

DEFINING CONGRESSIONAL OVERSIGHT AND MEASURING ITS EFFECTIVENESS

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Article I of the U.S. Constitution establishes the Congress of the United States and bestows upon it a long list of notable “powers,” including the power to enact legislation, raise revenue, and provide for the common defense and general welfare of the country.¹ One key congressional power that is not explicitly enumerated in the Constitution, but has since been recognized as fundamental to congressional operations, is its power to conduct oversight investigations.²

The power to investigate plays an essential role in every aspect of the legislative function. If Congress wants to evaluate existing laws, determine whether new laws are needed, or author useful legislation, it needs to understand the problems at issue and how the current system

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1. U.S. CONST. art. I, § 8.

2. For purposes of this paper, the terms “oversight” and “investigation” are intended to encompass the full range of inquiries conducted by Congress, whether short or long term, routine or special, targeting the public or private sector, or conducted by a committee or individual member of Congress, as explained *infra*.

operates. If Congress wants to exercise the power of the purse, it needs to assess past appropriations and determine where taxpayer dollars should be spent and in what amounts. If Congress wants to meet its Constitutional responsibility to provide checks and balances to the rest of government, it needs to screen nominations made by the president, examine federal agency actions, and evaluate the judiciary. If Congress wants to declare war, it needs to understand the conflict at issue, America's defense posture, and our national security interests. In every instance, to make informed decisions, Congress needs to ascertain the facts and identify and analyze the relevant issues. It needs to investigate.

The objective of this Article is to provide an overview of key aspects of congressional oversight investigations, providing both a description of the activities involved and possible ways to measure the effectiveness of congressional investigative efforts. In doing so, the Article hopes to spur new scholarship aimed at strengthening congressional oversight.

I. AUTHORITY OF CONGRESS TO INVESTIGATE

Although Congress has conducted investigations from its earliest days,³ it was not until 1927 that the U.S. Supreme Court articulated the legal foundation for Congress's investigative power.⁴

The key case is *McGrain v. Daugherty*, which recognized that Congress's authority to investigate is rooted in the Constitution.⁵ The case arose out of the Teapot Dome corruption scandal of the 1920s, which triggered an investigation by the Senate Committee on Public Lands and Surveys into misconduct associated with the sale of certain federal oil leases.⁶ Later, the Senate also established a select committee to examine the failure of the U.S. Attorney General to prosecute the wrongdoing.⁷ As part of its inquiry, the Senate select committee issued a subpoena seeking oral testimony from the Attorney General's brother.⁸ When the brother refused to comply, he was taken into custody by the

3. See, e.g., 1–2 ROGER A. BRUNS, CONGRESS INVESTIGATES: A CRITICAL AND DOCUMENTARY HISTORY (Roger A. Bruns, David L. Hostetter, & Raymond W. Smock eds., 2011) (describing key Congressional investigations dating back to 1792); NEIL MACNEIL & RICHARD A. BAKER, THE AMERICAN SENATE: AN INSIDER'S HISTORY chs. 9–10 (2013).

4. See *McGrain v. Daugherty*, 273 U.S. 135 (1927).

5. 273 U.S. 135 (1927).

6. See BRUNS, *supra* note 3, at 460–99.

7. *Id.* at 471; *McGrain*, 273 U.S. at 151–52.

8. BRUNS, *supra* note 3, at 352.

Senate Sergeant-at-Arms.⁹ He sued in court both to end his imprisonment and to invalidate the investigation and related subpoenas.¹⁰

The Supreme Court, in an 8-0 decision, upheld the right of Congress not only to conduct the investigation, but also to subpoena information and compel compliance with its subpoenas.¹¹ The Court explained:

[T]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function. . . . A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information – which not infrequently is true – recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed.¹²

The Supreme Court also determined that Congress’s “legislative function” extended far beyond drafting legislation to encompass such tasks as examining whether agencies regulated or funded by Congress were properly discharging their duties, and ruled that Congress could investigate and issue subpoenas in connection with those tasks as well.¹³

The Court rejected an attempt to invalidate the Senate inquiry on the ground that the select committee had essentially put the Attorney General on trial, thereby usurping a “judicial function.”¹⁴ The Supreme Court held that the case provided “no warrant for thinking the Senate was attempting or intending to try the Attorney General . . . for any crime or wrongdoing. Nor do we think it is a valid objection to the investigation that it might possibly disclose crimes or wrongdoing on his part.”¹⁵ The

9. *McGrain*, 273 U.S. at 153–54.

10. BRUNS, *supra* note 3, at 350.

11. *McGrain*, 273 U.S. at 177, 182.

12. *Id.* at 174–75.

13. *Id.* at 177–78; *see also* *Sinclair v. United States*, 279 U.S. 263, 294–95, 297–98 (1929) (clarifying the right of Congress to investigate in a second Teapot Dome case by interpreting the “legislative function” to include examining presidential orders, actions taken by executive departments, and actions affecting federally-owned lands), *overruled on other grounds by* *United States v. Gaudin*, 515 U.S. 506 (1995).

14. *McGrain*, 273 U.S. at 177; *see also* BRUNS, *supra* note 3, at 467–86, 470, 474 (discussing repeated efforts during the Teapot Dome investigation to invalidate the Senate’s right to investigate wrongdoing that might be the subject of an executive branch prosecution or court proceeding).

15. *McGrain*, 273 U.S. at 179–80.

Supreme Court held instead that a congressional inquiry may proceed even when exposing wrongdoing that could be the subject of an executive branch prosecution or court proceeding, so long as the investigation was pursuant to a legislative function.¹⁶

Subsequent Supreme Court cases reinforced the authority of Congress to conduct wide-ranging investigations tied to a legislative function. In *Watkins v. United States*,¹⁷ for example, the Court wrote:

The power of Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.¹⁸

At the same time, as in other rulings, the Supreme Court cautioned in the *Watkins* case that Congress's power to probe was not limitless; its purpose cannot be to allege or prove criminal conduct, and Congress cannot assume either the power of the executive branch to prosecute cases or the power of the judicial branch to resolve controversies. The Court wrote:

There is no general authority to expose the private affairs of individuals without justification in terms of the functions of 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

16. *Id.*

17. *Watkins v. United States*, 354 U.S. 178 (1957).

18. *Id.* at 187; *see also* *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491 (1975) ("The scope of [Congress's] power of inquiry ... is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."); *Townsend v. United States*, 95 F.2d 352, 361 (D.C. Cir.), *cert. denied*, 303 U.S. 665 (1938):

A legislative inquiry may be as broad, as searching, and as exhaustive as is necessary to make effective the constitutional powers of Congress. ... A judicial inquiry relates to a case, and the evidence to be admissible must be measured by the narrow limits of the pleadings. A legislative inquiry anticipates all possible cases which may arise thereunder and the evidence admissible must be responsive to the scope of the inquiry which generally is very broad.

must be related to, and in furtherance of, a legitimate task of the Congress.¹⁹

In short, congressional investigations must be tied to a legislative function, distinguishing them from executive branch investigations undertaken for law enforcement purposes and court adjudications to resolve specific disputes.²⁰

Other cases through the years have imposed additional constraints on congressional investigations, as courts have balanced Congress's investigative needs against individuals' Constitutional rights²¹ and certain presidential executive privileges²²—both of which, in some circumstances, can limit Congress's right to obtain information.²³ While many aspects of congressional oversight issues continue to be litigated, the right of Congress to conduct wide-ranging investigations to carry out its legislative responsibilities is now settled law.

II. WHO CONDUCTS CONGRESSIONAL INVESTIGATIONS

Most congressional investigations are conducted by a committee or subcommittee established by the U.S. House of Representatives or U.S.

19. *Watkins*, 354 U.S. at 187.

20. *Id.*

21. *See, e.g., Watkins*, 354 U.S. at 187–88:

It is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action. It is their unremitting obligation to respond to subpoenas, to respect the dignity of the Congress and its committees, and to testify fully with respect to matters within the province of proper investigation. This, of course, assumes that the constitutional rights of witnesses will be respected by the Congress as they are in a court of justice. The Bill of Rights is applicable to investigations as to all forms of governmental action. Witnesses cannot be compelled to give evidence against themselves. They cannot be subjected to unreasonable search and seizure. Nor can the First Amendment freedoms of speech, press, religion, or political belief and association be abridged.

22. *See, e.g., United States v. Nixon*, 418 U.S. 683 (1974) (recognizing a limited executive privilege belonging to the president), *superseded by statute on other grounds*, FED. R. EVID. 104(a), *as recognized in Abilt v. Central Intelligence Agency*, 848 F.3d 305 (4th Cir. 2017); *Committee on Judiciary, U.S. House of Representatives, v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008) (balancing claims of executive privilege against the right of Congress to investigate). *But see* *Committee on Oversight and Government Reform, United States House of Representatives v. Lynch*, 156 F.Supp.3d 101 (D.D.C. Jan. 19, 2016) (upholding Congressional investigative requests despite executive privilege); *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997) (finding that executive privilege disappears when there is reason to believe government misconduct has occurred).

23. *See supra* notes 21–22.

Senate.²⁴ Committees and subcommittees typically take the lead on congressional investigations since they are empowered by law and congressional rules to hold hearings and issue subpoenas, both of which often play critical roles in fact-finding.²⁵ In addition, within Congress, only committees and subcommittees have the staff and resources needed to undertake extended or complicated inquiries.

Throughout its history, Congress has used both its standing committees and newly created special committees to conduct its inquiries.²⁶ Celebrated examples of early investigations conducted by standing committees include the 1912 “money trust” hearings by a House Banking and Currency subcommittee,²⁷ the 1933 investigation by the Senate Banking and Currency Committee into the 1929 stock market crash, also known as the Pecora hearings,²⁸ and the 1963 Valachi hearings on organized crime by the Senate Permanent Subcommittee on Investigations.²⁹ Respected early examples of investigations conducted by special temporary committees include the 1941 Committee to Investigate the National Defense Program, also known as the Truman Committee,³⁰ the 1950 Special Committee to Investigate Organized Crime in Interstate Commerce, known as the Kefauver committee,³¹ and the 1957 Select Committee on Improper Activities in the Labor or Management Field, otherwise known as the labor racketeering probe.³²

In 1946, Congress enacted legislation which, for the first time, directed each of its standing committees to exercise ongoing oversight of the laws and federal agencies within its jurisdiction.³³ The new law also

24. ALISSA M. DOLAN ET AL., CONG. RESEARCH SERV., RL30240, CONGRESSIONAL OVERSIGHT MANUAL 14 (2014).

25. *Id.*

26. *Id.* at 14; *see, e.g., infra* notes 27-32 and accompanying text.

27. *See, e.g.,* BRUNS, *supra* note 3, at 417–59.

28. *See, e.g.,* BRUNS, *supra* note 3, at 500–39.

29. *See, e.g., Organized Crime and Illicit Traffic in Narcotics: Hearing on S. 17 Before the S. Permanent Subcomm. on Investigations of the S. Comm. On Gov't Operations*, 88th Cong. (1963), <https://babel.hathitrust.org/cgi/pt?id=uc1.a0000445478;view=1up;seq=3>.

30. *See, e.g.,* BRUNS, *supra* note 3, at 636–67.

31. *See, e.g., id.* at 715–56.

32. *See, e.g., id.* at 849–85.

33. Legislative Reorganization Act of 1946, Pub. L. No. 79-601, 60 Stat. 812, §136 (1946):

To assist the Congress in appraising the administration of the laws and in developing such amendments or related legislation as it may deem necessary, each standing committee of the Senate and the House shall exercise continuous watchfulness of the execution by administrative agencies concerned of any laws, the subject matter of which is within the jurisdiction of such committee;

gave each standing committee explicit authority to hold hearings and issue subpoenas to obtain documents and oral testimony.³⁴ Over the years, in addition to its standing committees, the House and Senate provided several of their longstanding “select” committees with the authority to hold hearings and issue subpoenas.³⁵

Today, the House and Senate each sponsor about two dozen standing and select committees.³⁶ Their assigned jurisdictions, detailed in House and Senate resolutions, are suggested by their names such as the Committee on Agriculture, Committee on Armed Services, Committee on the Judiciary, and Select Committee on Intelligence.³⁷ One standing committee in each house operates under an unusually broad jurisdictional grant intended to enable that committee to conduct wide-ranging investigations across government—the Committee on Oversight and Government Reform in the House,³⁸ and the Committee on Homeland Security and Governmental Affairs in the Senate.³⁹ Both committees are known for their oversight investigations.

In addition to standing and select committees, the House and Senate sponsor several longstanding joint committees, including the Joint

and, for that purpose, shall study all pertinent reports and data submitted to the Congress by the agencies in the executive branch of the Government.

See also Pub .L. No. 92-136, 85 Stat. 376, §136 (1971) (strengthening the directive to conduct oversight, including by requiring House and Senate standing committees to study “the application, administration, and execution of laws” within their subject matter jurisdiction), *codified at* 2 U.S.C.A. §190d (West 2012)).

34. Legislative Reorganization Act of 1946, PUB. L. NO. 79-601, 60 Stat. 812, §134(a) (1946).

35. DOLAN ET AL., *supra* note 24, at 27–28.

36. *Committees of the U.S. Congress*, CONGRESS.GOV, <https://www.congress.gov/committees> (last visited Apr. 12, 2018).

37. *See, e.g., Rules and Jurisdiction*, HOUSE COMMITTEE ON AGRICULTURE, <https://agriculture.house.gov/about/rules-and-jurisdiction.htm> (last visited Apr. 12, 2018) (listing twenty topics within jurisdiction including agriculture generally, agricultural and industrial chemistry, adulteration of seeds, commodity exchanges, and dairy industry among others); STANDING RULES OF THE SENATE, R. XXV(C)(1), S. DOC. NO. 113-18, at 20 (2013) (listing ten topics included under the jurisdiction of the Senate Armed Services Committee including common defense, Department of the Navy, Department of the Army, Department of the Air Force, Department of Defense, and Military Research and Development); STANDING RULES OF THE SENATE, R. XXV(m), S. DOC. NO. 113-18, at 25 (2013) (listing topics included in Committee on the Judiciary’s jurisdiction including apportionment of representatives, civil liberties, constitutional amendments, federal courts and judges, and immigration and immigration and naturalization); S. Res. 400, 94th Cong. (1976) (listing topics under jurisdiction of intelligence committee including the Central Intelligence Agency and its director, the Office of the Director of National Intelligence and the Director of National Intelligence, and intelligence activities of all other departments and agencies).

38. DOLAN ET AL., *supra* note 24, at 10.

39. *Id.* at 13–14.

Committee on Taxation and the Joint Economic Committee, with memberships drawn from both houses.⁴⁰ All of Congress's standing, select, and joint committees routinely conduct varying levels of oversight investigations within their assigned jurisdictions.⁴¹

Moreover, each of the standing committees has multiple subcommittees, some of which are dedicated to conducting oversight investigations.⁴² Perhaps the most famous example is the Permanent Subcommittee on Investigations (PSI), which is a standing subcommittee of the Senate Committee on Homeland Security and Governmental Affairs and has investigative, but not legislative, jurisdiction.⁴³ PSI's broad investigative jurisdiction authorizes it to examine, among other matters, the operations and misconduct of any federal agency, organized crime affecting interstate commerce, corporate misconduct, and all other aspects of crime and lawlessness within the United States.⁴⁴ Since its inception in the 1950s, PSI has used its broad jurisdiction to conduct multiple complex investigations, gaining recognition for its investigative expertise.⁴⁵

While Congress's standing, select, and joint committees (and their subcommittees) have undertaken the bulk of its oversight efforts in recent decades, on occasion, Congress has continued to establish special temporary committees to conduct important inquiries.⁴⁶ Examples include the 1973 Select Committee on Presidential Campaign Activities, otherwise known as the Watergate Committee,⁴⁷ the 1975 Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, otherwise known as the Church Committee,⁴⁸ the 1987 House and Senate select committees to investigate the Iran-Contra

40. *Committees*, UNITED STATES SENATE, https://www.senate.gov/committees/committees_home.htm (last visited Apr. 12, 2018).

41. DOLAN ET AL., *supra* note 24, at 24.

42. *See, e.g., Oversight and Investigations Subcommittee*, HOUSE ARMED SERVICES COMMITTEE, <https://armedservices.house.gov/subcommittees/oversight-and-investigations-115th-congress> (last visited Apr. 11, 2018).

43. *See Permanent Subcommittee on Investigations Home*, U.S. SENATE COMMITTEE ON HOMELAND SECURITY & GOVERNMENT AFFAIRS, <https://www.hsgac.senate.gov/subcommittees/investigations> (last visited Apr. 11, 2018).

44. *See, e.g., S. Res. 62*, 115th Cong. § 12(e) (2017), <https://www.congress.gov/115/bills/sres62/BILLS-115sres62ats.pdf>.

45. *See, e.g., U.S. SENATE COMMITTEE ON HOMELAND SECURITY & GOVERNMENT AFFAIRS, ACTIVITIES OF THE COMMITTEE ON HOMELAND SECURITY AND GOVERNMENT AFFAIRS*, S. REP. NO. 114-33, at 110-48 (2015), <https://www.gpo.gov/fdsys/pkg/CRPT-114srpt33/pdf/CRPT-114srpt33.pdf>.

46. *See infra* notes 47-51.

47. *See, e.g., BRUNS, supra* note 3, at 886-926.

48. *See, e.g., id.* at 927-67.

affair,⁴⁹ and the Joint Inquiry into Intelligence Community Activities before and after the Terrorist Attacks of September 11, 2001, also known as the 9/11 Joint Inquiry.⁵⁰ All four of those special committees conducted respected, bipartisan investigations that garnered worldwide attention and led to significant policy reforms.⁵¹

While most congressional oversight investigations have been undertaken by a committee or subcommittee, some individual members of Congress have also conducted noteworthy oversight efforts, despite having no authority to call hearings or issue subpoenas.⁵² Using other investigative methods, those members have issued reports or taken other actions to announce their investigative findings. A recent example is Senator Tom Coburn (R-OK) who, from 2008 to 2014, issued a series of reports, sometimes called “Wastebooks,” identifying what he considered to be wasteful federal expenditures.⁵³ In addition, many individual members of Congress have conducted specific inquiries into matters of interest to their states, districts, or constituents.⁵⁴

III. TYPES OF OVERSIGHT INVESTIGATIONS

Congressional oversight investigations arise in a variety of contexts and vary significantly in scope and intensity. All standing committees in the House and Senate are obligated to conduct oversight of the laws within their subject matter jurisdiction,⁵⁵ which may include examining

49. See, e.g., *id.* at 968–1006.

50. See, e.g., *id.* at 1093–1151.

51. Congress has also, on occasion, established special, temporary committees to help it conduct impeachment proceedings and determine whether a judge or federal official should be removed from office. See ELIZABETH B. BAZAN, CONG. RESEARCH SERV., RL98186, IMPEACHMENT: AN OVERVIEW OF CONSTITUTIONAL PROVISIONS, PROCEDURE, AND PRACTICE (2010), <https://fas.org/sgp/crs/misc/98-186.pdf>.

52. DOLAN ET AL., *supra* note 24, at 14.

53. See, e.g., Stephen Dinan, *Tom Coburn highlights ridiculous government spending in final Wastebook*, WASH. TIMES (Oct. 22, 2014), <https://www.washingtontimes.com/news/2014/oct/22/tom-coburn-highlights-ridiculous-government-spendi/>.

54. DOLAN ET AL., *supra* note 24, at 14.

55. 2 U.S.C.A. § 190d (West 2012):

In order to assist the Congress in—(1) its analysis, appraisal, and evaluation of the application, administration, and execution of the laws enacted by the Congress, and (2) its formulation, consideration, and enactment of such modifications of or changes in those laws, and of such additional legislation, as may be necessary or appropriate, each standing committee of the Senate and the House of Representatives shall review and study, on a continuing basis, the application, administration, and execution of those laws, or parts of laws, the subject matter of which is within the jurisdiction of that committee.

relevant federal or private sector programs, spending, or activities.⁵⁶ In the case of the House Committee on Agriculture, for example, its responsibilities include exercising oversight of the Department of Agriculture, Farm Credit System, farming techniques, farm subsidies, crop insurance, food safety programs, and a myriad of other agencies, programs, and activities related to agriculture.⁵⁷ Its oversight inquiries might arise in the context of the committee's routine oversight efforts; in connection with re-authorizing a law or assessing the use of federal funds; in response to complaints made by constituents, public interest groups, or industry associations; or in reaction to a scandal, disaster, or wrongdoing in the news. Additional oversight efforts might arise in the context of a presidential nomination such as for the Secretary of Agriculture, in response to a presidential initiative, or in response to the priorities of the committee chair or another committee member.⁵⁸

Congressional oversight investigations routinely examine activities in both the public and private sectors. In the case of the House Committee on Financial Services, for example, its oversight efforts have included examining the operations, personnel, and programs of federal agencies like the Federal Reserve, Treasury Department, and Securities and Exchange Commission.⁵⁹ The committee has also examined the activities of specific companies or whole industries like Wells Fargo, the securities markets, or banking.⁶⁰ When examining private sector activities, the congressional focus is often on such topics as: whether a problem has arisen or wrongdoing occurred; whether existing laws require modification; whether federal agency or law enforcement efforts need to be increased or altered; whether and how federal funds may have played a role in the issues; and whether and what new laws may be needed.

The scope and intensity of specific oversight efforts depend upon a range of factors including the importance of the problem, the level of interest in the committee and its leadership, the press of other legislative

56. See generally STANDING RULES OF THE SENATE, R. XXV, S. DOC. NO. 113-18 (2013); CLERK OF THE HOUSE, 114TH CONG, RULES OF THE HOUSE OF REPRESENTATIVES, R. X (2015).

57. *About*, HOUSE COMMITTEE ON AGRICULTURE, <https://agriculture.house.gov/about/> (last visited April 11, 2018); see also *Rules and Jurisdiction*, HOUSE COMMITTEE ON AGRICULTURE, <https://agriculture.house.gov/about/rules-and-jurisdiction.htm> (last visited Apr. 12, 2018) (listing twenty topics within jurisdiction of Committee on Agriculture).

58. See generally DOLAN ET AL., *supra* note 24.

59. *Financial Services Committee About Us, Committee Oversight Plan*, FINANCIAL SERVICES COMMITTEE, <https://financialservices.house.gov> (last visited Apr. 12, 2018).

60. *Id.* See also, e.g., *Holding Wall Street Accountable: Investigating Wells Fargo's Opening of Unauthorized Customer Account: Hearing Before H. Comm. on Fin. Servs.*, 114th Cong. (2016), <https://financialservices.house.gov/uploadedfiles/114-109.pdf>.

business, the extent to which facts are in dispute or involve wrongdoing, and the degree of media attention. Many oversight efforts are limited in scope, involving a confined number of telephone calls, briefings, or letters to get the facts, understand the issues, and identify or encourage a policy outcome. Others dig more deeply and may include such steps as requesting the subject of the investigation to conduct an internal review, answer detailed questions, provide documents, or appear at a hearing. A full-blown congressional investigation—by a standing, select, or joint committee or subcommittee, or a special committee set up for that purpose—may involve an inquiry lasting a year or longer complete with subpoenas, the collection and review of substantial numbers of documents, the conduct of hundreds of interviews or depositions, extensive fact-finding, and one or more congressional hearings and reports.⁶¹

IV. OVERSIGHT MECHANISMS

Congressional oversight investigations employ a number of investigative techniques to obtain information.⁶² Most begin with staff researching the problem, program, or agency at issue, including by making use of information or reports provided by the Congressional Research Service (CRS), a division of the U.S. Library of Congress with subject matter experts dedicated to assisting Congress;⁶³ by the Government Accountability Office (GAO), an independent agency with trained auditors who conduct investigations requested by Congress,⁶⁴ or by Inspectors General (IGs), presidential appointees charged with preventing and detecting waste, fraud, and abuse and promoting efficiency and effectiveness at more than seventy federal agencies.⁶⁵ CRS, GAO, and the IGs produce thousands of reports with basic information about issues of interest to Congress, and often the first step taken in a congressional oversight effort is to identify and review the reports with helpful information.

Typically, the next step is for congressional staff to obtain additional information about the matter at issue by requesting meetings or briefings from experts, relevant agencies, the subjects of the investigation, any victims, or other parties of interest. To dig more deeply, congressional

61. See generally DOLAN ET AL., *supra* note 24.

62. *Id.*

63. See *About CRS*, LIBRARY OF CONGRESS, <https://www.loc.gov/crsinfo/about/> (last updated Apr. 20, 2017).

64. See *About GAO*, GAO, <https://www.gao.gov/about/> (last visited Apr. 12, 2018).

65. See *About Oversight.gov*, Oversight.gov, <https://oversight.gov/about> (last visited Apr. 12, 2018).

staff may send letters requesting more detailed information or documents, conduct inspections of relevant facilities, issue surveys to collect comparative data, speak with whistleblowers, or take other steps to gather facts and analyze the related issues.

Still, more intensive inquiries may involve formal document requests, formal interviews or depositions of key personnel, and public hearings featuring witnesses with relevant information. If a person contacted by a committee or subcommittee declines to provide requested information, the committee or subcommittee may issue a subpoena to compel document production or oral testimony.⁶⁶ If a subpoena recipient refuses to comply, the committee or subcommittee may go to court or engage in other proceedings to enforce its subpoena, including by holding the person in contempt of Congress and, in extreme cases, threatening imprisonment.⁶⁷

Congressional investigations are backed by federal statutes that prohibit persons from making false statements to Congress whether in a public hearing, nonpublic interview, or other setting, and whether or not the person was formally placed under oath.⁶⁸ Federal law also makes it a crime to obstruct a congressional inquiry.⁶⁹

In addition to its own investigative efforts, Congress has several agencies it can call upon for assistance.⁷⁰ For example, committees, subcommittees, and individual members of Congress may ask CRS, GAO, or an IG not only to provide existing reports on a given subject,

66. 2 U.S.C.A. § 190m (West 2012) (authorizing congressional subpoenas); *see also*, e.g., *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 84 (D.D.C. 2008) (“In short, there can be no question that Congress has a right—derived from its Article I legislative function—to issue and enforce subpoenas, and a corresponding right to the information that is the subject of such subpoenas. Several Supreme Court decisions have confirmed that fact.”).

67. *See, e.g.*, *Bean LLC v. John Doe Bank*, No. 17-2187, 2018 WL 297125 (D.D.C. Jan. 4, 2018) (dismissing multiple challenges to a House subpoena and ordering defendants to comply with its terms); *Senate Permanent Subcomm. on Investigations v. Ferrer*, 199 F.Supp.3d 125 (D.D.C. 2016), *appeal vacated as moot*, 856 F.3d 1080 (D.C. Cir. 2017) (dismissing multiple challenges to a Senate subpoena and ordering defendants to comply with its terms); TODD GARVEY, CONG. RESEARCH SERV., RL34097, CONGRESS’S CONTEMPT POWER AND THE ENFORCEMENT OF CONGRESSIONAL SUBPOENAS: LAW, HISTORY, PRACTICE, AND PROCEDURE (2017); *see also* 2 U.S.C.A. § 192 (West 2012) (Congressional criminal contempt statute); 2 U.S.C.A. §§ 288b(b), 288d (West 2012); 28 U.S.C.A. § 1365 (West 2012) (Senate civil contempt statutes).

68. 18 U.S.C.A. § 1001 (West 2012) (prohibiting false statements to Congress); 18 U.S.C.A. § 1621 (West 2012) (outlawing as “perjury” misstatements of a “material matter” made under oath).

69. 18 U.S.C.A. § 1505 (West 2012).

70. DOLAN ET AL., *supra* note 24, at 75, 99–123.

but also to undertake a new inquiry to obtain needed information.⁷¹ Requests to CRS typically seek short-term projects to determine, for example, how federal programs or agencies operate, the facts underlying a complex issue, or legal interpretations of existing laws.⁷² Some recent examples are CRS reports on the federal flood insurance program,⁷³ lumber import disputes,⁷⁴ and the Russian banking system.⁷⁵

GAO typically conducts longer-term investigations which may take a year or more to complete and may address a wide variety of complex factual and legal issues.⁷⁶ A few examples are GAO reports or testimony discussing how federal officials can improve the resiliency of wireless networks to reduce outages;⁷⁷ the status of certain projects to develop space telescopes;⁷⁸ and the safety and infrastructure challenges posed by self-driving vehicles.⁷⁹

IGs can provide inside information about the agencies they review and initiate both short-term and long-term inquiries.⁸⁰ A few examples include a Justice Department IG inquiry into sexual harassment problems within the agency,⁸¹ a Defense Department IG inquiry into efforts to strengthen the Afghan Air Force,⁸² and a series of reviews by the Treasury and Federal Deposit Insurance Corporation IGs of regulators'

71. *Id.*

72. See DOLAN ET AL., *supra* note 24, at 99–107.

73. DIANE P. HORN & JARED T. BROWN, CONG. RES. SERV., R44593, INTRODUCTION TO THE NATIONAL FLOOD INSURANCE PROGRAM (2018), <https://fas.org/sgp/crs/homesecc/R44593.pdf>.

74. KATIE HOOVER & IAN F. FERGUSSON, CONG. RES. SERV., R42798, SOFTWOOD LUMBER IMPORTS FROM CANADA: CURRENT ISSUES (2017), <https://fas.org/sgp/crs/misc/R42789.pdf>.

75. MEMORANDUM, CONG. RES. SERV., THE RUSSIAN BANKING SECTOR: OVERVIEW, SANCTIONS, AND CONNECTED INDIVIDUALS (Apr. 7, 2017).

76. See DOLAN ET AL., *supra* note 24, at 117–20.

77. U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-198, TELECOMMUNICATIONS: FCC SHOULD IMPROVE MONITORING OF INDUSTRY EFFORTS TO STRENGTHEN WIRELESS NETWORK RESILIENCY (2017), <https://www.gao.gov/products/GAO-18-198>.

78. U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-277T, NASA: PRELIMINARY OBSERVATIONS ON THE MANAGEMENT OF SPACE TELESCOPES (2017), <https://www.gao.gov/products/GAO-18-277T>.

79. U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-132, AUTOMATED VEHICLES: COMPREHENSIVE PLAN COULD HELP DOT ADDRESS CHALLENGES (2017).

80. DOLAN ET AL., *supra* note 24, at 91–99.

81. U.S. DEPT. OF JUSTICE INSPECTOR GENERAL, REP. NO. 17-03, REVIEW OF THE HANDLING OF SEXUAL HARASSMENT AND MISCONDUCT ALLEGATIONS BY THE DEPARTMENT'S CIVIL DIVISION, (2017), <https://oig.justice.gov/reports/2017/e1703.pdf>.

82. U.S. DEPT. OF DEFENSE INSPECTOR GENERAL, DODIG-2018-058, PROGRESS OF U.S. AND COALITION EFFORTS TO TRAIN, ADVISE, AND ASSIST THE AFGHAN AIR FORCE (2018), <https://oversight.gov/report/dod/progress-us-and-coalition-efforts-train-advise-and-assist-afghan-air-force>.

supervision of financial institutions whose failure contributed to the financial crisis.⁸³

Federal IGs, GAO and CRS are explicitly charged with assisting Congress in its oversight responsibilities.⁸⁴ While federal agencies in the executive and judicial branches may lack a similar, explicit mandate, they too can provide assistance to Congress by answering questions, offering information, conducting inquiries, and issuing reports, audits, or other evaluations of relevant programs or activities.⁸⁵ Like the IGs, GAO, and CRS, federal agencies can help support or amplify congressional oversight efforts.

V. MAJORITY VERSUS MINORITY INFORMATION REQUESTS

A key dynamic in virtually every congressional investigation is the extent to which the Republican and Democratic members involved in the matter work together. The history of congressional investigations includes examples of both bipartisan and partisan inquiries. Examples of recent bipartisan inquiries include House and Senate hearings on extensive patient wait times at Veterans Administration hospitals,⁸⁶ consumer mistreatment by Wells Fargo bank,⁸⁷ and dramatic drug price increases by pharmaceutical companies.⁸⁸ Recent partisan investigations include inquiries into the Internal Revenue Service's handling of

83. See, e.g., U.S. DEPT. OF TREASURY INSPECTOR GENERAL, EVAL-10-002, EVALUATION OF FEDERAL REGULATORY OVERSIGHT OF WASHINGTON MUTUAL BANK (2010), <https://www.fdicigo.gov/sites/default/files/publications/10-002EV.pdf>.

84. DOLAN ET AL., *supra* note 24, at 91–123.

85. See, e.g., *id.* at 72, 79–85.

86. See, e.g., *A Continued Assessment of Delays in VA Medical Care and Preventable Veteran Deaths: Hearing Before the H. Comm. on Veterans' Affairs*, 113th Cong. (2014), <https://www.gpo.gov/fdsys/pkg/CHRG-113hhr87677/html/CHRG-113hhr87677.htm>; *The State of VA Health Care: Hearing Before S. Comm. on Veterans' Affairs*, 113th Cong. (2014), <https://www.veterans.senate.gov/imo/media/doc/SVAC-HRG%2005.15.2014.pdf>.

87. See, e.g., *Holding Wall Street Accountable: Investigating Wells Fargo's Opening of Unauthorized Customer Account: Hearing Before H. Comm. on Fin. Servs.*, 114th Cong. (2016), <https://financialservices.house.gov/uploadedfiles/114-109.pdf>; *An Examination of Wells Fargo's Unauthorized Accounts and the Regulatory Response: Hearing Before S. Comm. on Banking, Housing, and Urban Affairs*, 114th Cong. (2016), <https://www.gpo.gov/fdsys/pkg/CHRG-114shrg23001/pdf/CHRG-114shrg23001.pdf>.

88. See, e.g., *Developments In The Prescription Drug Market: Oversight: Hearing Before H. Comm. on Oversight and Gov't Reform*, 114th Cong. (2016), <https://www.gpo.gov/fdsys/pkg/CHRG-114hhr25500/pdf/CHRG-114hhr25500.pdf>; *Sudden Price Spikes in Decades-Old Rx Drugs: Inside the Monopoly Business Model: Hearing Before S. Special Comm. on Aging*, 114th Cong. (2016), <https://www.aging.senate.gov/hearings/sudden-price-spikes-in-decades-old-rx-drugs-inside-the-monopoly-business-model>.

applicants for 501(c)(4) status⁸⁹ and the terrorist attack in Benghazi, Libya.⁹⁰

One way in which the issue plays out in congressional investigations is the extent to which an investigation acts on information requests from the majority and minority members participating in the inquiry. In bipartisan inquiries, members from the majority and minority parties may, for example, issue joint document requests. In more partisan inquiries, the committee or subcommittee chair may issue information requests supported by members of the majority party but ignore information requests from members of the minority party.

In partisan inquiries, members in the minority party may seek to issue their own information requests without the backing of subpoenas. The lack of a subpoena compelling compliance may result, however, in the minority party members being unable to obtain the information they view as necessary to understand the facts and analyze the issues. That typically leads to not only an incomplete investigation (particularly if the executive branch is controlled by the same party as the congressional majority), but also partisan discord that inevitably weakens public confidence in both the investigation and Congress.

In 2017, the U.S. Department of Justice's Office of Legal Counsel (OLC) exacerbated this problem.⁹¹ The OLC provided a legal opinion to the White House legal counsel's office stating that executive branch agencies did not need to cooperate with any oversight information requests made by individual members of Congress or by ranking minority members on congressional committees or subcommittees, since those requests would likely not be enforced through subpoenas or contempt proceedings.⁹² OLC stated:

Individual members of Congress, including ranking minority members, do not have the authority to conduct oversight in the absence of a specific delegation by a full house, committee, or

89. See, e.g., *Examining The IRS Response To The Targeting Scandal: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 113th Cong. (2014), <http://docs.house.gov/meetings/GO/GO00/20140326/101998/HHRG-113-GO00-Transcript-20140326.pdf>.

90. See, e.g., *Hearing 4— Former Secretary of State Hillary Clinton: Hearing Before the H. Select Comm. on Benghazi*, 114th Cong. (2015), <https://benghazi.house.gov/hearings/hearing-4>.

91. See *infra* note 92.

92. Authority of Individual Members of Congress to Conduct Oversight of the Executive Branch, Office of Legal Counsel, 41 Op. O.L.C. ___, at *1 (May 1, 2017), available at <https://www.justice.gov/olc/file/966326/download> (last visited Mar. 31, 2018).

subcommittee. They may request information from the Executive Branch, which may respond at its discretion, but such requests do not trigger any obligation to accommodate congressional needs and are not legally enforceable through a subpoena or contempt proceedings.⁹³

Republican Senator Charles Grassley (R-IA), chair of the Senate Judiciary Committee, sent a strongly-worded letter to President Trump disputing the OLC's legal analysis and declaring that the executive branch had a Constitutional responsibility to cooperate with all congressional requests for information, whether or not backed by a subpoena.⁹⁴ He wrote:

Every member of Congress is a Constitutional officer, duly elected to represent and cast votes in the interests of their constituents. This applies obviously regardless of whether they are in the majority or the minority at the moment and regardless of whether they are in a leadership position on a particular committee. Thus, *all* members need accurate information from the Executive Branch in order to carry out their Constitutional function to make informed decisions on all sorts of legislative issues covering a vast array of complex matters across our massive federal government.⁹⁵

Senator Grassley continued:

The Constitution does not mention committees or committee Chairmen at all. The committee structure in Congress is simply how the Legislative Branch has chosen to internally organize itself. ... Unless Congress explicitly tells the Executive Branch to withhold information based on committee membership or leadership position, there is no legal or Constitutional basis for the Executive Branch to do so.⁹⁶

The Judiciary Chair also noted:

93. *Id.*

94. *Letter from Charles Grassley, Chairman, U.S. Sen. Comm. on the Judiciary to President Trump*, 1 (June 7, 2017), COMMITTEE ON THE JUDICIARY 1 (JUNE 7, 2017) [https://www.judiciary.senate.gov/imo/media/doc/2017-06-07%20CEG%20to%20DJT%20\(oversight%20requests\).pdf](https://www.judiciary.senate.gov/imo/media/doc/2017-06-07%20CEG%20to%20DJT%20(oversight%20requests).pdf).

95. *Id.* (emphasis in original).

96. *Id.* at 2.

The Executive Branch has in fact been *voluntarily* responding to requests from individual members for the entirety of its existence, whether or not those members did or had the power to unilaterally issue a subpoena. In most cases, congressional requests—even from Chairmen—never reach the compulsory stage precisely because of this process of voluntary accommodation. Traditionally, a subpoena has been used as a last resort, when the voluntary accommodation process has already failed. Thus that process begins, or at least ought to begin, well before a Chairman or a committee issues a subpoena or a house issues a contempt citation. OLC offers no authority indicating that courts expect the other two branches to cooperate with each other only when compelled to do so. Such a position would itself undermine the very purpose of comity and cooperation between the branches.⁹⁷

Issues related to the right of individual members of Congress to obtain information from the executive branch or other parties when those members are in the minority party or act outside the confines of a committee investigation continue to be contested matters in many congressional oversight investigations.⁹⁸

VI. MEASURING EFFECTIVENESS

A final set of issues involves measuring the effectiveness of congressional oversight efforts. Currently, only limited research has been performed in this area, and no consensus yet exists on the best measures of effectiveness.⁹⁹ Since identifying the most effective congressional

97. *Id.* at 5 (emphasis in original); see also *Murphy v. Dep't of the Army*, 613 F.2d 1151, 1157 (D.C. Cir. 1979) (holding that the executive branch could refuse to produce a document to the public under the Freedom of Information Act, even after showing the document to a House member):

All Members [of Congress] have a constitutionally recognized status entitling them to share in general congressional powers and responsibilities, many of them requiring access to executive information. ... [Each member] participates in the law-making process; each has a voice and a vote in that process; and each is entitled to request such information from the executive agencies as will enable him to carry out the responsibilities of a legislator.

98. See, e.g., Brian D. Feinstein, *Agencies' Responsibilities to Inform Congress: Two Perspectives*, 36 YALE J. REG.: NOTICE & COMMENT (July 7, 2017), <http://yalejreg.com/nc/agencies-responsibilities-to-inform-congress-two-perspectives-by-brian-d-feinstein/> (last visited Mar. 31, 2018).

99. Under the leadership of Professors Craig Volden and Alan E. Wiseman, a series of research papers has developed and tested measures of effectiveness for members of

investigations is key to identifying best practices and encouraging better oversight, additional scholarship is needed to advance this critical research topic.

While some may view the number of hearings, reports, or bills produced by a committee or by a Congress as a measure of its effectiveness, in the area of oversight, encouraging members of Congress to conduct numerous inquiries may be less productive than encouraging fewer, higher-quality inquiries.

Drawing upon the authors' oversight experience as well as discussions by leading scholars in congressional oversight,¹⁰⁰ this paper offers four possible measures of oversight effectiveness focusing on the quality of the investigation, the degree to which it was carried out in a bipartisan manner, the extent to which the investigation was viewed as credible, and its impact upon policy. All four potential measures would benefit from additional analysis of their theoretical and practical underpinnings, the factors going into the measurements, the extent to which the criteria encourage fact-based, bipartisan, high-quality oversight investigations, and the extent to which they would enhance public confidence in Congress and in the U.S. government as a whole.

A. Measuring the Quality of an Investigation

One possible measure of the effectiveness of an oversight investigation is to focus on the nature of the investigation itself, gauging whether it addressed issues of importance to the public, made use of appropriate investigative techniques, uncovered useful information, and was able to produce a consensus on the facts. Achieving a degree of consensus on the facts is of particular interest, since many Congressional investigations examine complex, controversial matters in dispute and reaching agreement on the facts—what happened and why—is often difficult. When successfully done, a factual consensus can provide a solid foundation for developing a shared understanding of a problem,

Congress engaged in enacting legislation, but their research does not examine effectiveness in conducting oversight investigations. See *Research*, CENTER FOR EFFECTIVE LAWMAKING, <http://www.thelawmakers.org/#/research> (last visited Mar. 31, 2018) (summarizing multiple papers on legislative effectiveness). In 2017, leading academic scholars from across the United States gathered at an Oversight Scholars Roundtable convened by the Levin Center at Wayne Law and determined that measuring the effectiveness of congressional oversight investigations is currently one of the field's most pressing research needs. Elise Bean, Linda Gustitus & Sandy Colvin, *Levin Center Scholars Roundtable Summary*, LEVIN CENTER AT WAYNE LAW 6 (June 9, 2017), https://law.wayne.edu/pdfs/levin_center_scholars_roundtable_summary_06-27-17.pdf.

100. See Bean et al., *supra* note 99, at 6.

analyzing related issues, and affecting policy. Possible markers to identify a high-quality investigation might, therefore, include the following factors:

Did the investigation address issues that were important to the public?

Did the investigation conduct an appropriate level of factual inquiry using appropriate investigative tools to gather information such as briefings, surveys, inspections, document requests, subpoenas, interviews, depositions, or hearings?

Did the investigation support reasonable information requests made by members of Congress with disparate points of view, including members of the minority party?

Did the investigation contact or attempt to contact the key subjects of the investigation and give each one an opportunity to provide information?

Did the investigation produce relevant, useful facts?

Was the investigation able to reach a consensus on key facts?

Did the investigation produce a written product that included findings of fact and recommendations?

If so, were the findings of fact and recommendations adequately supported by the evidence, and was that evidence adequately presented?

Did a majority of the members conducting the investigation, including members of the minority party, support the written product?

Was the investigation able to attract attention from policymakers and the public?

B. Measuring Bipartisanship

A second possible measure of oversight effectiveness is to focus on the extent to which the investigation was conducted in a bipartisan manner. Bipartisan investigations require members of Congress with

different views to work together. Taking those disparate views into consideration is likely to lead the investigation to ask a wider variety of questions, dig more deeply into the facts and issues, and produce a more accurate and sophisticated understanding of what happened and why. In addition, bipartisan investigations may make it easier to overcome opposition to an inquiry, obtain more information from the subjects of the investigation, help build a shared understanding of a problem, help bridge political divides, increase the investigation's credibility, and help increase public confidence in Congress. Possible markers to identify bipartisan investigations might include the following factors:

Did the investigation's leaders, from both parties, make public statements endorsing the investigation and committing themselves to a bipartisan inquiry?

Did the majority and minority both actively participate in the investigation?

Did the investigation use appropriate bipartisan investigative techniques such as developing joint document requests, joint subpoenas, a joint list of interview subjects, joint sets of interview questions, joint interviews, or joint invitations to hearing witnesses?

Did the majority and minority meet jointly with witnesses, agency and witness counsel, and other outside parties?

Did the majority and minority use joint press releases and press briefings?

Did the majority and minority reach a consensus on key facts?

Did the majority and minority issue a joint written product such as a report?

Did the majority and minority reach a consensus on key recommendations?

Did the majority and minority conduct joint efforts to encourage reforms?

Did the members of Congress involved in the investigation characterize it as a bipartisan investigation?

Did the media, public interest groups, or members of the public characterize or treat it as a bipartisan investigation?

C. Measuring Credibility

A third possible measure of the effectiveness of an oversight investigation is to focus on the extent to which the investigative findings were viewed by experts, policymakers, and the public as credible. In this era of political division, distrust, and disputes over alternative facts, credibility is key to whether an investigation's findings will be taken seriously and used as a basis for assessing a problem or designing reforms. Key to measuring credibility is gauging how third parties viewed the proceedings. Possible markers to measure the credibility of an investigation might include the following factors:

Did the following persons characterize or treat the investigation as credible:

- members of Congress involved in the investigation?
- other members of Congress?
- the president or relevant federal agencies?
- key investigative subjects or victims?
- subject matter experts?
- the media?
- public interest groups or members of the public?
- other key parties?

Did the investigation increase or decrease public confidence in Congress?

D. Measuring Policy Impacts

A fourth possible measure of an oversight investigation's effectiveness is the extent to which it led to changes in policy or practice. Congressional investigations are, by their nature, focused on policy. Investigations that have no discernible policy impact could be judged to

have limited utility even if well-done, bipartisan, and credible. At the same time, fairly gauging the policy impacts of an investigation raises difficult questions about the appropriate time period and policy spheres to consider, since reforms can take years to unfold and can arise in the public or private sectors, within the United States or abroad. Also of significance is the extent to which those who led the investigation worked to effect change. Possible markers to identify investigations with policy impacts might include the following factors:

Did the investigation make policy recommendations?

Did members of Congress involved in the investigation take actions to encourage or produce policy reforms or changes in practice?

If so, over what time period were those actions taken?

Did the investigation produce policy-related outcomes such as new or intensified enforcement actions, personnel changes, changes in agency policy or practice, changes in private sector policy or practice, regulatory changes, changes in appropriations, new or revised legislation, or the enactment of new laws?

What is the appropriate time period to consider when looking for policy reforms?

Evaluating the quality, bipartisanship, credibility, and policy impact of a Congressional oversight investigation is not a simple task. The questions identified above may not produce sufficiently objective markers to reliably identify effective Congressional investigations. The suggested measures do, however, offer a starting point for additional research.

Finally, one last issue to consider involves measuring the negative: instances where Congressional oversight investigations should have been undertaken, but were not. The failure to conduct needed inquiries could be viewed as evidence of ineffective oversight by Congress. Reasonably measuring the extent and contours of that negative, however—evaluating when and why the watchdog did not bark—poses yet another set of difficult issues worthy of future research.