



# 1. Introduction:

## *Updating the Study of Legislative Inquiry and Adapting it to the Changed Climate of Congressional Oversight*

*[T]he proper office of a representative assembly is to watch and control the government; to throw the light of publicity on its acts to compel a full exposition and justification of all of them which any one considers questionable; to censure them if found condemnable, and, if the men who compose the government abuse their trust ... to expel them, and either expressly or virtually appoint their successors. —John Stuart Mill<sup>1</sup>*

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

The 2009 handbook, which this study replaces, was designed to provide a relatively concise, practical guidance for members and staff on the conduct of congressional oversight, and on the scope and limitations of the respective powers of Congress, the executive branch, and the judiciary. It detailed the rules and tools of oversight available to congressional committees and when and how they may use them. It also assessed the limited abilities of the executive branch and members of the public to resist such inquiries, and of the courts to resolve such inter-branch conflicts. Finally, it described the then-recent executive branch challenges to congressional oversight and suggested ways to address those disputes. In short, that volume was designed to serve as a first resort resource for anyone involved in congressional oversight inquiries.

The new study updates the original handbook in three important respects:

**It examines the broader milieu of congressional oversight resources and treats discrete but vital subject matter areas of committee inquiry**

The updated study examines the broader, closely related but integral milieu of legislative oversight resources that encompasses congressionally established informational support bodies and mechanisms. The establishment of those complementary resources reflects Congress’s recognition of the limitations of its committees with respect to the time, resources and personnel available to oversee and assess the quality of the functioning of the vast administrative bureaucracy.

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Those additional supportive “eyes and ears” are provided by, among others, the Offices of Inspectors General (OIG), the Government Accountability Office (GAO), the Congressional Research Service (CRS), the Congressional Budget Office (CBO), the Offices of the Senate Legal Counsel and the House General Counsel, and the Office of Special Counsel (OSC). It also includes statutes that afford protections for whistleblowers and that provide bounties for information that results in the recoupment of federal monies lost through fraudulent activities. Finally, committees also often rely on the discovery work of the array of independent non-governmental organizations (NGOs).

The updated study also treats discrete but vital subject matters areas of committee inquiry that the original did not. These include:

- New Chapter 9, describing Congress’s 1978 creation of Offices of Inspectors General, and discussing IGs’ responsibility to prevent and detect waste, fraud and abuse, and to promote economy and effectiveness in each agency’s operations. IGs do this through audits, investigations, evaluations and other reviews that result in recommendations that are to be reported to both agency heads and congressional committees and members. Chapter 9 also examines obstacles that IGs face in fulfilling their mandate—including executive branch delay and obstruction; the recent passage of historic legislation that ensures IGs access to all information necessary to do their jobs, and that they can share such information with jurisdictional committees and individual members of Congress; and the need for IGs to more rigorously self-police.
- New Chapter 10, reviewing the current state of the law respecting the scope of the protections afforded members by the Speech or Debate Clause, the foundational pillar of the Framers’ design to protect and maintain the essential autonomy of the Congress in carrying out its legislative tasks in our scheme of separated powers. Particular attention is given to current areas of legal uncertainty respecting executive access to member documentary materials and records that reflect legislative activities and to testimony given during House and Senate ethics inquiries.
- New Chapter 11, dealing with the difficulties committees face in obtaining documents and testimony when the individuals and information sought are in foreign jurisdictions. If access is not achieved through complex formal international processes, resort can be had to informal methods and, at times, imaginative improvisations.
- New Chapter 12, exploring the case law supporting the validity of necessary congressional interventions into agency decisional processes during the course of oversight exercises in such contexts as notice and comment rulemakings, ratemakings, informal decisionmaking, formal adjudications, and agency investigations that arguably would lead to an adjudicatory proceeding.
- New Chapter 13, reviewing and assessing the experiences of oversight of executive agency rulemaking under the Congressional Review Act.
- New Chapter 14, delving into the sensitive questions of the breadth and limitations of oversight of the judiciary and its judges.

Expanding the study to cover these subjects should help readers better understand the political and practical intricacy and complexity of the oversight task, and the necessity of proper congressional management of and reliance on all of its information resources. It may also help readers appreciate the difficulty of committees’ oversight task and the importance of maintaining and protecting Congress’s institutional integrity.

**It provides a series of case studies that demonstrate how oversight works in practice, including successes, challenges, and lessons learned**

In order to best illustrate how oversight works—and at times why it does not—the updated study includes a series of case studies authored by oversight practitioners and scholars. The topics range from a first-hand look at a Senate subcommittee’s landmark investigation into the 2008 financial crisis, to a House committee’s investigation into the FBI’s

use of confidential informants, to Representative Henry Waxman's decades long oversight of the tobacco industry. The case studies demonstrate how the tensions, powers, and tools discussed throughout the updated study play out in practice.

**It accounts for the nature, scope and consequences of growing executive branch threats to Congress's oversight and investigative prerogatives**

The overriding premise of the original handbook was that committees wishing to engage in successful oversight must establish their credibility with the White House and the executive departments and agencies that they oversee early, often and consistently, and in a manner evoking respect, if not fear. Standing and special committees have been vested with an array of formidable tools and rules to support their powers of inquiry, and have developed an efficacious nuanced, staged investigatory process—one that proceeds from one level of persuasion or pressure to the next—to achieve a mutually acceptable basis of accommodation with the executive. But it has been absolutely critical to the success of the investigative process that there be a credible threat of meaningful consequences for refusals to provide necessary information in a timely manner. In the past that threat has been the possibility of a citation for criminal contempt of Congress or a trial at the bar of the House, either of which could result in imprisonment and fines. There can be little doubt that such threats were effective in the past. But that has changed.

Through a mix of executive branch aggression and congressional acquiescence, the continued efficacy of legislative oversight has come into serious question. The last decade and a half has seen, among other significant challenges, an unlawful FBI raid on a member's congressional office to obtain alleged incriminating documents; Department of Justice (DOJ) criminal prosecutions of members that have successfully denied members' Speech or Debate protections for legislative actions; the presidential cooption of legislative oversight of agency rulemaking; refusals to ensure the faithful execution of enacted statutory directions; an attempted usurpation of the Senate's exclusive confirmation prerogative; failures to submit timely nominations for vacant inspector general positions, thereby allowing unconfirmed acting officials to hold such sensitive positions, often for years; the issuance of a DOJ Office of Legal Counsel (OLC) opinion that authorizes heads of agencies and departments to decline inspector general requests for information necessary to perform their investigative and audit authorities; and OLC opinions asserting expanded presidential control over agency decision making through broad interpretations of the concept of a unitary executive and of the traditional understandings of the scope of executive privilege claims, opinions which have been utilized by departments and agencies to delay or deny congressional access to requested information.

With particular respect to congressional investigative oversight of the actions of the executive branch, there has been the adoption of an aggressive stance, first officially enunciated by OLC in 1984,<sup>2</sup> that the historic congressional enforcement processes of criminal and inherent contempt, designed to ensure officials' compliance with its core information gathering prerogative, are unconstitutional and unavailable to a committee if the president unilaterally determines that such officials need not comply. In such instances, DOJ will not present contempt citations voted by a house to a grand jury as is required by law. A more recent DOJ opinion declared that it has determinative authority whether to prosecute an executive official found in contempt of Congress even in instances when presidential privilege has not been invoked.<sup>3</sup> The consequence has been that committees have been forced to seek subpoena compliance through civil court enforcement actions. In two recent cases—discussed in Chapters 3, 5 and 6—that tactic has been shown to cause intolerable delays that undermine the effectiveness of timely committee oversight and it opens the door to aberrant judicial rulings.

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2. Prosecution for the Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege, 8 Op. O.L.C. 101 (1984). *See also*, Responses to Requests for Information Made Under the Independent Counsel Act, 10 Op. O.L.C. 68 (1986).

3. Letter from Ronald C. Machen, Jr., United States Attorney, District of Columbia, to The Honorable John A. Boehner, Speaker, U.S. House of Representatives (March 31, 2015).



These revisions to the original handbook should help the reader better understand the full scope of the rules, tools and practices of effective oversight, as well as the limitations and obstacles that overseers now face. Chapter 15 concludes with a discussion of steps that Congress should consider in order to reclaim its role in our scheme of separated powers, and to maintain the carefully calibrated system of checks and balances that the Constitution's Framers envisioned.