

THE CONSTITUTION PROJECT



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Backgrounder: The Russia Investigations and Congress's Oversight Powers

The Constitution Project recently published an updated version of Morton Rosenberg's *When Congress Comes Calling: A Study on the Principles, Practices, and Pragmatics of Legislative Inquiry*. The study is a useful reference for members of Congress, their staffs, journalists, and the public for understanding the issues facing congressional investigators and Special Counsel Robert Mueller.

It is available online here: <http://www.constitutionproject.org/documents/when-congress-comes-calling-2/>

At present there are active investigations by four congressional committees, and a Justice Department investigation overseen by a newly appointed special counsel. Legal and political issues and conflicts amongst the investigators are fast emerging. They are not novel. *When Congress Comes Calling* discusses the legal principles and precedents that govern these issues, and how past investigations have addressed them. Below is a short summary of portions of the study that tackle some key questions facing the Russia investigations.

How can Congress ensure that relevant documents and other evidence are preserved?

An official letter from a committee chair requesting information can be an essential, simple way to reduce the likelihood of evidence being destroyed. Courts have held that the legal obligation to preserve documents arises when a committee chair first officially requests them. Destruction of evidence can trigger prosecution for obstructing congressional proceedings under 18 U.S.C. § 1505 even if the evidence is destroyed before formal committee votes or the issuance of subpoenas.

For further discussion, see [chapter 4](#) pages 34-35.

How can Congress respond to the executive branch's refusal to comply with a subpoena?

While the threat or actual issuance of a subpoena for testimony or documents in the past has normally provided sufficient leverage to ensure compliance, it is through the contempt power, or its threat, that Congress may act with ultimate force. The contempt power may be used in response to actions that obstruct the legislative process in order to command compliance with the subpoena and punish the person violating the order. There are three different kinds of contempt proceedings. Both the House and Senate may cite a witness for contempt under their inherent contempt power or under a statutory criminal contempt procedure. The Senate also has a limited third option: enforcement by means of a statutory civil contempt procedure, though it cannot be utilized against executive branch officials. District courts also have recently recognized the authority of the House of Representatives—through passage of a House resolution—to authorize a standing committee to enforce a subpoena against executive officials through civil litigation. All of these tactics, however, are problematic. The Justice Department refuses to prosecute executive branch officials for contempt if they assert a claim of

privilege; civil litigation can lead to years of delays and ambiguous rulings; and Congress has not attempted to exercise its inherent contempt power to detain a witness for decades.

For a detailed discussion of each type of contempt proceeding, their limits, and alternative enforcement mechanisms, see [chapter 3](#) pages 23-32; [chapter 6](#) pages 72-73; and [chapter 15](#) pages 213-16.

What is executive privilege? How is it invoked, and to what extent does it limit Congress's access to information?

Executive privilege is a legal doctrine that the president may invoke to withhold certain information from Congress or the public. The doctrine is based on constitutional separation of powers principles and is designed to enable the president to receive candid advice from advisers, as well as to safeguard information the disclosure of which would threaten national security. It vies with Congress's foundational need for access to information to perform its legislative functions. There is disagreement—including among the three branches of government—as to the scope of executive privilege, and the term is often used loosely when a narrower subcategory of the doctrine—such as the presidential communications privilege—is actually at issue.

For further discussion of the constitutionally based presidential communications privilege, see [chapter 5](#) pages 39-46. For discussion of common law privileges—such as deliberative process, attorney-client, and work product—see [chapter 6](#).

What limits are there on oversight of sensitive national security information and activities?

Congress has the constitutional authority to obtain any information from the executive branch that it considers necessary to carry out its core lawmaking, appropriations, and foreign affairs powers. This includes matters related to national security, the use of military force, and intelligence. Presidents have often asserted a unilateral authority to withhold information from Congress about these areas on the basis of the Commander-in-Chief power, both informally and in a series of Office of Legal Counsel opinions, but there are no court precedents recognizing such an unlimited authority. In practice, though, Congress has often accepted limits on its own access to national security information.

For further discussion of related issues—including Congress's role in the national security classification system, and statutory requirements (with major gaps) that the president provide certain national security information to Congress—see [chapter 5](#) pages 46-66.

Can multiple committee investigations and the special counsel's investigations proceed at once? Which investigation has priority?

The history of concurrent executive and congressional investigations of similar issues demonstrates that while they can be complementary, the distinctly different goals of the inquiries may conflict and serve to undermine the success of either or both endeavors. Under Justice Department regulations, special counsels are appointed to conduct criminal investigations. In practice, these investigations are often limited in scope, secret, and lengthy (they can take years to resolve). By contrast, and particularly when an emerging scandal is eroding public confidence, congressional inquiries can at times move faster and result in greater public disclosures, immediate attention to legislative concerns, and possible remedial actions. Committees are empowered—through statutory authorizations, Supreme Court and lower federal court rulings, and historic congressional rules and practices—to

grant witnesses immunity, force witness testimony and document disclosures through subpoenas and threats of contempt citations, and determine which witnesses shall appear before them and who will be allowed to represent the witness. Committees are not constrained by the impact such actions might have on any criminal investigation, though committees can, and have, in the past acceded to special counsel requests to defer such actions.

For detailed discussions of issues related to concurrent investigations, see chapter 3 pages 18-23; [chapter 4](#) pages 37-38; [chapter 5](#) pages 55-59; [chapter 7](#) pages 75-90; [chapter 11](#) pages 142-43; Part II, Case Studies, [Investigating the Financial Crisis](#), pages 219-33; and [Investigating Iran-Contra](#), pages 275-86.

If a witness invokes his or her Fifth Amendment right against self-incrimination, what options are available to Congress?

The Fifth Amendment of the Constitution protects individuals from being compelled to testify against themselves in a criminal case. It applies to witnesses in congressional investigations, but is subject to limits. The privilege is personal in nature and may not be invoked on behalf of a corporation, small partnership, labor union, or other “artificial” organization. It protects a witness against being compelled to testify, but it generally does not protect against a subpoena for existing documentary evidence. As noted above, Congress has the power to grant a witness immunity in response to an invocation of privilege, but doing so may impede criminal investigations and prosecutions. Grants of immunity require a balancing by a committee of the need for timely disclosures, where scandals threaten to erode public confidence in governmental processes, against the uncertainty of the imposition of criminal justice.

For further discussion of the privilege—including grounds for asserting it, waiver, contempt, and immunity—see [chapter 6](#) pages 55-59.

Can congressional committees enforce subpoenas for testimony or documents from witnesses in foreign countries?

The Russia investigations are likely to require access to witnesses and documentary materials abroad. Historically, neither the courts nor executive branch agencies have been especially helpful in obtaining information from foreign jurisdictions. The two vehicles by which U.S. courts may seek assistance from foreign countries in obtaining such evidence are mutual legal assistance treaties (MLATs) and letters rogatory (requests to foreign courts to take evidence from certain witnesses). However, most MLATs either expressly or by interpretation preclude assistance for legislative investigations; independent counsels have been reluctant to share information they have collected from foreign jurisdictions; and administrations have often forbidden the State and Justice Departments from assisting Congress. Faced with such obstacles, congressional committees have in a number of instances resorted to creative, informal methods to obtain the information they need.

For a full discussion of Congress’s extraterritorial investigative powers, with examples of successful instances of access, see [chapter 11](#) pages 139-146.

Please contact Katherine Hawkins (khawkins@constitutionproject.org; (202) 580-6928) or Scott Roehm (sroehm@constitutionproject.org; (202) 580-6930) with any questions or to order a hard copy of *When Congress Comes Calling*.