently differing policy preferences."[20] In Pierce's view, the case was about a political dispute over the allocation of transportation funds between the administering agency and the key congressional appropriating subcommittee. The Secretary preferred seeing a subway built; the Subcommittee (and Congress) wanted a bridge built. After a heated public dispute, they reached a political compromise whereby both projects would go forward. But the appeals court intervened, finding that the Secretary's decisions, which were part of the political deal, were infected with impermissible bias as a result of legislative branch pressure. In the words of the court, "the impact of this pressure is sufficient, standing alone, to invalidate the Secretary's action."[21] In Professor Pierce's view, *D.C. Federation* is hard to explain in a democracy in which two politically accountable branches of government share the power to make policy. The agency was not adjudicating a dispute involving individual rights; nor was it resolving contested issues of adjudicative fact. Perhaps the case stands for the principle that the two politically accountable branches cannot compromise their frequently differing policy preferences. But if so, it is a singularly arrogant decision. The Constitution created a system of shared and coordinated policymaking by the two

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[15] *See* commentaries listed in note 1, *supra*.

[16] *Political Control*, *supra* note 1.

[17] *Id.* at 500 (quoting *Pillsbury*).

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *D.C. Fed'n*, 459 F.2d at 1244.

politically accountable branches… our nation would be ungovernable in the absence of constant policy compromises between the executive and legislative branches.[22]

As will be seen in the following review of the undue influence case law since the decisions in *Pillsbury* and *D.C. Federation*, Professor Pierce's pragmatic views appear to have been influential.

2. Adjudicatory Rulings Since Pillsbury

Courts since *Pillsbury* have continued to recognize the vitality of that precedent, but only one court has actually overturned a quasi-judicial agency proceeding on grounds of undue political influence. The most recent judicial rulings have evinced a clear predilection to defer to congressional actions where they involve the legitimate exercise of legislative oversight and investigative functions.

a. Koniag v. Kleppe (1975)

In the only ruling of its kind since *Pillsbury*, a district court set aside adjudicatory decisions of the Secretary of the Interior with respect to the eligibility of several communities to receive land and money under the Alaska Native Claims Settlement Act (ANSCA), at least in part because it found improper congressional pressure exerted on the Department and the Secretary.[23] A congressional subcommittee held oversight hearings on the administration of the act while the proceedings in question were pending. The district court found that the hearings went substantially beyond the oversight function, as members "probed deeply" into the details of pending cases.

> The stated purpose of the hearings was to present a forum for discussing the implementation of the Act but in fact the Committee, through its chairman and staff members, probed deeply into details of contested cases then under consideration, indicating that there was 'more than meets the eye.' The entire rule-making process was re-examined, travel vouchers and other information were sought to probe the adequacy of the investigations made, all papers in the pending proceedings were demanded, the accuracy of data and procedures was questioned, and constantly the Committee interjected itself into aspects of the decision-making process.[24]

Two days before the Secretary made his determination on the eligibility of the villages, the Subcommittee Chairman sent a letter to him requesting that he postpone his decision on the matter pending a review and opinion by the Comptroller General as to whether "village eligibility and Native enrollment requirements of ANSCA have been misinterpreted in the regulations and that certain villages should not have been certified as eligible for land selections under ANSCA."[25] On these facts the district court vacated the Secretary's eligibility decisions and reinstated the decisions initially rendered by the Bureau of Indian Affairs (BIA).

On appeal, the D.C. Circuit Court of Appeals disagreed in part with the lower court's application of the relevant law but not with its validity. With regard to the Chairman's conduct of the hearings, the appeals court found fault with the district court's ruling because none of the agency officials subjected to the Chairman's interrogations was an agency decision-maker, and

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[22] *Political Control*, *supra* note 1, at 496-97; *see also* Pierce Treatise, *supra* note 1, at 676-78 (reiterating and updating his 1990 critique of *Pillsbury* and *D.C. Federation*).

[23] Koniag v. Kleppe, 405 F. Supp. 1360 (D.D.C. 1975).

[24] *Id.* at 1371.

[25] *Id.*

> even if [the Court] assume[s] that the *Pillsbury* doctrine would reach advisors to the decision-maker, Mr. Brown [a close advisor to the Secretary who briefed him on the cases at the time he decided to approve the Board's recommended decisions] was not asked to prejudge any of the claims by characterizing their validity. The worst cast that can be put upon the hearing is that Brown was present when the subcommittee expressed its belief that certain villages had made fraudulent claims and that the BIA decisions were in error. This is not enough.[26]

With regard to the Chairman's letter, however, the Court of Appeals found "it compromised the appearance of the Secretary's impartiality," and thereby tainted the decision, citing *Pillsbury* approvingly. But rather than reinstate the BIA decisions, the appeals court remanded the matter to the Secretary of the Interior, since three and a half years had passed and a new Secretary of a new administration had taken office, thus making possible a fair and dispassionate treatment of the matter.[27]

b. Gulf Oil Corporation v. FPC (1977)

Other than *Koniag,* reviewing courts have consistently upheld congressional intercessions into adjudicatory proceedings against undue political influence challenges. In *Gulf Oil Corporation v. FPC,*[28] for example, petitioners sought to overturn a Federal Power Commission (FPC) order requiring delivery of larger quantities of natural gas by Gulf Oil in adherence with a contract executed pursuant to a previous FPC order. In upholding the order, the appeals court rejected a claim that members and staff of the FPC had been subjected to improper interrogation and interference in the decision of the matter by the House Interstate and Foreign Commerce Committee's Subcommittee on Oversight and Investigations. The court conceded *Pillsbury's* relevance to such an adjudicatory proceeding but said that it had to be sensitive to the legislative importance of congressional committees on oversight and investigation and recognized that "their interest in the objective and efficient operation of regulatory agencies serves a legitimate and wholesome function with which we should not lightly interfere."[29]

Balancing the interests of integrity of an adjudicatory proceeding and congressional oversight, the court found determinative distinctions between *Pillsbury* and the case before it. First, the court found that the subcommittee was not concerned with the merits of the agency's decision, as was the situation in *Pillsbury,* but "was directed at accelerating the disposition and enforcement of the FPC's compliance procedures."[30] Nor did the court find any effort to influence the commission in reaching any decision on the specific facts of the case or any factual prejudice. Any intrusions into the merits of the FPC's decision were deemed "incidental to the purpose of accelerating" the agency's disposition of the case. Those "incidental intrusions" were found not to have had serious influence on the agency because (1) the interrogation did not reflect the majority view of the subcommittee; (2) the agency did not accede to members' requests; and (3) the ultimate resolution of the issue was the same as it had been in proceedings concluded a year prior to the hearings in question.[31] The court thus concluded that the claim of prejudice could not be sustained under the facts and circumstances of the case.

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[26] Koniag, Inc., Uyak v. Andrus, 580 F.2d 601, 610 (D.C. 1978).
[27] *Id.*
[28] Gulf Oil Corp. v. Federal Power Comm'n., 563 F.2d 588 (3d Cir. 1977).
[29] *Id.* at 610.
[30] *Id.* at 611.
[31] *Id.*

c. Peter Kiewit Sons' Co. v. U.S. Army Corps of Engineers (1983)

In *Peter Kiewit Sons' Co. v. U.S. Army Corps of Engineers*,[32] an appeals court dealt with the effects of a Senator's prior congressional investigations on the subject of debarment of government contractors convicted of bid-rigging and similar offenses, and his recommendations and status inquiries to agency officials contemporaneous with an ongoing debarment proceeding. The plaintiff, the subject of the debarment proceeding, claimed that the Senator's persistence in the subject area, and his particular interest in his case, compromised the integrity of the administrative proceeding. The district court agreed. On appeal, the D.C. Circuit reversed.

The appeals court acknowledged that a judicial or quasi-judicial proceeding could be invalidated by the appearance of bias or pressure and that under that standard "pressure on the decision-maker alone, without proof or effect on the outcome, is sufficient to vacate a decision."[33] Thus, "[t]he test is whether 'extraneous factors intruded into the calculus of consideration' of the *individual* decision-maker."[34] In the case before it, the court found neither actual nor apparent congressional interference since the Senator had never communicated directly with the ultimate decision-maker in the debarment, the assistant judge advocate general for civil law, nor was it shown that that official was even aware of the Senator's communications.

d. State of California v. FERC (1992)

More recent appellate court rulings continue the trend of the courts declining to interfere with congressional attempts to influence quasi-adjudicatory proceedings, clearly emphasizing judicial recognition of the important constitutional role of oversight and investigation. In *State of California v. FERC*,[35] an applicant for a license to build a hydroelectric facility challenged the award of a conditioned license on the grounds that letters from the Chairman of the House Energy and Commerce Committee unduly influenced the entire sequence of Federal Energy Regulatory Commission orders which resulted in the conditioned license.

In three letters to FERC, the Chairman had complained that the agency had not followed a recently enacted dispute resolution procedure under the Federal Power Act.[36] In response to those complaints, FERC reopened dispute resolution negotiations with state and federal fish and wildlife agencies prior to the conclusion of the licensing process. The Chairman also sent two letters to the agency urging it to review its two-decades-old interpretation of the Federal Land Policy and Management Act (FLPMA) as giving FERC exclusive jurisdiction over federal hydroelectric development. The Chairman put forth a contrary view and requested and received support for that view in a report by the General Accounting Office (GAO). FERC, after initially rejecting the Chairman's contention and reaffirming its long-held interpretation during the course of the licensing proceeding, reversed its course after receiving the GAO report.

The appeals court rejected both objections, holding that neither rose "to the level of undue congressional influence described in *Pillsbury* nor do they adversely affect the appearance of impartiality in this case."[37] FERC's decision to open the dispute resolution process after receipt of the Chairman's letters was

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[32] Peter Kiewit Sons' Co. v. U.S. Army Corps of Engineers, 714 F.2d 163 (D.C. Cir. 1983).
[33] *Id.* at 169.
[34] *Id.* at 170 (emphasis by court).
[35] State of California v. FERC, 966 F.2d 1541 (9th Cir. 1992).
[36] 966 F.2d at 1552.
[37] *Id.*

designed, the court found, to "correct a procedural problem" and "was based on its own independent analysis of the record in this proceeding, and was an effort to establish fair procedures to allow the parties and the Commission to investigate."[38] Since the negotiation requirements were so recent both the Chairman "and the Commission were understandably concerned about getting off to a good start."[39] With respect to the successful urging that FERC change its long held interpretation of FLPMA, the court explained that *Pillsbury* was not implicated because "FERC gave a reasoned explanation for its reversal of its original interpretation of FLPMA, and this provides substance for its claim that it addressed and resolved the right-of-way issue under its own independent and detailed analysis of the issue."[40] The court concluded, "[i]n short, [the Chairman's] letters, expressing his views on the 10(j) and FLPMA issues, do not constitute the type of intense and undue congressional influence that was present in *Pillsbury.*"[41]

e. ATX, Inc. v. U.S. Department of Transportation (1994)

In *ATX, Inc. v. U.S. Department of Transportation*,[42] the appeals court upheld the Department of Transportation's (DOT's) denial of an application by ATX, Inc. to operate a new airline in Boston, Atlanta and Baltimore/Washington. The court found that DOT's denial was reasonable, and was not unduly influenced by vocal, hostile, and intense opposition of members of Congress to the ATX application.

Congressional opposition to ATX arose even prior to the filing of its application, based largely on the perceived reputation of Frank Lorenzo, its founder and majority owner, from his previous record managing a major airline. Twenty one members of Congress wrote the secretary of transportation urging him to deny ATX's application even before it had been filed, because of Lorenzo's alleged unfitness to own and operate an airline.[43] Most of the signatures on the letter were members of the House committee with jurisdiction over DOT, including the chairs of the full committee, the aviation subcommittee, and the oversight subcommittee.

After ATX filed its application, at least 125 House and Senate members wrote the Secretary to declare their opposition. Two Congressmen introduced legislation to prohibit Lorenzo from re-entering the airline industry.[44] The Secretary responded by acknowledging receipt of the letters, refusing to comment on the merits, and putting the correspondence in a file for "contacts outside the record of the case."[45] During the hearing on ATX's application one of the congressional letter writers was allowed to testify as to his opposition. Ultimately the Department rejected the application on the ground that ATX "lacked both managerial competence to operate an airline and a disposition to comply with regulatory requirements."[46]

In rejecting the undue influence challenge, the court acknowledged that the widespread and loud congressional opposition toward the applicant in this quasi-judicial proceeding required close judicial scrutiny to allay due process concerns with the alleged appearance of bias.

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[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] ATX, Inc. v. U.S. Dep't of Transp., 41 F.3d 1522 (D.C. Cir. 1994).
[43] *Id.* at 1524.
[44] *Id.* at 1525.
[45] *Id.* at 1526.
[46] *Id.* at 1526.

The court commented that the influence with which it was concerned is "when congressional influence shapes the determination of the merits." The court commented that the lengthy opinion supporting the decision based on the administrative record "was clear and open to scrutiny and [the] decision was fully supported by the record." The court also noted that the secretary of transportation "did not reverse the [Administrative Law Judge]'s recommendation nor was the merits decision a close one on the record."[47] The testimony of the Congressman at the hearing did not create "a fatal appearance of bias as it was based almost entirely on information already available to the ALJ, was void of threats, and was not relied on in any of the decisions, which were accompanied by extensive findings and reasons."[48] The court concluded:

> … Here, however, the nexus between the pressure exerted and the actual decision makers is so tenuous and the evidence so adequately establishes ATX's ineligibility for an airline certificate that we conclude political influence did not enter the decision maker's "calculus of consideration."[49]

f. Schaghticoke Tribal Nation v. Kempthorne (2010)

Another ruling addressing claims of improper political influence in quasi-adjudicatory agency proceedings encapsulates the above-describe trend in judicial deference, in a dispute that was more intense and acrimonious than any of the others. *Schaghticoke Tribal Nation v. Kempthorne*[50] involved the Schaghticoke Nation's (STN) 2002 petition to the Bureau of Indian Affairs (BIA) of the Department of the Interior (DOI) for "acknowledgement" under BIA rules that it was an Indian tribe legally eligible for various protections, services and benefits from the federal government (including exemption from state gambling laws). In January 2004, after an extended review process, the acting assistant secretary of DOI formally determined that the STN had met the legal criteria for acknowledgment, despite difficulties with respect to two of the criteria.[51]

There was an immediate negative and fierce reaction directed at DOI from Connecticut's Governor, Attorney General, and a majority of the state's congressional delegation. Throughout 2004 and 2005 elected officials, individuals, and spokespersons lobbied the Interior Secretary, the BIA, the White House and even the district court to reverse the determination. The House and Senate subcommittees that oversaw DOI held a number of hearings focused on the recognition decision, where lawmakers and witnesses called for legislative invalidation of the agency determination and the imposition of a moratorium on all BIA acknowledgement proceedings.[52]

Opponents of tribal recognition filed a request for reconsideration of the decision with the Interior Board of Indian Appeals (IBIA). In May 2005 the IBIA vacated the determination, and remanded the case to the BIA for further consideration. In October 2005, the Department of the Interior formally denied the STN's acknowledgement petition.[53]

The STN challenged the validity of the denial on the grounds that it was an impermissible product of undue political influence. The district court, relying heavily on the *Peter Kiewit* and *ATX* precedents, held

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[47] *Id.* at 1528-29.

[48] *Id.* at 1529-30.

[49] *Id.* at 1530; *see also* Pierce Treatise, *supra* note 1 (discussing, with approval, the appeals court ruling in *ATX*).

[50] Schaghticoke Tribal Nation v. Kempthorne, 587 F. Supp. 2d 389 (D. Conn. 2008), *aff 'd* 587 F. 3d 132 (2d Cir. 2009), *cert. denied* 131 S. Ct. 127 (2010).

[51] *Id.* at 402.

[52] *Id.* at 402-04.

[53] *Id.* at 408-09.

that the determinative focus in a challenge to the integrity of an agency's adjudicative process is not on the political maelstrom that surrounds it, but whether the political pressure was intended to and actually did cause the responsible agency decision maker to be influenced by factors not relevant to the controlling statute.[54] Critical to that determination was the court's finding that in early 2005 the Interior Secretary had validly delegated to James Cason, the Associate Deputy Secretary, some of the duties of the then-vacant position of Assistant Secretary for Indian Affairs, including acknowledgement decisions. The court credited Cason's testimony, and that of others, that he was not privy to or influenced by the hearings or any of the *ex parte* communications that took place. The court concluded, "Here … the nexus between the pressure exerted and the actual decision-maker is tenuous at best, and the evidence adequately establishes STN's ineligibility for tribal recognition."[55] On appeal, the Second Circuit upheld the district court's decision, relying on similar reasoning.[56]

g. State of Connecticut v. U.S. Dep't of Interior (2020)

In *State of Connecticut v. U.S. Dep't of Interior*,[57] Connecticut and the Mashantucket Pequot Tribe alleged that the Secretary of the Interior unlawfully declined to approve an agreement that would have allowed them to construct a casino in Connecticut. After the district court dismissed their original complaint, the plaintiffs moved to amend it by adding new allegations, including that the Secretary's decision was impermissibly influenced by political pressure. The plaintiffs alleged that the Secretary rejected an amendment to secretarial procedures that would have permitted them to start construction on the casino after he met with multiple members of Congress from Nevada, where MGM Resorts—which backed competing casinos in the northeast—was a major employer and political backer.[58] According to the plaintiffs, this decision was an "eleventh hour" reversal from the position senior Interior Department officials had previously told them the Secretary would take. Citing *ATX* and *Schagticoke Tribal Nation*, the district held that the plaintiffs could amend their complaint because they had plausibly alleged that political pressure was applied to the Secretary and that it caused him to rely on improper factors.[59]

h. Committee on Ways & Means, U.S. House of Representatives v. U.S. Dep't of Treasury (2021)

In the *Committee on Ways & Means, U.S. House of Representatives v. U.S. Dep't of Treasury*,[60] the Treasury Department and President Trump argued that the Committee's subpoena for the president's tax returns was analogous to the improper congressional interference of *Pillsbury* because it would influence an ongoing Internal Revenue Service audit of the returns.[61] The district court rejected that analogy. It reasoned that, in *Pillsbury*, senators had directly questioned an agency head in a public hearing about why he reached a certain decision on an adjudication. By contrast, the court found no similar nexus between any alleged pressure on the IRS and the actual decision-maker. The putative interference rested on speculation that IRS officials "could not help but be influenced" by the Committee's work and public

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[54] *Id.* at 409-10.

[55] Schaghticoke Tribal Nation v. Kempthorne, 587 F.3d 132 (2d. Cir. 2009).

[56] American Public Gas Ass'n v. Fed. Power Comm'n, 567 F.2d 1016 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 907 (1978).

[57] State of Connecticut v. U.S. Dep't of Interior, 363 F. Supp. 3d 45 (D.D.C. 2019).

[58] *Id.* at 64.

[59] *Id.* at 64-65. The plaintiffs voluntarily dismissed their lawsuit shortly after the district court's decision, so there was no decision on the merits. *See* Notice of Voluntary Dismissal, *State of Connecticut v. U.S. Dep't of Interior*, No. 17-cv-2564 (D.D.C. Mar. 25, 2019).

[60] 575 F.Supp.3d 53 (D.D.C. 2021).

[61] *Id.* at 82-83.

statements, which, the court determined, was not enough to allege that the Committee's work was "targeted directly" at IRS decisionmakers.[62] The court found that the Committee was exercising its legitimate oversight and legislative functions in requesting tax returns under a statute that granted it that authority.

3. Informal Decision-making Rulings since *D.C. Federation*

a. American Public Gas Association v. FPC (1978)

American Public Gas Association v. *FPC*[63] arose from a Federal Power Commission (FPC) ratemaking conducted pursuant to section 553 of the Administrative Procedure Act. The commission issued Opinion 770 in July 1976, and on rehearing, issued a revised version, Opinion 770-A, in November of the same year. In August 1976, while the rehearing was pending, Rep. John Moss, Chairman of the Oversight Subcommittee of the House Interstate and Foreign Commerce Committee, summoned the commissioners to appear at a hearing. Chairman Moss subjected the commissioners to what the reviewing court described as an "intensive examination." Moss stated at the hearing that "I am most committed as an adversary. I find that I am outraged by Order 770. I find it very difficult to comprehend any standard of just and reasonableness in the decision …."

These expressions, coupled with what the court characterized as the subcommittee counsel's adversarial interrogation about particular factors in the cost analysis of Opinion No. 770, formed the basis of the claim of prejudice.[64]

In reaching the question whether the commission should be disqualified, the court related the facts of *Pillsbury* and described its holding at length.[65] However, despite this rhetorical obeisance to the spirit of *Pillsbury*, the court did not disqualify the agency, because the natural gas producers, though fully aware of all these facts, failed to ask the Commission to disqualify itself before the ratemaking was finalized. The court said that a party cannot, with knowledge of the alleged taint, stay silent in hopes of a favorable decision, and then, when the decision is unfavorable, seek its reversal on the ground of partiality: "A party, knowing of a ground for requesting disqualification, cannot be permitted to wait and decide whether he likes subsequent treatment that he receives."[66] But the court did not end its analysis there. The court went on to note that "there is nothing to lead the court to find that actual influence affected Opinion No. 770-A; and the fact that insofar as any actions of the commissioners themselves are concerned no appearance of partiality is evident."[67]

In essence, then, the court's decision turned on its finding of no actual impact of the congressional intervention on the agency decision. Since the court earlier made clear it understood the differing

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[62] *Id.* at 83.

[63] American Public Gas Ass'n v. Fed. Power Comm'n, 567 F.2d 1016 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 907 (1978).

[64] *Id.* at 1068. An interesting judicial handling of a taint situation may be seen in *Aera Energy LLC v. Salazar*, 642 F.3d 212 (D.C. Cir. 2011). An initial final decision-maker in a quasi-adjudicatory proceeding admitted that he had been influenced by a political source. The agency ordered a new formal evidentiary hearing with a new final decision-maker. The appeals court held that the agency had acted properly and removed the political taint, which allowed the original decision refusing to extend a lease to stand.

[65] *APGN*, 567 F.2d at 1069.

[66] *Id.*

[67] *Id.* at 1070.

standards applied by the *Pillsbury* and *D.C. Federation* rulings,[68] it would appear to have considered the proceeding closer in type or form to *D.C. Federation*.

b. Town of Orangetown v. Ruckelshaus (1984)

In *Town of Orangetown* v. *Ruckelshaus*,[69] the town sought to prevent the Environmental Protection Agency (EPA) and the New York State Department of Environmental Conservation (NYSDEC) from approving grants that would modernize an outmoded and overloaded sewage treatment plant. The town argued that improper political pressure by state and local officials on EPA caused EPA to reconsider and relax certain conditions on the grants that it had originally imposed. The Second Circuit held that in a non-adjudicatory proceeding involving the disbursement of funds, it had to be shown that "political pressure was intended and did cause the agency's action to be influenced by factors not relevant under the controlling statute."[70] Here, the Court stated,

> "The potential effect of the proposed grant on area development is one of the relevant factors for the EPA to consider … and elected officials should not be precluded from bringing those factors to administrators' attention. [citing *Sierra Club* v. *Costle*, discussed below] … Orangetown 'may not rest upon mere conclusory allegations' of improper political influence as a means of obtaining a trial."[71]

Since the EPA decision whether to impose conditions on the grants was not adjudicatory in nature but "an administrative one dealing with the disbursement of grant funds, and required no adversary proceeding," the appeals court concluded that the town did not have the status of a party and was not entitled to notice and opportunity to be heard.[72]

c. Chemung County v. Dole (1986)

Chemung County v. *Dole*[73] involved a protest over the award of a contract by the Federal Aviation Administration (FAA) to locate and build a flight service station. The contract was originally awarded to Elmira, New York (in Chemung County) but was rescinded and then awarded to Buffalo, New York. Chemung County claimed that political pressure brought on the FAA by two New York Congressmen improperly affected the award. Adopting the rule announced in its *Town of Orangetown* opinion, the appeals court found no undue political influence, because the congressmen's actions were limited to meeting with a GAO investigator, and writing letters to the FAA urging it to comply with statutory contracting requirements.[74]

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[68] *Compare* the discussion of *Pillsbury*, 567 F.2d at 1068, *with D.C. Fed'n*, 567 F.2d at 1069.

[69] Town of Orangetown v. Ruckelshaus, 740 F.2d 185 (2d Cir. 1984).

[70] *Id.* at 188.

[71] *Id.* at 188.

[72] *Id.* at 188-89.

[73] Chemung County v. Dole, 804 F.2d 216 (2d Cir. 1986).

[74] *Id.* at 222.

d. DCP Farms et al v. Yeutter (1992)

In *DCP Farms et al* v. *Yeutter*[75] the Fifth Circuit addressed the issue whether the denial of farm subsidy payments had been tainted by the intercession of a powerful congressman prior to commencement of a Department of Agriculture adjudication.

The subject of the adjudication was whether DCP Farms, an aggregation of 51 irrevocable agricultural trusts, was legally eligible to receive over a million dollars in farm subsidies despite a statutory provision limiting subsidies to $50,000 per "person." Before the proceeding began, the Department of Agriculture's Inspector General (IG) issued a report on abuses of the farm subsidy program which highlighted DCP Farms as an example of "egregious violations of the $50,000 per person limit."[76] The report received considerable publicity and reached the attention of the jurisdictional subcommittee of the House Agriculture Committee. Staff of the Subcommittee Chairman met with Department officials to discuss the issues raised by the IG report in late 1989. DCP Farms was specifically discussed.

In December 1989 the Chairman wrote to the Secretary of Agriculture about the reports of abuses in the subsidy program, citing DCP Farms as an example. The Chairman received assurance from the secretary that the DCP Farms case was under administrative review and that the department would "take a very aggressive position in dealing with this case."[77]

In June 1990, the Department of Agriculture issued a decision finding that DCP Farms had adopted schemes to evade the payment limitation provisions of the statute, and was ineligible to receive any subsidy payments for the 1989, 1990 and 1991 crop years. DCP Farms appealed and requested a hearing, which was set for December 12, 1990. Before the hearing date DCP Farms learned of the meeting with the Chairman's staff and of the Chairman's letter and successfully sued to enjoin the hearing on the ground, among others, that improper congressional interference denied them due process.[78] They contended that because the case involved an adjudication, *Pillsbury*'s "mere appearance of bias" standard governed.

The Fifth Circuit rejected the argument in an opinion that recognized the need to permit political oversight with respect to policy issues Congress has entrusted to agency decision-makers. The appeals court first rejected the applicability of *Pillsbury* because "the contact here occurred well before any proceeding which could be considered judicial or quasi-judicial … There was no hearing on the merits of DCP Farms' application for farm subsidy payments because DCP Farms abandoned the administrative process for this litigation."[79] The court saw the dispute between DCP Farms and the Department as part of a larger policy debate and rejected any connection between the preliminary processing of DCP Farms' application and the appeals hearing that would raise *Pillsbury* issues:

> In short, the congressional communication here was not aimed at the decision-making process of any quasi-judicial body … The dispute between the USDA and DCP Farms was part of a larger policy debate. Applying *Pillsbury's* stringent "mere appearance of bias" standard at this juncture of administrative process would erect no small barrier to Congressional oversight. It reflects an insular view of these administrative processes for which we find no warrant. We are unwilling to so dramatically restrict communications

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[75] DCP Farms et al. v. Yeutter, 957 F.2d 1183 (5th Cir. 1992), *cert. denied*, 506 U.S. 953 (1992).
[76] *Id.* at 1186.
[77] *Id*.
[78] *Id.* at 1187.
[79] *Id.*

> between Congress and the executive agencies over policy issues. Appearance of bias is not the standard.[80]

The court emphasized the need to protect the proper and effective workings of the political process:

> It would be unrealistic to require that agencies turn a deaf ear to comments from members of Congress. The agency's duty, so long as it is not acting in its quasi-judicial capacity, is simply to "give congressional comments only as much deference as they deserve on the merits" [*S.E.C. v. Wheeling-Pittsburgh Steel Corp.*, 648 F. 2d 118, 126 (3d Cir. 1981) (*en banc*)].
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> … In particular, an agency's patient audience to a member of Congress will not by itself constitute the injection of an extraneous factor. Nor would a simple plea for more effective enforcement of a law be the injection of an improper factor. A truly extraneous factor must take into account "considerations that Congress could not have intended to make relevant," *D.C. Federation*, 459 F. 2d at 1247.
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> Congressional "interference" and "political pressure" are loaded terms. We need not attempt a portrait of all their sinister possibilities, even if we were able to do so. We can make plain that the force of logic and ideas is not our concern. They carry their own force and exert their own pressure. In this practical sense they are not extraneous. That a congressman expresses the view that the law ought not sanction the use of fifty-one irrevocable trusts to gain $1.4 million in subsidies is not impermissible political "pressure." It certainly injects no extraneous factor. We find no due process right in these preliminary efforts to persuade the government to grant farm subsidies sufficient to exclude the political tugs of the different branches of government, and we see nothing more here. We reject the holding of the district court that DCP Farms could ignore the administrative procedure yet available to it and turn to the consequence of this bypass of remedies.[81]

4. Rulemaking Cases Since D.C. Federation

a. Texas Medical Association v. Mathews (1976)

In one of the first cases to be decided after *D.C. Federation*, a district court applied its principles to find an impermissible congressional intervention in an agency rulemaking proceeding. In *Texas Medical Association* v. *Mathews*,[82] the court considered plaintiff's contention that congressional pressure should invalidate a decision of the Department of Health, Education and Welfare (HEW) dividing Texas into nine Professional Standards Review Organizations (PSROs). The Department, after consulting with the plaintiff and several other interested groups, first announced it would form one statewide PSRO. But after a lengthy meeting with Sen. Wallace Bennett, and a senior staff member of the Senate Finance Committee (sponsor of the relevant legislation), a Department official abruptly changed his mind and called for the division of Texas into nine PSROs.

The court noted that while it had no evidence as to what Sen. Bennett or the staffer may have said during the meeting, HEW was unable to adequately explain its sudden reversal of decision with regard to the

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[80] *Id.* at 1188-89.

[81] *Id.* at 1188.

[82] Texas Medical Association v. Mathews, 408 F. Supp. 303 (W.D. Tex. 1976).

number of PSROs so soon after the meeting.[83] Moreover, the court found "proof of a pattern of undue influence by the same congressional sources permeating HEW's entire administrative process relative to PSRO designation for Texas."[84] Applying *D.C. Federation's* principle that "agency action is invalid if based, even in part, on pressures emanating from Congressional sources,"[85] the court concluded that "the fact that an agency decision is a 'little pregnant' with pressures emanating from Congressional sources is enough to require invalidation of the agency action. Especially should this be the law where, as here, the invasive Congressional source has financial leverage on the involved agency."[86]

While *Mathews* is not inconsistent with *D.C. Federation*, the holdings in *U.S. ex rel Parco* v. *Morris* and *Sierra Club* v. *Costle*, discussed next, appear to reflect more accurately the nature and extent of the currently prevailing judicial deference to congressional attempts to influence policymaking in the rulemaking process.

b. United States ex rel. Parco v. Morris (1977)

United States ex rel. Parco v. *Morris*[87] involved a challenge by non-citizens eligible for deportation to the Immigration and Naturalization Service's rescission of a longstanding operating instruction which would have allowed them to extend the date of their voluntary departure. Plaintiffs contended that the change in policy was invalid because it was precipitated by the direct pressure applied by Rep. Peter Rodino, who was then Chairman of the subcommittee responsible for overseeing administration of the immigration laws.

Despite the INS's concession that Rep. Rodino's request was the direct impetus for the change in policy, the district court rejected the plaintiffs' claims. The court distinguished *D.C. Federation* because that holding was based upon a "public and enforceable threat" by a Congressman to withhold public funds for a particular purpose unless an agency official acceded to the Congressman's wishes, and evidence that the official's decision was based in part on that pressure.[88] The court went on to note the importance of the nature of the proceeding in analysis of such cases.

> [*D.C. Federation*'s] analysis of this principle distinguishes sharply between agency action which is "judicial" or "quasi-judicial" and agency action which is "legislative." The former concept related to agency adjudication of a particular, individual case, or when it renders a decision on the record compiled in formal hearings; in such instance the consideration of extraneous pressuring influences undermines the fairness of the hearing accorded the adverse parties …. On the other hand, when the agency action is purely "legislative," as in the informal rulemaking involved here, the decision "cannot be invalidated merely because the … action was motivated by impermissible considerations" any more than can that of a legislature.[89]

The court concluded that since plaintiffs did not claim that Rep. Rodino had interfered with the "quasi-judicial decision to deny them extended voluntary departure,"[90] but rather were attacking the motivation

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[83] *Id.* at 312-13.
[84] *Id.* at 310.
[85] *Id.* at 306.
[86] *Id.* at 313.
[87] United States ex rel. Parco v. Morris, 426 F. Supp. 976 (E.D. Pa. 1977).
[88] *Id.* at 982.
[89] *Id.* (internal citations omitted).
[90] *Id.* at 982.

of the official in changing the agency's policy, they had to meet a more stringent standard of proof. The court ruled they had failed to do so.[91]

c. Sierra Club v. Costle (1981)

The seminal case in this line is *Sierra Club v. Costle*,[92] in which the Court of Appeals for the D.C. Circuit found no taint of a rulemaking proceeding by an agency's failure to docket post-comment period meetings with the Senate Majority Leader. The court concluded that it would not set aside a rulemaking simply on the grounds that political pressure had been exerted in the process. It ruled that there has to be a showing that "the content of the pressure on this [decision-maker] is designed to force him to decide upon factors not made relevant by Congress in the applicable statute" and also that the determination made "must be affected by those extraneous considerations."[93]

More particularly, the Sierra Club alleged that an "*ex parte* blitz" conducted after the comment period for an informal rulemaking had caused the Environmental Protection Agency (EPA) to back away from its support of a more stringent emission standard, and was therefore unlawful and prejudicial.[94] Post-comment period communications included a number of oral conversations and briefings between agency officials and private parties and other government officials, including the Majority Leader of the Senate and the President.

The appeals court noted that the statute in question there did not require the docketing of all post-comment period conversations and meetings. The court refused to apply a blanket rule requiring such docketing. To the contrary, where the nature of the rulemaking is general policymaking, the court expressed the view that "the concept of *ex parte* contacts is of more questionable utility." The court continued,

> Under our system of government, the very legitimacy of general policymaking performed by unelected administrators depends in no small part upon the openness, accessibility, and amenability of these officials to the needs and ideas of the public from whom their ultimate authority derives and upon whom their commands must fall. As judges we are insulated from these pressures because of the nature of the judicial process in which we participate; but we must refrain from the easy temptation to look askance at all face-to-face lobbying efforts, regardless of the forum in which they occur, merely because we see them as inappropriate in the judicial context.[95]

The court inferred from the statutory scheme that only oral comments "of central relevance to the rulemaking" should be placed in the record:

> [T]he statute itself vests EPA with discretion to decide whether "documents" are of central relevance and therefore must be placed in the docket; surely EPA can be given no less discretion in docketing oral communications concerning which the statute has no explicit requirements whatsoever. Furthermore, this court has already recognized that the relative significance of various communications to the outcome of the rule is a factor in determining whether their disclosure is required. A judicially imposed blanket requirement that all post-comment period oral communications be docketed would, on

[91] *Id.*
[92] Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981).
[93] *Id.* at 409.
[94] *Id*. at 386.
[95] *Id.* at 400-01.

> the other hand, contravene our limited powers of review, would stifle desirable experimentation in the area by Congress and the agencies, and is unnecessary for achieving the goal of an established, procedure-defined docket, *viz*., to enable reviewing courts to fully evaluate the stated justification given by the agency for its final rule.[96]

The appeals court concluded that none of the non-docketed post-comment meetings, including those with the Senate Majority Leader and the President, required docketing. It stated that before an administrative rulemaking could be overturned simply on the grounds of political pressure, it had to be shown that "the content of the pressure on the [decision-maker] is designed to force him to decide upon factors not made relevant by Congress in the applicable statute" and also that the determination made "must be affected by those extraneous considerations."[97] Although the meetings were called at the behest of the majority leader "in order to express 'strongly' his views"[98] on the subject of the rulemaking, it found that the agency made no commitments to him nor was there evidence that he used "extraneous" pressures to further his position. The court characterized the Senator's efforts, since they were exerted in a rulemaking proceeding, as within the accepted boundaries of the political process.

> … Americans rightly expect their elected representatives to voice their grievances and preferences concerning the administration of our laws. We believe it entirely proper for Congressional representatives vigorously to represent the interests of their constituents before administrative agencies engaged in informal, general policy rulemaking, so long as individual Congressmen do not frustrate the intent of Congress as a whole as expressed in statute, nor undermine applicable rules of procedure. Where Congressmen keep their comments focused on the substance of the proposed rule—and we have no substantial evidence to cause us to believe Senator Byrd did not do so here—administrative agencies are expected to balance Congressional pressure with the pressures emanating from all other sources. To hold otherwise would deprive the agencies of legitimate sources of information and call into question the validity of nearly every controversial rulemaking.[99]

Similarly, with regard to a meeting involving the President, the court held that as long as there is factual support in the record for the agency's outcome, it does not matter that "but for" the presidential input it would have gone the other way.

> Of course, it is always possible that undisclosed Presidential prodding may direct an outcome that is factually based on the record, but different from the outcome that would have obtained in the absence of Presidential involvement … But we do not believe that Congress intended that the courts convert informal rulemaking into a rarified technocratic process, unaffected by political considerations or the presence of Presidential power.[100]

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[96] *Id.* at 402-04.

[97] *Id.* at 409.

[98] *Id*.

[99] *Id.* at 409-10.

[100] *Id.* at 408. *See also* New York v. Reilly, 969 F.2d 1147 (D.C. Cir. 1992) ("The fact that EPA re-evaluated its conclusions in light of the advice of the President's Council on Competitiveness does not mean that EPA failed to exercise its own expertise in promulgating the final rule."). *But cf*. Portland Audubon Society v. Endangered Species Comm., 984 F.2d 1534, 1541, 1545 (9th Cir. 1993) (finding that President's *ex parte* directions to the members of a statutory commission, whom he had appointed and were removal by him, to vote for a particular policy option violated the APA's *ex parte* prohibition because that decision was required to be made "on the record.").

5. Rulings Respecting Congressional Influence on Agency Investigatory Process

a. SEC v. Wheeling-Pittsburgh Steel Corp. (1981)

On rare occasions the claim is made that an agency investigation has been instigated by congressional pressure or influence, and therefore tainted by the political intervention. Parties making this claim generally cite the appellate court ruling in *SEC v. Wheeling-Pittsburgh Steel Corp.*, and argue that it precludes any agency contact with members of Congress which would give the appearance that an agency is taking an enforcement action at the behest of a member or committee.[101]

However, *Wheeling Pittsburgh*'s holding is considerably narrower. The case involved the Securities and Exchange Commission's initiation of an informal investigation of Wheeling-Pittsburgh Steel Corporation after receiving a letter from a Senator suggesting that Wheeling had violated Section 10(b) of the Securities Exchange Act of 1934. During the period of the initial informal investigation, there was considerable contact between the SEC staff attorney conducting the investigation, the Senator's office, and competitors of Wheeling who were allegedly colluding with the senator. The Senator was also seeking to pass legislation that would prevent Wheeling from obtaining federal loan guarantees if it was under investigation by a federal agency.

Thereafter, the SEC ordered a formal investigation of the matter, and issued a subpoena *duces tecum* to Wheeling and its CEO. After the CEO refused to answer certain questions, the SEC sought enforcement of its subpoena. Wheeling argued that the subpoena was issued in bad faith and for the purpose of harassment; and that the investigation constituted an abuse of the SEC's investigatory power by competitors of Wheeling who were opposed to the grant of certain federal loan guarantees to Wheeling.

The district court refused to enforce the subpoena. Although it specifically rejected the claim of bad faith on the part of the agency, it concluded that, "under the totality of circumstances," enforcement would be an abuse of the court's process.[102] The court reached this conclusion because it believed that the SEC had allowed biased third parties to improperly influence the investigation process, although it conceded that the agency did not adopt the biased motives of the third parties.[103]

A panel of the Third Circuit reversed, concluding that a court could not refuse to enforce administrative subpoenas issued in good faith pursuit of a statutorily authorized purpose. The panel concluded that bias of third parties was irrelevant where the agency had proceeded in good faith and that to invalidate agency action on the basis of an abuse of process theory independent of the bad faith defense was improper.

The case was reargued before the Third Circuit *en banc*, which by a 6-4 vote remanded the case to the district court in light of its ruling that even in the absence of bad faith on the part of an agency, it would not enforce an administrative subpoena if it was issued because of congressional influence and it was shown that the agency knew its process was being abused, that it knowingly did nothing to prevent the abuse, and that it vigorously pursued the frivolous charges.[104] The *en banc* court stated:

> We do not doubt the usefulness to administrative agencies of information gained from third parties. Nor do we doubt that frequently the motivations of informants are less than

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[101] SEC v. Wheeling-Pittsburgh Steel Corp., 482 F. Supp 555 (W.D. Pa. 1979), *vacated and remanded*, 648 F.2d 118 (3d Cir. 1981) (*en banc*).

[102] *Id*. at 567.

[103] *Id.* at 565-66.

[104] *Wheeling-Pittsburgh*, 648 F.2d at 125 (footnotes omitted).

> altruistic. See *United States v. Cortese*, 614 F.2d 914 (3d Cir. 1980). But we cannot simply avert our eyes from the realities of the political world: members of Congress are requested to, and do in fact, intrude, in varying degrees, in administrative proceedings ….
>
> The duty of the SEC, therefore is not to ignore information given to it by congressmen, but to "give congressional comments only as much deference as they deserve on the merits." *Id.* An administrative agency that undertakes an extensive investigation at the insistence of a powerful United States Senator "with no reasonable expectation" of proving a violation and then seeks federal court enforcement of its subpoena could be found to be using the judiciary for illicit purposes. We need not lend the process of the federal courts to aid such behavior.[105]

The appeals court made it clear that the bad faith defense need not be the sole basis for denial of enforcement, and that agency acquiescence in an abuse of its own process may lead to a finding of abuse of the court's process. The court distinguished between the two, noting that "bad faith connotes a conscious decision by an agency to pursue a groundless allegation," while "an agency may be found to be abusing the court's process if it vigorously pursued a charge because of the influence of a powerful third party without consciously and objectively evaluating the charge."[106]

The court also emphasized the point that it was improper for the district court to have taken into account the motivation of third parties in determining either bad faith or abuse of process. "This court has previously made clear that the proper focus in a challenge to an administrative subpoena is motivation of the agency itself, not that of third parties," citing *United States v. Cortese*, 614 F.2d 914, 921 (3d Cir. 1980).[107] The requirement of a finding of "institutional" bad faith rather than that of an individual agent, or the refusal to allow attributing the motives of third parties to an agency, is well established.[108] The court concluded:

> At bottom, this case raises the question whether, based on objective factors, the SEC's decision to investigate reflected its independent determination, or whether that decision was the product of external influences. The reality of prosecutorial experience, that most investigations originate on the basis of tips, suggestions, or importunings of third parties, including commercial competitors, need hardly be noted …. But beginning an informal investigation by collecting facts at the request of a third party, even one harboring ulterior motives is much different from entering an order directing a private formal investigation pursuant to 17 C.F.R. § 202.5 (1980), without an objective determination by the Commission and only because of political pressure. The respondents are not free from an informal investigation instigated by anyone, in or out of government. But they are entitled to a decision by the SEC itself, free from third-party political pressure, that a "likelihood" of a violation exists and that a private investigation should be ordered. See 17 C.F.R. § 205.2(a). The SEC order must be supported by an independent agency determination, not one dictated or pressured by external forces. If an allegation of improper influence and abdication of the agency's objective responsibilities is made, and supported by sufficient

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[105] *Id.* at 126.

[106] *Id.* at 125 n.9.

[107] *Id.* at 127.

[108] *See, e.g.*, United States v. LaSalle National Bank, 437 U.S. 298, 316 (1978); United States v. Target Advertising, Inc., 257 F.3d 348, 355 (4th Cir. 2001); Pickel v. United State, 746 F.2d 176, 184 (3d Cir. 1984); EEOC v. Michael Construction Co., 706 F.2d 244, 251 n. 7 (8th Cir. 1983); NLRB v. Interstate Dress Carriers, Inc., 610 F.2d 99, 112 (3d Cir. 1979).

> evidence to make it facially credible, respondents are entitled to examine the circumstances surrounding the SEC's private investigation order.[109]

The Third Circuit, while accepting the possibility of finding that political pressure can taint an investigative proceeding under a variety of theories, has imposed on a litigant the burden of establishing a substantial factual predicate to support such a determination. Showing that there was some contact between Congress and an agency regarding an enforcement proceeding does not suffice.

Wheeling-Pittsburgh does represent something of a liberalization in an area where court review of agency requests for enforcement of administrative subpoenas has traditionally been severely circumscribed and narrow.[110] Some courts appear to have rejected *Wheeling-Pittsburgh* and are adhering to the traditional standard of high deference to agency subpoena issuance decisions.[111] In any event, we are aware of no court that has utilized the *Wheeling-Pittsburgh* standard to refuse to enforce an administrative subpoena because of alleged undue congressional influence.

b. United States v. Armada Petroleum Corp. (1982)

Several courts have subsequently acknowledged the *Wheeling-Pittsburgh* rationale in cases involving the issuance of subpoenas by the Department of Energy to resellers of petroleum products who had refused to voluntarily supply documents in the course of a valid agency audit. In each case the defendant company claimed, *inter alia*, that the Chairman of the Oversight and Investigations Subcommittee of the House Energy and Commerce Committee had exerted improper influence on the agency official making the decision to issue the subpoena. In each instance the courts rejected the claims.[112] In *United States v. Armada Petroleum Corp.*, for example, the court acknowledged *Wheeling-Pittsburgh's* holding that an agency may not order an investigation "because of political pressure to do so," but found that where, as in the case before it, "the Congressional involvement is directed not at the agency's decision on the merits but at accelerating the disposition and enforcement of the pertinent regulations, it has been held that such legislative conduct does not affect the fairness of the agency's proceedings and does not warrant setting aside its order."[113]

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[109] *Wheeling-Pittsburgh*, 648 F.2d at 130 (1981).

[110] *See, e.g.*, LaSalle National Bank, 437 U.S. at 316-17; United States v. Morton Salt Co., 338 U.S. 632, 652 (1950); City of Chicago v. United States, 396 U.S. 162, 165 (1969) (agency decisions to conduct investigations are committed entirely to agency discretion); Union Mechling Corp. v. United States, 566 F.2d 722, 724-25 (D.C. Cir. 1977), Dresser Industries Inc. v. United States, 596 F.2d 1231, 1235 n. 1 (5th Cir. 1979), *cert. denied*, 444 U.S. 1044 (1980).

[111] *See, e.g.*, United States v. Aero Mayflower Transit Co., 831 F.2d 1142, 1146-47 (D.C. Cir. 1987) (a court only has discretion to conduct an evidentiary hearing in a subpoena enforcement case in the unlikely situation where the party opposing the subpoena has presented affidavit evidence that the agency "is acting without authority or where its purpose in harassment of citizens."); United States v. Teeven, 745 F.Supp. 220, 224-227 (D. Del. 1990) (discussing *Aero* and concluding that *Wheeling-Pittsburgh* is still controlling in Third Circuit).

[112] United States v. FRB Petroleum, Inc., 703 F.2d 528, 532 (Temp. Emer. Ct. App. 1983); United States v. Phoenix Petroleum, 571 F. Supp. 16, 20 (S.D. Tex. 1982); United States v. Armada Petroleum Corp., 562 F.Supp. 43, 50-51 (S.D. Tex. 1982). *See also* United States v. Merit Petroleum, Inc., 731 F.2d 901, 904 (Em. Appeals 1984).

[113] *Armada Petroleum Corp.*, 562 F. Supp. at 51. *See also* United States v. Hayes, 408 F.2d 932 (7th Cir.1969), *cert. denied*, 396 U.S. 835 (1969) (the fact that a House subcommittee had expressed an interest in an Internal Revenue Service investigation did not show that the investigation was conducted for an improper purpose).

c. United States v. American Target Advertising, Inc. (2001)

In *United States v. American Target Advertising, Inc.*,[114] the Fourth Circuit rejected the defendant's claim that the issuance of an investigative subpoena was a tool of harassment and intimidation exercised by the agency (the U.S. Postal Service) at the behest of a Senator. The court acknowledged that the Senator "has demonstrated a fair degree of hostility toward" the defendant. But the appeals court reiterated that that was not enough. The appellant "must show that the party actually responsible for initiating the investigation, *i.e.*, the Postal Service, has done so in bad faith."[115] The court found no evidence of bad faith and rejected American Target's request for discovery before the district court, noting "that such discovery is prohibited in these types of summary enforcement proceedings absent 'extraordinary circumstances.'" The appeals court advised that in order to obtain discovery, the target must distinguish himself "from the class of the ordinary respondent, by citing special circumstances."[116] The Fourth Circuit concluded that it had not done so there, stating: "when presented with evidence of unlawful conduct, the Government is not bound to investigate only those potential wrongdoers who support its policies. Because American Target failed to distinguish itself from the ordinary disgruntled respondent, it is not entitled to discovery regarding the genesis of the Postal Service's inquiry."[117]

In sum, it would appear that the assertions with respect to the *Wheeling-Pittsburgh* precedent will be unavailing even in situations of aggressive congressional intercessions. That case does not establish an "appearance of partiality" standard with respect to congressional contacts. A high degree of proof is needed to demonstrate that the agency's motivation in continuing an investigation is solely in acquiescence to congressional influence and without any regard to the adequacy of the grounds of the allegations.

d. United States v. Navarro (2022)

In *United States v. Navarro*, a former White House official sought discovery from the government to establish that the decision to criminally charge him "was tainted with 'unlawful political interference,'" including contacts between the Department of Justice and House Select Committee to Investigate the January 6 Attack on the United States Capitol and statements by President Biden that individuals who defied the committee's subpoenas should be prosecuted.[118] The district court stated that the defendant "cites no case for the proposition, for instance, that the Due Process Clause grants a 'right to the appearance of impartiality in the prosecution of [a] case," and that "the sole case on which Defendant relies, *SEC v. Wheeling-Pittsburgh Steel Corporation*, does not stand for that proposition."[119] Instead, the court stated, *Wheeling-Pittsburgh* addressed "the concepts 'of agency bad faith and the agency's acquiescence in abuse of its process leading to an abuse of the court's process,' [and] said nothing about

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[114] United States v. Am. Target Advertising, Inc., 257 F.3d 348 (4th Cir. 2001).

[115] *Id.* at 355.

[116] *Id.* at 355.

[117] *Id.* at 356. For an instance in which a court found that a party alleging undue political influence on an agency had made a sufficiently "strong showing" of improper influence to be entitled to extraordinary discovery and examination of agency personnel, *see* Sokaogan Chippewa Community v. Babbitt, 961 F.Supp. 1276, 1280-86 (W.D. Wisc. 1997). The court warned that plaintiffs still need "to show that the pressure was intended to and did cause the Department of Interior's actions to be influenced by factors not relevant under the controlling statute." 961 F.Supp. at 1286. After the court's ruling all proceedings in the matter were suspended during the pendency of an independent counsel investigation. At the conclusion of that investigation the government and the tribes settled and the undue influence issue was not pursued. *See* Sokaogon Chippewa Community v. Babbitt, 214 F.3d 941, 944-45 (7th Cir. 2000).

[118] United States v. Navarro, 627 F. Supp. 3d 1, 7-8 (D.D.C. 2022).

[119] *Id.* at 7 n.3.

whether a criminal defendant has any recourse if subjected to a politically motivated indictment."[120] As a result, the court concluded that the defendant had not established a colorable case of undue political interference.

[120] *Id.* (internal citation omitted).

13. The Congressional Review Act

Introduction

The Administrative Procedure Act (APA) was passed in 1946[1] and established in law the foundation for the modern administrative state. The statute's chief accomplishments—creating informal rulemaking for writing regulations, providing due process protections for agency formal adjudication, and setting standards for all administrative actions—make it one of the most important congressional enactments of the 20th century. Although it largely ratified the practice of executive branch policymaking that had emerged during the New Deal,[2] cementing this practice in statute was deemed critical. In particular, the express creation of the informal rulemaking process—even though it was constrained by notice and public comment and judicial review—would empower the federal bureaucracy when the formal rulemaking process was abandoned in the late 1970s. Almost all agencies found the formal process too slow and cumbersome to accommodate rapidly expanding congressional concerns around regulation of social, economic, health, welfare, and environmental issues. The universal adoption of informal rulemaking coincided with and fostered even greater proliferation of broad delegations of rulemaking authority to the executive bureaucracy. Regulatory lawmaking became the paramount hallmark of our administrative state.

Over the years, Congress was comfortable with its delegation strategy and reacted to appeals for regulatory reform by focusing on modifying existing processes and their impact on the concerned parties or stakeholders. It did so, for example, by mitigating the paperwork burden of regulations, lessening their impact on small businesses or other units of government, or imposing considerations of cost-benefit or cost efficiency on the regulatory decisionmakers. More specifically, Congress passed legislation including the Paperwork Reduction Act,[3] the Regulatory Flexibility Act,[4] the Unfunded Mandates Act,[5] and amendments to the Regulatory Flexibility Act.[6] But there is a consensus that few of the ostensible goals of these statutes have been achieved, in part because Congress gave the agencies sufficient discretion and loopholes to ensure that the reform statutes did not curb their ability to make their preferred regulatory decisions.[7]

At the same time, Congress has come under attack for repeatedly making open-ended grants of lawmaking powers to departments and agencies without assuming responsibility for overseeing the effects of such grants, and failing to take proper legislative actions where departments and agencies have abused those authorities. Some have also charged that Congress' inaction has allowed, even encouraged, the executive effectively to usurp Congress' oversight and control of the rulemaking process.

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[1] Administrative Procedure Act, Pub. L. 79-404, 60 Stat. 237 (1946).

[2] Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 Va. L. Rev. 219, 232 (1986). *See also*, George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics*, 90 NW. U. L. Rev. 1557 (1996).

[3] Pub. L. 96-511, 94 Stat. 2812 (1980).

[4] Pub. L. 96-354, 94 Stat. 1164 (1981).

[5] Pub. 104-4, 109 Stat. 48 (1995).

[6] Pub. L. 104-121, 110 Stat. 857 (1995).

[7] *See e.g.*, Stuart Shapiro and Deanna Moran, *The Checkered History of Regulatory Reform Since the APA*, 19 N.Y.U. J. Legis. & Pub. Pol'y 141 (2016).

Congress sought to push back by passing the Congressional Review Act (CRA)[8] in 1996. The goal was to establish a mechanism by which Congress could review and overturn—through passage of joint resolutions of disapproval subject to fast-track legislative procedures—virtually all federal agency rules. The House and Senate sponsors of the CRA made clear that they were seeking to address claims that Congress had effectively abdicated its constitutional role as the national legislature in allowing federal agencies so much latitude over the last half century in implementing and interpreting congressional enactments. The sponsors noted,

> In many cases, this criticism is well founded. Our constitutional scheme creates a delicate balance between the appropriate roles of the Congress in enacting laws, and the Executive Branch in implementing those laws. This legislation will help redress the balance, reclaiming for Congress some of its policy making authority, without requiring Congress to become a super regulatory agency.[9]

The CRA sponsors recognized both the desire to restore congressional political accountability and the need to establish a scheme of collaborative control among the political branches. But the initial enthusiasm and expectations on the Hill waned quickly as doubts emerged over the review scheme's ability to rein in lawmaking through responsible, effective, and expeditious legislative oversight. Those doubts were later confirmed.[10] From April 1996 through September 2025 over 92,000 rules have been reported to Congress and have become effective, including some 2,300 major rules. More than 400 resolutions of disapproval for more than 250 rules have been introduced, but the process has only successfully overturned a handful of rules.[11] The CRA was used to repeal 16 rules promulgated by the Obama administration in the 115th Congress, and was used to repeal three rules promulgated by the Trump administration during the 116th Congress—before 2017, however, the CRA was only once used to disapprove an agency rule.[12] During the 118th Congress, over 200 joint resolutions of disapproval were introduced—the most to date.[13] At the time of writing, the 119th Congress promises to exercise its CRA power vigorously as well. To date, 53 joint resolutions have been introduced in either the House or the Senate; and 12 have been signed by the President, repealing various rules related to energy efficiency, emission standards, marine preservation, and digital asset sales reporting, among other topics.[14]

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[8] The CRA was included as Subtitle E of the Small Business Regulatory Enforcement Act of 1996 (SBRFA), Pub. L. No. 104-121, 110 Stat. 857, 868 (codified at 5 U.S.C. §§ 801-808 (2006)).

[9] Joint Explanatory Statement of House and Senate Sponsors, 142 Cong. Rec. 6922, 6926 (1996) [hereinafter *Legislative History*]. An identical joint statement of the Senate sponsors appears at 142 Cong. Rec. 8196-8201 (1996). Further references to the legislative history will utilize the earlier House insertion.

[10] *See, e.g.*, Daniel Cohen and Peter L. Strauss, *Congressional Review of Agency Rulemaking*, 49 Admin. L. Rev. 95 (1996); Morton Rosenberg, *Whatever Happened to Congressional Review of Agency Rulemaking?: A Brief Overview, Assessment, and Proposal for Reform*, 51 Admin. L. Rev. 1051 (1999).

[11] Up-to-date data may be found at U.S. Gov't Accountability Off., *Congressional Review Act*, https://www.gao.gov/legal/congressional-review-act.

[12] NCSL, *Congressional Review Act: Overview and Tracking* (Aug. 28, 2025), https://www.ncsl.org/state-federal/congressional-review-act-overview-and-tracking; John C. Ruple & Devin Stelter, *Charting a "Substantially Different" Approach to Land Management Following a Congressional Review Act Joint Resolution of Disapproval*, 12 Ariz. J Env't. L. & Pol'y 84, 87-88 (2021).

[13] Sarah Hay, *The Congressional Review Act and the 118th Congress*, GWU Reg. Studs. Ctr. (Feb. 11, 2025), https://regulatorystudies.columbian.gwu.edu/congressional-review-act-and-118th-congress.

[14] Congressional Review Act: Overview and Tracking, Nat'l Conference of State Legislatures (updated Nov. 25, 2025), https://www.ncsl.org/state-federal/congressional-review-act-overview-and-tracking.

By contrast, in the 10-year period from 1999 through 2008, Congress enacted at least 190 provisions of law that prohibited agencies from using federal funds to develop proposed rules, make a proposed rule final, or implement or enforce a final rule.[15]

Some maintain that simple agency awareness of the review scheme has had a significant impact on a number of major rules.[16] Others counter that the threat of passing a disapproval resolution, which is subject to presidential veto, is no greater than that of passing an ordinary bill, and that this is particularly so in light of the structural and interpretive impediments to the CRA's use, which are well known.[17]

The most prominent structural obstacles to the CRA's potential use are: the lack of a screening mechanism to identify reported rules that may require special congressional attention; the failure to provide an expedited consideration procedure in the House of Representatives comparable to that provided to the Senate; and that a joint resolution of disapproval of a significant or politically sensitive rule is likely to need a supermajority of both houses to be successful. Moreover, a number of critical interpretive issues remain to be resolved. These include the questions whether the failure to report a covered rule is subject to court review and sanction, and what rules are covered by the act.

Renewed interest in legislative review of agency rules since the 112th Congress has provided Congress with a clear opportunity to address the perceived flaws in the CRA and redefine its oversight role in the rule development process. The most recent discussion vehicle has been H.R. 26, the "Regulations From the Executive in Need of Scrutiny Act of 2017" (REINS Act). The bill would dramatically alter the rule review process by deeming all major rules reported to Congress as proposals that cannot become effective unless Congress passes a joint resolution of approval within a specified time period. The REINS Act has been introduced in various forms, but has not been enacted into law.[18] Although the November 2024 presidential election placed the White House in the hands of Republican President Donald Trump—and republicans maintain control of both houses of Congress—it is not certain that the President would sign such legislation and cede back to Congress the virtually plenary power Presidents have acquired over the administrative rule making process over the last 45 years.[19]

The sections that follow provide a detailed description of the CRA review scheme, how its sponsors expected it to operate, perceived impediments to its operation, and how it in fact has been utilized (including the very few successful uses of the CRA's carryover period disapproval resolution authority). This chapter also examines proposals for reform, the REINS Act among them. It concludes by examining the need for the political branches to engage in a "collaborative enterprise" to review agency lawmaking,

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[15] Curtis W. Copeland, Cong. Rsch. Serv., RL34364, Congressional Influence on Rulemaking and Regulation Through Appropriations Restrictions, (August 5, 2008). Copeland has revisited Congress's utilization of appropriations limitations as an alternative to disapproval resolutions and has found the practice has continued to date. See his case study, The Presidential-Congressional Power Imbalance in Rulemaking, at Part II infra.

[16] *See, e.g.*, Paul R. Verkuil, *The Wait Is Over:* Chevron *as the Stealth* Vermont Yankee *II*, 75 Geo. Wash. L. Rev. 921, 925-26 (2007); H. Comm. on the Judiciary Subcomm. on Com. and Admin. Law, Judiciary Committee, 109th Cong., Interim Rep. on The Administrative Law, Process, and Procedure Project for the 21st Century, 1409-10 (Comm. Print No. 10) (presentation of Paul R. Verkuil) [hereinafter Interim Report].

[17] Note, *The Mysteries of the Congressional Review Act*, 122 Harv. L Rev. 2162, 2166-67 (2009) [hereinafter *Mysteries of the CRA*].

[18] Similar versions of the REINS Act were passed in the 112th (H.R. 10 (2011)), 113th (H.R. 367 (2013)), 114th (H.R. 427 (2015)), and 115th (H.R. 26 (2017)) Congresses but received no Senate action.

[19] *See* Andrew Rudalevige, *Congress Wants to Rein in Presidential Power. Will Trump Sign On?*, Wash. Post. (Jan. 3, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/01/03/congress-wants-to-rein-in-presidential-power-will-trump-sign-on.

and provides suggestions for priority remedial actions that may be immediately installed by utilizing the internal rulemaking powers of each house to secure an effective review scheme.

A. The Scheme of Review of Agency Rules under the CRA

1. Reporting Requirements

The CRA, codified at 5 U.S.C. §§ 801-808, requires that all agencies promulgating a covered rule must submit a report to each house of Congress and to the Comptroller General that contains a copy of the rule, a concise general statement describing the rule (including whether it is deemed to be a major rule), and the proposed effective date of the rule. A covered rule cannot take effect if the report is not submitted.[20] Each house must send a copy of the report to the chairman and ranking minority member of each jurisdictional committee.[21] In addition, the promulgating agency must submit to the Comptroller General: (1) a complete copy of any cost-benefit analysis; (2) a description of the agency's actions pursuant to the requirements of the Regulatory Flexibility Act and the Unfunded Mandates Reform Act of 1995; and (3) any other relevant information required under any other act or executive order. Such information must also be made "available" to each house.[22]

2. Rules Covered by the CRA

Adopting the definition found at 5 U.S.C. § 551(4), the CRA defines a "rule" as "the whole or part of an agency statement of general … applicability and future effect designed to implement, interpret, or prescribe law or policy."[23] The legislative history of Section 551(4) indicates that the term is to be broadly construed: "The definition of rule is not limited to substantive rules, but embraces interpretive, organizational and procedural rules as well."[24] The courts have recognized the breadth of the term, indicating that it encompasses "virtually every statement an agency may make,"[25] including interpretive and substantive rules, guidelines, formal and informal statements, policy proclamations, employee manuals and memoranda of understanding, among other types of actions. Thus, a broad range of agency action is potentially subject to congressional review.[26]

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[20] 5 U.S.C. § 801(a)(1)(A) (2015).

[21] 5 U.S.C. § 801(a)(1)(C) (2015).

[22] 5 U.S.C. § 801(a)(1)(B) (2015).

[23] 5 U.S.C. § 804(3) (2015) excludes from the definition "(A) any rule of particular applicability, including a rule that approves or prescribes for the future rates, wages, prices, services, or allowance therefore, corporate or financial structures, reorganizations, mergers, or acquisitions thereof, or accounting practices or disclosures bearing on any of the foregoing; (B) any rule relating to agency management or personnel; or (C) any rule of agency organization, or practice that does not substantially affect the rights or obligations on non-agency parties."

[24] U.S. Dept. of Justice, Attorney General's Manual on the Administrative Procedure Act 13 (1948); *see also* Batterton v. Marshall, 648 F. 2d 694, 700-02 (D.C. Cir. 1980).

[25] Avoyelles Sportsmen's League, Inc., v. Marsh, 715 F.2d 897 (5th Cir. 1983).

[26] *See, e.g.*, Chem. Service, Inc. v. EPA, 12 F.3d 1256 (3d Cir. 1993) (memorandum of understanding); Caudill v. Blue Cross and Blue Shield of North Carolina, 999 F.2d 74 (4th Cir. 1993) (interpretative rules); National Treasury Employees Union v. Reagan, 685 F. Supp. 1346 (E.D. La 1988) (federal personnel manual letter issued by OPM); New York City Employment Retirement Board v. SEC, 45 F.3d 7 (2d Cir. 1995) (affirming lower court's ruling that SEC "no action" letter was a rule within § 551(4)); Guardian Federal S&L Ass'n v. Fed. Savings and Loan Insurance Corp., 589 F.2d 658 (D.C. Cir. 1978) (agency statements that clarify laws are rules under the APA); Professional and Patients for Customized Care v. Shalala, 56 F.3d 592, 601-02 (D.C. Cir 1995) (FDA Compliance Policy guide was a rule).

3. The Roles of the Comptroller General and the OIRA Administrator

The Comptroller General and the administrator of the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget have particular responsibilities with respect to a "major rule," defined as a rule that will likely have an annual effect on the economy of $100 million or more, increase costs or prices for consumers, industries or state and local governments, or have significant adverse effects on the economy. The determination of whether a rule is major is assigned exclusively to OIRA's administrator.[27] If a rule is deemed major by the administrator, the Comptroller General must prepare a report for each jurisdictional committee within 15 calendar days of the submission of the agency report required by Section 801(a)(1) or its publication in the Federal Register, whichever is later. The statute requires that the Comptroller General's report "shall include an assessment of the agency's compliance with the procedural steps required by Section 801(a)(1)(B)."[28] The Comptroller General has interpreted his duty under this provision relatively narrowly as requiring that he determine whether the prescribed action has been taken. In other words, he must determine whether a required cost-benefit analysis has been provided, and whether the required actions under the Regulatory Flexibility Act, the Unfunded Mandates Reform Act of 1995, and any other relevant requirements under any other legislation or executive orders were taken, but he need not examine the substantive adequacy of the actions.

4. Effective Dates of Major and Non-Major Rules[29]

The designation of a rule as major also impacts its effective date. A major rule may become effective on the latest of the following: (1) 60 calendar days after Congress receives the report submitted pursuant to Section 801(a)(1)[30] or after the rule is published in the Federal Register; (2) if Congress passes a joint resolution of disapproval and the President vetoes it, the earlier of when one house votes and fails to override the veto, or 30 calendar days after Congress receives the veto message; or (3) the date the rule would otherwise have taken effect (unless a joint resolution is enacted).[31]

Thus, the earliest a major rule can become effective is 60 calendar days after the later of the submission of the report required by Section 801(a)(1) or its publication in the Federal Register, unless some other provision of the law provides an exception for an earlier date. Three possibilities exist. Under Section

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[27] 5 U.S.C. § 804(2) (2015).

[28] 5 U.S.C. § 801(a)(2)(A) (2015).

[29] The CRA is a complex statute, and among its chief complexities is its use of at least four different ways to measure the passage of time to effectuate the different purpose of the review scheme: *calendar days; days of continuous session,* which excludes all days when either the House of representatives or the Senate has adjourned for more than three days; *session days,* which include only calendar days in which a chamber is in session; and *legislative days,* which end each time a chamber adjourns and begin each time it convenes after an adjournment. It is important to be aware that different measures may be applicable to the various stages—effective dates, initiation and action periods, and the carryover period—of the review process. *See* Curtis W. Copeland & Richard S. Beth, Cong. Rsch. Serv., RL34633, Congressional Review Act: Disapproval of Rules in a Subsequent Session of Congress (August 25, 2008).

[30] The general counsel of the Government Accountability Office (GAO) has ruled that the 60-day period does not begin to run until *both* houses of Congress receive the required report. *See* Anthony H. Gamboa, U.S. Gov't Accountability Off., B-289880 (2002) (opinion letter to Hon. Edward M. Kennedy, Chairman, Senate Committee on Health, Education, Labor and Pensions from Anthony H. Gamboa, General Counsel). The situation involved a Department of Health and Human Services (HHS) major rule published in the Federal Register on January 18, 2002 with an announced effective date of March 29, 2002. The House of Representatives, however, did not receive the rule until February 14, 2002. HHS thereafter delayed the effective date of the rule until April 15, 2002, in an attempt to comply with the CRA. But the Senate did not receive the rule until March 15, 2002. The General Counsel determined that the rule could not become effective until May 14, 2002, 60 days following the Senate's receipt, relying on the language of § 801(a)(1)(A) of the act requiring that a copy of a covered rule must be submitted "to *each* House of Congress" in order to become effective.

[31] 5 U.S.C. § 801(a)(3) (2015).

808(2) an agency may determine that a rule should become effective notwithstanding Section 801(a)(3) where it finds "good cause that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."[32] Second, the President may determine that a rule should take effect earlier because of an imminent threat to health or safety or other emergency; to ensure the enforcement of the criminal laws; for national security purposes; or to implement an international trade agreement.[33] Finally, a third route is available under Section 801(a)(5), which provides that "the effective date of a rule shall not be delayed by operation of this chapter beyond the date on which either house of Congress votes to reject a joint resolution of disapproval under Section 802." [34]

All other rules take effect "as otherwise allowed by law" after having been submitted to Congress under Section 801(a) (4).[35] Under the APA, a final rule may go into effect 30 days after it is published in the Federal Register in final form.[36] An agency, in its discretion, may delay the effectiveness of a rule for a longer period; or it may put it into effect immediately if good cause is shown.

5. Rules That Have Become Effective and the Carryover Period

All covered rules are subject to disapproval even if they have gone into effect. Congress has reserved to itself a review period of at least 60 days. Moreover, if a rule is reported within 60 session days of adjournment of the Senate or 60 legislative days of adjournment of the House, the period during which Congress may consider and pass a joint resolution of disapproval is extended to the next session of the Congress.[37] Such held over rules are treated as if they were published on the 15th session day of the Senate and the 15th legislative day of the House in the succeeding session and as though a report under § 801(a)(1) was submitted on that date.[38] But a held over rule takes effect as otherwise provided.[39] The opportunity for Congress to consider and disapprove is simply extended so that it has a full 60 session or legislative days to act in any session. Congressional Research Service (CRS) studies have shown that in every session but two since 1996, the House starting point has determined the relevant date for CRA carryovers to the next session of Congress. The median starting point for all sessions has been June 25. However, the median starting point for second sessions (i.e., election years) is considerably shorter: June 7. The explanation, of course, is that both houses often adjourn early or recess early just prior to and/or

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[32] Reviewing courts have generally applied the APA's good cause exemption, from which this language is obviously taken, narrowly in order to prevent agencies from using it as an escape clause from notice and comment requirements. *See, e.g.,* Action on Smoking and Health v. CAS, 713 F.2d 795, 800 (D.C. Cir. 1987). However, since Section 805 precludes judicial review for any "determination, finding, action or omission under this chapter," there could be no court condemnation of a good cause determination. But the rule would still be subject to congressional vacation and retroactive nullification.

[33] 5 U.S.C. § 801(c) (2015).

[34] In *Leisegang v. Sect'y of Veterans Affairs*, 312 F.3d 1368, 1373-1376 (D.C. Cir. 2002), the appeals court held that Section 801(a)(3) "does not change the date on which [a major rule] becomes effective. It only affects the date when the rule becomes operative. In other words, the CRA merely provides a 60-day waiting period before the agency may enforce the major rule so that Congress has the opportunity to review the regulation." At issue in the case was the date from which certain veterans benefits would be calculated. The benefit statute provided that it would be the date of the issuance of the rule. The government argued that the CRA was a superseding statute and that the effective date was when the CRA allowed it to be operative. The appeals court agreed with the veterans that the date of issuance, as prescribed by the law, was determinative.

[35] 5 U.S.C. § 801(a)(4)(2015).

[36] 5 U.S.C. § 553(d) (2015).

[37] 5 U.S.C. § 801(d)(1) (2015).

[38] 5 U.S.C. § 801(d)(2)(A), (e)(2) (2015).

[39] 5 U.S.C. § 801(d)(3) (2015).

after elections. The congressional calendar for 2016 indicated that the critical carryover date was again determined by the House, this time as June 15.

6. Effect of a Congressional Disapproval of a Rule

If a joint resolution of disapproval is enacted into law, the rule is deemed not to have had any effect at any time.[40] A rule that does not take effect, or is not continued because of passage of a disapproval resolution, may not be reissued in substantially the same form. Indeed, before any reissued or new rule that is "substantially the same" as a disapproved rule can be issued it must be specifically authorized by a law enacted subsequent to the disapproval of the original rule.[41]

However, if a rule is subject to any statutory, regulatory, or judicial deadline for its promulgation and is not allowed to take effect, or is terminated by the passage of a joint resolution, any deadline is extended for one year after the date of enactment of the joint resolution. Thus, disapproval of a mandated rule allows an agency to "try again," guided presumably by the disapproval debate.[42]

7. Senate and House Procedures for Consideration of Disapproval Resolutions

Section 802(a) spells out the process for an up or down vote on a joint resolution of disapproval.[43] Such a resolution must be introduced within 60 calendar days (excluding days either house of Congress is adjourned for more than three days during a session of Congress) after the agency reports the rule to the Congress in compliance with Section 801(a)(1). Timely introduction of a disapproval resolution allows each house 60 session or legislative days to consider it through use of expedited consideration procedures. If the resolution passes, it allows retroactive nullification of an effective rule and limits the agency from promulgating a "substantially similar" rule without subsequent congressional authorization to do so by law.

The CRA provides an expedited consideration procedure for the Senate. If the committee to which a joint resolution is referred has not reported it out within 20 calendar days after referral, it may be discharged from further consideration by a written petition of 30 members of the Senate, at which point the measure is placed on the calendar. After committee report or discharge it is in order at any time for a motion to proceed to consideration. All points of order against the joint resolution (and against consideration of the measure) are waived, and the motion is not subject to debate, amendment, postponement, or to a motion to proceed to other business. If the motion to consider is agreed to, it remains as unfinished business of the Senate until disposed of.[44] Debate on the floor is limited to 10 hours. Amendments to the resolution

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[40] 5 U.S.C. § 801(f) (2015).

[41] 5 U.S.C. § 801(b)(2) (2015).

[42] 5 U.S.C. § 803 (2015).

[43] For an in-depth discussion of procedural issues that may arise during House and Senate consideration of disapproval resolutions, *see* Richard S. Beth, Cong. Rsch. Serv., RL31160, Disapproval of Regulations by Congress: Procedure Under the Congressional Review Act (2001).

[44] 5 U.S.C. § 801(d)(1) (2015).

and motions to postpone or to proceed to other business are not in order.[45] At the conclusion of debate an up or down vote on the joint resolution is to be taken.[46]

There is no special procedure for expedited consideration and processing of joint resolutions in the House. But if one house passes a joint resolution before the other house acts, the measure of the other house is not referred to a committee. The procedure of the house receiving a joint resolution "shall be the same as if no joint resolution had been received from the other House, but . . . the vote on final passage shall be on the joint resolution of the other House."[47]

8. Judicial Review of Actions Taken under the CRA

Section 805 precludes judicial review of any "determination, finding, action or omission under this chapter."[48] This would insulate from court review, for example, a determination by the OIRA administrator that a rule is major or not, a presidential determination that a rule should become effective immediately, an agency determination that "good cause" requires a rule to go into effect at once, or a question as to the adequacy of a Comptroller General's assessment of an agency's report. The legislative history of this provision indicates that it was not meant to preclude a court challenge to the failure of an agency to report a rule.[49] However, a majority of district and appellate court rulings have held that the preclusion provision applies to and prevents such challenges.[50]

Finally, the law provides a rule of construction that a reviewing court shall not draw any inference from a congressional failure to enact a joint resolution of disapproval with respect to such rule or a related statute.[51]

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[45] 5 U.S.C. § 802(d)(2) (2015)

[46] 5 U.S.C. § 802(d)(3) (2015). There is some question whether a motion to proceed is non-debatable because of the absence of language so stating. Arguably, the non-debatability of the motion is integral both to the scheme of the expedited procedure provisions as well as to the overall efficacy of the CRA's statutory scheme and thus may be implied. Alternatively, debate on such a motion may be limited by Section 803(d)(2) which limits debate on joint resolutions, as well as "all debatable motions," to 10 hours. Ultimately, a resolution of this question would be made by the Senate parliamentarian, or the Senate itself. However, at the commencement of the debate on S.J.Res. 6, to disapprove the ergonomics rule, the presiding officer declared that "The motion to proceed is not debatable. The question is on agreeing to the motion." The motion was agreed to. 147 Cong. Rec. S 1831 (daily ed. March 6, 2001). At least one other precedent exists in which it was ruled that a motion to proceed to a budget resolution under the Budget Act was non-debatable despite the silence of the act on the matter. *See* 127 Cong. Rec. S 4871 (May 12, 1981).

[47] 5 U.S.C. § 802(f)(1)(2) (2015).

[48] 5 U.S.C. § 805 (2015).

[49] *See* 142 Cong. Rec. 6907 (1996).

[50] *E.g*., Kan. Nat. Res. Coal. v. U.S. Dep't of Interior, 971 F.3d 1222, 1235-36 (10th Cir. 2020) ("The CRA contemplates determinations, findings, actions, and omissions by agencies, the Comptroller General, the President, and Congress" and "unambiguously prohibits judicial review of any omission by any of the specified actors.").

[51] 5 U.S.C. § 80(g) (2015).

B. Utilization of the Review Mechanism Since 1996

1. Summary of Rules Reported, Resolutions Introduced, and Actions Taken

As of June 2016, the Comptroller General had submitted reports pursuant to Section 801(a)(2)(A) to Congress on some 1,450 major rules.[52] In addition, the Government Accountability Office (GAO) had cataloged the submission of over 70,000 non-major rules as required by Section 801(a)(1)(A). To that date, 114 joint resolutions of disapproval have been introduced relating to 70 rules. Until the beginning of the 115th Congress only one rule, the Occupational Safety and Health Administration's ("OSHA") ergonomics standard, was disapproved (in March 2001), an action that some believe to be unique to the circumstances of its passage. Since that action no disapproval resolutions were passed by both houses and sent to the President until the 114th Congress, when five such disapprovals were voted by both houses despite presidential veto warnings. The President in fact vetoed each of them.[53] As of mid-2025, Congress has approved and the President has signed into law 29 disapproval resolutions.

Finally, it is significant to note that a CRS study has found that during the period 1998 through 2008 at least 190 proposed or effective rules were stayed by the limitations on appropriations in annual funding measures enacted during those years.[54]

2. The Ergonomics Rule Rescission

OSHA's ergonomics standard had been controversial since the publication of its initial proposal for rulemaking in 1992 during the Bush administration. OSHA circulated a draft proposal in 1994 which was met with strong opposition from business interests. An umbrella organization, the National Coalition on Ergonomics, formed to oppose its adoption. In 1995, OSHA circulated a modified draft proposal, particularly with respect to coverage and regulatory requirements. At the same time, congressional opposition resulted in appropriations riders that prohibited OSHA from promulgating proposed or final ergonomics regulations during the fiscal years 1995, 1996, and 1998.[55]

The riders did not prohibit OSHA from continuing its development work, however, which included questions related to whether scientific knowledge of ergonomics was adequate for rulemaking and whether the cost of implementation of a broad standard would be extraordinarily burdensome to industry. Congress mandated reports from the National Academy of Sciences which found a significant statistical link between workplace exposures and musculoskeletal disorders, but also noted that the exact causative factors and mechanisms were not understood. In 2000, congressional attempts to pass another appropriations rider, as well as stand-alone prohibitory legislation, failed. OSHA issued its final standard on November 14, 2000; it became effective on January 16, 2001.[56] Most employer responsibilities under the new standard, however, were not to begin until October 2001.

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[52] *See* U.S. Gov't Accountability Off., *supra* note 11, for updated reporting statistics. Between 1999 and 2009 GAO catalogued over 1000 rules, an average of over 100 per year, that had been published in the Federal Register that were neither reported to it nor to both houses of Congress as required. In 2010 GAO took direct action that reduced the number of unreported rules to four. Covered rules that are not required to be published in the Federal Register are rarely reported.

[53] The five were: S. J. Res. 8 (NLRB Union Election rules); S. J. Res. 22 (EPA Clean Water rules); S. J. Res. 23 (EPA Greenhouse Gas rules); S. J. Res. 24 (EPA Carbon Pollution Emission Guidelines); and H.J. Res. 88 (Department of Labor Fiduciary rules).

[54] *See* Copeland, *supra* note 13.

[55] In a close floor vote, the rider proposed for FY1997 was deleted.

[56] 65 Fed. Reg. 68261 (Nov. 14, 2000).

As soon as the rule was issued, two industry groups filed suit in the D.C. Circuit Court of Appeals. They challenged OSHA's authority to issue the rule, its failure to follow proper procedures, the rationality of its provisions, and the adequacy of its scientific and economics analyses. The intervening 2000 elections also altered the political situation, with one party taking control of the White House and both houses of Congress. Opponents of the standard introduced a resolution of disapproval under the CRA, S.J. Res. 16, on March 1, 2001. A discharge petition was filed on March 5. The Senate debated and passed the resolution the following day, by a vote of 56-44. The resolution was immediately sent to the House and that evening the House Rules Committee issued a rule for floor action the next day. After an hour of debate on March 7, the House passed H.J. Res. 35 by a vote of 223-206. The President signed the nullifying measure into law on March 20, 2001.[57]

The veto of the ergonomics standards could be seen as the product of an unusual confluence of factors and events: control of both houses of Congress and the presidency by the same party; these political actors' longstanding opposition, as well as that of broad components of the industry to be regulated, to the ergonomics standards; and the willingness and encouragement of a President seeking to undo a contentious, end-of-term rule from a previous administration. Indeed, it was presumed by some that the CRA's future might be limited to presidential transitions that effected similar political realignments.[58]

But subsequent events made it appear that even an almost exact repeat of the circumstances that fostered the ergonomics rule rescission may be insufficient to impel congressional use of the CRA. In the concluding months of the George W. Bush administration, a concerted public effort was made to finalize rules, many controversial, so that they would become effective before President–elect Obama and a more heavily democratic-controlled Congress took office. The carryover provisions of the CRA offered the opportunity to disapprove of these so-called "midnight rules" in the same manner used to rescind the ergonomics rule. However, only one disapproval resolution was introduced during the carryover period,[59] which was never reported out of the House committee to which it was referred. Rather, the President and Congress chose traditional means to overturn certain rules. The President asked agencies to commence rulemaking proceedings to repeal some rules, and in at least one instance a midnight rule was overturned by a proviso in an omnibus appropriations bill that the President signed into law.[60] One commentator has suggested that as long as traditional executive and legislative vehicles are available to rescind midnight rules, Congress will not take up valuable floor time to deal with individual rules—particularly when Senate consideration can consume as many as ten hours—and the President will not ask them to do it if there are alternative administrative means to pursue. The author concludes that "[e]ven in transition periods, when the CRA is most likely to be effective, an outgoing Administration did not take steps to avoid its effect, and the incoming Administration did not see any benefit in using it."[61]

When this handbook was last updated in 2017, the authors assessed that in that light, the passage of five disapproval resolutions of "hot button," politically sensitive rulemakings during the 114th Congress in the face of certain vetoes in a presidential election year can be deemed of no more than symbolic significance. Similarly, the successful veto of perhaps a handful of carryover rules in the 115th Congress may also be viewed as purely symbolic. In some 55 legislative days, the House expedited the passage of 15 disapproval resolutions, allowing an hour of floor time for debate on each resolution. On passage, as

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[57] Pub. L. No. 107-5, 115 Stat. 7 (2001).

[58] Pub. L. No. 107-5, 115 Stat. 7 (2001).

[59] H.R.J. Res. 18, 111th Cong. (2009) (concerning a joint rulemaking by the Departments of Interior and Commerce dealing with interagency cooperation under the Endangered Species Act).

[60] *Mysteries of the CRA, supra* note 15, at 2174-76.

[61] *Id.* at 2176.

required by the CRA, the House resolutions were placed directly on the Senate calendar for action. The Senate expended approximately 70 hours of floor time on the passage of 13 resolutions.

3. Illustrations of Attempts to Use the CRA to Influence Agency Actions

In all other cases, if there is any discernible pattern to the introduced resolutions, it is to exert pressure on the subject agencies to modify or withdraw the rule, or to elicit support of other members. In some instances such efforts were successful; in others they were not. For example, H.J.Res. 67 (1997) was aimed at disapproving an OSHA rule setting occupational exposure limits on methylene chloride, a paint stripper used in the furniture and airplane industries. Its sponsor, then-Representative Roger Wicker, contended that the rule would harm small businesses without increasing protections for workers. The disapproval resolution never received a floor vote. But the Congressman succeeded in effecting a compromise through the inclusion of provisions in the FY1998 Labor, HHS and Education appropriations measure,[62] which required OSHA to provide on-site assistance for companies to comply with the new rules without fear of penalty. Mr. Wicker is reported to have stated that he used the disapproval resolution as a vehicle to gather support from influential members, including the chairs of the House appropriations and commerce committees.[63]

The disapproval resolution mechanism was effectively utilized to suspend a highly controversial rulemaking by the then-Health Care Financing Administration (HCFA). In January 1998, HCFA issued a rule requiring that home health agencies (HHAs) participating in the Medicare program must obtain a surety bond that was the greater of $50,000 or 15 percent of the annual amount paid to the HHA by the Medicare program. In addition, a new HHA entering the Medicare or Medicaid program after January 1, 1998 had to meet a capitalization requirement by showing it actually had available sufficient capital to start and operate the HHA for the first three months. The rule was issued without the usual public participation through notice and comment and was made effective immediately. Substantial opposition to the rule quickly surfaced from both surety and HHA industry representatives. HCFA attempted to remedy the complaints by twice amending the rule, in March and in June, but was unsuccessful in quelling the industry concerns. On June 10, Senator Kit Bond, for himself and 13 other co-sponsors, introduced S.J.Res. 50 to disapprove the June 1 HCFA rule. Within a short period, the disapproval resolution had garnered 52 sponsors. On June 17, a companion bill, H.J. Res. 123, was introduced in the House. Thereafter, according to press reports, members of the staffs of Senators Bond, Baucus, and Grassley (all members of the Senate Finance Committee with jurisdiction over the agency) met with HCFA officials and concluded an agreement that (1) the agency would suspend its June 1, 1998 rule indefinitely; (2) the Committee would request a GAO report that would study the issues surrounding the surety bond requirement; (3) on completion and issuance of the GAO report, HCFA would work in consultation with the Congress on the surety bond requirement; and (4) any new rule would not be effective earlier than February 15, 1999, and would be preceded by at least 60 days prior notice. The agreement reportedly was memorialized in a June 26 letter to HCFA signed by Senators Bond, Baucus and Grassley.[64] The GAO report was issued on January 29, 1999, but the rule suspension was never lifted. No floor vote on the disapproval resolutions occurred in either house.

S.J. Res. 60 (1996) offers another illustration of the manner in which the review mechanism has been utilized. This resolution also concerned an HCFA rule, this one dealing with the agency's annual revision of the rates for reimbursement of Medicare providers (doctors and hospitals), which normally would have been effective on October 1, 1996. HCFA, however, submitted the rule to Congress on August 30, 1996,

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[62] P.L. 105-78, 111 Stat. 1467.

[63] *See* Allan Freedman, *GOP's Secret Weapon Against Regulations: Finesse*, CQ Weekly (Sept. 5, 1998), at 2318-19.

[64] *Id.* at 2319-20.

and since it was a major rule, it could not go into effect for 60 days, or until October 29, which meant there would be a significant loss of revenues because the differential rate increases could not be imposed for most of the month of October. Section 801(a)(5), however, provides that if a joint resolution of disapproval is rejected by one house, "the effective date of a rule shall not be delayed by operation of this chapter …" On the morning of September 17, 1996, Senator Lott introduced S.J. Res. 60, and that afternoon, by unanimous consent, the resolution "was deemed not passed."[65] The HCFA rule went into effect on October 1 as scheduled.

An interesting utilization of the CRA process that had an impact and resulted in an unusual outcome involved President George W. Bush's restoration, on February 15, 2001, of President Reagan's so-called Mexico City Policy. The policy limited the use of federal and non-federal monies by non-governmental organizations (NGOs) to directly fund foreign population planning programs that support abortion or abortion-related activities. President Clinton had rescinded the 1984 Reagan policy when he took office in January 1993.[66] A President's authority to determine the terms and conditions on which such NGOs may engage in foreign population planning programs derives from the Foreign Assistance Act of 1961.[67] The provision vests the authority to make these determinations exclusively in the chief executive. President Reagan delegated his authority to make the determinations to the administrator of the U.S. Agency for International Development (USAID), who issued regulations that specified the conditions upon which grants would be given to NGOs. Thus, when the Mexico City Policy was rescinded in 1993, it was the AID administrator that did it, at the direction of President Clinton. When President Bush restored it in 2001, he did it in a directive to the AID administrator[68] who simply revived the old conditions by internal agency administrative action.

A number of Senate opponents of the policy filed a disapproval resolution, S.J. Res. 9, on March 20, 2001. The members sought to nullify the administrator's action, reasoning that it was a covered rule under the CRA since the implementing action was taken by an executive agency official and not by the President himself, and thus was reviewable by Congress.[69] The President responded by rescinding his earlier directive to the AID administrator and thereafter issuing an executive order under his statutory authority to implement the necessary conditions and limitations on NGO grants.[70] The presidential action mooted the disapproval resolution and rendered a subsequent attempt to veto the rule by S.J. Res. 17 ineffective because the CRA does not reach such actions by the President.

A final interesting example of an attempt to use the CRA as a device to pressure agency conformity with asserted congressional policy designs involved the State Children's Health Insurance Program (SCHIP), which is administered by the Centers for Medicare and Medicaid (CMS) in the Department of Health and Human Services (HHS). SCHIP is a program designed to cover the health care costs of uninsured children in families with income that is modest but too high to qualify for Medicaid. States receive federal matching funds and for years were given flexibility in designing their SCHIP programs, including

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[65] *See* 142 Cong. Rec. S10723 (daily ed. September 17, 1996).

[66] Memorandum on the Mexico City Policy, 29 Weekly Comp. Pres. Doc. 88 (Jan. 22, 1993).

[67] 22 U.S.C. § 2151b(b) and (f)(1) (2000).

[68] Memorandum on Restoration of the Mexico City Policy, 37 Weekly Comp. Pres. Doc. 216 (Jan. 22, 2001).

[69] *Compare* Franklin v. Massachusetts, 505 U.S. 788, 800 (1992) and Dalton v. Specter, 511 U.S. 462, 469 (1993) (both holding that the president is not subject to the APA procedures since he is not expressly covered by its definition of agency), *with* Chamber of Commerce v. Reich, 74 F.3d 1311 (D.C. Cir. 1998) and National Family Planning Council v. Sullivan, 979 F.2d 227 (D.C. 1992) (each allowing challenges to agency actions that were issued pursuant to presidential directive).

[70] 22 U.S.C. § 2151b(b) and § b(f)(1) (2006).

consistently being granted waivers by CMS to cover uninsured families with incomes exceeding 200% of the federal poverty level (FPL).

In 2007 President Bush vetoed two authorization measures that would have effectively funded that expanded coverage. In August 2007, CMS issued a "clarification" letter to the officials who administer the state programs advising them that five discretionary strategies that had been utilized by states to prevent "crowd out" of private group health plans were now mandatory for states that expanded eligibility coverage above the effective level of 250% of the FPL. States had to amend their schemes by August 2008 "or CMS will pursue corrective action." In September 2007, CMS rejected a New York state plan that would have raised the family eligibility to up to 400% of the FPL, relying on the August clarification letter.

CMS refused to acknowledge that the letter was a rule under the APA that either had to be reported to Congress under the CRA—as both CRS's and GAO's General Counsel concluded it did—or promulgated pursuant to the notice and comment requirements of the APA, as asserted in a lawsuit filed by New York and three other states challenging the binding validity of the letter. Senator John D. Rockefeller, Chairman of the subcommittee with jurisdiction over SCHIP, following a House hearing on the CMA action,[71] filed a disapproval resolution[72] with 49 co-sponsors. The resolution was never reported or discharged out of committee. In January 2009, with increased Democratic majorities in both houses, Congress passed authorization legislation for expanded funding of SCHIP. The bill contained no express mention of the contested eligibility requirements. The President signed it into law on February 4, 2009.[73] That same day, the President issued a presidential memorandum directing the Secretary of HHS to withdraw the August 2007 letter. On June 30, 2010, New York State received CMS approval of its state plan amendment which raised family income eligibility up to 400% of the FPL retroactive to April 2009.

C. Perceived CRA Structural and Interpretive Impediments

As has been indicated, apart from the flurry of carryover period disapprovals in 2017, in the 20 years since its passage, the CRA disapproval process has been used sparingly. Those supporting the wider use of the regulatory disapproval mechanism have raised several criticisms and questions concerning the process. These have included a need for a screening mechanism for submitted rules; the absence of an expedited procedure in the House of Representatives for consideration of disapproval resolutions; the deterrent effect of the need for a supermajority to overcome a veto; the uncertainty about which rules the law covers; and the judicial enforceability of its key requirements.

1. Lack of a Screening Mechanism to Pinpoint Rules That Need Congressional Review and the Need for a Supermajority; Proposals for Change; the REINS Act

Proponents of an expanded use of the CRA process have called for a screening mechanism that would alert committees to rules that may raise important or sensitive substantive issues. In their view, the lack of timely and meaningful substantive information prevents busy committees from prioritizing such issues.[74] As discussed above, the comptroller general's reports on major rules are really just check lists for legally

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[71] *Protecting Children's Health Coverage Act of 2008: Hearing on H. R. 5998 Before the H. Comm. on Energy and Com. Subcomm. on Health*, 110th Cong., (2008).

[72] S.J. Res. 44, 110th Cong. (2008).

[73] Children's Health Insurance Program Reauthorization Act of 2009, Pub. L. 111-3, 123 Stat. 8.

[74] See Interim Report, *supra* note 14, at 81-84.

required agency tasks, not substantive assessments of whether those tasks were done properly or whether the rules accord with congressional intent.

It is rarely the case that jurisdictional committees or interested members lack knowledge of the existence of the most sensitive rules. Stakeholders, their lobbyists and public interest groups, among others, fill the notification gap. What critics say is absent is in-depth scrutiny and analysis of individual rules by an authoritative and presumably neutral source that could provide the basis for triggering meaningful congressional review. Opponents reject this argument and argue that the CRA, in its current form, is exactly what Congress intended, and that any lack of action under it does not equate to lack of knowledge of major rules.

Three distinct categories of reform proposals dealing with these concerns have abounded since the 105th Congress: establishment of an independent substantive screening body; creation of a joint congressional rulemaking review committee; and requiring that all agency major rulemaking efforts be deemed proposals that must be approved by passage of a law.[75]

a. Independent Body Screening Proposals

A number of proposals would establish an independent Congressional Office of Regulatory Analysis (CORA) modeled after the scheme of the Congressional Budget Office (CBO). The CORA would be headed by a director appointed by the House Speaker and the Senate Majority Leader for a term of four years, with service in the office limited to no more than three terms. The current review functions of the comptroller general under the CRA and the CBO under the Unfunded Mandates Act of 1995 would be transferred to the proposed CORA. The CORA regulatory analysis function would be primarily confined to reported major rules. Secondary authority would be assigned to committee requests for review of non-major rules; and tertiary priority would be given to individual member requests.

Supporters of the CORA model argue that an independent office of regulatory analysis would serve the congressional need for objective information necessary to evaluate agency regulations. In their view, a CORA would also provide credibility and impetus for wider utilization of the review mechanism. Further, by providing intensive review of certain major rules, it would forestall the possibility of OIRA's reluctance to provide an objective evaluation of agencies' regulations,[76] and make the regulatory process more rational and transparent. Those opposing the establishment of an office of this kind contend that creation of a new congressional bureaucracy for review purposes would be unnecessarily duplicative of what the agencies have already done. They raise doubts as to whether a CORA could provide the necessary assessments within the time frames of the CRA, and whether the appointment of a CORA director by the leadership of the House and Senate would make the office political in nature.[77] They also claim it would be extraordinarily expensive.

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[75] A detailed discussion of such proposals may be found in Morton Rosenberg, The Congressional Review Act after 15 Years: Background and Considerations for Reform (2011), available at https://www.acus.gov/sites/default/files/documents/COJR-Draft-CRA-Report-9-16-11.pdf. *See also* Interim Report, *supra* note 14, at 81-84.

[76] *The Regulatory Right-to-Know Act and the Congressional Office of regulatory Analysis Act: Hearing on S. 59 Before the S. Comm. on Governmental Affairs*, 106th Cong. (1999) (testimony of Robert W. Hahn and Robert E. Litan, Brookings Institution), https://www.brookings.edu/wp-content/uploads/2016/06/04_righttoknow_litan-1.pdf.

[77] *Id.*; *see also* Jennifer Coderre, *Senate Panel Continues Debate on Costs, Benefits of 'Regulatory Right-to-Know' Bills*, BNA Daily News Rep. (Apr. 23, 1999), at A-30. Comments on CORA were attributed to Gary Bass of OMB Watch.

Congress agreed to a limited test of the CORA concept late in the 106th Congress with the passage of the Truth in Regulating Act of 2000.[78] That legislation established a three-year pilot project for the GAO to report to Congress on economically significant rules. Under this pilot program, whenever an agency published an economically significant proposed or final rule a chairman or ranking minority member of a committee of jurisdiction of either house of Congress could request the comptroller general to review the rule. The Comptroller General was to report on each rule within 180 calendar days. The report had to contain an "independent evaluation" by the comptroller general of the agency's cost-benefit analysis. Only one request was ever made pursuant to the provision. That was submitted in January 2001 by the chairs of the jurisdictional committees of the House and Senate with respect to the Department of Agriculture's forest planning and roadless area rule. GAO advised the requesters that although the act authorized $5.2 million per year for the program, no monies had been appropriated, and it could not proceed with the request. No further action was taken on the request, and Congress never enacted an appropriation, thereby forestalling implementation of the project. It may be noted that the 180-day reporting period did not mesh at all with the time period under the CRA for consideration of rules subject to resolution of disapproval, although completed requests for analyses of *proposed* rules might coincide with such reviews. In any event, the pilot program established by the act expired in January 2004 and was never revived.

b. Joint Congressional Committee Models

In an apparent attempt to avoid the criticisms of the CORA model and to remedy some of the perceived impediments to the effectiveness of the CRA, proposals have been introduced which would amend the CRA by establishing a joint congressional committee with broad authority to investigate, evaluate and recommend actions with respect to the development of proposed rules, the amendment or repeal of existing rules, and disapproval of final rules submitted for review under the CRA. The responsibilities would have been in addition to the current statutory framework providing for review of new rules that are required to be reported. A version of such a joint committee proposal would permit the joint committee to recommend disapproval of new rules to jurisdictional committees. The joint committee would be capable of holding hearings, requiring the attendance of witnesses, and making rules regarding its organization and procedures. The bills also provided for an expedited consideration procedure in the House. The only part to be played by the joint committee in the rule review process would have been to recommend to jurisdictional committees that certain submitted new rules be subject to disapproval resolutions, thereby according deference to the current roles of jurisdictional committees. Downsides to such a committee include the considerable time necessary for members to consider its recommendations, the cost of developing requisite staff expertise, and the inherent potential for political influence, actual or perceived.[79]

c. Affirmative Approval Proposals/the REINS Act

A third category of reform proposals would address most of the perceived impediments by requiring agencies to submit all final rules to Congress for affirmative approval by law before they could become effective. The 112th Congress saw the first introduction, and House passage, of perhaps the most ambitious and detailed version of such a review scheme. Under H.R. 10, the Regulations from the Executive in Need of Scrutiny Act of 2011 (REINS Act), all major rules that are reported to Congress would be treated as proposals which, if not approved within a specified period of time, cannot go into

[78] Truth in Regulating Act of 2000, P.L. 106-312, 114 Stat. 1248-50; 5 U.S.C. § 801 (2015).

[79] *Id.*

effect and cannot be proposed again in the same Congress. The H.R. 10 model has been followed in subsequent congresses.

The REINS Act would supplant the CRA. Rules designated "major" by the OIRA administrator must be reported to each house and the Comptroller General and referred both to the appropriate jurisdictional committee and also to the House Judiciary and Senate Homeland Security and Governmental Affairs Committees. A major rule could become effective only upon enactment of a joint resolution of approval, which must be passed by the end of the 70th session day, or legislative day after Congress receives it. If not enacted within that period, the same rule could not be considered again in the same Congress. The President is authorized to make an emergency determination for certain specified exigent situations that would allow a rule to go into immediate effect, but for no longer than one 90-day period and doing so would not interrupt the statutory review process.

Both houses would have the same fast-track consideration procedure. If an approval resolution has not been acted upon by the referral committees within 15 session or legislative days, it is automatically discharged and placed on the respective house calendars. A vote on final passage must be taken within 15 session or calendar days thereafter. If a motion to proceed is agreed to, the resolution remains the sole business of the body until disposed of. Two hours of debate are allowed, and the resolution is not subject to amendment. If one house acts before the other, the resolution passed by the other house will be the one voted on by the receiving house.

The REINS Act would also deal with non-major rules. The procedure and timing for consideration of non-major rules would track the CRA's current model, which provides expedited fast-track consideration in the Senate, normal bill processing in the House, and placement on the calendar of the house receiving a passed disapproval resolution. However, the REINS Act would eliminate the current provision that a rule similar to a disapproved rule cannot be considered again unless Congress by law authorizes it.

Finally, the H.R. 10 model would have adopted two new provisions respecting judicial review. First, it would make clear that the judicial preclusion provision of Section 805 does not stop a court from determining that a rule that has not been reported is not effective. Second, Section 802(g) of the bill provides that congressional approval of a rule does not shield the rule from normal APA court review for substantive or procedural defects and may not be included in the record before a court reviewing the rule. The REINS Act proposal does not provide for a mechanism for independent screening and evaluation of reported major rules.

The House Judiciary Subcommittee on the Courts, Commercial and Administrative Law held hearings on the REINS Act on January 24 and March 8, 2011, which raised differing and contentious views on the constitutionality and practicality of the proposal.[80] The REINS Act passed the House on December 7, 2011 and was referred to the Senate Homeland Security and Governmental Affairs Committee for consideration. It was never acted upon in the Senate. Virtually identical versions of the REINS Act have been passed by the House in the 113th, 114th and 115th Congresses but also have not been acted upon by the Senate. As indicated previously, there is some doubt whether President Trump would sign legislation that would divest him of the virtually plenary powers he has inherited to control the exercise of the broad rule making authorities Congress has delegated to executive agencies over time. In the 119th Congress,

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[80] *See The REINS Act—Promoting Jobs and Expanding Freedom by Reducing Needless Regulations: Hearing Before the H. Judiciary Comm. Subcomm. on Courts, Commercial and Admin. Law*, 112th Cong. (2011) (testimony of Professor Sally Katzen and David McIntosh respectively opposing and supporting the constitutionality of affirmative approval mechanisms). *See also* Paul R. Verkuil, *Comment: Rulemaking Ossification—A Modest Proposal*, 47 Admin. L Rev. 453, 457 (1995) (proposing fast track legislative approval and limited judicial review); Stephen G. Breyer, *The Legislative Veto After Chadha*, 72 Geo. L.J. 785 (1984) (suggesting legislative approval as a valid alternative to the legislative veto).

the REINS Act was introduced and incorporated into the House Budget Resolution. Ultimately, it was not included in the One Big Beautiful Bill, the major budget reconciliation package enacted by the Republican trifecta in 2025. The REINS Act was also introduced as a standalone piece of legislation and was referred to the House Judiciary Committee.[81]

2. Lack of an Expedited Consideration Procedure in the House

Those unsatisfied with the present CRA review process argue that the absence of an expedited consideration procedure in the House of Representatives may well be a factor affecting the use of the process in that body. This is because, as a practical matter, it means engaging the House's leadership each time a rule is deemed important enough by a committee or group of members to seek speedy access to the floor. In view of the limits both on floor time and the ability to gain the attention of leadership, it is argued that only the most well-situated in the body will be able to gain access within the limited period of review.[82] It is also maintained that a perception that no action will be taken in the House might deter Senate action.

It has been suggested that this asymmetry may be reflective of the fact that the Senate has more procedural hurdles to majority rule than does the House, so the drafters of the CRA may have believed that fast-track procedures were only needed for the Senate.[83] The House parliamentarian speculated in 1997 that the CRA may have left out fast-track procedures for the House because the House Rules Committee can limit debate and expedite bills to the floor at its choosing.[84] One commenter, not inconsistent with the foregoing suggestions, contends that the "CRA is designed to ensure that political minorities are not able to use congressional procedure to hijack policy."[85] The author argues that while it is well established that the House is a majoritarian institution, the House also recognizes that its committees are susceptible to capture by special interests. A prominent example cited is that if one house passes a disapproval resolution and sends it to the other house, it is placed on the calendar of that house rather than referred to one of its committees and is the resolution that will be voted on. As a consequence, the author concludes, "[a]t the very least, Congress believes committee capture is real, because it adopted the CRA in part to circumvent committees."[86]

It is interesting to note, then, that the proposed REINS Act would impose expedited procedures on both House and Senate consideration of *approval* resolutions, including automatic discharge from the committees of referral after 15 days, but reverts to the CRA model when non-major rules come under review. Since it is virtually certain that the REINS Act proposal has the imprimatur of the current House leadership, it can be speculated that at the heart of the difference is the sense of the leadership that an *approval* scheme warrants a fast track to ensure that a mere faction cannot bring executive agency rulemaking to a universal halt. But leaving the *disapproval* process to the vicissitudes of unanimous

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[81] H.R. Res. 142, 119th Cong. (2025).

[82] The experience with respect to the repeal of the ergonomics standard, discussed *supra* at subsection C(2), would appear to bear this out.

[83] *See* William N. Eskridge et al., Cases and Materials on Legislation 517 (4th ed. 2007).

[84] *See Congressional Review Act: Hearing before the Subcomm. on Commercial and Administrative Law, H. Comm. on the Judiciary*, 105th Cong. 50 (1997) (testimony of Charles W. Johnson III, Parliamentarian, U.S. House of Representatives). This has in fact occurred with the expedited approval by the House of 13 disapproval resolutions in the first month of the 115th Congress.

[85] *Mysteries of the CRA*, supra note 15, at 2176-77.

[86] *Id.* at 2177-78.

consent, suspension, special rule, or discharge petition, which may bring it to a grinding halt, is apparently acceptable because the effects are insular and confined within the House.[87]

3. The Uncertainty of the Effect of an Agency's Failure to Report a Covered Rule to Congress

Section 801(a)(1)(A) of the CRA provides that "[b]efore a rule can take effect," the federal agency promulgating such rule shall submit to each house of Congress and the comptroller general a report containing the text of the rule, a description of the rule, including whether it is a major rule, and its proposed effective date. The CRA contains no internal institutional mechanism to enforce compliance with its reporting requirement, but its legislative history appears to presume that private parties subject to unreported rules would be able to seek judicial relief from agency enforcement of ineffective rules.[88]

However, Section 805 states that "no determination, finding, action or omission under this chapter shall be subject to judicial review." Early on, the Department of Justice (DOJ) broadly hinted that the language of Section 805 "precluding judicial review is unusually sweeping" so that it would presumably prevent judicial scrutiny and sanction of an agency's failure to report a covered rule.[89] DOJ has succeeded with its preclusion argument in all but one of numerous federal appellate and district court rulings, which rested essentially on the plain meaning rule.[90] None of the opinions of those courts have come to grips with the seemingly unequivocal evidence of the contrary statements by the House and Senate sponsors of the CRA or the fact that such a reading of the act could render it ineffectual. In fact, it appears that the legislative history of the act was never briefed as an issue in these cases.

Commentators have suggested that the preclusive judicial reading of Section 805 renders the statute ineffectual and encourages agency non-reporting of covered rules.[91] A study by CRS indicates that in fact for a lengthy period a significant number of covered, published rules have not been reported.[92] It appears

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[87] Interview with House Parliamentarian John Sullivan, August 9, 2011.

[88] *Legislative History*, *supra* note 9, at 6929 (1996) ("The [section 805] limitation on judicial review in no way prohibits a court from determining whether a rule is in effect. For example, the authors expect that a court might recognize that a rule has no legal effect due to the operation of subsections 801(a)(1)(A) or 801(a)(3).") The legislative history of Section of Section 805 is discussed and analyzed in Morton Rosenberg, Cong. Research Serv., RL30116, Congressional Review of Agency Rulemaking: An Update and Assessment of the Congressional Review Act After a Decade (2008), http://research.policyarchive.org/18670.pdf.

[89] *See* letter dated June 11, 1997 to the Honorable Lamar Smith, Chairman, Subcommittee on Immigration and Claims, Senate Judiciary Committee, from Andrew Fois, Assistant Attorney General, Office of Legislative Affairs, DOJ, and accompanying analysis dated June 10, 1997, at 9-11.

[90] *See* Texas Savings and Community Bankers Association v. Federal Housing Finance Board, 1998 U.S. Dist. LEXIS 13470, 1998 WL842181 (W.D. Tex., June 15, 1998), *aff 'd* 201 F. 3d 551 (5th Cir. 2000); United States v. American Electric Power Service Corp., 218 F. Supp. 3d 931, 949 (S.D. Ohio 2002); Montanans for Multiple Use v. Barbouletos, 568 F. 3d 225, 228 (D.C. Cir. 2009) *cert. denied* 560 U.S. 296 (2010); Via Christie Regional Medical Center v. Leavitt, 509 F. 3d 1259(10th Cir. 2007); United States v. Nasir, 2013 U.S. Dist. LEXIS 138622 (E.D. Ky 2013); United States v. Ameren, Mo., 2012 U.S. Dist. LEXIS 95065 (E.D. Mo. 2012); Forsyth Memorial Hospital, Inc. v. Sibelius, 667 F. Supp. 2d 143, 150 (D.D.C. 2009). *C.f.*, United States v. So. Indiana Gas & Electric Co., 2002 U.S. Dist. LEXIS 20936 at 13-14, 55 ERC (BNA) 1597 (S.D. Ind. 2002) (noting in *dicta* that the holdings in *Texas Savings* and *American* Electric *Power* "would render the [CRA] ineffectual.").

[91] *See, e.g.*, Sean D. Croston, *Congress and the Courts Close Their Eyes: The Continuing Abdication of the Duty to Review Agencies' Noncompliance with the Congressional review Act*, 62 Admin. L. Rev. 907, 908, 911, 915-17 (2010); Rosenberg, *supra*, note 10 at 1069-74.

[92] Curtis W. Copeland, Cong. Research Serv., R40997, Congressional Review Act: Rules Not Submitted to GAO and Congress (2009) (detailing over 1000 rules not received by GAO or both houses of Congress between 1999 and 2009). Also unresolved is the question whether an unreported rule that has been effective for many years is still subject to CRA disapproval if then reported. Would an argument founded on "staleness" or due process concerns trigger litigable issues?

that Congress would be warranted in considering legislation that would clarify its original intention respecting judicial enforcement.

4. The Uncertainty of Which Rules Are Covered by the CRA

The CRA's drafters arguably adopted the broadest possible definition of the term "rule" when they incorporated Section 551(4) of the APA. As indicated previously, the legislative history of Section 551(4) and the case law interpreting it make clear that it was meant to encompass all substantive rulemaking documents, which may include policy statements, guidances, manuals, circulars, memoranda, bulletins and the like and which as a legal or practical matter an agency wishes to make binding on the affected public.

The legislative history of the CRA emphasizes that by adopting the definition of "rule" found at Section 551(4) the review process would not be limited only to rules required to comply with the notice and comment provisions of Section 553 of the APA, or any other statutorily required variations of notice and comment procedures, but would rather encompass a wider spectrum of agency activities characterized by their effect on the regulated public. "The committee's intent in these subsections is … to include matters that substantially affect the rights or obligations of outside parties. The essential focus of this inquiry is not on the type of rule but on its effect on the rights and obligations of non-agency parties."[93]

The legislation's drafters were aware of agency practice of avoiding the notification and public participation requirements of APA notice-and-comment rulemaking by issuing other documents as a means of binding the public, either legally or practically.[94] They noted that it was the intent of the legislation to subject just such documents to congressional scrutiny: "The committees are concerned that some agencies have attempted to circumvent notice-and-comment requirements by trying to give legal effect to general statements of policy, 'guidelines,' and agency policy and procedure manuals. The committees admonish the agencies that the APA's broad definition of 'rule' was adopted by the authors of this legislation to discourage circumvention of the requirements of chapter 8."[95]

It is likely that virtually all of the 70,000 non-major rules thus far reported to the comptroller general have been either notice and comment rules or agency documents required to be published in the Federal Register. It is certain that many (perhaps even thousands) of rules that the CRA's sponsors intended to be subject to review have not been submitted.[96] Identifying an exact number is difficult since such covered documents are rarely published in the Federal Register and thus may only come to the attention of committees or members serendipitously or through interest groups' complaints.

Nine such agency actions have come to the attention of committee chairmen and members and were referred to the comptroller general to determine whether they were covered rules. Utilizing the "legal and

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[93] *Legislative History*, *supra* note 9, at 6930.

[94] This practice had been long recognized and criticized in administrative law commentaries. *See, e.g.,* Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them To Bind The Public?*, 41 Duke L.J. 1311 (1992). *See also*, U.S. Gen. Accounting Off., GAO/GGD-98-126, Federal Rulemaking: Agencies Often Published Final Actions Without Proposed Rules (1998).

[95] Legislative History, *supra* note 9, at 6930.

[96] An investigation by the House Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs of the House Government Reform Committee revealed that 7,523 guidance documents issued by the Department of Labor, the Environmental Protection Agency, and the Department of Transportation which were of general applicability and future effect had not been submitted for CRA review during the period March 1996 through November 1999. *See* H. Comm. on Governmental Reform, Non-Binding Legal Effect of Agency Guidance Documents, H.R. Rep. No. 106-1009 (2000), https://www.congress.gov/106/crpt/hrpt1009/CRPT-106hrpt1009.pdf.

practical" impact standard suggested by CRA's sponsors, the Comptroller General determined the actions to be covered rules in six of the nine cases.[97]

5. The Problem of Agency Non-Reporting

In December 2009 CRS issued a study that revealed that GAO had catalogued over 1,000 covered rules that it had not received between 1999 and 2009. Almost none of them were reported to both houses of Congress.[98] During each of those years, GAO monitored the Federal Register for published final substantive rules and compared it with rules it had actually received. A number of the unreported rules were rules deemed significant by OIRA. GAO notified OIRA on at least five occasions during this period about the lapses, provided it with lists of agencies and their unreported rules, and encouraged it to use the information to ensure agency compliance. It was not until November 2009 that OIRA directly contacted agencies advising them to comply. The e-mail went to all agencies and did not directly identify the non-compliant agencies or the unreported rules. Even with that notice, agency response was slight. In 2010 GAO changed its strategy and for the first time directly contacted non-reporting agencies. The effect was dramatic. In the next nine months the number of unreported rules dropped to four.[99]

There is no evidence that non-compliance was deliberate.[100] But clearly some systematic scheme of monitoring and reporting is necessary. GAO took on the task voluntarily in 1998 but never advised anyone in Congress of the emerging situation, except in its annual written testimony before Congress. If the solution is simply making an agency aware of its lapses, someone should be officially given the job of doing so. It certainly should be considered a task for a CORA or another screening body that may be created. And the task would be easier if the threat to the effectiveness of the unreported rule was meaningful.

In that vein, some attention also needs to be given to the difficult problem of identifying in the body of covered rules those agency document issuances that impose, legally or practically, new obligations and duties on the regulated public. Virtually no such documents will be published in the Federal Register. Likely the most effective means of identification will come from the affected public or concerned agency personnel. A confidential tip line could be considered, like those offered by agencies to whistleblowers, in whatever screening body that may be established in the future.

D. Concluding Observations: Establishing a Collaborative Enterprise

In 2006 and 2007, if for no other reason than to maintain a credible congressional presence in the process of delegated administrative lawmaking, suggestions for at least modest legislative remediation of the perceived flaws in the CRA were presented in a number of forums. These included hearings held by the House Judiciary Subcommittee on Commercial and Administrative Law, a CRS symposium, CRS and GAO reports, published recommendations of the House Judiciary Committee, and academic writings.[101] Participating witnesses and panelists concurred that the role of Congress as the nation's dominant policy maker was being threatened by widespread agency evasion of notice and comment rulemaking

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[97] For a discussion of the details of the GC's determinations, *see* Rosenberg, *supra* note 73.

[98] *See* Copeland, *supra* note 13. The CRA provides that for a rule to become effective it must be reported to both GAO and the two houses of Congress.

[99] Interview with Robert J. Cramer, Managing Associate General Counsel, August 15, 2011.

[100] *Id*

[101] *See* Interim Report, *supra* note 14; *Reauthorization of the Administrative Conference of the United States: Hearing Before the H. Comm. on the Judiciary Subcomm. on Com. and Adm. Law*, 109th Cong. (2007) [hereinafter *Reauthorization Hearing*].

requirements; the continued pressure for legislative enhancement of the trend toward substantive judicial review of agency rules; and the frequent calls for increased presidential control of agency rulemaking.

In particular, studies characterizing current rulemaking procedures as ossified conclude that rule promulgation has become too time-consuming, burdensome, and unpredictable.[102] Academic critics assign blame to each of the branches for the increasingly ineffective implementation of statutory mandates, but often identify the courts as the chief culprits. The judiciary overly intrudes in agency decision making, critics say, through interpretations and applications of the APA's arbitrary and capricious test.[103] They maintain that courts will find an agency to have violated its duty to engage in reasoned decision making if its statement of basis and purpose contains any gap in data, or other analytical flaw, with respect to any issue. The commentators cite statistical indications that reviewing courts have been holding major rules invalid up to fifty percent of the time.[104] Preliminary findings from a study commissioned by the House Judiciary Subcommittee suggest a far less successful challenge rate, but the perception that the courts are an obstacle has encouraged agencies to use alternative vehicles to make and announce far-reaching regulatory decisions.[105] For example, academic critics argue that agencies can use actions such as adjudication of individual disputes or so-called "non-rule" rules, where purportedly non-binding statements of policy are made in guidances, operating manuals, staff instructions, or similar agency public communications.[106][107]

These proposed solutions are essentially adjurations to the judiciary to modify or abandon its current doctrinal approach. For example, some scholars suggest that courts abolish the duty to engage in reasoned decision making and instead conduct a review of rules to determine whether they violate clear statutory or constitutional constraints, or apply the *Chevron* deference more consistently and strictly.[108]

Commentators have also argued that fixing the CRA's structural and interpretive flaws is only part of the problem facing Congress. Another part, they claim, is lack of congressional interest in confronting and dealing with complex and sensitive policy issues that major rulemakings often present. During the CRS-sponsored symposium on "Presidential, Congressional, and Judicial Control of Rulemaking," one panelist, Professor Jack Beermann, expressed the view that making it easier for Congress to overturn an agency rule may come at a high political cost. He asked "Does Congress want to be in the position where

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[102] *See. e.g.*, Jerry L. Mashaw & David L. Harst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 Yale J. Reg. 275 (1987); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 Duke L.J. 1385 (1992); Richard J. Pierce, Jr., *The APA and Regulatory Reform*, 10 Admin. L.J. Am. U. 81, 82-84 (1996) [hereinafter *Regulatory Reform*]; Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 Admin. L. Rev. 59 (1995) [hereinafter *Deossify Rulemaking*]; Richard J. Piece, Jr., *Two problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 Duke L.J. 300 (1988); Verkuil, *supra* note 77.

[103] *See, e.g.*, *Regulatory Reform*, *supra* note 98, at 83; *Deossify Rulemaking*, *supra* note 98, at 65-66.

[104] *See* Peter H. Schuck & Donald Elliot, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 Duke L.J. 984, 1022 (1990) (finding that during 1965, 1974, 1984 and 1985, reviewing courts upheld only 43% of agency rules); Patricia M. Wald, *Judicial Review; Talking Points*, 48 Admin L. Rev. 350 (1996) (noting that of 36 major rules reviewed by the District of Columbia Circuit during one year, 17 (or 47%) were remanded in part for reconsideration.).

[105] *Reauthorization Hearing*, *supra*, note 97 (Testimony of Professor Jody Freeman). The study was never finalized or published.

[106] *See, e.g.*, Anthony, *supra* note 90; Robert A. Anthony, *"Well You Want the Permit, Don't You?": Agency Efforts to Make Non-legislative Documents Bind the Public*, 44 Adm. L. Rev. 31 (1992); Michael Asimow, *California Underground Regulations*, 44 Adm. L. Rev 43 (1992).

[107] *See, e.g.*, Anthony, *supra* note 90; Robert A. Anthony, *"Well, You Want the Permit, Don't You?": Agency Efforts to Make Non-legislative Documents Bind the Public*, 44 Admin. L. Rev. 31 (1992); Michael Asimow, *California Underground Regulations*, 44 Admin. L. Rev 43 (1992).

[108] *See, e.g.*, Verkuil, *supra* note 77; Pierce, *supra* note 98*; Deossify Rulemaking*, *supra* note 98, at 71-93.

[it is perceived] that everything an agency does is their responsibility since they've taken it on and reviewed it under this mechanism? … Do they want to have that perception?" He concluded that "I think that this may just increase the blaming opportunities for Congress."[109]

Some of the commenters raised Congress's failure to understand and appreciate the nature of the stakes involved and the dangers inherent in failing to act decisively to resolve them. Professor Cynthia Farina has argued that the administrative lawmaking process's legitimacy is at the heart of the deossification, nondelegation and new presidentialism debates. Her insight that the regulatory process needs to be seen as a "collaborative enterprise" involving appropriate official actors and institutional practices could be a helpful guidepost moving forward.[110]

This chapter has identified structural and interpretive issues affecting the use of the CRA. While there have been some instances of the law apparently influencing the implementation of certain rules, the threat of congressional scrutiny and disapproval has not proven to be a significant factor in agency rule development. The consistent use of appropriations limitations to stall rule development or the implementation of final rules, in contrast to the quite limited use of the CRA's formal disapproval process, is corroborative evidence of the ineffectiveness of the current review scheme. The first instance in which an agency rule was successfully negated was seen as a singular event not soon to be repeated. Indeed, when a new President took office in 2009 and his party had comfortable majorities in both houses, neither Congress nor the President saw a need to use the CRA against the purportedly offensive midnight rules of the outgoing administration. They turned instead to traditional APA processes and administrative practices to effect changes. Although a handful of disapproval resolutions have recently been enacted, they are narrow in scope, of minimal substantive importance, and will likely be seen as exercises in political symbolism. The view that the current CRA scheme provides no better rule review than the regular legislative process appears correct and needs to be addressed in an effective manner.

Today, as in 2009, both houses of Congress and the White House are controlled by one political party. Although a common deregulatory inclination is evident, the political manner of achieving and maximizing that goal may be a subject of interbranch conflict. The House has long been committed to a REINS Act solution, one that would make all major rules simply proposals that require full legislative approval. The Senate has never taken a formal stance on that scheme. More importantly, enacting the REINS Act would severely diminish the long-time accumulated, pervasive presidential control of agency rule making. It is not beyond the realm of reasonable possibility that President Trump will be reluctant to relinquish the measure of control that Presidents now enjoy. If that proves true, the Congress needs to seriously consider ameliorative methods within their control, however incremental, that will move toward retrieval of its lost authority over the administrative law-making process.

Continuance of the current status quo is politically, and constitutionally, unacceptable. One commenter has opined that if a rulemaking agency perceives that congressional review is only a remote possibility "it will discount the likelihood of congressional intervention because of the uncertainty about where Congress might stand on that rule when it is promulgated years down the road." Such an attitude is

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[109] In subsequent writings Professor Beermann has argued that it is essential that Congress play a central role in rule review. *See* Jack M. Beermann, *The Turn Toward Congress in Administrative Law*, 89 B.U. L. Rev. 727, 758-61 (2009) ("For Congress to be truly responsible for the administrative state, it must monitor and supervise the process of administrative rulemaking and administrative policymaking more generally …. Concerted attention by Congress to agency rules would increase the legitimacy of agency rulemaking, since Congress would be an active partner in the process and could not credibly feign surprise when confronted with an undesirable agency rule.").

[110] Cynthia R. Farina, *Undoing the New Deal Through the New Presidentialism*, 22 Harv. J. of L. & Pub. Policy, 227, 232, 235, 238 (1998).

reinforced "so long as [the agency] believes that the President will support its rule."[111] That this observation has substance is reflected in a widely cited study by the former dean of the Harvard Law School and now Supreme Court Justice Elena Kagan.[112] Kagan suggests that when Congress delegates administrative and lawmaking power specifically to department and agency heads, it is at the same time making a delegation of those authorities to the President, unless the legislative delegation explicitly states otherwise. From this flow, she asserts, the President's prerogative to supervise, direct and control the discretionary actions of all agency officials. "A Republican Congress proved feckless in rebuffing Clinton's novel use of directive power—just as an earlier Democratic Congress, no less rhetorically inclined, had proved incapable of thwarting Reagan's use of a newly strengthened regulatory review process," Kagan argues.[113] She explains that "[t]he reasons for this failure are rooted in the nature of Congress and the lawmaking process. The partisan and constituency interests of individual members of Congress usually prevent them from acting collectively to preserve congressional power-or, what is the same thing, to deny authority to the other branches of government."[114]

With these views in hand, the case can be made that there is an urgent need to restore Congress's political accountability in order to shore up the administrative lawmaking process. An effective congressional rulemaking review process is an essential component of that restoration. Congress has the tools to accomplish that objective, either by a gradual, step-by-step process utilizing its internal rulemaking powers, or at once by a grand legislative accommodation. Either way, the ultimate goal should be the establishment of a "collaborative enterprise" between Congress and the executive. Such a resolution would rest on an understanding that broad delegations of lawmaking authority to agencies are necessary and appropriate, and will continue for the indefinite future. It also would rest on an understanding that agency lawmaking is no less political in nature than congressional lawmaking—even in areas involving sophisticated issues of science and technology—and must draw on the acknowledged strengths and competences of both constitutional actors. Thus, when Congress speaks through legislation, whether by joint resolution of approval or disapproval, it is acting in its representative function and rendering political judgments that are presumptively reflective of the people's will. It is the defining exercise of democratic power.

The President, in a supervisory and managerial role, is best situated to perform his constitutional duty to ensure that the administrative bureaucracy is faithfully executing congressional directives. Where those directives are vague, it is implicitly the President's role to supply necessary substance and explanation. To ensure that national programs are effectively and efficiently carried out, the President's encompassing presence in the agencies is welcome and legitimate. The chief executive should assist agencies in determining responsibilities, setting priorities, allocating limited resources, balancing competing policy goals, and resolving conflicting jurisdictions. But the President should not be the ultimate "decider" in our constitutional scheme.[115]

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[111] *See* Mark Seidenfeld, *The Psychology of Accountability and Political Review of Agency Rules*, 51 Duke L.J. 1059, 1089-90 (2001).

[112] Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2246 (2001).

[113] *Id*. at 2314.

[114] *Id.*

[115] *See* Peter L. Strauss, *Foreword: Overseer, or 'The Decider'? The President in Administrative Law*, 75 Geo. Wash. L. Rev. 696 (2007) ("[I]n ordinary administrative law contexts, where Congress has assigned a function to a named agency subject to its oversight and the discipline of judicial review, the President's role—like that of Congress and the Courts—is that of overseer and not decider. These oversight responsibilities, in my judgment, satisfy the undoubted constitutional specification of a unitary chief executive, while avoiding … executive tyranny.").

Any reformation of the current rulemaking review scheme must draw upon the lessons learned from the ineffective CRA and the insights supplied by the debates on ossification, non-delegation and the new presidentialism, which hopefully provide a framework for realizing a scheme for a collaborative enterprise. Earlier in this study I have noted that effective congressional oversight sustains and vindicates Congress's role in our constitutional scheme of separated powers and checks and balances. That scheme envisions and establishes a perpetual struggle for policy control between Congress and the executive. The Framers of our Constitution had a basic distrust of government as a result of their colonial, early state, and Articles of Confederation experiences. This distrust motivated the structure of the federal government in the Constitution; that is, separating powers among the three branches to avoid concentrations and abuses and to facilitate "checks and balances" among branches.

In practice, the powers of the two political branches are too incomplete for one to gain total control of the departments and agencies of the executive branch. Legislative oversight is the mechanism that attempts to assure that Congress's will is carried out. A more complete and accurate picture, then, is not of congressional dominance, or of executive recalcitrance, but of a dynamic process of continuous sparring, confrontation, negotiation, and ultimate accommodation.

In this spirit, a collaborative enterprise should be established respecting review of administrative lawmaking. The present scheme of review of the CRA should be revised to (1) review only major rules that would be subject to disapproval by joint resolution; (2) establish an independent CORA that would provide expert regulatory assessments of reported major rules for committee guidance; (3) provide for an expedited consideration procedure for the House of Representatives equivalent to that of the Senate; (4) assure that court review and sanction is available against enforcement of unreported rules; and (5) establish a rule of construction that allows courts to take into account the failure to veto a reviewed major rule. Most of these suggested reforms can be accomplished through the internal rulemaking powers of each house. Adoption of these suggested reforms would streamline the review process, make it more efficient, and, most importantly, make it more credible as an effective and fair oversight mechanism. It would also avoid the virtual political impossibility of achieving presidential acquiescence to a REINS Act approval scheme.

The scope of legislative review continues to evolve. In addition to the CRA authority, Congress has an analogous authority under D.C. Code § 1-206.02(c) to disapprove of acts of the Council of the District of Columbia by joint resolution. The 118th Congress did just that, for instance, in response to a controversial package of criminal-justice reforms passed by the D.C. Council (and, to general surprise, President Biden did not veto the joint resolution).[116]

The major 2024 case of *Loper Bright Enterprises v. Raimondo*[117] opens a new and potentially quite different era for the legislative-administrative relationship. No more, *Loper Bright* insists, may courts "defer to an agency interpretation of the law simply because a statute is ambiguous," as under the prior *Chevron* regime.[118] One might expect that in a post-*Loper Bright* regime, agencies will hew more closely to the original understanding of administrative statutes, or change their regulations' implementing

[116] *See* H.J. Res. 26, 118th Cong. (2023); Susan Davis, *Congress Overturns D.C. Crime Bill with President Biden's Help*, NPR (Mar. 8, 2023), https://www.npr.org/2023/03/08/1161902691/d-c-crime-bill-biden-overturn.

[117] 603 U.S. 369 (2024).

[118] *Id.* at 413.

interpretations of those statutes less frequently, or both.[119] If that proves true, then the CRA may matter less as a tool for reining in agency interpretation.

For illustrations of some of the oversight powers, tools, principles, and obstacles discussed in this chapter, see the following case study in the online version of this handbook:

Curtis W. Copeland: *The Presidential-Congressional Power Imbalance in Rulemaking*

[119] *Cf. Loper Bright*, 603 U.S. at 386–87 (suggesting that courts owe due "respect" to executive-branch interpretations of statutes, "especially … when an Executive Branch interpretation was issued roughly contemporaneously with enactment of the statute and remained consistent over time.").

14. Oversight of Federal Judges

Overview

Legislative oversight authority, although broad, is limited to subjects related to the exercise of legitimate congressional power. While Congress has the power to regulate the structure, administration and jurisdiction of the courts, its power over the judicial acts of individual judges[1] is more restricted. For instance, Congress has limited authority to directly remove or discipline a judge for decisions made on the bench. Article III, Section 1 of the Constitution provides that judges have "good behavior" tenure and protection against reduction of their salaries. That has effectively come to mean lifetime tenure for Article III judges, who are subject to removal only through impeachment, which requires a finding that such judge has engaged in a "High Crime or Misdemeanor." In practice, this requirement has excluded political disagreement with judges' rulings from the bench. Thus, an investigation into decisions or other actions by a particular judge pursuant to an impeachment proceeding would appear to require some connection between an alleged "High Crime or Misdemeanor" and a particular case or cases. Moreover, exercise of the subpoena power outside of the confines of an impeachment proceeding is highly problematic. These protections and limitations have served a basic constitutional goal: establishment of a scheme of judicial independence that ensures impartial judicial decision-making free from fear of political retaliation.

But not all scrutiny of individual judges need be within the context of an impeachment proceeding. Some types of review and consideration of particular court decisions or other judicial acts are, of course, well within the purview of Congress's legislative authority. For example, Congress has the power to amend statutes that it believes were misinterpreted by court cases, or to propose amendments to the Constitution that it believes would rectify erroneous constitutional decisions. The Senate confirmation process affords an opportunity to influence future decisions by its scrutiny of presidential nominees. Funding for the operations of the judicial branch is in the hands of Congress, as are the rules that determine the jurisdiction of the courts and the manner in which judges manage litigation and admit evidence. Congress has also established a comprehensive statutory scheme governing complaints against federal judges and, where appropriate, the imposition of judicial discipline, which is administered within the judicial branch.

What follows examines in more detail the scope and limits of Congress's oversight authority over individual federal judges.

A. Congressional Investigatory Authority over the Judiciary: Constitutional Controls and Their Limits

Although oversight may occur regarding any matter within the legislative purview of the Congress, oversight of the other branches of government can become particularly complicated as it implicitly raises sensitive separation of powers concerns. Congressional oversight authority and investigatory powers vis a vis the executive branch and the courts derive from Congress's various legislative authorities over those branches, whether it be the power of the purse, the power to organize the executive and judicial branches, or the power to make all laws necessary for "carrying into Execution" Congress's own enumerated powers as well as those of the coordinate branches. Congressional authority to investigate the other branches of government and compel testimony and the production of documents is not expressly enumerated in the Constitution, but the Supreme Court has made clear that those powers derive from the

[1] Unless otherwise noted, as used in this chapter the word "judge" refers to both Article III judges and Supreme Court justices.

grant of legislative authority in Article I, Section 1.[2] For example, in *McGrain v. Daugherty*, the Court described the power of inquiry, with the accompanying process to enforce it, as "an essential and appropriate auxiliary to the legislative function."[3] The Court also pointed out that the target of the investigation, the Department of Justice, like all other departments and agencies, is a creation of Congress and subject to its plenary legislative and oversight authority. Congress, it held, has clear authority to investigate whether and how these governmental entities are carrying out their missions as long as the power is linked to a legislative function of Congress.[4]

The catalog of areas for which the Constitution has vested in Congress legislative authority over the judicial branch is extensive and provides the basis for determining the scope of Congress' authority to investigate federal judges.

1. Constitutional Controls of the Judiciary Vested in the Congress

a. Creation and Abolition of Federal Courts

The Constitution created the Supreme Court but left Congress with the task of creating other federal courts.[5] Today there are 13 circuit courts of appeal and 94 federal district courts with life-tenured judges, and a variety of Article I courts whose judges are term limited.[6] Congress sets the number of judgeships in each court, including the Supreme Court. Congress can abolish courts it has created, including the judgeships associated with the abolished courts, and has done so.[7]

b. Appointment and Removal of Federal Judges

The Constitution gives Congress express authority over the appointment and removal of federal judges. The Appointments Clause gives the Senate the power to advi[se] and consent" on judicial appointments.[8] In addition, Article I grants to the House the power to impeach federal judges, and to the Senate the power to try all impeachments.[9] These express constitutional powers clearly imply congressional investigative authority with respect to proposed nominees and possible impeachments of federal judges. As discussed in more detail below, the Senate's exclusive and plenary authority over judicial confirmations entitles it to obtain all information necessary to inform its decisions, from both judicial and executive sources.

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[2] 273 U.S. 135, 174 (1927).

[3] *Id.* at 174-75.

[4] *Id.* at 177-78.

[5] U.S. Const. Art. III, § 1.

[6] *E.g.*, the Court of Appeals for the Federal Circuit, the Court of Veterans Appeals, and the United States Tax Court.

[7] There have been two such abolitions in our history. The first occurred in 1802 as a Jeffersonian response to the last-minute creation by the Adams administration of new courts and judgeships, which were quickly filled with Federalist appointees. The abolition and displacement of the judges was upheld by the Supreme Court in *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803). The second occurred in 1913 with the abolition of the Commerce Court. The repeal statute, however, provided for the redistribution of the Court's judges to other courts in the judicial system.

[8] U.S. Const. Art. II, § 2, cl. 2.

[9] *Id.* at Art. I, § 2, cl. 5; *id*. § 3, cl. 6.

c. Defining Jurisdiction of Federal Courts

Congress has express constitutional authority over the jurisdiction of the federal courts. Article III, Section 2 of the Constitution vests appellate jurisdiction in the Supreme Court "with such Exceptions, and under such Regulations as the Congress shall make."[10] The Court has acknowledged that Congress can determine the jurisdiction of the lower federal courts.[11] Thus, Congress has substantial power to investigate in connection with possible restrictions or expansions of the scope of federal court jurisdiction.

d. Procedural Rulemaking

Congress enacts, or approves under the Rules Enabling Act,[12] the national rules that govern how judges manage cases and admit evidence. Statutes prescribe numerous aspects of court operations including sentencing criminals, jury selection, providing attorneys for indigent criminal defendants, handling large class actions, setting limits on the amount of pretrial discovery in civil actions, and the processing of complaints of judicial misconduct, among many others. The breadth of Congress's inevitable involvement with judicial procedural rulemaking allows it to investigate matters relating to such legislative proposals and to compel both testimony and documents on these subjects.

e. Making Substantive Law

Congress of course has the power to define the substantive law that the courts apply in the cases that come before them. Disagreements with court interpretations of statutes can be, and have been, remedied by subsequent legislation. Constitutional interpretations of statutes most often need constitutional amendments to override, though in some instances courts will send signals that statutory language changes would resolve the issue. In either event, Congress has substantial investigatory power to examine anything relevant to possible legislative action.

f. Appropriations and Judicial Administration

Finally, Congress's appropriations power affords substantial authority over both the budget of the judicial branch and the administrative structure by which the judicial branch is managed. All the offices of the judicial bureaucracy were established by acts of Congress and thus are proper subjects of legislative oversight and investigation. Interestingly, all the structural enactments of the past century have been at the behest of the judiciary and have served the goal of maintaining judicial independence by establishing a large measure of judicial accountability and a means of communication between the branches. The Judicial Conference of the United States, which manages the preparation and submission of the judiciary's annual budget and any proposed changes to the procedural rules as authorized by the Rules Enabling Act, was created in 1922 at the request of Chief Justice William Howard Taft. The Judicial Conference also supervises the Administrative Office of the Federal Courts, which was created in 1939. Before the establishment of the Administrative Office, the Justice Department was the source of the judiciary's administrative support. The Administrative Office submits annual reports to Congress concerning the business of the courts, and the director is required by law to "perform such other duties as assigned to him by the Supreme Court or the Judicial Council." That legislation also created circuit judicial councils for the purpose of managing day-to-day operations of each judicial circuit. In 1967, Congress created the Federal Judicial Center, which conducts research for the judicial branch and

[10] *See Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 513 (1868).

[11] Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850).

[12] Ch. 642, 62 Stat. 961 (codified as amended at 28 U.S.C. §§ 2071-2077).

manages programs of judicial education. In 1980, Congress gave the Judicial Conference and circuit councils critical operational roles in the newly created judicial discipline system, which was revised in 2002. Congress's plainly strong interest in overseeing operations of the judicial branch may warrant congressional demands for both testimony and documents.

2. The Limits on Congressional Control of the Judiciary

Congress's oversight powers are acknowledged to extend to the judiciary and the operations of the courts, but only up to a point. Since *McGrain*, jurisdictional congressional committees have developed and honed a formidable array of methodologies and tools to obtain information from executive departments and agencies, and even the White House, when they have deemed it necessary to effectuate legitimate legislative functions. Where voluntary cooperation for requested documents and testimony has been withheld, committees have oftentimes had at least some degree of success, even in the face of claims of executive privilege, through a combination of staged, escalating pressures that may include aggressive public hearings, subpoena issuances, immunity grants, funding threats, appointments delays, contempt citations and court enforcement actions.[13] The question arises, however, whether the enforcement tactics utilized to overcome executive recalcitrance are appropriate, or even constitutionally permissible, in legislative oversight settings involving the operations of the judicial branch and, in particular, the actions of individual judges.

a. Issuance and Enforcement of Congressional Subpoenas to Federal Judges

There appear to have been only two instances of subpoenas to federal judges outside the context of an impeachment proceeding. Both occurred in 1953, and both judges refused to testify. One was issued by the House Un-American Activities Committee to United States Supreme Court Justice Tom C. Clark. Justice Clark responded with a letter in which he declined to appear based on the separation of powers, stating, "The independence of the three branches of our Government is the cardinal principle on which our constitutional system is founded. The complete independence of the judiciary is necessary for the proper administration of justice." The second instance involved U.S. District Judge Louis Goodman, who was summoned to appear before a House subcommittee, declined to testify, but read two statements from all his fellow judges at the Northern District of California indicating that, based upon separation of powers grounds, no judge could "testify with respect to any judicial proceedings."[14] The Committees

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[13] *See* Chapters 2, 4, and 6.

[14] Reported in *William J. Sullivan v. Andrew J. McDonald,* D.N. CV-06 401 0696, Superior Court, Waterbury, Conn. Judicial District (granting a motion to quash a legislative subpoena to a Connecticut Supreme Court justice not part of any impeachment proceeding as an intrusion on judicial independence protected by the separation of powers). Judge Goodman read into the record two statements signed by the seven judges of the U.S. District Court for the Northern District of California, which indicated their refusal to comply with the subpoena and the reasons therefore:

> You have summoned a Judge of the United States District Court for the Northern District of California to appear before your Committee to testify at your current hearings. The Judges, signing below, being all the Judges of the Court, are deeply conscious, as must be your committee, of the Constitutional Separation of functions among the Executive, Legislative, and Judicial branches of the Federal Government. The historic concept that no one of these branches may dominate or unlawfully interfere with the others.
>
> In recognition of the fundamental soundness of this principle, we are unwilling that a Judge of this Court appear before your Committee and testify with respect to any Judicial proceedings.
>
> The Constitution does not contemplate that such matters be reviewed by the Legislative branch, but only by the appropriate appellate tribunals. The integrity of the Federal Courts, upon which liberty and life depend, requires that such Courts be maintained inviolate against the changing moods of public opinion.
>
> We are certain that you, as legislators, have always appreciated and recognized this, as we know of no instance in our history where a committee, such as yours, has summoned a member of the Federal Judiciary.

declined to pursue either subpoena. The virtual absence of any precedent of congressional exercise of compulsory process against judges outside the impeachment context strongly bespeaks legislative acknowledgement of a lack of authority.

Apart from the questionable constitutionality of any attempt to compel judges to respond to congressional oversight through the subpoena and contempt process, such a course is essentially impractical. Committees have the authority to issue subpoenas for testimony or documents. Refusal to comply with such a subpoena is punishable by contempt of Congress, which could result in imprisonment for up to one year and/or a fine of up to $100,000.[15] But a criminal contempt of Congress prosecution can only be triggered by a citation voted by a house that must be presented to a grand jury by a United States Attorney.

Outside the impeachment context, the efficacy of such an oversight method with respect to federal judges seems problematic. A successful use of the criminal contempt mechanism by a committee needs to overcome two formidable legal and practical obstacles. First, although the Speaker (or in the case of the Senate, the President of the Senate) may certify a statement of facts of such contempt "to the appropriate United States Attorney, whose duty it shall be to bring the matter before the grand jury for its action,"[16] the Department of Justice has taken the position that Congress cannot constitutionally direct that the executive initiate a contempt prosecution.[17] In the instance of a prosecution of a judge for failure to comply with a congressional subpoena, for instance, the Department of Justice may weigh pragmatic and legal factors, e.g., a likely unfriendly forum and the availability of the impeachment or statutory judicial discipline process, as reasons to decline to prosecute.

A second option might be for the Judiciary Committee to seek a House resolution authorizing it to bring a civil action to compel compliance with the subpoena.[18] Such an action, if successful, serves to either force the witness to testify or produce the documents sought, or subjects the subpoenaed person to a contempt of court for failure to comply with the court's order. The downside to this course, as with the first option, is that it takes place in a forum likely to be sympathetic to a claim of congressional intrusion on judicial independence.

A third, more realistic and appropriate option is utilization of the statutory judicial discipline process. Currently, federal judges are subject to internal discipline proceedings within the judicial branch. These judicial discipline procedures are available to anyone, including a member of Congress, who deems it necessary to file a complaint against a federal district court judge, judge of a U.S. circuit court of appeals,

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> However, in deference to the publicly avowed earnestness of the Committee, we do not object to Judge Goodman appearing before you to make any statement or to answer any proper inquiries on matters other than Judicial proceedings.

Investigation of the Department of Justice, before the Special Subcommittee to Investigate the Department of Justice, Hearings before the House Comm. on the Judiciary, 83d Cong., 1st Sess., 1753-54 (1953), reprinted in 14 F.R.D 335-36 (1953). An account of the incident appears at http://www.isthatlegal.blogspot.com/2003_03_01_isthatlegal_archive.html.

[15] 2 U.S.C. §§ 192, 194. If the refusal to comply is before a subcommittee, it must vote to hold the person in contempt and refer it to the full committee, which, in turn, must vote out a resolution, accompanied by a report, directing the referral of a contempt citation for prosecution. If affirmatively acted upon by a house, the speaker or the president of the Senate certifies it to the United States attorney for presentation to a grand jury. Contempt of Congress proceedings do not seek the contemnor's testimony or documents; they serve only to vindicate the authority of the house through punishment.

[16] 2 U.S.C. § 194.

[17] 8 Op. OLC 101 (1984); House Judiciary Committee v. Miers, 558 F. Supp. 53 (D.D.C. 2008).

[18] Authorization for a civil contempt enforcement action may be made by passage of a simple resolution by a house. *See Miers*, 558 F. Supp. at 53; Common Oversight and Gov. Reform v. Holder, 979 F. Supp. 2d 1, 4 (D.D.C. 2013).

bankruptcy judge, or magistrate judge.[19] While Congress does not directly control this oversight option, information derived from this process may ultimately serve as the basis for impeachment proceedings.

Finally, the Judiciary Committee might seek a resolution of the House authorizing the Committee to investigate the conduct of a judge to ascertain whether formal impeachment proceedings might be appropriate.[20] Passage of such a resolution would authorize the exercise of subpoena power against the targeted judge by the Committee.

b. Downward Sentencing Departures and the Testimony of Judge Rosenbaum

For most of the nation's history there were no guidelines for judges at the criminal sentencing stage. Punishments for similar crimes varied greatly in courtrooms across the country. The call for an end to the unfairness of such disparate treatment resulted in the establishment by Congress of the United States Sentencing Commission in 1984. The Commission had authority to establish a set of sentencing guidelines that provided judges with ranges of sentences based on variable factors. The guidelines were binding but flexible; leeway was given for downward or upward departures for reasons set forth by the commission. The Supreme Court's 1996 ruling in *Koon v. United States*[21] expanded that leeway by establishing a deferential "abuse-of-discretion" standard for appellate review of downward sentencing departures. Whether by coincidence or because of *Koon*, downward sentencing departures increased dramatically between 1997 and 2001, which spurred interest from conservatives inside the Congress (particularly in the House Judiciary Committee), the Justice Department, and public interest groups concerned with the trend's impact on effective law enforcement.[22]

Congressional interest in and actions on the issue escalated dramatically after the testimony of Chief Judge James Rosenbaum before the House Judiciary Committee in May 2002. Judge Rosenbaum testified on a proposed amendment to the sentencing guidelines that would have permitted downward departures in certain instances for defendants with minimal roles in narcotics conspiracies.[23] Rosenbaum was appointed by President Reagan and had a sentencing record for drug offenders that exceeded the national median for several years. However, he testified in favor of the amendment for more lenient treatment of minor actors, offering 14 examples from the docket of his district court in Minnesota that he said showed why the proposed change would be more just. The testimony angered conservatives on the Committee and prompted the Chair of the Committee's Subcommittee on Crime to write a letter to Rosenbaum requesting that he provide a massive amount of documentation about the 14 cases. The chief judge responded that much of the information was contained in confidential pre-sentencing reports and he would only provide

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[19] *See* Judicial Improvements Act of 2002, 28 U.S.C. §§ 351-364. The 2002 act replaced the judicial discipline procedures of the Judicial Conduct and Disability Act of 1980, as amended, codified at the former 28 U.S.C. § 372 (c).

[20] In our constitutional history there have been 15 impeachment trials in the Senate against judges. Eight have resulted in convictions. In addition to those impeachment investigations that have resulted in Senate trials, there have been a number of instances in which the impeachment process has been initiated by the House of Representatives but has not resulted in articles of impeachment being voted against the subjects of those inquiries. At least 22 of those instances have been investigations initiated against judges. See Elizabeth B. Bazan, Cong. Rsch. Serv., RL98-186, *Impeachment: An Overview of Constitutional Provisions, Procedures, and Practice* (2010) (hereinafter *Bazan*), https://www.everycrsreport.com/files/20101122_98-186_314e463e47df2da5e42d64fa074f2483e309ef85.pdf.

[21] 518 U.S. 81, 99-100 (1996).

[22] *See generally* Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 Yale L. J. 1420 (2008) (discussing the law, practice and politics of sentencing from the establishment of the Sentencing Commission to the ruling in *United States v. Booker*).

[23] The investigation of Judge Rosenbaum is related in Douglas Kelley, *Minnesota Federal Court Judge Caught in Constitutional Crossfire*, 27 Hamline L. Rev. 427 (2004); Todd David Peterson, *Congressional Investigations of Federal Judges*, 90 Iowa L. Rev. 1, 13-19 (2004).

publicly available documents. The Chair responded that he wanted all the information he requested and, in addition, an explanation of the reason for a downward departure decision by the judge that he had just discovered. Rosenbaum provided more publicly available documents but refused to explain his departure ruling, suggesting that the Chairman get a transcript of the hearing. The Committee Report later issued on the bill criticized in detail Rosenbaum's noncooperation as evidencing hostility to the sentencing guidelines and indicated that the Committee's interest in his testimony would be "ongoing."

In March 2003, the Committee threatened to issue a subpoena for records of Judge Rosenbaum's sentencing decisions. A Committee spokesperson dismissed concerns that the subpoena threat improperly interfered with judicial independence, stating that being a federal judge did not excuse noncooperation and misleading statements to the Committee. In the summer of 2003, an agreement was brokered under which the Administrator of the United States Courts would be permitted to gather the requested documents and provide them to the Committee. By that time, however, other legislative events had overshadowed the agreement.

c. Downward Departures and the Feeney Amendment[24]

In March 2003, Rep. Tom Feeney proposed an amendment to pending legislation concerning child pornography and other sexual exploitation of children. The amendment would have prohibited all downward judicial departures on grounds other than those specifically provided in the guidelines, and would have eliminated most remaining downward departure grounds relating to the personal history or characteristics of a defendant. The bill that ultimately emerged from the House-Senate conference committee was less radical. In the final bill, the nearly absolute prohibition on judicial downward departures was limited to crimes involving child pornography, sexual abuse, and child trafficking. But the legislation nonetheless contained a series of challenges to the federal sentencing regime.

The Feeney Amendment's apparent interference with the exercise of judges' decision-making discretion was decried, and calls for its repeal were widely voiced. The Supreme Court's 2005 ruling in *United States v. Booker*—holding that Sentencing Commission guidelines are discretionary, not binding—largely mooted the outcry.[25] But the core question of the extent to which Congress may use legislative or investigatory powers to interfere with, intrude upon, or limit the independence of an individual judge lingers. During the 2012 presidential primary campaign, candidate Newt Gingrich issued a detailed position paper[26] proposing that congressional committees hold "judicial accountability hearings" at which

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[24] Feeney Amendment commentary at the time was extensive. The legal and political dimensions of the controversy are well presented in Smith, *supra* note 22, at 1458-71; Peterson, *supra* note 23, at n.26.

[25] 543 U.S. 220 (2005). The Supreme Court most recently reaffirmed its *Booker* ruling in *Peugh v. United States*, 133 S. Ct. 2072 (2013), holding that a district court erred in sentencing a defendant pursuant to guidelines issued subsequent to less onerous ones that had been in place at the time of the commission of his crime, in violation of the Ex Post Facto Clause. It reiterated that commission guidelines are not binding but are to be consulted and are "the starting point and the initial benchmark" for the exercise of judicial sentencing discretion. "The district court 'may not presume that the Guidelines range is reasonable,'… 'and it may in appropriate cases impose a non-Guidelines sentence based on disagreement with the [Sentencing] Commission'.'" 133 S. Ct. at 2080. *Booker*'s effect on sentencing has been significant. A 2008 study by the Sentencing Commission found that since *Booker*, 39 percent of the sentences handed down were outside the applicable guidelines range. The vast majority of sentences of the out-of-range sentences—95.9 percent—were downward departures. See Mark Osler, *After the Implosion: Trailing Edge Guidelines for a New Era*, 7 Ohio St. J. Crim. L. 795, 799 (2010) (suggesting that the commission's advisory guidelines should only serve to inform judges of what national sentencing trends are for a given type of case, based on the sentences given by federal district judges across the country, thereby sharing valuable peer judgments that would be useful in sentencing decision-making).

[26] *See, e.g.*, Andrew Cohen, *Gingrich: Time to Subpoena Federal Judges*, Atlantic (Oct. 9, 2011), https://www.theatlantic.com/politics/archive/2011/10/gingrich-time-to-subpoena-federal-judges/246407/; Andrew Cohen, *Gingrich's Dangerous Plan to Subpoena Federal Judges, Part II*, Atlantic (Oct. 11, 2011), https://www.theatlantic.com/politics/archive/2011/10/gingrichs-dangerous-plan-to-subpoena-federal-judges-part-ii/246428/.

members could "express their displeasure with certain decisions by … requiring federal judges [to] come before them to explain their constitutional reasoning … and to hear a proper Congressional constitutional interpretation."

Chief Justice Rehnquist, in the context of the Feeney Amendment, attempted to define that line of demarcation between valid legislative oversight and constitutionally unacceptable interference with an individual judge's independence:

> We can all recognize that Congress has a legitimate interest in obtaining information which will assist in the legislative process. But the efforts to obtain information may not threaten judicial independence or the established principle that a judge's judicial acts cannot serve as a basis for his removal from office.
>
> It is well settled that not only the definition of what acts shall be criminal, but the prescription of what sentence or range of sentences shall be imposed on those found guilty of such acts, is a legislative function—in the federal system, it is for Congress. Congress has recently indicated rather strongly, by the Feeney Amendment, that it believes there have been too many downward departures from the Sentencing Guidelines. It has taken steps to reduce that number. Such a decision is for Congress, just as the enactment of the Sentencing Guidelines nearly twenty years ago was.
>
> The new law also provides for the collection of information about sentencing practices employed by federal judges throughout the country. This, too, is a legitimate sphere of congressional inquiry, in aid of its legislative authority. But one portion of the law provides for the collection of such information on an individualized judge-by-judge basis. This, it seems to me, is more troubling. For side-by-side with the broad authority of Congress to legislate and gather information in this area is the principle that federal judges may not be removed from office for their judicial acts.[27]

The Chief Justice acknowledged that this principle is not set forth in the Constitution but was established in the impeachment trial of Judge Samuel Chase in 1805 when the Senate failed to convict Chase. The Chief Justice stated that the acquittal "represented a judgment that impeachment should not be used to remove a judge for conduct in the exercise of his judicial duties." The Chief Justice reiterated his reliance on this principle in a subsequent annual report to Congress on the state of the judiciary, charging that targeting judicial decisions of individual federal judges "could appear to be an unwarranted and ill-considered effort to intimidate individual judges in the performance of their judicial duties."[28]

B. Judicial Nominations

Under the Constitution's Appointments Clause, the President appoints Federal Article III judges and justices of the U.S. Supreme Court "by and with the Advice and Consent of the Senate."[29] Some of the

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[27] Chief Justice William H. Rehnquist, Remarks Before the Federal Judges Assn. Bd. of Directors Meeting (May 5, 2003), http://www.supremecourts. gov/publicinfo/speeches/sp_05-05-03.html.

[28] *See* Part II (*Relations Between Congress and the Judiciary*) of the 2003 Year-End Report by Chief Justice William H. Rehnquist, reprinted in 16 Fed. Sentencing Rep. 143 (2004), https://online.ucpress.edu/fsr/article-abstract/16/2/143/42685/2003-Year-End-Report-on-the-Federal-Judiciary-by?redirectedFrom=PDF.

[29] Under Art. II, § 2, cl. 2, of the U.S. Constitution, the president "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other Public Ministers and Counsels, 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...." Article II, § 3 also provides that the president "shall Commission all the Officers of the United States."

broadest authority of Congress to investigate individual judges arises during the nominations process. Although the use of subpoenas during this process is unusual, Congress can use other oversight tools to assess a nominee's qualifications. These opportunities can arise in a number of different procedural contexts.

1. Stages of the Appointments Process

The Constitution separates the appointments process into three stages: nomination by the President; consent (or rejection) by the Senate; and final appointment and commissioning[30] by the President.[31] With respect to the Senate's "advice" on the nomination, Presidents have varied as to the extent to which they have sought input from the Senate on nominations. Frequently, a President faced with the task of making a Supreme Court nomination will, as a matter of courtesy, consult with party leaders in the Senate, members of the Senate Judiciary Committee, and senators from a potential nominee's home state, particularly senators from the President's political party.[32] Depending on the importance or contentiousness of a particular nomination, significant information may be gathered both by the executive branch and by outside groups on potential nominees. At this stage of the proceedings, a senator would likely obtain access to such information informally. The benefit of such information would be primarily for senators seeking to influence a President's decision as to a prospective nominee. Such efforts could include private consultations with the executive branch or public statements (whether in committee, on the Senate floor, or through the media).

The consent phase is generally more rigidly structured. In recent years, the role of the Senate Judiciary Committee has usually consisted of three stages: a pre-hearing investigative stage;[33] public hearings;[34] and a committee decision as to what recommendation to make to the full Senate on the nominee.[35] Each of these stages presents an opportunity for Congress to exercise oversight.

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[30] *See* Marbury v. Madison, 5 U.S. 137, 155-56 (1803); Dysart v. United States, 369 F. 3d 1303, 1306, 1311-12 (Fed. Cir. 2004).

[31] As noted in an 1837 opinion of the attorney general: The Senate cannot originate an appointment. Its constitutional action is confined to the simple affirmation or rejection of the President's nominations, and such nominations fail whenever it rejects them. The Senate may suggest conditions and limitations to the President, but it cannot vary those submitted by him, for no appointment can be made except on his nomination, agreed to without qualifications or alteration. 3 Op. Atty. Gen. 188 (1837).

[32] Such care on the part of the president may be a reflection of the fact that "senatorial courtesy" has occasionally played a role in the rejection of a Supreme Court nominee. *See* Henry J. Abrahman, Justices, Presidents and Senators: A History of the U.S. Supreme Court Appointments from Washington to Clinton 19-20 (1999). *See also*, Denis Steven Rutkus, Cong. Rsch. Serv., RL31989, *Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate* (2005); Elizabeth Rybicki & Michael Greene, Cong, Rsch. Serv. RL 31980. Senate Consideration of Presidential Nominations: Committee and Floor Procedure (2025).

[33] In the pre-hearing investigative stage, the committee conducts a careful examination of the nominee's background, including a committee questionnaire to which the nominee responds in writing; confidential FBI reports; evaluation by the American Bar Association's Standing Committee on the Federal Judiciary; input from the nominee's "courtesy calls" to individual senators on Capitol Hill; news reports; and other pertinent information. *See* Rybicki, *supra* note 32.

[34] During confirmation hearings, after opening statements, a nominee is likely to face intensive questioning on many issues, including legal qualifications; personal background; past public activities; and timely legal, constitutional, social, or political issues.

[35] Typically within a week of the conclusion of confirmation hearings before the Senate Judiciary Committee, the committee will meet in open session to consider what recommendation to report to the full Senate. The committee may report favorably on the nomination, report a negative recommendation, or report no recommendation to the Senate. The Senate may still consider a nomination reported negatively or with no recommendation. Traditionally, at least since the 1880s, it has been the practice of the committee to report all nominations to the Supreme Court to permit the full body to consider, regardless of whether or not a majority of the committee opposes a nomination. This permits the full Senate to decide whether or not to confirm the nominee to the high court.

Later proceedings seem to present less opportunity for investigations. Following committee consideration, a nomination reported out of the Senate Judiciary Committee is placed on the executive calendar to be considered in executive session. In the absence of a vote to the contrary, such executive sessions are open to the public. Under current practice, floor debate on Supreme Court nominations is open to the public, the press, and, since 1986, to live television coverage.[36]

2. Opportunities for More Extensive Access

The increased contentiousness of the judicial confirmation process over the last three decades may be said to have fundamentally changed the nature of the process described above. The accumulated precedents over these show that the Senate, or a determined minority of that body, has some leverage to obtain access to information regarding judicial nominees that is not ordinarily available to a committee engaged in an investigatory oversight proceeding. For instance, when the President submits a nomination to the Senate, the dynamics of the inquiry process may be different from that of an oversight investigation. When faced with a congressional request for information that is deemed privileged, the President may have to weigh the price of sacrificing an executive privilege by providing the information sought against the risk that the nominee might not be confirmed.

a. The Estrada Nomination and DOJ Opposition to Disclosure

The failed nomination of Miguel Estrada to the D.C. Circuit Court of Appeals in 2002 is a case in point. Senate Democrats, asserting an inability to evaluate his fitness and qualification for the office because of the scarcity of his public writings, requested access to all his memoranda dealing with appeal, certiorari or amicus recommendations during the five years he was an attorney in the Solicitor General's office. The administration refused to comply.[37]

During the Estrada confirmation hearing, two senators presented for the record evidence of seven instances in which prior administrations had provided requested documents related to nominees' prior service in the Department of Justice (DOJ), which were claimed to be analogous to those being sought about Estrada. They involved the nominations of Judge Frank Easterbrook to the Seventh Circuit, Judge Robert Bork and Chief Justice William Rehnquist to the Supreme Court, Benjamin Civiletti to be Attorney General, William Bradford Reynolds to be Associate Attorney General, Judge Stephen Trott to the Ninth Circuit, and Jeffrey Holmes to be Assistant Administrator at the Environmental Protection Agency.[38]

In response, the DOJ Office of Legislative Affairs (DOJ-OLA) contended that disclosure of the memoranda—which it asserted were confidential and privileged—would have the effect of "undermin[ing] the integrity of the decision-making process" of the Office of the Solicitor General (SG). This claim was said to be supported by the statements of seven past solicitors general; by the fact that none of the 67 appeals court nominees since 1977, who had worked at the SG's office had ever been asked for similar memoranda; by the fact that none of the seven cited instances of disclosure involved appeal, certiorari or amicus recommendation documents, or other internal SG deliberation memoranda; and because the courts had recognized the deliberative nature of the documents sought as authority for the

[36] For a more in-depth discussion of the Supreme Court nomination process, *see* Rutkus, *supra* note 32.

[37] *Confirmation Hearings on Federal Appointments*: *Hearings before the S. Comm. on the Judiciary, Part 5*, 107th Cong., 2d Sess. 1110-11 (August 1, September 18, September 26, and October 7, 2002) (Letter date June 9, 2002 from Assistant Attorney General Daniel Bryant to Chairman Patrick J. Leahy) [hereinafter *Estrada Hearing*].

[38] *Estrada Hearing*, *supra* note 37, at 768, 783 (Senator Schumer), 1186-1257 (examples of solicitor general memos produced at hearings), 780-82 (response of Senator Hatch), 783-84 (Statement of Senator Leahy).

executive to protect the integrity of such materials which would reveal advisory opinions, recommendations, and deliberations comprising part of a process by which government policies are formulated.[39]

The memo asserted that "as a matter of law and tradition, these privileges can be overcome only when Congress establishes a 'demonstrably critical' need for the requested information," citing *Senate Select Committee v. Nixon*.[40] The memo concluded with the further assertion that "the existence of a few isolated examples where the executive branch on occasion has accommodated a Committee's targeted requests for very specific information does not in any way alter the fundamental and long-standing principle that memoranda from the Office of the Solicitor General–and deliberative Department of Justice materials more broadly–must remain protected in the confirmation context so as to maintain the integrity of the executive branch's decision making process."[41] President Bush never claimed executive privilege with respect to Estrada's SG memos, unlike President Nixon with the Kleindienst nomination and President Reagan with the Rehnquist nomination. Instead, he allowed Estrada to withdraw in the face of a threat of a filibuster.[42]

The Kleindienst, Rehnquist, Bork and Trott nomination experiences, dismissed as irrelevant by the DOJ-OLA memo, are nevertheless instructive as examples of how to obtain documents in the face of executive opposition. Kleindienst's nomination to be Attorney General was on the brink of approval, when a newspaper article accused him of lying about his connection with a corrupt deal to settle an antitrust case. A special hearing was conducted at which the Committee received conflicting accounts as to whether a White House aide had been involved in the settlement talks. The White House counsel, John Dean, claimed executive privilege to prevent the aide's testimony. Senator Sam Ervin threatened to filibuster Kleindienst's nomination if the aide was not produced. The threat led to an agreement for the aide's testimony and Kleindienst was confirmed. A year later, Kleindienst resigned during the Watergate affair. He subsequently pled guilty to a misdemeanor charge for lying at his confirmation hearing about President Nixon's intervention in the corrupt settlement of the antitrust case.[43]

During the confirmation proceeding for the elevation of Justice Rehnquist to be Chief Justice, the Judiciary Committee sought documents that he had authored on controversial subjects when he headed DOJ's Office of Legal Counsel. President Reagan asserted executive privilege, claiming the need to protect the candor and confidentiality of the legal advice submitted to Presidents and their assistants. But with opponents of Rehnquist gearing up to issue a subpoena, both Rehnquist's nomination and that of Antonin Scalia to be an associate justice, which were to be voted on in tandem, were in jeopardy. President Reagan agreed to allow the Committee access to a smaller number of documents, and Rehnquist and Scalia were ultimately confirmed.[44]

The DOJ-OLC memo correctly states that the documents sought during the Trott nomination had nothing to do with his work. Two senators used his nomination as a vehicle to gain access to a report prepared by DOJ's Public Integrity Section regarding a recommendation to Attorney General Meese that he seek appointment of an independent counsel to investigate the activities of a former ambassador. Meese did not

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[39] Letter from Assistant Attorney General Daniel J. Bryant to Chairman Patrick J. Leahy (October 8, 2002) [*hereinafter* DOJ Memo] (copy available in CRS files).

[40] 498 F.2d 725 (D.C. Cir. 1974).

[41] DOJ Memo, *supra* note *39*, at 4-45.

[42] See Louis Fisher, The Politics of Executive Privilege 79-81 (2004).

[43] *Id*. at 71-74.

[44] *Id.* at 76-77.

seek the appointment and refused the senators' requests for the report on the grounds of DOJ's "longstanding policy" not to allow congressional access to internal deliberative memoranda. It soon became clear that the Trott nomination would be held up indefinitely unless the Department yielded, which it did, and the senators' hold was ended.[45]

The DOJ-OLC memorandum appears to understate the nature and scope of the documents disclosed in Judge Robert Bork's nomination hearing. Louis Fisher describes the Justice Department's understanding of the sensitive nature of documents turned over:

> The Justice Department gave Biden the documents. Some were forwarded, such as memos from the Solicitor General's office on the pocket veto issue. Others, under seal by order of a federal district court, had to be unsealed and supplied to the committee. A few were converted to redacted versions (deleting a few sentences of classified material) or in unclassified form. The Department explained that "the vast majority of the documents you have requested reflect or disclose purely internal deliberations within the Executive Branch, the work product of attorneys in connection with government litigation or confidential legal advice received from or provided to client agencies within the Executive Branch." Releasing such materials "seriously impairs the deliberative process within the Executive Branch, our ability to represent the government in litigation and our relationship with other entities." Yet the department waived those considerations "to cooperate to the fullest extent possible with the Committee and to expedite Judge Bork's confirmation process …." When the Senate Judiciary Committee issued its report on Judge Bork's nomination, it included a fifteen-page memo that he wrote as Solicitor General on the constitutionality and policy considerations of the President's pocket veto power.[46]

Finally, it is ironic to note that in the past the Department has recognized that it has a responsibility, if not the obligation, to supply information that is relevant to a confirmation proceeding before a Senate committee. This acknowledgement is made in a 1941 opinion issued by Attorney General Robert Jackson.[47] The opinion is often cited as the seminal rationale and authority for withholding internal Justice Department documents from inquiring congressional committees. The opinion dealt with a congressional request for past and future FBI and Department reports, memoranda and correspondence with regard to labor matters in industrial establishments that had naval contracts. After detailing the rationale for noncompliance, Attorney General Jackson qualified his conclusion as follows:

> Of course, where the public interest has seemed to justify it, information as to particular situations has been supplied to congressional committees by me and former Attorneys General. For example, I have taken the position that committees called upon to pass on the confirmation of persons recommended for appointment by the Attorney General would be afforded confidential access to any information we have—because no candidate's name is submitted without his knowledge and the Department does not intend

[45] *Id.* at 79.

[46] Fisher also documents several instances in which senators' "holds" on nominations were instrumental in having withheld documents released. One such instance involved an investigation by the House Energy and Commerce Committee of the Justice Department's Environmental Crimes Section. DOJ refused to comply with document subpoenas. The acting assistant attorney general heading the section had been nominated to be the assistant attorney general. The chairman and ranking minority member of the committee wrote letters to the Senate Judiciary Committee advising them of the situation and requesting a delay in her confirmation. Her confirmation was delayed until the House members were satisfied that compliance had been achieved. *Id.* at 82-84.

[47] Position of the Executive Department Regarding Investigative Reports, 40 Op. Atty. Gen. 45 (1941).

> to submit the name of any person whose entire history will not stand light. By way of further illustration, I may mention that pertinent information may be supplied in impeachment proceedings, usually instituted at the suggestion of the Department and for the good of the administration of justice.

Attorney General Jackson's opinion arguably indicates that the Senate's exclusive confirmation role is a textual constitutional commitment to that body to receive all information held by the executive with respect to a nominee regardless of the degree of sensitivity—similar to that which arises during House impeachment investigations. The Supreme Court has recognized that the Appointments Clause is integral to maintaining the integrity of the separation of powers. The mechanism was one of the many to guard against the accumulation of too much power by one branch. Justice Scalia in *Edmonds v. U.S.*[48] opined that the Senate's advice and consent role was intended as a safeguard against executive abuses of the appointments power. Since *Marbury v. Madison*, the Court has acknowledged the unique and exclusive roles of the President and the Senate in the three stages of the process: the President cannot be forced to submit a nomination nor can the Congress unduly limit the universe of potential nominees for an office;[49] the Senate has complete, unreviewable discretion whether to give or withhold consent, or not to act at all;[50] but once it gives consent it cannot recall a confirmation;[51] and the President, after confirmation, still has the discretion not to issue a commission. Again, at each stage, the power of the President and the Senate is exclusive and plenary. This was most recently affirmed in the Court's 2014 ruling in *NLRB v. Noel Canning* rejecting President Obama's assertion that he could unilaterally determine when the Senate was in recess for recess appointment purposes, holding that "the Senate is in session when it says it is, provided under its own rules it retains the capacity to transact business."[52] The analogous constitutional commitments to the House (investigating impeachments) and to the Senate (investigating the qualifications of nominees) argue for a bar to executive information withholding claims in both contexts. The consequence in the House may be an impeachment article;[53] the consequence in the Senate may be no confirmation.

[48] 520 U.S. 651, 659 (1997).

[49] Myers v. United States, 272 U.S. 52, 128-29 (1926).

[50] INS v. Chadha, 462 U.S. 919, 956 n.21 (1983) ("The senate alone was given final unreviewable power to approve or disapprove Presidential appointments.").

[51] United States v. Smith, 286 U.S. 6 (1932)

[52] 134 S. Ct. 2550, 2574 (2014).

[53] Article III in the Nixon impeachment cited numerous instances of document withholdings as obstructive to the committee's investigation. Clinton's numerous claims of executive privilege during Independent Counsel Kenneth Starr's investigation were recommended to be impeachable offenses.

C. Judicial Discipline

The first[54] federal statutory judicial discipline procedures were enacted in the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980.[55] The Act quickly proved efficacious, providing the basis for the first judicial impeachments since 1936. Under the former 28 U.S.C. § 372(c) procedure, in 1986, 1988 and 1989, the Judicial Conference of the United States transmitted to the House of Representatives certifications of a judicial council and of the Judicial Conference to the effect that Judge Harry Claiborne, Judge Alcee Hastings and Judge Walter Nixon, Jr., respectively, may have engaged in conduct that might be considered grounds for impeachment. Judges Claiborne and Nixon had been previously convicted of felony charges, while Judge Hastings had been acquitted. The National Commission on Judicial Discipline and Removal observed that the certifications with respect to the two judges who had prior criminal convictions "were only a formality":

> Congress implicitly acknowledged as much in a 1990 amendment that permits the Judicial Conference to initiate and transmit such a determination on the basis of the criminal record. In the matter of Judge Hastings, however, the exhaustive investigation by a special committee and subsequent report and certification by the judicial council—coming as they did after the acquittal of Hastings on criminal charges—were undoubtedly critical to the House's willingness to proceed.[56]

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[54] Prior to the 1980 act, discipline of federal judges, except for impeachment, was part of the general administrative authority vested in the judicial councils under 28 U.S.C. § 332. Unlike the judicial discipline procedures under the 1980 act and its successor, 28 U.S.C. § 332 did not define an express statutory structure through which complaints regarding federal judges could be addressed. One other provision that may also be of interest, first enacted on April 30, 1790, provided that a federal judge convicted of accepting or receiving a bribe to "obtain or procure the opinion, judgment or decree ... in any suit, controversy, matter or cause depending before him ... shall be fined and imprisoned at the discretion of the courts, and shall forever be disqualified to hold any office of honor, trust or profit under the United States." It did not speak to removal from office, but only to disqualification from offices of trust, honor and profit under the United States. The current successor to this act is 18 U.S.C. § 201.

[55] P.L 96-458. It was codified at the former 28 U.S.C. § 372(c). In August 1993, the National Commission on Judicial Discipline and Removal, created by the Judicial Improvements Act of 1990, P.L. 101-650, 104 Stat. 5122, reported its findings and recommendations about the issues related to judicial discipline and removal of federal judges, including both the statutory mechanism and the impeachment process, among others. The commission, in its final report, described the 1980 act as follows:

> The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (the 1980 Act) was the result of compromises both within the Congress and between the legislature and the federal judiciary. It was the product of dialogue that revealed to the judiciary Congress' concern that there be in place a formal and credible supplement to the impeachment process for resolving complaints of misconduct or disability against federal judges, and revealed to Congress the judiciary's concern that any such system not prove to be a cure worse than the disease. In the end, believing that misconduct in the federal judiciary was not widespread, and sensitive to both institutional and individual judicial independence, Congress provided a charter for self-regulation that followed closely a model devised by the judiciary. The 1980 Act was, however, avowedly an experiment, and key Members of Congress promised that it would be the object of vigorous oversight.
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> Although Congress was principally concerned with assuring public accountability in the 1980 Act, a subsidiary goal was to help the House and Senate in those cases where the Act would not be adequate to the task and resort to the impeachment process would be necessary. With a large increase in the number of federal judges in the late 1970s, some Members of Congress deemed it a statistical certainty that there would be more instances of misconduct. Moreover, even though—or perhaps because—there had not been an impeachment since 1936, it was hoped that, in cases where impeachment might be warranted, the Act's process could lead to the development of a record that would ease the burdens on the House and Senate.

Report of the National Commission on Judicial Discipline and Removal, 152 F.R.D. 265, 278-9 (1993).

[56] *Id.* at 279.

In each instance, the House voted on articles of impeachment, and the Senate convicted the judge after an impeachment trial and removed the judge from office.[57]

The current judicial discipline law was enacted as the Judicial Improvements Act of 2002.[58] The new judicial discipline procedures[59] are available to anyone, including a member of Congress, who deems it appropriate to file a complaint against a federal district court judge, judge of a U.S. circuit court of appeals, bankruptcy judge, or magistrate judge.[60] The procedures include a complaint process, review of complaints initially by the chief judge of the circuit within which the judge in question sits, and, if appropriate, referral of the complaint to a special investigating committee, to a panel of the judicial council of the circuit involved, and, if needed, to the Judicial Conference of the United States. Action may be taken on the complaint at any point in the process. Subpoena power is available to the investigator at each stage. Where a complaint alleges conduct that may rise to the level of an impeachable offense, the Judicial Conference can certify that the matter may warrant consideration of impeachment and transmit the determination and the record of the proceedings to the House of Representatives for whatever action it considers necessary.

1. Illustrations of Handling Allegations of Misconduct in the Administration of Judicial Business Under the Discipline Act

While the Judicial Discipline Act provides an alternate mechanism for identifying judges who have engaged in impeachable conduct, thus saving time and resources of the House Judiciary Committee, the act principally serves the purpose of assuring that the day-to-day management and administration of the judicial system is competent, efficient and honest. But there is doubt that the exercise of congressional oversight and investigative authority against an individual judge for allegations of administrative misconduct would be either legitimate or appropriate. The following case studies suggest it would not.

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[57] 1 Bernard D. Reams Jr. & Carl J. Gray, Congressional Impeachment Process and the Judiciary: Documents and Materials on the Removal of Federal District Judge Harry E. Caliborne, 19, Document I, 1-6 (1987); *Report of the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings*, S. Rep.. No. 101-156, 101st Cong., 1st Sess. (Oct. 2, 1989); 135 Cong. Rec. 25330-35 (Oct. 20, 1989). *Impeachment of Judge Walter L. Nixon, Jr., Constitutional Provisions; Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials; Articles of Impeachment Against Judge Walter L. Nixon, Jr., as Amended; Judge Nixon's Answer to the Amended Articles; and Replication of the House of Representatives*, S. Doc. 101-17, 101st Cong., 1st Sess. 21-27 (Oct. 5, 1989); 135 Cong. Rec. 27102-04 (Nov. 3, 1989).

[58] The law was enacted as part of a subtitle of P.L. 107-273, codified at 28 U.S.C. §§ 351-364. It replaced former 28 U.S.C. § 372(c), enacted in 1980 as part of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Title IV of P.L. 101-650. The House Judiciary Committee described the purpose of the new act as follows:

> The purpose of H.R. 3892, the "Judicial Improvements Act of 2002," is to reorganize and clarify the existing statutory mechanism that allows individuals to file complaints against Article III judges. These reforms will offer more guidance to circuit chief judges when evaluating individual complaints, while providing individuals with more insight as to the disposition of their cases. The overall reorganization will make the process of learning about and filing a complaint more user-friendly.

H.R. Rep. No. 107-459, at 8 (2002).

[59] 28, U.S.C., 28 U.S.C. §§351-364. For a detailed discussion of the judicial discipline process, under the current provisions, *see* Emily C. Barbour, Cong. Rsch. Serv. RL41758, *Judicial Discipline Process: An Overview* (2011), https://www.everycrsreport.com/reports/R41758.html.

[60] The U.S. Court of Federal Claims, Court of International Trade, and Court of Appeals for the Federal Circuit are directed in 28 U.S.C. § 363 to prescribe their own rules, consistent with chapter 16 of title 28, U.S.C., establishing judicial discipline complaint procedures and mechanisms for investigation and resolution of such complaints. If a federal judge is convicted of a felony under federal or state law and has exhausted his or her appeals, or if the time for seeking direct review has expired and no such review has been sought, the judge may not hear cases until the pertinent judicial council decides otherwise, and any service after that time may not be considered for purposes of computing years of service on the bench under 28 U.S.C. §§ 371(c), 377, or 178, or creditable service under 28 U.S.C., ch. 83, subchapter III, or 5 U.S.C., ch. 84.

a. Claims of a Judge's Misconduct in the Misuse of a Court's Random Assignment Rule

In 1999 a public interest group and a member of Congress used the judicial discipline mechanism in the former 28 U.S.C. § 372(c) to investigate allegations of judicial misconduct. Complaints were filed against the chief judge of the United States District Court for the District of Columbia, Norma Holloway Johnson, alleging that she had engaged in "prejudicial" conduct in assigning "highly-charged criminal cases" concerning individuals with "close ties to the President, the White House and the Clinton Administration" to district court judges appointed by President Clinton, thereby bypassing the district court's random assignment rules.[61]

The initial complaint,[62] filed by Judicial Watch, Inc., a public interest group, on August 30, 1999, charged that Judge Johnson had improperly bypassed the normal random case assignment system, established by Local Criminal Rule 57.10 (a), to send a tax evasion case against Webster L. Hubbell and a campaign financing case against Charlie Trie to recent judicial appointees of President Clinton. The chief judge used a provision of the rule which allowed her to deviate from the random assignment requirement and send a case to a particular judge if she determined "at the time an indictment is returned that the case will be protracted and that the expeditious and efficient disposition of the court's business requires assignment of the case on a non-random basis."[63]

On November 17, 1999, Acting Chief Judge Stephen Williams dismissed the complaint as "frivolous."[64] Judicial Watch petitioned for review of the dismissal on December 17, 1999. On January 10, 2000, Representative Howard Coble, Chairman of the House Judiciary Committee's Subcommittee on Courts and Intellectual Property, filed a letter in support of reconsideration detailing further instances of alleged improper assignments by the chief judge. The letter followed dissatisfaction with Chief Judge Johnson's responses to committee requests for information and further investigation that turned up four more instances of nonrandom assignments. Rather than continuing the investigation and issuing subpoenas, Chairman Coble turned to the complaint procedure of the Judicial Discipline Act. On February 9, 2000, in response to Chairman Coble's letter, the Judicial Council ordered the reconsideration of that part of the Judicial Watch allegation dealing with case assignments and a determination whether a special committee should be appointed to investigate the matter. On February 16, 2000, Chairman Coble filed a formal complaint against Chief Judge Johnson[65] with respect to assignments in several other campaign finance cases. On March 14, 2000, Acting Chief Judge Williams authorized the special committee of the Judicial Council to investigate the complaints, and thereafter the special committee retained Joe D. Whitley as counsel to conduct the investigation.[66]

After an extensive review and investigation of nine questioned assignments—two from the Office of the Independent Counsel involving Webster Hubbell, and seven from the Justice Department's Campaign

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[61] Report of the Special Comm. to the Judicial Council for the District of Columbia Circuit in the Matter of a Charge of Judicial Misconduct or Disability (Judicial Complaints Nos. 99-11 and 00-1, February1, 2001, at 1) [hereinafter Special Committee Report].

[62] Judicial Council Complaint No. 99-11 (D.C. Cir. 1999).

[63] Local Criminal Rule 57.10(c). The deviation authorization had been in effect since 1971. It was repealed on February 1, 2000, during the pendency of the investigation.

[64] Report of the Counsel to the Special Committee for the Judicial Council for the District of Columbia Circuit in the Matter of a Charge of Judicial Misconduct or Disability (Judicial Complaint Nos. 99-11 and 00-1, December 18, 2000, at 16-17.) [hereinafter Special Counsel Report].

[65] Judicial Council Complaint No. 00-1 (D.C. Cir, 2000).

[66] Special Counsel Report, *supra* note 64, at 18-25.

Financing Task Force—the counsel reported that he had not found any evidence that Chief Judge Johnson's purpose included a political intent to advance the interests of President Clinton, the Clinton administration or the White House. After review, the special committee to the Judicial Counsel adopted his conclusion.[67] The Judicial Council affirmed the findings and conclusions of the report of the special committee in a memorandum opinion on February 26, 2001, which dismissed the complaints.[68]

While the proceeding did not result in any disciplinary action being taken against the chief judge, it had (1) the appearance of thoroughly and publicly ventilating the serious charges brought against the judge, and (2) supplied the impetus for the repeal of Local Criminal Rule 57.10 (c), which, since 1971, had authorized chief judges of the district court to deviate from the random assignment requirement. A chief judge no longer has authority to specially assign cases.[69] It also demonstrated that a well-founded official complaint by the House Judiciary Committee can trigger the statutory judicial discipline mechanism.

b. Allegations of Procedural Misconduct by Manipulation of the Composition of an Appellate Panel and the Timing of En Banc Review

In a "procedural appendix" to a dissenting opinion in a high-profile affirmative action case,[70] a Sixth Circuit judge alleged procedural irregularities in the

When the allegations of the procedural appendix were brought to the attention of the Chairman of the House Judiciary Committee, he sent a letter to the chief judge inquiring whether he had done the alleged acts and requesting production of internal Sixth Circuit documents relating to the case. The chief judge responded to the request, provided documents, and met with majority and minority staffers of the Committee. He volunteered that he was making efforts to revise the random assignment procedures of the Court. The matter then rested for some time. During that period, Sixth Circuit Judge Alice Batchelder was considering a misconduct complaint. She ultimately ruled that both allegations "rais[ed] an inference that misconduct had occurred" but that no further action was necessary because "internal reviews and procedural reforms at the court had 'greatly reduced the potential for future incidents.'" Neither side was satisfied with the result, and it was appealed to the Sixth Circuit judicial council. The council dismissed the appeals as moot on the grounds that corrective action had been taken, and the chief judge's term was expiring, but without any factual findings. The matter did not end there. The House Judiciary Committee attempted to revive the investigation with requests for internal court documents. It received a request from Judicial Watch for an impeachment investigation. No further committee action was taken, and the committee formally closed its investigation in 2006.

It can be concluded that, as in the Judge Holloway situation, the judicial discipline system worked. The situation was publicly aired, the assignment rules were changed, and there was no negative impact on the litigation.[71]

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[67] "[W]e conclude that the evidence does not support a finding that Chief Judge Johnson engaged in conduct 'prejudicial to the effective and expeditious administration of the business of the courts.' We find the Counsel's Report persuasive." Special Committee Report , *supra* note 61 at 2-3.

[68] Judicial Council Opinion at 2.

[69] Special Counsel Report at N. 43; Judicial Council Opinion at 5.

[70] Grutter v. Bollinger, 288 F. 3d 732 (6th Cir. 2002) (Boggs, J., dissenting). The ruling was subsequently upheld by the Supreme Court in *Grutter v. Bollinger*, 539 U.S. 306 (2003).

[71] An interesting parallel to the Sixth Circuit occurred shortly thereafter in Connecticut when the soon-to-retire chief judge of the state's supreme court was accused of delaying the publication of a sensitive decision in order to protect the selection of his

c. Lack of Transparency at the Tax Court

This case study does not directly concern the judicial discipline mechanism but illustrates a situation where congressional action (and inaction) has undermined judicial independence.

The Tax Court is an anomalous government entity. By statute, the Tax Court is a "court of record"[72] that engages in purely judicial functions, and the Supreme Court has said that it is a "Court of Law" exercising judicial power.[73] Yet Congress has left it outside the administrative framework to which most federal courts belong, and the laws, practices, and oversight scrutiny to which they are subject. Although it is an Article I court, it is not served by the Administrative Office of the United States Courts. Neither is the Tax Court subject to the Judicial Code—including the Judicial Discipline Act and the Rules Enabling Act—or, with respect to its rulemaking, to the Judicial Conference of the United States. It is not deemed an "agency" so it is not subject to the Freedom of Information Act or the agency provisions of the Administrative Procedure Act.[74] Perhaps most incongruous, it is not part of the annual judiciary budget request submitted by the director of the Administrative Office to OMB. The Tax Court submits its funding requests to the congressional tax writing committees—House Ways and Means and Senate Finance—which write the IRS Code provisions it enforces and are responsible for its oversight and its pay, a situation fraught with concerns of objectivity and judicial independence.[75]

The Tax Court only hears tax disputes between private parties and the federal government and is the forum of choice with aggrieved taxpayers because it allows litigation without paying the amount in dispute first. Tax Court trials are bench trials. The judges are presidential appointees who serve 15-year terms. The Chief Judge has the power to appoint special trial judges (STJs), judicial officers analogous to magistrate judges, though they are employees at will. STJs are permitted to hear any Tax Court case, but they are only authorized to render decisions in cases with limited amounts in dispute (under $50,000) under informal procedures.[76] The chief judge is authorized to assign STJs to cases for large dollar amounts to hear but not decide. Prior to 1983, Tax Court Rule 182 set forth procedures applicable to large cases assigned to STJs. It required the STJ to "file his report, including findings of fact and opinion." The report was to be served on the parties, each of whom had an opportunity to file a brief setting forth exceptions of law or fact to that report." The reports were made public and included in the record on appeal.[77] The rule was amended in 1983 to withhold the reports from the public and parties and to exclude them from the appellate record. The new rule required the STJ, after trial and submission of briefs, to "submit" a report with findings of fact and opinion to the chief judge, who was to assign it to a court judge for final decision. The assigned judge was to defer to the credibility findings and assume the fact-

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presumed successor, an associate justice who participated in the ruling. The legislature's Judiciary Committee began an inquiry and asked the former chief justice (now a retired senior judge) for process information regarding release of opinions, which was voluntarily acceded to. The committee then issued the judge a subpoena to testify. The judge moved to quash, which was granted by the Superior Court, which noted the similarity of the Sixth Circuit situation, on separation of powers grounds. It reasoned that since there was no impeachment proceeding then pending, there was substantial cooperation of the judge, and that because a judicial misconduct process was available, the issuance of a legislative subpoena was an improper intrusion on the judicial independence. *See* William Sullivan v. Andrew J. McDonald & Michael P. Lawler, D.N. CV-06 4010696 (Conn. Sup. Ct., Judicial D. of Waterbury, June 30, 2006.

[72] 26. U.S.C §7441.

[73] Freytag v. Comm'r, IRS, 501 U.S. 868, 889-91 (1991).

[74] Leandra Lederman, *Tax Appeal: A Proposal to Make the Tax Court More Judicial*, 85.Wash. L. Rev. 1195, 1202, 1209-10 (2008).

[75] *Id.* at 1210-12.

[76] *Id*. at 1201-02.

[77] *Id*. at 1233-34.

findings to be correct. The judge could adopt, modify, or reject the report in whole or part. The effect of the rule was to make unknown whether and how the final decision deviated from the STJ report. The change in term "file" in the old rule to "submit" in the new rule allowed the court to treat STJ reports as internal, personal documents that did not have to be part of the official records of the court.[78]

In 1999, the Tax Court issued a decision finding that the subject taxpayers had acted with the intent to deceive the commissioner and held them liable for underpaid taxes and substantial fraud penalties. That decision consisted wholly of a document labeled, "Opinion of the Special Trial Judge," and declared that the trial court judge agreed with and adopted the attached opinion. The taxpayers learned that the actual STJ opinion ruled in their favor and requested its revelation and that it be made part of the appeal record. The Tax Court and three appeals courts denied their requests, but a ruling by the Supreme Court in *Ballard v. Commissioner* found the failure to include the initial findings of fact and opinion in the record on appeal anomalous and unwarranted.[79] The Court held that "[N]o statute authorizes, and the current text of Rule 183 does not warrant, the concealment at issue."[80] It noted that the Tax Court's reading departed from uniform, accepted administrative decision-making practice elsewhere in the federal judiciary. "A departure of the bold character practiced by the Tax Court—the creation and attribution solely to the special trial judge of a superseding report composed in an unrevealed collaboration with a regular tax court judge—demands, at the very least, full and fair statement in the Tax Court's own Rules."[81] The Court warned, however, that if the rule was changed to reflect the current practice, "that change would, of course, be subject to appellate review for consistency with relevant statutes and due process."[82]

The aftermath of the *Ballard* ruling was revealing. There were no public hearings. The Oversight Subcommittee of the House Ways and Means Committee conducted internal investigations that consisted of interviews with Tax Court judges, at the Court's offices, in which discussion of the *Ballard* ruling was off limits.[83] The Tax Court agreed that Rule 183 would be revised to allow STJ reports to be public records and parties to receive copies and utilize them for appeals.[84] The Subcommittee and the Chicago Tribune requested copies of the original reports in other cases tried under Rule 183 between 1984 and 2005. Only the Tribune announced findings: that out of over 900 cases in which an STJ had issued a report adopted by the Tax Court, only 117 original reports could be located. Of the 117, five had been deviated from the final released version.

The Tax Court explained the disappearance of some 800 reports on the understanding of the STJs after 1984 that their reports were their personal property and not part of the official records of the Court.[85] There apparently was an internal staff report of its investigation, but no public issuances.[86] There has been no public congressional rebuke of the Tax Court, or any of the Tax Court judges or administrative personnel involved in the 20 years of collaborative secrecy. Nor has there been any legislative proposal to

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[78] *Id*. at 1235-38.

[79] 544 U.S. 40 (2005).

[80] *Id*. at 46-47.

[81] *Id*.

[82] *Id*. at 65.

[83] Interviews with Payson R. Peabody, former tax counsel, H. Comm. on Ways and Means, (2001-2005), on October 24, 2012, and David Kass, former staff director and chief investigative counsel, H. Subcomm. on Oversight, Ways and Means Comm. (2005-2006), on July 15, 2012 [hereinafter *Interviews*].

[84] Lederman, *supra* note 74, at 1239.

[85] *Id.* at 1229-30.

[86] Interviews, supra note 83.

bring the Tax Court into conformance with practices and laws that support judicial independence and accountability, including making the judicial discipline scheme applicable to the Tax Court.[87] The current relationship of the Tax Court to the tax oversight committees is rife with possibilities of influence and conflict of interest that undermine judicial independence and accountability. It may explain the muted congressional reaction to a festering 20-year practice.[88]

D. Impeachment

Congress can also exercise its oversight authority over individual judges in anticipation of or during impeachment proceedings.[89] Federal judges are among those "civil Officers of the United States" who can be impeached for engaging in conduct amounting to treason, bribery, or other high crimes and misdemeanors.[90] While use of compulsory process against a sitting judge outside the impeachment process is rare and legally problematic, the issuance of subpoenas *during* the impeachment process, including against judges, has become more common and acceptable.[91] Indeed, the failure to comply with subpoenas during an impeachment inquiry could result in an independent article of impeachment.[92]

Moreover, Federal Rule of Criminal Procedure 6(e)(3)(c)(i) authorizes a court to make disclosures "preliminary to or in connection with a judicial proceeding." Consistently, and without an exception that has been publicly noted, the courts have held that a House investigation preliminary to impeachment is a

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[87] The Judicial Discipline Act requires three Article I courts to adopt discipline mechanisms in conformance with those made applicable by the Act to Article III courts. *See* note 67 *supra.*

[88] The issues of lack of transparency and limited oversight continue to date. *See* Leandra Lederman, *(UN)Appealing Deference to The Tax Court*, 63 Duke L. J. 1835, 1837-38 (2014) ("The Tax Court...is a federal court whose decisions are appealable to federal courts of appeals, yet it is located outside of the judicial branch. Unlike the Federal Court of Claims, for example, which is also a legislative court, the Tax Court is not treated as part of the judiciary for administrative purposes. Among other things, that means that the Tax Court is not subject to the Administrative office of the U.S. Courts, the U.S. Judicial Conference, or the Rules Enabling Act.

[89] For a general overview of the impeachment process, see Jared P. Cole & Todd Garvey, Cong. Rsch. Serv. RL44260, *Impeachment and Removal* (updated Oct. 29, 2015), https://www.congress.gov/crs_external_products/R/PDF/R44260/R44260.2.pdf.

[90] The somewhat skeletal constitutional framework for the impeachment process can be found in the following provisions:

- Art. I, § 2, cl. 5: "The House of Representatives ... shall have the sole Power of Impeachment."
- Art. I, § 3, cl. 6: "The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two-thirds of the Members present."
- Art. I, § 3, cl. 7: "Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law."
- Art. II, § 2, cl. 1: "The President ... shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment."
- Art. II, § 4: "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."

[91] Similarly, the statutory scheme established for review and discipline of judicial conduct, discussed *supra*, provides that judicial councils, special committees appointed by judicial councils, the Judicial Conference, or a study committee appointed by the chief justice, all have full subpoena power. *See* 28 U.S.C. §§ 331, 332d and 356(a) and (b).

[92] *See, e.g.*, Impeachment Article III against President Nixon accusing him of withholding subpoenaed information from the Judiciary Committee. Also, Independent Counsel Starr's report to the House Judiciary Committee on the Lewinsky matter suggested that President Clinton's claims of executive privilege to prevent the testimony of a number of witnesses had "been inconsistent with the President's duty to faithfully execute the laws." The Judiciary Committee in Article III of its impeachment charges alleged that the president had "prevented, obstructed, and impeded the administration of justice" and had engaged in a "course of conduct or scheme designed to delay, impede, cover up, and conceal the existence of evidence and testimony." *See* Louis Fisher, The Politics of Executive Privilege 65-66 (2004).

judicial proceeding within the scope of the exception to the rule. Indeed, courts have held that investigations conducted by committees of judicial councils pursuant to the past and current judicial discipline statutes are within the exception and have granted access to grand jury material.[93] In addition, in at least four instances the House has directly requested and received grand jury materials in impeachment proceedings.[94]

The case law with respect to what a congressional committee may do with 6(e) material released by a court, while sparse, is unequivocal: A committee is free to do with it as it will, as long as it complies with the Rules of the House with respect to dissemination. The courts have conceded that they are powerless to place restrictions on the use of the material once it is in the hands of a committee.[95]

1. Frequency of Impeachments of Judicial Officers

A total of 15 judges have been the focus of impeachment proceedings. Of those 15, eight were convicted on impeachment and removed from office.[96] In the five most recent judicial impeachments, investigations under the former 28 U.S.C. § 372(c) and current 28 U.S.C. §§ 351-364 judicial discipline provisions resulted in referrals of the cases by the Judicial Conference of the United States to the House of Representatives for the House to determine whether or not impeachment might be appropriate. Judge Harry E. Claiborne, United States District Judge for the District of Nevada, was impeached, tried in the Senate, and convicted in 1986. In the case of Judge Hastings, the impeachment investigation and proceedings spanned parts of 1988 and 1989. The judicial impeachment of Judge Walter L. Nixon, Jr.,

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[93] *See, e.g.*, In re Report and Recommendations of June 5, 1992 Grand Judy Transmission of Evidence to House of Representative, 370 F. Supp 1219, 1228-1230 (D.D.C. 1974), *mandamus denied sub nom* Haldeman v. Sirica, 501 F.2d 714, 715 (D.C. Cir. 1974) (granting access to House Judiciary Committee in President Nixon impeachment); In re Grand Jury Proceedings of Grand Jury No. 81-1 (Miami), 669 F. Supp. 1072, 1075-76 (S.D. Fla. 1987), *aff 'd* 833 F.2d 1438, 1444-45 (11th Cir. 1987) (granting access to House Judiciary Committee in Judge Hastings' impeachment); In re petition to Inspect and Copy Grand Jury Materials, 735 F. 2d 1261 (11th Cir.), *cert. denied*, 469 U.S. 884 (1984) (granting access to grand jury materials to investigating committee of Judicial Council in preliminary investigation of Judge Hastings under 28 U.S.C. 372(c)). *See also* Kilbourn v. Thompson, 103 U.S. 168, 190 (1880) (supporting conclusion that power to impeach includes power to obtain evidence).

[94] In 1811, a grand jury in Baldwin County in the Mississippi Territory forwarded to the House a presentment specifying charges against Washington District Superior Court Judge Harry Toulmin for possible impeachment action. 3 Hind's Precedents of the House of Representatives, § 2488 at 985, 986 (1907) [hereinafter Hind's Precedents]. In 1944, the House Committee on the Judiciary received grand jury material pertinent to its investigation into allegations of impeachable offenses committed by judges Albert W. Johnson and Albert L. Watson. *Conduct of Albert W. Johnson and Albert L. Watson, United States District Judges, Middle District of Pennsylvania: Hearings before the Subcommittee of the Committee on the Judiciary to Investigate the Official Conduct of United States District Court Judges, Albert W. Johnson and Albert L. Watson*, 79th Cong. (1945). In 1989, the House Judiciary Committee petitioned and received grand jury material pertinent to impeachable offenses committed by Judge Walter L. Nixon. Nixon v. United States, Civ. No. H 88-0052 (G) (S.D. Miss., Hattiesburg Div.), referenced in Impeachment of Walter L. Nixon Jr., H. R. Rep. No. 101-36, 15 (1989). Finally, in 1998, the Special Division for Appointing Independent Counsel granted Kenneth Starr's *ex parte* motion to authorize him to release and transmit grand jury materials to the House of Representatives pursuant to his obligation under 28 U.S.C. 595(c) to report to the House "any substantial and credible information ... that may constitute grounds for impeachment." On September 4, 1998, the House adopted H.R. Res. 525, 144Cong. Rec. H7607, which directed that the House Judiciary Committee review the transmittal and ordered that the independent counsel's narrative report be printed as a House document and that all other material received be released by September 28, 1998, as a House document unless otherwise determined by the committee.

[95] *See* cases cited *supra*, note 93.

[96] For a summary compilation of names, dates, and outcomes of these proceedings, *see* http://www.fjc.gov/history/home.nsf. The first eight judicial impeachment trials predate the statutory judicial discipline provisions added by the Judicial Conduct Act of 1980, as amended, and the Judicial Improvements Act of 2002. For a detailed description of the articles of impeachment brought against these judges, see Charles Doyle, Cong. Rsch. Serv., RL98-896, *Impeachment Ground: Part 4A: Articles of Past Impeachments* (1998), https://www.congress.gov/crs-product/98-896; Charles Doyle, Cong. Rsch. Serv., RL98-897, *Impeachment Grounds: Part 4B; Articles of Past Impeachments* (1998), https://www.congress.gov/crs_external_products/RS/PDF/98-897/98-897.2.pdf.

United States District Judge for the Southern District of Mississippi, took place in 1989. The House of Representatives impeached Judge Samuel B. Kent in 2009. After he agreed to resign, the House agreed to a resolution not to further proceed with the articles, and the Senate dismissed them. Judge G. Thomas Porteous was impeached by the House in March 2010 and convicted and removed from office in December 2010.

2. Initiation and Prosecution of Impeachment Proceedings

The power to determine whether impeachment is appropriate in a given instance rests solely with the House of Representatives. Thus, investigations preliminary and attendant to impeachments carry some of the broadest authorities to investigate the activities of individual judges or justices. An impeachment process may be triggered in a number of ways, including charges made on the floor by a member or delegate on his or her own initiative;[97] a member presenting a memorial listing charges under oath, which is usually referred to a committee for examination;[98] a resolution dropped in the hopper by a member and referred to a committee;[99] a message from the President; charges transmitted from the legislature of a state or territory or from a grand jury; facts explored and reported by a House investigating committee; or a suggestion from the Judicial Conference of the United States[100] that the House may wish to consider whether impeachment of a particular federal judge would be appropriate.[101]

The Senate also has a unique role to play in the impeachment process; it has the authority and responsibility to try an impeachment brought by the House.[102] In addition, should an individual be convicted on any of the articles, the Senate must determine the appropriate judgment: either removal from office alone, or, alternatively, removal and disqualification from holding further offices of "honor, Trust or Profit under the United States."[103]

3. The Nature of an Impeachable Offense

What constitutes an impeachable offense has been the topic of considerable debate. Neither the Federalist Papers, nor the debates in the Constitutional Convention, nor the state ratifying conventions give us

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[97] 3 Hinds' Precedents, *supra* note 94, at §§2342, 2400, 2469. While there may have not been more formal impeachments in recent years, the landscape for impeachments is politically active, as discussed in further detail below.

[98] *Id.* §§2364, 2486, 2491, 2494, 2496, 2499, 2515.

[99] Such a resolution may take one of two general forms. It may be a resolution impeaching a specified person falling within the constitutionally prescribed category of "President, Vice President, and all civil Officers of the United States." Such a resolution would usually be referred directly to the House Committee on the Judiciary. Alternatively, it may be a resolution requesting an inquiry into whether impeachment would be appropriate with regard to a particular individual falling within the constitutional category of officials who may be impeached. Such a resolution, sometimes called an inquiry of impeachment to distinguish it from an impeachment resolution of the type described above, would usually be referred to the House Committee on Rules, which would then generally refer it to the House Committee on the Judiciary.

[100] 28 U.S.C. §§ 351-64.

[101] See Jefferson's Manual of Parliamentary Practice § 603, available at https://www.gpo.gov/fdsys/pkg/HMAN-112/pdf/HMAN-112-jeffersonman.pdf.

[102] As to each article, a conviction must rest upon a two-thirds majority vote of the senators present. U.S. Const. art. I, § 3, cl. 6.

[103] U.S. Const. art. I, §3, cl. 6. The precedents in impeachment suggest that removal can flow automatically from conviction, but that the Senate must vote to prohibit the individual from holding future offices of public trust under the United States, if that judgment is also deemed appropriate. A simple majority vote is required on a judgment. The Constitution precludes the president from extending executive clemency to anyone to prevent their impeachment by the House of Representatives or trial by the Senate. U.S. Const. art. II, § 2, cl. 1.

particular guidance on the standards to be applied to judicial impeachments beyond the constitutional language in Article II, Section 4 of the U.S. Constitution.[104]

Conviction through the impeachment process for "Treason, Bribery, or other high Crimes and Misdemeanors" is the constitutional standard for removal of a President, Vice President, or other civil officers of the United States. Treason is defined both in statute[105] and in the Constitution.[106] Bribery, while not defined in the Constitution, was an offense at common law and has been a statutory offense since the first Congress enacted the act of April 30, 1790.[107] It is now codified at 18 U.S.C. § 201. Thus, treason and bribery may be fairly clear as to their meanings, but the remainder of the language has been the subject of considerable debate.

The phrase "high Crimes and Misdemeanors" is not defined in the Constitution or in statute. It was used in many of the English impeachments, which were proceedings in which criminal sanctions could be imposed upon conviction.[108] No definitive list of types of conduct falling within the "high Crimes and Misdemeanors" language has been forthcoming as a result of this debate, but some measure of clarification has emerged.

The debate on impeachable offenses during the Constitutional Convention in 1787 indicates that criminal conduct[109] was at least part of what was included in the "Treason, Bribery, or other high Crimes and Misdemeanors" language.[110] However, the precedents in this country suggest that conduct which may not constitute a crime, but which is nonetheless serious misbehavior that brings disrepute upon the public office involved, can be a sufficient ground for impeachment.

The House Judiciary Committee, in recommending articles of impeachment against President Richard Nixon in 1974, appears to have premised those articles on both acts and omissions: First, that Nixon abused the powers of his office, causing "injury to the confidence of the nation and great prejudice to the cause of law and justice" and resulting in subversion of constitutional government; second, that he failed

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[104] The focus at that time was more on the type of conduct which might justify removal of a president. *See, e.g.*, The Federalist No. 69, at 416 (Clinton Rossiter ed., 1961).

[105] 18 U.S.C. § 2381.

[106] U.S. Const. art. III, § 3.

[107] 1 Stat. 112, 117.

[108] As Alex Simpson, Jr., amply demonstrated in his discussion of the Constitutional Convention's debate on this language and the discussion of it in the state conventions considering ratification of the Constitution, in "*Federal Impeachments*," 64 U. Pa. L. Rev. 651, 676-695 (1916), confusion as to its meaning appears to have existed even at the time of its drafting and ratification.

[109] Article I, Section 3, Clause 7 appears to anticipate that some of the conduct within this ambit may also provide grounds for criminal prosecution. It indicates that the impeachment process does not foreclose judicial action. Its phrasing might be regarded as implying that the impeachment proceedings would precede the judicial process, but, as is evident from the impeachments of Judge Claiborne in 1986, and of judges Hastings and Nixon in 1988 and 1989, at least as to federal judges and probably as to most civil officers subject to impeachment under the Constitution, the impeachment process may also follow the conclusion of the criminal proceedings. Whether impeachment and removal of a president must precede any criminal prosecution is as yet an unanswered question but was squarely faced by the Watergate special prosecutor's office. *See* Lance Cole & Stanley M. Brand, *Congressional Investigations and Oversight* 410-414, 419 (2011) [hereinafter Cole and Brand] for a discussion of the special prosecutor's considerations that led to his decision not to indict President Nixon.

[110] *See* the discussion of the debates on this subject in the minority views in connection with the report submitted by the House Judiciary Committee recommending President Nixon's impeachment, H.R. REP. No. 93-1305, 362-72 (1974), printed in 120 Cong. Rec. 29312-15 (1974). For a discussion of presidential impeachment grounds, *see* 3 Deschler's Precedents of the House of Representatives ch. 14, § 3.8 [hereinafter "Deschler's"], available at https://www.govinfo.gov/help/precedents-of-the-house#deschlers.

to carry out his constitutional obligation to faithfully execute the laws; and third, that he failed to comply with congressional subpoenas needed to provide relevant evidence for the impeachment investigation.[111]

The minority of the House Committee on the Judiciary in the report recommending that President Nixon be impeached took the view that errors in the administration of his office were not sufficient grounds for impeachment of the President or any other civil officer of the United States.[112] The minority views seem to suggest that, under their interpretation of "high Crimes and Misdemeanors," crimes or actions with criminal intent must be the basis of an impeachment.[113]

Impeachment charges were brought against President Andrew Johnson involving allegations of actions in violation of the Tenure of Office Act,[114] including removing Secretary of War Edwin McMasters Stanton and replacing him with Secretary of War Lorenzo Thomas and other related actions. Two of the articles brought against the President asserted that he sought to set aside the rightful authority of Congress and to bring it into reproach, disrepute and contempt by "harangues" criticizing the Congress and questioning its legislative authority.[115] President Johnson was acquitted on those articles upon which votes were taken.

4. Is the Impeachment Standard Different for Judicial Officers?

It has been suggested that the impeachment provisions and the "good behavior" language of the judicial tenure provision in Article III, Section 1 of the Constitution should be read in conjunction with one another when judicial officers are the subjects.[116] Whether this would serve to differentiate impeachable offenses for judicial officers from those that would apply to civil officers in the executive branch is not altogether clear. During the impeachment investigation of Justice Douglas in the 91st Congress, Representative Paul McCloskey, Jr., reading the impeachment and good behavior provisions in tandem, contended that a federal judge could be impeached for either improper judicial conduct or non-judicial conduct amounting to a criminal offense.[117] Then-Minority Leader Gerald Ford inserted in the Congressional Record a memorandum taking the position that impeachable misbehavior by a judge involved proven conduct, "either in the administration of justice or in his personal behavior," which casts doubt on his personal integrity and thereby on the integrity of the entire judiciary.[118]

For example, Judge John Pickering was convicted on all four of the articles of impeachment brought against him, including charges that he mishandled a case before him in violation of federal laws and procedures. The alleged misconduct included (1) delivering a ship which was the subject of a condemnation proceeding for violation of customs laws to the claimant without requiring bond to be posted after the ship had been attached by the marshal; (2) refusing to hear some of the testimony offered by the United States in that case; and (3) refusing to grant the United States an appeal despite the fact that the United States was entitled to an appeal as a matter of right under federal law. However, it should also

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[111] *See id*., ch. 14, § 3.7.

[112] Id.

[113] H.R. Rep. No. 93-1305.

[114] Act of March 2, 1867, ch. 154, § 6, 14 Stat. 430.

[115] *See* Impeachment of President Andrew Johnson, *in* H. Comm. On the Judiciary, 93rd Cong., Impeachment: Selected Materials 154-61 (Comm. Print 1973).

[116] *See* 3 Deschler's ch. 14, § 3.8.

[117] *Id.*

[118] *Id.* at ch. 14, § 3.11. *See also* Cole & Brand, *supra* note 109, at 403-06.

be noted that the fourth article against him alleged that he appeared on the bench in an intemperate and intoxicated state.

In another example, Judge Halsted Ritter was acquitted of six of the seven articles brought against him. He was, however, convicted on the seventh, which summarized or listed the first six articles. The factual allegations upon which the seventh article was based included assertions that Ritter, while a federal judge, accepted large fees and gratuities and engaged in income tax evasion. However, the basis of the seventh article was that the "reasonable and probable consequences of the actions or conduct" involved therein were "to bring his court into scandal and disrepute, to the prejudice of said court and public confidence in the Federal judiciary, and to render him unfit to continue to serve as such judge." This article was challenged unsuccessfully on a point of order, arguing that Article VII merely repeated and combined facts, circumstances and charges from the preceding six articles. The President Pro Tempore ruled that Article VII involved a separate charge of "general misbehavior,"[119] which it would appear was a charge going beyond the criminality of the behavior alleged in previous articles.

During the Douglas impeachment debate, Representative Frank Thompson, Jr., argued that historically federal judges had only been impeached for misconduct that was both criminal in nature and related to their judicial functions, and that such a construction of the constitutional authority was necessary to maintain an independent judiciary.[120] However, in the *Final Report by the Special Subcommittee on H. Res. 920 of the Committee on the Judiciary of the House of Representatives*,[121] the Subcommittee suggested two "concepts" of judicial impeachability for the Committee to consider. The Subcommittee observed:

> Both concepts would allow a judge to be impeached for acts which occur in the exercise of judicial office that (1) involved criminal conduct in violation of law, or (2) that involved serious dereliction from public duty, but not necessarily in violation of positive statutory law or forbidden by the common law. Sloth, drunkenness on the bench, or unwarranted and unreasonable impartiality [sic] manifest for a prolonged period are examples of misconduct, not necessarily criminal in nature, that would support impeachment. When such misbehavior occurs in connection with the federal office, actual criminal conduct should not be a requisite to impeachment of a judge or any other federal official. While such conduct need not be criminal, it nonetheless must be sufficiently serious to be offenses against good morals and injurious to the social body.
>
> Both concepts would allow a judge to be impeached for conduct not connected with the duties and responsibilities of the judicial office which involve [sic] criminal acts in violation of law.[122]

The impeachments of Judges Nixon, Hastings and Kent, appear to more clearly demark a dual standard applying to judicial impeachments. The House report on Judge Nixon stated:

> The House and Senate have both interpreted the phrase broadly, finding that impeachable offenses need not be limited to criminal conduct. Congress has repeatedly defined "other high Crimes and Misdemeanors" to be serious violations of the public trust, not

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[119] *See* 3 Deschler's ch. 14, § 13.6.

[120] *Id*. at ch. 14, § 3.12, at 455-57.

[121] Special Subcomm. on H. Res. 920, H. Comm. on the Judiciary, 91st Cong., Final Report (Comm. Print 1970), *as cited in* 3 Deschler's ch. 14, § 3.13.

[122] 3 Deschler's ch. 14, § 3.13.

> necessarily indictable offenses under criminal laws. ...[What constitutes an impeachable offense in the context of federal judges has] evolved to the position where the focus is now on public confidence in the integrity and impartiality of the judiciary. Where a judge's conduct calls into question his or her integrity or impartiality, Congress must consider whether impeachment or removal of the judge from office is necessary to the integrity of the judicial branch and to uphold the public trust.[123]

The House report on Judge Hastings expressed similar views, observing that the "high Crimes and Misdemeanors" standard "refers to misconduct that damages the state and the operations of government institutions, and is not limited to criminal conduct."[124] The Committee also drew attention to the noncriminal nature of impeachment, which is designed to remove the federal officer from his or her office in order to protect the "constitutional form of government from the depredations of those in high office who abuse or violate the public trust."[125] The foregoing understandings were approvingly referenced in the House report on Judge Kent, the most recent impeachment proceeding.[126]

These cases suggest that a judge might be vulnerable to impeachment not only for criminal conduct, but also for improper judicial conduct involving a serious dereliction of duty; placing the judge, the court, or the judiciary in disrepute; or casting doubt upon his integrity and the integrity of the judiciary. As discussed further below, the recent political climate has highlighted the line between disagreement with a judicial decision and judicial misconduct worthy of impeachment.[127]

5. Can a Judge Be Impeached For Misconduct Occurring Prior to the Time of Holding her Present Office?

The impeachment and conviction of Judge G. Thomas Porteous in 2010 was the first based, in part, on conduct occurring before he began his tenure as a federal judge. Articles I and II each alleged misconduct beginning while he was a state court judge, as well as misconduct while he was a federal judge. Article IV alleged false statements made in connection with his nomination and confirmation as a district court judge, all involving pre-federal conduct. Article III alleged personal misconduct with respect to his own personal bankruptcy proceeding. He was convicted on all four articles, removed from office, and disqualified from holding any future federal office.[128] Third Circuit Judge Robert W. Archbold was impeached and convicted based on misconduct committed as both a circuit and a district judge.[129]

6. Can a Judge Who Has Resigned Be Impeached For Misconduct During her Judicial Tenure?

On September 9, 2015, the Judicial Conference, pursuant to its authority under the Judicial Conduct and Disabilities Act, certified to the House its determination that consideration of impeachment of former

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[123] H.R. Rep. No. 101-36 at 5, 12 (1989).

[124] H.R. Rep. No. 100-810 at 6 (1988).

[125] *Id*. at 6-7.

[126] H.R. Rep. No. 111-159 at 5-6.

[127] See Amy Howe, *Chief Justice Rebukes Trump's Call for Judicial Impeachment*, SCOTUSBlog (Mar. 18, 2025), https://www.scotusblog.com/2025/03/chief-justice-rebukes-trumps-call-for-judicial-impeachment.

[128] 156 Cong. Rep. S8609-11 (daily ed. December 8, 2010).

[129] 6 Cannon's Precedents §§ 498, 499, 512, available at https://www.govinfo.gov/collection/precedents-of-the-house. *See also* Cole and Garvey, *supra* note 89, at 15-16.

United States District Court Judge Mark E. Fuller may be warranted. The Judicial Conference's certification was based on findings that Judge Fuller had (a) repeatedly physically abused his wife, (b) lied under oath about his misconduct to the special committee to the Judicial Council of the 11th Circuit, and (c) "made false statements to the Chief Judge of the Eleventh Circuit in late September 2010 in a way that caused massive disruption in the District Court's operation and loss of public confidence in the Court as an instrument of Justice."

The referral is significant because it is still an open constitutional question whether a former officer is subject to impeachment. A prominent impeachment scholar has noted "a surprising consensus among commentators that resignation does not necessarily preclude impeachment and disqualification."[130] The Judicial Conference apparently recognizes the novelty of its action but believes it is warranted "given the severity of the misconduct... together with a finding of perjury...that certification of this matter 'to the House of Representatives for whatever action the House of Representatives considers necessary' is appropriate." The Judicial Conference states that even if the House determines that impeachment is not warranted, it will "serve as a public censure of Judge Fuller's reprehensible conduct, which no doubt has brought disrepute to the Judiciary and cannot constitute the 'good behavior' required of a federal judge."[131] The House Judiciary Committee has not yet acted on the certification.

E. Impeachment

The past decade has seen increased politicization of the federal judiciary, with judicial nominations, impeachments, and ethical controversies increasingly falling along partisan lines.

When the Supreme Court shifted to a 6-3 conservative majority around 2020, Democrats in the House and Senate introduced legislation to expand the Court from 9 to 13 justices to allow President Biden to shift the Court's ideological balance. Such proposals were opposed by Republicans.

On April 20, 2023, the Democratic Chairman of the Senate Judiciary Committee, Senator Dick Durbin, requested Chief Justice Roberts' testimony regarding ethics standards for the Supreme Court. Contemporaneously, Senator Durbin launched an investigation into Justice Clarence Thomas for alleged ethical violations. On April 25, 2023, the Chief Justice wrote Senator Durbin declining to testify and stating he did not deign to engage with the Committee in its investigation citing "separation of powers concerns and the importance of preserving judicial independence."[132] The Chief Justice briefly discussed the rarity of his predecessors testimony and enclosed the "Statement of Ethics Principles and Practices," to which all the justices subscribe.[133]

Impeachment proceedings have also become prominent. In 2024, Representative Alexandria Ocasio-Cortez introduced H.R. Res. 1354, proposing the impeachment of Justice Samuel Alito for "high crimes and misdemeanors" for (1) refusing to disqualify himself from proceedings in which his impartiality might be reasonably questioned, and (2) failing to disclose certain gifts in required financial disclosure reports.[134] Simultaneously, Rep. Ocasio-Cortez introduced articles of impeachment against conservative

[130] Michael Gerhardt, The Federal Impeachment Process 79 (1996).

[131] *See* Cole and Garvey, *supra* note 89, at 16-17.

[132] Letter from Chief Justice John G. Roberts, Jr., to Sen. Richard J. Durbin, S. Cmte. Jud. (Apr. 25, 2023), available at https://www.govinfo.gov/content/pkg/GOVPUB-JU6-PURL-gpo212369/pdf/GOVPUB-JU6-PURL-gpo212369.pdf

[133] *Id.*

[134] H.R. Res. 1354, 118th Cong. (2024) ("Impeaching Samuel Alito, Jr., Associate Justice of the Supreme Court of the United States, for high crimes and misdemeanors.").

Justice Thomas, along similar lines, alleging that Justice Thomas has repeatedly failed to disclosed gifts from political donors and that his wife's political activity introduces conflicts.[135] Although these articles of impeachment are unlikely to advance in the House, their introduction represents a new willingness for the political branches to weigh in on the functioning of the Court. In fact, in 2025, multiple Republican Members of the 119th Congress have called for the impeachment of federal judges whose decisions have impeded some aspect of President Trump's agenda.[136]

F. Concluding Observations

Congress has a wide range of oversight tools available with respect to the judicial branch. However, the ability of the Congress to use these tools to investigate individual judges may be more limited. While these tools can be exercised in a variety of contexts, including nominations, judicial discipline, and impeachment, their use outside of these contexts has been relatively rare, and questions have been raised as to whether such exercise of congressional oversight could give rise to a separation of powers violation. The line between judicial independence and judicial accountability is fine; but a proper balance between them is essential for constitutional stability.[137]

[135] H.R. Res. 1353, 118th Cong. (2024) ("Impeaching Clarence Thomas, Associate Justice of the Supreme Court of the United States, for high crimes and misdemeanors.").

[136] *See, e.g.*, Steve Benen, *GOP's Jim Jordan on Judges: "I Don't Think You Should Rule Out Impeachment,"* MSNBC (Oct. 10, 2025)

[137] See Stephen B. Burbank, *Judicial Independence, Judicial Accountability, and Interbranch Relations*, 95 Geo. L. J. 909 (2007).

15. Responding to Congressional Inquiries

As noted in Chapter 1, this manual offers practical guidance to members of Congress and their staff on how to conduct oversight. It adopts a muscular view of Congress's investigative authorities, including on contested questions.

That said, it is important to understand the perspectives of counsel to the Executive Branch and private parties and the arguments and approaches that they often use to respond to congressional inquiries. This chapter briefly outlines the positions that have guided both the executive branch and private parties might employ in the context of congressional oversight.

A. Executive Branch

While acknowledging Congress's constitutionally based oversight role, the executive branch has at times taken a more limited view of Congress's power to investigate a separate and co-equal branch of government. Over the course of decades of informational disputes with Congress, the executive branch has developed a body of legal analysis and precedents in support of its ability to resist instances of what it views as congressional overreach. Much of this doctrine has been developed by the Department of Justice's Office of Legal Counsel (OLC) under administrations of both parties.[138]

1. The Limits of Congress's Legislative Oversight Powers

As discussed, the Constitution does not expressly grant Congress the power to investigate or issue subpoenas. Instead, almost all congressional oversight is conducted pursuant to Congress's legislative authority.[139] While that authority is undoubtedly broad, it is not limitless: Because Congress's subpoena power is "justified solely as an adjunct to the legislative process,"[140] such a subpoena "must serve a 'valid legislative purpose.'"[141]

Importantly, arguments about whether a congressional demand for information serves a legitimate legislative purpose are upstream of arguments about executive privilege or testimonial immunity. They are arguments about the limits of Congress's power rather than the scope or strength of executive branch defenses.

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[138] The 2021 OLC opinion *Congressional Oversight of the White House*, 45 Op. O.L.C. slip op. (Jan. 8, 2021), https://www.justice.gov/olc/file/1355831/dl?inline [hereinafter "Congressional Oversight"] offers a useful overview of OLC's understanding of the legal doctrines at play when Congress makes informational demands of the executive branch (and specifically the White House). While there have of course been some subsequent developments, the opinion is a valuable starting point and much of this section has been drawn from it.

[139] Congress has also occasionally invoked its authority to investigate pursuant to its impeachment power. *See, e.g.*, H.R. Res. 803, 93d Cong. (1974) ("Authorizes the House Committee on the Judiciary to investigate fully and completely whether sufficient grounds exist for the House of Representatives to impeach President Richard M. Nixon.").

[140] Trump v. Mazars USA, LLP, 591 U.S. 848, 862 (2020) (quoting *Watkins v. United States*, 354 U.S. 178, 197 (1957)).

[141] *Id.* at 863 (quoting *Quinn v. United States*, 349 U. S. 155, 161 (1955)).

a. Areas of Exclusive Presidential Power

While Congress's investigatory powers are undoubtedly broad—it may investigate "subject[s] on which legislation 'could be had'"[142]—Congress cannot investigate where it cannot legislate.[143] This includes matters committed to the exclusive constitutional authority of one of the other branches. Such "exclusive constitutional authority … 'disabl[es] the Congress from acting upon the subject.'"[144]

Of course, the precise boundaries of the President's "exclusive constitutional authority" remain sharply contested between the branches. But the executive branch has taken the position that "[t]he President's exclusive powers include the powers to pardon, to sign or veto legislation, to nominate and appoint officers of the United States, and to remove officers and other officials."[145] OLC has also taken the view that the Constitution vests the President with exclusive powers "in the area of diplomacy and national defense," even as the office has acknowledged that "in many cases those powers closely abut areas in which Congress may legislate."[146] But, per OLC, the Constitution vests the President with "exclusive authority to conduct diplomacy on behalf of the United States," as well as "broad authority over the deployment and control of the military in protecting American persons and interests abroad."[147] OLC has also stated that Congress "cannot intrude—through legislation or oversight—upon the President's control over national security information," which it argues derives from the President's constitutional authority as commander-in-chief.[148]

Going forward, the executive branch should be expected to draw from the Supreme Court's recent decision in *Trump v. United States*[149] to buttress its views. In the course of discussing the scope of a President's immunity from criminal prosecution, the Supreme Court stated that "Congress cannot act on, and courts cannot examine, the President's actions on subjects within his 'conclusive and preclusive' constitutional authority."[150] The Court offered the pardon power, the "power to remove—and thus supervise—those who wield executive power on his behalf," as well as the "power 'to control recognition determinations' of foreign countries" as examples of exclusive presidential powers.[151]
The Court paid special attention to the President's authority over federal law enforcement. It stated that the executive branch "has 'exclusive authority and absolute discretion' to decide which crimes to

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[142] *Id.* (quoting *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 506 (1975)).

[143] Quinn v. United States, 349 U.S. 155, 161 (1955) ("Nor does [Congress's power to investigate] extend to an area in which Congress is forbidden to legislate.").

[144] Trump v. United States, 603 U.S. 593, 607 (2024); *see also* Barenblatt v. United States, 360 US 109, 111-12 (1959) ("Since Congress may only investigate into those areas in which it may potentially legislate or appropriate, it cannot inquire into matters which are within the exclusive province of one of the other branches of the Government"). Congress's investigatory reach may be different when investigating pursuant to its impeachment authority. *Cf. Trump v. Mazars USA, LLP*, 591 U.S. at 872 (Thomas, J., dissenting) (suggesting that Congress's impeachment power may enable it to reach subject matter that it could not under its legislative authority).

[145] *Congressional Oversight*, *supra* note 1, at 18.

[146] *Id.* at 19.

[147] *Id.* (internal quotation marks omitted).

[148] *Id.* at 21.

[149] 603 U.S. 593 (2024).

[150] *Id.* at 609.

[151] *Id.*

investigate and prosecute"; that President Trump's "threatened removal of the Acting Attorney General … implicates 'conclusive and preclusive' Presidential authority"; and that the President had "exclusive authority over the investigative and prosecutorial functions of the Justice Department and its officials."[152]

While the Supreme Court made these statements in the context of deciding whether and how to apply criminal laws to presidential conduct, the executive branch is likely to rely on the Court's decision to support future claims that Congress cannot *investigate* these areas either. That is because, as already observed, the general rule is that Congress can investigate only where it can legislate.[153]

To say that the executive branch is likely to make these arguments is not to say Congress is without responses. For instance, Congress might claim to seek information from the Department of Justice not for purposes of probing the President's exercise of "conclusive and preclusive" authority—such as to second-guess individual law enforcement decisions—but to see if new laws are needed in areas of overlapping authority.

b. Second-Guessing Congress's Stated Purpose

As discussed, Congress's demands for information must serve a legitimate legislative purpose. During the first Trump administration, OLC took the position that the executive branch was "not obliged to accept [a] committee's proffered legislative purpose at face value, but instead must 'examine the objective fit between that purpose and the information sought, as well as any other evidence that may bear upon the Committee's true objective.'" [154] In other words, the executive branch was obligated to determine whether Congress's stated reason for an informational demand was pretextual.[155] And if Congress's *actual* reason—as determined by the executive branch—was impermissible (for instance, "to expose for the sake of exposure"[156]), then the executive branch could treat the demand as invalid.

During the Biden administration, OLC walked this position back. It said that, contrary to its prior guidance, the executive branch is "required to treat the Committee's stated rationale with deference and a presumption of good faith and regularity,"[157] even as it noted that this presumption could be overcome "in exceptional circumstances."[158] This revised position now more closely aligns with the position of the courts, which have taken the still-more-deferential view that "the courts do not probe the motives of

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[152] *Id.* at 620-21.

[153] *See supra* nn.5-7 and accompanying text.

[154] *Congressional Oversight*, *supra* note 1, at 13.

[155] *Congressional Committee's Request for the President's Tax Returns Under 26 U.S.C. § 6103(f)*, 43 Op. O.L.C. 151, 177 (2019) ("In order to prevent the 'special danger . . . of congressional usurpation of Executive Branch functions,' we believe that Treasury must determine, for itself, whether the Committee's stated reason reflects its true one or is merely a pretext." (citation omitted) (ellipsis in original)).

[156] *Watkins*, 354 U.S. at 200.

[157] *Ways and Means Committee's Request for the Former President's Tax Returns and Related Tax Information Pursuant to 26 U.S.C. § 6103(f)(1)*, 45 Op. O.L.C. slip op., at 19 (July 30, 2021), https://www.justice.gov/olc/file/1419111/dl?inline=.

[158] *Id.*

individual legislators"[159] and that evidence of legislative purpose for committee subpoenas is to be found simply in committee resolutions.[160]

2. Executive Privilege

The executive branch has long espoused the view that when Congress makes a legitimate informational request that implicates executive branch confidentiality interests, the two branches should work through the "accommodation process" to negotiate a mutually satisfactory resolution.[161] (Of course this accommodation process can take time, which, as discussed below, often inures to the benefit of the executive branch.) The executive branch understands a formal assertion of executive privilege—which must be made personally by the President—to be a "last resort" that is to be invoked where "the accommodation process has failed to produce a resolution and the relevant committee moves to initiate enforcement action by voting to recommend that the recipient of the subpoena be cited for contempt of Congress."[162]

As to the privilege itself, perhaps unsurprisingly, the executive branch takes a more robust view of executive privilege than does Congress, and OLC—across several administrations—has rejected the parameters of executive privilege described earlier in this handbook. According to OLC, "[t]here are at least five well-recognized, and sometimes overlapping, components of executive privilege: national security and foreign affairs, law enforcement, deliberative process, attorney-client communications and attorney work product, and presidential communications."[163]

While each of these components draw from privileges that have their own balancing tests in other contexts, the executive branch takes the position that, in the context of congressional oversight, there is only one test: "a committee may overcome an executive privilege assertion if the subpoenaed materials are 'demonstrably critical to the responsible fulfillment of the Committee's functions.'"[164] This standard,

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[159] Comm. on Ways & Means v. U.S. Dep't of the Treasury, 45 F.4th 324, 333 (D.C. Cir. 2022).

[160] *See id.* at 331 (characterizing "a deluge of citations to statements of individual committee members, statements made during Committee debate, reports published by Representative Neal, statements from the Speaker of the House of Representatives, an op-ed, interview statements, social media posts, and statements of Representatives who are not members of the Committee" as "looking for evidence of improper purpose in the wrong place" and stating that courts have looked to committee resolutions to ascertain the purpose of committee subpoenas); s*ee also*, *e.g.*, Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 508 (1975) ("Our cases make clear that in determining the legitimacy of a congressional act we do not look to the motives alleged to have prompted it." (citations omitted)).

[161] President Reagan issued a memorandum stating that it is the policy of his Administration "to comply with Congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch" and that the "tradition of accommodation should continue as the primary means of resolving conflicts between the [b]ranches." Memorandum from the White House, for the Heads of Executive Departments and Agencies on Procedures Governing Responses to Congressional Requests for Information at 1 (Nov. 4, 1982), https://www.justice.gov/ola/page/file/1090526/dl?inline. The memo goes on to describe how and when executive privilege will be invoked. This "foundational" memo has been adopted by every subsequent administration through at least the Biden Administration. *See* Jonathan David Shaub, *The Executive's Privilege*, 70 Duke L.J. 1, 24 (2020).

[162] *Congressional Oversight of the White House*, *supra* note 1, at 57–58.

[163] *Id.* at 30.

[164] *Assertion of Executive Privilege Over Audio Recordings of the Special Counsel's Interviews of the President and His Ghostwriter* [hereinafter "Hur Assertion"], 48 Op. O.L.C. slip op., at 10 n.2 (May 15, 2024), https://www.justice.gov/olc/media/1382621/dl?inline (quoting *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (*en banc*)); see also Jonathan David Shaub, *The Executive's Privilege*, 70 Duke L.J. at 21-22 (2020) (noting that "[e]ach of the evidentiary privileges on which the components of executive privilege are based has a distinct balancing test" but

which is drawn from the DC Circuit's *en banc* decision in *Senate Select Committee*, is more demanding than the *Espy* standard articulated in Chapter 5—that a committee must show the materials "likely contain[] important evidence" that "is not available with due diligence elsewhere"[165]—which was formulated in the context of a grand jury demand rather than a congressional investigation.

The executive branch has also developed related doctrines meant to safeguard the President's ability to assert executive privilege. As discussed in Chapter 4, Congress has adopted rules to exclude executive branch counsel from attending congressional depositions of executive branch officials. These rules are premised on the stated concern that the presence of executive branch counsel may have a chilling effect on witnesses who are called to testify about executive branch malfeasance, and accordingly inhibit Congress from getting the information it needs for its investigations. The executive branch essentially takes the other side of the coin—namely, that barring executive branch counsel from such depositions "compromise[s] the President's constitutional authority to control the disclosure of privileged information and to supervise the Executive Branch's communications with congressional entities."[166] It has thus taken the position that congressional subpoenas that purport to require agency employees from appearing without agency counsel are legally invalid in their entirety.[167]

The executive branch has also taken the position that the President may make a "protective" assertion of privilege when congressional demands for information escalate too quickly for an adequate privilege review to occur.[168] In other words, "the President may make a 'protective' assertion of executive privilege over a class of documents in order 'to ensure [his] ability to make a final decision, after consultation with the Attorney General, as to which specific documents are deserving of a conclusive claim of executive privilege.'"[169]

3. Testimonial Immunity

The executive branch contends that the President and immediate presidential advisors "are absolutely immune from testimonial compulsion by a Congressional committee on matters related to their official duties." This immunity is related to but importantly distinct from "executive privilege" as currently conceptualized by the executive branch. While both doctrines protect executive branch confidentiality,[170]

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stating that, in the context of congressional demands for executive branch information, the Executive Branch "asserts that a single balancing test applies to every invocation of executive privilege against Congress no matter the specific component of privilege on which the assertion is based."). At the same time, in *Congressional Oversight of the White House*, OLC stated that "[g]enerally speaking" the national security and foreign affairs component of executive privilege provides "absolute" protection, and that the law enforcement component "gives the Executive Branch a near-absolute right to withhold from Congress information that would compromise ongoing law enforcement activities." *Congressional Oversight*, *supra* note 1, at 31. So it seems possible that OLC might in the future articulate a still-more-stringent standard (or even a categorical bar) for certain components of the privilege.

[165] *In re Sealed Case*, 121 F.3d 729, 754 (D.C. Cir. 1997). The Department of Justice has suggested, without deciding, that the *Espy* standard might apply in the context of overcoming a privilege assertion in the context of congressional impeachment. See Hur Assertion, *supra* note 27, at 10 n.2.

[166] *Attempted Exclusion of Agency Counsel from Congressional Depositions of Agency Employees*, 43 Op. O.L.C. 131, 132 (2019).

[167] *Id.*

[168] *Congressional Oversight*, *supra* note 1, at 58 n. 22; *see also Exclusion of Agency Counsel*, 43 Op. O.L.C. at 132.

[169] *Congressional Oversight*, *supra* note 1, at 58 n. 22 (quoting *Protective Assertion of Executive Privilege Regarding White House Counsel's Office Documents*, 20 Op. O.L.C. 1, 1 (1996) (Reno, Att'y Gen.)) (brackets in original).

[170] *Testimonial Immunity Before Congress of the Former Counsel to the President*, 43 Op. O.L.C. 108, 111 (2019).

"immunity extends beyond answers to particular questions, precluding Congress from compelling even the appearance of a senior presidential advisor."[171] The doctrine is rooted in the separation of powers, "a function of the independence and autonomy of the President himself."[172]

As even the executive branch has acknowledged, courts have been skeptical of these claims.[173] Said then-Judge Ketanji Brown Jackson: "absolute testimonial immunity for senior-level White House aides appears to be a fiction that has been fastidiously maintained over time through the force of sheer repetition in OLC opinions, and through accommodations that have permitted its proponents to avoid having the proposition tested in the crucible of litigation."[174] Despite such decisions, OLC has maintained its views on immunity, noting that "[n]o precedential ruling has addressed the Executive Branch's position."[175] And while the Supreme Court's 2024 decision in *Trump v. United States* dealt with a President's immunity from criminal prosecution rather than the immunity of a President's aides from compelled testimonial immunity, one can only expect that its language will be parsed for potential application in this context.

4. Prosecutorial Discretion

Congress is heavily reliant on the executive branch for providing an enforcement backstop for its use of compulsory process. While a number of factors, such as the risk of reputational harm, can motivate individuals to comply with a congressional subpoena, the risk of federal prosecution following a criminal contempt referral is certainly the weightiest consideration.

Not so for the executive branch. The executive branch takes the position that, despite statutory language that it is the "duty" of the appropriate U.S. Attorney to bring a congressional contempt citation before a grand jury,[176] the executive branch has discretion "to decide whether a person should be indicted and prosecuted," and that "the contempt statute does not apply to executive branch officials who resist congressional subpoenas in order to protect the prerogatives of the Executive Branch."[177] Thus, if the executive branch takes the position that a particular congressional subpoena is invalid, executive branch officials have historically not had to fear federal prosecution for defying that subpoena because it is the executive branch itself that decides whether to prosecute. While Congress's inherent contempt power could not be short-circuited in this way, that power is subject to practical limitations and legal uncertainty with regard to its application against executive branch officials, leaving executive officials with a strong hand in facing down congressional subpoenas.[178]

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[171] *Id.*

[172] *Id.*

[173] *See Congressional Oversight, supra* note 1, at 55.

[174] Comm. on the Judiciary v. McGahn, 415 F. Supp. 3d 148, 214 (D.D.C. 2019), *aff'd in part*, 968 F.3d 755 (D.C. Cir. 2020); *see also* Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53, 56 (D.D.C. 2008) (rejecting "the claim by the Executive to absolute immunity from compelled congressional process for senior presidential aides").

[175] *See Congressional Oversight, supra* note 1, at 55.

[176] 2 U.S.C. § 194.

[177] *Congressional Oversight, supra* note 1, at 50.

[178] *See* Chapter 3 for a discussion of Congress's inherent contempt power. While we will not explore the issues fully here, OLC also takes the position that "congressional suits to enforce subpoenas to executive branch officials fall outside the constitutional and statutory jurisdiction of the federal courts," and that Congress's "inherent contempt mechanism appears to have fallen into

B. Private Parties

While the Supreme Court has "recognized the restraints of the Bill of Rights upon congressional investigations,"[179] as noted above private parties generally have more limited tools than the executive branch to defend against compulsory congressional process.

Because of this and other, broader, strategic considerations, private parties will often seek to cooperate with Congress so as to avoid compulsory process. Through discussion and negotiation with congressional staff, private parties can arrange to provide targeted information that addresses Congress's core informational needs. In many circumstances, it is often in the Congress's interest to maintain a voluntary posture to avoid the logistical and potentially political difficulties associated with authorizing and issuing a subpoena.

Even in cases where a subpoena is issued, private parties often continue to negotiate various aspects of the process, including the subpoena's scope and deadlines.[180] Like their executive branch counterparts, private parties also have legal defenses to congressional demands, and Congress might want to avoid protracted litigation or adverse judicial rulings on undecided questions of law.

Private parties could contend, for instance, that a subpoena is invalid because it lacks a "valid legislative purpose."[181] As the Supreme Court stated in *Mazars*:

> 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." Congress has no "'general' power to inquire into private affairs and compel disclosures," and "there is no congressional power to expose for the sake of exposure." "Investigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible."[182]

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desuetude, and would present grave constitutional concerns if deployed against executive branch officials acting to protect the lawful prerogatives of the Executive." *Congressional Oversight, supra* note 1, at 51–52. While also not addressed in full here, OLC identifies additional potential "legal defects" with congressional subpoenas in *Congressional Oversight of the White House*, *id.* at 52–59.

[179] Watkins v. United States, 354 U.S. 178, 198 (1957).

[180] *See* Emily M. Loeb & Natalie K. Orpett, *New Congress, New Outlook: 10 Things In-House Counsel Need To Know About House Congressional Committees*, Jenner & Block (2018), https://web.archive.org/web/20221114201249/https://www.jenner.com/system/assets/publications/18454/original/New%20Congress,%20New%20Outlook_%2010%20Things%20In-House%20Counsel%20Need%20To%20Know%20About%20House%20Congressional%20Committees.pdf?1546989580.

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

[182] Trump v. Mazars USA, LLP, 591 U.S. 848, 863 (2020) (citations omitted).

Additionally, "recipients of legislative subpoenas retain their constitutional rights throughout the course of an investigation,"[183] including protections under the First and Fifth Amendments.[184] And the Supreme Court's *Mazars* decision stated *in dicta* that "recipients have long been understood to retain common law and constitutional privileges with respect to certain materials, such as attorney-client communications and governmental communications protected by executive privilege." As discussed in Chapter 6, Congress has, in fact, long taken the position that it is *not* required to respect common law privileges like attorney-client confidentiality (even as it has often honored such privileges in practice), and some commentators have criticized or minimized the Supreme Court's language in *Mazars*.[185] Regardless, the language will undoubtedly strengthen the hand of both private parties and the executive branch in asserting common law privileges against congressional investigators.

But if Congress is unreceptive to these arguments, court decisions have construed the Speech or Debate Clause to limit parties' ability to affirmatively challenge a congressional subpoena prior to its attempted enforcement.[186] Admittedly, if a subpoena were served against a third party, such as when Congress seeks a target's records from a third-party financial institution, then the target could seek to enjoin that *third party's* compliance.[187] But if the subpoena were served upon them directly—such as with a testimonial subpoena—the surest means to test it would require the party to defy the subpoena.

Such a move exposes the party to Congress's enforcement tools. Congress could seek to enforce its subpoena via a civil suit, which provides a neutral forum to attack the subpoena's validity. But Congress also has the power to hold the party in contempt, putting the party in criminal jeopardy. Enforcement via the contempt process requires a vote by both the relevant committee and the relevant house of Congress,[188] which involves a great deal of time and resources. And, as discussed, the Justice Department takes the position that it has discretion in deciding which contempt prosecutions to bring before a grand

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[183] *Id.*

[184] *See* United States v. Rumely, 345 U.S. 41, 48 (1953) (First Amendment); Quinn v. United States, 349 U.S. 155 (1955) (Fifth Amendment).

[185] *See* Michael Stern, Mazars *and Common Law Privileges Before Congress*, Point of Order (July 10, 2020), https://www.pointoforder.com/2020/07/10/mazars-and-common-law-privileges-before-congress ("the Supreme Court's poorly researched *dicta* on this point should not be given any weight"); David Rapallo, *House Rules: Congress and the Attorney-Client Privilege*, 100 Wash. U. L. Rev. 455, 458-59 (2022) (contending that the *Mazars* language "could be read as acknowledging that recipients of congressional subpoenas retain the right to assert the privilege in other venues not directly related to congressional investigations and that complying with mandatory congressional demands does not constitute a general waiver in those other proceedings").

[186] *See* Robert Kelner et al., *Federal Court Dismisses Pre-Enforcement Challenge to HELP Committee Subpoena, Underscoring Limited Options for Congressional Subpoena Targets*, Global Policy Watch (Sept. 22, 2025), https://www.globalpolicywatch.com/2025/09/federal-court-dismisses-pre-enforcement-challenge-to-help-committee-subpoena-underscoring-limited-options-for-congressional-subpoena-targets (calling a 2025 district court Speech or Debate Clause case "a reminder of the stark limitations on the ability of companies, executives, and organizations facing scrutiny from Capitol Hill to affirmatively challenge congressional subpoenas").

[187] *See* Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 501 n.14 (1975) (noting the "significant difference between a subpoena that seeks information directly from a party and one that seeks the same information from a third person. In the former case the party can resist and thereby test the subpoena; in the latter case, however, unless a court may inquire to determine whether a legitimate legislative purpose is present, compliance by the third person could frustrate any judicial inquiry" (citations omitted)). The genesis of the Supreme Court's decision in *Mazars* began when President Trump sued various financial institutions to stop them from complying with congressional subpoenas seeking his financial information.

[188] *See* Todd Garvey, Cong. Rsch. Serv., LSB10974, *Criminal Contempt of Congress: Frequently Asked Questions* (2023) ("Although the statute does not expressly require approval of the contempt citation by the committee's parent body, both congressional practice and at least one judicial decision suggest that approval by the committee's chamber may be necessary. As a result, the process of holding an individual in contempt generally includes a vote of the committee reporting the matter to the full House or Senate, followed by a vote of the full chamber to direct the certification of the matter to the U.S. Attorney.").

jury. All the same, private parties often have little appetite to test their legal theories on pain of criminal sanction.

C. Overview

As described throughout this work, Congress has powerful investigative tools at its disposal. These tools, however, are not boundless. The executive branch, with OLC as its bulwark, has developed robust means of resisting congressional demands. And private parties too have legal defenses, as well as approaches to protect their core interests while navigating Congress's demands. Congressional investigators are likely to encounter these and other defenses during engagements with the Executive Branch and the private sector.

16. Concluding Observations: the Constitution and Oversight of the Administrative Bureaucracy

President Woodrow Wilson, describing the role of Congress in 1885, insisted that: "Quite as important as legislation is vigilant oversight of administration."[189] Wilson further noted the importance of oversight in promoting government transparency and cited the necessity of "the instruction and guidance in political affairs which the people might receive from a body, which kept all national concerns suffused in the broad daylight of discussion."[190]

Wilson went on to exhort: "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 functions of Congress should be preferred even to its legislative function."[191]

If Wilson was observing Congress today, he would be deeply disappointed, if not aghast. Congress has become mired in a state of legislative dysfunction, often meekly acquiescent to the executive's negation of its core investigative powers, and complicit in the degradation of internal congressional capacity to legislate effectively and conduct meaningful oversight. There has been a palpable loss of a sense of institution that in the past served to inspire actions to protect Congress's core constitutional prerogatives.

This study has attempted to introduce the reader to the current complexities of the legislative oversight process and the rules, tools, and folkways by which it operates. It has sought to demonstrate—through discussions of law, practices, and history—that effective oversight can assure not only that Congress has the capability to inform itself and the public how well or badly government is performing its public duties, but also that performing such oversight is key to Congress maintaining and vindicating its co-equal role in our constitutional scheme. It has shown that over the course of our nation's political history, dating from the earliest years of the Republic, Congress has established a constitutionally based foundation of mechanisms and practices for oversight that affords it virtually unlimited access to information from the executive necessary to perform its legislative responsibilities.

Indeed, the Supreme Court and lower federal courts have recognized Congress's prerogative to obtain documents and testimony from any executive branch entity through a host of rulings, including:

- that subpoenas may be enforced through inherent, criminal and or civil court enforcement processes;
- that a presidential claim of qualified privilege does not cloak an executive branch official with absolute immunity from responding to a committee subpoena;
- that a court may not entertain a request to quash a subpoena during the course of an on-going committee inquiry;

[189] Woodrow Wilson, Congressional Government 195 (1885).

[190] *Id.* at 227.

[191] *Id.* at 303.

- that committees have absolute control over the conduct of hearings, including the initial discretionary determination whether to accept presidential or common law claims of privilege; and

- that committees may intercede in ongoing agency decision making proceedings—such as notice and comment rulemakings, ratemakings, informal decision making, formal adjudications, and agency investigations—when pursuing legitimate oversight concerns in a manner that does not force agency consideration of factors that Congress did not intend to make relevant, or intrude, in an adjudicatory proceeding, directly on the considerations of the ultimate decisionmaker on the merits of the issue involved.

In addition, the House has established a practice, dating back 140 years and to which the Justice Department has acquiesced, requiring a member or committee in receipt of a DOJ subpoena for documents and/or testimony to report that service to the House General Counsel, so that she can make an initial determination whether any of the information sought falls within the protections of the Speech or Debate Clause. The Senate follows a similar practice. More recently, the Court of Appeals for the District of Columbia has held the Speech or Debate Clause does not allow the executive to execute a search warrant for documents in a member's congressional office without allowing the member and/or the House General Counsel the opportunity to make the initial determination as to which documents may be subject to speech or debate immunity. This practice and ruling underscores the Speech or Debate Clause's design to protect Congress's role in the separation of powers by "prevent[ing] intimidation of legislators by the Executive and accountability before a possibly hostile judiciary."[192]

In the past, Congress has reacted to executive challenges by timely, appropriate internal reorganizations, remedial legislation, and decisive political and legal actions. For example, in the 1970s, the accumulated problems with executive domestic and foreign intelligence secrecy, aggrandizement and maladministration in the Vietnam War, presidential impoundment tactics, and Watergate and the Nixon impeachment proceedings, laid bare the need for an expanded legislative ability to gain access to and properly utilize vital sources of information. The result was passage of legislation in the mid and late 1970s that created, adequately funded, and staffed new legislative support agencies and expanded the authorities and missions of existing ones; established offices of inspectors general in major agencies to enable on the spot policing of inefficiency, waste, fraud and abuse; and put in place a scheme that would allow the court to appoint independent counsels to investigate and prosecute any unlawful actions of high level executive officials. Internal reforms in that same period included the decentralization and disbursal of full committee authority over legislation and oversight to well-staffed subcommittees and their chairs, and the establishment of offices of legal counsel in the House and Senate to advise, and where necessary formally represent, members and committees.

The effect of the reforms was immediate. Aggressive, successful committee oversight actions produced supporting precedents that underlined the efficacy, importance, and availability of a credible threat of severe consequences for an official's failure to comply with valid compulsory demands for information. Between 1975 and 1998 there were 10 votes to hold cabinet-level officials in contempt of Congress. All resulted in complete or substantial compliance with the information demands in question before the necessity of a criminal trial. During this period, often the very threat of a contempt vote was sufficient to elicit compliance.

However, as the administrative bureaucracy has burgeoned since 1980—in response to Congress's vast expansion of its domestic and foreign responsibilities—Presidents have increasingly vied for control over

[192] Gravel v. United States, 408 U.S. 606, 617, 624-25 (1972).

the execution of these expansive legislative goals, and the executive branch has increasingly resisted compliance with committee information access demands. The Justice Department has taken the legal stance that neither house of Congress has the constitutional authority to enforce subpoena demands against executive officials through criminal or inherent contempt proceedings, even if there is no claim of presidential privilege. A congressional committee's only recourse, according to DOJ, is the filing of a civil enforcement action in federal district court. Congress's experience with this option since 2007 has not been good; the two investigations that have become the subject of litigation have been stymied to the point that ultimate resolution, even if successful for the committee, is untimely and essentially irrelevant. The latest such litigation has currently consumed over six years of investigative and court proceedings, with an appellate court review still in the offing.

The consequences of DOJ's tactic, however, go beyond delay in a particular inquiry. The uncertainty over whether a congressional committee can effectively enforce its informational demands has inspired growing agency resistance, even when a committee's request is accompanied by a subpoena. The Fast and Furious court's ruling that it would recognize claims of common law deliberative process privilege has provided additional incentive, albeit resting on a dubious legal basis, for slow walking. One frustrated committee has issued the empty threat of an impeachment proceeding, which certainly would be unavailing. Delaying confirmations or passing targeted agency appropriation cuts are difficult to accomplish in a timely fashion, and if noncompliance is widespread funding cuts may be seen as counterproductive.

In the face of this grave external challenge to its core oversight power, Congress has proven its own worst enemy. Since 1995, the House has cut committee staff by a third, reduced legislative support staff at GAO by a third, flat-lined funding at CRS, and abolished the Office of Technology Assessment. Today, GAO and CRS operate with about 80% of their 1979 professional personnel capacity. In 2011, the House cut its total operating budget by 20% across the board. During this period, policy leadership, including control of the initiation of sensitive investigative inquiries, has been centralized in the leadership of both houses (there has been a 53% increase in the size of House leadership support staffs since 1995), and term limits of six years have been imposed on committee chairs. These organizational and budget changes have had a profound impact on the committee and support agency structure and performance. An increased turnover of committee staff as a result of low pay and the departures of term limited chairs has caused a gap in experience and expertise that, in turn, has resulted in greater reliance on the assistance of outside lobbyists and special interest organizations for information analysis and policy development ideas. Most committees in each house ignore staffing models with career paths that favor tenure and internal structures that reward specialization, experience, and training.

Concurrently, centralized leadership in the selection of legislative priorities and the resultant diminution of the importance of committees in policy development has dampened member interest and enthusiasm for the drudgery of committee work, particularly oversight. Deliberative committee meetings are now rare and conference committees to iron out differences in legislative texts are almost non-existent. The former powers of House committees and subcommittees created incentives for members to concentrate on committee work and hope for advancement to senior positions through established, institutional roles. With seniority now one of only many qualifications, and chairmanships left to the party leadership's discretion, members must remain loyal to party leadership if they are to advance or accomplish their goals. Thus, parties, with their inherent focus on politics, have replaced the former House focus on policymaking.[193]

[193] See generally Charles Tiefer, The Polarized Congress: The Post-Traditional Procedure of Its Current Struggles (2016) (lucidly describing how the centralization of policymaking control in congressional leadership has resulted in the diminution the relevance of the roles of committees in the lawmaking process.)

A consequence, highly evident today, is that internal legislative processes generally are not geared to policy development and passage of considered public interest legislation, but rather to expending time and effort on symbolic messaging actions designed to garner media and public attention to political issues. The top-down leadership scheme has failed to draw in rank-and-file members, who often have single interest concerns. Minority party congresspersons and their leadership increasingly feel and behave like dispossessed outsiders who need to oppose whatever the powers that be present. And there are no rewards or punishments available to bring them in line. The result is stasis and dysfunction and almost no inclination at any level to protect institutional prerogatives against growing executive challenges.

The threat of an overreaching, unrestrained executive is an ever-present, built-in reality of our separated but balanced plan of government. Vigilance through continuous and aggressive oversight is indispensable. The current failure to meet executive challenges to Congress's core prerogatives is an abdication of its constitutional responsibility.

Congressional investigations can, have, and should continue to serve the public interest. Throughout our nation's history, congressional investigations have led to major reforms that have benefited taxpayers, improved public health, safety, and the environment, and safeguarded individual liberties from governmental abuse. Benchmark probes of the last six decades have included:

- the 1940s Truman Committee investigation that disclosed waste and abuse in the national defense program, which spurred subsequent important procurement reforms;

- the investigation of the drug industry led by Senator Estes Kefauver in the 1960s, which led to enactment of major amendments to the Food, Drug, and Cosmetic Act by imposing new safeguards over the manufacture, testing, inspection, certification, and withdrawal of drugs;

- House and Senate investigations during the 1960s and 1970s concerning the environment, which led to enactment of the Clean Air Act, Clean Water Act, and various hazardous waste laws;

- the exposure by the Church Committee in the 1970s of decades of inappropriate domestic and foreign intelligence activities by the CIA and the FBI, which produced reforms in congressional oversight over the intelligence community and the enactment of such landmark legislation as the Foreign Intelligence Surveillance Act and the establishment of the Foreign Intelligence Surveillance Court;

- in the 1980s, investigations of the generic drug and blood industries by Representative John Dingell's Oversight and Investigations Subcommittee, which led to major reforms in those industries;

- in 2002, following the exposure of the Enron and Worldcom accounting scandals and the revelation by the Senate and House Banking Committee investigations of serious weaknesses in industry self-regulatory reporting requirements for certain publicly held companies, Congress enacted the Sarbanes–Oxley Act of 2002, which established an independent board to oversee the audit of public companies subject to the securities laws;

- in 2010, the final report of the Senate Permanent Subcommittee on Investigations on its two-year inquiry into the causes and effects of the 2008 financial crisis spurred passage of the Dodd-Frank financial remedial legislation; and

- in December 2014, the release of the executive summary of the Senate Select Committee on Intelligence's 6,700 page report examining the CIA's former detention and interrogation

program—the longest oversight report in Senate history, culminating more than five years of investigation—which resulted in bipartisan legislation the following year to strengthen the prohibition against torture.

Those investigations and many others came at a price that included the investment in time, resources, and energy of committee chairs and staff, which could have been expended on more politically beneficial legislative activities. Often, high profile inquiries have inspired personal attacks on committee chairs and staff, as well as on the committees themselves. The Senate's investigation of the Teapot Dome scandal in the 1920s, now revered by most as the modern era's model of a responsible exercise of Congress's investigative powers for its exposure of government corruption and self-dealing, was reviled by the press and academics at the time. Leading New York newspapers called the Senate investigators "scandalmongers," "assassins of character," and "mudgunners." The eminent legal scholar Dean John H. Wigmore wrote of the "sensational debauch of investigation—poking into the garbage cans and dragging the sewers of political intrigue."[194]

During the House Energy and Commerce Oversight and Investigations Subcommittee's 1992–94 investigation of mismanagement in the Environmental Crimes Section (ECS) of the Department of Justice,[195] the Subcommittee, its Chair, John Dingell, and its staff came under relentless criticism from the media, public interest organizations, a former Attorney General, the American Bar Association (ABA), and the Justice Department. Editorials personally attacked "General Dingell" and the Subcommittee staff, describing them as "interrogators," "Dingell's wolves," and "Torquemadas-in-training." The former Attorney General questioned the constitutionality of the Subcommittee's demands for the testimony of subordinate employees and the probes into open and closed cases and criticized the Department for ultimately allowing the interviews and producing the documents. The Criminal Justice Section of the ABA recommended to its House of Delegates that it adopt a report that proposed severely restricting congressional oversight of prosecutorial agencies and encouraged the executive branch to resist demands for testimony and documents.[196] Nonetheless, the investigation was ultimately highly successful. The inquiry uncovered severe strains in the relationship between the U.S. Attorneys' offices and the ECS, which had been exacerbated by a three-year campaign by DOJ Headquarters to centralize its control over environmental prosecutions in Washington, D.C. In the end, the Attorney General ordered the return of prosecutorial discretion to the local U.S. Attorneys' offices and reversed efforts toward centralized control.[197]

As has been emphasized throughout this study, investigative oversight is very hard, sometimes dirty, and often unrewarding in the ways that are today so important for a legislator's political survival. It is, however, critical. Congress's recent quiescence in the face of very serious challenges to its core constitutional prerogatives is dangerous, and the prospect of its continuance is disquieting. The longer Congress stands silent on the sidelines, the more difficult it becomes to reclaim its powers. The legislative prerogatives are, of course, retrievable but only with great effort. Not only must Congress revive the

[194] Recounted in John C. Grabow, Congressional Investigations, Law and Practices 15 (1988).

[195] Staff of Subcomm. On Oversight and Investigations, H. Comm. On Energy and Commerce, 103rd Cong., Damaging Disarray: Organizational Breakdown and Reform in the Justice Department's Environmental Crimes Program (Comm. Print 1994). *See also* Deborah Jacobson, *1992-1994 Investigation of the Justice Department's Environmental Crimes Program*, Part II *infra.*

[196] *Id*. at 41-56.

[197] This move toward centralization came at the same time that control over nearly every other area of criminal prosecution was being decentralized. These conflicts were found to have affected field office morale and undermined the effectiveness of enforcement efforts. By the time the probe ended, the investigation had spurred important changes in DOJ's environmental criminal enforcement program. In addition to ordering a return of prosecutorial discretion to the local U.S. attorneys' offices, the department also established an entirely new management team to head the ECS. *Id*. at 1, 64.

respect for the powers of the institution, but the infrastructure of oversight also has to be rebuilt, starting with enforcement of the subpoena power and revitalizing committee capacity to properly assess and utilize the information for legislative purposes.

A. Congressional Options for Restoring Its Subpoena Enforcement Authority and Its Ability to Effectively Assess and Utilize Vital Information for Legislative Purposes

1. Criminal Contempt

As described in this study, the now-settled three options for enforcing subpoenas are all difficult and problematic. Criminal contempt has worked in the past, probably because the executive official who has been the target has been unwilling to be subjected to a criminal prosecution in order to make a constitutional point for the President. From a congressional standpoint, however, it is time-consuming and resource draining, even if there is eventual capitulation because the likelihood of success in court is high. However, the Justice Department's current stance on the constitutionality of criminal contempt prosecutions against executive officials removes the leverage that the threat of citation posed. Consideration might be given to establishment of a mechanism based on the model of the now-expired Independent Counsel Act. This would allow the appointment of a special advocate by a panel of the U.S. Court of Appeals for the District of Columbia Circuit to prosecute contempt of Congress whenever the executive blocks a U.S. Attorney from presenting a citation to a grand jury.[198] During the Teapot Dome investigation, the independent counsel successfully brought several such contempt prosecutions on behalf of the Senate.[199] However, the likelihood of a President signing such legislation is slim.

But the criminal contempt process cannot be dismissed out of hand as subject to some aspect of prosecutorial discretion. Supreme Court rulings, since 1821, have concluded that each house has the inherent constitutional authority to protect itself and to punish for contempt those who attempt to obstruct its legislative process, or else it would "be exposed to every indignity and interruption, that rudeness, or even conspiracy, may mediate against it."[200] The 1857 criminal contempt legislation was enacted in light of the same self-protective authority because of the Supreme Court's limitation on punishment by imprisonment to the end of a legislative session. It is to be recalled that there was no Justice Department in 1857 (it was not established until 1870) and United States attorneys were contract employees of the executive. They were simply viewed as the vehicle for either house to obtain judicial assistance to vindicate a House's integrity. That situation and rationale did not change with the creation of DOJ.[201] Thus, the similar, well recognized self--protective contempt authority of the federal courts provides an apt analogy.

In *Young v. ex rel. Louis Vuitton et Fils*[202] the Supreme Court recognized that courts may appoint private attorneys to act as prosecutorial officers for the limited purpose of vindicating their authority. The next

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[198] Rep. Brad Miller introduced such legislation in the 111th Congress. See H.R. 277, 111th Cong., 1st. Sess. (2009). It would have provided for appointment of an independent counsel by the Chief Judge of the U.S. district court for the district in which the certification was made if the attorney general or the U.S. attorney refuses to prosecute or if no indictment has been returned within 30 days after date of receipt of a House or Senate certification of a contempt citation. No House action was taken on the bill.

[199] John C. Grabow, Congressional Investigations: Law and Practice 29-30 (1988).

[200] Anderson v. Dunn, 19 U.S. 204 (1821).

[201] The legislative history of the 1857 criminal contempt enactment makes it abundantly clear that Congress intended to make its criminal strictures applicable to uncooperative executive branch officials. *See* Todd Garvey, *The Webster and Ingersoll Investigations*, at Part II infra.

[202] 481 U.S.787 (1987).

year, in its landmark ruling in *Morrison v. Olson*[203] upholding the validity of the independent counsel legislation, the Court cited *Young* as authority for court appointment of a prosecutor where there is no "incongruity between the functions normally performed by the courts and the performance of their duty to appoint." The Court noted that "Congress, of course, was concerned when it created the office of independent counsel with the conflicts of interest that could arise in situations when the Executive is called upon to investigate its own high-ranking officers. If it were to remove the appointing authority from the Executive Branch, the most logical place to put it was in the Judicial Branch." The *Morrison* court also made it clear that prosecutorial discretion was not a core presidential power.

A strong argument can be made that the notion put forth by DOJ that it is raising an applicable claim of presidential privilege is misplaced. The only defense it could properly raise is that it would face a conflict of interest if it is asked to represent the House by presenting a contempt citation to a grand jury against one of its clients. However, DOJ's own rules provide the solution to such conflict problems: appointment of a private counsel as prosecutor or designation of a DOJ counsel who is made independent. A judicial challenge to the next DOJ refusal to present a criminal contempt, asking the Court to order DOJ to appoint a special prosecutor in accordance with its own rules, would be a credible option.

2. Inherent Contempt

The historic inherent contempt power risks creating a political spectacle since it involves the arrest and detention of the accused, a trial on the floor of the House or Senate chamber, and possible incarceration if the person is found guilty. It also may involve a lawsuit in court, since the initial arrest and detention are typically quickly challenged in court through a *habeas corpus* petition. As a result, Congress has, since 1935, avoided using this power, turning instead to its criminal contempt option. But Congress may wish to consider this tool more seriously because it does provide the means to obtain the desired testimony or documents more quickly. Congress could establish, by internal house rules, procedures and practices that avoid "unseemly" initial detentions and ultimate incarcerations, provide an expeditious due process proceeding, and impose stiff monetary penalties in place of incarceration.

For example, preliminary to the holding of a trial in the House or Senate chamber, a special committee could conduct evidentiary proceedings at which the person cited, or his or her attorney could appear and present witnesses and arguments. The special committee would then report its findings and recommendations to the floor. The person cited for contempt could again appear in person prior to the vote to acquit or convict and present his defense. Such preliminary committee considerations were not uncommon in early inherent contempt proceedings, and an analogous pre-trial process for Senate impeachments has been held constitutional by the Supreme Court.[204] In addition, House and Senate rules could provide that upon conviction, the sole penalty that could be imposed would be a fine, which would automatically trigger a point of order reducing the official's pay. In such a process, the entire matter would be carried out within Congress. Without detention or incarceration, *habeas* is unavailable, and thus there would be no separate court proceedings. Under such revised procedures, inherent contempt might then be viewed as a politically palatable, "congressionally friendly," fair, and expeditious enforcement mechanism that would make recalcitrant executive officials think twice before resisting.

3. Civil Contempt

Finally, civil contempt is not as speedy as advertised, as both the *Miers* and Fast and Furious litigations have amply demonstrated. It also presents the ever-present danger of an aberrational judicial ruling as occurred in Fast and Furious. In the past, the Justice Department has suggested that subpoena disputes be

[203] 487 U.S. 654 (1988).

[204] See discussion in Chapter 3.

resolved in court because this would allow the Department to defend an official in a potentially executive-friendly judicial forum. Congressional committees in the past, whether led by Democrats or Republicans, uniformly avoided DOJ offers for resolution through a civil enforcement suit.[205] Interestingly, when utilized by the House to enforce the subpoenas in the *Miers* and Fast and Furious cases, DOJ challenged the suit on a variety of "justiciability" grounds, but lost in each case its claim that the lawsuit was improperly brought because an authorization by one house is insufficient to vest jurisdiction in a district court. Ultimately, the *Miers* suit proved to be the only way for Congress to challenge the President's claim of absolute immunity from congressional subpoenas for close presidential aides. The issue will undoubtedly be raised again by DOJ in the Fast and Furious appeal. In any event, civil contempt as an enforcement option will certainly be abandoned if the criminal and inherent contempt processes are restored.

Shoring up congressional enforcement mechanisms would help in making executive agencies and the White House more amenable to settling such disputes short of reliance on lengthy lawsuits with potentially uncertain outcomes. In most cases, it is the political process that is best able to forge compromises that address the needs of both political branches of government.[206]

B. Restoring the Centrality of the Roles of Committees and Subcommittees in Policy Development and Oversight and Their Ability to Assess and Evaluate Vital Legislative Information

Centralization in the party leadership of each house of control over legislative policy development and the initiation of sensitive investigative inquiries, accompanied by funding cuts for jurisdictional committees and the legislative branch support agencies that have traditionally assisted them, has served to undermine effective oversight and the depth and soundness of policy choices. Not only has there been a critical diminution in committee and support agency staffs' expertise and institutional memory, but also a reduction in the incentive of members to engage in the increasingly unrewarding, time consuming effort that committee work requires.[207]

Resolution of this problem will not be easy or immediately forthcoming. It will require a fundamental change in the current climate of political dysfunction, which will entail a resurrection of a long dormant communal sense of institution that understands and respects the collective duties and responsibilities as members of a representative legislature in our scheme of separated powers. It will first require a

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[205] The Justice Department on numerous past occasions has suggested, during contentious inquiries that raised possible executive privilege issues over subpoenaed documents and witnesses, that such disputes be resolved by civil enforcement proceedings in federal court. Until *Miers* such importunings were uniformly rejected. *See*, for example, H. R. Rep. No. 104-598, at 63 (1996) (additional views of Chairman William Clinger, Jr., stating that "I am astonished at hearing this recommendation by a Democratic President when the contemnor is a Democrat after knowing that the concept of a civil remedy has been so resoundingly rejected by previous Democrat Congresses when the contemnor was a Republican.").

[206] In perhaps the first instance of a congressional committee directly and publicly addressing the issue of restoration of the Congress's contempt power, the final report of the Select Committee on the Events Surrounding the 2012 Terrorist Attack on Benghazi, H.R. Rep. No. 114-848 (2016) made three recommendations, based upon investigatory experience of its inquiry: (1) House and Senate rules should be amended to provide for mandatory reductions in appropriations to the salaries of federal officials held in contempt of Congress; (2) the criminal contempt statute should be amended to require the appointment of a special counsel to handle criminal contempt proceedings upon the certification of a contempt citation against an executive branch official by the House or Senate; and (3) the enactment of expedited procedures for the civil enforcement of subpoenas. The first recommendation deals with suggested alterations of the inherent contempt process by means of changes in House rules that either allow a point of order against any appropriation measure that would fund the salary of a federal official held in contempt of Congress or that provides nearly automatic sanctions against officials held in contempt by including a triggering mechanism in an annual appropriations statute disallowing the use of any appropriation to pay the salary of a federal official held in contempt which would affect an immediate and automatic reduction in pay. The latter option would mirror Section 13 of the Financial Services and Government Appropriations Act of 2012, a rider that has been continued annually for many years.

[207] *See* discussion in Chapter 2.

successful challenge to the legal basis of executive refusals to obey compulsory processes for information. This in itself will call for an exercise of institutional will that of late has not been apparent. But ultimately, there must be a congressional recognition that continued executive obstruction of its core legislative oversight and investigative prerogatives will become such an institutionally intolerable invasion of its place in our scheme of separated powers that a constitutional confrontation is necessary and unavoidable. Arguably, that time has already arrived.[208]

Success in that effort must then be followed by the loosening of the reins of the current hierarchal control of committee policy development and oversight. This would be manifested by significant increases in funding for the hiring of committee personnel based on staffing models that establish career paths that favor tenure and internal structures that reward specialization, experience and training. Term limits for chairs should be abolished to avoid the inevitable staff turnover and the loss of expertise and institutional memory. A core cadre of committee personnel might be hired as committee staff rather than being attached to a particular member so as to minimize the impact of member or chair turnovers. Equally vital is sufficient funding for agencies like GAO and CRS to make them the resources of first and principal resort for technical and analytic assistance that is now being provided by lobbyists and special interest organizations. More powerful committees would attract and encourage more member loyalty. It would affirm one further Woodrow Wilson observation: "It is not far from the truth to say that Congress in session is Congress on public exhibition, whilst Congress in committee rooms is Congress at work."

The shape and contours of the legislative oversight process are dictated or directly influenced by our constitutional scheme of separated powers. That scheme envisions and establishes a perpetual struggle for policy control between Congress and the executive. The Framers of the Constitution had a basic distrust of government as a result of their colonial, early state, and Articles of Confederation experiences. Indeed, the issue of honesty and integrity in government, and the prevention of public corruption, has been important since the formation of our government in the 18th century. This distrust motivated the structure of the federal government in the Constitution; that is, separating powers among three branches of government to avoid concentrations and abuses of power and facilitate "checks and balances" among the branches.

In practice, the powers of the two political branches are too incomplete for one to gain total control of the departments and agencies of the executive branch. Legislative oversight is the mechanism that attempts to assure that Congress's will is carried out and that executive power does not overwhelm congressional prerogatives. A more complete and accurate picture, then, is not that of congressional dominance, or executive recalcitrance, but of a dynamic process of continuous sparring, confrontations, negotiations, and ultimate accommodation. Occasionally, there are monumental clashes. It is in those instances that congressional power has been refined and defined.

Our Constitution ensures that powers are divided among the branches of government no matter who controls the White House or the Congress. Thus, these issues of inter-branch conflict and cooperation will arise, and they should be resolved without regard to which political party is in control. In recent years, we have faced a lengthy period of legislative passivity in the face of serious executive challenges. As a result, there is present in Congress a pervasive sense of loss of institutional regard, loyalty, and self-respect. It is evident that the availability of formidable investigative powers alone is insufficient without an

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[208] *See* Eric A. Posner & Adrian Vermuele, *Constitutional Showdowns*, 156 Pa. L. Rev. 991, 1041-42 (2008) ("[U]nder certain circumstances the active virtues, the embrace of clarifying conflict, should be preferred to the passive virtues, or the evasion of unnecessary conflict....As against the passive virtues, however, decisive constitutional conflicts and precedent-setting showdowns should actually be encouraged where the value of waiting for more information is low, where similar issues will frequently recur in future generations (so that the value of settling questions now is high, and where legal uncertainty will impose high cost in the future....Where aggregate future conflict, even, even properly discounted, imposes greater social costs than present conflict, a showdown in the current period would be socially beneficial.").

accompanying oversight process that is continuous, consistent, and aggressive, that is conducted by experienced staff, and is overseen by chairpersons with no limits on tenure. Institutional memory must be maintained, and the sense of integrity and the need for preservation of institutional prerogatives must be cultivated once more. The executive branch and Congress must seek to work together as partners in a governmental enterprise. But Congress must never abdicate its oversight function that distinguishes its role in that partnership or even appear to do so. Its preeminence as the “First Branch” must be nurtured, sustained and protected in order to maintain the delicate constitutional equilibrium.

Part II

Investigating the Financial Crisis

Elise J. Bean[1]

In the fall of 2008, the United States suffered a devastating economic collapse, the worst since the stock market crash of 1929.[2] Securities backed by home mortgages lost much of their value, stock markets plummeted, and storied financial firms went under. Millions of Americans lost their jobs, and millions of families lost their homes. Some have estimated the financial cost at $20 trillion in lost gross domestic product, including costs associated with bankrupt businesses, foreclosures, homelessness, underwater mortgages, unemployment, and lost savings.[3]

Investigating what happened was the longest, toughest inquiry of the fifteen years I spent working for the U.S. Senate Permanent Subcommittee on Investigations (PSI or Subcommittee). The investigation took over two years, racked up over 50 million pages of documents and 150 interviews, and produced four hearings and a 750-page report. Our report provided the only U.S. bipartisan analysis of the financial crisis, complete with joint findings of fact and policy recommendations. PSI's hearings also helped break the filibuster blocking consideration of what would become the Dodd- Frank Act, the most extensive set of U.S. financial reforms in a generation.

A. The Subcommittee

PSI was well suited to investigate the financial crisis. For over sixty years, it had served as the premier investigative body in the Senate, with a roster of high-profile hearings. It began life as the Truman Committee, an ad hoc inquiry into waste, fraud and abuse during World War II, celebrated for producing hard-hitting, yet bipartisan and constructive results.

The Senate later revived it as the "Permanent" Subcommittee on Investigations. During the 1950s, the Subcommittee gained notoriety when Sen. Joe McCarthy took the helm and abused its investigative powers. As a result, its rules were rewritten to strengthen its bipartisan controls and protect the rights of investigative targets. Although the McCarthy years represented the Subcommittee's nadir, they also produced a legacy that made PSI staff more sensitive to conducting investigations that were bipartisan, fact-based, and fair.

One of the keys to PSI's effectiveness as an investigative body was its longstanding rule giving the Subcommittee chair unilateral authority to issue subpoenas—that is, without having to take a Subcommittee vote or gain the support of the ranking minority member. At the same time, while the rule did not require it, PSI had a tradition of obtaining the ranking minority member's sign-off before issuing any subpoena. In my years on the Subcommittee watching hundreds of PSI subpoenas go out the door,

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[2] Much of the information in this article is taken from an eight volume publication of the U.S. Senate Permanent Subcommittee on Investigations on the financial crisis. For the full citation, *see* footnote 18.

[3] *See* U.S. Gov't Accountability Off., GAO-13-180, Financial Regulatory Reform: Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act (2013), available at http://www.gao.gov/assets/660/651322.pdf; Better Markets, The Cost of the Crisis: $20 trillion and Counting (2015), https://www.bettermarkets.com/sites/default/files/Better%20Markets%20-%20Cost%20of%20the%20Crisis.pdf; *See also* Tyler Atkinson, David Luttrell & Harvey Rosenblum, Fed. Res. Bank of Dallas, How Bad Was It? The Costs and Consequences of the 2007-9 Financial Crisis (Fed. Reserve Bank of Dallas Staff Papers No. 20, 2013), available at https://dallasfed.org/assets/documents/research/staff/staff1301.pdf.

that bipartisan tradition was always honored. The bottom line was that PSI was able to issue subpoenas quickly and easily to advance its inquiries.

PSI's investigative effectiveness was further enhanced by a whole slew of unwritten traditions and standard operating procedures that provided guidance on how to proceed. Evolved from both successes and mistakes, the following investigative standards helped ensure we acted in a consistent, coherent, and fair manner.

First, it was a PSI tradition to frame our investigations in terms of factual questions to be answered rather than hypotheses to be proved. Fashioning open-ended, fact-based inquiries led to more thoughtful, flexible reviews and encouraged following the evidence wherever it led.

Second, PSI almost always used detailed case histories to analyze a problem. Real-life case studies helped cut through generalities and platitudes to expose the intricacies of the issues in question.

Third, PSI put a premium on confidentiality. Any investigation worth its salt dropped or added issues, widened or narrowed its focus, and questioned many parties with varying levels of information. Keeping the details of the investigations confidential gave us the ability to make adjustments without attracting premature public questions about what we were finding or exposing possibly innocent parties to public scrutiny.

Fourth, we conducted our investigations on an unrelentingly bipartisan basis. That meant joint document reviews, joint witness interviews, joint hearings, and joint analysis of the facts. It wasn't as easy as going it alone, but a bipartisan approach was critical to producing thoughtful, accurate, and credible results.

Fifth, PSI almost always wrote up its investigations. Written products not only forced us to articulate what we'd learned, but also provided a mechanism for ensuring we'd actually achieved bipartisan consensus on the facts. The goal was a joint report with joint findings and recommendations, but even if the other party signaled it wouldn't sign on, both sides ran their reports by the other for comments and edits. It was a trial by friendly fire that helped expose errors, sloppy thinking, and weak evidence, and it always produced a better product. It also built trust as colleagues realized each side valued the advice of the other and would listen to that advice even when it didn't have to.

All of which led to another PSI constant—taking the time needed to build bipartisan trust and bipartisan results. Our standards included looking at all the issues either side thought important, asking all the questions necessary to reach a consensus on the facts, and working on written products until both sides were comfortable with what was said. All of that took time. It couldn't be done in two weeks or two months. That's why PSI was known for its lengthy investigations, most of which took a year or longer to complete. In this complicated world, we viewed taking a year to reach bipartisan consensus on key facts as a reasonable timetable.

B. The Players

When the financial crisis escalated in 2008, Michigan Sen. Carl Levin, who first joined PSI's leadership ranks in 1999, was serving as the Subcommittee chair. His Republican counterpart was Sen. Tom Coburn from Oklahoma. While Sens. Levin and Coburn were polar opposites on many political issues, they shared traits that made them effective and collegial oversight partners. Both had a fierce commitment to the facts, were politically fearless in taking on powerful interests, and were willing to take the time needed to conduct a complex, bipartisan investigation.

In terms of staff, Sen. Levin had an experienced investigative team with a long line of hearings behind them. I had worked for him on the Subcommittee since 1999 and began serving as his Subcommittee staff director in 2003. Sen. Coburn had taken PSI's ranking Republican slot in early 2008, so his staff had only recently joined forces, but they had already shown themselves to be smart, hardworking, and capable. Both sides were supported by the Subcommittee's longstanding chief clerk, Mary Robertson, who served not only as PSI's institutional memory, but also as an even-handed administrator who kept PSI humming on a bipartisan basis.

To supplement the Subcommittee's small permanent staff, PSI employed a mix of federal agency detailees, law clerks, and college interns. Most joined the staff for a period of three to twelve months, seeking a better understanding of the legislative process. We warned them about PSI's long hours and relentless pace before coaxing colossal amounts of work out of them. Most told us PSI was the best gig they'd ever had. In the financial crisis inquiry, they made critical contributions to our work.

During 2008 and 2009, as the financial crisis investigation gained steam, the Levin and Coburn staffs worked together on several other, unrelated hearings. That work helped the two sides get to know each other and begin building a level of trust that would be tested, and ultimately enhanced, by our joint work on the financial crisis inquiry.

C. Getting Started

In November 2008, the assignment from our two senators was simple yet infinitely complex: identify the key causes of the financial crisis. The goal was to figure out what had happened in order to prevent it from happening again.

Our first step was to educate ourselves about the financial instruments at the heart of the crisis. None of us knew much about them, so it was a steep learning curve. Past experience had taught us that experts around the globe, when asked, would make time for the Senate. So we identified experts on mortgage-backed securities, credit derivatives, and related fields and asked them to educate us. Our teachers included longtime SEC staffers, professors, and industry experts. One leading credit derivatives expert, who lived in Australia, conducted a four-hour seminar for us by telephone that, due to time differences, started at 8:00 p.m. our time and ended at midnight. The grueling sessions were attended by staffers from both sides of the aisle.

At first it was a hard slog. Even learning the acronyms—MBS, CDOs, CDS—took time. And it wasn't a matter of learning just enough to get a good grade on a test; we had to really understand what was going on at a deep level. At the same time, the whole crew got a buzz from digging deep—we wouldn't have been much good as investigators otherwise.

Every week or so, Sen. Levin called in his staff for an update on what we'd learned. Typically, we prepared charts summarizing key information and went over them in sessions that lasted 15 to 60 minutes, sandwiched between his other appointments. If we couldn't answer his questions, we contacted the experts and reported back. Sen. Levin also began reading books and articles on aspects of the financial crisis, marking up the text, and, on occasion, scheduling meetings to discuss the materials he'd reviewed.

It took us months of intense effort to get a solid grasp of the U.S. mortgage market and its key financial instruments. But by the time we'd climbed that mountain of information, we had a pretty good idea of where we needed to go.

D. Narrowing the Focus

Based upon what we'd learned, we recommended that PSI focus its investigation on four key issue areas, framing them as factual inquiries:

1. why banks turned from low-risk to high-risk mortgages, and how large numbers of high-risk mortgages entered the mortgage market;

2. why federal regulators hadn't stopped the flood of high-risk mortgages;

3. why credit rating agencies gave AAA ultra-safe ratings to mortgage-related securities that included high-risk mortgages; and

4. what role was played by the investment banks, and how they may have contributed to the crisis.

In keeping with PSI's classic approach to understanding complex issues, we also identified the case histories we wanted to use to explore each issue area. To examine the role of banks in high-risk lending, we recommended Washington Mutual.

The sixth largest U.S. bank with over $300 billion in assets, it had been a massive mortgage issuer before becoming the largest bank failure in U.S. history. To examine the role of federal regulators, we recommended the Office of Thrift

Supervision (OTS). OTS was the primary regulator of thrifts like Washington Mutual, Countrywide, and IndyMac that played outsized roles in the financial crisis.

To examine the role of the credit rating agencies, we proposed focusing on the two largest, Moody's and Standard and Poor's (S&P). Both had issued credit ratings for the bulk of the mortgage-related securities at the heart of the crisis, later downgraded those ratings, and along the way reported large profits from their rating activities. Finally, to examine the role of investment banks, we recommended looking at Goldman Sachs and possibly another investment bank. Goldman was rumored to have made billions of dollars building up and then betting against the mortgage market; other investment banks were rumored to have lost billions. We figured both offered important lessons.

We presented our proposals to Sen. Levin. After a lot of analysis, he gave us the go-ahead. We then presented the proposal to our Republican colleagues. They checked with Sen. Coburn, who flashed another green light.

The next step was to form four teams to tackle the four issue areas. Since Sen. Levin was the chair and had the larger staff, Levin staffers took the lead on each team. As staff director, I oversaw all four. The Coburn staff used their smaller roster to staff the four teams as best they could.

E. Requesting Documents

The next big task was getting documents. PSI placed a premium on obtaining documents in its investigations and had many standard procedures and traditions related to document requests. First, don't ask for anything you aren't willing to read. Second, before writing a document request, meet with the target to learn what types of documents it has and which documents are the most important. Third, try to

fashion a request that produces a manageable number of highly useful documents and a minimal amount of irrelevant material. Fourth, when drafting a document request, put the easiest requests first and the most complex and controversial requests later to facilitate document negotiations and rolling document productions. Fifth, brainstorm about third parties who might have useful documents they'd turn over with minimal fuss.

To launch the inquiry, the four teams met to strategize about needed documents, and then we scheduled meetings with the companies and agencies serving as our case histories. Needless to say, no one was happy to hear from us. Everyone lawyered up, and we held initial meetings with legal counsel and representatives from each party.

In line with PSI practice, prior to each meeting, the relevant team leader wrote out a list of the topics to be addressed and circulated it to the team members, including our Republican colleagues. Everyone was invited to edit the list to ensure all issues of interest were covered and presented in a good order. PSI practice was to begin the meeting with easy issues and work up to more sensitive topics. Bringing up a sensitive topic early on could trigger wariness or offense and jeopardize cooperation. The team leader sent around the final version prior to the meeting so everyone knew what issues would be raised when. Most team members printed a copy, with spaces in between each topic, so they could take meeting notes directly on the document.

After one or more preliminary meetings with the relevant parties, the four teams drafted each document request in the form of an "attachment" that could be appended to a letter or subpoena. The drafts were circulated on a bipartisan basis for review and edits. We also did a comparative analysis of the four requests to identify the best ideas from each and standardize the language as much as possible. Chris Barkley, Sen. Coburn's staff director, and I signed off on the final drafts. Most were attached to subpoenas, a few to letters. We then met with Sen. Levin to update him on the requests and obtain his signature on any subpoenas.

Once approved, we telephoned legal counsel to let them know document requests were on the way. Most had obtained client consent to accept a subpoena. We alerted them to the due dates and offered to meet to discuss any issues. After those requests were out the door, the PSI teams initiated the same process with respect to third parties thought to be holding useful materials. Soon, we had over a dozen outstanding document requests.

F. Negotiating the Document Production

Getting documents via subpoena is rarely a simple process. In virtually all of our investigations—the financial crisis inquiry was no exception—subpoena requests became a test of wills and stamina, infused with drama. The subpoena recipients worried that their documents might be used against them and worked hard to limit what they gave us. At the same time, prominent financial institutions didn't want to be seen as obstructing a Senate investigation or risk an actual obstruction charge. A federal agency like OTS had even less standing or legal basis to refuse an official Senate document request.

Since even well-written document requests raise issues of scope and interpretation, they typically led to lengthy sets of negotiations to determine what documents would actually be produced. First, the two sides had to agree on the nature of the documents being requested. Every company and agency had its own lingo and way of doing things—the records they generated, who got copies, and who kept copies. The request's wording had to be translated into the documents actually held by the subpoena recipient, which was why preliminary meetings were crucial to learning the terminology to use in each request. Emails, telephone recordings, instant messages, and other types of materials typically required additional negotiations to clarify search terms and coverage.

Since our requests sought large numbers of documents, the next issue was prioritizing which groups of documents should be produced first. Without giving up on our broader requests, we often agreed to a much smaller, initial production so we could review the documents, figure out what was really useful, and identify the next group of priority documents. Still another task was getting a "privilege log," meaning a list of any documents being withheld from production under a claim of legal privilege.

The four PSI teams engaged in multiple discussions with the parties' legal counsel over the categories and timing of the documents to be produced. Counsel typically asked for 30 to 60 days to conduct a good faith search, review the documents for possible privilege, redact nonresponsive or privileged content, add a Bates number to track the pages being produced, and provide the documents to us in electronic form. To me, given the volume of documents, 30 to 60 days was a reasonable amount of time, even though I knew that when we told Sen. Levin when the documents would arrive, he would typically shake his head and urge us to move faster.

G. Playing Hardball on Documents

While a variety of document battles involving multiple parties arose during the investigation, Goldman Sachs was the standout. When everyone else had finally begun producing a substantial number of documents, Goldman was still producing a trickle.

Faced with Goldman's intransigence over producing the requested information, Sen. Levin called us in and gave us marching orders to take the deposition of Goldman's CEO Lloyd Blankfein. Surprised, we observed that we usually started with low-level employees and worked our way up. We also organized our interviews around documents, but had virtually no Blankfein materials. Sen. Levin gave us a level stare over the glasses perched on the end of his nose: "Ask him everything you want to know."

After Sen. Coburn signaled his agreement, we contacted Goldman's outside legal counsel to schedule the deposition. We indicated that we were willing to pick a mutually agreeable date in the next week or so, but otherwise would select the date ourselves and send a subpoena requiring Mr. Blankfein's appearance. During the ensuing back-and-forth, we actually executed the subpoena, but in the end, Mr. Blankfein agreed to appear "voluntarily." We later learned Mr. Blankfein had never provided a deposition before—the one at PSI would be his first.

The deposition took place in our conference room. Bob Roach, chief investigator on the Levin staff, took the lead. Pursuant to PSI practice, he wrote out the questions beforehand, circulated them on a bipartisan basis for edits, and sent out the final version to staffers on both sides of the aisle before the interview. He then deposed Mr. Blankfein under oath, before a stenographer, for most of the day, again in line with PSI practice.

During the deposition, Bob asked about every aspect of Goldman's involvement with the mortgage market and financial crisis. Mr. Blankfein answered the questions with a minimal amount of disruption from his lawyers. A few of his answers were hard to believe, including a claim that he didn't know "how important" AAA ratings were and "never thought" about how they affected investors like pension funds that couldn't buy mortgage-backed securities without a AAA rating.4 Other statements were more difficult to evaluate, given how little information we then had.

[4] *Wall Street and the Financial Crisis: The Role of Investment Banks: Hearing Before the Perm. Subcomm. on Investigations of the S. Comm. on Homeland Sec'y & Gov. Affairs*, 111th Cong. 189 (Apr. 27, 2010), available at https://www.gpo.gov/fdsys/pkg/CHRG-111shrg57322/pdf/CHRG-111shrg57322.pdf [hereinafter *The Role of Investment Banks*].

After the deposition, we asked Goldman's legal counsel to remain behind for a moment. We indicated that, to get the information we needed, we planned to take a similar deposition of Goldman's president, Gary Cohn, and then work our way through the executive suite. We noted that a good faith production of documents was an alternative way to provide much of the information we needed and could shorten or even alleviate the need for some of those interviews.

A few days later, Goldman documents began pouring in. Goldman had clearly decided to switch from the minimum to the maximum. When added to the documents already produced by others, the total number of documents in PSI's possession exploded into tens of millions of pages. We began referring to the vast document pool as "the ocean" and told PSI staff to jump in and start swimming as fast as possible.

H. Swimming in Documents

For at least three months, everyone involved with the investigation did nothing but document review. We'd collected materials from a wide variety of sources, not only from the parties serving as our case histories, but also from agencies with relevant filings, lawsuits seeking damages, former employees with firsthand information, investors burned by mortgage- related investments, and accountants who had handled various deals. The documents included emails, memoranda, board minutes, correspondence, bank examinations, audits, SEC filings, mortgage transactions, due diligence reviews, reports, legal pleadings, and more.

The four PSI teams met weekly, updating each other on documents of interest, analyzing the complex transactions they'd uncovered, and developing theories as to what had happened, when, and why. Each team produced thick notebooks of key documents, referred to as "hot docs." Each developed chronologies of events and lists of key players.

Fact patterns and themes began to emerge. At Washington Mutual, we located board meeting materials in which senior management explicitly asked the directors to approve a switch from low-risk to high-risk mortgages. The materials gave a single rationale to justify the switch: higher-risk mortgages were more profitable.[5] Higher-risk borrowers could be charged more, and higher-risk loans fetched higher prices on Wall Street, because they were bundled into financial instruments that paid higher returns for the higher risk. Neither the board materials nor any other documents we reviewed cited government requirements on affordable housing or community reinvestment for making the switch; profit alone was cited as the motivating factor. Other documents tracked the bank's actual acquisition of high-risk home loans, explained the mortgage features, identified multiple problem areas, and showed how the bank marketed loans to Wall Street, created its own securities, and permitted high-risk mortgages to be slipped into mortgage pools even when they knew the borrowers were likely to default.

At OTS, emails and memoranda showed that many examiners were aware of the growing tide of high-risk mortgages being issued by U.S. financial institutions, had warned their superiors, and had supported tougher restrictions on high-risk practices to no avail. Others showed OTS supervisors downplaying the risk, pointing to bank profits and the speed with which banks sold the high-risk loans to Wall Street. Still other materials documented a petty turf battle between OTS and the Federal Deposit Insurance Corporation (FDIC) over Washington Mutual, with OTS employees impeding FDIC oversight by denying bank documents and even office space to FDIC examiners. Some disclosed an increasingly bitter dispute between OTS and FDIC executives over cracking down on the thrift's mounting risk.

[5] See *Wall Street and the Financial Crisis: The Role of High Risk Home Loans: Hearing Before the Permanent Subcomm. on Investigations of the S. Comm. on Homeland Sec'y & Gov. Affairs*, 111th Cong. 278-79, Exhibit 3 (Apr. 13, 2010), https://www.gpo.gov/fdsys/pkg/CHRG-111shrg57319/pdf/CHRG-111shrg57319.pdf.

At Moody's and S&P, emails, memoranda, and other documents showed that firm analysts were well aware of the increasing issuance of high-risk mortgages. They also depicted a struggle between analysts and supervisors over assigning accurate ratings versus the inflated ratings sought by investment banks pushing the deals. Some emails showed supervisors pressuring analysts to take whatever measures were needed to maintain the firm's "market share." Other documents chronicled the concerns of analysts tasked with monitoring existing mortgage securities and deciding whether to downgrade their ratings when they lost value. Still others illustrated what happened when both firms decided, within two days of each other in July 2007, to suddenly downgrade the ratings of hundreds of subprime mortgage-backed securities, slashing their resale value and shocking the mortgage market worldwide. A noticeable gap in the documents left unexplained how both firms decided to execute hundreds of downgrades within two days of each other; neither produced a single document explaining the coincidental timing.

At Goldman, documents tracked how the firm purchased billions of dollars of high-risk, poor-quality loans, bundled them into mortgage-backed securities, procured AAA credit ratings, and sold the securities to investors around the world. Some emails included the abbreviation "ldl"—let's discuss live—to signal when sensitive topics should be discussed orally rather than in writing. Other documents showed how, starting in late 2006, Goldman traders noticed high-risk mortgages were beginning to lose value, reported it to their superiors, and then went into high gear betting against—"shorting"— mortgage-related securities so the firm would make money on the market downturn.

The documents disclosed multiple ways in which Goldman shorted the mortgage market. Some involved so-called synthetic collateral debt obligations (CDOs) that enabled investors to bet on whether a specified group of mortgage-backed securities would gain or lose value. Documents related to one CDO known as Abacus showed how Goldman had allowed a favored client to influence the CDO's selection of assets while placing a bet they'd lose value. Goldman advised other clients to bet on the Abacus assets gaining value without disclosing the role of the favored client in selecting those assets. When the asset values later tanked, the favored client walked away with $1 billion invested by the other clients.6 Still other documents showed how Goldman itself began using the CDOs it issued to bet against its own clients, making money hand over fist as the value of the referenced mortgage assets plummeted.

The document review took months, but it produced invaluable, firsthand evidence of the events that led to the financial crisis. We were ready for the next phase.

I. Conducting Interviews

In the latter half of 2009, we began conducting dozens of interviews. Interviews are critical to picking up nuance, context, and relationships, as well as people, events, and documents that might not otherwise come to light. In addition, PSI practice was to use interviews to review and gain a better understanding of key documents, since at least some would turn out not to mean what they seemed to.

The four PSI teams each drew up a list of the individuals they wanted to interview in the order they wanted to speak with them. Since we had limited staff, the teams confined themselves to only the most important players. When we presented the interview lists to the parties, battles erupted over scheduling as every firm and agency attempted to push back their interviews. We fought like lions to get folks in quicker.

[6] *See* 5 *Wall Street and the Financial Crisis: Anatomy of a Financial Collapse: Report and Appendix Before the Permanent Subcomm. on Investigations of the S. Comm. on Homeland Sec'y and Gov. Affairs*, 112th Cong. pt. I, at 669-86 (April 13, 2011), https://www.gpo.gov/fdsys/pkg/CHRG-112shrg57323/pdf/CHRG-112shrg57323.pdf [hereinafter *Anatomy of a Financial Collapse pt.I*].

To get the information we needed, we favored informal interviews over formal depositions. We'd found that individuals spoke more freely in an interview setting where staff took notes, than in a deposition setting, where a stenographer took down every word. So while we were ready to conduct depositions if someone wouldn't come in voluntarily and actually prepared deposition subpoenas to compel attendance, if a party agreed to a reasonable date for an informal interview, we preferred that format.

Our interview schedule in late 2009 and early 2010 coincided with an unusually snowy winter in Washington. We often questioned witnesses while watching hours of snow drift past the conference room window, wondering how we'd make it home. We told folks traveling from New York to take the train to Union Station and book a nearby hotel, so they could walk to our offices through the snow. We also brought in blankets in case staff got caught by a snowstorm and had to stay overnight at work.

We ended up conducting over 150 interviews. We followed PSI's standard practice of interviewing lower-level employees first and working our way up. Most interviews took all day, generally starting at 10:00 a.m. and finishing at 5:00 p.m. or later. Whoever had lead responsibility wrote out the questions beforehand, circulated them on a bipartisan basis, and identified the relevant documents. Interns and law clerks made copies of the key documents and prepared five to seven document notebooks for each interview, a tedious but critical task necessitating hours of work.

We opened most interviews by asking about the interviewee's background and then patiently worked our way through multiple events, transactions, and documents, usually chronologically. We generally took a very polite tone, which we found encouraged cooperation. Occasionally, we gently cautioned that, under 18 U.S.C. §1001, it was against the law to make a false statement to Congress. We typically asked multiple interviewees the same questions to confirm the facts and get added detail. When given information that conflicted with what others had told us, we slowed down and gave the interviewee an opportunity to clarify the facts or identify supporting documents. Sometimes, we began a topic by asking an interviewee to describe in their own words what had happened—occasionally eliciting new information—and then checked the description against contemporaneous documents. If they didn't match, the interviewee usually corrected their version of events or was left stammering that the documents had gotten it wrong. Slowly, we built up the factual record.

When we got important new information, we slowed down again and asked multiple questions about it to be sure we understood what was being said. We didn't believe in asking one question, getting a perfect answer, and then moving on. We weren't playing prosecutor on television. Instead, we asked similar questions several ways, not only to make sure we understood, but to give the interviewee an opportunity to correct or clarify their words. The questions also served to lock them into what they were saying, in the presence of their own lawyers. That made it less likely they would backtrack if asked about the same matter at a public hearing.

Throughout the process, we never played "hide the ball." We laid out the facts and issues that concerned us, and we asked the interviewees to educate us on what had really happened and how we should think about it. We asked them to explain complicated transactions from their point of view and were often rewarded by explanations that shed light on past events.

We didn't use rhetorical games or surprise questions, because we found they didn't help much when the objective was to find out the facts rather than "score points." In addition, since the facts didn't change, we saw no risk in laying out what we thought had happened and requesting any evidence we'd gotten something wrong. We also continued to follow the practice of asking easy questions first and hard questions later. Many interviewees, after being asked a question that implicated them in wrongdoing, simply shut down.

The interviews were both illuminating and surprising. With Washington Mutual, we realized that the thrift had relied on conventional low-risk loans until newly hired East Coast executives talked up the high-risk road. With OTS, we saw close-up the frustration of some examiners who saw what was happening but couldn't stop it, versus the pandering by some OTS executives who referred to thrifts as "constituents" and discouraged tough enforcement action out of fear the thrifts would switch to another regulator. With the credit rating agencies, we interviewed financial analysts mortified at how their employers had chased business from investment banks and supported inflated ratings for complex financial instruments with hidden risks.

With Goldman, we interviewed traders and executives who uniformly insisted, despite a mountain of evidence, that the firm never bet against the mortgage market or against their clients. We heard Goldman bankers refer to investors in its mortgage-related securities as "counterparties" rather than "clients," a revealing switch in terminology. We eventually realized that the traders saw their jobs not as designing financial products that would succeed, but as engineering and pricing financial instruments with multiple layers of risk that could pay off by either succeeding or failing. We also learned of the existence of brag sheets—"self-reviews" filled out by Goldman traders competing for bonuses—in which the traders boasted of designing complex shorts or making millions or even billions of dollars for the firm off the backs of investors who took their investment advice.[7] The brag sheets provided powerful evidence of how Goldman traders viewed what had been going on within the firm.

Unraveling the complex deals and relationships behind the financial crisis took patience, persistence, and careful attention to detail. In addition, it required being willing to recognize and accept what had really happened as opposed to what you thought had happened. That was sometimes the hardest part.

One example involved Fannie Mae and Freddie Mac. One of the big questions we were trying to answer was why banks had moved from low-risk to high-risk mortgages. One theory was that Fannie and Freddie, the biggest players in the secondary mortgage market, had caused the shift by purchasing higher-risk mortgages and bundling them into the mortgage-backed securities sold to investors. To test that theory, the Coburn staff asked us to include in our Washington Mutual subpoena an extensive request for documents related to Fannie and Freddie. We agreed, knowing it was a hot issue for many parties, and waited to see what would emerge.

To the surprise of both sides, the Washington Mutual documents told a fascinating story that was the exact opposite of what the theory had predicted.[8] It turned out that Washington Mutual was one of the biggest suppliers of mortgages to Fannie. Internal documents showed that the bank itself—without any prompting from Fannie or Freddie—had decided to move from low-risk to high-risk mortgages, because they were more profitable. As it began to pump out more high-risk mortgages, Washington Mutual pressed Fannie to buy more of them on more favorable terms. When Fannie declined, the bank threatened to switch the lion's share of its mortgages to Freddie. When Fannie stood fast, Washington Mutual did just that, after securing Freddie's agreement to buy more of its high-risk mortgages on better terms than Fannie offered.

In short, the documents showed it was Washington Mutual who had pressured Fannie and Freddie to buy high-risk mortgages rather than the other way around. To Sen. Coburn's credit, even though the documents told a different story than expected, he didn't try to suppress or re-interpret them; he let the documents speak for themselves.

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[7] *See The Role of Investment Banks*, *supra* note 4, at 435-54, Exhibit 55.

[8] *See The Role of Investment Banks*, *supra* note 4, at 435-54, Exhibit 55.

The interviews continued through the first quarter of 2010.

J. Going Public

In early 2010, more than a year after the investigation began, Sen. Levin decided we were ready to go public. He wanted all four hearings held during the month of April. We'd never held so many hearings so close in time on such complex subjects. I wasn't sure we could pull it off, and I warned Sen. Levin that the staff was already exhausted. He replied that the inquiry had gone on long enough, and it was time to let folks know what we had found.

Hearing prep at PSI involved multiple steps, carefully choreographed. First, we proposed an overall design for the four hearings, suggested the major points to be made, and got signoffs from both Sen. Levin and our Republican colleagues.

The design called for featuring the key participants in each case history as witnesses, using them to lay out the facts of what had happened. We decided against using academics, public interest groups, or trade associations in order to concentrate on holding accountable the individuals most responsible for the troubling conduct we'd identified. We also agreed that, for once, we wouldn't issue a report at the same time as the hearings, but would use the hearings to acquire additional information and issue a final report later.

From there, we planned the specifics of each hearing. That included identifying the witnesses, witness panels, documents to be made public, and key issues. Once we received a thumbs-up from Sens. Levin and Coburn, we notified the witnesses well in advance of the hearing dates—usually a month—to minimize calendar conflicts. We also drafted witness letters alerting each person to the issues they'd be asked about and inviting them to make a written submission. We let those who balked know that we would issue subpoenas to ensure attendance at the hearing if necessary.

Because hearings can illuminate only a limited set of facts and issues, each team began working to identify the most important points to make. We directed each team to draft a short background memorandum about the hearing that would go from Sens. Levin and Coburn to other Subcommittee members, the media, and the public. A memo was a long way from a report, but it still offered a good way to lay out the key information, present joint findings of fact, and demonstrate the investigation's bipartisan nature. In a single, short document, we could convey the story that we wanted each hearing to tell. In addition, we asked each team to compile a list of the most significant quotes from key documents, both to highlight the evidence and to help observers locate the most important materials. We also asked each team to develop charts to use at its hearing. Sens. Levin and Coburn approved each memo, document quote, and chart before it went out.

Next, we directed each team to designate up to 100 documents as hearing exhibits. We knew 100 was a huge number, but given the complexity of the issues and the expected opposition from the hearing witnesses, we figured providing firsthand evidence was the best way to help the media and public judge the facts. Compiling so many documents—locating the best copies, putting them in order, tagging them with exhibit numbers, creating a descriptive list, redacting unrelated but sensitive information, making 100 packets for the hearing, and creating an electronic version for the PSI website—was an avalanche of work.

Our next task was to draft three of the most important hearing documents from Sen. Levin's perspective: the joint press release, his opening statement, and possible witness questions. Each was key in conveying to the public his views about the facts and their significance. A few days prior to each hearing, we presented him with drafts and then met with him in demanding sessions that involved him going over

every issue, every witness, and every document. The sessions, which took place before or after business hours or over the weekend, lasted anywhere from one to four hours. Sen. Levin painstakingly analyzed and revised the questions, changing the order, content, and wording until he was satisfied.

Sen. Levin typically prepared for hearings with more care than any senator I had heard of, but for the financial crisis hearings he stepped up his game. He did his homework until he knew the facts and documents cold. Another critical factor turned out to be his staying power: Sen. Levin presided over each hearing for as many hours as it took to build the record and get answers.

K. Holding Washington Mutual Accountable

The first hearing, on April 13, 2010, featured Washington Mutual. My favorite of the four hearings, it went to the roots of the crisis, tracking the shift to higher-risk, poor-quality mortgages, explaining how the mortgages used initial low teaser rates to enable "subprime" and even "prime" borrowers to take out loans they couldn't afford, and showing how banks disregarded the default risk, since they quickly sold the loans to Wall Street. It showcased the bank's increasing use of "stated loans" in which borrowers stated their income, and the bank accepted their statements as true without verification. Critics called them "liar loans."

The hearing also disclosed how Washington Mutual was repeatedly criticized by its auditors and regulators for shoddy lending and securitization practices, high loan default rates, and massive loan fraud, but never improved its operations. It showed how the bank became a conveyor belt of toxic mortgages and mortgage-backed securities fueling Wall Street.

When mass credit rating downgrades suddenly shocked the mortgage market, Washington Mutual got stuck with billions of dollars in unmarketable mortgage securities. The bank's stock price plunged, and depositors withdrew billions of dollars from their accounts, creating a quiet run on the bank. In September 2008, regulators finally had to step in, leading to the largest bank failure in U.S. history.

We held a press briefing the day before the hearing, attended by about 20 reporters. We released a six-page memorandum from Sens. Levin and Coburn summarizing what we'd found, with six joint findings of fact. We also released a list of key document quotes and several charts summarizing the bank's mortgage activity, including sales of $77 billion in subprime mortgage loans and $115 billion in high-risk "Option ARM" loans. We announced we would release nearly 100 hearing exhibits the next day. We didn't hand out any of those documents at the press briefing itself. Delaying their release gave reporters a concrete reason to show up at the hearing room, even if they'd attended the press briefing the day before.

The hearing itself took testimony from three panels of Washington Mutual executives. The first panel consisted of former chief risk and audit officers who described in chilling detail how the bank favored loan volume and speed over loan quality, accepted borrower income statements without verification, turned a blind eye to rampant loan fraud, and never fixed even blatant problems. The next two panels of senior executives, including longtime CEO Kerry Killinger, tried to defend their actions, which, in the end, led to the bank's collapse after 100 years of safe operation.

Sens. Levin and Coburn, with assists from Sens. Susan Collins, R-Maine, and Ted Kaufman, D-Del., grilled the witnesses for seven hours, confronting them with document after incriminating document. A chart entitled, "Washington Mutual Mortgage Practices that Created a Mortgage Time Bomb," listed the bank's shoddy practices. Audit reports laid bare loan fraud rates of 58%, 62%, and 83% at some offices. Executive emails blasted their own bank's "horrible" loan performance. Extensive media coverage detailed the evidence disclosed at the hearing showing how a single bank injected into U.S. financial

markets a flood of toxic mortgages. The articles uniformly criticized Washington Mutual's role in the financial crisis.

L. Confronting the Regulators at OTS

The second hearing, focused on OTS, was three days later on Friday, April 16. Because it, too, featured Washington Mutual, we scheduled it for the same week, while the first hearing was still resonating with the public. Again, we held a press briefing the day before, attended this time by 20 to 30 reporters. Again, we released a Levin-Coburn memorandum summarizing what we'd found, this one nine pages long with nine joint findings of fact. Again, we released key document quotes and promised to release nearly 100 hearing exhibits the next day. At this and the other press briefings, Sen. Levin— joined at times by Sen. Coburn—spoke on the record for the first fifteen minutes or so. Staff followed, off the record, going through the facts, details, and handouts in sessions that typically lasted another 90 minutes.

The second hearing took testimony from four panels over five and a half hours. The first featured Treasury and FDIC inspectors general discussing their new joint report on regulatory shortcomings involving Washington Mutual; it confirmed many of our negative findings regarding OTS. Next up were four OTS regulators who oversaw the bank, including former OTS Director John Reich. Next were three FDIC regulators who had tried, in the face of OTS resistance, to analyze and discipline the bank. The final panel featured acting OTS head John Bowman and FDIC head Sheila Bair.

During the hearing, Sens. Levin, Coburn, and Kaufman took OTS to task over its years-long tolerance of Washington Mutual's shoddy mortgage practices, its infighting with the FDIC, and its failure to take enforcement action against the bank despite over 500 deficiencies identified by OTS examiners. The senators also confronted OTS and the FDIC for issuing weak restrictions on high-risk mortgage practices and failing to recognize the systemic risk caused by allowing U.S. banks to sell billions of dollars of high-risk, poor-quality mortgages that polluted financial markets globally.

M. Exposing the Credit Rating Agencies

The third hearing, on the credit rating agencies, took place a week later on Friday, April 23, 2010. Our press briefing the day before attracted an even larger crowd of over 40 reporters. Again, we released a Levin-Coburn memorandum, this one eleven pages long with nine joint findings of fact. Again, we released the key document quotes and promised to hand out the actual documents the next day at the hearing. Using the same kinds of materials and approach in each press briefing had made it easier for us to prepare and for the media to review our work, since the reporters knew what to expect.

The hearing took testimony from three panels of witnesses, all former or current employees of Moody's or S&P. The first panel consisted of three financial analysts who criticized their former employers for elevating market share and profits over accurate ratings, giving in to bank pressure to keep tough analysts off deals, failing to apply more accurate credit rating models to existing ratings, and delaying the rating downgrades. The following two panels heard from executives who participated in the ratings and from the Moody's and S&P CEOs Raymond McDaniel and Kathleen Corbet. The executives defended their firms while also admitting, when faced with incriminating documents, that the investment banks had engaged in high-pressure tactics and ratings shopping, that inadequate staff resources had been assigned to track the ratings, and that numerous inflated ratings had required later downgrades.

Sens. Levin and Kaufman (Sen. Coburn had been pulled away) grilled the Moody's and S&P witnesses for six hours, asking why AAA ratings were awarded to securities laced with high-risk, poor-quality loans from mortgage companies notorious for loan defaults. They confronted the executives about issuing mass rating downgrades to hundreds of subprime mortgage-backed securities at the same time, shocking the

markets and causing the collapse of the subprime mortgage market. Sen. Levin produced a chart showing that 91% of AAA subprime mortgage-backed securities issued in 2007, and 93% of those issued in 2006, had fallen into junk status. He also cited an email in which, when pressed by a ratings analyst about a deal, a banker wrote back: "IBG-YBG," meaning, "I'll be gone, you'll be gone" by the time the loans default, so stop worrying.

Press coverage was, again, extensive, detailing the evidence disclosed during the hearing. Some stories favorably compared the hearing to the Senate's depression-era Pecora hearings, which set the stage for major financial reform.[9]

N. Holding Goldman Accountable

The final hearing, featuring Goldman Sachs, took place four days later on Tuesday, April 27, 2010. Three panels of Goldman witnesses testified: a panel of mortgage department traders, a panel composed of Goldman's Chief Financial Officer, Chief Risk Officer, and, finally, CEO Lloyd Blankfein.

The Goldman hearing was by far the toughest of the four. First, we were already stumbling in exhaustion from the earlier hearings. Second, Goldman was taking an uncompromising, hard-nosed stance, refusing to acknowledge any missteps or wrongdoing and hotly disputing evidence showing it had knowingly packaged poor-quality mortgages into securities, sold those securities to clients, and profited from shorting those as well as other mortgage-related securities.

On top of that, we'd been surprised by an April 16th civil suit filed by the Securities and Exchange Commission (SEC) against Goldman for defrauding investors in connection with the Abacus CDO.[10] While we agreed with the lawsuit, we'd been planning to feature Abacus at the hearing. Now, just ten days before the hearing date, the facts we'd intended to disclose were already detailed in the SEC complaint.

Sen. Levin told us to alter course and feature some Goldman CDOs at the hearing in addition to Abacus. Everyone with an ounce of energy left rallied to help the team get it done. The result was that, instead of the hearing highlighting a single CDO where Goldman had manipulated the outcome to benefit one client over several others, it also detailed three other CDOs where Goldman had manipulated the outcome to benefit the firm itself at the expense of its clients. We came to view those three other CDOs, known as Hudson, Anderson, and Timberwolf, as even more troubling than Abacus.

All four CDOs were complex synthetic investments that were tricky to explain. Essentially, Goldman had designed them so that each "referenced" a basket of mortgage-related assets and enabled investors to wager on whether the value of that basket would rise or fall. Investors holding the "long" side of the bet wagered the value would rise; investors holding the "short" side bet it would fall.

Unlike Abacus, where investors took both sides of the bet and wagered against each other on the basket's value, in Hudson, Anderson, and Timberwolf, Goldman quietly took all or a substantial portion of the short side of the bet. At the same time, Goldman advised its clients to take the long side. Goldman

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[9] *See, e.g.*, Paul Krugman, *Berating the Raters*, N.Y. Times (Apr. 25, 2010), available at http://www.nytimes.com/2010/04/26/opinion/26krugman.html?_r=1.

[10] *See* Press Release, Securities and Exchange Commission, SEC Charges Goldman Sachs with Fraud in Structuring and Marketing of CDO Tied to Subprime Mortgages (Apr. 16, 2010), https://www.sec.gov/news/press/2010/2010-59.htm. On July 14, 2010, Goldman agreed to pay the SEC $550 million to settle the lawsuit. Consent of Defendant Goldman, Sachs & Co., SEC v. Goldman, Sachs & Co., No. 10-CV-3229, 2010 U.S. Dist. LEXIS 119802 (S.D.N.Y. July 20, 2010), available at https://www.sec.gov/litigation/litreleases/2010/consent-pr2010-123.pdf.

advised its clients to bet long, even though the firm was secretly betting short, having concluded internally that the mortgage market was about to crash and that the CDOs themselves referenced poor-quality mortgage assets that Goldman expected to lose value. In the case of Hudson, Goldman took 100% of the short side of the bet and ended up making a $1.7 billion profit, taken right out of the pockets of its duped clients.

During the course of our investigation, our investment bank team had gathered data on Hudson, Anderson, and Timberwolf, but hadn't examined those CDOs in the same level of detail as Abacus, which we knew inside and out. So the team called for a deeper dive into all three. Multiple staffers, from senior investigators to interns, dove into the document ocean. One immediately hit gold: a Goldman email in which an executive called Timberwolf a "shitty deal" at the same time Goldman was selling it to investors.[11] Another spotted a Goldman email in which Hudson was referred to as "junk."[12] The team dove deeper into the documents, following them back and forward in time, building a detailed chronology and document history for each CDO. The amount of information the team amassed in ten days and integrated into its written materials—at the same time our first three hearings were unfolding—was awe-inspiring. Sen. Levin ingested the new information in between hearings and gave the green light to go with it.

On Monday, April 26, the day before the Goldman hearing, we held our usual press briefing. The Levin press shop informed us they'd switched to a bigger room. When we walked in, it was a zoo—over 70 reporters filling every chair, cameras lining the back wall, and our handouts disappearing in minutes. It was the first signal that our hearing was entering a perfect storm—a vortex of press obsession with Goldman, public outrage at the financial crisis, and an ongoing congressional struggle over whether to take up financial reform. We released a 13-page Levin-Coburn memorandum, document quotes, and a joint press release. The press briefing lasted over two hours.

The hearing started the next day at 10:00 a.m. When we entered the hearing room through the staff door behind the senators' dais, the press storm was bigger than anything I'd been in. Reporters, photographers, and cameras were swarming witnesses. The audience included protestors dressed in pink or in fake prison suits, some waving flat paper masks decorated with Mr. Blankfein's face. CSPAN was filming. It was a scene.

The hearing turned out to be the longest of the Levin PSI years: eleven hours. One reason was that every Subcommittee member made an appearance, the only PSI hearing in years with that distinction. Senators from both parties expressed concern with the two central facts uncovered by the investigation: that Goldman had made billions of dollars from the mortgage market's downfall, and that it had bet against its own clients.

Goldman strenuously denied both facts. First, it insisted it had not shorted the mortgage market, despite a stack of evidence to the contrary. The hearing exhibits included an email from CEO Blankfein stating: "Of course we didn't dodge the mortgage mess. We lost money, then made more than we lost because of shorts."[13] An email from Goldman chief financial officer David Viniar speculated about "what might be happening to people who don't have the big short."[14] Dozens of other exhibits made the same point, including an internal submission to the Goldman board of directors which stated: "Although broader

[11] *The Role of Investment Banks*, *supra* note 4, at 674, Exhibit 105.

[12] *Id*. at 1085, Exhibit 170c.

[13] *Id*. at 403, Exhibit 52.

[14] *Id*. at 306, Exhibit 26.

weakness in the mortgage markets resulted in significant losses in cash positions, we were overall net short the mortgage market and thus had very strong results."[15] Sen. Levin marched the witnesses through document after document detailing Goldman's shorting activity.

Sen. Levin also took them through the evidence that Goldman had bet against its own clients. He highlighted an exhibit indicating Goldman held 100% of the short side of the $2 billion Hudson CDO it had advised investors to buy. He asked almost every witness to comment on the Goldman email describing Timberwolf as a "shitty deal" at the same time the firm was marketing it to investors and shorting the CDO. Beforehand, we'd given Sen. Levin several alternatives for describing that email's salty language, but when he'd asked Sen. Collins about using the actual phrase, she'd smiled and indicated she saw no problem with using it. So he did. Repeatedly. Telephones in the Levin personal office lit up with calls from offended viewers, and I cringed at every utterance, but Sen. Levin was completely untroubled. He shrugged that he was merely quoting Goldman's own email.

Another dramatic moment that day came from Sen. Coburn. It concerned Fabrice Tourre, a Goldman mortgage trader named in the Abacus lawsuit. A few days earlier, Goldman had released some of Mr. Tourre's personal emails with embarrassing details unrelated to the issues. Sen. Coburn first asked Mr. Blankfein if he set the tone at Goldman; Mr. Blankfein replied, "I do, sir."[16] The senator then asked him whether releasing the Tourre emails was fair to his employee, and if it constituted a deliberate political or defense "ploy." Mr. Blankfein's spluttered explanation was incoherent.

O. Moving Dodd-Frank

The next day, the Senate voted to end the filibuster that had been delaying Senate consideration of what became the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. Enacted into law three months after the

Goldman hearing, the law imposed a sweeping set of financial reforms targeting many of the problems highlighted by PSI.

The law imposed limits, for example, on the trading that banks could conduct to earn profits for themselves versus their clients—the so-called Volcker Rule which was added to the bill by Sens. Jeff Merkley, D-Ore., and Levin. The law also incorporated a Levin provision imposing new conflict-of-interest prohibitions and high-risk limits on federally insured banks. It even achieved that Washington rarity of abolishing an agency: OTS.

Other Dodd-Frank provisions restricted high-risk mortgages, barred "liar loans" with unverified borrower incomes, and established an SEC office to regulate credit rating agencies. Another section of the law eliminated legal prohibitions on the federal regulation of swaps and credit derivatives. The law also authorized banking regulators to hike bank capital requirements related to high-risk activities.

Still another innovation was the creation of the Consumer Financial Protection Bureau which, among other duties, was charged with protecting consumers from predatory mortgages. Another key innovation was the Financial Stability

[15] *Id*. at 240-41, Exhibit 1b.

[16] *Id*. at 158.

Oversight Council which, for the first time, required federal financial regulators to sit down at the same table and combine forces to identify and mitigate systemic risks to the U.S. financial system.

While the Dodd-Frank Act didn't fix all the problems that contributed to the financial crisis—it left out valuable reforms fought for by Sen. Levin and others—it was a worthy response to many of the key causes of the crash. We were proud of PSI's role in contributing to important financial reforms with the potential to prevent another devastating downturn.

P. Writing It Up

While the enactment of the Dodd-Frank Act addressed many of the ills targeted in our investigation, PSI's work wasn't over. Sen. Levin decided we needed to issue a comprehensive report on the key causes of the financial crisis. He felt it was too important, and we'd invested too much time and energy to allow most of what we'd learned to fade away. Even four hearing records failed to lay out the majority of the facts we'd gathered.

So we spent another full year producing a 750-page bipartisan report, with 2,849 footnotes. It nearly killed us, but it was worth every word, because it preserved everything we had learned about the mortgage market, mortgage-related securities, and the roles of the banks, regulators, credit rating agencies, and investment banks in the financial crisis. Its most important message was that "the crisis was not a natural disaster, but the result of high-risk, complex financial products; undisclosed conflicts of interest; and the failure of regulators, the credit rating agencies, and the market itself to rein in the excesses of Wall Street." In other words, the crisis was not an unavoidable calamity, but the product of corrupt financial practices that could be prevented.

Writing a long report on a complex investigation is another whole topic. Suffice it to say that PSI traditions offered a lot of guidance, and we had a lot of experience drafting long reports, since we viewed educating the public and policymakers about complex issues as one of our most important functions. After the hearings, we spent several months on additional document analysis and interviews to deepen our understanding of the facts and issues. Early on, we met with Goldman and let it know that, while we were ready to finish the investigation, we would persist for as long as necessary to get the information Sen. Levin wanted. In response, Goldman got us the data we needed, and we were able to accelerate our work. We also spent substantial time developing Deutsche Bank as a second investment bank case history to provide a broader view of the contributing role played by investment banks in the financial crisis.

We divided the report into four sections corresponding to the four main issue areas. We spent a lot of time on providing relevant context—historical background, laws, regulations, markets, financial instruments—so readers could view the financial crisis in a broader setting. We included joint findings of fact and joint policy recommendations so no one had to guess our conclusions. We went over every word of the report with our Republican colleagues, who helped strengthen the analysis, screen the evidence, and find and correct errors. Everyone spent countless hours on the footnotes identifying the documents supporting the facts recited in the text. Sen. Levin reviewed every section, made numberless edits, and approved the final version, which was issued as a bipartisan PSI staff report on April 13, 2011.

We released the report to the public and briefed the media on its contents. In addition, we sent copies to the U.S. Department of Justice and several federal regulatory agencies under a Subcommittee rule allowing Sens. Levin and Coburn to refer matters to those agencies where "there is reasonable cause to believe that a violation of law may have occurred."[17] While congressional investigations are constitutionally limited to inquiries with a "legislative purpose" and cannot prosecute individuals or

[17] S. Permanent Subcomm. on Investigations of the Comm. on Homeland Sec'y & Gov. Affairs, Rules of Proc., Rule 19.

impose civil penalties, if an investigation uncovers possible criminal or civil misconduct along the way, it can refer that misconduct to executive branch agencies to determine what legal action to take, if any. We weren't the only ones making such referrals, either, but one of the big disappointments of the financial crisis was how few wrongdoers were ever prosecuted. While criminal prosecutions turned out to be few and far between, numerous civil actions eventually collected billions of dollars from the investment banks, mortgage issuers, and others involved with the wrongdoing. Our investigative results contributed to some of those cases.

At PSI, our final step in writing up the investigation was to prepare the hearing record for publication. With our chief clerk's guidance, we combined the four hearing transcripts, the hearing exhibits, and the report with many of the cited documents, so that everyone could see the evidence we relied on. We developed a detailed table of contents and a document locater chart to help folks wend their way through the materials. We sent the final proofs to the Government Printing Office, which printed the eight-volume set that now sits on my bookshelf.[18] When I reviewed it in preparation for this article, I found it to be a faithful recounting of the investigation and a wealth of information for those interested in what congressional oversight can accomplish.

[18] *See* 1 *Wall Street and the Financial Crisis: The Role of High Risk Home Loans: Hearing Before the Permanent Subcomm. on Investigation of the S. Comm. on Homeland Sec'y & Gov. Affairs*, 111th Cong. (Apr. 13, 2010), https://www.gpo.gov/fdsys/pkg/CHRG-111shrg57319/pdf/CHRG-111shrg57319.pdf; 2 *Wall Street and the Financial Crisis: The Role of Bank Regulators Before the Permanent Subcomm. on Investigation of the S. Comm. on Homeland Security and Governmental Affairs*, 111th Cong. (Apr. 16, 2010), https://www.gpo.gov/fdsys/pkg/CHRG-111shrg57320/pdf/CHRG-111shrg57320.pdf; 3 *Wall Street and the Financial Crisis: The Role of Credit Rating Agencies: Hearing Before the Permanent Subcomm. on Investigation of the S. Comm. on Homeland Sec'y & Gov. Affairs*, 111th Cong. (Apr. 23, 2010), https://www.gpo.gov/fdsys/pkg/CHRG-111shrg57321/pdf/CHRG-111shrg57321.pdf; *The Role of Investment Banks*, *supra* note 4; *Anatomy of a Financial Collapse pt. I*, *supra* note 6 (report and documents supporting the Washington Mutual, OTS, and credit rating agency sections of the report); 5 *Wall Street and the Financial Crisis: Anatomy of a Financial Collapse: Hearing Before the Permanent Subcomm. on Investigation of the S. Comm. on Homeland Sec'y & Gov. Affairs*, 112th Cong. pt. II (Apr. 13, 2011), https://www.gpo.gov/fdsys/pkg/CHRG- 112shrg66050/pdf/CHRG-112shrg66050.pdf (documents supporting the Deutsche Bank section of the report); 5 *Wall Street and the Financial Crisis: Anatomy of a Financial Collapse: Hearing Before the Permanent Subcomm. on Investigation of the S. Comm. on Homeland Sec'y & Gov. Affairs*, 112th Cong. pt. III (Apr. 13, 2011), https://www.gpo.gov/fdsys/pkg/CHRG-112shrg66051/pdf/CHRG-112shrg66051.pdf (documents supporting the Goldman Sachs section of the report); 5 *Wall Street and the Financial Crisis: Anatomy of a Financial Collapse Before the Permanent Subcomm. on Investigation of the S. Comm. on Homeland Sec'y & Gov. Affairs*, 112th Cong. pt. IV (Apr. 13, 2011), https://www.gpo.gov/fdsys/pkg/CHRG 112shrg66052/ pdf/CHRG-112shrg66052.pdf (additional documents supporting the Goldman Sachs section of the report).

The Presidential-Congressional Power Imbalance in Rulemaking

Curtis W. Copeland[1]

In his book "Building a Legislative-Centered Public Administration" (which won the 2001 Louis Brownlow book award from the National Academy of Public Administration), David H. Rosenbloom noted that Congress in 1946 "faced an overall choice" in how to address the "large, powerful, disorganized, and poorly regulated executive branch."

It could follow the advice of the Brownlow Committee and orthodox administrative thought by viewing a stronger president as the best – and perhaps only – means of bringing the executive branch under control, instilling good management and making agency processes rational and fair. Alternatively, Congress itself could try to exercise a greater degree of control over administration.[2]

The result of those congressional deliberations was the Administrative Procedure Act of 1946 (APA, 5 U.S.C. §§ 551- 559), which Rosenbloom said "relied heavily on the idea that agencies should operate and be treated as extensions of the legislature."[3] As "extensions" (and not just "agents") of Congress, "agencies are essentially fused to the legislature. They exercise its core constitutional responsibility – legislation." Rosenbloom said that by 1946, the delegation of legislative power to the agencies was seen as inevitable and legitimate, although requiring control by the Congress to ensure openness, fairness, and public participation. Therefore, informal rulemaking procedures (e.g., publishing proposed rules, taking comments, and publishing the final rule) were seen as the adoption of legislative values in an administrative context.

Today, any notion that Congress controls federal rulemaking activity, or that Congress is even a co-equal to the president in directing such activity, is generally viewed as antiquated and unrealistic. For the past 35 years, presidents have dominated the day-to-day federal rulemaking process, establishing priorities for agencies' regulatory activities, and reviewing and approving the agencies' products prior to publication in the Federal Register. In a June 2001 article in Harvard Law Review (named that year's top scholarly article by the American Bar Association's Section on Administrative Law and Regulatory Practice), Elena Kagan (former dean of Harvard Law School and now justice of the Supreme Court) characterized the emergence of enhanced methods of presidential control over the regulatory state—what she termed the "presidentialization of administration"—as "the most important development in the last two decades in administrative process."[4] Kagan said those methods of control include directive authority at the front end of the process as well as personal ownership at the back end of the process, resulting in a

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[1] Much of this case study is drawn from the author's previous writings and testimonies, including his May 6, 2008 testimony before a House committee that was examining the "unitary executive principle." *See Federal Rulemaking and the Unitary Executive Principle: Hearing Before the Subcomm. on Com. & Admin. Law of the H. Comm. on the Judic.*, 110th Cong. (2008) (statement and testimony of Curtis W. Copeland, Ph.D., specialist in American National Government, Congressional Research Service).

[2] David H. Rosenbloom, Building a Legislative-Centered Public Administration: Congress and the Administrative State, 1946–1999, at 14 (2000). Nine years earlier, the Brownlow Committee (formally known as the president's Committee on Administrative Management) had recommended a number of changes to strengthen the president's ability to manage the executive branch. *See* President's Comm. on Admin. Mgmt., Administrative Management in the Government of the United States (1937).

[3] *Id.* at 23.

[4] Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2385 (2001).

"transformation…in the institutional relationship between the administrative agencies and the Executive Office of the President."[5]

At a 2006 symposium at the Congressional Research Service (CRS) on "Presidential, Congressional, and Judicial Control of Rulemaking," I moderated a panel on presidential review of rulemaking. The panel was composed of noted experts in the field of rulemaking and administrative law, and included representatives from federal agencies, the private sector, and academia. At the start of the discussion, I said the following:

We've heard a great deal of discussion today about whether Congress or the President or the courts control rulemaking; I'm here to answer the question. The reality is that on a day-to-day basis the President exerts a great deal more influence on rulemaking than either the courts or Congress, and I'll take on anybody that wants to dispute that.[6]

No one on the panel or in the audience of more than 100 people objected to that characterization.

How did we go from the view in 1946 that agencies were "extensions" of Congress, and that agency rulemaking was an extension of legislative action subject to congressional control, to the current view that rules are frequently a reflection of the president's priorities? The answer lies in a combination of two factors: (1) initiatives from every president during the past 35 years that were expressly intended to garner more power over agency rulemaking; and (2) congressional actions that have been ineffectual in controlling rulemaking, or that have even encouraged greater presidential authority. The following two major sections discuss each of these factors. The concluding section discusses ways for Congress to reassert its authority in this area.

A. Presidential Initiatives

Since 1980, two executive orders have largely determined the nature of presidential influence over agency rulemaking. First, Executive Order (EO) 12291, issued by President Reagan in 1981, dramatically changed the landscape, giving the president and his agents unprecedented authority to control the rulemaking process for most federal agencies.[7] (Another Reagan executive order issued four years later extended this authority.) Second, EO 12866, issued by President Clinton in 1993, generally continued the president's role in the rulemaking process—and in some ways, expanded it.[8] EO 12866 is still in effect.

Before discussing these executive orders and other initiatives, a brief mention of the president's principal agent in the rulemaking process—the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB)—is in order. OIRA was established by the Paperwork Reduction Act (PRA, 44 U.S.C. §§ 3501-3520, originally enacted in 1980) to provide central agency leadership and oversight of government-wide efforts to reduce unnecessary paperwork burden and improve the management of information resources. Under the law, agencies must receive OIRA-approval

[5] *Id* at 2384.

[6] Curtis Copeland, Moderator, *Presidential Review of Rulemaking: Reagan to Bush II*, part of the CRS Symposium on Presidential, Congressional and Judicial Control of Rulemaking, September 11, 2006, *reprinted in* H. Comm. on the Judic., Subcomm. on Com. and Admin. Law, Interim Report on the Administrative Law, Process, and Procedure Project for the 21st Century 1415, 109th Cong. (Comm. Print 2006) [hereinafter *CRS Symposium*].

[7] Exec. Order No. 12,291, 3 C.F.R. 127 (1982), *reprinted in* 5 U.S.C. § 601 (1982).

[8] Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 (2000).

(signified by an OMB control number displayed on the information collection) for each collection request before it is implemented, and those approvals must be renewed at least every three years.

1. Executive Order 12291

About two months after the PRA was enacted, and less than one month into his first term, President Reagan issued EO 12291, which expanded OIRA's mission far beyond just paperwork reviews.[9] The executive order authorized the director of OMB to review any draft proposed or final rule or regulatory impact analysis from a covered agency (Cabinet departments and independent agencies, but not independent regulatory agencies).[10] "Major" proposed rules (e.g., those expected to have a $100 million effect on the economy) were required to be submitted to OMB at least 60 days prior to publication, and major final rules were to be submitted at least 30 days before they were published.[11] Non-major rules were to be submitted 10 days before publication. The executive order indicated that OMB's review should be completed within those time periods, but allowed the director to extend the review period whenever necessary.[12] The agencies were generally required to refrain from publishing any final rules until they had responded to OIRA's comments, and agencies published rules without OIRA approval at their peril.[13]

Rulemaking agencies were also instructed to refrain from taking regulatory action "unless the potential benefits to society for the regulation outweigh the potential costs to society," to select regulatory objectives to maximize net benefits to society, and to select the regulatory alternative that involves the lowest net cost to society. Agencies were to prepare a "regulatory impact analysis for each 'major' rule containing a description of potential benefits and costs, a description of alternative approaches, and a determination of net benefits. OMB was given the authority to make the final determination as to which rules were considered "major."

OIRA's regulatory review authorities were not unlimited, however. EO 12291 authorized OMB to take action only "to the extent permitted by law," and stated that the review procedures prescribed in the order did not apply to "any regulation for which consideration or reconsideration under the terms of this Order

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[9] Although the executive order did not specifically mention OIRA, shortly after its issuance the Reagan administration decided to integrate OMB's regulatory review responsibilities under the executive order with the responsibilities given to OMB (and ultimately to OIRA) by the PRA. For a description of the effects of this order, *see* Erik D. Olson, *The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12291*, 4 Va. J. Nat. Res. L. 1 (1984). In 1985, President Reagan extended OIRA's influence over rulemaking even further by issuing Executive Order 12498, which required the same agencies to submit a "regulatory program" to OMB for review each year that covered all of their significant regulatory actions underway or planned. *See* Exec. Order No. 12,498, 3 C.F.R. 323 (1986) *reprinted in* 5 U.S.C. § 601 (Supp. III 1985).

[10] As used in this study, the term "independent regulatory agencies" refers to agencies established to be independent of the president, including the Federal Communications Commission, the Securities and Exchange Commission, and the Consumer Product Safety Commission. The term "independent agencies" refers to agencies that are independent of Cabinet departments but not independent regulatory agencies (e.g., the Environmental Protection Agency and the Office of Personnel Management). For a more detailed discussion of types of agencies, *see* David E. Lewis and Jennifer L. Selin, Sourcebook of United States Executive Agencies (1st ed. 2012). The book was prepared for the Administrative Conference of the United States and is available at http://www.acus.gov/sites/default/files/documents/Sourcebook-2012-Final_12-Dec_Online.pdf.

[11] However, if an agency published a final rule without a prior proposed rule, the final rule was to be submitted at least 60 days prior to publication.

[12] After describing the 60, 30, and 10-day review periods, Section 3 of EO 12291 states that OMB "shall be deemed to have concluded review" within those periods unless it advises an agency that it intends to comment on the rule or the regulatory impact analysis, in which case the agency is to "refrain from publishing" the rule or the analysis.

[13] For example, when EPA issued a regulation over the objections of OIRA during the Reagan administration, an EPA official said that an OIRA official told him "there was a price to pay for doing what we had done and we hadn't begun to pay." Mary Thornton, *OMB Pressured EPA, Ex-Aide Says*, Wash. Post (Sept. 28, 1983), at A1.

would conflict with deadlines imposed by statute or by judicial order."[14] Although Subsection 3(f) of the executive order prohibited agencies from publishing proposed rules until OMB review was concluded, it also specified that nothing in the subsection "shall be construed as displacing the agencies' responsibilities delegated by law."[15] In its February 13, 1981, opinion supporting the legality of EO 12291, the Office of Legal Counsel within the Department of Justice said, "the President's exercise of supervisory powers must conform to legislation enacted by Congress."[16] Therefore, "[i]n issuing directives to govern the Executive Branch, the President may not, as a general proposition, require or permit agencies to transgress boundaries set by Congress."

2. Executive Order 12498

In 1985, President Reagan extended OIRA's influence even further by issuing EO 12498, which required Cabinet departments and independent agencies (but not independent regulatory agencies) to submit a "regulatory program" to OMB for review each year that covered all of their significant regulatory actions that were underway or planned.[17] Previously, EO 12291 had required each of those agencies to publish semiannual "regulatory agendas" of proposed regulations that the agency "has issued or expects to issue," and any existing rule that was under review.[18] These agendas were required to contain a schedule for completing action on any major rule for which the agency had published a notice of proposed rulemaking. The new executive order went further, providing that, except in "unusual circumstances," OMB could return any rule submitted for review under EO 12291 to the issuing agency for "reconsideration" if it was not in the agency's regulatory program for that year, or was "materially different" from what was described in the program.

In other words, OIRA could return a draft rule to an issuing agency if the office did not have advance notice of the rule, even if the rule was otherwise consistent with the requirements in EO 12291. The regulatory agenda and program requirements also permitted OIRA to stop or alter an objectionable rule before the rulemaking process developed momentum. Although Reagan administration officials at the time compared this planning process to the process used to develop the president's budget, critics noted that the budget process has a final step that the regulatory process lacked— review and approval by Congress.[19] Therefore, they argued, the insertion of OIRA into the regulatory planning process represented a further aggregation of power in the hands of the OIRA administrator and, more generally, the president.

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[14] Exec. Order No. 12291, *supra* note 7, § 8(a)(2).

[15] *Id.* § 3(f)(3).

[16] Memorandum from U.S. Dep't of Just., Office of Legal Counsel, on Proposed Executive Order on Federal Regulation (Feb. 13, 1981), reprinted in *Role of OMB in Regulation*: *Hearings Before the Subcomm. on Oversight and Investigations, H. Comm. on Energy and Com*., 97th Cong. (1981).

[17] Exec. Order No. 12,498, *supra* note 9.

[18] Exec. Order No. 12,291, *supra* note 7, at § 5.

[19] Cong. Rsch. Serv., Off. of Mgmt. & Budget: Evolving Roles and Future Issues 201-10 (1986) [hereinafter *OMB Evolving Roles*].

3. Comparison of EO 12291 to Previous Presidential Initiatives

Although transformative in many ways, the Reagan executive orders were not entirely new. Some type of presidential review of rulemaking has occurred since the 1960s,[20] and the appropriate role of the president and his representatives in the rulemaking process has long been the subject of academic debate.[21] Prior to 1981, executive orders and other initiatives established relatively limited roles for the president and his agents in that process. For example:

In 1971, President Nixon established a "Quality of Life Review" program in which executive departments and independent agencies submitted all "significant" draft proposed and final rules pertaining to "environmental quality, consumer protection, and occupational and public health and safety" to OMB, which then circulated them to other agencies for comment.[22] Agencies were to provide a summary of their proposals, including their principal objectives, the alternatives that they considered, and a comparison of the expected benefits and cost of those alternatives.

In 1974, President Ford issued EO 11821, which required agencies to prepare an "inflation impact statement" for each "major" proposed rule. The statement was a certification that the inflationary impact of the rule had been evaluated in accordance with criteria and procedures developed by OMB. Before a major rule was published in the Federal Register, the issuing agency was required to submit the associated impact statement to the Council on Wage and Price Stability (CWPS). CWPS would then either provide comments directly to the agency or participate in the regular rulemaking comment process.

In 1978, President Carter issued EO 12044, which required agencies to publish semiannual agendas of any significant rules under development or review, and to prepare a regulatory analysis for all rules that have a more than $100 million impact on the economy. The analysis was to contain a succinct statement of the problem, a description of the alternative approaches considered, and the "economic consequences" of those alternatives. OMB was instructed to "assure the effective implementation of this Order," but was not given specific review responsibilities. President Carter also established (1) a Regulatory Analysis Review Group (RARG) to review the analyses prepared for certain major rules, and to submit comments during the comment period; and (2) a Regulatory Council to coordinate agencies' actions to avoid conflicting requirements and duplication of effort.

However, the analytical and review requirements in EO 12291 were significantly different from these previous efforts. For example, the requirement in the new executive order that agencies choose the least costly approach to a particular regulatory objective went further than the requirement in President Carter's EO 12044, which simply required agencies to analyze and consider alternative regulatory approaches.

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[20] *See* Jim Tozzi, *OIRA's Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA's Founding*, 63 Admin. L. Rev. 37 (2011).

[21] Some assert that the president should be able to make the final decision regarding the substance of agency rules, while others argue that the president cannot dictate the substance of rules that Congress has entrusted to the agencies. For a sample of this literature, *see* Robert Percival, *Presidential Management of the Administrative State: The Not-So Unitary Executive*, 51 Duke L. J. 963 (2001); Peter L. Strauss, *Overseer, or 'The Decider'?: The President in Administrative Law*, 75 Geo. Wash. Univ. L. Rev. 696 (2007); Thomas O. Sargentich, *The Emphasis on the Presidency in U.S. Public Law: An Essay Critiquing Presidential Administration*, 59 Admin. L. Rev. 1 (2007); Michael A. Livermore and Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 Geo. L. J. 1337 (2012-2013); and Alan B. Morrison, *Commentary: OMB Interference with Agency Rulemaking*, 99 Harv. L. Rev. 1059 (1986).

[22] According to some observers, these requirements were routinely imposed only on EPA. For more on these reviews, *see* Tozzi, *supra* note 20.

Also, whereas the regulatory oversight functions were divided among many offices (OMB, CWPS, RARG, and the regulatory council) during the Carter administration, EO 12291 consolidated these functions within OIRA. Another major difference was the amount of influence that OIRA had compared to its predecessors. Under previous executive orders, CWPS and RARG primarily had advisory roles. In contrast, under EO 12291, OIRA could overrule agency determinations regarding whether the rule was "major" (and therefore required a regulatory impact analysis) and could delay the regulation at either the proposed or final rulemaking stage until the agency had adequately responded to its concerns.

More generally, EO 12291 was viewed as a significant change in the balance of power between Congress and the president with regard to rulemaking. Kenneth Culp Davis, noted administrative law scholar and one of the authors of the Administrative Procedure Act, said that with the issuance of the executive order, the president has "assumed full power to control the content of rules issued by executive departments and agencies."[23]

4. Reactions to Initial OIRA Reviews

OIRA's initial regulatory reviews under EO 12291 were highly controversial, with some of the concerns raised by Members of Congress and others focusing on the appropriate role of the president in carrying out statutory requirements that Congress placed on departments and agencies.[24] Other concerns focused on the effect that OIRA reviews had on the time required for agencies to issue rules, on the lack of transparency of such reviews, and whether OIRA had become a conduit for private interests.[25] In 1982, GAO reported that it was "generally impossible to determine what role OMB plays in any given rulemaking" because it "avoids putting its comments on pending rules in writing."[26] Nevertheless, GAO supported OIRA's review of agencies' regulatory analyses, but also recommended more consistency and transparency.

By 1983, however, GAO concluded that the expansion of OIRA's responsibilities under EO 12291 had adversely affected the office's ability to carry out its statutory PRA responsibilities, and recommended that Congress consider amending the act to prohibit OIRA from carrying out other activities such as regulatory review.[27] Also in 1983, Congress was so dissatisfied with OIRA's performance in the areas of regulatory and paperwork review that it permitted the office's appropriation authority to expire (although the office's statutory authority under the PRA was not affected and it continued to receive an appropriation via OMB). Questions continued to be raised in the academic literature regarding EO 12291 reviews.[28]

In 1985, five House committee chairmen filed an amicus brief in a lawsuit brought against the Department of Labor (DOL) regarding the DOL's decision (reportedly at the behest of OIRA) not to pursue a proposed standard concerning exposure to ethylene oxide, a sterilizing chemical widely used in

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[23] Kenneth Culp Davis, *Presidential Control of Rulemaking*, 56 Tulane L. Rev. 849 (1982).

[24] *Role of OMB in Regulation: Hearing before the H. Comm. on Energy and Commerce, Subcomm. on Oversight and Investigation*, 97th Cong. (1981); *Infant Formula: The Present Danger: Hearing before the H. Comm. on Energy and Commerce, Subcomm. on Oversight and Investigation*, 97th Cong. (1982).

[25] *Office of Management and Budget Control of OSHA Rulemaking: Hearing before the H. Comm. on Gov't Operation, Subcomm. on Manpower and Housing*, 97th Cong. (1982).

[26] U.S. Gen. Acct. Off., GAO/PAD-83-6, Improved Quality, Adequate Resources, and Consistent Oversight Needed if Regulatory Analysis Is to Help Control Costs of Regulations 4-6 (1982).

[27] U.S. Gen. Acct. Off., GAO/GGD-83-35, Implementing the Paperwork Reduction Act: Some Progress, But Many Problems Remain (1983). Congress did not act on GAO's recommendation.

[28] *See, e.g.*, Olson, *supra* note 9.

hospitals and suspected of causing cancer.[29] The chairmen claimed that OIRA's actions represented a usurpation of congressional authority. Ultimately, however, the case was decided on statutory, not constitutional, grounds, and the Court declined to rule on the legality of OIRA's actions.[30]

Delays in the issuance of a statutorily required EPA regulation eventually led to a 1986 decision by the D.C. District Court that was critical of OIRA review delays.[31] That same year, the House of Representatives voted to cut off all funds to OIRA, in part because the office was accused of "sitting on regulations" and operating in secret.[32] In an effort to head off that legislation, the OIRA administrator issued a June 1986 memorandum to the heads of covered departments and agencies describing new procedures to improve the transparency of the review process.[33] For example, the memorandum said that OIRA would provide information to the public on meetings with outside parties, and on the dates it began and completed reviews of proposed and final rules. Although hailed by some as a congressional victory, OIRA reviews, and presidential involvement in rulemaking more generally, continued to be criticized as non-transparent.[34] But after 1986, the level of congressional scrutiny and opposition to EO 12291 reviews dropped considerably.

On the other hand, some observers were generally supportive of OIRA's expanded role under EO 12291, often utilizing a statement in a 1981 ruling by the U.S. Court of Appeals for the District of Columbia Circuit noting that:

The Court recognizes the basic need of the President and his White House staff to monitor the consistency of agency regulations with Administration policy. He and his advisors surely must be briefed fully and frequently about rules in the making, and their contributions to policymaking considered. The executive power under our Constitution, after all, is not shared—it rests exclusively with the President.[35]

In 1987, the National Academy of Public Administration (NAPA) characterized regulatory management as an "essential element of presidential management."[36] In 1988, the Administrative Conference of the United States (ACUS) concluded that presidential review of rules "can improve the coordination of agency actions and resolve conflicts among agency rules and assist in the implementation of national

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[29] Public Citizen Health Rsch. Grp. v. Tyson, 746 F. 2d 1479 (D.C. Cir. 1986). *See also* Morton Rosenberg, *Regulatory Management at OMB, in OMB Evolving Roles*, *supra* note 19, at 218.

[30] The Court did say that OIRA's participation in rulemaking "presents difficult constitutional questions concerning the executive's proper role in administrative proceedings and the appropriate scope of delegated power from Congress to certain executive agencies." *Public Citizen*, 746 F. 2d at 1507.

[31] Environmental Defense Fund v. Thomas, 627 F. Supp. 566 (D.D.C. 1986).

[32] Judith Havemann, *'Defunding' OMB's Rule Reviewers*, Wash. Post (July 18, 1986), at A17; Judith Havemann, *New Senate Difficulty Besets Regulatory Review Office*, Wash. Post (Aug. 16, 1986), at A8.

[33] Judith Havemann, *No 'Shade-Drawn' Dealings for OMB*, Wash. Post (June 17, 1986), at A21. To view a copy of this memorandum, *see* Memorandum from Wendy L. Gramm, OIRA Administrator, to Heads of Departments and Agencies Subject to Executive Order Nos. 12,291 and 12,498 on Additional Procedures Concerning OIRA Reviews Under Executive Order Nos. 12,291 and 12,498 [Revised] (June 13, 1986), *reprinted in* U.S. Office of Mgmt. and Budget, Regulatory Program of the United States Government 585 (1993).

[34] *See* Christine Triano & Nancy Watzman, All the Vice President's Men: How the Quayle Council on Competitiveness Secretly Undermines Health, Safety, and Environmental Programs (1991); Bob Woodward & David Broder, *Quayle's Quest: Curb Rules, Leave No Fingerprints*, Wash. Post (Jan. 9, 1992), at A1.

[35] Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981). The case, however, had nothing to do with E.O. 12291 but rather with claims that presidential and congressional intercessions with EPA decision-makers after the close of the APA's public comment period were improper, both of which were reject- ed by the appeals court.

[36] National Academy of Public Administration, Presidential Management of Rulemaking in Regulatory Agencies vii (1987).

priorities,"[37] and later characterized such reviews as "beneficial and necessary."[38] In 1993, Stephen Breyer (now justice of the Supreme Court) characterized OIRA as having a cross-agency perspective that could bring to bear a wider range of concerns than any specific regulatory agency.[39]

5. Executive Order 12866

President George H. W. Bush continued the Reagan executive orders throughout his administration. However, in September 1993, President Clinton issued Executive Order 12866 on "Regulatory Planning and Review," which revoked EO 12291 and EO 12498. EO 12866 is still in effect and continued the general framework of presidential review of rulemaking that was established by EO 12291. For example, it requires covered agencies (again, Cabinet departments and independent agencies but not independent regulatory agencies) to submit certain proposed and final rules to OMB before publishing them in the Federal Register. The order also requires agencies to prepare cost-benefit analyses for their "economically significant" rules (essentially the same as "major" rules under EO 12291).[40] Like the previous executive order, EO 12866 makes it clear that the requirements for review by OIRA are only permissible "to the extent permitted by law."[41]

However, EO 12866 differs from EO 12291 in several important respects. For example, it established a somewhat new regulatory philosophy and a new set of rulemaking principles,[42] and limited OIRA's reviews to "significant" rules, reducing the number of drafts proposed and final rules examined by OIRA from between 2,000 and 3,000 per year to between 500 and about 700 rules per year. EO 12866 also established timeliness and transparency requirements that included but went beyond those that had been put in place by the previously mentioned June 1986 memorandum. For example, the order requires OIRA to either waive review or notify the agency in writing of the results of its review within certain time frames (e.g., within 90 calendar days of submission for most regulatory actions).[43]

EO 12866 also requires OIRA to maintain a publicly available log containing the dates and names of individuals involved in all substantive oral communications between OIRA personnel and any person not employed by the executive branch, as well as the subject matter discussed during such communications. Agencies are required to identify for the public "in a complete, clear, and simple manner" the substantive

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[37] Administrative Conference of the United States, Presidential Review of Agency Rulemaking, Conference Recommendation 88-9 (1988), available at http://www.acus.gov/recommendation/presidential-review-agency-rulemaking.

[38] Administrative Conference of the United States, Improving the Environment for Agency Rulemaking, Conference Recommendation 93-4 (1993), available at http://www.acus.gov/recommendation/improving-environment-agency-rulemaking.

[39] Stephen Breyer, Breaking the Vicious Circle: Toward Effective Risk Regulation 10-11 (1993). Breyer stated that "tunnel vision" by regulatory agencies can prevent them from seeing the larger cost-benefit picture.

[40] The definitions of "major" and "economically significant" rules are similar, and most "economically significant" rules are also considered "major." Some rules may be considered "major" that are not "economically significant" (e.g., rules that would have a significant adverse effect on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic and export markets). *See* Memorandum M-99013 from Jacob J. Lew, Director, Office of Mgmt. and Budget, to the Heads of Departments, Agencies and Independent Establishments 5 (Mar. 30, 1999), https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/memoranda_2010/m99-13.pdf.

[41] The phrase "to the extent permitted by law" is used five times in EO 12866 in the context of required actions by both OIRA and regulatory agencies.

[42] For example, one of the stated objectives of EO 12866 is "to reaffirm the primacy of Federal agencies in the regulatory decision-making process," which was widely viewed as leaving greater control of the rulemaking process with regulatory agencies and taking away authority from OIRA. Also, the requirement that the benefits of a regulation "justify" its costs was a noticeably lower threshold than the requirement in EO 12291 that the benefits "outweigh" the costs.

[43] Exec. Order No. 12,866, *supra* note 8, § 6(b)(2)(C).

changes made during the time of OIRA's review, as well as the changes that were made at the suggestion and recommendation of OIRA.

While narrower and more transparent than its predecessor in some ways, EO 12866 is also broader in other respects and arguably gives the President more authority over the agencies than EO 12291. For example, Section 4 of EO 12866 continued the requirement in the earlier order that agencies publish an agenda of upcoming regulations, but broadened it to include independent regulatory agencies. As a result, agencies created to be independent of the president were required to notify OIRA about their upcoming rules. Also, Section 7 of EO 12866 states that (to the extent permitted by law) "any disagreements or conflicts between or among agency heads or between OMB and any agency that cannot be resolved by the Administrator of OIRA shall be resolved by the president…." In the event of such disagreements, it is highly likely that the president would side with his or her own OIRA Administrator's position because OIRA would likely have previously vetted that position with the president's staff.[44]

In addition to issuing an executive order that continued, and in some ways expanded, presidential authority over rulemaking, President Clinton was also more active than his predecessors in issuing directives to agency heads concerning how they should exercise their discretionary authority. President Clinton issued 107 such orders, compared to just 12 throughout the Reagan and George H.W. Bush administrations.[45] President Clinton also publicly announced that certain rules would be proposed prior to any such announcement by the agency responsible for issuing the rules.[46] Elena Kagan noted in her 2001 article that while it is generally acknowledged that President Reagan used OIRA's review function as a tool to control the policy and political agenda in an anti-regulatory manner, President Clinton did much the same thing to accomplish pro-regulatory objectives.

6. OIRA Initiatives During the George W. Bush Administration

President George W. Bush retained Executive Order 12866 when he took office in January 2001, but the implementation of that order was significantly different during his administration. OIRA usually assumes the personality of the administrator, and of the president whom the administrator serves. During the Clinton administration, OIRA reportedly played a consultative and collaborative role, and consciously avoided confrontation with the agencies over agency rules.

However, under President Bush, OIRA viewed itself as more of a "gatekeeper" designed to prevent poorly designed rules from being issued. Perhaps the best evidence of that change in perspective is in the office's use of return letters. In the seven years from 1994 through 2000, OIRA issued only seven letters returning rules to the agencies for "reconsideration." In 2001 and 2002, OIRA returned a total of 23 rules to the agencies.[47]

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[44] This appears to be what happened in a March 2008 dispute between the EPA and OIRA on where to set secondary ozone standards. EPA appealed to the president, citing legal requirements, science, and previous court decisions. Nevertheless, the president sided with OIRA, and EPA complied. *See* National Ambient Air Quality Standards for Ozone; Final Rule, 73 Fed. Reg. 16,497 (Mar. 27, 2008).

[45] *CRS Symposium*, *supra* note 6, at 1349.

[46] For example, in 1995 he announced that by executive authority he would restrict the marketing and promotion of tobacco products to teenagers and that he was authorizing the Food and Drug Administration to take steps to achieve that goal. However, in 2000, the Supreme Court struck down those rules because it concluded that Congress had not given the FDA the authority to regulate tobacco. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

[47] U.S. Gen. Acct. Off., GAO-03-929, Rulemaking: OMB's Role in Reviews of Agencies' Draft Rules and the Transparency of Those Reviews 41-42 (2003) [hereinafter *GAO on OMB's Role in Rule Reviews*].

In addition to the use of return letters, OIRA undertook a number of other initiatives during the Bush administration that strengthened its role in rulemaking. For example:

OIRA increased the use of "informal reviews" of draft rules prior to their formal submission. In early 2002, the administrator said OIRA was trying "to create an incentive for agencies to come to us when they know they have something that in the final analysis is going to be something we're going to be looking at carefully. And I think that agencies that wait until the last minute and then come to us—well, in a sense, they're rolling the dice."[48] OIRA said these informal reviews are not subject to the deadlines or the transparency requirements in EO 12866, but also said they were when OIRA could have its greatest impact on agency rules.

Agency officials reported that OIRA placed greater emphasis on economic analysis than in the past, requiring more quantification of benefits and benefit-cost analysis for all regulatory options considered, not just the option the agency selected.

OIRA began using "prompt letters" suggesting issues for the agencies' consideration. Between September 2001 and December 2003, OIRA issued a total of 13 such letters suggesting that agencies develop regulations in particular areas or encouraging ongoing efforts.[49] Although OIRA had privately suggested issues to agencies in the past, the use of public letters was new, reflecting what OIRA called a "more proactive role in suggesting regulatory priorities."

In 2003, GAO reported on these and other changes and described in detail how OIRA was requiring significant changes to certain agency rules.[50] GAO also identified nine areas where the transparency requirements in EO 12866 could be improved. For example, GAO recommended that agencies be required to disclose (after rules are published) the changes made to rules during OIRA's informal reviews, that OIRA or the agencies reveal why rules are withdrawn from review, and that OIRA's meeting log more clearly identify what rule was being discussed and who participants were representing. OIRA disagreed with these recommendations.

7. Peer Review Bulletin

OMB and OIRA also published several documents during the George W. Bush administration that attempted to push its (and therefore the president's) regulatory authority in new directions. For example, in December 2004, OMB published its "Final Information Quality Bulletin for Peer Review" on its website,[51] with publication in the Federal Register in January 2005.[52] The bulletin required each agency (to the extent permitted by law) to conduct a peer review of all "influential scientific information that the agency intends to disseminate," with "influential scientific information" defined as any information expected to have a "substantial impact on important public policies or private sector decisions." Specific requirements were established regarding the adequacy of any prior peer review, the selection of reviewers (in terms of expertise, conflicts, and independence), the choice of peer review mechanisms (e.g., letter

[48] Rebecca Adams, *Regulating the Rule-Makers: John Graham at OIRA*, CQ Weekly 520, 520-26 (2002).

[49] The number of prompt letters subsequently declined to only two in 2004, and none in 2005, one in 2006, and none in 2007.

[50] *See GAO on OMB's Role in Rule Reviews*, *supra* note 47.

[51] *See* Memorandum from Director Joshua B. Bolten, Exec. Office of the President, for Heads of Depts. and Agencies, on Issuance of OMB's "Final Information Quality Bulletin for Peer Review" (Dec. 16, 2004), available at https://web.archive.org/web/20150213001425/www.cio.noaa.gov/services_programs/pdfs/OMB_Peer_Review_Bulletin_m05-03.pdf.

[52] Final Information Quality Bulletin for Peer Review, 70 Fed. Reg. 2664 (Jan. 14, 2005) [hereinafter *2005 OMB Information Quality bulletin*].

reviews versus panels), and transparency. The bulletin established additional requirements in these and other areas for "highly influential scientific assessments," as determined by the OIRA administrator. Agencies were required to post on their web sites an agenda for planned peer reviews, and to provide OIRA each year a summary of the peer reviews conducted during the previous year. OMB said the bulletin was being issued "to oversee the quality of agency information, analyses, and regulatory actions."

8. Risk Assessment Bulletin

In January 2006, OIRA released a proposed bulletin on risk assessment for comment by the public and peer review by the National Academy of Sciences (NAS).[53] The bulletin proposed to establish six general risk assessment and reporting standards. It also proposed to establish a seventh general standard for assessments produced in relation to analysis for a rule with annual economic effects of $1 billion or more and nine special standards for "influential" risk assessments that go beyond those general standards. Although characterized as "guidance" in the document's summary, the preamble mentioned the "requirements" of the bulletin, and listed the standards with which "[e]ach agency shall" comply.

In January 2007, an NAS committee reported that the proposed bulletin was "fundamentally flawed" and should be withdrawn by OIRA.[54] Instead, the committee said that OMB should issue a bulletin that outlines goals and general principles of risk assessments that federal agencies could use to develop their own guidance. In September 2007, OMB withdrew the proposed bulletin and instead issued a memorandum reiterating and reinforcing principles for risk assessment that were originally written in 1995, indicating that agencies should comply with the principles.[55]

9. Good Guidance Practices Bulletin

In January 2007, OMB published a "Final Bulletin for Agency Good Guidance Practices."[56] Guidance documents (e.g., compliance guides, policy statements, and circulars), unlike regulations, are not binding on the public, but can provide information to the public that is helpful in understanding and complying with regulations. However, some guidance documents have been criticized as "backdoor rulemaking" in that they appear to establish new requirements that have not been reviewed by senior agency officials or OIRA.

The OMB bulletin required each covered agency (all except independent regulatory agencies) to have written procedures for the clearance of "significant" guidance documents, establish certain standard elements for each such document (e.g., not include mandatory language such as "shall" or "must"), allow electronic access to and public feedback on such documents, and publish "economically significant"

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[53] Office of Mgmt. & Budget, Proposed Risk Assessment Bulletin (2006), available at https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/omb/inforeg/proposed_risk_assessment_bulletin_010906.pdf . Risk assessment is used by federal agencies to determine whether a potential hazard exists and/or the extent of possible risk to human health, safety, or the environment. In a regulatory context, risk assessment helps agencies identify issues of potential concern (e.g., whether exposure to a given risk agent causes effects such as cancer, reproductive and genetic abnormalities, or ecosystem damage), select regulatory options, and estimate a forthcoming regulation's benefits.

[54] Pat Phibbs-Rizzuto, *Draft OMB Guidance 'Fundamentally Flawed,' National Academies Panel Says in Report*, Daily Report for Execs. (Jan. 12, 2007) (citing the National Academies of Science's Jan. 11, 2007 *Scientific Review of the Proposed Risk Assessment Bulletin from the Office of Management and Budget*).

[55] For the September 2007 document, *see* https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/regulatory_matters_pdf/m07-24.pdf; for the 1995 document, *see* https://georgewbush-whitehouse.archives.gov/omb/inforeg/regpol/jan1995_risk_analysis_principles.pdf.

[56] Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 343 (Jan. 25, 2007). OIRA later issued a memorandum to agency regulatory policy officers on the implementation of the bulletin.

guidance documents (i.e., those with a $100 million or more impact on the economy) in the Federal Register and solicit comments on the documents. The bulletin indicated that the definition of a "guidance document" includes all such material "regardless of format," and says that guidance may be "significant" if it "may reasonably be anticipated to" have certain effects (e.g., raise novel legal issues, or create an inconsistency with another agency's actions). OIRA was given a role in the implementation of this bulletin (e.g., to exempt certain types of documents from its requirements). Although some observers welcomed the issuance of this bulletin and suggested ways to make it stronger (e.g., judicial review), others said it represented a "power grab" by the White House and could lead to less responsive government action.

10. Executive Order 13422

In January 2007, President George W. Bush issued EO 13422, which represented the most significant change to the presidential regulatory review process since 1993.[57] The changes included requirements that agencies designate a presidential appointee as a "regulatory policy officer" who could control rulemaking activity within the agencies. The order also expanded presidential review to include significant guidance documents (although such reviews were not subject to the transparency requirements in EO 12866). In congressional hearings on EO 13422, one member of Congress expressed concerns that the order would "shift to the President powers that the framers of our Constitution intended to be exercised by Congress." Another member said she was concerned that "the main thrust of this new Order appears to shift control of the regulatory process from the agencies – the entities that have the most substantive knowledge and experience – to the White House." However, other members said the new executive order simply formalized what was already occurring and were "useful refinements" to the existing review process.[58]

Within two weeks of taking office in January 2009, President Obama issued EO 13497 which (among other things) revoked EO 13422.[59] Shortly thereafter, however, the director of OMB issued a memorandum to the agencies instructing them to continue to send significant policy guidance documents to OIRA for review.[60]

11. Obama Executive Orders

The Obama administration issued two executive orders on rulemaking that supplemented, but did not change, the requirements in EO 12866. In January 2011, President Obama issued Executive Order 13563 on "Improving Regulation and Regulatory Review."[61] The executive order is described as "supplemental to and reaffirms the principles, structures, and definitions governing contemporary regulatory review that were established in EO 12866 of September 30, 1993." It reiterates many of the principles in the 1993 executive order (e.g., that benefits should "justify" costs, and that agencies should select the regulatory alternative that maximizes net benefits). The primary new element was a requirement that agencies develop a plan for the retrospective review of their existing regulations to determine if any should be

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[57] Exec. Order No. 13,422 (Further Amendment to Executive Order 12866 on Regulatory Planning and Review), 72 Fed. Reg. 2763 (January 23, 2007).

[58] For more information, *see* Curtis W. Copeland, *The Law: Executive Order 13422: An Expansion of Presidential Influence in the Rulemaking Process*, 37 Pres. Stud. Q. 531, 531-544 (2007).

[59] Exec. Order No. 13,497, 3 C.F.R. 318 (2010).

[60] Memorandum from Peter R. Orszag, Director, Office of Mgmt. & Budget, for the Heads and Acting Heads of Exec. Depts. & Agencies on Guidance for Regulatory Review (Mar. 4, 2009), available at https://www.regulationwriters.com/downloads/OMBMemo-030409-GuidanceRegReview.pdf. Orszag is a former director of OMB.

[61] Exec. Order No. 13,563, 3 C.F.R. 215 (2012), *reprinted in* 5 U.S.C. § 601 app. (2006 & Supp. V 2011).

modified, streamlined, expanded, or repealed. In July 2011, President Obama issued Executive Order 13579 requesting, but not requiring, independent regulatory agencies to follow the principles in EO 13563, and to develop plans for the review of their existing rules.[62]

12. Delays of Rules During the Obama Administration

As noted previously, EO 12866 states that OIRA's reviews should generally be completed within 90 days. A study that I did for ACUS in 2013 showed that from 1994 through 2011, the average amount of time it took OIRA to complete a review was 50 days, and the highest average review time in any year was 62 days.[63] However, in 2012, the average time for OIRA to complete reviews increased to 79 days, and in the first half of 2013, the average review time was 140 days— nearly three times the average for the period from 1994 through 2011.[64] Some agencies were more affected than others, but by the first half of 2013, at least 17 departments and agencies had average review times of more than 90 days (up from only two departments in 2011). From 1994 through 2011, less than 2% of completed reviews took more than six months; however, in the first half of 2013, nearly 30% took more than six months, and nearly 13% took more than one year. Some rules sat at OIRA for more than two years.

Also, these statistics may understate the extent of the review delays during the Obama administration. According to senior employees that I interviewed in 11 departments and agencies, OIRA has increasingly used "informal reviews" of rules prior to their formal submission, and those reviews are not counted for purposes of calculating review times. Also, the senior employees said that OIRA in recent years had required agencies to get OIRA approval before submitting rules for review. In some cases, agencies reportedly had to wait months or even years to obtain OIRA permission to submit rules. As to why these delays were occurring, senior employees cited concerns by some in the Executive Office of the President about the issuance of potentially costly or otherwise controversial rules during an election year,[65] lengthy data or analytical requests from OIRA desk officers, and a perceived lack of management of those desk officers.

In response to the report, ACUS ultimately issued a statement indicating, among other things, that the agencies (not OIRA) should decide when significant rules will be submitted for review, that OIRA should adhere to the review deadlines in EO 12866, and that if OIRA is unable to complete reviews within a reasonable period, it should either return the rule to the agency or inform the public why the review was delayed.[66]

Although the average length of OIRA reviews has shortened since 2013, those reviews are still longer than historical averages. For example, in 2014, the average length of OIRA reviews was 127 days (down from 137 days in 2013). Rules submitted by the Department of Energy took an average of more than 300 days, and EPA rules took an average of more than 200 days. As of mid-November 2015, there were 15

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[62] Exec. Order No. 13,579, 3 C.F.R. 256 (2012), *reprinted in* 5 U.S.C. § 601 app. (2006).

[63] Curtis W. Copeland, *Length of Rule Reviews by the Office of Information and Regulatory Affairs* (Dec. 2, 2013), https://www.acus.gov/sites/default/files/documents/Revised%20OIRA%20Report%20Re-posted%202-21-14.pdf [hereinafter *Copeland, OIRA Delays*].

[64] An increase in average review time for completed reviews in one year may reflect the closure of lengthy reviews that primarily occurred in previous years.

[65] The impact of the 2012 election was the most frequently cited reason for the delays. The Washington Post reported that seven current and former administration officials said that the motives behind many of the delays were clearly political. *See* Juliet Eilperin, *White House delayed enacting rules ahead of the 2012 election to avoid controversy*, Wash. Post (Dec. 13, 2013), at A1.

[66] The ACUS statement can be viewed at https://www.acus.gov/document/statement-18-improving-timeliness-oira-regulatory-review.

significant agency rules under review that had been at OIRA for more than six months, including four for more than a year, and one for more than four years.[67]

13. OIRA and Lobbyists

In its previously-mentioned 2003 study, GAO reported that OIRA significantly affected at least 25 rules from nine health, safety, or environmental agencies. Most commonly, OIRA appeared to have influenced either (1) the expected costs and/or benefits of the rules and/or (2) the agencies' estimates of those costs and/or benefits.[68] GAO also reported that outside parties contacted OIRA before or during its formal review regarding 11 of the 25 rules that OIRA significantly affected. In 7 of these 11 cases, at least some of OIRA's recommendations were similar to those of the outside parties, particularly business groups. However, GAO could not definitively determine whether those contacts influenced OIRA's actions. In contrast, GAO reported that OIRA's actions were not similar to the recommendations made by public interest groups.

Two academic researchers recently reached similar findings. In an article in the American Political Science Review, Simon F. Haeder and Susan Webb Yackee reported that "lobbying is associated with change during OMB review."[69] Specifically, the authors found that "when only business groups lobby, we are more likely to see rule change; however, the same is not true for public interest groups."

14. Summary

In summary, a variety of actions during the past 35 years have greatly expanded OIRA's and the president's influence in rulemaking.

Under President Reagan, OIRA required agencies to submit rules to OIRA for review before they could be published, submit cost-benefit and other economic analyses to OIRA for the most important of those rules, and prepare agendas notifying OIRA and the public about upcoming rules. Submitting a rule for review that was not on the agenda, or that did not meet OIRA's requirement for cost-benefit analysis, could result in rejection by OIRA.

President Clinton had been encouraged to do away with OIRA review and cost-benefit analysis requirements but instead continued them and expanded OIRA and the president's authority in some areas (e.g., specifically stating that the president would judge disagreements between the agencies and OIRA).

Under President George W. Bush, OMB and OIRA established requirements for peer review and guidance documents, and attempted to do so in the area of risk assessment and regarding issues covered by EO 13422. OIRA became the "gatekeeper" to rulemaking during the Bush administration, imposing even more stringent requirements for agencies to follow in issuing rules, and more frequently using "informal reviews" to influence rulemaking (without triggering review deadlines or transparency requirements).

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[67] *See* Office of Info. & Reg. Affairs, Office of Mgmt. & Budget, *Regulatory Actions Currently Under Review by Agency* (filtered to 2014), available at http://www.reginfo.gov/public/jsp/EO/eoDashboard.jsp.

[68] *See GAO on OMB's Role in Rule Reviews*, *supra* note 47, at 84-92.

[69] Simon F. Haeder and Susan Webb Yackee, *Influence and the Administrative Process: Lobbying the U.S. President's Office of Management and Budget*, 109 Am. Pol. Sci. Rev. 507, 507-522 (2015); *see also* Simon F. Haeder and Susan Webb Yackee, *Psst, wanna change the law? Lobby this little-known government office after it's passed*, Wash. Post (July 27, 2015), https://www.washingtonpost.com/news/monkey-cage/wp/2015/07/27/psst-wanna-change-the-law-lob- by-this-little-known-government-office-after-its-passed/?utm_term=.d97d22eab026.

President Obama continued many of these efforts (e.g., informal reviews, and continuing the review of significant guidance documents even though he revoked EO 13422), instituted systematic retrospective reviews, and encouraged independent regulatory agencies to comply as well. Also, OIRA during the Obama administration held on to rules for much longer than during any previous administration (apparently for political reasons), and for the first time systematically required agencies to get OIRA's approval to even submit rules for review.

OIRA is uniquely positioned both within the rulemaking process (reviewing and commenting on rules just before they are published in proposed and final form in the Federal Register) and within OMB (with its budgetary and management influence) to enable it to exert significant influence on agency behavior. The office is the president's personal representative in the rulemaking process.[70] Some have suggested that advocating the president's priorities may take precedence over other responsibilities of the office. For example, former OIRA Administrator Susan Dudley and a co-author wrote more than 10 years ago that "OIRA is supposed to simultaneously provide independent and objective analysis, and report to the president on the progress of executive policies and programs. When those functions conflict, the presidential agenda will most certainly prevail over independent and objective analysis."[71]

B. Congressional Influence on Rulemaking Has Diminished

While the president's influence on rulemaking has clearly increased in recent decades, and despite numerous complaints by members about agency rulemaking actions, the influence that Congress has on rulemaking has diminished. There are several possible reasons for this, including continued broad grants of rulemaking authority, ineffectual rulemaking reform statutes, and statutes that actually give the president more authority to control agency rulemaking. But underlying all these reasons appears to be an unwillingness to assert effective control over regulatory agencies, or to prevent the president from doing so.

Both EO 12291 and EO 12866 specifically stated that their requirements applied "to the extent permitted by law." Therefore, Congress could have, but did not, constrain those presidential efforts. As Elena Kagan said in her 2001 Harvard Law Review article, "presidential administration" became dominant in rulemaking and is legal not because the Constitution requires it, but because "Congress generally has declined to preclude the President from controlling administration in this manner."[72] She described Republican efforts in Congress to restrain President Clinton's use of power over agency rulemaking as "feckless," "just as an earlier Democratic Congress…had proved incapable of thwarting Reagan's use of a newly strengthened regulatory review process."[73]

1. Broad Grants of Rulemaking Authority

Substantive rulemaking starts with an authorizing act of Congress and is one of the means through which statutes are implemented and specific requirements are established. The statutory basis for a regulation

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[70] Former OIRA administrator John Graham said, the office's actions "necessarily reflect Presidential priorities." John D. Graham, Presidential Management of the Regulatory State, speech at the Weidenbaum Center Forum, National Press Club, Washington, D.C. (Dec. 17, 2001). Similarly, former OIRA administrator Sally Katzen was quoted by GAO as saying that "OIRA is part of the Executive Office of the President, and the President is the office's chief client." *See GAO on OMB's Role in Rule Reviews*, *supra* note 47.

[71] Susan E. Dudley and Angela Antonelli, *Congress and the Clinton OMB: Unwilling Partners in Regulatory Oversight*, Regulation, fall 1997, at 17-23.

[72] Kagan, *supra* note 4, at 2245.

[73] *Id.* at 2314.

can vary greatly in terms of its specificity, with some statutes delineating exactly what regulatory agencies should do and how they should take action. For example, the Employee Retirement Income Security Act (29 U.S.C. §1001 et seq.) gives the Pension Benefit Guaranty Corporation no discretion in drafting rules that establish minimum pension insurance premium rates, specifying to the dollar what those rates should be.[74] Also, Congress may impose specific procedural requirements on agencies' rulemaking processes (e.g., the conduct of public hearings, the publication of a notice of proposed rulemaking by a particular date, or the coordination of rulemaking with another agency).

In other cases, however, and perhaps more commonly, statutes give rulemaking agencies substantial discretion in how rules are developed and what they require.[75] For example, the Agricultural Adjustment Act provides a broad grant of rulemaking authority to the secretary of agriculture, stating only that agricultural marketing should be "orderly" but providing little guidance regarding which crops should have marketing orders or how to apportion the market among growers. More recently, the Patient Protection and Affordable Care Act (ACA, P.L. 111-148) contained numerous provisions giving federal agencies broad authority to issue "such regulations as may be necessary" to carry out certain requirements in the law. Other ACA provisions simply stated that agencies "may" issue rules in certain areas.[76] Similarly, of the 330 rulemaking provisions in the Dodd-Frank Wall Street Reform and Consumer Protection Act (P.L. 111-203, July 21, 2010), more than half appear to be discretionary in nature, stating that certain agencies "may" issue rules to implement particular provisions, or that the agencies shall issue such rules as they "determine are necessary and appropriate."[77] An article in The New York Times described the Dodd-Frank Act as a "2,000 page missive to federal agencies," and that it "is notably short on specifics, giving regulators significant power to determine its impact."[78]

These kinds of broad delegations of rulemaking authority to the agencies may be chosen because Congress lacks the technical expertise needed to craft detailed legislation, or because Congress cannot reach consensus on how particular issues should be resolved. Nevertheless, when Congress permits agencies to prescribe "such regulations as are necessary" without providing boundaries, it is essentially giving agencies legislative power. On the other hand, when Congress requires that a regulation contain certain elements, Congress retains a measure of control over (and responsibility for) the subsequent rulemaking process.

2. Ineffectual Reform Statutes

Congress has established a number of crosscutting rulemaking requirements that apply to all or most regulatory agencies. Most of them have been established since 1980, including the Regulatory Flexibility Act, the Unfunded Mandates Reform Act, and the Congressional Review Act. Taken together, these provisions require agencies to perform an array of analyses and other actions before rules can be published and take effect, and appear to give Congress a real role in the rulemaking process. Upon closer

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[74] For example, 29 U.S.C. §1306(a)(3)(A) states that the annual premium rate payable in the case of a single-employer plan for basic benefits is "an amount equal to the sum of $19 plus the additional premium (if any) determined under subparagraph (E) for each individual who is a participant in such plan during the plan year."

[75] David Epstein & Sharyn O'Halloran, Delegating Powers: A Transaction Cost Politics Approach to Policy Making Under Separate Powers (1999).

[76] Curtis W. Copeland, Cong. Rcsh. Serv., R41180, Regulations Pursuant to the Patient Protection and Affordable Care Act (P.L. 111-148*)* (2010), http://www.ncsl.org/documents/health/Regulations.pdf.

[77] Curtis W. Copeland, Cong. Rsch. Serv., R41472, Rulemaking Requirements and Authorities in the Dodd-Frank Wall Street Reform and Protection Act (2010), available at http://www.llsdc.org/assets/DoddFrankdocs/crs-r41472.pdf; Curtis W. Copeland, Cong. Rsch. Serv., R41180, Regulations Pursuant to the Patient Protection and Affordable Care Act (P.L. 111-148) (2010).

[78] Binyamin Appelbaum, *On Finance Bill, Lobbying Shifts to Regulations*, N.Y. Times (June 27, 2010).

inspection, however, the statutes can be seen as ineffectual, with numerous "loopholes" giving agencies substantial discretion regarding when and how the requirements are to be applied. As a result, Congress' influence on rulemaking is not what it appears to be.

a. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) of 1980 (5 U.S.C. §§601-612), requires federal agencies to assess the impact of their forthcoming regulations on "small entities," which the act defines as including small businesses, small governmental jurisdictions, and certain small not-for-profit organizations. Under the RFA, all agencies must prepare a regulatory flexibility analysis at the time certain proposed and final rules are issued. The RFA requires the analysis to describe, among other things, (1) the reasons why the regulatory action is being considered; (2) the small entities to which the proposed rule will apply and, where feasible, an estimate of their number; (3) the projected reporting, recordkeeping, and other compliance requirements of the proposed rule; and (4) any significant alternatives to the rule that would accomplish the statutory objectives while minimizing the impact on small entities.

However, these analytical requirements are not triggered if the head of the issuing agency certifies that the proposed rule would not have a "significant economic impact on a substantial number of small entities." The RFA does not define "significant economic impact" or "substantial number of small entities," thereby giving federal agencies substantial discretion regarding when the act's analytical requirements are initiated. Also, the RFA's analytical requirements do not apply to final rules for which the agency does not publish a proposed rule, and nearly half of all final rules are published without a proposed rule, including about one-third of all "major" rules.[79]

GAO has examined the implementation of the RFA several times within the past 35 years, and a recurring theme in GAO's reports is a lack of clarity in the act and a resulting variability in the act's implementation. For example, GAO reported that EPA certified 96% of its proposed rules published from 1994 through 1999, with the rate of certification going up (to 100% in some parts of EPA) after Congress imposed new requirements on rules that are not certified.[80] Under the agency's guidelines, an EPA rule could impose $10,000 of compliance costs on 10,000 small entities, and those effects would still not be considered "significant" or "substantial."[81] In 2001, GAO testified that the promise of the RFA might never be realized until Congress or some other entity defines what the terms "significant economic impact" and "substantial number of small entities" mean in a rulemaking setting.[82] In 2006, GAO again testified on the RFA, noting its numerous prior recommendations.[83] To date, Congress has not acted on any of GAO's recommendations.

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[79] U.S. Gen. Acct. Off., GGD-98-126, Federal Rulemaking: Agencies Often Published Final Actions Without Proposed Rules (1998) [hereinafter *GAO on Federal Rulemaking*]; and U. S. Gov't Accountability Off. GAO-13-21, Federal Rulemaking: Agencies Could Take Additional Steps to Respond to Public Comments (2012). Many agencies are apparently aware of this limitation; GAO estimated that in more than 500 final rules published in 1997, the agencies specifically stated that the RFA was not applicable or that a regulatory flexibility analysis was not required because the action was not preceded by a proposed rule. *See GAO on Federal Rulemaking* at 31.

[80] U.S. Gen. Acct. Off., GAO/GGD-00-193, Regulatory Flexibility Act: Implementation in EPA Program Offices and Proposed Lead Rule (2000).

[81] *Id.*

[82] U.S. Gen. Acct. Off., GAO-01-669T, Regulatory Flexibility Act: Key Terms Still Need to Be Clarified (2001).

[83] U.S. Gov't. Accountability Off., GAO-06-998T, Regulatory Flexibility Act: Congress Should Revisit and Clarify Elements of the Act to Improve Its Effectiveness (2006).

b. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act (UMRA) of 1995 was enacted in an effort to reduce the costs associated with federal imposition of responsibilities, duties, and regulations upon state, local, and tribal governments and the private sector without providing the funding appropriate to the costs imposed by those responsibilities.

Title II of UMRA (2 U.S.C. §§1532-1538) requires Cabinet departments and independent agencies (but not independent regulatory agencies) to, among other things: (1) prepare a written statement containing specific descriptions and estimates for any proposed rule or any final rule for which a proposed rule was published that includes any federal mandate that may result in the expenditure of $100 million or more in any year by state, local, or tribal governments, in the aggregate, or the private sector; (2) identify and consider a reasonable number of regulatory alternatives and select the least costly, most cost-effective, or least burdensome alternative (or explain why that alternative was not selected) for each rule for which a written statement is prepared; and (3) develop an effective process to permit elected officers of state, local, and tribal governments (or their designees) to provide input in the development of regulatory proposals containing significant intergovernmental mandates.

In February 1998, GAO reported that, because of the way the statute was written, title II of UMRA had little effect on agencies' rulemaking actions during its first two years of implementation.[84] First, many of the act's requirements did not appear to apply to most of the "economically significant" rules (e.g., rules with a $100 million impact on the economy) that were promulgated during this period. For example, if a final rule did not have an associated proposed rule, or if it imposed a mandate as a condition of federal financial assistance, the written statement requirement in Section 202 of UMRA does not apply. Second, UMRA does not require agencies to take the actions specified if the agencies determine that they are duplicative of other actions or that accurate estimates of the effect of their rules are not feasible. Third, even when UMRA is triggered, it often requires agencies to take actions that are identical or similar to actions that they were already required to take. For example, UMRA's requirements for the conduct of cost-benefit analysis and identification of regulatory alternatives are similar to the requirements that were already in place under Executive Order 12866, which was issued more than a year before UMRA was enacted.

In May 2004, GAO again reported that UMRA's written statement requirements only applied to about 7% of the major or economically significant final rules issued in 2001 and 2002, even though some of the non-covered rules "appeared

to have potential financial impacts on affected nonfederal parties similar to those of the actions that were identified as containing mandates at or above the act's thresholds."[85] In March 2005, GAO reported that parties from various sectors (businesses, public interest groups, academia, and others) most commonly cited UMRA's numerous definitions, exclusions, and exceptions as problematic and in need of improvement.[86] In February 2011, GAO reiterated these conclusions, noting that there are 14 reasons why

[84] U.S. Gen. Acct. Off., GAO/GGD-98-30, Unfunded Mandates: Reform Act Has Had Little Effect on Agencies' Rulemaking Actions (1998).

[85] U.S. Gen. Acct. Off., GAO-04-637, Unfunded Mandates: Analysis of Reform Act Coverage (2004).

[86] U.S. Gov't Accountability Off., GAO-05-454, Unfunded Mandates: Views Vary About Reform Act's Strengths, Weaknesses, and Options for Improvement (2005).

a rule may not be considered a "mandate" under UMRA.[87] In each of these reports, GAO made numerous recommendations to improve UMRA. To date, however, Congress has not acted on any of GAO's recommendations.

c. Congressional Review Act

The statutory provision commonly known as the Congressional Review Act (CRA) (5 U.S.C. §§801-808) was enacted in March 1996 and is arguably the clearest example of Congress attempting to regain authority in agency rulemaking. The CRA established expedited procedures by which Congress may disapprove agencies' rules by enacting a joint resolution of disapproval. Under the act, before any final rule can become effective, it must be filed with each house of Congress and GAO. The definition of a "rule" under the CRA is very broad, and the act applies to rules issued by Cabinet departments and independent agencies as well as independent regulatory agencies. If OIRA considers the issuing agency's rule to be "major," the agency generally must delay the rule's effective date by 60 days after the date of publication in the Federal Register or submission to Congress and GAO, whichever is later. After Congress receives an agency's rule, a member of Congress can introduce a resolution of disapproval that, if adopted by both houses and enacted into law, can nullify the rule, even if it has already gone into effect.

Congressional disapproval under the CRA also prevents the agency from proposing to issue a "substantially similar" rule without subsequent statutory authorization.

As of November 2015, federal agencies had submitted almost 70,000 rules to GAO (and, presumably, Congress) since the CRA took effect in March 1996, including more than 1,350 major rules. However, only fourteen rules have been overturned through CRA's procedures—one in March 2001 and thirteen during the first several months of 2017.

Many reasons have been suggested for why the CRA has not been used more often, but chief among them may be the fact that, if the president vetoes a resolution of disapproval (which is likely if the underlying rule is developed during his administration), then enactment of the resolution would require approval of a two-thirds majority in both houses of Congress to override the veto. The rejection of each of the four rules noted above was the result of a specific set of circumstances created by a transition in party control of the presidency. The majority party in both houses of Congress was the same as the party of the incoming president (George W. Bush in 2001, then Donald Trump in 2017). In both cases, the new Congress convened and adopted a resolution disapproving the rule published under the outgoing president (Clinton in 2001, then Obama in 2017), which the new president signed into law. Congress may be most able to use the CRA to disapprove rules in similar, transition-related circumstances.

Also, a study that I did in 2014 indicated that many agency rules were not being submitted to Congress or GAO at all— which means that the rules were not subject to the expedited disapproval procedures.[88] From 1997 through 2011, federal agencies submitted an average of about 3,600 rules to GAO each year, which was about 88% of the final rules that were published in the Federal Register in those years.[89]

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[87] U.S. Gov't Accountability Off., GAO-11-385T, Unfunded Mandates: Few Rules Trigger Unfunded Mandates Reform Act (2011) (Testimony of Denise M. Fantone, Director, Strategic Issues, U.S. Government Accountability Office, before the Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform, House Committee on Oversight of Government Management).

[88] Curtis W. Copeland, Admin. Conf. of the U.S., Congressional Review Act: Many Recent Final Rules Were Not Submitted to GAO and Congress (2014), https://www.acus.gov/sites/default/files/documents/CRA%2520Report%25200725%2520%25282%2529.pdf.

[89] Some published rules fall under exceptions to the CRA submission requirement (e.g., rules of particular applicability), or were technical corrections or amendments to previously published rules (which GAO does not include in its database).

However, federal agencies submitted only about 71% of the rules that were published during 2012 and 2013—more than 1,200 fewer than would have been submitted at the 88% historical rate of submission. During the first half of 2014, less than half of the published rules were submitted to GAO and nearly 650 fewer than would have been submitted at the 88% rate of submission. At least six of the missing rules were considered "major" under the CRA, and at least 37 other rules were considered "significant" under EO 12866.

One of the reasons why so many rules were not submitted to GAO and Congress appears to be a decision by GAO (for budget reasons) to stop voluntarily checking the Federal Register to determine whether all covered rules were being submitted. Congress could require (and fund) a reinstitution of those checks. Also, because the CRA prohibits judicial review of any "action" or "omission," it is unclear whether a court may prevent an agency from enforcing a covered rule that was not reported to GAO and Congress. To address this issue, Congress could permit some form of judicial review of the CRA rule submission requirement. Congress could also focus the submission requirement on a more limited number of rules (e.g., eliminating "routine" and "administrative" rules on such topics as fireworks displays and bridge opening schedules), thereby focusing the effort on rules that are of greater concern to Congress and the public.

This study was widely reported,[90] and the previously mentioned problems with the CRA are well known. Nevertheless, to date, Congress has not acted to improve the operation of the CRA.

3. Statutes That Give the President More Power

In addition to regulatory reform statutes that are largely ineffectual, there are also statutes that have had the effect of giving the President *more* authority. These include the Paperwork Reduction Act, the Information Quality Act, and an OMB reporting requirement.

a. Paperwork Reduction Act

As noted earlier in this chapter, the Paperwork Reduction Act (PRA) established OIRA. Under the law, agencies must receive OIRA-approval for each collection request before it is implemented, and those approvals must be renewed at least every three years. OIRA can disapprove any collection of information if it believes the collection is inconsistent with the requirements of the PRA.[91] OIRA data indicates that the office takes action on between 3,000 and 5,000 information collection requests (new approvals, renewals, or revisions) each year.

The PRA was amended in 1995. The amended version reaffirmed the principles in the original act and gave significant new authorities and responsibilities to OIRA. For example, the act now requires OIRA to "oversee the use of information resources to improve the efficiency and effectiveness of governmental operations to serve agency missions." One of the key features of the PRA of 1995 was the requirement that OIRA, in consultation with the agency heads, set annual government-wide goals for the reduction of information collection burdens by at least 10% in fiscal years 1996 and 1997, and by at least 5% in each of the succeeding four fiscal years. The act also required OIRA to establish agency burden reduction

[90] Juliette Eilperin, *Study: Hundreds of rules passed by Obama Administration are technically illegal*, Wash. Post (July 29, 2014), https://www.washingtonpost.com/politics/study-hundreds-of-rules-passed-by-obama-administration-are-technically-illegal/2014/07/29/95e799ce-0872-11e4-a0dd- f2b22a257353_story.html?utm_term=.f85c62a93489.

[91] However, multi-headed independent regulatory agencies can, by majority vote of the leadership, void any OIRA disapproval of a proposed information collection. *See* 44 U.S.C. § 3507(f).

goals each year representing "the maximum practicable opportunity in each agency." This type of language encourages OIRA (and therefore the president) to exert greater control.

The coverage of the PRA is extremely broad, including actions by Cabinet departments and independent agencies as well as independent regulatory agencies, and covering virtually any type of collection of information that these agencies "conduct or sponsor." As a result of the 1995 amendments to the act, the PRA's clearance requirements clearly cover collections of information "requiring the disclosure to third parties or the public," effectively overturning the Supreme Court's 1990 decision in *Dole v. United Steelworkers of America*.[92] Because many regulations require some type of information collection, the PRA gives OIRA a substantial amount of influence over rulemaking—its authority under EO 12866 notwithstanding.

b. Information Quality Act

Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (P.L. 106-554), generally known as the "Data Quality Act" or the "Information Quality Act" (IQA), amended the Paperwork Reduction Act and directed OMB to issue government-wide guidelines that "provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies."[93] The act also required agencies to report periodically to the director of OMB on the number and nature of complaints received and how such complaints were handled by the agency. In addition, the previously mentioned peer review standards that OMB published in 2004 were issued pursuant to the authority that Congress granted in the IQA. OMB said "In the Information Quality Act, Congress directed OMB to issue guidelines to 'provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility and integrity of information' disseminated by Federal agencies."[94] Thus, the IQA gives OMB (and therefore the president) another potential source of power over rulemaking.

c. "Recommendations for Reform"

Section 628(a) of the FY2000 Treasury and General Government Appropriations Act required OMB to provide a report on the total costs and benefits of federal regulations, and to make "recommendations for reform." In 2001, OIRA transformed the general requirement for reform recommendations into an initiative requesting the public to identify specific rules that it believed should be eliminated or reformed. OIRA received a total 71 nominations from the public (44 of which were from the Mercatus Center at George Mason University), and OIRA selected 23 of them for "high priority review," indicating that OIRA was inclined to agree with the suggestion.[95] However, OIRA did not disclose how it decided which rules merited high priority review.

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[92] 494 U.S. 26.

[93] OMB published those government-wide guidelines in interim form on September 28, 2001, and in updated final form on February 22, 2002. *See* Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Republication, 67 Fed. Reg. 8452, 8452 (Feb. 22, 2002).

[94] *2005 OMB Information Quality Bulletin*, *supra* note 52, at 7.

[95] In its December 2002 report on costs and benefits, OIRA noted that several commenters questioned the 2001 comment process because the Merca- tus Center provided a majority of the recommendations for reform. OIRA said it believed that, if there was a problem with that process, "it was not that the Mercatus Center was too active but that other potential commenters were silent." U.S. Off. Mgmt. & Budget, Office of Info. and Reg. Aff., Stimulating Smarter Regulation: 2002 Report to Congress on the Costs and Benefits of Regulations and Unfunded Mandates on State, Local and Tribal Entities 33 (2002), available at https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/omb/inforeg/2002_report_to_ congress.pdf.

Section 624 of the Treasury and General Government Appropriations Act of 2001, also known as the "Regulatory Right- to-Know Act," required OIRA to include "recommendations for reform" in its cost-benefit report each year. OIRA again asked the public to identify regulations or regulatory programs in need of reform. This time, OIRA received comments on 267 regulations and 49 guidance documents from approximately 1,700 individuals, firms, trade organizations, and others. In its 2004 report on costs and benefits, OIRA identified 75 reforms that had been completed as a result of suggestions from the public and other efforts, and another 28 "promising" reforms that had been proposed by the agency.[96] In that same report, OIRA again requested public nominations of specific regulations that could be reformed, and expressed particular interest in reforms applicable to small and medium-sized manufacturers. OIRA received another 189 recommendations, of which 76 were judged to justify further action. OMB then published another report specifically on agency responses to these manufacturing-related recommendations.[97]

Therefore, OIRA turned the seemingly innocuous requirement to identify "recommendations for reform" into a series of efforts to eliminate or change regulations, many of which had already gone through the OIRA review process.

C. What Can Congress Do?

Given that all presidents for the past 35 years have attempted to increase the authority of the president and/or OIRA in the federal rulemaking process, and given that Congress has been unable or unwilling to compete with the president in this arena, what can Congress do to reassert itself in the area of rulemaking?

1. Avoiding and Correcting Past Mistakes

The most obvious answer is for Congress not to continue to do some of the things that have contributed to this situation.

For example, Congress should avoid enacting legislation with broad grants of authority to the agencies (and therefore the president) to put in place whatever regulations they "deem necessary." The more specific Congress is in its delegations of rulemaking authority (i.e., what the regulations say and how they should be developed), the less power it provides to the president and regulatory agencies. However, specific regulatory requirements in legislation can also have a downside, preventing agencies from promptly crafting regulations that are the most suitable, cost-efficient responses to perceived problems. Ultimately, therefore, it is a balancing act; including enough specifics in legislation to ensure that Congress' policy preferences are known while giving agencies discretion to craft regulations that are appropriate to the situation.

When Congress decides to give agencies rulemaking discretion, it should do so knowingly and without the intent of later blaming the agencies for using the discretion that Congress provided.

Also, Congress can correct some of the known deficiencies in the crosscutting regulatory requirements that have been put in place over the years and can avoid similar types of issues in future regulatory reform efforts. For example, Congress can improve the operation of the RFA and UMRA by implementing the

[96] U.S. Off. Mgmt. & Budget, Office of Info. and Reg. Aff., Progress in Regulatory Reform: 2004 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities 1050-133 (2004), available at https:// obamawhitehouse.archives.gov/sites/default/files/omb/assets/omb/inforeg/2004_cb_final.pdf.

[97] U.S. Off. Mgmt. & Budget, Office of Info. and Reg. Aff., Regulatory Reform of the U.S. Manufacturing Sector (2005), available at https://georgewbush-whitehouse.archives.gov/omb/inforeg/reports/manufacturing_initiative.pdf.

numerous recommendations that GAO has made over the years. Congress can make the CRA more effective by taking action to ensure that the most important rules are submitted to GAO and Congress. Numerous other suggestions have also been made to improve the operation of the CRA.[98]

In regulatory reforms that are still under consideration, Congress can use the experience of the past 35 years to avoid giving more power to the president or OIRA, and to avoid the use of exceptions and undefined terms (e.g., "significant economic impact" and "substantial number of small entities") that permit agencies to avoid the rulemaking requirements. For example, one bill introduced during the 114th Congress (S. 1607, the Independent Agency Regulatory Analysis Act of 2015) would expand cost-benefit requirements and OIRA reviews to independent regulatory agencies. Doing so would greatly increase OIRA's (and therefore the president's) authority over such agencies. Not surprisingly, seven former OIRA administrators from the Reagan, Clinton, and George W. Bush Administrations have expressed support for the bill.[99]

A number of other bills introduced during the 114th Congress would have increased OIRA's authority. For example, the "ALERT Act" (H.R. 1759) would have required the head of each federal agency to submit a monthly report to OIRA identifying each rule it expects to propose or finalize within the following year. It also would have required a monthly report to OIRA of all rules that it expects to be finalized in the next year for which a proposed rule had been published, including an estimate of its cost and economic effects. Another bill, the "Regulatory Sunset Act of 2015" (H.R. 2010, S. 1067), would have required OIRA to develop an inventory of existing "covered rules" (which OIRA would define) and to prioritize them for sunset review.

On the other hand, some legislation introduced in the 114th Congress could have improved congressional authority in rulemaking. For example, the Regulatory Improvement Act of 2015 (H.R. 1407, S.708) would have established within the legislative branch a "Regulatory Improvement Commission," and would have required the commission to "evaluate and provide recommendations for modification, consolidation, or repeal of covered regulations [those finalized at least 10 years earlier] with the aim of reducing compliance costs, encouraging growth and innovation, and improving competitiveness, all while protecting public health and safety."

Using this information, Congress could hold public hearings and make formal inquiries into particular agency rules, as well as presidential initiatives in this sphere. Congress has done so in the past, but those efforts have been episodic and relatively infrequent in the past 10 to 15 years. More systematic and sustained uses of the traditional tools of congressional oversight can go far toward improving the authority of Congress in rulemaking.

2. Appropriations Restrictions

In the past, Congress has also intervened in the regulatory process through budgetary means, preventing agencies from using their appropriations to issue or enforce certain types of rules. A study that the author did looking at appropriations bills from FY1999 through FY2008 identified least four types of such restrictions: (1) restrictions on the finalization of particular proposed rules, (2) restrictions on regulatory

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[98] *See, e.g.*, Morton Rosenberg, The Critical Need for Effective Congressional Review of Agency Rules: Background and Considerations for Incremental Reform, (July 18, 2012), a report prepared for the consideration of the Administrative Conference of the United States, available at https://www.acus.gov/sites/default/files/documents/CRA%20_%20Final%20Report.pdf.

[99] *See* Letter from Sally Katzen, Susan Dudley, John Spotila, James Miller, John Graham, Wendy Lee Graham, and Christopher DeMuth to Sen. Rob Portman (June 17, 2015), available at https://www.portman.senate.gov/public/index.cfm/files/serve?File_id=65eeee19-bac4-43f9-bc52-2154e2b09cfe.

activity within certain areas, (3) implementation or enforcement restrictions, and (4) conditional restrictions (e.g., preventing implementation of a rule until certain actions are taken).[100]

A quick examination of the Consolidated and Further Continuing Appropriations Act, 2015 (Public Law 113-235, December 16, 2014) revealed that these types of appropriations restrictions are continuing. For example, one provision in the FY2015 appropriations bill prohibited the finalization of an identified proposed rule that had been published more than four years earlier unless certain conditions were met:

None of the funds made available by this or any other Act may be used to write, prepare, or publish a final rule or an interim final rule in furtherance of, or otherwise to implement or enforce the proposed rule entitled "Implementation of Regulations Required Under Title XI, of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act" published by the Department of Agriculture in the Federal Register on June 22, 2010 (75 Fed. Reg. 35338 et seq.) unless the combined annual cost to the economy of such rules does not exceed $100,000,000.[101]

Another provision in the act prohibited enforcement or implementation of previously established statutory and regulatory provisions:

None of the funds made available in this Act may be used— (1) to implement or enforce section 430.32(x) of title 10, Code of Federal Regulations; or (2) to implement or enforce the standards established by the tables contained in section 325(i)(1)(B) of the Energy Policy and Conservation Act (42 U.S.C. 6295(i)(1)(B)) with respect to BPAR incandescent reflector lamps, BR incandescent reflector lamps, and ER incandescent reflector lamps.[102]

Other provisions prohibited the development of any regulations within particular areas. For example:

Notwithstanding any other provision of law, none of the funds made available in this Act or any other Act may be used to promulgate or implement any regulation requiring the issuance of permits under Title V of the Clean Air Act (42 U.S.C. 7661 et seq.) for carbon dioxide, nitrous oxide, water vapor, or methane emissions resulting from biological processes associated with livestock production.[103]

Yet another provision required that certain regulatory provisions put in place two years earlier remain unchanged:

None of the funds made available in this or any other Act making appropriations for Energy and Water Development for any fiscal year may be used by the Corps of Engineers during the fiscal year ending September 30, 2015, to develop, adopt, implement, administer, or enforce any change to the regulations in effect on October 1, 2012, pertaining to the definitions of the terms "fill material" or "discharge of fill material" for the purposes of the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.).[104]

Finally, one provision declared a published rule indefinitely "null and void."

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[100] Curtis W. Copeland, Cong. Rsch. Serv., RL34354, Congressional Influence on Rulemaking and Regulation Through Appropriations Restrictions (2008), https://fas.org/sgp/crs/misc/RL34354.pdf.

[101] Consolidated and Further Continuing Appropriations Act, Pub. L. No. 113-235, Division A, § 731, 128 Stat. 2167 (2005).

[102] *Id.* at Division D, § 313.

[103] *Id.* at Division F, § Section 419.

[104] *Id.* at Division D, § 109.

Provided further, That sections 201.2(o), 201.3(a), and 201.215(a), of title 9 of the Code of Federal Regulations (as in effect on the date of enactment of this Act) are hereby indefinitely declared null and void and shall have no force under the laws, and the Secretary of Agriculture shall, within 60 days after the date of enactment of this Act, rescind sections 201.2(o), 201.3(a), and 201.215(a), of title 9 of the Code of Federal Regulations (as in effect on such date).[105]

These various types of appropriation riders are common but do have limitations. For example, the restrictions are generally applicable only for the period of time, and the agencies covered by the relevant appropriations bill. (Therefore, some provisions are repeated each year.) Also, to the extent that agencies have independent sources of funding (e.g., user fees) or implement their regulations through state or local governments, some of the limitations may not be as restrictive as they seem.

Some observers and interest groups have specifically advocated the use of appropriations provisions to stop rulemaking activity. For example, John Shanahan and Mark Wilson of the Heritage Foundation described several spending restrictions in 1995 appropriations legislation for EPA and the Department of Labor (e.g., restricting implementation of the Delaney Clause, wetlands permitting requirements, and an ergonomics standard), and said the following:

While permanent labor and environmental policy reform should be pursued, many of the problems addressed by the House appropriations riders are so egregious that immediate relief should be granted. While these riders are an imperfect solution, Americans should view them as necessary to encourage recalcitrant federal agencies to work with Congress to reform some of the nation's most burdensome regulatory statutes.[106]

Others, however, have expressed concerns about these kinds of provisions from both a procedural and a public policy standpoint. For example, in a 2005 article entitled "Regulatory Underkill," William W. Buzbee of the Center for Progressive Reform said the following:

During the past decade, a particularly popular means of derailing programs, but in a low visibility manner, has been through the use of legislative riders. Such riders are typically not freestanding bills that are subject to the congressional committee process, openly debated, and visible for all to see.

Instead, they commonly appear without announcement or even an open legislative sponsor. Riders are appended to other bills, often large spending appropriations bills that have broad support and reflect hundreds of fiercely negotiated bargains. Some riders enact provisions that could not pass as freestanding legislation. . . . Other riders bar the use of appropriations to implement controversial policies. These "carveouts" effectively render such policies a nullity for certain periods or in certain areas. Because these riders do not involve a frontal attack on a popular law, and their advocates may remain unknown, the public seldom knows of these proposals in time to mount an effective opposition. [107]

3. OIRA Review Limitations

Congress could also consider restricting the ability of OIRA or the president from reviewing particular rules or sets of rules (as Congress has done through provisions added to OMB's appropriation bills with

[105] *Id.* at Division A, § 731.

[106] John Shanahan and Mark Wilson, *Using Appropriations Riders to Curb Regulatory Excess*, Heritage Issue Bulletin No. 218 (Oct. 16, 1995).

[107] William Buzbee et al., Regulatory Underkill: The Bush Administration's Insidious Dismantling of Public Health and Environmental Protections, Center for Progressive Regulations Working Paper (2004).

regard to agricultural marketing orders for the past 30 years).[108] Executive Order 12866 seems to contemplate and recognize this kind of limitation on presidential power when it states in Section 7 that the president will resolve disputes between OIRA and rulemaking agencies "to the extent permitted by law."

If Congress prohibited OIRA review of particular rules or types of rules, then the appeals process in Section 7 would seem to be inapplicable, as there could be no dispute between OIRA and the rulemaking agency for the president to settle. On the other hand, enactment of restrictions on the president's or OIRA's authority may be resisted by the president through presidential veto or a signing statement. Also, if Congress indicated that OIRA should not be involved in the review of an agency's rule, the president might try to counter that action by designating some other part of the Executive Office of the President (e.g., the Council of Economic Advisers) or some other agency (e.g., the Department of Agriculture) as the reviewing office for the rule.

However, any attempt to constrain OIRA would likely meet with opposition from the president. In June 2007, the House of Representatives voted to prevent the enforcement of Executive Order 13422.[109] That effort was ultimately not successful after OMB said the legislation would interfere with "the President's authority to manage the Executive Branch" and indicated that it would recommend that the president veto the bill. Congress has enacted numerous provisions in recent appropriations bills that prevent particular rules from being developed or enforced, but those restrictions are typically narrow in scope, of relatively short duration, and of uncertain impact.[110]

4. Final Rule Authority to the Agencies

In discussions about presidential power and rulemaking, the traditional or classical perspective says the president cannot make the final decision on substantive rules that Congress has assigned to the agencies, but can attempt to influence agency officials up to and including firing them if they disagree. The "unitary executive" position asserts that the president should be able to make the final decision regarding such rules, even when Congress has assigned rulemaking activities to the agencies. In her 2001 article on "Presidential Administration," Elena Kagan took a third position—that the president can determine the substance of agency rules, but not if Congress has specifically prohibited or limited the president's intervention.[111]

Therefore, Congress could specifically indicate in legislation authorizing or requiring regulation that the agency head, not the president, has final rulemaking authority. However, such an approach would likely meet with presidential objection. For example, while the George W. Bush administration accepted and abided by congressional provisions limiting OIRA review of agricultural marketing orders, President Bush objected to statutory language that delegated final authority to subordinate officials, even those

[108] For example, the Consolidated and Further Continuing Appropriations Act of 2015 states that "none of the funds appropriated in this Act for the Office of Management and Budget may be used for the purpose of reviewing any agricultural marketing orders or any activities or regulations under the provisions of the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601 et seq.)."

[109] *See* § 901 of H.R. 2829 (as passed by the House), the Financial Services and General Government Appropriations Act, 2008, which funded OMB, among other agencies.

[110] Curtis W. Copeland, Cong. Rsch. Serv., RL34354, Congressional Influences on Rulemaking Through Appropriations Restrictions (2008).

[111] Kagan, *supra* note 4.

officials who have been appointed by the president with the advice and consent of the Senate.[112] It is unclear to what extent such objections might have influenced the implementation of such laws.

5. Transparency Requirements

Congress could also increase the visibility of the president's and OIRA's involvement in the rulemaking process. Doing so might have the secondary effect of reducing such involvement. For example, Congress could:

Prohibit OIRA from stopping agencies from submitting their significant rules for review and require that the time limits for review begin when OIRA begins to review drafts of agency rules.

Require that OIRA adheres to the 90-day review limit in EO 12866, and either complete review, return the rule to the agency with an explanation, or disclose to the public why the review is being delayed.

Require that, after the rules are published, all changes that the agencies made at OIRA's suggestion or recommendation be reflected in the agencies' regulatory dockets—regardless of whether the changes occurred during formal or informal reviews by OIRA.

Require either the agencies or OIRA to disclose why rules are withdrawn from review.

Require OIRA to more fully disclose in the office's meeting log which regulatory action was being discussed and the affiliations of participants in those meetings.

Require documentation of changes made to significant guidance documents that are reviewed by OIRA, and require that OIRA reveal when such documents are submitted for review and when the office's reviews are completed—just as OIRA does now for agency rules.

These suggestions to improve transparency are not new. They were all included in GAO's 2003 report on OIRA,[113] the ACUS report on OIRA rule delays,[114] or both. The same is true for most of the suggested improvements mentioned above. Virtually all of them have been made before, and Congress is (or should be) aware of them. What has been lacking to date has been the willingness for Congress to assert itself and reclaim at least some of the authority over rulemaking that it had in 1946 when the Administrative Procedure Act was passed.

[112] *See, e.g.*, Harold J. Krent, *From a Unitary to a Unilateral Presidency*, 88 B.U. L. Rev. 523, 534 (2008).

[113] *See GAO on OMB's Role in Rule Reviews*, *supra* note 47.

[114] *OIRA Delays*, *supra* note 63.

The Roles of NGOs and Whistleblowers in the Oversight Process

Lydia Dennett,[1] Elizabeth Hempowicz,[2] Justin Rood[3]

Some of the best resources and insights available to congressional oversight staff can be found off Capitol Hill and away from government buildings. Non-governmental organizations (NGOs)—particularly government watchdog groups—often have extraordinary access to people and information in their area of expertise. That can include access to whistleblowers or potential whistleblowers. When called upon, they can provide significant help to a congressional investigation.

From government spending and agency affairs to civil liberties and tax policy, NGOs often enjoy better access to knowledgeable officials and experts in their focus area than do many congressional offices. A veteran oversight staffer does not hesitate to call on these groups, even when they may not align with the ideology of his or her boss or chairman.

In addition to facilitating access to people, documents, and other sources of useful information, these groups can provide briefings to oversight staff on their topics of expertise (featuring analyses which are sometimes less ambivalent and more direct than what may be offered by governmental experts). They can also provide witnesses to testify at oversight hearings and discuss both oversight findings and also possible policy solutions.

The Project On Government Oversight (POGO) is one such group. Founded in 1981, POGO originally worked to expose outrageously overpriced military spending on items such as a $7,600 coffee maker and a $435 hammer. In 1990, after many successes reforming military spending, POGO decided to expand its mandate and investigate waste, fraud, and abuse throughout the federal government. Since then, POGO investigations have delved into issues involving the nation's national security, contracting oversight, natural resources, nuclear energy, the financial sector, public health, lobbying, and more.

POGO's investigators and journalists take leads and information from insiders and verify the information through investigations using the Freedom of Information Act, interviews, and other fact-finding strategies. The organization then disseminates its findings to the media, Congress, and the public through alerts, statements, studies, and journalistic reports.

On countless occasions, POGO has assisted congressional staffers in pursuing their oversight efforts through organized briefings, testifying in open hearings, training investigators, and providing access to documents and information relevant to congressional inquiries.

A. Whistleblowers and POGO

Known as an organization that champions the rights and protections of whistleblowers, POGO works directly with both individual whistleblowers (as they work with Congress) and with congressional offices across the political spectrum.

In 1986, POGO championed Republican Senator from Iowa Chuck Grassley's False Claims Act, the most effective tool to fight fraud against the government, and one that protects the whistleblowers who come forward. In 1987, POGO helped defend Air Force whistleblower A. Ernest Fitzgerald in his First

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Amendment fight against a government-wide gag order. In 1989, POGO and the Government Accountability Project published *Courage Without Martyrdom: A Survival Guide for Whistleblowers*.

After more than a decade of advocacy, in 2012 POGO helped usher in a new wave of protections for whistleblowers with the Whistleblower Protection Enhancement Act (WPEA). The legislation closed many loopholes and upgraded protections for federal workers who blow the whistle on waste, fraud, abuse, and illegality. Among many other common- sense reforms, the WPEA provided compensatory damages for whistleblowers who prevailed in their Whistleblower Protection Act cases after an administrative hearing and made it easier for the Office of Special Counsel (OSC) to discipline those responsible for illegal retaliation.

Unfortunately, loopholes remained in the final WPEA text. POGO was instrumental in urging President Barak Obama to take executive action to close them. In response, the president issued a landmark directive, Presidential Policy Directive 19, extending varying whistleblower protections to many of the federal employees and contractors in the intelligence and national security community for the first time.

POGO also helped inform legislation that would improve whistleblower protections at specific agencies. The Department of Veterans Affairs (VA) is one such agency. After the 2014 VA scandal broke (see our case study later in this piece), it became clear that the VA had a culture that was decidedly anti-whistleblower and that culture played a significant role in how widely and deeply the department's problems extended. POGO began working with congressional offices to develop legislation to reverse the culture of retaliation at the VA. Our staff was invited multiple times to testify before Congress on this problem and the legislative proposals to fix it—but the real work was done behind the scenes, hammering out language with congressional offices and with The Office of Special Counsel (OSC), an independent federal investigative and prosecutorial agency dedicated to protecting federal employees from reprisal for blowing the whistle. OSC had vast experience on the issue, having worked for years on VA cases, investigating claims of retaliation and securing favorable actions for many of the VA whistleblowers who came forward.

POGO has also worked to close loopholes in current whistleblower protections within the FBI, the intelligence community (IC), and the military.

B. The State of Whistleblower Protection Laws Today

Whistleblowers are a tremendous asset to the American public, but Congress has passed piecemeal protections for them. The result is a patchwork of wildly uneven protections depending on factors such as which agency the whistleblower works for, his or her employment status, and the kind of wrongdoing he or she is exposing. Some whistleblowers receive not only protection but financial incentives to blow the whistle; others receive no protection at all. The disparity can only be understood by looking at some of the differing laws.

The False Claims Act (FCA) is in many ways the gold standard of whistleblower incentives and protections. The FCA prohibits a person or entity from fraudulently or dishonestly obtaining or using government funds. It also allows individuals or entities to bring a civil claim, in the name of the government, against contractors defrauding American taxpayers. If the claim is successful, the individual or entity can receive up to 30 percent of the recovery. The law incentivizes whistleblowing through financial awards and strong protections against retaliation. Any employee who is discharged, demoted, harassed, or otherwise discriminated against because of an FCA disclosure is entitled to reinstatement, double back pay, and compensation for litigation costs and reasonable attorney's fees. However, the entitlement is limited to claims involving fraud perpetrated by a person or entity receiving federal funds.

There also are extremely narrow protections for employees of entities with public contracts under 41 U.S.C. § 4705. This law is fairly flimsy, lacking fundamental policies for an effective whistleblower statute. It only protects disclosures of "substantial" violations of law relating to the contract—it does not protect disclosures of gross mismanagement, gross waste, substantial danger to health and safety, or violations of law, rule, or regulations. This law also does not specifically protect disclosures made internally to one's supervisor or to another employee with the authority to investigate or resolve the matter. Because whistleblowers report internally first, it is incredibly important to clear the path to report to a supervisor.

This is true whether the case involves contractors or federal employees.

One important agency where federal employees are not protected when they make disclosures to their direct supervisors is the FBI. Unlike any other federal law enforcement agency, the FBI only allows employees to report wrongdoing to a small number of senior officials. Even after this problem was highlighted in a Government Accountability Office report, the Department of Justice said it did not plan to expand the number of people FBI whistleblowers can report wrongdoing to because that might increase the number of complaints. Bipartisan legislation that would fix this and other problems with FBI whistleblower protections has been introduced.

Another key area of whistleblower law focuses on members of the military and contractors who make up a growing percentage of the workforce at the Department of Defense (DOD). Recent improvements to the Military Whistleblower Protection Act include extending the time limit to report misconduct from a short 60 days to one year, which is more in line with what other federal workers and contractors are given and allows potential whistleblowers sufficient time to find counsel. It also requires that the service secretary take action within 30 days of receiving a complaint, and that a whistleblower may file a reprisal complaint with the DOD inspector general. The military must support whistleblowers through the difficult investigatory process, rather than leaving them to navigate that process on their own, as was the case previously. Another important provision of the law is that whistleblowers and victims of retaliation for having reported sexual assault are now guaranteed an administrative due-process hearing.

However, military whistleblowers still face one of the hardest fights in proving they were retaliated against for blowing the whistle. This is because the burden of proof is on the whistleblower to prove retaliation, rather than on the agency to prove its absence—the opposite of the current standard in every other whistleblower statute.

Since 2008, DOD contractors have had whistleblower rights enforceable through district court jury trials. When enacted, these protections extended to contractors at the Defense Intelligence Agency and the National Security Agency (NSA). In 2009, best-practice rights were enacted for all government contract employees paid with stimulus funds, including other IC agencies like the CIA.

The whistleblower shield was so successful in deterring taxpayer waste and contractor abuse that the Council of the Inspectors General on Integrity and Efficiency proposed permanent expansion for all government contractors. In 2012, Sen. Claire McCaskill, D-Mo., introduced a whistleblower protection amendment for all government contractors, and it won bipartisan Senate approval in the fiscal year 2013 National Defense Authorization Act.

However, during the closing conference committee negotiations, whistleblower rights were extended only to contractors outside of the intelligence community. Pre-existing rights for IC contractors were removed, despite a proven track record that the law was working as intended and did not produce any adverse impacts on national security during its five-year lifespan. Every year since, Senator McCaskill has

introduced a bill to reinstate whistleblower protections for intelligence community contractors, but as of this writing she has been unsuccessful in getting it passed.

DOD contractors also lack some basic protections found elsewhere, including in private-sector whistleblower laws. DOD contractors' disclosures are not protected from abuse of authority, for instance. The Inspector General (IG) is not required to recommend relief if the whistleblower meets the burdens of proof, a legal standard found in every whistleblower law since 1989. And there is no provision for a genuine remedy of compensatory damages to "make whole" DOD contractor whistleblowers who have been found to have endured reprisal for protected disclosures.

Despite these uneven protections, many federal employees are able to seek redress outside of their internal whistleblower review channels by going to OSC or the Merit Systems Protection Board (MSPB). The Merit Systems Protection Board is an independent, quasi-judicial executive branch agency that serves as the guardian of federal merit systems. MSPB hears federal employee appeals of alleged prohibited personnel practices, or retaliation, including those resulting from the employee's whistleblowing.

Whistleblower protections in many places are stronger than ever, but for others the laws have not changed, and for still others the laws have only gotten worse.

C. Case Study: POGO and the VA Corruption Scandal

The VA case mentioned earlier initially came to light when a brave VA doctor revealed long wait times at a veteran hospital in Arizona, and a scheme by VA managers to hide data on those wait times and the deaths they may have caused. Immediately POGO suspected there would be more VA whistleblowers with similar stories to tell. POGO volunteered to provide support to any VA staff who wanted to come forward with information about the agency's wrongdoing.

The response was overwhelming—nearly 800 current and former VA employees and veterans contacted POGO in the first three months. POGO reviewed each of the submissions, which together indicated that concerns about the VA went beyond long or falsified wait times for medical appointments, to include many other issues affecting the quality of health care services at VA hospitals. There were allegations of errors and delays in the delivery of medications to patients, on-call physicians failing or refusing to report to the hospital during medical emergencies, and several cases of blatant patient neglect.

The submissions also indicated a culture of fear at the VA: agency employees across the country worried they would face repercussions if they dared to raise concerns about their workplace. POGO found this culture was pervasive throughout the VA system, and over the next two years worked with countless whistleblowers, members of Congress, congressional committee staff, and agencies like OSC to try to expose and eliminate this toxic climate.

POGO also took an in-depth look at problems within the VA bureaucracy that sometimes prevented veterans from getting the benefits they needed and deserved. For example, in 2005 Steven P. Massong went to a VA hospital in Loma Linda, California, for a straightforward vascular procedure on his left leg. He ended up with much of his right foot and scrotum removed due to a complication during surgery. In the years that followed, Massong's fruitless attempt to receive related VA disability benefits shows how claims can get tied up in a seemingly endless bureaucratic cycle. His story spotlighted how federal law limits malpractice suits against the VA, insulating the agency from an important source of accountability.

The call to VA whistleblowers reached not only VA employees but veterans themselves. Several vets contacted POGO to say that they were concerned about their quality of care but were scared to say

anything to VA management or even hospital patient advocates for fear that their access to care would be cut off. The culture of fear and retaliation affected them as well.

For all the people who agreed to speak to POGO on the record, there were many more who told their story only on the condition of anonymity. When VA insiders contacted POGO anonymously, it was impossible to look into their claims. However, their comments contributed to a disturbing picture.

For example, an anonymous commenter from Florida wrote: “The working environment is [so] full of fear and intimidation that very few employees will advocate for the Veteran. I have and so I am treated very badly.”

Their fears were well-founded. VA employees who came forward later reported retaliation from their managers: being placed on administrative leave, being fired, and even having their personal medical records accessed and used against them. Because so many VA employees are veterans themselves, this was a particularly cruel form of retaliation.

Just two weeks after POGO put out the call to VA whistleblowers, POGO received an unexpected response from the VA Office of Inspector General (OIG). An administrative subpoena arrived at the front door of POGO’s offices from the OIG demanding: “All records that POGO has received from current or former employees of the Department of Veterans

Affairs, and other individuals or entities relating in any way to wait-times, access to care, and/or patient scheduling issues at the Phoenix, Arizona VA Healthcare System and any other VA medical facility.”

POGO had previously offered to work with the OIG to share general trends and information without revealing whistleblower names and contact information. The subpoena appeared to suggest the OIG was more interested in the identities of VA whistleblowers than in the problems they were trying to help fix.

At the time, the VA did not have a permanent, Senate-confirmed IG leading its work. The post was held by an appointed “acting” official. POGO’s work on IG offices has shown that when an agency does not have a permanent IG, accountability is reduced and abuses can proceed unchecked. Acting IGs are generally less effective than permanent IGs because their temporary status impedes their ability to provide leadership and set long-term priorities. And unlike permanent IGs, acting IGs do not go through a vetting process, raising concerns about their independence and effectiveness. Two years later, in April 2016, the Senate finally confirmed a new permanent IG for the VA.

POGO declined to comply with the VA OIG subpoena, citing the First Amendment freedom of speech, freedom of press and freedom of association rights. But it was not until over a year later, in the summer of 2015, that the VA OIG—under the leadership of a new acting IG but still without a permanent head—withdrew the subpoena. The office’s change in tune was due in large part to the support of members of Congress, a few of whom specifically and pointedly requested that the VA OIG withdraw the subpoena.

POGO worked closely with the House Committee on Veterans Affairs, which sought to assist veterans who came forward with specific care complaints. POGO also worked with members and their offices in their efforts to reform the VA legislatively. POGO investigators testified before Senator Mark Kirk, R-Ill., chairman of the Senate Committee on Appropriations Subcommittee on Military Construction, Veterans Affairs, and Related Agencies, several times in support of his legislation to hold retaliatory VA managers accountable.

POGO also worked closely with OSC. After the initial media reports on VA problems in 2014, their office saw a huge spike in disclosures from VA whistleblowers. In 2014 and 2015 alone, the OSC

achieved favorable actions for 116 VA whistleblowers. But even two years later, there are still many VA cases pending at OSC, with some involving the underlying disclosures and claims of retaliation. The percentage of VA cases at OSC remains among the highest of any government agency.

POGO continues to work with VA whistleblowers, the OSC, and members of Congress to expose ongoing problems at VA facilities and improve patient care for veterans. Slowly, the agency is cleaning up its act and addressing those problems. But were it not for whistleblowers who bravely came forward to share their stories, none of us would be aware of the extent of the problems at the VA.

The House Committee on Government Reform Investigation of the FBI's Use of Confidential Informants

By Alissa M. Dolan[1]

In early 2001, the House Committee on Government Reform initiated an investigation of corruption in the Boston Regional Office of the Federal Bureau of Investigation (FBI) related to the use of confidential informants. As noted by the Department of Justice (DOJ) Office of the Inspector General (OIG), "[i]nformants have become integral to the success of many FBI investigations of organized crime, public corruption, the drug trade, counterterrorism, and other initiatives."[2] While the committee's investigation spanned decades of FBI practices, it focused particularly on the use of alleged murderers as informants in the Boston Regional Office, including notorious figure James "Whitey" Bulger. The committee deemed the affair to be "one of the greatest failures in federal law enforcement history."[3]

A. Investigation Background and the Committee's Findings

The FBI's informant program goes back to the J. Edgar Hoover days, beginning with the establishment in 1961 of the Top Echelon Criminal Information Program (Top Echelon), in which special agents in charge were instructed to "develop particularly qualified, live sources within the upper echelon" of organized crime.[4] The program was later replaced with the Criminal Informant Program. In addition to the informant's program, the FBI utilized electronic surveillance devices to capture recordings of conversations between organized crime leaders, including informants. For example, in 1962, the FBI placed electronic surveillance devices in the headquarters of organized crime leader Raymond Patriarca. In the next years, the FBI attempted to court both Vincent James "Jimmy" Flemmi and Stephen Flemmi to be Top Echelon informants. The Flemmi brothers were heavily involved in organized crime in Boston.

Through its electronic surveillance, the FBI knew that Jimmy Flemmi and another gang member, Joseph Barboza, asked Patriarca for permission to kill Edward "Teddy" Deegan. Following the murder, an FBI agent also learned from a different informant that Jimmy Flemmi had admitted to being one of the killers. Despite this knowledge, the FBI continued to develop Flemmi as an informant. Six men were tried for Deegan's murder. Following an arrest on an unrelated weapons charge, Barboza was developed, with the assistance of Stephen Flemmi, as a cooperative witness for the trial. However, he informed FBI agents that "he would not provide information that would allow Jimmy Flemmi to 'fry,'" suggesting that he would provide false testimony to protect one of the guilty parties. [5] It appears as though nothing was done to prevent his false testimony, and the prosecution was not advised on the limitations of his testimony.[6] That testimony was contradicted by evidence in the FBI's possession, including evidence culled from the FBI's electronic surveillance.[7] None of this evidence was furnished to the prosecution or defendants. All six defendants were convicted. The committee determined that four of those individuals "did not commit

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[1] Legislative attorney, Congressional Research Service, Library of Congress. The views expressed herein are those of the author and are not those of the Congressional Research Service or the Library of Congress.

[2] U.S. Dep't of Justice, Off. of the Inspector General, The Federal Bureau of Investigation's Compliance with the Attorney General's Investigative Guidelines 65 (2005), available at https://oig.justice.gov/special/0509/final.pef [hereinafter 2005 OIG Report].

[3] H. Comm. Gov. Reform, Everything Secret Degenerates: The FBI's Use of Murderers as Informants, 1 H.R. Rep. No. 108-414 (2003), at 10.

[4] 2005 OIG Report, *supra* note 2, at 64-65.

[5] 1 H.R. Rep. No. 108-414 (2003), at 3.

[6] *Id.*

[7] *Id.*

the crime for which they were convicted."[8] Following the exposure of the withheld evidence decades later, the original prosecutor declared that he would not have indicted the defendants if he had the same information as the FBI.[9] Barboza went on to be the first participant in the Witness Protection Program.[10]

During his stint in witness protection, "affirmative steps were taken [by the FBI] to help him escape the consequences of a murder he committed in California."[11]

Despite knowledge of his involvement in the Deegan murder, Jimmy Flemmi was taken on as a Top Echelon informant.[12] Hoover himself was informed of Jimmy Flemmi's status as an informant and the fact that he had likely committed seven murders.[13] The FBI determined that "'he is going to continue to commit murder[,]' but 'the informant's potential outweighs the risk involved.'"[14] The committee concluded that "there was no evidence that anyone expressed concern that Jimmy Flemmi would kill people while serving as a government informant."[15] Jimmy was later dropped as an informant after being charged by state authorities with assault with a dangerous weapon with the intent to murder. The FBI decided that given his status as a fugitive, "any contacts with him might prove to be difficult and embarrassing."[16]

However, his brother Stephen Flemmi continued to serve as an informant for decades to come. Stephen and Whitey Bulger were leaders of Boston's "Winter Hill Gang."[17] Bulger was developed as an informant by Special Agent John Connolly, who then developed an "improper relationship" with Bulger and other informants.[18] Bulger and Flemmi were allegedly shielded from prosecution for a number of serious violent crimes in exchange for their cooperation in collecting evidence against La Cosa Nostra in Boston.[19] The committee concluded that the evidence it reviewed "leaves no doubt that at least some law enforcement personnel… were well aware that federal informants were committing murders," including 19 murders allegedly committed by Bulger and Flemmi while they were informants.[20] Special Agent Connolly was convicted of obstruction of justice, in part for tipping off Bulger to a forthcoming indictment, which allowed him to escape and remain on the lam for 16 years. Bulger was finally captured

[8] *Id.* at 2.

[9] *Id.* at 4.

[10] *Id*. at 13.

[11] *Id.* at 4.

[12] *Id*. at 5.

[13] *Id*. at 16.

[14] *Id*. (citing Memorandum from Special Agent in Charge, Boston FBI Field Office, to J. Edgar Hoover, Director, FBI (June 9, 1965) (Exhibit 102)).

[15] *Id.* at 5

[16] *Id.* at 17 (citing Memorandum from Special Agent in Charge, Boston FBI Field Office, to J. Edgar Hoover, Director, FBI (Sept. 15, 1965) (Exhibit 109)).

[17] *Id.* at 89.

[18] *Id*. at 2.

[19] 2005 OIG Report, *supra* note 2, at 71.

[20] H.R. Rep. No. 108-414 (2003), at 2, 5.

in Santa Monica, California, in 2011.[21] Connolly was also accused of leaking confidential law enforcement information to his informants that led to the murders of three witnesses.[22]

In summary, the committee determined that the FBI knowingly used murderers as informants and then took actions to protect those informants despite their involvement in future criminal activity. It allegedly consciously chose not to prosecute these informants to protect their relationship. It also reportedly frustrated the efforts of other law enforcement agencies to hold these informants accountable for their actions. The committee determined that criminal investigations in at least seven states "were frustrated or compromised" by federal law enforcement officials in order to protect informants.[23] The committee concluded that its "investigation make[s] clear that the FBI must improve management of its informant programs to ensure that agents are not corrupted."[24]

B. The Committee's Investigation and the Obstacles It Faced: 2001-2004

While the committee was ultimately able to uncover a wealth of information about the dysfunction within the Boston Regional Office and the general lack of FBI oversight of its informant program, its investigation encountered several roadblocks along the way. The committee described the FBI's involvement in the investigation as "more adversarial than collegial"[25] and repeatedly encountered an "institutional reluctance to accept oversight."[26] The committee requested tapes and documents related to the electronic surveillance of Patriarca, U.S. attorney records on the Deegan murder, and other categories of relevant documents. While DOJ responded to these document requests and assured the committee on multiple occasions that all responsive documents had been provided, throughout its investigation the committee discovered other responsive documents within DOJ's possession that were not disclosed.[27] The committee later summarized the investigation:

Executive privilege was claimed over certain documents: redactions were used in such a way that it was difficult to understand the significance of information, and some categories of documents that should have been turned over to Congress were withheld. Indeed, the Committee was left with the general sense that the specter of a subpoena or the threat of compelled testimony was necessary to make any progress at all.[28]

The committee resorted to issuing a subpoena on September 6, 2001, for prosecution and declination memoranda authored by DOJ related to confidential informants.[29] Those documents, "averaging twenty-two years in age, would show the extent to which the prosecuting attorneys in the Justice Department

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[21] *Id.* at 109; Adam Nagourney, *Whitey Bulger is Arrested in California*, N.Y. Times (June 23, 2011), http://www.nytimes.com/2011/06/23/us/23bulger. html?_r=0.

[22] Fox Butterfield, *Trial Ending for Boston F.B.I. Agent Accused of Mob Ties*, N.Y. Times (May 24, 2002), http://www.nytimes.com/2002/05/24/us/trial- ending-for-boston-fbi-agent-accused-of-mob-ties.html.

[23] 1 H.R. Rep. No. 108-414 (2003), at 5.

[24] *Id.* at 2.

[25] *Id*. at 125

[26] *Id*. at 126.

[27] *Id*. at 126-128.

[28] *Id*. at 126.

[29] *Id*. at 129.

knew of the FBI's relationship with the informants."[30] DOJ "made it clear" that it would not comply with the subpoena and provide the requested documents.[31] DOJ and White House officials objected to providing the committee with deliberative, prosecutorial documents.

The committee scheduled a hearing for September 13, 2001, in which it hoped DOJ would explain its position on noncompliance.[32] However, the hearing and the investigation generally were put on hold for several months following the terrorist attacks on September 11, 2001.

When the committee returned to its investigation in December 2001, President George W. Bush formally invoked executive privilege, for the first time in his presidency, and instructed DOJ not to comply with the outstanding subpoena.[33] The documents withheld were described by a DOJ official at a committee hearing as a "small group of documents, namely, internal deliberative memoranda, which outline the specific advice to the decisionmakers by the line attorneys who handle the cases. We have also declined to provide memoranda that reveal confidential advice to the Attorney General or other high ranking Department officials on particular criminal matters."[34] The president's letter to the attorney general concluded that disclosure to the committee would be "inconsistent with the constitutional doctrine of separation of powers and the department's law enforcement responsibilities…"[35] The president further argued that "[d]isclosure to Congress of confidential advice to the Attorney General regarding … confidential recommendations to Department of Justice officials regarding whether to bring criminal charges would inhibit the candor necessary to the effectiveness of the deliberative processes by which the Department makes prosecutorial decisions. Moreover, I am concerned that congressional access to prosecutorial decision-making documents of this kind threatens to politicize the criminal justice process."[36]

In its December 2001 hearing, DOJ officials argued that the assertion of executive privilege and its general refusal to provide these prosecutorial memoranda were "consistent with longstanding Department policy…"[37] White House Counsel Gonzales elaborated on this policy in a January 2002 letter, stating:

"Absent unusual circumstances, the Executive Branch has traditionally protected those highly sensitive deliberative documents against public or congressional disclosure. This traditional Executive Branch practice is based on the compelling need to protect both the candor of the deliberative processes by which the Department of Justice decides to prosecute individuals and the privacy interests and reputations of uncharged individuals named in such documents."[38]

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[30] Charles Tiefer, *"The Law": President Bush's First Executive Privilege Claim: The FBI/Boston Investigation*, 31 Pres. Studies Quarterly 201, 202 (2003).

[31] 1 H.R. Rep. No. 108-414 (2003), at 129.

[32] *Id*. at 130.

[33] *Id*.

[34] 1 *Investigation into Allegations of Justice Department Misconduct in New England: Hearings before the H. Comm. on Gov't Reform*, 107th Cong. 380 (2001) [hereinafter *1 New England Hearings*].

[35] Memorandum on the Congressional Subpoena for Executive Branch Documents, 2001 Pub. Papers 1509 (Dec. 12, 2001) [hereinafter Subpoena Memorandum], https://www.gpo.gov/fdsys/pkg/WCPD-2001-12-17/html/WCPD-2001-12-17-Pg1783.htm.

[36] *Id.*

[37] 1 H.R. Rep. No. 108-414 (2003), at 131; *1 New England Hearings*, *supra* note 34, at 380.

[38] 1 H.R. Rep. No. 108-414 (2003), at 131.

Apparently, the executive branch did not believe that the committee's investigation qualified as "unusual circumstances." During testimony, a DOJ official argued that the agency's willingness to provide the committee with information about its *final* prosecutorial decisions allowed Congress to carry out its constitutional responsibilities, insinuating that the deliberative process was unnecessary to the inquiry.[39]

The committee strenuously disagreed with the portrayal of the history of production of sensitive law enforcement documents to congressional committees.[40] It held a hearing in February 2002 for the purpose of demonstrating the persistent history of DOJ providing similar deliberative documents to Congress as part of its oversight duties. DOJ notified the committee before the hearing that it could not furnish a catalog of all instances in which deliberative documents had been disclosed to Congress, conceding, at least in part, that the department's aforementioned historical practice was not uniformly applied throughout the years.[41] Experts testified to over 30 instances since 1920 in which DOJ disclosed these kinds of materials, including in such investigations as ABSCAM,[42] [43] [44]

The stalemate between the committee and DOJ broke shortly after this hearing. The committee announced a forthcoming hearing in which it would receive testimony from Judge Edward Harrington, who formerly worked at DOJ. Following the announcement of Judge Harrington as a witness, DOJ notified the committee that he had authored a memorandum related to the Deegan murder case, one of 10 prosecutorial memoranda being withheld.[45] During the course of DOJ's investigation of confidential informants, it interviewed Judge Harrington and showed this memorandum to him but continued to refuse to produce it to the committee.[46] The chairman wrote to DOJ once again demanding access to this document and the nine other withheld memoranda, noting that DOJ had admitted the importance of the Harrington memorandum by disclosing its existence to the committee.[47] The chairman then criticized the agency for not admitting that the other nine documents likely held information similarly relevant to the investigation.[48] Following this demand, DOJ agreed to provide the Harrington memorandum to the committee before his scheduled testimony. DOJ justified this disclosure by claiming the committee had "demonstrated a particular and critical need for access to the one Harrington memorandum sufficient to satisfy constitutional standards" for disclosure.[49] Both in its hearings and final report, the committee expressed confusion and disbelief as to how its letter demanding the Harrington memorandum

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[39] *1 New England Hearings*, *supra* note 34, at 381.

[40] 1 H.R. Rep. No. 108-414 (2003), at 131-32.

[41] *Id*. at 132.

[42] The Senate established a select committee to investigate ABSCAM, an FBI sting operation related to public corruption that resulted in the convictions of one senator and six members of the House of Representatives. The committee focused its investigation on the FBI's undercover law enforcement activities. *See* Final Rept. of the S. Select Comm. to Study Undercover Activities of Components of the Dep't of Just., S. Rep. No. 97-682 (1982).

[44] *1 New England Hearings*, *supra* note 34, at 520-21; *see also id.* at 562-65.

[45] 1 H.R. Rep. No. 108-414 (2003), at 132-33.

[46] 2 *Investigation into Allegations of Justice Department Misconduct in New England: Hearings before the H. Comm. on Gov't Reform*, 107th Cong. 160-1 (2001) [hereinafter 2 *New England Hearings*].

[47] *Id*. at 133.

[48] *Id.*

[49] *Id*.

communicated a new particularized need not present when the document was subpoenaed earlier in the investigation.[50]

Following this disclosure, in committee testimony on February 14 a DOJ official offered to meet with the committee regarding its interest in the remaining nine withheld memoranda, but continued to defend DOJ's use of the Harrington memorandum in its internal investigation and refusal to disclose it promptly to Congress.[51] In response, the committee chairman threatened to schedule a bipartisan vote to hold the administration in contempt of Congress for its refusal to cooperate expeditiously with demands for the memoranda.[52] On February 26, 2002, committee staff met with then Assistant Attorney General Michael Chertoff to discuss these memoranda.[53] He described their contents and staff determined that five of the nine documents were relevant to the committee's investigation. Chertoff then "agreed to provide the Committee with access to the remaining five memoranda."[54] These documents provided additional information to the committee on the Deegan murder prosecution and the prosecutors' evaluation of the legitimacy of Barboza as a witness. A 1978 memorandum provided "extremely important information about how prosecutorial discretion was exercised to benefit FBI informants" Bulger and Stephen Flemmi.[55] This information called into question a 1997 DOJ Office of Professional Responsibility investigation of the use of informants, which concluded that DOJ had not exercised prosecutorial discretion on behalf of Bulger or Flemmi.[56]

C. The Legal Basis for the Assertion of Executive Privilege

It is notable that the disagreement between the committee and DOJ on the propriety of disclosing these prosecutorial memoranda centered on debates over DOJ's historical policy and specific instances in which similar documents had been disclosed. By focusing on these historical practices, the confrontation underscored the then lack of available case law to assist in assessing the validity of an executive privilege claim in the congressional oversight context. Since the committee's investigation ended in 2004, lower federal courts have decided two cases that shed additional light on the validity of the executive privilege claim that the administration eventually abandoned in the informant investigation.[57]

In 2008, the U.S. District Court for the District of Columbia ruled on another executive privilege claim of the Bush administration in *Committee on the Judiciary v. Miers*. That case arose from a congressional investigation of the removal of a number of U.S. attorneys. The House Judiciary Committee sought testimony and documents regarding the White House's involvement in the removal decision to determine whether improper political considerations motivated the move.[58] The White House initially offered to make certain officials available for testimony, but testimony would be limited in scope to discussions between the White House and third parties (i.e. not internal White House deliberations) and could not be

[50] *Id*. at 159-60.

[51] *Id.* at 158.

[52] *Id*. at 161, 660.

[53] *Id*. at 134.

[54] *Id.*

[55] *Id.* at 135.

[56] *Id.*

[57] Committee on the Judiciary v. Miers, 558 F. Supp. 2d 53 (2008); Committee on Oversight and Gov't Reform v. Lynch, 156 F. Supp. 3d 101 (D.D.C. 2016). Prior to the confirmation of Loretta Lynch as attorney general in 2015, this case was styled as *Committee on Oversight and Government Reform v. Holder*.

[58] *See generally* H.R. Rep. No. 110-423 (2007).

recorded or transcribed.[59] The committee rejected this accommodation as insufficient and ultimately issued subpoenas to Harriet Miers, the former White House counsel, for testimony and documents, and Joshua Bolten, the White House Chief of Staff, for documents.[60] In response, President Bush asserted executive privilege.[61] In the ensuing civil case, the Bush administration argued that close presidential advisers, like Miers and Bolten, were absolutely immune from congressional compulsory process when executive privilege was asserted.[62]

The *Miers* court rejected the executive's argument and concluded that "the asserted absolute immunity claim here is entirely unsupported by existing case law."[63] Since executive privilege was not an absolute privilege, an executive official could not simply refuse to comply with a subpoena by, for example, refusing to appear before a committee to provide testimony.[64] Instead, the privilege could be asserted on a question-by-question basis rather than in a blanket fashion.

Furthermore, given the qualified nature of the privilege, it could be overcome by a sufficient showing of need by a committee.[65]

The case represented a victory for Congress in the court's rejection of the argument that executive privilege was an absolute privilege. However, the court also imposed a potential limitation on Congress's ability to force compliance with a subpoena. Without much explanation, the court suggested that presidential advisors may enjoy absolute immunity when "national security or foreign affairs form the basis for the Executive's assertion of privilege."[66] Nevertheless, it would appear that this case could have bolstered the committee's response to DOJ's recalcitrance during the course of the informant investigation. DOJ made repeated claims about the need to preserve both executive branch decision-making, untainted by the potential chilling effect of concerns over congressional disclosure, and the separation of powers generally in defense of its refusal to provide the requested documents.[67] However, it seems unlikely that it could have argued that the protection of decades-old prosecutorial memoranda regarding domestic organized crime players was a matter of national security.

Therefore, at the most, DOJ's privilege would have been qualified and could have been overcome by a sufficient showing of need. Despite the potential limitation on Congress's powers of compulsion, the national security/foreign affairs exception has not been further litigated.

While *Miers* may be appropriately recorded in Congress's victory column, the other recent case involving an assertion of executive privilege might be more accurately described as a problematic draw. In *Committee on Oversight and Government Reform v. Lynch*, the U.S. District Court for the District of

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[59] *Miers*, 558 F. Supp. 2d at 60.

[60] H.R. Rep. No. 110-423, at 4-6.

[61] Letter from Fred Fielding, Counsel to the President, to Chairman Leahy and Chairman Conyers (June 28, 2007), available at https://georgewbush-whitehouse. archives.gov/news/releases/2007/06/20070628-2.html.

[62] *Miers*, 558 F. Supp. 2d at 56.

[63] *Id.* at 99.

[64] *Id.* at 102.

[65] *Id*. at 106.

[66] *Id.*

[67] *See* Subpoena Memorandum, *supra* note 35.

Columbia again confronted a question of executive privilege in a congressional investigation.[68] This case arose from a committee investigation of Operation Fast and Furious, an ill-fated "gun-walking" operation led by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), a subagency of DOJ.[69] At the outset of the investigation, DOJ sent a letter to the committee denying that the ATF had knowledge that the operation involved sales of assault weapons to straw purchasers, who then transported the firearms to Mexico.[70]

Ten months later, DOJ retracted this letter, at which point the committee's investigation shifted to determining how and why DOJ had provided false information to the committee.[71] The committee issued subpoenas for documents created after the retracted letter was submitted and related to DOJ's response to the committee's investigation.[72] The attorney general refused to turn over certain documents and the president formally asserted executive privilege several months later, on the eve of a contempt vote in the committee.[73] The executive branch put forth the same arguments here as it had in the informant investigation: Compelled disclosure of deliberative DOJ documents "would inhibit the candor of such Executive Branch deliberations in the future" and "would be inconsistent with the separation of powers established in the Constitution."[74]

The committee filed a civil suit to enforce the subpoena.[75] One of the central issues in the case was whether the president could rely on a deliberative process executive privilege assertion to withhold documents subject to a subpoena. The D.C. Circuit previously addressed different dimensions of executive privilege in the 1997 case *In re Sealed Case (Espy)*, arising in the context of a grand jury subpoena.[76] There, the court drew a distinction between two different kinds of executive privilege: the deliberative process privilege and the presidential communications privilege. The court characterized deliberative process as a common law privilege, which required a lower threshold of need to overcome and may "disappear[] altogether" when government misconduct has occurred.[77] *Lynch* was the first case to directly address the validity of a deliberative process privilege claim in a congressional investigation. The committee argued, based on language in *Espy*, that the deliberative process privilege is a wholly common law privilege and must be distinguished from other constitutionally based executive privilege assertions.[78] Given the committee's constitutionally based oversight authority, it contended that DOJ

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[68] *See generally Lynch*, 156 F. Supp. 3d 101.

[69] *See* H.R. Rep. No. 112-546 (2012).

[70] Staff of H. Comm. on Oversight and Gov't Reform and S. Comm. on the Judiciary, 112th Cong., Fast and Furious: The Anatomy of a Failed Operation Pt. 1 at 139 (2012).

[71] Letter from Deputy Attorney General James Cole to Chairman Darrell Issa and Ranking Member Charles Grassley (December 2, 2011), available at http:// oversight.house.gov/wp-content/uploads/2012/06/Feb-4-Dec-2-letters.pdf.

[72] H.R. Rep. No. 112-546, at 14-21.

[73] Letter from Deputy Attorney General James Cole to Chairman Darrell Issa (June 20, 2012), available at http://oversight.house.gov/wp-content/uploads/2012/08/June-20-2012-Letter-from-Deputy-Attorney-General-Cole-to-Rep.-Darrell-Issa-with-attachment.pdf.

[74] *Id*.

[75] H.R. Res. 706, 112th Cong. (2012).

[76] In re Sealed Case (Espy), 121 F.3d 729 (D.C. Cir. 1997).

[77] *Id*. at 746.

[78] Plaintiff's Motion for Summary Judgment, Committee on Oversight and Gov't Reform v. Lynch, No. 12-1332 at 25-33 (D.D.C. Dec. 16, 2013).

could not rely on the deliberative process privilege as grounds for withholding subpoenaed documents.[79] In contrast, DOJ argued that the deliberative process privilege is derived from the Constitution and, therefore, was a valid rationale for withholding documents that were subject to a congressional subpoena.[80]

The court rejected the committee's characterization of the privilege. It "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."[81] *Lynch* was the first court to specifically rule that the deliberative process privilege could be validly asserted in the face of a congressional subpoena. While ultimately the *Lynch* court ordered DOJ to provide all of the withheld documents at issue in the complaint to the committee,[82] the case could be accurately described as one in which Congress won the battle and lost the war. The court's conclusion that the deliberative process privilege has constitutional roots bolsters the legitimacy of the executive branch's historical practice of asserting the privilege in response to congressional subpoenas. Federal case law now exists to dispute a committee's claim that deliberative process cannot be used as a shield against a subpoena.

This post-investigation case law demonstrates the danger of looking to the federal courts for resolution of these disputes. While committees have been successful at gaining court orders to compel the production of specific documents, the establishment of court precedent can also diminish Congress's power and leverage in future negotiations with the executive branch.

D. Concluding Thoughts

The committee's continued pressure and pursuit of the documents withheld by DOJ during the confidential informant's investigation resulted in a win for the committee: voluntary disclosure of the withheld documents. It is possible that the committee chairman's public threat to hold the administration in contempt of Congress, and the likelihood that such a vote could receive bipartisan support and pass, tipped the scales in favor of DOJ's ultimate disclosure.[83] It is not clear that such a committee strategy would result in the same disclosure if it were executed today. Recent high-profile confrontations between executive branch agencies and congressional committees have not always ended with such negotiation and accommodation, and the threat of a contempt vote may no longer be much of a threat at all. The Operation Fast and Furious investigation ended not with concessions from DOJ and voluntary disclosure, but rather with protracted and costly litigation. The House voted to hold the attorney general in contempt of Congress. However, unlike in the confidential informant's investigation, this threat and fulfillment of a contempt vote did nothing to deter DOJ from continuing to withhold documents or move the conflict closer to resolution. Ultimately, not only did the Committee on Oversight and Government Reform have to wait nearly three and a half years for an order instructing DOJ to produce withheld documents, but it must also now contend with an adverse ruling on the application of the deliberative process privilege.

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[79] *Id*.

[80] Memorandum in Support of Defendant's Motion for Summary Judgment and in Opposition to Plaintiff 's Motion for Summary Judgment, Committee on Oversight and Gov't Reform v. Lynch, No. 12-1332, at 18-32 (D.D.C. Jan. 21, 2014).

[81] Order [on Plaintiff 's Motion for Summary Judgment], Committee on Oversight and Gov't Reform v. Lynch, No. 12-1332, at 3 (D.D.C. Aug. 20, 2014).

[82] *See Lynch* Merits Opinion, *supra* note 56, at 32.

[83] *See 2 New England Hearings, supra* note 45, at 161, 660 ("So right now we are having our legal staff prepare a contempt citation on this issue. I don't really want to do that and I have told the Justice Department this time and again but if they continue to be recalcitrant and we cannot get cooperation from them to get these documents, I hope everyone on this committee will assist me in getting the support we need in the Congress to move this for- ward.") (statement of Chairman Dan Burton).

While the confidential informant's investigation was successful in asserting Congress's investigatory powers, it is less clear if the investigation had a lasting, positive impact on the FBI policies and behavior it examined. The attorney general has had policies on the books regarding the handling of confidential informants since 1976, following congressional hearings and public scrutiny of the FBI's use of domestic surveillance in the prior decades.[84] These policies were overhauled in 2001 and 2002, in part due to the revelations of misconduct that were the subject of the congressional investigation.[85] These reforms included greater involvement of DOJ prosecutors in deciding whether to register and retain high-risk informants and the creation of a Criminal Informant Review Committee.[86]

Despite these seemingly positive reforms, compliance with the revised attorney general guidelines did not manifest quickly. A 2005 study conducted by the DOJ Office of the Inspector General (OIG) found deficiencies in nearly every level of implementation of the guidelines. The FBI's process for implementing the revised guidelines was "not optimal" and included "inadequate interdivision planning, coordination, and direction." The OIG determined that 87 percent of confidential informant case files it examined evidenced at least one violation of the attorney general guidelines, and field supervisors were frequently not held accountable for such compliance violations.[87] Finally, the OIG "found serious shortcomings in the supervision and administration of the Criminal Informant Program,"[88] which was not adequately supported by FBI headquarters.[89]

In 2006, DOJ created a set of policies on confidential informants that applies to the FBI specifically.[90] These guidelines were reportedly motivated by "an FBI effort to enhance consistency in the use of informants across locations and investigative programs and better align the management of informants with its mission."[91] The new guidelines differed only in minor ways from the attorney general guidelines, relating to the vetting of informants and oversight of informants' illegal activities.[92] Other DOJ subagencies continue to be bound by the attorney general guidelines. Agencies have had varying degrees of success in complying with the requirements. A 2015 study by the DOJ OIG found that the Drug Enforcement Administration's (DEA) confidential informant policies deviated from the attorney general guidelines in significant ways.[93] For example, DEA did not require agents to address specific risk assessment factors as required by the Attorney General's guidelines when writing an initial suitability

[84] U.S. Gov't Accountability Off., GAO-15-807, Confidential Informants: Updates to Policy and Additional Guidance Would Improve Oversight by DOJ and DHS Agencies 2 (2015).

[85] U.S. Dep't of Just., Dep't of Just. Guidelines Regarding the Use of Confidential Informants 135-36 (2001); 2005 OIG Report, *supra* note 2, at 63; Alexandra Natapoff, Snitching: Criminal Informants and the Erosion of American Justice 142 (2009).

[86] 2005 OIG Report, *supra* note 2, at 83.

[87] *Id*. at 2, 4.

[88] *Id*. at 8.

[89] *Id*. at 3, 8.

[90] U.S. Dep't of Just., Attorney General's Guidelines Regarding the Use of FBI Confidential Human Sources (2006).

[91] U.S. Gov't Accountability Off., *supra* note 83, at 2.

[92] *Id*.

[93] Off. of the Inspector General, U.S. Dep't of Just., Audit of the Drug Enforcement Administration's Confidential Source Policies and Oversight of Higher-Risk Confidential Sources ii (2015), available at https://web.archive.org/web/20210519235521/https://www.oversight.gov/sites/default/files/oig-reports/a1528.pdf.

assessment, a preliminary step in establishing a confidential informant.[94] A Government Accountability Office report published several months later discussed similar concerns with DEA compliance.[95]

Several of these deficiencies speak directly to the concerns motivating the committee's investigation: the dangers of developing high-risk confidential informants and the oversight needed to prevent informants from freely committing crimes with the tacit approval of law enforcement. These enduring deficiencies may speak to the need for and importance of consistent and continuing congressional oversight.

[94] *See id.*, Executive Summary.

[95] U.S. Gov't Accountability Off., *supra* note 83, at 11-9.

Investigating Iran-Contra

Louis Fisher[1]

Early in the 1980s, the Reagan administration initiated a supposedly secret war against the Sandinista government in Nicaragua. In 1981 and 1982 the United States had provided covert assistance to the Contra rebels, but the operation was too large to remain hidden. Congress, the executive branch and the courts would eventually spend a decade dealing with what became known as the Iran-Contra affair. At issue throughout was the scope of presidential power over foreign affairs and the extent to which it could be controlled by Congress.

A. Statutory Limitations

By December 1982, Rep. Tom Harkin, D-Iowa, had sufficient information to introduce legislation designed to deny funds to the CIA and the Defense Department to furnish any military assistance to groups and individuals in Nicaragua.[2] He was able to point to various articles in newspapers and national magazines that described military activities in Nicaragua. During debate on Harkin's amendment, Rep. Edward Boland, D-Mass., disclosed that the House Intelligence Committee had already adopted restrictive language in a classified annex to the intelligence authorization bill. No funds authorized in the bill could be used "to overthrow the Government of Nicaragua or to provoke a military exchange between Nicaragua and Honduras."[3] Congress then enacted language prohibiting the CIA or the Defense Department from furnishing military equipment, military training or advice, or any other support for military activities "to any group or individual, not part of a country's armed forces, for the purpose of overthrowing the Government of Nicaragua or provoking a military exchange between Nicaragua and Honduras."[4]

These legislative restrictions proved ineffective. Insurgent forces in Nicaragua openly admitted their intent to use military force to overthrow the Sandinistas.[5] In a May 1983 report, the House Intelligence Committee remarked: "This is no longer a covert operation. The public can read or hear about it daily. Anti-Sandinista leaders acknowledge U.S. aid."[6] Early in 1984, Congress learned that the administration relied on the CIA to mine the harbors of Nicaragua, putting at risk both domestic and foreign vessels. Congress enacted this statutory language in response: "It is the sense of Congress that no funds heretofore or hereafter appropriated in any Act of Congress shall be obligated or expended for the purpose of planning, directing, executing, or supporting the mining of the ports or territorial waters of Nicaragua."[7]

Later in 1984, Congress enacted what is called the Boland Amendment, preventing any funds from being used to support the Contras. The objective was to adopt all-embracing language to prevent any further evasions by the administration. The full text stated:

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[2] 128 Cong. Rec. 29457 (1982).

[3] *Id.* at 29466.

[4] 69 Stat. 1865 § 793 (1982).

[5] H.R. Rep. No. 122, pt. 1, at 11 (1983).

[6] *Id.* at 12.

[7] 98 Stat. 1210 § 2907 (1984).

During fiscal year 1985, no funds available to the Central Intelligence Agency, the Department of Defense, or any other agency or entity of the United States involved in intelligence activities may be obligated or expended for the purpose or which would have the effect of supporting, directly or indirectly, military or paramilitary operations in Nicaragua by any nation, group, organization, movement, or individual.[8]

Congress drafted this exacting language because the Reagan administration had demonstrated a willingness to exploit every possible loophole. Congress hoped to close them all. Even so, some lawmakers suspected the administration would find some way to assist the Contras. During a Senate hearing on March 26, 1985, Senator Christopher Dodd, D-Conn., remarked that there have been a number of rumors or news reports around this town about how the administration might go about its funding of the contras in Nicaragua. There have been suggestions that it would be done through private parties or through funneling funds through friendly third nations, or possibly through a new category of assistance and asking the Congress to fund the program openly.[9]

His instincts and judgments were good.

In testimony at the hearing, Assistant Secretary of State for Inter-American Affairs Langhorne S. Motley assured Senator Dodd that the administration would make no attempt to circumvent the Boland Amendment by soliciting funds from private parties or foreign governments. He said the administration would comply fully with statutory policy: "Nobody is trying to play games with you or any other Member of Congress. That resolution stands, and it will continue to stand; and it says no direct or indirect. And that is pretty plain English; it does not have to be written by any bright, young lawyers. And we are going to continue to comply with that."[10]

Motley offered similar assurances to the House Committee on Appropriations on April 18, 1985, testifying that the administration would not attempt to solicit funds from outside sources to assist the Contras.[11] When President Reagan signed the continuing resolution that contained the strict language of the Boland Amendment, he did not issue a statement that Congress had overstepped its authority and the administration would be at liberty to pursue its policy in Nicaragua. Neither Attorney General Edwin Meese nor the Office of Legal Counsel in the Justice Department raised any legal objections to the Boland Amendment. National policy seemed to be clear and settled.

However, at the very moment that Motley was testifying before the two legislative hearings, executive branch officials were actively soliciting funds from private parties and foreign governments to assist the Contras. Working closely with the White House and the National Security Council, private citizens raised more than $10 million from private contributors, most of it for the Contra cause. Potential donors were given a list of weapons and ammunition, with a price assigned to each item.[12] Several foreign governments agreed to provide funds, setting up the problem that the U.S. government, at some future

[8] 98 Stat. 1935 § 8066(a) (1984).

[9] *Security and Development Assistance: Hearings before the S. Comm. on Foreign Relations*, 99th Cong., 1st Sess. 908 (1985).

[10] *Id.* at 910.

[11] *Department of Defense Appropriations for 1986: Hearing before the H. Comm. on Appropriations*, 99th Cong. 1092 (1985).

[12] S. Select Comm. on Secret Military Assistance to Iran and the Nicaraguan Opposition and H. Select Comm. to Investigate Covert Arms Transactions with Iran, Report of the Cong. Comm. Investigating the Iran-Contra Affair, H.R. Rep. No. 100-433 and S. Rep. No. 100-216, at 85-103 (1987) [hereinafter Iran-Contra Report].

date, would have to respond with a quid pro quo. Congress would later pass legislation to deal with that issue.

B. The Story Begins to Break

On October 5, 1986, a C-123 aircraft carrying small arms, ammunition, uniforms, and medicine for the Contras was shot down over Nicaragua. One crew member, Eugene Hasenfus, survived and was captured by the Sandinistas. Documents recovered from the plane connected it to Southern Air Transport (SAT), a former CIA proprietary charter airline based in Miami, Florida.[13] Hasenfus told his captors that he worked under someone named Max Gomez, the "CIA's overseer" of operations out of a base where the flight had originated.[14] Max Gomez was the code name for Felix Rodriguez, a retired CIA officer who helped the Reagan administration provide assistance to the Contras.[15] When national security adviser John Poindexter briefed President Reagan about the shoot-down of the C-123, he gave assurances that the government had no connection with Hasenfus's aircraft.[16]

Illegal assistance to the Contras became linked with another Reagan initiative: supplying arms to Iran. Previously, the Reagan administration had told the American public and allies that all nations should be neutral in the war between Iran and Iraq, and had a policy not to deliver weapons to either country. The Reagan administration also emphasized that it was firmly opposed to providing any concessions to terrorists. But on November 3, 1986, a Lebanese weekly named *Al-Shiraa* reported that the United States had secretly sold arms to Iran. The Iranian government confirmed this report. The Reagan administration initially denied it, but on November 25, 1986, Attorney General Edwin Meese acknowledged weapons being sold to Iran and diverted to the Contras.[17] The purpose of the arms sales, the administration said, was to gain the assistance of Iran for the release of American hostages held by terrorists.

C. The Tower Commission Report

The administration, aware of the damage to its credibility, acted quickly. On December 1, 1986, President Reagan issued Executive Order 12575, creating a special review board of three persons to study the role of the National Security Council staff in operational activities, "especially extremely sensitive diplomatic, military, and intelligence missions." The board was given 60 days to submit its findings. All departments, agencies, and independent instrumentalities were directed to provide to the board, "to the extent permitted by law," information requested.[18] Former Senator John Tower served as chairman, and the board was commonly called "the Tower Commission." The other two members were former Secretary of State Edmund Muskie and former national security adviser Brent Scowcroft.

In issuing its report, the board said that some key witnesses had refused to testify before any forum, vital documents were not available, nor were important witnesses from other countries available. The board had no authority to subpoena documents, compel testimony, swear witnesses, or grant immunity.[19] Several individuals who were central to the Iran- Contra affair, including John Poindexter and Oliver

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[13] *Id.* at 287.

[14] Lawrence E. Walsh, Firewall: The Iran-Contra Conspiracy and Cover-Up 21 (1997).

[15] *Id.* at 21.

[16] *Id.* at 244.

[17] Iran-Contra Report, *supra* note 12, at 269.

[18] Report of the President's Special Review Board 100 (1987) [hereinafter Tower Commission Report].

[19] *Id.* at 16.

North, declined to appear before the board.[20] John Tower wrote to President Reagan, asking that he order the two men to appear. White House counsel Peter Wallison advised Tower that Poindexter and North had a constitutional right not to testify.[21] As to the role of NSC staff in support of the Contras, the board "had neither the time nor the resources to make a systematic inquiry into this area."[22]

The board described NSC as an advisory body, not designed to be decision-making or operational. To the extent that the national security advisor assumes operational responsibilities, "the legitimacy of that role and his authority to perform it may be challenged."[23] The board recommended that the national security advisor "should focus on advice and management, not implementation and execution," as the latter "is the responsibility and the strength of the departments and agencies."[24]

D. The Congressional Investigation

Congress, aware that the administration had regularly lied about its adherence to statutory policy, decided that the implications for U.S. foreign policy and the rule of law required a full-scale inquiry. On January 6, 1987, the Senate established the Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition. The next day, the House established the Select Committee to Investigate Covert Arms Transactions with Iran. The two chambers initially focused on four major areas: arms sales to Iran, the diversion of funds to the Contras, violations of federal law, and the involvement of National Security Council staff in the conduct of foreign policy. These investigations necessarily implicated the constitutional question of how the two elected branches formulate and execute national security policy.

The two committees merged their investigations and hearings and shared all the information they obtained. The staffs worked together in reviewing more than 300,000 documents and interviewing or examining more than 500 witnesses. The joint committee held 40 days of public hearings and several executive sessions, and issued a joint report.[25]

The committee conducted its investigation with a mix of advantages and drawbacks. One benefit was the decision of President Reagan to completely waive executive privilege, the first president to do so. It is likely that he took this step to lessen the risk of impeachment. By waiving executive privilege, Reagan instructed all relevant agencies to produce their documents and witnesses. He made available extracts from his personal diary, although he rejected the request of the joint committee to refer to those entries in the final report on the ground that he did not wish to establish a precedent for future presidents.[26]

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[20] *Id.* at 17, 511-14.

[21] *Id.* at 515-16.

[22] *Id.* at 3.

[23] *Id.* at 11.

[24] *Id.* at 92.

[25] The first section of the report runs from pages 1 to 427, followed by a minority report signed by eight Republican members, covering pages 437 to 586. These members were Senators James McClure (Idaho) and Orrin Hatch (Utah) and Representatives Dick Cheney (Wyo.), William Broomfield (Mich.), Henry Hyde (Ill.), Jim Courter (N.J.), Bill McCollum (Fla.) and Michael DeWine (Ohio). Three Republican senators did not sign the minority report: Warren Rudman (N.H.), William Cohen (Maine), and Paul Trible (Va.).

[26] Iran-Contra Report, *supra* note 12, at xvi.

On the downside, a key witness—CIA Director William Casey—resigned on January 29, 1987, incapacitated with a brain tumor. He was thus unavailable for visitors from the committee or the office of Independent Counsel Lawrence Walsh.

He died on May 6, 1987. Moreover, members of the National Security Council shredded relevant documents in the fall of 1986. The committee therefore lacked evidence that could have resolved the problem of witnesses offering inconsistent testimony and often stating that they could not recall certain events. Finally, the committee operated under an extremely tight schedule, determined to holds hearing from May 5 to August 6 and issue its final report on November 17, 1987.

Why agree to such an unrealistic deadline, given the time needed to hear witnesses and carefully analyze hundreds of thousands of agency documents? One factor was the presidential election in 1988. Releasing a report in the middle of that year would likely have an impact on the candidates. As noted by Senators William Cohen and George Mitchell, an investigation that "spilled into 1988 could only help keep Republicans on the defensive during an election year."[27] The deadline also provided "critical leverage for the attorneys of witnesses in dealing with the Committee on whether their clients would appear without immunity and when in the process they might be called."[28]

As to granting immunity, witnesses before a congressional committee may invoke the Fifth Amendment privilege against self-incrimination, but a procedure is available to force certain testimony. Witnesses may receive full or absolute immunity. Compelled testimony in the company of absolute immunity meets the essential purpose of the Self-Incrimination Clause. There is also partial or "use" immunity. Under this procedure, a witness can be compelled to testify and later be prosecuted so long as the witness's testimony (or evidence derived from it) is not used in the prosecution. North received partial immunity when he testified before the Iran-Contra committee, as did Poindexter.

Because of the decision to grant immunity, witnesses were not deposed by committee staff before they appeared before the committee. A private meeting with North, Poindexter, and others might have helped the committee members and their counsel decide how to ask questions during the hearings. Understandings could have been reached to avoid time-consuming and embarrassing challenges and confusion before a witness testified, as happened on numerous occasions.

There is an obvious tension between the decision of Congress to grant immunity in order to better inform itself and the efforts of prosecutors to convict wrongdoers. Independent Counsel Walsh did not object to the committee granting immunity. He offered this explanation on how national priorities are established: "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 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."[29]

E. Congressional Hearings

The purpose of the hearings was to determine which officials in the administration knew about the assistance to the Contras in violation of the Boland Amendments, who was involved in the transfer of arms to Iran, and who (such as President Reagan) knew that profits from the arms sales went to the

[27] William S. Cohen & George J. Mitchell, Men of Zeal: A Candid Inside Story of the Iran-Contra Hearings 30 (1988).

[28] *Id.* at 31.

[29] Lawrence E. Walsh, *The Independent Counsel and the Separation of Powers*, 25 Houston L. Rev. 1, 9 (1988). For proposals to change the immunity statute to make congressional grants of immunity less costly to prosecutors and to Congress, *see* Ronald F. Wright, *Congressional Use of Immunity Grants After Iran-Contra*, 80 Minn. L. Rev. 407 (1995).

Contras. Those were the specific issues, not the larger question of covert operations in U.S. history. However, when North appeared before the committee on July 7, 1987, House chief counsel John Nields decided to question North about covert operations and the need for secrecy.

Nields began by asking whether North was involved in support of the Contras during the time the Boland Amendment was in effect and in the sale of arms to Iran. North responded "Yes." Nields further asked whether the operations were carried out in secret. North answered: "We hope so." Nields asked whether they were covert operations. North answered that they were. Here Nields went far afield from the specific objectives set for the hearings. He asked whether covert operations "are designed to be secrets from our enemies?" North gave the obvious answer: "That is correct." Nields added: "But these operations were designed to be secrets from the American people." North responded: "Mr. Nields, I am at a loss as to how we can announce it to the American people and not have the Soviets know about it. I am not trying to be flippant, but I don't see how you can possibly do it."[30]

At that point, Nields directed his objection not to the specific issues of assisting the Contras despite a statutory ban, selling arms to Iran, and using proceeds to benefit the Contras. He objected in general to covert operations and reliance on secrecy. He told North: "In certain Communist countries, the Government's activities are kept secret from the people, but that is not the way we do things in America, is it?"[31] North responded by stating the obvious: "By their very nature, covert operations or special activities, are a lie. There is great deceit—deception practiced in the conduct of covert operations. They are at essence a lie. We make every effort to deceive the enemy as to our intent, our conduct, and to deny the association of the United States with those activities." The intelligence committees, he explained, hold hearings on these activities but do so in secret session, with the information kept from the public and even other lawmakers not on those committees.[32]

Nields said, accurately, that the American people were told by the Reagan administration that the government had "nothing to do with the Hasenfus airplane, and that was false, and it is a principal purpose of these hearings to replace secrecy and deception with disclosure and truth, and that is one of the reasons we have called you here, sir."[33] Yes, the principal purpose of the congressional investigation was to establish the facts about the Iran-Contra affair and to make it public, but there was no need to recommend that all covert operations be abolished or prohibit the secrecy needed to maintain those programs. The Iran-Contra committee understood the need for secrecy. Instead of publicly identifying the foreign governments involved, they were identified in the hearings and final report as Country 1, Country, 2, Country 3, etc.

F. Committee Findings

Given the serious statutory and constitutional violations committed by the Reagan administration, it was important for Congress to clearly identify those violations and restore the country to fundamental principles. That did not happen because Congress split into two factions: Democrats and some Republicans willing to hold the administration accountable, versus a number of Republicans in a minority report objecting that Congress had intruded into policy areas left exclusively to the president. The position in the minority report did not have a steady shelf life. It was applied while President Reagan served in

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[30] *The Iran-Contra Investigation: Joint Hearings Before the S. Select Comm. on Secret Military Assistance to Iran and the Nicaraguan Opposition and the H.R. Select Comm. to Investigate Covert Arms Transactions with Iran*, 100th Cong. 7 (1987) (hereinafter *Iran-Contra Hearings*).

[31] *Id.* at 9.

[32] *Id*

[33] *Id.* at 10.

office, revived again under President George W. Bush and Vice President Dick Cheney, but if Democratic presidents Bill Clinton and Barack Obama decided to act unilaterally in making and carrying out national policy, or could be accused of not telling the truth, Republicans were ready to hold them to account.

The majority report was signed by all Democrats and three Republican senators. The report recognized the value of covert action provided they were done with "prior authorization of the President and timely notice to Congressional committees specially constituted to protect the secrecy necessary for effective operations."[34] With Iran-Contra, covert actions were taken outside specific authorization by the president and by actions through entities other than the CIA.[35] In particular, NSC staff took "an increasingly active role in support of the Contras," raising money for the Contras and creating an organization outside the government to procure arms and resupply the Contras.[36] No presidential finding covered the effort to ransom hostages in the Middle East, ship arms to Iran, or divert money from the Iran program to the Contras.[37] Accountability to Congress was further undermined when senior administration officials misled Congress, withheld information, destroyed documents, and failed to speak up when they knew other officials had given Congress incorrect information.[38]

By relying on funding from private citizens and foreign governments, Iran-Contra violated the basic constitutional principle that all government operations must be funded from appropriated monies of funds made known to oversight committees.[39] As for the field of foreign policy, the majority report emphasized that control is vested in both Congress and the president and the system of checks and balances.[40] During the hearings, several witnesses claimed that the Supreme Court in *United States v. Curtiss-Wright Export Corporation* vested broad inherent power over foreign policy to the exclusion of Congress.[41]

The Reagan administration relied heavily on *Curtiss-Wright* to justify its actions during Iran-Contra. Charles J. Cooper, head of the Office of Legal Counsel, wrote a lengthy memo on December 17, 1986, stating that the president has substantial discretion in deciding when to report to Congress about activities in the realm of foreign policy. He claimed that the president possesses "inherent and plenary constitutional authority in the field of international relations."[42] Throughout this 17-page memo, Cooper cites *Curtiss-Wright* eight times in an effort to establish the president's exclusive power over external affairs.

However, the majority report explained that *Curtiss-Wright* did not involve any inherent or exclusive power of the president. Instead, it concerned only presidential action in placing an arms embargo in a region in South America pursuant to express statutory authority from Congress.[43] In *Curtiss-Wright*,

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[34] Iran-Contra Report, *supra* note 12, at 375.

[35] *Id.* at 378.

[36] *Id.* at 379.

[37] *Id*

[38] *Id.* at 381.

[39] *Id.* at 383.

[40] *Id.* at 387.

[41] United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

[42] Charles J. Cooper, The President's Compliance with the 'Timely Notification' Requirement of Section 501(b) of the National Security Act, 10 Op. O.L.C. 159, 160 (1986). His legal memo was printed in *Iran-Contra Hearings*, Vol. 100-9, at 1546-72. For the degree to which the Reagan administration relied on *Curtiss-Wright*, see Theodore Draper, A Very Thin Line: The Iran-Contra Affairs 591-92 (1991).

[43] Iran-Contra Report, *supra* note 12, at 388.

Justice George Sutherland relied heavily on a speech by John Marshall in 1800 when he served in the House of Representatives.[44] Marshall said that the president "is the sole organ of the nation in its external relations, and its sole representative with foreign nations." The majority report correctly noted that Marshall was *not* promoting inherent and exclusive power of the president over external affairs. Instead, he merely defended President John Adams for turning over to England a British subject charged with murder, a power given the president by the Jay Treaty.[45] President Adams was not making national policy unilaterally. He was simply carrying out an extradition provision in a treaty agreed to by both branches. To the majority report, actions by the Reagan administration weakened the president and damaged the constitutional system of government.[46]

The minority report in its introduction conceded that President Reagan and his staff "made mistakes in the Iran-Contra Affair" but gave credit to Reagan for taking "the hard step of acknowledging his mistakes and reacting precisely to correct what went wrong." Moreover, the mistakes "were just that—mistakes in judgment, and nothing more. There was no constitutional crisis, no systematic disrespect for 'the rule of law,' no grand conspiracy, and no Administration-wide dishonesty or cover-up. In fact, the evidence will not support any of the more hysterical conclusions the Committees' Report tries to reach." The minority report claimed that no one in government "was acting out of corrupt motives."[47]

According to the minority report, the dispute originated from "an aggrandizing theory of Congress' foreign policy powers that is itself part of the problem." Compounding the friction between the two branches was a "history and legitimate fear of leaks" by Congress and "vaguely worded and constantly changing laws to impose policies in Central America that went well beyond the law itself."[48] Judgments about the Iran-Contra affair "ultimately must rest upon one's views about the proper roles of Congress and the President in foreign policy." To prevent future disagreements, Congress "must recognize that an effective foreign policy requires, and the Constitution mandates, the President to be the country's foreign policy leader." Although no president "can ignore Congress and be successful over the long term," Congress needed to realize that "the power of the purse does not make it supreme."[49] Still, the report acknowledges that the president "cannot use the country's resources to carry out policy without congressional appropriations."[50]

The minority report relies extensively on Justice Sutherland's erroneous "sole organ" dicta in *Curtiss-Wright* to conclude that the president possesses "inherent" foreign policy powers that are not subject to congressional control, either through statutory restrictions or withholding appropriations. That doctrine is undermined by sections in the minority report that concede the president's dependence on appropriations from Congress. Building on the sole-organ doctrine, the minority states that "it is beyond question that Congress did not have the constitutional power to prohibit the President from sharing information, asking other governments to contribute to the Nicaraguan resistance, or entering into secret negotiations with factions inside Iran."[51] Justice Sutherland's obvious misreading about John Marshall's speech was finally acknowledged by the Supreme Court in *Zivotofsky v. Kerry* (2015). When the Justice Department relied

[44] *Curtiss-Wright*, 299 U.S. 304 at 319.

[45] Iran-Contra Report, *supra* note 12, at 389-90.

[46] *Id.* at 392.

[47] *Id.* at 437.

[48] *Id.* at 437-38.

[49] *Id.* at 438.

[50] *Id.* at 478.

[51] *Id.* at 473.

on the sole-organ doctrine to justify exclusive and independent presidential power over external affairs, the court responded: "This Court declines to acknowledge that unbounded power."[52]

The minority report appears to end on a critical note about claims of exclusive and plenary presidential power over external affairs. It states that the Constitution "gives important foreign policy powers both to Congress and the president. Neither can accomplish very much over the long term by trying to go it alone." It rejected the theory that the president may use "the country's resources to carry out policy without congressional appropriations."[53] At face value, such language prevents presidents from attempting to use funds from private parties and foreign countries to implement their national security policies. Having gone back and forth on its understanding of the Constitution, the minority report offers a broad reading of presidential power over national security policy: "The executive branch's functions are the ones most closely related to the need for secrecy, efficiency, dispatch, and the acceptance by one person, the President, of political responsibility for the result. His basic framework must be preserved if the country is to have an effective foreign policy in the future."[54]

G. Prosecutorial Efforts

Walsh's effort to prosecute individuals involved in Iran-Contra was undermined in many ways, partly by the documents that suspects were able to destroy and the immunity granted by Congress to further its investigation. As part of his investigation, Walsh looked into the activities of Joseph Fernandez, the CIA station chief in Costa Rica who helped North supply the Contras in violation of the Boland Amendment. On June 20, 1988, a grand jury indicted Fernandez for false statements and obstruction and for conspiring with North and others to carry out the covert action. The conspiracy count was later dropped. The prosecution of Fernandez would likely have shed further light on the CIA's role and put others at risk. That line of inquiry closed when Attorney General Richard Thornburgh refused to release classified information needed for the trial.[55]

On August 4, 1993, Independent Counsel Walsh released his final report. He explained that after a grand jury on March 16, 1988, handed down a 23-count indictment against Poindexter, North, Secord, and Hakim, U.S. District Judge Gerhard Gesell ordered severance of the trials because Poindexter, North, and Hakim had given immunized testimony to the Iran- Contra Committee. North was tried and convicted by jury in May 1989 of altering and destroying documents, accepting an illegal gratuity, and aiding and abetting in the obstruction of Congress. His conviction was reversed on appeal in July 1990 and the charges were dismissed in September 1991 on the ground that trial witnesses had been tainted by North's televised testimony to Congress. Poindexter was convicted by a jury on five felony counts of conspiracy, false statements, destruction and removal of records, and obstruction of Congress. His conviction was reversed on appeal because of the immunized testimony issue. Secord pled guilty to falsely denying to Congress that North had personally benefited from his involvement in Iran-Contra. Hakim pled guilty to a misdemeanor count of supplementing North's salary.[56]

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[52] Zivotofsky v. Kerry, 135 S. Ct. 2076, 2089 (2015). On July 17, 2014, I filed a brief *amicus curiae* with the Supreme Court in this case, analyzing the erroneous sole-organ dicta in *Curtiss-Wright* and asking the court to publicly make a correction, *see* Brief for Louis Fischer as Amicus Curiae Supporting Petitioner, Zivotofsky v. Kerry, 135 S. Ct. 2076 (2015) (No. 13-628), http://www.loufisher.org/docs/pip/Zivotofsky.pdf.

[53] Iran-Contra Report, *supra* note 12, at 478.

[54] *Id*

[55] Walsh, *supra* note 14, at 210-11, 218-19.

[56] Lance Cole & Stanley M. Brand, Congressional Investigations and Oversight 236-37 (2011).

On June 16, 1992, a grand jury indicted Secretary of Defense Caspar Weinberger for five felonies, including one count of obstructing the congressional investigation, two counts of false statements, and two charges of perjury. President George H. W. Bush was likely to be called to Weinberger's trial to testify. Bush had denied knowing that Weinberger and Secretary of State George Shultz had opposed the sale of arms to Iran, but a supplemental indictment of Weinberger disclosed that Bush, as vice president, had attended a White House meeting where Reagan had overridden both Weinberger and Shultz.[57]

On November 2, 1992, Walsh filed a supplemental indictment against Weinberger. Whatever further prosecutorial efforts Walsh intended were blocked when President Bush on December 24, 1992, issued pardons to six people involved in the Iran-Contra affair. At the top of the list was Weinberger. The others were Robert McFarlane, Elliott Abrams, and CIA officials Clair George, Alan Fiers, and Duane Clarridge.

H. Subsequent Evaluations

In a study published in 2011, Lance Cole and Stanley M. Brand focused on the issue of the Self-Incrimination Clause raised by the Iran-Contra investigation. In his final report, Walsh weighed the tension between congressional oversight and efforts to enforce existing law in this manner: "When a conflict between the oversight and prosecutorial roles develops—as plainly occurred in the Iran/contra affair—the law is clear that it is Congress that must prevail." He added that Congress, in exercising this judgment, must be "sensitive to the dangers posed by grants of immunity to the successful prosecution of criminal conduct."[58] The costs to society are significant. As in Iran-Contra, "the more peripheral players are convicted while the central figures in the criminal enterprise escape punishment." The failure to punish "may lead the public to believe that no real wrongdoing took place."[59] Disrespect for Congress by a popular president like Reagan and his appointees was obscured when Congress accepted "the tendered concept of a runaway conspiracy of subordinate officers and avoided the unpleasant confrontation with a powerful President and his Cabinet."[60] To Walsh, the evidence he acquired established that the Iran-Contra affair was "not an aberrational scheme carried out by a 'cabal of zealots' in the National Security Council staff, as the congressional Select Committees concluded in their majority report." It was instead the product of two foreign policy directives issued by Reagan that "skirted the law and which was executed by the NSC staff with the knowledge and support of high officials in the CIA, State and Defense departments, and to a lesser extent, officials in other agencies."[61]

Walsh underscored that the extensive role of the NSC in formulating and carrying out national security policy was facilitated by the regular departments failing to exercise control. He singled out two Cabinet officers—Defense Secretary Weinberger and Secretary of State Shultz—who opposed the sale of arms to Iran because it was illegal and bad policy. Yet they "either cooperated with the decision once made, as in the case of Weinberger, or stood aloof from it while being kept informed of its progress, as was the case of Schultz [sic]."[62]

In a study published in 2011, David L. Hostetter evaluates the Tower Commission, the Iran-Contra hearings, and Independent Counsel Walsh. To Hostetter, the quick work of the Tower Commission,

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[57] *Id.* at 415, 419.

[58] *Id.* at 325.

[59] *Id.* at 326.

[60] *Id*

[61] *Id.* at 327.

[62] *Id.* at 328.

pledging to make information publicly available and working through a bipartisan board, "shielded President Reagan from any sustained consideration of impeachment by Congress." Moreover, Walsh's efforts "were hampered by the congressional investigation, which granted immunity to many of the key players in order to get them to testify publicly."[63] As for the hearings, Hostetter initially focused on the Iran-Contra committee selecting Arthur Liman as chief counsel for the Senate and John Nields as chief counsel for the House. They were chosen for their professional qualifications, "not their ability to project a likable persona to a television audience." Liman, "the gruff New Yorker whose unruly hair often draped over his eyes, and Nields, young-looking with a coif that brushed the collar of his suit jacket, often appeared as if they were imperious tribunes persecuting brave individuals who were only trying to do what they thought was right." The image they conveyed "was at odds with the neat hair and military bearing of many of the witnesses."[64]

Alone among the witnesses, McFarlane "expressed remorse for his actions." He had attempted suicide in February 1987 because of his role in the scandal. Despite misgivings at the time, he explained how he had "falsified the chronology of events to help cover up the illegalities of the affair."[65] Assistant Secretary of State Elliott Abrams admitted to the committee that he had misled Congress about the funding of the Contras. He had reached out to the sultan of Brunei, a small monarchy on the island of Borneo in the Pacific, to seek $2 million for the Contras. However, because of a clerical error by North's secretary, Fawn Hall, the money ended up in the wrong Swiss bank account and never reached the Contras. When Abrams continued to evade questions put to him by committee members, Rep. Jack Brooks, D-Texas, asked: "Do you have to be authorized to tell the truth?"[66]

Testimony from several attorneys in the administration gave insight into the kind of values and calculations that led to Iran-Contra. Bretton Sciaroni, a lawyer and sole staff person on the Intelligence Oversight Board, offered his opinion that the Boland Amendments pertained only to the Defense Department and the CIA, not to NSC. Assistant Attorney General Charles Cooper, who worked on the Meese investigation in November 1986, made it clear that the slow pace of that investigation gave North and others ample time to destroy documents. When asked whether he thought North's testimony could be believed, he told the committee that he did not think "an oath in any way enhances the obligation of truthfulness."[67] Fawn Hall, after being granted immunity, testified that she helped North destroy phone logs and e-mail messages to eliminate evidence of illegality, explaining that in the pursuit of just ends "sometimes you have to go above the written law."[68]

As Hostetter notes, North had generally worn civilian clothes while working at the National Security Council but appeared before the committee in his Marine uniform "festooned with medals." With his partial immunity, he admitted that he had shredded documents, lied to Congress, misled the CIA, and engaged in subterfuge. Aided by his counsel, Brendon Sullivan, over a period of six days he defended his actions in such a spirited way that it led to an outpouring of public support called "Olliemania." Heavy-handed efforts by the Iran-Contra committee to discredit him helped make him a hero in the eyes of many. North made it seem that Congress, not the administration, had damaged the national interest by

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[63] David L. Hostetter, *The Iran-Contra Hearings, 1987*, *in* 2 Congress Investigates: A Critical and Documentary History 976 (Robert Burns et al. eds., rev. ed. 2011).

[64] *Id.* at 977.

[65] *Id*

[66] *Id.* at 978.

[67] *Id.* at 979.

[68] *Id.*

withholding funds from the Contras and "interfering with sensitive operations related to the attempt to gain freedom for American hostages."[69]

In 2014, Malcom Byrne published a detailed analysis of the Iran-Contra affair, focusing on Reagan's role in supporting unchecked abuse of presidential power. Byrne is deputy director and research director at the National Security Archive, which has a long history of seeking confidential documents and having them declassified for public access. This book benefits from access to a number of previously unavailable Iran-Contra documents. To Byrne, far from being the work "of a few mid-level 'rouge operatives,'" Iran-Contra involved "at various stages an array of senior officials including the president and vice president themselves." By presenting the diversion of funds from arms sales to Iran to the Contras as the main issue, the administration "managed to marginalize the importance of other critical elements."[70] Among those were Reagan's evident support for the Contras in violation of the Boland Amendments and his clear knowledge and approval of selling weapons to Iran. As Byrne notes: "The president approved every significant facet of the Iran arms deals, and he encouraged conduct by top aides that had the same aim and outcome as the diversion—to subsidize the Contra war despite the congressional prohibition on U.S. aid."[71]

Byrne clarifies that many top officials in the Reagan administration knew that various elements of Iran-Contra were not only illegal and unconstitutional but invited impeachment. When it was argued that it would be entirely lawful for the administration to seek money from foreign governments for resources that Congress had not only denied but prohibited, Secretary of State Shultz objected: "I would like to get money for the Contras also, but another lawyer, Jim Baker [the president's chief of staff], said that if we go out and try to get money from third countries, it is an impeachable offense."[72] According to Weinberger, Reagan was so intent on rescuing American hostages held in the Middle East that "he could answer charges of illegality but he couldn't answer [the] charge that 'big strong President Reagan passed up a chance to free hostages.'"[73] Shultz confirmed Weinberger's recollection. Reagan believed that the public could not understand if four hostages died because "I wouldn't break the law." His attitude: "They can impeach me if they want."[74]

To Byrne, the Iran-Contra affair did not provide any instructive lessons to avoid future scandals. The congressional and independent counsel processes "failed to create a disincentive for future administrations against ill-conceived exercises of presidential power."[75] Cheney, one of the leaders of the minority report, took steps in the George W. Bush administration to expand the reach of the executive branch. In 2005, he told reporters that the minority report was the best "road map" to understand the proper constitutional relationship between Congress and the President.[76] The increase in independent executive power under the Bush II administration led to "enhanced interrogation" of terrorism suspects, warrantless surveillance of U.S. citizens, deceptive arguments to justify war against Iraq, and increased

[69] *Id.* at 980.

[70] Malcolm Byrne, Iran-Contra: Reagan's Scandal and the Unchecked Abuse of Presidential Power 3 (2014).

[71] *Id.*

[72] *Id.* at 78.

[73] *Id.* at 106.

[74] *Id.* at 107.

[75] *Id.* at 338.

[76] *Id.*

secrecy "ranging from counterterrorism to economics."[77] The inability of Congress and the courts to check the abuse of Iran-Contra "leaves the way open for future presidents—and their staffs—to press their advantage as far as politics will allow, posing predictable hazards to the broader public interest."[78]

I. Conclusion

As described above, there are many takeaways from the Iran-Contra investigation. Two bear emphasis: one that resulted immediately from Congress's oversight and the other that has had an impact over time. At stake are fundamental constitutional principles, including separation of powers, the system of checks and balances, and the Framers' concern that power not be concentrated, particularly over the war power.

First, the Iran-Contra investigation discredited Reagan's image as a strong, decisive, and accountable commander in chief. He said he did not know about various decisions by executive officials, including continued funding of the Contras despite the Boland Amendment and the diversion of profits from the sale of weapons to Iran to assist the Contras. Vice President George H. W. Bush, supposedly closely involved in matters of national policy and ready to take over as president if Reagan became incapacitated, claimed to know little about Iran-Contra. He said he knew about the sale of arms to Iran but not about the diversion of funds to the Contras.[79] As to key meetings on Iran-Contra, he recalled: "it appears I was not there. I can not possibly reconstruct events. I can not remember details and nobody can."[80]

Second, the Iran-Contra hearings and committee report offered Congress an opportunity to restore fundamental constitutional principles about the rule of law and the power of the purse. The majority report did that, but the minority report adopted an entirely different model of national security policy, granting to the president extensive independent powers to initiate military action even in the face of statutory prohibitions. That model has been costly to the nation.

Consider presidential actions from World War II to the present time. In 1950, Truman decided to go to war against North Korea without seeking congressional authority. Truman and the Democratic Party paid dearly with the resulting military stalemate and heavy loss of lives.[81] President Johnson decided to seek congressional authority with the Tonkin Gulf Resolution in August 1964 after announcing that North Vietnam had made two attacks on U.S. vessels, a claim doubted at the time and later found to be false in a NSA study released in 2005. What was thought to be a second attack consisted of late signals coming from the first.[82] Johnson's decision to escalate the war split the country and persuaded Johnson not to run for another term.

In 2002, President George W. Bush did come to Congress to seek statutory authority for taking military action against Iraq, but lost credibility with his justifications. In his State of the Union address on January

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[77] *Id.* at 338-39.

[78] *Id.* at 339. For further analysis of Cheney's determination to apply the lessons of Iran-Contra in his effort to rebuild inherent and plenary presidential power in the Bush II administration, see Charlie Savage, Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy 50-63, 83, 202 (2007).

[79] George H.W. Bush, All the Best: My Life in Letters and Other Writings 354 (1999).

[80] *Id*. at 356.

[81] Louis Fisher, Presidential War Power 80-103 (3d ed. 2013).

[82] Robert J. Hanyok, *Skunks, Bogies, Silent Hounds, and the Flying Fish: The Gulf of Tonkin Mystery, 2-4 August 1964*, Cryptologic Quarterly (Feb. 1998), available at http://www.nsa.gov/public_info/files/_files/gulf_of_tonkin/articles/rel1_skunks_bogies.pdf (declassified by the National Security Agency on Nov. 3, 2005).

28, 2003, Bush said that the British government "has learned that Saddam Hussein recently sought significant quantities of uranium from

Africa."[83] Why rely on British intelligence instead of U.S. intelligence? As it turned out, the document used by the British government turned out to be a fabrication, containing crude errors that undermined its value.[84] The administration offered five other reasons why Saddam Hussein possessed weapons of mass destruction, with all found to be entirely empty of substance.[85]

In 2011, President Obama decided against seeking congressional authority when he used military force against Libya. Initially, he said the action would be "a matter of days and not a matter of weeks."[86] It lasted seven months. When military operations exceeded the 60-day deadline of the War Powers Resolution, requiring him to cease operations unless Congress provided statutory authority, he asked the Office of Legal Counsel to write a memo that the WPR did not apply because there were no "hostilities" in Libya, despite the use of Tomahawk missiles launched from the Mediterranean, attacks by military aircraft, and use of armed drones. OLC refused to write the memo. Jeh Johnson, General Counsel in the Defense Department, also refused Obama's request. Finally, White House counsel Robert Bauer and State Department Legal Adviser Harold Koh came to Obama's rescue, making the fatuous assertion that no hostilities existed in Libya.[87]

Following the model adopted by the Iran-Contra committee minority report, presidents from Truman to Obama have damaged themselves, the country, and the Constitution by invoking implausible arguments about access to inherent and independent powers over national security policy.

[83] President George W. Bush, State of the Union Address, 1 Pub. Papers 88 (Jan. 28, 2003).

[84] Joby Warrick, *Some Evidence on Iraq Called Fake*, Wash. Post (Mar. 8, 2003).

[85] Fisher, *supra* note 81, at 216-21.

[86] President Barack Obama's News Conference with President Sebastian Pinera Echenique of Chile, 1 Pub. Papers 271 (Mar. 21, 2011).

[87] Charlie Savage, *2 Top Lawyers Lose Argument on War Power*, N.Y. Times (June 18, 2011); see also Louis Fisher, *Military Operations in Libya: No War? No Hostilities?*, 42 Pres. Stud Q. 176 (2012).

The Webster and Ingersoll Investigations

By Todd Garvey[1]

Precedent-setting congressional investigations of the executive branch come in various forms. Many are triggered by fundamental constitutional clashes; others by the discovery of rampant corruption, criminal behavior, and failed cover-ups. However, some investigations cannot be said to find their origins in such weighty conflicts, but rather arise from long-festering personal or political quarrels. The 1846 House investigation of Daniel Webster and a related inquiry into his accuser and fellow congressman, Charles Ingersoll, represent two such investigations. Despite their origins, the investigations are strong evidence of Congress's longstanding authority to obtain information on even the most sensitive aspects of the executive's conduct of foreign affairs, including through compelled testimony of former presidents and other high-ranking executive branch officials.

A. Background

The 1840s were a time of American territorial expansion. The nation's borders were pressing outward in the southwest, the northwest, and the northeast. But expansion brought conflict and an era of stiff political discord between the two dominant political parties of the day: the Democrats, who had earlier coalesced around Andrew Jackson and now ascribed to the doctrine of "Manifest Destiny"; and the Whigs, who were concerned by both Democratic expansionist policies and the growing power of the presidency. Daniel Webster, the "second-generation" Whig senator from Massachusetts and two- time secretary of state, played as prominent a role as any during the political battles of the 1840s, and in some sense paid the political price for his efforts during the debate over the northwestern border in the spring of 1846.

After Webster served fourteen years in the Senate and four years as secretary of state under President John Tyler,[2] the Massachusetts state legislature returned Webster to the Senate in 1845. James K. Polk was elected to the presidency that same year on an expansionist platform in which he pledged to bring Texas, California, and the entire Oregon territory into the union. Though campaigning on the slogan of "fifty-four forty or fight"—a reference to the Democratic desire to extend America's borders to the absolute northern boundary of the Oregon territory, at 54 degrees, 40 minutes latitude—Polk reached a compromise with the British in 1846 in which the northwest border would be set farther south, at the 49th parallel.[3]

The Oregon question stirred intense debate in Congress. Dissatisfaction with Polk's compromise in the northwest prompted harsh criticism of the previous administration's handling of the northeast boundary dispute. Specifically, the Democrats objected to the Webster-Ashburton Treaty, negotiated by Secretary of State Webster only four years prior, which had resolved the ongoing—and, at times, violent—conflict over the placement of the Maine and New Brunswick border. The treaty represented a compromise, in which neither side received all the territory it had hoped for.[4] The Democratic "eagle-screamers of Manifest Destiny,"[5] however, had seen the agreement with Great Britain as a folly—an opportunity for further expansion squandered by Secretary Webster.

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[2] Tyler, then vice president, ascended to the presidency after William Henry Harrison's untimely death only a month into his first term. Though Harrison was a Whig, Tyler was viewed as an independent.

[3] Robert V. Remini, Daniel Webster: The Man and his Time 609-10 (1997).

[4] Irving H. Bartlett, Daniel Webster 179 (1978).

[5] Remini, *supra* note 3, at 608.

In February 1846, Charles Ingersoll, an eager expansionist and Democratic chairman of the House Foreign Affairs Committee, took to the House floor and attacked Webster and his role in what Ingersoll considered the disastrous Webster-Ashburton Treaty.[6] Had Webster not bungled the Maine question, argued Ingersoll, America would have been in a much stronger negotiating position in the Oregon dispute, and President Polk never would have had to settle for an Oregon boundary at the 49th parallel.

Ingersoll's attack on Webster was presumably motivated by both political and personal forces. Politically, Ingersoll and Webster clearly had conflicting views on American territorial expansion generally, and the Maine, Oregon, and Texas questions specifically. But there was also evidence of personal discord between the two. Years earlier, Webster had spearheaded a Senate investigation into allegations that Ingersoll had accepted bribes while serving as a U.S. attorney in Pennsylvania.[7] Ingersoll was later removed from that position by President Andrew Jackson. Ingersoll, in turn, had been active in criticizing Webster throughout his tenure as secretary of state. Although it would appear that the enmity between the two was mutual, Ingersoll was viewed as "highly partisan" and a "man of violent political prejudices."[8] As a result, and perhaps due to Webster's stature, the "prevailing impression made upon the moderate men of both parties was that Mr.

Ingersoll's spleen was the result of some private pique."[9] In any event, the personal nature of the conflict was evident to fellow members of Congress.[10]

In early April 1846, Webster responded to Ingersoll's criticisms with a "stinging" and virulent "tirade," the likes of which has rarely been heard on the Senate floor.[11] In a speech bursting with personal attacks, Webster described Ingersoll as having a "grotesque" and "bizarre" mind, with not just a "screw loose," but "screws loose all over."[12] In defending himself, Webster angrily asserted that Ingersoll's comments "entirely justify the use of that expressive monosyllable."[13]

B. The Congressional Investigation

Ingersoll then elevated the dispute on April 9th. Seeking his "personal vindication," Ingersoll accused Webster of specific "misdemeanors" while serving as secretary of state, including the "fraudulent misapplication and personal use of the public funds, and corrupting party presses with…money appropriated by law."[14] The funds at issue were those appropriated by Congress for what was known as

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[6] Cong. Globe, 29th Cong., 1st Sess. App. 284-86 (1846).

[7] Remini, *supra* note 3, at 536.

[8] Edward P. Crapol, John Tyler: The Accidental President 125-26 (2012).

[9] Varina Davis, Jefferson Davis: A Memoir by His Wife 250-51 (1890), available at http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A2001.05.0037. Jefferson Davis was a member of the committee investigating Ingersoll's accusations against Webster. Mrs. Davis called the entire investigation a "tempest in a tea-pot." *Id*. at 250.

[10] Cong. Globe, 29th Cong., 1st Sess. 729 (1846) ("If the application relates to the personal matters between the gentleman from Pennsylvania and the gentleman from Massachusetts, I protest against it…because the time of the country is too precious to be consumed in matters of personal crimination and recrimination…") (statement of Mr. Haralson); *Id*. at 639 (Mr. Hilliard "regretted the unpleasant state of affairs-the personal collision (for certainly every one must see that it was such) which had arisen between a distinguished Senator, and the distinguished gentleman on his left…").

[11] Remini, *supra* note 3, at 610-1.

[12] Cong. Globe, 29th Cong., 1st Sess. 616-22 (1846).

[13] *Id*.

[14] Cong. Globe, 29th Cong., 1st Sess. 636 (1846).

the "secret service fund," a contingent "slush fund" established for the president to use to cover secret expenditures necessary for the effective conduct of foreign affairs and intercourse. In an effort to obtain the evidence necessary to prove Webster's crimes, Ingersoll then introduced, and the body adopted, a resolution calling for the president to provide the House with "an account of all payments made" out of the fund since 1841, including "to whom paid, [and] for what."[15] Ingersoll's speech made clear that he articulated these charges with an eye toward impeachment. This led initially to a debate as to whether the House even held the authority to impeach an officer that had already left office. Although opposing Ingersoll's resolution on the grounds that it would infringe on presidential prerogatives, John Quincy Adams, secretary of state-turned-president-turned-member of the House, authoritatively rejected any view that the House's power of impeachment did not extend to "former" officials. Adams' influential remark—"I hold myself, so long as I have breath of life in my body, amenable to impeachment by this House for everything I did during the time I held any public office,"[16]—established an interpretation of the scope of the impeachment power that remains the accepted rule today.

Noting that the appropriation to the secret service fund provided the president with the discretion to keep secret "such expenditures as he may think it advisable not to specify," Polk refused the House's request for evidence of all payments made on the grounds that the law did not permit him to disclose secret expenditures made by previous administrations.[17] Polk himself had not approved any such expenditures. The president's response also relied on broad assertions of the exclusivity of presidential powers in foreign affairs, asserting, for example, that "our foreign negotiations are wisely and properly confined to the knowledge of the Executive during their pendency."[18] Despite Congress's general oversight role and its obvious interest in how federal funds are spent, neither the House nor Senate appears to have immediately objected to the president's position.

Stymied by the president, Ingersoll returned in late April with more specific allegations after apparently being provided access to State Department records, perhaps thanks to connections he had made through his position as chairman of the House Committee on Foreign Affairs. Ingersoll made three specific accusations against Webster. First, he alleged that Webster had engaged in the unlawful use and control of the secret service fund by requiring that, without the president's knowledge, all expenditures be disbursed through him rather than directly to third parties. Second, having established independent control over the fund, Webster had misused federal dollars to "corrupt the party presses" during negotiation and debate over the Webster-Ashburton Treaty. Third, Webster had left his position as secretary of state in default to the government, owing a debt of $2,290 to the fund. In making each accusation, Ingersoll described the underlying evidence— including account entries and other internal communications—that he asserted proved Webster's guilt.[19]

The ensuing debate, however, did not go as Ingersoll had planned. Rather than focusing on the allegations made against Webster, some members of the House, led by Congressman George Ashmun of Massachusetts, were more concerned about how Ingersoll had come into possession of the evidence he claimed to possess, especially in light of the fact that the president had recently refused to produce the very same information for the House. In a heated debate between Ashmun and Ingersoll (in which the rhetoric was of such a nature that Ingersoll called Ashmun a "liar" and a "coward," and Ashmun

[15] *Id*. at 643. The resolution introduced by Ingersoll originally called for Webster to furnish the House with the requested documents. The resolution was amended to request the documents from the president. *Id*. at 636-43.

[16] *Id*. at 641.

[17] *Id*. at 698.

[18] *Id*.

[19] *Id*. at 729-30.

responded by reminding Ingersoll that in Massachusetts they "neither believe in dueling, bowie-knives, or pistols"), Ashmun pointed out that the question for the House was "by what means, foul or fair…has this pretended information been extracted from the secret archives of the State Department."[20]

A resolution was then offered directing that a special committee be appointed to "inquire how the seal of confidence imposed by law" upon the Department of State had been broken and how Ingersoll had obtained the information on secret expenditures that formed the basis of the accusations he had presented to the House.[21] It was not until the final moments of the debate on that proposed resolution that an amendment was offered to also establish a second select committee "to inquire into the truth of the charges this day made…against Mr. Daniel Webster, with a view to founding an impeachment."[22] The amendment was accepted, the resolution adopted, and the committees formed.

By modern measure, both select committees conducted their business quickly, releasing final reports only two months later in early June. Moreover, despite the sensitive subject matter of the investigations; their direct relation to the executive's approach to foreign relations, treaty negotiations, and the employment of secret agents; and the president's prior refusal to disclose details on the use of the secret service fund to the House, neither select committee appears to have had difficulty obtaining information that was necessary to complete a fair and thorough investigation. Importantly, the evidence received included internal executive branch communications as well as direct testimony from former presidents and current high-ranking executive officials.

The select committee appointed to investigate the allegations against Webster began by deposing former President John Tyler to determine the manner in which his administration used the secret service fund. Tyler's testimony revealed that the president had, consistent both with law and previous administrations, indeed placed the fund at the disposal of his secretary of state and had certified all expenditures made.[23] The president had instructed Webster to use the funds to employ certain "confidential agents" in Maine that could effectively "make known" to the public the administration's views on the northeast border dispute "by all proper means."[24]

According to communications that had been obtained by the committee, Webster had, in turn, used the funds to employ Francis O.J. Smith, a former member of Congress and influential Mainer, to sway public opinion in the state towards the compromise position favored by Webster and Tyler on the ongoing boundary dispute. Smith and others were employed to hold "interviews with leading and influential men" of both parties to "induce favorable action…on the part of the legislature" and to "procur[e] a favorable expression thereto on the part of the press" through submission of editorials supporting the administration's position.[25] Although not using funds to directly bribe or corrupt the press or for any other unlawful purpose, it was clear, as one biographer has suggested, that "Webster and Tyler had used public

[20] *Id*. at 731.

[21] *Id*. at 734.

[22] *Id*. at 735.

[23] H.R. Rep. No. 684, at 8-10 (June 9, 1846).

[24] *Id*. at 9-10.

[25] *Id*. at 16.

funds to manipulate public opinion among their own citizens."[26] Though a new approach to diplomacy, it was no crime.[27]

Finally, the committee reviewed the accounts and determined that Webster had, in fact, repaid any outstanding balance at the time he left the State Department, and it was possible that the government actually *owed* Webster $500.[28]

In light of the evidence, the committee concluded that "there is no proof in relation to any of the charges to impeach Mr. Webster's integrity or the purity of his motives in the discharge of the duties of his office."[29]

The select committee to investigate the conduct of Congressman Ingersoll also received testimony, generally pursuant to subpoena, from high-level executive branch officials, including sitting Secretary of State James Buchanan, former President Tyler, former President John Quincy Adams, and an interrogatory from President Polk.[30] The testimony received focused on State Department practices for securing information and the manner in which the department provided members of Congress and Chairman Ingersoll specifically with access to confidential files.

Although it obtained a "mass of testimony," the select committee did not see fit to make any recommendation to the House.[31] Rather, the report stated that "the committee has concluded to present the evidence which they have collected, without any expression of their opinion in regard to what it established." It was left to the House as a whole to "deduce" what it would from the accumulated evidence.[32] The report went only so far as to suggest that evidence that "connects and implicates" subordinate officers in the State Department should be "communicated to the proper executive heads."[33]

While Congress took no action in response to either committee report, Webster himself was able to inflict one last insult upon Ingersoll the following year, when President Polk submitted Ingersoll's nomination as ambassador to France to the Senate. Webster, still stinging from the Ingersoll allegations, used his influence to ensure that the nomination was defeated.[34]

C. The Webster-Ingersoll investigation and congressional power

At least three noteworthy and lasting principles of congressional investigative power can reasonably be drawn from the Webster-Ingersoll dispute and its resulting investigations.

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[26] Bartlett, *supra* note 4, at 194.

[27] The minority report, however, noted that "[w]hether this direct effort of the general government, through the agency of one of its high functionaries and the employment of pecuniary means for the purpose of influencing the legislative action of a State government, constitutes an impeachable offence in that functionary, the undersigned will not assume to decide." H.R. Rep. No. 684, at 38 (June 9, 1846).

[28] *Id*. at 3.

[29] *Id*. at 4.

[30] H.R. Rep. No. 686 (June 12, 1846).

[31] *Id*. at 1.

[32] *Id*.

[33] *Id*.

[34] William Montgomery Meigs, The Life of Charles Jared Ingersoll 291 (1897).

First, with respect to the scope of Congress's oversight power, the investigations suggest that foreign affairs, even clandestine foreign operations relating to treaty negotiations, are not immune from congressional oversight and do not form a legitimate justification for withholding information from Congress. This is especially the case when the conduct being investigated involves the expenditure of appropriated funds. Moreover, the investigations equally suggest that Congress may properly compel testimony and documents reflecting internal communications from executive branch officials of the highest rank—subject, of course, to the types of constitutionally-based presidential confidentiality interests hinted at by President Polk, though not of the breadth articulated in his response to the House.

Second, with respect to the effectiveness of congressional oversight, the Webster investigation displays that Congress is able to exercise prudence in how it handles sensitive information obtained from the executive branch. The committee, for example, expressly acknowledged that its "investigation has brought out facts (which are embodied in the testimony) connected with the foreign relations of the country, the disclosure of which public policy would seem to forbid."[35] The committee also noted that it had received certain evidence under "an implied understanding" that the information would not be made public except "in the event of an impeachment."[36] To that end, the committee chose to seal much of the received testimony, declining to make it public.[37] Congress can often more effectively and efficiently obtain sensitive information necessary for the conduct of an investigation when the executive branch is willing and able to trust in a committee's discretion.

Finally, with respect to Congress's ability to enforce its investigatory powers, the Webster investigation became an important point of consideration eleven years later, during the passage of the criminal contempt statute in 1857. That statute makes failure to comply with a congressional subpoena for either testimony or documents a federal misdemeanor.[38] The Webster investigation was explicitly referenced during a floor discussion in which questions were raised about whether it would be appropriate for the criminal contempt statute to be applied in a scenario in which a witness was asserting some form of privilege over the information requested, or where the information sought related to executive branch "diplomatic matters."[39]

In response to these questions, Congressman James Orr, who argued on behalf of the committee that reported the bill, referenced the Webster and Ingersoll investigations, noting that "this House has already exercised the power and authority of forcing a disclosure as to what disposition had been made for the secret-service fund. And it is right and proper that is should be so. Under our Government—under our system of laws—under our Constitution—I should protest against the use of any money by an executive authority, where the House had not the right to know how every dollar had been expended, and for what purpose."[40] It would appear, then, that in enacting the criminal contempt statute, the House presumably viewed the secret service fund investigations as appropriate in scope and precedential in nature. And most importantly, the House apparently believed that investigative demands regarding the activities of executive branch officials are properly subject to enforcement through the criminal contempt statute.

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[35] H.R. Rep. No. 684, at 4 (June 9, 1846).

[36] *Id*.

[37] Ultimately, the House chose to print the testimony relating to the use of secret service funds to influence the press. Cong. Globe, 29th Cong., 1st Sess. 988 (1846).

[38] 2 U.S.C. §§ 192, 194.

[39] Cong. Globe, 34th Cong., 3rd Sess. 430-32 (1857).

[40] *Id*. at 431.

1992-1994 Investigation of the Justice Department's Environmental Crimes Program

Debra Jacobson[1]

From 1981 to 1994, Rep. John D. Dingell, D-Mich., chaired the Oversight and Investigations Subcommittee of the House Committee on Energy and Commerce (O&I Subcommittee or Subcommittee). During that period, the Subcommittee conducted numerous investigations that led to important changes that benefited the American public, such as improvements in the safety of the blood supply and of generic drugs, and reforms in government contracting and environmental enforcement programs. Below I discuss the Subcommittee's high-profile investigation of the Justice Department's environmental crimes program, the positive results to which it led, and why.[2]

A. Purpose and Results of the Subcommittee's Investigation

The purpose of the Subcommittee's investigation was to probe allegations that personnel at the Department of Justice's headquarters in Washington D.C. (Main Justice) had undertaken activities and implemented procedures that had seriously impeded the effectiveness of the Environmental Protection Agency's (EPA) criminal enforcement program. These allegations were significant because the EPA must rely on Department of Justice (DOJ) prosecutors to develop and litigate its criminal case referrals.

The Subcommittee's inquiry involved two public hearings and nearly three years of staff work (from January 1992 to December 1994), including intensive review of thousands of pages of documents and staff interviews with agency officials.

The major issues investigated by the Subcommittee involved centralization of environmental prosecution decisions in Main Justice and mismanagement by the leadership of the environmental crimes program. As described in more detail below, the Subcommittee overcame much resistance in its efforts to determine the nature and extent of the problems in DOJ's environmental crimes program, which proved to be significant. The investigation helped drive important reforms in the program, including DOJ's revision of a counterproductive section of the U.S. Attorney's Manual (USAM) and major management improvements.

One of the most significant investigatory results of the Subcommittee's inquiry was its documentation of the facts surrounding the development and adverse effects of a controversial section of the USAM governing environmental criminal prosecutions. The Subcommittee's findings were based on a review of more than 2000 pages of internal DOJ documents, interviews of U.S. attorneys and their staffs, and formal testimony at a November 1993 hearing. The documents reviewed included all drafts of the January 1993 revision of the USAM as well as "all documents, including E-mail messages, interoffice memoranda, internal communications, notes and correspondence pertaining to the document or its development."[3] The documents revealed the details of an intense, three-year struggle between Main Justice and U.S. attorneys over the development of the controversial USAM section and documented the

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[2] Staff of Subcomm. on Oversight and Investigations, H. Comm. on Energy and Commerce, 103rd Cong., Damaging Disarray: Organizational Breakdown and Reform in the Justice Department's Environmental Crimes Program (Comm. Print 1994) [hereinafter Subcomm. Report]. Ms. Jacobson was a co-author of this report. The case study also relies on the subcommittee's hearing record. *See EPA's Criminal Enforcement Program: Hearing before the Subcomm. on Oversight and Investigations, H. Comm. on Energy and Commerce*, 103rd Cong. 103-63 (1993) [hereinafter *1993 Hearing*].

[3] *1993 Hearing*, *supra* note 2, at 280*;* Subcomm. Report, *supra* note 2, at 80.

strong opposition of U.S. attorneys to the veto authority over indictments asserted by political appointees at Main Justice.[4]

The Subcommittee's role in spurring the elimination of damaging aspects of the USAM was one of its most important accomplishments. The Subcommittee's inquiry revealed that senior political appointees in DOJ's environment division had asserted in 1990 for the first time that a section of the 1988 USAM required formal approval by Main Justice (rather than mere consultation) before one of the 93 U.S. attorneys could bring an indictment in an environmental prosecution. Subsequently, this newly cited interpretation of the USAM was relied upon by Main Justice officials to second-guess, and in some cases even stymie, the prosecutorial decisions of U.S. attorney offices and line attorneys. Several days before the change in presidential administrations in January 1993, the deputy attorney general issued an amendment to the USAM that unambiguously changed the procedures for the handling of environmental criminal cases and clarified DOJ's clear intent to provide Main Justice with a veto power over indictments and plea agreements recommended by U.S. attorneys in so-called "priority" environmental crimes cases.[5]

It is noteworthy that the efforts of the environment division to centralize control of cases in Washington, D.C. (and to thereby curtail the authority of the U.S. attorneys) ran directly counter to the decentralization of power in the preceding years in nearly every other area of federal criminal law. Leading U.S. attorneys expressed concern that this new Main Justice pre-approval process was an open invitation to subvert the process of making balanced prosecutorial decisions on the merits of a case and provided well-connected defense counsel openings through which to end-run their offices. The director of the EPA's office of criminal enforcement strongly criticized these new procedures as "calling balls and strikes from center field."[6]

In addition, the Subcommittee's November 3, 1993 hearing record revealed strong concerns that the January 1993 USAM amendments were likely to impede environmental prosecutions through cumbersome procedures and micromanagement. Witnesses expressed the view that they were not aware of any other area of criminal enforcement where a Main Justice component insisted on such "micromanagement."

The Subcommittee's investigation spurred DOJ (in August 1994) to substantially revise the provisions of the USAM governing environmental criminal prosecutions (that had been issued in January 1993). In so doing, DOJ addressed the vast majority of concerns that the Subcommittee had highlighted in its investigation and in written communications with the department. The August 1994 revisions:

Eliminated the authority provided to DOJ's environment division in the USAM to veto indictments and plea agreements proposed by U.S. attorneys' offices in environmental crimes cases. This change promoted a more balanced and efficient approach to decision-making in environmental prosecutions.

Removed a USAM provision setting forth a procedure governing meetings between defense counsel and Main Justice officials. The Subcommittee's chairman and ranking Republican member had expressed strong concern to DOJ that this provision would encourage defense counsel to seek meetings with environment division management officials in Washington, D.C., thereby undercutting the authority of line attorneys and U.S. attorneys in their own jurisdictions.

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[4] *1993 Hearing*, *supra* note 2, at 42-62; Subcomm. Report, *supra* note 2, at 57-75, 80-84.

[5] *1993 Hearing*, *supra* note 2, at 422-32.

[6] *Id.* at 420.

Eliminated a large number of procedural requirements, which experienced environmental prosecutors had identified as unduly burdensome.

Modified a USAM provision that had interfered with the ability of U.S. attorneys' offices to obtain legal support from EPA counsel and state and local prosecutors.

A second major accomplishment of the Subcommittee's review was documenting problems with senior management of DOJ's Environmental Crimes Section (ECS)[7] and helping to spur the department to appoint an experienced environmental criminal prosecutor, Ronald Sarachan, to assume leadership of the section in the summer of 1994.[8] This experienced environmental prosecutor replaced the ECS chief, who had been involved in a pattern of counterproductive and questionable actions that had the net effect of undermining environmental criminal enforcement efforts. The appointment of a new ECS chief was critical in helping to repair damaged working relationships between DOJ and the U.S. attorneys' offices as well as improve the relationship between the DOJ and the EPA's criminal enforcement program. This action also helped to restore stability in ECS itself.

B. Oversight Lessons

A large number of factors increase the likelihood of success of a congressional investigation generally, and did so for the environmental crimes investigation specifically. These factors include the credibility of the oversight review and the persistence of the Subcommittee in the face of resistance. Both of these factors played a major role in the success of the O&I Subcommittee's environmental crimes investigation.

1. Credibility of the Subcommittee's Investigation

The credibility of a committee investigation often can be assessed by asking a number of questions, including the following:

Has the investigation been conducted on a bipartisan basis?[9]

Is the committee focused on serious questions about the efficiency and effectiveness of existing government programs, the implementation of existing law, and/or the need for new laws (rather than a primary focus on scoring political points)?

Does the committee's review reflect a thorough and balanced effort to assess the factual and legal issues?

In this case, all three of these questions can be answered in the affirmative.

a. Bipartisan Investigation

The Subcommittee's investigation "was conducted on a fully bipartisan basis," as emphasized by the Subcommittee chairman and the ranking Republican member, Rep. Dan Schaefer, R-Colo., in their letter transmitting the final staff report to the members of the Committee on Energy and Commerce.[10] This

[7] Subcomm. Report, *supra* note 2, at 18.

[8] *Id.* at 486.

[9] If the investigation is not bipartisan, the burden in meeting criteria 2 and 3 is even higher.

[10] Subcomm. Report, *supra* note 2, at III.

point also was underscored by Rep. Schaefer in his opening statement at the Subcommittee's November 3, 1993 hearing.[11]

One of the factors that may have encouraged the support of the ranking Republican member was an ongoing controversy about the handling of an environmental crimes investigation in his home state. As Rep. Schaefer noted at the 1993 hearing, "[t]he topic of the enforcement of environmental laws is particularly important to Colorado because of the controversy surrounding environmental crimes at the Rocky Flats plant"[12]—a former nuclear weapons facility located in Colorado.[13]

It should be noted that the bipartisan nature of this investigation was not unusual for the O&I Subcommittee during Chairman Dingell's tenure. In fact, this investigation "exemplified the strong bipartisan nature of the Subcommittee's most successful inquiries."[14]

Various facts further underscore the bipartisan nature of the O&I Subcommittee's review. The Subcommittee's vote to issue a subpoena to obtain documents from Attorney General Janet Reno in March 1994 "received unanimous support from Republicans and Democrats alike,"[15] and all the staff 's investigative interviews involved both Democratic and Republican staff. Moreover, the investigation "proceeded in a collaborative manner over a timeframe that spanned both

a Republican and Democratic Administration."[16] "Both Democratic and Republican members of the Subcommittee had been involved in efforts during the previous decade to create the EPA's criminal [environmental] enforcement program, and they worked together to assure that the program was continuing to operate effectively."[17]

Finally, one of the major documents that precipitated the initiation of the O&I Subcommittee's inquiry was a letter from the Republican attorney general of Washington state (Ken Eikenberry) to the Republican U.S. attorney general (William Barr) strongly objecting to DOJ's handling of a specific environmental crimes case and to the treatment of attorneys in Eikenberry's office by the environmental crimes section in Main Justice. This letter was particularly noteworthy because a Republican state attorney general had no partisan interest in criticizing DOJ within a Republican administration.[18]

It is true that pursuing an investigation on a bipartisan basis involves substantial time and effort. Extensive consultation and coordination are required between majority and minority staff and members. It may be necessary to "tone down" statements or conclusions to accommodate concerns of the opposing political party.

However, the value of bipartisanship—particularly in high-profile, controversial investigations—cannot be overstated. For example, if the members of the opposing party believe that an investigation is

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[11] *1993 Hearing*, *supra* note 2, at 5.

[12] *Id.*

[13] *Id.* at 40-41.

[14] Subcomm. Report, *supra* note 2, at 3.

[15] *Id.* at 3.

[16] *Id.* at 2. The programmatic problems in DOJ's environmental crimes program began during the tenure of Republican President George H. W. Bush and continued into the early years of the tenure of Democratic President Bill Clinton.

[17] *Id.*

[18] *Id.* at 14-15.

politically motivated or unfair, they will criticize the investigation at public hearings and in the news media. Such action will greatly impede the ability of the investigatory committee to obtain cooperation from the subjects of the review and will undercut public support of any findings, conclusions, and recommendations emerging from the committee's review.

In contrast, bipartisan support can facilitate accomplishment of the goals of an investigatory committee. For example, in this case, the Subcommittee greatly benefited from the ranking Republican member's support for its staff interviews of DOJ line attorneys and U.S. attorneys and their staffs. The request for these interviews met strong resistance, but Rep. Schaefer publicly defended them at the Subcommittee's November 1993 hearing.[19]

The support of the ranking Republican member also was extremely valuable in achieving one of the major accomplishments of the Subcommittee: DOJ's extensive revision of the environmental criminal enforcement provisions of the USAM in August 1994. On June 27, 1994, Rep. Schaefer co-signed with Chairman Dingell a 12-page letter to Attorney General Janet Reno providing a detailed critique of the January 1993 USAM amendments.[20] At the time of this 1994 letter, DOJ had undertaken a revision of the controversial 1993 USAM provisions, and the bipartisan letter set forth a strong case for modification of those provisions based on extensive information obtained during the course of the Subcommittee's inquiry. As noted above, DOJ's August 1994 revisions addressed the vast majority of the concerns that the Subcommittee had highlighted.

b. Programmatic Focus and Long-Standing Leadership Role on Issue

If a committee investigation is viewed as a thinly veiled attempt to score political points, the impact of the inquiry will be greatly diminished. The O&I Subcommittee's investigation avoided this perception—and proved both credible and successful—in significant part because of the investigation's programmatic focus and the Subcommittee's long-standing leadership role in the area of environmental criminal enforcement. For more than a decade, the chairman and other Subcommittee members had demonstrated a strong personal commitment to ensuring the effectiveness of the environmental crimes program.

For years, the O&I Subcommittee had been at the forefront of assuring the availability of adequate legal authority and resources to deter environmental crimes and had been engaged in overseeing the implementation of the nation's environmental criminal enforcement program. In fact, Subcommittee hearings in the late 1970s and early 1980s had provided a major impetus for the very creation of the EPA's criminal enforcement program.[21]

Once the EPA's criminal enforcement program became operational, the chairman and other Subcommittee members worked to ensure that the agency's criminal investigators were provided adequate legal authority to perform their jobs in an effective manner. A 1982 Subcommittee report and a 1983 Subcommittee hearing were pivotal in spurring legislative and administrative action to provide EPA's criminal investigators with full law enforcement authority (*i.e.*, authority to execute search warrants, arrest violators, prevent ongoing illegal activity, and carry weapons to protect themselves).[22]

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[19] *1993 Hearing*, *supra* note 2, at 5.

[20] Subcomm. Report, *supra* note 2, at 424-35.

[21] *Id.* at 5.

[22] *Id.* at 6-9.

Chairman Dingell also played a significant role in legislative action to provide additional resources for the EPA's criminal enforcement program. In addition, throughout the 1980s and early 1990s, the Energy and Commerce Committee was instrumental in efforts to strengthen criminal penalties in various environmental laws to provide adequate deterrence against serious violators (*i.e.*, the Hazardous and Solid Waste Disposal Act Amendments of 1984, the Superfund Amendments and Reauthorization Act of 1986, and the Clean Air Act Amendments of 1990).[23]

Obviously, not all committee investigations will be grounded on such extensive foundations. In fact, a committee often will investigate issues that represent new areas of inquiry. In any case, the inquiry will have much more credibility if the committee is focused on substantive questions about the efficiency and effectiveness of existing government programs, the implementation of existing law, and/or the need for new laws.

A substantive focus will be reflected in a variety of ways, including the tenor and tone of any hearings. For example, if committee members' hearing questions are designed to elicit facts about deficiencies in the implementation of existing law or recommendations for new laws, the committee will demonstrate a sincere interest in improving the operation of government or in cutting programs that have failed to deliver results. Alternatively, if the focus of a hearing largely involves speeches or questions by members focused primarily on embarrassing political appointees or the opposing party, then the credibility of the investigatory committee is greatly diminished.

c. Thorough and Balanced Effort to Assess the Factual and Legal Issues

Even if a committee undertakes a substantive inquiry, it is essential that the staff findings and member statements are based on a balanced, meticulous assessment of the facts. This effort often will involve the synthesis of hundreds of pages of documents, hearing testimony, and staff interviews. The committee's critics will seize upon and highlight any misstatement of fact to undermine the committee's credibility, particularly in high-profile investigations.

An experienced staff director and experienced staff counsel and investigators are critical. By necessity, committee and subcommittee chairmen must rely on their staff to conduct the extensive legwork required by a lengthy investigation. A chairman typically has numerous competing responsibilities, including multiple investigations, legislative priorities, constituent work, and district visits. If the staff members have participated in previous, complicated inquiries, their investigative abilities will be much sharper.

A variety of tools can be used to facilitate a thorough and balanced fact-finding effort. The development of a chronology of key events can be extremely helpful in organizing the information from a large mass of documents. In the environmental crimes inquiry, the O&I Subcommittee developed such a chronology of events to clarify the roles and positions of various

U.S. attorneys' offices and Main Justice officials regarding revisions to the environmental criminal enforcement sections of the USAM.[24]

Ensuring checks and balances in the investigative process also can be very helpful. The general practice of the O&I Subcommittee was to seek to minimize the potential for misstatements of fact by involving a team of at least two staff members in the conduct of major investigations. This team approach (as well as the involvement of the Republican counsel in staff interviews) served to promote a balanced look during

[23] *Id.* at 9-10.

[24] *1993 Hearing*, *supra* note 2, at 42-62.

the fact-finding process. In addition, the Subcommittee's staff director approved and the chairman signed all written correspondence, and the staff director reviewed all written summaries and reports released publicly by the Subcommittee. Finally, congressional support agencies (e.g., Congressional Research Service (CRS), General Accounting Office, offices of inspectors general) can be extremely valuable in helping to supplement a committee's limited staff resources and to fill in gaps in committee staff expertise. For example, in the environmental crimes inquiry, O&I Subcommittee staff obtained critical support from an experienced constitutional lawyer in CRS's American Law Division. The CRS support was particularly important in developing strong legal arguments (and compiling historical precedents) to support the Subcommittee's right to obtain deliberative documents from DOJ and to gain access to staff interviews with DOJ attorneys.[25] Many of these arguments were cited by the Subcommittee chairman in correspondence with DOJ.[26]

2. Persistence of the Subcommittee in the Face of Agency Resistance and Outside Critics

Another key element of a successful congressional investigation is the persistence of a committee in the face of resistance from outside parties. The fact that an investigation has important public policy goals does not mean that the investigation will be easy. In many cases, officials of an agency undergoing a committee review will create major roadblocks, and criticism by outside parties and the press can sometimes be intense. A committee chairman and staff must have a strong backbone to withstand the outside criticism, and a committee must be prepared to use a variety of tools and strategies to overcome resistance.

In the environmental crimes investigation, the intensity of the agency resistance and outside criticism was particularly strong. DOJ strongly opposed interviews of agency line attorneys by O&I Subcommittee staff,[27] and roughly a year of delay ensued before DOJ allowed interviews to proceed.[28] The department also vigorously resisted Subcommittee access to key internal agency documents.[29] In addition, during the course of the Subcommittee's review, DOJ issued a lengthy "Internal Review" of the environmental crimes program that unfortunately failed to scrutinize the program in an evenhanded manner and "discredited those who had called for reform in the management of the program, including… the Subcommittee itself."[30] The attorney general's decision to finally allow interviews of line attorneys and to release the withheld documents was precipitated by the Subcommittee's pursuit of the strategies discussed below.

In 1993, the O&I Subcommittee also faced significant efforts by the criminal defense bar and the news media to impede its investigation. "The Subcommittee was able to proceed only because of the steadfastness of the Chairman, the Ranking Minority Member, and the other members of the Subcommittee in the face of repeated attacks."[31]

The major outside attacks began in August 1993, when former Attorney General Benjamin Civiletti argued in a public speech that DOJ's decision to permit O&I Subcommittee staff interviews of DOJ line

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[25] *Id.* at 321-350.

[26] *See, e.g.*, Subcomm. Report, *supra* note 2, at 299-301.

[27] *Id.* at 2.

[28] *Id.* at 129 n.425. DOJ did make exceptions to allow a few interviews during this period. *Id.* at 238.

[29] *Id.* at 2.

[30] *Id.* at 128-29.

[31] *Id.* at 41-42.

attorneys about closed criminal cases was constitutionally impermissible and an abrupt departure from "a time-honored Department of Justice policy." Shortly thereafter, The Wall Street Journal published an editorial titled "General Dingell II" that centered on the Civiletti speech and provided a ringing endorsement of it.[32]

"The attention focused by The Wall Street Journal on the Subcommittee's investigation was notable for its intensity."[33] During a two-and-a-half-month period, the newspaper published three editorials, entitled "General Dingell," "General Dingell II" and "General Dingell III." The articles personally attacked the chairman and the investigation and also personally attacked the Subcommittee staff—describing them as "interrogators," "Dingell wolves," and "Torquemadas-in- training."[34]

A number of other publications also attacked the O&I Subcommittee's inquiry. For example, a conservative newspaper, the Washington Times, published 16 articles critical of the investigation between late June 1993 and June 1994. As stated in the Subcommittee's final report, these articles "were notable for their factual inaccuracies."[35]

Finally, in the fall of 1993, the white collar criminal defense bar also launched an effort within the American Bar Association (ABA) to encourage resistance to the O&I Subcommittee's review. During this period, the white collar crime committee of the ABA established an "Ad Hoc Committee on Department of Justice/Congress Relations" to develop policy recommendations on the question of congressional oversight of DOJ prosecutorial decision-making. According to an internal memorandum summarizing these developments, the Ad Hoc Committee was specifically aimed at "the Dingell problem" and planned to rely, at least in part, on former Attorney General Civiletti's speech in conducting its review.[36]

During the course of the environmental crimes inquiry, the O&I Subcommittee employed a number of investigative tools and strategies to overcome this strong resistance. The Subcommittee proceeded in a deliberate way to build a strong factual and legal foundation in its letter requests for interviews with line attorneys and in its document requests.[37] It was only after the Subcommittee established this foundation that it unanimously voted in March 1994 to issue a subpoena to Attorney General Janet Reno requiring the production of documents related to six closed criminal cases and other specified internal documents. As noted in the Subcommittee's report, internal documents as well as the staff interviews were critical to the success of the environmental crimes inquiry.[38]

Another strategy employed by the O&I Subcommittee involved coordination with the Senate confirmation process to help achieve its goals. This strategy required the Subcommittee to win the cooperation of the Senate Judiciary Committee, and in fact, a key Judiciary subcommittee delayed the confirmation of the nominee for assistant attorney general for environment and natural resources, Lois Schiffer, for several months until DOJ provided withheld documents and implemented key management reforms in the environmental crimes program. Ms. Schiffer had been serving as acting attorney general, and there was a strong administration interest in having her fill this position on a permanent basis. The

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[32] *Id.* at 43.

[33] *Id.*

[34] *Id.* at 44.

[35] *Id.* at 48.

[36] *Id.* at 50.

[37] The key correspondence is contained as an appendix to the subcommittee's report.

[38] Subcomm. Report, *supra* note 2, at 79-84.

Subcommittee's involvement is highlighted in a February 25, 1994 letter from Chairman John Dingell to Senate Judiciary Chairman Joseph Biden. The letter emphasized:

Although as a general rule, I do not involve myself extensively in nomination issues, which are committed by the Constitution to the Senate, I have, from time to time, sought to assist the relevant Senate committee by bringing to its attention information developed in our Subcommittee's oversight and investigative work that may bear significantly on a particular nominee's suitability. In this connection, the Members of the Senate Judiciary Committee may be interested in learning about the ongoing environmental crimes inquiry being conducted by the Subcommittee and about certain developments in that inquiry.[39]

Continuous, detailed follow-up on an issue also can be critical to success. In the environmental crimes inquiry, this approach proved to be pivotal in winning the battle to secure a major revision of the USAM. The November 2003 hearing record and follow-up letters were particularly important. In particular, a December 2003 letter to Leon Panetta, director of the Office of Management and Budget, stressed that the January 1993 USAM provisions on environmental criminal enforcement were inconsistent with the "reinventing government" initiative of the Clinton administration,[40] and a February 2004 letter to Chairman Biden criticized DOJ's endorsement of the same provisions at the November 2003 hearing. Moreover, as discussed previously, the June 27, 2004 joint letter on the USAM to DOJ from Chairman Dingell and Ranking Republican Member Schaefer[41] was especially important because of its timing.

The O&I Subcommittee's final published report also provides an example of the benefits of detailed follow-up. The report reinforced the results of the investigation and was designed to ensure that DOJ would not repeat its mistakes in later years. It also detailed the deficiencies of DOJ's own self-evaluation.[42] The report included the major correspondence with DOJ and other significant documents generated during the investigation, thereby highlighting the investigatory approaches employed by the O&I Subcommittee to overcome various challenges. As a result of this detailed record, some prominent congressional experts have utilized the Subcommittee's report as a resource to teach about congressional oversight.

In many cases, investigatory committees complete detailed inquiries but fail to issue detailed final reports. In fact, in the 1980s, six subcommittees investigated mismanagement and abuses in the EPA's Superfund program, but the O&I Subcommittee was the only subcommittee to issue a final report.[43] Although it is easy to simply move on to the next investigation and fail to issue a final report, the lasting impact of the investigation will be greatly diminished.

In addition, in a hotly contested investigation, an experienced chairman and experienced staff will be a huge asset. With past experience under their belts, the chairman and staff will have a foundation on which to develop creative strategies to counter outside opposition. With experience comes the knowledge that a

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[39] *Id.* at 392.

[40] *Id.* at 70.

[41] *Id.* at 424-35.

[42] *Id.* at 128-63.

[43] The Superfund program was established by the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. The purpose of this legislation is to manage the cleanup of the nation's worst hazardous waste sites and to respond to local and nationally significant environmental emergencies. The subcommittee's report on its Superfund investigations was issued in 1984. Staff of Subcomm. on Oversight and Investigations, H. Comm. on Energy and Commerce, 98th Cong., Investigation of the Environmental Protection Agency: Report on the President's Claim of Executive Privilege Over EPA Documents, Abuses in the Superfund Program, and Other Matters (Comm. Print 1984).

committee cannot simply move from one hearing to the next and expect lasting results. The agency or entity under review needs to know that the committee's scrutiny will not end as soon as the hearing is over. Follow-up letters (and sometimes additional hearings) over a period of months or even years may be needed to accomplish the committee's goals.

Staff will be much more effective in dealing with outside agencies and parties if they know that their chairman will stand by them when the going gets tough in a well-founded investigation. Chairman Dingell's support was an essential asset to the staff in the environmental crimes inquiry.

One of the watchwords of investigations by the O&I Subcommittee was to "start with the end in mind." If a committee does not anticipate the likely challenges in an investigation and the avenues to overcome such challenges, it is unlikely to be successful.

*Protecting the House's Institutional Prerogative to Enforce Its Subpoenas**

By Irvin B. Nathan[1]

The suspicious and apparently politically motivated firings in 2006 by President George W. Bush of several of the United States attorneys he had appointed led to the unprecedented action by the United States House of Representatives to file suit in federal court to enforce its subpoenas against high-ranking White House officials.

The lawsuit resulted in a landmark ruling by a federal judge (appointed by George W. Bush) that held that the House could properly bring such a suit and that top executive branch officials had no right to ignore the subpoenas, but must appear in person, answer questions truthfully, and assert, where appropriate, on a question-by-question basis any privilege, including executive privilege.[2]

Prior to this lawsuit, it was the conventional wisdom that the House had only two ways to enforce its subpoenas: (1) vote to hold the witness in contempt and refer the matter to the U.S. Department of Justice for criminal prosecution under 2 U.S.C. Sections 192 and 194; or (2) direct the sergeant-at-arms to arrest the witness, try her in the House, and upon conviction, place her in detention in a House facility until she either complied with the subpoena or the term of the Congress expired, whichever came first. Since the first option was not available, according to the Department of Justice, when the recalcitrant witness was acting at the direction of the White House, and since the second option did not appear politically palatable when the witness in contempt for refusing to appear for her testimony was a gracious, middle-aged professional who was acting at the direction of the president of the United States, it was necessary to find a third way to proceed.

The unconventional lawsuit approach was opposed by, among others, the Republicans in the House, then in the minority headed by Minority Leader John Boehner. Indeed, the Republicans in the House filed an amicus brief with the court, urging dismissal of the action. However, proving once again that where one stands on an issue depends on where one sits, when the Republicans took control of the House, and a Democrat, Barack Obama, was elected president, Speaker Boehner used the *Miers* precedent to direct the House to file suit against Attorney General Eric Holder for withholding documents despite a subpoena in the so-called "Fast and Furious" investigation. This suit also resulted in a ruling in favor of the House's ability to bring suit to enforce its subpoenas (in a decision by a judge appointed by President Obama).[3]

It is now reasonably well settled that, at least, where all of the formalities have been observed—including proper service of the subpoenas, reasonable efforts to secure compliance, a formal vote of contempt of the House for non- compliance with the subpoena, and a House resolution authorizing a lawsuit—the House may bring an action

in court to enforce a subpoena, and the failure of the witness to comply with a resulting court order can result in contempt of court and appropriate judicial sanctions. This case study describes how this remedy came to be available to the House and why in certain circumstances it is preferable to the two conventional approaches.

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[1] The author was the general counsel of the U.S. House of Representatives under Speaker Nancy Pelosi and was the lead counsel for the House in the lawsuit to enforce the subpoenas issued to former White House Counsel Harriet Miers and Bush White House Chief of Staff Joshua Bolten. He is currently senior counsel at the Washington law firm of Arnold & Porter.

[2] *See* Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53 (D.D.C. 2008).

[3] *See* Comm. on Oversight & Gov't Reform v. Holder, 979 F. Supp. 2d 1 (D.D.C. 2013).

A. Factual Background

In late 2006, nine United States attorneys who had been appointed by President George W. Bush were unceremoniously forced from office by the Bush administration without notice, warning or explanation. Suspicions promptly arose that the firings were politically motivated since several of the deposed U.S. attorneys were either prosecuting prominent Republican officials or failing to pursue Democratic officials or supporters as vigorously as White House officials hoped. Examples of the fired U.S. attorneys included:

Carol Lam, the U.S. attorney in Los Angeles, who secured a conviction on corruption charges of powerful Republican Representative Randy "Duke" Cunningham and was actively pursuing a corruption investigation of a top Bush-appointed CIA official and a prominent Republican donor. Before her firing, Ms. Lam had informed senior Justice Department officials that she would be executing search warrants in the corruption investigation.

David Iglesias, the U.S. attorney in New Mexico, who was fired shortly after he rebuffed urgent requests from Republican Senator Pete Dominici and Republican Representative Heather Wilson to expedite his office's investigation of state Democratic officeholders. Indictments of the local Democrats would have benefited Wilson who at the time was running for re-election against the Democratic attorney general of New Mexico. Federal indictments would have made it appear that her adversary had not been sufficiently aggressive in enforcing the law against his fellow Democratic officeholders. Iglesias later termed his removal "a political fragging, pure and simple."

John McKay, a U.S. attorney in the state of Washington, who Republican officials had asked to pursue allegations of voter fraud against suspected Democratic voters. McKay found the allegations unsupported by the evidence and, to the vocal dismay of Republican state operatives, declined to bring criminal charges. He was confronted on this issue by then White House counsel Harriet Miers and her deputy not long before he was notified of his dismissal.

Concerned about the apparent politicization of the federal criminal justice system and the potential messages sent to the remaining U.S. attorneys by these firings, committees of both houses of Congress initiated investigations into the firings in early 2007. In the House, the investigation was initiated by the Commercial and Administrative Law Subcommittee of the House Judiciary Committee, which has jurisdiction over the Executive Office for U.S. Attorneys. As difficulties developed in obtaining information, the matter was taken on by the full House Judiciary Committee. The House committee's investigative staff was ably led by Elliot Mincberg, who had formerly been a partner at a leading Washington law firm and for many years the lead counsel at a prominent public advocacy organization.

Top officials at the Department of Justice, including then Attorney General Alberto Gonzales, gave false and misleading testimony, claiming that there was little White House involvement in the termination decisions and claiming that the fired U.S. attorneys were "poor performers." In fact, documents obtained from the Department of Justice showed that most of the fired U.S. attorneys were evaluated as excellent and former Deputy Attorney General James Comey (now FBI director), who had been their supervisor, testified that most were outstanding performers. Many of the explanations for the firings offered by Justice officials to both Congress and the public proved to be pretextual and demonstrably false, and testimony to Congress minimized the role of the White House in the terminations.[4]

[4] Off. of the Inspector Gen., Off. of Prof. Resp., An Investigation into the Removal of Nine U.S. Attorneys in 2006 (2008).

Documents obtained from the Department of Justice demonstrated that the White House had a substantial role in the determination of which U.S. attorneys were to be terminated. The documents indicated that the idea of replacing U.S. attorneys in the second Bush term had originated with influential White House adviser Karl Rove. They showed that multiple drafts of lists of U.S. attorneys to be fired passed between the Department of Justice and the White House counsel's office, when Harriet Miers was White House counsel. These drafts were ever-changing, and additions were made after complaints from Republican operatives from the states were delivered to the White House. The attorney general repeatedly claimed not to remember any of the details regarding the firing process or why these particular U.S. attorneys were chosen for termination. In fact, no witness from the Department of Justice could explain who decided which U.S. attorneys should be terminated or the criteria used for these decisions.

When all sources within the Department of Justice had been exhausted, key questions remained unanswered. Who drew up the lists? Who decided who would be on them? What criteria were used for the termination decisions? The House Judiciary Committee, headed by Rep. John Conyers, attempted to obtain through voluntary cooperation with the White House relevant documents and interviews with current and former White House officials with knowledge about the selection process and the reasons for the termination. In written correspondence, the White House counsel, Fred Fielding, refused to produce any documents or witnesses for interviews unless the committee agreed to a number of conditions.

They included: accepting a very limited set of documents; conducting the interviews without any oath or transcript; and precluding in advance any follow-up to whatever information was provided. These conditions were totally unacceptable to the committee. It issued subpoenas for the testimony of Ms. Miers, by this time a retired White House counsel who had returned to the private practice of law in Texas, and for pertinent White House documents in the custody and control of then White House chief of staff Joshua Bolten.

In response to the subpoenas, the White House refused to produce a single document, claiming executive privilege as to every responsive document. The White House refused to produce a privilege log, which is commonly used in litigation to identify and describe the withheld documents (by date, author, recipient and so forth) so that informed challenges could be made to an assertion of privilege. The subpoena to Ms. Miers, issued on June 13, 2007, directed her to appear for testimony about a month later, on July 12. As late as July 9, her private counsel advised the committee that she would appear, but might withhold some documents and decline to answer certain questions if she believed that they were protected by executive privilege. Then on July 10, her counsel sent a letter to the committee advising that the White House counsel,

Mr. Fielding, had advised him that the president's senior advisors, including retired ones like Ms. Miers, were "absolutely immune" from testimonial compulsion by a congressional committee and further that President Bush had directed Ms. Miers not to appear at the scheduled hearing.[5]

In response, on July 11, 2007, one day before the scheduled hearing, the committee sent a letter to Ms. Miers' counsel, noting that there was no court decision supporting the claim of absolute immunity; that no one, including high White House officials, had the option of failing to appear in response to a congressional subpoena; that numerous current and former senior White House officials, including White House counsel, had testified before Congress; and that a refusal to appear could subject Ms. Miers to contempt proceedings, including criminal prosecution and the inherent contempt authority of the House.

Ms. Miers did not appear before the committee on the day of the hearing.

[5] *See Miers*, 558 F. Supp. 2d at 56.

B. Actions of the House In Response to the Failure to Comply with the Subpoenas

On the day of the scheduled hearing, July 12, 2007, the chairwoman of the Commercial and Administrative Law Subcommittee of the Judiciary Committee, Rep. Linda Sanchez, ruled that the claims of privilege and immunity were not properly asserted and that there was no legal basis for the witness's refusal to appear. The next day Chairman Conyers sent a letter to Ms. Miers' counsel giving her the opportunity to mitigate her noncompliance and avoid contempt by appearing at a rescheduled hearing. Once again, the chairman reminded counsel of the possibility of a contempt proceeding. In response, her counsel reiterated that she would refuse to appear as a result of a direction from President Bush and the legal conclusion of White House counsel Fielding that she was absolutely immune from congressional subpoenas.

On July 25, 2007, the Judiciary Committee voted, largely along party lines, 22-17, to recommend that the full House find Miers and White House chief of staff Bolten in contempt of Congress. Efforts over the summer and fall to resolve by negotiations what Fielding referred to as an "impasse" were unsuccessful. In the meantime, the staff of the committee considered options to enforce a contempt citation if the full House voted, for the first time in 25 years, to hold a cabinet- level official in contempt.

The staff recognized that the statutory procedure for a criminal prosecution would not succeed under these circumstances. The procedure set forth in the federal criminal code contemplates that after a vote by the full House to hold a subpoenaed witness in contempt of Congress, the speaker refers the matter to the U.S. attorney in the District of Columbia, who then seeks an indictment and prosecutes the contemnor. Upon conviction, the defendant can be imprisoned or fined or both. In this case, since the executive branch was the source of the legal advice that the witness need not appear pursuant to the subpoena, it was clear that the Department of Justice would not permit the U.S. attorney to prosecute either the former White House counsel or the White House chief of staff.

An alternative to federal criminal prosecution is for the House to use its inherent contempt authority to imprison the contemptuous witness. As a result of early 19th century Supreme Court precedents, it is well established that the House (as well as the Senate) has the power to arrest and try an individual who has acted in contempt of Congress.[6] If convicted, the individual could be imprisoned in the House until either the witness cures the contempt or until the session of Congress is concluded. This procedure has not been employed in the last 75 years, and the author is reliably informed that the space formerly used as the House jail now serves as a snack bar.

While this alternative procedure was known to be available to the House, no one seriously considered it because of its political non-viability. Both the Judiciary Committee and the White House were battling over the political firings of the U.S. attorneys in the press and with the public. The committee had the high road with its search for the reasons behind the suspicious firings and those directly responsible for them. There would have been a great loss of public support if the House had attempted to imprison a distinguished professional woman who had served her country as White House counsel and had even been a nominee to be a Supreme Court justice, who in failing to appear was acting at the direction of the president.

A third alternative had to be found. The staff raised the possibility of a federal lawsuit for a declaratory judgment and an injunction and as a senior counsel to the committee, I urged that we pursue that approach. There was no direct precedent for such a suit, but all of the elements for such a suit appeared to be satisfied and it appeared to the staff that this was the best available approach. After all, the White

[6] *See, e.g.*, Anderson v. Dunn, 19 U.S. 204 (1821).

House was making a legal claim that the witnesses were absolutely immune from House subpoenas and the Judiciary Committee was asserting that there was no such immunity. This was a legal issue, pure and simple, one which the courts were there to resolve. As Chief Justice John Marshall wrote in the landmark case of *Marbury v. Madison*: "It is emphatically the province and duty of the Judicial Department to say what the law is."[7]

The committee staff requested and received a legal opinion from the Congressional Research Service on the ability of the House to seek civil judicial enforcement of a subpoena. In an opinion, written by Morton Rosenberg and Todd Tatelman, the CRS reported that there had never been such a lawsuit before and had never been a House resolution authorizing such a specific action. There had, however, been prior instances when the House had passed resolutions authorizing committees to intervene in pending court cases where the House had a compelling interest and cases where the House had authorized investigative actions, which could eventually include judicial enforcement. The opinion concluded that it was possible to argue that the House, by adopting an authorizing resolution, could permit a committee, the House's general counsel or an outside private law firm to represent the House in court to seek a judgment ordering compliance with a congressional subpoena. At the same time the opinion warned that that there would be significant procedural hurdles that would have to be overcome before a court could reach the merits of such an action, including the House's standing to bring such an action, the jurisdiction of the court to consider it, and prudential reasons for the court to decline to entertain such a suit.

Internally, there was considerable debate whether to bring such a lawsuit. Attorneys with long experience in the House general counsel's office, and with considerable devotion to the prerogatives of the House, strongly recommended against such a suit. Their argument was that the House was likely to lose the suit and thus the powers of the House would be diminished. Recognizing that it would be an uphill battle and that there were substantial procedural hurdles—including the fact that the Senate had by statute a right to bring such a suit, but the House was conspicuously absent from the statute—I, as general counsel, and some on the committee staff argued in favor of the suit. We believed that we had the better of the procedural arguments and a clear winner on the merits, if the court would reach them. We argued that if we did not sue, the House would appear to be a paper tiger, holding the witnesses in contempt but without any effective follow up action. I also argued that even if we lost on procedural grounds, it would be a loss on a ground that could likely be cured by future legislation, thus not doing any long term damage to the powers of the House. After I made my recommendations to them, Speaker Pelosi and Chairman Conyers exhibited considerable courage to pursue the litigation.

On February 14, 2008, the full House took up the Judiciary Committee resolution to hold Ms. Miers and Mr. Bolten in contempt. By an overwhelming vote of 223-32, the House voted to cite Ms. Miers and Mr. Bolten for contempt and to refer them for criminal prosecution. Knowing that the criminal prosecution was not likely, the full House also adopted a resolution authorizing the House Judiciary Committee to initiate a civil action in federal court to seek declaratory and injunctive relief "affirming the duty of any individual" to comply with a duly issued House subpoena.[8] The House Republicans walked out of the proceedings en masse and boycotted the votes on these resolutions.

In accordance with the resolutions, Speaker Pelosi certified the matter to the U.S. attorney in D.C., who was directed, under the statutes, to present the matter to a grand jury. The speaker also sent a letter to Attorney General Michael Mukasey to the same effect. Promptly thereafter, the attorney general advised the speaker that because the witnesses were acting at the express direction of the president "non-compliance …with the Judiciary Committee subpoenas did not constitute a crime and therefore the

[7] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803).

[8] *Miers*, 558 F. Supp. 2d at 63.

Department will not bring the congressional contempt citations before a grand jury or take any other action to prosecute" the witnesses.[9]

C. The Precedent-Setting Litigation

Less than 10 days after the rejection by the attorney general and less than a month after the full House vote, the committee filed its 36-page complaint in the federal court in the District of Columbia seeking declaratory and injunctive relief. The complaint urged the court to rule that the witnesses had to honor the subpoenas and appear before the committee to answer questions or raise privilege objections to specific questions and either to provide the subpoenaed documents or identify in writing the documents withheld and the basis for withholding them. The case was assigned randomly by the clerk's office to Judge John Bates, who had been appointed to the bench by President George W. Bush.

As the lead litigator for the House, I believed it was critical to demonstrate that this suit was intended to preserve the institutional integrity and powers of the House, and was not a partisan matter between a Democratic-controlled House and a Republican president. Accordingly, I tried to convince the Republicans in the House to join the suit. I met with then-Minority Leader John Boehner in his office. He listened cordially as I explained that this suit was intended to preserve the institutional integrity of the House. I argued in the spring of 2008 that it did not take a lot of imagination to posit a day in the not too distant future when there would be a Democrat in the White House and the Republicans would control the House. (Indeed, that is exactly what happened by January, 2011.) Mr. Boehner was not persuaded, and advised that the Republicans would oppose our suit. Indeed, the minority leadership in the House, led by Mr. Boehner, filed an amicus brief urging that our suit be dismissed on the ground that it was "not ripe" for resolution.

To demonstrate the non-partisan nature of the suit, I worked hard to secure amici across the political spectrum and from both major political parties. With the aid of some of the terminated U.S. attorneys, we assembled a group of former U.S. attorneys, some appointed by Republican presidents and some appointed by Democratic presidents, ranging in their service from the days of President Lyndon Johnson to President George W. Bush. Their brief (written by outstanding lawyers at the premier boutique firm of Robbins Russell) attested to how important it was that the administration of the criminal justice system be (and be perceived as being) non-partisan and non-political. It also contended that it was important that the House determine what had led to the firings of nine of the president's own appointed U.S. attorneys. Finally, the brief argued that these White House officials could not ignore duly authorized congressional subpoenas by asserting a unilateral, unqualified claim of immunity.

We also secured a bipartisan group of prominent current and former members of Congress who filed an amicus brief (prepared by the highly regarded attorney, James Hamilton) on the importance of congressional oversight and the need for enforceable subpoena powers and the absence of any absolute executive privilege. An amicus brief (prepared by eminent Washington attorney Barry Coburn) was also filed by prominent academics from liberal and conservative institutions who were experts at separation of powers and the history and procedures for the assertion of executive privilege. They explained that no one had absolute immunity from a congressional subpoena, and that even where executive privilege applied, it had to be asserted on a question by question basis. Finally, an amicus brief (prepared by lawyers at the well known law firm of Paul Weiss and Brennan Center legal scholars headed by Frederick A.O. Schwarz, Jr.) in support of our positions was filed by a broad array of think tanks that focused on the importance of separation of powers in the federal government and the need and propriety for the court to

[9] *Id.* at 62-63.

resolve the impasse. Among those joining this amicus brief were the Brennan Center for Justice, the Rutherford Institute, Judicial Watch and the Citizens for Responsibility and Ethics in Washington.

As anticipated, the Department of Justice on behalf of defendants Miers and Bolten hit us with a barrage of procedural defenses to encourage the court to avoid the merits, that is, whether the witnesses were right to claim that they, as senior White House officials, were absolutely immune from congressional subpoenas. The executive branch's motion to dismiss claimed that (1) the House had no legal injury and therefore lacked standing to sue; (2) the House had no cause of action; and (3) the court should exercise its discretion to decline to entertain the suit under the Declaratory Judgment Act. The motion argued that only if the House had cleared each of these obstacles should the court reach the merits, and then rule that these high White House officials were absolutely immune from congressional subpoenas.

We had anticipated each of these arguments and had been researching these issues for months before filing suit. We had also consulted with some of the leading constitutional authorities in academia, including the brilliant Harvard Law School civil procedure professor Daniel Meltzer, who provided us invaluable assistance. (Ironically, Professor Meltzer became deputy White House counsel in the Obama White House and had to recuse himself when the Obama administration inherited the litigation from the Bush administration. Sadly, Professor Meltzer passed away prematurely shortly after completing his White House duties.)

In addition to filing our detailed opposition to the executive branch's motion to dismiss, we filed our motion for partial summary judgment because there were no material facts in dispute and because it was important to get a prompt result. We deliberately sought only partial summary judgment because we wanted to emphasize to the court that it did not need to decide at this point whether executive privilege was valid as to any specific questions or to any particular request for documents. Both our motion and the executive's were briefed on an expedited basis, and oral argument was scheduled for the end of June, less than four months after the filing of the case. The oral argument was held in the large ceremonial courtroom of the federal district court building in Washington, D.C. before an overflow crowd. Demonstrating to the court the importance each side attached to the litigation, White House counsel Fred Fielding sat at counsel table for the executive branch defendants with a half dozen lawyers from the Department of Justice. House Judiciary Chairman John Conyers sat with my team of lawyers from the House general counsel's office at plaintiffs' counsel table.

Judge Bates, who had spent much of his career before ascending the bench serving as the head of the civil division of the U.S. attorney's office in the District of Columbia defending suits against the executive branch, came to the oral argument fully prepared. He had obviously read carefully not only all of the voluminous briefs filed by both sides but many of the leading cases cited in those briefs. For over three hours, he peppered both sides with tough but fair questions, probing the vulnerable points of each side, and never indicating which way he was leaning. Recognizing what he later wrote was "the extraordinary constitutional significance" of the issues presented, Judge Bates allowed each side to make their full arguments, with rebuttals and surrebuttals.[10] Taking the matter under advisement without any indication of the result, the judge promised a prompt decision. Each side left the hearing confident that it had made its full case and best arguments but totally unsure what the result would be.

Less than one month later, the judge, true to his word, gave us our answer.

D. The Court's Decision

[10] *Miers*, 558 F. Supp. 2d at 55.

In a carefully considered, highly detailed 93-page opinion, Judge Bates ruled for the House on each of the issues. The opinion found that the House had standing to sue to enforce its subpoenas; that it had an implied cause of action under the Constitution and an express vehicle under the Declaratory Judgment Act; that the court should exercise its discretion to hear this case on the merits; and that senior White House officials were not immune from compulsory process from the Congress. The court did not rule on whether executive privilege might be properly invoked to some questions and requests for documents, but did order the defendants to honor the subpoenas by appearing as a witness and by producing not a full privilege log but a "detailed list and description of the documents" withheld on the basis of executive privilege sufficient to enable resolution first by the parties and ultimately, if necessary, by the court.[11]

The court repeatedly stressed how limited its holding was, noting that it had not ruled on whether executive privilege protected any particular document or answer. The court also emphasized that it was encouraging the political parties to resume their negotiations to resolve the matter, without further intervention by the court, now that the basic legal issues had been decided. But the judge was too modest. The opinion did set a significant precedent on important issues, one that has been followed by another federal judge and is likely to be followed by others. That is the reason that, even though the matter was thereafter resolved by negotiations between the Obama administration and the House and without an appellate resolution, the House insisted as part of the eventual settlement that the Bates decision not be withdrawn, and it never was.

To demonstrate how the *Miers* case should be interpreted in the future, it is worth exploring the basis and limits of each of the court's rulings on the three procedural questions and on the merits.

1. Standing

Under established Supreme Court doctrine, there are three elements to standing: (i) a concrete, particularized injury sustained by the plaintiff; (ii) a causal connection between the asserted injury and the defendants' challenged actions; and (iii) the ability of a favorable court decision to redress the injury. The executive branch conceded the latter two, reserving its attack on whether the House had sustained the requisite "injury." The court's decision on this issue is very significant because while it allowed the suit for subpoena enforcement to continue, it also set limits against congressional suits where members or chambers of Congress simply disagree with an interpretation of a statute or even a constitutional provision by the executive branch.

The court found that the injury the House had sustained as a result of the executive's failure to comply with the subpoenas was both the loss of information needed to carry out its constitutional oversight and investigatory functions and the institutional diminution of its subpoena power. Distinguishing this case from other battles between the political branches, the court emphasized that enforcement of a subpoena is a "routine and quintessential judicial task" and the judiciary is the final arbiter of privilege questions, including executive privilege.[12] The court reasoned that the Congress has the power of inquiry as an essential part of its legislative function and that enforceability of subpoenas is a critical part of the power of inquiry. This reasoning suggests that other types of suits—such as a difference of opinion in interpreting a statute or even a constitutional provision—would not necessarily give rise to standing, and those kinds of disputes would have to be fought out in the political sphere.

[11] *Id.* at 107.

[12] *Id.* at 71.

2. Cause of Action

The court found two bases for predicating its suit: the Declaratory Judgment Act (DJA) and an implied right of action under the U.S. Constitution. The court found that the House had met the specific conditions set out in the declaratory judgment statute: because (i) there was an actual controversy and (ii) the House had filed "an appropriate pleading" seeking a "declaration" regarding its "rights and other legal relations."[13] The House was not seeking an advisory opinion, but wanted actual compliance with its subpoenas. The court agreed with our arguments that the DJA can provide an appropriate vehicle to come to court when another law establishes the legal relationship between the parties. In this case, the other law was the Constitution. The court, relying on a long line of Supreme Court precedents, found that the power of inquiry— with the compulsory process to enforce it—is an essential auxiliary to the legislative function. Thus, it was in aid of its constitutional rights and powers that the DJA was being invoked by the House.

As an alternative basis for finding a cause of action, the court found that the House had an implied cause of action under Article I of the Constitution. The court distinguished the cases where courts are loath to create an implied cause of action from a statute, which requires considering congressional intent in passing the statute. In the case of the Constitution, it is the courts that have the authority to determine how rights and powers should be construed in order to make our nation's charter function effectively. The court noted that this was not an action for damages and establishing an implied cause of action in this limited circumstance was unlikely to open a floodgate of litigation. The court accepted our argument that the Supreme Court had already established an implied remedy—inherent contempt—for those in contempt of Congress, and the implied remedy of a judicial subpoena enforcement action was considerably less severe than incarceration in the House premises.

The court considered the executive's argument that these kinds of disputes should be settled in the political arena, using measures such as withholding of appropriations or confirmations of appointees (which, of course, is only available to the Senate), but concluded that the "appropriations process is too far removed" from this kind of legal dispute, which turned on a well-defined legal analysis, such as the availability and extent of a recognized privilege.[14] The court also noted that a ruling on the enforcement of a subpoena would have little risk of any negative impact on the conduct of government operations. Where a lawsuit might have considerable impact on government operations, a court should take little comfort from the *Miers* opinion and should lean toward not allowing the matter to be handled in court but rather in the political processes. The court concluded by noting that the implied cause of action it was recognizing for enforcement of subpoenas "is exceedingly narrow" and would apply only "in this very limited scenario."[15] The court also agreed with our contention that even under the executive's theory of leaving this dispute to the inherent House power of contempt, the matter would still end up in the courts as a result of an imprisoned contemnor's habeas corpus petition.

3. Equitable Discretion

The court recognized that it did have discretion under the Declaratory Judgment Act to decline to entertain the action. Notwithstanding the executive's claim that the court should not get involved in a dispute between the political branches, the court decided that it should exercise its discretion to decide the legal issue separating the parties. One of the leading factors was that if the court did not decide the immunity issue, the impasse would continue and the executive would prevail, even if there was no basis

[13] *Id.* at 78.

[14] *Id.* at 93.

[15] *Id.* at 93, 94.

for its legal position. The court was persuaded that a judicial resolution would settle the legal issue and allow both sides to move on in accordance with applicable law. The court also believed that the issues were of significant public importance, where the public would benefit by a judicial resolution.

Finally, as expressed a number of times in the opinion, the court agreed with our contention that the DJA was a particularly appropriate vehicle to avoid the unseemly scenario in which the House would arrest and detain high-ranking executive branch officials, thereby bringing both branches into less repute with the public and possibly precipitating a serious constitutional crisis. Where arrests and detentions are not a possibility, a court might be more inclined to let political battles between the branches play out in the political processes as contemplated by the Constitution.

4. Rejection of Absolute Immunity

Having resolved all of the procedural obstacles, the court reached the merits and unequivocally rejected the executive's claim that senior presidential aides have any immunity from congressional subpoenas. Relying on well-established Supreme Court precedent, the court held that compliance by all citizens, regardless of their governmental positions, with a congressional subpoena is a binding legal requirement. The court noted that senior White House officials have often testified before Congress subject to various subpoenas, and allowing them to ignore subpoenas would interfere with a critical part of Congress's constitutional role. As the court explained, endorsing the immunity urged by the executive "would eviscerate Congress's historical oversight function."[16]

Bearing in mind that there was no claim that the matters under inquiry involved national security or foreign relations, the court declined to speculate whether there might be limited immunity in those circumstances. The court concluded by noting that the underlying investigation—the reasons for the termination of a large number of U.S. attorneys—was extremely important, that there was good reason to believe that the subpoenaed information would be pertinent to that inquiry, and that there was no reason to believe the subpoenas were issued to harass or burden the recipients. The court ordered that Ms. Miers was required to appear for testimony, but could assert executive privilege on a question-by-question basis, subject to ultimate review by the court. Similarly, while not requiring the White House custodian of records to file a full-fledged privilege log, the court ordered the witnesses to provide to the House committee a detailed list and description of the nature and scope of the documents they sought to withhold, first so the parties can attempt to resolve their differences and if not, for ultimate resolution, if necessary, by the court.

Having resolved all the legal issues to that point, the court's opinion repeatedly encouraged the political branches to resume their negotiations "to resolve their differences constructively, while recognizing each branch's essential role."

E. The Aftermath

When the *Miers* decision came down, there were less than six months left of the Bush administration, and it was clear that it could drag its feet through the appellate process and avoid compliance with the court's order. Accordingly, after the November election of Barack Obama as the president-elect, our attention focused on trying to reach an accommodation with the incoming administration. We had good reason to believe that new administration would be a more favorable negotiating partner. During the presidential election campaign, candidate Obama had been asked about the Miers matter, and he responded that he thought the committee was correct, that its subpoenas should be obeyed, and that there was no basis to

[16] *Id.* at 103.

claim immunity for top White House aides.[17] That position did not continue quite so robustly after the president took office in January 2009. By that time, President Obama had become more protective of executive privilege.

In the fall, the Bush administration noticed its appeal from the Judge Bates decision, and a panel of the U.S. Court of Appeals for the D.C. Circuit stayed the effectiveness of the order. Perfecting the appeal by filing of briefs was put off until the first quarter of 2009, when the Obama administration was in office. It was apparent that the Obama Department of Justice did not want to file an appellate brief, defending the position of the Bush administration, particularly to conceal the facts behind the political firings of Bush U.S. attorneys. Yet, presumably looking ahead to future confrontations with the Congress, the new administration did not want to make wholesale release of the subpoenaed documents. A delicate set of negotiations ensued, where one of the key sticking points was a demand by the White House that the Judge Bates opinion be withdrawn. To their considerable credit, both Speaker Pelosi and Chairman Conyers refused that request and instead, the appeal was dropped.

As a result of the negotiations that ensued after the district court's decision, Ms. Miers' deposition was taken by the House Judiciary Committee staff on the record, under oath, with very few assertions of privilege. Also as a result of the decision, the Senate Judiciary Committee was able to depose Karl Rove, the White House political operative, who until the judicial decision had also been refusing to appear for testimony despite a subpoena from that committee. Many of the subpoenaed documents were produced. No further challenges were made to those withheld on grounds of executive privilege. Ms.

Miers' memory turned out to be as poor as former Attorney General Gonzales,' and no smoking gun appeared either in the testimony or the documents. Conversely, nothing appeared from the records to support any explanation for the firings other than the suspected political calculation that the fired U.S. attorneys were too aggressive in pursuing corruption cases against Republican officials and not perceived by Bush loyalists as sufficiently aggressive against Democratic interests. That was the conclusion reached by a majority of the Judiciary Committee in 2009. Fallout from the investigation included the resignations of Attorney General Gonzales, his chief of staff (who participated directly with Ms. Miers in preparing the list of U.S. attorneys to be terminated) and several other top aides who were implicated in the process of implementing the terminations.

The *Miers* decision remains on the books as a persuasive precedent and ironically was relied on heavily by the Republican controlled House in its lawsuit against Attorney General Eric Holder in its so-called Fast and Furious investigation to compel the production of documents withheld on various privilege grounds. In denying a motion to dismiss the House's civil action to enforce the subpoena against the executive branch, Judge Amy Berman Jackson, appointed to the bench by President Obama, called the *Miers* decision "a persuasive opinion" that the courts have jurisdiction to resolve privilege disputes raised by the executive branch to congressional subpoenas. Relying largely on the reasons set forth in *Miers*, Judge Jackson let the suit go forward, finding that "neither the Constitution nor prudential considerations require judges to stand on the sidelines" and rejected the notion that there is any "unreviewable privilege" that can be asserted by the executive "in response to a legislative demand."[18] There is no question but that

[17] Matt Apuzzo, *Lawsuit Could Be Power Shake-up for Obama, McCain*, USA Today (June 24, 2008), http://usatoday30.usatoday.com/news/washington/2008-06-23-2444639400_x.htm (quoting then-candidate Barack Obama in reference to the House Judiciary Committee's subpoenas to Ms. Miers and Mr. Bolten: "The blanket notion that [the House] can't subpoena White House aides where there's evidence of genuine wrongdoing, I think is completely misguided. We're a nation of laws and not men and women … and that's a precedent I don't mind living with as president of the United States.").

[18] *Holder*, 979 F. Supp. 2d at 4.

the *Miers* decision strengthened the hand of the House *vis a vis* the executive and established that its duly issued subpoenas are not to be ignored by anyone, including high- ranking executive branch officials.

Whether the *Miers* holding will be extended by the judiciary beyond enforcement of subpoenas and determination of legal privileges remains to be seen. But at this time, it is established that a civil action in court is available to either the House or the Senate as one of three possible remedies for a witness who refuses to comply with a congressional subpoena. It will presumably be the alternative of choice when the recalcitrant witness is an executive branch official who is acting under the advice or at least with the acquiescence of the Department of Justice. In such a case, criminal prosecution will be unavailable. As an alternative to a civil judicial remedy, with its attendant delays and uncertainties, the Congress may wish to consider modernizing its procedures and attendant practices for inherent contempt. Under that approach, there will be no need for Congress to seek judicial intervention, although if incarceration by the House remains an option, habeas corpus relief in the courts at the initiative of the witness will remain a possibility.

A thoughtful study by the Congressional Research Service (CRS) has suggested consideration of adopting the Senate's practice during the impeachment process of establishing a special committee that gathers facts and formulates recommendations which are sent to the full body before the trial on the floor of the Senate, a practice that has been approved by the Supreme Court. If the House were to adopt such procedures for contempt (which were used in some 19th century inherent contempt proceedings), provide essential due process protections (including reasonable notice, opportunity to defend with counsel and cross-examination) and limit the penalty upon conviction to a monetary fine, it might have a more seemly process that would satisfy political and constitutional standards and be more expeditious than civil judicial enforcement.[19] This approach would obviate any need for Congress to seek judicial intervention, but does not guarantee that the respondent will not seek judicial review of any resulting penalty. Indeed, one can foresee that there will be litigation regarding whether this type of procedure can be used against executive branch officials as well as other challenges. In addition, if the issue is one of an asserted privilege, whether by a government official or by a private party, such as the attorney-client privilege, it is most likely that the respondent will insist on neutral judicial review rather than accepting the resolution by Congress.

As a postscript, I should note that one of my proudest possessions, displayed prominently in my office, is a gift I received from the staff of the House general counsel's office when I retired from that position. It is a signed, autographed copy of the *Miers* opinion, with the judicious inscription by Judge Bates, reading: "A fascinating case, well litigated by all."

[19] *See* Todd Garvey, Alissa M. Dolan, Cong. Rsch. Serv., RL34097, Congress's Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice and Procedure (2014).

Henry Waxman and the Tobacco Industry: A Case Study in Congressional Oversight

Michael L. Stern[1]

Whatever one thinks of his politics, there can be little question that Representative Henry Waxman (D-CA), who served in Congress from 1975 to 2015, was an effective practitioner of the art of congressional oversight.

Deemed "Mr. Oversight" by Walter Oleszek of the Congressional Research Service, Waxman presided over some of the most noteworthy congressional hearings of his era, which delved into matters such as the use of force by the private contracting firm Blackwater in Iraq, the 2008 Wall Street collapse, and the BP oil spill.[2] As Waxman writes in his memoir:

Though oversight doesn't get nearly the popular attention of major acts of legislation, I consider many of my accomplishments in this area to be every bit as significant as the laws I've worked on. Though legislation and oversight are often thought of as distinct processes, they are in fact very much conjoined.[3]

Above all, Waxman is associated with oversight of the tobacco industry, a project he pursued both during periods when his party enjoyed majority status in the House of Representatives (1975-95, 2007-11) and when it was in the minority (1995-2007, 2011-15). His successes in this endeavor provide important lessons for chairmen, ranking members, and even backbenchers who seek to effectively use the congressional power of inquiry in service of their legislative goals.

At the outset it is helpful to focus on the term "oversight," which is often used in contrast to "investigation." It is common to think of congressional oversight as involving fairly routine scrutiny, possibly but not necessarily adversarial in nature, which committees give to federal agencies within their jurisdictions, while investigations are thought of as adversarial proceedings which focus on uncovering the facts regarding a particular event, scandal, or other matter and which often take on the attributes of a mini-trial.

As Waxman's "tobacco wars" illustrate, however, it is more helpful to think of "oversight" as the overall legislative or public policy objective of a given congressional inquiry, while "investigation" is best used to refer to techniques such as subpoenas or hearings that serve to compel the production of information. Properly conceived, investigation is not a separate category of activity from oversight, but rather is a set of tools that can be used in service of legislative oversight (or in support of a different congressional power, such as discipline of members or impeachment of officers).

Conceiving a congressional inquiry in terms of its oversight objectives can help the inquiry stay on track. Waxman's broad oversight objectives were to establish a record regarding the health effects of tobacco use and the addictiveness of nicotine and to secure the passage of laws that would reduce smoking and thereby improve public health.[4] In the course of his inquiry, many subsidiary factual issues would be litigated. Did the tobacco industry know that nicotine was addictive? Did it manipulate nicotine levels to

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[2] Minority Staff of H. Comm. on Energy and Commerce, 113th Cong., Representative Henry A. Waxman's Record of Accomplishment 18-19 (2014) [hereinafter Waxman's Record of Accomplishment].

[3] Henry A. Waxman with Joshua Green, The Waxman Report: How Congress Really Works 146-147 (2009).

[4] *See id.* at 179.

enhance addictiveness? Did it knowingly suppress information regarding addictiveness or health risks? Did it market its product to children?[5]

One can easily imagine that any one of these factual questions could lead to a lengthy mini-trial before Congress. Did a particular tobacco executive really know the results of his company's research into tobacco use and its effects? Did he try to suppress the research or prevent the company's scientists from cooperating with Congress? Did he lie to Congress about his knowledge or actions? While Congress might legitimately pursue any of these questions, an excessive focus on establishing the "guilt" of a particular individual or company could distract from, rather than enhance, the accomplishment of the oversight objective. By and large, Waxman's tobacco project avoided such pitfalls.

This is not to say that investigative tools were unimportant to Waxman's efforts. Perhaps the best-known episode of the tobacco inquiry involved the 1994 hearing at which the CEOs of the largest tobacco companies testified before Waxman's health and environment subcommittee. Each of these executives was sworn and testified under oath that he did not believe that cigarettes were addictive. This iconic moment was pivotal to Waxman's strategy of "shattering tobacco's public image and exposing the industry for what it really was" by demonstrating the gulf between the industry's public position and the scientific evidence regarding the dangers of tobacco.[6] The executives were then cross-examined by committee members regarding tobacco's health risks and addictive effects, allegations of nicotine manipulation, and issues of marketing to children.

This type of adversarial hearing is the hallmark of a congressional "investigation." But the key to Waxman's success was skillful design and preparation, not merely the brute exercise of Congress's compulsory powers. Indeed, Waxman did not even subpoena the tobacco executives to testify. Instead, he announced the hearing and publicly "invited" the executives to appear, making it clear that the hearing would be held whether they appeared or not. As Waxman explains in his memoir, "[i]f they chose not to avail themselves of the opportunity, the television cameras would capture seven empty chairs, leaving the public to draw its own conclusions about whether the tobacco industry had something to hide."[7]

Waxman and his staff spent weeks preparing for the hearing, acting in coordination with members of the committee who shared his objectives and defining the issues that they wished to concentrate on.[8] This type of preparation is critical to a successful congressional hearing, particularly in the House, where the five-minute rule sharply limits the ability of any one member to develop continuity in questioning.

One creative use of the hearing was to get the tobacco executives to agree to release materials that might otherwise have been protected by privilege, such as the work of a former Philip Morris researcher into the addictiveness of nicotine.[9] The committee no doubt could have subpoenaed these documents, but the companies might have raised objections and run out the clock for the remainder of the congressional session. By putting the executives on the spot in a televised hearing, the committee was able to get them to agree to provide it with significant materials that had been secret up to that point.[10]

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[5] *See id.* at 185.

[6] *See id.* at 183, 185-87; *id.* at xi ("By inviting the CEOs to testify, I hoped to change that image and expose the men who controlled this deadly business to the full glare of the public spotlight.").

[7] *Id.* at 184.

[8] *Id.* at 185.

[9] *Id.* at 187.

[10] *Id.*

Congressional inquiries have tools beyond their formal investigatory powers. Professor Josh Chafetz has described these tools as Congress's "soft powers," which is a term he gives to each branch's "deliberate engagement with the citizenry—[in which] each branch must make its case in the public sphere."[11] One of the most important capabilities of a congressional oversight committee is its ability to exercise such "soft power" by engaging the media and the general public with the narrative and information produced by its inquiry.

Waxman understood that communicating to a wider audience was critical to the success of congressional oversight. His memoirs note that "[f]rom the very beginning, the purpose of the oversight hearings had been to build a public record and eventually create enough momentum in Congress and among the American public for legislation to mitigate the terrible health effects of tobacco." By 1996, he explains, "the actions of Congress had dramatically changed public perception of the industry and made real the possibility that comprehensive tobacco legislation could soon be forthcoming."[12]

To build a "public record," Waxman did not rely primarily on Congress's "hard power" of testimonial compulsion, but on information voluntarily provided by cooperative witnesses. These included outside experts and public health officials such as Food and Drug Administration (FDA) Commissioner David Kessler. Significantly, they also included whistleblowers from within the tobacco industry, many of whom came forward because of the publicity generated by the congressional inquiry.[13] It was to enable such witnesses to provide public testimony (which otherwise might have violated nondisclosure agreements they had signed with the tobacco companies) that Waxman's committee asked the CEOs to waive any objections to such disclosure.

The Constitution protects Congress's exercise of soft power in part through the Speech or Debate Clause, which immunizes members of Congress from criminal or civil liability for speech within the legislative sphere.[14] Waxman used this protection when his committee received an important leak of internal Philip Morris documents. Waxman was concerned (properly) that if he simply released the documents in a press conference, the protections of the Speech or Debate Clause might not apply:

It wasn't clear that a court would agree that press conferences constituted official House business, and the proven litigiousness of the tobacco industry suggested a high likelihood that it would test the proposition. So in order to make the documents public, I went to the House floor and read their entire contents into the Congressional Record. Afterward, with the media clamoring to discuss this important new information, I had to decline all press requests since nothing I said to reporters was assured of being protected speech.

Another important use of the Speech or Debate protections occurred when the committee received internal Brown & Williamson documents, which had been disseminated by the former paralegal of a law firm representing the tobacco company. The law firm and the tobacco company brought an action in Kentucky state court against the paralegal and those who had allegedly received copies of the documents, including Waxman and one of his colleagues on the committee. Brown & Williamson then procured an order from the Kentucky judge and a subpoena from the D.C. Superior Court requiring the congressmen to appear for a deposition at the offices of Brown & Williamson's D.C. attorneys and to bring with them any of the relevant B&W documents in their possession.

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[11] Josh Chafetz, *Congress's Constitution*, 160 U. Pa. L. Rev. 715, 722 (2012).

[12] *See* Waxman with Green, *supra* note 3.

[13] *See id.* at 188.

[14] *See* Chafetz, *supra* note 11. at 744-45.

The matter was removed to the federal district court in D.C., which issued a scathing opinion and ordered the subpoenas quashed. Judge Harold Greene acknowledged that the paralegal may have acted unlawfully in releasing the documents, but he noted that there was no evidence that Waxman or his committee caused the illegal activity or conspired with the paralegal to break the law. He then concluded:

The crux of the matter is still this. B&W, through its management, may be asked to testify at a hearing conducted by a committee of the House of Representatives into grave allegations, apparently with substantial factual supporting evidence, that B&W's products present a threat to the health and indeed the lives of thousands, if not millions, of Americans, as well as into other serious allegations that B&W has for decades been engaged in a cover-up designed to mislead its customers and the public with respect to these health hazards.

Through the current proceedings B&W is attempting to interfere with that probe by a variety of means: by summoning the Congressmen to the offices of B&W's lawyers; by seeking to require them to identify their sources; and by seeking to require them to permit B&W to peruse such documentary evidence that the committee may or may not ultimately use in its investigation. As the court has previously concluded, the committee and the Members of Congress which sit on that body are clearly protected by the Speech or Debate Clause of the Constitution from such interference.[15]

Perhaps as important as Waxman's legal victory was the fact that he had successfully framed the narrative regarding the health effects of tobacco and the industry's conduct. Rather than focusing on the paralegal's alleged misconduct (which represented a blatant breach of the attorney-client privilege), the court looked at the matter in terms of Brown & Williamson's "cover-up" of evidence showing its products presented a health hazard to its customers and the public.[16]

Successful congressional oversight almost always depends not just on the actions of Congress itself, but also on non- congressional parties that independently uncover information and help to shape the legal landscape and the terms of the debate. These "force multipliers" include investigative reporters and other media outlets, regulatory and enforcement authorities at the federal and state levels, and private lawsuits. One of the overlooked aspects of the art of congressional oversight is the ability to encourage and work cooperatively with such outside parties where appropriate.

As Waxman indicates in his memoir his oversight of the tobacco industry benefitted from many such force multipliers. He gives credit to investigative journalism, such as The Wall Street Journal series called "Smoke and Mirrors," which exposed the tobacco industry's efforts to cast doubt on whether smoking causes cancer and other diseases "by creating and funding entire organizations devoted to manufacturing bogus scientific research."[17] Such journalism helped spark public interest in Waxman's inquiry, and the committee's efforts in turn produced more information for the media. For example, Waxman reports that a key industry whistleblower, Jeffrey Wigand, came forward after watching the 1994 CEO hearing. Wigand would appear on "Sixty Minutes" and allege that his former employer, Brown & Williamson, had manipulated nicotine levels and, contrary to the testimony before Congress, was well aware of the

[15] Maddox v. Williams, 855 F. Supp. 406, 417 (D.D.C. 1994).

[16] On appeal, the D.C. Circuit affirmed the lower court's decision to quash the subpoenas on the basis of the Speech or Debate Clause, but the panel declined to wade into Judge Greene's more inflammatory remarks regarding the health effects of tobacco and Brown & Williamson's alleged desire to interfere with the congressional investigation. *See* Brown & Williamson Tobacco Corp. v. Williams, 62 F.3d 408 (D.C. Cir. 1995).

[17] *See* Waxman with Green, *supra* note 3, at 181-2.

addictiveness of smoking. Wigand's story would later become the basis for the Hollywood movie The Insider.[18]

Further impetus for the anti-tobacco efforts came from the efforts of government regulators such as the Environmental Protection Agency, which investigated secondhand smoke as an environmental risk factor, and Kessler's FDA, which announced plans to consider regulating cigarettes as a drug. Perhaps even more important were the efforts of state attorneys general, such as Mike Moore of Mississippi, and plaintiffs' lawyers like Richard ("Dickie") Scruggs, who began filing numerous lawsuits and class actions against the tobacco industry on behalf of states and smokers.[19] These lawsuits in turn uncovered more damaging information from the files of tobacco companies, generated additional publicity, and put more legal and financial pressure on the industry.

In part because of the momentum generated by all of these efforts, Waxman was able to continue his oversight of the tobacco industry even after he lost the chairmanship of the subcommittee following the Republican victory in the 1994 election. Despite the fact that he no longer had the power to subpoena witnesses or hold formal hearings, Waxman found that he continued to receive leaks and other important information regarding tobacco. The subcommittee he once chaired had been a clearinghouse of sorts for negative information regarding cigarettes and the tobacco industry, but there was no reason why he could not fill the same function as a ranking member.

Indeed, during his time in the minority, Waxman realized that he could still conduct oversight, albeit with a somewhat reduced level of resources (in the House the minority on a committee gets one third of the budget). While he no longer had control of the committee's hard powers, he could still make requests for information, receive information from cooperative sources, and release information to the public through the media. He even formed a Special Investigations Division within the committee's minority staff to perform tasks such as interviewing whistleblowers, accessing government databases, and even on occasion going undercover.[20]

On one occasion, Waxman used his power in the minority to block a tentative settlement that the state attorneys general and private plaintiffs had reached with the tobacco industry. Waxman deemed the settlement too soft on the industry, but he could not call a hearing of the committee to review its terms. Instead, he and other allies on the Hill created a "shadow committee" led by Kessler and former Surgeon General C. Everett Koop. Called the "Advisory Committee on Tobacco Policy and Public Health," this group conducted a series of hearings on Capitol Hill and was successful in creating political opposition that ultimately derailed the settlement.[21]

Waxman's years of oversight over the tobacco industry coincided with a great reduction in the number of smokers and a decline in the financial condition and public standing of the tobacco industry. While there were legislative measures passed during this time that incrementally restricted tobacco use, Waxman argues that "ultimately it was oversight, rather than legislation, that made the greatest impact on our nation's relationship to tobacco."[22] It is difficult to dispute that assessment.

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[18] *See id*. at 188.

[19] *See id*. at 189, 192.

[20] *See* Waxman's Record of Accomplishment, *supra* note 2, at 19-20 (describing how Waxman "invented a new model for oversight from the minority").

[21] *See* Waxman with Green, *supra* note 3, at 194-196.

[22] *See id*. at 199.

What lessons can be drawn from Waxman's efforts? First, successful oversight requires time. Waxman had spent more than a decade on the tobacco inquiry before he began to make real progress in the early 1990s. Developing both expertise and information on a particular subject can pay dividends. Similarly, learning the techniques of oversight is not something that happens overnight. Term-limited committee chairs may therefore be at a disadvantage when it comes to conducting effective oversight.

Second, investigative tools are not an end in themselves. They can be very useful to achieving an oversight objective, but they should not be confused with the objective. Members of Congress can conduct successful oversight without issuing subpoenas or even holding formal hearings. As Waxman demonstrated, a good deal of oversight can be accomplished by a creative and determined member in the minority.

Finally, oversight is greatly enhanced by use of "force multipliers" outside of Congress, including the media, executive agencies, and public interest organizations. Ultimately, successful oversight is about communicating information and a narrative to Congress and to the general public, and creative use of these outside resources is essential to achieving that objective.

Appendix A. Institutional Support Resources for Legislative Oversight

Congress and its committees do not have sufficient resources or personnel to adequately pursue its oversight responsibilities alone. Thus, it must rely extensively on legislative, administrative, and non-governmental entities to provide it with timely, objective, and nonpartisan assistance in reviewing program performance. In addition to the Offices of Inspectors General, discussed in the text, they include: the Government Accountability Office (GAO); Congressional Research Service (CRS); the Offices of Chief Financial Officers (CFOs); the House General Counsel; the Senate Legal Counsel; and the media.

A. Government Accountability Office[1]

The Government Accountability Office was established in 1921 as an independent auditor of government agencies for the Congress. Over the years, Congress has expanded GAO's audit authority, added new responsibilities and duties, and strengthened GAO's ability to perform independently of the executive branch. GAO is under the direction and control of the comptroller general of the United States, who is appointed by the president from a list of candidates provided by the Congress and serves for a 15-year term. He or she is removable only by the passage of a joint resolution of removal by the Congress.

The key oversight support functions performed by the GAO are as follows:

1. **Program Evaluator:** At the request of congressional committees and Members, GAO evaluates whether programs are achieving their desired results, whether there are better ways to accomplish their statutory prescribed missions, whether government programs are being carried out in compliance with applicable laws and regulations, and whether data furnished to Congress on programs are accurate. 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. GAO's policies for accepting and prioritizing mandates and requests are detailed in its *Congressional Protocols.*
2. **Audits:** GAO determines whether funds are being spent legally and whether the agency's manner of accounting for them is acceptable.
3. **Investigations:** GAO conducts special investigations of alleged violations of criminal or civil law through its Office of Special Investigations. Cases involve such matters as conflict of interest of federal officials, questions of ethics of federal officials, and procurement and contract fraud. Completed investigations are usually reported in writing.
4. **Legal Services:** GAO provides opinions and comments on proposed bills and on the applicability and interpretation of appropriations laws and jurisprudence respecting statutorily assigned matters, adjudicates claims for and against the government, and resolves bid protests on government contracts. In addition, GAO occasionally assigns staff to work directly for congressional committees. In such cases, the staff assigned represent the committee and not GAO.

[1] 31 U.S.C. § 701 et. seq.

B. Congressional Budget Office

Founded in 1974 by the Congressional Budget and Impoundment Control Act, Pub. L. 93-244, 2 U.S.C. §§ 601-603, the Congressional Budget Office (CBO), a legislative branch agency, produces independent analyses of budget and economic issues to support the congressional budget process. It was created to provide Congress with a legislative counterweight to the president's Office of Management and Budget (OMB). The agency is strictly nonpartisan and conducts objective, impartial analyses in producing dozens of reports and hundreds of cost estimates each year. The agency's role is purely analytical. It does not write bills, enforce budget rules, implement regulations, lobby Congress, or conduct audits.

The CBO director is appointed by the Speaker of the House and the President Pro Tempore of the Senate jointly, after considering recommendations from the two budget committees. Directors are appointed for four-year terms and may be reappointed. A director serving at the expiration of a term may continue in office until his or her successor is appointed. By law, the CBO director is to be chosen without regard to political affiliation.

CBO staff, including the deputy director, are appointed by the director. CBO directors have established the firm tradition of retaining staff from their predecessors. Directors appoint all CBO staff solely on the basis of professional competence, without regard to political affiliation.

CBO provides budgetary and economic information in a variety of ways and at various points in the legislative process. These include:

Cost Estimates for Individual Bills: These estimates measure a proposed bill's impact on spending or revenues over a period of five to ten years. Each cost estimate contains a section describing the basis for the estimate. In a given year, CBO analyzes anywhere from 500 to 700 bills.

Budget Baseline and Economic Forecast Products: These reports provide spending and revenue forecasts for expenditures already authorized and cover the 10-year congressional budget process. Congress uses these projections as a baseline for developing and reauthorizing legislation. As a result, CBO's projections are closely watched and are, at times, controversial. The projections are typically released annually in January and updated in August.

Analysis of the President's Budget: Released every March, this report serves as an alternative cost estimate of the White House's proposed budget. CBO estimates the budgetary impact of the president's proposals using the agency's own economic forecast and estimating assumptions. CBO's independent re-estimation of the president's budget allows Congress to compare the administration's spending and revenue proposals with CBO's baseline spending and revenue projections and with other proposals using a consistent set of economic and technical assumptions.

Scorekeeping Reports for Enacted Legislation: The CBO provides the budget and appropriations committees with frequent tabulations of congressional action affecting spending and revenues. Those scorekeeping reports provide information about whether legislative actions are consistent with spending and revenue levels set by the budget resolution.

CBO's conclusions are generally not challenged. However, many of the CBOs cost estimates of bills involve highly complex analytical methods. These methods are often scrutinized and used by Members of Congress to advance or hinder progress of sensitive legislation. The CBO's March 2017 assessment of the proposed American Health Care Act (AHCA) to replace the Affordable Care Act (ACA) is a recent case in point. The CBO estimated that by the year 2026 a total of 24 million more Americans would be uninsured, for a total of 52 million, the opposite of what would have been the case under the ACA, and

that in the near term premiums would increase by 15 to 20 percent. CBO also estimated that the federal deficit would have been reduced by $337 billion over the next decade. The deficit reduction was less than anticipated by its proponents. The uninsured figures sharply contrasted with the administration's forecast of increased coverage, which expressed upset with the report. There was, however, no substantial challenge to the CBO estimates, which were utilized by factions in both parties opposing the AHCA, and proved to be an important factor in the House's withdrawal of the bill from floor consideration.

C. Congressional Research Service

The Congressional Research Service (CRS) has a diverse professional staff of around 600 people. It has a broad mission to provide Congress with nonpartisan, confidential, timely, and objective information. Organized into five interdisciplinary research divisions (American Law, Domestic Social Policy, Foreign Affairs, Defense and Trade, Government and Finance, and Resources, Science and Industry).

CRS functions in some respects as Congress's own "think tank." Its reports, confidential memoranda, and studies on the issues before Congress are at least as sophisticated as those produced in the executive branch or in universities. Reports for Congress on specific issues take many forms: policy analyses, statistical reviews, economic studies, legal analyses, historical studies, and chronological reviews. Reports are available only to Members and staff on the CRS website at http://www.crs.gov. The public may gain access to such reports through Member offices or on public sites such as the FAS Project on Government Secrecy at https://fas.org/blogs/secrecy.html. CRS also prepares confidential memoranda for a specific office. These memoranda are solely for the use of the requesting office and are not distributed further unless permission has been granted by that office. Memoranda are often used by CRS attorneys and analysts to respond to inquiries focused on legislative or policy matters of individual Member interest.

In addition, CRS provides personal briefings to Members and staff, conducts issue and procedural workshops and seminars, prepares customized memoranda and reports to lawmakers, and often consults and advises committee staffs in the preparation for and conduct of oversight proceedings.

D. Offices of Chief Financial Officers

The Chief Financial Officers Act of 1990[2] and the Government Management Reform Act of 1994[3] were designed to improve financial management throughout the federal government and provide additional sources of information, data, and materials that can aid congressional oversight endeavors by creating a new top management position, a chief financial officer (CFO) in the 24 largest government agencies. The CFOs for the 14 cabinet-level agencies and for the National Aeronautic Space Administration and the Environmental Protection Agency are presidential appointees.

The CFOs are required to prepare full financial statements covering all the activities of the individual departments and agencies, which are audited by the Government Accountability Office (GAO) annually. The CFOs also conduct audits of major subdivisions of these agencies. The GAO and CFO audits are disclosed to the public just the way the Securities and Exchange Commission discloses the annual statements of regulated companies, by publication on their websites. In addition, the 1994 Act requires the secretary of the treasury, in coordination with the director of the office of management and budget (OMB), to annually submit audited consolidated financial statements for the U.S. government to the president and Congress. GAO is required to audit and report on these consolidated statements as well. 31 U.S.C. § 331(e). The result is a very public score card as to whether these departments and agencies are accurately accounting for the care of public funds. These score cards provide a wealth of information for

[2] Pub. L. 101-576, 104 Stat. 2838.

[3] Pub. L. 103-356, 108 Stat. 3410.

congressional committees as to how well and effectively individual agencies are administering their programs as well as how capably the central executive authorities are monitoring and assessing the fiscal and financial responsibilities of the bureaucracy.

In 1996, the first year all 24 agencies were audited, only six were able to receive clean GAO audit opinions. By 2002, 21 of the 24 received clean audit opinions. For fiscal year 2016 GAO stated that it was unable to issue clean audit opinions for the Departments of Defense (DOD) and Housing and Urban Development, the National Science Foundation and the Smithsonian Institution. GAO particularly noted that the Defense Department has not been able to obtain a clean audit for many years.

Perhaps more significantly, GAO's report concluded that its audit of the government's consolidated financial statements for fiscal years 2016 and 2015 prevented it from expressing an opinion on their sustainability because of "material weaknesses" and "significant uncertainties" with respect to internal controls over fiscal reporting and other limitations on its audit task. GAO explained:

> The federal government is not able to demonstrate the reliability of significant portions of the accompanying accrual-based consolidated financial statements as of and for the fiscal years ended September 30, 2016, and 2015, principally resulting from limitations related to certain material weaknesses in internal control over financial reporting and other limitations affecting the reliability of these financial statements and the scope of our work. ... As a result of these limitations, readers are cautioned that amounts reported in the accrual-based consolidated statements may not be reliable.
>
> The federal government did not maintain adequate systems or have sufficient appropriate evidence to support certain material information reported in the accompanying accrual based consolidated financial statements. The underlying material weaknesses in internal control, which have existed for years, contributed to our disclaimer of opinion on the accrual-based consolidated financial statements.

Among the weaknesses identified was the federal government's inability satisfactorily to determine that property, plant, and equipment and inventories and related property, primarily held by DOD, were properly reported; to support significant portions of the reported net cost of operations, most notably related to DOD, and to adequately reconcile disbursement activity balances between federal entities; and to reasonably assure that the consolidated financial statements are (1) consistent with the underlying audited entities' financial statements, (2) properly balanced, and (3) in accordance with U.S. generally accepted accounting principle.

The GAO's Independent Audit Report appears as part of the Fiscal Year 2016 Financial Report of the United States Government, 237-266 (January 12, 2017) accessible at https://www.fiscal.treasury.gov/fsreports/rpt/16frusg/011120fr_(Final).pdf and at the GAO website https://www.gao.gov/products/gao-17-283R-61k.

E. Senate Legal Counsel

The Office of Senate Legal Counsel was created by Title VII of the Ethics in Government Act of 1978[4] "to serve the institution of Congress rather than the partisan interests of one party or another."[5] The

[4] Pub. L. 95-521, 92 Stat. 1824, § 701 *et seq.*, codified principally at 2 U.S.C. § 288, *et seq*.

[5] S. Rep. No. 95-170, 95th Cong., 2nd sess. 84 (1978).

counsel and deputy counsel are appointed by the President Pro Tempore of the Senate upon the recommendation of the Majority and Minority Leaders. The appointment of each is made effective by a resolution of the Senate, and each may be removed from office by a resolution of the Senate. The term of appointment of the counsel and deputy counsel is two Congresses. The appointment of the counsel and deputy counsel and the counsel's appointment of Assistant Senate Legal Counsel are required to be made without regard to political affiliation. The office is responsible to a bipartisan Joint Leadership Group, which is comprised of the Majority and Minority Leaders, the President Pro Tempore, and the Chair and Ranking Minority Mmember of the Committees on the Judiciary and on Rules and Administration.

The act specifies the activities of the office, two of which are of immediate interest to committee oversight concerns: representing committees of the Senate in proceedings to aid them in investigations, and advising committees and officers of the Senate. As discussed in detail in Chapter 3, the Senate Legal Counsel may represent a committee in seeking an immunity order from a U.S. district court if so authorized by the committee. It may also represent a committee or subcommittee in a civil action to enforce a subpoena if authorized by a Senate resolution. There have been seven such authorizations since the passage of the act. Civil actions may not be brought against executive branch officers or employees of the federal government acting in their official capacities.

The Ethics Act details a number of advisory functions of the Office of Senate Legal Counsel. Principal among these are the responsibility of advising Members, committees, and officers of the Senate with respect to subpoenas, 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.

The act also provides that the counsel shall perform such other duties consistent with the nonpartisan purposes and limitations of Title VII as the Senate may direct. Thus, in 1980, the office was used in the investigation examining President Carter's brother Billy's connection to Libya. The office worked under the direction of the chair and vice-chair of the subcommittee charged with the conduct of that investigation. Members of the office have also undertaken special assignments such as the Senate's investigation of "Abscam" and other undercover activities, the impeachment proceedings of Judge Harry Claiborne, Judge Walter L. Nixon, Jr., and Judge Alcee L. Hastings, Jr., and the confirmation hearings of Supreme Court Justice Clarence E. Thomas. The office was called upon to assist in the Senate's conduct of the impeachment trial of President Clinton.

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.

F. House General Counsel

The House Office of General Counsel has evolved since the mid-1970s, from its original role as a legal adviser to the clerk of the House on matters within its jurisdiction, to serving as counsel for the House as an institution. At the beginning of the 103rd Congress, it was made a separate House office, reporting directly to the Speaker, and charged with the responsibility "of providing legal assistance and representation to the House." This office plays a similar role to the Senate Legal Counsel with respect to oversight assistance to committees and protection of institutional prerogatives, but there are some differences.

The General Counsel, Deputy General Counsel, and other attorneys of the House Office of General Counsel are appointed by the Speaker and serve at his or her pleasure. The office "function[s] pursuant to the direction of the Speaker, who shall consult with a Bipartisan Legal Advisory Group," which consists of the Speaker, the Majority Leader, Majority Whip, Minority Leader, and Minority Whip. The office has statutory authority to appear before state or federal courts in the course of performing its functions (*see* 2 U.S.C. § 130f). The office may file friend-of-the-court briefs on behalf of the Speaker and the Bipartisan Legal Advisory Group in litigation involving the institutional interests of the House. Where authorized by statute or resolution, the office may represent the House itself or a committee in judicial proceedings.[6] The office also represents House officers in litigation affecting the institutional interests and prerogatives of the House. Finally, the office defends the House, its committees, officers, and employees in civil litigation relating to their official responsibilities, or when they have been subpoenaed to testify or to produce House records (*see* House Rule VIII).

Unlike Senate committees, House committees may only issue subpoenas under the seal of the clerk of the House. In practice, committees often work closely with the Office of General Counsel in drafting subpoenas, and every subpoena issued by a committee is reviewed by the office for substance and form. Committees frequently seek the advice and assistance of the Office of General Counsel in dealing with various asserted constitutional, statutory, and common-law privileges in 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.

Further, the Office of General Counsel represents the interests of House committees in judicial proceedings in a variety of circumstances. The office represents committees in federal court on applications for immunity orders pursuant to 18 U.S.C. § 6005; files briefs as friend-of-the-court in cases affecting House committee investigations; defends against attempts to obtain direct or indirect judicial interference with congressional subpoenas or other investigatory activity; represents committees seeking to prevent compelled disclosure of non-public information relating to their investigatory or other legislative activities; and appears in court on behalf of committees seeking judicial assistance in obtaining access to documents or information, such as documents that are under seal or materials which may be protected by Rule 6(e) of the Federal Rules of Criminal Procedure.

Like the Senate Legal Counsel's office, the House General Counsel's office also devotes a large portion of its time to providing informal advice to individual Members and committees.

G. Non-Governmental Organizations (NGOs)

There has been a dramatic rise in recent years in the formation of non-government organizations (NGOs) that have taken increasingly active roles in exposing improper government activities as well as attempting to influence government policy. They include broad-based membership and other types of organizations—which may be organized around very expansive themes of "good government"—such as the Center for Responsive Politics, Citizens Against Waste, Common Cause, Congress Watch, The Constitution Project, the Government Accountability Project, Judicial Watch, OMB Watch, and the

[6] S*ee, e.g.*, House Committee on the Judiciary v. Miers, 558 F. Supp. 2d 53 (D.D.C. 2008) (litigation to enforce subpoenas against former and present presidential advisers authorized by House resolution); Comm. on Oversight and Government Reform v. Holder, 979 F. Supp. 2d 1, 4 (D.D.C. 2013) (House authorization to judicially enforce subpoena sufficient to support jurisdiction and standing); U.S. House of Representatives v. Burwell, 130 F. Supp. 3d 53, 81 (D.D.C. 2015) (House resolution authorizing enforcement of challenge to alleged violation of Appropriations Clause sufficient to support jurisdiction and standing); Department of Commerce v. U.S. House of Representatives, 525 U.S. 316 (1999) (litigation in which the general counsel was authorized by statute, Pub. L. 105-119 § 209(b) (1997), to represent the House in a challenge to the legality of the Department of Commerce's plan to use statistical sampling in the 2000 census).

Project on Government Oversight (POGO), among many others. These groups are often significant players in shaping and influencing public opinion through the media, and in Congress by way of testimony at hearings in which they are often able to present very professional and competent studies, reports, and statistical analyses.

The "good government" groups have also had a significant impact on the political culture and the standard of what we should expect and tolerate from our government and its officials, not only through the media and lobbying in Congress, but also through legal and administrative action. One early example will illustrate. In 1968, the House of Representatives took the historic step of establishing as a standing committee a committee on ethics, called the House Committee on Standards of Official Conduct. This committee would propose rules on conduct, giving advice to Members and staff, and would initiate disciplinary hearings against sitting Members for misconduct. It was not until 1976, however, and only upon the initiation and persistence of an NGO, Common Cause, that the House Committee on Standards began its first investigation and disciplinary hearing against a sitting Member of Congress. A petition and complaint was filed on behalf of Common Cause by 44 members of the House of Representatives.

H. The Role of the Press and Media Coverage

The intensity of press and media coverage of governmental operations has increased over the last three decades, and has been particularly heightened by the advent of internet communications. Many people in Washington, including commentators and others in the media, now talk about the "new rules" of media coverage of public officials, while many public officials believe that we are facing not so much "new rules," but rather "no rules." There is now very little about a public official that is considered "off limits" to the media. Since two then-young reporters from the Washington Post (Woodward and Bernstein) made their names uncovering the "Watergate" burglary and cover-up, scores and scores of eager reporters and Woodward and Bernstein "wanna-bes" are looking for the next Watergate, and rushing stories of "scandal" and "corruption" to the press, the electronic media, and increasingly onto the internet. The Watergate exposures spawned an era of "investigative journalism" characterized by the dedication of press resources to careful, long-term inquiries.

While such traditional press inquiries are still engaged in frequently, the internet has sped up the news cycle significantly. No longer is the media dominated by a late evening deadline for a morning newspaper, nor even getting a story for the 6:00 P.M. or 11:00 P.M. television news cycle. Rather, the internet has made for hourly news cycles, which often force reporters and commentators into hurried stories with less corroboration and background to beat the competition to a "breaking" story of scandal or corruption. For all its faults and criticisms directed its way, however, an independent and vigorous free press remains a crucial vanguard against corruption in government. Transparency, openness, and disclosure in government is of little value if information cannot be communicated to the general populace through a source totally independent from the

government. Indeed, much of what we call regulation in the context of ethics is really only disclosure and not necessarily a limit on certain conduct. Today, an aggressive, free, and independent press and media remain an essential resource in uncovering and publicizing corruption and maladministration, and an indispensable asset for investigating committees to assist them in becoming aware of governmental failures or in engendering necessary public support for legislative action by publicizing the results of committee probes. But committees and their members must be wary of those who disparage the investigators, the readers, the writers, the listeners, the speakers and the thinkers; and in this time of "alternate facts" and those who confuse reality with reality TV, they must be suspicious of those who repeat falsehoods while insisting, against all evidence, that they are true. To defend freedom, committees must demand, and get, fact.

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