

Committee on Rules Legislative Process Program

Section 5 – *The Senate, the Executive Branch and Congressional Oversight*

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Introduction

With the assistance of a number of committee staffers, CRS has written a comprehensive manual on Congressional investigations, included in its entirety below.

Congress' investigatory and oversight activities are aimed primarily at the Executive Branch and its administration of laws and programs established and funded by Congress. Accordingly, Congressional investigations and oversight of the Executive is the focus of the Congressional Oversight Manual.

However, as noted in the manual itself, the Supreme Court has held that Congress' authority to investigate and conduct oversight is coterminous with its constitutional authority to legislate. In other words, if Congress *could* legislate on a subject, they have the authority to investigate it in order for Members to inform themselves as they consider whether new laws are warranted. This is why we see committees holding hearings on subjects such as steroids in baseball and not just "Agency X's administration of Statute Y and Regulation Z."

Also keep in mind as you read the Congressional Oversight Manual that some of the details do not reflect recent changes. For example, the section on staff depositions states that neither House currently has rules authorizing staff depositions. Presently, the Oversight and Government Reform Committee has such authority under rule X, clause 4(c)(3). The Education and Labor Committee also has staff deposition authority for certain purposes under H.Res. 836.



Congressional Oversight Manual

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Summary

The *Congressional Oversight Manual* was developed about 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 the Congressional Research Service (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 sponsored and conducted various oversight seminars for House and Senate staff and updated the *Manual* as circumstances warranted. The last revision occurred in 2004. 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 21st century.

To revise a document of this size and scope requires the contributions of many people. Five CRS specialists, listed on the title page, were responsible for organizing and writing this version of the *Manual*. In addition, other CRS personnel assisted in the preparation and publication of this report, along with staff of the Congressional Budget Office (CBO) and the Government Accountability Office (GAO).

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I. Purposes, Authority, and Participants

Throughout its history, Congress has engaged in oversight of the executive branch—the review, monitoring, and supervision of the implementation of public policy. 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, moreover, have increased the legislature’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:

A. 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.

B. 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.

C. 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.

D. 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.

E. 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.

F. 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.

G. 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.

H. 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.

I. 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.

J. 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

A. 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 the 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.”

B. 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 (1994).

- 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 discloses 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 818 of the Treasury, Transportation et al. Appropriations Act of 2005, P.L. 109-115, 119 Stat. 2500, 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 820 of the Treasury, Transportation et al. Appropriations Act of 2005, P.L. 109-115, 119 Stat. 2500, 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 supercede, 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.*” (Emphasis added.) 42 Stat. 23 (1921)
 - 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.*” (Emphasis added.) 42 Stat. 26 (1921)

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. (Emphasis added.) 60 Stat. 832 (1946)
- b. Authorized for the first time in history, *permanent professional and clerical staff* for committees. 60 Stat. 832 (1946)
- c. Authorized and directed the *Comptroller General* to make administrative management analyses of each executive branch agency. 60 Stat. 837 (1946)
- 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.” (Emphasis added.) 60 Stat. 836 (1946)

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)
- 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.” (Emphasis added.) 84 Stat. 1156 (1970)
- b. Required most House and Senate committees to issue *biennial* oversight reports. 84 Stat. 1156 (1970)
- c. Strengthened the *program evaluation* responsibilities and other authorities and duties of the Government Accountability Office. 84 Stat. 1168-1171 (1970)
- 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)
- e. Recommended that House and Senate committees ascertain whether *programs* within their jurisdiction could be *appropriated for annually*. 84 Stat. 1174-1175 (1970)

- 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)
- 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)
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)
- 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)
- c. Strengthened GAO’s role in *acquiring fiscal, budgetary, and program-related information*. 88 Stat. 327-329 (1974)
- 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)
- 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)
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)
- 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 (2000)

C. Responsibilities in House and Senate Rules

1. House Rules

- a. House rules grant the *Committee on 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 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 Government Reform and the Committee on House Administration. Not later than March 31, the 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; and
 - (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.
- (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.
- 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.” (Emphasis added.) (Rule X, clause 2)

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 Government 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 of the 80th 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

A. 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.

B. 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.

C. Congressional Support Agencies and Offices

1. Of the agencies in the legislative branch, three directly assist Congress in support of its oversight function. (See "Section V" below 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

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II. 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 93rd Congress noted, “Review findings and recommendations developed by one committee are seldom shared on a timely basis with another committee, and, if they are made available, then often the findings are transmitted in a form that is difficult for Members to use.” 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

A. 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.

B. 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

A. 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.

B. 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 some reformers are now pressing 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.

C. 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).

D. 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 Section III for greater detail and analysis]

E. 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, in the annual Treasury, Transportation, Housing and Urban Development Appropriations Act, Congress enacts an additional funding restriction on recess appointees (see box).

No part of any appropriation for the current fiscal year 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. 114 Stat. 2763A-157, sec. 609 (2000).

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.

F. 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.

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III. Investigative Oversight

Congressional investigations, often adversarial and confrontational, sustain and vindicate Congress’s role in our constitutional scheme of separated powers. The rich history of congressional investigations, from the failed St. Clair expedition in 1792 through Teapot Dome, Watergate, Iran-Contra, and Whitewater, has established, in law and practice, the nature and contours of congressional prerogatives necessary to maintain the integrity of the legislative role in that constitutional scheme.

This section provides a brief overview of some of the more common legal, procedural, and practical issues that committees face in the course of an investigation. Following a summary of the case law developing the scope and limitations of the power of inquiry, the essential tools of investigative oversight—subpoenas, staff interviews and depositions, grants of immunity, and the contempt power—are described. Next, some of the special problems of investigating the executive branch are detailed, with particular emphasis on claims of presidential executive privilege and agency assertions of common law testimonial privileges. The section concludes with a discussion of the role of the minority in the investigatory process.

A. The Legal Basis for Oversight

Numerous Supreme Court precedents recognize a broad and encompassing power in Congress to engage in oversight and investigation that would reach all sources of information necessary for carrying out its legislative function. In the absence of a countervailing constitutional privilege or a self-imposed statutory restriction upon its authority, Congress and its committees have plenary power to compel information needed to discharge its legislative function from executive agencies, private persons, and organizations. Within certain constraints, the information so obtained may be made public.

Although there is no express provision of the Constitution that specifically authorizes Congress to conduct investigations and take testimony for the purposes of performing its legitimate functions, numerous decisions of the Supreme Court have firmly established that the investigatory power of Congress is so essential to the legislative function as to be implied from the general vesting of legislative power in Congress.¹ Thus, in *Eastland v. United States Servicemen’s Fund*, the Court explained that “[t]he scope of its power of inquiry . . . is as penetrating and far-reaching as the

¹ *McGrain v. Daugherty*, 272 U.S. 135 (1927).

potential power to enact and appropriate under the Constitution.”² In *Watkins v. United States*, the Court described the breadth of the power of inquiry: “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.”³ The Court went on to emphasize that Congress’s investigative power is at its peak when the subject is alleged waste, fraud, abuse, or maladministration within a government department. The investigative power, it stated, “comprehends probes into departments of the Federal Government to expose corruption, inefficiency, or waste.”⁴

But while the congressional power of inquiry is broad, it is not unlimited. The Supreme Court has admonished that the power to investigate may be exercised only “in aid of the legislative function”⁵ and cannot be used to expose for the sake of exposure alone. The *Watkins* Court underlined these limitations: “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.”⁶ Moreover, an investigating committee has only the power to inquire into matters within the scope of the authority delegated to it by its parent body.⁷ But once having established its jurisdiction and authority and the pertinence of the matter under inquiry to its area of authority, a committee’s investigative purview is substantial and wide-ranging.

B. The Tools of Oversight

1. The Subpoena Power

The power of inquiry, with the accompanying process to enforce it, has been deemed “an essential and appropriate auxiliary to the legislative function.”⁸ 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 by a committee chairman alone, with or without the concurrence of the ranking minority member.⁹

² 421 U.S. at 504, footnote 15 (quoting *Barenblatt v. United States*, 360 U.S. 109, 111).

³ 354 U.S. 178, 187 (1957).

⁴ *Id.*

⁵ *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880).

⁶ *Watkins v. United States*, 354 U.S. at 187.

⁷ *United States v. Rumely*, 345 U.S. 41, 42, 44 (1953); *Watkins v. United States*, 354 U.S. at 198.

⁸ *McGrain v. Daugherty*, 273 U.S. at 174-75.

⁹ See, e.g., House Committee on Government Reform Rule 18 (d); Senate Committee on Homeland Security and Governmental Affairs Rule 5.C.

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 reaches aliens in the United States. Securing compliance of United States nationals and aliens living in foreign countries presents more complex problems.

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 Constitution¹⁰ provides "an absolute bar to judicial interference" with such compulsory process.¹¹ 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*:¹² (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 the 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.¹³ (See model subpoena at **Appendix A**.)

2. Staff Depositions

Committees normally rely on informal staff interviews to gather information preparatory to investigations hearings. However, with more frequency 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 may be more conducive to candid responses than would be the case at a public hearing. Statements made by witnesses that might defame or even tend to incriminate third parties can be verified before they are repeated in an open hearing. Depositions can prepare a committee for the questioning of witnesses at a hearing or provide a screening process that can obviate the need to call some witnesses. The deposition process also allows questioning of witnesses outside of Washington, D.C., thereby avoiding the inconvenience of conducting field hearings requiring the presence of Members.

¹⁰ U.S. CONST. Art. I, Sec. 6, cl. 1.

¹¹ *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 503-07 (1975).

¹² 365 U.S. 399, 408-09 (1961).

¹³ *In re Chapman*, 166 U.S. 661, 669 (1897).

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.¹⁴

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, neither house of Congress has rules that expressly authorize staff depositions. On a number of occasions such specific authority has been granted pursuant to Senate and House resolutions.¹⁵ 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.

3. Congressional Grants of 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.¹⁶ 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 (see box below), 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.”¹⁷

¹⁴ 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.

¹⁵ See CRS Report 95-949, *Staff Depositions in Congressional Investigations*, by Jay R. Shampansky, at notes 16 and 18.

¹⁶ *Watkins v. United States*, 354 U.S. 178 (1957); *Quinn v. United States*, 349 U.S. 155 (1955).

¹⁷ Lawrence E. Walsh, *The Independent Counsel and the Separation of Powers*, 25 Hous. L. Rev. 1, 9 (1988).

Granting Immunity

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 in order 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. *Kastigar v. United States*, 406 U.S. 441, 460 (1972).

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, if not insurmountable, 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. 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); *United States v. Poindexter*, 951 F. 2d 369 (D.C. Cir. 1991). 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 approximately 345 immunity orders. Of these, almost half (165) were obtained in connection with the 1978 investigation into the assassinations of President Kennedy and Martin Luther King, Jr. Since 1990, House committees have obtained 31 immunity orders, and Senate committees have obtained 20.

C. Enforcement of the Investigative Power

1. The Contempt Power

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 in order to punish the contemnor and/or to remove the obstruction. The Supreme Court early recognized the power as an inherent attribute of Congress's legislative authority, reasoning that if it did not possess this power, it "would be exposed to every indignity and interruption that rudeness, caprice or even conspiracy may mediate against it."¹⁸

There are three different kinds of contempt proceedings. Both the House and Senate may cite a witness for contempt under their inherent contempt power or under a statutory criminal contempt procedure. The Senate also has a third option, enforcement by means of a statutory civil contempt procedure.¹⁹

(a) 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

¹⁸ *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821).

¹⁹ A more comprehensive treatment of the history and legal development of the congressional contempt power is discussed in CRS Report 86-83, *Congress' Contempt Power*, by Jay R. Shampansky (archived; out of print).

least in the case of the House, beyond the adjournment of a session of the 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.²⁰ 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 70 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.

(b) 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 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, 10 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.²¹ 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 section 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.

(c) Civil Contempt

As an alternative to both the inherent contempt power of each house and criminal contempt, a civil contempt procedure is available in the Senate. Upon application of the Senate, the federal

²⁰ See *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821); see also *McGrain v. Daugherty*, 273 U.S. 135 (1927).

²¹ The 10 officials are as follows: Secretary of State Henry Kissinger (1975); Secretary of Commerce Rogers C. B. Morton (1975); Secretary of Health, Education, and Welfare Joseph A. Califano, Jr. (1978); Secretary of Energy Charles Duncan (1980); Secretary of Energy James B. Edwards (1981); Secretary of the Interior James Watt (1982); EPA Administrator Anne Gorsuch Burford (1983); Attorney General William French Smith (1983); White House Counsel John M. Quinn (1996); and Attorney General Janet Reno (1998).

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.²² 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.

2. Perjury and False Statements Prosecutions

(a) Testimony Under Oath

A witness under oath before a congressional committee who willfully gives false testimony is subject to prosecution for perjury under section 1621 of title 18 of the United States Code. 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.²³ 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 committees²⁴ and one member for Senate committees.²⁵ 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.

(b) Unsworn Statements

Most statements made before Congress, at both the investigatory and hearing phases of oversight, are unsworn. The practice of swearing in all witnesses at hearings is infrequent. 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.

D. Executive Privilege and Common Law Testimonial Privileges

Presidential claims of a right to preserve the confidentiality of information and documents in the face of legislative demands have figured prominently, though intermittently, in executive-congressional relations since at least 1792, when President Washington discussed with his cabinet

²² 2 U.S.C. § 288 d.

²³ *Christoffel v. United States*, 378 U.S. 89 (1949).

²⁴ House Rule XI(2)(h)(2).

²⁵ 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.

how to respond to a congressional inquiry into the military debacle that befell General St. Clair's expedition.²⁶ The vast majority of these interbranch disputes have been resolved through political negotiation and accommodation, thus, few have reached the courts for substantive resolution.²⁷ In fact, it was not until the Watergate-related lawsuits in the 1970's seeking access to President Nixon's tapes that the existence of a presidential confidentiality privilege was judicially established as a necessary derivative of the President's status in our constitutional scheme of separated powers. Of the seven court decisions involving interbranch information access disputes,²⁸ three have involved Congress and the Executive²⁹ but only one of these resulted in a decision on the merits.³⁰ 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.³¹

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

However, until the Court of Appeals for the District of Columbia Circuit's 1997 ruling in *In re Sealed Case (Espy)*,³² and its 2004 ruling in *Judicial Watch Inc. v. Department of Justice*,³³ these judicial decisions had left important gaps in the law of presidential privilege which increasingly became focal points, if not the source, of interbranch confrontations. Among the more significant issues left open 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

²⁶ See Archibald Cox, *Executive Privilege*, 122 U. OF PA. L. REV. 1383, 1395-1405 (1979). See also generally, Mark J. Rozell, *Executive Privilege: Presidential Power, Secrecy and Accountability* (2 ed. Revised, 2002, University Press of Kansas); Mark J. Rozell, *Executive Privilege and Modern Presidents: In Nixon's Shadow*, 83 MINN. L. REV. 1069 (1999).

²⁷ See Neil Devins, *Congressional-Executive Information Access Disputes: A Modest Proposal-Do Nothing*, 48 ADM. L. REV. 109 (1996).

²⁸ *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).

²⁹ *Senate Select Committee*, *supra*; *United States v. House of Representatives*, *supra*; and *United States v. AT&T*, *supra*.

³⁰ *Senate Select Committee*, *supra*.

³¹ *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977).

³² 121 F.3d 729 (D.C. Cir. 1997).

³³ 365 F.3d 1108 (D.C. Cir. 2004).

demonstration of need must be shown to justify release of materials that qualify for the privilege. The unanimous panel in *In re Sealed Case* authoritatively addressed each of these issues in a manner that may have drastically altered the future legal playing field in resolving such disputes. The ruling in the *Judicial Watch* case reinforces that likelihood.³⁴

1. The Presidential Communications Privilege

In rare instances the executive response to a congressional demand to produce information may be an assertion of presidential 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 whether there are any circumstances in which the executive branch can refuse to provide information sought by the Congress is on the basis of executive privilege. Indeed, most such disputes are settled short of litigation through employment of the political process and negotiations,³⁵ and the few that reach a judicial forum find the courts highly reluctant to rule on the merits. However, in *United States v. Nixon* (1974), involving a judicial subpoena issued to the President at the request of the Watergate special prosecutor,³⁶ 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."³⁷

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 elaborated on several important issues left unresolved by *Nixon* and other Watergate-related cases: the precise parameters of the presidential executive privilege; how far down the chain of command the privilege reaches; whether the President has to have seen or had knowledge of the existence of the documents for which he claims privilege; and what showing is necessary to overcome a valid claim of privilege. The court

³⁴ Neither case, however, involved congressional access to information.

³⁵ Neal Devins, "Congressional-Executive Information Access Disputes: A Modest Proposal: Do Nothing," *Administrative Law Review*, vol. 48, 109-137: winter 1996; Joel D. Bush, Congressional-Executive Access Disputes: Legal Standards and Political Settlements, *Journal of Law and Politics*, vol. 9, 717:1993; Stephen W. Stathis, "Executive Cooperation: Presidential Recognition of the Investigatory Authority of Congress and the Courts," *Journal of Law and Politics*, vol. 3, 183:1986.

³⁶ 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.

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

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 privilege was held to be confined to White House staff, and not staff in agencies, and then only to White House staff that has “operational proximity” to direct presidential decision making. The claim of 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.³⁸ 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*³⁹ appears to lend substantial support to the above-expressed understanding of *Espy*. The *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.⁴⁰ Some 4300 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.⁴¹ 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.”⁴²

Guided by the analysis of the *Espy* ruling, the panel 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.”⁴³ *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:

³⁸ 121 F. 3d 729 (D.C. Cir. 1997).

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

⁴⁰ 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.

⁴¹ 365 F.3d at 1109-12.

⁴² *Id.* at 1112, 1114, 1123.

⁴³ *Id.* at 1114.

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.”⁴⁴

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:

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 swatch of the executive branch a privilege that is bottomed on a recognition of the unique role of the President.⁴⁵

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.”⁴⁶ 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.”⁴⁷

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

⁴⁴ *Id.* at 1117.

⁴⁵ *Id.* at 1121-22.

⁴⁶ *Id.* at 1116.

⁴⁷ *Id.* at 1116-117.

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.⁴⁸ The appeals court ordered the disclosure of 4300 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 (See Reagan memo at **Appendix B**).

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 the 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. (See Cutler memo at **Appendix C**.) The current Bush Administration has not taken a public position on the Reagan memorandum or the Cutler modification, but President Bush’s sole assertion of executive privilege in December 2001 was issued over his signature.

The current Bush Administration, through presidential signing statements⁴⁹ and opinions of the Department of Justice’s Office of Legal Counsel (OLC), has 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.⁵⁰ In OLC’s view, under the precepts of executive privilege and the unitary executive, Congress may not bypass the procedures the President establishes to authorize disclosure to Congress of classified, privileged, or even non-privileged information 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

⁴⁸ *Id.* at 1118-24.

⁴⁹ See CRS Report RL33667, *Presidential Signing Statements: Constitutional and Institutional Implications*, by T. J. Halstead, September 20, 2006.

⁵⁰ 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/crsmemoresponse.htm>.

appointees to supervise and control the work of subordinate officers and employees of the Executive Branch.”⁵¹

The OLC assertions of these broad notions of presidential prerogatives are 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:

1. 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.
2. 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.
3. 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.

2. Common-Law Testimonial Privileges

More common are claims by departments and agencies (and at times by the White House), and by private persons, that common law testimonial privileges, such as the attorney-client, work-product, and deliberative-process privileges, afford a shield to congressional investigative inquiries. Although there has never been a definitive Supreme Court ruling on the question, the strong constitutional underpinnings of the legislative investigatory power, long-standing congressional practice, and recent appellate court rulings casting doubt on the viability of common-law privilege claims by executive officials in the face of grand jury investigations, support the position that committees may determine, on a case-by case basis, whether to accept a claim of privilege.

Thus it is well established by congressional practice that acceptance of a claim of attorney-client, work product, or other common law testimonial privilege before a committee rests in the sound discretion of that committee. Such common-law privileges cannot be claimed as a matter of right

⁵¹ *Id.* at 3.

by a witness, and a committee can deny them simply because it believes it needs the information sought to be protected in order to accomplish its legislative functions.⁵² In actual practice, all committees that have denied claims of privilege have engaged in a process of weighing considerations of legislative need, public policy, and the statutory duties of congressional committees to engage in continuous oversight of the application, administration, and execution of the laws that fall within its jurisdiction, against any possible injury to the witness. Committees, among other factors, have considered whether a court would have recognized the claim in the judicial forum.⁵³ Moreover, the conclusion that recognition of nonconstitutionally based privileges is a matter of congressional discretion is consistent with both traditional British parliamentary and the Congress's historical practice.⁵⁴

The legal basis for Congress's prerogative in this area is based upon its inherent constitutional prerogative to investigate, which has been long recognized by the Supreme Court as extremely broad and encompassing, and which is at its peak when the subject is fraud, abuse, or maladministration within a government department.⁵⁵ Common-law privileges are, on the other hand, judicially-created exceptions to the normal principle of full disclosure in the adversary process, which are to be narrowly construed and have been confined to the judicial forum. These privileges have no constitutional basis.⁵⁶ Recent appellate court rulings have cast substantial doubt whether executive branch officials may claim attorney-client, work product or deliberative process privileges in the face of investigative demands of a grand jury.⁵⁷

⁵² Glenn A. Beard, "Congress v. The Attorney-Client Privilege: A 'Full and Frank' Discussion," *American Criminal Law Review*, vol. 35, 119: 1997; CRS Report 95-464, *Investigative Oversight: An Introduction to the Law, Practice and Procedure of Congressional Inquiry*, by Morton Rosenberg.

⁵³ See, e.g., "Contempt of Congress Against Franklin L. Haney," H.Rept. 105-792, 105th Cong., 2nd sess. 11-16 (1998); "Proceedings Against John M. Quinn, David Watkins, and Matthew Moore (Pursuant to Title 2, United States Code, Sections 192 and 194)," H.Rept. 104-598, 104th Cong., 2nd sess. 50-54 (1996); "Refusal of William H. Kennedy, III, To Produce Notes Subpoenaed By The Special Committee to Investigate Whitewater Development Corporation and Related Matters," S.Rept. 104-191, 104th Cong. 1st sess. 9-19 (1995); "Proceedings Against Ralph Bernstein and Joseph Bernstein," H.Rept. 99-462, 99th Cong. 2nd sess. 13, 14 (1986); Hearings, "International Uranium Control," Before the Subcommittee on Oversight and Investigations, House Committee on Interstate and Foreign Commerce, 95th Cong., 1st sess. 60, 123 (1977).

⁵⁴ See CRS Report, *supra* footnote 28, at 44-49.

⁵⁵ *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).

⁵⁶ *Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F. 2d 1414, 1423 (3d Cir. 1991) ("Because the attorney-client privilege obstructs the truth-finding process, it is narrowly construed."); *Moran v. Burbine* 475 U.S. 412, 430 (1986) (Sixth Amendment not a source for attorney-client privilege); *Fisher v. United States*, 425 U.S. 391, 396-97 (1976) (compelling on attorney to disclose client communications does not violate the client's Fifth Amendment privilege against self-incrimination); *Hannah v. Larche*, 363 U.S. 420, 425 (1960) ("Only infrequently have witnesses [in congressional hearings] been afforded rights normally associated with an adjudicative proceeding"); *United States v. Fort*, 443 U.S. 932 (1971) (rejecting contention that the constitutional right to cross-examine witnesses applied to congressional investigations); *In re Sealed Case (Espy)*, 121 F. 3d 729 (D.C. Cir. 1997) (the deliberative process privilege is a common law privilege which, when claimed by executive officials, is easily overcome, and "disappears" altogether upon the reasonable belief by an investigating body that government misconduct has occurred).

⁵⁷ *In re Grand Jury Subpoena Duces Tecum*, 112 F. 3d 910 (8th Cir. 1997), *cert. denied sub. nom. Office of the President v. Office of the Independent Counsel*, 521 U.S. 1105 (1997) (claims of First Lady of attorney-client and work-product privilege with respect notes taken by White House Counsel Office attorneys rejected); *In re Bruce R. Lindsey (Grand Jury Testimony)*, 158 F. 3d 1263 (D.C. Cir. 1998), *cert. denied* 525 U.S. 996 (1998) (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) (deliberative process privilege is a common law agency privilege which easily overcome by showing of need by an investigating body); *In re: A Witness Before the Special Grand Jury*, 288 F. 3d 289 (7th Cir. 2002) (attorney-client privilege not applicable to (continued...))

While no court has as yet recognized the inapplicability of common law testimonial privileges in congressional proceedings,⁵⁸ an advisory opinion directly addressing the issue,⁵⁹ by Legal Ethics Committee of the District of Columbia Bar in February 1999 provides substantial support for the longstanding congressional practice. 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 office complex.⁶⁰ During the course of the inquiry, the Subcommittee sought certain documents from the Portals developer, Mr. Franklin L. Haney. Mr. Haney's refusal to comply resulted in subpoenas for those documents to him and the law firm representing him during the relocation efforts. Haney and the law firm asserted attorney-client privilege in their continued refusal to comply. The law firm sought an opinion from the D.C. Bar's Ethics Committee as to its obligations in the face of the subpoena and a possible contempt citation, but the Bar Committee notified the firm that the question was novel and that no advice could be given until the matter was considered in a plenary session of the committee.⁶¹ 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.⁶²

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. Rule of Professional conduct 1.6(d)(2)(A),⁶³ 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

(...continued)

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 afore-cited 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)).

⁵⁸ 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 (per Edgar, J.) (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".).

⁵⁹ 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).

⁶⁰ See H.Rept. 105-792, *supra* footnote 29, at 1-6, 7-8, 15-16.

⁶¹ *See* "Meeting on Portals 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, 105th Cong., 2nd sess. 48-50 (1998).

⁶² *Id.* at 101-105.

⁶³ Under Rule 1.6(d)(2)(A) a lawyer may reveal client confidences or secrets only when expressly permitted by the D.C. rules or when "required by law or court order."

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,⁶⁴ 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 in the nation to directly and definitively address the merits of the issue. It is likely to arouse a controversial and sensitive debate,⁶⁵ particularly if congressional committees choose to subpoena client documents from attorneys as a matter of course.

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 unduly interfere, and perhaps “chill,” the frank and open internal communications necessary to the quality and integrity of the decisional process. It 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 discussed previously, congressional practice has been to treat their acceptance as discretionary with the committee. Moreover, a recent appellate court decision underlines 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.

The 1997 appeals court ruling in *In re sealed Case (Espy)*,⁶⁶ discussed previously, is of special note. The case involved, *inter alia*, White House claims of executive and deliberate process privileges for documents subpoenaed by an independent counsel. At the outset of the appeals court’s unanimous ruling it carefully distinguished between the “presidential communications privilege” and the “deliberative process privilege.” Both, the court observed, are executive privileges designed to protect the confidentiality of executive branch decisionmaking. But the deliberative process privilege applies to executive branch officials generally, is a common law privilege which requires a lower threshold of need to be overcome, and “disappears altogether when there is any reason to believe government misconduct has occurred.”⁶⁷ The court’s

⁶⁴ 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).

⁶⁵ *See, e.g.,* W. John Moore, “First Save All The Lawyers,” *National Law Journal*, July 24, 1999 at 2170.

⁶⁶ 121 F. 3d 729 (D.C. Cir. 1997).

⁶⁷ 121 F. 3d at 745, 746; *See also id.* at 737-738 (“[W]here there is reason to believe the documents sought may shed light on government misconduct, the [deliberative process] privilege is routinely denied on the grounds that shielding (continued...)”).

recognition of the deliberative process privilege as a common law privilege which, when claimed by executive department and agency officials, is easily overcome, and which “disappears” upon the reasonable belief by an investigating body that government misconduct has occurred, may severely limit the common law claims of agencies against congressional investigative demands. A demonstration of need of a jurisdictional committee would appear to be sufficient, and a plausible showing of fraud, waste, abuse or maladministration would be conclusive.

E. Investigative Oversight Hearings

1. Jurisdiction and Authority

A congressional committee is a creation of its parent house and only has the power to inquire into matters within the scope of the authority that has been delegated to it by that body. Thus, the enabling rule or resolution which gives the committee life is 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, past committee practice, and interpretation. 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. In view of the specificity with which Senate and House rules now confer jurisdiction on standing committees, as well as the care with which most authorizing resolutions for 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.

2. Rules Applicable to 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 has resulted in the invalidation of a perjury prosecution.⁶⁸ 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

(...continued)

internal government deliberations in this context does not serve ‘the public interest in honest, effective government’”).

⁶⁸ *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.⁶⁹

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.

3. Conducting 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 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.

A witness does not have a right to make a statement before being questioned but that 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. Witnesses may be allowed to review a transcript of their testimony and to make nonsubstantive 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.⁷⁰ 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.⁷¹ There is no right of cross-examination of adverse witnesses during an investigative hearing. Witnesses are entitled to a range of constitutional protections (see box).

⁶⁹ Senate Rule XXVI(7)(a)(1); House Rule XI(2)(m)(3).

⁷⁰ See, e.g., Senate Permanent Committee on Investigations Rule 8.

⁷¹ See, e.g., Senate Aging Committee Rule V. 8; Senate Permanent Subcommittee on Investigations Rule 7.

Constitutional Rights of Witnesses

It is well established that the protections of the Bill of Rights extend to witnesses at legislative inquiry and thus may pose significant limitations on congressional investigations. The Fifth Amendment provides that “no person . . . shall be compelled in any criminal case to be a witness against himself.” The privilege protects a witness against being compelled to testify subject to a grant of immunity (see pages 35 and 36) but not against a subpoena for existing documentary evidence. However, where compliance with a subpoena *duces tecum* would constitute an implicit testimonial authentication of the documents produced, the privilege may apply. There is no particular formulation of words necessary to invoke the privilege. All that is required is that the witness’s objection be stated in a manner that the committee may reasonably be expected to understand as an attempt to invoke the privilege.

Although the First Amendment, by its terms, is expressly applicable only to *legislation* that abridges freedom of speech, press, or assembly, the Court has held that the amendment also restricts Congress in conducting investigations. In the leading case involving the application of First Amendment rights in a congressional investigation, *Barenblatt v. United States*, 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.” 360 U.S. 109, 162 (1959). 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.

Dicta in opinions of the Supreme Court indicate that the Fourth Amendment’s prohibition against unreasonable searches and seizures is applicable to congressional committees. It appears that there must be probable cause for the issuance of a congressional subpoena. The Fourth Amendment protects a congressional witness against a subpoena that is unreasonably broad or burdensome.

F. 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.

Prominent Select Investigative Committees

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

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

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

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

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
Sen. Select Committee on Watergate^a	Member/ Staff	No	No	Yes
Nixon Impeachment Proceedings^b	Member/ Staff	Yes	No	No
Billy Carter Investigation^c	Staff	No	Yes	No
House Assassinations Inquiry^d	Member/ Staff	Yes	No	No
Church Committee^e	Member/ Staff	Yes	No	No
Koreagate^f	Member/ Staff	Letters Rogatory	No	Yes, by special counsel
ABSCAM (House)^g	Member	Letters Rogatory	No	Yes, by special counsel
ABSCAM (Senate)^h	Member/ Staff	No	No	No
Iran-Contra Houseⁱ and Senate^j	Member/ Staff	Letters Rogatory, Commissions, Depositions	Yes	Yes
Judge Hastings Impeachment^k	Staff	No	No	No
Judge Nixon Impeachment^l	Staff	No	No	No
October Surprise^m	Member/ Staff	Letters Rogatory, Commissions, Depositions	No	Yes
Senate Whitewater(I)ⁿ	Staff	No	No	No
Senate Whitewater (II)^o	Staff	Letters Rogatory, Commissions	Yes	No
White House Travel Office^p	Member/ Staff	No	No	No
House Campaign Finance^q	Member/ Staff	Letters Rogatory, Commissions	No	No
Senate Campaign Financer^r	Staff	No	No	No

	Deposition Authority	International Information Gathering Authority	Tax Information Access Authority	Authority to Participate In Judicial Proceedings
Select Committee on National Security Commercial Concerns^s	Member/ Staff	Letters Rogatory, Depositions	Yes	Yes, by House General Counsel
Teamsters Election Investigation^t	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, 105th Cong., 1st sess. (1998), and CRS Report 95-949, *Staff Depositions in Congressional Investigations*, by Jay R. Shampansky., at notes 16 and 18.

- a. S.Res. 60 and S.Res. 194, 93rd Cong., (1973).
- b. H.Res. 803, 93rd Cong., (1974).
- c. 126 Cong. Rec. 19544-46 (1980) (unanimous consent agreement); S.Res. 495, 96th Cong., (1980) (staff deposition authority); S.Res. 496, 96th Cong., (1980) (tax access authority).
- d. H.Res. 222, 95th Cong., (1974).
- e. S.Res. 21, 94th Cong., (1974).
- f. H.Res. 252 and H.Res. 752, 95th Cong., (1977).
- g. H.Res. 67, 97th Cong., (1981).
- h. S.Res. 350, 97th Cong., (1982).
- i. H.Res. 12, 10th Cong., (1987).
- j. S.Res. 23, 100th Cong., (1987).
- k. H.Res. 320, 100th Cong., (1987).
- l. H.Res. 562, 100th Cong., (1988).
- m. H.Res. 258, 102nd Cong., (1991).
- n. S.Res. 229, 103rd Cong., (1994).
- o. S.Res. 120, 104th Cong., (1995).
- p. H.Res. 369, 104th Cong., (1996).
- q. H.Res. 167, 105th Cong., (1997).
- r. S.Res. 54, 105th Cong., (1997).
- s. H.Res. 463, 105th Cong., (1998).
- t. H.Res. 507, 105th Cong., (1998).

G. Role of Minority-Party Members In the Investigative Process

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 documents⁷²), 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,⁷³ 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, a 1994 federal district court ruling dismissed the attempt of the then-ranking minority member of the House Banking [now titled 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 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.”⁷⁴

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.⁷⁵ 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 section 2 of the Act of May 29, 1928,⁷⁶ 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 the 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.⁷⁷

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: to make “it possible to require any report discontinued by the

⁷² House Rule XI 2(j)(1); *see also* House Banking Committee Rule IV. 4.

⁷³ *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 (5th 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.”)

⁷⁴ *Leach v. Resolution Trust Corporation*, 860 F. Supp. 868, 874-76 (D.D.C. 1994).

⁷⁵ *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.”

⁷⁶ 45 Stat. 996.

⁷⁷ H.R. 1757, 70th Cong., 1st Sess., pp. 2-3 (1928). A study of the Bureau of Efficiency had recommended their elimination. H.R. 1757, at p. 2; S.Rept. 1320, 70th Cong., 1st sess., p. 1 (1928).

language of this bill to be resubmitted to either House upon its necessity becoming evident to the membership of either body.”⁷⁸ The House report agreed on that point, but added: “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.”⁷⁹

It is uncertain, then, on how closely 5 U.S.C. § 2954 is tied to the 128 reports abolished by section 1 of the 1928 legislation.⁸⁰ 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 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*.⁸¹

The first attempt to secure court enforcement of a document demand under section 2954 was brought in 2001 in a federal district court.⁸² 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 section 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 section 2954 should be construed, in light of its legislative history, and to avoid doubts about its constitutionally, 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 section 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.⁸³

⁷⁸ S.Rept. 1320, *supra*, at 4.

⁷⁹ H.R. 1757, *supra*, at 6; *see also* 69 Cong. Rec. 9413-17, 10613-16 (1928) (House and Senate floor debates).

⁸⁰ 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, Sec. 7(a).

⁸¹ 521 U.S. 811 (1997).

⁸² *Waxman, et al. v. Evans*, Civ. Action No. 01-14530-LGB (AJWx) (C.D. Calif, May 21, 2001).

⁸³ *Waxman v. Evans*, Case No. CV 01-14530-LGB (AJWx) at 3.

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, 2002,⁸⁴ 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.⁸⁵ 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 section 2954 document demand in the same district court was recently rejected. *Waxman v. Thompson*,⁸⁶ is a suit by 19 Members of the House Government Reform Committee to compel release by the Department of Health and Human Services (HHS) of cost estimates prepared by its Office of Actuary during congressional consideration of Medicare reform legislation in 2003. In addition to asserting a right of access under section 2954, the congressional plaintiffs allege 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*, ruled that the congressional plaintiffs did not have standing to sue.⁸⁷ *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) or 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.⁸⁸

Bound by the Supreme Court's precedent, the district court concluded that when the Secretary refused to produce the documents requested pursuant to section 2954, plaintiffs did not suffer a personal injury as that term is defined by *Raines*. Rather, Congress, on whose behalf the plaintiffs

⁸⁴ *Carter v. U.S. Department of Commerce*, 307 F. 3d 1084 (9th Cir. 2002).

⁸⁵ *Waxman v. Evans*, No. 02-55825 (9th Cir. Dec. 6, 2002).

⁸⁶ No. CV-04-3467 MMM (Manx) (C.D. Calif., May 17, 2004).

⁸⁷ 521 U.S. 811 (1997).

⁸⁸ See *Congressional Standing to Sue*, CRS Report RL30280, by Jay R. Shampansky, June 19, 2001 (containing a more detailed discussion of *Raines v. Byrd*).

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 section 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 section 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 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.⁸⁹ 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.⁹⁰ 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.⁹¹

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IV. 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.

A. 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.

B. 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. . .”

C. Casework

An important check against bureaucratic indifference or inefficiency is “casework,” as noted in Section I. 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.⁹²

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.”⁹³

D. 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

⁹² Lee H. Hamilton, “Constituent Service and Representation,” *The Public Manager*, summer 1992, p. 12.

⁹³ John R. Johannes, “Constituency Service,” in Donald Bacon, et. al., eds., *The Encyclopedia of the United States Congress* (New York: Simon and Schuster, 1995), p. 544.

- 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?
 - 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 the Congress.

E. 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 via <http://www.nara.gov/fedreg>.
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 now available and searchable online (see <http://www.access.gpo.gov/nara>). The Regulatory Information Service Center of the General Services Administration annually issues two publications—the *Unified Agenda of Federal Regulatory and Deregulatory Actions* in April and *The Regulatory Plan and the Unified Agenda of Federal Regulatory and Deregulatory Actions* in October—that provide a wealth of information about proposed and completed regulatory actions of federal agencies. Both documents are available online at <http://reginfo.gov>. Further information about these two publications can be obtained from the center. The center’s telephone number is (202) 482-7350 and its e-mail address is RIS@gsa.gov.

F. 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 “Section V” 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.

G. 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.

a. 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.

b. 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.

c. 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.

d. 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.

e. 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).

f. Radio

- (1) Time is of the essence. Radio newsmen 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.

g. 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 reporters begin to lose news time 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.

h. 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.

i. 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 now monitor federal spending. A *USA Today* article—“‘Blogosphere’ Spurs Government Oversight,” September 12, 2006, p. 4A—highlights this trend and underscores how more citizen participation in the public realm can promote greater government accountability.

H. Statutory Offices of Inspector General: Establishment and Evolution

Statutory offices of inspector general (OIGs) consolidate responsibility for audits and investigations within a federal agency. Established by public law as permanent, nonpartisan, independent offices, they now exist in more than 60 establishments and entities, including all departments and largest agencies, along with numerous boards and commissions. Under two major enactments—the Inspector General Act of 1978 and its amendments of 1988—inspectors general (IGs) have been granted substantial independence and powers to carry out their mandate to combat waste, fraud, and abuse. Recent laws have added offices in agencies, funding for special operations, and law enforcement powers to OIGs in establishments. Other initiatives have set up mechanisms to oversee the Gulf Recovery Program, while various legislative proposals have been introduced to increase the IGs’ independence and establish new posts.

Responsibilities

The IGs’ three principal responsibilities are:

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

Authority and Duties

To carry out these purposes, IGs have been granted broad authority to: conduct audits and investigations; access directly all records and information of the agency; request assistance from other federal, state, and local government agencies; subpoena information and documents; administer oaths when taking testimony; hire staff and manage their own resources; and receive and respond to complaints from agency employees, whose confidentiality is to be protected. In addition, the Homeland Security Act of 2002 gave law enforcement powers to criminal investigators in offices headed by presidential appointees. IGs, moreover, implement the cash

incentive award program in their agency for employee disclosures of waste, fraud, and abuse (5 U.S.C. 4511).

Notwithstanding these powers and duties, IGs are *not* specifically authorized to take corrective action themselves. Along with this, the Inspector General Act prohibits the transfer of “program operating responsibilities” to an IG. The rationale here 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

IGs have reporting obligations regarding their findings, conclusions, and recommendations. These include reporting (1) suspected violations of federal criminal law directly and expeditiously to the Attorney General; (2) semiannually to the agency head, who must submit the IG report (along with his or her comments) to Congress within 30 days; and (3) “particularly serious or flagrant problems” immediately to the agency head, who must submit the IG report (with comments) to Congress within seven days. The CIA IG must also report to the Intelligence Committees if the Director or Acting Director is the focus of an investigation or audit. By means of these reports and “otherwise,” IGs are to keep the agency head and Congress fully and currently informed. Other means of communication include testifying at congressional hearings; meeting with Members and staff of Congress; and responding to congressional requests for information and reports.

Independence

In addition to having their own powers (e.g., to hire staff and issue subpoenas), the IGs’ independent status is reinforced in other ways: protection of their budgets in the larger establishments, qualifications on their appointment and removal, prohibitions on interference with their activities and operations, a proscription on operating responsibilities, and fixing the priorities and projects for their office without outside direction in most cases. One exception to the IGs’ rule occurs when a review is required in statute, while another is the contrary: in the few instances when an establishment head prevents or halts an audit or investigation. IGs, of course, may voluntarily conduct a review requested by the agency head, President, or legislators.

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. 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....” 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 prevent the IG from initiating, carrying out, or completing an audit or investigation, or issuing a subpoena, and then only for specified reasons: to preserve national security interests or to protect ongoing criminal investigations, among others. When exercising this power, the department head must transmit an explanatory statement for such action to the House Government Reform Committee, the Senate Homeland Security and Governmental Affairs Committee, and other appropriate congressional panels within 30 days. The CIA IG Act also similarly allows the head to prohibit the inspector general from conducting investigations, audits,

or inspections; but he must then notify the House and Senate intelligence panels of his reasons, within seven days.

Appropriations

Presidentially appointed IGs in the larger federal agencies—but not in designated federal entities (DFEs)—are granted a separate appropriations account (a separate budget account in the case of the CIA) for their offices. This prevents agency administrators from limiting, transferring, or otherwise reducing IG funding once it has been specified in law.

Appointment and Removal

Under the Inspector General Act, IGs are to be selected without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial and management analysis, law, public administration, or investigations. The CIA IG, who operates under a different statute, is to be selected under these criteria as well as prior experience in the field of foreign intelligence and in compliance with the security standards of the agency. Presidentialy nominated and Senate-confirmed IGs can be removed only by the President. When so doing, he must communicate the reasons to Congress.

However, IGs in the (usually) smaller DFEs are appointed by and can be removed by the agency head, who must notify Congress in writing when exercising the power. In the Postal Service, by comparison, the governors appoint the inspector general, one of only two IGs with a set term (seven years) specified in law. The other is in the Capitol Police (five years), who is appointed by and can be removed by the Capitol Police Board. Indirectly, the IG in the Peace Corps also faces an effective limited tenure, because all positions in the entity are restricted to a certain period (from five to 8½ years). Furthermore, the USPS IG is the only one 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.

Coordination and Controls

Several presidential orders govern coordination among the IGs and investigating charges of wrongdoing by the IGs themselves and other top echelon officers. The President’s Council on Integrity and Efficiency (PCIE) was established in 1981 to coordinate and enhance efforts at promoting integrity and efficiency in government programs and to combat waste, fraud, and abuse (E.O. 12301). Chaired by the Deputy Director of the OMB, the PCIE is composed of the existing statutory IGs plus officials from other relevant agencies. In 1992, the concept was extended to IGs in designated federal entities, through a parallel Executive Council on Integrity and Efficiency (ECIE). Both PCIE and the ECIE now operate under E.O. 12805, issued in 1992. An Intelligence Community Inspectors General Forum—a coordinative body of the inspectors general from the IC agencies along with observers from the FBI and several defense units—also exists. Investigations of alleged wrongdoing by IGs or other high-ranking OIG officials (under the IG act) are governed by a special Integrity Committee, composed of PCIE and ECIE members and chaired by the FBI representative (E.O. 12993), with investigations referred to an appropriate executive agency or to an IG unit.

Establishment

Statutory offices of inspector general have been authorized in 63 current federal establishments and entities, including all 15 cabinet departments; major executive branch agencies; independent regulatory commissions; various government corporations and boards; and three legislative branch agencies. All but six of the OIGs—in GPO, LOC, Capitol Police, CIA, ODNI, and the Special Inspector General for Iraq Reconstruction (SIGIR)—are directly and explicitly under the 1978 Inspector General Act. Each office is headed by an inspector general, who is appointed in one of two ways:

- (1) 30 are nominated by the President and confirmed by the Senate in the federal establishments, including all departments and the larger agencies under the IG act specifically, plus the CIA under its separate statutory authority (**Table 1**).
- (2) 33 are appointed by the head of the entity in the 28 designated federal entities—usually smaller boards and commissions—and in five other units, where the IGs operate under separate but parallel authority: SIGIR, ONDI, and three legislative agencies (i.e., GPO, LOC, and U.S. Capitol Police) (**Table 2**).

Table 2. Statutes Authorizing Inspectors General Nominated by the President and Confirmed by the Senate, 1976-Present

(current offices are in **bold**)^a

Year	Statute	Establishment
1976	P.L. 94-505	Health, Education, and Welfare (now Health and Human Services)
1977	P.L. 95-91	Energy
1978	P.L. 95-452	Agriculture, Commerce, Community Services Administration,^b Housing and Urban Development, Interior, Labor, Transportation, Environmental Protection Agency, General Services Administration, National Aeronautics and Space Administration, Small Business Administration, Veterans Administration (now the Veterans Affairs Department)
1979	P.L. 96-88	Education
1980	P.L. 96-294	U.S. Synthetic Fuels Corporation ^b
1980	P.L. 96-465	State^c
1981	P.L. 97-113	Agency for International Development^d
1982	P.L. 97-252	Defense
1983	P.L. 98-76	Railroad Retirement Board
1986	P.L. 99-399	U.S. Information Agency ^{b,c}
1987	P.L. 100-213	Arms Control and Disarmament Agency ^{b,c}
1988	P.L. 100-504	Justice,^e Treasury, Federal Emergency Management Administration,^{b,f} Nuclear Regulatory Commission, Office of Personnel Management
1989	P.L. 101-73	Resolution Trust Corporation ^b
1989	P.L. 101-193	Central Intelligence Agency^a
1993	P.L. 103-82	Corporation for National and Community Service
1993	P.L. 103-204	Federal Deposit Insurance Corporation

Year	Statute	Establishment
1994	P.L. 103-296	Social Security Administration
1994	P.L. 103-325	Community Development Financial Institutions Fund ^b
1998	P.L. 105-206	Treasury Inspector General for Tax Administration ^g
2000	P.L. 106-422	Tennessee Valley Authority ^h
2002	P.L. 107-189	Export-Import Bank
2002	P.L. 107-296	Homeland Security ^f

- a. All except the CIA IG are directly under the 1978 Inspector General Act, as amended.
- b. CSA, Synfuels Corporation, USIA, ACDA, RTC, CDFIF, and FEMA have been abolished or transferred.
- c. The State Department IG had also served as the IG for ACDA. In 1998, P.L. 105-277 transferred the functions of ACDA and USIA to the State Department and placed the Broadcasting Board of Governors and the International Broadcasting Bureau under the jurisdiction of the State IG.
- d. The Inspector General in AID may also conduct reviews, investigations, and inspections of the Overseas Private Investment Corporation (22 U.S.C. 2199(e)).
- e. In 2002, P.L. 107-273 expanded the jurisdiction of the Justice OIG to cover all department components, including DEA and the FBI.
- f. P.L. 107-296, which established the Department of Homeland Security, transferred FEMA's functions to it and also granted law enforcement powers to OIG criminal investigators in establishments.
- g. The OIG for Tax Administration in Treasury is the only case where a separate IG, under the 1978 IG Act, exists within an establishment or entity that is otherwise covered by its own statutory IG.
- h. P.L. 106-422, which re-designated TVA as an establishment, also created, in the Treasury Department, a Criminal Investigator Academy to train IG staff and an Inspector General Forensic Laboratory.

Table 3. Designated Federal Entities and Other Agencies with Statutory IGs Appointed by the Head of the Entity or Agency
(current offices are in **bold**)^a

ACTION ^b	Interstate Commerce Commission ^f
Amtrak	Legal Services Corporation
Appalachian Regional Commission	Library of Congress ^{aj}
Board of Governors of the Federal Reserve System	National Archives and Records Administration
Board for International Broadcasting ^c	National Credit Union Administration
Coalition Provisional Authority (in Iraq) ^a	National Endowment for the Arts
Commodity Futures Trading Commission	National Endowment for the Humanities
Consumer Product Safety Commission	National Labor Relations Board
Corporation for Public Broadcasting	National Science Foundation
Election Assistance Commission ^l	Office of the Director of National Intelligence ^{ak}
Equal Employment Opportunity Commission	Panama Canal Commission ^g
Farm Credit Administration	Peace Corps
Federal Communications Commission	Pension Benefit Guaranty Corporation
Federal Deposit Insurance Corporation ^d	Securities and Exchange Commission

ACTION^b	Interstate Commerce Commission^f
Federal Election Commission	Smithsonian Institution
Federal Home Loan Bank Board ^e	Special Inspector General for Iraq Reconstruction^a
Federal Housing Finance Board^e	Tennessee Valley Authority ^h
Federal Labor Relations Authority	United States Capitol Police^{aj}
Federal Maritime Commission	United States International Trade Commission
Federal Trade Commission	United States Postal Serviceⁱ
Government Printing Office^a	

- a. All these agencies—except SIGIR, ODNI, GPO, LOC, and Capitol Police—are considered “designated federal entities” and placed directly under the 1978 IG Act by the 1988 Amendments and subsequent acts. The CPA was dissolved in mid-2004 and its IG was converted to SIGIR.
- b. In 1993, P.L. 103-82 merged ACTION into the new Corporation for National and Community Service.
- c. The BIB was abolished by P.L. 103-236 and its functions transferred to the International Broadcasting Bureau within USIA, which was later abolished and its functions transferred to the State Department.
- d. In 1993, P.L. 103-204 made the IG in FDIC a presidential appointee, subject to Senate confirmation.
- e. In 1989, P.L. 101-73 abolished the FHLBB and placed the new FHFB under the 1988 IG Act.
- f. The ICC was abolished in 1995 by P.L. 104-88.
- g. The Panama Canal Commission, replaced by the Panama Canal Commission Transition Authority, was phased out with the transfer of the Canal to the Republic of Panama (22 U.S.C. 3611).
- h. P.L. 106-422 re-designated TVA as a federal establishment.
- i. In 1996, the U.S. Postal Service Inspector General post was separated from the Chief Postal Inspector. The separated IG is appointed by, and can be removed only by, the governors.
- j. The Legislative Branch Appropriations Act, FY2006 (P.L. 109-55) added IGs to LOC, following the IG Act of 1978 closely, and the Capitol Police, whose IG has specialized responsibilities.
- k. P.L. 108-458 grants the Director of National Intelligence (DNI) full discretion to create and construct an OIG in his Office (based on provisions in the IG Act). This occurred in 2006. ODNI, *Report on the Progress of the DNI in Implementing “the Intelligence Reform Act of 2004,”* May 2006; and House Select Committee on Intelligence, *Intelligence Authorization Act for FY 2007* (H.Rept. 109-411).
- l. P.L. 107-252, the Help America Vote Act of 2002.

Table 4. Tabulation of Existing Federal Establishments, Entities, or Agencies with IGs Authorized in Law

Controlling statute	IGs nominated by President and confirmed by Senate	IGs appointed by head of entity or agency	Total
1978 IG Act, as amended	29	28	57
Other statutes	1 ^a	5 ^b	6
Total	30	33	63

- a. CIA Inspector General.
- b. SIGIR, GPO, LOC, U.S. Capitol Police, and ODNI inspectors general.

Recent Initiatives

Initiatives in response to the 2005 Gulf Coast Hurricanes arose to increase OIG capacity and capabilities in overseeing the unprecedented recovery and rebuilding efforts: an initial coordinating team of IGs or deputies from affected agencies has evolved into the Homeland Security Roundtable, chaired by the IG in DHS; a Hurricane Katrina Contract Task Force, established by the Justice Department, includes relevant inspectors general; an official in the DHS office has been designated to direct its effort here; and an additional \$15 million for the OIG in Homeland Security was approved (P.L. 109-62). Other proposals include setting up a long-term task force or coordinative mechanism of IGs from relevant agencies and creating an office of inspector general with overarching jurisdiction for gulf recovery programs (H.R. 3737 and 3810, 109th Cong.). Other suggestions included consolidating DFE OIGs under one or more new presidentially appointed IGs or under a related establishment office (GAO-02-575) and granting law enforcement authority to DFE IGs.

Separate recommendations have arisen in the 110th Congress. H.R. 785 and S. 461 would establish an inspector general for the Judicial Branch, appointed by and removable by the Chief Justice for a renewable four-year term, with authority to investigate and audit matters pertaining to the Judicial Branch. H.R. 3496 would create an IG in the office of the Architect of the Capitol and one in the Washington Metropolitan Area Transit Authority, while another would make the Postal Service IG a presidential appointment (H.R. 22). A far-reaching proposal, advanced to increase the IGs' independence and powers, calls for sending the initial OIG budget requests to Congress and OMB for later comparison with the final amount in the President's budget submission, removing an IG only "for cause," setting a term of office for IGs, establishing a Council of Inspectors General for Integrity and Efficiency in law (thus, replacing the PCIE and ECIE), revising the pay structure for IGs, and granting personnel flexibilities powers to IGs over their own employees (H.R. 2489). Another (S. 680) would increase the pay level for presidentially appointed IGs, set qualifications for the appointment and removal of IGs in designated federal entities, and grant IGs subpoena power in any medium.

I. 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).

1. 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.

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)

2. 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."

3. 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.

a. Chief Financial Officers Act of 1990 (104 Stat. 2838)

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

1. The act created two new posts within OMB, along with a new position of chief financial officer in 23 major federal agencies, including all Cabinet departments; a 24th agency has since been added. Sixteen of these posts are filled by presidential appointees *subject to Senate confirmation*; these are in the 14 Cabinet departments plus the Environmental Protection Agency and the National Aeronautics and Space Administration. The remaining eight CFO positions are in the Agency for International Development, Federal Emergency Management Agency, 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.

b. Government Performance and Results Act (107 Stat. 285)

This act—commonly known by the acronym GPRA or the Results Act—requires federal agencies to submit long-range strategic plans and follow-up annual 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; the follow-up reports, which began in 2000, are required six months after the end of the fiscal year.

c. 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.

d. 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.

e. 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.

f. 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.

g. 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.

h. Federal Advisory Committee Act

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.

i. 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 107th 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.

j. 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.”

k. 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.

l. 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 104th Congress. Generally, unfunded intergovernmental mandates include responsibilities or duties that federal programs, standards, or requirements impose on governments at other levels without providing for the payment of the costs of carrying out these responsibilities or duties. The intent of the mandate legislation was to limit the ability of the federal government to impose costs on state and local governments through unfunded mandates. The enactment has three components: revised congressional procedures regarding future mandates; 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.

m. 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 new 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.

J. 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*, 4th Cong., 1st sess., March 24, 1796. p. 480.)

A contemporary illustration occurred on March 1, 1995, when the House adopted H. Res. 80, as amended (104th Cong., 1st 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.

K. 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. 106-320, 106th Cong., 2d Sess. §1053 (2001). 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 box on pg 103).

- (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).

L. 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.

1. 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.

a. Legislative Vetoes in Statute

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).

b. Informal Legislative Vetoes

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

2. 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).

M. 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 on previous page).

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.”

Selected Readings

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V. 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.

A. Congressional Research Service (CRS)

1. CRS Mission Statement

“The Congressional Research Service provides the Congress, throughout the legislative process, comprehensive and reliable legislative research, analysis, and information services that are timely, objective, nonpartisan, and confidential, thereby contributing to an informed national legislature.”

2. 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 the Congress.

3. 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.

4. CRS Work for Congress

CRS provides the following services:

Analytical and Research Services

a. 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.

b. 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.

c. 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 the 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.

Public Policy Issues Institute. Held at the beginning of each session of the Congress, this program provides introductory briefings and discussions by CRS staff on issues of legislative significance to the Congress.

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

a. 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.

b. CRS Reports

Reports for Congress on specific issues take many forms: policy analyses, statistical reviews, economic studies, legal analyses, historical studies, chronological reviews, and bibliographies. Reports are available on the CRS website at <http://www.crs.gov>. In addition, CRS prepares concise briefing papers on issues before the Congress.

c. 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.

d. 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
Rayburn Research Center
Russell Senate Research Center
Hours: Monday-Friday, 9:00 a.m.-5:30 p.m.
(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.

e. 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 “Legislative Alert,” 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 104th 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 105th 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, was 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 were 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 the Congress from the CRS Home Page, reflects policy areas identified by CRS research staff as active and of current importance to the 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 the 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 13 annual appropriations bills. The appropriations status table includes an online guide to the FY2003 Consolidated Appropriations Act (P.L. 108-7), which offered access and short cuts to notable sections from the end-of-session measure that combined 11 appropriations acts into one bill.

f. Audiovisual Products and Services

Audiovisual Products and Services. CRS provides a variety of audiovisual products and technical assistance in support of its service to the Congress. These include producing video or audio copies of CRS institutes and seminars that congressional staff can request for viewing in DVD format or at their desktops from the Web. The Web versions are broken out into subtopics so that individual viewers can go directly to the portions that are of greatest interest to them. In addition, CRS provides two hours of television programming each weekday for the house and Senate closed-circuit systems.

Language Support. The Foreign Affairs, Defense, and Trade Division provides limited translation services for Members and committees. For translations pertaining to legislative business into or from other languages, the division can make arrangements to contract the work to outside vendors.

5. CRS Divisional Responsibilities

CRS has adopted an interdisciplinary and integrative approach as it responds to requests from the 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 the Congress.

Divisions

American Law Division

The American Law Division provides the Congress with legal analysis and information on the range of legal questions that emerge from the congressional agenda. Division lawyers 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 the 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 the 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 is responsible for meeting the analytic and research needs of Congress on matters relating to government operations and oversight, intergovernmental relations, congressional organization and procedures, public finance, financial regulation, and macroeconomic policy. Issue areas related to government include the operations and history of Congress; the legislative process; the congressional budget and appropriations processes; federal executive and judicial branch organization and management; government personnel; government information policy; statehood, territories and the District of Columbia; disaster assistance and homeland security; census and reapportionment; elections and political parties; lobbying; and constitutional amendments and history. Issue areas related to finance and economics include financial institutions and market structure; financial markets and securities regulation; insurance; consumer finance, including banking, credit reporting, and financial privacy; government-sponsored enterprises and housing finance; debt and taxation; economic development; international finance, including foreign exchange and financial flows; monetary and fiscal policy; and macroeconomic conditions and indicators, such as gross domestic product, price indexes, and saving.

Knowledge Services Group

The Knowledge Services Group (KSG) is comprised of information research professionals who partner with CRS analysts and attorneys in providing authoritative and reliable information research and policy analysis to the Congress. Information professionals are clustered together by policy research area and align their work directly to the CRS analytical divisions (see listing above), providing analysis in those same policy areas. KSG members 1) write descriptive products and contribute descriptive input to analytical products in policy research areas; 2) advise CRS analysts and the Congress in finding solutions for their information needs, and make recommendations for incorporating new research strategies into their work; 3) create customized Web pages; 4) evaluate, acquire, and maintain state-of-the-art resources materials and collections for CRS staff; 5) work with the analytical divisions in ensuring the currency and accuracy of CRS products and CRS-created databases and spreadsheets; 6) maintain the currency, comprehensiveness, and integrity of CRS information resources by identifying, assessing, acquiring, organizing, preserving, and tracking materials; 7) provide authoritative information on specific policy research areas through discussions or presentations; 8) provide or coordinate customized training on information research or information resources for individuals or groups, as requested or anticipated.

Resources, Science, and Industry Division

The Resources, Science, and Industry Division covers an array of legislative issues for the 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.

Offices

Office of Finance and Administration

The Office of Finance and Administration maintains oversight of the Service's planning, management controls, financial management, and administrative activities. This includes coordinating development of the Service's strategic planning goals and annual program plans and conducting quarterly performance reviews. This office directs a full range of fiscal operations to achieve the Director's program objectives, including development of long-range budgetary requirements and associated appropriations requests, budget execution, contracting, and fund-raising. The office also performs facilities management and asset control activities and co-chairs the Services Contract Review Board, conducts a business analysis of all proposals for external research capacity, and makes recommendations to the Director.

Office of Information Resources Management

The Office of Information Resources Management develops and maintains information services that support both the Congress and CRS staff. The office provides information support to CRS staff through its management of three Information Resource Centers, reference services, procurement of electronic and print resources, training in the use of electronic resources, and Intranet resource development.

Office of the Congressional Affairs and Counselor to the Director

The Office of Congressional Affairs and Counselor to the Director provides counsel to the Director and Deputy Director on matters of law and policy—planning, developing, and coordinating matters relating to internal CRS policies, particularly as they affect the Service's relationships with congressional clients and other legislative support agencies. The office provides final CRS review and clearance of all CRS products; 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. This office receives, assigns to the research divisions, and tracks congressional inquiries; works with the divisions to plan and carry out institutes, seminars, and briefings for Members, committees, and their staffs, and takes the lead in developing, strengthening, and implementing outreach to congressional offices; records, tracks, and reports data on congressional inquiries and CRS responses; and develops and refines systems designed to provide managers with statistical information needed to analyze subject coverage, client service, and the use of resources. The office also provides a co-chair of the External Research Review Board, which reviews contract proposals and makes recommendations to the Director, and provides the CRS representative to the Interagency Liaison Group of legislative support agencies.

Office of Legislative Information

The Office of Legislative Information develops and maintains information services that support both the Congress and CRS staff, including the CRS website and the congressional legislative information retrieval system (LIS); provides summaries and status information for all bills introduced each Congress; builds and maintains the technology infrastructure of the Service as a whole; develops and applies new technologies to enhance CRS research capability and productivity; develops and implements information technology to enhance communication of CRS research to its clients; edits, produces, and distributes CRS products in both print and

electronic format; and represents the Director in dealing with other organizations and agencies on issues regarding legislative information technology.

The Office of Workforce Development

The Office of Workforce Development administers the Service's human resources programs and the following activities: staffing, recruitment, position classification, diversity, upward mobility, performance management, mentoring, special recognition, and training and professional development. This office represents the Director on 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 the Congress.

6. Interdisciplinary Teams

a. 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 the Congress, and provides effective, timely, and comprehensive products and services to the 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.

7. 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 the 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 division chief or the Associate Director for Policy Compliance.

- 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 the 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 the Congress.
- r. As a general rule, the services of CRS are provided exclusively to the 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.

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B. Congressional Budget Office (CBO)

The Congressional Budget Office (CBO) was created by the Congressional Budget and Impoundment Control Act of 1974. It began operating on February 24, 1975, with the appointment of its first director, Alice M. Rivlin. CBO's mission is to provide Congress with objective, timely, nonpartisan analyses needed for economic and budget decisions and with the information and estimates required for the congressional budget process. Compared with the missions of the Congress's other support agencies—the Congressional Research Service and the Government Accountability Office—CBO's mandate is relatively narrow. But its subject matter

gives it a broad reach, reflecting the wide array of activities that the federal budget covers and the major role the budget plays in the U.S. economy.

A substantial part of what CBO does is to support the work of the House and Senate Committees on the Budget, which were also created by the 1974 act. Those committees are in charge of the process, spelled out in the act, by which the Congress sets its own targets for the federal budget, including the overall levels of revenues and spending, the surplus or deficit that results, and the distribution of federal spending by broad functional categories. Each spring Congress adopts the end result of that process, the congressional budget plan, in the form of a concurrent resolution. The resolution imposes an overall framework and discipline on the consideration of appropriations, other spending measures, and tax legislation.

The policies and principles that have shaped CBO since its inception are a key factor in its effectiveness. CBO is a professional, nonpartisan staff office, and it does not make recommendations on policy. That nonpartisan stance has been instrumental in preserving the agency's reputation for professionalism and has enhanced the credibility of its products. CBO prepares independent analyses and estimates relating to the budget and the economy and presents options and alternatives for Congress to consider. It routinely discloses the assumptions and methods it uses, which enhances the general perception of its products as objective and impartial.

Some of CBO's activities are statutory tasks; others are carried out at the request of congressional committees or individual Members. According to the Budget Act, CBO must give priority first to requests for services from the House and Senate Budget Committees; second, to requests from the two Appropriations Committees, the House Committee on Ways and Means, and the Senate Committee on Finance; and finally, to requests from all other congressional committees. CBO prepares various type of analyses for Congress, including cost estimates for bills that individual Members have introduced or plan to introduce. But, committee requests always take priority. CBO handles requests from individual Members only to the extent that its resources permit.

CBO's services can be grouped in four categories: helping Congress formulate a budget plan, helping it stay within that plan; helping it assess the impact of federal mandates, and helping it consider issues related to the budget and to economic policy.

1. Helping Congress Develop a Plan for the Budget

The House and Senate Budget Committees prepare the annual congressional budget plan, drawing on the "views and estimates" of the other committees. A major part of CBO's role in that process is to prepare an annual report, which provides economic and budget projections for the next 10 years. Typically, it also includes a discussion of some current economic or budget policy issues, such as the effects of the federal deficit on economic growth or recent changes in the budget process. CBO customarily updates its economic and budget projections in midyear.

Economic Forecasts and Projections

CBO is the only part of the legislative branch whose mandate includes making economic forecasts and projections. Its forecasts cover 18 to 24 months and involve the major economic variables—gross domestic product (GDP), unemployment, inflation, and interest rates. CBO does not attempt to forecast cyclical fluctuations in the economy more than two years ahead; instead, its longer-term projections are based on trends in the labor force, productivity, and savings.

CBO draws the information for its forecasts from the major econometric models and commercial economic forecasting services. It also relies on the advice of a distinguished panel of advisers that meets twice a year. Usually, CBO's forecasts are fairly close to the consensus of private forecasters. CBO regularly publishes an evaluation of its economic forecasting record.

Baseline Budget Projections

The purpose of CBO's budget projections is to give Congress a baseline for measuring the effects of proposed changes in tax and spending laws. The projections show what would happen to the federal budget if current spending or revenue policies were unchanged over the projection period. The Budget Committees use the projections to develop their annual budget resolutions and directives to other committees. CBO uses them to produce cost estimates for proposed legislation and in scorekeeping tabulations.

For revenues and entitlement programs, such as Social Security or Medicare, the baseline projections generally assume that current laws will continue without change. For discretionary spending, which is controlled by annual appropriation bills, CBO bases its projections on the most recent appropriations, adjusted for the projected rate of inflation.

Analysis of the President's Budget and Other Assistance

Each year, at the request of the Senate Committee on Appropriations, CBO analyzes the President's budget to see how its revenue and spending proposals would affect CBO's baseline budget projections. In the analysis, CBO uses its own economic assumptions and estimating techniques to recast the budget the President has proposed and submitted to Congress. In addition, as Congress moves towards its annual budget resolution, CBO helps the budget and other committees estimate the effects of alternative budget plans. Frequently, CBO officials are asked to testify before congressional committees about the outlook for the economy and the budget and about other matters related to developing the annual budget plan.

Long-Term Budgetary Pressures and Policy Options

The 10-year time frame CBO uses for preparing budget projections is not sufficient to show the dramatic effects that the projected demographic changes in the U.S. population over the next three decades would have on the federal budget. The upcoming retirement of the large baby-boom generation and the continuing growth of per-enrollee health care costs would place growing pressure on the budget, largely because they would increase spending on Social Security, Medicare, and other programs that serve the elderly. Since 1996, CBO has periodically prepared a report on the long-term budgetary outlook and on some of the policy options for controlling the growth of spending in those programs.

2. Helping Congress Stay Within Its Budget Plan

Once Congress adopts the annual budget resolution, the Budget Committees take the lead in enforcing its provisions. To help them, CBO supplies estimates of the budgetary impact of bills reported by the different committees and up-to-date tabulations (referred to as scorekeeping) of the status of congressional actions on legislation that affects the budget.

Cost Estimate for Bills

CBO is required to develop a cost estimate for virtually every bill reported by congressional committees to show how it would affect spending or revenues over the next five years or more. For most tax legislation, CBO uses estimates provided by the Joint Committee on Taxation, a separate congressional analytic group that works closely with the two tax-writing committees. CBO also prepares cost estimates for use in drafting bills (especially in the early stages), formulating floor amendments, and working out the final form of legislation in conference committees. To the extent that its resources permit, CBO estimates the cost of bills at the request of individual Members. In the past, where appropriate, CBO estimates contained the projected costs to state and local governments of carrying out the proposed legislation. In March 1995, enactment of the Unfunded Mandates Reform Act greatly expanded CBO's responsibilities in that area (see below).

CBO's cost estimates have become an integral part of the legislative process and committees increasingly refer to them at every stage of drafting bills. The estimates may also have an impact on the final outcome of legislation because they are used to determine whether committees are complying with the annual budget resolutions and reconciliation instructions.

Another CBO responsibility is providing estimates to the Appropriations Committees of Congress. The numbers contained in appropriation bills usually represent budget authority, and the resulting outlays must be estimated. (Outlays are generally checks issued by the Treasury or cash-equivalent transactions that, when subtracted from receipts, are used to calculate the budget surplus or deficit.) CBO's estimates may be critical in determining whether a bill complies with allocations in the annual budget resolution.

Scorekeeping

One of CBO's most important functions is to keep track of all spending and revenue legislation considered each year so Congress can know whether it is acting within the limits set by the annual budget resolution. CBO provides the Budget and Appropriations Committees with frequent tabulations of congressional action on both spending and revenue bills—although the bulk of CBO's scorekeeping involves spending legislation. The scorekeeping systems keep track of all bills that affect the budget from the time they are reported out of committee to the time they are enacted into law.

3. Helping Congress Assess Federal Mandates

To assess better the impact of its laws on state, local, and tribal governments and the private sector, Congress passed the Unfunded Mandates Reform Act of 1995. The act amends the Congressional Budget Act to require CBO to give authorizing committees a statement about whether reported bills contain federal mandates. If the direct costs of an intergovernmental or private-sector mandate exceed specified thresholds in any of the first five years after the mandate takes effect, CBO must provide an estimate of those costs (if feasible) and the basis of the estimate.

CBO's statement must also include an assessment of what funding is authorized in the bill to cover the costs of the mandates and, for intergovernmental mandates, an estimate of the appropriations needed to fund such authorizations for up to 10 years after the mandate is

effective. When requested, CBO is also required to assist committees by preparing studies of legislative proposals containing federal mandates. The law took effect on January 1, 1996.

4. Helping Congress Consider Budget and Economic Policy Issues

CBO's responsibilities also entail analyzing specific program and policy issues that affect the federal budget and the economy. For the most part, requests for those analyses come from the chairman or ranking minority member of a full committee or subcommittee. The leadership of either party in the House or Senate may also request CBO analysis.

The analyses cover a variety of federal activities, examining current policies, suggesting other approaches, and projecting how the alternatives would affect current programs, the federal budget, and the economy. In keeping with its nonpartisan mandate, CBO does not offer recommendations on policy in those reports.

Some of the analyses take nine to 12 months, or sometimes longer, to complete. Other analyses may be conducted in a much shorter time frame, usually appearing as papers or memorandums. Many CBO reports have helped shape public discussion of the issues they address, not only on Capitol Hill but in the nation at large. A list of CBO's recent publications shows the broad range of their subject matter.

Employing Staff and Budgetary Resources

CBO's annual appropriation limits the number of staff the agency may employ. The appropriation for FY1976 authorized 193 positions. Since 1977, the agency's staffing limit has grown to the present level of 235 full-time equivalent positions. Of those, 215 are designated professional and 20 are support positions.

CBO is an agency dominated by economists and policy analysts. All of its directors have held Ph.D.'s, most in economics, and about 60 percent of its professional staff hold advanced degrees in either economics, public policy, or a related field. Nearly all of CBO's professional staff have completed four or more years of college; three out of four have graduate degrees.

CBO's FY2004 appropriation was \$33.6 million. Of its total expenditures, the largest share—88 percent—is allotted to personnel. The second largest component is computer costs. Today, those expenditures make up about six percent of total spending.

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.

How to Contact CBO

For general information, call 202-226-2600. The fax number is (202) 226-2714. CBO is open weekdays from 9:00 a.m. to 5:30 p.m.

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CBO cost estimates are available to the public on the website and are generally included in Senate and House committee reports that accompany reported legislation. The Publications Office does not distribute copies of cost estimates.

C. 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.

A. Senate Legal Counsel

The Office of Senate Legal Counsel⁹⁴ was created by Title VII of the Ethics in Government Act of 1978⁹⁵ "to serve the institution of Congress rather than the partisan interests of one party or another."⁹⁶ The counsel and deputy counsel are appointed by the president pro tempore of the

⁹⁴ 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, 101st Cong., 2nd 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).

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

⁹⁶ S.Rept. 95-170, 95th Cong., 2nd 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.⁹⁷

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.⁹⁸

(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.⁹⁹

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.¹⁰⁰ 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. Hastings¹⁰¹ and proceedings to enforce a subpoena *duces tecum* for the production of diaries of Senator Bob Packwood.¹⁰²

⁹⁷ 2 U.S.C. § 288(a) and (b), 288a.

⁹⁸ 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.

⁹⁹ 2 U.S.C. § 288b(d)(2), 288f.

¹⁰⁰ 28 U.S.C. § 1365.

¹⁰¹ See S.Rept. 98, 101st Cong., 1st sess. (1989).

¹⁰² 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.¹⁰³ 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.¹⁰⁴ 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.¹⁰⁵ Its reach is limited to natural persons and to entities acting or purporting to act under the color of state law.¹⁰⁶

(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.¹⁰⁷

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.¹⁰⁸ 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.¹⁰⁹ Members of the office have also undertaken special assignments such as the Senate's investigation of "Abscam" and other undercover activities,¹¹⁰ the impeachment proceedings of Judge Harry Claiborne,¹¹¹ Judge Walter L. Nixon, Jr.,¹¹² and Judge Alcee L. Hastings Jr.,¹¹³ 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

¹⁰³ 2 U.S.C. § 288d and 28 U.S.C. § 1365.

¹⁰⁴ 2 U.S.C. § 288 d(c).

¹⁰⁵ See 28 U.S.C. § 1365 (a).

¹⁰⁶ *Id.*

¹⁰⁷ 2 U.S.C. § 288g(a)(5) and (6).

¹⁰⁸ 2 U.S. 288g(c).

¹⁰⁹ See S.Rept. 1015, 96th Cong., 2nd sess. (1980).

¹¹⁰ See S.Rept. 682, 97th Cong., 2nd sess. (1982).

¹¹¹ See S.Rept. 812, 99th Cong., 2nd sess. (1986).

¹¹² See S.Rept. 164, 101st Cong., 1st sess. (1989).

¹¹³ See S.Rept. 156, 101st Cong., 1st 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.

B. 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 103rd 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."¹¹⁴ 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.¹¹⁵ 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.¹¹⁶ 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.¹¹⁷ Where authorized by statute or resolution, the office may represent the House itself in judicial proceedings.¹¹⁸ The office also represents House officers in litigation affecting the institutional interests and prerogatives of the House.¹¹⁹ 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

¹¹⁴ See H. Res. 5, Sec. 11, 139 Cong. Rec. H5 (daily ed. Jan. 5, 1993).

¹¹⁵ House Rule II(8) of the Rules of the 108th Congress.

¹¹⁶ *Id.*

¹¹⁷ 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).

¹¹⁸ 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).

¹¹⁹ 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 (10th 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,¹²⁰ in responding to executive agencies and officials that resist congressional oversight,¹²¹ and in navigating the statutory process for obtaining a contempt citation with respect to a recalcitrant witness.¹²²

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;¹²³ defends against attempts to obtain direct or indirect judicial interference with congressional subpoenas or other investigatory authority;¹²⁴ represents committees seeking to prevent compelled disclosure of non-public information relating to their investigatory or other legislative activities;¹²⁵ 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.¹²⁶

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.

D. 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.

¹²⁰ See, e.g., H.Rept. 105-797, *In the Matter of Representative Jay Kim*, Committee on Standards of Official Conduct, 105th Cong., 2nd sess. 84-85 (Oct. 8, 1998).

¹²¹ 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, 101st Cong., 2nd sess. 77-104 (Dec. 5, 1990).

¹²² 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).

¹²³ See, e.g., *Dornan v. Sanchez*, 978 F. Supp. 1315, 1317 n.1 (C.D. Cal. 1997).

¹²⁴ See, e.g., *Harris v. Board of Governors*, 938 F.2d 720 (7th Cir. 1991); *United States v. United States House of Representatives*, 556 F. Supp. 150 (D.D.C. 1983).

¹²⁵ 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).

¹²⁶ 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.

1. 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 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?

2. 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.

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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.

3. 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.

4. Additional Services

In addition to its audits and evaluations, GAO offers a number of other services.

a. 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 the 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).

b. 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.

c. 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 prescribes standards for auditing government programs.

d. 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.

e. Committee Support

Occasionally, GAO assigns staff to work directly for congressional committees. In these cases, the staff assigned represent a committee and not GAO.

5. 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 David M. Walker
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>.

E. 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 budget agency has been a part of the Executive Office of the President.

1. Capabilities

- a. OMB 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 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. Helping the President by clearing and coordinating the advice of agencies regarding 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 President's Council on Integrity and Efficiency and the Executive Council on Integrity and Efficiency.

2. 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.

F. 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.

1. Executive Branch Budget Products

Budget of the United States Government, Fiscal Year 2005 contains the Budget Message of the President and information on the President's 2005 budget proposals by budget function.

Analytical Perspectives, Budget of the United States Government, Fiscal Year 2005 contains analyses that are designed to highlight specified subject areas or provide other significant presentations of budget data that place the budget in perspective.

The *Analytical Perspectives* volume includes economic and accounting analyses; information on Federal receipts and collections; analyses of federal spending; detailed information on Federal borrowing and debt; the Budget Enforcement Act preview report; current services estimates; and other technical presentations. It also includes information on the budget system and concepts and a listing of the federal programs by agency and account.

Historical Tables, Budget of the United States Government, Fiscal Year 2005 provides data on budget receipts, outlays, surpluses or deficits, federal debt, and federal employment covering an extended time period—in most cases beginning in FY1940 or earlier and ending in FY2009. These are much longer time periods than those covered by similar tables in other budget documents. As much as possible, the data in this volume and all other historical data in the budget documents have been made consistent with the concept and presentation used in the 2001 budget, so the data series are comparable over time.

Budget of the United States Government, Fiscal Year 2005—Appendix contains detailed information on the various appropriations and funds that constitute the budget and is designed primarily for the use of the Appropriations Committee. The Appendix contains more detailed financial information on individual programs and appropriation accounts than any of the other budget documents. It includes for each agency: the proposed text of appropriations language, budget schedules for each account, new legislative proposals, explanations of the work to be performed and the funds needed, and proposed general provisions applicable to the appropriations of entire agencies or groups of agencies. Information is also provided on certain activities whose outlays are not part of the budget totals. The *Appendix* is perhaps the most useful product in the President's initial budget submission for obtaining programmatic detail.

Automated Sources of Budget Information. The information contained in the above-listed documents is available in electronic format from the following sources: (1) CD-ROM. The CD-ROM contains all of the budget documents and software to support reading, printing, and searching for documents. The CD-ROM also has many of the tables in the budget in spreadsheet format. (2) Internet. All budget documents, including documents that are released at a future date, are to be available for downloading in several formats from the Internet. To access documents through the website, use the following address: <http://www.gpo.gov/usbudget>.

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 homepage (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.

2. 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.

G. 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.

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.”¹²⁷

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Appendix A. Illustrative Subpoena

Subpena Duces Tecum

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

To Custodian of Documents International Brotherhood of Teamsters

You are hereby commanded to produce the things identified on the attached schedule before the
Subcommittee on Oversight
and Investigations, Committee on Education and the Workforce

of the House of Representatives of the United States, of which the Hon. Pete Hoekstra

..... is chairman, by producing such things in Room B-346A of the

Rayburn Building, in the city of Washington, on

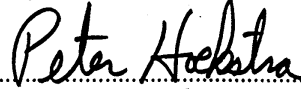
March 17, 1998, at the hour of 5:00 P.M.

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

Witness my hand and the seal of the House of Representatives

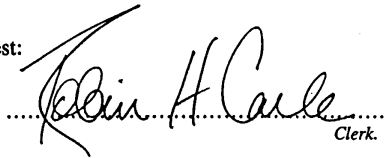
of the United States, at the city of Washington, this

10th day of March, 1998



The Honorable Pete Hoekstra *Chairman*

Attest:


Clerk.

Subpoena for Custodian of Documents

International Brotherhood of Teamsters

25 Louisiana Avenue, N.W.

Washington, D.C. 20001

before the Committee on the Education

and the Workforce, Subcommittee on

Oversight and Investigation

Served

.....
.....
.....
.....
.....

..... House of Representatives

GENERAL INSTRUCTIONS

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

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

GENERAL DEFINITIONS

1. The term “document” means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the

following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, interoffice and intra office communications, electronic mail (E-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, discs, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disc, or videotape. A documents bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.

2. The term “communication” means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether face to face, in a meeting, by telephone, mail, telexes, discussions, releases, personal delivery, or otherwise.
3. The terms “and” and “or” shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this subpoena any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.
4. The term “White House” refers to the Executive Office of the President and all of its units including, without limitation, the Office of Administration, the White House Office, the Office of the Vice President, the Office of Science and Technology Policy, the Office of Management and Budget, the United States Trade Representative, the Office of Public Liaison, the Office of Correspondence, the Office of the Deputy Chief of Staff for Policy and Political Affairs, the Office of the Deputy Chief of Staff for White House Operations, the Domestic Policy Council, the Office of Federal Procurement Policy, the Office of Intergovernmental Affairs, the Office of Legislative Affairs, Media Affairs, the National Economic Council, the Office of Policy Development, the Office of Political Affairs, the Office of Presidential Personnel, the Office of the Press Secretary, the Office of Scheduling and Advance, the Council of Economic Advisors, the Council on Environmental Quality, the Executive Residence, the President’s Foreign Intelligence Advisory Board, the National Security Council, the Office of National Drug Control, and the Office of Policy Development.

March 10, 1998

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

SCHEDULE A

1. All organizational charts and personnel rosters for the International Brotherhood of Teamsters (“Teamsters” or “IBT”), including the DRIVE PAC, in effect during calendar years 1991 through 1997.
2. All IBT operating, finance, and administrative *manuals* in effect during calendar years 1991 through 1997, including, but not limited to those that set forth (1) operating policies, practices, and procedures; (2) internal financial practices and reporting requirements; and (3) authorization, approval, and review responsibilities.
3. All annual audit reports of the IBT for the years 1991 through 1996 performed by the auditing firm of Grant Thornton.
4. All IBT annual reports to its membership and the public for years 1991 through 1997, including copies of IBT annual audited financial statements certified to by independent public accountants.
5. All books and records showing receipts and expenditures, assets and liabilities, profits and losses, and all other records used for recording the financial affairs of the IBT including, journals (or other books of original entry) and ledgers including cash receipts journals, cash disbursements journals, revenue journals, general journals, subledgers, and workpapers reflecting accounting entries.
6. All Federal Income Tax returns filed by the IBT for years 1991 through 1997.
7. All minutes of the General Board, Executive Board, Executive Council, and all Standing Committees, including any internal ethics committees formed to investigate misconduct and corruption, and all handouts and reports prepared and produced at each Committee meeting.
8. All documents referring or relating to, or containing information about, any contribution, donation, expenditure, outlay, in-kind assistance, transfer, loan, or grant (from DRIVE, DRIVE E&L fund, or IBT general treasury) to any of the following entities/organizations:
 - a. Citizen Action
 - b. Campaign for a Responsible Congress
 - c. Project Vote
 - d. National Council of Senior Citizens
 - e. Vote Now ‘96
 - f. AFL-CIO
 - g. AFSCME
 - h. Democratic National Committee
 - i. Democratic Senatorial Campaign Committee (“DSCC”)

- j. Democratic Congressional Campaign Committee (“DCCC”)
 - k. State Democratic Parties
 - 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.

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

Appendix C.

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.

Appendix D.

Congressional Oversight Video Series

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 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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