



## 8. *The Rights and Role of the Minority Party and Individual Members in the Investigatory Process*

### Overview

In general, congressional oversight powers only apply when the House, the Senate, or an appropriate committee acts, and the powers cannot be exercised by individual members of Congress. Each house defines the scope of the role its members play in the investigatory process. The House is a majoritarian institution that has maintained rules that strictly limit the ability of individual members to effectively engage in investigative actions. Senate rules are more accommodating, allowing individual members more leeway to engage in oversight actions.

Over the years, members have unsuccessfully attempted to rely on lawsuits to obtain documents from agencies. Supported by such court rulings, the Justice Department, as a matter of executive branch policy, treats requests for agency documents by *individual* members of Congress—other than the chairs of committees and subcommittees—in essentially the same way as it treats requests by private individuals seeking information under the Freedom of Information Act (FOIA). But organized, persistent informal “back bench actions” by the minority, such as those engaged in by Rep. Henry Waxman in his days as a ranking minority committee member, provide a model for potentially effective actions.

### A. The Limited Rights of Individual Members of the House

The role of members of the minority party in the investigatory process in the House of Representatives is governed by the rules of the House and its committees. While minority members in the House are specifically accorded some rights,<sup>1</sup> no ranking minority members or individual members can start official committee investigations, hold hearings, issue subpoenas, or attend informal briefings or interviews held prior to the institution of a formal investigation. House rules and practice provide a procedure for individual members to file “resolutions of inquiry,” the passage of which expresses an official, non-binding request of the full House for particular information from the president or the head of a department. Individual members may also seek the voluntary cooperation of agency officials or private persons. But no judicial precedent has recognized a right in an individual member, other than the chair of a committee,<sup>2</sup> to exercise the authority of a committee in the oversight context.

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1. Whenever a hearing is conducted on any measure, the minority may, upon written request of a majority of the minority members to the chair before the completion of the hearing, call witnesses selected by the minority to testify during at least one day of the hearing (House Rule XI.2(j)(1)). Minority members are authorized to vote to issue subpoenas (unless the committee vests subpoena issuance authority in the chair alone) and to vote to enforce subpoenas. Minority members are allowed to participate in actions requiring quorums and to go into closed sessions, and minority members may file supplemental, minority, or additional views for inclusion in committee reports (House Rule XI.1(I)).

2. See *Ashland Oil v. FTC*, 548 F.2d 977, 979-80 (D.C. Cir. 1976), *affirming* 409 F. Supp. 297 (D.D.C. 1976); see also *Exxon v. FTC*, 589 F.2d 582, 592-93 (D.C. Cir. 1978) (acknowledging that the “principle is important that disclosure of information can only be compelled by authority of Congress, its committees or subcommittees, not solely by individual members...”); *In re Beef Industry Antitrust Litigation*, 589 F.2d 786, 791 (5<sup>th</sup> Cir. 1979) (refusing to permit two congressmen from intervening in private litigation because they “failed to obtain a House Resolution or any other similar authority before they sought to intervene in the beef industry case.”); and *Walker v. Cheney*, 230 F. Supp. 51, 68 (D.D.C. 2002) (dismissing a suit by the comptroller general for information from an executive branch body brought on behalf of two individual congressmen for lack of standing because neither House of Congress had authorized him to file such an action).

## B. Long-Standing Executive Branch Policy Treats Member Information Inquiries as FOIA Requests from Non-Governmental Persons

Supported by the court rulings referenced above, the Department of Justice, in 1984, issued guidelines in which it declared “unequivocally, as a matter of Department of Justice FOIA policy,” that agencies should:

Distinguish between requests made by a House of Congress as a whole (including through its committee structure), on one hand, and requests from individual Members of Congress on the other. Even when a FOIA request is made by a Member clearly acting in a completely official capacity, such a request does not properly trigger the special access rule of [5 U.S.C. § 553(d)] unless it is made by a committee or subcommittee chairman, or otherwise under the authority of a committee or subcommittee.<sup>3</sup>

The Section 553(d) special-access rule referred to above requires agencies to submit information to Congress even if the terms of a FOIA exemption would otherwise apply and permit the agency to withhold that information. The Justice Department policy statement narrows this special-access rule to apply only to official requests by a congressional committee or its chair, and not to require disclosure when an individual member of Congress is acting outside the committee process. All agencies since then have issued rules relegating individual member requests for information to the status of private citizen requests under FOIA. An agency denial of a member’s request for information may be challenged in court, but this process could take years to resolve.

## C. Members Have Not Succeeded in Persuading Courts to Recognize Individual Investigative Prerogatives

Individual members and groups of members have unsuccessfully attempted to file lawsuits in order to obtain information that agencies have denied them. These suits have been dismissed as non-justiciable attempts to involve the courts in political disputes that members have lost with their colleagues. In addition, courts have found that members of Congress lack standing or a right to sue when the “injury” they have suffered is “institutional”— one based on their role as legislators, rather than a personal injury.

### 1. *Lee v. Kelley*

In *Lee v. Kelley*<sup>4</sup> the court dismissed a lawsuit filed by Sen. Jesse Helms to unseal FBI tapes and transcripts concerning Martin Luther King, Jr. The court concluded that Helms’ action was an effort to enlist the court in his dispute with fellow legislators. The district court ruled that “[It] was not for this court to review the adequacy of the deliberative process of the Senate leadership . . . [T]o conclude otherwise would represent an obvious intrusion by the judiciary into the legislative arena.” The appeals court affirmed on the ground that Helms lacked standing to sue because he had not asserted any interest protected by the Constitution, and that his complaint was actually with his fellow senators.<sup>5</sup>

### 2. *Leach v. Resolution Trust Corporation*<sup>6</sup>

In 1994, a federal district court dismissed the attempt of the then-ranking minority member of the House Banking (now Financial Services) Committee to compel disclosure of documents from two agencies under FOIA and the Administrative Procedure Act. The court held that the case was one “in which a congressional plaintiff’s dispute is primarily with his or her fellow legislators.”<sup>7</sup>

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3. See 5 OFFICE OF INFORMATION POLICY, U.S. DEP’T OF JUSTICE, FOIA UPDATE: OIP GUIDANCE: CONGRESSIONAL ACCESS UNDER FOIA 3-4 (1984), <https://www.justice.gov/oip/blog/foia-update-oip-guidance-congressional-access-under-foia>. The policy is reiterated by DOJ in OFFICE OF INFORMATION POLICY, U.S. DEP’T OF JUSTICE, FREEDOM OF INFORMATION ACT GUIDE 63 (2007).

4. 99 FRD 340 (D.D.C. 1983), *aff’d sub nom. Southern Christian Leadership Conference v. Kelley*, 747 F.2d 777 (D.C. Cir. 1977).

5. 747 F.2d at 779-81.

6. 860 F. Supp. 868 (D.D.C. 1994).

7. 860 F. Supp. at 874.

That court also suggested that a “collegial remedy” for the minority already exists: 5 U.S.C. § 2954. Under this law, small groups of members of the House Government Reform (now Oversight and Government Reform) and Senate Governmental Affairs (now Homeland Security and Government Affairs) Committees can request information from executive agencies without formal committee action.<sup>8</sup> However, as discussed below, the scope of this provision is uncertain and a recent district court opinion casts doubt on its enforceability by a court.

### 3. Requests for Information under Section 2954

Section 2954, codified at 5 U.S.C. § 2954,<sup>9</sup> requires executive branch agencies to comply with document requests by certain small groups of members of Congress. The provision only covers requests from members of the House Oversight and Government Reform Committee and the Senate Homeland Security and Government Affairs Committee, because the language is derived from 1920’s legislation which originally referred to the current committees’ predecessors: the House and Senate Committees on Expenditures in the Executive Departments.<sup>10</sup> The limited purpose for this legislation was to enable individual members of Congress to seek information from agencies without need for an official congressional inquiry.<sup>11</sup> However, the provision lacks an explicit enforcement mechanism. If an agency refuses to comply, existing contempt processes would not apply, and it is unlikely that the members of Congress could pursue a civil suit to compel production.

Further, the provision applies only to the named committees; thus members of all other committees would still face the problem cited in the *Leach* case: courts would likely view the dispute as a political one between members of Congress. Finally, even members of the named committees still would have to persuade a court that it has jurisdiction to hear the suit, and that committee members have standing to sue within the narrow parameters set by the Supreme Court.<sup>12</sup> As detailed further below, two judicial tests appear to have significantly undermined any potential utility of Section 2954 for individual members of the covered committees.

### 4. *Waxman v. Evans*

The first attempt to secure court enforcement of a document demand under Section 2954 was brought in a federal district court in 2001 by 16 members of the House Government Reform Committee seeking census data.<sup>13</sup> The congressional plaintiffs argued that the plain language of Section 2954 unambiguously directs agencies to comply with information requests. They also claimed that legislative history supported their position. In addition, the plaintiffs argued that they were entitled to judicial relief because the agency had refused to provide access to information that was specifically granted to them by law.

The district court ordered the release of the requested census data on the basis of the “plain language” argument. The government thereafter moved for reconsideration, raising for the first time the questions whether plaintiffs, as individual legislators, lacked standing to sue because they were claiming “institutional injuries,” and whether the plaintiffs had a right

8. *Id.* at 876 n.7.

9. Section 2954 provides: “An Executive agency, on request of the Committee on Government [Reform] of the House of Representatives, or any seven members thereof, or on request of the Committee on [Homeland Security and] Governmental Affairs of the Senate, or any five members thereof, shall submit any information requested of it relating to any matter within the jurisdiction of the committee.”

10. 45 Stat. 996 (1928). *See also* H.R. REP. NO. 70-1757 (1928) (citing a study of the Bureau of Efficiency recommending the elimination of 128 specified required reports as unnecessary); and S. REP. NO. 70-1320 (1928).

11. S. REP. NO. 70-1320, *supra* note 10, at 4; H.R. REP. NO. 70-1757, *supra* note 10, at 6; *See also* 69 CONG. REC. 9413-17, 10613-16 (House and Senate debates). In codifying Title 5 in 1966, Congress made it clear that it was effecting no substantive changes in existing laws: “The legislative purpose in enacting Sections 1-6 of this act is to restate, without substantive change, the laws replaced by those sections on the effective date of this act.” PUB. L. NO. 89-554, § 7(a).

12. In *Raines v. Byrd*, 523 U.S. 811 (1997), a suit challenging the Line Item Veto Act, the Supreme Court held that members of Congress lack standing where they fail to allege any “injury to themselves as individuals” and “the institutional injury they allege is wholly abstract and widely dispersed.”

13. *Waxman, et al. v. Evans*, Civ. Action No. 01-14530-LGB (A)(AJWx) (C.D. Cali., May 21, 2001).

of action under Section 2954. The court declined to reconsider its opinion and address these new arguments. The decision was later vacated on other grounds on appeal to the Ninth Circuit.<sup>14</sup>

### 5. *Waxman v. Thompson*

A second attempt to enforce a Section 2954 document demand in the same district court was decisively rejected. *Waxman v. Thompson*<sup>15</sup> was a suit by 19 members of the House Government Reform Committee to compel release of a Department of Health and Human Services document. In addition to asserting a right of access under Section 2954, the congressional plaintiffs alleged a violation of 5 U.S.C. § 7211, which provides that “[t]he right of employees . . . to furnish information to either House of Congress, or to a committee or member thereof, may not be interfered with or denied.” The executive branch opposed the claims, raising the issues of standing, jurisdiction of the court to enforce the statutes, and the doctrine of “equitable discretion.”

On July 24, 2006, the district court, applying the guiding principles established by the Supreme Court in *Raines v. Byrd*, ruled that the congressional plaintiffs did not have standing to sue. Accepting that it was bound by that Supreme Court precedent, the district court concluded that when the secretary refused to produce the documents requested pursuant to Section 2954, plaintiffs did not suffer a personal injury. Rather, Congress, on whose behalf the plaintiffs acted, suffered an institutional injury; namely, that its ability to assess the merits of the bill in question was impeded or impaired.

Quoting the Supreme Court, the district court noted that the plaintiffs were “not . . . singled out for specifically unfavorable treatment as opposed to other Members of their respective bodies.” As such, they could not “claim that they have been deprived of something to which they are *reasonably* entitled,” since the alleged injury “runs (in a sense) with the Member’s seat, a seat which the Member holds (it might be quite arguably be said) as trustees of his constituents, not as prerogatives of personal power.” A violation of Section 2954, the court concluded, raises no personal or particularized injury to the plaintiffs, but at most, creates a type of institutional injury, which necessarily damages all members of Congress and both houses of Congress equally.

The court also noted that no jurisdictional committee had issued either an official request for the documents or a subpoena, nor did the legislative history of the provision imply intent to delegate authority to the requisite number of members of the covered committees<sup>16</sup> to seek to enforce its provisions judicially.<sup>17</sup> The House plaintiffs did not appeal the district court’s ruling. Based on this decision, it is now highly unlikely that any future lawsuit to enforce a document request under Section 2954 would succeed.

## D. House Resolutions of Inquiry

Under the rules and precedents of the House, a “resolution of inquiry” allows the House to request information from the president or direct the head of a department to provide such information. According to the leading procedural guidebook:

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14. On appeal to the Ninth Circuit, the case was argued together with a separate Freedom of Information Act suit for the same census data brought by two Washington State legislators. After oral argument, the appeals court withdrew the submission of *Waxman v. Evans*, deferring the case pending its decision in the FOIA suit. The appeals court ruled in favor of the legislative plaintiffs in the FOIA case on October 8, 2002, and declared the action in *Waxman* was mooted by its FOIA decision. The appeals court issued an order reversing and vacating the district court’s ruling, and sent the case back to the district court with instructions to dismiss. *Waxman v. Evans*, No. 02-55825 (9<sup>th</sup> Cir. 2002). On motion of the plaintiffs, the court of appeals modified this order on January 9, 2003, striking its reversal of the district court’s ruling, but leaving in effect its order to dismiss, thereby opening the door to another round of litigation.

15. CV-04-3467MMM(Manx) (C.D. Calif., May 17, 2004).

16. Section 2954 requires at least seven members of the House committee or five members of the Senate committee to make the request.

17. The ruling in *Miers*, 558 F. Supp. at 68, appears to make it clear that, while a refusal by an agency to comply with a subpoena issued by a jurisdictional committee for information provides a cognizable institutional injury that raises an implied, constitutionally based cause of action, it may only be exercised by means of a civil action that is authorized by a full house of the Congress. Section 2954 requests lack that constitutional component.

[It is a] simple resolution making a direct request or demand of the President or the head of an executive department to furnish the House of Representatives with specific factual information in the possession of the executive branch. The practice is nearly as old as the republic, and is based on principles of comity between the executive and legislative branches rather than on any specific provision of the Constitution that a Federal court may be called on to enforce.<sup>18</sup>

Such resolutions, therefore, are not enforceable through the compulsory processes available to the House. However, they have been useful at times in eliciting the information or providing a springboard for more formal House actions.<sup>19</sup>

A resolution of inquiry is thus a type of expedited procedure for seeking information. Requesting members of Congress do not need to seek a “rule” or permission from the Rules Committee before proceeding to the floor for House consideration, and therefore, the process is not subject to the delays usually facing most legislative actions. A resolution of inquiry may be introduced by one or more members of the House. Once introduced it is considered “privileged.” Clause 7 of House Rule XIII provides that if the committee to which it is referred does not act on the resolution within 14 legislative days, the resolution may then be considered on the House floor despite the lack of committee action. If the committee does seek to act within the 14-day period, it may vote on the resolution of inquiry without amendment; report it with amendments; or report it favorably, adversely or without recommendation.

In actual practice, the committee usually asks the executive to comment upon the information request during the 14-day period. Frequently, the executive’s response during this period will provide enough information to satisfy the purpose of the resolution of inquiry, or the response will convince the committee not to proceed based upon the sensitivity of the information sought or because of competing executive investigations. Thus, an adverse report by a committee may not actually indicate opposition.

On several occasions, resolutions of inquiry have successfully revealed important information or have spurred more formal committee inquiries. Such instances have included revelations of military operations in Vietnam, information about the 1995 Mexico rescue package, and Iraq’s 2002 declaration to the United Nations on its weapons of mass destruction.<sup>20</sup> Not all such attempts have been successful, however. For example, attempts during the 109th Congress to use resolutions of inquiry to seek information from the president, the attorney general, and the secretary of defense regarding the terrorist surveillance program resulted in apparently partisan votes to reject the resolutions.<sup>21</sup>

Despite the absence of enforcement mechanisms, members may turn to resolutions of inquiry for a variety of reasons. They may not be well-positioned within a jurisdictional committee to seek information through normal investigatory processes; or, they may find that such resolutions provide a useful way to draw public attention to an issue and instigate formal investigations.

House resolutions of inquiry have historically been a relatively effective means of obtaining factual material from the executive branch. In the past, even when committees report the resolutions adversely or succeed in tabling them on the House floor, a substantial amount of information has usually been released to Congress. In fact, an argument that the executive has complied substantially with a resolution is frequently the reason for reporting a resolution adversely and tabling it. On occasion, a resolution of inquiry is reported adversely because it competes with other investigations (either in Congress or in the executive branch) that are considered the more appropriate avenue for inquiry. In some situations, resolutions of inquiry have been instrumental in triggering other congressional methods of obtaining information, such as through supplemental hearings or alternative legislation.

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18. 7 DESCHLER’S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES Ch. 24 § 8. *See also* 49 WM. HOLMES GROWN & CHARLES W. JOHNSON, HOUSE PRACTICE: A GUIDE TO THE RULES, PRECEDENTS, AND PROCEDURES OF THE HOUSE 817-22 (Gov’t Printing Office 2003).

19. For a thorough examination of the history, practice and procedures of such resolutions, and an evaluation of their practical utility, *see* CHRISTOPHER M. DAVIS, CONG. RESEARCH SERV., RL 31909, HOUSE RESOLUTIONS OF INQUIRY (2009).

20. *See id.* at 15-18, 20-21; *see also* LOUIS FISHER, THE POLITICS OF EXECUTIVE PRIVILEGE, 150-59 (2004) (recounting successful utilization of such resolutions).

21. *See, e.g.*, H.R. Rep. No. 109-382 (2006) (adversely reporting H. Res. 643, directed at the attorney general for documents concerning warrantless surveillance by the National Security Agency); H.R. Rep. No. 109-384 (2006) (adversely reporting H. Res. 645 directed at the president and secretary of defense for information about the terrorist surveillance program). Neither resolution reached the floor.

The Senate has never established comparable formal procedures for the consideration and passage of resolutions of inquiry.

## E. Rights of Members of the Senate

The rules of the Senate provide substantially more effective means for individual minority-party members to engage in “self-help” to support oversight objectives than afforded to their House counterparts. Senate rules emphasize the rights and prerogatives of individual senators and, therefore, minority groups of senators.<sup>22</sup>

The most important of these rules are those that effectively allow unlimited debate on a bill or amendment unless an extraordinary majority votes to invoke “cloture.”<sup>23</sup> Unless or until there are 60 votes in favor of ending debate through cloture, senators can use their right to filibuster, or simply the threat of filibuster, to delay or prevent the Senate from engaging in legislative business. The Senate’s rules also are a source of other minority rights that can directly or indirectly aid the minority in gaining investigatory rights. For example, the right of extended debate applies in committee as well as on the floor, with one crucial difference: the Senate’s cloture rule may not be invoked in committee. Each Senate committee decides for itself how it will control debate, and therefore, a filibuster opportunity in a committee may be even greater than on the floor. Also, Senate Rule XXVI prohibits the reporting of any measure or matter from a committee unless a majority of the committee is present. Similarly, the Senate Environment and Public Works Committee has adopted a quorum rule that requires the presence of at least two minority party members for a vote on the issuance of a subpoena.

Even beyond the power to delay, senators can promote their goals by taking advantage of other parliamentary rights and opportunities that are provided by the Senate’s formal procedures and customary practices. These include the processes dealing with floor recognition, committee referrals, and the amending process.<sup>24</sup> Members can also take advantage of certain committee rules.<sup>25</sup>

## F. Back Bench Oversight: The Waxman Model

Typically, minority party committee members reflexively oppose their majority party counterparts’ actions, with the object of maintaining the status quo until political fortunes put them back in control. Bereft of compulsory information gathering power or the authority to initiate formal investigations or hold official hearings, they at times resort to five minute diatribes at hearings, fulminating press releases, and dissents in final reports. But—as Rep. Henry A. Waxman demonstrated throughout his time in Congress—this need not be the case.

For Waxman, public engagement was key to successful oversight. Achieving a legislative or public policy objective required building a public record that would eventually create sufficient momentum for change, both in Congress and among the American people.<sup>26</sup> And while “hard” formal investigative powers—such as subpoenas, depositions, hearings, and contempt proceedings<sup>27</sup>—are effective tools toward that end, Waxman understood that they are not the only tools.

During his 14 years as the ranking minority member of the House Oversight and Government Reform Committee, Waxman employed a variety of non-official, non-compulsory approaches to access and disseminate information in service of his oversight objectives. Using the limited funding allocation for the committee’s minority operations<sup>28</sup> and the energy

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22. JUDY SCHNEIDER, CONG. RESEARCH SERV., RL30850, MINORITY RIGHTS AND SENATE PROCEDURES 8-11 (2005).

23. S. Rules XIX and XXII.

24. SCHNEIDER, *supra* note 22, at 8-11.

25. For example, the Senate Environment and Public Works Committee Rule 2(a) that requires a quorum of six members, with at least two minority members, to vote for the issuance of subpoenas has consistently stymied investigations over the years.

26. Michael L. Stern, *Henry Waxman and the Tobacco Industry: A Case Study in Congressional Oversight*, at Part II; see also HENRY A. WAXMAN & JOSHUA GREEN, *THE WAXMAN REPORT: HOW CONGRESS REALLY WORKS* (2009); and MINORITY STAFF OF H.R. COMM. ON ENERGY AND COMMERCE, 113<sup>TH</sup> CONG., *REP. HENRY A. WAXMAN’S RECORD OF ACCOMPLISHMENTS* (2014) [hereinafter *RECORD OF ACCOMPLISHMENTS*].

27. See Josh Chafetz, *Congress’s Constitution*, 160 U. OF PA. L. REV. 715, 722 (2012) (distinguishing between the nature and utility of committee actions in different oversight situations of “hard” compulsory powers to access information and the availability of “soft” powers through the engagement of the media and the general public with a continuing narrative of relevant information produced by a particular inquiry).

28. The minority is allocated one-third of the committee’s budget.

of an experienced, dedicated and long-serving holdover staff, he sent thousands of information requests—to the White House, to agency officials and to targeted private sector parties. Waxman released these letters to the media, which often drew wide attention to a particular issue. Some received official responses, others did not.<sup>29</sup> But Waxman also made clear that he welcomed information from whistleblowers and other cooperative sources, and would protect their confidentiality. A toll-free tip line was established, which was well-used.

In addition, Waxman formed a Special Investigations Division (SID) that interviewed whistleblowers, studied obscure government data bases, and sometimes did undercover work. In 12 years SID produced more than 1000 reports on a wide range of issues that laid the groundwork for landmark legislation and revelations of fraud, abuse of power and maladministration. SID began with reports on the high cost of drugs in comparison to prices in Canada, which ultimately lead to legislation to create a Medicare prescription drug benefit. A host of inquiries followed—on classroom overcrowding; nursing home abuses; the involuntary incarceration of mentally ill youths; online file-sharing programs that bombarded children with pornography; government secrecy; pre-Iraq war claims about weapons of mass destruction; politicization of science; waste, fraud and abuse in private no-bid and limited competition private procurement contracts worth over \$1 trillion; vast overcharges for goods and services for Iraq by Halliburton Corporation; and steroid use in professional sports, among others.<sup>30</sup>

Finally, Waxman's actions after the disclosures of his 1994 tobacco hearing are notable. As indicated in Michael Stern's case study of the tobacco industry inquiry,<sup>31</sup> the revelation of internal industry documents conceding the long-known ill effects of nicotine shifted momentum against the tobacco companies. State attorney general and private plaintiff lawsuits against the industry quickly proliferated, to the point that the industry offered a settlement deal that would have insulated the companies from further legal liability.

Waxman, who by then was the ranking minority member as a result of the 1994 mid-term elections, determined to scuttle the settlement. Because he could not force an official hearing to demonstrate the inadequacy of the settlement terms, he and other congressional colleagues created a "shadow committee" called the Advisory Committee on Tobacco Policy and Public Health. It was co-chaired by former Food and Drug Commissioner David Kessler and former Surgeon General C. Everett Koop, both respected former public officials and anti-smoking advocates. The panel was asked to hold hearings to study the proposed agreement and recommend a public policy through a series of public hearings. The panel found the proposed agreement "unacceptable" and detailed a stronger plan to curb smoking. The committee's conclusion caused the White House to distance itself from the original settlement and the Senate to consider strong ameliorative legislation.

Momentum continued to shift against the industry. Incremental legislation passed over the next few years, but it was not until the 2009 Family Smoking and Tobacco Smoking Control Act—passed under Waxman's aegis—that the FDA was finally given the authority to regulate tobacco products and to ensure that tobacco is not advertised or sold to children.<sup>32</sup>

The efficacy of the persistent Waxman back bench model was demonstrated during the 114<sup>th</sup> Congress by the institution of bipartisan investigations in both houses as a result of minority prodding. In one instance in 2014, it began with letters from Rep. Elijah Cummings and Sen. Bernie Sanders to 17 drug companies respecting allegations of excessive generic drug pricing that were made public and was followed by proposed legislation in 2015. Further, House Democrats formed the Affordable Care Drug Pricing Task Force in 2015 in an effort to spotlight the issue and gain the attention of the chairs of oversight jurisdictional committees such as the Senate Committee on Ageing and the House Committee on Oversight and Government Reform. The efforts were successful as both committees subjected the issue to careful examination in series of public hearings.<sup>33</sup>

There are a number of lessons to be learned from Waxman's efforts. Successful oversight can take time and requires

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29. WAXMAN & GREEN, *supra* note 26, at 152-3.

30. *Id.*, at 157-9, 201-16; RECORD OF ACCOMPLISHMENTS, *supra* note 26, at 20-21, 24-27.

31. Stern, *supra* note 26.

32. WAXMAN & GREEN, *supra* note 26, 171-200.

33. This and other examples of successful minority oversight initiatives in the 114<sup>th</sup> Congress are related in Margaret Krawiec and Thomas Panham, *Why Minority-Initiated Investigations Can Be As Dangerous As Majority-Initiated Investigations*, BLOOMBERG BNS'S DAILY REPORT, Dec. 9, 2016.

perseverance. It is vital to have a chair willing to devote the time and effort to the task and to be supported by long-term, experienced, and dedicated staff. The blunderbuss of formal compulsory processes may not be necessary but the communication with and support of the media, public interest organizations and, ultimately, the general public, is essential.

During Rep. Waxman's tenure in the minority, it was not clear whether the Inspector General Act of 1978 afforded individual members the right to request IG investigations or evaluations of agencies, to receive information about information gathered, or to see the IG's recommendations to the agencies for remedial action. The Inspector General Empowerment Act of 2016, discussed in the following chapter, appears to have clarified these questions in a manner that may provide another effective backbenching tool.

For illustrations of some of the oversight powers, tools, principles, and obstacles discussed in this chapter, see the following case study in Part II:

Michael L. Stern: *Henry Waxman and the Tobacco Industry: A Case Study in Congressional Oversight*