



# Congressional Oversight Manual

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## Summary

The Congressional Research Service (CRS) developed the *Congressional Oversight Manual* over 30 years ago, following a three-day December 1978 Workshop on Congressional Oversight and Investigations. The workshop was organized by a group of House and Senate committee aides from both parties and CRS at the request of the bipartisan House leadership. The *Manual* was produced by CRS with the assistance of a number of House committee staffers. In subsequent years, CRS has sponsored and conducted various oversight seminars for House and Senate staff and updated the *Manual* as circumstances warranted. The last revision occurred in 2007. Worth noting is the bipartisan recommendation of the House members of the 1993 Joint Committee on the Organization of Congress (Rept. No. 103-413, Vol. I):

[A]s a way to further enhance the oversight work of Congress, the Joint Committee would encourage the Congressional Research Service to conduct on a regular basis, as it has done in the past, oversight seminars for Members and congressional staff and to update on a regular basis its *Congressional Oversight Manual*.

Over the years, CRS has assisted many members, committees, party leaders, and staff aides in the performance of the oversight function, that is, the review, monitoring, and supervision of the implementation of public policy. Understandably, given the size, reach, cost, and continuing growth of the modern executive establishment, Congress's oversight role is even more significant—and more demanding—than when Woodrow Wilson wrote in his classic *Congressional Government* (1885): “Quite as important as lawmaking is vigilant oversight of administration.” Today's lawmakers and congressional aides, as well as commentators and scholars, recognize that Congress's work, ideally, should not end when it passes legislation. Oversight is an integral way to make sure that the laws work and are being administered in an effective, efficient, and economical manner. In light of this destination, oversight can be viewed as one of Congress's principal responsibilities as it grapples with the complexities of the 21<sup>st</sup> century.

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## **Purposes, Authority, and Participants**

Throughout its history, Congress has engaged in oversight—broadly defined as the review, monitoring, and supervision of the implementation of public policy—of the executive branch. 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. Contemporary developments, have only increased Congress’s capacity and capabilities *to check on and check the Executive*. Public laws and congressional rules have measurably enhanced Congress’s implied power under the Constitution to conduct oversight.

Despite its lengthy heritage, oversight was not given explicit recognition in public law until enactment of the Legislative Reorganization Act of 1946. That act required House and Senate standing committees to exercise “*continuous watchfulness*” over programs and agencies within their jurisdiction.

Since the late 1960s, according to such scholars as political scientist Joel Aberbach, Congress has shown increasing interest in oversight for several major reasons. These include the expansion in number and complexity of federal programs and agencies; increase in expenditures and personnel, including contract employees; the rise of the budget deficit; and the frequency of divided government, with Congress and the White House controlled by different parties. Major partisan disagreements over priorities and processes also heighten conflict between the legislature and the executive.

Oversight occurs in virtually any congressional activity and through a wide variety of channels, organizations, and structures. These range from formal committee hearings to informal member contacts with executive officials, from staff studies to support agency reviews, and from casework conducted by Member offices to studies prepared by non-congressional entities, such as statutory commissions and offices of inspector general.

### **Purposes**

Congressional oversight of the Executive is designed to fulfill a number of purposes:

#### **Ensure Executive Compliance with Legislative Intent**

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

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

A large federal bureaucracy makes it imperative for Congress to encourage and secure efficient and effective program management, and to make every dollar count toward the achievement of program goals. A basic objective is strengthening federal programs through better managerial

operations and service delivery. Such steps can improve the accountability of agency managers to Congress and enhance program performance.

### **Evaluate Program Performance**

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

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

Beginning in the late 1960s, many commentators, public policy analysts, and legislators argued that Presidents and executive officials overstepped their authority in various areas such as impoundment of funds, executive privilege, war powers, and the dismantling of federal programs without congressional consent. Increased oversight—as part of the checks and balances system—was called for to redress what many in the public and Congress saw to be an executive arrogation of legislative prerogatives.

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

Instances of fraud and other forms of corruption, the breakdown of federal programs, incompetent management, and the subversion of governmental processes arouse legislative and public interest in oversight.

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

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

### **Review and Determine Federal Financial Priorities**

Congress exercises some of its most effective oversight through the appropriations process, which provides the opportunity to review recent expenditures in detail. In addition, most federal agencies and programs are under regular and frequent reauthorizations—on an annual, two-year, four-year, or other basis—giving the authorizing committees the same opportunity. As a consequence of these oversight efforts, Congress can abolish or curtail obsolete or ineffective programs by cutting off or reducing funds or it may enhance effective programs by increasing funds.



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

Congressional oversight can appraise whether the needs and interests of the public are adequately served by federal programs, and thus lead to corrective action, either through legislation or administrative changes.

## **Protect Individual Rights and Liberties**

Congressional oversight can help to safeguard the rights and liberties of citizens and others. By revealing abuses of authority, for instance, oversight hearings can halt executive misconduct and help to prevent its recurrence, either directly through new legislation or indirectly by putting pressure on the offending agency.

## **Other Specific Purposes**

The general purposes of oversight—and what constitutes this function—can be stated in more specific terms. Like the general purposes, these unavoidably overlap because of the numerous and multifaceted dimensions of oversight. A brief list includes:

1. review the agency rulemaking process;
2. monitor the use of contractors and consultants for government services;
3. encourage and promote mutual cooperation between the branches;
4. examine agency personnel procedures;
5. acquire information useful in future policymaking;
6. investigate constituent complaints and media critiques;
7. assess whether program design and execution maximize the delivery of services to beneficiaries;
8. compare the effectiveness of one program with another;
9. protect agencies and programs against unjustified criticisms; and
10. study federal evaluation activities.

### THOUGHTS ON OVERSIGHT AND ITS RATIONALE FROM ...

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

The house of representatives ... form the grand inquest of the state. They will diligently inquire into grievances, arising both from men and things.

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

Quite as important as legislation is vigilant oversight of administration.

It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents.

The informing function of Congress should be preferred even to its legislative function.

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

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

## Authority to Conduct Oversight

### United States Constitution

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

1. *The power of the purse.* The Constitution provides that “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” Each year the Committees on Appropriations of the House and Senate review the financial practices and needs of federal agencies. The appropriations process allows Congress to exercise extensive control over the activities of executive agencies. Congress can define the precise purposes for which money may be spent, adjust funding levels, and prohibit expenditures for certain purposes.
2. *The power to organize the executive branch.* Congress has the authority to create, abolish, reorganize, and fund federal departments and agencies. It has the authority to assign or reassign functions to departments and agencies, and grant new forms of authority and staff to administrators. Congress, in short, exercises ultimate authority over executive branch organization and generally over policy.
3. *The power to make all laws for “carrying into Execution” Congress’s own enumerated powers as well as those of the executive.* Article I grants Congress a wide range of powers, such as the power to tax and coin money; regulate foreign and interstate commerce; declare war; provide for the creation and maintenance of armed forces; and establish post offices. Augmenting these specific powers is the so-called “Elastic Clause,” which gives Congress the authority “To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”

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

### **THE SUPREME COURT ON CONGRESS’S POWER TO OVERSEE AND INVESTIGATE**

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

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

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

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

### **Principal Statutory Authority**

A number of laws directly augment Congress’s authority, mandate, and resources to conduct oversight, including assigning specific duties to committees. Among the most important, listed chronologically, are

1. *1912 Anti-Gag Legislation and Whistleblower Protection Laws for Federal Employees.*
  - a. The 1912 act countered executive orders, issued by Presidents Theodore Roosevelt and William Howard Taft, which prohibited civil service employees from communicating directly with Congress.
  - b. It also guaranteed that “the right of any persons employed in the civil service ... to petition Congress, or any Member thereof, or to furnish information to either House of Congress, or to any committee or member thereof, shall not be denied or interfered with.” 37 Stat. 555 (1912), codified at 5 U.S.C. § 7211 (2006).

- c. The Whistleblowers Protection Act of 1978, as amended, makes it a prohibited personnel practice for an agency employee to take (or not take) any action against an employee that is in retaliation for disclosure of information that the employee believes relates to violation of law, rule or regulation or which evidences gross mismanagement, waste, fraud or abuse of authority (5 U.S.C. § 2302 (b) (8)). The prohibition is explicitly intended to protect disclosures to Congress: “This subsection shall not be construed to authorize the withholding of information from the Congress or the taking of any personnel action against an employee who disclosures information to the Congress.”
  - d. Intelligence Community Whistleblower Protection Act (P.L. 105-272) establishes special procedures for personnel in the Intelligence Community, to transmit urgent concerns involving classified information to inspectors general and the House and Senate Select Committees on Intelligence.
  - e. Section 714 of the Consolidated Appropriations Act, 2010, P.L. 111-117, 123 Stat. 3034 (2010), prohibits the payment of the salary of any officer or employee of the Federal Government who prohibits or prevents or attempts or threatens to prohibit or prevent, any other Federal officer or employee from having direct oral or written communication or contact with any Member, committee or subcommittee. This prohibition applies irrespective of whether such communication was initiated by such officer or employee or in response to the request or inquiry of such Member, committee or subcommittee. Further, any punishment or threat of punishment because of any contact or communication by an officer or employee with a Member, committee, or subcommittee is prohibited under the provisions of this act.
  - f. Section 716 of the Consolidated Appropriations Act, 2010, P.L. 111-117, 123 Stat. 3034 (2010), prohibits the expenditure of any appropriated funds for use in implementing or enforcing agreement in Standard Forms 312 and 4414 of the Government or any other non-disclosure policy form, or agreement if such policy, form, or agreement that does not contain a provision that states that the restrictions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligation, rights and liabilities created by E.O. 12958; 5 U.S.C. § 7211 (Lloyd-LaFollette Act); 10 U.S.C. § 1034 (Military Whistleblower Act); 5 U.S.C. § 2303 (b)(8) (Whistleblower Protection Act); 50 U.S.C. § 421 et seq. (Intelligence Identities Protection Act); and 18 U.S.C. §§ 641, 793, 794, 798, and 952 and 50 U.S.C. § (783)(b).
2. *1921 Budget and Accounting Act Establishing the General Accounting Office (GAO), renamed the Government Accountability Office in 2004.*
- a. Insisted that GAO “*shall be independent of the executive departments and under the control and direction of the Comptroller General of the United States.*” 42 Stat. 23 (1921) (emphasis added); and
  - b. Granted authority to the Comptroller General to “*investigate, at the seat of government or elsewhere, all matters relating to the receipt, disbursement, and application of public funds.*” 42 Stat. 26 (1921) (emphasis added).

3. 1946 Legislative Reorganization Act

- a. Mandated House and Senate committees to exercise “*continuous watchfulness*” of the administration of laws and programs under their jurisdiction. 60 Stat. 832 (1946) (emphasis added);
- b. Authorized for the first time in history, *permanent professional and clerical staff* for committees. 60 Stat. 832 (1946) (emphasis added);
- c. Authorized and directed the *Comptroller General* to make administrative management analyses of each executive branch agency. 60 Stat. 837 (1946) (emphasis added); and
- d. Established the Legislative Reference Service, renamed the Congressional Research Service by the 1970 Legislative Reorganization Act (see below), as a separate department in the Library of Congress and called upon the Service “to advise and assist any committee of either House or joint committee in the analysis, appraisal, and evaluation of any legislative proposal ... and *otherwise to assist in furnishing a basis for the proper determination of measures* before the committee.” 60 Stat. 836 (1946) (emphasis added).

4. 1968 Intergovernmental Cooperation Act

- a. Required that House and Senate committees having jurisdiction over *grants-in-aid* conduct studies of the programs under which grants-in-aid are made. 82 Stat. 1098 (1968); and
- b. Provided that studies of these programs are to determine whether: (1) their purposes have been met, (2) their objectives could be carried on without further assistance, (3) they are adequate to meet needs, and (4) any changes in programs or procedures should be made. 82 Stat. 1098 (1968).

5. 1970 Legislative Reorganization Act

- a. Revised and rephrased in more explicit language the oversight function of House and Senate standing committees: “... each standing committee shall *review and study, on a continuing basis, the application, administration, and execution* of those laws or parts of laws, the subject matter of which is within the jurisdiction of that committee.” 84 Stat. 1156 (1970) (emphasis added);
- b. Required most House and Senate committees to issue *biennial* oversight reports. 84 Stat. 1156 (1970) (emphasis added);
- c. Strengthened the *program evaluation* responsibilities and other authorities and duties of the Government Accountability Office. 84 Stat. 1168-1171 (1970) (emphasis added);
- d. Redesignated the Legislative Reference Service as the *Congressional Research Service*, strengthening its *policy analysis* role and expanding its other responsibilities to Congress. 84 Stat. 1181-1185 (1970) (emphasis added);

- e. Recommended that House and Senate committees ascertain whether *programs* within their jurisdiction could be *appropriated for annually*. 84 Stat. 1174-1175 (1970) (emphasis added);
  - f. Required most House and Senate committees to include in their committee reports on legislation *five-year cost estimates* for carrying out the proposed program. 84 Stat. 1173-1174 (1970) (emphasis added); and
  - g. *Increased by two the number of permanent staff for each standing committee, including provision for minority party hirings*, and provided for hiring of *consultants* by standing committees. 84 Stat. 1175-1179 (1970) (emphasis added).
6. *1972 Federal Advisory Committee Act*
- a. Directed House and Senate committees to make a *continuing review* of the activities of each advisory committee under its jurisdiction. 86 Stat. 771 (1972) (emphasis added); and
  - b. The studies are to determine whether: (1) such committee should be abolished or merged with any other advisory committee, (2) its responsibility should be revised, and (3) it performs a necessary function not already being performed. 86 Stat. 771 (1972) (advisory committee charters and reports can generally be obtained from the agency or government organization being advised).
7. *1974 Congressional Budget Act, as amended*
- a. *Expanded* House and Senate committee *authority for oversight*. Permitted committees to appraise and evaluate programs themselves “or by contract, or (to) require a Government agency to do so and furnish a report thereon to the Congress.” 88 Stat. 325 (1974);
  - b. Directed the Comptroller General to “*review and evaluate the results of Government programs and activities*,” on his own initiative, or at the request of either House or any standing or joint committee and to assist committees in analyzing and assessing program reviews or evaluation studies. (Emphasis added.) Authorized GAO to establish an Office of Program Review and Evaluation to carry out these responsibilities. 88 Stat. 326 (1974) (emphasis added);
  - c. Strengthened GAO’s role in *acquiring fiscal, budgetary, and program-related information*. 88 Stat. 327-329 (1974) (emphasis added);
  - d. Required any House or Senate legislative committee report on a public bill or resolution to include an *analysis* (prepared by the Congressional Budget Office) providing an *estimate and comparison of costs* which would be incurred in carrying out the bill during the next and following four fiscal years in which it would be effective. 88 Stat. 320 (1974) (emphasis added); and
  - e. Established House and Senate Budget Committees and the Congressional Budget Office. The CBO director is authorized to “*secure information, data, estimates, and statistics directly* from the various departments, agencies, and establishments” of the government. 88 Stat. 302 (1974) (emphasis added).

## 8. Other noteworthy statutory provisions

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

- a. Establishing offices of inspector general in all cabinet departments, larger agencies and numerous boards, commissions, and government corporations—*Inspector General Act of 1978*, as amended, 5 U.S.C. Appendix 3;
- b. Establishing chief financial officers in all cabinet departments and larger agencies—*Chief Financial Officers Act of 1990*, 107 Stat. 2838 (1990);
- c. Improving the government's ability to manage its programs—*Federal Managers' Financial Integrity Act of 1982*, 96 Stat. 814-815 (1982);
- d. Improving the efficiency, effectiveness, and equity in the exchange of funds between the federal government and state governments—*Cash Management Improvement Act of 1990*, 104 Stat. 1058 (1990);
- e. Increasing efficiency, effectiveness, and accountability within the government—*Government Performance and Results Act of 1993*, 107 Stat. 285-296 (1993), as amended by the *GPRA Modernization Act of 2010* (P.L. 111-352; 124 Stat. 3866-3884);
- f. Improving the executive's stewardship of federal resources and accountability—*Government Management and Reform Act of 1994*, 108 Stat. 3410 (1994);
- g. Controlling federal paperwork requirements—*Paperwork Reduction Act of 1995*, 109 Stat. 163 (1995);
- h. Establishing the position of chief information officer in federal agencies to provide relevant advice for purchasing the best and most cost-effective information technology available—*Information Technology Improvement Act*, 110 Stat. 679 (1996);
- i. Establishing uniform audit requirements for state and local governments and nonprofit organizations receiving federal financial assistance—*Single Audit Act of 1984*, as amended, 98 Stat. 2327 (1984) and 110 Stat. 679 (1996);
- j. Creating a mechanism, the Congressional Review Act by which Congress can review and disapprove virtually any federal rule or regulation—*Small Business Regulatory Enforcement Fairness Act of 1996*, 110 Stat. 857-874 (1996), codified at 5 U.S.C. §§ 801-808 (2006); and
- k. Enacting other laws to assist the House and Senate in their reviews of various programs. For example, the Economic Stabilization Act of 2008 (P.L. 110-343) permits the Secretary of the Treasury to purchase and insure "troubled assets" to help promote the strength of the economy and financial system. The act established two organizations to

provide broad oversight of the program—a Financial Stability Oversight Board and a Congressional Oversight Panel. The act also placed audit responsibilities for the program with two individuals—a new Special Inspector General for the Troubled Asset Relief Program and the Comptroller General of the United States, who heads the Government Accountability Office (GAO). And in 2010, Congress called on GAO to report annually, identifying “areas of potential duplication, overlap, and fragmentation, which, if effectively addressed, could provide financial and other benefits” (P.L. 111-139; 124 Stat. 29).

## Responsibilities in House and Senate Rules

### 1. House Rules

- a. House rules grant the *Committee on Oversight and Government Reform* a comprehensive role in the conduct of oversight (Rule X, clause 4). For example, pertinent review findings and recommendations of this committee are to be considered by the authorizing committees, if presented to them in a timely fashion. In addition, the authorizing committees are to indicate on the cover of their reports on public measures that they contain a summary of such findings when that is the case (Rule XIII, clause 3).
- b. The Committee on Oversight and Government Reform has *additional* oversight duties to:
  - (1) review and study on a continuing basis, the operation of government activities at all levels to determine their economy and efficiency (Rule X, clause 3);
  - (2) receive and examine reports of the Comptroller General and submit recommendations thereon to the House (Rule X, clause 4);
  - (3) evaluate the effects of laws enacted to reorganize the legislative and executive branches of the government (Rule X, clause 4);
  - (4) study intergovernmental relationships between the United States and states, municipalities, and international organizations of which the United States is a member (Rule X, clause 4); and
  - (5) *report an oversight agenda*, not later than March 31 of the first session of a Congress, based upon oversight plans submitted by each standing committee and after consultation with the Speaker of the House, the majority leader, and the minority leader. The oversight agenda is to include the oversight plans of each standing committee together with any recommendations that it or the House leadership group may make to ensure the most effective coordination of such plans (Rule X, clause 2).
- c. House rules mandate or provide authority for other oversight efforts by *standing committees*:
  - (1) Each standing committee (except Appropriations and Budget) shall review and study on a *continuing basis* the application, administration, and execution of all laws within its legislative jurisdiction (Rule X, clause 2).



- (2) Committees have the authority to *review the impact of tax policies* on matters that fall within their jurisdiction (Rule X, clause 2).
- (3) Each committee (except Appropriations and Budget) has a responsibility for futures research and forecasting (Rule X, clause 2).
- (4) Specified committees have *special oversight authority* (i.e., the right to conduct comprehensive reviews of specific subject areas that are within the legislative jurisdiction of other committees). Special oversight is akin to the broad oversight authority granted the Committee on Government Reform, by the 1946 Legislature Reorganization Act, except that special oversight is generally limited to named subjects (Rule X, clause 3).
- (5) Each standing committee having more than 20 members shall establish an oversight subcommittee, or require its subcommittees, if any, to *conduct oversight* in their jurisdictional areas; a committee that establishes such a subcommittee may add it as a sixth subcommittee, beyond the usual limit of five (Rule X, clauses 2 and 5).
- (6) Committee reports on measures are to include *oversight findings* separately set out and clearly identified (Rule XIII, clause 3).
- (7) Costs of stenographic services and transcripts for *oversight hearings* are to be paid “from the applicable accounts of the House” (Rule XI, clause 1).
- (8) *Each standing committee is to submit its oversight plans* for the duration of a Congress by February 15 of the first session to the Committee on Oversight and Government Reform and the Committee on House Administration. Not later than March 31, the Oversight and Government Reform Committee must report an oversight agenda (discussed above). In developing such plans, each standing committee must, to the extent feasible (Rule X, clause 2):
  - (a) consult with other committees of the House that have jurisdiction over the same or related laws, programs, or agencies within its jurisdiction, with the objective of ensuring that such laws, programs, or agencies are reviewed in the same Congress and that there is a maximum of coordination between such committees in the conduct of such reviews; and such plans shall include an explanation of what steps have been and will be taken to ensure such coordination and cooperation;
  - (b) give priority consideration to including in its plans the review of those laws, programs, or agencies operating under permanent budget authority or permanent statutory authority;
  - (c) have a view toward ensuring that all significant laws, programs, or agencies within its jurisdiction are subject to review at least once every 10 years; and
  - (d) “include proposals to cut or eliminate mandatory and discretionary programs that are inefficient, duplicative, outdated, or more appropriately administered by State or local governments” (H.Res. 5, 112<sup>th</sup> Congress, 1<sup>st</sup> sess.).

- (9) *Each committee* must submit to the House, not later than January 2 of each odd-numbered year, *a report on the activities of that committee* for the Congress (Rule XI, clause 1):
- (a) Such report must include *separate sections summarizing the legislative and oversight activities* of that committee during that Congress.
  - (b) The *oversight section* of such report must include a summary of the oversight plans submitted by the committee at the beginning of the Congress, a summary of the actions taken and recommendations made with respect to each such plan, and a summary of any additional oversight activities undertaken by that committee, and any recommendations made or actions taken thereon.
- (10) Soon after the 111<sup>th</sup> Congress convened, the House, on January 14, 2009, amended its rules “to require each standing committee to hold at least three hearings per year on waste, fraud, and abuse under each respective committee’s jurisdiction.” House committees were obligated to hold a hearing if “an agency’s financial statements are not in order” and if a program under a committee’s jurisdiction is “deemed by GAO [Government Accountability Office] to be at high risk for waste, fraud, and abuse.”
- d. *The Speaker*, with the approval of the House, is given additional authority to “appoint *special ad hoc oversight committees* for the purpose or reviewing specific matters within the jurisdiction of two or more standing committees.” (Rule X, clause 2) (emphasis added).

## 2. Senate Rules

- a. Each standing committee (except for Appropriations and Budget) must *review and study on a continuing basis, the application, administration, and execution of all laws within its legislative jurisdiction* (Rule XXVI, clause 8).
- b. “*Comprehensive policy oversight*” responsibilities are granted to specified standing committees. This duty is similar to special oversight in the House. The Committee on Agriculture, Nutrition, and Forestry, for example, is authorized to “study and review, on a comprehensive basis, matters relating to food, nutrition, and hunger, both in the United States and in foreign countries, and rural affairs, and report thereon from time to time (Rule XXV, clause 1a).”
- c. All standing committees, except Appropriations, are required to *prepare regulatory impact evaluations* in their committee reports accompanying each public bill or joint resolution (Rule XXVI, clause 11). The evaluations are to include:
  - (1) an estimate of the numbers of individuals and businesses to be affected;
  - (2) a determination of the measure’s economic impact and effect on personal privacy;  
and
  - (3) a determination of the amount of additional paperwork that will result.
- d. The Committee on Homeland Security and Governmental Affairs has the following *additional oversight duties* (Rule XXV, clause 1k):

- (1) review and study on a continuing basis the operation of government activities at all levels to determine their economy and efficiency;
- (2) receive and examine reports of the Comptroller General and submit recommendations thereon to the Senate;
- (3) evaluate the effects of laws enacted to reorganize the legislative and executive branches of the government; and
- (4) study intergovernmental relationships between the United States and states, municipalities, and international organizations of which the United States is a member.
- (5) On March 1, 1948 (during the 80<sup>th</sup> Congress), the Senate adopted S. Res. 189, which established the Permanent Subcommittee on Investigations of the then titled Committee on Government Operations. The Subcommittee was an outgrowth of the famous 1941 Truman Committee (after Senator Harry Truman) which investigated fraud and mismanagement of the nation's war program. The Truman Committee ended in 1948, but the chairman of the Government Operations Committee made the functions of the Truman panel one of his subcommittees: the Permanent Subcommittee on Investigations. Since then this subcommittee has investigated scores of issues, such as government waste, fraud, and inefficiency.

## Congressional Participants in Oversight

### Members and Committees

1. *Members.* Oversight is generally considered a committee activity. However, both casework and other project work conducted in a Member's personal office can result in findings about bureaucratic behavior and policy implementation; these, in turn, can lead to the adjustment of agency policies and procedures and to changes in public law.
  - (a) *Casework*—responding to constituent requests for assistance on projects or complaints or grievances about program implementation provides an opportunity to examine bureaucratic activity and operations, if only in a selective way.
  - (b) Sometimes *individual Members* will conduct their own investigations or ad hoc hearings, or direct their staffs to conduct oversight studies. Individual Members have no authority to issue compulsory process or conduct official hearings. The Government Accountability Office or some other legislative branch agency, a specially created task force, or private research group might be requested to conduct an investigation of a matter for a Senator or Representative.
2. *Committees.* The most common and effective method of conducting oversight is through the committee structure. Throughout their histories, the House and Senate have used their standing committees as well as select or special committees to investigate federal activities and agencies along with other matters.

- (a) The House Committee on *Government Reform* and the Senate Committee on *Homeland Security and Governmental Affairs*, which have oversight jurisdiction over virtually the entire federal government, have been vested with broad investigatory powers over government-wide activities.
- (b) The House and Senate Committees on *Appropriations* have similar responsibilities when reviewing fiscal activities.
- (c) Each *standing* committee of Congress has oversight responsibilities to review government activities within their jurisdiction. These panels also have authority on their own to establish oversight and investigative *subcommittees*. The establishment of such subcommittees does *not preclude* the *legislative* subcommittees from conducting oversight.
- (d) Certain House and Senate committees have “*special oversight*” or “*comprehensive policy oversight*” of designated subject areas as explained in the previous subsection.

### Staff of Member Offices and Committees

1. *Personal Staff*. Constituent letters, complaints, and requests for projects and assistance frequently bring problems and deficiencies in federal programs and administration to the attention of Members and their personal office staffs. The casework performed by a Member’s staff for constituents can be an effective oversight tool.
  - (a) Casework can be an important vehicle for pursuing both the oversight and legislative interests of the Member. The Senator or Representative and the staff may be attuned to the *relationship* between *casework* and the *oversight* function. This is facilitated by a regular exchange of ideas among the Member, legislative aides, and caseworkers on problems brought to the office’s attention by constituents, and of possible legislative initiatives to resolve those problems.
  - (b) If casework is to be useful as an oversight technique, *effective staffing and coordination are needed*. Casework and legislative staffs maximize service to their Member’s constituents when they establish a relationship with the staff of the subcommittees and committees that handle the areas of concern to the Member’s constituents. Through this interaction, the panel’s staff can be made aware of the problems with the agency or program in question, assess how widespread and significant they are, determine their causes, and recommend corrective action.
  - (c) *Office procedures* enable staff in some offices to identify cases that represent a situation in which *formal* changes in agency procedure could be an appropriate remedy. Prompt congressional inquiry and follow up enhance this type of oversight. Telephone inquiries reinforced with written requests tend to ensure agency attention.
2. *Committee Staff*. As issues become more complex and Members’ staffs more overworked, professional staffs of committees can provide the expert help required to conduct oversight and investigations. Committee staff typically have the experience and expertise to conduct effective oversight for the committees and subcommittees they serve. Committees may also call upon *legislative support agencies* for assistance, hire *consultants*, or “*borrow*” staff from federal departments.

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

## **Congressional Support Agencies and Offices**

1. Of the agencies in the legislative branch, three directly assist Congress in support of its oversight function (see "Oversight Information Sources and Consultant Services" for further detail on each):
  - (a) Congressional Budget Office (CBO),
  - (b) Congressional Research Service (CRS) of the Library of Congress, and
  - (c) Government Accountability Office (GAO), formerly the General Accounting Office.
2. Additional offices that can assist in oversight are
  - (a) House General Counsel's Office,
  - (b) House Parliamentarian's Office,
  - (c) House Clerk's Office,
  - (d) Senate Legal Counsel's Office, and
  - (e) Senate Historian's Office and Senate Library.

## **Oversight Coordination and Processes**

A persistent problem for Congress in conducting oversight is coordination among committees, both within each chamber as well as between the two houses. As the final report of the House Select Committee on Committees of the 93<sup>rd</sup> Congress noted, "Review findings and recommendations developed by one committee are seldom shared on a timely basis with another committee, and, if they are made available, then often the findings are transmitted in a form that is difficult for Members to use." Despite the passage of time, this statement remains relevant today. Oversight coordination between House and Senate committees is also uncommon; and it occurs primarily in the aftermath of perceived major policy failures or prominent inter-branch conflicts, as with the Iran-contra affair (1986) and the 9/11 terrorist attacks (2001-2002).

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

## Oversight Coordination

### General Techniques of Ensuring Oversight Coordination Include

1. The House and Senate can establish select or special committees to probe issues and agencies, to promote public understanding of national concerns, and to coordinate oversight of issues that overlap the jurisdiction of several standing committees.
2. House rules require the findings and recommendations of the Committee on Government Reform to be considered by the authorizing committees if presented to them in a timely fashion. Such findings and recommendations are to be published in the authorizing committees' reports on legislation. House rules also require the oversight plans of committees to include ways to maximize coordination between and among committees that share jurisdiction over related laws, programs, or agencies.

### Specific Means of Ensuring Oversight Coordination Include

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

## Oversight Processes

### The Budget Process

1. The Congressional Budget and Impoundment Control Act of 1974, as amended, enhanced the legislative branch's capacity to shape the federal budget. The act has major institutional and procedural effects on Congress:
  - a. *Institutionally*, Congress created three new entities:
    - (1) the Senate Committee on the Budget;
    - (2) the House Committee on the Budget; and
    - (3) the Congressional Budget Office.
  - b. *Procedurally*, the act established methods that permit Congress to:
    - (1) determine budget policy as a whole;

- (2) relate revenue and spending decisions;
  - (3) determine priorities among competing national programs; and
  - (4) ensure that revenue, spending, and debt legislation are consistent with the overall budget policy.
2. The new budget process coexists with the established authorization and appropriation procedures and significantly affects each.
    - a. On the *authorization side*, the Budget Act requires committees to submit their budgetary “views and estimates” for matters under their jurisdiction to their Committee on the Budget within six weeks after the President submits a budget.
    - b. On the *appropriations side*, new contract and borrowing authority must go through the appropriations process. Subcommittees of the Appropriations Committees are assigned a financial allocation that determines how much may be included in the measures they report, although less than one-third of federal spending is subject to the annual appropriations process. (The tax and appropriations panels of each house also submit budgetary views and estimates to their respective Committee on the Budget.)
    - c. In deciding spending, revenue, credit, and debt issues, Congress is sensitive to trends in the overall composition of the annual federal budget (expenditures for defense, entitlements, interest on the debt, and domestic discretionary programs).
  3. In short, the Budget Act has the potential of strengthening oversight by enabling Congress better to relate program priorities to financial claims on the national budget. Each committee, knowing that it will receive a fixed amount of the total to be included in a budget resolution, has an incentive to scrutinize existing programs to make room for new programs or expanded funding of ongoing projects or to assess whether programs have outlived their usefulness.

## The Authorization Process

1. Through its authorization power, Congress exercises significant control over any government agency.
2. The entire authorization process may involve a host of oversight tools—hearings, studies, and reports—but the key to the process is the *authorization statute*.
  - a. An authorization statute creates and shapes government programs and agencies and it contains the statement of legislative policy for the agency.
  - b. Authorization is the *first* lever in congressional exercise of the power of the purse; it usually allows an agency to be funded, but it does *not* guarantee financing of agencies and programs. Frequently, authorizations establish dollar ceilings on the amounts that can be appropriated.
3. The authorization-reauthorization process is an important oversight tool.

- a. Through this process, Members are educated about the work of an agency and given an opportunity to direct the agency's effort in light of experience.
- b. Expiration of an agency's program provides an excellent chance for in-depth oversight:
  - (1) In recent decades, there has been a mix of permanent and periodic (annual or multi-year) authorizations, although reformers at time press for *biennial budgeting* (acting on a two-year cycle for authorizations, appropriations, and budget resolutions).
  - (2) Periodic authorizations improve the likelihood that an agency will be scrutinized systematically.
4. In addition to formal amendment of the agency's authorizing statute, the authorization process gives committees an opportunity to exercise informal, nonstatutory controls over the agency.
  - a. Knowledge by an agency that it must come to the legislative committee for renewed authority increases the influence of the committee.
  - b. This condition helps to account for the appeal of short-term authorizations.
  - c. *Non-statutory controls* used by committees to exercise direction over the administration of laws include statements made in:
    - (1) committee hearings;
    - (2) committee reports accompanying legislation;
    - (3) floor debates; and
    - (4) committee contacts and correspondence with the agency.
5. If agencies fail to comply with these informal directives, the authorization committees can apply sanctions or move to convert the informal directive to a statutory command.

## The Appropriations Process

1. The appropriations process is one of Congress's most important forms of oversight.
  - a. Its strategic position stems from the constitutional requirement that "no Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."
  - b. Congress's power of the purse allows the House and Senate Committees on Appropriations to play a prominent role in oversight.
2. The oversight function of the Committees on Appropriations derives from their responsibility to examine and pass on the budget requests of the agencies as contained in the President's Budget.



- a. The decisions of the committees are conditioned on their assessment of the agencies' need for their budget request as indicated by past performance.
  - b. In practice, the entire record of an agency is fair game for the required assessment.
  - c. This comprehensive overview and the "carrot and stick" of the appropriations recommendations make the committees significant focal points of congressional oversight and is a key source of their power in Congress and in the federal government generally.
3. Enacted appropriations legislation frequently contains at least five types of *statutory controls* on agencies:
- a. Such legislation specifies the *purpose* for which funds may be used.
  - b. It defines the specified *funding level* for the agency as a whole as well as for programs and divisions within the agency.
  - c. It sets *time limits* on the availability of funds for obligation.
  - d. Appropriations legislation may contain *limitation* provisions. For example, in appropriating \$350 million to the Environmental Protection Agency for research and development, Congress added this condition: "Provided, That not more than \$55,000,000 of these funds shall be available for procurement of laboratory equipment, supplies, and other operating expenses in support of research and development." 108 Stat. 2319 (1994).
  - e. Appropriations measures and committee reports also stipulate how an agency's budget can be *reprogrammed* (shifting funds within an appropriations account; see box below).
4. *Nonstatutory controls* are a major form of oversight. Legislative language in committee reports and in hearings, letters to agency heads, and other communications give detailed instructions to agencies regarding committee expectations and desires. Agencies are not legally obligated to abide by non-statutory recommendations, but failure to do so may result in a loss of funds and flexibility the following year. Agencies ignore nonstatutory controls at their peril (see box).

The conference report for the Omnibus Consolidated and Emergency Supplemental Appropriations for FY1999 provides guidelines for the reprogramming and transfer of funds for the Treasury and General Government Appropriations Act, 1999. Each request from an agency to the review committee "shall include a declaration that, as of the date of the request, none of the funds included in the request have been obligated, and none will be obligated, until the Committees on Appropriations have approved the request." H.Rept. 105-825, p. 1472 (1998).

## The Investigatory Process

1. Congress's power of investigation is *implied* in the Constitution.
  - a. Numerous Supreme Court decisions have upheld the legislative branch's right of inquiry, provided it stays within its legitimate legislative sphere.

- b. The roots of Congress’s authority to conduct investigations extend back to the British Parliament and colonial assemblies.
  - c. In addition, the Framers clearly perceived the House of Representatives to function as a “grand inquest.” Since the Framers expected lawmakers to employ the investigatory function, based upon parliamentary precedents, it was unnecessary to invest Congress with an explicit investigatory power.
  - d. From time to time, legal questions have been raised about the investigative authority of Congress. However, numerous Supreme Court decisions have upheld the legislative branch’s right of inquiry, provided it serves a legitimate legislative interest.
2. Investigations and related activities may be conducted by:
    - a. individual members;
    - b. committees and subcommittees;
    - c. staff or outside organizations and personnel under contract; or
    - d. congressional support agencies.
  3. Investigations serve several purposes:
    - a. they help to ensure honesty and efficiency in the administration of laws;
    - b. they secure information that assists Congress in making informed policy judgments; and
    - c. they may aid in informing the public about the administration of laws.

See “Investigative Oversight” for greater detail and analysis.

## **The Confirmation Process**

By establishing a public record of the policy views of nominees, congressional hearings allow lawmakers to call appointed officials to account at a later time. Since at least the Ethics in Government Act of 1978, which encouraged greater scrutiny of nominations, Senate committees are setting aside more time to probe the qualifications, independence, and policy predilections of presidential nominees, seeking information on everything from physical health to financial assets. Confirmation can assist in oversight in several ways.

1. The Constitution provides that the President “shall nominate, and by and with the *Advice and Consent of the Senate*, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.” (Emphasis added.)
  - a. The consideration of appointments to executive branch leadership positions is a major responsibility of the Senate and especially of Senate committees.

- b. Panels review the qualifications of nominees for public positions.
2. The confirmation hearing provides a forum for the discussion of the policies and programs the nominee intends to pursue; this is a classic opportunity for senatorial oversight and influence. The confirmation process as an oversight tool can be used to:
  - a. provide policy direction to nominees;
  - b. inform nominees of congressional interests; and
  - c. extract future commitments.
3. Once a nominee has been confirmed by the Senate, oversight includes following up to ensure that the nominee fulfills any commitments made during confirmation hearings. Subsequent hearings and committee investigations can explore whether such commitments have been kept.
4. *Recess Appointments*. The Constitution provides that the President “shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.” When Presidents relied on this power to circumvent Senate confirmation, Congress responded with legislation that prohibits, with certain exceptions, the payment of salaries to recess appointees. 54 Stat. 751 (1940); 5 U.S.C. § 5503 (2004). Also, Congress has imposed additional funding restriction on recess appointees in appropriations acts. For instance, a provision in the Financial Services and General Government Appropriations Act for FY2008 reads (see box):

Hereafter, no part of any appropriation contained in this or any other Act shall be paid to any person for the filling of any position for which he or she has been nominated after the Senate has voted not to approve the nomination of said person. 121 Stat. 2021 (2007).

5. *Vacancies Act*. In addition to making recess appointments, Presidents make other temporary or interim appointments. Since 1795, Congress has legislated limits on the time a temporary officer may occupy a vacant advice and consent position. In 1868, Congress established a procedure for filling vacancies in advice and consent positions through the Vacancies Act. When the head of an executive department dies, resigns, or is sick or absent, the next in command may perform the duties until a successor is appointed or the absence ceases. The President may also direct someone else (previously appointed with the advice and consent of the Senate) to perform the duties. These acting officials, under the Vacancies Act, were restricted by law to a period of not to exceed 30 days. That limit was violated with such frequency that Congress in 1988 increased it to 120 days. 102 Stat. 988, sec. 7 (1988); 5 U.S.C. §§ 3345-48 (2004).

The Justice Department took the position that some executive officials were not restricted by the Vacancies Act and could serve beyond the 120-day period. Under that interpretation, the Administration selected Bill Lann Lee to head the Justice Department’s Civil Rights Division, and argued that he could serve longer than had he been a recess appointee. Congress responded by passing legislation in 1998 to make the Vacancies Act the exclusive vehicle for temporarily filling vacant advice and consent positions. The new Vacancies Act, included in the FY1999 Omnibus Consolidated and Emergency Supplemental

Appropriations Act (P.L. 105-277), rejects the Justice Department position and established procedures for the appointment of executive officials who temporarily hold an office. With various exceptions, the 120-day period has been replaced by a 210-day period.

## The Impeachment Process

1. The impeachment power of Congress is a unique oversight tool, reserved for unusual circumstances and as a technique of last resort when conventional forms of oversight fail. Impeachment applies also to the judiciary. Impeachment offers Congress:
  - a. a constitutionally mandated method for obtaining information that might otherwise not be made available by the executive; and
  - b. an implied threat of punishment for an executive official whose conduct exceeds acceptable boundaries.
2. Impeachment procedures differ from those of conventional congressional oversight.
  - a. The most significant procedural differences center on the *roles* played by each house of Congress.
  - b. The House of Representatives has the sole power to impeach. A majority is required to impeach.
  - c. If the House votes to impeach, the person is tried by the Senate, which has the sole power to try an impeachment. A two-thirds majority is required to convict and remove the individual. Should the Senate deem it appropriate in a given case, it may, by majority vote, impose an additional judgment of disqualification from further federal offices of honor, trust, or profit.
  - d. In *Nixon v. United States*, 506 U.S. 226 (1993), the Supreme Court held nonjusticiable a constitutional challenge to the use by the Senate in an impeachment proceeding of a 12-member committee appointed to take testimony and gather evidence. Such a committee makes no recommendations as to the ultimate question before the Senate. Nor does the committee rule on questions of relevancy, materiality, and competency. Rather, it reports a certified copy of the transcript of the proceedings before the committee and any evidence received by the committee to the full Senate for its consideration. The full Senate may take further testimony or evidence, or it may hold the entire trial in open Senate. In either event, the full Senate determines whether to convict on one or more of the articles of impeachment involved and, upon conviction, decides the appropriate judgment to be imposed.
3. The impeachment process is cumbersome and infrequently used. The House has voted to impeach in 17 cases, 16 of which have reached the Senate, and 15 of which have gone to a vote on one or more articles of impeachment. Seven cases, all pertaining to federal judges, have resulted in conviction and removal; two of these also resulted in disqualification. The most recent impeachment trial was that of President Clinton in 1998-99; the most recent judicial impeachment trials were those of Judges Claiborne, Hastings, and Nixon in 1986, 1988 and 1989, respectively. A number of issues were addressed in the Clinton

impeachment trial and other past impeachment proceedings, although the answers to some still remain somewhat ambiguous. For example:

- a. An impeachment may be continued from one Congress to the next, although the procedural steps vary depending upon the stage in the process.
- b. The Constitution defines the grounds for impeachment as “Treason, Bribery, or other high Crimes and Misdemeanors.” However, the meaning and scope of “high Crimes and Misdemeanors” remains in dispute and depends on the interpretation of individual legislators.
- c. The Constitution provides for impeachment of the “President, Vice President, and all civil Officers of the United States.” While the outer limits of the “civil Officers” language are not altogether clear, past precedents suggest that it covers at least federal judges and executive officers subject to the Appointments Clause.
- d. Members of the House and Senate are not subject to impeachment because they are not “civil officers.” William Blount, a U.S. Senator from Tennessee, was impeached by the House in 1797, but the Senate chose to *expel* him instead of conducting an impeachment trial.

## Investigative Oversight

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

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

## Constitutional Authority to Perform Oversight and Investigative Inquiries

Generally, Congress’s authority and power to obtain information, including, but not limited to, classified and/or confidential information, is extremely broad. While there is no express provision of the Constitution or specific statute authorizing the conduct of congressional oversight or investigations, the Supreme Court has firmly established that such power is essential to the legislative function as to be implied from the general vesting of legislative powers in Congress.<sup>1</sup> In *Eastland v. United States Serviceman’s Fund*, for instance, the Court stated that the “scope of its power of inquiry ... is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.”<sup>2</sup> Also, in *Watkins v. United States*, the Court emphasized that the “power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes.”<sup>3</sup> The Court further stressed that Congress’s power to investigate is at its peak when focusing on alleged waste, fraud, abuse, or maladministration within a government department. Specifically, the Court explained that the investigative power “comprehends probes into departments of the federal government to expose corruption, inefficiency, or waste.”<sup>4</sup> The Court went on to note that the first Congresses held “inquiries dealing with suspected corruption or mismanagement of government officials.”<sup>5</sup> Given these factors, the Court recognized “the power of the Congress to inquire into and publicize corruption, maladministration, or inefficiencies in the agencies of Government.”<sup>6</sup>

## Authority of Congressional Committees

Oversight and investigative authority is implied from the Article I of the Constitution and rests with the House of Representatives and Senate. The House and Senate in turn have delegated this authority to various entities, the most relevant of which are the standing committees of each chamber. Committees of Congress have only the power to inquire into matters within the scope of the authority delegated to them by their parent body. Once having established its jurisdiction, authority and the pertinence of the matter under inquiry to its area of authority, however, a committee’s investigative purview is substantial and wide-ranging.

## Committee Jurisdiction

Establishing committee jurisdiction is the foundation for any attempt to obtain information and documents from the Executive Branch. A claim of lawful jurisdiction, however, does not automatically entitle the committee to access whatever documents and information it may seek. Rather, an appropriate claim of jurisdiction authorizes the committee to inquire and request

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<sup>1</sup> See, e.g., *Nixon v. Administrator of General Services*, 433 U.S. 435 (1977); *Eastland v. United States Servicemen’s Fund*, 421 U.S. 491 (1975); *Barenblatt v. United States*, 360 U.S. 109 (1959); *Watkins v. United States*, 354 U.S. 178 (1957); *McGrain v. Daugherty*, 273 U.S. 135 (1927).

<sup>2</sup> 421 U.S. at 504, n. 15 (quoting *Barenblatt*, *supra*, 360 U.S. at 111).

<sup>3</sup> 354 U.S. at 187.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 182.

<sup>6</sup> *Id.* at 200, n.33.

information. The specifics of such access may still be subject to prudential, political, and constitutionally-based privileges asserted by the targets of the inquiry.

As previously stated, a congressional committee is a creation of its parent house and, therefore, has only the power to inquire into matters within the scope of the authority that has been delegated to it by that body.<sup>7</sup> Thus, the enabling chamber rule or resolution that gives the committee life is also the charter that defines the grant and limitations of the committee's power. In construing the scope of a committee's authorizing charter, courts will look to the words of the rule or resolution itself, and then, if necessary, to the usual sources of legislative history such as floor debate, legislative reports, and prior committee practice and interpretation.

Rule X of the House Rules and Rule XXV of the Senate Rules deal respectively with the organization of the standing committees and establish their jurisdiction.<sup>8</sup> Jurisdictional authority for "special" investigations may be given to a standing committee, a joint committee of both houses, or a special subcommittee of a standing committee, among other vehicles. Given the specificity with which the House and Senate rules now confer jurisdiction on their standing committees, as well as the care with which most authorizing resolutions for special and/or select committees have been drafted in recent years, sufficient models exist to avoid a successful judicial challenge by a witness that his noncompliance was justified by a committee's overstepping its delegated scope of authority.

## Legislative Purpose

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"<sup>9</sup> and cannot be used to expose for the sake of exposure alone. The *Watkins* Court underlined these limitations stating that:

There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress ... nor is the Congress a law enforcement or trial agency. These are functions of the executive and judicial departments of government. No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress.<sup>10</sup>

A committee's inquiry must have a legislative purpose or be conducted pursuant to some other constitutional power of Congress, such as the authority of each House to discipline its own members, judge the returns of the their elections, and to conduct impeachment proceedings.<sup>11</sup> Although the 1927 Supreme Court decision in *Kilbourn v. Thompson*<sup>12</sup> held that the investigation in that case was an improper probe into the private affairs of individuals, the courts today generally will presume that there is a legislative purpose for an investigation, and the House or

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<sup>7</sup> *United States v. Rumely*, 345 U.S. 41, 42, 44 (1953); see also *Watkins v. United States*, 354 U.S. at 198.

<sup>8</sup> See RULES OF THE HOUSE OF REPRESENTATIVES FOR THE 111<sup>TH</sup> CONGRESS, Rule X, available at <http://www.rules.house.gov/ruleprec/111th.pdf> (2009); see also S. Doc. 107-1, *Senate Manual*, Rule XXV, 107<sup>th</sup> Cong. (2002).

<sup>9</sup> *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880).

<sup>10</sup> *Watkins v. United States*, 354 U.S. at 187.

<sup>11</sup> See, e.g., *McGrain v. Daugherty*, 273 U.S. 135 (1927); see also *In Re Chapman*, 166 U.S. 661 (1897).

<sup>12</sup> 103 U.S. 168 (1881).

Senate rule or resolution authorizing the investigation does not have to specifically state the committee's legislative purpose.<sup>13</sup> In *In re Chapman*,<sup>14</sup> the Court upheld the validity of a resolution authorizing an inquiry into charges of corruption against certain Senators despite the fact that it was silent as to what might be done when the investigation was completed. The Court stated:

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

Nor will it do to hold that the Senate had no jurisdiction to pursue the particular inquiry because the preamble and resolutions did not specify that the proceedings were taken for the purpose of censure or expulsion, if certain facts were disclosed by the investigation. The matter was within the range of the constitutional powers of the Senate. The resolutions adequately indicated that the transactions referred to were deemed by the Senate reprehensible and deserving of condemnation and punishment. The right to expel extends to all cases where the offense is such as in the judgment of the Senate is inconsistent with the trust and duty of a Member.

We cannot assume on this record that the action of the Senate was without a legitimate object, and so encroach upon the province of that body. Indeed, we think it affirmatively appears that the Senate was acting within its right, and it was certainly not necessary that the resolutions should declare in advance what the Senate meditated doing when the investigation was concluded.<sup>15</sup>

In *McGrain v. Daugherty*,<sup>16</sup> the original resolution that authorized the Senate investigation into the Teapot Dome Affair made no mention of a legislative purpose. A subsequent resolution for the attachment of a contumacious witness declared that his testimony was sought for the purpose of obtaining "information necessary as a basis for such legislative and other action as the Senate may deem necessary and proper." The Court found that the investigation was ordered for a legitimate object. It wrote:

The only legitimate object the Senate could have in ordering the investigation was to aid it in legislating, and we think the subject matter was such that the presumption should be indulged that this was the real object. An express avowal of the object would have been better; but in view of the particular subject-matter was not indispensable. \*\*\*

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<sup>13</sup> *McGrain v. Daugherty*, 273 U.S. 135 (1927); see also *Townsend v. United States*, 95 F.2d 352 (D.C. Cir. 1938); LEADING CASES ON CONGRESSIONAL INVESTIGATORY POWER, 7 (Comm. Print 1976) [hereinafter cited as *Leading Cases*]. For a different assessment of recent case law concerning the requirement of a legislative purpose, see Allen B. Moreland, *Congressional Investigations and Private Persons*, 40 SO. CAL. L. REV. 189, 232 (1967) [hereinafter *Moreland*].

<sup>14</sup> 166 U.S. 661, 669 (1897).

<sup>15</sup> *In re Chapman*, 166 U.S. at 699.

<sup>16</sup> 273 U.S. 135 (1927).



The second resolution—the one directing the witness be attached—declares that this testimony is sought with the purpose of obtaining “information necessary as a basis for such legislative and other action as the Senate may deem necessary and proper.” This avowal of contemplated legislation is in accord with what we think is the right interpretation of the earlier resolution directing the investigation. The suggested possibility of “other action” if deemed “necessary or proper” is of course open to criticism in that there is no other action in the matter which would be within the power of the Senate. But we do not assent to the view that this indefinite and untenable suggestion invalidates the entire proceeding. The right view in our opinion is that it takes nothing from the lawful object avowed in the same resolution and is rightly inferable from the earlier one. It is not as if an inadmissible or unlawful object were affirmatively and definitely avowed.<sup>17</sup>

Moreover, when the purpose asserted is supported by reference to specific problems which in the past have been, or in the future may be, the subject of appropriate legislation, it has been held that a court cannot say that a committee of Congress exceeds its power when it seeks information in such areas.<sup>18</sup> In the past, the types of legislative activity which have justified the exercise of the power to investigate have included the primary functions of legislating and appropriating;<sup>19</sup> the function of deciding whether or not legislation is appropriate;<sup>20</sup> oversight of the administration of the laws by the executive branch;<sup>21</sup> and the essential congressional function of informing itself in matters of national concern.<sup>22</sup> In addition, Congress’s power to investigate such diverse matters as foreign and domestic subversive activities,<sup>23</sup> labor union corruption,<sup>24</sup> and organizations that violate the civil rights of others<sup>25</sup>—have all been upheld by the Supreme Court.

Despite the Court’s broad interpretation of legislative purpose, Congress’s authority is not unlimited. Courts have held that a committee lacks legislative purpose if it appears to be conducting a legislative trial rather than an investigation to assist in performing its legislative function.<sup>26</sup> Furthermore, although “there is no congressional power to expose for the sake of exposure,”<sup>27</sup> “so long as Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power.”<sup>28</sup>

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<sup>17</sup> *Id.* at 179-180.

<sup>18</sup> *Shelton v. United States*, 404 F.2d 1292, 1297 (D.C. Cir. 1968), *cert denied*, 393 U.S. 1024 (1969).

<sup>19</sup> *Barenblatt v. United States*, 360 U.S. 109 (1959).

<sup>20</sup> *Quinn v. United States*, 349 U.S. 155, 161 (1955).

<sup>21</sup> *McGrain*, 273 U.S. at 295.

<sup>22</sup> *United States v. Rumely*, 345 U.S. 4, 43-45 (1953); *see also* *Watkins*, 354 U.S. at 200 n. 3.

<sup>23</sup> *See, e.g., Barenblatt v. United States*, 360 U.S. 109 (1959); *Watkins v. United States*, 354 U.S. 178 (1957); *McPhaul v. United States*, 364 U.S. 372 (1960).

<sup>24</sup> *Hutcheson v. United States*, 369 U.S. 599 (1962).

<sup>25</sup> *Shelton v. United States*, 404 F.2d 1292 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1024 (1969).

<sup>26</sup> *See United States v. Icardi*, 140 F. Supp. 383 (D.D.C. 1956); *United States v. Cross*, 170 F. Supp. 303 (D.D.C. 1959).

<sup>27</sup> *Watkins v. United States*, 354 U.S. 178, 200 (1957). However, Chief Justice Warren, writing for the majority, made it clear that he was not referring to the “power of the Congress to inquire into and publicize corruption, maladministration or inefficiency in agencies of the Government.” *Id.*

<sup>28</sup> *Barenblatt*, 360 U.S. at 132.

## Legal Tools Available for Oversight and Investigations

A review of congressional precedents indicates that there is no single method or set of procedures for engaging in oversight or conducting an investigation.<sup>29</sup> Historically, congressional committees appeared to rely a great deal on public hearings and subpoenaed witnesses to garner information and accomplish their investigative goals. In more recent years, congressional committees have seemingly relied more heavily on staff level communication and contacts as well as other “informal” attempts at gathering information – document requests, informal briefings, etc. – before initiating the necessary formalistic procedures such as issuing committee subpoenas, holding on-the-record depositions, and/or engaging the subjects of inquiries in open, public hearings. This section reviews the legal basis for the formal process of issuing subpoenas, depositions, and holding committee hearings. This section also reviews Congress’s authority to grant witnesses limited immunity for the purpose of obtaining information and testimony that may be protected by the Fifth Amendment’s right against self incrimination.

### Subpoena Power

As a corollary to Congress’s accepted oversight and investigative authority, the Supreme Court has determined that the “[i]ssuance of subpoenas ... has long been held to be a legitimate use by Congress of its power to investigate.”<sup>30</sup> In particular, the Court has repeatedly cited the principle that:

A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information – which not infrequently is true – recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed. All this was true before and when the Constitution was framed and adopted. In that period the power of inquiry – with enforcing process – was regarded and employed as a necessary and appropriate attribute of the power to legislate—indeed, was treated as inhering in it.<sup>31</sup>

The power of inquiry, with the accompanying process to enforce it, has been deemed “an essential and appropriate auxiliary to the legislative function.”<sup>32</sup> 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. To validly issue a subpoena, individual committees or subcommittees must be delegated this authority. 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 must be specifically delegated that authority by Senate or House resolution. The rules or practices of standing committees may restrict the issuance of subpoenas only to full committees or, in certain instances, allow issuance

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<sup>29</sup> See, e.g., CONGRESS INVESTIGATES: A DOCUMENTARY HISTORY 1792-1974 (Arthur M. Schlesinger, Jr. & Roger Burns eds. 1975).

<sup>30</sup> *Eastland v. United States Servicemen’s Fund*, 421 U.S. at 504.

<sup>31</sup> *McGrain*, 273 U.S. at 175; see also *Buckley v. Valeo*, 424 U.S. 1, 138 (1976), *Eastland*, 421 U.S. at 504-505.

<sup>32</sup> *McGrain v. Daugherty*, 273 U.S. at 174-75.

by a committee chairman alone, with or without the concurrence of the ranking minority member.<sup>33</sup>

Congressional subpoenas are most frequently served by the U.S. Marshal's office or by committee staff, or less frequently by the Senate or House Sergeants-At-Arms. Service may be effected anywhere in the United States. The subpoena power has been held to extend to aliens physically present in the United States. As will be discussed below, however, securing compliance of United States nationals and aliens living in foreign countries presents more complex problems.<sup>34</sup>

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 enjoin the issuance of a congressional subpoena, holding that the Speech or Debate Clause of the Constitution<sup>35</sup> provides "an absolute bar to judicial interference" with such compulsory process.<sup>36</sup> 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.

Challenges to the legal sufficiency of subpoenas must overcome formidable judicial obstacles. The standard to be applied in determining whether the congressional investigating power has been properly asserted was articulated in *Wilkinson v. United States*:<sup>37</sup> (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 to the broad subject matter areas which have been authorized by Congress. As to the requirement of "valid legislative purpose," the Supreme Court has made it clear that Congress does not have to state explicitly what it intends to do as a result of an investigation.<sup>38</sup>

## Deposition Authority

Committees often rely on informal staff interviews to gather information preparatory to investigative hearings. However, in recent years, when specially authorized, congressional committees have utilized staff-conducted depositions as a tool in exercising the investigatory power. Staff depositions afford a number of significant advantages 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, thus, may be more conducive to candid responses than would be the case at a public hearing. In addition, statements made by witnesses that might defame or even tend to incriminate third parties can be verified before they are repeated publically in an open hearing. Furthermore, depositions can prepare a committee for the questioning of witnesses at a hearing or provide a screening process that can obviate the need

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<sup>33</sup> See, e.g., House Committee on Government Reform, Rule 18(d); Senate Committee on Homeland Security and Governmental Affairs, Rule 5(c).

<sup>34</sup> See *infra* notes 160-181 and accompanying text.

<sup>35</sup> U.S. CONST. Art. I, § 6, cl. 1.

<sup>36</sup> *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 503-07 (1975).

<sup>37</sup> 365 U.S. 399, 408-09 (1961).

<sup>38</sup> *In re Chapman*, 166 U.S. 661, 669 (1897).

to call some witnesses. Finally, the deposition process also allows questioning of witnesses outside of Washington, DC, thereby avoiding the inconvenience of conducting field hearings requiring the presence of Members.

Moreover, Congress has enhanced the efficacy of the staff deposition process by re-establishing the applicability of 18 U.S.C. § 1001 to false statements made during congressional proceedings, including the taking of depositions.<sup>39</sup>

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

At present, there are only a few standing committees that the House and Senate are expressly authorized to conduct staff depositions.<sup>40</sup> On a number of occasions such specific authority has been granted pursuant to Senate and House resolutions.<sup>41</sup> When granted, a committee will normally adopt procedures for taking depositions, including provisions for notice (with or without a subpoena), transcription of the deposition, the right to be accompanied by counsel, and the manner in which objections to questions are to be resolved.

## Hearings

House Rule XI(2) and Senate Rule XXVI(2) require that committees adopt written rules of procedure and publish them in the *Congressional Record*. The failure to publish such rules has resulted in the invalidation of a perjury prosecution.<sup>42</sup> Once properly promulgated, such rules are judicially cognizable and must be strictly observed. The House and many individual Senate committees require that all witnesses be given a copy of a committee’s rules.

Both the House and the Senate have adopted rules permitting a reduced quorum for taking testimony and receiving evidence. House hearings may be conducted if at least two members are present; most Senate committees permit hearings with only one member in attendance. Although most committees have adopted the minimum quorum requirement, some have not, while others 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 to authorizations for the issuance of subpoenas. Senate rules require a one-third quorum of a committee or

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<sup>39</sup> 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.

<sup>40</sup> In the House, the only standing committee authorized to take depositions is the Committee on Oversight and Government Reform. See RULES OF THE HOUSE OF REPRESENTATIVES FOR THE 111<sup>TH</sup> CONGRESS, Rule X(4)(c)(3)(A) (2009), available at <http://www.gpo.gov/fdsys/pkg/BILLS-111hres5eh/pdf/BILLS-111hres5eh.pdf>. In the Senate, the Committees on Agriculture, Nutrition, and Forestry, Ethics, Homeland Security and Governmental Affairs, Indian Affairs, and the Permanent Subcommittee on Investigations all have deposition authority. See S. Doc. 111-3, AUTHORITY AND RULES OF SENATE COMMITTEES 2009-2010, 111<sup>th</sup> Cong. (2009).

<sup>41</sup> See CRS Report 95-949, *Staff Depositions in Congressional Investigations*, by Jay R. Shampansky, at notes 16 and 18.

<sup>42</sup> *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).

subcommittee while the House requires a quorum of a majority of the members, unless a committee delegates authority for issuance to its chairman.<sup>43</sup>

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 if a majority of a committee or subcommittee determines it “may tend to defame, degrade, or incriminate any person.” Such testimony taken in closed session is normally releasable only by a majority vote of the committee. Similarly, confidential material received in a closed session requires a majority vote for release.

In most oversight and investigative hearings the chair usually makes an opening statement. In the case of an investigative hearing, it is an important means of defining the subject matter of the hearing and thereby establishing the pertinence of questions asked 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<sup>44</sup> to apply, it should, in accordance with the statute, administer an oath and swear its witnesses, though it should be noted that false statements not under oath are also subject to criminal sanctions.<sup>45</sup>

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

The right of a witness to be accompanied by counsel is recognized by House rule and the rules of Senate committees. The House rule limits the role of counsel as solely “for the purpose of advising them concerning their constitutional rights.” Some committees have adopted rules specifically prohibiting counsel from “coaching” witnesses during their testimony.<sup>46</sup> A committee has complete authority to control the conduct of counsel. Indeed, House Rule XI(2)(k)(4) provides that “[t]he chairman may punish breaches of order and decorum, and of professional 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.<sup>47</sup> There is no right of cross-examination of adverse witnesses during an investigative hearing. Witnesses are entitled to a range of constitutional protections including, but not limited to the Fifth Amendment right to avoid making self incriminating statements. These protections and privileges will be discussed in more detail below.<sup>48</sup>

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<sup>43</sup> Senate Rule XXVI(7)(a)(1); House Rule XI(2)(m)(3).

<sup>44</sup> 18 U.S.C. § 1621 (2006).

<sup>45</sup> 18 U.S.C. § 1001 (2006).

<sup>46</sup> See, e.g., Senate Permanent Committee on Investigations Rule 8.

<sup>47</sup> See, e.g., Senate Aging Committee Rule V(8); Senate Permanent Subcommittee on Investigations Rule 7.

<sup>48</sup> See *infra* notes 88-109 and accompanying text.

## Congressional Immunity

The Fifth Amendment to the Constitution provides in part that “no person ... shall be compelled in any criminal case to be a witness against himself...” The privilege against self-incrimination is available to a witness in a congressional investigation.<sup>49</sup> When a witness before a committee asserts this testimonial constitutional privilege, the committee may, upon a two-thirds vote of the full committee, obtain a court order that compels and grants immunity against the use of testimony and information derived from that testimony in a subsequent criminal prosecution. The witness may still be prosecuted on the basis of other evidence. 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). The decision to grant immunity involves a number of complex issues, but is ultimately a political decision that Congress makes. As observed by Iran-Contra Independent Counsel Lawrence E. Walsh, “[t]he legislative branch has the power to decide whether it is more important perhaps even to destroy a prosecution than to hold back testimony they need. They make that decision. It is not a judicial decision or a legal decision but a political decision of the highest importance.”<sup>50</sup>

In determining whether to grant immunity to a witness, a committee might wish to consider, on the one hand, its need for the witness’s testimony to perform its legislative, oversight, and informing functions, and on the other, the possibility that the witness’ immunized congressional testimony could jeopardize a successful criminal prosecution. 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.<sup>51</sup>

Appellate court decisions reversing the convictions of key Iran-Contra figures Lt. Colonel Oliver North and Rear Admiral John Poindexter appear to have made the prosecutorial burden substantially more difficult in high-profile cases. Despite extraordinary efforts by the independent counsel and his staff to avoid being exposed to any of North’s or Poindexter’s immunized testimony, and the submission of sealed packets of evidence to the district court to show that the material was obtained independently of any immunized testimony to Congress, the appeals court in both cases remanded the cases for a further determination whether the prosecution had directly or indirectly used immunized testimony. Upon remand in both cases, the independent counsel moved to dismiss the prosecutions upon his determination that he could not meet the strict standards set by the appeals court in its decisions.<sup>52</sup> It is unclear whether a consequence of the ruling was to engender a reluctance on the part of committees to issue immunity grants. Since the enactment of the 1970 statute, congressional committees have obtained more than 300 immunity orders. Of these, almost half were obtained in connection with the 1978 investigation into the assassinations of President John F. Kennedy and Martin Luther King, Jr.

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<sup>49</sup> *Watkins v. United States*, 354 U.S. 178 (1957); *Quinn v. United States*, 349 U.S. 155 (1955).

<sup>50</sup> Lawrence E. Walsh, *The Independent Counsel and the Separation of Powers*, 25 Hous. L. Rev. 1, 9 (1988).

<sup>51</sup> See *Kastigar v. United States*, 406 U.S. 441, 460 (1972).

<sup>52</sup> See *United States v. North*, 910 F. 2d 843 (D.C. Cir.), modified, 920 F. 2d 940 (D.C. Cir. 1990), cert denied, 500 U.S. 941 (1991); see also *United States v. Poindexter*, 951 F. 2d 369 (D.C. Cir. 1991).

## Enforcement of Congressional Authority

### Contempt of Congress

While the threat or actual issuance of a subpoena normally provides sufficient leverage to ensure compliance, it is through the contempt power, or its threat, that Congress may act with ultimate force in response to actions that obstruct the legislative process to punish the contemnor and/or to remove the obstruction. The Supreme Court has recognized the contempt power as an inherent attribute of Congress's legislative authority, reasoning that if it did not possess this power, it "would be exposed to every indignity and interruption that rudeness, caprice or even conspiracy may mediate against it."<sup>53</sup>

There are three different types of contempt proceedings. Both the House and Senate may cite a witness for contempt under their inherent contempt power or under the criminal contempt procedure established by statute.<sup>54</sup> The Senate also has a third option, enforcement by means of a statutory civil contempt procedure.<sup>55</sup> In the House, civil contempt is also possible, but first the full House of Representatives must authorize, via House Resolution (H. Res.), the Committee or the Office of General Counsel to pursue a civil contempt action against a witness.

### *Inherent Contempt*

Under the inherent contempt power, the individual is brought before the House or Senate by the Sergeant-at-Arms, tried at the bar of the body, and can be imprisoned. The purpose of the imprisonment or other sanction may be either punitive or coercive. Thus, the witness can be imprisoned for a specified period of time as punishment, or for an indefinite period (but not, at least in the case of the House, beyond the adjournment of a session of Congress) until he agrees to comply. The inherent contempt power has been recognized by the Supreme Court as inextricably related to Congress's constitutionally-based power to investigate.<sup>56</sup> Between 1795 and 1934 the House and Senate utilized the inherent contempt power over 85 times, in most instances to obtain (successfully) testimony and/or documents. The inherent contempt power has not been exercised by either House in over 75 years. This appears to be because it has been considered too cumbersome and time-consuming to hold contempt trials at the bar of the offended chamber. Moreover, some have argued that the procedure is ineffective because punishment can not extend beyond Congress's adjournment date.

### *Statutory Criminal Contempt*

Congress recognized the problem raised by its inability to punish a contemnor 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

<sup>53</sup> *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821).

<sup>54</sup> See 2 U.S.C. §§ 192, 194 (2006).

<sup>55</sup> A more comprehensive treatment of the history and legal development of the congressional contempt power is discussed in CRS Report RL34097, *Congress's Contempt Power: Law, History, Practice, and Procedure*, by Todd B. Tatelman.

<sup>56</sup> See *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821); see also *McGrain v. Daugherty*, 273 U.S. 135 (1927).

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, the full committee, and the full House or Senate (or by the presiding officer if Congress is not in session). After a contempt 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.”

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. Since 1975, however, 12 cabinet-level or senior executive officials have been cited for contempt for failure to produce subpoenaed documents by either a subcommittee, a full committee, or by a House.<sup>57</sup> In each instance there was substantial or full compliance with the document demands before the initiation of criminal proceedings. However, following the vote of contempt of EPA Administrator Anne Gorsuch Burford, but before the contempt citation was forwarded to the United States Attorney for grand jury action, the Department of Justice raised the question whether Congress could compel the U.S. Attorney to submit the citation for grand jury consideration. The documents in question were turned over to Congress before the issue was litigated in court. The question of the duty of the U.S. Attorney under § 192 to enforce contempt of Congress citations remains unresolved and has left some uncertainty as to the efficacy of the use of criminal contempt proceedings against executive branch officials.

### *Civil Contempt*

As an alternative to both the inherent contempt power of each house and criminal contempt, a statutory civil contempt procedure is available in the Senate. Upon application of the Senate, the federal district court issues an order to a person refusing, or threatening to refuse, to comply with a Senate subpoena. If the individual still refuses to comply, he may be tried by the court in summary proceedings for contempt of court, with sanctions imposed to coerce compliance. Civil contempt can be more expeditious than a criminal proceeding, and it also provides an element of flexibility, allowing the subpoenaed party to test legal defenses in court without necessarily risking a criminal prosecution. Civil contempt is not authorized for use against executive branch officials refusing to comply with a subpoena except in certain limited circumstances.<sup>58</sup> Since 1979, the Senate has authorized the Office of Senate Legal Counsel to seek civil enforcement of a document subpoena at least 6 times, the last in 1995. None have been against executive branch officials.

In the House of Representatives, civil contempt proceedings are also possible, however, the authority is not statutorily based. Rather, the full House must adopt a resolution finding the person or persons in contempt and authorizing the Committee and/or the House General Counsel

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<sup>57</sup> The 12 officials are as follows: Secretary of State Henry Kissinger (1975); Secretary of Commerce Rogers C. B. Morton (1975); Secretary of Health, Education, and Welfare Joseph A. Califano, Jr. (1978); Secretary of Energy Charles Duncan (1980); Secretary of Energy James B. Edwards (1981); Secretary of the Interior James Watt (1982); EPA Administrator Anne Gorsuch Burford (1983); Attorney General William French Smith (1983); White House Counsel John M. Quinn (1996); Attorney General Janet Reno (1998); White House Counsel Harriet Miers (2008); and White House Chief of Staff Joshua Bolton (2008).

<sup>58</sup> 2 U.S.C. § 288d (2006).



to pursue a civil action in federal district court against the contemptuous witness. This action has only been authorized one time, in 2008, against Harriet Miers and Joshua Bolton, both high ranking officials in the administration of President George W. Bush.<sup>59</sup>

## **Perjury and False Statement Prosecutions**

### *Testimony Under Oath*

A witness under oath before a congressional committee who willfully gives false testimony is subject to prosecution for perjury pursuant to 18 U.S.C. § 1621. The false statement must be “willfully” made before a “competent tribunal” and involve a “material matter.” For a legislative committee to be competent for perjury purposes a quorum must be present.<sup>60</sup> The 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<sup>61</sup> and one member for Senate committees.<sup>62</sup> 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 lie for statements made only in the presence of committee staff unless the committee has deposition authority and has taken formal action to allow it.

### *Unsworn Statements*

Most statements made before Congress, at both the investigatory and hearing phases of oversight, are unsworn. The practice of swearing in all witnesses at hearings is infrequent. Prosecutions may be brought to punish congressional witnesses for giving willfully false testimony not under oath. Under 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.<sup>63</sup>

## **Limitations on Congressional Authority**

### **Constitutional Limitations**

The Supreme Court has observed that “Congress, in common with all branches of the Government, must exercise its powers subject to the limitations placed by the Constitution on governmental action, more particularly in the context of this case, the relevant limitations of the Bill of Rights.”<sup>64</sup> There are constitutional limits not only on Congress’s legislative powers, but also on its oversight and investigative powers.

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<sup>59</sup> *Committee on Judiciary, U.S. House of Representatives v. Miers*, 558 F.Supp.2d 53 (D.D.C. 2008).

<sup>60</sup> *Christoffel v. United States*, 378 U.S. 89 (1949).

<sup>61</sup> House Rule XI(2)(h)(2).

<sup>62</sup> 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.

<sup>63</sup> 18 U.S.C § 1001 (2006).

<sup>64</sup> *Barenblatt v. United States*, 360 U.S. 109, 112 (1959). Not all of the provisions of the Bill of Rights are applicable to (continued...)

## First Amendment

Although the First Amendment, by its terms, is expressly applicable only to legislation that abridges freedom of speech, press, religion (establishment or free exercise), or assembly, the Court has held that the amendment also restricts Congress in conducting oversight and/or investigations.<sup>65</sup> In the leading case involving the application of First Amendment rights in a congressional investigation, *Barenblatt v. United States*,<sup>66</sup> the Court held that “where First Amendment rights are asserted to bar government interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown.” 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.<sup>67</sup>

The Court has held that in balancing the personal interest in privacy against the congressional need for information, “the critical element is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosure from an unwilling witness.”<sup>68</sup> To protect the rights of witnesses, in cases involving the First Amendment, the courts have emphasized the requirements discussed above concerning authorization for the investigation, delegation of power to investigate to the committee involved, and the existence of a legislative purpose.<sup>69</sup>

While the Court has recognized the application of the First Amendment to congressional investigations, and although the amendment has frequently been asserted by witnesses as grounds for not complying with congressional demands for information, the Court has never relied on the First Amendment as grounds for reversing a criminal contempt of Congress conviction.<sup>70</sup>

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(...continued)

congressional hearings. For example, the sixth amendment right of a criminal defendant to cross-examine witnesses and to call witnesses in his behalf has been held not applicable to a congressional hearing. *United States v. Fort*, 443 F.2d 670 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 932 (1971).

<sup>65</sup> *Watkins v. United States*, 354 U.S. 178, 197 (1957).

<sup>66</sup> 360 U.S. 109, 126 (1959).

<sup>67</sup> *Id.*

<sup>68</sup> *Watkins*, 354 U.S. at 198. A balancing test was also used in *Branzburg v. Hayes*, which involved the issue of the claimed privilege of newsmen not to respond to demands of a grand jury for information. *See* 408 U.S. 665 (1972). In its 5-4 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).

<sup>69</sup> *See, e.g., Barenblatt v. United States*, 360 U.S. 109 (1959); *Watkins v. United States*, 354 U.S. 178 (1957); *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 (1977).

<sup>70</sup> Leading Cases, *supra* note 13, at 42; JAMES HAMILTON, THE POWER TO PROBE: A STUDY OF CONGRESSIONAL INVESTIGATIONS, 234 (1977) [hereinafter Hamilton]. 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. *See* 415 F.2d 1365 (7<sup>th</sup> 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 although 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. Chord*, 442 F.2d 1207 (D.C. Cir. 1970); *Ansara v. Eastland*, 442 F.2d 751 (D.C. Cir. 1971). (continued...)

However, the Court has narrowly construed the scope of a committee's authority so as to avoid reaching a First Amendment issue.<sup>71</sup> 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.<sup>72</sup>

In a 1976 investigation of the unauthorized publication in the press of the report of the House Select Committee on Intelligence, the Committee on Standards of Official Conduct subpoenaed four news media representatives, including Daniel Schorr.<sup>73</sup> The Standards of Official Conduct Committee concluded that Mr. Schorr had obtained a copy of the Select Committee's report and had 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," it declined to cite him for contempt for his refusal to disclose his source.<sup>74</sup> The desire to avoid a clash over First Amendment rights apparently was a major factor in the committee's decision on the contempt matter.<sup>75</sup>

In another First Amendment dispute, the Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce, in the course of its probe of allegations that deceptive editing practices were employed in the production of the television news documentary program *The Selling of the Pentagon*, subpoenaed Frank Stanton the president of CBS, directing him to deliver to the subcommittee the "outtakes" relating to the program.<sup>76</sup> When, on First Amendment grounds, Stanton declined to provide the subpoenaed materials, the subcommittee unanimously voted a contempt citation, and the full committee by a vote of 25-13 recommended to the House that Stanton be held in contempt.<sup>77</sup> After extensive debate, the House failed to adopt the committee report, voting instead to recommit the matter to the committee.<sup>78</sup> 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.<sup>79</sup>

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(...continued)

However, in *Eastland v. United States Servicemen's Fund*, the Supreme Court held that the Constitution's Speech or Debate Clause (Art. I, § 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).

<sup>71</sup> *United States v. Rumely*, 345 U.S. 41 (1953).

<sup>72</sup> *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.

<sup>73</sup> H. Rept. 94-1754, 94<sup>th</sup> Cong., 6 (1976).

<sup>74</sup> *Id.* at 42-43.

<sup>75</sup> *Id.* at 47-48 (additional views of Representatives Spence, Teague, Hutchinson, and Flynt).

<sup>76</sup> 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.

<sup>77</sup> H. Rept. 92-349, 92d Cong. (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.

<sup>78</sup> See 117 CONG. REC. 23922-926, 24603-59, 24720-53 (1971).

<sup>79</sup> *Id.* at 24731-732.

## Fourth Amendment

Several opinions of the Supreme Court indicate that the Fourth Amendment’s prohibition against unreasonable searches and seizures is applicable to congressional committees; however, there has not been an opinion directly addressing the issue.<sup>80</sup> It appears that there must be a legitimate legislative or oversight-related basis for the issuance of a congressional subpoena.<sup>81</sup> The Fourth Amendment protects a congressional witness against a subpoena which is unreasonably broad or burdensome.<sup>82</sup> The Court has outlined the standard to be used in judging the reasonableness of a congressional subpoena:

Petitioner contends that the subpoena was so broad as to constitute an unreasonable search and seizure in violation of the Fourth Amendment.... ‘Adequacy or excess in the breath of the subpoena are matters variable in relation to the nature, purposes, and scope of the inquiry....’ The subcommittee’s inquiry here was a relatively broad one ... and the permissible scope of materials that could reasonably be sought was necessarily equally broad. It was not reasonable to suppose that the subcommittee knew precisely what books and records were kept by the Civil Rights Congress, and therefore the subpoena could only ‘specify ... with reasonable particularity, the subjects to which the documents ... relate....’ The call of the subpoena for ‘all records, correspondence and memoranda’ of the Civil Rights Congress relating to the specified subject describes them ‘with all of the particularity the nature of the inquiry and the [subcommittee’s] situation would permit....’ The description contained in the subpoena was sufficient to enable [petitioner] to know what particular documents were required and to select them adequately.<sup>83</sup>

If a witness has a legal objection to a subpoena *duces tecum* or is for some reason unable to comply with a demand for documents, he must give the grounds for his noncompliance upon the return of the subpoena. As the D.C. Circuit stated:

If [the witness] felt he could refuse compliance because he considered the subpoena so broad as to constitute an unreasonable search and seizure within the prohibition of the fourth amendment, then to avoid contempt for complete noncompliance he was under [an] obligation to inform the subcommittee of his position. The subcommittee would then have had the choice of adhering to the subpoena as formulated or of meeting the objection in light of any pertinent representations made by [the witness].<sup>84</sup>

Similarly, if a subpoenaed party is in doubt as to what records are required by a subpoena or believes that a subpoena calls for documents not related to the investigation, he must inform the committee. Where a witness is unable to produce documents he will not be held in contempt

<sup>80</sup> *Watkins v. United States*, 354 U.S. 178, 188 (1957); see also *McPhaul v. United States*, 364 U.S. 372 (1960).

<sup>81</sup> 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 records, relevant or irrelevant, in the hope that something will turn up.”)); see also *United States v. Groves*, 188 F. Supp. 314 (W.D. Pa. 1937) (dicta); *But see Eastland v. United States 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.”).

<sup>82</sup> *McPhaul v. United States*, 364 U.S. 372 (1960); see also *Shelton v. United States*, 404 F.2d 1292 (D.C. Cir. 1968), cert. denied, 393 U.S. 1024 (1969).

<sup>83</sup> *McPhaul*, 364 U.S. at 832.

<sup>84</sup> *Shelton*, 404 F.2d at 1299-1300; see also *Leading Cases*, *supra* note 13, at 49.

“unless he is responsible for their unavailability ... or is impeding justice by not explaining what happened to them.”<sup>85</sup>

The application of the exclusionary rule to congressional committee investigation is in some doubt and appears to depend on the precise facts of the situation. It seems that documents which 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.<sup>86</sup> In the absence of a Supreme Court ruling, it remains unclear whether the exclusionary rule bars the admission into evidence in a contempt prosecution of a congressional subpoena which was issued on the basis of documents obtained by the committee following their unlawful seizure by another investigating body (such as a state prosecutor).<sup>87</sup>

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

Although it has never been necessary for the Supreme Court to decide the issue, in dicta it has been indicated that the privilege against self-incrimination afforded by the Fifth Amendment is available to a witness in a congressional investigation.<sup>88</sup> The privilege is personal in nature,<sup>89</sup> and may not be invoked on behalf of a corporation,<sup>90</sup> small partnership,<sup>91</sup> labor union,<sup>92</sup> or other “artificial” organizations.<sup>93</sup> The privilege protects a witness against being compelled to testify but

<sup>85</sup> *McPhaul*, 364 U.S. at 382.

<sup>86</sup> *Nelson v. United States*, 208 F.2d 505 (D.C. Cir.), *cert. denied*, 346 U.S. 827 (1953).

<sup>87</sup> 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 [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 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 in June, 1973, 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 had been 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 and on rehearing by the full District of Columbia Circuit, five judges were of the view that *Calandra* was applicable to the legislative sphere and 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*, 54 U.S.L.W. 3372 (Dec. 3, 1985).

<sup>88</sup> *Watkins v. United States*, 354 U.S. 178 (1957); *Quinn v. United States*, 349 U.S. 155 (1955).

<sup>89</sup> *See McPhaul v. United States*, 364 U.S. 372 (1960); *see also* McCormick, EVIDENCE § 120 (Cleary ed. 1984) [hereinafter McCormick].

<sup>90</sup> *Hale v. Henkel*, 201 U.S. 43 (1906).

<sup>91</sup> *Bellis v. United States*, 417 U.S. 85 (1974).

<sup>92</sup> *See United States v. White*, 322 U.S. 694 (1944).

<sup>93</sup> *Bellis*, 417 U.S. at 90; *see also Rogers v. United States*, 340 U.S. 367 (1951) (Communist Party).

generally not against a subpoena for existing documentary evidence.<sup>94</sup> However, where compliance with a subpoena *duces tecum* would constitute implicit testimonial authentication of the documents produced, the privilege may apply.<sup>95</sup>

There is no required verbal formula for invoking the privilege, nor does there appear to be necessary a warning by the committee.<sup>96</sup> A committee should recognize any reasonable indication, such as “the fifth amendment,” that the witness is asserting his privilege.<sup>97</sup> Where a committee is uncertain whether the witness is in fact invoking the privilege against self-incrimination or is claiming some other basis for declining to answer, the committee should direct the witness to specify his privilege or objection.<sup>98</sup>

The committee can review the assertion of the privilege by a witness to determine its validity, but the witness is not required to articulate the precise hazard that he fears. In regard to the assertion of the privilege in judicial proceedings, the Supreme Court has advised:

To sustain the privilege, it need only be evident, from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.... To reject a claim, it should be ‘perfectly clear, from a careful consideration of all the circumstances of the case, that the witness is mistaken, and that the answers cannot possibly have a tendency’ to incriminate.<sup>99</sup>

The basis for asserting the privilege was elaborated upon in a lower court decision:

The privilege may only be asserted when there is reasonable apprehension on the part of the witness that his answer would furnish some evidence upon which he could be convicted of a criminal offense ... or which would reveal sources from which evidence could be obtained that would lead to such conviction or to prosecution therefore.... Once it has become apparent that the answers to a question would expose a witness to the danger of conviction or prosecution, wider latitude is permitted the witness in refusing to answer other questions.<sup>100</sup>

The privilege against self-incrimination may be waived by declining to assert it, specifically disclaiming it, or testifying on the same matters as to which the privilege is later asserted.

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<sup>94</sup> *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 89 at §§ 126, 127.

<sup>95</sup> *United States v. Coe*, 465 U.S. 605 (1984); *Fisher v. United States*, 425 U.S. 391 (1976); see also *Curcio v. United States*, 354 U.S. 118 (1957); McCormick, *supra* note 89 at § 126.

<sup>96</sup> 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).

<sup>97</sup> *Quinn v. United States*, 349 U.S. 155 (1955).

<sup>98</sup> *Emspak v. United States*, 349 U.S. 190 (1955); see also *Leading Cases*, *supra* note 13 at 63.

<sup>99</sup> *Hoffman v. United States*, 341 U.S. 479, 486-87 (1951).

<sup>100</sup> *United States v. Jaffee*, 98 F. Supp. 191, 193-94 (D.D.C. 1951); see also *Simpson v. United States*, 241 F.2d 222 (9<sup>th</sup> Cir. 1957) (privilege inapplicable to questions seeking basic identifying information, such as the witness’s name and address).

However, because of the importance of the privilege, a court will not construe an ambiguous statement of a witness before a committee as a waiver.<sup>101</sup>

Where a witness asserts the privilege, the full House or the committee conducting the investigation may seek a court order which (a) directs the witness to testify and (b) grants him immunity against the use of his testimony, or other evidence derived from his testimony, in a subsequent criminal prosecution.<sup>102</sup> As previously discussed, the immunity that is granted is “use” immunity, not “transactional” immunity.<sup>103</sup> Neither the immunized testimony that the witness gives, nor evidence derived therefrom, may be used against him in a subsequent criminal prosecution, except one for perjury or contempt relating to his testimony. However, he may be convicted of the crime (the “transaction”) on the basis of other evidence.<sup>104</sup>

An application for a judicial immunity order must be approved by a majority of the House or Senate or by a two-thirds vote of the full committee seeking the order.<sup>105</sup> The Attorney General must be notified at least ten days prior to the request for the order, and he can request a delay of twenty days in issuing the order.<sup>106</sup> Although the order to testify may be issued before the witness’s appearance,<sup>107</sup> it does not become legally effective until the witness has been asked the question, invoked his privilege, and been presented with the court order.<sup>108</sup> 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.<sup>109</sup>

### *Fifth Amendment Due Process Rights*

The due process clause of the Fifth Amendment requires that “the pertinency of the interrogation to the topic under the ... committee’s inquiry must be brought home to the witness at the time the questions are put to him.”<sup>110</sup> “Unless the subject matter has been made to appear with

<sup>101</sup> *Emspak v. United States*, 349 U.S. 190 (1955); see also *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

<sup>102</sup> 18 U.S.C. §§ 6002, 6005 (2000).

<sup>103</sup> See *supra*, notes 49-52 and accompanying text.

<sup>104</sup> The constitutionality of granting a witness only use immunity, rather than transactional immunity, was upheld in *Kastigar v. United States*, 406 U.S. 441 (1972). In *United States v. Romano*, 583 F.2d 1 (1<sup>st</sup> Cir. 1978), the defendant appealed from his conviction of several offenses on the ground, *inter alia*, that the prosecution’s evidence had been derived, in part, from immunized testimony that he had given before a Senate subcommittee. Although the conviction was affirmed, the case illustrates the difficulty that the prosecutor may have in establishing that its evidence was not “tainted,” but rather was derived from independent sources, especially in a case where there was some cooperation in the investigation between a committee and the Justice Department prior to the grant of immunity to testify before the committee. See *Kastigar*, 406 U.S. at 461-621.

<sup>105</sup> 18 U.S.C. § 6005(a) (2006).

<sup>106</sup> 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. 1980), *cert. denied*, 454 U.S. 1084 (1981).

<sup>107</sup> *Application of the Senate Permanent Subcommittee on Investigations*, 655 F.2d at 1257.

<sup>108</sup> See *In re McElreath*, 248 F.2d 612 (D.C. Cir. 1957) (en banc).

<sup>109</sup> *Application of the U.S. Senate Select Committee on Presidential Campaign Activities*, 361 F. Supp. 1270 (D.D.C. 1973). In *dicta*, however, the court referred to the legislative history of the statutory procedure, which suggests that although a court lacks power to review the advisability of granting immunity, a court may consider the jurisdiction of Congress and the committee over the subject area and the relevance of the information that is sought to the committee’s inquiry. See *id.* at 1278-79.

<sup>110</sup> *Deutch v. United States*, 367 U.S. 456, 467-68 (1961). As the court explained in that case, there is a separate statutory requirement of pertinency.

undisputable clarity, it is the duty of the investigative body, upon objection of the witness on grounds of pertinency, to state for the record the subject under inquiry at that time and the manner in which the propounded questions are pertinent thereto.”<sup>111</sup> Additionally, to satisfy both the requirement of due process as well as the statutory requirement that a refusal to answer be “willful,” a witness should be informed of the committee’s ruling on any objections he raises or privileges which he asserts.<sup>112</sup>

## Common Law Privileges

### *Attorney-Client Privilege*

In practice, the exercise of committee discretion whether to accept a claim of attorney-client privilege has turned on a “weighing [of] the legislative need for disclosure against any possible resulting injury.”<sup>113</sup> More particularly, the process by which committees resolve claims of attorney-client privilege has traditionally been informed by weighing considerations of legislative need, public policy, and the statutory duty of congressional committees to engage in continuous oversight of the application, administration, and execution of laws that fall within their jurisdiction,<sup>114</sup> against any possible injury to the witness. In the particular circumstances of any situation, a committee may consider and evaluate *inter alia*: the strength of a claimant’s assertion in light of the pertinency of the documents or information sought to the subject of the investigation; the practical unavailability of the documents or information from any other source; the possible unavailability of the privilege to the claimant if it were to be raised in a judicial forum; and the committee’s assessment of the cooperation of the witness in the matter. A valid claim of attorney-client privilege, free of any taint of waiver, exception or other mitigating circumstance, would merit substantial weight. Any serious doubt, however, as to the validity of the asserted claim would diminish its compelling character.<sup>115</sup> Moreover, the conclusion that recognition of non-constitutionally based privileges, such as attorney-client privilege, is a matter of congressional discretion is consistent with both traditional British parliamentary and Congress’s historical practice.<sup>116</sup>

<sup>111</sup> *Watkins v. United States*, 354 U.S. 178, 214-15 (1957).

<sup>112</sup> *Deutch v. United States*, 367 U.S. 456, 467-68 (1961).

<sup>113</sup> Hearings, “International Uranium Cartel,” Subcomm. on Oversight and Investigations, House Comm. on Interstate and Foreign Commerce, 95<sup>th</sup> Cong., Vol. 1, 123 (1977).

<sup>114</sup> See 2 U.S.C. § 190d (2006).

<sup>115</sup> See, e.g., *Contempt of Congress Against Franklin L. Haney*, H.Rept. 105-792, 105<sup>th</sup> Cong., 11-15 (1998); *Proceedings Against John M. Quinn, David Watkins, and Matthew Moore (Pursuant to Title 2, United States Code, Sections 192 and 194)*, H.Rept. 104-598, 104<sup>th</sup> Cong., 40-54 (1996); *Refusal of William H. Kennedy, III, To Produce Notes Subpoenaed by the Special Committee to Investigate Whitewater Development Corporation and Related Matters*, S.Rept. 104-191, 104<sup>th</sup> Cong., 9-19 (1995); *Proceedings Against Ralph Bernstein and Joseph Bernstein*, H.Rept. 99-462, 99<sup>th</sup> Cong., 13, 14 (1986); *Hearings, International Uranium Control, before the Subcommittee on Oversight and Investigations, House Committee on Interstate and Foreign Commerce, 95<sup>th</sup> Cong.*, 60, 123 (1977).

<sup>116</sup> See, CRS Report 95-464, *Investigative Oversight: An Introduction to the Law, Practice and Procedure of Congressional Inquiry*, pp. 43-55 (out of print; available from the authors). see also, Glenn A. Beard, *Congress v. the Attorney-Client Privilege: A “Full and Frank Discussion,”* 35 AMER. CRIM. L. REV. 119 122-127 (1997) (“[C]ongressional witnesses are not legally entitled to the protection of the attorney-client privilege, and investigating committees therefore have discretionary authority to respect or overrule such claims as they see fit.”); Thomas Millett, *The Applicability of Evidentiary Privileges for Confidential Communications Before Congress*, 21 JOHN MARSHALL L. REV. 309 (1988).



Although there is limited case law with respect to attorney-client privilege claims before congressional committees,<sup>117</sup> appellate court rulings on the privilege in cases involving other investigative contexts (e.g., grand jury) have raised questions as to whether executive branch officials may claim attorney-client, work product, or deliberative process privileges in the face of investigative demands.<sup>118</sup> These rulings may lead to additional arguments in support of the long-standing congressional practice.

The legal basis for Congress's practice in this area is based upon its implicit constitutional prerogative to investigate, which has been long recognized by the Supreme Court as extremely broad and encompassing, and is at its peak when the subject is waste, fraud, abuse, or maladministration within a government department.<sup>119</sup> The attorney-client privilege is, on the other hand, not a constitutionally based privilege; rather it is a judge-made exception to the normal principle of full disclosure in the adversary process which is to be narrowly construed and has been confined to the judicial forum.<sup>120</sup>

Although no court has recognized the inapplicability of the attorney-client privilege in congressional proceedings in a decision directly addressing the issue,<sup>121</sup> an opinion issued by the Legal Ethics Committee of the District of Columbia Bar in February 1999 clearly acknowledges the long-standing congressional practice.<sup>122</sup> The occasion for the ruling arose as a result 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

<sup>117</sup> See *In the Matter of Provident Life and Accident Co.*, E.D. Tenn., S.D., CIV-1-90-219, June 13, 1990 (noting that the court's earlier ruling on an attorney-client privilege claim was "not of constitutional dimensions, and is certainly not binding on the Congress of the United States.").

<sup>118</sup> *In re Grand Jury Subpoena Duces Tecum*, 112 F. 3d 910 (8<sup>th</sup> Cir. 1997), *cert. denied sub. nom.*, *Office of the President v. Office of the Independent Counsel*, 521 U.S. 1105 (1997) (rejecting claims by the First Lady of attorney-client and work-product privilege with respect notes taken by White House Counsel Office attorneys); *In re Bruce R. Lindsey (Grand Jury Testimony)*, 158 F. 3d 1263 (D.C. Cir. 1998), *cert. denied*, 525 U.S. 996 (1998) (holding that a White House attorney may not invoke attorney-client privilege in response to grand jury subpoena seeking information on possible commission of federal crimes); *In re Sealed Case (Espy)*, 121 F.3d 729 (D.C. Cir. 1997) (deciding that the deliberative process privilege is a common law agency privilege which can be overcome by a showing of need by an investigating body); *In re: A Witness Before the Special Grand Jury*, 288 F.3d 289 (7<sup>th</sup> Cir. 2002) (holding that the attorney-client privilege is not applicable to communications between state government counsel and state office holder); *But see In re Grand Jury Investigation*, 399 F.3d 527 (2d Cir. 2005) (upholding a claim of attorney-client privilege with respect to communications between a former chief legal counsel to the governor of Connecticut who was under grand jury investigation. It is worth noting that the Second Circuit recognized its apparent conflict with the aforementioned cases, however, the ruling is arguably distinguishable on its facts. See Kerri R. Blumenauer, *Privileged or Not? How the Current Application of the Government Attorney-Client Privilege Leaves the Government Feeling Unprivileged*, 75 FORDHAM L. REV. 75 (2006)).

<sup>119</sup> *McGrain v. Daugherty*, 272 U.S. 135, 177 (1926); *Watkins v. United States*, 354 U.S. 178, 187 (1957); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 504 n.15 (1975).

<sup>120</sup> *Westinghouse Electric Corporation v. Republic of the Philippines*, 951 F.2d 1414, 1423 (3d Cir. 1991).

<sup>121</sup> The Supreme Court has recognized that "only infrequently have witnesses ... [in congressional hearings] been afforded the procedural rights normally associated with an adjudicative proceeding." *Hannah v. Larche*, 363 U.S. 420, 425 (1960); see also *United States v. Fort*, 443 F. 2d 670 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 932 (1971) (rejecting the contention that the constitutional right to cross-examine witnesses applied to a congressional investigation); *In the Matter of Provident Life and Accident Co.*, E.D. Tenn., S.D., CIV-1-90-219, June 13, 1990 (noting that the court's earlier ruling on an attorney-client privilege claim was "not of constitutional dimensions, and is certainly not binding on the Congress of the United States.").

<sup>122</sup> Opinion No. 288, *Compliance With Subpoena from Congressional Committee to Produce Lawyers' Files Containing Client Confidences or Secrets*, Legal Ethics Committee, District of Columbia Bar, February 16, 1999. (D.C. Ethics Committee Opinion).

office complex.<sup>123</sup> 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. Both Mr. Haney and the law firm asserted attorney-client privilege in their continued refusal to comply. In addition, 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. 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.<sup>124</sup> 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.<sup>125</sup>

Subsequently, on February 16, 1999, the D.C. Bar's Ethics Committee issued an opinion vindicating the action taken by the firm. The Ethics Committee, interpreting D.C. Bar Rule of Professional conduct 1.6(d)(2)(A),<sup>126</sup> held that an attorney faced with a congressional subpoena that would reveal client confidences or secrets

has a professional responsibility to 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 D.C. Bar opinion urges attorneys 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 institute a third-party action to enjoin compliance,<sup>127</sup> but allows the attorney to relent at the earliest point when he is put in legal jeopardy. The opinion represents the first, and thus far the only, bar association in the nation to directly and definitively address the merits of the issue.

In the end, it is the congressional committee alone that determines whether to accept a claim of attorney-client privilege.

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<sup>123</sup> See H. Rep. No. 105-792, 105<sup>th</sup> Cong., 1-6, 7-8, 15-16 (1997).

<sup>124</sup> See *Meeting on Portal Investigation (Authorization of Subpoenas; Receipt of Subpoenaed Documents and Consideration of Objections); and Contempt of Congress Proceedings Against Franklin L. Haney*, H. Comm. On Commerce, 105<sup>th</sup> Cong., 48-50 (1998).

<sup>125</sup> *Id.* at 101-105.

<sup>126</sup> Under Rule 1.6(d)(2)(A) a lawyer may reveal client confidences or secrets only when expressly permitted by the D.C. Bar rules or when "required by law or court order."

<sup>127</sup> A direct suit to enjoin a committee from enforcing a subpoena has been foreclosed by the Supreme Court's decision in *Eastland v. United States 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 subpoena to provide telephone records that might compromise national security matters).

### *Work Product Immunity and Other Common Law Testimonial Privileges*

Common law rules of evidence as well as statutory enactments recognize a testimonial privilege for witnesses in a judicial proceeding so that they need not reveal confidential communications between doctor and patient, husband and wife, or clergyman and parishioner.<sup>128</sup> Although there is no court case directly on point, it appears that, like the privilege between attorney and client, congressional committees are not legally required to allow a witness to decline to testify on the basis of other similar testimonial privileges.<sup>129</sup> It should be noted, however, that the courts have denied claims by the White House Counsel's office of attorney-work-product immunity in the face of grand jury subpoenas that have been grounded on the assertion that the materials sought were prepared in anticipation of possible congressional hearings.<sup>130</sup> In addition, court decisions indicate that various rules of procedure generally applicable to judicial proceedings, such as the right to cross-examine and call other witnesses, need not be accorded to a witness in a congressional hearing.<sup>131</sup> The basis for these determinations is rooted in Congress's Article I section 5 rulemaking powers,<sup>132</sup> under which each House is the exclusive decision-maker regarding the rules of its own proceedings. This rulemaking authority, as well as general separation of powers considerations, suggest that Congress and its committees are not obliged to abide by rules established by the courts to govern their own proceedings.<sup>133</sup>

Though congressional committees may not be legally obligated to recognize the privilege for confidential communications, they may do so at their discretion. Historical precedent suggests that committees often have recognized such privileges.<sup>134</sup> The decision as to whether or not to allow such claims of privilege turns on a "weighing [of] the legislative need for disclosure against any possible resulting injury."<sup>135</sup>

### *Deliberative Process Privilege*

In response to congressional investigations, agencies within the executive branch may attempt to assert a claim of "deliberative process" privilege with respect to any information related to the decision-making process of the agency. Assertions of deliberative process privilege by agencies have not been uncommon in the past. In essence, it is argued that congressional demands for information as to what occurred during the policy development process of an agency would

<sup>128</sup> See generally, 8 Wigmore, EVIDENCE § 2285 (McNaughton ed. 1961); see also FED. R. EVID. 501.

<sup>129</sup> Compare *Attorney-Client Privilege: Memoranda Opinions of the American Law Division, Library of Congress, Comm. Print of the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce*, 98<sup>th</sup> Cong., 926 (1983) [hereinafter *Attorney-Client Privilege Comm. Print*], with *Id.* at 41, 44 *et. seq.*; see also generally, Moreland, *supra* note 13 at 265-67.

<sup>130</sup> See e.g., *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 907, 924-25 (8<sup>th</sup> Cir. 1997); *In re Grand Jury Proceedings*, 5 F.Supp.2d 21, 39 (D.D.C. 1998).

<sup>131</sup> *United States v. Fort*, 443 F.2d 670 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 932 (1971), (citing *Hannah v. Larche*, 363 U.S. 420 (1960)).

<sup>132</sup> U.S. CONST. Art. 1, § 5, cl. 2.

<sup>133</sup> See generally, Telford Taylor, *GRAND INQUEST: THE STORY OF CONGRESSIONAL INVESTIGATIONS* 227-28 (1974).

<sup>134</sup> See Hamilton, *supra* note 70, at 244; see also S. Rept. No. 2, 84<sup>th</sup> Cong. (1955). Hamilton notes that John Dean, the former counsel to the President, testified before the Senate Watergate Committee after Nixon had "waived any attorney-client privilege he might have had because of their relationship." *Id.*

<sup>135</sup> *Attorney-Client Privilege Comm. Print, supra* note 129, at 27 (citing *Hearings on an International Uranium Cartel before the Subcommittee on Oversight and Investigations, House Committee on Interstate and Foreign Commerce*, 95<sup>th</sup> Cong., 60, 123 (1977)).

unduly interfere, and perhaps “chill,” the frank and open internal communications necessary to the quality and integrity of the decisional process. Such a privilege claim may also be grounded on the contentions that it protects against premature disclosure of proposed policies before they are fully considered or actually adopted by the agency, and to prevent the public from confusing matters merely considered or discussed during the deliberative process with those on which the decision was based. However, as with claims of attorney-client privilege and work product immunity, congressional practice has been to treat their acceptance as discretionary with the committee.<sup>136</sup> Moreover, appellate court decisions have affirmed the understanding that the deliberative process privilege is a common law privilege of agencies that is easily overcome by a showing of need by an investigatory body, and other court rulings and congressional practice have recognized the overriding necessity of an effective legislative oversight process.<sup>137</sup>

### Executive Privilege (“Presidential Communications Privilege”)

In rare instances the executive branch may respond to a congressional demand to produce information with an assertion of executive privilege, a doctrine which, like Congress’s powers to investigate and cite for contempt, has constitutional roots. No decision of the Supreme Court has yet resolved the question of whether there are any circumstances in which the executive branch can refuse to provide information sought by Congress on the basis of executive privilege. Indeed, most such disputes are settled short of litigation through negotiations between the branches.<sup>138</sup> The few situations that have reached a judicial forum, have found the federal courts highly reluctant to rule on the merits. However, in *United States v. Nixon*, which involved a judicial subpoena issued to the President at the request of the Watergate special prosecutor,<sup>139</sup> the Supreme Court found a constitutional basis for the doctrine of executive privilege in “the supremacy of each branch within its own assigned area of constitutional duties” and in the separation of powers. Although it considered presidential communications to be “presumptively privileged,” the Court rejected the President’s contention that the privilege was absolute, thereby precluding judicial review whenever it is asserted. The Court held that the judicial need for the tapes outweighed the President’s “generalized interest in confidentiality.” The Court was careful to limit the scope of its decision, noting that “we are not here concerned with the balance between the President’s generalized interest in confidentiality ... and congressional demands for information.”<sup>140</sup>

<sup>136</sup> See generally, CRS Report 95-464, *Investigative Oversight: An Introduction to the Law, Practice and Procedure of Congressional Inquiry*, by Morton Rosenberg (available upon request).

<sup>137</sup> See, e.g., *In Re Sealed Case (Espy)*, 121 F. 3d 729 (D.C. Cir. 1997).

<sup>138</sup> See, e.g., Neal Devins, *Congressional-Executive Information Access Disputes: A Modest Proposal: Do Nothing*, 48 ADMIN. L. REV., 109-137 (1996); Joel D. Bush, *Congressional-Executive Access Disputes: Legal Standards and Political Settlements*, 9 J.L. & POL., 717 (1993); Stephen W. Stathis, *Executive Cooperation: Presidential Recognition of the Investigatory Authority of Congress and the Courts*, 3 J.L. & POL., 183 (1986).

<sup>139</sup> The subpoena was for certain tape recordings and documents relating to the President’s conversations with aides and advisors. The materials were sought for use in a criminal trial.

<sup>140</sup> 418 U.S. 683, 712 n. 19 (1974). In *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F. 2d 725 (D.C. Cir. 1974), decided prior to *U.S. v. Nixon*, the appeals court denied the Watergate Committee’s access to five presidential tapes because the committee had not met its burden of showing that “the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the Committee’s function.” The court noted that its denial was based upon the initiation of impeachment proceedings by the House Judiciary Committee, the overlap of the investigative objectives of both committees, and the fact that the impeachment committee already had the tapes in question, concluding that “The Select Committee’s immediate oversight need for the subpoenaed tapes is, from a congressional perspective, merely cumulative.” The unique and confining nature of the case’s factual and historical (continued...)

Including *Nixon*, of the seven court decisions involving interbranch information access disputes,<sup>141</sup> three have involved Congress and the Executive, but only one of these resulted in a decision on the merits.<sup>142</sup> One other case, involving legislation granting custody of President Nixon's presidential records to the Administrator of the General Services Administration, also determined several pertinent executive privilege issues.<sup>143</sup> Until the District of Columbia Circuit's 1997 ruling in *In re Sealed Case*,<sup>144</sup> and its 2004 ruling in *Judicial Watch Inc. v. Department of Justice*,<sup>145</sup> these judicial decisions had left important gaps in the law of presidential privilege which increasingly became focal points, if not the source, of subsequent interbranch confrontations. Among the more significant issues left open to debate included: whether the President has to have actually seen or been familiar with the disputed matter; whether the presidential privilege encompasses documents and information developed by, or in the possession of, officers and employees in the departments and agencies of the Executive Branch; whether the privilege encompasses all communications with respect to which the President may be interested or is it confined to presidential decisionmaking and, if so, is it limited to any particular type of presidential decisionmaking; and precisely what kind of demonstration of need must be shown to justify release of materials that qualify for the privilege.

In *In re Sealed Case (Espy)*, involving a grand jury subpoena for documents to the White House Counsel's Office during an independent counsel's investigation of allegations of improprieties by the Secretary of Agriculture, an appeals court held that the presidential communications privilege extended to communications authored by or solicited and received by presidential advisers that involved information regarding governmental operations that ultimately call for direct decision making by the President, but he does not have to actually have seen the documents for which he claims privilege. However, the court held that the privilege was held to be confined to White House staff, and does not extend to staff in agencies. Moreover, the court concluded that the privilege applied only to White House staff within "operational proximity" to direct presidential decision making. According to the court, claims of executive privilege may be overcome by a demonstration that each discrete group of subpoenaed materials likely contains important evidence, and that the evidence was not available with due diligence elsewhere, a showing which the court held the independent counsel had made.<sup>146</sup> In *Espy*, the appeals court held that the independent counsel had met his burden and ordered the disclosure of the disputed documents.

The District of Columbia Circuit's 2004 decision in *Judicial Watch, Inc. v. Department of Justice*<sup>147</sup> appears to lend substantial support to the above-expressed understanding of *Espy*. The

(...continued)

context likely makes this an uncertain precedent for limiting a committee's investigatory power in the face of a presidential claim of privilege.

<sup>141</sup> *United States v. Nixon*, 418 U.S. 683 (1974); *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973); *Senate Select Committee v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974); *United States v. AT&T*, 551 F.2d 384 (D.C. Cir. 1976), *appeal after remand*, 567 F.2d 121 (D.C. Cir. 1977); *United States v. House of Representatives*, 556 F.Supp. 150 (D.D.C. 1983); *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997); *In re Grand Jury Proceedings*, 5 F. Supp. 2d 21 (D.D.C. 1998).

<sup>142</sup> *Senate Select Committee*, 498 F.2d 725 (D.C. Cir. 1974).

<sup>143</sup> *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977).

<sup>144</sup> 121 F.3d 729 (D.C. Cir. 1997).

<sup>145</sup> 365 F.3d 1108 (D.C. Cir. 2004).

<sup>146</sup> 121 F. 3d 729 (D.C. Cir. 1997).

<sup>147</sup> 365 F.3d 1108 (D.C. Cir. 2004). The panel split 2-1, with Judge Rogers writing for the majority and Judge Randolph dissenting.

*Judicial Watch* dispute involved requests by Judicial Watch, Inc. for documents concerning pardon applications and pardon grants reviewed by the Justice Department’s Office of the Pardon Attorney and the Deputy Attorney General for consideration by President Clinton.<sup>148</sup> Some 4,300 documents were withheld on the grounds that they were 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” – the exercise of the President’s constitutional pardon authority – the extension of the presidential communications privilege to internal Justice Department documents which had not been “solicited and received” by the President or the Office of the President was not warranted.<sup>149</sup> The appeals court reversed, concluding 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.”<sup>150</sup>

Guided by the analysis in *Espy*, the *Judicial Watch* majority emphasized that the “solicited and received” limitation “is necessitated by the principles underlying the presidential communications privilege, and a recognition of the dangers of expanding it too far.”<sup>151</sup> *Espy* teaches, the court explained, that the privilege may be invoked only when presidential advisers in close proximity to the President who have significant responsibility for advising him on non-delegable matters requiring direct presidential decisionmaking have solicited and received such documents or communications or the President has received them himself. In rejecting the Government’s argument that the privilege should be applicable to all departmental and agency communications related to the Deputy Attorney General’s pardon recommendations for the President, the panel majority held that:

such a bright-line rule is inconsistent with the nature and principles of the presidential communications privilege, as well as the goal of serving the public interest.... Communications never received by the President or his Office are unlikely to “be revelatory of his deliberations ... nor is there any 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 documents.... Any pardon documents, reports or recommendations that the Deputy Attorney General submits to the Office of the President, and any direct communications the Deputy or the Pardon Attorney may have with the White House Counsel or other immediate Presidential advisers will remain protected.... It is only those documents and recommendations of Department staff that are not submitted by the Deputy Attorney General for the President and are not otherwise received by the Office of the President, that do not fall under the presidential communications privilege.<sup>152</sup>

Indeed, the *Judicial Watch* panel makes it clear that the *Espy* rationale would preclude cabinet department heads from being treated as being part of the President’s immediate personal staff or as some unit of the Office of the President:

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<sup>148</sup> 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.

<sup>149</sup> 365 F.3d at 1109-12.

<sup>150</sup> *Id.* at 1112, 1114, 1123.

<sup>151</sup> *Id.* at 1114.

<sup>152</sup> *Id.* at 1117.

Extension of the presidential communications privilege to the Attorney General's delegatee, the Deputy Attorney General, and his staff, on down to the Pardon Attorney and his staff, with the attendant implication for expansion to other Cabinet officers and their staffs, would, as the court pointed out in *In re Sealed Case*, pose a significant risk of expanding to a large swath of the executive branch a privilege that is bottomed on a recognition of the unique role of the President.<sup>153</sup>

The *Judicial Watch* majority took great pains to explain why *Espy* and the case before it differed from the Nixon and post-Watergate cases. According to the court, “[u]ntil *In re Sealed Case*, the privilege had been tied specifically to direct communications of the President with his immediate White House advisors.”<sup>154</sup> The *Espy* court, it explained, was for the first time confronted with the question whether communications that the President's closest advisors make in the course of preparing advise for the President and which the President never saw should also be covered by the presidential privilege. The *Espy* court's answer was to “espouse[ ] a ‘limited extension’ of the privilege ‘down the chain of command’ beyond the President to his immediate White House advisors only,” recognizing “the need to ensure that the President would receive full and frank advice with regard to his non-delegable appointment and removal powers, but was also wary of undermining countervailing considerations such as openness in government.... Hence, the [*Espy*] court determined that while ‘communications authored or solicited and received’ by immediate White House advisors in the Office of the President could qualify under the privilege, communications of staff outside the White House in executive branch agencies that were not solicited and received by such White House advisors could not.”<sup>155</sup>

The situation before the *Judicial Watch* court tested the *Espy* principles. While the presidential decision involved—exercise of the President's pardon power—was certainly a non-delegable, core presidential function, the operating officials involved, the Deputy Attorney General and the Pardon Attorney, were deemed to be too remote from the President and his senior White House advisors to be protected. The court conceded that functionally those officials were performing a task directly related to the pardon decision but concluded that an organizational test was more appropriate for confining the potentially broad sweep that would result from a functional test; under the latter test, there would be no limit to the coverage of the presidential communications privilege. In such circumstances, the majority concluded, the lesser protections of the deliberative process privilege would have to suffice.<sup>156</sup> The appeals court ordered the disclosure of 4,300 withheld documents.

Since the Kennedy Administration, executive policy directives establish that presidential executive privilege may be asserted only by the President personally. The latest such directive, issued by President Reagan in November 1982, and still in effect, requires that when agency heads believe that a congressional information request raises substantial questions of executive privilege they are to notify and consult with the attorney general and the counsel to the President. If the matter is deemed to justify invocation of the privilege, it is reported to the President who makes his decision.

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<sup>153</sup> *Id.* at 1121-22.

<sup>154</sup> *Id.* at 1116.

<sup>155</sup> *Id.* at 1116-117.

<sup>156</sup> *Id.* at 1118-24.

However, a memorandum of September 28, 1994, from White House Counsel Lloyd Cutler to all department and agency general counsels modified the Reagan policy by requiring agency heads directly to notify the White House Counsel of any congressional request for “any document created in the White House ... or in a department or agency, that contains deliberations of, or advice to or from, the White House” that may raise privilege issues. The White House counsel is to seek an accommodation and, if that does not succeed, he is to consult the attorney general to determine whether to recommend invocation of privilege to the President. The President then determines whether to claim privilege, which is then communicated to Congress by the White House Counsel. Thus, it would appear that decision making with respect to claims of presidential privilege is now fully centralized in the White House, but that the President must still personally assert the claim. It does not appear that the Obama Administration has taken a public position on the Reagan memorandum or the subsequent Cutler modification, but that could simply be because President Obama has yet to make a claim of executive privilege.

The administration of President George W. Bush, through presidential signing statements<sup>157</sup> and opinions of the Department of Justice’s Office of Legal Counsel (OLC), articulated a legal view of the breadth and reach of presidential constitutional prerogatives that, if applied to information and documents often sought by congressional committees, would stymie such inquiries.<sup>158</sup> In the Bush Administration 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 by vesting lower-level officers or employees with a right to disclose such information without presidential authorization. Thus, OLC has declared that, “right of disclosure” statutes “unconstitutionally limit the ability of the President and his appointees to supervise and control the work of subordinate officers and employees of the Executive Branch.”<sup>159</sup>

The Bush Administration’s OLC assertions of these broad notions of presidential prerogatives were unaccompanied by any authoritative judicial citations and, as indicated in the above discussion, recent appellate court rulings cast considerable doubt on the broad claims of privilege posited by OLC. Taken together, *Espy* and *Judicial Watch* arguably have effected important qualifications and restraints on the nature, scope and reach of the presidential communications privilege. As established by those cases, and until reviewed by the Supreme Court, to appropriately invoke the privilege the following elements appear to be essential:

- 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. Other core, direct presidential decisionmaking powers include 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. It would arguably not include decisionmaking with respect to laws that vest policymaking and implementation authority in the heads of departments and agencies or which allow presidential delegations of authority.

<sup>157</sup> See CRS Report RL33667, *Presidential Signing Statements: Constitutional and Institutional Implications*, by T. J. Halstead.

<sup>158</sup> 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, available at <http://www.usdoj.gov/olc/crsmemoresponses.htm>.

<sup>159</sup> *Id.* at 3.



- The communication must be authored or “solicited and received” by a close White House advisor (or the President). The judicial test is that an advisor must be in “operational proximity” with the President. This effectively means that the scope of the presidential communications privilege extends only to the boundaries of the White House and the Executive Office complex.
- The presidential communications privilege remains a qualified privilege that may be overcome by a showing of need and unavailability of the information elsewhere by an appropriate investigating authority. The *Espy* court found an adequate showing of need by the Independent Counsel; while in *Judicial Watch*, the court found the privilege did not apply and the deliberative process privilege was unavailing.

## Other Limitations

### *Ability to Serve Congressional Subpoenas Overseas*

There appear to be very few examples of congressional attempts to issue, serve, and enforce subpoenas abroad.<sup>160</sup> The experiences of Congress during the Iran-Contra investigations arguably provide a unique view both of the difficulties that may be encountered by committees in securing judicial assistance abroad and the use of imaginative improvisation.<sup>161</sup> The House and Senate Select Committees investigating the Iran-Contra matter were faced with formidable obstacles from the outset, including, but not limited to: a relatively short deadline to complete their investigation; a parallel Independent Counsel investigation competing for the same evidence; witnesses and evidence in foreign countries with strict secrecy laws; and an Administration that would not cooperate in facilitating any possible diplomatic accommodations.

One instance of an attempt to obtain information located overseas occurred with respect to information contained in Swiss bank accounts. The Independent Counsel was qualified under § 1782 and under a Swiss Treaty to seek judicial assistance, and did. The letters rogatory and treaty processes, however, were considered too time-consuming and, as it turned out, could not provide the Independent Counsel all that he needed.<sup>162</sup> The Committees sought a sharing agreement with the Independent Counsel, but he was reluctant to jeopardize his arrangement under the Treaty with the Swiss government. With doubt whether they could use § 1782, the Committees abandoned this route.

In 1987, the Committees issued an order requiring that former Major Richard V. Secord execute a consent directive authorizing the release of his offshore bank records and accounts to the Committee.<sup>163</sup> When Mr. Secord refused to sign the consent directive, the Committee sought to

<sup>160</sup> See John C. Grabow, CONGRESSIONAL INVESTIGATIONS: LAW AND PRACTICE, § 3.2[b] (1988) (noting a 1985 attempt by a Senate committee to serve a member of the Soviet Navy while on a Soviet freighter located temporarily in American waters, and a 1986 attempt by various House committees to serve Ferdinand Marcos, the exiled former president of the Philippines.) However, the author does not provide any supporting authority documenting these attempts or any explanation for why they were unsuccessful.

<sup>161</sup> See generally, 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) [hereinafter Van Cleve & Tiefer].

<sup>162</sup> *Id.* at 75-77.

<sup>163</sup> *Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition v. Secord*, 664 (continued...)

obtain a court order directing him to comply.<sup>164</sup> While the Committee did not prevail in the Second litigation, the matter was not disposed of on jurisdictional grounds. Specifically, the district court noted its jurisdiction pursuant to 28 U.S.C. § 1364, as Mr. Second was a private citizen. Moreover, there is no mention or indication of any challenge to the Committee's ability to seek such an order. Rather, the case was decided on Fifth Amendment grounds, with the court holding that there was a testimonial aspect to requiring the signing of the consent directive.<sup>165</sup> Thus, the court concluded that the Committee's order was a violation of Mr. Second's Fifth Amendment right against self-incrimination.<sup>166</sup> An appeal was taken by the Senate Committee, but it was dismissed when the Committees obtained the documents they had sought another way. It should be noted that the next year the Supreme Court upheld the tactic as valid because signing documents releasing the information was found not to be testimonial in nature and, therefore, did not violate the Fifth Amendment.<sup>167</sup>

As a last resort, the Committees decided that to obtain the critical financial records 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. To establish its own investigative legitimacy and to satisfy the witness as to the authoritativeness of the immunity grant, the Committees cloaked its chief counsel with the maximum amount of congressional authority by obtaining an order (a "commission") from a district court, under Rule 28 of the Federal Rules of Civil Procedure, empowering him (the "commissioner") to obtain evidence in another country and to bring it back. This contrasts with a letter rogatory, which goes to a foreign court, and with domestic deposition practice, which occurs on notice without going to or from any court. Finally, the House Committee issued the chief counsel a commission, much like a subpoena in format, to further document his official status. The witness turned over the financial documents and aided in deciphering and understanding them.<sup>168</sup> The legal sufficiency of the tactic was never tested in court; nevertheless, it proved effective.

### *Options for Obtaining Materials From Overseas*

As previously discussed,<sup>169</sup> congressional contempt is the vehicle by which congressional subpoenas are generally enforced. If a requesting committee files either a criminal or civil contempt action in a U.S. federal court, it is likely that the court will attempt seek assistance from foreign authorities to enforce any resulting order outside of its jurisdiction.

Two vehicles exist by which U.S. courts request assistance from foreign countries in obtaining evidence (including witness testimony) located outside the United States: mutual legal assistance treaties and letters rogatory. Mutual legal assistance treaties provide for two countries' mutual assistance in criminal proceedings. Letters rogatory are formal requests made by a court in one

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(...continued)

F.Supp. 562, 563 (D.D.C. 1987).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 564-65.

<sup>166</sup> *Id.* at 566. The ruling was not appealed because of the time strictures imposed on the House and Senate Select Committee's inquiry. It may be noted that in 1988 the Supreme Court adopted the Senate's argument in a different case, holding that such a directive is not testimonial in nature. See *Doe v. United States*, 487 U.S. 201 (1988).

<sup>167</sup> Van Cleve & Tiefer, *supra* note 161 at 77-79; see also *Doe v. United States*, 487 U.S. 201 (1988).

<sup>168</sup> *Id.* at 79-80.

<sup>169</sup> See *supra*, notes 53-59 and accompanying text.

country to a competent body in another country to serve process or order testimony of a witness or the production of evidence.<sup>170</sup> U.S. courts are statutorily authorized to issue such letters.<sup>171</sup> However, letters rogatory are generally considered a measure of last resort and are generally used only when no mutual legal assistance treaty exists.<sup>172</sup>

The existence of a mutual legal assistance treaty, however, does not guarantee that a congressional subpoena will be enforced in a foreign jurisdiction. Rather, the specific wording of the treaty will still need to be consulted before any determination can be made. 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.<sup>173</sup> Invocation of the treaty would likely be the method by which a U.S. court would seek assistance from the United Kingdom in obtaining evidence.<sup>174</sup> Article 19 of the treaty defines the “proceedings” to which the treaty applies. Specifically, it applies to any proceeding “related to criminal matters,” including “any measure or step taken in connection with the investigation or prosecution of criminal offenses.”<sup>175</sup> 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.”<sup>176</sup> Although this language might appear on its face to apply to civil or criminal contempt proceedings, the relevant proceeding would likely be considered the underlying congressional testimony, rather than the contempt proceeding with the court.<sup>177</sup> Because it would not result in criminal or civil sanctions, British officials may view a congressional committee hearing as not being a “proceeding” under the treaty.

If a letter rogatory were found to be an appropriate vehicle despite the U.S.-U.K. mutual legal assistance treaty, it appears that the United Kingdom might nevertheless decline to enforce such a letter sent to compel a witness to testify in a congressional investigation. Principles of international comity – i.e., “friendly dealing between nations at peace”<sup>178</sup> – undergird countries’ mutual compliance with letters rogatory. Although reciprocity is not coterminous with international comity and the Supreme Court has held that judicial assistance by U.S. courts need

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<sup>170</sup> See 22 C.F.R. § 92.54 (2008).

<sup>171</sup> 28 U.S.C. §§ 1781, 1782 (2006).

<sup>172</sup> See U.S. Department of State, Preparation of Letters Rogatory, available at [http://travel.state.gov/law/judicial/judicial\\_683.html](http://travel.state.gov/law/judicial/judicial_683.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”).

<sup>173</sup> Treaty with the United Kingdom on Mutual Legal Assistance on Criminal Matters, U.S.-U.K., S. Treaty Doc. 104-2 (1995).

<sup>174</sup> However, the U.S.-U.K. mutual assistance treaty does not expressly prohibit assistance requested outside the scope of the treaty. See *Id.* at Art. 17 (“Assistance and procedures set forth in this treaty shall not prevent either of the parties from granting assistance to the other party through the provisions of other internal agreements to which it is a party or through the provisions of its national laws”).

<sup>175</sup> *Id.* at Art. 19.

<sup>176</sup> *Id.*

<sup>177</sup> See, e.g., *In re Letters of Request to Examine Witnesses from the Court of Queens Bench for Manitoba*, 488 F.2d 511 (9<sup>th</sup> Cir. 1973) (denying assistance on ground that the entity issuing the subpoena was not a tribunal, despite the fact that the request was sent by the Chief Justice of the Court of Queen’s Bench for Manitoba).

<sup>178</sup> *Hilton v. Guyot*, 159 U.S. 113, 162 (1895).

not depend on reciprocity,<sup>179</sup> many countries use reciprocity as a guide to determine compliance with letters rogatory. Thus, it is important to examine the extent of U.S. compliance with other countries' letters rogatory to determine the likely extent of reciprocal compliance abroad. The applicable statute authorizes a U.S. district court to assist a foreign court if: (1) the person from whom discovery is sought resides (or may be found) in the district of the court to which the application is made; (2) the discovery is for use in a proceeding before a foreign tribunal; and (3) the application is made directly by a foreign tribunal rather than by any other "interested person."<sup>180</sup> For present purposes, the requirement that the evidence be for use in a "proceeding before a foreign tribunal" is the only requirement that might present a hardship for a foreign governmental body in an analogous situation. Domestic courts have generally interpreted the word "tribunal" as including only entities with the capacity to make a binding adjudication.<sup>181</sup> Following this interpretation, a foreign country following a reciprocal approach may elect to decline assistance when requests originate from congressional committees, which are not commonly considered "tribunals" as they lack the legal authority to render binding adjudications.

## Frequently Encountered Information Access Issues

Congressional oversight and investigations can often, though not always, become adversarial. This is especially true when the entity being targeted, whether a private individual, corporation, or executive branch agency, has information Congress believes is necessary to its inquiry but refuses to disclose. In those situations the targeted entity may attempt to use several methods of avoiding disclosure. A commonly used tactic to avoid disclosure is to assert that the information cannot be disclosed due to a specific law, rule, or executive decision. Another common tactic is to assert that the information itself is of such a sensitive nature that Congress is not among those entities entitled or authorized to have the information. This section will address some of the most common laws, rules, and orders that have been cited as the basis for targeted entities withholding information from Congress.

### Applicability of the Privacy Act

The Privacy Act prohibits, with certain exceptions, the disclosure by a federal agency of "any record which is contained in a system of records" to any person or to another agency, except pursuant to a written request by, or with the prior written consent of, the subject of the record.<sup>182</sup> The term "record" is defined as "any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as

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<sup>179</sup> See *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 263 ("Section 1782 is a provision for assistance to tribunals abroad. It does not direct United States courts to engage in comparative analysis to determine whether analogous proceedings exist here. Comparisons of that order can be fraught with danger.").

<sup>180</sup> 28 U.S.C. § 1782 (2006).

<sup>181</sup> See, e.g., *In re Letters Rogatory Issued By Director of Inspection of Government of India*, 285 F.2d 1017 (2d Cir. 1967) (denying judicial assistance for an Indian tax collection entity because the tax assessment process did not result in any adjudicative proceeding); *In re Letters of Request to Examine Witnesses from the Court of Queens Bench for Manitoba, Canada*, 488 F.2d 511 (9th Cir. 1973) (holding that assistance to the Canadian Commission of Inquiry was not contemplated by the statute because the body's purpose is to conduct investigations unrelated to judicial or quasi-judicial controversies).

<sup>182</sup> 5 U.S.C. § 552a (2006).

a finger or voice print or a photograph....”<sup>183</sup> The phrase “system of records” means “a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual....”<sup>184</sup>

Although the Privacy Act places certain limitations on the disclosure of information by executive departments, Congress has expressly reserved its constitutional right of access to information,<sup>185</sup> specifying that the limitations on the executive do not apply to disclosure of records by the executive “to either House of Congress, or, to the extent matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee....”<sup>186</sup> The exemption permitting disclosure to Congress applies, by its terms, to a disclosure to the House or Senate, or to a committee or subcommittee which has jurisdiction over the subject of the disclosure. The exemption does not, however, permit disclosures to committees without jurisdiction, minority members of committees, or to individual members of Congress.

Furthermore, the original guidelines adopted by the Office of Management and Budget (OMB)<sup>187</sup> state that the exemption for disclosure to Congress “does not authorize the disclosure of a record to Members of Congress acting in their individual capacities without the consent of the individual.”<sup>188</sup> Similarly, some court rulings have found that the congressional exemption applies “only to a House of Congress or a committee or subcommittee, not to individual congressmen.”<sup>189</sup> One case construed the exemption somewhat more broadly and held that it applies to a disclosure to an individual Member “in his official capacity as a member of ... [a] subcommittee, not as an individual Member of Congress.”<sup>190</sup> Another case, construing language in the Freedom of Information Act (FOIA) comparable to that in the congressional exemption under the Privacy Act, declined to distinguish between disclosure to a congressional committee and a single member acting in an official capacity.<sup>191</sup>

<sup>183</sup> *Id.* at § 552a(b).

<sup>184</sup> *Id.* at § 552a(a)(4).

<sup>185</sup> *Id.* at § 552a(a)(5).

<sup>186</sup> *See, e.g., Watkins v. United States*, 354 U.S. 178, 200 n.33 (1957); *McGrain v. Daugherty*, 273 U.S. 135 (1927).

<sup>187</sup> 5 U.S.C. § 552a(b)(9) (2006). The House report on the act explained that the congressional exemption “relates to personal information needed by the Congress and its committees and subcommittees. Occasionally, it is necessary to inquire into such subjects for legislative and investigative reasons.” *See* H. Rept. 93-1416, 93<sup>rd</sup> Cong., 13 (1974). The legislative history of the act is sketched in *Devine v. United States*, 202 F.3d 547, 552 (2<sup>nd</sup> Cir. 2000).

<sup>188</sup> OMB is required to prescribe guidelines and regulations for the use of agencies in implementing the act. *See* 5 U.S.C. § 552a(v) (2006).

<sup>189</sup> Office of Management and Budget, *Privacy Act Guidelines*, 40 FED. REG. 28,949, 28,955 (1975).

<sup>190</sup> *Swenson v. United States Postal Service*, 890 F.2d 1075, 1077 (9<sup>th</sup> Cir. 1989). *Accord Williams v. Stovall*, 1993 WL 431149 (D.C. Cir. Oct. 14, 1993) (per curiam) (stating that the “Privacy Act’s exception for information disclosed to Congress or its committees does not expressly provide for disclosure to individual members of Congress”). *Cf. Exxon Corp. v. FTC*, 589 F.2d 582, 592-94 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 943 (1979). On remand, the district court in *Swenson* held that the defendant had violated the Privacy Act by disclosing private facts about plaintiff’s status as a Postal Service employee to two Members of Congress who contacted the Service following allegations by the plaintiff that the Service had undercounted certain routes. *See* 1994 U.S. Dist. LEXIS 16524 (E.D. Cal. Mar. 10, 1994).

<sup>191</sup> *Devine*, 202 F.3d at 549, 551 (letter from agency Inspector General, concerning investigation, to chairman and member of subcommittee with jurisdiction over subject of letter, was within scope of congressional exemption).

## Applicability of the Freedom of Information Act

The Freedom of Information Act (FOIA), adopted by Congress in 1966, requires publication in the *Federal Register* of various information, such as descriptions of an agency's organization and procedures, and also requires that certain materials, such as statements of policy that have not been published in the *Federal Register* and certain staff manuals, be made available for public inspection. In addition, FOIA provides that all other records are to be disclosed in response to a specific request by any person, except records that fall under one of the nine exemptions from the disclosure requirements.<sup>192</sup> FOIA also provides for both administrative and judicial appeals when access to information is thought to be improperly denied by an agency.

FOIA applies to “agencies,”<sup>193</sup> which are defined to include “any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.”<sup>194</sup> Congress is not included within the scope of that definition, therefore, records of the House, Senate, congressional committees, and members are not subject to disclosure.<sup>195</sup>

Contained within FOIA itself, is a carefully provided exemption that states that the statute “is not authority to withhold information from Congress.”<sup>196</sup> The D.C. Circuit, in *Murphy v. Department of the Army*,<sup>197</sup> explained that FOIA exemptions were no basis for withholding from Congress because of:

the obvious purpose of the Congress to carve out for itself a special right of access to privileged information not shared by others.... 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. If one consequence of the facilitation of such access is that some information will be disclosed to congressional authorities but not to private persons, that is but an incidental consequence of the need for informed and effective lawmakers.<sup>198</sup>

Thus, when a congressional committee of jurisdiction is seeking information from an agency for legislative or oversight purposes, it acts not pursuant to FOIA, but rather pursuant to Congress's constitutionally-based right of access to information from the executive branch.<sup>199</sup> Arguably this places Congress in a much stronger position than the general public as the agency should not be

<sup>192</sup> Exemptions cover material such as trade secrets obtained from an individual. *Id.* § 552(b)(4).

<sup>193</sup> *Id.* § 552(a).

<sup>194</sup> *Id.* § 552(f).

<sup>195</sup> See, e.g., *United We Stand Am. v. IRS*, 359 F.3d 595, 597 (D.C. Cir. 2004) (stating that “The Freedom of Information Act does not cover congressional documents.”); *Dow Jones & Co. v. DOJ*, 917 F.2d 571, 574 (D.C. Cir. 1990) (holding that Congress is not an agency for any purpose under FOIA); *Dunnington v. DOD*, No. 06-0925, 2007 WL 60902, at \*1 (D.D.C. Jan. 8, 2007) (ruling that U.S. Senate and House of Representatives are not agencies under FOIA).

<sup>196</sup> 5 U.S.C. § 552(d) (2006).

<sup>197</sup> 613 F.2d 1151 (D.C. Cir. 1979).

<sup>198</sup> *Murphy*, 613 F.2d at 1155-56, 1158.

<sup>199</sup> See, e.g., *McGrain v. Daugherty*, 273 U.S. 135 (1927). When a committee seeks information from the executive, it may do so by means of an informal request from committee staff, a letter signed by the committee chair, or by exercise of the subpoena authority, which is vested in standing committees by both bodies. House Rule XI, cl. 2(m); Senate Rule XXVI.

able to avail itself of the exceptions provided by the FOIA statute and should have no legal basis to withhold the information from Congress.

Individual members, members not on a committee of jurisdiction, or minority members of a jurisdictional committee, may like any person, invoke FOIA to attempt to obtain access to agency records.<sup>200</sup> When they do, however, they are not acting pursuant to Congress's constitutional authority to conduct oversight and investigations and, therefore, the exemption discussed above has been interpreted by the Department of Justice not to apply to such requests.<sup>201</sup> Thus, the standard exceptions that an agency could invoke to prevent information from being disclosed to the general public can also be cited to prevent disclosure to members of Congress. Further complicating matters for these types of requests is the fact that the members may not be permitted to invoke the statutory right to litigate the agency's denial of access to the requested material. The 1997 decision by the Supreme Court in *Raines v. Byrd*,<sup>202</sup> arguably restricts the ability of members of Congress, when acting in their official capacity, to bring lawsuits in federal court.<sup>203</sup> The combination of the availability of the exceptions and the lack of judicial enforcement render FOIA requests by members a generally ineffective means of obtaining information from the executive branch.

## Access to Grand Jury Materials

As a general matter, Federal Rule of Criminal Procedure 6(e) provides for the secrecy of "matters occurring before the grand jury," unless a court authorizes disclosure for the purposes of a judicial proceeding, or at the request and showing by a defendant that he needs the information to justify dismissal of an indictment. This traditional protection of the activities of the grand jury serves these purposes:

(1) to prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witness who may testify before [the] grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes; (5) to protect [the] innocent accused who is exonerated from disclosure of the fact that he has been under investigation and from the expense of standing trial where there was no probability of guilt.<sup>204</sup>

Although Rule 6(e) codifies the traditional policies underlying grand jury secrecy, it remains subject to the exceptions that those policies recognize.<sup>205</sup> The rule, however, was arguably not

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<sup>200</sup> H. Rept. 1497, 89<sup>th</sup> Cong., 11-12 (1966).

<sup>201</sup> See Department of Justice, Office of Information and Privacy, Freedom of Information Act Guide, 41-42, (Spring 2010), available at [http://www.justice.gov/oip/foia\\_guide09/procedural-requirements.pdf](http://www.justice.gov/oip/foia_guide09/procedural-requirements.pdf) (stating that "individual Members of Congress possess the same rights of access as 'any person'").

<sup>202</sup> 521 U.S. 811 (1997).

<sup>203</sup> See CRS Report R40873, *Congressional Participation in Article III Courts: Jurisdiction and Standing to Sue*, by Todd B. Tatelman.

<sup>204</sup> *United States v. John Doe, Inc.*, 481 U.S. 102, 109 n.5 (1987) (quoting *United States v. Rose*, 215 F.2d 617, 628-29 (3d Cir. 1954) & *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681-82 n.6. (1958)); see also *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 219 n.10 (1979).

<sup>205</sup> See *In re Report & Recommendation of Grand Jury*, 370 F.Supp. 1219, 1229 (D.D.C.1974).

intended to insulate from disclosure all information once it is presented to a grand jury.<sup>206</sup> Rather, according to the courts, the aim of the rule is to “prevent disclosure of the way in which information was 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 suspicion focuses, and specific details of what took place before the grand jury.”<sup>207</sup>

Court approved disclosures of grand jury material require “a strong showing of particularized need.”<sup>208</sup> Persons or entities seeking disclosure “must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed.”<sup>209</sup> Since any examination begins with a preference for preservation of the grand jury’s secrets, the particularized need requirement cannot be satisfied simply by demonstrating that the information sought would be relevant or useful or that acquiring it from the grand jury rather than from some other available source would be more convenient.<sup>210</sup>

In determining whether “the need for disclosure is greater than the need for continued secrecy,”<sup>211</sup> the district court enjoys discretion to judge each case on its own facts,<sup>212</sup> but some general trends seem to have developed. The need to shield the grand jury’s activities from public display is less compelling once it has completed its inquiries and been discharged,<sup>213</sup> especially if the resulting criminal proceedings have also been concluded.<sup>214</sup> Of course, there must still be a counterbalancing demonstration of need,<sup>215</sup> a requirement that becomes more difficult if the grand

<sup>206</sup> *United States v. Saks & Co.*, 426 F.Supp. 812, 814 (S.D.N.Y.1976).

<sup>207</sup> *In re Grand Jury Investigation of Ven-Fuel*, 441 F.Supp. 1299, 1302-03 (D. Fla. 1977) (citing *United States v. Interstate Dress Carriers, Inc.*, 280 F.2d 52, 54 (2d Cir. 1960); *United States v. Saks & Co.*, 426 F.Supp. at 815; *In re Senate Banking Committee Hearings*, 19 F.R.D. 410, 412-13 (N.D.Ill.1956)).

<sup>208</sup> *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 443 (1983); see also *Right of Party in Civil Action to Obtain Disclosure, Under Rule 6(e)(3)(C)(i) of the Federal Rules of Criminal Procedure, of Matters Occurring Before Grand Jury*, 71 ALR Fed 10.

<sup>209</sup> *Douglas Oil Co. v. Northwest Petrol Stops*, 441 U.S. at 222; see also *United States v. Moussaoui*, 483 F.3d 220, 235 (4<sup>th</sup> Cir. 2007); *McAninch v. Wintermute*, 491 F.3d 759, 767 (8<sup>th</sup> Cir. 2007); *United States v. Aisenberg*, 358 F.3d 1327, 1348 (11<sup>th</sup> Cir. 2004); *United States v. Campbell*, 324 F.3d 497, 498-99 (7<sup>th</sup> Cir. 2003); *In re Special Grand Jury 89-2*, 143 F.3d 565, 569-70 (10<sup>th</sup> Cir. 1998); *In re Grand Jury Proceedings (Ballas)*, 62 F.3d 1175, 1179 (9<sup>th</sup> Cir. 1995); *United States v. Miramontex*, 995 F.2d 56, 59 (5<sup>th</sup> Cir. 1993).

<sup>210</sup> *In re Grand Jury 95-1*, 118 F.3d 1433, 1437 (10<sup>th</sup> Cir. 1997); see also *In re Grand Jury Investigation (Missouri)*, 55 F.3d 350, 354-55 (8<sup>th</sup> Cir. 1995); *Cullen v. Margiotta*, 811 F.2d 698, 715 (2d Cir. 1987); *Hernly v. United States*, 832 F.2d 980, 883-85 (7<sup>th</sup> Cir. 1987); *In re Grand Jury Proceedings GJ-76-4 & GJ-75-3*, 800 F.2d 1293, 1302 (4<sup>th</sup> Cir. 1986).

<sup>211</sup> *Douglas Oil*, 441 U.S. at 222; *United States v. Nix*, 21 F.3d 347, 351 (9<sup>th</sup> Cir. 1994).

<sup>212</sup> *United States v. Aisenberg*, 358 F.3d 1327, 1349 (11<sup>th</sup> Cir. 2004); see also *In re Grand Jury Proceedings (Ballas)*, 62 F.3d 1175, 1180 (9<sup>th</sup> Cir. 1995).

<sup>213</sup> *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 234 (1940); see also *In re Grand Jury Investigation (Missouri)*, 55 F.3d 380, 354 (8<sup>th</sup> Cir. 1995); *In re Grand Jury Proceeding Relative to Perl*, 838 F.2d 304, 307 (8<sup>th</sup> Cir. 1988).

<sup>214</sup> *United States v. Blackwell*, 954 F.Supp. 944, 966 (D.N.J. 1997); see also *In re Grand Jury Proceedings GJ-76-4 & GJ-75-3*, 800 F.2d at 1301 (4<sup>th</sup> Cir. 1986); *In re Shopping Cart Antitrust Litigation*, 95 F.R.D. 309, 312-13 (S.D.N.Y. 1982).

<sup>215</sup> *United States v. Aisenberg*, 358 F.3d 1327, 1348 (11<sup>th</sup> Cir. 2004); see also *Hernly v. United States*, 832 F.2d 980, 985 (7<sup>th</sup> Cir. 1987); *In re Grand Jury Testimony*, 832 F.2d 60, 64 (5<sup>th</sup> Cir. 1987).



jury witnesses whose testimony is to be disclosed still run the risk of retaliation.<sup>216</sup> According to several courts of appeal:

Courts have consistently distinguished the requests for documents generated independent of the grand jury investigation from the request for grand jury minutes or witness transcripts reasoning that the degree of exposure of the grand jury process inherent in the revelation of subpoenaed documents is lesser than the degree of disclosure attributable to publication of witness transcripts.<sup>217</sup>

Moreover, the courts seem responsive to requests to disclose matters occurring before the grand jury for the purpose of resolving some specific inconsistency in the testimony of a witness, or to refresh a witness's recollection during the course of a trial.<sup>218</sup>

Turning to instances that have involved Congress or congressional committees, there are numerous examples in which entities of the legislative branch have sought and received material that was covered by Rule 6(e). For example, in 1952, the Senate Banking Committee requested to review documents in the custody of the United States Attorney that had been shown to a federal grand jury.<sup>219</sup> The committee filed a motion asking that the United States Attorney be directed to permit inspection and to supply copies of the documents. The United States objected on the ground that the secrecy and confidentiality of the grand jury would be breached; however, the court ordered the documents disclosed, concluding that "when the fact or document is sought for itself, independently, rather than because it was stated before or displayed to the grand jury, there is no bar of secrecy."<sup>220</sup>

Similarly, in *In re Grand Jury Investigation of Ven-Fuel et al.*,<sup>221</sup> a federal district court held that a subcommittee requesting documents presented to a grand jury was not prohibited by Rule 6(e). The *Ven-Fuel* court, however, went further and discussed Congress's general power of inquiry with respect to Rule 6(e) information. The court held that when Congress is acting within the "legitimate sphere of legislative activity" it is legally entitled to Rule 6(e) information.<sup>222</sup> The court thus ordered that the Chair and members of the Subcommittee "be permitted to examine all of the documents, without segregation and identification of those upon which the criminal indictment was based, in order to determine what specific documents they wish produced for their use."<sup>223</sup>

<sup>216</sup> *Cullen v. Margiotta*, 811 F.2d 698 (2d Cir. 1987); see also *In re Grand Jury Investigation (Missouri)*, 55 F.3d 350, 355 (8th Cir. 1995).

<sup>217</sup> *In re Grand Jury Proceeding Relative to Perl*, 838 F.2d 304, 306-307 (8th Cir. 1988); see also *In re Grand Jury Investigation (Missouri)*, 55 F.3d at 354 (8th Cir. 1995); *In re Sealed Case*, 801 F.2d 1379, 1381 (D.C.Cir. 1986); *In re Grand Jury Investigation*, 630 F.2d 996, 1000 (3d Cir. 1980).

<sup>218</sup> *Douglas Oil*, 441 U.S. at 222 n.12; see also *United States v. Rockwell International Corp.*, 173 F.3d 757, 759 (10th Cir. 1999); *In re Grand Jury*, 832 F.2d 60, 63 (5th Cir. 1987); *Lucas v. Turner*, 725 F.2d 1095, 1105 (7th Cir. 1984); *United States v. Fischbach and Moore, Inc.*, 776 F.2d 839, 845 (9th Cir. 1985). Under much the same logic, a court may afford a grand jury witness access to his or her earlier testimony prior to a subsequent appearance, *In re Grand Jury*, 490 F.3d 978, 986-90 (D.C. Cir. 2007).

<sup>219</sup> *In re Senate Banking Committee Hearings*, 19 F.R.D. 410 (N.D. Ill. 1956).

<sup>220</sup> *Id.* at 412.

<sup>221</sup> 441 F.Supp. 1299, 1302-03 (D. Fla. 1977).

<sup>222</sup> *Id.* at 1307 (stating that "[t]here is no question that Chairman Moss and the Subcommittee have demonstrated their constitutionally independent legal right to the documents that they seek for their legitimate legislative activity.>").

<sup>223</sup> *Id.*

When information sought by a congressional committee seeks to reveal what actually occurred before the grand jury, however, the courts have been much more reluctant to order its disclosure. In *In Re Grand Jury Impaneled October 2, 1978* (79-2),<sup>224</sup> the District Court for the District of Columbia held that a Subcommittee's request for an inventory of all documents subpoenaed by a grand jury falls within the scope of Rule 6(e) and, therefore, was not required to be disclosed.<sup>225</sup> The court was particularly concerned that such a disclosure would "set a dangerous precedent by revealing a great deal about the scope and focus of the grand jury's investigation."<sup>226</sup>

Although it appears that the decision to release grand jury information to congressional committees is considered on a case-by-case basis, provided that the information sought from the grand jury does not intrude impermissibly into the scope and focus of the grand jury's investigation, there is a strong set of precedents that would support its disclosure.<sup>227</sup>

### Access to Litigation Files in Pending Cases

Often congressional committees decide to investigate matters where litigation is currently pending. The Department of Justice (DOJ) may respond to such a congressional inquiry by refusing to provide materials on the grounds that the information is contained in pending litigation files. In 1941, Attorney General Robert Jackson famously articulated numerous reasons for declining to provide information to Congress about open and closed civil and criminal proceedings.<sup>228</sup> The reasons 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, avoiding the potentially chilling effect on the exercise of prosecutorial discretion by DOJ attorneys, and precluding interference with the President's constitutional duty to faithfully execute the laws all of which would "seriously prejudice law enforcement."<sup>229</sup>

General Jackson's views were reiterated by Attorney General William French Smith in 1982 as also applying to documents:

which are sensitive memoranda or notes by EPA attorneys and investigators reflecting enforcement strategy, legal analyses, lists of potential witnesses, settlement considerations and similar materials the disclosure of which might adversely affect a pending enforcement action, overall enforcement policy, or the rights of individuals. I continue to believe, as have my predecessors, that unrestricted dissemination of law enforcement files would prejudice the cause of effective law enforcement and, because the reasons for the policy of confidentiality are as sound and fundamental to the administration of justice today as they

<sup>224</sup> 510 F.Supp. 112 (D.D.C. 1981).

<sup>225</sup> *Id.* at 114.

<sup>226</sup> *Id.* at 115 (citing *S.E.C. v. Dresser Indus.*, 628 F.2d 1368, 1382 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 993 (1980); *United States v. Stanford*, 589 F.2d 285, 291 n.6 (7<sup>th</sup> Cir. 1978), *cert. denied*, 440 U.S. 983 (1980); *Davis v. Romney*, 55 F.R.D. 337, 341-42 (E.D. Pa. 1972)).

<sup>227</sup> *See, e.g., In re Grand Jury Investigations of Uranium Industry*, 1979 WL 1661 (D.D.C. 1979) (holding that a subcommittee was entitled to disclosure of certain financial and other documents presented to the grand jury including DOJ analyses, memoranda, and recommendations); *In re Senate Banking Committee Hearings*, 19 F.R.D. 410 (N.D. Ill. 1956).

<sup>228</sup> 40 OP. ATTY. GEN. 45 (1941).

<sup>229</sup> *Id.* at 46-47.

were forty years ago, I see no reason to depart from the consistent position of previous presidents and attorney generals.<sup>230</sup>

Acceding to congressional investigation demands, the Attorney General asserted, would make Congress “in a sense, a partner in the investigation” raising “ a substantial danger that congressional pressures will influence the course of the investigation.” This policy is said to be “premised in part on the fact that the Constitution vests in the President and his subordinates the responsibility to ‘Take Care that the Laws be faithfully executed.’”<sup>231</sup>

Finally, in the 2001-2002 House Government Reform Committee investigation of the FBI misuse of informants, the Department maintained its historic position of withholding internal deliberative prosecutorial documents until just weeks before its eventual abandonment. In a February 1, 2002, letter to Chairman Burton, the DOJ Assistant Attorney General for Legislative Affairs explained:

[the Department of Justice’s] particular concern in the current controversy pertains to the narrow and especially sensitive categories of advice memoranda to the Attorney General and the deliberative documents making recommendations regarding whether or not to bring criminal charges against individuals. We believe that the public interest in avoiding the polarization of the criminal justice process required greater protection of those documents which, in turn, influences the accommodation process. This is not an “inflexible position,” but rather a statement of a principled interest in ensuring the integrity of prosecutorial decision-making.<sup>232</sup>

A review of the case law in this area suggests that the courts have recognized the potentially prejudicial effect congressional hearings can have on pending cases.<sup>233</sup> While not questioning the prerogatives of Congress with respect to oversight and investigation, the cases pose a political choice for Congress. On one hand, congressionally generated publicity may result in harming the prosecutorial effort of the Executive. Conversely, access to information under secure conditions can fulfill the congressional power of investigation and at the same time need not be inconsistent with the authority of the executive to pursue its case. Although powerful arguments may be made on both sides, the decision to pursue a congressional investigation of pending civil or criminal matters remains a choice that is solely within Congress’ discretion to make, irrespective of the consequences. As the Iran-Contra Independent Counsel observed “[t]he 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.”<sup>234</sup>

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<sup>230</sup> Letter to Hon. John D. Dingell Chairman, House Subcommittee on Oversight and Investigation, Committee on Energy and Commerce, from Attorney General William French Smith, dated November 30, 1982, *reprinted in* H.Rept. No. 97-968, 97<sup>th</sup> Cong., 37-38 (1983).

<sup>231</sup> *Id.*

<sup>232</sup> Hearings, “ Investigation Into Allegations of Justice Department Misconduct In New England-Volume I,” House Comm. on Government Reform, 107<sup>th</sup> Cong. 520-556, 562-604 (May 3, December 13, 2001; February 6, 2002).

<sup>233</sup> See CRS Report RL34197, *Congressional Investigations of the Department of Justice, 1920-2007: History, Law, and Practice*, by Morton Rosenberg at 16-18 (available upon request).

<sup>234</sup> Lawrence E. Walsh, *The Independent Counsel and the Separation of Powers*, 25 HOUS. L. REV. 1, 9 (1988).

## Access to Classified Material

The standards for classifying and declassifying information are contained in Executive Order 13526 and were adopted by President Obama on December 29, 2009.<sup>235</sup> These standards provide that the President, Vice President, agency heads, and any other officials designated by the President may classify information upon a determination that the unauthorized disclosure of such information could reasonably be expected to damage national security.<sup>236</sup> Such information must be owned by, produced by, or under the control of the federal government, and must concern one of the following areas delineated by the Executive Order.<sup>237</sup>

Information is classified at one of three levels based on the amount of danger that its unauthorized disclosure could reasonably be expected to cause to national security.<sup>238</sup> Information is classified as “Top Secret” if its unauthorized disclosure could reasonably be expected to cause “exceptionally grave damage” to national security. The standard for “Secret” information is “serious damage” to national security, while for “confidential” information the standard is “damage” to national security. Significantly, for each level, the original classifying officer must identify or describe the specific danger potentially presented by the information’s disclosure.<sup>239</sup> The officer who originally classifies the information establishes a date for declassification based upon the expected duration of the information’s sensitivity. If the office cannot set an earlier declassification date, then the information must be marked for declassification in 10 years’ time or 25 years, depending on the sensitivity of the information.<sup>240</sup> The deadline for declassification can be extended if the threat to national security still exists.<sup>241</sup>

Access to classified information is generally limited to those who demonstrate their eligibility to the relevant agency head, sign a nondisclosure agreement, and have a need to know the information.<sup>242</sup> The need-to-know requirement can be waived, however, for former Presidents and Vice Presidents, historical researchers, and former policy-making officials who were appointed by the President or Vice President.<sup>243</sup> The information being accessed may not be removed from the controlling agency’s premises without permission. Each agency is required to establish systems for controlling the distribution of classified information.<sup>244</sup>

<sup>235</sup> Exec. Order No. 13526, 75 FED. REG. 707 (January 5, 2010).

<sup>236</sup> *Id.* at § 1.3. The unauthorized disclosure of foreign government information is presumed to damage national security. *Id.* at § 1.1(b).

<sup>237</sup> *Id.* at § 1.4. The areas are as follows: military plans, weapons systems, or operations; foreign government information; intelligence activities, intelligence sources/methods, cryptology; foreign relations or foreign activities of the United States, including confidential sources; scientific, technological, or economic matters relating to national security; federal programs for safeguarding nuclear materials or facilities; vulnerabilities or capabilities of national security systems; or weapons of mass destruction. *Id.* In addition, when classified information which is incorporated, paraphrased, restated, or generated in a new form, that new form must be classified at the same level as the original. *Id.* at §§ 2.1 - 2.2.

<sup>238</sup> *Id.* at § 1.2.

<sup>239</sup> *Id.* Classifying authorities are specifically prohibited from classifying information for reasons other than protecting national security, such as to conceal violations of law or avoid embarrassment. *Id.* at § 1.7(a).

<sup>240</sup> *Id.* at § 1.5.

<sup>241</sup> *Id.* at § 1.5(c).

<sup>242</sup> *Id.* at § 4.1.

<sup>243</sup> *Id.* at § 4.4.

<sup>244</sup> *Id.* at § 4.2.

The Executive Order does not contain any instructions regarding disclosures to Congress or its committees of jurisdiction. Members of Congress and federal judges are considered to have the need to know and access to any classified material, regardless of level of classification, based on their election/appointment to constitutional office. Congressional aides, support staff, and other legislative branch employees, however, do not automatically have such access and, therefore, must go through the necessary security clearance process prior to being permitted to review such information. The Executive Order's silence with respect to disclosure to Congress, combined with the absence of any other law restricting congressional access to classified material, leads to the conclusion that mere classification cannot be used as a legal basis to withhold information from Congress. That said, practical and political concerns with respect to controlled access, secure storage, and public disclosure may provide persuasive rationales for withholding or limiting congressional access. Committees and subcommittees have wide discretion to negotiate with the Administration regarding these issues. For example, an investigating committee or subcommittee may choose to agree to review documents at an Executive Branch secure facility, permit redactions of certain information such as "sources and methods," limit the ability of staff to review certain material, and/or opt to hold non-public meetings, briefings, and hearings where classified information will be discussed. None of these measures are legally required, but all are within the investigating entity's discretion and may assist in facilitating the disclosure of materials sought during the investigation.

### *Judicial Precedent Involving Classified Materials*

Though there have been numerous notable congressional investigations of programs and activities that have involved classified information,<sup>245</sup> it appears that only one dispute reached the courts. The investigation that gave rise to the judicial dispute involved allegations of improper domestic intelligence gathering, foreign intelligence gathering, and the wiretapping of telephone communications without a warrant. In June of 1976, subpoenas were issued to the American Telephone and Telegraph Company (AT&T) by the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce. The Subcommittee was seeking copies of "all national security request letters sent to AT&T and its subsidiaries by the [Federal Bureau of Investigation] FBI as well as records of such taps prior to the time when the practice of sending such letters was initiated."<sup>246</sup> Before AT&T could comply with the request, the DOJ and the Subcommittee's Chairman, Representative John Moss, entered into negotiations seeking to reach an alternate agreement which would prevent AT&T from having to turn over all of its records.<sup>247</sup> When these negotiations broke down, the DOJ sought an injunction prohibiting AT&T from complying with the Subcommittee's subpoenas. According to the court, the DOJ based its claim on the "the damage to the national interest from the centralization and possible disclosure outside of Congress, of information identifying the targets of all foreign intelligence surveillance since 1969."<sup>248</sup> The District Court for the District of Columbia applied a balancing test between the competing Executive and Legislative Branch authorities with respect to the

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<sup>245</sup> See, e.g., S. Rep. No. 755, Books 1-3, 94<sup>th</sup> Cong. (1976); Intelligence Activities, S. Res. 21: Hearings Before the Senate Select Comm. to Study Governmental Operations with Respect to Intelligence Activities, vols. 1-6, 94<sup>th</sup> Cong. (1975); FBI Oversight: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. of the Judiciary, parts 1-3, 94<sup>th</sup> Cong. (1975-1976), parts 1-2, 95<sup>th</sup> Cong. (1978).

<sup>246</sup> *United States v. AT&T*, 551 F.2d 384, 385 (D.C. Cir. 1976) [hereinafter AT&T I].

<sup>247</sup> *Id.* at 386. The precise details of the delicate negotiations between the DOJ and the Subcommittee are explained by the court, and, therefore, will not be recounted here. See *id.* at 386-88.

<sup>248</sup> *Id.* at 388.

issues presented. That court concluded that the alternative offered by the President met most of the Subcommittee's needs. The court, however, deferred to the "final determination" of the President that execution of the subpoena "would involve unacceptable risks of disclosure of extremely sensitive foreign intelligence and counterintelligence information and would be detrimental to the national defense and foreign policy of the United States" and issued the injunction.<sup>249</sup>

On appeal, the Court of Appeals for the District of Columbia Circuit (D.C. Circuit) first dismissed several prudential concerns. Specifically, the court considered the doctrines of mootness, political question, and standing, determining that none of them prevented the court from reaching the merits of the injunction.<sup>250</sup> Next, the court very carefully addressed the claims of absolute rights asserted by both Congress and the Executive Branch. Relying on both *Eastland v. United States Servicemen's Fund*,<sup>251</sup> and *United States v. Nixon*,<sup>252</sup> 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 asserted by a coordinate branch of government."<sup>253</sup> Turning to the Executive Branch's claims of absolute control over national security information, the court noted 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."<sup>254</sup> Given the sensitivity of the constitutional balancing that the court was faced with, combined with the fact that the parties had nearly reached an out-of-court settlement, the court expressly declined to rule on the merits of the injunction. Rather, it remanded the case to the district court to modify the injunction to exclude information for which no claim of national security had been made.<sup>255</sup> Moreover, the court directed the parties to continue negotiations and report to the district court on their progress.<sup>256</sup>

After continued negotiations, which focused primarily on access to un-redacted DOJ memoranda, the parties reached an impasse and found themselves back before the D.C. Circuit.<sup>257</sup> Again, the court was faced with a dispute between two assertions of absolute constitutional authority. On one hand, the Executive Branch asserted absolute discretion with respect to national security materials. The court again rejected this claim stating that:

the executive would have it that the Constitution confers on the executive absolute discretion in the area of national security. This does not stand up. While the Constitution assigns to the President a number of powers relating to national security, including the function of commander in chief and the power to make treaties and appoint Ambassadors, it confers

<sup>249</sup> *United States v. AT&T & Moss*, 419 F.Supp. 454, 458-461 (D.D.C.1976).

<sup>250</sup> See *AT&T I*, 551 F.3d at 390-91.

<sup>251</sup> 421 U.S. 491 (1975).

<sup>252</sup> 418 U.S. 683 (1974).

<sup>253</sup> *Id.* at 392 (citing *United States v. Nixon*, 418 U.S. 683, 706 (1974)).

<sup>254</sup> *Id.* (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) & *Chicago & Southern Air Lines v. Waterman Steamship Corp.*, 333 U.S. 103 (1948)).

<sup>255</sup> *Id.* at 395 (stating that "[w]e direct the District Court to modify the injunction to exclude request letters pertaining to taps classified by the FBI as domestic, since there was no contention by the Executive, nor finding by the District Court, of undue risk to the national security from transmission of these letters to the Subcommittee.").

<sup>256</sup> *Id.*

<sup>257</sup> See *United States v. AT&T*, 567 F.2d 121, 124-25 (D.C. Cir. 1977) (detailing the extensive negotiations between the DOJ and the Subcommittee since the court last heard from the parties) [hereinafter *AT&T II*].

upon Congress other powers equally inseparable from the national security, such as the powers to declare war, raise and support armed forces and, in the case of the Senate, consent to treaties and the appointment of ambassadors.<sup>258</sup>

On the other hand, Congress, relying on the Speech or Debate Clause,<sup>259</sup> asserted that judicial interference with its investigations was constitutionally prohibited. The appeals court, adhering to Supreme Court precedent, rejected this claim as well, holding that:

the [Speech or Debate] Clause does not and was not intended to immunize congressional investigatory actions from judicial review. Congress'[s] investigatory power is not, itself, absolute. And the fortuity that documents sought by a congressional subpoena are not in the hands of a party claiming injury from the subpoena should not immunize that subpoena from challenge by that party.<sup>260</sup>

Like its previous decision, the court, rather than ruling on the merits of the constitutional conflict, attempted to fashion a compromise resolution that would force the parties back to the negotiating table, or at least allow the district court to play a role in mediating the dispute. It allowed the DOJ to limit the sample size of the unedited memoranda and prohibited the committee staff from removing its notes from the FBI's possession.<sup>261</sup> In a situation where inaccuracy or deception was alleged by the Subcommittee, the materials were to be forwarded to the district court for *in camera* review and any remedial action the court found necessary.<sup>262</sup> In addition, while the Attorney General was afforded the right to employ a substitution procedure for the most sensitive documents, the substitutions would have to be approved by the district court based on a showing of "the accuracy and fairness of the edited memorandum, and the extraordinary sensitivity of the contents of the original memorandum to the national security."<sup>263</sup>

In the end, the court in *AT&T* never ruled on the merits of the dispute and never resolved the constitutional conflict between the branches. At most, *AT&T* stands for the proposition that neither claims of executive control over national security documents, nor congressional assertions of access are absolute. Instead, both claims are qualified and, therefore, subject to potential judicial review, but only after every attempt to resolve the differences between the branches themselves has been exhausted. In addition, *AT&T* provides support for the proposition that third-party subpoenas—such as ones to telecommunications companies—can be challenged in federal court and are not subject to the constitutional protection provided by the Speech or Debate Clause.

### **Access to Sensitive But Unclassified Materials (SBU, SSI, FOUO, etc)**

In addition to encountering classified national security materials, committees performing investigations and oversight of various executive branch agencies may also frequently require access to information and documents that are "sensitive" but do not rise to the level of being

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<sup>258</sup> *AT&T II*, 567 F.2d at 128.

<sup>259</sup> U.S. CONST. Art. 1, § 6, cl. 2.

<sup>260</sup> *AT&T II*, 567 F.2d at 129 (citing *Barenblatt v. United States*, 360 U.S. 109, 111-12 (1959); *Eastland*, 421 U.S. at 513).

<sup>261</sup> *Id.* at 131-32.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.* at 132.

classified for national security purposes pursuant to Executive Order 13526. This general category of “sensitive but unclassified” (SBU) information can present access issues for congressional committees.

“Sensitive but unclassified” material can take numerous forms, some categories are statutorily authorized, while others are creations of the agency that authored or is holding the requested information. Either way, the fact that information is “sensitive” does not provide a legal basis for withholding it from duly authorized jurisdictional committees of Congress. However, there may be legitimate political and policy reasons that an agency’s classification of information as “sensitive” be afforded due deference.

One example of a statutorily authorized SBU category is “sensitive security information” (SSI). As ultimately codified by the Homeland Security Act of 2002, the Department of Homeland Security (DHS), and specifically the Director of the Transportation Security Administration, has the authority to:

prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security under authority of the Aviation and Transportation Security Act (P.L. 107-71) or under chapter 449 of this title if the Under Secretary decides that disclosing the information would— (A) be an unwarranted invasion of personal privacy; (B) reveal a trade secret or privileged or confidential commercial or financial information; or (C) be detrimental to the security of transportation.<sup>264</sup>

With respect to Congress, the SSI statute expressly states that the general authority provided to DHS to withhold information from the public “does not authorize information to be withheld from a committee of Congress authorized to have the information.”<sup>265</sup> In addition, the SSI regulations also appear to insulate congressional committees and their staffs from any sanctions or penalty from the receipt and disclosure of SSI. Specifically, the SSI regulations contain a provision defining those persons who are “covered persons” and, thus, subject to the regulations. A close reading of the definition of “covered person” indicates that it does not include members of Congress, committees, or congressional staff.<sup>266</sup> Moreover, the regulations specifically provide, as directed by the underlying statute, that “[n]othing in this part precludes TSA or the Coast Guard from disclosing SSI to a committee of Congress authorized to have the information or to the Comptroller General, or to any authorized representative of the Comptroller General.”<sup>267</sup>

While SSI may be a statutorily authorized category of SBU information, many agencies have developed their own internal information protection regimes that may be cited to prevent information from being disclosed to Congress during legitimate oversight and investigations. One example of such an agency created regime is “for official use only” (FOUO). According to a DHS Management Directive, the FOUO classification<sup>268</sup> distinguishes between documents marked

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<sup>264</sup> See Homeland Security Act of 2002, P.L. 107-296, § 1601(b) 116 Stat. 2135, 2314 (2002) (codified as amended at 49 U.S.C. § 114(r)(1) (2006)) [hereinafter Homeland Security Act of 2002]; see also CRS Report RL33670, *Protection of Security-Related Information*, by Gina Stevens and Todd B. Tatelman (providing a more complete discussion of the background and history of the SSI statute).

<sup>265</sup> Homeland Security Act of 2002, *supra* note 252 at § 1601(b)(2) (codified at 49 U.S.C. § 114(r)(2) (2006)).

<sup>266</sup> See 49 C.F.R. § 1520.7 (2010) (providing 13 specific categories of “covered persons”).

<sup>267</sup> 49 C.F.R. § 1520.15(c) (2010).

<sup>268</sup> Department of Homeland Security, Management Directive System MD No. 11042.1, Safeguarding Sensitive but Unclassified (For Official Use Only) Information (2005).



FOUO and other information that may be protected from public disclosure under different designations. Specifically, the Directive defines FOUO as “not to be considered classified information.”<sup>269</sup> Additionally, the Directive states that information marked FOUO “is not automatically exempt from disclosure under the provisions of the Freedom of Information Act.”<sup>270</sup> Moreover, the Directive makes clear that FOUO information is not intended to be withheld from other governmental entities. According to the Directive, information marked FOUO “may be shared with other agencies, federal, state, tribal, or local government and law enforcement officials.”<sup>271</sup> Such a definition appears to include Congress among the entities to which the information can be disclosed and, therefore, congressional committees and subcommittees of jurisdiction are included as well. Such inclusion is consistent with Congress’s broad constitutionally-based authority to obtain information from executive agencies.

### Statutory Limitations on Congressional Access to Information

Although generally Congress’s powers with respect to oversight are broad, there are very specific types of information that Congress has, by statute, limited its own ability to access. Arguably, the quintessential example of such self-limiting action involves Congress’s authority to access an individual citizen’s tax return information. Pursuant to 26 U.S.C. § 6103(f), only the House Committee on Ways and Means, Senate Committee on Finance, and the Joint Committee on Taxation are permitted access to individual tax returns.<sup>272</sup> Returns are to be submitted to the requesting Committee in a manner that protects the privacy of the individual. In the event that information identifying, either directly or indirectly, any tax filer is requested, it may only be “when sitting in closed executive session unless such taxpayer otherwise consents in writing to such disclosure.”<sup>273</sup> Should any other committee of the House or Senate require such information, the committee must first obtain a resolution of the House or Senate (in the case of other joint or special committees a concurrent resolution) specifying the purpose for which the information is to be furnished and that the requested information can not be reasonably obtained from any other source.<sup>274</sup> The information is to be provided only when the requesting committee is sitting in closed executive session.<sup>275</sup>

Another commonly cited statutory restriction on its oversight prerogatives involves foreign intelligence activities; specifically, the provisions of 50 U.S.C. §§ 413, 413a and 413b. Generally, § 413 governs congressional oversight of “intelligence activities”<sup>276</sup> and requires that the

<sup>269</sup> *Id.* at ¶ 4.

<sup>270</sup> *Id.* at ¶ 6(a)(4).

<sup>271</sup> *Id.* at ¶ 6(h)(6).

<sup>272</sup> 26 U.S.C. § 6103(f)(1) (2006).

<sup>273</sup> *Id.*

<sup>274</sup> *Id.* at § 6103(f)(3).

<sup>275</sup> *Id.*

<sup>276</sup> While it appears that the term “intelligence activities” is defined by statute to include “covert actions” and “financial intelligence activities,” the phrase “intelligence activities” is not further defined by law. *See* 50 U.S.C. § 413(f) (2006). The phrase, however, is defined by Executive Order 12333 as “all activities that agencies within the Intelligence Community are authorized to conduct pursuant to this Order.” Exec. Order 12333, § 3.4(e), 46 Fed. Reg. 59,941 (Dec. 4, 1981). Moreover, in report language accompanying the FY1991 Intelligence Authorization Act, the SSCI described intelligence activities as consisting of “... the gathering of information ...,” while characterizing covert action as “... an instrument of foreign policy ... that goes beyond information gathering.” *See* Intelligence Authorization Act, Fiscal Year 1991, P.L. 102-88, 105 Stat. 429 (1991); *see also* S.Rept. No. 102-85, 102<sup>nd</sup> Cong., 33-34 (1991). More detailed definitions of intelligence activities and “intelligence-related activities” are contained in the Senate resolution and the (continued...)

President “shall ensure that the congressional intelligence committees are kept fully and currently informed of the intelligence activities of the United States, including any significant anticipated intelligence activity as required by this subchapter.”<sup>277</sup> Similarly, § 413a imposes a duty on the Director of National Intelligence (DNI) to, “with due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters,” keep the congressional intelligence committees “fully and currently informed of all intelligence activities, other than a covert action (as defined in § 413b(e) of this title), which are the responsibility of, are engaged in by, or are carried out for or on behalf of, any department, agency, or entity of the United States Government....”<sup>278</sup> Finally, § 413b deals with the conduct of “covert actions” and, like its sister provisions requires the DNI to keep the congressional intelligence committees “fully and currently informed of all covert actions which are the responsibility of, are engaged in by, or are carried out for or on behalf of, any department, agency, or entity of the United States Government ....”<sup>279</sup>

These self-imposed restrictions and limitations on congressional oversight powers raise the question of whether statutes that generally prohibit public disclosure of documents and other information are also restrictions on congressional access. The federal courts, when considering Congress’s broad investigatory power to obtain documents containing confidential or other proprietary information, have expressly held that executive agencies and private parties may not deny Congress access to such documents, even if they may contain information whose disclosure to the public is otherwise statutorily barred.<sup>280</sup> According to the courts, to the extent that Congress seeks to enact a self-imposed bar to its ability to access information, it cannot do so by implication; rather such an intent must be made expressly and unambiguously. Specifically, courts have held that release of information to a congressional requestor is not considered to be disclosure to the general public and 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.<sup>281</sup> Moreover, it would appear that courts may not prevent congressional disclosure at least when such disclosure would serve a valid legislative purpose.<sup>282</sup>

From time to time the President, the executive branch, and private parties have argued that certain statutes of general applicability prevent the disclosure of confidential or sensitive information to congressional committees. For example, a frequently cited statute to justify such non-disclosure is the Trade Secrets Act, a criminal provision that generally prohibits the disclosure of trade secrets and other confidential business information by a federal officer or employee “unless otherwise authorized by law.”<sup>283</sup> A review of the Trade Secrets Act’s legislative history, however, provides

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(...continued)

House Rule which established the SSCI and the House Permanent Select Committee on Intelligence (HPSCI), respectively. See S. Res. 400, 94<sup>th</sup> Cong., § 14(a); see also House Rule X(11).

<sup>277</sup> 50 U.S.C. § 413(a)(1) (2006).

<sup>278</sup> 50 U.S.C. § 413a(a)(1) (2006).

<sup>279</sup> 50 U.S.C. § 413b(b)(1) (2006).

<sup>280</sup> 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 Co., Inc. v. F.T.C.*, 548 F.2d 977, 979 (D.C. Cir. 1976).

<sup>281</sup> See *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 v. CIA*, 514 F.Supp. 836, 849-51 (S.D.N.Y. 1981).

<sup>282</sup> See *Doe v. McMillan*, 412 U.S. 306 (1973); see also *Owens-Corning Fiberglass Corp.* 626 F.2d at 970.

<sup>283</sup> 18 U.S.C. § 1905 (2006).

no indication that it was ever intended to apply to Congress, its employees, or any legislative branch agency or its employees.<sup>284</sup> Moreover, as a matter of statutory construction it would appear to be unusual for Congress to subject, *sub silentio*, its staff to criminal sanctions for such disclosures, especially given its well-established oversight and investigative prerogatives, and its constitutional privilege with respect to Speech or Debate.<sup>285</sup> As such, there appears to be little doubt that disclosure to Congress of confidential information covered by the Trade Secrets Act would be deemed to be “authorized by law.” Similar arguments are likely to be advanced with respect to statutes expressly prohibiting the disclosure of information to the public or limiting disclosure to all but specific entities or government agencies, but are silent with respect to disclosures to Congress. In these cases, the target of a congressional inquiry may attempt to use the statute’s prohibition to avoid cooperation. Potential solutions are negotiations with the target, accommodations in the form of accepted redactions or other means of providing the information, or a so-called “friendly subpoena,” which may provide the targeted entity or individual with the necessary legal cover to assist the committee with its inquiry. Each of these and many other prospective solutions are at the discretion of the committee.

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

The role of members of the minority in the investigatory oversight process is governed by the rules of each house and its committees. While minority members are specifically accorded some rights (e.g., in the House of Representatives, whenever a hearing is conducted on any measure or matter, the minority may, upon the written request of a majority of the minority members to the chairman before the completion of the hearing, call witnesses selected by the minority, and presumably request documents<sup>286</sup>), no House or committee rules authorize either ranking minority members or individual members on their own to institute official committee investigations, hold hearings, or issue subpoenas. Individual members may seek the voluntary cooperation of agency officials or private persons. But no judicial precedent has directly recognized a right in an individual member, other than the chair of a committee,<sup>287</sup> to exercise the authority of a committee in the context of oversight without the permission of a majority of the committee or its chair. Moreover, in *Leach v. Resolution Trust Corporation*,<sup>288</sup> a federal district court dismissed the attempt of the then-ranking minority member of the House Banking [now Financial Services] Committee to compel disclosure of documents from two agencies under the Freedom of Information Act and the Administrative Procedure Act. The court held that the case was one “in which a congressional plaintiff’s dispute is primarily with his or her fellow legislators” and that the ranking minority member’s “complaint derives solely from his failure to persuade his

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<sup>284</sup> See *CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1144-52 (D.C. Cir. 1987) (discussing in depth the legislative history of the Trade Secrets Act).

<sup>285</sup> U.S. CONST. Art. 1, § 6, cl. 1.

<sup>286</sup> House Rule XI 2(j)(1); see also House Banking Committee Rule IV(4).

<sup>287</sup> *Ashland Oil Co., Inc., v. FTC*, 548 F. 2d 977, 979-80 (D.C. Cir. 1976), *affirming* 409 F. Supp. 297 (D.D. C. 1976); see also *Exxon v. Federal Trade Commission*, 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 members ...”); and *In re Beef Industry Antitrust Litigation*, 589 F. 2d 786, 791 (5<sup>th</sup> Cir. 1979)(refusing to permit two Congressmen from intervening in private litigation because they “failed to obtain a House Resolution or any similar authority before they sought to intervene.”)

<sup>288</sup> 860 F. Supp. 868 (D.D.C. 1994).

colleagues to authorize his request for the documents in question, and that Plaintiff thus has a clear ‘collegial remedy’ capable of affording him substantial relief.”<sup>289</sup>

That court also suggested that the possibility that a “collegial remedy” for the minority exists already, pointing to 5 U.S.C. § 2954, under which small groups of members of the House Government Reform and Senate Governmental Affairs Committees can request information from executive agencies without the need of formal committee action.<sup>290</sup> However, the precise scope and efficacy of this provision is uncertain and a recent federal district court opinion casts doubt on its enforceability by a court.

5 U.S.C. § 2954 is derived from § 2 of the Act of May 29, 1928,<sup>291</sup> which originally referred not to the current committees generally overseeing government agency operations but their predecessors, the House and Senate Committees on Expenditures in the Executive Departments. The principal purpose of the 1928 act, embodied in its first section, was to repeal legislation that required the submission to Congress of some 128 reports, many of which had become obsolete in part, and which, in any event, were deemed at the time to have no value, serve no useful purpose, and were not printed by the House of Representatives.<sup>292</sup>

Section 2 of the 1928 Act contains the language that has been codified in 5 U.S.C. § 2954. The legislative history, is somewhat mixed on the purpose of that language. The Senate report indicated a limited purpose; namely, to make “it possible to require any report discontinued by the language of this bill to be resubmitted to either House upon its necessity becoming evident to the membership of either body.”<sup>293</sup> The House report agreed on that point, but added the following: “If any information is desired by any Member or Committee upon a particular subject that information can be better secured by a request made by an individual Member or Committee, so framed as to bring out the special information desired.”<sup>294</sup>

It is uncertain, then, how closely 5 U.S.C. § 2954 is tied to the 128 reports abolished by section 1 of the 1928 legislation.<sup>295</sup> Moreover, the provision lacks an explicit enforcement component. Agency refusals to comply would not be subject to existing contempt processes, and the outcome of a civil suit to compel production on the basis of the provision is problematic despite the *Leach* court’s suggestion. Further, the provision applies only to the named committees; thus members of all other committees would still face the *Leach* problem. Finally, even members of the named committees are still likely to have to persuade a court that their claim is more than an intramural

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<sup>289</sup> *Id.* at 874-76.

<sup>290</sup> *Id.* at 876 note 7. 5 U.S.C. § 2954 provides: “An Executive agency, on request of the Committee on Government [Reform] of the House of Representatives, or of any seven members thereof, or on request of the Committee on Government Operations of the Senate, or any five members thereof, shall submit any information requested of it relating to any matter within the jurisdiction of the committee.”

<sup>291</sup> 45 Stat. 996.

<sup>292</sup> H.R. 1757, 70<sup>th</sup> Cong., pp. 2-3 (1928). A study of the Bureau of Efficiency had recommended their elimination. H.R. 1757, at p. 2; S.Rept. 1320, 70<sup>th</sup> Cong., p. 1 (1928).

<sup>293</sup> S.Rept. 1320, *supra*, at 4.

<sup>294</sup> H.R. 1757, *supra*, at 258; *see also* 69 CONG. REC. 9413-17, 10613-16 (1928) (House and Senate floor debates).

<sup>295</sup> 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.” P.L. 89-544, § 7(a).

dispute, that a court 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 v. Byrd*.<sup>296</sup>

The first attempt to secure court enforcement of a document demand under § 2954 was brought in 2001 in a federal district court.<sup>297</sup> That case involved a request of 16 minority party members of the House Government Reform Committee for information from the Secretary of Commerce for data concerning the 2000 census. The congressional plaintiffs sought declaratory and injunctive relief, arguing that the plain language of § 2954 unambiguously directs agency compliance with information requests and that while resort to the legislative history of the provision is not necessary in such clear language situations, that history is supportive. In addition, the plaintiffs argued that they were entitled to judicial relief because of the agency's direct and particularized rejection of an entitlement specifically granted to them by law. The government argued that because the case had arisen out of a political dispute between Congress and the Executive concerning access to information, the court should refrain from hearing the case in accordance with the doctrine of equitable discretion. Alternatively, the government argued that § 2954 should be construed, in light of its legislative history, and to avoid doubts about its constitutionality, as preserving Congress' access to the information formerly contained in the reports abolished by section 1 of the 1928 Act, but not as guaranteeing an unqualified right of access to information possessed by the executive branch. The district court rejected these arguments and ordered release of the requested census data. The government thereafter moved for reconsideration, raising for the first time the questions whether plaintiffs, as individual legislators, lacked standing under the Supreme Court's ruling in *Raines v. Byrd* to sue for institutional injuries and whether the plaintiffs had a right of action under § 2954, the Administrative Procedure Act, or the Mandamus statute to bring suit against the Executive Branch for access to information. The court declined to consider these arguments on the ground that the government could have presented them in support of its original motion to dismiss but did not do so.<sup>298</sup>

On appeal to the Ninth Circuit, the case was argued together with a separate Freedom of Information Act (FOIA) suit for the same census data brought by two Washington State legislators. 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 plaintiffs in the FOIA case on October 8, 2002,<sup>299</sup> and on December 6, 2002, declared that the action in *Waxman* was mooted by its FOIA decision and issued an order reversing and vacating the district court's decision, and remanding the case to the district court with instructions to dismiss.<sup>300</sup> 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 vacate and dismiss.

A second attempt to secure judicial enforcement of a § 2954 document demand in the same district court was rejected. In *Waxman v. Thompson*,<sup>301</sup> 19 members of the House Government Reform Committee brought suit to compel release by the Department of Health and Human Services (HHS) of cost estimates prepared by its Office of Actuary during congressional

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<sup>296</sup> 521 U.S. 811 (1997).

<sup>297</sup> *Waxman, et al. v. Evans*, Civ. Action No. 01-14530-LGB (AJWx) (C.D. Calif, May 21, 2001).

<sup>298</sup> *Waxman v. Evans*, Case No. CV 01-14530-LGB (AJW) at 3.

<sup>299</sup> *Carter v. U.S. Department of Commerce*, 307 F. 3d 1084 (9<sup>th</sup> Cir. 2002).

<sup>300</sup> *Waxman v. Evans*, No. 02-55825 (9<sup>th</sup> Cir. Dec. 6, 2002).

<sup>301</sup> No. CV-04-3467 MMM (Manx) (C.D. Calif., May 17, 2004).

consideration of Medicare reform legislation in 2003. In addition to asserting a right of access under § 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 government opposed the claims, raising the issues of standing under *Raines v. Byrd*, jurisdiction of the court to enforce either statute, and the doctrine of equitable discretion.

On July 24, 2006, the district court, applying the guiding principles established by the Supreme Court in the 1997 decision in *Raines v. Byrd*,<sup>302</sup> ruled that the congressional plaintiffs did not have standing to sue. *Raines* involved a challenge to the constitutionality of the Line-Item Veto Act of 1996 by six members of Congress who had voted against it, alleging that it unconstitutionally diminished the member’s voting power by authorizing the President to “cancel” certain spending and tax measures after he signed them into law, without complying with the requirements of bicameral passage and presentment to the President. In *Raines*, the Supreme Court held that the member plaintiffs lacked standing because their complaint did not establish that they had suffered an injury that was personal, particularized, and concrete. The Court distinguished between a personal injury to a private right and an institutional or official one, and was of the view that a congressional plaintiff may have standing in a suit against the executive if it is alleged that the plaintiff has suffered either a personal injury (e.g., loss of member’s seat) on an institutional one that is not “abstract or widely dispersed,” but amounts to member vote nullification. The Court concluded that the plaintiffs in *Raines* had alleged an institutional injury that damaged all members (a reduction of legislative and political power), rather than a personal injury to a private right, which would be more particularized and concrete.<sup>303</sup>

Bound by the Supreme Court’s precedent, the district court concluded that when the Secretary refused to produce the documents requested pursuant to § 2954, plaintiffs did not suffer a personal injury as that term is defined by *Raines*. 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. Such an injury is precisely of the type that, under *Raines*, deprives individual legislators of standing to sue. Quoting *Raines*, the court noted that the plaintiffs were “not ... singled out for specifically unfavorable treatment as opposed to other Members of their respective bodies,” and cannot “claim that they have been deprived of something to which they are *reasonably* 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 trustees of his constituents, not as prerogatives of personal power.” A violation of § 2954, the court concluded, therefore raises no personal or particularized injury to the plaintiffs, but at most a type of institutional injury which necessarily damages all members of Congress and both Houses of Congress equally. The plaintiffs’ right to request and receive information from the executive branch pursuant to § 2954 would cease once they were no longer in Congress or no longer a member of the House Committee on Government Reform. The right that is asserted, the court observed, runs with their congressional and committee seats, and is not personal to them. The court also noted that no jurisdictional committee has specifically requested that the documents be produced either by an official request or by a subpoena, nor does the legislative history of the

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<sup>302</sup> 521 U.S. 811 (1997).

<sup>303</sup> See CRS Report R40873, *Congressional Participation in Article III Courts: Jurisdiction and Standing to Sue*, by Todd B. Tatelman.

provision imply an intent to delegate authority to the requisite number of members to seek to enforce its provisions judicially.

The rules of the Senate provide substantially more effective means for individual minority-party members to engage in “self-help” to support oversight objectives than afforded their House counterparts. Senate rules emphasize the rights and prerogatives of individual Senators and, therefore, minority groups of Senators.<sup>304</sup> 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.<sup>305</sup> Senators can use their right to filibuster, or simply the threat of filibuster, to delay or prevent the Senate from engaging in 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. 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. Also, Senate Rule XXVI prohibits the reporting of any measure or matter from a committee unless a majority of the committee is present, another point of possible tactical leverage. Even beyond the potent power to delay, Senators can promote their goals by taking advantage of other parliamentary rights and opportunities that are provided by the Senate’s formal procedures and customary practices, such as are afforded by the processes dealing with floor recognition, committee referrals, and the amending process.

## Specialized Investigations

Oversight at times occurs through specialized, temporary investigations of a specific event or development. These are often dramatic, high profile endeavors, focusing on scandals, alleged abuses of authority, suspected illegal conduct, or other unethical behavior. The stakes are high, possibly even leading to the end of individual careers of high ranking executive officials. Indeed, congressional investigations can induce resignations, firings, and impeachment proceedings and question major policy actions of the executive, as with these notable occasions: the Senate Watergate Committee investigation into the Nixon Administration in the early 1970s; the Church and Pike select committees’ inquiries in the mid-1970s into intelligence agency abuses; the 1981 select committee inquiry into the ABSCAM scandal; the 1987 Iran-contra investigation during the Reagan Administration; the multiple investigations of scandals and alleged misconduct during the Clinton Administration; and the Hurricane Katrina probe in 2005 during the Bush Administration. As a consequence, interest—in Congress, the executive, and the public—is frequently intense and impassioned.

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<sup>304</sup> See CRS Report RL30850, *Minority Rights and Senate Procedures*, by Judy Schneider.

<sup>305</sup> Senate Rules XIX and XXII.

### Prominent Select Investigative Committees

#### Senate Watergate Committee (1973-74), S.Res. 60, 93<sup>rd</sup> Congress, 1<sup>st</sup> session.

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

#### House Select Committee on the Iran-Contra Affair (1987), H.Res. 12, 100<sup>th</sup> Congress, 1<sup>st</sup> session.

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

1. These investigative hearings may be *televised* in the contemporary era, and often result in *extensive news media coverage*.
2. Such investigations may be undertaken by *different organizational arrangements*. These include temporary select committees, standing committees and their subcommittees, specially created subcommittees, or specially commissioned task forces within an existing standing committee.
3. Specially created investigative committees usually have a *short life span* (e.g., six months, one year, or at the longest until the end of a Congress, at which point the panel would have to be reapproved if the inquiry were to continue).
4. The investigative panel often has to *employ additional and special staff*—including investigators, attorneys, auditors, and researchers—because of the added work load and need for specialized expertise in conducting such investigations and in the subject matter. Such staff can be hired under contract from the private sector, transferred from existing congressional offices or committees, transferred from the congressional support agencies, or loaned by executive agencies, including the Federal Bureau of Investigation. The staff would require appropriate security clearances if the inquiry looked into matters of national security.
5. Such special panels have often been vested with investigative authorities not ordinarily available to standing committees. Staff deposition authority is the most commonly given, but given the particular circumstances, special panels have been vested with the authority to obtain tax information, to seek international assistance in information gathering efforts abroad, and to participate in judicial proceedings (see **Table 1**).



Table I. Special Investigative Authorities of Selected Investigating Committees

	Deposition Authority	International Information Gathering Authority	Tax Information Access Authority	Authority to Participate In Judicial Proceedings
<b>Sen. Select Committee on Watergate<sup>a</sup></b>	Member/ Staff	No	No	Yes
<b>Nixon Impeachment Proceedings<sup>b</sup></b>	Member/ Staff	Yes	No	No
<b>Billy Carter Investigation<sup>c</sup></b>	Staff	No	Yes	No
<b>House Assassinations Inquiry<sup>d</sup></b>	Member/ Staff	Yes	No	No
<b>Church Committee<sup>e</sup></b>	Member/ Staff	Yes	No	No
<b>Koreagate<sup>f</sup></b>	Member/ Staff	Letters Rogatory	No	Yes, by special counsel
<b>ABSCAM (House)<sup>g</sup></b>	Member	Letters Rogatory	No	Yes, by special counsel
<b>ABSCAM (Senate)<sup>h</sup></b>	Member/ Staff	No	No	No
<b>Iran-Contra House<sup>i</sup> and Senate<sup>j</sup></b>	Member/ Staff	Letters Rogatory, Commissions, Depositions	Yes	Yes
<b>Judge Hastings Impeachment<sup>k</sup></b>	Staff	No	No	No
<b>Judge Nixon Impeachment<sup>l</sup></b>	Staff	No	No	No
<b>October Surprise<sup>m</sup></b>	Member/ Staff	Letters Rogatory, Commissions, Depositions	No	Yes
<b>Senate Whitewater(I)<sup>n</sup></b>	Staff	No	No	No
<b>Senate Whitewater (II)<sup>o</sup></b>	Staff	Letters Rogatory, Commissions	Yes	No
<b>White House Travel Office<sup>p</sup></b>	Member/ Staff	No	No	No
<b>House Campaign Finance<sup>q</sup></b>	Member/ Staff	Letters Rogatory, Commissions	No	No
<b>Senate Campaign Finance<sup>r</sup></b>	Staff	No	No	No

	Deposition Authority	International Information Gathering Authority	Tax Information Access Authority	Authority to Participate In Judicial Proceedings
<b>Select Committee on National Security Commercial Concerns<sup>s</sup></b>	Member/ Staff	Letters Rogatory, Depositions	Yes	Yes, by House General Counsel
<b>Teamsters Election Investigation<sup>t</sup></b>	Member/ Staff	No	No	No

**Note:** More 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, 105<sup>th</sup> Cong., 1<sup>st</sup> sess. (1998), and CRS Report 95-949, *Staff Depositions in Congressional Investigations*, by Jay R. Shampansky.

- a. S.Res. 60 and S.Res. 194, 93<sup>rd</sup> Cong., (1973).
- b. H.Res. 803, 93<sup>rd</sup> Cong., (1974).
- c. 126 Cong. Rec. 19544-46 (1980) (unanimous consent agreement); S.Res. 495, 96<sup>th</sup> Cong., (1980) (staff deposition authority); S.Res. 496, 96<sup>th</sup> Cong., (1980) (tax access authority).
- d. H.Res. 222, 95<sup>th</sup> Cong., (1974).
- e. S.Res. 21, 94<sup>th</sup> Cong., (1974).
- f. H.Res. 252 and H.Res. 752, 95<sup>th</sup> Cong., (1977).
- g. H.Res. 67, 97<sup>th</sup> Cong., (1981).
- h. S.Res. 350, 97<sup>th</sup> Cong., (1982).
- i. H.Res. 12, 100<sup>th</sup> Cong., (1987).
- j. S.Res. 23, 100<sup>th</sup> Cong., (1987).
- k. H.Res. 320, 100<sup>th</sup> Cong., (1987).
- l. H.Res. 562, 100<sup>th</sup> Cong., (1988).
- m. H.Res. 258, 102<sup>nd</sup> Cong., (1991).
- n. S.Res. 229, 103<sup>rd</sup> Cong., (1994).
- o. S.Res. 120, 104<sup>th</sup> Cong., (1995).
- p. H.Res. 369, 104<sup>th</sup> Cong., (1996).
- q. H.Res. 167, 105<sup>th</sup> Cong., (1997).
- r. S.Res. 54, 105<sup>th</sup> Cong., (1997).
- s. H.Res. 463, 105<sup>th</sup> Cong., (1998).
- t. H.Res. 507, 105<sup>th</sup> Cong., (1998).

## Selected Oversight Techniques

Many oversight techniques are self-explanatory. There are several techniques, however, for which explanation or elaboration may prove helpful for a better understanding of their utility.

## **Determine Laws, Programs, Activities, Functions, Advisory Committees, Agencies, and Departments Within Each Committee's Jurisdiction**

A basic step in oversight preparation is to determine the laws, programs, activities, functions, advisory committees, agencies, and departments within a committee's jurisdiction. This is essential if a committee is to know the full range of its oversight responsibilities. To accomplish this general goal, House and Senate committees might:

1. Prepare a document, as needed, which outlines for each subcommittee of a standing committee the agencies, laws, programs activities, functions, advisory committees, and required agency reports that fall within its jurisdictional purview.
2. Publish, as needed, a compilation of the all the basic statutes in force within the jurisdiction of each subcommittee or for the committee itself if it has no subcommittees.
3. Request the assistance of the various legislative support agencies (the Congressional Budget Office, the Congressional Research Service, or the Government Accountability Office) in identifying the full range of federal programs and activities under a committee's jurisdiction.

## **Orientation and Periodic Review Hearings With Agencies**

1. Oversight hearings (or even "pre-hearings") may be held for the purposes of briefing members and staff on the organization, operations, and programs of an agency, and determining how an agency intends to implement any new legislation. The hearings can also be used as a way to obtain information on the administration, effectiveness, and economy of agency operations and programs.
2. Agency officials can be noticeably influenced by the knowledge and expectation that they will be called before a congressional committee regularly to account for the activities of their agencies.
3. Such hearings benefit the committee by, for example:
  - a. helping committee members keep up-to-date on important administrative developments;
  - b. serving as a forum for exchanging and communicating views on pertinent problems and other relevant matters;
  - c. providing background information which could assist members in making sound legislative and fiscal judgments;
  - d. identifying program areas within each committee's jurisdiction that may be vulnerable to waste, fraud, abuse, or mismanagement; and
  - e. determining whether new laws are needed or whether changes in the administration of existing laws will be sufficient to resolve problems.

4. The ability of committee members during oversight hearings to focus on meaningful issues and to ask penetrating questions will be enhanced if staff have accumulated, organized, and evaluated relevant data, information, and analyses about administrative performance.
  - a. Ideally, each standing committee should regularly monitor the application of laws and implementation of programs within its jurisdiction. A prime objective of the “continuous watchfulness” mandate (Section 136) of the Legislative Reorganization Act of 1946 is to encourage committees to take an active and ongoing role in administrative review and not wait for public revelations of agency and program inadequacies before conducting oversight. As Section 136 states in part: “each standing committee of the Senate and House of Representatives shall exercise continuous watchfulness of the execution by the administrative agencies concerned of any laws, the subject matter of which is within the jurisdiction of such committee.”
  - b. Committee personnel could be assigned to maintain active liaison with appropriate agencies and to record their pertinent findings routinely.
  - c. Information compiled in this fashion will be useful not only for regular oversight hearings, but also for oversight hearings called unexpectedly with little opportunity to conduct an extensive background study.
5. It is important that specific letters be directed by the committee to the agency witnesses so that they will be on notice about what they will have to answer. In this way witnesses will be responsive in providing worthwhile testimony at hearings; testify “to the point” and avoid rambling and/or evasive statements; and restrict their use of this kind of answer to questions: “I didn’t know you wanted that information....”

## **Casework**

An important check against bureaucratic indifference or inefficiency is casework. Typically, Members of Congress hear from individual constituents and communities about problems they are having with various federal agencies and departments. As a House member once said:

Last year, one of my constituents, a 63-year old man who requires kidney dialysis, discovered that he would no longer be receiving Medicare because the Social Security Administration thought he was dead. Like many residents who have problems dealing with the federal bureaucracy, this man contacted my district office and asked for help. Without difficulty, he convinced my staff that he was indeed alive, and we in turn convinced the Social Security Administration to resume sending him benefits.<sup>306</sup>

Casework is important not only in resolving problems that constituents are having with bureaucrats but also in identifying limitations in the law. As a scholar of constituency service explained: “Casework allows ad hoc correction of bureaucratic error, impropriety, and laxity, and can lead a senator or representative to consider changes in laws because of particularly flagrant or persistent problems that casework staff discovered.”<sup>307</sup>

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<sup>306</sup> Lee H. Hamilton, “Constituent Service and Representation,” *The Public Manager*, summer 1992, p. 12.

<sup>307</sup> John R. Johannes, “Constituency Service,” in Donald Bacon, et al., eds., *The Encyclopedia of the United States* (continued...)

## Audits

1. *Periodic auditing* of executive departments is among the strongest techniques of legislative oversight. Properly utilized, the audit enables Congress to hold executive officers to a strict accounting for their use of public funds and the conduct of their administration.
2. *Government auditing* encompasses more than checking and verifying accounts, transactions, and financial statements. Many federal, state, and some foreign audit agencies are moving in the direction pioneered by Government Accountability Office (GAO), the chief audit agency of Congress, of including an evaluation of:
  - a. whether claimed *achievements* are *supported* by adequate and reliable evidence and data and are in compliance with legislatively established objectives; and
  - b. whether resources are being used efficiently, effectively, and economically.
3. In reviewing the agencies' own evaluations, or in undertaking an initial evaluation, auditors are advised by GAO to ask questions such as the following:
  - a. How successful is the program in *accomplishing the intended results*? Could program objectives be achieved at less cost?
  - b. Has agency management clearly defined and promulgated the objectives and goals of the program or activity?
  - c. Have *performance standards been developed*?
  - d. Are *program objectives* sufficiently clear to permit agency management to accomplish effectively the desired program results? Are the objectives of the component parts of the program consistent with overall program objectives?
  - e. Are program costs reasonably commensurate with the benefits achieved?
  - f. *Have alternative programs or approaches been examined*, or should they be examined to determine whether objectives can be achieved more economically?
  - g. Were all studies, such as cost-benefit studies, appropriate for analyzing costs and benefits of alternative approaches?
  - h. Is the program producing benefits or detriments that were not contemplated by Congress when it authorized the program?
  - i. Is the *information furnished* to Congress by the agency *adequate and sufficiently accurate* to permit Congress to monitor program achievements effectively?

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Congress (New York: Simon and Schuster, 1995), p. 544.

- j. Does top management have *the essential and reliable information* necessary for exercising supervision and control and for ascertaining directions or trends?
  - k. Does management have *internal review or audit facilities* adequate for monitoring program operations, identifying program and management problems and weaknesses, and insuring fiscal integrity?
4. In addition to GAO and other governmental audits, Congress may have access to the internal audit reports of agency audit teams.
- a. Internal audit reports are designed to meet the needs of *executive* officials.
  - b. This information is useful in conducting oversight; executive agencies are sometimes reluctant to provide internal audit reports to Congress.
  - c. A large number of governmental and private organizations conduct audits of expenditures. Every major federal agency, for example, has its own statutory Inspector General and each of the 50 states plus hundreds of local governments have their own audit offices. Many government agencies also contract with public accounting firms to perform financial audits. For assistance in finding audit reports or in learning how to commission audit reports, congressional staff might consult with officials at the GAO, which is the auditing arm of Congress.

## **Monitoring the *Federal Register***

1. The Federal Register is published daily, Monday through Friday, except official holidays by the Office of the Federal Register, National Archives and Records Administration. It provides a uniform system for making available to the public regulations and legal notices issued by Federal agencies. These include presidential proclamations and executive orders, federal agency documents having general applicability and legal effect, documents required to be published by act of Congress, and other Federal agency documents of public interest. Final regulations are codified by subject in the Code of Federal Regulations.
2. Documents are on file for public inspection in the Office of the Federal Register the day before they are published, unless the issuing agency requests earlier filing. The list of documents on file for public inspection can be accessed at <http://www.gpoaccess.gov/nara/index.html>.
3. Regular scrutiny of the Federal Register by committees and staff may help them to identify proposed rules and regulations in their subject areas that merit congressional review as to need and likely effect.
4. The Federal Register is available and searchable online at <http://www.gpoaccess.gov/nara/index.html>. There is a wealth of information about proposed and completed regulatory actions of federal agencies at [reginfo.gov](http://reginfo.gov), which is produced by OMB's Office of Information and Regulatory Affairs (OIRA) and the Regulatory Information Service Center (RISC) of the General Services Administration.

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

1. *Staff Investigations.* The staffs of committees and individual members play a vital role in the legislative process.
  - a. Committee staffs, through field investigations or on-site visits for example, can help a committee develop its own independent evaluation of the effectiveness of laws.
2. *Support Agencies.* The legislative support agencies, directly or indirectly, can assist committees and members in conducting investigations and reviewing agency performance. (See “Oversight Information Sources and Consultant Services” for a discussion of CRS, GAO, and CBO capabilities.)
  - a. The Government Accountability Office is the agency most involved in investigations, audits, and program evaluations. It has a large, professional investigative staff and produces numerous reports useful in oversight.
3. *Outside Contractors.* The 1974 Budget Act, as amended, and the Legislative Reorganization Act of 1970 authorize House and Senate committees to enlist the services of individual consultants or organizations to assist them in their work.
  - a. A committee might contract with an independent research organization or employ professional investigators for short-term studies.
  - b. Committees may also utilize, subject to appropriate approvals, federal and support agency employees to aid them in their oversight activities.
  - c. Committees might also establish a voluntary advisory panel to assist them in their work.

## Communicating with the Media

1. Public exposure of a problem is an effective oversight technique, and will often help bring about a solution to that problem. Public officials often seem much more responsive to correcting deficiencies *after* the issue has been described in widely circulated news stories.
2. Effective communication with the media is based on knowledge and understanding of each of the media forms and the *advantages* and *disadvantages* of each.

## Wire Services

- (1) Timeliness, brevity, and accuracy are the main criteria for dealing with the wire service.
- (2) Personal contact with wire service reporters gets the best results.

## Daily Newspapers

- (1) Obtain information on the operational procedures and deadlines of daily newspapers, and how they are affected by time.
- (2) Since regular news for Monday is usually low, it may be useful to issue statements and releases for “Monday a.m.” use.
- (3) Saturday usually has the lowest circulation and Sunday has the widest.
- (4) Stories for weekend publication should be given to reporters during the middle of the week or earlier.

## Magazines

- (1) Magazines and other periodicals are generally wider ranging and focus on why something happens, not *what* happened.
- (2) Weeklies do not ordinarily respond to member press conferences and releases in the same manner as the other media; personal meetings and telephone conversations are usually more effective.
- (3) *Deadlines Vary*
  - (a) Obtain information on operational procedures.
  - (b) Weekends are generally production periods for most magazines.

## Trade Periodicals

Many of these topically oriented magazines and newsletters are produced by publishing firms which utilize the services of the periodical press galleries in the Capitol.

## Television

- (1) House and Senate rules identify procedures for radio and television broadcasting of committee hearings. (See House Rule XI and Senate Rule XXVI).
- (2) News of a committee’s oversight activities may appear in diverse forms on television. For example, it could appear on the networks as a brief report on the morning or evening news, air on a cable news channel, or arise in the course of live House or Senate floor debate telecast over C-SPAN (the Cable Satellite Public Affairs Network).

Washington-based news organizations may also provide daily television coverage of Congress to independent television stations. Public television and cable news organizations occasionally broadcast live coverage of committee oversight hearings.

- (3) To encourage television coverage of a committee’s oversight activities, the following checklist might be helpful to staff.



- (a) Alert correspondents and Washington bureau chiefs of upcoming hearings several days in advance via press releases; follow up with personal or telephone notification of certain “must-contact” correspondents.
- (b) Notify the Associated Press, Reuters, and other news services of a scheduled hearing or meeting at least a day in advance. Allow enough lead time to permit inclusion of the committee activity in the wire services’ calendar of daily events for the next day.
- (c) If widespread media interest is anticipated, reserve at least a week in advance a hearing room large enough to accommodate television cameras.
- (d) Alert interested correspondents or assignment editors when House or Senate floor action is likely on a matter related to the committee’s oversight function.
- (e) Provide or have available for the media background information on oversight issues awaiting committee action or consideration by the House or Senate.
- (f) Consider making committee members readily available for television cameras either before or after any executive sessions (e.g., allowing television crews in briefly at the start to take video footage of the committee, or arranging for a press conference after the committee session).
- (g) Videotape, where appropriate committee members discussing topical oversight issues for distribution to interested television stations.
- (h) Keep the contact person of each of the network news interview programs (“Meet the Press,” etc.) apprised of a committee’s oversight activities, and their relevance to topical national issues. Suggest the appearance of committee members on interview programs when a committee oversight issue becomes especially newsworthy.
- (i) Be alert to live television interview possibilities for committee members that can be arranged on relatively short notice (e.g., newsmaker interviews on cable news channels).

## **Radio**

- (1) Time is of the essence. Radio news reporters want congressional reaction *immediately*, not hours later when the story breaks in the newspaper or on television.
- (2) Members who are readily available for quick interviews are frequently broadcast within minutes or the next morning coast-to-coast on hundreds of radio stations. In most cases an interview will be aired repeatedly over a period of several hours.
- (3) Congressional offices should contact radio reporters *directly* through the House and Senate press galleries.

## Press Conferences

### (1) *Time*

- (a) The periods between 10 a.m. and 2 p.m. are often preferable.
- (b) *Early* morning press conferences usually have low attendance because reporters on daily papers do not start work until mid-morning.
- (c) Late afternoon press conferences are often unattended because these occur too close to the evening news program and reporters do not have adequate time to prepare and deliver coverage of these for that particular day.
- (d) Check with the press galleries. They keep a running log of most scheduled news events and can provide information on possible competition at any time on any day.

### (2) *Place*

- (a) Committee rooms are good, but they are frequently in use at the best time for a conference.
- (b) A member's office or the press galleries can be adequate, but keep in mind that the reporters and cameramen need room to operate.
- (c) It might be wise to go to the radio-TV galleries after the conference and do a repeat to get electronic coverage.

### (3) *Notification*

- (a) Notify the press galleries in *writing* as far in advance as possible.
- (b) Also notify the wire services and television networks *directly* at their downtown offices.

### (4) *Form*

- (a) A press conference should be viewed as an open house with *everybody* invited and *everybody* welcome.
- (b) A brief *opening* statement should be read or summarized. After copies of it have been distributed, the questioning should begin.
  - (1) Leave plenty of time for questions.
  - (2) Do not restrict the areas of questioning.
  - (3) Anticipate the questions and have answers prepared.
- (c) The normal time for a routine press conference is about one-half hour.

## News Releases

- (1) A good news release answers in *one page* or less the questions where, when, who, what, how, why, and, for some topics, how much (e.g., cost) or how many (e.g., beneficiaries).
- (2) A good news release should:
  - (a) contain the name, *telephone number*, and e-mail of your *press contact*;
  - (b) be for *immediate* release (better than embargo);
  - (c) quote the member *directly*;
  - (d) avoid excessive use of the member's name;
  - (e) avoid needless big words, *long* sentences, and *long* paragraphs; and
  - (f) make the point quickly, clearly, directly, and then end.

## The Internet and the Media

- (1) Members and committees can use the Internet to communicate with media representatives and constituents to explain their views and positions with respect to oversight activities. The Internet permits lawmakers and committees to rely less on traditional journalistic sources for coverage and more on direct communication with the citizenry.
- (2) The Internet can be employed in a variety of ways to mobilize public interest in congressional oversight. For example, lawmakers can conduct on-line discussions with interested citizens or committees can establish their own websites to solicit input from individuals and organizations about executive branch departments and programs.
- (3) There are various “bloggers” who monitor federal spending. With numerous government websites that enable attentive individuals to monitor the expenditure of federal funds, Congress gets additional oversight assistance from the “public as watchdog.”

## Statutory Offices of Inspector General: Establishment and Evolution

### Overview

Contemporary statutory inspectors general (IGs), whose origins date to the mid-1970s, have been granted substantial independence and powers to carry out their mandate to combat waste, fraud, and abuse and to keep agency heads and Congress fully and currently informed about problems and deficiencies within agencies. In order to carry these out, offices of inspector general (OIGs) consolidate responsibility for and conduct audits and investigations within federal agencies.

Established by public law as permanent, nonpartisan, independent offices, they exist in more than 70 federal agencies, including all departments and larger agencies, along with numerous boards and commissions and other entities.<sup>308</sup>

The overwhelming majority of IGs are governed by the Inspector General Act of 1978, as amended (herein after referred to as the IG Act),<sup>309</sup> which has been substantially modified twice as well as subject to agency-specific OIG amendments. The Inspector General Act of 1978 provided the blueprint regarding IG appointments and removals, powers and authorities, and responsibilities and duties, and created OIGs in 12 federal “establishments.”<sup>310</sup> The Inspector General Act Amendments of 1988 created a new set of IGs in “designated federal entities” (DFEs), the usually smaller federal agencies, and added to the reporting obligations of all IGs and agency heads, among other things.<sup>311</sup> And the Inspector General Reform Act of 2008 established a new Council of the Inspectors General for Integrity and Efficiency (CIGIE); amended reporting obligations, salary and bonus provisions, and removal requirements; and added certain budget protections for offices of inspector general.<sup>312</sup>

While the jurisdictions of most inspectors general are circumscribed, concentrated on the programs and operations of the parent agency,<sup>313</sup> a few IGs have express authority over more than one agency, organization, program, or activity. These cross-agency jurisdictions, moreover, differ along three lines: across multiple agencies involved in a certain program or activity, over a separate federal organization with related responsibilities, or over an independent bureau within the parent agency.<sup>314</sup>

<sup>308</sup> Three other inspector general posts (in the armed forces departments) are recognized in public law: Air Force (10 U.S.C. § 8020), Army (10 U.S.C. § 3020), and Navy (10 U.S.C. § 5020). However, these offices are not examined here, because they have a significantly different heritage, set of authorities, operational structure and organization, and degree of independence.

<sup>309</sup> 5 U.S.C. App. For background information and further citations, see CRS Report R40675, *Statutory Offices of Inspectors General (IGs): Methods of Appointment and Legislative Proposals*, by Vanessa K. Burrows, and CRS Report R40099, *The Special Inspector General for the Troubled Asset Relief Program (SIGTARP)*, by Vanessa K. Burrows; Phyllis K. Fong, Department of Agriculture Inspector General and Chair of the Council of the Inspectors General on Integrity and Efficiency (CIGIE), “The IG Reform Act and the New IG Council: Dawn of a New Era,” *Journal of Public Inquiry*, Fall-Winter 2008-2009, pp. 1-6; Paul Light, *Monitoring Government: Inspectors General and the Search for Accountability* (Washington, Brookings Institution, 1992); Frederick M. Kaiser, “The Watchers’ Watchdog: The CIA Inspector General,” *International Journal of Intelligence and Counterintelligence*, Spring 1989, vol. 3, pp. 55-75; and Project on Government Oversight (POGO), *Inspectors General: Many Lack Essential Tools for Independence* (Washington, POGO, 2008). Additional sources include a number of reports and congressional testimony from the U.S. Government Accountability Office, including: *Federal Inspectors General: An Historical Perspective*, T-AIMD-98-146 (1998); *Inspectors General: Enhancing Federal Accountability*, GAO-04-117T (2003); *Inspectors General: Proposals to Strengthen Independence*, GAO-07-1021T (2007); *Inspectors General: Opportunities to Enhance Independence and Accountability*, GAO-07-1089T (2007); *Highlights of the Comptroller General’s Panel on Federal Oversight and the Inspectors General*, GAO-06-931SP (2006); *Designated Federal Entities: Survey of Governance Practices and the Inspector General Role*, GAO-09-270 (2009); and *Inspectors General: Office Consolidation and Related Issues*, GAO-02-575 (2002), all available at <http://www.gao.gov>. Additional sources include studies, reports, and strategic plans of individual IGs and CIGIE, available on the inspector general website at <http://www.ignet.gov>.

<sup>310</sup> P.L. 95-452. Two other IGs, which served as models, pre-dated this broad enactment: in 1976, in the Department of Health, Education, and Welfare, now Health and Human Services (P.L. 94-505); and in 1977, in the then-new Department of Energy (P.L. 95-91).

<sup>311</sup> P.L. 100-504.

<sup>312</sup> P.L. 110-409.

<sup>313</sup> 5 U.S.C. App. Secs. 2-4 and 8G(g)(1).

<sup>314</sup> The Inspector General of the Intelligence Community (IC), created by the Intelligence Authorization Act for Fiscal (continued...)

Other pieces of legislation have established or amended offices in specified agencies or programs, either directly under the IG Act or as separate units. The offices outside the IG Act are: housed in five legislative branch agencies; attached to three temporary reconstruction and relief programs; or situated in an office with jurisdiction over other agencies. Still other enactments have enhanced IG independence or have added new responsibilities and powers on a selective basis.<sup>315</sup>

As a result, statutory IGs are not all created equal. And in certain cases, differences among them are meaningful. Nonetheless, statutory IGs, for the most part, follow the standards, guidelines, and directives in the IG Act.

## Types and Categories

Statutory offices of inspector general are currently authorized in more than 70 federal establishments, designated federal entities, and other agencies or programs.<sup>316</sup> The collection includes all 15 cabinet departments; major executive branch agencies; independent regulatory commissions; various government corporations, foundations, and boards; legislative branch agencies; and several specialized reconstruction or relief programs.

Most of the IGs fall directly and explicitly under the IG Act. Ten, however, have been established by and are governed by separate statutes. Seven of the ten are the Inspector General in the Central Intelligence Agency (CIA), the Inspector General of the Intelligence Community within the Office of the Director of National Intelligence (ODNI) with cross-agency jurisdiction, and the inspector general in each of five legislative branch agencies. Another three IGs are special

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Year 2010 (P.L. 111-259, § 405), has express cross-agency jurisdiction; this enactment, importantly, recognizes the continued authority of the existing statutory inspectors general over IC components. (The same law (P.L. 111-259, § 431), incidentally, also created new inspector general posts in four Defense Department agencies, identified as “designated federal entities” under the IG Act: i.e., the Defense Intelligence Agency, National Geospatial-Intelligence Agency, National Reconnaissance Office, and National Security Agency.) A second type of IG with interagency jurisdiction is the Inspector General of the Department of State and Broadcasting Board of Governors, recognizing the Broadcasting Board as a separate organization outside the State Department (P.L. 105-277, Division G, Title XIII, Chapter 3, § 1322(a)(3); 112 Stat. 2681-777 and 2681-778). Another IG reflects a variation on this theme; in this case, the IG has explicit authority over an independent bureau within the IG’s designated federal entity. In 2010, the Inspector General of the Board of Governors for the Federal Reserve System was given jurisdiction over a new organization—the Bureau of Consumer Financial Protection which was established as an “independent bureau” in the Federal Reserve System—by the Dodd-Frank Wall Street Reform and Consumer Protection Act (P.L. 111-203, § 1011). To reflect this expanded coverage, the IG was retitled the Inspector General of the Board of Governors of the Federal Reserve System and the Bureau of Consumer Financial Protection (P.L. 111-203, § 1081(1)-(2)).

For a review of cross-agency jurisdictions for IGs and related matters, see GAO, *Inspectors General: Office Consolidation and Related Issues*.

<sup>315</sup> For instance, the inspectors general of federal banking agencies and of the Federal Reserve System had been given review and reporting mandates in separate legislation (12 U.S.C. 1831o(k) and 12 U.S.C. 1790d(j), respectively), which were modified in 2010 by the Dodd-Frank Wall Street Reform and Consumer Protection Act (P.L. 111-203, Secs. 987(a) and 988(a)).

<sup>316</sup> Some now-defunct statutory IGs have been abolished or transferred either when their “parent” agency met the same fate or when superseded by another inspector general office. For example, the Office of Inspector General in the Office of the Director of National Intelligence (DNI)—which operated under the full discretionary authority of the DNI (P.L. 108-458)—was supplanted by the Inspector General of the Intelligence Community (IC); the new IC IG post was established by the Intelligence Authorization Act of 2010 (P.L. 111-259, § 405) with substantially broader authority, jurisdiction, and independence than the previous IG.

inspectors general for temporary programs, each of whom, interestingly, operates under a different appointment process.

The statutory IGs can be grouped into five different categories, depending upon their location (e.g., in either the executive branch or legislative branch), permanency of the entity or program with which the IGs are affiliated, and methods of appointment and removal. The appointment can be: by the President with the advice and consent of the Senate (PAS); by the President alone (in only one case, i.e., the Special Inspector General for Afghanistan Reconstruction); or by the agency head, who might be an individual or a group composed of members of a governing board or commission.

The two largest categories of statutory IGs—combining for more than 60 offices in “establishments” and “designated federal entities”—operate under the IG Act. The five types are the inspectors general in:

- **“federal establishments,”** as identified in the IG Act, which include the 15 cabinet departments and larger federal agencies. Each IG is appointed by the president by and with the advice and consent of the Senate and can be removed by the president, but *not* by the agency head;<sup>317</sup>
- **“designated federal entities” (DFEs),** as also identified in the IG Act, which include the usually smaller boards, commissions, foundations, and government enterprises. Each IG is appointed by and removable by the head of the agency;<sup>318</sup>
- **two other permanent executive agencies,** each operating under its own statutory authority. These are the Inspector General in the Central Intelligence Agency (P.L. 101-193) and the Inspector General of the Intelligence Community within the Office of the Director of National Intelligence, whose jurisdiction extends across all IC elements or components (P.L. 111-259). Each IG is a PAS appointee and removable by the president;
- **three temporary programs,** each operating under its own authority and reflecting different appointment powers. These are: the Special Inspector General for Afghanistan Reconstruction (SIGAR), a direct presidential appointee, unique among IGs (P.L. 110-181); the Special Inspector General for Iraq Reconstruction (SIGIR), an appointee of the Secretary of Defense, after consultation with the Secretary of State (P.L. 108-375); and the Special Inspector General for the Troubled Asset Relief Program (SIGTARP), a PAS appointee (P.L. 110-343)<sup>319</sup>; and

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<sup>317</sup> 5 U.S.C. App., § 2. For a listing of IGs in establishments, see Fong, “The IG Reform Act;” and the IG directory on inspector general website at <http://www.ignet.gov>. Two establishment-wide OIGs have other statutory OIGs within each one’s department: in the Department of the Treasury, the Treasury Inspector General for Tax Administration, which is also considered an establishment and whose IG is a PAS (5 U.S.C. App., § 8D(e)-(1)); and in the Department of Defense, four DFEs, whose IGs are agency head appointees (P.L. 111-259, § 431, amending 5 U.S.C. App., Secs. 8G(a)(2) and 8H(a).

<sup>318</sup> For a listing of IGs in DFEs, see the sources in the three previous footnotes.

<sup>319</sup> The Troubled Asset Relief Program investment authority expired on Oct. 3, 2010. But the termination of that authority did not affect the Treasury’s ability to administer existing troubled asset purchases and guarantees and its ability to expend TARP funds for obligations entered into before the closing date. Consequently, SIGTARP’s oversight mandate did not end then. Rather, the special inspector general is authorized to carry out the office’s duties until the Government has sold or transferred all assets and terminated all insurance contracts acquired under TARP. See (continued...)

- **five legislative branch agencies**, each operating under its own statutory authority. These are the Architect of the Capitol (P.L. 110-161); Government Accountability Office (P.L. 110-323); Government Printing Office (P.L. 100-504), the oldest of these; Library of Congress (P.L. 109-55); and U.S. Capitol Police (P.L. 109-55), which has specialized responsibilities. Each IG is an agency head appointee and removable by the head of the agency.

## **Purposes**

Under Section 2 of the IG Act, the three principal purposes of inspectors general are:

- conducting and supervising audits and investigations related to agency programs and operations;
- providing leadership and coordination and recommending policies for activities designed to promote the economy, efficiency, and effectiveness and the prevention and detection of fraud and abuse in such programs and operations; and
- keeping the agency head and Congress fully and currently informed about problems and deficiencies relating to such programs and the necessity for and progress of corrective action.

Over time and as conditions dictated, IGs have acquired additional related responsibilities, on a selective basis. For instance, relevant inspectors general, led by the IG in the Department of Homeland Security, established a Homeland Security Roundtable in the aftermath of the 2005 Gulf Coast hurricanes and have participated in a Hurricane Katrina Contract Fraud Task Force, headed by the Justice Department. Another group of IGs are members of the Recovery Accountability and Transparency Board, established by American Recovery and Reinvestment Act of 2009, to oversee its operation.<sup>320</sup> In addition, the Dodd-Frank Wall Street Reform and Consumer Protection Act contains a number of provisions that add to the duties of IGs over certain federally insured funds and aid in coordination among relevant IGs via a Council of Inspectors General on Financial Oversight.<sup>321</sup>

## **Authorities**

To carry out their purposes, IGs have been granted broad powers in a number of matters. They are authorized to: conduct audits and investigations; access directly records and information related to agency programs and operations; request assistance from other federal, state, and local government agencies; subpoena information and documents; administer oaths when conducting interviews; hold certain law enforcement powers; hire staff and manage their own resources; receive and respond to complaints from agency employees, whose identity is to be protected; and

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SIGTARP, *Quarterly Report to Congress*, October 26, 2010, p. 19; and Burrows, *SIGTARP*.

<sup>320</sup> P.L. 111-5.

<sup>321</sup> P.L. 111-203, § 989E(a)-(b). This council is separate from CIGIE.

implement the cash incentive award program in their agency for employee disclosures of waste, fraud, and abuse.<sup>322</sup>

Notwithstanding these powers, IGs are *not* authorized to take corrective action themselves. Supplementing this, the Inspector General Act prohibits the transfer of “program operating responsibilities” to an IG.<sup>323</sup> The rationale for this proscription is that it would be difficult, if not impossible, for IGs to audit or investigate programs and operations impartially and objectively if they were directly involved in carrying them out.

## **Reporting Requirements to the Attorney General, Agency Head, Congress, and the Public**

IGs have various reporting obligations—to the Attorney General, agency head, Congress, and the public—with regard to their findings, conclusions, and recommendations for corrective action.

One is to report suspected violations of federal criminal law directly and expeditiously to the Attorney General.<sup>324</sup>

IGs are also required to report semiannually about their activities, findings, and recommendations to the agency head, who must submit the IG report (unaltered but with his or her comments) to Congress within 30 days.<sup>325</sup> These semiannual reports, which contain a substantial amount of required information and data, are to be made available to the public in another 60 days.<sup>326</sup> 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.<sup>327</sup>

By means of the required reports and “otherwise,” IGs are to keep the agency head and Congress “fully and currently informed.”<sup>328</sup> Besides the prescribed reports, other means of communication with Congress include: OIG officials testifying at hearings, meeting with members and staff, and responding to requests for information and reviews.

As a separate matter, the CIGIE is authorized (but not required) to “make such reports to Congress as the Chairperson determines are necessary and appropriate.”<sup>329</sup> By comparison to this discretionary authority, the Chair is required to “prepare and transmit a report annually on behalf of the Council to the President on the activities of the Council.”<sup>330</sup>

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<sup>322</sup> 5 U.S.C. App. Secs. 6(a), 6(e), and 7; 5 U.S.C. § 4512.

<sup>323</sup> 5 U.S.C. App. § 8G(b); § 9(a)(2).

<sup>324</sup> 5 U.S.C. App. § 4(d).

<sup>325</sup> 5 U.S.C. App. § 5(a), (b).

<sup>326</sup> 5 U.S.C. App. § 5(c).

<sup>327</sup> 5 U.S.C. App. § 5(d).

<sup>328</sup> 5 U.S.C. App. § 4(a)(5).

<sup>329</sup> 5 U.S.C. App. § 11(c)(1)(G).

<sup>330</sup> 5 U.S.C. App. § 11(b)(3)(viii).



Each agency website, moreover, is to provide a direct link to the IG website, which, in turn, is to make its reports on audits, investigations, and evaluations or inspections available to the public (unless, of course, it is classified).<sup>331</sup>

## **Independence**

IGs have broad powers and protections that support their independence, including hiring their own staff and being given necessary facilities and services. Their independent status is reinforced in other ways, for instance, by the authority to issue subpoenas for documents and through their own law enforcement powers.<sup>332</sup> The IG Act also ensures a degree of protection of IG budgets, by providing for an appropriations line-item for IGs in the establishments, whose IGs are PAS appointees, and by requiring that information about each IG budget request be made available in the president’s annual budget submission to Congress (discussed further below).<sup>333</sup>

Another protection of IG independence arises from the broad qualifications for IG appointments and specialized ones on removals. Appointments are to be made without regard to political affiliation and solely on the basis of integrity and demonstrated ability in certain relevant areas.<sup>334</sup> At the other end of the IG continuum, the IG and Congress are to be notified 30-days in advance of a prospective removal of an inspector general.<sup>335</sup> (Both matters are discussed further below.)

There are also prohibitions on interference with their activities and operations and a proscription on operating responsibilities (as noted above).<sup>336</sup> Inspectors general, moreover, determine the priorities and projects for their offices without outside direction, in most cases. However, Congress has mandated, in legislation, that OIGs conduct certain reviews. Additionally, there are a few instances when an agency head is authorized to prevent or halt an audit or investigation (discussed further below). IGs, of course, may decide to conduct a review requested by the agency head, president, legislators, employees, or anyone for that matter; but they are not obligated to do so, unless it is called for in law.

## **Supervision**

IGs serve under the “general supervision” of the agency head, reporting exclusively to the head or to the officer next in rank if such authority is delegated.<sup>337</sup> With but a few specified exceptions, neither the agency head nor the officer next in line “shall prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing any subpoena....”<sup>338</sup>

Under the IG Act, the heads of only six agencies—the Departments of Defense, Homeland Security, Justice, and Treasury, plus the U.S. Postal Service and Federal Reserve Board—may

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<sup>331</sup> 5 U.S.C. App. § 8L.

<sup>332</sup> 5 U.S.C. App. Secs. 6(a)(4) and 6(e).

<sup>333</sup> 5 U.S.C. App. § 6(f); 31 U.S.C. § 1105(a)(25).

<sup>334</sup> 5 U.S.C. App. Secs. 3(a), 8G(c).

<sup>335</sup> 5 U.S.C. App. Secs. 3(b), 8G(e).

<sup>336</sup> 5 U.S.C. App. Secs. 3(a), 8G(b) and (d), 9(a)(2).

<sup>337</sup> 5 U.S.C. App. Secs. 3(a), 8G(d).

<sup>338</sup> 5 U.S.C. App. Secs. 3(a), 8G(d).

prevent or halt the IG from initiating, carrying out, or completing an audit or investigation, or issuing a subpoena, and then only for certain reasons: to preserve national security interests or to protect ongoing criminal investigations, among a few others.<sup>339</sup> When exercising this power, though, the IG Act generally provides for congressional notification of the exercise of such authority, either via the agency head or the inspector general, who must transmit an explanatory statement for such action to specified congressional committees within 30 days.<sup>340</sup> In addition to the Secretary of Defense’s existing authority regarding the department IG, the Secretary, in consultation with the Director of National Intelligence, may prohibit, for national security reasons, certain intelligence community IGs from undertaking audits and investigations.<sup>341</sup> The four potentially-affected intelligence community elements—listed as designated federal entities but housed in the Defense Department—are the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Reconnaissance Office, and the National Security Agency.

The CIA IG Act similarly allows the Director of the Central Intelligence Agency to prohibit the inspector general from conducting investigations, audits, or inspections. But when exercising this power, the head must then notify the House and Senate intelligence panels of his or her reasons within seven days.<sup>342</sup> A parallel provision applies to the Director of National Intelligence (DNI) with respect to the Inspector General of the Intelligence Community.<sup>343</sup>

## **Budgets and Appropriations**

Under the IG Act, presidentially appointed IGs in establishments—but not in designated federal entities (DFEs)—are granted a separate appropriations account for their offices.<sup>344</sup> The IGs in the CIA and of the Intelligence Community have similar safeguards for each one’s budget account.<sup>345</sup> This prevents agency administrators from limiting, transferring, or otherwise reducing IG funding once it has been specified in law. In contrast, each DFE IG’s budget is part of the parent entity’s budget process.

The Inspector General Reform Act of 2008, moreover, addressed the reporting of the IG’s initial budget estimate to the head of the establishment or DFE and subsequent developments.<sup>346</sup> The budget estimate includes the budget request, a request for funds for training, and amounts necessary to support the newly created Council of the Inspectors General on Integrity and Efficiency (CIGIE) (discussed further below). The establishment or DFE head must then include this information, as well as comments of the IG with respect to the budget proposal, when

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<sup>339</sup> 5 U.S.C. App. Secs. 8, 8D(a), 8E(a), 8G(f), 8G(g)(3), and 8I(a).

<sup>340</sup> *See, e.g.*, 5 U.S.C. App. § 8(b)(3)-(4) (stating that the Secretary of Defense must “submit a statement concerning” the exercise of such power to various congressional committees within 30 days and must also submit a “statement of the reasons for the exercise of power” to the congressional committees within an additional 30 days after the submission of the first statement); see also 5 U.S.C. App. § 8E(a)(2) (requiring the Attorney General to notify the IG in writing of the exercise of such power and mandating that the IG transmit a copy of such notice to certain congressional committees).

<sup>341</sup> 5 U.S.C. App. § 8G(d)(2).

<sup>342</sup> P.L. 101-193.

<sup>343</sup> 50 U.S.C. § 403-3h(f).

<sup>344</sup> 31 U.S.C. § 1105(a)(25).

<sup>345</sup> 50 U.S.C. § 403(q)(17)(f) and 50 U.S.C. §. 403-3H(m), respectively.

<sup>346</sup> 5 U.S.C. App. § 6(f)(1)-(3).

transmitting the request to the President. The President, in turn, must then include in his budget submission to Congress: the IG's budget estimate; the President's requested amounts for the IG, IG training, and support of the CIGIE; and comments of the affected IG, if he or she determines that the President's budget would "substantially inhibit" the IG from performing his or her duties.

Similar provisions apply to the inspectors general for the CIA and of the Intelligence Community.<sup>347</sup>

## **Appointment, Removal, and Term Limits**

Some variations occur with regard to the appointment and removal of inspectors general, reflecting, to a degree, the status, location, and permanency of the "parent" agency. But all follow certain precepts to help ensure the IGs' impartiality and political neutrality. Term limits are expressly limited in statute to only two offices.

Under the Inspector General Act and other statutory establishments, IGs are to be selected without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial and management analysis, law, public administration, or investigations.<sup>348</sup> Along this line, CIGIE has set up a panel to submit recommendations of individuals to the appropriate appointing authority for any appointment to an office of inspector general, as directed in statute.<sup>349</sup> The CIA IG and the Intelligence Community IG, who operate under different statutes, are to be selected under these criteria as well as prior experience in the field of foreign intelligence or national security and in compliance with the relevant security standards.<sup>350</sup>

IGs, who are presidential appointees with the advice and consent of the Senate, can be removed only by the president (or through the impeachment process in Congress).<sup>351</sup> When exercising this authority, the president must communicate the reasons to Congress in writing 30 days prior to the scheduled removal date.<sup>352</sup> This advance notice allows the inspector general, Congress, or other interested parties to examine and possibly object to the planned removal.

Some variations among IGs in designated federal entities and legislative branch agencies exist over appointments, removals, and term limits. The DFE IGs are appointed by and can be removed by the agency head, who must notify Congress in writing 30 days in advance when exercising the removal power.<sup>353</sup> Differences, however, arise over who might be considered to be the "head of the agency" in a DFE. The agency head may be: an individual serving as the administrator or director or as spelled out in law (e.g., the Archivist of the United States in the National Archives and Records Administration), the chairperson of a board or commission, a full board or council as specified in law (e.g., the National Council on the Arts in the National Endowment of the Arts), or

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<sup>347</sup> 50 U.S.C. § 403q(17)(f) and 50 U.S.C. § 403-3(n), respectively.

<sup>348</sup> 5 U.S.C. App. §§ 3(a) and 8G(c).

<sup>349</sup> 5 U.S.C. App. § 11(c)(1)(F). Also, see Fong, "The IG Reform Act," p. 5.

<sup>350</sup> 50 U.S.C. §403(q)(b) and § 403-3H(c), respectively, for the CIA IG and the Intelligence Community IG.

<sup>351</sup> 5 U.S.C. App. § 3.

<sup>352</sup> 5 U.S.C. App. § 3(b) for PAS IGs under the IG Act; 50 U.S.C. §403(q)(b) for the IG in the CIA; and 50 U.S.C. §403-3(H)(c)(4)) for the IG of the Intelligence Community.

<sup>353</sup> 5 U.S.C. App. § 8G(c) and (e).

a certain super-majority of a governing board.<sup>354</sup> In the United States Postal Service (USPS), for instance, the governors appoint the inspector general, one of only two IGs with a set term (seven years for the USPS IG) specified in law.<sup>355</sup> Furthermore, the USPS IG is the only inspector general with the qualification that he or she can be removed only “for cause” and then only by the written concurrence of at least seven of the nine governors. In other cases, the Dodd-Frank Wall Street Reform and Consumer Protection Act amended the IG Act of 1978 to require the written concurrence of a two-thirds majority of board or commission members for removal of an IG in a designated federal entity, where the board or commission is considered the DFE head.<sup>356</sup>

The IG in the U.S. Capitol Police, who is appointed by and can be removed by the Capitol Police Board, is the other inspector general with a legislated term limit; the inspector general is appointed to a five-year term and can be reappointed twice.<sup>357</sup> The Capitol Police IG may be removed before the expiration of a five-year term but “only by the unanimous vote of all of the voting members of the Capitol Police Board, and the Board shall communicate the reasons for any such removal” to specified committees of Congress.<sup>358</sup>

Indirectly, the IG in the Peace Corps also faces an effective limited term (from five to eight-and-a-half years), due to employment time limits for all Peace Corps personnel.<sup>359</sup>

## **Coordination and Controls**

Coordination among the IGs and controls over their actions—including investigating charges of wrongdoing by the IGs themselves and other top echelon officers—exist through several channels, including interagency councils created by public law or administrative directive.

### *Council of the Inspectors General for Integrity and Efficiency*

Perhaps most important is the Council of the Inspectors General for Integrity and Efficiency (CIGIE), created by the IG Reform Act of 2008.<sup>360</sup> CIGIE is designed to aid coordination among IGs; and it is to maintain one or more academies for the professional training of auditors, investigators, inspectors, and evaluators, and other personnel in IG offices.<sup>361</sup> Interagency funding arrangements for certain Council activities and operations, using a revolving fund in the Treasury (i.e., the Inspectors General Council Fund), are also authorized by the 2008 enactment.<sup>362</sup> The council has established seven committees to assist its activities, as well as an IG Candidate

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<sup>354</sup> 5 U.S.C. App. §§ 8G(a)(4), 8G(e), and 8G(h)(1).

<sup>355</sup> 5 U.S.C. App. §§ 8G(f)(1)-(2) and (4).

<sup>356</sup> P.L. 111-103; 5 U.S.C. App. § 8G(e).

<sup>357</sup> P.L. 109-55, § 1004(1)-(2). The IG’s appointment is to be made in consultation with the Inspectors General of the Library of Congress, Government Printing Office, and Government Accountability Office.

<sup>358</sup> P.L. 109-55, § 1004(3).

<sup>359</sup> The statutory limit on Peace Corps employment ranges from five to eight-and-a-half years. It allows the Director to grant a one-year extension to any employee plus a two-and-a-half year addition with the agency. This additional amount would appear to be granted to an IG in the case that the IG’s extension would “promote the continuity of functions in administering the Peace Corps.” 22 U.S.C. § 2506(a)(5) and (6).

<sup>360</sup> 5 U.S.C. App. § 11.

<sup>361</sup> 5 U.S.C. App. § 11(c)(E).

<sup>362</sup> 5 U.S.C. App. § 11(c)(3).

Recommendation Panel, to identify and provide qualified candidates for vacant IG positions (as noted above).<sup>363</sup>

CIGIE includes all statutory IGs along with other relevant officers, such as a representative of the Federal Bureau of Investigation (FBI) and the Special Counsel of the Office of Special Counsel.<sup>364</sup> The council chairperson is an inspector general chosen from within its ranks, while the executive chairperson is the OMB deputy director of management.<sup>365</sup> CIGIE superseded two other councils—the President’s Council on Integrity and Efficiency (PCIE) and the Executive Council on Integrity and Efficiency (ECIE)—both created by executive orders, with the PCIE beginning in the early 1980s.<sup>366</sup>

### *Other Coordinative Bodies*

Other interagency mechanisms have been created by law or administrative directive to assist coordination among IGs. For example, a separate Council of Inspectors General on Financial Oversight—chaired by the Treasury IG, and composed of IGs from nine financial agencies—was established by statute to facilitate information sharing among them and develop ways to improve financial oversight.<sup>367</sup> Another statutory construction occurred with the 2010 establishment of the Intelligence Community Inspectors General Forum. Building on a predecessor administrative body, the forum consists of all statutory or administrative inspectors with oversight responsibility of an element of the Intelligence Community and is chaired by IC Inspector General.<sup>368</sup> At least two administrative organizations have also been created to help coordinate IG activities and capabilities in selected areas: the Homeland Security Roundtable (noted above); and the Defense Council on Integrity and Efficiency, composed primarily of DoD audit and investigative units and chaired by the DoD inspector general.<sup>369</sup>

### *Investigation of Alleged OIG Wrongdoing*

Investigation of alleged misconduct by OIG officials, including inspectors general themselves, are the province of a special Integrity Committee in CIGIE.<sup>370</sup> It receives, reviews, and refers for investigation allegations of wrongdoing by these officials, with the relevant processes and procedures spelled out in the amended IG Act. The committee is composed of four IGs on the

<sup>363</sup> 5 U.S.C. App. 11(c)(1)(F). The seven committees are Audit, Human Resources, Information Technology, Inspection and Evaluation, Integrity, Investigations, and Legislation. See the IG website at <http://www.ignet.gov>; and Fong, “The IG Reform Act,” p. 5.

<sup>364</sup> 5 U.S.C. App., § 11(b)(1).

<sup>365</sup> 5 U.S.C. App., § 11(b)(2).

<sup>366</sup> P.L. 110-409, § 7(c); see Exec. Order No. 12805, 57 Fed. Reg. 20627 (May 11, 1992); Exec. Order No. 12993, 61 Fed. Reg. 13043 (Mar. 21, 1996).

<sup>367</sup> P.L. 111-203, § 989E.

<sup>368</sup> P.L. 111-259, § 405; 50 U.S.C. § 403-3h(h). The predecessor organization had operated under the same title. See Offices of the Inspector General, Central Intelligence Agency and Department of Defense, Intelligence Community Inspectors General Forum, *Charter* (modified March 15, 2004).

<sup>369</sup> Office of Inspector General, Department of Defense, *Defense Council on Integrity and Efficiency: Charter*, available at <http://www.dodig.mil/dcie.html>.

<sup>370</sup> 5 U.S.C. App. § 11(d)(1).

Council, along with the Special Counsel, the Director of the Office of Government Ethics, and the FBI representative on the council, who chairs the committee.<sup>371</sup>

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

Congressional oversight of the executive is dependent to a large degree upon *information supplied by the agencies being overseen*. In the contemporary era, reporting and prior consultation provisions have increased in an attempt to ensure congressional access to information, statistics, and other data on the workings of the executive. The result is that *approximately 4,000 reports arrive annually* on Capitol Hill. Concerns about unnecessary, duplicative, and wasteful reports, however, have prompted efforts to eliminate these. One such initiative, in part stimulated by earlier recommendations from the Vice President's National Performance Review and from the GAO, resulted in the Federal Reports Elimination and Sunset Acts of 1995 and 1998. Nonetheless, reductions in the number of required reports have not kept pace with new or continuing requirements, such as those identified in the 2001 act to Prevent the Elimination of Certain Reports (P.L. 107-74).

### **Reporting Requirements**

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

- a. make a study and recommendations about a particular problem or concern;
- b. alert Congress or particular committees and subcommittees in advance about a proposed or planned activity or operation;
- c. provide information about specific on-going or just-completed operations, projects, or programs; or
- d. summarize an agency's activities for the year or the prior six months.

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<sup>371</sup> 5 U.S.C. App. § 11(d)(2).

### Examples of Reporting Requirements in Law

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

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

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

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

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

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

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

### Prior Consultation

In the past, explicit prior consultation provisions were rarely incorporated into law. However, there appears to be an increase in statutory provisions as well as in committee reports that accompany legislation specifying conditions for such discussion (see box).

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

### Other Significant Sources of Information

A number of general management laws provide for additional sources of information, data, and material that can aid congressional oversight endeavors.

#### *Chief Financial Officers Act of 1990, as Amended (104 Stat. 2838, 108 Stat. 3410, 110 Stat. 3009-389, and 116 Stat. 2049)*

The CFO act is designed to improve financial management throughout the federal government, through various procedures and mechanisms.

1. The 1990 act created two new posts within OMB, along with a new position of chief financial officer in each of 23 major federal agencies, including all Cabinet departments. In the meantime, two other agencies have been added (the Department of Homeland Security and the Social Security Administration) and

- one subtracted (when the Federal Emergency Management Agency was merged into DHS). Of these 24 posts, 17 are filled by presidential appointees *subject to Senate confirmation*; these are in the 15 Cabinet departments plus the Environmental Protection Agency and the National Aeronautics and Space Administration. The remaining seven positions directly under the CFO act are in the Agency for International Development, General Services Administration, National Science Foundation, Nuclear Regulatory Commission, Office of Personnel Management, Small Business Administration, and the Social Security Administration.
2. The CFO act also provides for improvements in agency systems of accounting, financial management, and internal controls to assure the *issuance of reliable financial information* and to deter fraud, as well as waste and abuse of government resources.
  3. The enactment, furthermore, calls for the production of *complete, reliable, timely, and consistent financial information for use by both the executive and the legislature* in the financing, management, and evaluation of federal programs.
  4. The act, as amended, requires most executive branch entities to submit audited financial statements annually.

***Government Performance and Results Act, as Amended (107 Stat. 285 and 124 Stat. 3866)***

This act—commonly known by the acronym GPRA or the Results Act—requires federal agencies to submit long-range strategic plans, annual performance plans based on these, follow-up yearly assessments, and government-wide performance plans.

1. **Strategic Plans.** The strategic plans specify five-year goals and objectives for agencies, based on their basic missions and underlying statutory or other authority of the agency. These plans, initially required in 1997, were to be developed *in consultation with relevant congressional offices* and with information from “stakeholders” and then *submitted to Congress*.
2. **Annual Performance Plans and Goals.** Based on these long-term plans, which may be modified if conditions and agency responsibilities change, the agencies are directed to set annual performance goals and to measure the results of their programs in achieving these goals. The objective of GPRA is to focus on *outcomes* (i.e., the results and accomplishments of a program, such as a decline in the use of illegal drugs for an anti-drug abuse program) rather than outputs (i.e., other measures of agency activity and operations, such as the number of anti-drug agents in the field). The annual plans, which are also *available to Congress*, began with FY1999.
3. **Annual Assessments.** Each agency is to issue yearly follow-up reports assessing the implementation of its annual plan. Beginning in 2000, these are required six months after the end of the fiscal year.
4. **Government-wide Plans and Goals.** GPRA, as amended in 2010, calls for a federal government performance plan and priority goals, under the direction of the Office of Management and Budget. These are to include “outcome-oriented



goals covering a limited number of crosscutting policy areas; and goals for management improvements needed across the Federal Government.”

***Small Business Regulatory Enforcement Fairness Act of 1996 (110 Stat. 857-874)***

Subtitle E of this act established, for the first time, a mechanism by which *Congress can review and disapprove virtually any federal rule or regulation*. It requires that:

1. All agencies promulgating a covered rule must submit a report *to each house of Congress and the Comptroller General*, containing specific information about the rule before it can go into effect.
2. Rules designated by the Office of Management and Budget as “major” may normally not go into effect *until 60 days after submission*, while non-major rules may become effective “as otherwise allowed in law,” usually 30 days after publication in the *Federal Register*.
3. All covered rules are subject to *fast-track disapproval by passage of a joint resolution*, even if they have already gone into effect, for a period of at least 60 days. Upon enactment of such a joint resolution, no new rule that is “substantially the same” as the disapproved rule may be issued until it is *specifically authorized by a law* enacted subsequent to the disapproval of the original rule.
4. There can be *no judicial review of actions taken (or not taken) by Congress, the Comptroller General, or OMB*; but the failure of an agency to submit a covered rule for congressional review may be subject to sanction by a federal court.

***Paperwork Reduction Act of 1995 (109 Stat. 163)***

This most recent version of paperwork reduction legislation builds on a heritage of statutory controls over government paperwork that dates to 1940.

1. Among other things, the current act and its 1980 predecessor more clearly defined the oversight responsibilities of OMB’s Office of Information and Regulatory Affairs (OIRA); it is authorized to develop and administer uniform information policies in order to ensure *the availability and accuracy of agency data collection*.
2. Congressional oversight has been strengthened through its subsequent *reauthorizations* and the requirement for *Senate confirmation* of OIRA’s administrator.

***Federal Managers’ Financial Integrity Act (FMFIA) of 1982 (96 Stat. 814)***

FMFIA is designed to improve the government’s ability to manage its programs by strengthening internal management and financial controls, accounting systems, and financial reports.

1. The internal accounting systems are to be consistent with standards that the *Comptroller General* prescribes, including a requirement that all assets be safeguarded against waste, fraud, loss, unauthorized use, and misappropriation.

2. FMFIA also provides for *ongoing evaluations* of the internal control and accounting systems that protect federal programs against waste, fraud, abuse, and mismanagement.
3. The enactment further mandates that the head of each agency *report annually to the President and Congress* on the condition of these systems and on agency actions to correct any material weakness which the reports identify.
4. FMFIA is also connected to the Chief Financial Officers Act of 1990, which calls upon the director of OMB to submit a financial management *status report to appropriate congressional committees*; part of this report is to be a summary of reports on internal accounting and administrative control systems as required by FMFIA.

### ***Cash Management Improvement Act of 1990 (104 Stat. 1058)***

This enactment is intended to *improve efficiency, effectiveness, and equity in the exchange of funds* between the federal government and state governments. Its fundamental objective is to prevent either level of government from engaging in cash management practices that allow it to earn interest on cash reserves at the expense of the other.

### ***Information Technology Management Reform Act of 1996 (110 Stat. 679)***

This act requires that agencies buy the *best and most cost-effective information technology* available. To do so, the act gave more responsibility to individual agencies, revoking the primary role that the General Services Administration had played previously, and established the position of chief information officer (CIO) in federal agencies to provide relevant advice to agency heads.

### ***Federal Advisory Committee Act (FACA)***

Congress formally acknowledged the merits of using advisory committees to obtain expert views drawn from business, academic, government, and other interests when it enacted the Federal Advisory Committee Act (FACA) in 1972 (5 U.S.C. Appendix; 86 Stat. 700). Congressional enactment of FACA established the first requirements for the management and oversight of federal advisory committees to ensure impartial and relevant expertise. As required by FACA, the General Services Administration (GSA) administers and provides management guidelines for advisory committees. GSA also submits an annual report to the President and Congress, based on the information provided by the federal agencies concerning the meetings, costs, and membership of advisory committees. During FY2003, GSA reported a total of 953 advisory committees, with 31,385 individuals serving as members during the year. On March 14, 2000, GSA announced the elimination of its annual report on advisory committees, relying instead on its website to make available the detailed reports covering each committee's activities during the fiscal year <http://fido.gov/facadatabase>. GSA also issues an annual summary report for Congress pertaining to advisory committee management and performance.

### ***Federal Information Security Management Act of 2002***

The Federal Information Security Management Act of 2002 (FISMA) replaced what has been commonly referred to as the Government Information Security Reform Act (GISRA), which expired at the end of the 107<sup>th</sup> Congress. Both GISRA and FISMA represent an effort by

Congress to improve federal agency compliance with information security standards and guidelines. Congress put into statute certain requirements, including a directive that federal agencies submit their information security programs to an annual independent review, along with a requirement that the Director of the Office of Management and Budget report the results of these reviews to Congress.

### ***Accountability of Tax Dollars Act of 2002***

The Accountability of Tax Dollars Act (ATDA) of 2002 (P.L. 107-289; 116 Stat. 2049) was intended “to expand the types of Federal agencies that are required to prepare audited financial statements to all executive branch agencies in the federal government.” In fact, ATDA brings almost all executive branch agencies under the requirement for preparation of annual audited financial statements that previously applied only to the 24 major departments and agencies covered by the Chief Financial Officers (CFO) Act. Specifically, Section 2(a) changes the list of agencies covered by the audited annual financial statements requirement in 31 U.S.C. § 3515 by deleting the cross-reference to CFO Act agencies and inserting “each covered executive agency.”

### ***Federal Financial Management Improvement Act of 1996***

The Federal Financial Management Improvement Act of 1996 (FFMIA) (110 Stat. 3009-389; 31 U.S.C. § 3512 note) incorporates in statute certain financial management system requirements already established as executive branch policy. The law also requires auditors to report on agency compliance with these requirements, and agency heads and management to correct deficiencies within certain time periods. FFMIA reflects an ongoing effort to reform financial management in the federal government. The 1996 law builds upon prior legislation, including the Chief Financial Officers Act of 1990, the Government Performance and Results Act of 1993, and the Government Management Reform Act of 1994.

### ***Unfunded Mandates Reform Act of 1995***

After considerable debate, the Unfunded Mandates Reform Act (P.L. 104-4; 109 Stat. 48-71; 2 U.S.C. §§ 1501-1571) was enacted early in the 104<sup>th</sup> Congress. Generally, unfunded intergovernmental mandates include responsibilities or duties that federal programs, standards, or requirements impose on governments at other levels without providing for the payment of the costs of carrying out these responsibilities or duties. The intent of the mandate legislation was to limit the ability of the federal government to impose costs on state and local governments through unfunded mandates. The enactment has three components: revised congressional procedures regarding future mandates; new requirements for federal agency regulatory actions; and authorization for a study of existing mandates to evaluate their current usefulness. The primary objective was to create procedures that would retard and spotlight, if not stop, congressional authorization of new unfunded mandates on state and local governments.

### ***Federal Funding Accountability and Transparency Act***

On September 26, 2006, President George W. Bush signed into law the Federal Funding Accountability and Transparency Act (P.L. 109-282; 31 U.S.C. § 6101). This Act requires OMB by 2008 to launch a searchable, free, and public website that will enable anyone to go online to find information that names the recipients and dollar amounts of most federal grants, loans, and

contracts. A key concept of the law is to provide citizens with greater transparency as to how Federal funds are spent and thus be better able to hold public officials accountable for funding decisions.

## Resolutions of Inquiry

The House of Representatives can call upon the executive for factual information through resolutions of inquiry.

1. This is a *simple resolution*, approved by only the House.
2. Resolutions of inquiry are addressed to either the President or heads of departments and agencies to supply specific factual information to the chamber. The resolutions usually “*request*” the President or “*direct*” administrative heads to supply such information. In calling upon the President for information, especially about foreign affairs, the qualifying phrase—“if not incompatible with the public interest”—is often added.
3. Such resolutions are to ask for facts, documents, or specific information; these devices are *not* to request an opinion or require an investigation (see box).
4. Even when a committee of jurisdiction reports a resolution of inquiry adversely, or succeeds in tabling the resolution on the House floor, it is often the case that the Administration has substantially complied with the resolution.
5. Resolutions of inquiry can be instrumental in triggering other congressional methods of obtaining information, such as through supplemental hearings or the regular legislative process.
6. A resolution of inquiry is privileged and may be considered in the House after it is reported. If the resolution is not reported within 14 legislative days after its introduction, any member can move to discharge the committee of jurisdiction and bring the resolution to the floor. However, action by a committee within the 14 days to reject the resolution effectively sidetracks House action on the resolution.

### Resolutions of Inquiry in Practice

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

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

**A contemporary illustration** occurred on March 1, 1995, when the House adopted H.Res. 80, as amended (104<sup>th</sup> Cong., 1<sup>st</sup> sess., 407-21). The resolution sought information about the Mexican peso crisis at the time and an Administration plan to use up to \$20 billion in resources from the Exchange Stabilization Fund to help stabilize the Mexican currency and financial system. The resolution read:

“*Resolved*, That the President, is hereby requested to provide the House of Representatives (consistent with the rules of the House), not later than 14 days after the adoption of this resolution, the following documents in the possession of the executive branch, if not inconsistent with the public interest....” The House request then specified the matters that the documents

were to cover: The condition of the Mexican economy; consultations between the Government of Mexico, on the one hand, and the U.S. Secretary of the Treasury and/or the International Monetary fund, on the other; market policies and tax policies of the Mexican Government; and repayment agreements between Mexico and the United States; among other things.

## Limitations and Riders on Appropriations

Congress uses a two-step legislative procedure: authorization of programs in bills reported by legislative committees followed by the financing of those programs in bills reported by the Committees on Appropriations. Congressional rules generally keep the two stages distinct and sequential. Authorizations should not be in general appropriation bills, nor appropriations in authorization measures. However, there are various exceptions to the general principle that Congress should not make policy through the appropriations process. One exception is the practice of permitting “limitations” in an appropriations bill. “Riders” (language extraneous to the subject of the bill) are also added to control agency actions.

1. **Limitations.** Although House rules forbid in any general appropriations bill a provision “changing existing law,” certain “limitations” may be admitted. “Just as the House under its rules may decline to appropriate for a purpose authorized by law, so it may by limitation prohibit the use of the money for part of the purpose while appropriating for the remainder of it.” *Constitution, Jefferson’s Manual, and Rules of the House of Representatives*, H. Doc. No. 110-162, 110<sup>th</sup> Cong., 2d Sess. § 1053 (2009). Limitations can be an effective device in oversight by strengthening Congress’s ability to exercise control over federal spending and to reduce unnecessary or undesired expenditures. Under House Rule XXI, no provision changing existing law can be reported in any general appropriation bill “except germane provisions that retrench expenditures by the reduction of amounts of money covered by the bill” (the Holman rule). Rule XXI was amended in 1983 in an effort to restrict the number of limitations on appropriations bills. The rule was changed again in 1995 by granting the majority leader a central role in determining consideration of limitation amendments. The procedures for limitation in the House are set forth in the *Congressional Record* for January 6, 1999, p. H29. A well-known limitation is the Hyde amendment, which since the 1970s has restricted the use of Medicaid funds to fund abortions for indigent women (see box).

“None of the funds appropriated under this Act shall be expended for any abortion ... [except] (1) if the pregnancy is the result of an act of rape or incest; or (2) in the case where a woman suffers from a physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy itself, that would, as certified by a physician, place the woman in danger of death unless an abortion is performed.” Labor-HHS Appropriations Act for fiscal 1998, 111 Stat. 1516, sec. 509 & 510 (1997).

2. **Riders.** Unlike limitations, legislative riders are extraneous to the subject matter of the bill to which they are added. Riders appear in both authorization bills and appropriations bills. In the latter, they may be subject to a point of order in the House on the ground that they are attempts to place legislation in an appropriations bill. In the Senate, Rule XVI prohibits on a point of order the addition to general appropriations bills of amendments that are legislative or non-germane. Both chambers have procedures to waive these prohibitions. (See the box below for an example of a rider.)

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

(b) Interim regulations issued under this section shall apply until the effective date of interim or final regulations promulgated under other laws that establish requirements and standards referred to in subsection (a) and expressly supersede this section: Provided, That the authority provided by this section shall terminate three years after the date of enactment of this Act.

(c) Notwithstanding any other provision of law and subsection (b), information developed under this section, including vulnerability assessments, site security plans, and other security related information, records, and documents shall be given protections from public disclosure consistent with similar information developed by chemical facilities subject to regulation under section 70103 of title 46, United States Code: Provided, That this subsection does not prohibit the sharing of such information, as the Secretary deems appropriate, with State and local government officials possessing the necessary security clearances, including law enforcement officials and first responders, for the purpose of carrying out this section, provided that such information may not be disclosed pursuant to any State or local law: Provided further, That in any proceeding to enforce this section, vulnerability assessments, site security plans, and other information submitted to or obtained by the Secretary under this section, and related vulnerability or security information, shall be treated as if the information were classified material.

(d) Any person who violates an order issued under this section shall be liable for a civil penalty under section 70119(a) of title 46, United States Code: Provided, That nothing in this section confers upon any

person except the Secretary a right of action against an owner or operator of a chemical facility to enforce any provision of this section.

(e) The Secretary of Homeland Security shall audit and inspect chemical facilities for the purposes of determining compliance with the regulations issued pursuant to this section.

(f) Nothing in this section shall be construed to supersede, amend, alter, or affect any Federal law that regulates the manufacture, distribution in commerce, use, sale, other treatment, or disposal of chemical substances or mixtures.

(g) If the Secretary determines that a chemical facility is not in compliance with this section, the Secretary shall provide the owner or operator with written notification (including a clear explanation of deficiencies in the vulnerability assessment and site security plan) and opportunity for consultation, and issue an order to comply by such date as the Secretary determines to be appropriate under the circumstances: Provided, That if the owner or operator continues to be in noncompliance, the Secretary may issue an order for the facility to cease operation, until the owner or operator complies with the order.” Department of Homeland Security Appropriations Act, 2007, P.L. 109-295 § 550, 120 Stat. 1355 (2006).

## Legislative Veto and Advance Notice

Many acts of Congress have delegated authority to the executive branch on the condition that proposed executive actions be submitted to Congress for review and possible disapproval before

they can be put into effect. This way of ensuring continuing oversight of policy areas follows two paths: the legislative veto and advance notification.

## **Legislative Veto**

Beginning in 1932, Congress delegated authority to the executive branch with the condition that proposed executive actions would be first submitted to Congress and subjected to disapproval by either house or disapproval by both houses acting through a concurrent resolution. Over the years, other types of legislative veto were added, allowing Congress to control executive branch actions without having to enact a law. In 1983, the Supreme Court ruled that the legislative veto was unconstitutional on the ground that all exercises of legislative power that affect the rights, duties, and relations of persons outside the legislative branch must satisfy the constitutional requirements of bicameralism and presentment of a bill or resolution to the President for his signature or veto. *INS v. Chadha*, 462 U.S. 919 (1983). Despite this ruling, Congress has continued to enact proscribed legislative vetoes and it has also relied on informal arrangements to provide comparable controls.

### ***Statutory Legislative Vetoes***

Congress responded to *Chadha* by converting some of the one-house and two-house legislative vetoes to joint resolutions of approval or disapproval, thus satisfying the requirements of bicameralism and presentment. However, Congress continues to rely on legislative vetoes. Since the *Chadha* decision, more than 400 legislative vetoes have been enacted into public law, usually in appropriations acts. These legislative vetoes are exercised by the Appropriations Committees. Typically, funds may not be used or an executive action may not begin until the Appropriations Committees have approved or, at least, not disapproved the planned action, often within a specified time limit (see box).

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

### ***Informal Legislative Vetoes***

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

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

Statutory provisions may stipulate that before a particular activity can be undertaken by the executive branch or funds obligated, Congress must first be advised or informed, ordinarily through a full written statement, of what is being proposed. These statutory provisions usually

provide for a period of time during which action by the executive must be deferred, giving Congress an opportunity to pass legislation prohibiting the pending action or using political pressure to cause executive officials to retract or modify the proposed action. This type of “report and wait” provision has been upheld by the Supreme Court. The Court noted: “The value of the reservation of the power to examine proposed rules, laws and regulations before they become effective is well understood by Congress. It is frequently, as here, employed to make sure that the action under the delegation squares with the Congressional purpose.” *Sibbach v. Wilson*, 312 U.S. 1 (1941). An example appeared in the Comprehensive Anti-Apartheid Act of 1986, which was directed toward South Africa’s political persecution of Nelson Mandela and other dissidents (see box).

“The President may suspend or modify any of the measures required by this title or section 501(c) or section 504(b) thirty days after he determines, and so reports to the Speaker of the House of Representatives and the chairman of the Committee on Foreign Relations of the Senate, that the Government of South Africa has [taken certain actions] unless the Congress enacts within such 30-day period, in accordance with section 602 of this Act, a joint resolution disapproving the determination of the President under this subsection.” 100 Stat. 103, sec. 311 (1986).

## Independent Counsel

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

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



### **Collisions between Congress and Independent Counsels**

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

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

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

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

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

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

Lawrence E. Walsh, “The Independent Counsel and the Separation of Powers,” *Houston Law Review*, v. 25 (1988):1.

There was no specific term of appointment for independent counsels. They could serve for as long as it took to complete their duties concerning that specific matter within their defined and limited jurisdiction. Once a matter was completed, the independent counsel filed a final report. The special division of the court could also find that the independent counsel’s work was completed and terminate the office. A periodic review of an independent counsel for such determination was to be made by the special division of the court. An independent counsel, *prior* to the completion of his or her duties, could be removed from office (other than by impeachment and conviction) only by the Attorney General of the United States for good cause, physical or mental disability, or other impairing condition, and such removal could be appealed to the court. The procedures for appointing and removing the independent counsel were upheld by the Supreme Court in *Morrison v. Olson*, 487 U.S. 654 (1988).

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

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

The independent counsel was directed by statutory language to submit to Congress an annual report on the activities of such independent counsel, including the progress of investigations and any prosecutions. Although it was recognized that certain information would have to be kept confidential, the statute stated that “information adequate to justify the expenditures that the office of the independent counsel has made” should be provided. 28 U.S.C. § 595(a)(2).

The conduct of an independent counsel was subject to congressional oversight and an independent counsel was required to cooperate with that oversight. 28 U.S.C. § 595(a)(1). In addition, the independent counsel was required to report to the House of Representatives any “substantial and credible” information that may constitute grounds for any impeachment. 28 U.S.C. § 595(c). On September 11, 1998, Independent Counsel Kenneth W. Starr forwarded to the House a report concluding that President Clinton may have committed impeachable offenses. The House passed two articles of impeachment (perjury and obstruction of justice), but the Senate voted only 45 to 55 on the perjury charge and 50 to 50 on the obstruction of justice charge, both votes short of the two-thirds majority required under the Constitution.

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

Unless Congress in the future reauthorizes the independent counsel, the only available option for an independent counsel is to have the Attorney General invoke existing authority to appoint a special prosecutor to investigate a particular matter. For example, when the independent counsel statute expired in 1992 and was not reauthorized until 1994, Attorney General Janet Reno appointed Robert Fiske in 1993 to investigate the Clintons’ involvement in Whitewater and the death of White House aide Vincent Foster. On July 9, 1999 Attorney General Reno promulgated regulations concerning the appointment of outside, temporary counsels, to be called “Special Counsels,” in certain circumstances to conduct investigations and possible prosecutions of certain sensitive matters, or matters which may raise a conflict for the Justice Department (28 C.F.R. Part 600). Such special counsels will have substantially less independence than the statutory independent General, including removal for “misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Department policies.”

## **Oversight Information Sources and Consultant Services**

Congress calls upon a variety of sources for information and analysis to support its oversight activities. Most of this assistance is provided by legislative support agencies: The Congressional Research Service, the Congressional Budget Office, and the Government Accountability Office. In addition, the Offices of Senate Legal Counsel and House General Counsel are valuable oversight resources. A range of outside interest groups and research organizations also provide rich sources of information.

### **Congressional Research Service (CRS)**

#### **CRS Mission Statement**

“The Congressional Research Service serves the Congress throughout the legislative process by providing comprehensive and reliable legislative research and analysis, that are timely, objective, authoritative, and confidential, thereby contributing to an informed national legislature.”

## **Organization**

CRS is organized into five interdisciplinary research divisions: American Law; Domestic Social Policy; Foreign Affairs, Defense and Trade; Government and Finance; and Resources, Science and Industry. The Knowledge Services Group provides research support services to CRS analysts and attorneys in providing authoritative and reliable information research and policy analysis to Congress.

## **Staff of CRS**

CRS has about 700 employees on its permanent staff. The professional staff are diverse, including, among others, attorneys, economists, engineers, social science analysts, information scientists, librarians, defense and foreign affairs analysts, political scientists, public administrators, and physical and biological scientists.

## **Analytical and Research Services**

### *Policy analysis and research*

CRS staff anticipates and responds to congressional needs for policy analysis, research and information in an interdisciplinary, integrated manner. CRS provides timely and objective responses to congressional inquiries for policy analysis, research and information at every stage of the legislative process.

Legislative attorneys and paralegal staff respond to congressional needs for legal information and analysis to support the legislative, oversight, and representational functions of Congress.

### *Information research*

Information research specialists and resource specialists are available to provide information research and reference assistance. The staff also provides copies of articles in newspapers, journals, legal and legislative documents and offers assistance with a wide variety of electronic files.

### *Briefings, seminars, and workshops*

CRS conducts briefings, seminars, and workshops for members of Congress and their staffs. On these occasions CRS analysts and other experts discuss public policy issues, international concerns, and the legislative process.

**Briefings.** CRS analysts and specialists are available to give one-on-one briefings to members and staff on public policy issues, the legislative process, congressional office operations, committee matters, or a general orientation to CRS.

**Issue seminars and workshops.** In anticipation of congressional interest or at the request of a member or committee, CRS organizes and conducts seminars and workshops on issues of current interest to members and staff of Congress. CRS and outside experts participate in these events with members and staff.

**Federal Law Update.** This series, offered twice yearly by the American Law Division, focuses on developments on important issues of law directly related to the legislative business of Congress. The series can meet continuing legal education (CLE) requirements in some states.

**CRS Legislative Institutes.** This three-part series provides training in the work of Congress and the legislative process. Topics include the federal budget process, committee system and procedures, floor procedures, amendments, and resolutions. In the Graduate Legislative Institute, participants simulate congressional proceedings as “members of the CRS Congress” and gain experience in procedures by moving bills through the legislative process.

**District and Staff Institutes.** These institutes provide orientation for staff of district offices that include discussions of CRS services, the legislative and budget processes, casework, member allowances, ethics, and franking. The program is supported by the House and Senate.

**New Member Seminar.** Every two years CRS offers new members an orientation seminar on public policy issues. These sessions are held in January at the beginning of each new Congress.

For additional information about CRS seminars and events, call 7-7904.

## **CRS Products**

### *Customized Memoranda*

Confidential memoranda prepared for a specific office are a major form of CRS written communication. These memoranda are solely for the use of the requesting office and are not distributed further unless permission has been given by that office. Memoranda are often used by CRS attorneys and analysts to respond to inquiries focused on legislative and policy matters of individual member interest.

### *CRS Reports*

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 on the CRS website at <http://www.crs.gov>.

### *Congressional Distribution Memoranda*

Matters that are not suitable for treatment in a CRS Report, but that may be of interest to more than one congressional office, can be the subject of general distribution memoranda provided to a congressional office upon request. General Distribution memoranda differ from Reports because they are tailored; are directed to a specific question or concern; or are more technical or focused in nature.

### ***The La Follette Congressional Reading Room, the CRS Research Centers and the Jefferson Congressional Reading Room***

Staff in the congressional reading rooms and research centers provide telephone reference assistance and in-person consultation on resources and research for congressional staff. A selected research collection, newspapers and journals, and assistance with online searching is available.

La Follette Congressional Reading Room—8:30am – 8:00pm Mon-Th; 8:30am – 5:00pm, Fri. and Sat.

Rayburn Research Center—9:00am – 5:30pm Mon.-Fri.

Russell Senate Research Center—9:00am – 5:30pm Mon.-Fri.

(Hours may change when Congress is not in session.)

The Jefferson Congressional Reading Room is a members-only facility staffed by CRS research librarians providing in-person service.

### ***Electronically Accessible Products and Services***

**CRS Website** <http://www.crs.gov>. The CRS website provides 24-hour access to an array of CRS services including full text of reports, a weekly “Floor Agenda,” updates and analyses of the annual appropriations legislation, an interactive guide to the legislative process, online registration for CRS seminars, and complete information on other CRS services. In operation since the 104<sup>th</sup> Congress, the CRS website is accessible only to House and Senate offices and other legislative branch agencies. A linked format allows the user to move easily within a CRS online document and link to the text and summary of relevant legislation and other CRS products on the topic.

**Legislative Information System** <http://www.congress.gov>. The Legislative Information System (LIS) was available for the first time on Capnet at the beginning of the 105<sup>th</sup> Congress. The system provides members of Congress and their staff with access to the most current and comprehensive legislative information available. It can be accessed only by the House and Senate and the legislative support agencies. The LIS has been developed under the policy direction of the Senate Committee on Rules and Administration and the House Committee on House Administration. It has been a collaborative project of the offices and agencies of the legislative branch, including the Secretary of the Senate and the Clerk of the House; House Information Resources and the Senate Sergeant at Arms; the Government Printing Office; the Government Accountability Office; the Congressional Budget Office; the Congressional Research Service; and the Library of Congress. CRS has responsibility for the overall coordination of the retrieval system; the Library of Congress is responsible for its technical development and operation.

**Floor Agenda.** The “Floor Agenda: CRS Products” page, a weekly compendium of CRS products relevant to scheduled or expected floor action in the House and Senate, is available on the CRS website and through e-mail subscription to all members, committees, subcommittees, and congressional staff. All CRS products listed on the Floor Agenda are linked for electronic delivery to subscriber desktops.

**CRS Programs Listserv.** Launched in fiscal 2001, this e-mail notification system provides subscribers with descriptions of current CRS programs and links to online registration forms.

**Current Legislative Issues.** The Current Legislative Issues (CLI) system, accessible to Congress from the CRS Home Page, reflects policy areas identified by CRS research staff as active and of current importance to Congress. All products presented as CLIs are maintained to address significant policy developments. On occasion the system is used to facilitate the contribution of CRS expertise in situations requiring immediate attention of Congress on an unanticipated basis. CRS typically develops and maintains about 150 CLIs a year.

**Appropriations.** The CRS Appropriations web page continues to provide comprehensive legislative tracking and access to legislative analysis of each of the 12 annual appropriations bills. The appropriations status table includes an online guide to the consolidated Department of Defense and Full-Year Continuing Appropriations Act, 2011(P.L. 112-10).

### *Audiovisual Products and Services*

CRS provides a variety of audiovisual products and technical assistance in support of its service to Congress. These include producing video or audio copies of CRS institutes and seminars that congressional staff can request for viewing in DVD format. In addition, CRS provides two hours of television programming each weekday for the House and Senate closed-circuit systems.

## **CRS Divisional Responsibilities**

CRS has adopted an interdisciplinary and integrative approach as it responds to requests from Congress. The Service seeks to define complex issues in clear and understandable ways, identify basic causes of the problems under consideration, and highlight available policy choices and potential effects of action. CRS is organized into the following divisions and offices to support the analysis, research, and information needs of Congress.

## **Divisions**

### *American Law Division*

The American Law Division provides Congress with legal analysis and information on the range of legal questions that emerge from the congressional agenda. Division lawyers and paralegals work with federal, state, and international legal resources in support of the legislative, oversight, and representational needs of members and committees of Congress. The division's work involves the constitutional framework of separation of powers, congressional-executive relations and federalism; the legal aspects of congressional practices and procedures; and the myriad questions of administrative law, constitutional law, criminal law, civil rights, environmental law, business and tax law, and international law that are implicated by the legislative process. In addition, the division prepares *The Constitution of the United States of America—Analysis and Interpretation* (popularly known as the Constitution Annotated).

### *Domestic Social Policy Division*

The Domestic Social Policy Division offers Congress research and analysis in the broad area of domestic social policies and programs. Analysts use multiple disciplines in their research, including program and legislative expertise, quantitative methodologies, and economic analysis. Issue and legislative areas include education and training, health care and medicine, public health,

social security, public and private pensions, welfare, nutrition, housing, immigration, civil rights, drug control, crime and criminal justice, border security and domestic intelligence, labor and occupational safety, unemployment and workers compensation, and issues related to the aging of the U.S. population, to children, persons with disabilities, the poor, veterans, and minorities.

### ***Foreign Affairs, Defense, and Trade***

The Foreign Affairs, Defense, and Trade Division is organized into seven regional and functional sections. Analysts follow worldwide political and economic and security developments for Congress, including U.S. relations with individual countries and transnational issues such as terrorism, narcotics, refugees, international health, global economic problems, and global institutions such as the United Nations, World Bank, International Monetary Fund and the World Trade Organization. They also address U.S. foreign aid programs, strategies, and resource allocations; State Department budget and functions; international debt; public diplomacy; and legislation on foreign relations. Other work includes national security policy, military strategy, weapons systems, military compensation, the defense budget, and U.S. military bases. Trade-related legislation, policies, and programs and U.S. trade performance and investment flows are covered, as are trade negotiations and agreements, export promotion, import regulations, tariffs, and trade policy functions.

### ***Government and Finance Division***

The Government and Finance Division responds to congressional requests for assistance on all aspects of Congress. These include the congressional budget and appropriations process, the legislative process, congressional history, and the organization and operations of Congress and legislative branch agencies. Among the financial issues covered by the division are banking, financial institutions, insurance, and securities; taxation, public finance, fiscal and monetary policy, and the public debt; the interaction between taxes and interest rates; and such economic indicators as gross domestic product, inflation, and savings. In addition, the division responds to requests on the organization and management of the federal executive and judicial branches; government personnel and the civil service; the presidency and vice presidency; government information policy and privacy issues; intergovernmental relations and forms of federal aid; state and local government; statehood and U.S. territories; the District of Columbia; economic developments; federal planning for and response to emergencies, disasters, and acts of terrorism in the United States; survey research and public opinion polls; the census; reapportionment and redistricting; elections, campaign finance, lobbying, and political parties; U.S. history; constitutional amendments; and constitutional theory and history.

### ***Resources, Science, and Industry Division***

The Resources, Science, and Industry Division covers an array of legislative issues for Congress involving natural resources and environmental management, science and technology, and industry and infrastructure. Resources work includes policy analysis on public lands and other natural resources issues; environment; agriculture, food, and fisheries; and energy and minerals. Science coverage includes policy analysis on civilian and military research and development issues, information and telecommunications, space, earth sciences, and general science and technology. Support on industry issues includes policy analysis on transportation and transportation infrastructure issues, industrial market structure and regulation, and sector-specific industry analysis.

### ***Knowledge Services Group***

The Knowledge Services Group is comprised of information research professionals who partner with CRS analysts and attorneys in providing authoritative and reliable information research and policy analysis to Congress. Information professionals are clustered together by policy research area and align their work directly to the CRS analytical divisions. They write descriptive products and contribute descriptive input to analytical products in policy research areas, advise analysts and Congress in finding solutions for their information needs, make recommendations for incorporating new research strategies into their work, and create customized web pages. Staff evaluate, acquire, and maintain state-of-the-art resource materials and collections for CRS staff; work with the analytical divisions in ensuring the currentness and accuracy of the Services' products, databases, and spreadsheets; and maintain the currentness, comprehensiveness, and integrity of CRS information resources by identifying, assessing, acquiring, organizing, preserving, and tracking materials. They also provide authoritative information on specific policy research areas through discussions or presentations and provide or coordinate customized training on information resources.

### **Offices**

#### ***Office of Finance and Administration***

The Office of Finance and Administration oversees the financial, procurement, and administrative programs of the Service. This includes coordinating the strategic planning; preparing the budget request; formulating and executing the financial operating plan; performing contracting and procurement actions; supervising the Service's status, role, activities, and interaction with the Library in performing these functions.

#### ***Office of the Counselor to the Director***

The Office of the Counselor to the Director examines and defines policy and legal questions and issues affecting all aspects of the Service, and serves as the principal legal and policy advisor to the CRS Director, Deputy Director, and other senior management officials. The office develops and coordinates matters relating to internal CRS policies, particularly as they affect the Service's relationship with congressional clients and other legislative support agencies, and ensures that the Service complies with applicable guidelines and directives contained in the Reorganization Act, in statements by appropriations and oversight committees, and in Library regulations and CRS policy statements. The Office of the Counselor to the Director also addresses policy and legal questions with respect to such matters as congressional requests, potential conflicts of interest and activities on the part of staff, and personnel policy and labor-management issues.

#### ***Office of Congressional Information and Publishing***

The Office of Congressional Information and Publishing develops and maintains the congressional Legislative Information System (LIS) that supports both Congress and CRS staff, and manages the electronic research product system including the editing, processing, and production of CRS reports. The office provides summaries and status information for all bills introduced each Congress, coordinates access to the LIS, provides quality assurance for CRS reports and for the Service's input to the LIS, offers graphic support on CRS products, and



represents the Director in dealing with other organizations and agencies on issues regarding legislative information technology.

### ***Office of Information Management and Technology***

The Office of Information Management and Technology provides the information management capabilities and support required for CRS legislation-related activities, communications, and service to Congress. This includes planning, procurement, development, operations, and maintenance of the information technology infrastructure and systems required to support the CRS mission.

### ***The Office of Workforce Management and Development***

The Office of Workforce Management and Development administers the Service's recruitment, staffing, and workforce development programs, including succession planning, merit selection, and other employment programs, special recruitment programs, upward mobility programs, diversity efforts, mentoring, special recognition programs, training, position classification, and performance management programs and activities. This office represents the Director in issues involving the Service's status, role, activities, and interaction with other Library entities in relevant areas of human resources administration, management, and development. Overall the goal of the office is to enhance the Service's ability to attract and retain the human resources talent it needs to respond to the dynamic research, analysis, and information needs of Congress.

## **Interdisciplinary Teams**

### ***Identification of Major Issues***

As part of Service-wide planning efforts, CRS managers attempt to anticipate major congressional issues. The program identifies and defines major issues, structures them for more effective scrutiny by Congress, and provides effective, timely, and comprehensive products and services to Congress, that usually require multi-disciplinary and interdivisional contributions. The issues chosen are national in scope, receive widespread public attention, have significant effects on the federal budget, economy, or social fabric of the Nation, and are virtually certain to be the subject of congressional hearings and legislative action.

### ***Limitations***

The Legislative Reorganization Act of 1970 and specific provisions in various other Acts direct and authorize CRS to provide a great range of products and services to Congress. However, pursuant to these statutory authorities and understandings reached over time in consultation with the relevant oversight committees, the Service has developed the following policies limiting or barring certain types of assistance. When it appears that a congressional request should be declined on these policy grounds, that decision and notification to the requestor is to be made only after consultation with the appropriate Section Research Manager or Assistant Director.

- a. CRS cannot prepare reports, seminars or undisclaimed products which are of a partisan nature or advocate bills or policies. But CRS will respond to requests for "directed writing"—statement drafts, casemaking or other disclaimed products clearly identified as

- prepared at the direction of the client and not for attribution as CRS analysis or opinion. In no case is excessive partisanship, incorrect factual data, moral denigration of opponents, or personal research damaging to members permissible.
- b. CRS cannot provide researched information focusing on individual members or living former members of Congress (other than holders of, or nominees to, federal appointive office), except at the specific request or with permission of the member concerned.
  - c. Members of the CRS staff shall not appear as witnesses before committees of Congress in their capacity as CRS employees or on matters relating to their official duties without the express consent of the Director.
  - d. CRS does not draft bills (a function of the office of the legislative counsels), but will assist with the preparation of legislative proposals.
  - e. CRS cannot meet deadlines or demands that could only be met by dropping or jeopardizing the quality of responses to urgent legislative requests related to the public policy work of Congress, but the Service will respond to all requests as rapidly as is feasible under prevailing workload conditions.
  - f. CRS cannot accept “rush” or priority deadlines on constituent inquiries but will respond as expeditiously as is possible without compromising the quality of responses relating to current legislative business.
  - g. CRS cannot undertake casework or provide translating services or briefings for constituents, but can lend assistance in responding to constituent matters, including identification of the appropriate agency or private entity to contact for further pursuit of the matter.
  - h. CRS cannot give personal legal or medical advice, but will assist in the provision of background information, the identification of relevant issues for further scrutiny, and advice on sources of additional assistance.
  - i. CRS cannot undertake scholastic or personal research for office staff, but can, on a nonpriority basis, help with bibliographic and reference services.
  - j. CRS assistance for former members of Congress should be limited to use of the La Follette Reading Room and reference centers, the hotline service, the provision of readily available information and previously prepared CRS congressional distribution products. CRS cannot undertake original research for former members, but on a nonpriority basis responds to requests for reference services and research guidance.
  - k. CRS is not authorized to provide congressional offices with clerical assistance (e.g., typing, duplication, maintenance of mailing lists, continuing clipping services, etc.).
  - l. CRS must not use its staff to index hearings or congressional documents other than those prepared by the Service itself.
  - m. The Library of Congress is not authorized to subscribe to or lend on a regular basis current issues of periodicals and newspapers for the purpose of furnishing them regularly to individual congressional offices.

- n. CRS must not use its staff to support executive or other commissions that are not funded through the Legislative Branch Appropriations Act. In those instances where members of Congress are official members of a commission not served by CRS, the Service may supply customary assistance to the members, but queries should be placed through the members' offices by their official staffs, and the replies should be sent to the members' offices, not to the office of the commission.
- o. CRS does not conduct audits or field investigations.
- p. CRS is not authorized to provide its services in support of political campaign organizations.
- q. While CRS reference and research specialists serve all members and committees of Congress, the Director has the authority to assign staff to work temporarily for particular committees on request. In current circumstances, however, no full time assignments may be approved, and staff assigned to close support of a committee must be available to serve other clients. When staff is adequate to permit the loan of subject specialists for short periods, the Director may approve formal requests without reimbursement; staff loans for periods of over 60 days must be reimbursed. No full-time assignment of staff is approved if the assignment leaves the Service unable to adequately serve Congress.
- r. As a general rule, the services of CRS are provided exclusively to Congress and, to the extent provided by law, to other congressional support agencies. Because of the benefits derived from the exchange of information with other governmental bodies (including elected and appointed officials of foreign governments), the Service may also at the discretion of the Director exchange courtesies and services of a limited nature with such organizations, so long as such assistance benefits CRS services to Congress.
- s. CRS does not provide its services to congressional member organizations and informal caucuses not funded by legislative branch appropriations but will provide its normal services to the offices of members who belong to such entities and to formal congressional party organizations. Current lists of organizations that may place requests directly are available from the Inquiry Section.
- t. CRS does not offer services to former members of Congress, other than providing copies of current CRS publications or limited brief reference assistance.

## **Contact Information**

### ***Fast Access to all CRS services***

Phone 7-5700 (Press 1-5 to speak to an information specialist)

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Fax 7-6745

TTY 7-7154

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Navigation assistance 7-7100

***CRS Experts***

Phone 7-5700 (press 1-5 to request an expert)

Dial by name 7-5700 (press 1-4 and spell last name then first name)

***CRS Products***

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***In-Person Services and CRS Products***

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*(Closed Saturdays when Congress is not in session.)*

Rayburn Research Center B3355-6958

Monday - Friday 9:00 a.m. - 5:30 p.m.

Senate Research Center Russell B074-3550

Monday - Friday 9:00 a.m. - 5:30 p.m.

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Mary B. Mazanec, Acting Director  
Congressional Research Service  
The Library of Congress, LM 213  
Washington, DC 20540-7210  
(Note: Hill offices may use Inside Mail)

For questions, comments or problems about CRS services, please call 7-3915.

## **Congressional Budget Office (CBO)**

The mission of the Congressional Budget Office (CBO) is to provide Congress with the objective, timely, nonpartisan analysis needed for economic and budget decisions and the information and estimates required for the Congressional budget process.

### **CBO's Statutory Responsibilities**

Under the Congressional Budget Control and Impoundment Act of 1974 (P.L. 93-344), which created CBO, the agency's primary job is to provide budget-related information to all committees of both Houses, with priority given to the needs of the Committees on the Budget and of the Committees on Appropriations, Ways and Means, and Finance. The law also requires CBO to prepare several budget projections each year and to perform studies of budgetary issues. In addition, CBO must prepare estimates of new budget authority, outlays, or revenues that would result from bills or joint resolutions reported from committees of either House, and of the costs that the government would incur in carrying out the provisions of the proposed legislation. Those cost estimates are usually included in the committee reports accompanying bills or resolutions before action by the House or Senate.

Under the Budget Act, the Joint Committee on Taxation is responsible for estimating the impact on revenues when legislation involves income, estate, gift, excise, and payroll taxes, and CBO is required to use those revenue estimates in its own analyses.

The Unfunded Mandates Reform Act of 1995 requires CBO to estimate the costs of federal mandates in legislation that would affect state, local, and tribal governments or the private sector. The act also authorizes CBO to prepare analyses and studies of the budgetary or financial impact of proposed legislation that may significantly affect state and local governments or the private sector, to the extent practicable, at the request of any committee.

Occasionally, other laws have directed CBO to analyze specific subjects. Such analyses have included the treatment of administrative costs under credit reform accounting and the financial risks posed by government-sponsored enterprises.

### **How Work on CBO's Estimates and Studies Is Initiated**

#### ***Cost Estimates***

The Congressional Budget Office is responsible for providing federal budget and mandate cost estimates for bills (other than appropriation bills) when they are reported by a full committee of either House. Committee staff should notify CBO when bills are about to be ordered reported and when cost estimates are needed.

CBO sometimes prepares cost estimates for proposals at other stages of the legislative process at the request of a committee of jurisdiction, a budget committee, or the Congressional leadership. For example, CBO may prepare cost estimates for alternative proposals to be considered by a committee or subcommittee, including draft bills not yet introduced, or for amendments to be considered during committee markups. In many cases, cost estimates provided at early stages in the legislative process are informal, conveying preliminary budgetary effects. Similarly, CBO may prepare cost estimates for floor amendments and for bills that pass one or both Houses.

For appropriation bills, CBO provides estimates of outlays that would result from budget authority provided by such legislation. CBO also provides the budget and appropriations committees with frequent tabulations of Congressional action on both spending and revenue bills so that Congress can know whether it is acting within the limits set by its annual budget resolution.

When undertaking a cost estimate, CBO analysts contact the staff of the committee of jurisdiction and, when applicable, the staffs of the member sponsoring the proposal and the member requesting the estimate to gather background information and discuss the schedule for completing the estimate. Budget and mandate cost estimates are based on the text of the proposed legislation. CBO analysts consult with the staff of the committee of jurisdiction (for a reported bill) or the sponsoring member (for an introduced bill or amendment) when questions of interpretation arise, but they draw their own conclusions on an impartial and objective basis.

CBO analysts contact the appropriate staff members if a forthcoming CBO estimate shows direct spending costs, mandates that exceed the legislative thresholds, or other significant findings. However, CBO does not make judgments about the application of any procedural objections (points of order) that could be raised in the legislative process on the basis of those findings.

### ***Analytic Studies***

In addition to statutory reports, or studies done to support CBO's statutory work, each year the office also undertakes a number of analytic studies at the request of the Chairman or Ranking Minority member of the relevant committee or subcommittee; the Congressional leadership; or, as time permits, individual members.

When undertaking requested analyses of legislative proposals or issues, CBO staff members consult with the requester's staff to reach an understanding of the scope and nature of the work to be done. CBO analysts draw their own conclusions on an impartial and objective basis, as they do when preparing cost estimates. When appropriate and after consultation with the requester's staff, CBO staff inform committees that may have an interest in the work. As a final step in the process, CBO informs the requester's staff of the results of the analysis and releases the material.

### **Sources of Information and Peer Review Practices**

CBO uses the rich data sources available from the government's statistical agencies. Those sources include the national income and product accounts, the census of manufacturers, the Statistics of Income, the Current Population Survey, and various national health surveys. CBO also uses information provided by relevant government agencies and industry groups to meet specific needs. To answer some questions, CBO uses available analytic models or develops them on its own.

CBO employs standard methods of economic analysis and closely follows professional developments in economics and related disciplines. CBO frequently seeks outside experts' advice on specific analytic matters, such as the outlook for agriculture production, spending projections for Medicare and Medicaid, and business prospects in the telecommunications industry. For its economic forecasts, CBO draws on the advice of a distinguished panel of advisers that meets twice a year.

All CBO estimates and analytic products are reviewed internally for technical competence, accuracy of data, and clarity of exposition. CBO studies also are reviewed by outside experts. Although outside advisers provide considerable assistance, CBO is solely responsible for the accuracy of the estimates and analyses that it produces. In keeping with its nonpartisan status and its mandate to provide objective analysis, CBO does not make policy recommendations in any of its analyses.

### **Disclosure of CBO's Assumptions and Methodologies**

Both the Congressional Budget Act and the Unfunded Mandates Reform Act direct CBO to disclose the basis for each budget and mandate cost estimate; CBO does so both for its cost estimates and for its analytic studies.

### **Transmission of CBO's Work to Congress**

CBO seeks to ensure that key parties in Congress who are involved in any particular issue have equal access to its analytic work. Insofar as possible, CBO delivers its cost estimates and analyses to all interested parties simultaneously. Requests for confidentiality are honored only for cost estimates for legislative proposals that have not been made public.

The Director of the Congressional Budget Office transmits by letter all formal budget and mandate cost estimates of legislative proposals and all requested analyses. CBO sends its formal cost estimates for reported bills and estimates prepared at committee request to the Chairman and Ranking Minority member of the reporting or requesting committee. When the requester is a budget committee or individual member, CBO also sends a copy of its cost estimate simultaneously to the Chairman and Ranking Minority member of the committee of jurisdiction; for an introduced bill or amendment, CBO sends a copy of the estimate to the sponsor and the Chairman and Ranking Minority member of the committee of jurisdiction, as well to as the requester.

In contrast, CBO staff may provide informal cost estimates at various stages of the legislative process as members or committees evaluate proposals. Informal estimates are preliminary because they do not undergo the same review procedures required for formal estimates.

### **Distribution of CBO's Estimates and Studies**

CBO makes its work widely available to members of Congress and their staff as well as to the public. CBO posts all of its cost estimates and publications on its website, and visitors to the site can subscribe to receive e-mails notifying them when CBO issues a cost estimate or publication on a subject of interest to them. The agency provides copies of its publications to members of Congress and can provide single copies to members of the public at no charge.

## **Funding**

The consolidated Department of Defense and Full-Year Continuing Appropriations Act, 2011 (P.L. 112-10) provided the agency with \$46.8 million in FY2011 funding.

## **Workload**

In fiscal year 2009, CBO issued 33 studies and reports, nine briefs, 11 Monthly Budget Reviews, 38 letters, eight presentations, and five background papers—along with two other publications and numerous supplemental data. CBO also testified before Congress 17 times on a variety of issues. In calendar year 2009, CBO completed approximately 480 federal cost estimates as well as about 420 estimates of the impact of legislation on state and local governments, including the identification of any unfunded mandates contained in such legislation, and about 420 estimates of the impact of any unfunded mandates on the private sector.

Finally, CBO provides up-to-date data on its website, including current budget and economic projections and information on the status of discretionary appropriations.

## **Appointment of the Director**

The Speaker of the House of Representatives and the President pro tempore of the Senate jointly appoint the CBO Director, after considering recommendations from the two budget committees. The term of office is four years, with no limit on the number of terms a Director may serve. Either House of Congress, however, may remove the Director by resolution. At the expiration of a term of office, the person serving as Director may continue in the position until his or her successor is appointed.

## **Director**

Douglas W. Elmendorf is CBO's Director. He had been initially appointed to serve from January 22, 2009, to January 3, 2011, completing the remainder of his predecessor's four-year term of office. Dr. Elmendorf has been reappointed to serve through January 3, 2015.

## **Staffing**

CBO currently employs about 250 people. The agency is composed primarily of economists and public policy analysts. About three-quarters of its professional staff hold advanced degrees, mostly in economics or public policy.

## **Location and Contact Information**

Services and offices are located on the fourth floor of the Ford House Office Building (formerly House Annex II) at Second and D Streets, SW, in Washington, DC. The building is served by the Blue and Orange Lines of the Washington Metrorail system; the Federal Center SW station is across from the Third Street side of the building. A shuttle bus service operated on Capitol Hill by the Architect of the Capitol serves the Ford Building.



For general information, call 202-226-2837. The fax number is (202) 226-2714. CBO is open weekdays from 9:00 a.m. to 5:30 p.m.

## **How to Obtain CBO Products**

*Congressional Distribution.* Members of Congress receive copies of all CBO reports and studies. The fax number is (202) 226-3040. CBO is open weekdays from 9:00 a.m. to 5:30 p.m.

*Public Distribution.* Single copies of CBO’s reports, studies, papers, and memorandums are available to the public at no charge. Those documents are also available on CBO’s website ([www.cbo.gov](http://www.cbo.gov)). To request a list of publications or a specific document, call the Publications Office at (202) 226-2809 weekdays between 9:00 a.m. and 5:30 p.m. or write to the following:

CBO Publications Office  
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Ford House Office Building  
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Washington, DC 20515

To obtain multiple copies, contact the U.S. Government Printing Office, which sells many of CBO’s reports and studies. For information about availability, exact costs, and ordering, call (202) 275-3030 or write to the following:

Superintendent of Documents  
U.S. Government Printing Office  
Washington, DC 20402

## **Offices of Senate Legal Counsel and House General Counsel**

For over two decades the offices of Senate Legal Counsel and House General Counsel have developed parallel yet distinctly unique and independent roles as institutional legal “voices” of the two bodies they represent. Familiarity with the structure and operation of these offices and the nature of the support they may provide committees in the context of an investigative oversight proceeding is essential.

### **Senate Legal Counsel**

The Office of Senate Legal Counsel<sup>372</sup> was created by Title VII of the Ethics in Government Act of 1978<sup>373</sup> “to serve the institution of Congress rather than the partisan interests of one party or another.”<sup>374</sup> The counsel and deputy counsel are appointed by the president pro tempore of the

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<sup>372</sup> A full description of the Office of Senate Legal Counsel and its work may be found in Floyd M. Riddick and Alan S. Frumin, Riddick’s Senate Procedure, S.Doc. 28, 101<sup>st</sup> Cong., 2<sup>nd</sup> sess. 1236 (1992). See Charles Tiefer, The Senate and House Counsel Offices: Dilemmas of Representing in Court the Institutional Congressional Client, *Law and Contemporary Problems*, vol. 61: no. 2, spring 1998:48-63 (providing a more recent discussion of the history, development and work of both the Senate and House counsels’ offices).

<sup>373</sup> P.L. 95-520, secs. 701 *et seq.*, 92 Stat. 1824, 1875 (1978), *codified principally in* 2 U.S.C. §§ 288, *et seq.*

<sup>374</sup> S.Rept. 95-170, 95<sup>th</sup> Cong., 2<sup>nd</sup> sess. 84 (1978).

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 chairman and ranking minority member of the Committees on the Judiciary and on Rules and Administration.<sup>375</sup>

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.<sup>376</sup>

(1) Proceedings to Aid Investigations by Senate Committees

The Senate Legal Counsel may represent committees in proceedings to obtain evidence for Senate investigations. Two specific proceedings are authorized.

The first proceeding is under the law providing committees the authority to grant witness immunity (18 U.S.C. § 6005). It provides that a committee or subcommittee of either house of Congress may request an immunity order from a U.S. district court when the request has been approved by the affirmative vote of two-thirds of the members of the full committee. By the same vote, a committee may direct the Senate Legal Counsel to represent it or any of its subcommittees in an application for an immunity order.<sup>377</sup>

The second proceeding involves authority under the Ethics in Government Act of 1978 which permits the Senate Legal Counsel to represent a committee or subcommittee of the Senate in a civil action to enforce a subpoena. Prior to the Ethics Act, subpoenas of the Senate could be enforced only through the cumbersome method of a contempt proceeding before the bar of the Senate or by a certification to the U.S. attorney and a prosecution for criminal contempt of Congress under 2 U.S.C. §§ 192, 194. The Ethics Act authorizes the Senate to enforce its subpoenas through a civil action in the U.S. District Court for the District of Columbia.<sup>378</sup> The House chose not to avail itself of this procedure and this enforcement method applies only to Senate subpoenas. Senate subpoenas have been enforced in several civil actions. See, for example, proceedings to hold in contempt a recalcitrant witness in the impeachment proceedings against Judge Alcee L. Hastings<sup>379</sup> and proceedings to enforce a subpoena *duces tecum* for the production of diaries of Senator Bob Packwood.<sup>380</sup>

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<sup>375</sup> 2 U.S.C. § 288(a) and (b), 288a.

<sup>376</sup> In addition, the office is called upon to defend the Senate, its committees, officers and employees in civil litigation relating to their official responsibilities or when they have been subpoenaed to testify or to produce Senate records; and to appear for the Senate when it intervenes or appears as *amicus curiae* in a lawsuit to protect the powers or responsibilities of Congress.

<sup>377</sup> 2 U.S.C. § 288b(d)(2), 288f.

<sup>378</sup> 28 U.S.C. § 1365.

<sup>379</sup> See S.Rept. 98, 101<sup>st</sup> Cong., 1<sup>st</sup> sess. (1989).

<sup>380</sup> See, *Senate Select Committee on Ethics v. Packwood*, 845 F.Supp 17 (D.D.C. 1994), *petition for stay pending appeal denied*, 510 U.S. 1319 (1994).

The statute details the procedure for directing the Senate Legal Counsel to bring a civil action to enforce a subpoena. In contrast to an application for an immunity order, which may be authorized by a committee, only the full Senate by resolution may authorize an action to enforce a subpoena.<sup>381</sup> The Senate may not consider a resolution to direct the counsel to bring an action unless the investigating committee reports the resolution by a majority vote. The statute specifies the required contents of the committee report; among other matters, the committee must report on the extent to which the subpoenaed party has complied with the subpoena, the objections or privileges asserted by the witness, and the comparative effectiveness of a criminal and civil proceeding.<sup>382</sup> A significant limitation on the civil enforcement remedy is that it excludes from its coverage actions against officers or employees of the federal government acting within their official capacities, except where the refusal to comply is based on the assertion of a personal privilege or objection and not on a governmental privilege or objection that has been authorized by the executive branch.<sup>383</sup> Its reach is limited to natural persons and to entities acting or purporting to act under the color of state law.<sup>384</sup>

## (2) Advice to committees and officers of the Senate and other duties

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 or requests for the withdrawal of Senate documents, and the responsibility of advising committees about their promulgation and implementation of rules and procedures for congressional investigations. The office also provides advice about legal questions that arise during the course of investigations.<sup>385</sup>

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.<sup>386</sup> Thus, in 1980, the office was used in the investigation relating to President Carter's brother, Billy, and his connection to Libya. The office worked under the direction of the chairman and vice-chairman of the subcommittee charged with the conduct of that investigation.<sup>387</sup> Members of the office have also undertaken special assignments such as the Senate's investigation of "Abscam" and other undercover activities,<sup>388</sup> the impeachment proceedings of Judge Harry Claiborne,<sup>389</sup> Judge Walter L. Nixon, Jr.,<sup>390</sup> and Judge Alcee L. Hastings Jr.,<sup>391</sup> and the confirmation hearings of 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

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<sup>381</sup> 2 U.S.C. § 288d and 28 U.S.C. § 1365.

<sup>382</sup> 2 U.S.C. § 288 d(c).

<sup>383</sup> See 28 U.S.C. § 1365 (a).

<sup>384</sup> *Id.*

<sup>385</sup> 2 U.S.C. § 288g(a)(5) and (6).

<sup>386</sup> 2 U.S. 288g(c).

<sup>387</sup> See S.Rept. 1015, 96<sup>th</sup> Cong., 2<sup>nd</sup> sess. (1980).

<sup>388</sup> See S.Rept. 682, 97<sup>th</sup> Cong., 2<sup>nd</sup> sess. (1982).

<sup>389</sup> See S.Rept. 812, 99<sup>th</sup> Cong., 2<sup>nd</sup> sess. (1986).

<sup>390</sup> See S.Rept. 164, 101<sup>st</sup> Cong., 1<sup>st</sup> sess. (1989).

<sup>391</sup> See S.Rept. 156, 101<sup>st</sup> Cong., 1<sup>st</sup> sess. (1989).

the House practice, the Senate Legal Counsel plays no formal role in the review and issuance of subpoenas. However, since it may become involved in civil enforcement proceedings, it has welcomed the opportunity to review proposed subpoenas for form and substance prior to their issuance by committees. The Office of Senate Legal Counsel can be reached at 224-4435.

## House General Counsel

The House Office of General Counsel has evolved since the mid-1970s, from its original role as a legal advisor to the Clerk of the House on a range of matters that fell within the jurisdiction of the Clerk's office, to that of counsel for the institution. At the beginning of the 103<sup>rd</sup> Congress, it was made a separate House office, reporting directly to the Speaker, charged with the responsibility "of providing legal assistance and representation to the House."<sup>392</sup> While the function and role of the House Office of General Counsel and Senate Legal Counsel with respect to oversight assistance to committees and protection of institutional prerogatives are similar, there are some differences that will be noted below.

The General Counsel, Deputy General Counsel, and other attorneys of the office are appointed by the Speaker and serve at his pleasure.<sup>393</sup> 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 himself, the Majority Leader, Majority Whip, Minority Leader, and Minority Whip.<sup>394</sup> The office has statutory authority to appear before state or federal courts in the course of performing its functions. 2 U.S.C. § 130f. The office may appear as *amicus curiae* on behalf of the Speaker and the Bipartisan Legal Advisory Group in litigation involving the institutional interests of the House.<sup>395</sup> Where authorized by statute or resolution, the office may represent the House itself in judicial proceedings.<sup>396</sup> The office also represents House officers in litigation affecting the institutional interests and prerogatives of the House.<sup>397</sup> 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

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<sup>392</sup> See H. Res. 5, § 11, 139 Cong. Rec. H5 (daily ed. Jan. 5, 1993).

<sup>393</sup> House Rule II(8) of the Rules of the 108<sup>th</sup> Congress.

<sup>394</sup> *Id.*

<sup>395</sup> See, e.g., *Elk Grove Unified School District v. Newdow*, 124 S. Ct. 2301 (2004); *Raines v. Byrd*, 521 U.S. 811 (1997); *Beverly Enterprises, Inc. v. Trump*, 182 F.3d 183 (3d Cir. 1999); *United States v. McDade*, 28 F.3d 283 (3d Cir. 1994); *Cano v. Davis*, No. 01-8477 (C.D. Cal. March 28, 2002) (unpublished order granting motions to quash subpoenas to Members).

<sup>396</sup> See, e.g., *Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999) (litigation in which the General Counsel was authorized by statute, P.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).

<sup>397</sup> See, e.g., *Adams v. Clinton*, 90 F. Supp. 2d 35, *aff'd sub nom. Alexander v. Mineta*, 531 U.S. 940, 941 (2000); *Schaffer v. Clinton*, 240 F.3d 878 (10<sup>th</sup> Cir. 2001); *Skaggs v. Carle*, 110 F.3d 831 (D.C. Cir. 1997); *Newdow v. Eagen*, No. 02-01704 (D.D.C. filed March 24, 2004).

privileges,<sup>398</sup> in responding to executive agencies and officials that resist congressional oversight,<sup>399</sup> and in navigating the statutory process for obtaining a contempt citation with respect to a recalcitrant witness.<sup>400</sup>

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; appears as amicus curiae in cases affecting House committee investigations;<sup>401</sup> defends against attempts to obtain direct or indirect judicial interference with congressional subpoenas or other investigatory authority;<sup>402</sup> represents committees seeking to prevent compelled disclosure of non-public information relating to their investigatory or other legislative activities;<sup>403</sup> 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.<sup>404</sup>

Like the Senate Legal Counsel's office, the House General Counsel's office also devotes a large portion of its time to rendering informal advice to individual members and committees. The office can be reached at (202) 225-9700. Its website address is <http://generalcounsel.house.gov/>, which is available only to House offices.

## Government Accountability Office (GAO)

The Government Accountability Office, formerly called the General Accounting Office (GAO), was established by the Budget and Accounting Act of 1921 (31 U.S.C. § 702) as an independent auditor of government agencies. 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 control and direction of the Comptroller General of the United States, who is appointed by the President with the advice and consent of the Senate for a term of 15 years.

<sup>398</sup> See, e.g., H.Rept. 105-797, *In the Matter of Representative Jay Kim*, Committee on Standards of Official Conduct, 105<sup>th</sup> Cong., 2<sup>nd</sup> sess. 84-85 (Oct. 8, 1998).

<sup>399</sup> See, e.g., Hearing, "The Attorney General's Refusal to Provide Congressional Access to 'Privileged' Inslaw Documents," before the Subcommittee on Economic and Commercial Law, Committee on the Judiciary, 101<sup>st</sup> Cong., 2<sup>nd</sup> sess. 77-104 (Dec. 5, 1990).

<sup>400</sup> See, e.g., 132 Cong Rec. 3036-38 (1986) (floor consideration of contempt citation against two witnesses who refused to testify concerning alleged assistance provided to former Philippines President Ferdinand E. Marcos and his wife).

<sup>401</sup> See, e.g., *Dornan v. Sanchez*, 978 F. Supp. 1315, 1317 n.1 (C.D. Cal. 1997).

<sup>402</sup> See, e.g., *Harris v. Board of Governors*, 938 F.2d 720 (7<sup>th</sup> Cir. 1991); *United States v. United States House of Representatives*, 556 F. Supp. 150 (D.D.C. 1983).

<sup>403</sup> See, e.g., *Pentagon Technologies Int'l, Ltd. v. Committee on Appropriations of the United States House of Representatives*, 20 F. Supp. 2d 41 (D.D.C. 1998), *aff'd* 194 F.3d 174 (D.C. Cir. 1998); *United States v. McDade*, No. 96-1508 (3d Cir. July 12, 1996) (unpublished order quashing subpoena to the Committee on Standards of Official Conduct); *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408 (D.C. Cir. 1995); *United States v. Arthur Andersen, LLP*, No. 02-121 (S.D. Tex. filed May 15, 2002) (unpublished order quashing subpoena to the Committee on Energy and Commerce).

<sup>404</sup> See, e.g., *In re Harrisburg Grand Jury*, 638 F. Supp. 43 (M.D. Pa. 1986). Cf. *United States v. Moussaoui*, No. 01-455-A, 2002 WL 1990900 (E.D. Va. Aug. 29, 2002) (order denying the "Expedited Motion of the United States for Clarification Regarding the Applicability of the Protective Order for Unclassified But Sensitive Material and Local Rule 57 to Information That May Be Made Public in Congressional Proceedings").

GAO's core values define the organization and its people. These core values are accountability, integrity, and reliability.

## **Accountability**

Most GAO reviews are made in response to specific congressional requests. GAO is required to do work requested by committee chairmen and, as a matter of policy, assigns equal status to requests from ranking minority members. To the extent possible, GAO also responds to individual member requests. Other assignments are initiated pursuant to standing commitments to congressional committees, and some reviews are specifically required by law. Finally, some assignments are undertaken in accordance with GAO's basic legislative responsibilities. GAO staff are located in Washington, DC, and in offices across the United States.

## **Types of Questions GAO Answers**

Is a federal program achieving the desired results, or are changes needed in government policies or management?

Are there better ways of accomplishing the objectives of a federal program at lower costs?

Is a government program being carried out in compliance with applicable laws and regulations, and are data furnished to Congress on the program accurate?

Do opportunities exist to eliminate waste and inefficient use of public funds?

Are funds being spent legally, and is accounting for them accurate?

## **Integrity**

Integrity describes the high standards that GAO sets for itself in the conduct of its work. GAO seeks to take a professional, objective, fact-based, fair and balanced approach to all of its activities. Integrity is the foundation of its reputation and GAO's approach to its work.

## **Products**

GAO provides oral briefings, testimony, and written reports. Written reports vary in format and content depending on the complexity of the assignment. If agreements reached during early discussions differ substantially from the original request, GAO often confirms changes in writing to ensure a mutual understanding about the assignment. Sometimes, agreements need to be altered as an assignment progresses. For example, a requester's needs may change, the required data may be unavailable or unobtainable in the time allowed, or the methodology may need to be changed. In these cases, GAO works with the requester to revise the assignment. Again, substantial changes from previous agreements are often confirmed in writing.

Early communication with the requester also is important because:

Similar or duplicate requests may be received. GAO tries to consolidate assignments and provide copies of a report to each requester.

An ongoing review may address (or may be revised to address) a requester's needs. GAO works with the requester to ensure a satisfactory and prompt response.

A recently completed review may adequately address a requester's concerns and make starting a new assignment unnecessary.

GAO may not be the most appropriate agency to perform the assignment. In those cases, GAO will suggest referring the assignment to the Congressional Budget Office, the Congressional Research Service, the inspector general of a particular agency, or the agency itself. GAO remains available to help a requester if the information provided does not meet the requester's needs.

GAO strives to use its budget and staff resources effectively. On occasion, the resources required by congressional requests exceed the supply of talent available within GAO. Also, in some cases, the GAO staff most knowledgeable of a request's subject matter are engaged on other assignments and are not immediately available. In either case, GAO will do everything possible to respond to a new congressional request. However, it may be necessary to delay starting some requests. In those cases, GAO seeks the requesters' help in setting priorities.

## **Reliability**

Reliability describes GAO's goal for how its work is viewed by Congress and the American public. GAO's objective is to produce high quality reports, testimony, briefings, legal opinions, and other products and services that are timely, accurate, useful, clear, and candid.

The effectiveness of GAO products derives from their quality and the way requesters and agency officials use them to improve government operations. GAO offers a range of products to communicate the results of its work. The type of product resulting from a particular assignment depends on the assignment's objectives and/or a requester's needs. In selecting a type of product, tradeoffs may be necessary in scope, detail, or time. GAO's products include written reports to Congress, committees, or individual members; testimony; and oral briefings.

## **Additional Services**

In addition to its audits and evaluations, GAO offers a number of other services.

### ***Office of Special Investigations.***

The Office of Special Investigations (OSI) conducts investigations for Congress and the Government Accountability Office (GAO). OSI's primary mission is to support Congress by investigating allegations of illegal and improper conduct relating to federal funds, programs, and activities. OSI typically investigates allegations of fraud, corruption, abuse, ethics violations and conflicts of interest. Additionally, OSI performs security tests and reviews to determine whether security vulnerabilities exist in federal systems and facilities. OSI conducts its work in accordance with the standards established by the President's Council on Integrity and Efficiency (PCIE).

### ***Legal Services***

GAO provides various legal services. For example, upon request, GAO may render a legal decision or opinion on questions involving the use of, and accountability for, public funds or on other legal issues of interest to congressional committees. In addition, under a variety of statutes, GAO (1) oversees executive branch compliance with the Impoundment Control Act of 1974 and reviews and reports to Congress on proposed rescissions and deferrals of federal funds; (2) reviews all major rules proposed by federal agencies and provides reports to Congress; and (3) receives agency reports about vacancies in Presidentially appointed, Senate confirmed positions and issues legal opinions under the Federal Vacancies Reform Act of 1998. GAO publishes *Principles of Federal Appropriations Law* (known as the Red Book) and teaches a class that provides an orientation to federal fiscal laws. GAO attorneys are available for informal technical assistance. Also, GAO, under the Competition in Contracting Act, provides an objective, independent, and impartial forum for the resolution of bid protests of awards of federal contracts.

### ***Accounting and Financial Management Policy***

GAO prescribes accounting principles and standards for the executive branch. It also advises federal agencies on fiscal and other policies and procedures and prescribe standards for auditing government programs.

### ***Audit/Evaluation Community Support***

GAO also provides other services to help the audit and evaluation community improve and keep abreast of current developments. For example, it publishes and distributes papers on current audit and evaluation methodologies and approaches; assists in various training programs sponsored by these organizations; and sponsors an international auditor fellowship program to help other nations achieve an effective audit/evaluation organization.

### ***Committee Support***

Occasionally, GAO assigns staff to work directly for congressional committees. In these cases, the staff assigned represent a committee and not GAO.

### **Obtaining GAO Services**

Congressional requesters are encouraged to contact GAO on an informal basis prior to submitting a written request. GAO staff are pleased to consult with requesters or their staffs and help them frame questions and issues and formulate strategies and approaches even before a request letter is written.

GAO encourages the continuation of close working relationships between requesters or their staffs and GAO. GAO's Office of Congressional Relations (512-4400) can help requesters identify an appropriate GAO point for contact. To request formally GAO assistance, write to:

The Honorable Gene L. Dodaro  
Comptroller General of the United States



441 G Street NW  
Washington, DC 20548

Information about GAO and the materials it produces can be obtained from its website at <http://www.gao.gov>.

## Office of Management and Budget (OMB)

The Office of Management and Budget, <http://www.omb.gov>, came into existence in 1970; its predecessor agency, the Bureau of the Budget, dated back to 1921. Initially established as a unit in the Treasury Department, since 1939 the agency has been a part of the Executive Office of the President.

### Capabilities

- a. OMB, though created by Congress, is the *President's* agent for the management and implementation of policy, including the federal budget.
- b. OMB's *major* responsibilities include:
  1. Assisting the President in the preparation of the budget and development of a fiscal program.
  2. Supervising and controlling the administration of the budget, including transmittal to Congress of proposals for deferrals and rescissions.
  3. Keeping the President informed about agencies' activities (proposed, initiated, and completed), in order to coordinate efforts, expend appropriations economically, and minimize overlap and duplication.
  4. Administering the process of review of draft proposed and final agency files established by Executive Order 12866.
  5. Administering the process of review and approval of collections of information by federal agencies and reducing the burden of agency information collection on the public under the Paperwork Reduction Act of 1995.
  6. Overseeing the manner in which agencies disseminate information to the public (including electronic dissemination); how agencies collect, maintain, and use statistics; how agencies' archives are maintained; how agencies develop systems for insuring privacy, confidentiality, security, and the sharing of information collected by the government; and how the government acquires and uses information technology, pursuant to the Paperwork Reduction Act of 1995.
  7. Studying and promoting better governmental management, including making recommendations to agencies regarding their administrative organization and operations.
  8. Clearing and coordinating agencies' draft testimony and legislative proposals and making recommendations about presidential action on legislation.

9. Assisting in the preparation, consideration, and clearance of executive orders and proclamations.
10. Planning and developing information systems that provide the President with program performance data.
11. Establishing and overseeing implementation of financial management policies and requirements for the federal government as required by the Chief Financial Officers Act of 1990.
12. Assisting in development of regulatory reform proposals and programs for paperwork reduction, and then the implementation of these initiatives.
13. Improving the economy and efficiency of the federal procurement process by providing overall direction for procurement policies, regulations, procedures, and forms.
14. Establishing policies and methods that reduce fraud, waste, and abuse, and coordinating the work of the inspectors general through the Council of the Inspectors General on Integrity and Efficiency (P.L. 110-409).

## **Limitations**

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

## **Budget Information**

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

Worth mention is that discretionary spending, the component of the budget that the Appropriations Committees oversee through the appropriations process, accounts for about one-third of federal spending. Other House and Senate committees, particularly Ways and Means and Finance, oversee more than \$1 trillion in spending through reauthorizations, direct spending measures, and reconciliation legislation. In addition, Ways and Means and Finance oversee a diverse set of programs, including tax collection, tax expenditures, and some user fees, through the revenue process. The oversight activities of all of these committees is enhanced through the use of the diverse range of budgetary information that is available to them.

## Executive Branch Budget Products

*Budget of the United States Government, Fiscal Year 2012* contains the Budget Message of the President and information on the President's budget proposals by budget function.

*Analytical Perspectives, Budget of the United States Government, Fiscal Year 2012* contains analyses that are designed to highlight specified subject areas or provide other significant presentations of budget data that place the budget in perspective. This volume includes economic and accounting analyses; information on Federal receipts and collections; analyses of Federal spending; information on Federal borrowing and debt; baseline or current services estimates; and other technical presentations. The Analytical Perspectives volume also contains supplemental material with several detailed tables, including tables showing the budget by agency and account and by function, subfunction, and program, that is available on the Internet and as a CD-ROM in the printed document.

*Historical Tables* provides data on budget receipts, outlays, surpluses or deficits, Federal debt, and Federal employment over an extended time period, generally from 1940 or earlier to 2012 or 2015. To the extent feasible, the data have been adjusted to provide consistency with the 2012 Budget and to provide comparability over time.

*The Appendix, Budget of the United States Government, Fiscal Year 2012* contains detailed information on the various appropriations and funds that constitute the budget. The Appendix contains financial information on individual programs and appropriation accounts. It includes for each agency: the proposed text of appropriations language; budget schedules for each account; legislative proposals; explanations of the work to be performed and the funds needed; and proposed general provisions applicable to the appropriations of entire agencies or group of agencies. Information is also provided on certain activities whose transactions are not part of the budget totals.

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

## Some Other Sources of Useful Budgetary Information

a. *Committees on Appropriations.* The subcommittees of the House and Senate Appropriations Committees hold extensive hearings on the fiscal year appropriations requests of federal departments and agencies. The Appropriations Subcommittees typically print agency *justification material* with the hearing record of the federal officials concerning these requests.

Each federal department or agency submits *justification material* to the Committees on Appropriations. Their submissions can run from several hundreds of pages to over two thousand pages.

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

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

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

## **Beneficiaries, Private Organizations, and Interest Groups**

Committees and members can acquire useful information about executive branch programs and performance from the beneficiaries of those programs, private organizations, and interest groups. An effective oversight device, for example, is to ask beneficiaries how well federal programs and services are working. A variety of methods might be employed to solicit the views of those on the receiving end of federal programs and services, including investigations and hearings, field and on-site meetings, surveys and opinion polls, and websites. The results of such efforts can assist committees in obtaining policy-relevant information about program performance and in evaluating the problems people might be having with federal administrators and agencies.

There are numerous think tanks, universities, or associations, for instance, that periodically conduct studies of public policy issues and advise members and others on how well federal agencies and programs are working. Similarly, numerous interest groups are active in monitoring areas such as civil rights, education, or health and they are not reluctant to point out alleged bureaucratic failings to committees and members. Some of these groups may also assist committees and members in bringing about improvements in agencies and programs. For example, the Project on Government Oversight (POGO), an independent, nonprofit organization, that seeks a more effective, accountable, open, and ethical federal government. The group’s web site is: <http://www.pogo.org>.

There are also scores of social, political, scientific, environmental, and humanitarian nongovernmental organizations (NGOs) located around the world. Working with governments, corporations, foundations, and other entities are such NGOs as Greenpeace, Amnesty International, the World Resources Institute, the Red Cross, and the Save the Children Fund. Many NGOs might provide valuable assistance to congressional overseers because they “do legal,

scientific, technical, and policy analysis; provide services; shape, implement, monitor, and enforce national and international commitments; and change institutions and norms.”<sup>405</sup>

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<sup>405</sup> Jim Bencivenga, “Critical Mass,” *Christian Science Monitor*, February 3, 2000, p. 15. Also see “NGOs,” *The Economist*, January 29, 2000, pp. 25-27.

# Appendix A. Illustrative Subpoena

Subpena Duces Tecum

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

To ..Custodian of Documents International Brotherhood of Teamsters.....

You are hereby commanded to produce the things identified on the attached schedule before the  
Subcommittee on Oversight  
and Investigations. Committee on ..Education and the Workforce.....

of the House of Representatives of the United States, of which the Hon. Pete Hoekstra.....

..... is chairman, by producing such things in Room ...B-346A... of the

.....Rayburn..... Building ....., in the city of Washington, on

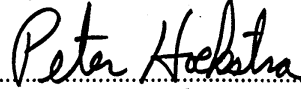
.....March 17, 1998....., at the hour of .....5:00 P.M.....

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

Witness my hand and the seal of the House of Representatives

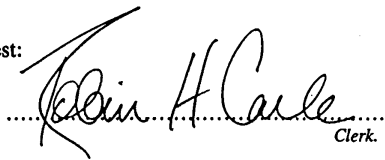
of the United States, at the city of Washington, this

.....10th.... day of .....March....., 19..98..



.....  
The Honorable Pete Hoekstra     Chairman.

Attest:



.....  
Clerk.



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

### **GENERAL DEFINITIONS**

1. The term “document” means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the



following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, interoffice and intra office communications, electronic mail (E-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, discs, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disc, or videotape. A documents bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.

2. The term “communication” means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether face to face, in a meeting, by telephone, mail, telexes, discussions, releases, personal delivery, or otherwise.
3. The terms “and” and “or” shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this subpoena any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.
4. The term “White House” refers to the Executive Office of the President and all of its units including, without limitation, the Office of Administration, the White House Office, the Office of the Vice President, the Office of Science and Technology Policy, the Office of Management and Budget, the United States Trade Representative, the Office of Public Liaison, the Office of Correspondence, the Office of the Deputy Chief of Staff for Policy and Political Affairs, the Office of the Deputy Chief of Staff for White House Operations, the Domestic Policy Council, the Office of Federal Procurement Policy, the Office of Intergovernmental Affairs, the Office of Legislative Affairs, Media Affairs, the National Economic Council, the Office of Policy Development, the Office of Political Affairs, the Office of Presidential Personnel, the Office of the Press Secretary, the Office of Scheduling and Advance, the Council of Economic Advisors, the Council on Environmental Quality, the Executive Residence, the President’s Foreign Intelligence Advisory Board, the National Security Council, the Office of National Drug Control, and the Office of Policy Development.

March 10, 1998

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

## SCHEDULE A

1. All organizational charts and personnel rosters for the International Brotherhood of Teamsters (“Teamsters” or “IBT”), including the DRIVE PAC, in effect during calendar years 1991 through 1997.
2. All IBT operating, finance, and administrative *manuals* in effect during calendar years 1991 through 1997, including, but not limited to those that set forth (1) operating policies, practices, and procedures; (2) internal financial practices and reporting requirements; and (3) authorization, approval, and review responsibilities.
3. All annual audit reports of the IBT for the years 1991 through 1996 performed by the auditing firm of Grant Thornton.
4. All IBT annual reports to its membership and the public for years 1991 through 1997, including copies of IBT annual audited financial statements certified to by independent public accountants.
5. All books and records showing receipts and expenditures, assets and liabilities, profits and losses, and all other records used for recording the financial affairs of the IBT including, journals (or other books of original entry) and ledgers including cash receipts journals, cash disbursements journals, revenue journals, general journals, subledgers, and workpapers reflecting accounting entries.
6. All Federal Income Tax returns filed by the IBT for years 1991 through 1997.
7. All minutes of the General Board, Executive Board, Executive Council, and all Standing Committees, including any internal ethics committees formed to investigate misconduct and corruption, and all handouts and reports prepared and produced at each Committee meeting.
8. All documents referring or relating to, or containing information about, any contribution, donation, expenditure, outlay, in-kind assistance, transfer, loan, or grant (from DRIVE, DRIVE E&L fund, or IBT general treasury) to any of the following entities/organizations:
  - a. Citizen Action
  - b. Campaign for a Responsible Congress
  - c. Project Vote
  - d. National Council of Senior Citizens
  - e. Vote Now ‘96
  - f. AFL-CIO
  - g. AFSCME
  - h. Democratic National Committee
  - i. Democratic Senatorial Campaign Committee (“DSCC”)

- j. Democratic Congressional Campaign Committee (“DCCC”)
  - k. State Democratic Parties
  - l. Clinton-Gore ‘96
  - m. SEIU
9. All documents referring or relating to, or containing information about any of the following individuals/entities:
- a. Teamsters for a Corruption Free Union
  - b. Teamsters for a Democratic Union
  - c. Concerned Teamsters 2000
  - d. Martin Davis
  - e. Michael Ansara
  - f. Jere Nash
  - g. Share Group
  - h. November Group
  - i. Terrence McAuliffe
  - j. Charles Blitz
  - k. New Party
  - l. James P. Hoffa Campaign
  - m. Delancy Printing
  - n. Axis Enterprises
  - o. Barbara Arnold
  - p. Peter McGourty
  - q. Charles McDonald
  - r. Theodore Kheel
10. All documents referring or relating to, or containing information on about, communications between the Teamsters and the White House regarding any of the following issues:
- a. United Parcel Service Strike

- b. Diamond Walnut Company Strike
  - c. Pony Express Company organizing efforts
  - d. Davis Bacon Act
  - e. NAFTA Border Crossings
  - f. Ron Carey reelection campaign
  - g. IBT support to 1996 federal election campaigns.
  - i. All documents referring or relating to, or containing information about, communications between the Teamsters and the Federal Election Commission.
12. All documents referring or relating to, or containing information about, communications between the Teamsters and the Democratic National Committee, DSCC, or DCCC.
  13. All documents referring or relating to, or containing information about, communications between the Teamsters and the Clinton-Gore '96 Campaign Committee.
  14. All documents referring or relating to, or containing information about, policies and procedures in effect during 1996 regarding the approval of expenditures from the IBT general treasury, DRIVE E&L fund, and DRIVE PAC.
  15. All documents referring or relating to, or containing information about the retention by the IBT of the law firm Covington & Burling and/or Charles Ruff.
  16. All documents referring or relating to, or containing information about work for the IBT performed by the firm Palladino & Sutherland and/or Jack Palladino.
  17. All documents referring or relating to, or containing information about work for the IBT performed by Ace Investigations and/or Guerrieri, Edmund, and James.
  18. All documents referring or relating to, or containing information about IBT involvement in the 1995-1996 Oregon Senate race (Ron Wyden vs. Gordon Smith).
  19. All documents referring or relating to, or containing information about, Ron Carey's campaign for reelection as general president of the Teamsters.
  20. All documents referring or relating to, or containing information about organization, planning, and operation of the 1996 IBT Convention.
  21. All documents referring or relating to, or containing information about the following:
    - a. Trish Hoppey
    - b. John Latz
    - c. any individual with the last name of "Golovner".

- d. Convention Management Group.
22. All documents referring or relating to, or containing information about the Household Finance Corporation.
  23. All documents referring or relating to, or containing information about, any “affinity credit card” program or other credit card program sponsored by or participated in by the IBT.
  24. A list of all bank accounts held by the International Brotherhood of Teamsters including the name of the bank, account number, and bank address.
  25. All documents referring or relating to, or containing information about, payments made by the IBT to any official or employee of the Independent Review Board.
  26. Unless otherwise indicated, the time period covered by this subpoena is between January 1991 and December 1997.

## **Appendix B. Examples of White House Response to Congressional Requests**

**THE WHITE HOUSE**

**November 4, 1982**

### **MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES**

#### **SUBJECT: Procedures Governing Responses to Congressional Request for Information**

The policy of this administration is to comply with Congressional Requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch. While this Administration, like its predecessors, has an obligation to protect the confidentiality of some communications, executive privilege will be asserted only in the most compelling circumstances, and only after careful review demonstrates that assertion of the privilege is necessary. Historically, good faith negotiations between Congress and the executive branch has minimized the need for invoking executive privilege, and this tradition of accommodation should continue as the primary means of resolving conflicts between the Branches. To ensure that every reasonable accommodation is made to the needs of Congress, executive privilege shall not be invoked without specific Presidential authorization.

The Supreme Court has held that the Executive Branch may occasionally find it necessary and proper to preserve the confidentiality of national security secrets, deliberative communications that form a part of the decision-making process, or other information important to the discharge of the Executive Branch's constitutional responsibilities. Legitimate and appropriate claims of privilege should not thoughtlessly be waived. However, to ensure that this Administration acts responsibly and consistently in the exercise of its duties, with due regard for the responsibilities and prerogatives of Congress, the following procedures shall be followed whenever Congressional requests for information raise concerns regarding the confidentiality of the information sought:

1. Congressional requests for information shall be complied with as promptly and as fully as possible, unless it is determined that compliance raises a substantial question of executive privilege. A "substantial question of executive privilege" exists if disclosure of the information requested might significantly impair the national security (including the conduct of foreign relations), the deliberative processes of the Executive Branch or other aspects of the performance of the Executive Branch's constitutional duties.
2. If the head of an executive department or agency ("Department Head") believes, after consultation with department counsel, that compliance with a Congressional request for information raises a substantial question of executive privilege, he shall promptly notify and consult with the Attorney General through the Assistant Attorney General for the Office of Legal Counsel, and shall also promptly notify and consult with the Counsel to the President. If the information requested of a department or agency derives in whole or in part or from information received from another department or agency, the latter entity shall also be consulted as to whether disclosure of the information raises a substantial question of executive privilege.

3. Every effort shall be made to comply with the Congressional request in a manner consistent with the legitimate needs of the Executive Branch. The Department Head, the Attorney General and the Counsel to the President may, in the exercise of their discretion in the circumstances, determine that executive privilege shall not be invoked and release the requested information.
4. If the Department Head, the Attorney General or the Counsel to the President believes, after consultation, that the circumstances justify invocation of executive privilege, the issue shall be presented to the President by the Counsel to the President, who will advise the Department Head and the Attorney General of the President's decision.
5. Pending a final Presidential decision on the matter, the Department Head shall request the Congressional body to hold its request for the information in abeyance. The Department Head shall expressly indicate that the purpose of this request is to protect the privilege pending a Presidential decision, claim of privilege.
6. If the President decides to invoke executive privilege, the Department Head shall advise the requesting Congressional body that the claim of executive privilege is being made with the specific approval of the President.

Any questions concerning these procedures or related matters should be addressed to the Attorney General, through the Assistant Attorney General for the Office of Legal Counsel, and to the Counsel to the President.

**Ronald Reagan**

**THE WHITE HOUSE**

**September 28, 1994**

**MEMORANDUM FOR ALL EXECUTIVE DEPARTMENT AND AGENCY GENERAL COUNSELS**

**FROM: LLOYD N. CUTLER, SPECIAL COUNSEL TO THE PRESIDENT**

**SUBJECT: Congressional Requests to Departments and Agencies for Documents Protected by Executive Privilege**

The policy of this Administration is to comply with congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch. While this Administration, like its predecessors, has an obligation to protect the confidentiality of core communications, executive privilege will be asserted only after careful review demonstrates that assertion of the privilege is necessary to protect Executive Branch prerogatives.

The doctrine of executive privilege protects the confidentiality of deliberations within the White House, including its policy councils, as well as communications between the White House and executive departments and agencies. Executive privilege applies to written and oral communications between and among the White House, its policy councils and Executive Branch agencies, as well as to documents that describe or prepares for such communications (e.g.

“talking points”). This has been the view expressed by all recent White House Counsels. In circumstances involving communications relating to investigations of personal wrongdoing by government officials, it is our practice not to assert executive privilege, either, in judicial proceedings or in congressional investigations and hearings. Executive privilege must always be weighed against other competing governmental interests, including the judicial need to obtain relevant evidence, especially in criminal proceedings, and the congressional need to make factual findings for legislative and oversight purposes.

In the last resort, this balancing is usually conducted by the courts. However, when executive privilege is asserted against a congressional request for documents, the courts usually decline to intervene until after the other two branches have exhausted the possibility of working out a satisfactory accommodation. It is our policy to work out such an accommodation whenever we can, without unduly interfering with the President’s need to conduct frank exchange of views with his principal advisors.

Historically, good faith negotiations between Congress and the Executive Branch have minimized the need for invoking executive privilege.

Executive privilege belongs to the President, not individual departments or agencies. It is essential that all requests to departments and agencies for information of the type described above be referred to the White House Counsel before any information is furnished. Departments and agencies receiving such request should therefore follow the procedures set forth below, designed to ensure that this Administration acts responsibly and consistently with respect to executive privilege issues, with due regard for the responsibilities and prerogatives of Congress:

First, any document created in the White House, including a White House policy council, or in a department or agency, that contains the deliberations of, or advice to or from, the White House, should be presumptively treated as protected by executive privilege. This is so regardless of the document’s location at the time of the request or whether it originated in the White House or in a department or agency.

Second, a department or agency receiving a request for any such document should promptly notify the White House Counsel’s Office, and direct any inquiries regarding such a document to the White House Counsel’s Office.

Third, the White House Counsel’s Office, working together with the department or agency (and, where appropriate, the Department of Justice), will discuss the request with appropriate congressional representatives to determine whether a mutually satisfactory recommendation is available.

Fourth, if efforts to reach a mutually satisfactory accommodation are unsuccessful, and if release of the document would pass a substantial question of executive privilege, the Counsel to the President will consult with the Department of Justice and other affected agencies to determine whether to recommend that the President invoke the privilege.

We believe this policy will facilitate the resolution of issues relating to disclosures to Congress and maximize the opportunity for reaching mutually satisfactory accommodations with Congress. We will of course try to cooperate with reasonable congressional requests for information in ways that preserve the President’s ability to exchange frank advice with his immediate staff and the heads of the executive departments and agencies.



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## Appendix D. Other Resources

### Congressional Oversight Video Series<sup>406</sup>

**Oversight: A Key Congressional Function.** Former Representative Lee Hamilton delivered the keynote address to a 1999 series of CRS programs examining various aspects of congressional oversight. In this program, Mr. Hamilton emphasizes the importance of traditional oversight and reviews factors that contribute to successful oversight.

Program Length: 60 minutes. Product No.: MM70003.

**The Constitutional Context of Oversight.** Michael Stern, senior counsel with the House General Counsel's Office, and Michael Davidson, former Senate Legal Counsel, discuss the constitutional context of oversight. In addition, the two attorneys address a variety of oversight topics, including congressional investigations. Taped as part of a 1999 series of CRS programs examining various aspects of congressional oversight.

Program Length: 60 minutes. Product No.: MM70004.

**The "Rules & Tools" of Oversight.** This program focuses on the formal institutional rules that committees must follow to insure the legitimacy and fairness of oversight proceedings. The nature of the formidable powers of inquiry available to congressional committees and the practicalities of their effective utilization are also explored. Taped as part of a 1999 series of CRS programs examining various aspects of congressional oversight.

Program Length: 60 minutes. Product No.: MM70005.

**Sources of Oversight Assistance.** This session focuses on where congressional committees can obtain assistance in conducting oversight. Especially relevant are inspectors general, chief financial officers, and Congress's own support agencies, the Congressional Budget Office, Congressional Research Service, and Government Accountability Office. Taped as part of a 1999 series of CRS programs examining various aspect of congressional oversight.

Program Length: 46 minutes. Product No.: MM70006.

**Fiscal Oversight: "Follow the Money."** This seminar examines congressional oversight of fiscal and budgetary activities, focusing on the role of the House and Senate Appropriations Committees in the annual budget cycle and key support activities of the Congressional Budget Office to Congress on budgetary matters generally. Taped as part of a 1999 series of CRS programs examining various aspects of congressional oversight.

Program Length: 45 minutes. Product No.: MM70007.

**Outside Actors in the Oversight Process.** This program addresses how non-congressional individuals can assist in the investigative process and in monitoring executive branch performance. The panel includes a journalist, members of public and private interest groups, and

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<sup>406</sup> These products are available from the authors of this report upon request.

a former counsel with the House Commerce Committee, Subcommittee on Oversight and Investigations. Taped as part of a 1999 series of CRS programs examining various aspects of congressional oversight.

Program Length: 50 minutes. Product No.: MM70008.

**Preparing for an Oversight Investigation.** This program probes the “ins and outs” of how to prepare for Congressional Investigations from the perspective of both the investigator and those being investigated. Taped as part of a 1999 series of CRS programs examining various aspects of congressional oversight.

Program Length: 59:50. Product No.: MM70009.

**Congress, the President, the Courts, and the Separation of Powers.** Product No.: MM70097.

VHS copies of CRS video programs are available on loan to congressional offices. The soundtracks of many television programs are also available on audio cassettes. For the schedule of CRS Programs on Channel 6 of the House and Channel 5 of the Senate, call 7-7009. For further information about any of these programs, please call 7-7547.

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