



4. *The Process of Conducting Investigative Oversight Proceedings*

A. The Nature of an Investigative Hearing

A congressional investigative hearing is part of the political process. It is not a judicial fact-finding proceeding reaching for the truth; nor is it an administrative agency's attempt to create a record. It is a proceeding often driven by political considerations. If a proposed investigation is within the scope of a committee's assigned jurisdiction, the manner of conducting the inquiry is subject to the discretion of the chair. All committees must adopt rules for the conduct of investigatory hearings, which must be followed to the letter.

The rules governing investigative hearings demonstrate that they are very different from court proceedings. For example, in congressional hearings:

- A witness is entitled to consult with an attorney, but counsel's overall role is circumscribed.
- Familiar courtroom rules of evidence do not apply. Thus, no foundation need be laid for a question, and hearsay testimony may be used.
- Witnesses have no right to cross-examine other witnesses or view the materials relied upon to develop committee questions.
- Counsel cannot make objections except in the most egregious circumstances and are subject to a chairperson's plenary power to control the conduct and integrity of a hearing, which can include the expulsion of counsel.

B. Jurisdiction and Authority

If a person does not comply with a committee's investigative demands, the committee may hold the person in contempt. However, a contempt conviction will not be upheld if the committee's investigation has not been clearly authorized by the full House or Senate.¹ Both the investigation itself and the specific questions posed must be within the scope of the committee's jurisdiction.² A committee cannot issue a subpoena for a subject outside the scope of its jurisdiction.

The required authorization from the full House or Senate may take the form of a statute,³ a resolution,⁴ or a standing

1. *United States v. Rumely*, 345 U.S. 41 (1953); *Tobin v. United States*, 306 F.2d 270 (D.C. Cir. 1962), *cert. denied*, 371 U.S. 902 (1962); *United States v. Patterson*, 206 F.2d 433 (D.C. Cir. 1953).

2. *Id.*

3. *E.g.*, 26 U.S.C. §§ 8021, 8022 (2010) (Joint Committee on Taxation).

4. Resolutions are generally used to establish select or special committees and to delineate their authority and jurisdiction. *See* 4 DESCHLER'S PRECEDENTS OF THE U.S. HOUSE OF REPRESENTATIVES, ch. 17, 56 (1977); *see also, e.g.*, S. Res. 23, 100th Cong. (1987) (Iran-Contra); S. Res. 495, 96th Cong. (1980) (Billy Carter/Libya); H.R. Res. 12, 100th Cong. (1987) (Iran-Contra).

rule of the House or Senate.⁵ In the case of a subcommittee investigation, the subject matter must fall within the scope of authority granted by the full committee.⁶ Investigations may be conducted, and subpoenas issued, pursuant to a committee's legislative or oversight jurisdiction.⁷

In construing the scope of a committee's authorizing rule or resolution, the Supreme Court has adopted a mode of analysis that resembles the analysis the Court uses in determining the meaning of a statute: It looks first to the words of the resolution, and then, if necessary, to the usual sources of legislative history, including floor statements, reports, and past committee practice. It appears that the clear articulation of committee jurisdiction in both the House and Senate rules, combined with the express authorization of special committees by resolution, has effectively eliminated the lack of jurisdiction defense in contempt proceedings.

C. Initiation of an Investigation

1. Committees and Chairpersons Have Broad Authority to Commence Proceedings

House and Senate rules have vested broad powers in committees and their chairs to conduct oversight and investigative proceedings. House Rule X.2(b)(1) directs that “[e]ach standing committee ... shall review and study on a continuing basis, the application, administration, and effectiveness of those laws, or parts of laws, the subject matter of which is within the jurisdiction of that Committee ... in order to determine whether such laws and the programs thereunder are being implemented and carried out in accordance with the intent of Congress and whether such programs should be continued, curtailed, or eliminated.” House Rule XI.1(b) provides that “[e]ach Committee is authorized at any time to conduct such investigations and studies as it may consider necessary and appropriate in the exercise of its responsibilities under Rule X.”

The various House committees and subcommittees have their own rules, procedures, and practices. Different committees' inquiries may follow their own individual paths. Committees decide among themselves, by precedent or newly devised procedures, how to conduct any particular inquiry.

a. Requiring Votes, Concurrence, or Consultation Before an Investigation

A committee can adopt rules requiring committee votes before initiating major inquiries, as the House Un-American Activities Committee (HUAC) did in the 1960s, and as the House Permanent Select Committee on Intelligence (HPSCI) has done in recent years.⁸ If such a rule is adopted, “it must be strictly observed.”⁹ Both committees had special reasons for adopting such a rule—HUAC's stemming from the controversial nature of its investigations, and HPSCI's because of the sensitivity of its inquiries. But the vast majority of committees have not adopted such rules.¹⁰

More common are committee rules that require either concurrence or consultation with the ranking minority member before the chairperson initiates a formal investigation.¹¹ House standing committees are also authorized to establish task

5. This mode is the most common today. Both the House and the Senate authorize standing committees to initiate investigations within their jurisdiction, and permit such committees and their subcommittees to issue subpoenas. See H.R. House Rules Manual, H.R. Doc. No. 108-241, Rule XI, cl. 1 (b) and cl. 2 (m) (2005); Manual, S. Doc. No. 98-1, Rule XXVI, cl. 1 (1984).

6. *Gojack v. United States*, 384 U.S. 702, 706 (1966). The case involved a rule of the former House Committee on Un-American Activities, which stated that “no major investigations shall be initiated without the approval of a majority of the Committee.” The court reversed the contempt conviction in *Gojack* because the subcommittee's investigation, which resulted in the contempt citation, had not been approved by the committee as its rules required.

7. A leading study of Senate committee jurisdiction noted that “oversight jurisdiction necessarily flows from specific legislative enactments, but it also emanates from broader and more vaguely defined jurisdiction which committees may exercise in particular subject matter areas.” STAFF OF TEMPORARY SELECT COMM. TO STUDY THE S. COMM. SYSTEM, 94TH CONG., THE S. COMM. SYSTEM: JURISDICTIONS, REFERRALS, NUMBERS AND SIZES, AND LIMITATIONS OF MEMBERSHIP 104 (Comm. Print 1976) see also *United States v. Kamin*, 136 F. Supp. 791, 801 (D. Mass. 1956) (providing a judicial application of oversight jurisdiction in the investigatory context).

8. See H.R. PERMANENT SELECT COMMITTEE ON INTELLIGENCE, RULE 9.

9. *Gojack v. United States*, 384 U.S. 702, 708 (1966).

10. Senate rules are comparable. See S. Standing Rule XXVI, §§ 1 and 8(a).

11. See, e.g., S. Banking Comm., Rule 2 (concurrence); H.R. COMM. ON RESOURCES, Rule 7 (consultation).

forces, special subcommittees, or sub-units to assist in carrying out their oversight functions.¹²

But even with such special rules, committee chairs may commence informal, preparatory inquiries through inquiry letters, scheduling of hearings, or staff studies and interviews without committee votes or minority party participation. In accordance with the responsibility to engage in continuous oversight, chairs of committees and subcommittees have traditionally initiated preliminary reviews and studies (i.e., “preliminary investigations” to be undertaken by the chair and subject to the ultimate control and direction of the committee). Courts have recognized the legal significance and propriety of such preliminary inquiries.

2. Preliminary Inquiries Can Be Protective of Important Evidence

In certain circumstances, a chairperson’s preliminary inquiry can be essential to minimizing the possibility that documents are destroyed before formal investigations begin. In this regard, the courts have held that the legal obligation to surrender documents requested by the committee chair arises at the time of the official request.¹³ The courts have construed 18 U.S.C. § 1505, a statute proscribing the obstruction of congressional proceedings, to cover obstructive acts in anticipation of a subpoena.¹⁴

For example, in *United States v. Mitchell*, the appeals court upheld a conviction for obstructing an investigation by the House Committee on Small Business. The court said of the obstruction statute, “[t]o give §1505 the protective force it was intended, corrupt endeavors to influence congressional investigations must be proscribed even when they occur prior to formal committee authorization.”¹⁵ The appeals court clearly approved the notion that a chairperson can initiate a proper committee investigation without official committee sanction and identified two classic indications of this: the writing of an official letter and the handling of the investigation by a committee staffer (the “chief investigator of the Small Business Committee”).

The U.S. District Court for the District of Columbia upheld chairman-initiated inquiries in a series of Iran-Contra cases. In 1985 and 1986 the chairmen of the HPSCI and the House Subcommittee on Western Hemisphere Affairs sent inquiry letters to the National Security Council (NSC) seeking documents and other information regarding allegations in press stories about NSC activities. Those letters were sent without prior committee or subcommittee votes, and the inquiries occurred without the more formal procedures of subpoenas to witnesses, or witnesses under oath. Despite the absence of such prior votes or other formal procedure, members of the NSC staff were indicted for obstructing the inquiries, destroying records, and providing false answers. The court rejected the defendants’ challenges to the indictment, holding that the defendants’ acts constituted the felony offenses of obstruction of Congress and of making false statements, even though the inquiry letters and responses occurred in the absence of votes, subpoenas, and oaths.¹⁶ As in *Mitchell*, the court emphasized that the inquiry letters of the chairmen were clearly written in their official capacities and identified specifically the nature and subject of the inquiries.¹⁷

In sum, in the absence of a prohibitive committee rule, there appears to be an inherent authority in committee chairpersons, derived from the duty to engage in continuous oversight, to initiate preliminary inquiries that do not require the concurrence or participation of committee members. Such chair-initiated actions will be deemed by the courts as official committee acts that trigger the proscriptions of federal criminal laws protecting against the obstruction of congressional proceedings.¹⁸

12. See H.R. Rule X(5)(b)(2)(C). The duration of such task forces may be limited to less than six months so that member assignments do not count against the limitation on subcommittee service under the rule.

13. See, e.g., *Ashland Oil v. FTC*, 548 F.2d 977, 997–81 (D.C. Cir. 1976).

14. See, e.g., *United States v. Mitchell*, 877 F.2d 294, 300–01 (4th Cir. 1989); *United States v. Tallant*, 407 F. Supp. 878, 888 (N.D. Ga. 1975).

15. 877 F.2d at 301.

16. See *United States v. North*, 708 F. Supp. 372, 374 notes 3 and 4 (D.D.C. 1988); *United States v. North*, 708 F. Supp. 380, 381–82 (D.D.C. 1988).

17. The subsequent histories of the trials, appeals and ultimate reversals of the convictions of Oliver North and John Poindexter involved other unrelated legal grounds.

18. Interestingly, in the 114th Congress the Senate Committee on Energy and Natural Resources amended its rules to authorize either the chairman *or* ranking member to direct a preliminary inquiry “to determine whether there is substantial credible evidence” to warrant a formal committee investigation. Rule 10 (c). The chair and ranking member still must both agree to a formal investigation.

D. Rules Applicable to Hearings

1. Committees Must Adopt and Publish Their Rules of Procedure

House Rule XI.2(a) and Senate Rule XXVI(2) require that committees adopt written rules of procedure and publish them in the Congressional Record.¹⁹ Once properly issued, such rules are judicially recognized by courts and must be strictly observed. The failure to publish committee rules has resulted in the invalidation of a perjury prosecution.²⁰ The House and many individual Senate committees require that each witness be given a copy of a committee's rules.

2. Advance Notice of Hearings Must Be Published

House and Senate rules require committees to provide at least one week's public notice for the holding of a hearing.²¹ In addition to the date, time, and location of the hearing, there must be a description of the subject matter. Individual committee rules provide a separate minimum notice for witnesses. Non-governmental witnesses in the House must include their curriculum vitae in their written statements. They must also include a disclosure of the amount and source (by agency program) of each federal grant or contract received in the current and preceding two fiscal years by the witness or the entity represented by the witness.

3. Quorum Requirements for Certain Investigative Actions

Both the House and the Senate have adopted rules permitting a reduced quorum for taking testimony and receiving evidence. House hearings may be conducted if at least two members are present; most Senate committees permit hearings with only one member in attendance. Some committees require a higher quorum for sworn rather than unsworn testimony. For perjury purposes, the quorum requirement must be met at the time the allegedly perjured testimony is given, not at the beginning of the session.

Reduced quorum requirement rules do not apply, however, to authorizations for the issuance of subpoenas. For subpoenas, Senate rules require a one-third quorum, while the House requires a quorum of a majority of the members, unless a committee delegates authority for subpoena issuance to its chairperson.²²

4. Closed Sessions

Senate and House rules limit the authority of their committees to meet in closed session. A House rule provides that testimony "shall" be held in closed session only if a majority of a committee or subcommittee determines that public testimony "would endanger national security, would compromise sensitive law enforcement information," or "would tend to defame, degrade, or incriminate any person."²³ Testimony taken in closed session is normally releasable only by a majority vote of the committee. Similarly, confidential material received in a closed session requires a majority vote for release.²⁴ However, confidential material not obtained in closed sessions is not so protected.

5. Audio and Visual Coverage of Open Hearings

House and Senate hearings open to the public are required to allow audio and visual coverage subject to implementing rules.²⁵ Neither house permits a subpoenaed witness the right to demand that television, radio, or still photographic coverage cease during his or her testimony.

19. *United States v. Reinecke*, 524 F.2d 435 (D.C. Cir. 1975) (failure to publish committee rule setting one senator as a quorum for taking hearing testimony held a sufficient ground to reverse a perjury conviction).

20. *Yellin v. United States*, 374 U.S. 109 (1963).

21. H.R. Rule XI(2)(g)(3); S. Rule XXVI(4)(a).

22. S. Rule XXVI(7)(a)(1); H.R. Rule XI(2)(m)(3).

23. H.R. Rule XI(2)(K)(5); H.R. Rule XI(2)(K)(7). Many Senate committees have adopted a similar rule.

24. H.R. Rule XI(2)(k)((7)). Many Senate committees have adopted a similar rule.

25. H.R. Rule IX(4)(e) and (f).

E. Conduct of Hearings

1. Opening Procedures

The chair usually makes an opening statement to define the subject matter of the hearing and establish the pertinence of questions put to the witnesses. Not all committees swear in their witnesses; a few committees require that all witnesses be sworn. Most committees leave the swearing of witnesses to the discretion of the chair. If a committee wishes the potential sanction of perjury to apply, it should, in accordance with the statute, administer an oath and swear in its witnesses. It should be noted that false statements not under oath are also subject to criminal sanctions.

2. Rights of Witnesses and the Role of Counsel

Absent an explicit committee rule, or the applicability of a limitation under the Constitution, witnesses' rights at an investigative hearing are at the sufferance of the committee. Indeed, courts have deemed congressional investigatory proceedings the "legislative branch equivalent of a grand jury,"²⁶ a proceeding in which witness's rights are highly circumscribed.

A witness does not have a right to make a statement before being questioned by a committee, but that opportunity is usually provided. Committee rules may prescribe the length of such statements and also require that written statements be submitted in advance of the hearing. Questioning of witnesses may be structured so that members alternate for specified lengths of time, usually five minutes. Questioning may also be conducted by staff. Witnesses may be allowed to review a transcript of their testimony and make non-substantive corrections.

House rules and Senate committee rules recognize a witness's right to be accompanied by counsel.²⁷ The House rule limits the role of counsel as solely "for the purpose of advising [witnesses] concerning their constitutional rights." Some committees have adopted rules specifically prohibiting counsel from "coaching" witnesses during their testimony.²⁸ Oral arguments and counsel objections to member questions and chair rulings can be deemed out of bounds. Many Senate committees have adopted more lenient rules in allowing counsel advice with respect to the witness's "legal rights." Both houses have rules that authorize chairs to maintain the decorum and integrity of a hearing,²⁹ and a few committees have adopted rules that explicitly allow chairs to exclude counsel for improper conduct or for apparent conflicts of interest that would preclude candid, unintimidated witness testimony.³⁰ House Rule XI.2(k)(4) provides that "[t]he chairman may punish breaches of order and decorum, and of professional ethics on the part of counsel, by censure or exclusion from the hearings; and the Committee may cite the offender for contempt." Some Senate committees have adopted similar rules.³¹

There is no right to cross-examine adverse witnesses, or to discovery of materials utilized by a committee as the basis for questions.³² Witnesses are entitled to a range of constitutional protections, but their access to privileges traditionally recognized in court proceedings can be limited. Indeed, the Supreme Court has commented that "only infrequently have witnesses ... [in congressional hearings] been afforded the procedural rights normally associated with an adjudicative proceeding."³³

26. See S. Select Comm. on Ethics v. Packwood, 845 F. Supp. 17, 21 (D.D.C. 1994), *stay pending appeal denied*, 510 U.S. 1319 (1994).

27. House Rule XI(2)(k)(3).

28. See, e.g., S. Permanent Subcomm. on Investigations, Rule 8.

29. H.R. Rule XI(2)(k)(4) provides that "[t]he chair may punish breaches of order and decorum, and of professional ethics on the part of counsel, by censure and exclusion from the hearings; and the committee may cite the offender to the House for contempt."

30. See, e.g., Senate Homeland Security and Governmental Affairs Comm., Rule 5D; S. Permanent Subcomm. on Investigations, Rule 8.

31. See, e.g., Senate Aging Comm., Rule V. 8; S. Permanent Subcomm. on Investigations, Rule 7.

32. *United States v. Fort*, 443 F.2d 670 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 932 (1971).

33. *Hannah v. Larche*, 363 U.S.420, 445 (1960).

3. Committees Have the Ultimate Say Respecting Which Agency Witnesses Shall Appear Before Them and Who Will Represent Them

As a matter of practice, committees normally allow witnesses their choice of representation and afford wide leeway with respect to their representational role. But under certain circumstances, agency witnesses raise special considerations and different concerns, particularly where the investigatory hearing involves issues of agency corruption, maladministration, abuse, or waste.

The ability of a committee to effectively carry out its oversight responsibilities requires that it be confident that the responses it obtains from officers and employees with respect to the administration of agency programs are candid, objective, and truthful. Committees have no way to ascertain with any degree of certainty whether a witness truly requested, and in fact wants, to be accompanied by agency personnel. Where a potential conflict of interest situation appears to arise, a committee will seek to insulate a witness from the presence of agency personnel during a staff interview, deposition, or hearing testimony. For example, if the chairperson determines that a witness's agency-selected counsel raises a potential conflict of interest, or might chill the witness's candor, that counsel can be excluded from a hearing. The determination stems from the need to ensure effective oversight of agency activities while protecting witnesses from the possibility of abuse, threats, or coercion.

In addition to the possibility that the mere presence of agency counsel would have a chilling effect on employees' testimony, counsel for the executive branch have at times directly instructed agency witnesses not to answer a committee's questions. To justify these instructions, counsel for the executive branch have pointed to statutes protecting the confidentiality of information gathered from private sources; the dangers of chilling the agency's deliberative processes; the prerogative of an agency to determine which agency representative should testify; and even agency-promulgated regulations forbidding employee testimony before a congressional committee.³⁴ These assertions have come principally from the Department of Justice, but many agencies have raised similar claims from time to time. In most cases, they proved unsuccessful in the face of determined committee engagement. The inquiring committee need only show that the information sought is within the broad subject matter of its authorized jurisdiction, is in aid of a legitimate legislative function, and is pertinent to the area of concern.

4. Effect on Investigative Proceedings of a Final Adjournment of a Chamber at the End of a Legislative Session

House and Senate rules allow for the continuation of investigative proceedings when each house votes to end a legislative session and reconvene on a specified date in the next session.³⁵ This is commonly called sine die adjournment. Committees are authorized to continue or initiate investigations, hold hearings, and issue and enforce subpoenas during the sine die recess. Also, under the criminal contempt statute, committees can recommend a resolution to the speaker of the House or president of the Senate, who may certify a contempt of Congress citation to the U.S. attorney for presentation to a grand jury.

The recess period may be for days, weeks, or even months, so authorization to continue all legislative functions other than lawmaking is necessary to maintain continuity and efficiency. When the next session of Congress is the first session of a new Congress, House committees must take additional actions to continue investigations; investigations must be reauthorized and subpoenas reissued. Since the Senate is a continuing body, its committee investigations may continue into the next session of a new Congress. As a measure of precaution, some Senate committees certify a "continuing interest" in the investigation and in any subpoenas that had been issued.

34. MAJORITY STAFF OF H. COMM. ON ENERGY AND COMMERCE AND H. COMM. ON WAYS AND MEANS, JOINT CONGRESSIONAL INVESTIGATIVE REP. OF FUNDING FOR THE ACA'S COST SHARING REDUCTION PROGRAM 89-156 (2016). The report describes at length the tactics employed by attorneys from the Departments of the Treasury, Health and Human Services, and the Office of Management and Budget to obstruct compliance with the Committees' information requests, which included instructions to present and former agency employees to limit their testimony.

35. H.R. Rule XI.2(m)(1); Standing S. Rule XXVI (1).