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Defending Against Projects of Faction: Reforming the Congressional Investigation Process

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Cover Page Footnote

The author wishes to thank Professor Mark Rienzi and Mrs. Tabitha Kempf for their assistance in developing this paper. I am grateful for their constant support and valuable perspectives.

DEFENDING AGAINST PROJECTS OF FACTION: REFORMING THE CONGRESSIONAL INVESTIGATION PROCESS

John Sullivan⁺

Throughout American history, the power to investigate has been one of key powers of the U.S. Congress. This power, shaped by the Congress itself and the courts, has evolved into a critical tool used to hold parties accountable and to promote effective legislation for the American people. Yet as much as it can be used to further the interests of all Americans, so too can it be used to further a party's own political agenda. Today, the congressional investigation process has become overly-politicized, misused for fundraising purposes, and overseen by members of Congress who are not investigators by trade.

As a means of reform, the U.S. Congress should institute a neutral office to conduct an initial inquiry into matters referred by a congressional committee or subcommittee. Such an office could conduct an initial investigation of an issue in order and determine whether or not further inquiry would be merited. This will help ensure that investigations are vetted by a neutral, independent, and professional entity and preserve the trust of the American people.

⁺ The author wishes to thank Professor Mark Rienzi and Mrs. Tabitha Kempf for their assistance in developing this paper. I am grateful for their constant support and valuable perspectives.

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INTRODUCTION — CURRENT ISSUES WITH CONGRESSIONAL OVERSIGHT

Each year, on or about his birthday, the U.S. Senate ceremoniously reads into the Congressional Record the transcript of President George Washington’s final speech.¹ This bipartisan tradition, dating back to 1893, alternates the Senator assigned to read the speech between the Republican and Democratic parties.² No other speech is accorded the same dignity, making it a document that helps to define the ideals and mission of the U.S. Congress.³

In one of the notable parts of the speech, Washington warned of excessive partisanship and political infighting.⁴ In one apt quote, Washington characterizes each political party’s goal as “mak[ing] the public administration the [m]irror of the ill concerted and incongruous projects of faction, rather than the [o]rgan of consistent and wholesome plans digested by common counsels and mod[i]fied by mutual interests.”⁵

Washington’s counsel rings true, especially in the modern political era. The United States Congress prioritizes the “ill concerted and incongruous projects of faction” and maintains a reputation of oversight and investigation that seldom reflects those aspirational “mutual interests.”⁶ Both parties abused the heart of the power to promulgate legislation—the power to inquire; this continued abuse results in investigations that are heavily politicized, that fail to efficiently use taxpayer resources, and that do not serve the overarching purpose of promulgating legislation for the benefit of the public.⁷

As much as it is the U.S. Congress’s charge to pass legislation, so too is it their duty to oversee and investigate pertinent and pressing issues affecting the nation. While these investigations, in theory, serve as a vital method of accountability for private parties, government agencies, and the President, such

1. Mount Vernon, *Senator Tim Kaine Discusses Washington’s Farewell Address*, VIMEO (Mar. 4, 2015) <https://vimeo.com/121292907>; see also *George Washington’s Farewell Address*, GEORGE WASHINGTON’S MOUNT VERNON,

<https://www.mountvernon.org/library/digitalhistory/digital-encyclopedia/article/george-washington-s-farewell-address/> (last visited Feb. 6, 2023).

2. *Id.*

3. *Id.*

4. *President George Washington’s Farewell Address, 18 September 1796*, NAT’L ARCHIVES, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Washington/05-20-02-0440-0002> (last visited Feb. 12, 2023).

5. *Id.*

6. *Id.*

7. See Claire Leavitt, *Is Congress On a Witch Hunt? 5 Ways to Judge Whether Oversight Hearings Are Legitimate or Politicized*, THE CONVERSATION (July 21, 2023, 8:24 AM), see also Abigail Tracy, *“They’re Going to Waste a Lot of People’s Time”: House Democrats Gird for Benghazi 2.0*, VANITY FAIR (Dec. 19, 2022), <https://www.vanityfair.com/news/2022/12/house-democrats-republicans-investigations>; see also Gwen Ifill, *Two years, \$7 Million, 800 Pages Later, GOP Benghazi Report Lands with a Thud*, PBS NEWSHOUR (June 28, 2016, 7:10 PM), <https://www.pbs.org/newshour/show/two-years-7-million-800-pages-later-gop-benghazi-report-lands-with-a-thud>.

investigations may also be used for a political agenda and to threaten and intimidate private citizens for partisan ends.⁸ The lack of investigatory experience, legal insight, or neutrality on the part of members of Congress can compromise an entirely legitimate investigation that is concurrently pursued by other governmental bodies.⁹ Additionally, the high expense of such investigatory activities can potentially harm the American taxpayer, resulting in waste—a priority that congressional investigatory committees are tasked with remediating.¹⁰ Finally, the purpose of the power to inquire is to promulgate legislation—a purpose that, as illustrated by several key investigations herein, is not always given its due.¹¹ This failure to ensure nonpartisan, efficient, and legislation-driven investigations compromises the congressional investigatory process and the U.S. Congress itself—the first governmental body in which the American people placed their trust.

This article intends to analyze different congressional investigations and to suggest a remedy to fix the current system. While this article will review the history of congressional investigations dating back to the founding of the United States, it will focus mostly on recent investigations conducted within the past few years. This is because there are several notable judicial precedents that have arisen with respect to congressional investigations and the bounds of executive privilege before a congressional subpoena. Of note is the Supreme Court's decision in *Trump v. Mazars*, in which Congress attempted to procure documents on then-President Donald Trump's finances and corporate activities through the banks in which he was a client.¹² From this case, Congress received several limits on their investigatory powers; the Court called specifically for "[a] balanced approach [in conducting an investigation] . . . one that takes a 'considerable impression from the 'practice of the government.'"¹³ While the

8. See *House Un-American Activities Committee*, HARRY S. TRUMAN LIBR. & MUSEUM, <https://www.trumanlibrary.gov/education/presidential-inquiries/house-un-american-activities-committee> (last visited Mar. 5, 2023) ("During this time period the lines of civil liberties and national security began to blur, and U.S. citizens felt a sense of uncertainty. Some Americans felt that their personal freedoms were being taken away . . .").

9. See Mort Rosenberg, *Why Congressional Inquiries Trump Federal Investigations*, POGO (May 11, 2018), <https://www.pogo.org/analysis/2018/05/why-congressional-inquiries-trump-federal-investigations/> (citing a New York Times opinion stating that "Congress's decision to grant immunity to three key officials in the Iran-Contra scandal 'inflict[ed] a near-crippling burden' on Walsh to successfully prosecute the men . . . even as it defended the legislative branch's decision."); see, e.g., *The Price of Iran-Contra Immunity*, N.Y. TIMES (June 12, 1988), <https://www.nytimes.com/1988/06/12/opinion/the-price-of-iran-contra-immunity.html>.

10. *Report Waste, Fraud, or Abuse*, HOUSE COMM. ON OVERSIGHT & ACCOUNTABILITY, <https://oversightdemocrats.house.gov/contact/tip-line> (last visited Feb. 6, 2023); see also L. Elaine Halchin & Frederick M. Kaiser, *Congressional Oversight*, CONG. RSCH. SERV. 1 (Oct. 17, 2012), <https://sgp.fas.org/crs/misc/97-936.pdf>.

11. U.S. CONST. art. I, §§ 1, 8; see *McGrain v. Daugherty*, 273 U.S. 135, 160 (1927) (citing U.S. CONST. art. I, §§ 1, 8).

12. *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2022 (2020).

13. *Id.* at 2024 (citing *McCulloch v. Maryland*, 17 U.S. 316, 401 (1819)).

Chief Justice’s words have a specific meaning in the context of the case, this “balanced approach” should be generally applied to congressional investigations. To do so, Congress should create an entity that can investigate issues in a non-partisan and efficient manner and ensure that all investigations are completed pursuant to the congressional power to legislate.

The Comment will first discuss the origins of congressional investigatory powers, with a focus on key judicial precedents. While earlier cases focus on the relationship between Congress and federal appointees, latter cases increasingly focus on the dynamic between the President, his senior staff, and Congress. These cases culminate with *Trump v. Mazars*, the Supreme Court’s most recent decision respecting executive privilege in the face of a congressional investigation. The Comment will analyze several recent congressional investigations into Presidents and senior federal appointees. Then, the Comment will analyze the activities conducted by congressional investigatory bodies that maligned each of these investigations. Finally, the Comment will suggest the creation of a neutral investigative entity as a solution to preserve the integrity of congressional investigatory powers. This new entity would ensure that future investigations are non-partisan, efficient, and legislation-focused.

I. FOUNDATIONS OF CONGRESSIONAL INVESTIGATORY POWERS

A. General Background

Congress received the power to investigate through Article I of the United States Constitution, which states that “All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”¹⁴ Article I, Section 8 of the Constitution lists a wide array of powers vested in Congress, including the “Power To lay and collect Taxes . . . To declare War . . . [and] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.”¹⁵ Amid all of these explicit powers, the power to conduct oversight or investigations is not found in this or any other Section of Article I; rather, it is an implied power that has been substantiated through judicial precedent.¹⁶ Of note to scholars is the case of *Watkins v. United States*, in which the Supreme Court analyzed a contempt of Congress conviction against a John T. Watkins.¹⁷ In this case, when prompted by the House Committee on Un-American Activities during his testimony, Mr. Watkins refused to confirm names of individuals previously identified to the Committee as members of the “Communist Party.”¹⁸ After Watkins’ refusal, the U.S. House of Representatives (“House”) passed a report

14. U.S. CONST. art. I, § 1.

15. U.S. CONST. art. I, § 8.

16. James Hamilton, et al., *Congressional Investigations: Politics and Process*, 44 AM. CRIM. L. REV. 1115, 1121–24 (2007).

17. *Watkins v. United States*, 354 U.S. 178, 181–82 (1957).

18. *Watkins v. United States*, 354 U.S. 178, 182–85 (1957).

against Watkins, directing the U.S. Department of Justice to commence a criminal indictment against him for contempt of Congress.¹⁹ Watkins was later sentenced to “a fine of \$100 and one year in prison, [which] was suspended, and [Watkins] was placed on probation.”²⁰ In considering the case on appeal, the Supreme Court began with (what they considered to be) the general consensus that “[t]he 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.”²¹

Article I, Section 5 of the U.S. Constitution provides that “[e]ach House may determine the [r]ules of its [p]roceedings,” which include the rules for oversight and investigatory activities.²² In practice, both chambers of Congress have dedicated resources towards this broad power through the establishment of the U.S. House Committee on Oversight and Reform and the U.S. Senate Committee on Homeland Security and Governmental Affairs.²³ Additionally, several standing committees in both chambers have subcommittees dedicated to oversight and investigations.²⁴ Per the Rules of the House, the committees:

[H]ave general oversight responsibilities . . . in order to assist the House in its analysis, appraisal, and evaluation of the application, administration, execution, and effectiveness of Federal laws; and conditions and circumstances that may indicate the necessity or desirability of enacting new or additional legislation; and its formulation, consideration, and enactment of changes in Federal laws, and of such additional legislation as may be necessary or appropriate.²⁵

Committee investigations are made pursuant to a legislative interest—a principle reflected in cases such as *Watkins*.²⁶

19. *Id.* at 186.

20. *Id.*

21. *Id.* at 187.

22. U.S. CONST. art. I, § 5.

23. See *Rules of the Committee on Oversight and Reform for the 117th Congress*, cl. 2 COMM. ON OVERSIGHT & REFORM (2021),

<https://www.govinfo.gov/content/pkg/CPRT-117HPRT43722/html/CPRT-117HPRT43722.htm>; *Rules of Procedure of the Committee on Homeland Security and Governmental Affairs*, § 12(e) U.S. SENATE (Mar. 2021),

<https://www.govinfo.gov/content/pkg/CPRT-117SPRT43473/pdf/CPRT-117SPRT43473.pdf>.

24. See, e.g., *Oversight and Investigations*, HOUSE NAT. RES. COMM.,

<https://naturalresources.house.gov/issues/issue/?IssueID=5064> (last visited Feb. 7, 2023);

Oversight & Investigations, HOUSE COMM. ON VETERANS’ AFFAIRS,

<https://veterans.house.gov/issues/issue/?IssueID=117993> (last visited Jan. 22, 2023);

Subcommittee on Oversight and Investigations, FIN. SERVS. COMM.,

<https://financialservices.house.gov/116th-congress-subcommittees/subcommittee-on-oversight-and-investigations.htm> (last visited Feb. 17, 2023).

25. H.R. Res. 5, 118th Cong., Rule X, clause 2(a) (2023).

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

As for the U.S. Senate (“Senate”), their Rules provide that each standing committee is authorized to “make investigations into any matter within its jurisdiction . . .” without enumerating in similar detail what such activities are focused towards.²⁷ Looking to the jurisdiction of the U.S. Senate Committee on Homeland Security and Government Affairs, the Committee claims that as the Senate’s “primary oversight committee,” it is entitled to “broad jurisdiction over government operations generally” with an emphasis on studying Executive-branch entities, statutes and regulations, and the relationships between the U.S. federal government and state, local and international governmental bodies.²⁸ The Rules’ vagueness potentially provides the body greater discretion to conduct oversight activities.²⁹ In sum, Congress derives its investigatory powers from implied Constitutional powers, judicial precedent, and internal rules of each chamber.

B. Key Judicial Precedents

While there is not a specific enumeration of the supposed bounds of congressional investigatory powers, these powers, as per *Watkins*, are very broad. Judicial precedents in addition to *Watkins* not only support this proposition, but they add to the powers of Congress to compel presence and testimony.

In *McGrain v. Dougherty*, the Supreme Court considered the question of whether an individual may be compelled to appear before one of the two legislative chambers to provide “testimony needed to enable [the chamber] efficiently to exercise a legislative function belonging to it under the Constitution.”³⁰ The Court answered yes.³¹ In *McGrain*, the former Attorney General of the United States, Henry Daugherty, was under investigation by both the House and the Senate for “misfeasance and nonfeasance” while he was in office.³² Accordingly, both chambers passed legislation commencing an investigation and establishing an investigatory committee with the power to “send for books and papers, to subpoena witnesses, [and] to administer oaths . . .”³³ After the Committee served several subpoenas to Mally Daugherty (brother of Henry Daugherty) who failed to appear before the Committee, the

27. STANDING RULES OF THE SENATE, S. Doc. No. 113-18, at 31 (2013).

28. *About: Jurisdiction and Rules*, U.S. SENATE COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFAIRS, <https://www.hsgac.senate.gov/about/jurisdiction> (last visited Mar. 8, 2023).

29. *What, Exactly, Does Congress Have the Authority To Investigate?*, MOLOLAMKEN LLP, <https://www.mololamken.com/knowledge-What-Exactly-Does-Congress-Have-the-Authority-To-Investigate> (last visited Feb. 5, 2023).

30. *McGrain v. Daugherty*, 273 U.S. 135, 154 (1927).

31. *See McGrain*, 273 U.S. 135, 174 (1927) (“We are of opinion that the power of inquiry-with process to enforce it-is an essential and appropriate auxiliary to the legislative function.”).

32. *Id.* at 150–51.

33. *Id.* at 151–52.

Senate directed the Sergeant-at-Arms to take custody of Mally Daugherty.³⁴ Subsequent to his detainment, Mally Daugherty petitioned for a writ of habeas corpus, where the judge determined that Daugherty's detainment was unlawful.³⁵ In considering the case, the Supreme Court, citing Articles I and VIII, noted that the U.S. Constitution endowed both chambers of Congress with "all legislative powers" as well as "power 'to make all laws which shall be necessary and proper' for carrying into execution these powers and 'all other powers' vested by the Constitution in the United States or in any department or officer thereof."³⁶ The Court opined that the "power of inquiry-with process to enforce it-is an essential and appropriate auxiliary to the legislative function."³⁷ The Court noted, referencing the precedent of the British Parliament, that the power to gather information is "an attribute of the power to legislate."³⁸

In *Barenblatt v. United States*, the Court expanded on its previous ruling under *McGrain* with a more favorable view towards the interests of the state.³⁹ The petitioner, Lloyd Barenblatt, refused to answer questions regarding whether or not he or an acquaintance of his were members of the Communist Party.⁴⁰ The House subsequently referred the matter to the U.S. Department of Justice to commence contempt proceedings against Barenblatt, and he was later convicted and sentenced to six months in prison.⁴¹ Again, the Court found that the House was able to compel Barenblatt's testimony, but it built on the precedent set by *McGrain*. The Court noted that while Barenblatt had an interest in self-preservation, the Federal Government had a greater interest in rooting out the Communist Party given its disposition towards the "violent overthrow[ing] of [the] government."⁴² In its ruling, the Court found that such questions were asked for the purpose of the "legislative proce[ss]," and that the intention was not to "pillory witnesses" or for some "wrong motive" on the part of members of the Committee.⁴³ The Court specifically noted that it failed to determine that Barenblatt's interests "were not subordinate to those of the state."⁴⁴ From this it can be seen that the House and Senate, so long as there is a rational interest weighing in its favor, are able to compel testimony and documents.

These powers featured prominently in cases concerning investigations stemming from the Watergate controversy, where the courts outlined the limits of the congressional oversight power with respect to the Executive and

34. *Id.* at 152-53.

35. *Id.* at 54.

36. *Id.* at 160 (quoting U.S. CONST. art. I, §§ 1, 8).

37. *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927).

38. *Id.* at 161.

39. *See Barenblatt v. United States*, 360 U.S. 109, (1959).

40. *Id.* at 114.

41. *Id.* at 115.

42. *Id.* at 127-29.

43. *Id.* at 132-34.

44. *Id.* at 134.

Legislative branches. First, in *Senate Select Committee on Presidential Campaign Activities v. Nixon*, a Committee convened for the purpose of investigating the 1972 Election subpoenaed President Nixon for tapes of conversations between himself and then-White House Counsel, John Dean.⁴⁵ In adjudicating the case, the U.S. Court of Appeals for the District of Columbia determined that Congress did not show that the evidence requested was “demonstrably critical to the responsible fulfillment of the Committee’s functions.”⁴⁶ As such, the Court found the Committee’s rationale for requesting the documents to be “too attenuated and too tangential to its functions to permit [the requested] judicial judgment.”⁴⁷

United States v. Nixon provides a threshold test for the Executive Branch of government to oppose a subpoena.⁴⁸ The Court in *Nixon* found that the application of executive privilege is limited when exercised solely on the basis of confidentiality in the face of a “demonstrated, specific need for evidence in a pending criminal trial” and “the fundamental demands of due process of law in the fair administration of criminal justice.”⁴⁹ Upon a claim on privilege over materials by a President, those materials are presumed privileged until that presumption is rebutted by a prosecutor with a showing that the material is “essential to the justice of the [pending criminal] case.”⁵⁰

Turning to contemporary times, Congress’s multiple investigations into the Trump Administration permitted the Supreme Court to provide a perspective on the relationship between congressional investigations and executive privilege. In *Trump v. Mazars*, however, the Supreme Court provided a key precedent on the bounds of congressional subpoenas when faced with executive privilege.⁵¹

The Trump Administration was subject to multiple investigations by the 116th and 117th Congresses, including an investigation leading to his first impeachment while in office.⁵² As part of those investigations, the House Committee on Financial Services issued subpoenas to Deutsche Bank and Capital One (where Trump maintained bank accounts) and Mazars USA (an

45. Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 726 (D.C. Cir. 1974).

46. *Id.* at 731.

47. *Id.* at 733.

48. *United States v. Nixon*, 418 U.S. 683, 713 (1974).

49. *Id.*

50. *Id.* at 713–14 (citing *United States v. Burr*, 25 Fed. Cas. at 192).

51. Andy Wright, *Supreme Court’s Trump v. Mazars Ruling Gave Attorney-Client Privilege a Boost in Congress*, JUST SECURITY (Aug. 12, 2020), <https://www.justsecurity.org/71970/supreme-courts-trump-v-mazars-ruling-gave-attorney-client-privilege-a-boost-in-congress/>.

52. See, e.g., Bob Van Voris, *Congress to Reissue Subpoenas for Trump Deutsche Bank Records*, BLOOMBERG (Jan. 12, 2021, 1:44 PM), <https://www.bloomberg.com/news/articles/2021-01-12/congress-to-reissue-subpoenas-for-trump-deutsche-bank-records>; see generally *Articles of Impeachment Against Donald John Trump*, H.R. Res. 755, 116th Cong. (2019).

accounting firm of which Trump was a client).⁵³ The President filed suit in an attempt to block the subpoenas.⁵⁴

Here, while the Committee declared that its subpoenas “relate[d] to a valid legislative purpose,” the Supreme Court found that these subpoenas were not related to a criminal matter (like those in *Nixon* or *Senate Select Committee*); rather, these subpoenas “aggravate[d]” the animosity between the Executive and Legislative branches of government by attempting to create limitless subpoena power.⁵⁵ The holding noted that “[a]ny personal paper possessed by a President could potentially ‘relate to’ a conceivable subject of legislation, for Congress has broad legislative powers that touch a vast number of subjects.”⁵⁶ The Court noted the unique nature of the subpoenas in that they requested the President’s personal information, and given the position of the President, personal and official information could become intertwined.⁵⁷

Most notable about the opinion, however, is that it provides a guide for subpoenas where a President’s personal information is the information being requested.⁵⁸ In considering similar requests, courts should first “carefully assess whether the asserted legislative purpose warrants the significant step of involving the President and his papers,” noting that such purposes are not immediately confounded “when every scrap of potentially relevant evidence is not available.”⁵⁹ Second, courts should ensure that a “subpoena [is] no broader than reasonably necessary to support Congress’s legislative objective” in order to “safeguard against unnecessary intrusion into the operation of the Office of the President.”⁶⁰ Third, Courts must consider “the nature of the evidence offered by Congress to establish that a subpoena advances a valid legislative purpose”—if a subpoena is specific about the information it seeks to advance a legislative purpose, the better chance it has to be upheld up the courts.⁶¹ Finally, courts should consider “burdens imposed on the President by a subpoena.”⁶² Applying this test, the Supreme Court determined that the subpoenas in question did not rise to the level required to warrant turning over such personal information.⁶³

53. *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2027–28 (2020).

54. *Id.* at 2028.

55. *Id.* at 2033–34 (quoting *Barenblatt v. United States*, 360 U.S. 109, 127 (1959)).

56. *Id.* at 2034.

57. *Id.* at 2034–35 (citing *THE FEDERALIST NOS. 51 & 71*).

58. *Id.* at 2035–36 (noting the need for a “balanced approach . . . in assessing whether a subpoena directed at the President’s personal information is ‘related to, and in furtherance of, a legitimate task of the Congress . . .’” that weighs the specific interests of Congress and the Executive) (citing *Watkins v. United States*, 354 U.S. 178, 187 (1957) and *Clinton v. Jones*, 520 U.S. 681, 698 (1997)).

59. *Id.* at 2035–36 (citing *Cheney v. United States Dist. Ct. for D.C.*, 542 U.S. 367, 384, 389–90 (2004)).

60. *Id.* at 2036 (citing *Cheney v. United States Dist. Ct. for D.C.*, 542 U.S. 367, 387 (2004)).

61. *Id.* (citing *Watkins v. United States*, 354 U.S. 178, 201, 205 (1957)).

62. *Id.*

63. *See id.* at 2035–36.

The courts also considered the bounds of congressional subpoenas and immunity as applied to presidential staff. In *Harlow v. Fitzgerald*, A. Ernest Fitzgerald brought suit against two former aides of President Nixon for their alleged scheme to violate Fitzgerald's constitutional rights.⁶⁴ The aides motioned for summary judgment, claiming they were granted absolute immunity from Fitzgerald's suit.⁶⁵ The Supreme Court determined that while some individuals—in their professional capacities serving in the Executive Branch—may be entitled to absolute immunity, that immunity is qualified.⁶⁶ Additionally, the Court held that there is no “blanket recognition of absolute immunity for all Presidential aides” based on the “‘special function’ of White House aides” nor is there a “derivative” immunity for aides deriving from the immunity held by the aides' principal.⁶⁷

In *Committee on Judiciary of the United States House of Representatives v. Miers*, the House Judiciary Committee subpoenaed former White House Counsel, Harriett Miers, to testify as to the “forced resignation of nine United States Attorneys in late 2006.”⁶⁸ Miers maintained that, *inter alia*, “sound principles of separation of powers and presidential autonomy dictate that the President's closest advisors must be absolutely immune from compelled testimony before Congress.”⁶⁹ In adjudicating this decision, the Court cited *United States v. Nixon*, stating that “neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial [or congressional] process under all circumstances.”⁷⁰ Additionally, the Court found, citing *Harlow v. Fitzgerald*, that while Miers and other senior White House officials were indeed important officials, they were not subject to “a ‘blanket recognition of absolute immunity.’”⁷¹ If an aide were to be entitled to absolute immunity, the aide would have to demonstrate “that the responsibilities of his office embraced a function so sensitive as to require a total shield from liability” and that “he was discharging the protected function when performing the act for which liability is asserted.”⁷²

Congress exerts a great amount of investigatory power, in large part from these cases. From *McGrain* through *Mazars*, the investigatory power of Congress has grown through trial and error based on the actions of the Congressional and Executive branches. What results is a power that is limited

64. See *Harlow v. Fitzgerald*, 457 U.S. 800, 802 (1982).

65. See *id.* at 805–06.

66. See *id.* at 807–08.

67. *Id.* at 810–11 (discussing *Gravel v. United States*, 408 U.S. 606, 625 (1972) and *Butz v. Economou*, 438 U.S. 478, 507 (1978)).

68. *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 55 (D.D.C. 2008).

69. *Id.* at 56.

70. *Id.* (citing *United States v. Nixon*, 418 U.S. 683, 706 (1974)).

71. *Id.* at 101 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 812 (1982)).

72. *Id.* (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 812–13 (1982)).

with respect to the purpose of the investigation and respect for the other branches of government.

C. Key Investigations

Beyond the aforementioned judicial precedents, much of the landscape on this issue developed through congressional investigations. This comment highlights two high-profile investigations—one chaired by Republicans and one chaired by Democrats—and briefly looks to other recent investigations. These investigations highlight how congressional investigations—regardless of the political party in power—can be abused for political ends, run inefficiently, and deviate from the purpose of legislative promulgation.

First is the investigation completed by the U.S. House Select Committee on Benghazi. On September 11, 2012, a violent mob stormed the U.S. Embassy in Benghazi, Libya.⁷³ In total, four Americans were killed in Benghazi, including the Ambassador to Libya, Chris Stevens.⁷⁴ In its wake, the Republican-held House commenced four investigations between the Armed Services, Foreign Affairs, Oversight and Government Reform, and Intelligence Committees.⁷⁵ Additionally, the House voted to create the House Select Committee on Benghazi through a House resolution entitled “Providing for the Establishment of the Select Committee on the Events Surrounding the 2012 Terrorist Attack in Benghazi.”⁷⁶ The text of the resolution stated that the purpose of the Committee was to, among other things, “conduct a full and complete investigation and study and issue a final report of its findings to the House regarding” the attack and the response by the Executive Branch.⁷⁷

Next is the investigation into President Donald Trump during his first impeachment inquiry. On December 18, 2019, the House passed two articles of impeachment against then-President Donald Trump.⁷⁸ These included “Abuse of Power” and “Obstruction of Justice.”⁷⁹ Prior to that time, the House conducted an extended inquiry into President Trump’s activities relating to alleged attempts to “smear” then-presumptive Democratic nominee for President, Joe Biden.⁸⁰ As part of that inquiry, six House committees began

73. Margaret E. Krawiec et al., *Congressional Investigations Highlight Risks for Companies Across Industries*, PRAC. INSIGHTS COMMENTS., Apr. 6, 2015, 2015 WL 1514595.

74. *See id.*

75. *See id.*

76. Providing for the Establishment of the Select Committee on the Events Surrounding the 2012 Terrorist Attack in Benghazi, H.R. Res. 567, 113th Cong. § 1 (2014) (enacted).

77. *Id.* at § 3.

78. *See* Articles of Impeachment Against Donald John Trump, H.R. Res. 755, 116th Cong. art. I, II (2019).

79. *Id.*

80. *See* Patricia Zengerle & David Morgan, *House begins Trump Impeachment Inquiry over Call to Ukraine Leader*, REUTERS (Sept. 24, 2019, 9:09 AM), <https://www.reuters.com/article/us-usa-trump-whistleblower-idUSKBN1W91OP>.

probes into the President's activities, enabled by House Resolution 660.⁸¹ For this inquiry, the House designated the Permanent Select Committee on Intelligence to conduct hearings and issue subpoenas to compel documents or testimony.⁸² Once the investigation concluded, all materials were to be transferred to the Judiciary Committee, which conducted the proceedings resulting in a recommendation for impeachment to the full House.⁸³ Additionally, the Permanent Select Committee on Intelligence was directed to issue a report of its findings (produced in consultation with the Committees on Foreign Affairs, and Oversight & Reform) to be submitted to the Committee on the Judiciary.⁸⁴

Over the course of the investigation by the Intelligence Committee, numerous high-profile witnesses were called by the Committee to testify to a potential "quid-pro-quo" scheme between President Trump and Ukrainian President, Volodymyr Zelensky.⁸⁵ Much of the initial testimony did not focus on Trump directly discussing such a scheme; instead, the brunt of the allegations went to Trump's advisor, Rudy Giuliani.⁸⁶ The testimony of Bill Taylor, then-lead U.S. envoy to Ukraine, however, provided the most promising evidence in establishing a link between President Trump and the quid-pro-quo scheme with Ukraine.⁸⁷

Additional investigations targeted two federal agencies. In 2012, the Republican-led House Committee on Oversight and Government Reform initiated an investigation into the alleged targeting of conservative tax-exemption applicants by the Internal Revenue Service (IRS).⁸⁸ After requesting

81. See Zengerle & Morgan, *supra* note 80; see also H.R. Res. 660, 116th Cong. at 1–2 (2019) (directing certain committees to "continue their ongoing investigations as part of the existing House of Representatives inquiry into whether sufficient grounds exist for the House of Representatives to exercise its Constitutional power to impeach Donald John Trump, President of the United States of America," and for other purposes).

82. See Zengerle & Morgan, *supra* note 80; see also H.R. Res. 660, 116th Cong. at 2–4 (2019).

83. See Zengerle & Morgan, *supra* note 80; see also H.R. Res. 660, 116th Cong. at 6 (2019).

84. See Zengerle & Morgan, *supra* note 80; see also H.R. Res. 660, 116th Cong. at 5 (2019); see also HOUSE PERMANENT SELECT COMM. ON INTELLIGENCE, THE TRUMP-UKRAINE IMPEACHMENT INQUIRY REPORT, H.R. REP. NO. 116-335, at 172–73 (1st Sess. 2019).

85. Christal Hayes & Nicolas Wu, *Who are the 17 Witnesses in the Trump Impeachment Inquiry and what have they said?*, USA TODAY (Nov. 22, 2019, 8:51 AM), <https://www.usatoday.com/story/news/politics/2019/11/06/trump-impeachment-inquiry-officials-who-testified-before-congress/4159209002/>.

86. See *id.* (citing Former U.S. Special Envoy to Ukraine, Kurt Volker, Former Ukraine Ambassador, Marie Yovanovitch, and former White House advisor on Russia, Fiona Hill, all of whom testified to a campaign by Giuliani to work with Ukraine).

87. *Id.*; see also Leigh Ann Caldwell et al., *The Moment that Shocked the Room During Taylor's Ukraine Testimony*, NBC NEWS (Oct. 24, 2019, 6:03 PM) <https://www.nbcnews.com/politics/donald-trump/moment-shocked-room-during-taylor-s-ukraine-testimony-n1071476>.

88. Investigation of the IRS, HOUSE GOP,

an investigation by the Treasury Inspector General for Tax Administration (TIGTA), the House Committee on Oversight and Government Reform and the House Committee on Ways and Means launched a public inquiry into the matter.⁸⁹

In 2018, then-Secretary for Housing and Urban Development, Dr. Ben Carson, was accused of purchasing a set of dining room furniture costing more than \$31,000 without notifying Congress.⁹⁰ Per federal law, purchases using government funds “in excess of \$5,000 to furnish . . . the office of [a] department head” require notification to Congress.⁹¹ In tandem with this accusation, a former U.S. Department of Housing and Urban Development (HUD) employee who complained about the amount spent for the table claimed that she was retaliated against for coming forward.⁹² Subsequently, the HUD Office of Inspector General (OIG) launched an investigation.⁹³ Each of these key investigations considered critical issues of how the U.S. government serves the American people; however, as seen in the next section, both the Republican and Democrat parties abused the investigatory process in each of these investigations.

II. NOTABLE RECENT CONGRESSIONAL INVESTIGATIONS

Each of the aforementioned investigations covers important issues that, on their face, merit the scrutiny of an investigation; however, the results of each congressional investigation leave each issue mired in controversy, abused by the individuals trusted with the power to investigate, and resulting in massive waste.

A. U.S. HOUSE SELECT COMMITTEE ON BENGHAZI

The U.S. House Select Committee on Benghazi was convened to analyze the September 11, 2012, terrorist attack, which resulted in the deaths of four

https://webharvest.gov/congress114th/20170112030124/http://www.gop.gov/solution_content/irs-investigation/ (last visited Feb. 5, 2023).

89. *Id.*

90. Glenn Thrush, *Ben Carson's HUD Spends \$31,000 on Dining Set for His Office*, N.Y. TIMES (Feb. 27, 2018),

<https://www.nytimes.com/2018/02/27/us/ben-carson-hud-furniture.html?smid=tw-share>; *see also* Off. of Investigation, Off. of Inspector Gen., U.S. Dep't of Housing and Urban Dev., *Investigation into Alleged Violation of Federal Appropriations Law by the Office of the Secretary 1* (2019), <https://www.hudoig.gov/sites/default/files/2019-09/HUD%20OIG%20Report%20of%20Investigation%20into%20Alleged%20Violation%20of%20Federal%20Appropriations%20Law%20by%20OSEC%20%28Sept.%202011%2C%202019%29.pdf> [*hereinafter* OIG HUD INVESTIGATION].

91. Pub. L. No. 111-8, 123 Stat. 683, § 711 (2009); *see also* Thrush, *supra* note 90.

92. Thrush, *supra* note 90; *see also* Lorraine Woellert, *HUD Civil Servant claims Retaliation after Red-Flagging Carson's Decorating*, POLITICO (Feb. 27, 2018, 6:32 PM), <https://www.politico.com/story/2018/02/27/carson-decorating-whistleblower-claims-retaliation-369785>.

93. *See* OIG HUD INVESTIGATION, *supra* note 90, at 1.

Americans—including an American ambassador.⁹⁴ Although the final report—issued as part of the Committee’s mission—does include several policy recommendations that Congress could have enacted, it is not clear from a plain reading of the authorizing legislation that the intention of the Committee was for any kind of legislative purpose.⁹⁵

While the Committee, on paper, was established as a non-partisan entity, the political bias of the Committee later emerged during the course of its activities.⁹⁶ After the Committee was established in 2014, members of the Democratic party believed that then-House Minority Leader Nancy Pelosi should have refused to seat Democratic members on the Committee, believing the Committee to be “a political stunt.”⁹⁷ Contributing to that thought was the fact that Hillary Clinton—the Secretary of State during the time of the Benghazi attacks and a prospective Presidential candidate—was a central target of the Committee.⁹⁸ Indeed, Clinton attended as a witness to a 2015 hearing before the Committee, where she was questioned over the course of eleven hours about “her management of embassy security[,] her push for U.S. military intervention in Libya[,]” and her use of private emails.⁹⁹ That final issue would become a focal point for the Trump campaign in the final days of the 2016 campaign, after Clinton won the Democratic party nomination for President.¹⁰⁰

94. Margaret E. Krawiec et al., *Congressional Investigations Highlight Risks for Companies Across Industries*, PRACTITIONER INSIGHTS COMMENTARIES, Apr. 6, 2015, 2015 WL 1514595.

95. Providing for the Establishment of the Select Committee on the Events Surrounding the 2012 Terrorist Attack in Benghazi, H.R. Res. 567, 113th Cong. (2014); H.R. Rep. No. 114-848 (2016).

96. See H.R. Res. 567, 113th Cong. (2014) (committee members appointed collaboratively by both the Speaker and the Minority Leader); see also Lis Power, *Fox News Finally Concedes Benghazi Committee is Political After Republicans Admit to Partisan Nature of Investigation*, MEDIA MATTERS (Oct. 16, 2015, 3:32 PM), <https://www.mediamatters.org/fox-nation/fox-news-finally-concedes-benghazi-committee-political-after-republicans-admit-partisan>.

97. Jonathan Weisman & Jennifer Steinhauer, *Pelosi Picks 5 Democrats for Panel on Benghazi*, N.Y. TIMES (May 21, 2014), <https://www.nytimes.com/2014/05/22/us/politics/bucking-deputies-pelosi-picks-5-democrats-for-benghazi-panel.html>; Aaron Blake, *Benghazi Looms Large over GOP and the Jan. 6 Committee*, WASH. POST (July 6, 2021, 3:00 PM), <https://www.washingtonpost.com/politics/2021/07/06/benghazi-looms-large-over-gop-jan-6-committee/>.

98. Marina Fang, *Second GOP Congressman Admits Benghazi Committee is All About Hillary Clinton (UPDATE)*, HUFFPOST (Jan. 3, 2017), https://www.huffpost.com/entry/hillary-clinton-benghazi-investigation_n_561ef9eae4b0c5a1ce62037e.

99. Dan Roberts, et al., *Hillary Clinton Deflects Conservative Jabs in 11-hour House Benghazi Hearing*, THE GUARDIAN (Oct. 22, 2015, 6:24 PM), <https://www.theguardian.com/us-news/2015/oct/22/hillary-clinton-benghazi-attack-hearing>; Sam Frizell, *How Hillary Clinton Won the Benghazi Hearing*, TIME (Oct. 23, 2015, 12:36 AM), <https://time.com/4084578/benghazi-hearing-hillary-clinton-analysis/>.

100. See Ali Vitali, *Trump Attacks Clinton on Emails and Energy in Coal Country*, NBC NEWS (Aug. 10, 2016, 7:23 PM), <https://www.nbcnews.com/politics/2016-election/trump-attacks-clinton-emails-energy-coal-country-n627691>; see also Carrie Dann, *Hillary Clinton Becomes First Female Nominee of Major U.S. Political Party*, NBC NEWS (July 27, 2016, 3:04 AM),

Ultimately, the Committee's report was published in 2016; however, the credibility of the Committee remained in question, given how the press published stories—both during and after the investigation—regarding the Committee's bias against Clinton.¹⁰¹ In 2015, then-House Majority Leader Kevin McCarthy appeared on Fox News, where he implied that the purpose of the Select Committee on Benghazi was to attack Hillary Clinton prior to her presidential run, stating “[e]verybody thought Hillary Clinton was unbeatable, right? But we put together a Benghazi special committee. What are her numbers today? . . . Her numbers are dropping. Why? Because she's untrustable. But no one would have known any of that had happened had we not fought.”¹⁰² In other cases, senior Republicans, rank-and-file members of the Republican Caucus, and a staffer substantiated the claim that the Committee was formed to personally attack Clinton.¹⁰³

In total, the Select Committee on Benghazi ran a total of two years and cost taxpayers \$7 million.¹⁰⁴ Such costs allegedly included overseas trips and staff bonuses.¹⁰⁵ The Committee's activities were also criticized by Democrats as being partisan, accusing Republicans of ignoring the Committee's rules,

<https://www.nbcnews.com/storyline/2016-conventions/hillary-clinton-becomes-first-female-nominee-major-u-s-political-n617406>.

101. Adam Edelman, *Chairman of Benghazi Special Committee Defends Hillary Clinton Probe*, N.Y. DAILY NEWS (Oct. 18, 2015, 2:44 PM),

<https://www.nydailynews.com/news/politics/chairman-benghazi-special-committee-defends-clinton-probe-article-1.2401950>; see also Gwen Ifill, *Two years, \$7 Million, 800 Pages Later, GOP Benghazi Report Lands with a Thud*, PBS NEWSHOUR (June 28, 2016, 7:10 PM), <https://www.pbs.org/newshour/show/two-years-7-million-800-pages-later-gop-benghazi-report-lands-with-a-thud>.

102. *Id.*; Angie Drobnic Holan, *In Context: What Kevin McCarthy said about Hillary Clinton and Benghazi*, POLITIFACT (Oct. 7, 2015),

<https://www.politifact.com/article/2015/oct/07/context-what-kevin-mccarthy-said-about-hillary-cl/>.

103. Marina Fang, *Second GOP Congressman Admits Benghazi Committee is All About Hillary Clinton (UPDATE)*, HUFFPOST (Jan. 3, 2017), https://www.huffpost.com/entry/hillary-clinton-benghazi-investigation_n_561ef9eae4b0c5a1ce62037e; see also Steve Benen, *Another Republican Admits: Benghazi Panel is Political*, MSNBC (Oct. 15, 2015, 8:00 AM), <https://www.msnbc.com/rachel-maddow-show/another-republican-admits-benghazi-panel-political-msna703166> (noting that “Senior Republican Officials acknowledged . . . that GOP leaders directed the Benghazi committee to focus on Clinton’s email server management . . . in order to ‘cause political problems’” for then-candidate Clinton); see also Jake Tapper & Jeremy Diamond, *Ex-Staffer: Benghazi Committee Pursuing ‘Partisan Investigation’ Targeting Hillary Clinton*, CNN POL. (Oct. 11, 2015, 6:53 PM),

<https://www.cnn.com/2015/10/10/politics/benghazi-committee-investigation-political-hillary-clinton-brad-podliska-lawsuit/index.html>.

104. Gwen Ifill, *Two years, \$7 Million, 800 Pages Later, GOP Benghazi Report Lands with a Thud*, PBS NEWSHOUR (June 28, 2016, 7:10 PM), <https://www.pbs.org/newshour/show/two-years-7-million-800-pages-later-gop-benghazi-report-lands-with-a-thud>.

105. Glenn Kessler, *Have Republicans Really Spent \$7 Million on the Benghazi Committee?*, WASH. POST (May 17, 2016, 3:00 AM), <https://www.washingtonpost.com/news/fact-checker/wp/2016/05/17/have-republicans-really-spent-7-million-on-the-benghazi-committee/>.

withholding documents from minority Committee members, and fundraising off of the attack.¹⁰⁶ Additionally, the Committee claimed that the Obama Administration delayed the production of relevant documents by “more than 10,000 days, the equivalent of over 27 years.”¹⁰⁷

In this case, the House Select Committee on Benghazi may have provided a procedurally satisfactory resolution. However, given the context of the Committee’s establishment, the political vitriol, and the high costs to taxpayers, what resulted was a committee that remains somewhat suspect in its credibility and an attempt by Congress to influence a presidential election.¹⁰⁸

B. Trump Impeachment Investigation

Even before the Articles of Impeachment were passed by the House, political dialogue was strained.¹⁰⁹ While Democrats were convinced that the President’s alleged misconduct might compromise the entire office of the Presidency—as demonstrated by comments provided by then-House Intelligence Committee Chair, Rep. Adam Schiff—Republicans believed that the impeachment investigation would result in a hastened vote to remove Trump from office.¹¹⁰

106. 160 CONG. REC. 7634, 7636–41 (2014).

107. See Press Release, *The Select Committee on Benghazi, House of Representatives, More Than 10,000 Days of Delays: Obama Admin’s Delays of Benghazi Documents Equivalent to Over 27 Years*, SELECT COMM. ON BENGHAZI (May 18, 2016), <https://archives-benghazi-republicans-oversight.house.gov/news/press-releases/over-10000-days-of-delays-obama-administration-s-delays-on-benghazi-documents>.

108. See Gwen Ifill, *Two years, \$7 Million, 800 Pages Later, GOP Benghazi Report Lands with a Thud*, PBS NEWSHOUR (June 28, 2016, 7:10 PM), <https://www.pbs.org/newshour/show/two-years-7-million-800-pages-later-gop-benghazi-report-lands-with-a-thud>; Richard Cohen, *The Benghazi Panel is a Scandal of a Committee*, WASH. POST (Sept. 28, 2015), https://www.washingtonpost.com/opinions/the-real-benghazi-scandal/2015/09/28/36a1f7c2-6602-11e5-8325-a42b5a459b1e_story.html; Steve Benen, *Republican Benghazi Committee ends with a Whimper*, MSNBC (June 28, 2016, 11:27 AM), <https://www.msnbc.com/rachel-maddow-show/republican-benghazi-committee-ends-whimper-msna870586>.

109. See, e.g., *Trump: Impeachment ‘witch hunt’ will help me get re-elected*, SKY NEWS (Dec. 11, 2019, 10:58 AM), <https://news.sky.com/story/impeachment-charges-against-trump-unveiled-11883079> (then-President Trump stated that his impeachment was a “witch hunt” and that, given the election, “[The Trump Campaign’s] poll numbers have gone through the roof because of [Nancy Pelosi’s] stupid impeachment”); see Press Release, *Congressman Matt Gaetz, House of Representatives, Congressman Matt Gaetz Exposes Extreme Anti-Trump Bias of Democrat Witnesses at Impeachment Hearing* (Dec. 5, 2019), <https://gaetz.house.gov/media/press-releases/congressman-matt-gaetz-exposes-extreme-anti-trump-bias-democrat-witnesses>; Todd Beamon, *Trump Slams Impeachment Articles: ‘WITCH HUNT!’*, NEWSMAX (Dec. 10, 2019, 11:39 AM), <https://www.newsmax.com/newsfront/house-democrats/2019/12/10/id/945299/>.

110. Haley Byrd, *Kevin McCarthy Calls On Nancy Pelosi To Suspend Impeachment Inquiry*, CNN (Oct. 3, 2019), <https://www.cnn.com/2019/10/03/politics/mccarthy-pelosi-suspend-inquiry/index.html#:~:text=House%20Minority%20Leader%20Kevin%20McCarthy,and%20procedures%20for%20the%20probe;see%20also%20Gretchen%20Frazee,Read%20Adam%20Schiff's%20Full%20Opening%20Statement%20in%20the%20First%20Day%20of%20the%20Public%20Impeachment%20Hearing>, PBS NEWSHOUR (Nov. 13, 2019,

The situation was, arguably, made worse by news media outlets providing partisan perspectives on the trial; one outlet characterized the impeachment proceedings as “a moment sure to define a turbulent era,” while another claimed this was being promoted solely as the “Hindenburg of political stories.”¹¹¹

The impeachment inquiry monetarily benefitted House members who commenced the proceedings or attempted to defend against them.¹¹² Lead impeachment manager and House Intelligence Committee Chairman, Adam Schiff, fundraised more than \$2.5 million during the final quarter of 2019.¹¹³ During that same period, then-Senate Majority Leader Mitch McConnell received \$3.8 million in contributions; even though he was a juror in President Trump’s impeachment trial, McConnell previously stated that he would actively work with the Trump Administration when the Articles of Impeachment reached the Senate.¹¹⁴

C. Additional Investigations

Throughout the 2012 investigation into the IRS, and after its closure, the proceedings were mired in politics and attempted to link the Obama Administration to the compromise of free speech rights.¹¹⁵ While TIGTA did not find any malfeasance on the part of the IRS, the Republican-led Committees maintained that the IRS dealt in political targeting.¹¹⁶ The work of the Committees cost the IRS more than \$20 million, with more than 1 million pages provided through the IRS, the Department of the Treasury, and the Department of Justice.¹¹⁷

10:33 AM), <https://www.pbs.org/newshour/politics/read-adam-schiffs-full-opening-statement-in-the-first-day-of-the-public-impeachment-hearing>.

111. David Folkenflik, *Analysis: What Did You Make Of Impeachment? It May Depend On What Media You Seek Out*, NPR (Dec. 19, 2019, 5:17 PM) (quoting Lester Holt and Tucker Carlson),

<https://www.npr.org/2019/12/19/789949305/analysis-how-people-processed-trumps-impeachment-based-on-the-media-they-turned->

112. Yelena Dzhanova, *Trump’s Impeachment Boosts Fourth-Quarter Fundraising for Key Lawmakers on Both Sides of the Aisle*, CNBC (Feb. 5, 2020, 12:20 PM),

<https://www.cnbc.com/2020/02/05/trumps-impeachment-boosted-q4-fundraising-for-schiff-mcconnell-stefanik.html>.

113. *Id.*

114. *Id.*

115. *See Investigation of the IRS*, HOUSE GOP,

https://webharvest.gov/congress114th/20170112030124/http://www.gop.gov/solution_content/irs-investigation/ (last visited Feb. 5, 2023) (“The IRS is at the epicenter of the Obama administration’s efforts to enforce its healthcare law and regulate free speech, and the House’s investigation has unearthed a clear record of harassing Americans because of their political beliefs.”).

116. *Id.*

117. *Investigation of the IRS*, HOUSE COMM. ON OVERSIGHT & REFORM,

<https://oversightdemocrats.house.gov/investigations/investigation-of-irs> (last visited Feb. 7, 2023).

During the 2018 HUD investigation, the House Committee on Oversight and Government Reform required Secretary Carson to brief the Committee, and also requested documentation in relation to the furnishing of the Secretary's office. Meanwhile, the HUD OIG itself received complaints related to Secretary Carson, which prompted its investigation into the matter.¹¹⁸ During the investigation, the Senate invited Secretary Carson to testify at an oversight hearing; during the hearing, both Senator Elizabeth Warren and Senator Sherrod Brown faulted Secretary Carson for his alleged misconduct.¹¹⁹ After review, the OIG declined to pursue additional action, having "found no evidence of misconduct."¹²⁰ While the OIG investigation did not yield any evidence of wrongdoing, Secretary Carson claimed that HUD spent more than \$700,000 on the investigation, and about \$60,000 in personal legal costs.¹²¹

D. A System Set up to Fail

The existing system by which Congress conducts investigations provides the wrong incentives to the wrong group of individuals. Members of Congress are incentivized to prolong investigations into political circuses, financially benefit from such investigations, and approach their work without sufficient prior experience.

1. Politicization

The investigations mentioned above are just a few of the investigations that are based on heavily politicized points of view. Of recent notoriety, the investigation into the events of January 6, 2021 became politicized, with only two Republicans—Representative Liz Cheney and Representative Adam Kinzinger—sitting on the Select Committee to Investigate the January 6th Attack on the United States Capitol.¹²² One member of the House Freedom Caucus—a group of the most Conservative House members—called for the removal of the two members from the House Republican Conference.¹²³ Many

118. Thomas Phippen, *Congress Wants Answers on Ben Carson's \$31,000 Dining Set*, DAILY CALLER (Mar. 1, 2018, 7:38 AM), <https://dailycaller.com/2018/03/01/congress-answers-ben-carson-dining-set/>; see also OIG HUD INVESTIGATION, *supra* note 90 at 1.

119. Joe DiFazio, *Senators Tell Ben Carson He Cares More About Dining Set Than Poor People Who Need Housing*, NEWSWEEK (Mar. 22, 2018, 4:36 PM), <https://www.newsweek.com/ben-carson-elizabeth-warren-hud-spending-857849>.

120. OIG HUD INVESTIGATION, *supra* note 90 at 2.

121. Glenn Thrush, *Ben Carson Is Cleared of Misconduct Over Order of \$31,000 Dining Set*, N.Y. TIMES (Nov. 9, 2020), <https://www.nytimes.com/2019/09/12/us/politics/furniture-ben-carson.html>.

122. H.R. REP. NO. 117-663, at ii (2022); see Melanie Zanon & Manu Raju, *Biggs to call on McCarthy to Boot Kinzinger and Cheney from GOP over January 6 Probe*, CNN (Sept. 1, 2021, 9:28 PM), <https://www.cnn.com/2021/09/01/politics/andy-biggs-kinzinger-cheney-letter/index.html>.

123. Zanon & Raju, *supra* note 122; see generally Tom Murse, *Members of the Freedom Caucus and Their Mission in Congress*, THOUGHTCO. (Oct. 5, 2020),

saw Representative Cheney's removal as House Republican Conference Chair as retribution by her Republican colleagues in response to her outspoken views on President Trump and the January 6th attack.¹²⁴

Republicans currently hold a narrow majority in the House and a minority in the Senate as a result of the 2022 midterm elections.¹²⁵ Prior to the November 2022 election, Representative Jim Jordan, current Chair of the House Judiciary Committee, indicated that the Republican majority would initiate probes into controversial topics used during the 2020 election cycle.¹²⁶ These topics include President Joe Biden's son, Hunter Biden, the Biden Administration's alleged targeting of parents who spoke out against local school boards, and pursuing retribution against Dr. Anthony Fauci—former Director of the National Institute of Allergy and Infectious Diseases, as well as a senior advisor to both President Trump and President Biden during the COVID-19 pandemic.¹²⁷ Should these probes come to fruition, these investigations will likely become mired in politics and distract from important issues at the heart of each inquiry.

Both current and prospective investigations—conducted according to a given political agenda—provide voters with an incentive to vote for a given political party.¹²⁸ This advantage, however, fuels the fire for vitriol during elections and

<https://www.thoughtco.com/what-is-the-freedom-caucus-3368156>.

124. Zachary Hudak et al., *Liz Cheney Removed from House GOP Leadership*, CBS NEWS (May 13, 2021, 9:00 AM), <https://www.cbsnews.com/live-updates/liz-cheney-removed-gop-leadership/>.

125. Olivia Munson, *Who Controls the House? Get to Know the Balance of Power in the 118th Congress*, USA TODAY (Aug. 3, 2023, 2:00 PM), <https://www.usatoday.com/story/news/politics/2023/03/16/who-controls-the-house-of-representatives/11229241002/>.

126. Kerry Picket, *House GOP Eyes Probes of Afghan Pullout, Fauci, Hunter Biden if They Win Back Majority*, WASH. TIMES (Nov. 16, 2021), <https://www.washingtontimes.com/news/2021/nov/16/house-gop-eyes-future-probes-afghan-pullout-hunter/>.

127. Kerry Picket, *House GOP Eyes Probes of Afghan Pullout, Fauci, Hunter Biden if They Win Back Majority*, WASH. TIMES (Nov. 16, 2021), <https://www.washingtontimes.com/news/2021/nov/16/house-gop-eyes-future-probes-afghan-pullout-hunter/>; see Lisa Hagen, *Trump Forces Biden to Defend Hunter Biden's Record*, U.S. NEWS (Sept. 29, 2020, 11:20 PM), <https://www.usnews.com/news/elections/articles/2020-09-29/trump-forces-biden-to-defend-hunter-bidens-record>; see Rebecca Shabad, *Trump Suggests he Might Fire Fauci After the Election*, NBC NEWS (Nov. 2, 2020, 7:03 AM), <https://www.nbcnews.com/politics/2020-election/trump-suggests-he-might-fire-fauci-after-election-n1245735>; see generally Isaac Schorr, *White House Defends Fauci amid Allegations of Lying to Congress about Gain-of-Function Research*, YAHOO! NEWS, NAT'L REV. (Sept. 9, 2021), <https://news.yahoo.com/white-house-defends-fauci-amid-184647851.html>.

128. See, e.g., *2020 Republican Platform*, THE REPUBLICAN NAT'L COMM., 13, 27, https://prod-static.gop.com/media/Resolution_Platform_2020.pdf (“We call for a thorough investigation—by a new Republican administration—of the deadly ‘Fast and Furious’ operation perpetrated by Department of Justice officials who approved and allowed illegal sales of guns to known violent criminals.”) (“[The IRS] commissioner has lied to Congress, hidden evidence, and stonewalled investigations.”).

draws the focus from enacting good policies to attacking a party using the sword of a congressional investigation.¹²⁹

2. Fund-raising

Members of Congress, while empowered with the ability to investigate, are primarily engaged in fund-raising activities for their respective political parties.¹³⁰ According to Dave Jolly, a former Representative from Florida, Members of Congress are encouraged to devote a significant amount of time to raising funds for their respective parties—in addition to each member’s fund-raising for their own campaign.¹³¹ In the case of House Democrats, guidance encouraged new members to spend four hours per day calling for donations and to spend only two hours a day on committee or House Floor activities.¹³² The schedule for the House is allegedly arranged so that Members can fundraise throughout the day.¹³³ To quote Mr. Jolly, raising funds for his political party was “[m]y first responsibility”¹³⁴

While political fund-raising can incorporate a host of current events and issues, fund-raising initiatives profit from congressional investigations. For example, the investigations into the 2012 Benghazi attack, as well as the first impeachment inquiry into President Trump, were used by both Democratic and Republican campaign organizations to fundraise for elections.¹³⁵ In the case of the Benghazi investigation, the National Republican Congressional Committee (“NRCC”) posted an advertisement on its website in 2014 encouraging prospective donors to “[b]ecome a Benghazi Watchdog” by making a donation.¹³⁶ This was done in spite of Representative Trey Gowdy, then-

129. *See id.*

130. Norah O’Donnell, *Are Members of Congress Becoming Telemarketers?*, 60 MINUTES (Apr. 24, 2016), <https://www.cbsnews.com/news/60-minutes-are-members-of-congress-becoming-telemarketers/>.

131. *See id.*; *see also* Adrian Horton, *The Swamp: A Revealing Look into Washington Corruption*, THE GUARDIAN (Aug. 3, 2020, 3:35 AM), <https://www.theguardian.com/tv-and-radio/2020/aug/03/the-swamp-hbo-washington-democracy>.

132. O’Donnell, *supra* note 130; *see also* Horton, *supra* note 131.

133. O’Donnell, *supra* note 130; *see also* Horton, *supra* note 131.

134. O’Donnell, *supra* note 130.

135. Dave Levinthal & Chris Zubak-Skees, *Impeachment a Windfall for Donald Trump – And Some Democrats*, THE CTR. FOR PUB. INTEGRITY (Oct. 16, 2019), <https://publicintegrity.org/politics/impeachment-trump-money-democrats-fundraising/>;

Jake Sherman, *NRCC Fundraising off Benghazi*, POLITICO (May 7, 2014, 3:06 PM), <https://www.politico.com/story/2014/05/nrcc-fundraising-benghazi-106444>; Sam Stein, *House Republican Candidate Fundraising Off Of Benghazi Investigation*, HUFFPOST (Dec. 6, 2017), https://www.huffpost.com/entry/house-republicans-benghaz_n_5275103;

DCCCVideo, *Republicans’ Benghazi Fundraising*, YOUTUBE (May 8, 2014), <https://www.youtube.com/watch?v=1zkZQ-zvy1U> (displaying several different advertisements marketed by the National Republican Congressional Committee used to fundraise off of the Benghazi investigation).

136. Sherman, *supra* note 135.

Chairman of the House Select Committee on Benghazi, discouraging any fundraising off of the investigation.¹³⁷ The House impeachment inquiry into Donald Trump also allowed members on both sides of the aisle to fundraise heavily during the final quarter of 2019.¹³⁸

Congressional campaigns are indeed expensive. In the 2020 electoral cycle, the average winning House campaign spent nearly \$2.4 million and the average winning Senate campaign spent more than \$27 million.¹³⁹ In a scenario where every dollar counts in order to keep a party in power, it could be said such fundraising techniques are necessary evils. However, if Members of Congress are elected to serve the people and investigate on their behalf, as other political and career civil servants are called to do, it is improper to provide them such leeway when they too hold a relationship of trust with their constituents.

3. *Lack of Experience*

A majority of Members of Congress do not have formal experience leading investigative task forces.¹⁴⁰ Out of the total membership elected to House or Senate offices in 2021, only nine Representatives had previous law enforcement experience.¹⁴¹ None of the Chairmen or Ranking Members of either the House Committee on Oversight and Reform or the Senate Committee on Homeland Security and Governmental Affairs have previous law enforcement or investigatory career experience.¹⁴²

137. See Katie Glueck & Byron Tau, *Republicans Stick with Benghazi Cash*, POLITICO (May 7, 2014, 6:43 PM), <https://www.politico.com/story/2014/05/republicans-benghazi-fundraising-trey-gowdy-106461>; see also Jake Sherman, *NRCC fundraising off of Benghazi*, POLITICO (May 7, 2014, 3:06 PM), <https://www.politico.com/story/2014/05/nrcc-fundraising-benghazi-106444>; see also Sam Stein, *House Republican Candidate Fundraising Off of Benghazi Investigation*, HUFFPOST (Dec. 6, 2017), https://www.huffpost.com/entry/house-republicans-benghaz_n_5275103.

138. Dzhanova, *supra* note 112.

139. *Total Cost of Election (1990-2020)*, OPEN SECRETS, <https://www.opensecrets.org/elections-overview/election-trends> (last visited Feb. 21, 2022).

140. See JENNIFER E. MANNING, CONG. RSCH. SERV., R46705, MEMBERSHIP OF THE 117TH CONGRESS: A PROFILE 3–5 (2022) (summarizing the most frequently listed occupational categories among members of the 117th Congress prior to taking office).

141. See *id.* at 4.

142. See JAMIE RASKIN, SERVING MARYLAND'S EIGHTH DISTRICT, <https://raskin.house.gov/about> (last visited Aug. 16, 2023) (prior to his political career, Representative Raskin was a constitutional law professor); *Chairman James Comer*, COMMITTEE ON OVERSIGHT AND REFORM, <https://oversight.house.gov/chairman-james-comer/> (last visited Feb. 21, 2023) (prior to his political career, Representative Comer was a farmer); *About Chairman Gary Peters*, HOMELAND SECURITY & GOVERNMENTAL AFFAIRS, <https://www.hsgac.senate.gov/about/majority-bio/> (last visited Aug. 16, 2023) (prior to his political career, Senator Peters was a financial advisor and served in the U.S. Navy Reserve); *About Ranking Member Rand Paul*, HOMELAND SECURITY & GOVERNMENTAL AFFAIRS, <https://www.hsgac.senate.gov/about/minority-bio/> (last visited Aug. 16, 2023) (prior to his political career, Senator Paul was an ophthalmologist).

This may be irrelevant, provided that congressional committees have staffers who make day-to-day decisions on investigations and are the ones who actually conduct investigations; however, it is the Members of Congress themselves—many times the Chair of a Committee—who direct congressional investigative staff activities.¹⁴³ Without the agenda and assent by Members of Congress, staff have no authority to conduct investigations whatsoever.¹⁴⁴ The politicization of investigations, the focus on fund-raising, and the lack of Members of Congress with investigatory experience make both houses of Congress ill-equipped to conduct non-partisan, efficient, and legislation-focused investigations.

III. REMEDYING THE PROBLEM

A. *The Proposed Office of Investigative Counsel*

As a solution to the aforementioned problems, a new “Office of Investigative Counsel” (“OIC”) would improve the quality of congressional investigations. With this new legislative office, a congressional committee or subcommittee would no longer conduct an investigation. Instead, a committee or subcommittee Chair would refer a matter to the OIC for an initial inquiry. At the end of that inquiry, the OIC would report its findings to the inquiring committee or subcommittee Chair. If the OIC finds merit to an initial inquiry, it will pursue further investigation; if the OIC finds that an inquiry contains no merit on which to proceed with a full investigation, the inquiry is closed and the decision must be respected by both the House and Senate.

The OIC would be an independent office with an “Investigative Counsel” designated as the head, appointed by and reporting to both chambers of Congress. The Investigative Counsel would employ individuals to serve in the OIC and have the ability to organize the OIC as he or she desires. Similar to a chamber’s parliamentarian office or the Congressional Research Service (CRS), funding for the OIC would be approved through the congressional budget process. There are several reasons why such an office would remedy the aforementioned problems and ensure non-partisan, efficient, and legislation-focused investigations.

1. *Neutrality*

As part of their day-to-day operations, both chambers of Congress maintain a set of independent offices which provide professional services and guidance to both Republican and Democratic members on a non-partisan basis.¹⁴⁵ Among

143. *Congressional Investigations and the Rules of the 117th Congress*, COVINGTON (Aug. 17, 2021),

<https://www.cov.com/-/media/files/corporate/publications/2021/08/congressional-investigations-and-the-rules-of-the-117th-congress.pdf> (It is frequently the Chair of a Committee who grants subpoenas and grants staff the ability to take depositions).

144. *See id.*

145. *See generally Leadership & Officers*, UNITED STATES SENATE,

the more pertinent examples, the Parliamentarians of the House and the Senate provide guidance and rulings on the procedure of their respective chambers.¹⁴⁶ In most cases, a chamber respects the findings of their Parliamentarian pursuant to a legislative activity.¹⁴⁷ In one recent case, Senate Parliamentarian Elizabeth McDonough, who was appointed by former Democratic Senator and Majority Leader Harry Reid, provided guidance to the Democrat-majority Senate finding that a Democrat provision to provide legal status to eight million illegal immigrants would be improper to include in a spending bill.¹⁴⁸

As another example, the CRS, a subsidiary of the Library of Congress, “provid[es] policy and legal analysis to committees and Members of both the House and Senate, regardless of party affiliation[;]” indeed, the House Select Committee on the Modernization of Congress concurs that CRS operates as “an essential source for nonpartisan policy information.”¹⁴⁹ Such research is dedicated solely towards supporting Congress in its “legislative, oversight, and representational duties . . .” and in keeping with that mission, CRS provides “experts [that] assist at every stage of the legislative process.”¹⁵⁰

While there may be a risk of bias or prejudice on the part of OIC staff, those risks are diminished considering that such staff would be statutorily prohibited from engaging in partisan activities.¹⁵¹ Thus, creating the OIC similar to any of these neutral, non-partisan legislative entities would support the work of Congress and ensure equal service to Members of Congress on both sides of the aisle.

<https://www.senate.gov/senators/leadership.htm> (last visited Feb. 23, 2023) (examples include the Parliamentarian, the Sergeant at Arms, and the Chaplain); *Officers and Organizations of the House*, UNITED STATES HOUSE OF REPRESENTATIVES,

<https://www.house.gov/the-house-explained/officers-and-organizations> (last visited Feb. 5, 2023) (examples include the Chief Administrative Officer, the Clerk of the House, the Parliamentarian of the House, and the Sergeant at Arms).

146. See *Parliamentarian of the House*, UNITED STATES HOUSE OF REPRESENTATIVES, <https://www.house.gov/the-house-explained/officers-and-organizations/parliamentarian-of-the-house> (last visited Feb. 11, 2023); Scott Bomboy, *Who is the Senate Parliamentarian and what does she do?*, NATIONAL CONSTITUTION CENTER (Jan. 15, 2020), <https://constitutioncenter.org/blog/who-is-the-senate-parliamentarian-and-what-does-she-do>.

147. See *id.*

148. See *id.*; see also Amber Phillips, *How the Senate Parliamentarian Could Make or Break Democrats' Spending Bill*, WASH. POST (Sept. 20, 2021, 7:48 AM), <https://www.washingtonpost.com/politics/2021/09/16/senate-parliamentarian-elizabeth-macdonough-reconciliation/>.

149. *Congressional Research Service Careers*, LIBR. OF CONG., <https://loc.gov/crsinfo/> (last visited Feb. 17, 2023); SELECT COMMITTEE ON THE MODERNIZATION OF CONGRESS, MODERNIZE AND REVITALIZE HOUSE TECHNOLOGY, H.R. REP. NO. 116-562, at 160 (2020).

150. *About Site & FAQ's*, CONG. RSCH. SERV., <https://crsreports.congress.gov/Home/About> (last visited Jan. 22, 2023).

151. See *Hatch Act Overview*, U.S. OFFICE OF SPECIAL COUNSEL, <https://osc.gov/Services/Pages/HatchAct.aspx> (last visited Feb. 5, 2023).

2. Independence

The OIC would be an independent organization, similar to an Inspector General (“IG”) for a government agency. The first IGs were created under the Inspector General Act of 1978, establishing “independent and objective units . . .” to keep federal departments and agencies accountable to the American people.¹⁵² IGs are appointed by the President “with the advice and consent of the Senate, without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations.”¹⁵³ While each IG directly reports to the head of a department or agency, no individual within that department or agency may prevent the IG from initiating or pursuing any investigation.¹⁵⁴ This independence allows IGs to keep an entire agency accountable, even up to a Cabinet-level secretary.¹⁵⁵ Only the President may remove an IG from office—even then, the President must inform Congress in writing of the termination and the reasons.¹⁵⁶

In the case of this proposed OIC, the individuals employed by this entity would remain independent and have the ability to investigate issues without being encumbered by political pressures. Similar to employees within a parliamentarian’s office, the CRS, or other career federal civil servants, these individuals would not serve at the will of Congress; rather, OIC employees could only be terminated through the procedures already established for career employees. The OIC would report to the leaders of each chamber of Congress; however, similar to an IG, the OIC would not be beholden to the agenda of a political party so much as to compromise an investigation.

3. Professionalism

Finally, an OIC would provide a professional method of investigating pertinent issues while ensuring that Congress maintains its autonomy and ability to investigate pursuant to a legislative prerogative. This would also enable Members of Congress and their committees to cut back on otherwise redundant political staff who would otherwise engage in investigatory activities for committees. Unlike congressional staff that serve at the pleasure of their employing Member of Congress or committee Chair, non-politically-appointed federal career employees, known as career employees, may only be terminated

152. Inspector General Act of 1978, 5 U.S.C. § 2 (2008).

153. 5 U.S.C. § 3(a).

154. *See id.*

155. *See, e.g.,* Nathan Rott & Shannon Van Sant, *Ryan Zinke Is Leaving The Interior Department, Trump Tweets*, NPR (Dec. 15, 2018),

<https://www.npr.org/2018/12/15/663597698/ryan-zinke-is-leaving-the-interior-department> (by the time he departed, the former Secretary of the Interior, Ryan Zinke, was under investigation for misconduct by the Inspector General for the Department of the Interior).

156. 5 U.S.C. § 3(b).

because of downsizing or well-documented poor performance.¹⁵⁷ Additionally, unlike Members of Congress, an Investigative Counsel would not be subject to re-election after a prescribed period of time. While Members of Congress may prefer to have their staff that they trust, their interests—and the interests of their constituents—would be better served by using professional investigators. Creating this new nonpartisan entity will ensure that any investigations conducted by Congress are completed in a similar manner as investigations by federal agencies.

The creation of a neutral, independent, and professional investigative body—similar to an OIG within a federal agency—would hedge against politicization by screening off Members of Congress who—as demonstrated above—have political or financial interests in investigations and generally lack the necessary experience to constructively engage in this line of work. In sufficiently addressing these issues, the OIC will ensure that the investigative activities of Congress are efficient, non-partisan, and legislation-focused.

CONCLUSION

In Federalist 78, Hamilton wrote that “the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society.”¹⁵⁸ While he wrote specifically on what would become the Federal Judiciary, the quote is just as aptly applied to the Legislative branch. In appointing Members of Congress as investigators, the American people impart on them a duty to determine facts and adjudicate issues most critical to the nation’s interests. Congressional investigations, when done right, have the power to hold government and private parties accountable. Yet when investigations become subject to political wills, fund-raising tactics, and inexperience, Congress fails to perform one of its vital roles. Instead of using the ability to investigate for legislative purposes, this tool is abused for partisan agendas—of note, the specific focus on fund-raising colors Members’ abilities to neutrally and professionally assess issues that arise during investigations. Additionally, the time, costs, and inefficiencies of these investigations bear greatly on the taxpayer. Finally, these investigations deviate from their purpose—to provide the American people with impactful and beneficial legislation.

Establishing an OIC would shift the main responsibility of investigating from Members of Congress to a professional team of career investigators. Similar in operation to a parliamentarian’s office or the CRS, an OIC would serve to provide a neutral, independent, and professional service to Members of Congress. This office would not remove the ability of Congress to investigate issues; it would simply ensure that investigations are done well. This proposed

157. See *Federal Employee Termination Procedures*, MSPB.ORG, <https://www.mspb.org/federal-employee-termination-procedures.html> (last visited Feb. 13, 2023).

158. THE FEDERALIST NO. 78 (Alexander Hamilton).

OIC will help promote a less-partisan Congress, an efficient investigatory process, and the integrity of the branch that is closest to the American people.

