

A BIPARTISAN VEHICLE FOR CHANGE: PROPOSING A NOVEL INVESTIGATIVE FRAMEWORK DESIGNED TO IMPROVE AND EMPOWER CONGRESSIONAL INVESTIGATIONS

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The American system of government entrusts Congress with significant responsibility. America's lawmakers are often required to gather facts or conduct investigations as part of the legislative process. Despite the need for these types of investigations, however, Congress has often demonstrated that it is ill equipped to fulfill this weighty responsibility. This Article represents an effort to restore the debate surrounding congressional investigations to its proper context.

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Recognizing that America’s lawmakers intend such proceedings to have a dual impact, fulfilling both political and legislative goals, the following argument attempts to reorient discussion around improving bipartisan cooperation within the legislative branch of government. Moreover, this Article makes several recommendations and proposes legislation intended to harness existing organizational structures and capabilities, while improving the manner in which Congress expends its resources. This proposal does not decrease or eliminate congressional authority. Rather, it provides for a novel funding mechanism designed to give Congress added flexibility. In essence, the proposed legislation represents a good-faith effort to demonstrate that America’s lawmakers can work together productively. It reinforces that both sides of the aisle are committed to effective governance. Furthermore, by implementing certain procedural changes designed to improve the overall efficiency of congressional investigations, Congress can firmly establish that it is committed to the shared interests of all Americans.

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INTRODUCTION

“Everybody thought Hillary Clinton was unbeatable, right? But we put together a Benghazi special committee, a select committee. What are her numbers today? Her numbers are dropping,” said House Majority Leader Kevin McCarthy in late 2015.¹ McCarthy backtracked within days stating, “It was never my intention to ever imply that this committee was political, because we

1. Philip Rucker & Robert Costa, *McCarthy’s Comments on Benghazi Probe May Be Political Gift to Clinton*, WASH. POST: POLITICS (Oct. 1, 2015), https://www.washingtonpost.com/politics/mccarthys-comments-on-benghazi-probe-may-be-a-political-gift-to-clinton/2015/10/01/6ceb6e88-6857-11e5-9223-70cb36460919_story.html?utm_term=.4ea04499faf0.

all know it is not.”² Although reasonable minds can differ about the truth and significance of these comments, the political ramifications are less ambiguous. McCarthy had been a rising star in the Republican Party.³ Many assumed he would be the next Speaker of the House, but in late October 2015, Paul Ryan was elected Speaker—Kevin McCarthy had unexpectedly withdrawn from consideration.⁴

The Select Committee on Benghazi was given a wide-ranging mandate to examine several issues related to U.S. national security.⁵ The House of Representatives authorized committee members to “conduct a full and complete investigation . . . and issue a final report of its findings to the House.”⁶ Their final report was to include an analysis of “all policies, decisions, and activities that contributed to the [terrorist] attacks on United States facilities in Benghazi, Libya, on September 11, 2012, as well as those that affected the ability of the United States to prepare for the attacks.”⁷ More importantly, the Select Committee was charged with examining “[i]nternal and public executive branch communications about the attacks,” including email communications from Secretary Clinton herself.⁸ Thus, while events surrounding the Select Committee’s investigation may have negatively affected Representative McCarthy’s political aspirations, the long-term outcome of this congressional investigation could be far more profound.⁹ Some would contend

2. *Id.*

3. Christine Bedell, *Moving Up the Ladder: Bakersfield’s Kevin McCarthy Is Making a Mercurial Rise in the GOP*, BAKERSFIELD (Nov. 30, 2008), http://www.bakersfield.com/news/moving-up-the-ladder-bakersfield-s-kevin-mccarthy-is-making/article_49b92c2f-b494-5c97-a0ed-8b828f7a88af.html; Aaron Blake, *Kevin McCarthy Is the Fastest-rising House Majority Leader Ever*, WASH. POST (June 19, 2014), https://www.washingtonpost.com/news/the-fix/wp/2014/06/12/how-kevin-mccarthys-political-rise-is-unprecedented/?utm_term=.e2bf5efa91dd.

4. See Jason Easley, *Next Speaker of the House Kevin McCarthy Admits Benghazi Investigation Is a Sham*, POLS. USA (Sept. 30, 2015), <http://www.politicususa.com/2015/09/30/speaker-house-kevin-mccarthy-admits-benghazi-investigation-sham.html>; Julian Hattem et al., *Republicans Try to Clean Up McCarthy’s Benghazi Mess*, THE HILL (Oct. 1, 2015, 1:30 PM), <http://thehill.com/homenews/house/255632-republicans-try-to-clean-up-mccarthys-benghazi-mess>; Scott Wong, *Paul Ryan Elected Speaker*, THE HILL (Oct. 29, 2015, 10:36 AM), <http://thehill.com/homenews/house/258516-house-elects-paul-ryan-as-speaker>.

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

6. *Id.*

7. *Id.*

8. *Id.*

9. See, e.g., Stephen Collinson & Ted Barrett, *Democrats Release Benghazi Report*, CNN (June 27, 2016), <http://www.cnn.com/2016/06/27/politics/benghazi-report-hillary-clinton/>; David M. Herszenhorn, *House Benghazi Report Finds No New Evidence of Wrongdoing by Clinton*, N.Y. TIMES (June 28, 2016), <http://www.nytimes.com/2016/06/29/us/politics/hillary-clinton-benghazi.html>; Paul Singer, *Analysis: House Benghazi Committee Report Was Drowned by Politics*, USA TODAY (Jun. 28, 2016), <http://www.usatoday.com/story/news/politics/elections/2016/06/28/analysis-house-benghazi-committee-report-clinton/86475012>.

that the Select Committee's efforts may have also influenced the results of the 2016 U.S. presidential election.¹⁰

This Article represents an effort to restore the debate surrounding congressional investigations to its proper context. Recognizing that America's lawmakers intend such proceedings to have a dual impact, fulfilling both political and legislative goals, the following argument attempts to reorient discussion around improving bipartisan cooperation within the legislative branch of government. Moreover, in an attempt to remedy existing deficiencies, this Article makes several recommendations for corrective actions and proposes specific mechanisms designed to reduce waste and increase the overall quality and effectiveness of congressional investigations. Finally, this Article includes proposed legislation intended to harness existing organizational structures and capabilities, while improving the manner in which Congress expends its resources.¹¹

While the 2016 presidential election revealed that Americans still have deep political divides, it is imperative that Congress take action to enact new legislation that encourages a bipartisan vehicle for change. This legislation should represent a good-faith effort to demonstrate that America's lawmakers can work together productively.¹² It should reinforce that both sides of the aisle are committed to effective governance.¹³ Furthermore, by implementing certain procedural changes designed to improve the efficiency of congressional investigations, Congress can firmly establish that it is committed to the shared interests of all Americans, and to spending our taxpayer dollars in a more conscientious manner.¹⁴

10. Chris Cillizza, *The FBI's October Surprise Just Made Hillary Clinton's Awful Week Even Worse*, WASH. POST: THE FIX (Oct. 28, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/10/28/the-fbis-october-surprise-just-made-hillary-clintons-awful-week-even-worse/?utm_term=.94cd64bf84ee ("the news—announced Friday afternoon—that the FBI would be again looking into the private email server Clinton used as secretary of state takes her bad week into truly terrible territory."); Mark Landler & Amy Chozick, *Unscathed by Report, Hillary Clinton Faces Emails as Final Benghazi Chapter*, N.Y. TIMES (June 29, 2016), <https://www.nytimes.com/2016/06/29/us/politics/benghazi-report-hillary-clinton-house-committee.html> ("the biggest revelation unearthed by the House special committee investigating the Benghazi attack came 15 months ago: the disclosure that Hillary Clinton had used a private email address and server . . . the emails now loom as the last chapter of the Benghazi saga that could still harm Mrs. Clinton's presidential ambitions").

11. See *infra* Appendix 1—Proposed Implementing Legislation [hereinafter Appendix 1]. Readers are encouraged to examine Appendix 1 in its entirety before reading the remainder of this Article. While not inclusive of all legislative amendments required to effectuate a procedural change of this nature, the Proposed Implementing Legislation should serve as a simplified blueprint or roadmap for future government reform.

12. *Id.*

13. *Id.*

14. *Id.*

I. EXAMINING CONGRESS'S POWER TO INVESTIGATE

The American system of government entrusts Congress with significant responsibility.¹⁵ America's lawmakers are often required to gather facts or conduct investigations as part of the legislative process.¹⁶ Despite the important need for these types of investigations, however, Congress has often demonstrated that it is ill equipped, in terms of both personnel and expertise, to fulfill this weighty responsibility.¹⁷ This Article examines the growing disparity between the need for effective congressional investigations and Congress's continued inability to conduct meaningful oversight. The analysis and recommendations included herein seek to promote efficiencies and economies of scale, while leaving untouched the congressional prerogative to conduct public and private hearings.

There is little doubt that Congress is best positioned for select types of investigative matters, such as internal ethics investigations.¹⁸ With that point in mind, this Article offers a broad solution intended to aid Congress generally and the committees and subcommittees thereof collectively. The following discussion is in no way exhaustive of every possible investigative tool. For example, the independent counsel is beyond the scope of this Article.¹⁹ Rather,

15. See generally Jeffrey K. Tulis, *On Congress and Constitutional Responsibility*, 89 B.U. L. REV. 515 (2009) (discussing the role of Congress in the twenty-first century); *About Congress*, U.S. CAPITOL VISITOR CENTER, <https://www.visitthecapitol.gov/about-congress> (last visited Aug. 25, 2017) (providing an overview of the operation of Congress); *The House Explained*, U.S. HOUSE OF REPRESENTATIVES, <http://www.house.gov/content/learn/> (last visited Apr. 28, 2018) (summarizing the responsibilities of the U.S. House of Representatives); *Powers & Procedures*, U.S. SENATE, <https://www.senate.gov/history/powers.htm> (last visited Apr. 28, 2018) (describing the responsibilities of the U.S. Senate).

16. Rodrigo Alba et al., *An Overview of Congressional Investigation of the Executive: Procedures, Devices, and Limitations of Congressional Investigative Power*, 1 SYRACUSE J. LEGIS. & POL'Y 1, 8-16 (1995) (discussing the legislative purpose of congressional investigations).

17. See generally James Hamilton et al., *Congressional Investigations: Politics and Process*, 44 AM. CRIM. L. REV. 1115 (2007) (discussing the process of conducting congressional investigations and hearings); Michael B. Rappaport, *Replacing Independent Counsels with Congressional Investigations*, 148 U. PA. L. REV. 1595 (2000) (acknowledging certain weaknesses of congressional investigations while arguing for increased use thereof).

18. See Josh Chafetz, *Curing Congress's Ills: Criminal Law as the Wrong Paradigm for Congressional Ethics*, 117 YALE L.J. POCKET PART 238, 238-41 (2008) (arguing that criminal law is an inadequate analogy for congressional ethics, in part, because congressional ethics implicate the public trust); Theresa A. Gabaldon, *The Self-Regulation of Congressional Ethics: Substance and Structure*, 48 ADMIN. L. REV. 39 (1996) (reviewing the reasons for, and processes available to Congress for disciplining members for ethical violations).

19. See 28 U.S.C. §§ 591-595 (1994). See generally Rappaport, *supra* note 17 (discussing the shortfalls of the Independent Counsel statute, then set to expire); Erica Orden & Jacob Gershman, *Expired Independent-Counsel Law Leaves More Power with Justice Department*, WALL ST. J. (May 10, 2017), <https://www.wsj.com/articles/expired-independent-counsel-law-leaves-more-power-with-justice-department-1494453577>

the goal of this piece is to propose a new framework whereby Congress can prioritize investigations, and, more importantly, provide its own appropriated funds on a case-by-case basis to outside entities charged with independently conducting all required investigative tasks.²⁰ This approach may be especially beneficial in the national security context, where neutral fact finders are essential to identify and remedy specific security vulnerabilities.

It should be noted that while the funding mechanism proposed in this Article is novel, the actual means by which Congress will delegate its authority to other investigative bodies has been utilized by America's lawmakers for decades.²¹ Congress enacted the Inspector General Act of 1978 to ensure integrity and efficiency in government.²² This act established various offices of inspector general throughout the executive branch charged with conducting internal audits, inspections, and investigations of federal government programs and operations.²³ Moreover, the Government Accountability Office (GAO), a legislative-branch agency created in 1921, is an independent, nonpartisan organization that works directly for Congress.²⁴ Often referred to as "the congressional watchdog," GAO's mission is to "support [Congress] in meeting its constitutional responsibilities and to help improve the performance and

(explaining that after the Independent Counsel Act expired in 1999, the Department of Justice, rather than Congress, has the authority to appoint a special prosecutor).

20. See Appendix 1 at § 201 (providing that "[a]ny appropriation that would otherwise be available to the Congress and authorized for its use in conducting such investigation, administering such program, or otherwise lawfully utilized by the congressional committee or entity conducting an investigation under Title I, may be transferred to any entity conducting such investigation under Titles III or IV of this Chapter, for the limited purpose of conducting such investigation.").

21. Pursuant to Congress's oversight authority, as well as long-established government policy and practice, America's lawmakers have the ability to issue congressional requests to investigative bodies such as the offices of inspector general or the Government Accountability Office. These requests are often issued as formal correspondence from a committee chairperson or ranking member, but they can also be mandated by public law. In responding to these requests, various factors must be weighed, including, within executive branch investigative entities, subjective investigative factors that arise out of the separation of powers between the executive and legislative branches.

22. The Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101, *reprinted as amended* in 5 U.S.C. app. (2014) [hereinafter The IG Act].

23. *Id.* at § 2 (explaining the purpose and establishment of the offices of inspector general, as well as the specific departments and agencies involved); see, e.g., *About Us*, OFFICE OF INSPECTOR GENERAL, U.S. DEP'T OF DEF., http://www.dodig.mil/About_Us/index.html (last visited Sept. 2, 2017); *About OIG*, OFFICE OF INSPECTOR GENERAL, U.S. DEP'T OF TREASURY, <https://www.treasury.gov/about/organizational-structure/ig/Pages/default.aspx> (last visited Sept. 2, 2017); *About Us*, OFFICE OF INSPECTOR GENERAL, U.S. DEP'T OF HOMELAND SECURITY, <https://www.oig.dhs.gov/about> (last visited Sept. 2, 2017); *About the Office*, OFFICE OF INSPECTOR GENERAL, U.S. DEP'T OF JUSTICE, <https://oig.justice.gov/about> (last visited Sept. 2, 2017).

24. ABOUT GAO, U.S. GOVERNMENT ACCOUNTABILITY OFFICE, <http://www.gao.gov/about> (last visited Aug. 29, 2017).

ensure the accountability of the federal government for the benefit of the American people.”²⁵

Thus, this Article proposes two distinct investigative models—one that relies on executive-branch investigative agencies, such as the offices of inspector general, and a second model that leverages the oversight mechanisms already in place within GAO. In both instances, Congress will be able to provide additional, spot-appropriations to augment the existing budget of these investigative agencies.²⁶ In other words, Congress will be able to transfer its own funds—money otherwise used by investigative commissions, committees, or subcommittees—directly to one of these agencies irrespective of their existing budget.²⁷ This approach will not only incentivize offices of inspector general and GAO to take part in additional oversight duties, it will also provide essential resources these agencies need to conduct high-profile, nonpartisan investigations of government programs or operations.

To facilitate this framework, the solutions offered in this Article are accompanied by proposed implementing legislation that provides statutory support for each process or procedure not already clearly articulated under the law.²⁸ This implementing legislation further delineates Congress’s ability to coordinate investigations amongst the various offices of inspector general within the executive branch.²⁹ It also enables Congress to direct GAO to conduct a particular investigation and considers provisions by which GAO can seek use of congressional investigative authorities such as the subpoena power.³⁰ As described above, the proposed legislation will also include a mechanism by which Congress can transfer appropriated funds to an entity conducting an investigation on its behalf.³¹

The result will be an investigation that is managed in a more efficient manner and with less bureaucratic waste. Moreover, the ability of America’s lawmakers to gather facts in all matters of interest to Congress and the public will be significantly strengthened.

25. *Id.*

26. *See* Appendix 1. While partisanship creates procedural challenges in the context of this new funding mechanism, this Article asserts that the necessary negotiation involved in transferring these funds will be less formidable than the current processes involved in conducting a broad bipartisan investigation. By inserting an outside investigative body into this calculus, and removing many of the procedural factors that traditionally lead to partisan disputes, this Article aspires to remediate and streamline existing investigative methods.

27. *Id.*

28. *See id.*

29. *Id.*

30. *Id.*

31. *Id.*

A. Congressional Investigative Authorities

Congress's authority to conduct investigations is "inherent in the legislative process."³² Congressional oversight of the executive branch serves many purposes, such as ensuring compliance with legislative intent, improving the overall efficiency of government, evaluating performance of government programs or operations, investigating alleged abuses by the President and his administration, and protecting individual rights and civil liberties.³³ In order to conduct effective oversight, it is imperative that Congress has the ability to gather facts.³⁴ However obvious this may seem to us today, it may not have been inherent in the legislative process from its inception.³⁵

To provide historical context to this discussion, the Supreme Court noted in *Watkins v. United States* that the first judicial challenge to a congressional investigation did not arise until 1881, some ninety-two years after the Constitution was ratified.³⁶ Moreover, as the United States District Court for the District of Columbia more recently concluded in *Ashland Oil, Inc. v. FTC*, fact-finding has been an essential part of the legislative process from its inception. In essence, "[a]bsent such a power [to investigate], a legislative body could not 'wisely or effectively' evaluate those conditions 'which the legislation is intended to affect or change.'"³⁷ Thus, multiple commentators have successfully argued that Congress's authority to investigate is implicit in the Constitution, and the Framers would have found it unnecessary to specifically enumerate such powers.³⁸

The United States Constitution does provide for several specifically enumerated powers that directly or derivatively allow Congress to conduct or oversee investigations.³⁹ Such powers include the power of the purse, the power to organize the executive branch, the power to confirm officers of the United States, and the power of investigation and inquiry.⁴⁰ The Supreme Court has said that "[t]he scope of the power of inquiry, in short, is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."⁴¹

32. *Watkins v. United States*, 354 U.S. 178, 187 (1957).

33. ALISSA M. DOLAN ET AL., CONG. RESEARCH SERV., RL30240, CONGRESSIONAL OVERSIGHT MANUAL 1-3 (2014) [hereinafter CONGRESSIONAL OVERSIGHT MANUAL].

34. *See Alba*, *supra* note 16, at 2-6 (discussing sources of congressional investigative authority).

35. *See Watkins*, 354 U.S. at 192-93 (noting that the first occasion for an investigation in the House of Representatives apparently arose in 1827 and no such occasion arose in the Senate until 1859).

36. *Id.* at 193.

37. *Ashland Oil, Inc. v. FTC*, 409 F. Supp. 297, 305 (D.D.C. 1976), *aff'd*, 548 F.2d 977 (D.C. Cir. 1976) (quoting *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927)).

38. CONGRESSIONAL OVERSIGHT MANUAL, *supra* note 33, at 20.

39. *See* U.S. CONST. art. I, §§ 8-9; U.S. CONST. art. II, §§ 2, 4.

40. CONGRESSIONAL OVERSIGHT MANUAL, *supra* note 33, at 4-5.

41. *Barenblatt v. United States*, 360 U.S. 109, 111 (1959).

The Court has also recognized that such broad powers do have some restrictions, including limitations placed on the scope of Congress's jurisdiction by constitutional provisions such as the First and Fifth Amendments.⁴² For example, "Congress may only investigate into those areas in which it may potentially legislate or appropriate, it cannot inquire into matters which are within the exclusive province of one of the other branches of the Government."⁴³

Additionally, the Supreme Court has applied a balancing test between First Amendment protections and congressional authority.⁴⁴ In *Barenblatt v. United States*, the Court explained that "[w]here First Amendment rights are asserted to bar government interrogation, resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown."⁴⁵ The Court then went on to examine the specific parameters encompassed in this balancing test. Congress, for its part, has been mindful of avoiding a prominent clash that pits its authority against that of the First Amendment.⁴⁶

Moreover, congressional investigative authority does not overcome a witness's Fifth Amendment right against self-incrimination. This right is "personal in nature, and may not be invoked on behalf of a corporation, small partnership, labor union, or other 'artificial' organizations."⁴⁷

Another pertinent limitation on congressional authority can be found in the executive privilege, which has two varieties: the deliberative process privilege and the presidential communications privilege.⁴⁸ Admittedly, these privileges may affect how the recommendations in this Article are implemented when it comes to investigations that involve executive branch agencies.⁴⁹ The benefit of the proposed investigative framework, however, is that it will give Congress the opportunity to request or propose an investigation to an executive agency, rather than strictly compelling that agency to act.⁵⁰ This will allow an agency to

42. *See id.* at 126; *Watkins v. United States*, 354 U.S. 178, 197 (1957).

43. *Barenblatt*, 360 U.S. at 112-113.

44. CONGRESSIONAL OVERSIGHT MANUAL, *supra* note 33, at 37 (citing *Barenblatt*, 360 U.S. at 126).

45. *Barenblatt*, 360 U.S. at 126.

46. CONGRESSIONAL OVERSIGHT MANUAL, *supra* note 33, at 38 (citing H.R. REP. NO. 94-1754, at 47-48 (1976) (presenting additional views of Representatives Spence, Teague, Hutchinson, and Flynt)).

47. CONGRESSIONAL OVERSIGHT MANUAL, *supra* note 33, at 40 (citing *Bellis v. United States*, 417 U.S. 85 (1974); *McPhaul v. United States*, 364 U.S. 372 (1960); *Rogers v. United States*, 340 U.S. 367 (1951); *United States v. White*, 322 U.S. 694 (1944); *Hale v. Henkel*, 201 U.S. 43 (1906); and MCCORMICK ON EVIDENCE § 120 (Edward W. Cleary ed., 3d ed. 1984)).

48. CONGRESSIONAL OVERSIGHT MANUAL, *supra* note 33, at 43-44; *see also* *United States v. Nixon*, 418 U.S. 683 (1974); *In re Sealed Case (Espy)*, 121 F.3d 729 (D.C. Cir. 1997) (grand jury subpoena).

49. *See* Appendix 1.

50. *Id.*

conduct its investigation and present findings consistent with, and without eroding, the executive privilege.⁵¹

The permissive and voluntary nature of this transaction will, when utilized, allow for compliance with informational requests from Congress without explicitly conceding that Congress has the authority to direct an executive agency to conduct such an inquiry. Additionally, Congress should benefit from this process because it will receive information more readily in some instances, particularly where an investigation would have otherwise been impeded by executive privilege, or where investigators would have found themselves locked in a battle of wills or authorities.⁵²

In other instances, America's lawmakers should be reminded that this proposed mechanism is purely discretionary, and they can rely on existing means of exercising their investigative authority should they so decide. The current investigative playing field includes myriad actors ranging from individual members of Congress to committees or subcommittees, even including outside organizations commissioned or contracted to conduct investigations.⁵³ As a result, this Article's main goal is to provide one more tool in the congressional toolbox. Fundamentally, it seeks to explicitly harness existing congressional authority and provide a more efficient and effective framework by which to conduct specified investigations.⁵⁴

B. *The Minority Interest*

The ability of members of the minority party to participate in the investigative process is generally "governed by the rules of each house and its committees."⁵⁵ While minority members do have some rights, "no House or committee rules authorize either ranking minority Members or individual Members on their own to institute official committee investigations, hold hearings, or issue subpoenas."⁵⁶ Although individual members can seek the voluntary assistance of government officials, "no judicial precedent has directly recognized an individual Member's right, other than a committee chair, to exercise the committee's oversight authority without the permission of a majority of the committee or its chair."⁵⁷

This Article does not seek to substantively alter the minority interest or its authorities. Rather, it bears noting that the solutions proposed herein seek to protect this interest consistent with the laws, rules, and procedures already in

51. *Id.*

52. *Id.*

53. CONGRESSIONAL OVERSIGHT MANUAL, *supra* note 33, at 20.

54. *See* Appendix 1.

55. CONGRESSIONAL OVERSIGHT MANUAL, *supra* note 33, at 65.

56. *Id.*

57. *Id.* (citing *Ashland Oil Co., Inc. v. FTC*, 548 F.2d 977, 979-80 (D.C. Cir. 1976), *aff'd* 409 F. Supp. 297 (D.D.C. 1976)); *see also* *Exxon v. FTC*, 589 F.2d 582, 592-93 (D.C. Cir. 1978).

place.⁵⁸ Notably, the minority interest has a unique place in congressional oversight, one that may not have an equal in other types of investigations.⁵⁹ For example, the importance of the minority interest is illustrated in the majority and minority reports issued in connection with the Iran-Contra scandal.⁶⁰ While only a small part of the overall controversy, one commentator notes that the majority and minority reports reinvigorated an age-old debate about “the intertwined questions of constitutional power and interpretive method in foreign affairs cases.”⁶¹

If nothing else, this example highlights the importance of the minority interest, not just politically, but in terms of providing for meaningful debate on matters of congressional consequence. The proposed legislation is therefore designed to ensure that the minority interest is neither enhanced, nor further disadvantaged, when the fact-finding process is delegated to non-congressional entities or organizations.⁶²

II. FACTORS AFFECTING THE CONDUCT OF CONGRESSIONAL INVESTIGATIONS

There are a number of factors that directly impact the successful conduct of a congressional investigation.⁶³ Examples of such factors include timing, resources, training, access to information, access to potential witnesses, and the ability to compel the production of documents and witnesses.⁶⁴ As a result, the quality of an investigation can vary greatly depending on which factors take

58. See Appendix 1.

59. Hamilton et al., *supra* note 17, at 1154; Aaron I. Young, *Hard Hitting: The Impact of Collective Bargaining and Private Civil Litigation on Congressional Investigations in Sports*, 14 VA. SPORTS & ENT. L.J. 141, 146-47 (2014) (discussing the role of the minority in the House Judiciary Committee’s investigation into the National Football League’s treatment of head injuries).

60. See *The Iran-Contra Investigation: Joint Hearings Before the House Select Committee to Investigate Covert Arms Transactions with Iran and the Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition*, 100th Cong. (1987). See generally Andrew W. Hayes, *The Boland Amendments and Foreign Affairs Difference*, 88 COLUM. L. REV. 1534 (1988) (discussing, in part, the debate raised about statutory interpretation between the committees’ majority and minority members).

61. Hayes, *supra* note 61, at 1536.

62. See Appendix 1.

63. See, e.g., Rappaport, *supra* note 17, at 1609-11 (explaining some problems with existing congressional investigations); Melissa B. Russano et al., “Why Don’t You Take Another Look at Number Three?”: *Investigator Knowledge and Its Effect on Eyewitness Confidence and Identification Decisions*, 4 CARDOZO PUB. L. POL’Y & ETHICS J. 355 (2006) (discussing the observer-expectancy effect of a criminal investigator); Robert P. Tinnin, Jr., *3 Keys to Effective Investigations*, 20 NO. 8 N. M. EMPL. LETTER 3 (2014) (discussing internal employment investigations).

64. Alba, *supra* note 16, at 7-8; see also CONGRESSIONAL OVERSIGHT MANUAL, *supra* note 33.

precedence.⁶⁵ Moreover, the relative importance of an investigation can oftentimes be measured by the apportionment of an organization's total resources to that specific endeavor, assuming, of course, that the organization is willing to expend more resources on a matter it finds to be of greater consequence.⁶⁶

A more efficient use of these resources will add considerable value to any investigative organization, and specifically to Congress in this context.⁶⁷ This section will address some of these factors in detail and discuss additional variables Congress can use to guide or adjust the conduct of an investigation.⁶⁸ As it pertains to this Article's proposed investigative framework, this section will also examine mechanisms that allow Congress to dictate these factors with greater flexibility.⁶⁹

A. *Timing and Use of Resources*

One factor that determines the prioritization of congressional investigations is the availability of resources.⁷⁰ Historically, resource constraints have had a substantial impact on Congress's ability to conduct oversight. Until the passage of the 1946 Legislative Reform Act, for example, congressional committees could not hire permanent professional and clerical staff.⁷¹ Without these skilled staffers, members of Congress were left to conduct investigations themselves, a time-consuming task in an already busy legislative schedule.⁷² One could

65. Christopher F. Corr & Gregory J. Spak, *The Congressional Subpoena: Power, Limitations, and Witness Protection*, 6 *BYU J. PUB. L.* 37, 41-42 (1992) (discussing the limitations of congressional subpoena power); Howard R. Sklamberg, *Investigation Versus Prosecution: The Constitutional Limitation on Congress's Power to Immunize Witnesses*, 78 *N.C. L. REV.* 153, 157-70 (1999) (discussing the consequences of grants of congressional immunity).

66. See, e.g., Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 *ADMIN. L. REV.* 1 (2008) (discussing the implications of regulatory agency resource allocation).

67. Anthony A. Joseph & R. Marcus Givhan, *The New Litigative Environment: Defending a Client in Parallel Civil and Criminal Proceedings*, 60 *ALA. L. REV.* 48 (1999) (discussing efficient use of litigation resources where such resources are limited by the client or there are additional implications from parallel litigation).

68. See generally Appendix 1.

69. *Id.*

70. See, e.g., Biber, *supra* note 66, at 16-18 (citing *Heckler v. Cheney*, 470 U.S. 821, 831-32 (1985) (“[N]o agency has limitless resources, and perfect enforcement of any statute is impossible.”)).

71. See Legislative Reorganization Act of 1946, Pub. L. No. 79-601, 60 Stat. 812 (1946).

72. See, e.g., Benjamin Siegel, *A Look at Congress's Busy September*, ABC NEWS (Aug. 7, 2015), <http://abcnews.go.com/Politics/congress-busy-september/story?id=32947315> (discussing the busy congressional schedule in September 2016); *Members of Congress Too Busy for Honeymoons?*, WASH. POST: ENTERTAINMENT (Sept. 6, 2011), https://www.washingtonpost.com/blogs/reliable-source/post/max-baucus-loretta-sanchez-too-busy-for-honeymoons/2011/09/06/gIQAcbyW7J_blog.html.

surmise, therefore, that measures designed to increase Congress's overall efficiency, or better distribute certain burdens, generally have a positive impact on lawmakers' ability to meaningfully process information and facts collected during investigations.

To further emphasize this point, Congress has passed several laws that encourage the efficient use of resources, such as the Paperwork Reduction Act of 1995, the Federal Managers' Financial Integrity Act of 1982, the Cash Management Improvement Act of 1990, and the Clinger-Cohen Act of 1996.⁷³ It has been noted that many government programs are fraught with waste or inefficiency.⁷⁴ In fact, "Congress's power to investigate is at its peak when focusing on alleged waste . . . or maladministration within a government department."⁷⁵ It is curious then, that Congress has been unable to eliminate waste and inefficiencies within its own internal processes. Accordingly, this Article suggests that any organization, including Congress, would benefit from implementing more efficient internal business practices.

B. *Investigative Tools*

Congress has numerous tools at its disposal to aid in the conduct of investigations. Relevant examples include the subpoena power, staff deposition authority, hearings, and congressional immunity.⁷⁶ Each tool has significant implications for the conduct of a congressional investigation, and individual limitations have been placed on their use.⁷⁷ Notably, these tools are instrumental to the recommendations discussed in sections IV and V of this Article. The proposed implementing legislation also includes provisions that authorize delegation and coordination of each particular authority.⁷⁸

Congressional subpoenas are issued in a variety of ways and are extremely difficult to challenge.⁷⁹ Courts have repeatedly held that the subpoena power is

73. Clinger-Cohen Act of 1996, Pub. L. No. 104-106, 110 Stat. 679 (1996) (enacted in part "to reform acquisition laws and information technology management of the Federal Government"); Paperwork Reduction Act of 1995, Pub. L. No. 104-13, 109 Stat. 163 (1995) (enacted in part to "minimize the cost to the Federal Government of the creation, collection, maintenance, use, dissemination, and disposition of information."); Cash Management Improvement Act of 1990, Pub. L. No. 101-459, 104 Stat. 1058 (1990) (enacted "to ensure greater efficiency, effectiveness, and equity in the exchange of funds between the Federal Government and the States"); Federal Managers' Financial Integrity Act of 1982, Pub. L. No. 97-255, 96 Stat. 814 (1982) (requiring certain agencies or entities to "identify and make proposals to eliminate duplicative and unnecessary systems, including encouraging agencies to share systems which have sufficient capacity to perform the functions needed").

74. CONGRESSIONAL OVERSIGHT MANUAL, *supra* note 33, at 23 (citing *Watkins v. United States*, 354 U.S. 178, 187 (1957)).

75. *Id.*

76. *See id.* at 27-32.

77. *See generally* Alba, *supra* note 16; Hamilton, *supra* note 17.

78. *See* Appendix 1, §§ 105, 602, 603.

79. *See* CONGRESSIONAL OVERSIGHT MANUAL, *supra* note 33, at 28; Corr, *supra* note 65.

a “legitimate use by Congress of its power to investigate.”⁸⁰ Moreover, congressional rules allow for the authority to be delegated to committees and subcommittees.⁸¹ Special or select committees can also issue subpoenas when authorized by full committee vote, the chairman, or the chairman with ranking minority member concurrence.⁸²

As a result of the Ethics in Government Act of 1978, the Senate can pursue civil enforcement of subpoenas in the United States District Court for the District of Columbia, although this remedy is seldom used.⁸³ While the House of Representatives can also pursue civil enforcement, it necessitates a resolution from the full House and other, more burdensome requirements.⁸⁴ Given the significance of congressional subpoena power, the proposed implementing legislation includes provisions that allow Congress to temporarily delegate or lend this authority to investigative entities on a case-by-case basis.⁸⁵

Additionally, not all investigative tools are as broadly established as congressional subpoena power. For example, the law surrounding staff deposition authority is not as well settled, and the power is only expressly available for some congressional committees.⁸⁶ Committees and subcommittees can be granted this authority by House or Senate resolution, but when it is conferred, the authorized body is generally required to adopt procedures that govern how the power will be utilized.⁸⁷ The legislation proposed in this Article primarily redirects investigative workload from members’ and committees’ staffs.⁸⁸ Thus, under the current proposal, the staff deposition authority will either be transferred to new investigative entities or become largely irrelevant.⁸⁹

80. See CONGRESSIONAL OVERSIGHT MANUAL, *supra* note 33, at 27 (citing *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 504 (1975)).

81. See S. RULE XXXVI(1); H.R. RULE XI(2)(m)(1).

82. See CONGRESSIONAL OVERSIGHT MANUAL, *supra* note 33, at 28.

83. *Id.* at 34 (citing Ethics in Government Act of 1978, Pub. L. No. 95-521, §§ 703, 705, 92 Stat. 1877-80 (1978) (codified as amended at 2 U.S.C. §§ 288(b)-(d), 28 U.S.C. § 1365 (2012))); see ALISSA M. DOLAN & TODD GARVEY, CONG. RESEARCH SERV., RL34097, CONGRESS’S CONTEMPT POWER AND THE ENFORCEMENT OF CONGRESSIONAL SUBPOENAS: LAW, HISTORY, PRACTICE, AND PROCEDURE, tbl.A-3 (2014).

84. CONGRESSIONAL OVERSIGHT MANUAL, *supra* note 33, at 39.

85. See Appendix 1, § 602. While this approach may lead to future constitutional challenges, this Article asserts that such barriers are markedly more ambiguous when conducted under newly-enacted legislation and under circumstances in which Congress maintains close supervision of each subpoena request and issues each subpoena itself, on a case-by-case basis.

86. *Id.*

87. *Id.*

88. *Id.* §§ 301, 302, 401.

89. *Id.*

Hearings are perhaps the most public tool utilized during congressional investigations.⁹⁰ Consequently, there are three television channels dedicated to providing coverage of “gavel-to-gavel proceedings of the U.S. House of Representatives and the U.S. Senate” and other congressional proceedings.⁹¹ The House and Senate have contemplated various issues related to hearings, and they are incorporated in rules that govern procedure, quorum, meetings in closed session, time for opening statements, and other related topics.⁹² The public nature of hearings contributes to their overall effectiveness, and it is clear from relevant news coverage that these proceedings often shape public perception of a particular scandal or controversy.⁹³ For these reasons, the proposed implementing legislation will not significantly impact Congress’s ability to hold hearings, and members should be free to use the results of future investigations to fuel public debate.⁹⁴

Additionally, since a witness can invoke the Fifth Amendment right against self-incrimination, Congress also has the authority to immunize potential witnesses.⁹⁵ There are two types of immunity that can be granted by Congress – “transactional” and “use.”⁹⁶ Use immunity is generally granted for the use of specific testimony, and information that is derived therefrom.⁹⁷ In contrast, transactional immunity protects a witness from prosecution for the offense as a whole.⁹⁸ Congress’s ability to compel testimony relies, in part, upon the ability to confer such immunities.⁹⁹ Moreover, these decisions are based on a number

90. Elizabeth DeCoux, *Does Congress Find Facts or Construct Them? The Ascendance of Politics Over Reliability, Perfected in Gonzalez v. Carhart*, 56 CLEV. ST. L. REV. 319, 336-37 (2008) (discussing modern congressional hearings); James F. Fitzpatrick, *Enduring a Congressional Investigation*, 18 LITIG., no. 4, 1992, at 16.

91. *Our Mission*, C-SPAN, <https://www.c-span.org/about/mission> (last visited Aug. 25, 2017) (discussing C-Span’s general mission and programing on channels C-SPAN, C-SPAN2 and C-SPAN3).

92. CONGRESSIONAL OVERSIGHT MANUAL, *supra* note 33, at 30.

93. Sam Frizell, *How Hillary Clinton Won the Benghazi Hearing*, TIME: POLITICS (Oct. 23, 2015), <http://time.com/4084578/benghazi-hearing-hillary-clinton-analysis>; Elliott C. McLaughlin, *Military Chiefs Oppose Removing Commanders from Sexual Assault Probes*, CNN: POLITICS (June 5, 2013), <https://www.cnn.com/2013/06/04/politics/senate-hearing-military-sexual-assault/index.html>; Brett Molina & Matt Krantz, *Wells Fargo CEO Grilled by House Panel*, USA TODAY: MONEY (Sept. 29, 2015), <http://www.usatoday.com/story/money/business/2016/09/29/live-wells-fargo-ceo-hearing/91260900>; Maria Newman, *Congress Opens Hearings on Steroid Use in Baseball*, N.Y. TIMES (Mar. 18, 2005), http://www.nytimes.com/learning/teachers/featured_articles/20050318friday.html.

94. *See* Appendix 1, § 105.

95. CONGRESSIONAL OVERSIGHT MANUAL, *supra* note 33, at 31; *see also* Hamilton, *supra* note 17, at 1129-30.

96. CONGRESSIONAL OVERSIGHT MANUAL, *supra* note 33, at 31-32; *see also* Hamilton, *supra* note 17, at 1130.

97. CONGRESSIONAL OVERSIGHT MANUAL, *supra* note 33, at 31-32.

98. *Id.*

99. *Id.* at 43; *see also* Ronald F. Wright, *Congressional Use of Immunity Grants After Iran-Contra*, 80 MINN. L. REV. 407, 415 (1995) (noting that transactional immunity “made

of complex issues and are largely political in nature.¹⁰⁰ As such, a robust discussion of this topic is beyond the scope of this Article. It should be recognized, however, that compelled testimony, in conjunction with grants of immunity, are important tools that allow Congress to set aside less significant inquiries to pursue issues of greater public importance.¹⁰¹

Finally, Congress has numerous mechanisms to enforce the authorities discussed above, including contempt of Congress, as well as civil and criminal enforcement actions.¹⁰² The contempt power is likely Congress's most forceful tool; designed to punish or remove impediments to lawful investigations.¹⁰³ The Supreme Court has recognized it as an "inherent attribute" of Congress's legislative authority.¹⁰⁴ The Court remarked that if Congress did not have this power, it would be "exposed to every indignity and interruption that rudeness, caprice, or even conspiracy, may mediate against it."¹⁰⁵ In other words, the Court was attempting to preserve tradition and decorum within the legislative branch, while also protecting the ability of both houses to conduct investigations.

Similarly, this Article's proposed implementing legislation is in no way intended to impede Congress's investigative authority. Rather, it is an attempt to maintain current investigative tools while also allowing for a more efficient and effective process. Thus, the subpoena power, public hearings, and the ability to compel testimony will still be available to America's lawmakers. The difference, however, will be that through procedural changes to funding mechanisms and the investigative referral process, Congress will truly gain the ability to conduct large-scale, bipartisan investigations.

III. CREATING A NEW INVESTIGATIVE FRAMEWORK

Congressional investigations are intended to fulfill both political and legislative goals. Recent events, however, have demonstrated that partisan considerations and political maneuvering often derail Congress's efforts to examine some of the most pressing issues facing our country today. In an attempt to remedy existing deficiencies, this section proposes specific mechanisms designed to increase the overall quality and effectiveness of

compelled witnesses better off than they would have been if they had remained silent," and it also served as a significant tool to collect testimony).

100. CONGRESSIONAL OVERSIGHT MANUAL, *supra* note 33, at 32; *see also* Hamilton, *supra* note 17, at 1129-30.

101. *See, e.g.*, Anna Douglas, *Senate Investigation of Russian Hacking Will Be Broad, Going Beyond 2016 Elections*, MIAMI HERALD (Dec. 16, 2016), <http://www.miamiherald.com/news/nation-world/national/article121315393.html>.

102. CONGRESSIONAL OVERSIGHT MANUAL, *supra* note 33, at 33-35.

103. *Id.* at 33.

104. *Id.* (citing *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821)).

105. *Anderson*, 19 U.S. at 204, 228.

congressional investigations. These mechanisms also represent an attempt to create a bipartisan vehicle for change.

The existing framework for the conduct of congressional investigations has a few key inefficiencies that the proposed implementing legislation aims to harness and turn into efficiencies, specifically issues related to timing, resources, and divisive partisan disputes.¹⁰⁶ Addressing these issues will allow Congress greater discretion in its ability to conduct investigations and also refer matters to outside entities for bipartisan examination.¹⁰⁷ Both methods have a place in a system that can be, at times, adversarial.¹⁰⁸ The solutions proposed in this section, however, seek to give Congress the greatest amount of flexibility, while redistributing necessary time and resources to organizations better equipped to preserve the minority interest.¹⁰⁹

A. *Types of Investigations*

Congress takes part in many types of investigations including those conducted in support of confirmations, in consideration of impeachment, and “in aid of the legislative function.”¹¹⁰ Some of these investigations are more suitable for Congress to handle directly, and it would be inappropriate for an outside investigative agency to participate in these matters.¹¹¹ Examples include impeachment of senior executive branch officials or inquiries into potential ethical violations by members of Congress.¹¹² As a result, these types of investigations would not be suitable for the processes recommended in this Article.

Conversely, other investigations are currently beyond the scope of Congress’s jurisdiction, such as inquiries into the private affairs of individual citizens.¹¹³ These inquiries should continue to fall outside of Congress’s

106. *Id.* at 234.

107. *See generally* Michael D. Bopp et al., *Trouble Ahead, Trouble Behind: Executive Branch Enforcement of Congressional Investigations*, 25 CORNELL J.L. & PUB. POL’Y 453 (2015) (discussing some problems and/or inefficiencies in enforcing congressional investigations).

108. *Id. But cf.* Jonathan P. Rich, *The Attorney-Client Privilege in Congressional Investigations*, 88 COLUM. L. REV. 145, 152, 169 (1988) (suggesting that congressional investigations are not adversarial in nature).

109. *See* Appendix 1, §§ 701, 702.

110. *Kilbourn v. Thompson*, 103 U.S. 168, 189 (1880); *see also* Hamilton, *supra* note 17, at 1121-1126.

111. *See generally* Julie R. O’Sullivan, *The Interaction Between Impeachment and the Independent Counsel Statute*, 86 GEO. L.J. 2193 (1998) (generally discussing impeachment); *Impeachment*, HISTORY, ART & ARCHIVES, U.S. HOUSE OF REPRESENTATIVES (last visited Aug. 25, 2017), <http://history.house.gov/Institution/Origins-Development/Impeachment> (same).

112. *See generally* Sullivan, *supra* note 111.

113. *Watkins v. United States*, 354 U.S. 178, 187 (1957); *see also Kilbourn*, 103 U.S. at 190; Andrew McCause Wright, *Congressional Due Process*, 85 MISS. L.J. 401, 449-51 (2016) (discussing the limitations of congressional jurisdiction).

jurisdiction, and this Article does not seek to grant any additional power or authority. For most types of congressional investigations, however—specifically matters involving fraud, waste, abuse, mismanagement, or topics that are of a highly sensitive political nature—the proposed framework will result in a more efficient use of government resources, as well as a final product that is both bipartisan and impartial in nature.

B. *Available Investigative Resources*

As described above, there are a number of agencies and offices within the federal government that exist for the sole purpose of conducting investigations of government programs and operations. These entities are often tasked with examining highly sensitive and politically-charged topics. Moreover, most of these investigative agencies have an existing relationship with Congress and are often called upon to conduct investigations at its behest. This section surveys the most relevant investigative entities and provides additional context for the proposed legislation included at the end of this Article.¹¹⁴

The various offices of inspector general, established throughout the executive branch of government, were created to conduct audits, inspections, and investigations of federal government programs and operations.¹¹⁵ Offices of inspector general, particularly those established by the Inspector General Act of 1978, serve a number of functions including “to keep the head of such establishment and the Congress fully and currently informed . . . concerning fraud, and other serious problems, abuses, and deficiencies.”¹¹⁶ Notably, these investigative agencies are uniquely positioned to work closely with the head of an executive branch organization while also having a direct line of communication with Congress.¹¹⁷ More importantly, they have the benefit of

114. *See* Appendix 1.

115. *See* The IG Act, § 12(2). The act lists the “establishments,” or various departments and agencies that have Inspectors General, including, “the Department of Agriculture, Commerce, Defense, Education, Energy, Health and Human Services, Housing and Urban Development, the Interior, Justice, Labor, State, Transportation, Homeland Security, or the Treasury; the Agency for International Development, the Community Development Financial Institutions Fund, the Environmental Protection Agency, the Federal Emergency Management Agency, the General Services Administration, the National Aeronautics and Space Administration, the Nuclear Regulatory Commission, the Office of Personnel Management, the Railroad Retirement Board, the Resolution Trust Corporation, the Federal Deposit Insurance Corporation, the Small Business Administration, the Corporation for National and Community Service, the Veterans’ Administration, the Social Security Administration, the Federal Housing Finance Agency, the Tennessee Valley Authority, the Export-Import Bank, the Commissions established under section 15301 of title 40, United States Code, the National Security Agency, or the National Reconnaissance Office, as the case may be.”

116. *Id.*

117. *Id.* § 4 (requiring that each respective Inspector General keep Congress fully and currently informed of fraud and other serious problems, abuses, and deficiencies relating to the administration of programs and operations).

being embedded in the executive branch and having access to significant knowledge of its day-to-day operations.¹¹⁸ As a result, offices of inspector general are a unique entity in the proposed legislative framework, and should be given precedence when it comes to the referral of investigative matters.¹¹⁹

The GAO, an investigative agency within the legislative branch of government, was originally empowered to “investigate, at the seat of government or elsewhere, all matters related to the receipt, disbursement, and application of public funds.”¹²⁰ With this mandate, GAO is uniquely situated to work hand-in-hand with America’s lawmakers. Led by a presidentially appointed and Senate-confirmed Comptroller General, this organization already has direct access to Congress.¹²¹ Its workforce also includes “economists, social scientists, accountants, public policy analysts, attorneys, and computer experts as well as specialists in fields ranging from foreign policy to health care.”¹²² Thus, GAO already has a primary mission that includes conducting congressional investigations. It should serve as a key component of the solutions proposed in this Article.

The Congressional Budget Office (CBO) was created by the Congressional Budget and Impoundment Control Act of 1974 (CBICA).¹²³ In passing CBICA, Congress made a number of declarations regarding the office, including that it was essential “to provide for the furnishing of information by the executive branch in a manner that will assist the Congress in discharging its duties.”¹²⁴ Its main mission is to “provide the Budget Committees and the Congress with objective, impartial information about budgetary and economic issues.”¹²⁵ As such, CBO is well situated to provide Congress with valuable financial information that would help inform an investigation.¹²⁶

The Congressional Research Service (CRS) within the Library of Congress is another entity that serves as a valuable resource to inform congressional

118. See generally The IG Act; William S. Fields & Thomas E. Robinson, *Legal and Functional Influences on the Objectivity of the Inspector General Audit Process*, 2 GEO. MASON INDEP. L. REV. 97 (1993); Stephen Nypaver III, *Department of Defense Inspector General Subpoena*, ARMY LAW., Mar. 1989, at 17.

119. See Appendix 1, §§ 301, 302.

120. Budget and Accounting Act of 1921, 42 Stat. 20, 25 (1921).

121. CONGRESSIONAL OVERSIGHT MANUAL, *supra* note 33, at 121; *About GAO*, U.S. GOV’T ACCOUNTABILITY OFFICE, <http://www.gao.gov/about/index.html> (last visited Aug. 25, 2017).

122. *Id.*; see also *Our Workforce*, U.S. GOV’T ACCOUNTABILITY OFFICE, <http://www.gao.gov/about/workforce/> (last visited Aug. 25, 2017).

123. Congressional Budget and Impoundment Control Act of 1974, 2 U.S.C. §§ 601-608 (1974).

124. *Id.* § 2(5).

125. *History*, CONGRESSIONAL BUDGET OFFICE, <https://www.cbo.gov/about/history> (last visited Aug. 25, 2017).

126. See Appendix 1.

decision-making.¹²⁷ Congress intended CRS “to advise and assist any committee of either House or joint committee in the analysis, appraisal, and evaluation of any legislative proposal . . . and otherwise to assist in furnishing a basis for the proper determination of measures before the committee.”¹²⁸ CRS is, therefore, a unique entity that Congress can call upon to look into matters that are more research-intensive, as opposed to traditional investigative matters.

An executive agency, legislative body, or other governmental entity can also conduct its own investigation, generally with the assistance of its general counsel or chief legal advisor.¹²⁹ Such organizations could contract with outside law firms to assist in their efforts.¹³⁰ It is important to note, however, that referring an investigation to an executive agency has potential disadvantages for Congress. Although investigators would already have access to documents and personnel, there are conceivable circumstances where alerting officials to Congress’s interest in a program or operation may inadvertently provide an opportunity to conceal or destroy relevant evidence.¹³¹ As a result, this approach should only be used when Congress deems it appropriate.¹³²

Finally, federal, state, and local law enforcement agencies may also play some part in the proposed investigative framework where such investigations inquire into matters within their particular jurisdiction. Congress should be aware, though, that there are potential complications in running parallel investigations, whether they be for criminal, civil, or other matters.¹³³ As such,

127. The Legislative Reorganization Act of 1970, 84 Stat. 1140 (1970); The Legislative Reorganization Act of 1946, 60 Stat. 836 (1946); CONGRESSIONAL OVERSIGHT MANUAL, *supra* note 33, at 20 (detailing the history of the Congressional Research Service and its predecessor, the Legislative Reference Service).

128. CONGRESSIONAL OVERSIGHT MANUAL, *supra* note 33, at 7 (citing The Legislative Reorganization Act of 1946, 60 Stat. 836 (1946)).

129. *See, e.g.*, Timothy M. Cox, *Promoting Integrity from Without: A Call for the Military to Conduct Outside, Independent Investigations of Alleged Procurement Integrity Act Violations*, 66 A.F. L. REV. 225, 249-53 (2010) (discussing benefits and disadvantages to conducting an agency investigation or outside investigation of internal agency matters within the Department of Defense).

130. *See* CONGRESSIONAL OVERSIGHT MANUAL, *supra* note 33, at 123-24; Cox, *supra* note 129, at 249-53.

131. *See, e.g.*, Ronald L. Claveloux, *The Conflict Between Executive Privilege and Congressional Oversight: The Gorsuch Controversy*, 1983 DUKE L.J. 1333, 1356-57 (discussing circumstances under which executive branch officials have sought to evade, or successfully evaded, congressional oversight, based in part upon knowledge of the investigation).

132. *Id.*

133. *See generally*, Joseph & Givhan, *supra* note 67 (discussing considerations in parallel civil and criminal investigations or proceedings); Shiv Narayan Pesuad, *Parallel Investigations Between Administrative and Law Enforcement Agencies: A Question of Civil Liberties*, 39 U. DAYTON L. REV. 77 (2013) (discussing parallel law enforcement and administrative regulatory proceedings); Edwin J. Tomko & Floyd Clardy III, *When the Lines Merge: The Danger of Simultaneous Civil and Criminal Proceedings Involving the SEC*, 73

Congress must be deliberate throughout this process and consider all resources at its disposal.

While this section does not account for all possible investigative entities, it serves as a general overview of some of the actors that are integral to this process. Thus, it logically follows that one potential obstacle to a concise and efficient investigation could be coordination between these many agencies, as well as between individual members of Congress.

C. Control and Coordination of Investigations

All of the aforementioned factors reveal that there is a real danger in having overlapping or inconsistent investigative authorities, or multiple investigations that share a common mandate.¹³⁴ The question of jurisdiction should be given additional consideration when examining how congressional investigations are centrally managed or allocated under the proposed framework. At best, such jurisdictional overlap could result in considerable waste of government resources, and, at worst, it may be a recipe for disaster for investigators. As noted by CRS, “[a] persistent problem for Congress in conducting oversight is coordination among committees, both within each chamber as well as between the two houses.”¹³⁵ The same can be said for jurisdictional disputes among the various investigative entities discussed in this Article.¹³⁶ Accordingly, the appendix contains additional mechanisms intended to enable Congress to de-conflict and coordinate their investigative efforts.¹³⁷

IV. RECOMMENDATIONS FOR IMPROVEMENT

The overall goal of this Article is to identify instances where the current scheme for Congressional investigations can be improved. By leveraging existing procedures, as well as utilizing investigative agencies that are already

TEX. B.J. 94 (2010) (discussing the implications of dual proceedings where the SEC is involved).

134. See, e.g., Clayton Youngman, *Clinton: 7 Benghazi Probes So Far* (Oct. 12, 2015), <http://www.politifact.com/truth-o-meter/statements/2015/oct/12/hillary-clinton/clinton-there-have-been-7-benghazi-probes-so-far> (reporting that multiple committees conducted overlapping probes or inquiries into the same set of circumstances).

135. CONGRESSIONAL OVERSIGHT MANUAL, *supra* note 33, at 16.

136. See, e.g., KRISTIN M. FINKLEA, CONG. RESEARCH SERV., R41927, *THE INTERPLAY OF BORDERS, TURF, CYBERSPACE, AND JURISDICTION: ISSUES CONFRONTING U.S. LAW ENFORCEMENT* (2013) (describing the jurisdictional complexities faced by U.S. law enforcement and the many techniques criminals use to target U.S. persons, businesses, and interests); see also Marc D. Goodman, *Why the Police Don't Care About Computer Crime*, 10 HARV. J.L. & TECH. 465 (1997) (discussing difficulties in determining jurisdiction for complex cyber investigations); Seth P. Waxman & Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 YALE L.J. 2195 (2003) (examining the Supremacy Clause and questions of federal and state jurisdiction).

137. See Appendix 1.

involved in the congressional process, this Article strives to redirect the conduct of congressional investigations away from overworked and under-resourced committee staffs. Congress can truly achieve bipartisan results if it relies on agencies that are better equipped to conduct professional, thorough, and timely investigations. Moreover, with the implementation of a novel and creative funding structure, America's lawmakers can ensure that these agencies have the resources necessary to achieve success.

A. *Investigative Referrals*

The first option to increase overall efficiency within the investigative process is to codify and streamline a mechanism by which Congress can refer a topic for voluntary investigation by an executive branch agency such as the various offices of inspector general.¹³⁸ This option will be most favorable in instances where Congress and the investigative agency have similar interests – for example, both entities likely have an interest in rooting out fraud, waste, abuse, or mismanagement within an executive branch organization.

Clearly, there is greater potential for success when either Congress or the investigative agency have the ability to compel government personnel to comply with an investigation. Thus, referrals to the offices of inspector general should be the preferred method within this new investigative framework. These offices already have direct access to executive branch programs and operations, and they operate under robust statutory authorities.¹³⁹ Conversely, GAO is not part of the executive branch of government, and its employees could be met with significant resistance by executive branch entities whose interests do not align with that of Congress.

Although some may argue that increased referrals will lessen Congress's power, there are a number of circumstances under which the arrangement would be favorable. Imagine a situation in which Congress has been alerted to an allegation of fraud, waste, abuse, or mismanagement. Generally speaking, it would seem that the Inspector General of that particular department or agency would also have an interest in conducting an inquiry.¹⁴⁰ Moreover, the Office of Inspector General already has a trained staff and subject matter experts equipped to handle an investigation. In this instance, the proposed legislation allows Congress, at its own discretion, to refer the investigation to an outside investigative body. More importantly, it authorizes Congress to provide

138. *See* Appendix 1.

139. *See generally* The Inspector General Act, 5 U.S.C. App. 3 §§ 1-13 (1978) (describing the appointment and confirmation of Inspectors General within establishments, and additional statutory provisions that provide for substantial independence and the ability to conduct objective investigations free of outside influence, thus allowing inspectors general to avoid certain partisan pressure).

140. *See generally id.* (describing the interest of an Inspector General in conducting investigations that prevent and detect fraud and abuse in executive branch programs and operations).

additional funding, thereby eliminating the government waste and inefficiency that would have resulted from running parallel investigations.¹⁴¹

For this model to succeed, it is important to have clearly articulated legislation that removes any uncertainty from the investigative referral process. Therefore, the legislation should require an investigative agency in receipt of a congressional request to provide a response within a specified time period. The proposed legislation should also include a provision that allows Congress to submit a list of questions, or requests for information, along with the initial investigative referral, thereby giving members the ability to inquire into the exact motivation of an investigative agency. The responses to these questions will provide greater confidence that the underlying congressional intent is being met. Moreover, if Congress is dissatisfied with an agency's response, it can move onto the next step in the investigative framework.¹⁴²

B. *Directing Investigations*

As described above, GAO is a worthwhile partner in the legislative process. It has a rich history and has made considerable contributions to Congress's oversight efforts. Accordingly, Congress should retain the ability to direct GAO to conduct an investigation rather than relying purely on its own internal committee staff.¹⁴³ Under the proposed framework, the interactions between Congress and GAO will remain largely unchanged. The unique funding mechanism in this proposal, however, will provide Congress with greater control over the timeline of the investigation as it unfolds. For example, in granting spot-appropriations to GAO, Congress can mandate additional deadlines or other bipartisan parameters that define investigative scope. Thus, while serving as a force multiplier for congressional investigations, GAO will also benefit from this arrangement by receiving additional resources and being the primary investigative body involved in a particular investigation.¹⁴⁴

An important implication of this approach is that, in certain circumstances, GAO will likely need the ability to leverage congressional authorities, such as congressional subpoena power and the ability to grant immunity. These authorities will likely prove invaluable when met with resistance by the target of an investigation.¹⁴⁵ The proposed legislation, therefore, provides a mechanism by which GAO, or a similarly situated agency, can seek use of

141. *See* Appendix 1.

142. *See infra* Part III.C.

143. *See generally* CONGRESSIONAL OVERSIGHT MANUAL, *supra* note 33; Alba, *supra* note 16; Hamilton, *supra* note 17.

144. *Id.*

145. *Id.* (although 31 U.S.C. § 716 authorizes GAO to obtain agency records required to discharge its duties, this statutory provision has increasingly been met with resistance. Thus, leveraging congressional subpoena power would enable GAO to have the full force and effect of congressional authority with the requirement that they must first petition members on a case-by-case basis for this additional investigative tool).

congressional authorities for a specified purpose.¹⁴⁶ For example, there are set rules and procedures by which Congress issues subpoenas.¹⁴⁷ The proposed legislation includes a provision by which an agency or entity conducting an investigation can request that Congress either delegate the subpoena power for a clearly-delineated purpose, or utilize that power directly to further the goals of the investigation.¹⁴⁸ This would ensure that Congress retains all investigative powers at its disposal while also allowing GAO to leverage this considerable authority, should it become necessary.¹⁴⁹

C. *Coordinating Investigations*

Given the unique proposal contained in this Article, as well as jurisdictional issues that arise during investigations, there needs to be an effective coordinating body included in the proposed legislation. Consequently, committees and subcommittees should be required to coordinate with an investigations coordination office (ICO), which will gather facts to determine if there are multiple investigations proceeding on a single question or matter. The ICO will be staffed with personnel who will maintain records of all congressional investigations, and these individuals should be informed of all but the most sensitive of matters.

Furthermore, the ICO will retain subject matter experts familiar with the individual jurisdictions of each committee or subcommittee, as well as the various investigative agencies at Congress's disposal. This will allow for dispute resolution should there be any conflicts. As an important note, however, the ICO will not be empowered to initiate, terminate, or otherwise conduct investigations. The establishment of this coordinating body is purely intended to keep Congress fully and currently informed of ongoing investigations.

D. *Examples of the Referral and Direction Process*

Given the types of investigations discussed above, and the processes identified in this Article, it is worthwhile to consider several hypotheticals to illustrate how this new investigative framework will be implemented.

Scenario 1: A whistleblower identifies conduct of an executive branch employee that has led to the waste of appropriated funds.

Upon receipt of an allegation, Congress will likely have specific questions of fact, including questions regarding the events that led to the allegation, the

146. *Id.*

147. *See* CONGRESSIONAL OVERSIGHT MANUAL, *supra* note 33, at 28; Corr & Spak, *supra* note 65.

148. *See* Appendix 1.

149. *See generally* CONGRESSIONAL OVERSIGHT MANUAL, *supra* note 33; Corr & Spak, *supra* note 65; Alba, *supra* note 16.

extent of funds that were expended, how precisely the money was spent, and whether there are existing inefficiencies that allowed this waste to occur. The executive branch agency, when notified of this allegation, will likely have many of the same questions. Thus, Congress would have the option to refer this matter to the agency's office of inspector general for an internal investigation. Lawmakers could also request that the Inspector General consider and answer certain specified questions, or requests for information, before granting additional funds.

Assuming that the Inspector General agrees that they need to inquire into the aforementioned allegation, they can provide Congress with a formal reply, affirming all or a portion of the questions in the request for information. If an agency's Inspector General declines, however, then Congress has the ability to direct GAO to investigate the matter, dictating the timeline for the investigation, and, if desired, designating additional spot-appropriations from the interested committee's budget.

Scenario 2: Corporate conduct is identified that makes unintended use of executive regulation derived from the authority of specific environmental legislation.

In this second scenario, a U.S. corporation, over which the U.S. government has jurisdiction, has unintentionally misused an environmental regulation that was implemented as a result of specific legislation. The corporation's conduct clearly defeats the intent of the regulation and has resulted in substantial loss to the government. Nonetheless, it is not criminally enforceable. Assuming that Congress and an executive branch entity have similar interests, Congress can make an investigative referral to the agency's office of inspector general. Unfortunately, the Inspector General may not have the ability to compel a private corporation to comply with information requests. Investigators could also be met with considerable resistance from a corporate entity that does not fall directly within their purview.

Under these circumstances, the office of inspector general can utilize the proposed statutory framework to request that Congress take additional investigative steps. For example, they could request that Congress issue a subpoena for the production of documents, or they could request official depositions, thus having the full force and effect of these congressional authorities. As a result, Congress would save valuable resources, including staffing and personnel, while at the same time furthering a bipartisan investigation. Moreover, an agency's office of inspector general would have additional investigative tools at their disposal, thus resulting in substantial savings to an executive branch department or agency.

Scenario 3: A private actor commits misconduct based upon a legislative provision that, as written, is particularly susceptible to abuse (such as a financial or securities statute).

In this final scenario, a private actor intentionally commits an act that takes advantage of a legislative provision that, as written, is particularly susceptible to abuse. Notably, this activity may be enforceable in a federal court. Congress may have an interest in how the specific provision was abused, and whether that provision can be exploited again in the future, despite the fact that the conduct in question resulted from the actions of an individual citizen. Thus, Congress could refer a criminal matter, in its entirety, to the appropriate law enforcement agency who will be tasked with conducting a criminal investigation. Alternatively, Congress could refer the overall question of the statute's susceptibility to future abuse to one of the aforementioned investigative entities. If Congress should decide that both matters require additional investigation—for example a law enforcement agency should investigate the criminal matter and GAO should examine the broad statutory question—then there could be two concurrent investigations with additional coordination conducted by the ICO.

E. *Hearings*

As described above, the legislation proposed in this Article is no way intended to hinder Congress's ability to conduct public and private hearings based on investigative findings. Rather, each provision contemplates regular hearings as part of the political process. Congress should be free to base its proceedings on the bipartisan findings of an outside investigator. Moreover, by delegating investigations to existing entities, committees and subcommittees may be able to gain significant efficiencies. Committee staff will be better equipped to serve respective members and more closely analyze the results of investigative findings. Thus, the proposal contained in this Article would serve not only the interest of America's lawmakers, who are tasked with gathering facts in all matters of interest to our country, it would also substantially benefit members of the general public, who have a vested interest in ensuring that their taxpayer dollars are spent in a conscientious manner.

CONCLUSION

This Article's central proposal corresponds with enabling legislation included in the attached appendix. As Congress has demonstrated on multiple occasions, there is a definite need to improve bipartisan cooperation. The proposal contained herein does not decrease or eliminate congressional authority, rather it diverts and redirects certain investigative tasks to outside entities. Moreover, it provides for a unique and novel funding mechanism designed to give Congress added flexibility. Thus, this legislation represents a bipartisan vehicle for change and allows individual lawmakers to demonstrate to the American people that they are committed to working together productively. Furthermore, by implementing certain procedural changes designed to improve the overall efficiency of congressional investigations,

Congress can firmly establish that it is committed to the shared interests of all Americans.

APPENDIX 1

Proposed Implementing Legislation

The Congressional Investigations Act of 2018

Chapter – Congressional Investigations

Title I – Preliminary Matters

Section 101. Definitions. [Pertinent definitions will be included at the discretion of Congress].

Section 102. Unless otherwise restricted, the Congress may cause to be investigated any matter related to:

- (a) the legislative process,
- (b) programs enacted by legislative action, or
- (c) other matters appropriate for the Congress's oversight.

Section 103. In the event of controversy over whether a matter may be investigated under section 101 of this Title, the final determination of suitability for investigation shall be made by the appropriate chamber's leadership, with written consultation to that chamber's chief legal advisor or general counsel.

Section 104. Nothing in this Chapter shall limit, define, or otherwise constrain the jurisdiction or interest of the Congress, or any subdivision thereof.

Section 105. This Chapter enumerates the authority to investigate or inquire into any matter as defined in this Title.

- (a) Hearings. Nothing in this Chapter shall limit, define, or otherwise constrain the ability of the Congress, or any subdivision thereof, to conduct hearings as otherwise lawful.
- (b) Excepted Entities. The following committees or congressional bodies (or their lawful successors) shall be exempt from this Chapter's provisions:
 - (1) The House Committee on Oversight and Government Reform;
 - (2) The House Committee on Ethics; and
 - (3) The Senate Select Committee on Ethics.

Title II – Availability and Transfer of Appropriations for Investigations

Section 201. Any appropriation that would otherwise be available to the Congress and authorized for its use in conducting such investigation, administering such program, or otherwise lawfully utilized by the congressional committee or entity conducting an investigation under Title I, may be transferred to any entity conducting such investigation under Titles III or IV of this Chapter, for the limited purpose of conducting such investigation.

Section 202. In the event that the Congress transfers appropriations under this Title, the entity receiving such appropriations shall provide the Congress with a full accounting of the appropriations received, the use made of such appropriations, and the return of any appropriations not utilized by the entity.

Title III – Referring Investigations

Section 301. The Congress, or any Committee, Subcommittee, or Subdivision thereof, may refer any matter for investigation that it would otherwise have the authority or jurisdiction to investigate consistent with this Title.

Section 302. Referrals under this Title may be made to a United States Government organization, agency, or similar entity, to include the various offices of inspector general established throughout the executive branch of federal government, which operate pursuant to authorities contained in the Inspector General Act of 1978, as amended.

Section 303. All referrals under this Title will include the following pieces of information:

- (a) Whether the matter is being referred bilaterally, by the majority, or by the minority.
- (b) The time within which the entity receiving the referral must indicate whether it will conduct the inquiry requested.
- (c) The questions or issues to be investigated, with specificity.
- (d) Any other conclusions or recommendations requested.
- (e) Proposed funding, if any, to accompany the request, if accepted.
- (f) Proposed deadline for the investigation and report.
- (g) Any other appropriate matters.

Section 304. Nothing under this Title should be construed to grant additional jurisdiction, authority, or other powers to any entity. In the event that the Congress refers an investigation, the Congress may transfer funds under Title II of this Chapter, to an organization, agency, or similar entity for the conduct of such investigation.

Title IV – Directing Investigations

Section 401. Barring a relevant restriction in law, policy, or regulation that prohibits a particular investigation, the Congress may direct the Government Accountability Office (GAO) to conduct any inquiry or investigation that the Congress would otherwise have the authority to conduct. In the event that the Congress directs an investigation, it may transfer funds under Title II of this Chapter to GAO for the conduct of such investigation.

Title V – Coordinating Investigations

Section 501. An Investigation Coordinating Office (ICO) will be established within each chamber of Congress.

Section 502. The ICO will be authorized a staff of at least __ professional members and __ administrative members. [Staffing allocation will be included at the discretion of Congress]

Section 503. The ICO will maintain a mechanism to track the conduct of all congressional Investigations. This mechanism will comply with the provisions of the Privacy Act and will be subject to the Freedom of Information Act.

Section 504. The ICO will have a privacy officer, designated by the chamber's majority leader.

Title VI –Other Authorities

Section 601. None of the provisions in this Chapter provide additional authorities, exceptions, or other access to information, records, or documents otherwise protected by the Freedom of Information Act, the Privacy Act, Grand Jury Materials, documents related to pending litigation, or classified materials.

Section 602. The Congress, or any committee, subcommittee, or appropriate subdivision thereof, may temporarily delegate the following authorities for a clearly defined purpose and duration, and to the extent that the delegating entity is empowered with such authority:

- (a) To issue subpoenas for the production of testimony or documents; or
- (b) To conduct staff depositions.

Section 603. The authorities granted in this title do not extend to grants of immunity or findings of contempt.

Title VII – The Minority Interest Conserved

Section 701. Nothing in this Chapter is intended to further disadvantage the Minority Interest, nor erode any existing authority, therefore, the following provisions serve to preserve that interest.

Section 702. A minority investigations group will be created within GAO and within the Council of the Inspectors General on Integrity and Efficiency. These groups will be staffed via permanent administrative and investigative staff, as appropriations allow, and will have additional detailed investigators assigned at the discretion of the minority leader for every committee currently empowered to conduct such investigations.