[COMMITTEE PRINT]

CONGRESSIONAL OVERSIGHT: A "HOW-TO" SERIES OF WORKSHOPS

Sponsored By The

THE SPEAKER AND THE CHAIRMAN, HOUSE RULES COMMITTEE

Organized and Conducted By The

CONGRESSIONAL RESEARCH SERVICE

Proceedings of the Three-Day Workshop On

Congressional Oversight: A "How-To" Series of Workshops

June 28, July 12 and 26, 1999

Printed for the use of the Committee on Rules

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Congress of the United States
House of Representatives
Washington, DC 20515

May 13, 1999

The Honorable Daniel P. Mulhollan
Director
Congressional Research Service
The Library of Congress
Washington, D.C. 20540-7210

Re: Bipartisan Oversight Workshop

Dear Mr. Mulhollan:

We believe Congress must focus more attention on programmatic oversight to ensure accountability in government programs. Congressional oversight is a core constitutional function of the legislative branch and a function which needs improvement. One way to improve oversight is to provide training to Members and professional staff on a bipartisan basis. To this end we would like Walter Oleszek and Morton Rosenberg of the Congressional Research Service ("CRS") to conduct an "oversight workshop" for congressional staff.

Among the purposes of the workshop would be to provide a forum for committee staffs to discuss ways of carrying out the oversight responsibilities of Congress, review case studies of successful committee oversight and investigative activities, and improve coordination and rapport among committee staffs involved with oversight. It is our expectation that many congressional staff and some Members of Congress will participate in such a workshop – particularly those individuals involved with programmatic oversight.

In past years CRS has been instrumental in providing oversight training to congressional staff. We believe such training is again needed to assist Members and staffs to more effectively conduct programmatic oversight.

Thank you in advance for your assistance in this endeavor.

Sincerely,

J. Dennis Hastert
Speaker

David Dreier
Chairman, Committee on Rules

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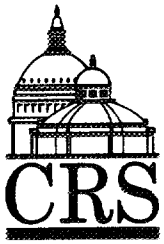
LETTER OF TRANSMITTAL



CONGRESSIONAL RESEARCH SERVICE • The Library of Congress
101 INDEPENDENCE AVENUE, S.E. WASHINGTON, D.C. 20540–7000

March 9, 2000

The Honorable Dennis Hastert
Speaker of the House
H-232, The Capitol
Washington, D.C. 20515

The Honorable David Dreier
Chairman, House Rules Committee
H-312, The Capitol
Washington, D.C. 20515

Dear Mr. Speaker and Mr. Chairman:

Your letter of May 13, 1999 requested the Congressional Research Service to provide training to the professional staff of Congress on a bipartisan basis. The letter suggested that a series of oversight workshops be conducted as a way "to provide a forum for committee staff to discuss ways of carrying out the oversight responsibilities of Congress, review case studies of successful committee oversight and investigative activities, and improve coordination and rapport among committee staffs involved with oversight."

In response to your request, CRS organized and conducted a "how-to" series of workshops. More specifically, there were three workshops with each addressing a unique theme: (1) Congress's Oversight Prerogative, (2) Resources for the Conduct of Oversight, and (3) Investigative Oversight: An Overview. All the workshops were held on Monday mornings (June 28, July 12 and 26, 1999) in HC5 of The Capitol. Program participants included acknowledged experts in the legislative review process, including the Comptroller General of the United States. CRS videotaped the proceedings of each workshop and prepared a series of oversight videotapes to be broadcast over Congress's internal television network. A transcript of the three-day workshop was also prepared, and I am pleased to submit per your request an edited version of the proceedings.

I should note that two CRS staff members, Walter Oleszek and Morton Rosenberg, took the lead in organizing and conducting each of the workshops. To be sure, they consulted with appropriate Capitol Hill aides for advice and assistance in putting the programs together. In addition, Robert Nickel, Jerry David, and Gary Levine videotaped the proceedings and Thomas Miller and Karen Wirt provided logistical assistance. Lastly, we are indebted to Mabel Gracias for her excellent production assistance.

I trust that this edited transcript of the workshop's proceedings will assist the Congress in carrying out its important oversight responsibilities and provide useful and valuable ideas and information to the Members and professional staff of the legislative branch.

Sincerely,

Daniel Mulhollan
Director

CONGRESSIONAL OVERSIGHT: A "HOW-TO" SERIES OF WORKSHOPS

MONDAY, JUNE 28, 1999

CONGRESS'S OVERSIGHT PREROGATIVE

Introductory Remarks

Angela Evans
Deputy Director, Congressional Research Service

1 MS. EVANS: On behalf of the director of CRS, Daniel Mulhollan, and the
2 staff of CRS, I welcome you to this very important workshop. We are pleased at
3 CRS to present this bipartisan workshop at the request of the Speaker, Mr. Hastert,
4 and the Chairman of the Rules Committee, Congressman Dreier. CRS first
5 conducted a formal workshop on oversight in 1978 at the request of Speaker of the
6 House O'Neill. So this type of assistance is not new to us, and we hope we designed
7 a good program for you.
8 Oversight, as you know, is critical in so many ways. It ensures executive
9 compliance with legislative intentions, it prevents executive encroachment on
10 legislative prerogatives, it reviews and determines federal financial priorities, it
11 ensures that executive policies reflect the public trust, and it protects individual rights
12 and liberties. These are just a few things that you will be exploring with us over
13 these three workshops.
14 Our hope is that the design and content of this workshop, the first in the
15 series, meets with the objectives set out by the leadership: to give you real and

1 practical experience in programmatic oversight, and to give you a forum to meet each
2 other, form collaborative relationships and get to know each other and how you
3 work.
4 I am very pleased to turn over the program to Chairman Dreier. We wish you
5 well.

6 **Statement of House Rules Chairman David Dreier**

7 CHAIRMAN DREIER: Thank you very much. Let me say, it is nice to be
8 here with all of you on a Monday morning. This may be the first time in my life that
9 I have ever been in the Capitol at 9:00 o'clock Monday morning.
10 I have just returned from a meeting that Mr. Hamilton and I participated in
11 last year. Let me say there was a tremendous void without your presence, Lee, but
12 it was a meeting of the Mexico-U.S. Interparliamentary Conference, the 38th
13 meeting. And this morning, as I was coming over, I was thinking about the
14 juxtaposition between the Mexican Parliament and the United States Congress. It is
15 very clear that there is a major responsibility that the United States Congress has that,
16 frankly, most legislative bodies throughout the world do not have. And that is
17 exactly why we are here today--to emphasize the very important role of
18 congressional oversight.
19 As was said a moment ago, former Speaker Tip O'Neill launched an effort on
20 this two decades ago. To me, it seems that it is very important that it continue. I was
21 particularly gratified when, at the beginning of the 106th Congress, Speaker Hastert
22 made it very clear that proceeding with bipartisan congressional oversight is a very

1 important responsibility that we have here. And, frankly, it is something that we
2 have not focused as much attention on as we should.
3 When Speaker Hastert and I discussed this, and I have discussed it with my
4 counterpart on the Rules Committee, Mr. Moakley, and a number of other people,
5 clearly, this is a very important task. And we have, I am happy to say, brought on
6 someone who is very expert in dealing with that and is overseeing this issue for me.
7 And I'm talking about Will Moschella, who worked for both the Government Reform
8 Committee as well as the Judiciary Committee before he became counsel to the
9 House Rules Committee.
10 So, Will, why don't you stand up and be recognized here.
11 [Applause.]
12 CHAIRMAN DREIER: Well, I will applaud since very few other people did,
13 Will. Mort is the only one who really led the applause there.
14 So let me express my appreciation to the Congressional Research Service for
15 their fine effort in organizing these workshops. Mort Rosenberg and Walter Oleszek,
16 who have spent a lot of time and energy working on this issue, are to be commended.
17 This is the first of three sessions to make sure that we have congressional staffs
18 expending time and energy on this issue of oversight. So I want to congratulate all
19 of you for being here, and hope that it is a very helpful program.
20 And with that, I am very pleased to turn the microphone over to my former
21 colleague who is the Director of the Woodrow Wilson Center and someone with
22 whom I worked very closely in 1993 when we co-chaired what was known as the
23 Joint Committee on the Organization of Congress. We are still to this day working
24 to implement some of the provisions that were recommended by that Joint

1 Committee, one of which is budget process reform. We in the Rules Committee,
2 Lee, had a markup just last week on that and we were hoping to consider it this week.
3 We're not going to be able to, but it still is a high priority for Speaker Hastert and,
4 again, it is a bipartisan effort.

5 I will just mention that Lee and I served together as delegates to the Mexico-
6 U.S. Interparliamentary Conference last year. Lee Hamilton is very well known for
7 his expertise in foreign policy and he and I have worked closely on a wide range of
8 issues, including international trade which is a top legislative priority.

9 So, with that, I am going to turn it over to the very able hands of my former
10 colleague who is much missed here but who is still playing a very active role in
11 public policy, Lee Hamilton.

12 **Keynote Address**

13 **OVERSIGHT: A KEY CONGRESSIONAL FUNCTION**

14 **The Honorable Lee H. Hamilton**
15 **Director, The Woodrow Wilson Center**
16 **Member of the U.S. Congress, 1965-1999**

17 MR. HAMILTON: Good morning to all of you. Chairman Dreier, thank you
18 for your gracious words. Some years ago we had a Speaker of the House by the
19 name of John McCormack. He always wanted to get involved in the debates. So he
20 would sit up in the Speaker's Chair, and you could just see him get more and more
21 impatient, and finally, he would come down and join the debate. Someone on the
22 other side of the aisle would likely irritate him, and he would say in this elaborate

1 courtesy that we often have in debate around here, "I hold the gentleman from Iowa
2 in minimum high regard."
3 I hold Rules Chairman David Dreier in maximum high regard and it is good
4 to be with him. Indeed, in this room, we had many of the meetings of the Joint
5 Committee on the Organization of Congress, which he and I worked on for a good
6 long while.
7 I am pleased, of course, to be here to talk about oversight. Oversight of how
8 effectively the executive branch is carrying out congressional mandates is an
9 enormously important function of government. Indeed, from my point of view at
10 least, it is at the very core of good government. Congress must do more than write
11 laws; it must make sure that the Administration is carrying out the laws the way the
12 Congress intended.
13 The purpose of oversight, it seems to me, is to determine what happens after
14 a law is passed. Woodrow Wilson--I find myself quoting Woodrow Wilson a good
15 bit these days as the Director of the Wilson Center--said, "Quite as important as
16 lawmaking is vigilant oversight of administration." More power now is delegated
17 to the executive branch. All you have to do is observe the extraordinary extent by
18 which President Clinton, for example, has governed by use of Executive Orders. As
19 more and more power is given to the executive branch, and as more laws are passed,
20 the need for oversight continues to grow.
21 That is why I have been particularly concerned about what I consider to be
22 the weakening of congressional oversight over the past years. Congress has given
23 too much focus to personal investigation and possible scandals. It has permitted the
24 desire for media coverage to drive the hearing and the oversight process rather than

1 emphasize programmatic review and a comprehensive assessment of what federal
2 programs work and what federal programs don't work. For those of us who care very
3 deeply about this institution of the Congress, I think that has been a disturbing trend.
4 Thus, I strongly commend and support Speaker Hastert's desire, as I
5 understand it, to return the House to its more traditional oversight functions. He and
6 Mr. Dreier say in the letter suggesting this oversight workshop, "We believe the
7 Congress must focus more attention on programmatic oversight to ensure
8 accountability in government programs." That is right on the mark so far as I am
9 concerned, because Congress needs to get back to the basics on oversight.
10 Under CRS Director Dan Mulhollan's direction, Walter Oleszek and Mort
11 Rosenberg have assembled excellent panels for this series of oversight workshops.
12 You are going to be hearing some real experts in this area. And I am very pleased
13 about that.
14 Now, let me talk first about the importance of good oversight. I believe in
15 tough, continuing oversight. Oversight, as has already been suggested, has many
16 purposes--to evaluate programs; to make sure programs conform to congressional
17 intent; to ferret out, in that oft-heard phrase in government, "waste, fraud, and abuse;"
18 to see whether programs may have outlived their usefulness; to compel an
19 explanation or justification of policy; to ensure that programs and agencies are
20 administered in a cost-effective, efficient manner.
21 Oversight is designed to throw light on the activities of government. It can
22 protect the country from an imperial presidency and an arrogant bureaucracy, it can
23 expose and prevent misconduct, and maintain a degree of constituency influence in
24 an administration. I think the responsibility of oversight is to look into every nook

1 and cranny of government. It is designed to look at everything the government does,
2 expose it, put the light of publicity on it, review, monitor, supervise the execution
3 and implementation of public laws to assure that the laws are faithfully executed.
4 Now Congress uses a number of tools, as you all know, in exercising its
5 oversight responsibilities--the reauthorization of bills, personal visits to agencies by
6 staff members and members themselves, the GAO, the Inspectors' Generals,
7 subpoenas, and agency and committee reports. In addition, several types of
8 committees of the Congress engage in oversight--authorization, appropriations,
9 special ad hoc committees, and the Government Affairs Committees all play an
10 important role. And Congress needs all of these oversight tools to hold agencies
11 accountable.
12 In many ways, I think the Congress has always underestimated and
13 undervalued its power in oversight. My experience is that agencies get very nervous
14 when someone from Congress starts poking around, and that is to the overall good.
15 Federal bureaucracies do not stay on their toes unless they expect review and
16 oversight by Congress.
17 Many of you here are more familiar with the history of oversight than I am.
18 I will not go into that in great detail. For my purposes, I know it starts from the very
19 beginning days of Congress; I believe the Indian Wars of the early 1790's may have
20 been the first time the Congress conducted a major investigation. But for my
21 purposes, oversight really began with the Legislative Reorganization Act of 1946
22 which had that phrase "continuous watchfulness" by Congress of the Executive
23 Branch in it. And House Speakers from time to time, such as Speaker O'Neill and

1 Speaker Hastert, have decided that the Congress needs to do a better job in exercising
2 its oversight prerogative.
3 I believe that legislative oversight is essential to good public policy. Most
4 important public policy issues today really are very complicated and Congress is
5 seldom able to specify fully all of the details of a government program in legislation.
6 You all know that the legislative process requires a lot of compromises to be made.
7 Language often gets fuzzy as a result of those compromises. And when that happens
8 the direction of the bureaucracy is less clear and less precise. What that means is that
9 the bureaucracy has a lot more leeway in determining the nature of the program. So
10 you need oversight for a number of reasons. Tough monitoring by Congress can
11 encourage cost-effective implementation of a legislative program.
12 Congress must assure that the program as implemented reflects the intent of
13 the Congress. In complex areas like environmental policy or health care, agency
14 officials will sometimes misinterpret a piece of legislation, or they may simply use
15 their discretion because of the fuzzy language given in the law to shift policy toward
16 their views, the president's views, or sometimes the views of a special interest group.
17 Congress must continue to monitor programs to determine whether
18 unintended consequences or changed circumstances have altered the need for reform.
19 Members of Congress are helped in the task of oversight because they have very
20 close contact with their constituents and that gives them special opportunities to
21 observe on a day-to-day basis the strengths and weaknesses of federal programs as
22 they are being carried out.
23 In recent years, the traditional oversight activities of the Congress have
24 declined. I believe that is true for a variety of reasons. The shorter congressional

1 work week means that committees do not meet as often as they used to and that
2 reduces the time for oversight. You cannot call a meeting of a committee on
3 Monday, you cannot usually call now in the House a meeting even on Tuesday
4 morning. When the House begins to vote Tuesday evening, that really knocks out
5 Monday and Tuesday for oversight hearings.

6 The congressional schedule gets jammed into Tuesday night, Wednesday and
7 Thursday. Members want to be out of here Thursday night. That means a chairman
8 on an ordinary week may have only two days for congressional oversight hearings,
9 and, of course, oversight is given second priority to the legislative output. So the
10 shorter congressional workweek, I think, has had a major impact on oversight.

11 The power of the authorization committees, which is where most of the
12 oversight was done, has declined over the years. Indeed, some academics today are
13 beginning to debate whether or not you need authorization committees in the
14 Congress anymore. Monitoring the myriad of federal programs is tedious. It takes
15 time, the preparation is tough, and often it is quite technical. It is very unglamorous
16 work and most members see very little political benefit from engaging in it.

17 Members do not rank oversight at the top of their responsibilities. If you talk
18 to most members, number one is constituent service, number two is legislation, and
19 number three is oversight. The media does not pay much attention to traditional
20 oversight work, they prefer to focus on scandals and other matters. There is simply
21 less interest in government reform today, and constituents rarely contact their
22 members asking them to engage in a systematic program review.

23 Another factor in oversight's decline has been that the priorities of Congress
24 have shifted away from the careful review of programs to highly adversarial attempts

1 at discrediting individual public officials, looking at great length into some of these
2 matters. Now you and I understand that that kind of thing is going to happen, and
3 should happen from time to time. The Congress has probed executive actions from
4 its earliest investigations of the Indian Wars, to the Teapot Dome scandals, to
5 Watergate, to Iran Contra. The authority of Congress to conduct investigations can
6 be a critical check on executive power.

7 But I think there has been too much personalization and not enough policy
8 in congressional oversight. For many years, a lot, a very lot, of congressional
9 oversight has been done for partisan purposes. That does not necessarily make it bad.
10 But spending too much time on personal investigations weakens the oversight
11 function of Congress. It consumes, of course, the executive branch and its resources,
12 but more importantly, it diverts Congress and Congress' time and resources from the
13 more constructive work of policy oversight.

14 I haven't spoken to Speaker Hastert about the reasons for suggesting this
15 workshop, but my guess is his thoughts run along the same lines. He wants to
16 attempt to redirect congressional oversight, and I think that is a good sign.

17 Now let me identify for you, if I may, several areas that I found helpful in
18 conducting oversight, and then I will talk about some of the rules of oversight.

19 I did a lot of my work in the area of international affairs. I found several
20 things helpful in the conduct of oversight. As you would expect, regular hearings,
21 they are a very important part of oversight. Yet I believe hearings can be very
22 unproductive if members simply come into the room and read prepared questions and
23 are not prepared to follow up with tough questions in light of the initial responses
24 from the witness. You have to be prepared to do good oversight work. I have sat in

1 hearing after hearing and been appalled at the fuzziness of questions asked by
2 Members, and at the unwillingness of Members to pursue a topic, to get a response.
3 The fact of the matter is, the Administration, this one or any other, doesn't
4 like to articulate policy, at least in that setting of the congressional hearing. There
5 are vast areas of policy an administration simply doesn't want to articulate. It is the
6 job of the Congress, in part, to make them articulate policy. And I found hearings
7 especially helpful in forcing executive branch witnesses to articulate the policy and
8 the rationale behind the policy.
9 Closed briefings can be helpful. I instituted a monthly series of "Hot Topic"
10 classified briefings to shift members' attention away from the headlines to important
11 issues which were not in the headlines that members did not routinely pay attention
12 to.
13 Inserting response letters from the executive branch into the *Congressional*
14 *Record* is a routine matter, but I found that practice exceedingly helpful and I was
15 amazed at how many people in the policy community and in the academic
16 community read those letters with great care. Sometimes you have to go back and
17 forth. You send a series of questions to the Administration, they send back answers.
18 You have to analyze those answers to see whether or not they are responsive and
19 pertinent and relevant. If they are not, you have to go back again with follow-up
20 questions. So this is a tedious process but an important one. And then you put those
21 letters into the *Congressional Record.* It helps pin down the Administration's policy.
22 Staff travel, of course, can be very important. Periodic staff trips focused on
23 particular areas of concern to the chairman and ranking members of the committee
24 can provide useful oversight information. Informal contacts likewise can be very

1 important, frequent informal contacts. If you get to know the people in the
2 Administration who have the responsibility for overseeing a particular program,
3 regular contacts with those people can be enormously helpful and informative to
4 congressional staff. That can sometimes lead you astray, however, if there gets to be
5 too close a relationship between the staffer in the Congress and the bureaucrats. You
6 have to balance that very carefully.

7 Agency reports to the Congress are an important and very useful tool. GAO
8 investigations are as well.

9 Now let me turn to a few general thoughts and observations about what I
10 believe makes for successful oversight. The first one, obviously, is a bipartisan
11 effort. There are going to be times when a committee chairman and a ranking
12 member will not agree with respect to oversight. But in most areas, and this may
13 surprise you I think, but in most areas they will agree about the need for oversight,
14 at least for the bulk of the congressional oversight agenda.

15 Policy oversight is aided when there is a constructive relationship between
16 the Congress and the implementing agency. Much oversight by its very nature is
17 adversarial and it is particularly appropriate when an agency has demonstrated
18 egregious behavior in the implementation of some program. But excessive
19 antagonism between the executive branch and the congressional committee can be
20 counterproductive and do very little to improve program performance, which is, after
21 all, the target, at least it was the target for me although not always the target of
22 others. If you get to the point where you are at total loggerheads between the
23 Congress and the executive branch, then you are not going to see any improvement
24 through oversight of the policy.

1 Oversight should be done in a regular and systematic way. Congress lacks
2 a continuous systematic oversight process. It often employs oversight in an erratic,
3 episodic manner. Dave Dreier and I chaired the 1993 Joint Committee on the
4 Organization of Congress and one of the things we recommended was that every
5 committee do a systematic review of all of the programs in its jurisdiction every ten
6 years. My sense is that there are activities of government that have literally gone on
7 for scores of years without any oversight.

8 Oversight has to be comprehensive. There are a vast number of activities of
9 the federal government that never get into the newspaper headlines, but it is still the
10 task of the Congress to look into them. Oversight that is driven by whether we can
11 get cameras into the hearing room is not going to get the job done. I am impressed
12 by how much oversight in this institution today is driven by the cameras. Decisions
13 are so frequently made, and I have sat in on scores of them, about oversight on the
14 basis of how much media attention can be attracted, or how many celebrities can be
15 attracted to the hearing. The relationship between the decline of oversight by the
16 Congress and the decline of investigative journalism, which has clearly occurred, I
17 think bears further examination.

18 Being comprehensive in oversight means casting the net widely to look at a
19 variety of federal agencies involved in a particular area, not just the main agency that
20 is involved. You cannot investigate American foreign policy by only looking at the
21 State Department, not when many other agencies in government have major foreign
22 affairs responsibilities.

23 The oversight agenda of Congress, of course, should be coordinated to
24 eliminate duplication. The Armed Services Committee, the Select Intelligence

1 Committee, the International Relations Committee often have some overlap in the
2 foreign policy work that they do, but there ought to be some kind of coordination.
3 I am not sure I have ever seen much coordination in the oversight activities of the
4 Congress.

5 Continuity and expertise are critical to successful oversight. If you have large
6 turnover of staff on a committee, if you have large turnover of chairmen, that harms
7 the institutional continuity and expertise so essential to the job of oversight. In
8 general, that is why I favor standing committees doing the oversight, although I have
9 participated in several ad hoc committees. Oversight, of course, should not be used
10 or directed by special interest groups.

11 There is such a thing, I believe, as too much oversight. Good oversight draws
12 the line between careful scrutiny, on the one hand, and intervention and
13 micromanagement, on the other. Congress should try to focus and examine the broad
14 public policy issues but it should not mettle and it should, in my view at least, try to
15 avoid a media show. It should certainly expose corrupt and incompetent officials.
16 It should avoid attacking competent and dedicated officials. These are hard lines to
17 draw, I appreciate, in any given situation.

18 Oversight requires the reports of agencies to be informed, but the reporting
19 requirements should not be excessive. I have seen a dozen times Congress
20 compromise on a given issue by saying, "Well, let's have the agency prepare a
21 report." As a result, there are literally thousands of requests for reports made to the
22 executive branch. It is hard to know when to call for a report and when not to call
23 for a report. It is an important tool of oversight. I am inclined to think we have

1 overdone it. In general, the quality of oversight is much more important than the
2 quantity of that review.

3 Good oversight requires documentation. The more you can get things in
4 writing the better off you are. It requires follow-through. It is one thing to ask
5 agencies to improve their performance, but it requires staff and members to make
6 sure that changes have taken place.

7 Oversight cannot be done simply by staff. It requires member involvement.
8 The staff plays the key role in oversight, but the members have often left too much
9 responsibility to the staff on oversight. Bringing members in certainly gives
10 additional leverage to any oversight inquiry.

11 Oversight requires favorable signals from the leadership of both parties.
12 Oversight must be seen by all members as a priority of the leadership. And that, too,
13 is an important reason why Speaker Hastert's letter is important.

14 And, of course, oversight needs great public accountability. I believe the
15 Congress needs to provide clear reports from each committee outlining the main
16 programs under its jurisdiction and explaining how the committee reviewed them.
17 As citizens begin to understand the importance of oversight in achieving the kind of
18 government they want--basically, a government that costs less and works better, in
19 the phrase of a few years ago--I think they will demand more emphasis on the quality
20 of oversight by the Congress.

21 Let me conclude. My personal belief is that conducting oversight is every bit
22 as important as passing legislation. A strong record of congressional oversight will
23 do a lot to restore public confidence in this institution, and it will show that the
24 Congress takes its work seriously and that members are able to work together. I am

1 not Pollyannaish about all of this. There are going to be a lot of roadblocks and
2 obstacles in the effort to strengthen and improve oversight. I am very much aware
3 that the views that I have just stated to you would not meet with the approval of
4 many Members of Congress today.

5 Oversight work is not particularly easy under the best of circumstances. We
6 cannot expect all of the hard feelings and the distrust about the direction of oversight
7 in recent years to dissipate quickly overnight. But it is my very firm view that in this
8 area the Congress simply must do a better job. Your willingness to participate in
9 these workshops, and the extraordinary amount of work that has gone into the
10 preparation of these CRS reports are, to me, a heartening sign, along with Speaker
11 Hastert's letter. Because of all this work, the Congress should and will do a better job
12 of oversight. Thank you very much.

13 MR. OLESZEK: Mr. Hamilton will stay for some questions. So I hope some
14 of you have are ready to ask some questions.

15 QUESTION: You mentioned that a purpose of oversight is to elicit the policy
16 views of executive agencies. Were you trying to insure that agencies are
17 implementing laws in accordance with Congress's intent?

18 MR. HAMILTON: I think that is part of it very much. You want to make
19 sure that the policy as articulated by the Administration follows whatever statutory
20 guidance there is. But oftentimes you want the Administration to state policy where
21 there is no legislative guidance. I guess I ran into that frequently in my area of
22 foreign affairs when you are simply trying to understand what the Administration's
23 policy is towards a given area of the world. But your point is well-taken. You ask
24 them to articulate policy to see if that policy is in accord with the legislation.

1 QUESTION: In your experience, have you noticed a change or an evolution
2 in the responses of those being overseen?
3 MR. HAMILTON: I don't think they like it. They didn't like it a long time
4 ago; they don't like it today. But I don't think it matters. I think the Congress has the
5 responsibility and should do it.
6 I don't know that I find a difference so much in timeframe as you just find an
7 enormous difference within the executive branch about the role of the Congress.
8 There are agencies and departments of government that look upon the Congress as
9 an obstacle to be overcome, as a hindrance in the execution of policy. In other
10 words, their attitude is get out of my way, I know what the national interest is and I
11 can do it better than you can do it. On the other hand, you find a lot of people, and
12 probably the majority of them, who genuinely appreciate that the role of the Congress
13 is as a partner in public policy, not as an obstacle to public policy, and that Congress
14 has important things to say. So I just find a great variation, yes.
15 QUESTION: If I could follow up. I was listening to Henry Ruth during the
16 Senate's recent Independent Counsel reauthorization hearings. He mentioned that
17 he had seen a great difference in the way people were responding to oversight during
18 Watergate and today, and I am talking specifically about the legal process, the ability
19 to extend the process of discovery for longer periods of time. Did you notice a shift
20 from the beginning of your congressional participation to now?
21 MR. HAMILTON: I would certainly respect the view of Henry Ruth. He
22 played a very important role some years ago in some of these investigations,
23 although I don't think his experience has run too heavily to oversight in the last few

1 years. I guess my experience would be a little different from his at that point. But
2 he is a very able person and has had a lot of experience with congressional oversight.
3 QUESTION: You mentioned that federal agencies get nervous, because
4 Congress holds the purse strings. Is there another "carrot-stick" combination that
5 should be employed in following through with oversight to make sure an agency has
6 made a change? Is there some power that we have other than the purse strings?
7 MR. HAMILTON: Obviously, the purse string, as you recognize, is a very
8 important power and may be, by all odds, the most important in any oversight
9 function. But I think disclosure is a very important power in all of this. And it has
10 to be used in a nuanced way.
11 You always have to ask yourself, what is my objective? If my objective is
12 to make the department of whatever look like a bunch of bumbling idiots, I can
13 usually do it as a chairman, because if you're administering a department of billions
14 of dollars and hundreds of thousands of people, if you can't find a few screw-ups
15 somewhere, you are not doing a very good job. And it's easy to make a witness in
16 front of you look like an idiot if you are any good at all as an oversight chairman.
17 And sometimes you may want to do that. You may want to embarrass them--I guess
18 that's the stick--and you may want them to look incompetent. But if you do that, you
19 have to be very sure what your purposes are, I think. And if the purpose of oversight
20 really is eventually better policy, I don't know that you necessarily get it through
21 embarrassing a witness.
22 So I think the important thing is to keep your mind on your particular
23 objective. It may be you come into a hearing and say, okay, the conduct of this
24 department has been so bad that I just want to expose them, I just want to bring it out,

1 I want to embarrass them, and you go after them in a very tough, hard way. It may
2 be that you say, okay, this is a very good program we've got on the books here, does
3 a lot of good, and I want to further that program, I want to strengthen it. And so your
4 attitude is entirely different, it seems to me, with that kind of an approach. You have
5 to keep in mind what you are shooting at.

6 QUESTION: Some of the issues that come up again and again have to do
7 with simple management. It is tedious stuff. Some experienced staff have said the
8 biggest problem with doing oversight on those issues is getting members interested
9 in that kind of inquiry. Do you have any comment on that?

10 MR. HAMILTON: Well, I think it is a big problem. And I can appreciate
11 the frustration of staff on it. Most chairmen that I know--let me put it gently--can be
12 guided by good staff. I certainly was. There are so many different things to pay
13 attention to. So I think staff can guide a member, a chairman, in the right direction,
14 and that often is the case. But what you say is very true. Management of an agency
15 is a very difficult thing to conduct oversight on because you have to get into financial
16 records, auditing, all very difficult matters. It is very tedious. And let me tell you,
17 the audience will be yawning and cameras will stay away from you. But I think it
18 has to be done and should be done anyway.

19 And the obligation of a staff member, if I may be so bold, is to say to a
20 chairman, look, this is an area where we think the administration is really screwing
21 up, or where we suspect incompetence or maybe even worse, fraud, and we really
22 need to dig into it. And I think most chairmen would be receptive to that, although
23 not invariably. In the end, the chairman calls the shots.

1 QUESTION: Mr. Hamilton, you mentioned that staff turnover and chairmen
2 turnover have been an obstacle to continuous oversight. How do we stop staff
3 turnover being as great as it is, and, other than changing the Rules of the House, how
4 do we keep chairmen in office?
5 MR. HAMILTON: Well, I figured somebody would pick up on that with all
6 the interest in the Republican Conference on term-limited chairmen. It is a hard line
7 to draw, and I don't know that there are any set rules about it. I have seen instances
8 of an absolutely too cozy of a relationship between a chairman and a secretary of a
9 department or high ranking officials in a department. A turnover of the chairman, at
10 that point, is probably a good thing. It all depends, of course, on the chairman.
11 I don't know how you can stop the turnover of staff. I assume it is pretty
12 high. Staff is basically a young person's job here. People come to Washington to the
13 Congress, get on a congressional staff; they can make a good reputation there and
14 move into other areas and do very well. It is very hard to keep a staff member
15 twenty, thirty years around here, although all of us can point to a good many staff
16 people who have been here a long time.
17 I am simply saying that this is an obstacle that you have to watch in getting
18 good oversight. You do need experienced people on your staff who have a long-term
19 perspective on a particular agency, it seems to me. And to some degree, the
20 chairmen and ranking members benefit from experience.
21 Let me give you one particular committee where I think it is terribly
22 important. I served as chairman of the Intelligence Committee. In the Democratic
23 Caucus, I think the rule is the same today, we had a six-year rule for serving on the
24 committee because it was such an enormously popular committee. I think the

1 Republicans have some limitation as well. I went before the Democratic Caucus and
2 said it took me two terms literally to learn the vocabulary.
3 I had worked in the Congress on foreign affairs, and I thought I knew a lot
4 about foreign affairs. I went into the Intelligence Committee and found out I didn't
5 know anything. I would sit in hearings and there would be whole sentences and
6 paragraphs I wouldn't understand because of the terminology and the vocabulary.
7 Well, the Committee probably had a lot of members who learned faster than I did,
8 but it took me a long while. I became chairman in my final term and I felt at that
9 point I was beginning to be on a par with the CIA officials, that they couldn't fool me
10 quite as easily as before.
11 So I see some advantage in a longer term for a chairman from that standpoint.
12 There are a lot of aspects to this problem, but from that standpoint I see some
13 advantage to it. We have to, I guess, strike a balance as to what the best thing is with
14 respect to longevity versus turnover of committee chairmanships.
15 QUESTION: What about the Senate's role? House Members often ask why
16 do I have to go through weeks and weeks of hearings only to know my
17 reauthorization bill is DOA in the other body? I guess part of the reason is because
18 many Senators sit on both the authorizing and the appropriating committees and don't
19 see the need necessarily to hassle with reauthorization bills. But that attitude
20 certainly hampers oversight in the House. You would hope, if there is a three year
21 authorization and you passed it in year one, you would do oversight for the next
22 several years.
23 MR. HAMILTON: That is a very formidable problem. I think it is the cause
24 of an awful lot of frustration by members, including myself when I was in the House,

1 when you spend enormous hours on hearings, markups, all the rest, go through the
2 floor, and then see the bill just collapse in the Senate. What is the solution to it? I
3 don't think I have any easy solution except to say that sometimes it can be headed off
4 by very close collaboration between the chairmen of the two committees in the
5 respective houses. There is not always a willingness to take their word, but if the
6 chairman of the Senate committee, for example, tells you that a bill is not going to
7 come to the floor, and gives you his word that it is not going to come up, then I think
8 the House ought to know that it is wasting its time.

9 Now sometimes members will choose to go ahead anyway because they want
10 to make a political point with the bill, which is perfectly okay in the process. In other
11 words, their purpose then becomes not legislation, but politics. And that's okay. But
12 it is a major fact. The only thing I know is close cooperation between the two
13 chairmen to head that kind of thing off.

14 More fundamentally, however, you are raising the question of the
15 authorization committee. When I came to the Congress way back in the middle
16 1960s, members would fight to get on the Education and Labor Committee, for
17 example, which was where the action was, the authorization committee. Today, the
18 greenest freshman walks into the Congress and knows immediately he or she wants
19 to get on the Appropriations Committee because he knows, she knows, that is where
20 the action is. And more and more action in the Congress has been shifted to the
21 Appropriations Committee. I do not see that stopping.

22 The executive branch begins to play it, too. In other words, the executive
23 branch early on in the year will say, "Why fight this issue through the authorization
24 committee? We are going to have to fight it again through the Appropriations

1 Committee. Why go through this fight twice? Let's just start dealing with the
2 Appropriations Committee and forget about the authorization committee." That is
3 a very common posture in the executive branch today. If you are looking at it from
4 the executive branch point of view, it makes some sense. And so the authorizing
5 committees are more and more diminished in their responsibilities. This varies a
6 little bit from subject to subject.

7 My own personal view is I have begun to doubt whether authorizing
8 committees are really necessary in this institution. I am prepared to look at
9 alternatives. There is no quick answer to your question. I think it is fundamentally
10 built into the process and not easily resolved.

11 QUESTION: Doesn't that lead you, Mr. Hamilton, to conclude that maybe
12 the administration won't respond to document requests, they won't send up witnesses.
13 I'm talking about the authorizing committee. What you are looking for if you are an
14 authorizer would be a splash, it would be something where you absolutely do have
15 cameras. That is the only way that you are going to get any change rather than doing
16 sort of a standard oversight in a quiet room, or by staff, GAO, or whatever. You
17 have somebody go out and look at something and then you put in a paragraph in your
18 authorization bill. What this process has led to is a requirement for some headlines.

19 MR. HAMILTON: Yes. Well, that is the other side. Hillel and I have
20 worked together; he's an excellent staff member for the House International Relations
21 Committee. He makes a very good point. Sometimes the frustration on the
22 legislative side builds up so high because of intransigence, reluctance, whatever it is
23 of the executive branch to testify that you have to do something to hit them over the
24 head to get their attention. I understand that has to happen.

1 When it does happen, you have to recognize that the oversight process is
2 breaking down. Maybe there are reasons for it breaking down, but you do have to
3 recognize that the oversight process is breaking down at that point. Not all the blame
4 here with regard to the decline of oversight--and Hillel's point is well-taken--rests on
5 the Congress. Some of it is in the executive branch as well.
6 Take this business of micromanagement. I said at one point in my formal
7 remarks that there is such a thing as too much oversight, that you can get into the
8 business of micromanagement. Oftentimes members feel that they must get into the
9 business of micromanagement because the consultative process has reached the point
10 where the members feel that the executive branch no longer pays any attention to
11 them and their views. And so the member decides, well, they have rejected my
12 views, the only way I can get their attention is through some kind of a dramatic
13 hearing or through legislation. And you get a breakdown in the process in many
14 instances, not because of the congressional system but because of the executive
15 branch.
16 QUESTION: Let me ask about the lack of follow up. If you take a look at the
17 way committees are funded, how would you compare the funding for oversight
18 during your tenure as chairman and now? If you take a look at what we are supposed
19 to do, I can see that the departments we have jurisdiction over will manage to get
20 through the hearing, hope that it goes off focus, and we never follow up on anything
21 for the record.
22 MR. HAMILTON: My experience is that for oversight hearings that I wanted
23 to conduct funding was not a major issue. Now that might have been because of the
24 level of the oversight functions. I am sure it does become an issue when you have

1 a very major oversight responsibility. But I don't have any experience in the area of
2 funding as a restraint on oversight.
3 But your point brings this to my mind, that oversight can be expensive. If
4 you are going to put a lot of auditors into the game, if you are going to put a lot of
5 staff out there, it is an expensive process. My own view on that generally is that it
6 is worth it, that it is a good expenditure in general. There would be exceptions to
7 that. But I would hate to see oversight pulled in and reigned in in this institution on
8 the argument that we cannot get the funding for it. That really, I think, would be a
9 major mistake. Oversight costs money but it is so very important to the functioning
10 of good government that I would argue that those oversight budgets should be
11 maintained.
12 MR. OLESZEK: Thank you very much. I am sure you would all agree that
13 Congress' loss is the Wilson Center's gain. But, fortunately, Mr. Hamilton is around
14 to do these kinds of sessions regularly.
15 Why don't we take about a five to ten minute break and reassemble. We have
16 two more panels today. The next one will be on the constitutional context of
17 oversight and then the second one will be on the "rules and tools" of oversight.
18 [Recess.]

19 **THE CONSTITUTIONAL CONTEXT OF OVERSIGHT**

20 **Panelists: Michael Davidson, former Senate Legal Counsel, and Michael**
21 **Stern, Senior Counsel, house general Counsel's Office. Moderator: Walter J.**
22 **Oleszek, CRS Senior Specialist**

1 MR. OLESZEK: Let me introduce our distinguished two-person panel.

2 We have, on my immediate left, Mike Stern, who is the senior counsel with
3 the House General Counsel's Office. He is a University of Chicago Law School
4 alumnus where he was associate editor of the law review. He clerked for the Chief
5 Judge of the U.S. Court of Appeals for the Fifth Circuit and he also worked
6 downtown for a law firm.

7 Next to him is Michael Davidson, who also is, surprisingly and interestingly,
8 and we didn't plan it this way, from the University of Chicago Law School as well.
9 A different time period for each but nonetheless still out of that illustrious law
10 school. Mike was the first Senate legal counsel and served from 1979 until 1995, and
11 thereafter he has been, as he indicates in his own vitae, sort of an itinerant lawyer
12 serving in a variety of capacities, including helping to bring the line-item veto law
13 suit to the Supreme Court, assisting Senator Robert Byrd and Senator Carl Levin in
14 that effort.

15 These two gentlemen will discuss the constitutional context associated with
16 oversight. Mike Stern will begin, to be followed by Michael Davidson, and then we
17 will open it up to Q&A from all of you.

18 MR. STERN: My topic this morning is the constitutional origins of the
19 oversight and investigatory power. I would like to start by calling to your attention
20 a recent article by Professor John Yoo, who was previously, a few years ago, the
21 general counsel of the Senate Judiciary Committee. Some of you may know him.
22 He wrote an interesting article on the role of lawyers in the Congress. He notes that
23 this topic has not received a great deal of attention in the literature and he speculates
24 that one reason for that may have to do with the image of the Congress in academia.

1 For example, he says that "Public choice scholars view Congress as a great auction
2 house in which legislation is sold to those narrowly focused, rent-seeking interest
3 groups that channel the most money into legislators' campaign coffers. Under this
4 approach, lawyers serving in Congress would play the role of glorified sales clerks
5 or, if they have reached a higher level of management, personal shoppers."

6 Now you will be happy to know that Professor Yoo does not agree with that
7 characterization of the role of lawyers in Congress, and he points out that, in fact,
8 they do have an institutional and professional role to play as well as the political and
9 policy role. In fact, there is an important institutional and constitutional component
10 particularly with respect to the investigative and oversight process that transcends
11 immediate political interests or impulses. Hopefully, this seminar will help to focus
12 us on that aspect of the oversight process.

13 Now, as most of you probably know, there is no constitutional provision
14 which explicitly addresses the oversight or investigatory power. But three reasons
15 are commonly given for implying that power into the Constitution.

16 First of all, it is generally accepted that the power to investigate and collect
17 information is an essential and inherent part of the legislative function. After all, as
18 the Supreme Court stated in the seminal case of *McGrain v. Daugherty*, "A
19 legislative body cannot legislate wisely or effectively in the absence of information
20 respecting the conditions which the legislation is intended to effect or change.
21 Similarly, Congress cannot exercise its legislative functions with respect to the
22 executive branch without the ability to conduct probes into departments of the federal
23 government to expose corruption, inefficiency, or waste." And again as the court
24 noted in *McGrain*, "Experience has taught that mere requests for information are

1 often unavailing, and also that information which is volunteered is not always
2 accurate or complete. So some means of compulsion are essential to obtain what is
3 needed."

4 Thus, it seems reasonable to conclude that the Constitution's grant of
5 legislative power to Congress implicitly includes the power to compel the production
6 of information, or, at a minimum, that the "necessary and proper" clause authorizes
7 the Congress to compel such production by statute.

8 Secondly, all of the legislative bodies with which the Framers were most
9 familiar, namely, the English parliament and the colonial legislatures, exercised the
10 power to conduct investigations and to punish contempt. In England, for example,
11 the House of Commons had long successfully asserted the power to punish for
12 contempt.

13 The power was first used to punish those who disrupted its proceedings by
14 boisterous or threatening conduct, by insult or libels, or by attempting to bribe a
15 member of parliament. By the early 17th century, the House of Commons began to
16 use compulsory process for determining facts in contested election proceedings. And
17 soon thereafter it began to use this power to conduct what we would recognize as
18 legislative and oversight investigations.

19 One of the more famous investigations took place in 1742 when the House
20 of Commons authorized an investigation into the activities of Sir Robert Walpole,
21 the recently resigned Prime Minister and Chancellor of the Exchequer. In rejecting
22 arguments that such a broad investigation should not be undertaken without
23 substantial evidence of wrong-doing, William Pitt the Elder said, "We are called the
24 Grand Inquest of the nation. And as such, it is our duty to inquire into every step of

1 public management, either abroad or at home, in order to see that nothing has been
2 done amiss."

3 As in England, the colonial legislatures in America used these inherent
4 powers both to punish contumacious witnesses and other forms of contempt. For
5 example, an unlucky citizen in Virginia was subject to the following order of the
6 House of Burgesses: "That said William Hopkins be led through the town, from the
7 Capital Gate to the College Gate and back again, with the inscription in great letters
8 pinned upon his breast in the following words: 'For insolent behavior at the Bar of
9 the House of Burgesses when he was there as an offender, and obstinacy and
10 contempt in disobeying their order.' And in case he shall refuse to walk, that he be
11 tied to a cart and drawn through the town, and that he be thereafter committed to the
12 public jail in Williamsburg, the keeper whereof is hereby required to receive and
13 there safely to keep him during the pleasure of this House." I am sure he was happy
14 that he was to be kept safe by the keeper.

15 So given this history, it seems very likely the Framers expected that the
16 houses of Congress would perform the investigatory function similar to those of
17 parliament and the colonial legislatures. For example, in 1791, James Wilson, who
18 was one of the Framers and later a Supreme Court Justice, echoed the words of
19 William Pitt the Elder when he predicted that the House of Representative would
20 form the Grand Inquest of the State. "They will diligently inquire into grievances
21 arising both from men and things." And that term "grand inquest" is one that
22 throughout history has been used to describe the House's investigatory function.

23 And finally, the conduct of the early Congresses supports this interpretation
24 of the Constitution. In 1792, for example, the House authorized the first

1 congressional investigation into a disastrous military campaign that General St. Clair
2 conducted against the Indians. The first act of the investigating committee that was
3 set up by the House was to write a letter to the Secretary of War requesting that all
4 papers relating to the military campaign be turned over.

5 This request was the first of its kind in our history. President Washington
6 summoned his cabinet to meet and consider the request, and, according to Jefferson's
7 notes, President Washington didn't have a reaction one way or the other as to whether
8 this was a proper request but he wanted his cabinet to advise him. They met and they
9 considered it and they reached a unanimous conclusion that, in fact, the House did
10 have the right to call for such papers and that a request for such papers was proper.
11 They did also assert, although they did not actually exercise, the right to withhold
12 papers, what we would now recognize as executive privilege, if in fact the public
13 interest required it.

14 I think this aspect, the existence of the investigatory power and the right to
15 oversee the executive, has been relatively noncontroversial since those early days.
16 But more controversial was the existence of the inherent contempt power. This, of
17 course, is the power that the House or the Senate had to actually imprison
18 contumacious witnesses or others who committed contempts against the body. The
19 House first exercised this power in 1795 to imprison two persons for attempting to
20 bribe certain Members of Congress.

21 However, Thomas Jefferson, in his "Manual of Parliamentary Practice,"
22 questions whether the Constitution really grants such contempt power to Congress.
23 He acknowledges the arguments in favor of the power; namely, that it is a power
24 necessary for self-preservation, that legislative bodies have an inherent right to do all

1 acts necessary to keep themselves in a position to discharge their public trust, and,
2 finally, that the power had been exercised by parliament and the state legislatures.
3 But Jefferson points to some powerful arguments on the other side. He notes
4 that, unlike parliament and the state legislatures, Congress has only those powers
5 explicitly given by the Constitution. And he also raises the concern that the inherent
6 contempt power is essentially lawless because the offense is kept undefined and the
7 House and Senate will "keep the law concealed in their own breast." Jefferson
8 acknowledges that the question remains an open one at the time he's writing, which
9 is around 1800, but he leaves little doubt that he opposes the exercise of such a broad
10 power.
11 However, in the 1821 case of *Anderson v. Dunn*, the Supreme Court formally
12 recognized the existence of the inherent contempt power. The plaintiff in that case
13 had been adjudged guilty by the House of a breech of its privileges, apparently for
14 attempting to bribe a member. Although it is not entirely clear from the opinion, the
15 plaintiff brought suit against the Sergeant-at-Arms for having arrested him. The
16 Supreme Court held that "Just as courts have the inherent power to impose silence,
17 respect, and decorum, so too does a legislative body."
18 However, the court also made it clear that American legislative bodies have
19 never possessed or pretended to possess the omnipotence which constitutes the
20 leading feature in the legislative assembly in Great Britain. The court said that the
21 contempt power under our system is limited to imprisonment up until the time of
22 adjournment of the legislative body. Apart from this limitation, however, the court
23 strongly suggested that the House's or the Senate's exercise of the contempt power
24 would be essentially unreviewable by a court.

1 There is one aspect of the *Anderson* decision which continues to have
2 relevance today. The Justice Department, based in part on the reasoning of
3 *Anderson*, has taken the position that congressional subpoenas cease to be valid upon
4 adjournment sine die. The theory is that if the witness must be released upon
5 adjournment, it follows that the underlying power to compel information must have
6 expired. I don't think that that quite follows, but that is the position that they take to
7 this day. A 1994 OLC opinion expressly reaffirms that Justice Department position.
8 In any event, the Supreme Court did not have occasion to address the inherent
9 contempt power for almost sixty years after *Anderson*. In the 1880 case of *Kilborn*
10 *v. Thompson*, however, the court took a very different view than that of the Anderson
11 court. *Kilborn* arose out of a bankruptcy of a banking firm called Jay Cooke and
12 Company, which was the depository of federal funds. The House authorized an
13 investigation into the bankruptcy of this firm, the settlement of the firm's interest in
14 the bankruptcy, and the dealings between Mr. Cook and a real estate pool in the
15 District of Columbia. Mr. Kilborn was called to testify and produce papers relating
16 to this real estate pool. When he refused to do so, he was adjudged to be in contempt
17 and was locked up in the D.C. jail by the Sergeant-at-Arms.
18 The court held that this exercise of the contempt power by the House
19 exceeded its constitutional powers. Its reasoning went like this. First of all, the court
20 looked at the parliament in England and it said we recognize that parliament, the
21 House of Commons exercises a very broad contempt power. But we believe that the
22 contempt power that is exercised in England actually originates from the time that
23 the House of Commons, and the House of Lords were together sitting as the High
24 Court of England. So it is really a judicial power that continued either by habit or

1 because the House of Commons continued to exercise some judicial functions after
2 the division of the bodies. And so it doesn't really have much application to the
3 United States where there is a clear separation of the judicial and the legislative
4 functions.

5 The court acknowledged that the House does have some judicial functions--
6 for example, the impeachment power, judging contested elections, or disciplining its
7 members--and for those it said that the House could properly use the contempt
8 power. But the court strongly suggested that outside that area there would be no
9 general contempt power, or perhaps any contempt power, that the House could
10 lawfully exercise.

11 However, the court didn't rest its decision on that proposition. It left that
12 question open. Instead, the court looked for another way to cut back on Congress'
13 power, and it did that by finding the investigation itself exceeded the constitutional
14 authority of the House. The court began with the proposition that the House had no
15 general authority of making inquiry into the private affairs of a citizen. The court
16 then asked why is the House investigating a bankruptcy and a failed real estate deal.
17 The House can't remedy whatever wrongs may have occurred in the course of these
18 matters, that is what the courts are for. And the court points out that, in fact, there
19 is an ongoing bankruptcy proceeding to deal with the very issues the House is
20 investigating.

21 To a large extent, later cases have repudiated both the holding and the
22 reasoning of the *Kilborn* case. However, there are two principles established by that
23 case which remain valid today. The first is simply that the contempt power is subject
24 to judicial review. The second is that the power of investigation does not extend to

1 investigating private wrong-doing for its own sake. As later cases would put it, there
2 is no power to "expose for the sake of exposure." To justify an investigation into
3 private affairs, as opposed to governmental matters, there must be some relationship
4 to potential legislation.

5 About fifty years after *Kilborn*, the Supreme Court decided the *McGrain* case,
6 which I mentioned earlier. In this case the court at last definitively held that each
7 house of Congress does have the power to compel the production of information
8 through use of the inherent contempt power. *McGrain* involved a Senate
9 investigation into the conduct of the former attorney general who had recently
10 resigned for failing to prosecute cases arising out of the Teapot Dome scandal. In the
11 course of this investigation, the Attorney General's brother was imprisoned for
12 contempt when he refused to appear in response to a subpoena. Following the logic
13 of *Kilborn*, the lower court found that this investigation was really an impermissible
14 attempt to exercise the judicial function because it was directed at proving personal
15 wrong-doing by the former attorney general, rather than at achieving some legislative
16 result.

17 The Supreme Court, however, reversed, holding that the investigation of the
18 activities of the Attorney General and the Department of Justice generally are clearly
19 within the legislative power since these activities are obviously subject to legislation
20 and specifically to the annual appropriations process. The court did not inquire too
21 deeply into the question of whether this was the true object of the investigation, being
22 willing essentially to take that on faith. Finally, the court held that it was not a valid
23 objection to the investigation that it might possibly disclose crime or wrong-doing
24 by the persons being investigated.

1 The *McGrain* case was significant not only because it upheld the use of the
2 contempt power to compel testimony in a legislative investigation, but because it
3 began the process of largely eviscerating *Kilborn's* concept of judicially enforceable
4 limits on the scope of congressional investigations.

5 Given the broad scope of Congress' power to legislate and appropriate, as it
6 has been construed by the courts in the post-New Deal era, virtually any information
7 is arguably relevant to some potential legislation that could be enacted. And given
8 the judicial unwillingness to impute an improper purpose to a congressional
9 investigation that is otherwise within the scope of the congressional power, it would
10 be difficult to state with confidence that any particular investigation is beyond the
11 scope of that power. It seems almost certain, for example, that a modern court would
12 recognize that Congress had a legitimate interest in investigating a failed real estate
13 deal such as that involved in *Kilborn*, particularly since it impacted the financial
14 interest of the United States which had money invested in the company that had been
15 affected.

16 Even in investigations involving constitutionally sensitive matters such as
17 political expression, where the courts have declared that they will balance the
18 congressional interest in obtaining information against the constitutional rights of
19 individuals, the balance has tended to tip decidedly in favor of the congressional
20 interest. As Justice Black stated in his dissent in a case involving a witness held in
21 contempt before the House Un-American Activities Committee, "The truth is that the
22 balancing test, as least as applied to date, means that the committee may engage in
23 any inquiry a majority of this court happens to think could possibly be for a
24 legitimate purpose, whether that purpose be the true reason for the inquiry or not.

1 And under the tests of legitimacy that are used in this area, any first year law student
2 worth his salt could construct a rationalization to justify almost any question put to
3 any witness at any time."

4 Yet, I think it would be a mistake to conclude from this that the Congress'
5 powers are unlimited, or to fall into what has been described as the "illusion of
6 investigative omnipotence." There remain a number of significant checks on the
7 congressional investigative power.

8 First of all, that power is limited by the ability of witnesses to assert
9 constitutional privileges, such as the privilege against self-incrimination.

10 Secondly, although Congress has generally not recognized itself to be bound
11 by common law privileges, it has generally respected clearly valid assertions of the
12 attorney-client privilege, for example.

13 Third, since Congress has not utilized the inherent contempt mechanism for
14 more than sixty years, its ability to punish contempt is limited by the statutory
15 procedures set forth in Title II. And this is a particularly powerful check on the
16 Congress' ability to get information in cases involving the executive branch or
17 assertions of executive privilege, since contempt cannot be prosecuted without the
18 cooperation of the executive branch.

19 Fourth, although the courts have been reluctant to challenge the authority of
20 Congress to conduct congressional investigations, they have developed a number of
21 methods to overturn particular contempt convictions in cases where they believe that
22 Congress has gone too far. These methods include requiring strict compliance with
23 congressional rules regarding the issuance of subpoenas, narrowly construing the
24 authority of a particular committee under the governing rules, or finding

1 noncompliance with procedural requirements such as providing clear notice to a
2 witness that his or her objections have been overruled and that compliance is now
3 required.

4 In one case, for example, a union president appeared and refused to turn over
5 the membership list of his union. The committee ordered him to produce the list
6 within ten days, which he did not do. The Supreme Court held that the witness could
7 not be convicted for his original refusal to produce the documents because
8 "petitioner, though adamant in his position, was given ten days from October 5,
9 1951, to deliver the list, and for all we know, a witness who is adamant and defiant
10 on October 5 might be meek and submissive on October 15." These are the kinds of
11 very technical decisions which the courts have used as opposed to adopting broad
12 theoretical limitations on the investigatory power.

13 The overall effect of these checks, combined with the procedural and political
14 difficulties of obtaining a contempt resolution in committee and getting it approved
15 by the full House, is shown by the fact that the House has not actually approved a
16 contempt resolution since 1986, and it has been even longer since anyone was
17 actually prosecuted for contempt. Thus, the present danger appears to be less than
18 that identified by Justice Black, namely, unchecked congressional investigatory
19 power, but rather that witnesses who wish to withhold information from Congress
20 will feel that there is little risk in doing so.

21 In order for Congress to obtain the complete and accurate information it needs
22 to perform its constitutional functions, it must be prepared to use its coercive powers
23 where it is actually necessary. After all, I bet that few people ignored a subpoena
24 from the Virginia House of Burgesses.

1 MR. DAVIDSON: Let me speak briefly so we can proceed to open this to
2 discussion. Building on Michael's excellent introduction to the constitutional law
3 of congressional investigations, I would like to propose that we look at major
4 elements of that law as being more than restrictions on Congress. Of course, they are
5 that. But they are also invitations or road maps to strong congressional
6 investigations. I will begin, as he did, with the basic constitutional grounding for
7 congressional investigations.

8 In the 1920's, the Court reinvigorated the law of congressional investigations,
9 holding that the power to investigate was as broad as the power of legislate. Simply
10 put, Congress may investigate all subjects on which legislation can be had. The basic
11 idea is that a legislative body cannot legislate wisely or effectively without
12 information about the conditions which the legislation is intended to change.

13 One element sometimes lacking in congressional inquiries is an adequate
14 exploration of the legal background of the principal issues under inquiry. At times,
15 the temptation is overwhelming to allow proceedings to be driven by pursuit of the
16 last media enticing fact that can be brought out in the dramatic setting of a
17 congressional investigation, rather than using a sufficient part of the investigatory
18 effort to be well informed about the inquiry's legal context. The more the legal
19 background of the subject matter is developed, the better informed members of the
20 public and Congress will be, and the more assured that the courts can be of the
21 inquiry's legislative purpose.

22 A full view of the factual context of a matter under inquiry can also add to the
23 strength and productivity of an investigation. In *Watkins v. United States*, the Court
24 observed that the congressional power of inquiry includes surveys of defects in our

1 social, economic, and political system for the purpose of enabling Congress to
2 remedy them. Using hearings to examine the social, economic or political context
3 or background of an investigation, helps to place it in an area in which the courts
4 voice great respect for the power of Congress.

5 In the Iran-Contra investigation, there was an interesting debate, which is
6 described in Senators Cohen's and Mitchell's book *Men of Zeal*, about how to begin
7 the joint hearings of the House and Senate committees. The issue was whether to
8 begin the public hearings with a witness whose role in the affair would captivate the
9 nation's attention, or begin with a panel of wise men, as they were characterized in
10 the discussion. The latter would be people, such as former national security advisors
11 or secretaries of state, who from their experiences could lay a background for the
12 Members and the public about topics that included the history and role of the
13 National Security Council or the role of the President in authorizing intelligence
14 activities.

15 Ultimately, the side of the debate which called for beginning with a witness
16 who might engage television viewers prevailed over the one that favored beginning
17 with witnesses who would inform Members and the public about the context of the
18 investigation. The hearings began with Richard Secord, who played a pivotal role
19 in linking the Iran and Nicaraguan parts of the story. The decision to begin that way
20 created, I believe, a problem for the investigation. It meant that the public, and
21 perhaps some Members, were presented with facts relating to breakdowns in
22 institutional checks or adherence to law that they could not place in a context of
23 sufficient knowledge about the history of those institutions or the requirements of
24 law.

1 So, it is important to consider, in helping committees to plan hearings, how
2 using the Court's observations about the grounding of the congressional investigatory
3 power in matters for which legislation could be had -- through an understanding of
4 the law and of the social, political, and economic background of a problem--can
5 contribute to effective investigations. I would encourage you not only to help
6 establish those elements at the beginning of an investigation, but to carry them
7 through to the end, including the committee's report.
8 Just as the Court has expressed itself on the legitimate constitutional purpose
9 of investigations, it has spoken strongly against use of congressional investigatory
10 power simply to expose for the sake of exposure facts about individuals. Violation
11 of that salutary principle has brought, too often, congressional investigations into
12 unfavorable repute. Skillful tacticians can structure investigations that go to the edge
13 of that limitation without crossing it. Nonetheless, even walking to that line can
14 diminish the effectiveness of congressional investigations by raising the specter of
15 ghosts that are among the least pleasant in the history of the Congress.
16 The Court has also expressed itself on limitations which come out of respect
17 for other branches of government. Here we have tensions in doctrine because,
18 obviously and importantly, as the Court has held, a fundamental purpose of
19 congressional investigation is to expose corruption, inefficiency and waste in the
20 executive branch. As Mr. Hamilton described earlier, that is the essence of a great
21 deal of oversight.
22 One possible intrusion is into the judiciary's powers in individual
23 adjudications. Others may be into matters within the exclusive province of the
24 executive branch. A key challenge for staff is to persuade Members, if the

1 circumstances arise, that in the long run their investigations will be better received
2 by the public and in the courts if committees proceed with recognition not only of
3 their own power but also of the needs of coordinate branches.

4 A principal source for interbranch tension is control over information. Often
5 struggles over information loom larger in investigations than the underlying
6 substance of them. As we see frequently, the assertion of a right of the executive to
7 withhold documents can easily become the dominant part of an inquiry. Indeed,
8 disputes over information may assume more importance than the issue that first
9 spawned the investigation.

10 A useful way for Congress to consider some of these issues is to think about
11 them in relation to its own concern about its proceedings. A first step is
12 understanding that the fervor which Congress brings to protecting its own
13 deliberations from being examined elsewhere may be mirrored by the importance
14 which other branches give to the protection of their deliberations.

15 I have argued, as others here have done, for the fullest possible evidentiary
16 record for Congress. Nonetheless, as we look, illustratively, at proceedings in which
17 the executive branch is conducting criminal investigations, involving such matters
18 as confidential grand jury information, there are legitimate concerns about the
19 interplay between investigations by the two branches. Some clashes are inevitable,
20 but experience also demonstrates that the more that congressional investigators
21 respect (even if they do not fully accept) concerns rooted in another branch's
22 legitimate interests, the better they can conduct a dialogue about the manner in which
23 competing interests may be accommodated. Of course, the same is true for executive
24 branch officials who are on the other side of that dialogue.

1 Next, I would like to address the process within Congress for authorizing
2 investigations. It is a cardinal element of the constitutional law of congressional
3 investigations that committees draw their authority from the Houses of Congress of
4 which they are a part. Similarly, committee chairs and subcommittees draw authority
5 from their full committees, or at times directly from the full House or Senate, as the
6 case may be.

7 Having clear authorization from a parent body of the scope of a potentially
8 controversial inquiry may be critical if conflicts over subpoenas result in litigation.
9 Most matters by far, of course, do not result in litigation. But even for them,
10 authorization is important. The powers of inquiry of the House or Senate, are the
11 powers of each body, not those of chairs or chief counsels. The effectiveness of
12 committees in persuading witnesses and government agencies, and their counsel, of
13 the need and benefit of being responsive can grow if there is a conviction that
14 investigatory actions are supported by the larger body of which the committee is a
15 part.

16 The authorization process not only requires initial authorization, but also
17 steps along the way as that authorization is applied to unfolding events during an
18 investigation. When it is time to respond to a question, a witness should know not
19 only what the full house has authorized, which may be in general terms, but how the
20 committee has delineated that authorization in a statement of purpose or other
21 description of the investigation. It is also important how a committee chair, in
22 responding to an objection from a witness, articulates the predicate of the question,
23 such as how it relates to the jurisdiction of the committee. Done correctly, the
24 committee's ability to insist on an answer, if there is a dispute, should be enhanced.

1 But apart from the possibility of compulsion, by making the basis of questioning
2 understandable rather than bewildering, a committee can help promote voluntary
3 cooperation.

4 The courts have dealt disapprovingly with subpoenas signed by chairmen in
5 blank and filled out later by committee counsel, or objections disposed of by counsel
6 and not by the committees. The strength of congressional investigations increases
7 when decisions are made by elected members acting in a collegial setting, sometimes
8 with delegations to their chairmen, but always by politically accountable actors. No
9 matter the temptation, for efficiency or otherwise, to turn investigations into staff
10 inquiries, that undercuts the strength of a process which depends on the
11 accountability of the political actors who are the members of the committee.

12 I will end with something that touches the power of inquiry, just as it
13 pervasively touches other aspects of the Congress, the Speech or Debate Clause.
14 When committee members leave the protected setting of a committee or the floor to
15 talk about investigative findings, they run the risk of personal liability. One of the
16 first cases I worked on as Senate Legal Counsel was a defamation action against
17 Senator Proxmire for disseminating to the press a floor speech that commented on
18 a scientist whose research was funded by a federal grant. The Court held that the
19 Speech or Debate Clause did not protect re-publication outside of Congress of
20 otherwise protected legislative speech.

21 The value of speaking in Congress's formal collegial settings — at hearings,
22 through reports, or on the floor, each of which is a place where other Members with
23 different perspectives have an opportunity to disagree--makes sense because it limits
24 the possibility of liability. It also makes sense in terms of the strength of Congress

1 as an institution. Positions on public issues are generally fairly debatable. By
2 discussing investigatory matters in collegial settings, rather than outside of them to
3 the press, the discussion is kept in arenas where ideas can be tested, rebutted, or
4 reinforced by others.

5 In sum, this has been an effort to persuade you of the benefit of seeing legal
6 rules not as edges of conduct that one can carefully reach and not quite cross, but as
7 invitations or road maps to effective investigation. I hope you find these thoughts to
8 be useful. Thank you.

9 MR. OLESZEK: Thank you very much.

10 Why don't we open it up to questions. Just direct them to the two Mikes over
11 there, not to me. You guys can handle the questions.

12 QUESTION: Mr. Davidson, you mentioned the Constitution's speech and
13 debate clause and communications by members outside the normal confines of the
14 legislative process. The movement today is to put everything on Member web sites
15 and to put things out on the Internet. How shall I counsel people now with regard to
16 putting stuff on the Internet? Is it part of a deliberative process, the legislative
17 process, or is there a danger in potential liability to the member with respect to that?
18 I put that to both you, Mike, who started it, and Mike Stern, who I know has
19 investigated this sort of stuff.

20 MR. DAVIDSON: Having left these responsibilities four years ago, I am
21 happy to turn the question over to Michael. Obviously, there are extraordinary
22 benefits that web sites have provided. The ability to read testimony the morning that
23 it is being presented to the Congress, at least read the prepared statements of

1 witnesses, is a wonderful contribution to democracy. Members use websites to
2 provide information to the public about the legislative process. Those are
3 fundamentally important communications.

4 In my remarks, I was addressing matters that relate to facts that are learned
5 in congressional investigations, those facts which deal with the conduct of people,
6 in which there are statements that affect individuals, not statements about policy, not
7 statements about what legislation should be, but commentary on the conduct of
8 people. In those areas, I think one needs to be very cautious, and for a good reason.

9 MR. STERN: Yes, I think that what Mike was saying in terms of the
10 distinction between in-the-house and outside-the-house is a generally important
11 distinction to keep in mind. It goes to what I think was one of the themes that he was
12 stressing, which is that you always ought to keep in mind why you have these powers
13 and these privileges. That is, the inside-the-house/outside-the-house distinction may
14 be too general and does not answer every particular case for you, but the reason for
15 the distinction is that the privilege is not a privilege for the person, but it is a
16 privilege for the body and for certain types of activities.

17 Jefferson said about the privileges of parliament that they are "endlessly
18 encroaching" and became essentially unlimited and undefined. In the United States,
19 it is not like that. Members of Congress are not above the law. They are subject to
20 the laws with certain very carefully crafted exceptions.

21 Now as to the specific question, the answer is, I don't know. We're looking
22 at it. It is clear that congressional committee reports are protected by the speech and
23 debate clause and the fact that they are "published" and made available to the public
24 does not remove that protection. On the other hand, it is also clear that if you go

1 outside of Congress, even if you are a Member of Congress or a staffer, and you start
2 respeaking about what is in those reports or even handing them to people, that is not
3 necessarily privileged.

4 The question is if a committee is routinely putting things on its Web site, is
5 that simply making them available for distribution, or is it actually redistributing it?
6 I think that given the importance of the Internet, the courts would be reluctant to say
7 that somehow Congress has to keep its documents off the Internet in order to
8 maintain the privilege. If distribution of reports is done on a routine basis and is not
9 a situation where people simply say, "Okay, this is a report I really want to publish,
10 I really want to get out, I am going to put this one on the Internet and call attention
11 to it." But if they are routinely put on the Internet, I think there is a strong argument
12 that it should remain protected.

13 MR. OLESZEK: Further questions?

14 QUESTION: For Michael Davidson. One of the issues in the House in the
15 last few years has been whether the staff should be given permanent deposition
16 authority. In the Senate, I think the Senate Investigations Subcommittee has it and
17 it is renewable under a funding resolution. What has your experience been with
18 deposition authority? How does that relate to the overall conduct of investigations
19 as you see it?

20 MR. DAVIDSON: I believe the deposition authority is a highly useful
21 investigatory tool. Because we are talking about the subpoena power of the
22 Congress, there needs to be in each house a clear delegation of that authority.

23 The deposition issue ultimately deals with the question whether testimony
24 may be taken in the absence of members. So it needs to be a well-structured system

1 in which witnesses who do have objections have access to Members, usually the
2 Chair, for rulings on objections. One could not delegate the power to rule to staff.
3 But you could delegate the power to staff to propound questions as long as there was
4 a way of taking a pause and submitting a question that was in contention to the
5 committee, or saving it for a later ruling.

6 The one caution that I would have is when those committees that do have
7 deposition authority, that are dealing with fact-intensive investigations, utilize it in
8 a fulsome manner. Those depositions can become the preoccupying element of the
9 investigation, producing long periods of staff depositions. These are very expensive
10 matters for the committee but also for the increased number of witnesses, resulting
11 from the use of staff depositions who then have to pay for counsel.

12 There is also the possibility that the use of depositions diminishes the direct
13 interaction of Members with witnesses. Although Members of course have the
14 opportunity to read deposition transcripts or summaries of them, the quality of
15 Member education may be affected by the fact that the learning is through the
16 intermediary device of the deposition rather than through direct confrontation with
17 witnesses. So one has to I think, be concerned about the expense in the process:
18 what might have been a two or three hour examination of a witness at a hearing
19 becoming a day or two deposition of a witness, and what the effect on the quality of
20 Members' education may be.

21 That said, depositions can be a wonderfully useful device for determining
22 which witnesses have, in fact, a contribution to make to an inquiry. Judiciously used,
23 information is obtained that illuminates what the witness has to say, perhaps even by
24 persuading the committee that this is not a person who can contribute very much.

1 That can be a very helpful thing. Depositions can be used to produce a hearing in
2 which questions are sharper, in which the committee has an opportunity to focus on
3 that part of the witness' story that would benefit from an exchange with Members in
4 a public setting rather than a simple reiteration of the witness' deposition testimony.
5 The least productive use of deposition is after two days of exhaustive
6 depositions in which, through majority and minority counsel, every question one
7 could imagine and more are asked, that the same is then repeated before members
8 who have read the transcript and who are relatively bored about the presentation
9 because there is nothing that is fresh about it. So one wants to think about what it is
10 one wants to gain from it and how it helps the process rather than simply adding
11 something to it.
12 QUESTION: I have a question for either or both Michaels. I understand that
13 both the House General Counsel and the Senate General Counsel provide informal
14 advice to Members and committees. Can you touch briefly on the areas in which
15 your functions differ, and whether you see your functions evolving along the same
16 lines. Or because of the distinct and separate natures of the two bodies, whether that
17 would necessarily require that you perform substantive functions differently?
18 MR. STERN: I think that probably the major difference is that the Senate is
19 more formal in what they are allowed to do. They need more formal authorization--
20 for example, to provide a written opinion. And that is something that our office does
21 do on occasion--give formal written opinions to committees. I suspect that on a day-
22 to-day basis--just in terms of advising staffers and Members or whoever comes for
23 just a conversation--it is probably similar.

1 MR. DAVIDSON: In the Ethics in Government Act of 1978, there was a title
2 on special prosecutors, later known as independent counsel. The last title of that act
3 established the Office of Senate Legal Counsel. In fact, it had passed the Senate as
4 a title that would have created an Office of Congressional Legal Counsel. But in
5 conference, the House conferees concluded that that matter hadn't been studied in the
6 House and so the measure was trimmed to an Office of Senate Legal Counsel. As
7 a consequence, the Office of Senate Legal Counsel is structured by a statute. The
8 House General Counsel's Office is structured now by a resolution of the House.
9 One feature of the difference is that one of the things that the legislation
10 might have done for the entire Congress, and this relates back to investigations, was
11 only done for the Senate, and that was to create an action by which the Senate could
12 enforce its subpoenas in a civil proceeding in the United States District Court here
13 in the District of Columbia. The civil action is an alternative to, not necessarily in
14 place of for all purposes, but an alternative to criminal enforcement. Rather than
15 sending the matter to the U.S. Attorney to prosecute a recalcitrant witness for a
16 crime, the Senate, by resolution, may direct the Senate Legal Counsel to bring an
17 action for an order requiring a witness to answer questions that the witness, for
18 example, has asserted some privilege to. If the witness refuses to obey the court's
19 order, the court may impose coercive sanctions, such as incarceration or daily fines,
20 to compel the witness to answer.
21 In fact, although in the House there have not been contempt votes since 1986,
22 in the Senate more recently there were actual proceedings to enforce subpoenas
23 through civil actions. For example, in 1994 there was an action against Senator

1 Packwood to enforce the Ethics Committee subpoena that he produce his diaries to
2 the committee while it was considering disciplinary measures against him.
3 As part of the Ethics in Government Act, I think the House has long
4 replicated this by resolution, there is a body--the Joint Leadership Group within the
5 Senate--that the Senate Legal Counsel goes to for guidance. It becomes the medium
6 through which the two leaders receive recommendations and go to the floor. In the
7 Senate, for the Senate Legal Counsel to represent the Senate, or a committee, or a
8 senator in some official matter, there needs to be an authorization by the full Senate.
9 So although the Senate Legal Counsel may appear for a committee, he or she--by the
10 way, please allow me to introduce Pat Bryan who is the new Senate Legal Counsel
11 and is here in the audience today--would go to the leadership and the leadership
12 would, if it agreed, present a resolution to the Senate. The authority to litigate is
13 ultimately the authority of the full body.
14 Traditionally, the Senate Legal Counsel has done very little in the way of
15 formal opinion-writing. There had been an idea to create an office in which a
16 congressional counsel would give opinions on the constitutionality of proposed bills.
17 That fell by the wayside early--this goes back to the late 1960s--in the Senate's
18 consideration of creating an office. There was a reluctance to empower an official
19 of the Congress or the Senate to speak with any kind of definitiveness on the
20 constitutionality of legislation. In any event, there is a terrific Congressional
21 Research Service to provide advice on the constitutionality of proposed bills. The
22 Senate counsel, often collegially with House counsel, would pick that issue up at the
23 point at which the constitutionality of an act was challenged on separation of powers

1 grounds and there was a difference of opinion with the Department of Justice
2 about its defense.
3 MR. OLESZEK: We've come to the end of this panel. I certainly want to
4 thank Michael Stern and Michael Davidson for their terrific presentations.
5 Let's take a five minute break and come back for the "Rules and Tools" of
6 oversight, with Mort Rosenberg and Don Wolfensberger.

7 **THE RULES AND TOOLS OF OVERSIGHT**

8 **Panelists: Morton Rosenberg, American Law division of CRS and Donald**
9 **Wolfensberger, former Staff Director of the House Rules Committee and**
10 **Director, The Congress Project, Woodrow Wilson Center. Moderator: Walter**
11 **J. Oleszek, CRS Senior specialist**

12 MR. OLESZEK: Let's begin with our panel on the rules and tool of oversight.
13 To my immediate left is Don Wolfensberger who served in the House of
14 Representatives for 30 years. He was staff director of the House Rules Committee
15 and is probably one of the most knowledgeable individuals about everything
16 regarding the House--its history, its procedures, its processes - just a wealth of
17 knowledge about it all. He is going to talk specifically about the rules of the House
18 of Representatives with respect to oversight. He has also handed out a list that
19 identifies those House rules that deal with oversight (see-the enclosed material).
20 Mort Rosenberg, a Harvard Law School graduate, is without question CRS's
21 premier person on how to do congressional investigations and oversight. He's done
22 it for decades. He has served both the House and Senate, Democrats and
23 Republicans, and knows the ins and outs of oversight nobody else -- at least at CRS.
24 So, if want to talk to someone who's in the know about oversight, don't overlook

1 Mort Rosenberg. With that, let's get started. Our informal understanding is that Don
2 will go first, and Mort second. Don, the podium is yours.
3 DON WOLFENSBERGER: Thank you very much Walter. Earlier today you
4 heard about how the House of Burgess in Virginia treated Contumacious witnesses
5 by pinning a sign on them and making them walk through the streets and if they
6 didn't walk they were dragged behind a cart. Well, you haven't heard the whole
7 story. Here's how the House of Representatives used to punish such witnesses
8 [referring to photo on wall of a crane raising a large object to the Capitol dome with
9 a man underneath.]. It was called "lowering the boom."
10 I want to commend the speaker and the chairman of the Rules Committee for
11 sponsoring this workshop and obviously the CRS and Rules Committee staff for
12 doing all the work in putting this together. I vividly recall my first oversight
13 workshop as a congressional staffer back in December of 1978. At that time I was
14 John Anderson's legislative director. I was about to move over to the Rule's
15 Committee the following month as the minority staff director of a subcommittee.
16 Well, I remember being fascinated by the stories that were told by the various
17 persons, the subcommittee chairmen and the staff, that appeared before this oversight
18 workshop. I think most of the staff who attended found the workshop was both
19 interesting and very informative. To me, moving on to a committee staff, it was like
20 a motivational seminar. I came away thinking, "Gee, I can do that, in fact, I want to
21 do that." I guess I was only left to wonder if so many staff found the prospect of
22 actually conducting oversight so exciting, why then do most members of Congress
23 seem so turned off about doing regular oversight? Well, I thought about it and I
24 guess the short answer is that the oversight workshop tended to show us the more
25 glamorous side of it. We were regaled with oversight war stories in which the good

1 guys triumphed over the big bad bureaucracy after locating a smoking memo buried
2 deep in bureaucracy files. But, the reality for most members, on the other hand, is
3 that the most effective oversight is not all that exciting. In fact, it can be tedious,
4 time consuming and even boring with no obvious political payoff at the end of the
5 line. So, that's why we have staff. They send the staff out to do the preliminary
6 digging and panning for gold, to sift through tons of worthless bureaucratic rocks, for
7 hours on end, in hopes of turning up than one nugget that will make them rich in
8 political rewards.

9 But this kind of work is not what most members of Congress came to
10 Washington to do. They came to find new solutions and make new laws, not spend
11 their time investigating past mistakes and bad laws. Consequently, oversight is and
12 has been, through the ages, one of Congress's biggest oversights in the sense of being
13 ignored or overlooked--an overlooked responsibility. For that reason I have chosen
14 to entitle my remarks "Congressional Oversight: Rules of the Road Less Traveled".
15 I borrow that phase from the final lines of a Frost poem which you are all familiar
16 with: "Two roads diverged in a wood and I took the one less traveled by and that has
17 made all the difference." Let me quote from a well known political scientist as to
18 just why taking that road less traveled, in this case the oversight road, can and should
19 make all the difference. In his words, "it is the proper duty of a representative body
20 to look diligently into every affair of government and to talk much about what it sees.
21 It is meant to be the eyes and the voice, and to embody the wisdom and will of its
22 constituents. Unless Congress have and use every means of acquainting itself with
23 the acts and the disposition of administrative agents of government, the county must
24 be helpless to learn how it is being served; and unless Congress both scrutinize these
25 things and sift them by every form of discussion, the country must remain in an

1 embarrassing, crippling ignorance of the very affairs which it is most important that
2 it should understand and direct. The informing function of Congress should be
3 preferred to its legislative function."
4 The political scientist went on to say that Congress is perhaps too diligent
5 about legislation, and not diligent enough about oversight and informing functions.
6 Well, the political scientist who penned those words was Woodrow Wilson
7 in his classic doctoral thesis "Congressional Government," back in 1885.
8 So, charges of lax oversight by Congress are nothing new. You'll recall this
9 morning that Mr. Hamilton quoted from another part of that same book by Woodrow
10 Wilson. It's just coincidental yhat we're both at the Wilson Center and tend to quote
11 Wilson in every speech we give.
12 You've already learned that Congress's oversight authority is rooted in the
13 constitutional powers to make laws and appropriate money for the operation of
14 government. Why is it, then, that the House and Senate tend to adopt oversight rules
15 that seem to reiterate the obvious?
16 I think there are two reasons for oversight rules, and that's the thrust of my
17 remarks. Rather than just tell you what the rules are, I will put them in the context as
18 to why they were adopted and when. I think this will bring it more to life for you.
19 I think the first development (and this is a fairly recent phenomena by the
20 way), was the actual writing of oversight rules and provisions in the statutes. The
21 first reason for this, I think, was to make clear to those who will be the subject of
22 oversight, just what to expect. What are their rights and their duties and what are
23 Congress's responsibilities in conducting oversight.
24 The second reason for such rules, quite frankly, was to remind, push, prod,
25 and cajole Congress into doing its job. Oversight rules are like a "roadside sign"

1 pointing to that road less traveled, urging congressional travelers to take it. I don't
2 care whether you read the reports of the Joint Committee on the Organization of
3 Congress in 1945 or 1965 or 1993 or any number of House and Senate select
4 committees on Congressional reform in between, they all essentially say the same
5 thing: Congress has been doing a lousy job of overseeing the Executive Branch, and
6 it must do better. So, here are a few new rules and procedures and devices to help you
7 do a better job.

8 The first modern oversight formulation came in the 1946 Legislative
9 Reorganization Act, which charged each standing committee of Congress with
10 exercising a "continuous watchfulness" over the execution of laws by Executive
11 Branch agencies. That was mentioned by Mr. Hamilton in his remarks. That
12 requirement was changed in the Legislative Reorganization Act of 1970 to what the
13 Rules Committee in its report on the bill said was, quote, "the more appropriate
14 concept"-- to "review and study on a continuing basis" the laws agencies and entities
15 of government are charged with carrying them out. In other words, the emphasis was
16 more on a proactive, rather than a merely passive, oversight role. This is the language
17 that's currently contained in House Rule X. It is attached to your handout - at least
18 that clause which contains those words--under the rubric of "general oversight
19 responsibility."

20 The Senate has a similar rule. It's much shorter because the House, quite
21 frankly, has added further language to this over the years since the 1970 Legislative
22 Reorganization Act. The 1970 Act also required for the first time that committees file
23 biennial activity reports at the end of each Congress that summarize both the
24 committee's legislative and oversight activities.

1 This was further enhanced in the 1974 House Committee Reform
2 Amendments requiring committees to discuss oversight plans at the beginning of
3 each Congress with the then Government Operations Committee (now the
4 Government Reform Committee), which would then publish them. That provision
5 was deleted in 1987 because it had become a rather meaningless exercise, in which
6 the staff simply gave the chairmen, instead of a meaningful, thoughtful oversight
7 agenda, something that reiterated about every bit of jurisdiction the committee had
8 so they'd be sure they were covering all their bases. They handed in the same thing
9 Congress after Congress after Congress. So, it was felt that this was no longer
10 serving a purpose and it was dropped.
11 Well, it was revitalized by the Joint Committee on the Organization of
12 Congress in 1993. Its report never made it to the House floor, along with some other
13 recommendations, but it was picked up on at the beginning of the 104th Congress by
14 the new rules changes instituted by the Republicans.
15 It revitalized and strengthened that requirement by saying that committees
16 must adopt oversight agendas at the beginning of each Congress. It was an attempt
17 to have more a collective effort, rather than simply staff passing something to the
18 chairman, who would pass it to the Government Reform Committee. It was to be a
19 conscientious effort by committees to think things through and have input from the
20 majority and minority.
21 Oversight plans are now handed in by February 15th.
22 Another thing that Mr. Hamilton mentioned that was in the Joint Committee's
23 report is the idea that every committee would look at every significant program
24 within its jurisdiction every ten years. That has been incorporated into the House
25 oversight rules. New requirements were included for making committees account for

1 these plans in a separate section of their biennial activity reports, along with any
2 additional oversight activities not listed on their original plans.
3 Here was a way to get some accountability: at the beginning of the Congress
4 you turn in your two year plan for oversight. At the end of the Congress you have
5 your activity report with a separate oversight section that summarizes what your
6 plans were originally and what you've done about each of them or have not done, and
7 what additional things you have done.
8 One of the complaints that we had gotten from committees when we
9 instituted this new rule was, "Gee, we don't want to show our hand to the minority
10 as to what we're going to look at over the next two years." Well, obviously you
11 don't know everything you're going to look at, for one thing. At least systematic and
12 program mehz oversight should be a natural thing that you would be doing as you
13 lead up to maybe an authorization in your second year. In fact, the Library of
14 Congress, I believe, is still required at the beginning of each Congress to tell
15 committees what laws are expiring under those committees' jurisdictions as well as
16 what things the committees might want to look into. These CRS reports, could be
17 useful in formulating the oversight plans, so committees would know what they're
18 going to have to look at and what oversight probably should be done.
19 The 1974 Committee Reform Amendments also originally called for each
20 committee to establish a separate oversight subcommittee but that was watered down
21 on the floor when the Democratic Caucus came in with a substitute that knocked out
22 most of the jurisdictional changes. The substitute also watered down the
23 subcommittee requirements. It said, "Yes, each committee should have an exclusive
24 oversight subcommittee unless the other subcommittees are doing oversight."

1 I see where at the beginning of this Congress, the rules now have been
2 changed again to encourage committees to have an exclusive oversight
3 subcommittee. They now say all committees can have five subcommittees unless
4 you have a separate oversight subcommittee and then you can have six. Again, partly
5 leaders are trying to get committees to think in terms of having some unit that deals
6 exclusively with oversight.
7 The 1974 Committee Reform Amendments also added special and additional
8 oversight authorities and responsibilities for specified committees as a way of saying,
9 "Yes, you have jurisdiction here, but it's close to things that other committees are
10 doing. As a result, you can still do oversight in those areas even though the other
11 committees have original jurisdiction for passing legislation in those areas." It was
12 a way of getting committees overseeing other committees as to whether they were
13 doing their jobs.
14 The other thing that I wanted to mention is the permanent investigative
15 authority for all committees that's contained at the beginning of House Rule XI.
16 That was also added in the 1974 Amendments. An interesting bit of history is that
17 before that time, committees had to come to the Rules Committee at the beginning
18 of each Congress to ask for authority if they wanted to conduct investigations. In
19 others words, to get subpoenas authority, to get travel authority for oversight
20 activities, field hearings and so on, they needed special authorization. Prior to 1974,
21 1975 was when this change took effect, committees had to get their investigative
22 authority through a resolution that the Rules Committee would send to the floor. It
23 was fairly routine and yet a lot of committees thought it was a pain. The change gave
24 committees the subpoena authority, permanent investigative authority, travel
25 authority, and so on.

1 The other thing that was done that is of interest is that not only did they say
2 committees have to vote to authorize subpoenas, but they said committees can adopt
3 rules if they want to give the chairman authority to authorize subpoenas, subject to
4 whatever conditions the committee might require. They did not extend subpoena
5 authority to subcommittee chairmen, but subcommittees can vote on subpoenas.
6 Subcommittee subpoenas would still have to be voted by the subcommittee, or
7 approved by the full committee chairman if the chairman has been delegated that
8 authority.
9 The investigative committee hearing procedures, sometimes referred to as the
10 "witness bill of rights," is now contained in House Rule XI clause 2(k). That rule has
11 an interesting story behind it, too. It was first adopted in 1955 as a result of a lot of
12 the abuses that occurred during the McCarthy era, specially in the House by what
13 was called the "House Un-American Activities Committee" (HUAC) and then the
14 "House Internal Security Committee," (HISC). There were a lot of abuses that
15 occurred and people felt reputations were being trampled on. So the "Witness Bill
16 of Rights" was adopted in 1955 to let witnesses know that they have a right to see
17 rules that the committee operates under; they have the right to have a counsel present;
18 they have a right to claim if what they are saying might tend to defame or degrade
19 them, they could ask that the committee go into closed session.
20 I think it's an interesting set of rules. Committees are always very careful
21 to abide by thm when they are doing a formal investigation because, in the past, some
22 of these things have been thrown into the courts on appeal by a witness who felt there
23 was some abuse that occurred.
24 The other thing that occurred, I believe in 1955, is that for the first time
25 House Rules required that there be at least a two member quorum requirement for

1 any hearing. Prior to that, the chairman of a committee could say, "I am the
2 committee and you will answer to me," and trample all over someone. So they got
3 rid of what was called "one man investigations." Since that time we've had the two
4 member quorum requirement. In fact, one of the famous Supreme Court cases threw
5 out a contempt charge against a witness who lied because there was only one member
6 sitting on the panel at the time that the alleged lie was committed. The Supreme
7 Court said, "Well, you didn't follow your own rules so this witness is off the hook."
8 The right of the minority to call its own witnesses at any hearing, whether
9 investigative, legislative or general oversight in nature, was part of the 1970
10 Legislative Reorganization Act as was the right of committee members to file
11 minority, additional, or supplemental views to committee reports. That applies to
12 oversight reports as much as it does to legislative reports.
13 Finally, a rule used only sparingly in recent times, but still important to
14 individual members, is the rule governing resolutions of inquiry. These are simple
15 House resolutions in which any member of Congress can, in a resolution, request of
16 an Executive department head, or of the president, factual information -- not
17 opinions, not internal memos of recommendations from staff to the president, or to
18 the cabinet secretary--but factual information.
19 This rule dates back to 1820, though the right to request information is
20 thought to have been in existence from the very beginning of our republic obviously.
21 Such resolutions should be worded so as to "request" information from the president,
22 but "demand" it from a cabinet secretary. This is the form in which it is
23 recommended that they be drafted. If a member introduces a resolution of inquiry,
24 it's referred to a committee, and the committee is given 14 days to try and voluntarily
25 get this information and then report back to the House on whether it's been

1 successful. If it has not been, then the resolution can come to a vote as a privileged
2 matter. If the committee does not do anything and sits on it, any member of the
3 House can call it up as privileged after those 14 days and at least get a vote on
4 discharging the committee. That would be the first vote without any debate. If the
5 majority says yes [and discharges the committee of the resolution of inquiry, there
6 would then be an hour] of debate and the House would vote on whether it wants to
7 demand this information of the Executive Branch.

8 This really concludes my brief survey of the House rules. Mort Rosenberg
9 will get into the details of how these various legal authorities operate in the real
10 world. Let me just conclude by saying that no set of rules, no matter how artfully
11 drafted and well intentioned, will produce effective oversight if the will is not there
12 on the part of the committee and subcommittee chairmen and their members to do
13 the nitty-gritty work involved. Put another way, and I've often said this about many
14 of our reform efforts that have fallen flat and not gotten the intended results, you can
15 lead a committee horse to the trough but you can't make it drink. Congress has been
16 very strong on the rhetoric of oversight over the years, but it often comes up short on
17 the delivery of oversight results. I think the exceptions of course are the more
18 sensational scandal investigations that have made many a political reputation from
19 Joe McCarthy, Estes Kefauver, Richard Nixon and Sam Ervin.

20 But programmatic oversight is a lot more difficult, and the payoffs are
21 uncertain in the short term. In the long term though, as Wilson put it, oversight is a
22 key component, not only in insuring that the government is running effectively and
23 efficiently, but that the public is properly informed by Congress of how well its tax
24 dollars are being spent for its benefit. If Congress cannot get a proper handle on a
25 vast bureaucracy, public confidence in government, including Congress, is bound to

1 decline even further. Its seems to me that in itself should be a compelling incentive
2 for Congress to do a proper job. Thank you.
3 MORTON ROSENBERG: Thank you Walter for your generous introduction.
4 What you have heard today about the purposes of legislative oversight, the breadth
5 and substantial constitutional basis of investigative oversight, the elements that have
6 characterized good oversight, and the rules that must be followed to insure
7 legitimacy, fairness and success of the oversight process, lay the foundation for some
8 of the things that I want to talk about today. What I will attempt to provide you with
9 is an overview of the powers and the practicalities of congressional oversight. And
10 how congressional committees can use the formidable tools of inquiry most
11 effectively.
12 First, understand that the shape and the contours of the legislative process are
13 dictated or directly influenced by our constitutional scheme of separated powers and
14 checks and balances. That scheme envisions and establishes a perpetual struggle for
15 policy control between Congress and the Executive. In practice the powers of both
16 are too incomplete for one to gain total control. Legislative oversight, then, is the
17 mechanism that attempts to insure that Congress's will is carried out and that the
18 Executive power does not overwhelm congressional prerogatives. The complete and
19 correct picture, I believe, is not that of Congressional dominance or Executive
20 recalcitrance but a dynamic process of continuous sparring, confrontation,
21 negotiation, and ultimate accommodation. Occasionally we have monumental
22 clashes. It is in those instances that congressional power has been refined and
23 defined.
24 Constitutional confrontations, fortunately, are rare, avoidable, and should be
25 avoided. Simply because congressional committees have a wide array of oversight

1 tools does not mean that bending the Executives or private parties reluctance to the
2 legislative will is a piece of cake. This one of the lessons of the past four and one-half
3 years and why we are holding these workshops. This is not to be taken as a caution
4 leading to advice to abandon the use of subpoenas or citations of contempt. But it is
5 an observation that, in order to engage in successful oversight, committees must
6 establish their credibility early, often, and consistently in a manner that evokes
7 respect. A request for information for documents, information or briefings from a
8 committee chairman or staffer should be treated the same: as a legitimate exercise of
9 the committee oversight function and if not complied with without proper
10 explanation, it will be followed up with more formal, uncomfortably public
11 processes.

12 How is this accomplished? Simply by very hard staff work. The first rule of
13 successful oversight is that there must be in most instances intensive preparation.
14 Nothing should be left to chance. Rarely should an inquiry, for instance, begin with
15 a subpoena for documents or for testimony at a hearing. Formal compulsory process
16 should be the product of urgent need after a sufficient period of fact gathering and
17 source checking. If the purpose of a document subpoena is to preserve the sought
18 after material from possible destruction, that can be legally and more easily
19 accomplished by a letter from the chairman announcing the initiation of an inquiry
20 pursuant to the committee's authority, describing its purpose and scope, and
21 requesting documents in categories that are pertinent to that inquiry. That is normally
22 sufficient to trigger the notice necessary to invoke the federal criminal law that
23 prohibits obstruction of a congressional proceeding.

24 Pay attention to details. Every letter, every phone call, every meeting, every
25 hearing, should have some well defined purpose. Asking yourself, "How am I

1 furthering understanding or resolution of the matter", should be the question at every
2 step of an ongoing investigation. An oversight inquiry should be viewed as a staged
3 process. That is, understand that you're going from one level of persuasion or
4 pressure to the next, to find out the who, what, when, where and why of a particular
5 situation under inquiry. Normally you shouldn't have to serve a subpoena out of the
6 blue. There should have been reached some sort of perceptible impasse. And, even
7 if impasse appears to have been reached and the votes for a subpoena are available
8 in a committee, a quite effective tactic is to vest authority for issuance of the
9 subpoena in the chairman, either for a definite period or indefinitely. My experience
10 has been that letting the threat of service hang over the heads of officials for a limited
11 period spurs reconsideration of previously adamant refusals, or brings a recognition
12 that the committee wasn't bluffing. And that most often leads to further negotiation
13 and accommodation.
14 Similarly, you shouldn't hold an investigative hearing unless you have a
15 compelling horror story, a smoking gun to reveal, or a very important point to make.
16 Executive witnesses at these hearings should be explicitly advised what you want
17 them to talk about and what materials you want them to bring with them. Failure to
18 be precise invites the response, "Gee, I didn't anticipate that. We'll get back to you
19 with an answer in writing pretty soon."
20 A concomitant to intensive preparation is cooperation within the committee
21 at all levels. This includes dealing with the minority party members where possible.
22 An effort must be made to keep all members informed in a timely fashion. Don't let
23 other members or key staffers find out something that you've done by reading it in
24 the *Washington Post* or the *Washington Times*. Information should be shared in and
25 between subcommittees and within and between the full committee and its

1 subcommittees. Holding periodic or special staff meetings to accomplish this, or at
2 least sending informational memos, is extremely valuable. And, write down
3 everything, including summaries of all telephone and face-to-face conversations with
4 agencies officials and employees.

5 If an anticipated phone conversation is about a vital matter, put it on the
6 speakerphone and have a fellow staffer present. I recently dealt with a situation in
7 which a one on one conversation took place in which agreements over the release and
8 utilization of documents that would be turned over to the committee were reached.
9 The agency immediately followed up with a letter memorializing the agreements,
10 apparently inaccurately. The effect has been to deepen the impasse and add an
11 extraneous element--suspicion--to an already delicate situation.

12 A third rule or guideline is to open and to keep open lines of communication
13 with agency people, even when you are most angry and suspicious of them. One way
14 to do this is to develop informal contacts with key agency people before trouble
15 arises and keep nurturing it. Developing some degree of trust by such relationships,
16 through sharing of information or advanced notice of agency or committee actions
17 that will appear in the media that will affect either side, can help mute instant
18 congressional outrage. Developing interbranch relationships of mutual respect and
19 comity, if not actual trust, is difficult and takes time. That task is made more difficult
20 by congressional turnover rates which, as Lee Hamilton has indicated, are at high
21 levels, and term limits on chairmen that take them away at just the point when their
22 experience and reputation in their jurisdictional areas has made them optimally
23 effective.

24 Finally, experience has demonstrated that it is useful to utilize the media. For
25 oversight purposes there are at least two overriding reasons: to bring pressure on the

1 other side and to attract whistle blowers. More investigations have been jumpstarted
2 by information coming over the transom than many will admit. But, be sure to
3 protect your whistle blowers as best you can. A reputation as a taker of information
4 but not a protector gets around and forever dries up such resources.

5 But let's assume now that the process of accommodation and interbranch
6 comity has broken down, and a committee believes its ability to inform itself and the
7 Congress and the public on how well its government is performing has been
8 thwarted. What can it do assure that Congress's will is carried out and that Executive
9 power does not overwhelm institutional prerogatives?

10 Our previous speakers have made it quite clear that historic and legal
11 precedents, from the failed St. Clair military expedition in 1792 to Teapot Dome and
12 Watergate, to Iran Contra and Whitewater and its emanations, have established the
13 nature, scope, and contours of the congressional powers necessary to maintain the
14 integrity of the congressional role in a constitutional scheme. In the words of the
15 Supreme Court, "The scope of Congress's power to inquire is as penetrating and as
16 far reaching as the potential power to enact and appropriate under the constitution."

17 That power is not unlimited, however. It must be exercised only in the aid of
18 a legislative function and it cannot be used to expose for the sake of exposure alone.
19 It must respect the Fifth, the First and the Fourth Amendments, and an investigating
20 committee has only the jurisdictional authority delegated to it by its parent body. But,
21 once having established its jurisdiction and authority and the pertinence of the matter
22 under inquiry to its area of authority, a committee's investigative purview is
23 substantial and far ranging.

24 Congress has a formable array of tools to carry out its investigative function.
25 To gather information, committees and subcommittees can issue subpoenas to

1 compel testimony or the production of documents. If a committee follows its rules
2 for issuance of a subpoena, it is extraordinarily difficult to successfully challenge it
3 for legal sufficiency. The Supreme Court has ruled that courts may not enjoin the
4 issuance of a congressional subpoena, holding that the "Speech or Debate" clause
5 provides an absolute bar to judicial interference with such compulsory process. As
6 a consequence, a witness' sole remedy, generally, is to refuse to comply, risk being
7 cited for contempt, and then raise the objections as a defense to a criminal contempt
8 action. Perhaps one of the reasons that we haven't had a criminal contempt
9 proceeding since 1986 is that there has been acquiescence once a contempt citation
10 has been voted by the full committee or by the full House. I believe this is the proper
11 view of the exercise of the staged oversight process.
12 Congressional grants of immunity are another means of eliciting desired
13 information where a witness has invoked or intends to invoke his Fifth Amendment
14 privilege against self-incrimination. By a statutorily prescribed process, a committee
15 may, by a two thirds vote of its membership, seek an order from a court compelling
16 the witness to testify in return for a grant of immunity from use of the testimony
17 given or information derived directly or indirectly from that testimony in a
18 subsequent criminal proceeding. The process also allows committees to obtain more
19 limited immunity orders from a court where what is involved is a subpoena for
20 documents. In the latter situation, a submitter of documents is given act-of-
21 production immunity with respect to the testimonial aspects of his turning over the
22 documents. That is, the production of the documents cannot be used against the
23 person as an admission that the documents exist, that they were in possession of the
24 witness, and that they are authentic. But, the contents of the documents are not
25 protected and may still be utilized at a committee hearing. A drawback to immunity

grants is that it may be very difficult for the government or an independent counsel to successfully prosecute after such grants. This was the problem in the Iran-Contra prosecutions of Ollie North and John Poindexter which failed despite the meticulous efforts of the Independent Counsel to shield himself and his staff from knowledge of the testimony, and by the depositing of packets of information he independently collected with a court before trial.

The standard set by the court of appeals in those cases for shielding witnesses from immunized testimony may be insurmountable. Thus, grants of immunity by committees since then have been limited to situations where it is determined that the need for the public to know the information overrides the potential consequence of a failed prosecution, or that the grant is a necessary tradeoff of a lesser figure in order to reach someone higher up. But this does not limit a congressional committee's ability to grant immunity and to utilize such immunized testimony even if it means that government or independent counsel criminal or civil prosecutions may be compromised or undermined. In this regard the observations of Iran-Contra Independent Counsel Lawrence Walsh is particularly pertinent here: "The legislative branch," he said, "has the power to decide whether it is more important perhaps even to destroy a prosecution than to hold back testimony they need. They make this decision. It is not a judicial decision or a legal decision but a political decision of the highest importance."

In recent years an increasing number of House and Senate specially authorized investigating committees have been vested with special investigating authorities that standing committees normally don't have. By far the most common of these powers to be given is that of allowing staff to depose witnesses under oath. Some advantages of this authority are that members need not be present; there can

be a screening process for witnesses to weed out those with less useful or unreliable information; and that a deposition is a proceeding in which congressionally immunized witnesses can testify and not lose their immunity. Other extraordinary powers given to such special committees have included the authority to obtain and utilize tax return information from the Internal Revenue Service; the authority to seek assistance from the courts and the State Department to obtain information from witnesses abroad; and the authority to go to court to enforce a committee process.

While the threat or the actual issuance of a subpoena is normally sufficient to achieve compliance with information demands, it is through the contempt power that Congress may act with ultimate force in response to refusals to provide demanded information. Three different kinds of contempt proceedings are available. Both the House and the Senate may cite a witness for contempt under their inherent contempt power and under a statutory criminal contempt procedure. The Senate also has a third option, enforcement by means of a civil contempt procedure. Inherent contempt, which requires a hearing on the floor of the House or Senate, was found too cumbersome and too unyielding a process and has not been used for over 60 years. Instead, both Houses until recently have utilized the statutory criminal contempt process which was established in 1857. It provides a mechanism whereby a recalcitrant witness can be cited for contempt by a subcommittee, a committee, and then the House, which then refers the matter to the United States Attorney for prosecution which may lead to imprisonment for up to a year, and/or a fine of up to $100,000. It is applicable to both private citizens and Executive Branch officials. It is a punitive process. That is, the contempt is not purged even if the information is turned over at some point.

1 Civil contempt is available only to the Senate. A recalcitrant witness may be
2 ordered by a court to respond and if he doesn't he may be tried for contempt of court
3 with sanctions being imposed to coerce compliance. It allows the witness to test his
4 legal defenses without risking criminal prosecution. It is often much faster. However,
5 it is not applicable to Executive Branch officials in most instances. It was used
6 successfully most recently in the Senator Bob Packwood investigation to secure an
7 inspection of his diary.

8 An enforcement difficulty may arise when a referral is made to the United
9 States Attorney for the District of Columbia, as required by the criminal contempt
10 statute. Section 194 simply requires the receiving United States Attorney to bring it
11 before a grand jury. The Justice Department has taken the position that Congress can
12 neither constitutionally compel the United States Attorney to bring the matter before
13 a grand jury, nor require him to sign an indictment should the jury hand up one. This
14 is an unsettled matter judicially and the only experience we have had with an
15 executive official occurred during the 1983 contempt proceedings against EPA
16 Administrator Ann Buford.

17 In that case, after Congress voted a contempt of Congress, but before a
18 citation was able to be transmitted to the United States Attorney, the Justice
19 Department filed an action to enjoin the Congress from sending it over. The district
20 court refused to entertain that suit saying that the question of whether the claim of
21 executive privilege that was paramount in that case could only be decided in the
22 context of a criminal prosecution. During this period the U.S. Attorney sat on the
23 indictment. He never presented it to the grand jury but he never refused to send it
24 over. During the two or three week period that ensued after the dismissal of the suit,
25 negotiations took place, and the suit was settled and the contempt citation was

1 withdrawn by the House of Representatives. So, that case is equivocal and didn't
2 resolve anything with respect to that issue.
3 But does this mean that Congress is powerless in subpoena disputes with the
4 Executive Branch? Of course not. As a historical matter, presidents have been
5 reluctant to exert executive privilege against congressional demands in all but the
6 most clear cut cases. As I have noted, accommodation rather than confrontation has
7 been the keynote of most congressional attempts to obtain executive documents or
8 testimony, recent history to the contrary not withstanding.
9 Moreover, Congress retains a host of other tools to require the information
10 and testimony it needs. Not the least of these is public opinion. Thus, even if a
11 citation of contempt does not lead to a criminal prosecution, presumably few
12 administrations and fewer officials within an administration, would welcome a
13 contempt citation with its resultant publicity and public criticism. This has been, for
14 the most part, the experience of the last four and one half years where, at the point
15 of a contempt citation, an accommodation was reached, and in most instances
16 documents that were sought were turned over.
17 Further, Congress can delay action on a bill favored by the Administration.
18 The power of the purse is available to increase pressure. The Senate can put
19 Administration nominees on indefinite hold. And, finally, there is the exercise of the
20 ultimate oversight weapon- the power of impeachment. Thus, Congress retains ample
21 means by which it can defend its legitimate interests and prerogatives in order to
22 secure the information it desires. History has demonstrated that these indirect means
23 are sufficient to enable Congress to perform its legislative function, even if
24 constitutional or other considerations limit the effectiveness of more direct means of
25 subpoena enforcement. Thank you.

1 QUESTION: My experience at the committee I am with during this and past
2 administrations is that no matter how careful and conscientious we are in our
3 oversight efforts, agencies attempt to drag out the process and wear us down. They
4 are often successful. This is discouraging. Sometimes threats of subpoenas and
5 contempt don't seem sufficient.
6 MR. ROSENBERG: I'm not saying this isn't tough process. When normal
7 persuasion devices don't seem to be working, you may have to be creative. Here's
8 an interesting example that may be instructive. John Dingell was investigating the
9 environmental crimes section of the Justice Department and issued subpoena after
10 subpoena to the Department, insisting that he get certain documents they weren't
11 giving to him. It happened at that time the Acting Assistant Attorney General for that
12 Division had been recently nominated for the position and was pending before a
13 Senate committee. Mr. Dingell advised the Senate Committee that was looking at
14 her nomination that his committee was having a problem with document production,
15 and that the nominee was the source of the difficulty. A "hold" was placed on her
16 nomination and the documents were forthcoming almost immediately. The moral is
17 that there are a variety of ways to skin a cat. Vigorously pursuing legitimate
18 oversight is important to maintaining the proper constitutional balance. At times you
19 may have to work hard at it to be successful.
20 QUESTION: What's the best way to approach getting classified information?
21 MR. WOLFENSBERGER: Fortunately or not the Rules Committee never
22 had to deal with trying to get classified information. Members of Congress are
23 automatically cleared for classified information, subject to the regimes which
24 committees put in place to deal with that material when it is sent up. But, I don't
25 think the Administration ever really has a solid defense against prohibiting classified

1 information from being shared with select persons on the committee, whose staff
2 have been cleared as well as Members. But they do have very tight rules to handle
3 it. The Intelligence Committee has an extra set of rules that are written right into the
4 House Rules to deal with such matters and most select committees that we appoint
5 that will deal with classified information do. If your committee does not have that
6 extra regime in its own committee rules or whatever, then it's something worth
7 looking into so that the Administration will have more confidence in your ability to
8 hold it close.

9 MR. ROSENBERG: There should be some demonstration that what is
10 involved is in fact classified information. Classified information is probably the one
11 area in which there is a great deal of deference to the Executive Branch agency that
12 is claiming it. Accommodations should be made with respect to its handling, as Don
13 was saying. There has to be some kind of confidence that the committees other than
14 the intelligence committees, which have normal channels and prescribe in their rules
15 the manner in which classified documents are handled, can be similarly trusted.
16 That's going to be difficult, let's put it that way. It is not like Executive privilege
17 which can be challenged out of need. It is not like common law testimonial privileges
18 which can be overcome even more easily by a committee with needs. So that you
19 touch upon the most sensitive kind of claim that the executive can make and it is
20 incumbent upon the committees to make the kinds of accommodations necessary to
21 assure that that kind of information is held in confidence.

22 QUESTION: I suspect that because of what you just described that you
23 believe that many documents may not actually be classified.

1 MR. ROSENBERG: That is why I prefaced what I said with with the caveat
2 agencies should be asked to make a demonstration that it is indeed a properly
3 classified document. And from that point then you negotiate.
4 MR. WOLFENSBERGER: I think Senator Pat Moynihan has just put out a
5 book on that whole issue about how we have so much material that is overclassified.
6 Probably for that very reason a lot of it has just been forgotten about. It is a point that
7 things are over classified.
8 MR. OLESZEK: Okay, last question. Yes. Way in the back.
9 QUESTION: This question is for Donald Wolfensberger. You touched
10 briefly on resolutions of inquiry. Can they only be issued by committees?
11 MR. WOLFENSBERGER: No, the resolution of inquiry is beyond committee
12 authority. This is the authority that resides with any member of Congress where they
13 can ask for factual information of the President or any Cabinet Head and if the
14 committee does not do anything within two weeks or 14 legislative days I believe,
15 then that can be called up as privileged on the floor, a discharge motion can be
16 offered, and if that passes then the House proceeds to debate and vote on it. So,
17 committees have more extraordinary authority than this resolutions of inquiry are
18 kind of a blunt weapon, but something that an individual member can invoke if
19 committees are not doing what that member would like them to do. Ordinarily,
20 members would work through the committee of jurisdiction first to try and get that
21 information. But, if that is not successful, then this procedure is available to them.
22 MR. ROSENBERG: But it's hortatory. There is no way to enforce it. The
23 next step is either a subpoena, if it hasn't been issued already, or impeachment.
24 MR. OLESZEK: We're going to wind this panel down. On behalf of all of
25 the participants, not just Don and Mort, but all of us here today, and everybody who

1 put this program together, we want to thank you in the audience for attending these
2 workshops. You will see these sessions again in video form at some point when we
3 get the videotaping all done. I want to remind and encourage everyone to show up
4 July 12 to hear the Comptroller General, who not only has a lot to say about
5 oversight but I understand can say it very, very well. So, we look forward to seeing
6 you on the 12th -- same time, same place.

CONGRESSIONAL OVERSIGHT:
RULES OF THE ROAD LESS TRAVELED
REMARKS OF DONALD R. WOLFENSBERGER
DIRECTOR, THE CONGRESS PROJECT
WOODROW WILSON CENTER
BEFORE THE OVERSIGHT WORKSHOP
UNITED STATES CONGRESS
MONDAY, JUNE 28, 1999

I commend the Speaker and Rules Committee for initiating this bipartisan and bicameral workshop on congressional oversight. I vividly recall my first oversight workshop as a congressional staffer back in December of 1978. At the time, I was Congressman John Anderson's legislative director. But I was about to take over as the minority staff director of a Rules subcommittee.

I remember being fascinated by the stories told by various House subcommittee chairmen and interesting and informative. To me, moving onto a committee staff, it was like a motivational seminar. I came away thinking: "Gee, I can do that; in fact, I WANT to do that."

I guess I was only left to wonder why -- if so many staff found the prospect of actually conducting oversight so exciting - why then do most Members of Congress seem so turned-off about doing regular oversight? I guess the short answer is that the oversight workshop tended to show us the more glamorous side of it. We were regaled with the oversight war stories in which the good guys triumphed over the big, bad bureaucracy after locating a smoking memo buried deep in the bureaucracy files.

The reality for most members, on the other hand, is that the most effective oversight is not all that exciting. In fact, it can actually be tedious, time-consuming and even boring, with no obvious political payoff at the end of the line. That's why they send staff out to do the preliminary digging and panning for gold - to sift through tons of worthless bureaucratic rocks for hours on end in hopes of turning up that one nugget that will make them rich in political rewards.

But this kind of work is not what most Members came to Washington to do. They came to find new solutions and make new laws; not spend their time investigating past mistakes and bad laws. Consequently, oversight is, and has been through the ages, one of Congress's biggest oversights in the sense of being an ignored or overlooked responsibility.

For that reason, I have chosen to entitle my remarks: "Congressional Oversight: Rules of the Road Less Traveled." I borrow that phrase from the final lines of Frost's poem which read:

Two roads diverged in a wood, and I-
I took the one less traveled by,
And that has made all the difference.

Let me quote from a well known political scientist as to just why taking the road less traveled --in this case the oversight road - can and should make all the difference. In his words:

> It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what is sees. It is meant to be the eyes and the voice, and the embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct. The informing function of Congress should be preferred even to its legislative function.

And yet, the political scientist adds, Congress is too diligent about legislation and not diligent enough about its oversight and informing functions. The political scientist who penned those eloquent observations was Woodrow Wilson, writing in his classic doctoral treatise, *Congressional Government*, published in 1885. So charges of lax oversight by Congress are now nothing new.

You have already learned that Congress's oversight authority is grounded in its constitutional powers to make laws and appropriate money for the operation of government.

So why is it when necessary for the house and Senate to adopt oversight rules that only seem to reiterate the obvious?

There are two reasons a system of oversight rules has evolved in recent decades - and this is a fairly recent phenomenon in the history of our Republic. The first is to make clear to those who may be the subject of oversight just what to expect--what their rights are and what the duties and responsibilities of Congress are in conducting oversight.

And the second reason for such rules, quite frankly, is to remind, push, prod, pull and cajole the Congress into doing its job. Oversight rules are kind of a road sign pointing to that road less traveled and urging congressional travelers to take it.

I don't care whether you read the reports of the Joint Committee on the Organization of Congress in 1945, 1965, or 1993, or any number of House or Senate select committees reform reports in between. They all say essentially the same thing: Congress has been doing a lousy job of overseeing the executive branch, it must do better, and so here are a few new rules, procedures and devices to help it do a better job.

The first modern statutory formulation of oversight didn't occur until the 1946 Legislative Reorganization Act which charged each standing committee of Congress with exercising a "continuous watchfulness" over the execution of the laws by executive branch agencies.

That was changed in the 1970 Legislative Reorganization Act to what the Rules Committee in its report said was the "more appropriate concept" to "review and study on a continuing basis" the laws agencies and entities of government are charged with carrying out. In other words, the emphasis was on a more pro-active rather than merely passive oversight role.

This is the language currently contained in House rule X, clause 2 under "general oversight responsibilities." The Senate has a similar rule derived from the 1970 reorganization act.

The 1970 Act also required for the first time that committees file biennial activity reports at the end of each congress that summarized both their legislative and oversight activities.

That was further enhanced in the 1974 House Committee Reform Amendments that required committees to discuss their oversight plans at the beginning of each Congress with the Government Operations Committee which would then publish them. That was deleted in 1987 because it had become a rather meaningless exercise in which the staff simply gave the chairman the same list of jurisdictional responsibilities rather than consciously develop a more selective oversight agenda.

However, the idea was revived and strengthened at the beginning of the 104th Congress in 1995 by requiring that committees formally adopt their oversight plans at the beginning of the Congress and submit them to the house Oversight and Government Reform and Oversight Committees, the latter of which would publish them after consultation with the bipartisan leadership.

Moreover, new requirements were included for making committees account for these plans in a separate section of their biennial activity reports, along with any additional oversight activities not listed on their original plans.

The 1974 Committee Reform Amendments also originally called for each committee to establish a separate oversight subcommittee; but that was watered down by a Democratic Caucus substitute that allowed committees to exercise oversight through existing legislative subcommittees. However, at the beginning of this Congress, committees were encouraged to create a separate oversight subcommittee by not counting it against the five subcommittee limit.

The 1974 Committee Reform Amendments also added special and additional oversight authorities and responsibilities for specified committees, and also charged committees with conducting foresight as well as oversight. To date, though, I have not seen a committee foresight report.

The permanent investigative authority for all committees contained at the beginning of House Rule XI was also added in the 1974 amendments. Prior to that, only Appropriations, Budget, Government Operations, Internal Security, and Standards had such investigative authority. Other committees had to obtain special investigative authorities such as subpoena powers and travel through resolutions reported by the Rules Committee and adopted by the House.

Moreover, in 1977 subpoena authority was extended to subcommittees and delegated to full committee chairmen if committee rules provided for such a delegation.

The investigative committee hearings procedures, sometimes referred to as "the witness bill of rights," and now contained in Rule XI, clause 2(k) were first adopted back in 1955 as a result of numerous abuses of witnesses that occurred during the McCarthy era. At the same time, the quorum requirement for hearings was set at not less than two members to avoid so-called one-member investigations - again something that had become an embarrassment to Congress.

The right of the minority to call its own witnesses at any hearing, whether investigative, legislative or general oversight in nature, was part of the 1970 Legislative Reorganization Act, as was the right of any committee member to file minority, additional or supplemental views and estimates submitted to the Budget Committee.

Finally, a rule used only sparingly in recent times, but still important to individual members, is the rule governing resolutions of inquiry. These are simple house resolutions in which any Member may request factual information from the President or a cabinet department head.

The rule dates back to 1820, though the right to request information from the executive goes back to the beginning of our government. Such resolutions should be worded so as to "request" information of the President; but they may "demand" it from a cabinet secretary.

A committee is given 14 legislative days to report back to the House on the disposition of the request. If it has not gotten voluntary compliance from the President or cabinet officer, it report the resolution and ask for a House vote on it. If it does not report within 14 days, then any house Member any officer a motion to discharge. The discharge motion is considered without debate. If it is adopted, then the House proceeds to one hour of debate on the resolution of inquiry.

That concludes my brief survey of House oversight rules. Mort Rosenberg will get into the details of how these rules and various legal authorities operate in the real world. Let me simply conclude by saying that no set of rules, no matter how artfully drafted and well intentioned will produce effective oversight if the will is not there on the part of the committee and subcommittee chairmen and their members to do the nitty-gritty work involved.

Put another way, you can lead a committee horse to the oversight trough with sweet sounding words, but you can't make it drink. Congress has been very strong on the rhetoric of oversight over the years, but often comes up short on the delivery of effective oversight results.

The exceptions, of course, are the more sensational scandal investigations that have made many a political reputation including those of Joe McCarthy, Estes Kefauver, Richard Nixon and Sam Ervin.

But programmatic oversight is a lot more difficult and the payoffs are uncertain in the short term. In the long term though, as Wilson put it, oversight is a key component not only in ensuring that the government is running effectively and efficiently, but that the public is properly informed by the congress of how well its tax dollars are being spent for its benefit. If Congress cannot get a proper handle on our vast governmental bureaucracy, then public confidence in government, including the Congress, is bound to decline even further. That in itself should be a compelling incentive for the Congress to do its job properly.

The Congress Project

The Woodrow Wilson International Center for Scholars

A Brief Summary of House Oversight Rules

- **General Oversight Responsibilities**-Each committee shall review on a continuing basis the following matters within its jurisdiction: (a) the application, administration and execution of laws and programs; (b) the organization and operation of federal agencies and entities; (c) any conditions or circumstances that might warrant the necessity or desirability or enacting new legislation on such matters; (d) future research and forecasting; (e) the impact or probably impact of tax policies. **(Rule X, clause 2(a),(b),(c))**

- **Committee Oversight Plans** - Not later than February 15 of each first session of a Congress, each committee shall, in open session, adopt an oversight plan for that Congress which shall be submitted to the Committees on House Administration and Government Reform. The plans shall ensure that all significant laws, programs and agencies in a committee's jurisdiction are reviewed every ten years. The Committee on Government Reform shall report the committee oversight plans to the House not later than March 31 after consultation with the Speaker and majority and minority leaders to ensure effective coordination of plans. **(Rule X, clause 2(d))**

- **Oversight Plan Accountability** - Each committee shall include in its biennial activity report separate sections summarizing its legislative and oversight activities, with the oversight section containing a summary of the oversight plans and the actions taken and recommendations made with respect to each such plan, as well as of additional oversight activities. **(Rule XI, clause 1(d))**

- **Oversight Subcommittees and Ad Hoc Committees** - Each committee with 20 or more members shall establish an oversight subcommittee, or require its subcommittees to conduct oversight in their respective jurisdictions. (A committee having an oversight subcommittee may have six subcommittees.) The Speaker may appoint special ad hoc oversight committees to review specific matters within the jurisdiction of two or more standing committees, subject to House approval. **(Rule X, clause 2(b)(2) and (e))**

- **Special and Additional Oversight Functions** - Special oversight functions are assigned to eleven committees. Additional review requirements are

specified for the committees on Appropriations, Budget, and Government Reform. **(Rule X, clauses 3, 4)**

- **Investigative Authority** - Each committee may conduct at any time such investigations and studies as it considers necessary or appropriate in exercising its legislative and oversight responsibilities under rule X, and may incur travel expenses in connection with such investigations. **(Rule XI, clause 1(b)(1))**

- **Investigative Hearing Procedures** - ("Witness Bill of Rights") The duties of committee chairmen and the rights of witnesses in investigative hearings are detailed here, plus provision relating to the confidentiality of testimony or evidence taken in executive session. **(Rule XI, clause 2(k))**

- **Power to Sit, Act, and Subpoena** - All committees are entitled to sit and act at such times in the United States whether the House is in session or not, to require by subpoena or otherwise the attendance and testimony of witnesses and production of materials. Subpoenas may be authorized by committees and subcommittees or the authority may be delegated to the committee chairman under conditions set by committee rule. **(Rule XI, clause 2(m))**

- **Calling and Questioning Witnesses** - The minority is entitled, upon request of a majority of its members, to call its witnesses during at least one day of hearings with respect to a measure or matter. Questioning of witnesses shall be by the five-minute rule, but the committee may adopt a rule permitting a specified number of its members to question a witness for longer than five minute. With such extended time divided equally between the majority and minority parties, not to exceed one hour. A committee may adopt a committee rule permitting majority staff to question a witness for equal time, which shall not exceed one hour. **(Rule XI, clause 2(j))**

- **Contents of committee Reports** - The report of a committee on a measure that has been approved shall include the oversight findings and recommendations of that committee, and a summary of oversight findings and recommendation by the Committee on Government Reform if timely submitted to the committee. **(Rule III, clause 3(c))**

- **Investigative and Oversight Reports** - A proposed investigative or oversight report shall be considered as read if available to members at least 24 hours in advance. A report on an investigation conducted jointly by more than one committee may be filed jointly provided each committee complies independently with all requirements for approval and filing of the report. **(Rule XI, clause 1(b)(2),(3))** The right to file minority, additional or supplemental views applies to a report on "any measure or matter," and thus to investigative, oversight, and activity reports. **(Rule III, clause 3(a)(1))**

- **Resolutions of Inquiry** - A resolution of inquiry (filed by any Member seeking factual information of the executive) must be reported back by the

committee of jurisdiction not later than 14 legislative days after referral, or it is subject to a discharge motion. **(Rule Xiii, clause 7)**

(Summary compiled by Donald R. Wolfensberger, Congress Project Director)

# # #

House Rule X. Organization of Committees;
Clause 2. General Oversight Responsibilities:

(a) the various standing committees shall have general oversight responsibilities as provided in paragraph (b) in order to assist the house in -- (1) its analysis, appraisal, and evaluation of -- (A) the application, administration, execution, and effectiveness of Federal laws; and (B) conditions and circumstances that my indicate the necessity or desirability of enacting new or additional legislation; and (2) its formulation, consideration, and enactment of changes in Federal laws, and of such additional legislation as may be necessary or appropriate.

(b)(1) In order to determine whether laws and programs addressing subjects within the jurisdiction of a committee are being implemented and carried out in accordance with the intent of Congress and whether they should be continue, curtailed, or eliminated, each standing committee (other than the Committee on Appropriations) shall review and study on a continuing basis -- (A) the application, administration, execution, and effectiveness of laws and programs addressing subjects within its jurisdiction; (B) the organization and operation of Federal agencies and entities having responsibilities for the administration and execution of laws and programs addressing subjects within its jurisdiction; (C) any conditions or circumstances that my indicate the necessity or desirability of enacting new or additional legislation addressing subjects within its jurisdiction (whether or not a bill or resolution has been introduced with respect thereto); and (D) future research and forecasting on subjects within its jurisdiction.

(2) Each committee to which subparagraph (1) applies having more than 20 members shall establish an oversight subcommittee, or require its subcommittees to conduct oversight in their respective jurisdictions, to assist in carrying out its responsibilities under this clause. The establishment of an oversight responsibilities.

(c) Each standing committee shall review and study on a continuing basis the impact or probable impact of tax policies affecting subjects within its jurisdiction as described in clauses 1 and 3.

(d)(1) Not later than February 15 of the first session of a Congress, each standing committee shall, in a meeting that is open to the public and with a quorum present, adopt its oversight plan for that Congress. Such plan shall be submitted simultaneously to the Committee on Government Reform and to the Committee on House Administration. In developing its plan each committee shall, to the maximum extent feasible-- (A) consult with other committees that have jurisdiction over the same or related laws, programs, or agencies within its jurisdiction with the objective of ensuring maximum coordination and cooperation among committees when conducting reviews of such laws, programs, or agencies and include it its plan an explanation of steps that have been or will be taken to ensure such coordination and cooperation; (B) give priority consideration to including in its plan the review of those laws, programs, or agencies operating under permanent budget authority or permanent statutory authority; and (C) have a view toward ensuring that all

significant laws, programs, or agencies within its jurisdiction are subject to review every 10 years.

(2) Not later than March 31 in the first session of a Congress, after consultation with the speaker, the Majority Leader, and the Minority Leader, the Committee on Government Reform shall report to the House the oversight plans submitted by committees together with any recommendations that it, or the house leadership group described above, may make to ensure the most effective coordination of oversight plans and otherwise to achieve the objectives of this clause.

(e) the Speaker, with the approval of the House, may appoint special ad hoc oversight committees for the purpose of reviewing specific matters within the jurisdiction of two or more standing committees.

CONGRESSIONAL OVERSIGHT: A "HOW-TO" SERIES OF WORKSHOPS

Monday, July 12, 1999

RESOURCES FOR THE CONDUCT OF OVERSIGHT

Introductory Remarks

Kent Ronhovde
Associate Director, Congressional Research Service

KENT RONHOVDE: Good morning. My name's Kent Ronhovde. I'm the associate director for Research Operations at the Congressional Research Service. I want to start by welcoming everybody to the second in our three-part series on congressional programmatic oversight. We're pleased to present this bipartisan oversight workshop at the request of Speaker Hastert and the Chairman of the Rules Committee, Congressman David Dreier. CRS first conducted a workshop on congressional oversight and investigations in 1978 at the request of Speaker O'Neill. Since then we have sponsored and conducted various oversight seminars and have updated an accompanying manual as needed.

As we all know, congressional oversight is a core constitutional function of the legislative branch, and it plays a crucial role in ensuring the effective and efficient operations of our government. As the 106th Congress undertakes its oversight responsibilities, and as CRS supports you with research and analysis in your performance of that function, we seek here to provide you with specialized training in the process of congressional oversight and have called together a number of

experts to assist us. Our goal is to provide a foundation for the conduct of effective oversight activities during the 106th Congress.

The speakers and panels will place oversight in context, will explain the various components of this important constitutional function, and will provide you with practical information useful in your work. We hope that this program will also give you an opportunity to meet a few of the experts in the field as well as to share information with colleagues who have similar areas of interest. Our panels today will address two distinct aspects of oversight. First, sources of assistance for congressional oversight outside the Congress. And second, the nature of fiscal oversight within the Congress.

We're pleased to welcome this morning the Comptroller General of the United States, David Walker, who heads the agency most directly involved in efforts and activities supporting congressional oversight. In his keynote address this morning, Comptroller General Walker will discuss how committees and Members can acquire information and analysis to monitor and evaluate program and agency performance. Our first panel will also focus on this aspect of oversight. We're joined by Eleanor Hill, a former Inspector General with the Department of Defense; Gene Dodaro, the Principal Assistant Comptroller at the General Accounting Office; and Sallyanne Harper, the Chief Financial Officer with the Environmental Protection Agency. Mr. Barry Anderson, Deputy Director of the Congressional Budget Office, and Dennis Kedzior, formerly with the House Committee on Appropriations form our second and final panel today. They will focus on fiscal oversight and share their views on how Congress spends public monies and manages the power of the purse. In two weeks, on July 26, we'll host the third and final segment of this workshop. I hope you'll be able to join us then as we focus specifically on investigative oversight.

It's now my pleasure to introduce Comptroller General David Walker. David Walker became the seventh Comptroller General of the United States last November. As the nation's top auditor, he heads the 77-year-old General Accounting Office, the legislative branch agency charged with following the federal dollar and assessing federal programs throughout the world. Who better to talk to us this morning about how best to go about the conduct of effective oversight. Mr. Walker

Presentation of

David Walker
Comptroller General of the United States

DAVID WALKER: Thank you and good morning. It's good to be with you this morning, especially on the first day back from a break. I know it's tough and I appreciate all of you showing up on time this morning. I can note at the outset that there is a wealth of information that's being provided out in the foyer, including a copy of the powerpoint presentation that I'll be using today for any of you who would like to have a copy. I'd also like to note at the outset that Theresa Perkins is kind enough to operate the powerpoint presentation so I can present my remarks in an uninterrupted fashion given the fact that we are being filmed. Let's start off.

As was mentioned, I am Comptroller General of the United States. One of the responsibilities that I have as Comptroller General, my primary responsibility, is that of being the chief executive officer of the General Accounting Office. That may be confusing to you because if you're from NBC, ABC or CBS, quite frequently we're referred to as the Government Accounting Office. But we really are the General Accounting Office. As you'll see in a few minutes, though, that is really somewhat

of a misnomer because only about 25% of what we do is about traditional financial, audit, and accounting matters. Seventy-five percent of what we do involves other activities. Therefore, the word that probably describes us most accurately would be accountability. We're really about accountability, not accounting. And I'll come back to that.

First, our mission. Why do we exist? It's important to note that we are in the legislative branch of the government, and therefore, our primary client is the Congress of the United States. Our beneficial client is the American people. Our responsibilities under our mission are two-fold. First, to support the Congress in meeting its constitutional responsibilities, including its oversight responsibilities. And secondly, to help improve the performance and accountability of the government for the benefit of the American people.

It's important to note that nearly all of our work is either mandated by legislation or is performed at the request of the Congress, typically, a committee chairman, a ranking member, or members on a committee of relevant jurisdiction, whether it be an appropriations, authorizing, budget or oversight committee. We also do work for individual members of Congress to the extent that we have the resources available to get it done. But our first priority is the institution of the Congress and our second priority is the committees. Congress has decided to organize itself into various committees to exercise its responsibilities.

This next graph shows you what percentage of our work is based on statutory mandates, committee requests, or requests from various members. As of the end of 1998, 96% of the work that GAO did was either based upon a statutory mandate--such as the CFO Act or GPRA, the Results Act--or based upon a request from a committee, a subcommittee, or one or more members of Congress. That is up

significantly from the past when my predecessor Chuck Bowsher left as Comptroller General in September of 1996—when about 80% of GAO's work was congressional requested or mandated. When his predecessor left in 1980, only about 30% of GAO's work was congressionally mandated or requested. And so you'll see that our work changed significantly over the years. We're a very prolific agency.

In 1998, we delivered over 900 reports to the Congress and agency officials on a wide range of activities. Basically, anything the federal government has ever done, is doing, or is thinking about doing, GAO gets involved with. That's how broad our scope is. We've delivered over 250 sets of congressional testimony, gave over 200 formal congressional briefings, issued numerous legal opinions, provided technical assistance, and prepared other information memoranda.

Most importantly, because cost/benefit analysis is a lot of what we're about, we returned $50 in financial benefits for every dollar appropriated to GAO. Let me restate that-- $50 in financial benefits returned for every dollar appropriated to GAO. That is number one in the world for any type of accountability institution.

Next, as far as our scope of services, most people think of us as accounting and auditing because our name, after all, is the General Accounting Office. But as you can see from this next slide, we actually have a wide range of capabilities.

- Evaluations—how well are federal programs working?
- Financial audits—are public funds spent efficiently and effectively?
- Investigations—are there illegal or improper activities going on?
- Legal opinions—are agencies meeting congressional intent and the letter of the law?
- Policy analyses—what are the implications of proposed courses of actions.

So if you divide government into two sides, the business of government and yes, the government is a business. It's not a for-profit entity, but it has a responsibility to conduct itself in a business-like manner—to do it economically, efficiently, and effectively. We focus on trying to make recommendations as to how to improve economy and efficiency. On the other side, the mission of government varies based upon the department or agency--obviously DOD is to fight and win wars, whereas HHS is different. With respect to mission, we are focusing on how well the mission is being accomplished, namely, the department's or agency's effectiveness.

To the extent that we have to deal with sensitive policy issues, our job is to provide the Congress with the facts, the options, the pros and cons, a framework for action. Since we are not elected, we don't make policy decisions. It's the members of Congress who have to make the policy judgments as to what's the best course for the country.

In order to perform these various functions, we are comprised of a multi-disciplinary professional services group. We have about 3,275 personnel, 70% of which are in Washington, DC; the balance are in 16 cities around the United States. We do not at present have any individuals stationed overseas, although we have in years past. Over 50% of our professionals have either a Ph. D or a Master's degree, most of which are from the top schools in the country. Their expertise ranges anywhere from functional expertise--financial auditing, law, information technology, human capital strategy, strategic planning--to a wide variety of issue areas--weapons systems, health care, Social Security, income security, taxes, transportation, environment, a whole range of issues. We do anything that you can imagine that

would be necessary in order to assist the Congress in its oversight and other activities.

We have deep institutional memory. The average tenure for a GAO person is over 20 years. The average age for a GAO person is my age, 47. We do a significant amount of original data collection and analysis rather than just reporting information that's out there. What we do at GAO is we turn assertions and information into facts and knowledge.

There's a tremendous amount of information out there, there's also a tremendous number of assertions. It's our job to pull together the different skills that we have to separate fact from fantasy and to be able to take information, sort it, and bring knowledge to help the Congress do its job. Our competitive advantage, quite frankly, is the ability to pull together this wide range of skills to look longer, broader, and more integrated than otherwise might be the case, whether it be dealing with Social Security, defense policy, the financial management area, human capital strategy, etc.

We have to perform our responsibilities given the fact that our clients are numerous--namely we have 540 clients--that is the sum of the members of the Senate and the House of Representatives, including the five representatives for the U.S. possessions. It's extremely difficult to satisfy 540 clients. As a result, what we try to do is to be committed to a set of core values that transcend politics, that transcend current situations that could be problematic for us to achieve our responsibilities to the institution of the Congress.

Those core values are three. First, accountability, which describes what we do. Our job is to help assure that the Executive Branch is accountable to the Legislative Branch under the Constitution, irrespective of who the President is. We

try to help assure the government's accountable to the American people. Accountability, as articulated previously, is also more descriptive of what we do. We are not just accounting, we're much broader than that.

The second word--and very key--is integrity. It describes how we do our wor--professional, objective, fact-based, non-partisan; just as importantly, our work is non-ideological, fair, and balanced. It's absolutely critical that when you come to GAO you know you're going to get a product that's committed to these values. You need to get the facts. Reasonable people can differ as to what the right policy solution is or what the right course of action might be, but you need to get the facts and you need to get them in a manner that has integrity. And we need to not only make sure that we talk about what's wrong, we also need to note where progress is being made, what's going right, so we can put things in a balanced perspective.

Our third core value is reliability: timely, accurate, useful, clear and candid information and analysis. We need to say what we mean, we need to mean what we say, we need to tell it like it is, and sometimes we have to deliver messages that people don't want to hear. But if not us, who? The answer is all too frequently, it would be no one if we don't do it.

Next, how do we support congressional oversight, which is the purpose of this session? The answer: in many ways. First, we review agency performance, we oversee operations, we assess federal policies and programs, we analyze the financing of government activities, and we anticipate emerging issues. With regard to all that, let's talk a little bit about reviewing agency performance.

There are three key areas that we focus on in reviewing agency performance. First, agency compliance with legislative directions and intent. Secondly, whether or not the agencies have the capacity to plan and execute their responsibilities. And last,

whether or not there are any potential abuses of authority. On the next slide, you will see several examples of how we've performed these responsibilities. They are numerous. I'll touch on a few.

We've been involved for years in looking at the various security issues associated with DOE (Department of Energy) labs. While this is a timely topic, it's something that we've been working on since the 1980s. And we've had a number of reports that we've issued making recommendations as to what ought to be done. We've done a lot of work at the IRS in connection with taxpayer service, to balance the responsibilities to provide customer service with their responsibilities to enforce the laws. And we are very well known for issuing every two years our Performance in Accountability Series that talks about major management challenges and program risk facing the federal government. Our high risk series notes those programs or activities in the federal government that are subject to a much greater risk of fraud, waste, abuse, and mismanagement.

In that regard, let me hold up two props. This is a 30-page summary of our major management challenges and program risks Executive Summary that was issued in January of 1999. I commend it to you. This is a 30-page summary of what otherwise would have been 22 booklets of over a thousand pages. It's written in plain English, with charts and graphs and gives you the bottom line. This is a valuable document for oversight. And each of the major 24 departments and agencies have their own individual booklet that goes into a lot more depth, which should be invaluable to the Congress in oversight.

We also have a more detailed booklet available on our high risk series, which comes out every two years. This is the latest high risk series, which also came out in January of 1999. We plan to issue updates of these at the beginning of each

Congress. Every two years we plan to issue an updated performance and accountability series as well as a high risk series. Those documents, are invaluable oversight documents, and I would commend them to you.

I think we can probably all agree that we should have zero tolerance for fraud, waste, abuse, and mismanagement. But let's get realistic. The US government is a $1.7 to $1.8 trillion enterprise. It is the largest, the most diverse, the most complex government on earth. And it probably always will be. So the fact of the matter is while we should have zero tolerance for fraud, waste, abuse, and mismanagement, it will never be zero. Therefore, we have to focus on fighting fraud, waste, abuse, and mismanagement, but we have to look at what type of systemic changes can be made to improve economy, efficiency, and effectiveness. What can be done in the area of strategic planning, financial management, information technology, human capital strategy--the drivers of any enterprise--to make sure that we're getting the most bang for the buck and we're doing the best job? Evaluating the adequacy of accounting systems and controls over the use of funds would be another example of how we assist in overseeing operations. A few examples.

We audit the consolidated financial statements of the federal government. We do a financial statement audit which is designed to express an opinion on whether or not the financial statements are fairly presented in all material respects. We also express an opinion on controls and the degree of compliance with major laws and regulations that affect the federal government. We happen to audit the IRS as well as the Bureau of Public Debt and the FDIC, but the one that we're most noted for is the Consolidated Financial Statement Audit.

Unfortunately, the FY '98 audit resulted in a disclaimer of opinion because there are several agencies that do not have adequate controls and reliable enough

financial information at this point in time for us to be able to express an opinion. We are working with the Administration to try to get there, but there are objective standards that have to be met in order to express an opinion.

Probably the biggest challenge is DOD, the Department of Defense. They do an excellent job of fighting wars and other conflicts, But they have a long way to go from the standpoint of management practices. Although I will say for the record that Secretary William Cohen, Deputy Secretary John Hamre, and others are really taking this seriously. They've made a lot of progress in the last year and, hopefully, they will continue to make progress.

We also try to look for "best practices." What are the best management practices that exist not just in the federal government but, frankly, the private sector as well? We bring those best practices to government and share them. One example of that is work that we've done with regard to DOD's $6 billion hardware inventory program.

The next area--assessing federal policies and programs--where we're focused is on ascertaining the effectiveness of federal programs and service delivery, the extent to which there is overlap, duplication, or inadequate coordination among agencies, and the impacts of programs on the people and those entities that are affected by the programs. Importantly, this is one of the areas where we are strategically positioned to best help the Congress. We're looking longer than you might normally look, and we're looking broader. For example, terrorism. There are over 30 agencies in the federal government that are involved in combating terrorism. In the area of food safety, there are a number of agencies involved in dealing with food safety.

In areas that cut across government--such as financial management, strategic planning, human capital strategy--we can particularly add a lot of value because we can transcend glass walls and glass ceilings that the IGs and others might not be able to, and that's not what they're intended to do. Here are several examples of assessing federal policies and programs. Tracking state implementation of welfare reform would be a recent example. Bringing government-wide and cross-cutting programs into perspective on counter-terrorism, food safety, drug control; making sure that the right players are involved, somebody's in charge, there's some accountability mechanisms, minimizing duplication, minimizing conflict but trying to maximize efficiency and effectiveness. Another example is analyzing financing for government activities. We look at long range financial outlooks not just two years, not just five years, not just 15 years, which is fashionable today. But we look to the next generation and the generation following that in order to try to help the Congress make sure that they can make informed choices today that will not only generate desirable policy outcomes today, but ones that will better prepare us for tomorrow, especially given a number of the significant demographic challenges that we and other major industrialized nations face.

We also review various funding requests including doing budgets scrubs for budgets that are proposed by executive branch agencies. We review opportunities to reduce or target spending within existing and projected constrained resource levels. Some examples.

We do a long range budget simulation, and we've also recently produced an excellent document that I would commend to you on federal debt that answers frequently asked questions with regard to federal debt. Here's what it looks like. In fact, I noticed in the *Washington Post* it was recommended reading during the

congressional break. Hopefully, some of you had a chance to read it because people sometimes have a hard time understanding how total debt can be going up when we're in a time of surplus? Well, that's a legitimate question. And that's just one of many questions that gets answered in this document. This document also contains a wealth of other information and some nice charts and graphs to try to help enhance the learning experience.

We have performed long range budget simulations to try to put the current budget situation in context. Yes, both CBO and OMB are projecting budget surpluses for as far as the eye can see. But just two years ago they were projecting budget deficits as far as the eye can see. Underline the word "projected." Budget surpluses may or may not occur. What we know for a fact based upon our budget simulations is that we face real spending challenges in the out years due to the explosive growth of entitlement programs. Based upon our budget simulation, depending upon what course of action is decided on the budget surplus, we could have no discretionary spending as soon as 2030 because of the explosive growth of entitlement programs. So we're doing these simulations to put things in perspective to, hopefully, put Congress in a position where lawmakers can make informed choices today that will help better position us for tomorrow and so they can combat myopia and tunnel vision in certain regards. We've helped the Congress in looking at Social Security and Medicare program solvency and reform options. Our budget implications document for the fiscal 2000 budget has analyzed a number of budgetary proposals and made comments that should be helpful to various committees on the Hill in exercising their oversight, appropriations and other responsibilities.

Anticipating emerging issues is another important area for GAO. For understandable reasons members tend to focus on shorter term issues, especially if

you have to get elected every two years. But it's important to have somebody in government that is focused on more than just two years, frankly more than five years, more than 15 years. And that's part of our responsibility. We look at current and emerging issues to put the Congress in a position to make timely and informed decisions before they reach crisis proportions. We look at the implications of various public policies on current and future generations of Americans, because, after all, members represent all generations of Americans. Let me cite some examples. The Y2K computing challenge where GAO globally sounded the clarion call and provided leadership on a global basis. The executive branch, through John Koskinen and others, has really picked up the ball and run with it.

International institutions. What are the new roles of international institutions in a post-Cold War environment? Institutions like NATO, institutions like the UN, institutions like the IMF and the World Bank. What are their roles and what is the US' responsibility in that regard?

We're going through our strategic planning process at the present time. And in doing that we have asked ourselves, through consultation with Members and key staff and others on the outside, what are the key issues that our nation will face in the next six plus years? What are those issues? And these are the six we came up with.

First, *demographics*. Longer life spans, increasing dependency ratios, more and more retirees, fewer and fewer workers relative to retirees, and the impact that that has on labor force planning, on entitlement programs, on pensions, on health, on a whole variety of training and other type of issues.

Globalization. Increasingly, the world consists of interdependent economies. We see the globalization of markets, globalization of enterprises and the multi-dimensional impact all that has on the country.

Security. The changing nature of security threats in a post-Cold War environment raises serious issues. Rogue nations, terrorism, cyber-terrorism, bioterrorism, represent changing security threats and we need to position ourselves to address them.

Quality of life. This issue concerns the changing needs of our population. We want people to have a good education, to have access to health care, to be able to be gainfully employed. The environment, work/family matters, and a whole range of other associated issues are part of the quality of life.

Technology. The explosion of technology, on the positive side, is driving down costs and enhancing productivity. On the cautionary side, technology dehumanizes much of what is done and creates new security threats for our country and new privacy threats.

And then last, but certainly not least, *government performance*. This area includes the devolution revolution, the new federalism, the delegation of responsibilities to lower levels of government and the increase in partnering -- whether it be domestically or internationally, as well as public/private sector cooperation. The focus is on results, on outcomes, not outputs. What difference are we really making? Did the law do what was intended? Did the regulation have the anticipated effect? Did the reforms result in meaningful and lasting change?

In summary, the GAO represents a multi-disciplinary professional service organization. It has a wider variety of disciplines than any other entity on earth. It is one of the most highly educated institutions on earth. It is much more than accounting. It is about accountability. It can provide invaluable assistance to members in a variety of ways, including oversight. In addition to testifying, GAO can provide briefings. We can provide Qs & As for hearings. We can let you know what

work we've done in an area in the past to prepare for hearings. We can provide technical assistance on legislative drafts.

There's a whole range of things that we can do that would be invaluable to the Congress. I would encourage you to discuss any requests you have, any needs you have, with an appropriate GAO representative. A member of our Office of Congressional Relations is a good place to start. You have contact information now on the screen with regard that office. Most of our publications, a vast majority, are available electronically on our Website, which is www.GAO.gov. You also can obtain additional hard copies of GAO documents by calling the appropriate number that's listed here.

And last but not least, let me note that one of the things that I have done, and taken very seriously since coming to GAO, is to recognize that we're in a client service business. The Congress is our client. I am up on the Hill virtually every day talking to Members and key staff about what are we doing right, what can we do better, and how can we improve our processes.

One of the things we are working on now, which we have substantially completed and hope to roll out in the next month or two, is a new list of GAO policies and procedures for how we can help you--what can we do, who do you call, what are the rules of the road, if you will, in interacting with GAO. We want to make them clearly defined, we want to make them well documented, and we want to make them transparent so we can make it easier for you to use us.

However, you've got to understand we have a finite amount of resources and so we're going to have to end up, obviously, prioritizing and working together with you to try to make sure that we're doing the most important things for the Congress

to make a difference for the country. I thank you for your time and attention, and I would be more than happy to answer any questions you might have. Thank you.

MR. OLESZEK: We've got time for questions, and Mr. Walker has kindly agreed to answer them.

QUESTION: I missed the first couple of minutes of your remarks, but there were some newspaper reports to the effect that when you came in as Comptroller General, there were things about GAO you were not satisfied with. So I wonder if you would talk a little bit more about the changes you plan for GAO.

DAVID WALKER: Well, I think that GAO is one of the best agencies in government but we can be better. I think we're doing a lot more things right than we're doing wrong, but we can improve. First, I think we need a more active and ongoing outreach effort with the Congress and we're well on the way to getting that done. We need to have more clearly defined policies and procedures for how we interact with our client that are transparent. I think we need to engage in a cultural transformation. GAO as well as many government agencies, in my opinion, can be described as somewhat hierarchial, process-oriented, and "siloed" where there are glass walls, not glass ceilings.

I'm trying to transform our culture to be more "partnerial," which means more empowerment but more accountability, more results oriented, focused on outcomes rather than outputs, and also more integrated where we're pulling together the right kind of skills to get the job done within the time frame that the client needs it done.

We need to look at our product mix. We're famous for these blue cover reports. They're outstanding. GAO is a global brand name, but we need to recognize that we're serving a client. We need to make sure that we are keeping our product mix up-to-date for what the client needs. Many times a client doesn't need a blue

cover report. Many times the client is really looking for testimony or they're looking for a briefing or they're looking for a short turn-around document. We have to hear that and we have to respond.

Although people need to understand when we do financial audit work, it puts us in the position to be able to respond to those quick turn around requests. So we've got to look at our product mix, we've got to look at our job processes to make sure that when we say we're timely, we're timely based on the client's timing needs, not our commitments. So we've got a number of major efforts underway.

I think the other thing that I would say as probably the biggest challenge, other than cultural transformation that we face at GAO, is we face an emerging human capital crisis. And so does the federal government. Let me give you an example. We downsized 39% from the early 1990s to 1997. We did that by closing a number of offices. We did that through freezing hiring for five years. We did that through cutting back on training programs and other "seed corn" for the future and as a result we face certain major challenges. Today, within five years, 55% of our executives are going to be eligible to retire and one-third of our entire work force.

And we have certain other challenges that we have to meet. We are the Congress' institutional memory to a great extent, supplementing key staff for the Congress. And I've got to focus on making sure that we not only can get the job done today, but we're taking the steps to make sure that we're well positioned to help future Congresses get the job done for tomorrow. So that's just a few examples of some things that we're doing.

QUESTION: I'd like you to talk a little bit about partnership with congressional offices. One of the things I've used GAO for is to peer review my own work. If there's a component of an agency or program that I don't know much about

and someone at GAO does, I've found it's very helpful to partner with GAO throughout an oversight project, which may last quite awhile.

MR. WALKER: Absolutely, and I think we've done that in a variety of forms. First, we do have certain loaned staff arrangements where we've actually lent staff to the Hill for stated periods of times not to exceed a year to work on special projects like Y2K or the high risk series. Secondly, even in a more non-labor intensive context, we want to make sure that you can access the people within our agency who have the content expertise that you're looking for to "QC" (quality control) something, to peer review something. That's a perfect example of how we can help. It's also an example of something that I think that we're going to need to be doing more as we look at our product mix.

Interestingly, 80% of our products that we currently deliver take less than 50 staff days. But 90% of our resources are dedicated to the remaining 20%. So our job is to be make we're focused on the things our client needs; that we can give quick turn around on things that don't take a lot of time like, for example, what you just talked about; and that we can do job process re-engineering to get more efficient in generating these types of very valuable products that, frankly, help us do the short turn around stuff.

QUESTION: Where do you get the authority to initiate operational or policy studies?

MR. WALKER: Well, number one, we frequently get congressional requests. Ninety-six percent of our work is based upon congressional requests. We don't make - we're not the ones that decide policy, it's the Congress that decides the policy. But quite frequently we will get requests on sensitive policy issues. Let's take Social Security and Medicare as an example.

I've testified probably six or eight times already on Social Security/Medicare reform. I'm going to be doing it again next week. I've already got two or three requests to testify on those issues. Now, how we go about dealing with that is different than an operational issue. On an operational issue, we're going to make specific recommendations as to how to improve operations. On a policy issue, we're going to get the facts, lay out the options, put things in perspective, talk about the pros and cons, provide a framework which the Congress can consider to make decisions, but we're not going to make the recommendation on what the right policy is. That's why Members get elected. But I think we can do a lot to help them make more timely and informed decisions.

QUESTION: What is the difference between CRS and GAO? I was having this discussion with a colleague last week. They didn't understand exactly what the difference is between the two agencies.

MR. WALKER: The question is what's the difference between CRS and GAO? And I think one of the things that I'm trying to work on with Dan Mulhollan and Dan Crippen [the CBO Director] and others is to recognize that we all have a common client and one of things that we need to do is to try to help our client understand who we are, what we do, what are our core competencies, and what are our respective competitive advantages. In my opinion, CRS has a wide variety of very knowledgeable individuals, processes and technology that enable them to respond to requests for available information on a wide variety of topics on a quick turn around basis. If you're wanting current information on a wide variety of topics, then you can call them, they can turn it around and give it to you. What we focus more on is where we are doing analysis or where we're doing attestation; where we're not just looking at the information but we're also trying to determine the veracity of

it, the accuracy of it, the fairness of it, and the balance of it. And so as I said before, our job is to take assertions and information and turn it into facts and knowledge. And so while we can provide a lot of information, especially based on our past work, we typically go a lot more in-depth, I think, in what we do. Other questions?

QUESTION: What distinguishes the work that you do and the work that IGs do?

MR. WALKER: The question is what's the difference between us and IGs? IGs basically are focused on two things--first, fighting fraud, waste, abuse, and mismanagement within their respective department and agency, and, secondly, either conducting or overseeing the conduct of the financial statement audit for their respective department and agency. And so, therefore, they are focused solely on one department or agency.

You also have to look at what the skill base is for IGs. I think you'll find that while IG organizations vary, many of them have more of an investigative background which is focused more towards that first objective than the second. In addition, they may not do as much in the area of program evaluation.

We are particularly effective at dealing with issues that are cross cutting throughout government, that require a lot more indepth analysis, that require a look beyond that particular department and agency, to consider how other parts of government might be affected, especially on things like terrorism and anti-drugs and some of these other issues where you don't have just one department and agency involved.

One of the areas we are looking to do is to also try to help clarify for Congress the differences between the IGs and GAO--when you should call them first, when you should call us first. But I'll tell you, many committees try to maintain

effective, ongoing relationships with both, and to recognize that while it may be something that only deals with one particular department and agency it may have relevance to others. So you may want to touch base with both and find out what they have.

QUESTION: What's the future of GAO-initiated work? What do you see coming down the road?

MR. WALKER: First I call that work R&D—research and development, or, stated differently, investment. My personal opinion is that a vast majority of our resources should be dedicated to congressional mandates and congressional requests--about 85% for discussion purposes. But I believe that the Congress needs, and the nation needs, to have us focus some percentage of our resources on looking at issues that aren't current crises, that represent emerging challenges.

Quite frankly, if we had to rely solely on congressional requests, we might not get very many. My view is that first and foremost GAO supports the Congress on mandates and requests, and through job process and re-engineering and some other things, hopefully, try to free up a little bit more flexibility so we can do a little bit more R&D work. Quite frankly, some of our best work was R&D work. Some of those emerging issues I talked to you about was R&D work that ended up having one or more congressional sponsors after we got started. After we made the initial investment congressional sponsors jumped on and championed it, which is great, and I compliment them for it. But if we hadn't gotten it started, I don't know that it would have gotten done.

QUESTION: How do you allocate your scarce resources between committee requests, Member requests, majority party requests, minority party requests, that sort of thing?

MR. WALKER: How do we allocate resources? Very carefully, first. But the answer is more serious than that. It is as follows. Our first priority is congressional mandates. If it's in a law, if it's in a conference report, if it's in a committee report, if it's in an act of Congress that was passed, that's priority one because that's an institutional request.

Priority two is committee requests. We would like for them to be bipartisan but we can't require that. We recognize that the majority party--whoever that is and we don't decide that, the American people decide that--is going to get more resources because with the majority comes the responsibility of leadership and setting the agenda, the ability to call hearings, for example. But we do want to make sure we allocate resources to the minority party no matter who it is because we think it's important that the minority party have resources. So, our first priority is mandates, our second priority is committees, our third priority is subcommittees, our fourth priority is members on a relevant committee of jurisdiction, and our last priority is Members who aren't on a relevant committee of jurisdiction. That's basically how it works.

QUESTION: In collecting information from the departments and agencies, I imagine some are more cooperative than others. How do you deal with the agencies that are less cooperative?

MR. WALKER: First, a vast majority of agencies are cooperative. To the extent that they aren't, then we obviously try to encourage them to be cooperative. We also have frequent interaction with members on the Hill and the relevant committees of jurisdiction. There have been occasions where either the committee or Members on the committee have come to our aid to try to help further encourage the department and agency to cooperate.

We have the authority to issue subpoenas to outside contractors and people that are getting grants. We can't issues subpoenas to the executive branch directly, but we can issue demand letters. And if it's a very critical piece of information that we absolutely have to have to get our job done, then, under rare circumstances, we've actually issued demand letters that go to the President and the Congress. That doesn't happen very often for understandable reasons. And we only do that if we don't think we have enough information to do our job. There are some circumstances where we didn't get the cooperation we'd like but we think we have enough information in order to do what we were asked to do so we wouldn't issue a demand letter in that circumstance. That's basically how we go about it. Other questions?

QUESTION: One of the differences between GAO and the other supporting agencies is that you, as the Comptroller General, can make recommendations on policies. How do you determine which recommendations to make or whether to make recommendations?

MR. WALKER: Well, the Comptroller General has broad statutory authority. GAO has to deal with a whole range of issues, not just operational issues but also program issues, which can get you into policy issues. I think we have to be judicious about making policy recommendations. For example, I'm going to have to testify on Medicare and prescription drugs. My objectives will be to make sure people understand the current and projected condition of Medicare, the current and projected budgetary outlook for the federal government, and to try to provide information that the Congress, I believe, should consider in deciding whether, and, if so, how to go forward on the prescription drug issue.

I'm sure I'll be providing some information that may cause people to stand and kind of pause and think about some of these issues. But that's part of my job.

Right now we're in a euphoric period. We have a strong economy. We think we're going to be rolling in dough based on projected surpluses, but we have very real structural deficits that will re-emerge and that we eventually have to come to grips with, mainly in the form of entitlement programs.

KENT RONHOVDE: I would like to elaborate a little about the CRS mission because that question came up earlier. As I think a lot of you may know, CRS was created back in 1914 as the Legislative Reference Service, and from that point until 1970 with the passage of the Legislative Reorganization Act of 1970, CRS really was primarily serving the Congress' informational needs. In 1970 however, CRS was expanded to take on a greater research and analysis role for the Congress. And so while the major distinction that I see and-of course, David, I'm sure you see it the same way-the major distinction between CRS and GAO probably resides in the investigative and auditing function that GAO performs. GAO goes out and investigates on the ground, makes determinations and policy recommendations. CRS, on the other hand, isn't staffed and wasn't created in order to perform the kind of mission that was given to the Comptroller General's office. The CRS mission is to support the Congress in providing information and analysis on all subjects of legislative activity to help them make informed decisions as they go. And so I just wanted to make it clear that while, yes, at CRS, the turn around time on requests on average is probably faster than GAO's by a good bit, we at CRS do an extensive amount of in-depth policy and research analysis for the Congress on literally every subject that arises. And I think we work very well in tandem with the GAO role of doing the investigative and auditing function that allows the Congress to have an entity that can send people out and see, where the rubber meets the road, exactly what's happening.

MR. WALKER: What is the difference between CRS and GAO. One of our competitive advantages, in addition to our skill base, is the people that we have. The fact that we have 16 offices in the US, on the ground, people that can kick the tires, check the test tubes, look at the weapons systems, that is a tremendous competitive advantage. And the other is that when we're providing you with information, that information has to be consistent with the core values that I articulated previously. We have to make sure that it's fair and balanced, it's fact based, it's accurate, it's not misleading. And that requires work. There's a lot of information you can get off the Internet. A lot of information is not accurate, it's not fair, it's not balanced. So you have to be careful. And so it's our commitment to you that we get information that is consistent with those core values.

MR. OLESZEK: Thank you Mr. Walker for a terrific presentation. Let's take about five to 10 minutes and reconvene for our next panel.

THE OVERSIGHT ROLE OF THE GAO, INSPECTORS' GENERAL, AND CHIEF FINANCIAL OFFICERS

Panelists: Gene Dodaro, Principal Assistant Comptroller General; Eleanor Hill, former Inspector General, Department of Defense; and Sallyanne Harper, Chief Financial Officer, Environmental Protection Agency. Moderator: Frederick Kaiser, CRS Specialist

MR. KAISER: This past Spring, as we're all aware, the U.S. Air Force was involved in a war in Kosovo. But it was also involved in a battle here, domestically, with the Civil Air Patrol. Evidently, there was some controversy and conflict between the two. The Air Force maintains oversight and some degree of management

control over the Civil Air Patrol. Air Force auditors over the past several years have found mismanagement and problems dealing with waste and abuse. The Civil Air Patrol responded by saying that part of the blame lies with the Air Force, because the Air Force is spending more money overseeing the Civil Air Patrol than the Civil Air Patrol's entire budget of about $31 million a year.

Congress, in order to make an informed judgment about this matter, recently passed a Sense of the Congress Resolution, or at least the Senate has approved one. It calls upon the GAO and the Inspector General at the Department of Defense to mount an investigation of the Civil Air Patrol. That tells us a lot about oversight and Congress's expectations associated with it.

Congress has a variety of sources of information, research and analysis that it can rely upon to conduct oversight. One of those is the institution that I represent, the Congressional Research Service. We provide research and analysis, as you heard earlier, for Congress and can get directly involved, too, with congressional committees, and even member offices in assisting in oversight activities. We conduct in-person briefings, write background pieces, provide pro/con analysis of different policy areas, as well as suggesting witnesses who might be called upon to testify from both inside and outside the Executive Branch when conducting oversight. We help to identify emerging issues and prominent concerns that might be associated with an oversight activity. And we can even help in drafting questions for congressional committees and subcommittees in pursuit of oversight of the Executive Branch.

We have three panelists today who will speak about different aspects of oversight and the information resources that Congress has available. We've already heard a lot about GAO, the General Accounting Office; it has been around since

1921. There's no other supreme audit organization in any other country that has the capabilities and collective power of the GAO. A study done in the mid-1990s surveyed and compared the various audit organizations and comptrollers general that existed in other democracies and none of them had the same degree of independence from the executive agencies. None of them had the same degree of authority that the Comptroller General has. And none of them have the resources or virtual government-wide jurisdiction that GAO has.

We will hear shortly from Gene Dodaro, who is the Principal Assistant Comptroller General. In fact, he is the Chief Operating Officer at GAO and is responsible for the day-to-day management of GAO. He had been an Assistant Comptroller General and was responsible for a wide range of audits and investigations and studies, including the development of guides for the Y2K issue. We'll hear from him shortly.

In addition, one of our other speakers is Eleanor Hill. She had been the Department of Defense Inspector General. IGs, as you are probably well aware, have existed since the late 1970s, at least the contemporary IGs in the civilian agencies. They were created because of a number of scandals and concerns that Congress had about the inability of the Executive Branch to detect and prevent waste, fraud, and abuse within their agencies. IGs were created to consolidate investigative and audit responsibilities.

In addition to that, they have direct and impressive reporting obligations. They are to keep the agency head fully and currently informed, and to keep Congress fully and currently informed by way of semi-annual reports and 7-day letter reports, or immediate reports that go to the agency head about particularly serious or flagrant problems. Then those reports come from the agency head to Congress after 7 days.

Also, the IGs are to keep Congress informed "otherwise; the language of the law provides that Congress can call upon IGs to testify at hearings, conduct briefings, and provide information for congressional committees. There's a great wealth of information that's available from IGs in the whole area of oversight.

Our speaker in this area, as I mentioned, is Eleanor Hill. She is now with the law firm of King and Spalding but previous to that she had been DOD's Inspector General for about a 5-year period, from 1995 through this year, 1999. At that time, she was also Vice Chairman of the President's Council on Integrity and Efficiency and co-chair of the Intelligence Community Inspector General Forum. Prior to that time, for about a fifteen-year period, she was associated with the Senate Permanent Investigations Subcommittee, where she was involved in a number of oversight investigations and inquiries as well as working on the Inspector General legislation and on Inspector General matters during that entire time period.

Finally, we'll hear from Sallyanne Harper who is the Chief Financial Officer at the Environmental Protection Agency. In 1990, Congress passed the CFO ACT, the Chief Financial Officers Act, to provide for improvements in agencies accounting systems, financial management, and internal controls. In addition, these officers were to help in the production of complete, reliable, timely, and consistent financial information for use by both the executive and legislature in the financing, management, and evaluation of federal programs.

Obviously, the kind of information that we get from all three of these sources is key to conducting effective oversight. Ms. Harper, as CFO at the EPA, was confirmed in 1998, but she had worked with EPA for some time before then. She had also been with the Navy's Procurement and Contracting Division, and so has a great

deal of experience in the whole area of financial management. So, without any further delay, I'll ask Gene to speak further about GAO's role.

MR. DODARO: Thank you, Fred. The Controller General gave a very good, thorough overview of the General Accounting Office services. To augment his discussion, I will focus on the degree to which management reforms that have been passed over the past decade are generating additional sources of information for oversight purposes for the Congress and the role of GAO in both helping to institute those reforms, and in interpreting the information that is being generated by those reforms.

Implementation of these reforms is important in terms of improving the performance of government, but they're also generating a great deal of information on a routine basis that is useful in helping to oversee the federal government's activities. Over the last decade, these reforms were passed as a result of recurring problems that the Congress and others noted in how the agencies have been carrying out their activities.

The first was the Chief Financial Officer's Act in 1990. Later, that Act was expanded through the Government Management Reform Act of 1994. In addition to putting leadership positions in each of the agencies for Chief Financial Officers, it also started a process of bringing "best practices" to the government that were never there before. These included the regular preparation of financial statements covering all the activities of individual departments and agencies and having those financial statements audited on an annual basis.

Believe it or not, the federal government was the last major segment of our economy to use this basic management tool. In the 1930s, as a result of the stock market crash, the federal government began requiring publicly traded corporations

to produce financial statements and have them audited as a means of providing accurate information to shareholders. In the 1970s, the Congress required state and local governments receiving federal monies to have regular financial audits done on an annual basis. But the Executive Branch of the federal government did not come under that requirement until fiscal year 1996. While there were pilot audits underway, fiscal year 1996 was the first time all twenty-four major departments and agencies of our federal government had to produce financial statements and have them audited.

The audits of the individual departments and agencies are to be done or arranged by the Inspectors General, and GAO was required to audit the consolidated financial statements of the federal government beginning in fiscal year 1997. The Comptroller General mentioned the report that we issued in terms of providing a disclaimer. Basically, we disclaimed because the federal government could not adequately report on a significant portion of its costs, assets, and liabilities. And there were a number of documentation, internal control problems, and other financial systems weaknesses that prevented that from occurring.

Now, what's being generated out of this process that could be useful for oversight? Number 1, there's an annual report now for the last 3 years on each of the twenty-four largest departments and agencies of the federal government. So you have a 3-year track record of opinions being issued on the financial statements of those departments. In addition, some of the departments require financial audits at levels within the department. For example, there's an audit report on the Department of Treasury, and there's also a separate audit report on the Internal Revenue Service and the Customs Service within Treasury. There's an audit report for the Department of Defense overall, but there are also individual audits of the Army, Navy, and Air

Force. At Transportation, there's an audit report at the Department level, and there's also one of FAA.

In total, there are about one hundred different financial statements and audits being prepared now on an annual basis. This gives a very good public score card as to whether the departments and agencies are accurately accounting for the use of public funds. In fiscal year 1996, there were six out of the twenty-four departments and agencies that received clean opinions. That number jumped to thirteen of twenty-four in fiscal year 1997. And it has roughly stayed at about half of the departments and agencies for fiscal year 1998, but many of the large departments and agencies have been unable to obtain a clean opinion yet on their financial statements. These include, as the Comptroller General mentioned, the Defense Department, as well as the Agriculture Department and the Transportation Department. There are many other agencies that, while progress is being made, are not there yet.

In addition, it's important to understand there are three separate conclusions that come out of this process. One, are the financial statements accurate? Do the numbers fairly represent the agency's activities during the year? Number 2, do they have good controls in place? And have there been control breakdowns over the use of monies?

Typically, what you'll find in this category are consistent control problems in ensuring computer security over information systems that need to be corrected. There's also weaknesses that would identify whether or not the agencies are able to produce information on an on-going basis. The IRS, for example, can tell you that at the end of the year, based on statistical evidence and sampling, how much outstanding federal taxes are collectible, but at any point during the year, they cannot

tell you exactly what that figure is because there are not underlying systems and records to be able to generate that type of activity.

So this process gives a benchmark in terms of how well agencies are progressing, but it also is generating a wealth of information.

There's also, for example, a conclusion on whether or not there were any problems with compliance with laws and regulations that were tested during that year. So there's a lot of information being generated that GAO and the Inspectors General can both help interpret. This is information for you as a source of tracking how well the agency's exercising their stewardship responsibility over public funds, carrying out their activities to ensure that they've understood the risk associated with their programs and how well they are managing that risk and reducing fraud, waste, and abuse.

Now, the second management reform is really a broader management reform and that has to do with the development of strategic and performance plans and performance measurements for federal agencies and departments. As Mr. Walker mentioned, there's a movement of transforming the federal government into a more results oriented government. And that process starts with determining what are the objectives of federal programs, how are agencies going to measure the performance of those programs over time, and what are the agencies focusing in on and how much resources are being devoted to achieve the program outcomes that the Congress has envisioned in the authorizing legislation for these programs?

Prior to the 1990s, agencies were not required to produce strategic plans and have those plans really be the basis for consultation with the Congress on what are the objectives of the programs; that is, what is intended to be achieved over the future through those programs. This consultative process also covers how much resources

are going to be applied, and what kind of measures the agencies are using to gauge success. As a result of any lack of consensus, often times auditors at the General Accounting Office or Inspectors General, or special studies that have been done, would identify what they believe to be the accurate measures of gauging the relative success of federal programs and activities. Consultation through the Government Performance and Results Act establishes a dialogue between the Executive and Legislative Branches on what are the best specific performance measures.

Basically, this process started in the last several years; agencies are required now to submit an annual performance plan to the Congress along with the budget submission in the beginning of the year. And beginning next year, there will be the first set of performance reports emanating from this process to track how agencies have implemented the performance plans that they first submitted to the Congress for Fiscal Year 1999.

So this process is just beginning to unfold government-wide. Here again, it provides a good foundation for oversight from the standpoint of what are the agencies expecting to achieve for these programs and activities? It provides the basis for the Congress to ask questions of agencies about their views on whether or not the goals and objectives have been achieved, and the effectiveness of strategies being used by the agencies. Are agencies producing the outcome in terms of performance in their programs that they intended to? And if not, what were the reasons for that? So this law provides a good foundation for tracking the overall performance of agencies and programs.

The last set of reforms deal with information technology. Most of you are well aware of the governments difficulties in using information technology effectively to improve government services and to reduce the cost of government.

There have been a lot of successes but there have been some monumental failures. The former IRS tax system modernization effort was a $3 billion investment that really produced a very little return, in terms of improving and modernizing the IRS information systems. FAA has struggled with a multi-billion dollar investment in the air traffic control system.

This is terribly important because if the federal government's going to operate effectively in the next century, it's going to have to do a better job of closing the performance gap between what citizens are receiving in the private sector, in terms of advances through information technology, and what they're experiencing with the government. Right now we can all go to gasoline pumps and swipe our credit cards there. We can call twenty-four hours a day and get information on our accounts from a wide variety of sources that we deal with. You can't quite do that yet with the IRS or with other federal agencies that you deal with in terms of providing timely, accurate information and quick access in delivering services. Better management of information technology is critical to better performance.

Because the federal government's track record on this are has not been stellar at all, in 1996 the Congress responded by passing the Clinger/Cohen Act, which creates chief information officers in each of the federal departments and agencies and requires more disciplined processes. Agencies know that before they invest billions of dollars of taxpayer's money, they need to evaluate whether or not it's actually going to produce improved performance on the part of the agencies and really result in better service to the citizens.

Implementation of those reforms have been sidetracked because of the important imperative that agencies focus on the Y2K compliance initiatives. The Year 2000 computing challenge has really taken front-and-center importance with

the agencies to make sure their existing systems are Y2K compliant. This is critical to help ensure there are no disruptions in services to the public as a result of moving into the next millennium. So implementation of Clinger/Cohen has really not been fully focused on. Moving forward it should be the basis of continued congressional oversight.

If agencies that you are interested in are planning to make major investments in technology over the next few years, and virtually all the agencies are, there are certain required information elements that they need to produce under the Clinger/Cohen Act in order to justify the cost and benefit of that investment and to determine whether or not they're following sound system development and software engineering practices. The GAO can help in working with you to determine whether or not that investment is going to be a good investment on the part of the federal government. We've developed a number of tools and techniques used in the private sector in order to assess that in advance. In other words, before these investments are made, there are certain things that need to be put in place. In terms of agencies' ability to either develop software themselves or to be able to acquire it using contractors, this type of analysis can give you a good gauge as to whether or not the funding will be well spent in that regard.

In information technology, and I'll conclude with this in terms of future challenges, the whole question of computer security and protecting the critical infrastructure in the United States is going to be the next big information technology issue. And it effects every agency whether you're the Social Security Administration protecting wage data, whether you're the Veterans' Administration protecting sensitive information on medical records, or whether you're trying to protect non-classified but sensitive information at the Department of Defense.

We've listed computer security along with Year 2000 computing challenge as the first two government-wide high risk areas in our latest high risk update that the Comptroller General mentioned. We're still in the process of seeing what the last chapter will be, like a mystery novel, as to whether the year 2000 will be successfully navigated. Whether or not the federal government, in terms of its computer operations, is effectively preparing for the future is really critical. And that's an area we're spending a lot of time and attention on because more and more information and business will be conducted through the Internet and in a more automated fashion on the part of the agencies.

These three management reforms are generating a great deal of information and providing much more visibility to the Congress about agency activities in critical areas. In each of those areas GAO was at the forefront of identifying the need for the reform. We've been helping in a proactive way to help insure effective implementation of those reforms in the agencies. But we can also play a very important role in working with the congressional committees and others in understanding the output of those reforms and whether or not the federal government is better positioning itself to account for spending, the effective use of technology, and really focusing on the achievement of results by federal programs and activities. I'd be happy to answer any questions about those or anything else about GAO following the other presentations. Thank you.

MR. KAISER: Thank you, Gene. We will have time for questions at the end of everyone's presentation. Next we'll hear from Eleanor Hill, former DOD Inspector General.

MS. HILL: Thank you. I like to think that I have what I term a healthy perspective on congressional oversight, because I have really seen it from both sides.

I spent about ten years in the Executive Branch, both in the Justice Department--where as a prosecutor I had occasion to work with some congressional committees--and as Inspector General at the Department of Defense. I also spent about fifteen years in the Senate where I was the Staff Director and the Chief Counsel of the Senate's Permanent Subcommittee on Investigations, which is a subcommittee that really does nothing but congressional oversight. It does not have legislative jurisdiction. It only has investigative jurisdiction, which is extremely broad. So I spent many years working with that subcommittee on congressional investigations.

On the other hand, the IGs do work with the Hill and I have dealt with many committees in that role. So I've seen it from both sides of the fence, the Executive Branch and the Hill. And I have to say that I have come away from that really being a very, very firm believer, not only in the importance, but also in the huge potential that congressional oversight has. My own view is that the Congress probably has the most powerful, or it certainly has the most broadest and the most far reaching, oversight powers that exist in the federal government.

It's a very significant function of the Hill. But it's also not an easy one to carry out sometimes. It can be very difficult to exercise that function in the environment of Capitol Hill. Oversight, if it's done right, and it must be done right, has to include a really thorough, in-depth look at the issues. It has to be done accurately. It has to be done in a way that can often be very time consuming and very tedious in many respects. And it has to be done, as the Comptroller mentioned, in a fair and balanced manner.

And all of that, having worked in the Senate for fourteen years, I know can be very hard to do in the environment that the Hill operates in. To do it the right way, it takes a lot of time and a lot of focus, and the Senate and the House are places

where the staff and the Members are extremely busy. You have an extremely busy and ever changing legislative agenda. You have many issues before you. You often have to respond to the crisis of the moment. It's hard to maintain focus, not only on the staff level, but also on the member level, a complete focus on an investigation that in some cases may take several months. It may take several years. It may include, as we often did in the Senate, the review of thousands of documents and the depositions of numerous individuals. It may often require long hearings, which members often don't want to sit through because they have ten other things going on at the same time. So it's not easy to do.

We had the luxury at PSI, the subcommittee that I worked for, of really not having the legislative burden that many committees have. We didn't have to do mark ups. We didn't have to regularly review bills. We didn't have to do those kinds of things. So we were really operating only with an investigative and oversight agenda. And we also had a staff that was, because the Chairman felt it was important, basically all professional staff, people with backgrounds in law enforcement, in prosecution, at GAO, in accounting, and as CPAs. We had a lot of detailees with investigative background. So we had people who had done many investigations in their prior lives before coming to the Senate.

But even in that atmosphere and even with those kinds of advantages, we were always looking for more staff and more resources. And that, I think, is one very common thing that is true of every committee that tries to do congressional oversight.

So one of the things that's the focus of this meeting this morning is how you can beef up those resources. Where do you go for help in doing the kind of job that really effective oversight has to do, both to maintain your credibility as an oversight body, but also to really be effective? To get those kinds of resources, I think you have

to go outside. The Comptroller and Gene Dodaro have told you about GAO. That certainly is a huge source of help for any congressional committee. CRS also provides a source of expertise and assistance on many types of oversight investigations.

I've been asked to talk to you a little bit about the IG community, because the IGs really are a partially untapped source of assistance to much of the Hill in conducting oversight. The Inspector Generals have been around since 1978. Right now there are sixty-one IGs in the federal government. I believe that's a current figure. Twenty-eight of them are presidentially appointed with confirmation by the Senate. Those are at the larger departments and agencies. The rest of the IGs are designated by their agency directors or heads of agencies.

They all consider themselves part of a formal community of Inspector Generals with a very unique role in government. And I will say, again having served in both the Executive and Legislative Branches, that they really are unique for the reason that Fred Kaiser alluded to. Although they are in the Executive Branch and they are statutorily operating under the general control and supervision of the head of their agency, they have a statutory responsibility to report to the Congress and to keep the Congress fully and currently informed. So they really have 2 masters. When I talk to people about IGs, I like to say it's a schizophrenic arrangement, if you would, because IGs answer to the Hill, but also to their departments. And the beauty of that set-up, I think, is that in doing that, the Congress ultimately insured the independence of the Inspector General community.

I came from the Department of Defense, which I think you know is a huge department. We had the biggest IG organization in the federal government, and I can tell you that, certainly at the Department of Defense, everyone recognizes the

independence of the IG shop. Although the Department worked cooperatively with us, they did not try to tell us how to address a report or how to answer a request from the Hill. As you know, when people come to testify in front of you from Executive Branch agencies, normally those testimonies are cleared by OMB and through the agency themselves by the clearance process. The IG's testimony is not cleared, except if it relates to budget matters which OMB does see. The IG gives a courtesy copy to the Department but nobody in the Department tells the Inspector General how to write that testimony. So it comes to you in unfiltered form. And that really is unique.

I also want to tell you a little bit about my experience in the community as to how IGs are used and how they relate to Capitol Hill, to the Senate, and to the House. My own view is that some of them are used a lot. Some of them have very good relationships with their committees, in both the House and the Senate, as well as with individual members. There are certain members, both in the House and Senate, who know very well what IGs do and use them a lot. There are others who never use them. There is also great variation in the IG community. We have some IGs, like Defense and HHS and some of the others, that are huge. They are big organizations. We had, for instance, around seven hundred auditors at DOD. We had three hundred and fifty criminal investigators. We did ethics investigations. We did criminal procurement investigations. We did all sorts of things. We issued around two hundred audit reports a year.

At the same time in that same IG community, you have IGs who are really very small, reflecting the nature of their department or their agency. Some of them have nowhere near the resources I had at DOD. When I was Vice Chair of the PCIE, which is the President's Council that consists of all the IGs and OMB, I really had

a chance to see the differences. IGs are used to dealing with committees and the Hill and they know the members. They give them briefings and they come and talk to the staffs on a regular basis. Other IGs hardly ever see any interest from Capitol Hill.

I would suggest to you that, in many ways, there's a lot of untapped resources out there. I'm not urging you to go out and ask every IG to do fifteen different kinds of investigations, because, I will warn you, there's also some concern out there that some IGs are getting too many, as they call them, "unfunded mandates." In other words, they get a lot of requests from the Hill to do work when they, like every other part of government, are counting their resources and have plenty to do. They oftentimes think they're being asked to do too much and that they don't get additional resources to do it.

What I would say to you is that both the House and Senate could really benefit immensely by taking more advantage of the work that IGs already do. They do a tremendous amount of work and a lot of it goes unseen. A lot of it goes unnoticed. There are some formal reporting mechanisms to the Hill. One is the semi-annual report which you all get up here. Every IG issues a semi-annual report. Now I have a dual perspective on semi-annuals, because I was in the Senate and I remember those reports coming up. And I will be quite candid about it and I think that many IGs would tell you the same thing. Many of those reports are a laundry list of investigations and, frankly, I think many congressional staff neither have the time nor the patience to wade through all of that to try and find out what the biggest and most important oversight issues are in each department.

The IGs are addressing that. I think you'll find many of them are recrafting their semi-annuals. We did this at DOD and there are several others that are doing it and have done it. Some IGs now begin the report with a highlighted summary which

really is an attempt to point where we think the biggest problems are. These are the issues that need to be addressed. And hopefully, that will spur more interest by the Hill in those reports because they really do cover every issue. A lot of committees could certainly make good use of them since they are really a window into the Executive Branch. You can see where the biggest problems are, what needs to be addressed, and what has not been done. Some agencies follow up on most IG communications. Some agencies do not. So there's a lot of potential in there for oversight topics.

Some IGs, as I said, work closely with the Hill. And certain parts of the Hill have been very active with the IGs. Both the Government Reform Committee in the House and the Governmental Affairs Committee in the Senate are very knowledgeable of IG work and they keep in good contact with the IGs. I think we also find with the big departments that the oversight committees usually maintain active communication with the IG offices.

There are a couple of things that probably you could do if you haven't already. There are ways to get to know the IG community and to get to know what they do and the things that you can develop as effective topics for hearings and follow up by the committees. There's several things. You can certainly use the semi-annual reports. IGs also do a tremendous amount of audit work. Now, I would be the last person to suggest that you read every audit by every IG.

We have had many members who are looking for oversight topics write to IGs and ask to be sent a copy or a list of their reports. The Member's staff then reads the list and follows up on topics that they think are of interest to them and get in-depth briefings on those particular audits. That's one way of doing it. At Defense, we would also go up on a yearly basis to the Armed Services Committees and

basically give them briefings and have the staff from those committees come out to the Inspector General's office and get briefings from our criminal and administrative investigators and our auditors as to what the IG people are doing. What kinds of issues are out there? What should we in the Committee need to be focused on? And it's a two-way street. Not only do you hear what the IGs are doing, you have the opportunity to tell the IGs the issues the committees are interested in and that they would really appreciate some work in that area. Many of the IGs are very willing to do that.

So there are ways to get better communication back and forth and really to try to make use of some of the work that they do. They do have the capacity to do the kind of in depth, detailed investigative work that sometimes needs to be done on very complex oversight issues. That's the kind of work that I think is very hard to do on the Hill because you don't have the staff, you don't have the time, you don't have the focus that you often need for those kinds of things. You cannot drop all your other issues and just focus on one narrow topic, although it may be very complex and a time-consuming oversight inquiry. So I think the IGs are a way to help you do that kind of oversight.

I also think that the IGs, many of them, would welcome that kind of interest because many of them feel that they are not really utilized as much by the Hill as they could be. When they are utilized, some of them may feel that it's on an individual request or on something that's a particular issue of the moment but that their real long term contributions to the effectiveness of their agency are often not really appreciated. That's not true for everybody but there are many who feel that way.

In short, and I won't go any longer, I think IGs are a tremendous, somewhat untapped resource. There's certainly room for greater use of their work. I think they can be a big help to the Hill committees, members and staff by really focusing the Hill on good oversight issues and giving you an idea as to what is going on inside many of the agencies--what's being addressed and what isn't being addressed. And that really is the key, I think. In the long run, those are the kinds of things you want to look at. Those are the kinds of things that will really speak well for the Congress in the long run in making the most of the oversight function. Thank you.

MR. KAISER: Now we'll hear about the Chief Financial Officers from Sallyanne Harper.

MS. HARPER: Thank you. I'm delighted to be here to speak with you. I'm in a little bit of an unusual role. When you heard from Gene Dodaro from GAO, you know that the Congress, its members, its staff are their primary customers. And when Eleanor talked about the Inspector General community, she told you that they have dual reporting responsibilities. They report to the Congress as well as to the head of the agency or the department.

The Chief Financial Officer community is a community established under the Chief Financial Officers Act in 1990. There are twenty-four CFO Act agencies and a few more that were added in subsequent legislation. The CFOs are Presidential appointees. They are confirmed by the Senate, so they are executive branch employees. So how can they help you in an oversight capacity? Actually, if you think about it, the role of the Chief Financial Officer encompasses a lot of things. It would encompass what you would expect, such as financial statements, accounting, and financial systems, but that's probably not what you're primarily interested in. No one

I know has changed a decision or anything in their in-box based on having read the financial statements of any of the CFO Act departments or agencies.

What you are most likely interested in, though, is money. Sooner or later in your oversight capacity, you'll probably run into a CFO shop because if you think about it, most CFOs have purview of all of the money coming into the agency and department and all of that money going out of the agency or department. So, from an Appropriations Subcommittee standpoint, many of you will deal with the CFOs because they have budget authority. They have budget formulation and budget execution under them. They also are responsible for contract payments, and so as you follow the money and you do your oversight, you probably have agencies and departments that do a lot of their work through others, such as contractors, grant recipients, states, and local governments. Sooner or later, that money is going to flow into the CFO shop and out of the CFO shop.

Other areas where many CFOs have responsibility include contracts and grants management and administration. This area still falls under the purview of a number of the CFOs. Some of them wear a dual hat by having the CIO (Chief Information Officer) responsibilities under them. CFOs also have to respond to the semi-annual reports that Eleanor talked about that the IG issues. Normally, the counter-balance to looking at fraud, waste, and abuse from management's standpoint often falls under the CFO shop.

If you look at all of the semi-annual reports that you get from the Inspectors General, you do find that, in many instances, they are a laundry list of everything that happened that year. You'll find the management response right in there, too. So, if there is a piece that you're looking for on oversight from the Inspector General's side, most likely you will find that there's a management response also. Although it

may be a program issue, it's the Chief Financial Officer who, in many instances, is responsible for doing the audit follow-up and for coordinating and making sure that anyone who inquires has access to the programs and the information that we use to prepare those responses.

How else can the CFOs help in terms of oversight? Similar to the President's Council on Integrity and Efficiency, which includes the Inspector Generals coming together, there is a CFO Council. The CFO Council was established as part of the CFO Act, and that Council comprises all of the Chief Financial Officers and the Deputy Chief Financial Officers for the major departments and agencies of the executive branch. The Council can be of help in any number of ways, particularly to the House Government Reform Committee and the Senate Governmental Affairs Committee, where members and staff are looking at broad cross-cutting governmental issues.

The CFOs also have come to be very aggressive in pushing the goals of the Results Act. As you take a look at budget formulation and how people are trying to tie that to what they're trying to achieve, and then measure and report on whether they have actually achieved it or not, the CFO is often involved. They are either responsible for the process or they are one of the key people in putting the budget pieces in with the strategic plan.

The CFO Council has had a very active committee that's issued a number of reports, which I'd be happy to provide to anyone who would be interested, on how the executive branch can best implement the Results Act. How can you tie your budget formulation to your strategic plan? What are you looking at? Do you have the right skill mix to begin to do results-based management, and to begin to look at outcomes instead of outputs?

In addition, the CFO Council has been very active in working with our State partners. Much of the money in the federal government flows through a department or agency but ultimately the actor will be a state with the money flowing to that state. The states have been struggling for quite some time with the various ways that the federal government tries to move that money out. We've had a number of conflicting payment systems. We've had a number of conflicting ways that we have tried to manage that money. The CFO Council has a grants management committee that attempts to work with the states to address those concerns, such as getting those grants payments systems down to three.

The Council is also looking at making sure that there is a common interface for everyone so that even though the financial system that they encounter may be a little different, there will be similarities in terms of use. So, as you look at constituent services or grants, or if you've got issues affecting grant recipients, one of the places that you might want to consider is the CFO Council to see if there is anything that they can do to assist in oversight.

We also are looking at financial systems issues. We're looking at many of the Clinger/Cohen Act responsibilities, such as capital assets management within the federal government. The federal government spends a lot of money on computer systems--software and hardware; and one of the CFO responsibilities is weighing the costs and benefits of whether to invest or not and how to invest. What is the capital asset allocation methodology within a department or agency and how do you make decisions? How do you decide what's the right way to go? The CIO drives the program. They drive the technical decisions on that. But there is a business case that needs to be made for the rest of the federal government.

In summary, although the CFOs are perhaps less of a visible component of your oversight resources, I would suggest that they actually could be a valuable resource. If what you are dealing with sooner or later is going to come down to either budgeted funds that are coming into an agency or an organization, or a way that they're flowing out, you might want to get together with the CFO and make his or her acquaintance because they may actually have information that can be very helpful to you. Thank you.

MR. KAISER: We have time for questions.

QUESTION: The President has issued various procurement guidelines. I'm wondering, both Eleanor and Sallyanne, do you have any comments about those?

MS. HILL: I have not seen them, although certainly the IGs are very much involved with the department proceedings on federal contracts. They don't do the contracts, but they work closely with those who do. I would think that would be an issue that needs to be tightened up. The IG should probably be supporting that. Since I'm not familiar with the details, I can't really comment on it.

MS. HARPER: I, of course, support the President's policies on procurement. I think one of the reasons for that is the executive branch is trying to move to performance-based contracting where it's not going to have a heavy component of the FAR, which is the Federal Acquisition Regulations. The executive branch is also trying to base its procurements on the end result that it's trying to achieve rather than specifying in minute detail how that result is going to get achieved. Weighing past performance becomes very critical when you go that route because you're being much less directive and you're becoming much more willing to accept what the market place has to offer. So I think that's one of the reasons why that executive order was actually put forth.

QUESTION: I have a question for Eleanor and Gene. Are there any formal mechanisms by which the GAO and the IGs interact with one another?

MS. HILL: Well, the IG statute has language in it that tells the IG to make every effort not to duplicate what GAO is doing and to coordinate with GAO. I think that happens quite a lot. Gene and I have interfaced many times, as you can imagine, in trying to get Defense Department financial management improved. Our auditors, for instance, have a very close relationship with GAO because they try to coordinate their efforts and to avoid duplication of work. We work closely with GAO and I think overall, from my experience at DOD, it was a very good relationship. It was a very productive relationship. The IGs cannot control what GAO does and GAO doesn't control what the IGs do, but I think that, in good faith, they try to work together. They are very much on top of some of the same issues and try to divide up the work, so to speak.

MR. DODARO: I would echo what Eleanor said. There are a couple of other things I'd point out though, in terms of a little bit more formal consultation in the setting of auditing standards for the federal government. GAO has the responsibility to set standards of any organization that's basically auditing the use of federal funds, whether it be state and local organizations, non-profits, or federal contractors. We have the Inspectors General participate with us along with some users of those auditing standards.

On a planning basis, we strive to share work plans with the Inspectors General to make sure we're not duplicating work. And in a case of GAO's responsibility for auditing the consolidated financial statements of the federal government, we, in fact, use and take responsibility for the work of the Inspectors General and do not duplicate the work that they're doing, to audit the individual

departments and agencies. So we have a very good set of relationships. Another example I'll point out is Y2K. Recently, in looking at the preparedness of individual agencies for Year 2000 readiness, we've basically in most cases, deferred to the Inspectors General. We're looking across government for preparedness and actually looking at the state and local preparedness and the preparedness of the private sector as well. So that's enabled us to look, as the Controller General talked about, more broadly across the federal government, and, in this case, into the private sector and even monitoring international issues as it relates to Y2K preparedness. So all those mechanisms help us leverage our respective resources very well.

QUESTION: Eleanor, you mentioned that you've had a number of criminal investigations, particularly in the area of fraud.

MS. HILL: When I left, which was in April, I think, DCIS, which is part of the IG shop, had about 1700 criminal cases pending.

QUESTION: My questions are: What is the relationship of the IG and the Department of Justice? Further, do ongoing Justice Department investigations sometimes complicate the IGs response to Capitol Hill, because the Justice Department will say, "Well, the IG is working on something that we may some day be involved with and that criminal investigative information cannot be shared."

MS. HILL: The IG, on the criminal side, are similar to any other law enforcement organization. The relationship with Justice is pretty much as if you were talking to ATF (Alcohol, Tobacco, and Firearms) or Customs, or another law enforcement agency outside the Department of Justice. DCIS agents are law enforcement agents. They do law enforcement investigations and the Justice Department is the prosecutor. So it is the same agent/prosecutorial relationship that you have elsewhere in the criminal justice system.

The IG agents go out and do the investigation. They consult regularly with the US Attorney's Offices. In most cases, the prosecutor handles decisions on releasing information in a pending criminal case. You are right that if it's a pending criminal investigation, the response generally to committee requests for information will be that we cannot give you all the details because it's pending. And that of course, is the typical response you would get from the FBI or the Justice Department, the reason being all the due process considerations and the fairness considerations of the criminal justice system and a hope to not jeopardize an on-going criminal case.

At Defense, we would tell Members that there was an on-going criminal case. We would not try to go into all the details of the case and the Justice Department if it was actively monitoring it as a potential prosecution, would most of the time oppose giving out details because you're going to end up hurting the case when you go to trial, if you go to trial.

Having been a prosecutor, all of that is very close to my heart because I dealt with it when I was a prosecutor. I also dealt with it when I was in the Senate at PSI because many times we did investigations involving criminal allegations, some of which ended up in the hands of the FBI after we were finished and they often ended up convicting people. Sometimes our work and their investigations were going on simultaneously. What we used to try to do in the Senate was to sit down with Justice and sit down with the FBI. For the most part, if they felt we were trying to be responsible and trying to work with them, we would work out time lines that we could agree on.

I worked for Members who really would not push them to disclose prematurely a criminal case where you really may jeopardize a criminal investigation. And I think most Members probably don't want to do that. So it's

something you have to work with them on an individual basis and recognize that when they do give you those reasons, hopefully for the most part, they're done in good faith.

There really are legitimate reasons why they often can't disclose things. If they're doing an undercover investigation, which at Defense we used to do, they would obviously not want to be disclosing names of agents who are still in an undercover capacity because you not only have considerations of hurting the ability to prosecute someone, you may even get into personal safety considerations. So there are a lot of special things that affect criminal investigations.

MR. KAISER: One more question.

QUESTION: Is it customary that requests to the IG and to CFOs would go through the Congressional Affairs Offices of those agencies? Secondly, if a committee were to make a request to the IG's office, what kind of confidentiality could we expect as to the communication between the agency and the IG?

MS. HILL: Well, as to your first question, I can tell you that at Defense, the congressional requests, and we got many of them, came directly to the IG. In fact, the DOD IG, and I think perhaps several other IGs have their own congressional affairs shops. We had, I think, five people that handled congressional affairs for the IG. So we would get requests directly from the committee. They were addressed to the Inspector General and they would not go through the Defense Department's Legislative Affairs section. I'm not sure how it's handled with CFOs, but that's how the IG works.

MS. HARPER: If the request comes from one of the Appropriations, Committees or one of the Appropriation Subcommittees, it generally goes directly to the CFO. If it involves an oversight matter from another committee that may have

jurisdiction, the request normally goes through Congressional Affairs. Obviously the request would not be turned away if it came directly to the CFO. However, the preference would be for requests to go through Congressional Affairs.

MS. HILL: Now the second part of your question was on confidentiality. The IG Act does say that the IG has to keep the head of the agency and also the Hill currently and fully informed. So I would think that you could probably argue that there is an obligation for the IG to keep the department advised that we got a request and we are doing this and that sort of thing. I don't recall when I was at Defense ever getting a Hill request that certain things be kept confidential.

What we would generally do when we got a congressional request, we would notify the Department. It's going to become obvious to the Department anyway because we're going to go out and start investigating or reviewing or auditing somewhere in DOD and they're going to figure out that we're doing something. So normally we would get the request in, we'd look at it, and we'd decide if it's something we could do. We would notify the committee or the Member and tell them what we're going to do and, at the same time, we would let the department know we have a congressional request: this is the request and we're going to undertake this investigation. That's what we would do. Now, as you know, as we do an audit or as we do an investigation, most of the time we try to finish it before we come up and brief the Hill. But if we brief the Hill, ultimately on something, we would brief the Department on what we told them was the outcome, if the Department wanted to hear it.

MR. KAISER: Thank you all for your insight and observations about congressional oversight. We'll reconvene shortly for our next panel on fiscal oversight.

FISCAL OVERSIGHT

Panelists: Barry Anderson, Deputy Director, Congressional Budget Office, and Dennis Kedzior, former staff member of the House Appropriations Committee. Moderator: Robert Keith, CRS Specialist

MR. KEITH: It's a pleasure to introduce this second panel of the morning, which will address "fiscal oversight." Fiscal oversight brings the budgetary component into oversight, looking at not only program objectives, goals, and performance, but at such things as whether or not the amount of money provided to programs is sufficient to meet the program objectives and whether that money is being spent in an economical and sound fashion. House and Senate committees engage in fiscal oversight when they attempt to address these types of matters.

Fiscal oversight on Capitol Hill is a very broad and encompassing type of activity. Nearly all House and Senate committees are involved in it in one fashion or another. Legislative committees look at direct spending, which funds largely entitlement programs. The House and Senate Appropriation Committees look at discretionary funding, which finances for the most part the day-to-day operations of federal agencies. Fiscal oversight can even extend to the review of tax expenditures, where the federal government seeks to pursue various policies through exemptions, deductions, and so forth in the federal tax code.

Over the years, Congress has examined, considered, and sometimes adopted new ways of enhancing its oversight activities. The previous panel, for example, discussed legislation bolstering resources in the offices of the Inspectors General throughout the federal government and establishing Chief Financial Officers in various agencies. Over the last twenty-five years since the 1974 Congressional Budget Act was enacted, Congress has tried to aid fiscal oversight through "sunset

and sunrise" legislation in the late seventies and the eighties and, more recently, the Government Performance and Results Act of 1993.

I think the annual appropriations process is widely regarded as the principal venue for oversight activities in Congress. Not only is Congress supported in this activity by the General Accounting Office, but since the 1974 Budget Act, it has also had the Congressional Budget Office (CBO), a non-partisan independent agency to help it in these endeavors.

We're very privileged to have today two veterans of the budget process. They bring a great deal of expertise and knowledge to our discussion today. Barry Anderson currently is Deputy Director of the Congressional Budget Office. Prior to that, for eighteen years, he served in the Office of Management and Budget, heading the Budget Review Division toward the end of his tenure there. Dennis Kedzior, who also has had a long career in federal service, currently is a Senior Vice President with Cassidy and Associates. For eighteen years prior to that, he was on the full committee staff of the House Appropriations Committee, where his responsibilities included coordinating the activities of the thirteen subcommittees. I'd like to ask Barry now to open our discussion.

MR. ANDERSON: Thank you, Bob. I appreciate this opportunity to discuss fiscal oversight from the Congressional Budget Office's perspective. CBO was created by the Congressional Budget and Impoundment Act of 1974. Next year we will celebrate our twenty-fifth birthday. About half of our largely professional staff of some 220 people perform daily, I should say hourly, cost estimates and budget analyses required by the congressional budget process. The remaining staff are engaged in long-term analysis and research requested by members of Congress. I would like to discuss CBO's relationship with Congress, particularly with regard to

fiscal oversight, in three different senses. The first is how CBO helps Congress devise a budget. The second is how CBO scores, or assesses, budgetary proposals. And the third is how CBO provides additional budgetary and economic analysis for the Congress.

Our first task in assisting the Congress to devise a budget is to develop a budget baseline. This may sound elementary, but it is critical to the budget process. When we develop the baseline, we first forecast how well we expect the economy to perform, particularly in the next two years. We are ably assisted in this process by a panel of 20 to 25 top economists from around the country. This group assembles in Washington twice a year, and is otherwise in regular communication with us the remainder of the year.

After developing our 2-year forecast for the current year and the one to follow, we then project economic trends and their likely impact on the budget for eight additional years. This basically comprises our Economic and Budget Outlook, which we publish every January and update during the summer. The difference between a forecast and a projection is basically one of confidence and reliability. Like the weather service, we are more confident of our ability to foresee trends in the near term than in the long term.

The economic forecast is the foundation of our baseline. We apply the forecast to existing laws and policies. In other words, we look at the tax code and determine, based upon our economic assumptions, what amount of receipts will come into the government. We do the same thing with mandatory spending, but in this area we must go beyond the economic forecast and look at some demographic forecasts, too. We analyze the population in terms of ages and income classes and additional

characteristics to determine how many people will be eligible to draw benefits from the various mandatory programs, such as Social Security and Medicare.

As for the discretionary programs, since 1990 our baseline has been relatively simple because of the Budget Act of 1997. Thus, our baseline forecast assumes Congress will enact appropriations for discretionary spending that equal the caps which are set through the year 2002. After that, we assume discretionary spending will increase at the rate of inflation. Using the CBO baseline in our January Outlook, Congress enacts a budget resolution which sets spending targets for the following fiscal year. The budget resolution includes instructions, sometimes called reconciliation instructions, that basically tell the Appropriations Committees how much they can spend. Again, the Budget Enforcement Act and subsequent budget acts, have simplified that to some extent, because the amount of discretionary spending available is generally specified in the law.

The importance of the baseline is evident in Congress's decision to create a fiscal mechanism called the "lock box," which is designed to prevent spending of any of the surpluses generated by the Social Security payroll tax. Right now, the amount by which Social Security revenues exceed Social Security outlays corresponds closely with the surplus in the overall federal budget. So Congress was very interested in our forecast of what we call the on-budget surplus over and above the surplus collected for Social Security. In January 1999, we forecast an on-budget deficit in Fiscal Year 2000 of $5 billion. However, our summer update of the Outlook issued on July 1 revised that forecast from a deficit of $5 billion to a surplus of 14 billion, a difference of 19 billion.

Our reestimate was based entirely, or almost entirely, on the fact that the rate of economic growth in the last six months since we did our previous set of economic

assumptions was much higher than we had forecast. We took into account the actual information we had acquired, revised our forecast accordingly, and changed the forecast of an on-budget deficit to an on-budget surplus.

Now, $19 billion may seem like a lot of money, but within the context of our $1.7 trillion federal budget, it really doesn't amount to much. But because it happened to coincide with the crucial dividing line between deficit and surplus, it led to a plethora of suggestions by both majority and minority members of Congress, not to mention the Clinton administration, of ways to spend the surplus. The administration wants to use the money for a variety of spending proposals. The majority in Congress wants to use it for a variety of tax cuts and spending proposals. And still others would prefer to set aside some or all of the projected surpluses to pay down our $3.7 trillion of debt owed to the public.

My point is that the importance of the baseline in our national debate about fiscal matters should not be underestimated. Particularly this year, it is providing a foundation not only for the basis of reconciliation and budget resolution amounts, but also for the amounts that determine specific policies. That's the first thing we do to help Congress develop a budget.

The next thing we do is price out the President's proposed budget. The President submits a budget to Congress on the first Monday of February, which is the beginning of the budget process. We take a hard look at what the President proposes and basically comment on its accuracy according to a variety of factors. Among the more important of these is the spend-out rate. This has become a major issue in recent years, especially with regard to the defense budget. The administration will propose a certain amount of budget authority or spending for defense, but then will assert that much of that spending will not occur until later, sometimes many years

later. We sometimes disagree with the administration about how far into the future this spending will occur.

This is an important issue because it is actual outlays, not the appropriations enacted by Congress, that determine whether there is a deficit or a surplus. In the late 1980s and early 1990s, there were significant differences of opinion between the administration and CBO regarding spend-out rates, especially for defense. The difference of opinion was so large that Congress instructed the Defense Department and the Office of Management and Budget to meet with CBO to resolve the differences and produce a joint report. Within a couple of years after that joint report was prepared, the spend-out differences, particularly in defense spending, basically went away.

Now they've resurfaced again. One of the things our most recent analysis of the President's budget revealed was a massive amount, and by massive I mean well over $10 billion, in spend-out differences between what the Office of Management and Budget said the budget provides and what we believe it provides.

Our criticism of the President's budget also reflects some basic conceptual differences between us. Let me give you an example of a conceptual difference. The President has proposed something called U.S.A. Accounts, which are described in his budget as a tax cut. Upon reviewing the information provided by the administration, we have concluded that the U.S.A. Accounts are really a spending increase, not a tax cut. As a practical matter, the U.S.A. accounts, though they would appear on your Form 1040, would really not have any effect on the amount of taxes that individuals owe to the government. It is rather a mechanism by which the administration proposes to provide a benefit to everyone regardless of their tax

liability, and to do it via the Form 1040. it should not be considered the same as a government receipt, or a tax, or a reduction in taxes.

We also perform analyses of often contentious issues, such as the President's health care reform proposal of a few years ago which he described, not as a government action, but rather a private sector initiative. In a report issued in February 1994, CBO said the health care alliances proposed by the administration were within the government sphere, not the private sector.

One of CBO's most important services to the Congress, in helping it devise a budget, is our annual book of options that for many years was titled "Reducing The Deficit: Spending and Revenue Options." Now that we no longer have a deficit, or at least not a unified budget deficit, we call this publication "Maintaining Budgetary Discipline: Spending and Revenue Options." It presents a variety of options for reducing spending in both mandatory and discretionary spending programs, and also for increasing taxes.

I want to stress that the options presented in this publication are options, not recommendations. We are forbidden by statute to make recommendations or to try to influence policy.

So this is a key role of CBO, helping Congress devise a budget. We also help Congress enforce the budget and in this area we perform several important functions. I mentioned before that the Appropriations Committees have specific caps for discretionary spending. CBO helps the Committees analyze the different appropriation bills, and all of the separate items in the bills. It keeps score of how much budget authority, and particularly outlays, will result.

We also perform 5-year-cost estimates of bills reported by full committees. Under the caps and PAYGO (pay-as-you-go) rules, Congress must find offsets for

any new programs, or expansions of existing programs, to assure the budget impact is neutral. To do this, it needs a non-partisan, balanced assessment of the likely impact of proposed legislation. CBO performs this key role. We are in many ways like the referee at a ball game, making calls as objectively and fairly as is humanly possible.

In addition, under provisions of the Unfunded Mandates Act, we identify federal mandates in legislation that would impact state and local governments and the private sector. This issue has come more to the forefront in the last couple of years as the caps and other constraints of the Budget Enforcement Act have become more and more binding. Congress and the administration have frequently resorted to influencing economic and private behavior by simply mandating that certain things be done--you must have cleaner water or wear a safety helmet, that sort of thing. These mandates frequently impose substantial costs. So now CBO has a separate unit to take a look at federal mandates.

Another important CBO function is to issue reports on the sequester process, as required by the Budget Enforcement Act. A sequestration is basically a fail-safe mechanism in the law that calls for across-the-board spending cuts if the caps are not met. Our sequester reports, filed three times a year, are mainly advisory. The Office of Management and Budget makes the final call on whether there is to be a sequestration. However, our estimates can be the basis for procedural points of order in Congress.

Finally, in helping Congress perform fiscal oversight, we issue periodic reports and studies on various public policy issues relating to the budget and other economic matters. These publications encompass a diverse array of subjects--labor and health issues, military spending, sale of government assets, funding of

transportation infrastructure, education--virtually everything the government is involved in, which is virtually everything. We have a substantial library of studies and reports that are available to the public on our Web site. That address, by the way, is www.cbo.gov.

I would like to conclude my discussion with a mention of a law that will have little direct impact on CBO, but a very large impact on you, the Congress, GAO and others. That is the Government Performance and Results Act, which is sometimes called GPRA or the Results Act. Enacted in 1993, it had a long lead time before it began to make an impact, but its deadlines are coming due.

The law basically requires three things. First, federal agencies must determine the goals of their programs. I know that seems sort of obvious, but there are many programs whose goals were never explicitly stated. In some cases, the goals envisioned by Congress in drafting the enabling legislation were not shared or perhaps not fully understood by the executive branch in its administration of the program. So the first objective of the Results Act was to state the goals. This was to have been accomplished within the last year or two.

The second objective was to state the performance measures by which one would measure whether the goals were being reached or not. These measures were to be stated by the administration in its last budget.

The third objective, and the one I wish to highlight for you, is that by March 31, 2000, the executive branch is supposed to report to Congress on the statement of the goals, the performance measures, and the progress that has been made.

In other words, the administration is supposed to perform good old fashioned program evaluations. The significance of this to you is that if the executive branch

actually performs as the law requires, come March 31 you will have a mass of information that you have largely not had access to in the past.

We at CBO are actively anticipating this report. I mentioned earlier the "Maintaining Budgetary Discipline" book that we have done in the past. Next year we intend to tie more of the Government Performance and Results Act, and its goals, performance measures, and program evaluations, into the "Maintaining Budgetary Discipline" book.

I'll be happy to entertain any questions after Dennis is finished.

MR. KEITH: Thanks. Now we'll turn to Dennis Kedzior.

MR. KEDZIOR: It's kind of ironic. This is the first time I've been back in this room. I left Capitol Hill in January after having served eighteen years on the Appropriations Committee in the House. Last time I was in these HC-5 rooms was back in October of last year when the somewhat famous omnibus appropriations bill was put together in the dark of night. And here we are again in HC-5 talking about fiscal oversight. So I think we've gone from one extreme to the other here.

Article 1, Section 9, of the Constitution says, "That no money shall be drawn from the treasury, but in consequence of appropriations made by law." That is what the appropriators hang their hat on in terms of making annual appropriations for the discretionary portion of the budget. Rule X of the House of Representatives also lays within the Appropriations Committee the responsibility for appropriations of the revenues for the support of the government. Those two things together, the constitutional requirement and the rules of the House, is what the Appropriations Committee uses as its justification for the annual appropriations.

We were created in 1865 as a separate free-standing committee, at the very closing days of the Civil War. Prior to that time, the Ways and Means Committee had

the responsibilities not only of raising the revenues but of also spending the revenues. As the country grew in the 1860s, as the war was winding down, the workload got a little bit too much for one committee to do it all. And so our sister committee split and the Appropriations Committee was created.

Currently, it is the second largest committee in the Congress, composed of sixty-one members, thirty-four Republicans, and twenty-seven Democrats. Only the Transportation Committee is larger. And we do our work primarily through our thirteen subcommittees. This is very critical. I'll speak a little later about what Barry had mentioned, the so-called 302 allocation that comes from the Budget Committees.

The appropriations process is very heavily process driven. Basically, you can take the calendar and do an overlay of the appropriations process and divide it into three distinct pieces that relate to three different times of the year. As we all know, the President submits his budget in early February. And that begins what I refer to as phase one, which is the hearing and information gathering stage for the Congress. If any of you work for federal agencies, you know that your Inspector General, or your Division Leader in some cases, will have to come before the Congress to justify their budget. This process is very critical because it gives the administration an opportunity to put its best foot forward in terms of what the President is requesting.

It also is informational in terms of the Congress being able to ask questions and better comprehend and understand what is buried in the President's budget. Why do you need an increase? Why has the emphasis shifted within the National Institutes of Health, for example. That hearing process begins, as I said, when the President's budget comes up and usually lasts until the end of April or the beginning of May, depending on which subcommittee we're speaking of.

Phase two really begins in the May/June time period. In a perfect world, which this year certainly is not, the mark-up and the floor consideration of appropriation bills begins. Usually if you've got a good year, if you're on track, subcommittees will begin their subcommittee mark-ups in early May, take their bills to the full Committee, and then present them to the House for floor consideration.

The third and final phase, again following the calendar, will usually occur in September or October, sometimes later if we miss the October 1 fiscal year. Phase three is the conference stage with our brothers over in the Senate and presentation to the President under the Constitution. That is a brief overview of how the appropriations process overlays the calendar year.

I have mentioned the hearings. This is a discussion of fiscal oversight. I would argue that the Appropriations Committee is probably one of the best committees at oversight. Having department and agencies come before the Committee year after year in order to justify their budget, brings forward a lot of information. In any given Congress, and these statistics are for a two year period, we traditionally have about 10,000 witnesses appear before the Appropriations Committee through its thirteen subcommittees. That amounts to about 700 hearing days over a two year period. We publish approximately one 100,000 pages of hearing transcript in any given Congress. We're one of the largest job orders in the Government Printing Office.

The Appropriations Committee also began a unique thing a number of years ago--a tracking system for monitoring Members' requests. In spite of some of the fiscal conservatism that is being bantered about on the House floor, we've been averaging about 7,000 individual Member requests in a given year for items in

appropriation bills. Many times the requests may be supportive of an increase that the President has suggested.

The discretionary budget is something that grew out of the 1974 Budget Act. Prior to that time, there wasn't a lot of focus on different types of spending in the federal government. In 1962, which is a year that frequently is used because it was the year before a lot of the Great Society programs kicked in, approximately fifty percent of the total federal budget was for national defense, with about twenty percent for discretionary domestic spending, and almost thirty percent for Social Security, Medicare, and other entitlements.

Today, that budget pie is cut up quite differently than it was in 1962. Right now, mandatory programs--such as Medicare, Medicaid, and Social Security--amount to about fifty-one percent of the budget, slightly over half. Defense has dropped from fifty percent down to seventeen percent, and non-defense discretionary, which is primarily domestic and a little bit of foreign aid, is approximately seventeen percent. So you can see that while the budget overall has grown, the relative pieces of the pie have gone in different directions.

There is another piece of the legislative track record that also applies to the appropriations process and that is the budget cycle that was created by the 1974 Budget Act. The Budget Committees deal primarily in the macro level, with the big numbers. What are the best estimates of the gross domestic product? What should the level of federal revenues be? What should the level of federal spending be? Should we increase entitlements? Should we increase discretionary spending? You find the Budget Committees dealing with the macro numbers, whereas the appropriators are dealing with the micro numbers. How much should go for this program, project, or activity?

Once the Budget Committees, hopefully in the spring in April, meet their targets, they will give to each of the spending committees of the Congress an allocation pursuant to Section 302 of the 1974 Budget Act. That's the so-called 302 allocations.

This year the number that was established in the budget resolution is the same as it was in the caps set for 1997, $538 billion. The appropriators take that number and divvy it up among their thirteen subcommittees. The smallest subcommittee that funds the District of Columbia received approximately $460 million this year. The largest subcommittee, which is Defense, got approximately fifty percent of the allocation coming in around, I think, $272 billion. During this allocation process, we work closely with the Congressional Budget Office for scorekeeping.

It is the 302 process that also gives the Budget Act an enforcement mechanism through what's called a point of order on the floor of the House. If your allocation, say for the Interior appropriations bill, is $11 billion and the Committee has recommended spending right up to the cap, if you bring an appropriations bill to the floor and someone seeks to offer an amendment that is not off-set, then it would cause that number to be breeched. Any member of the House--Republican, Democrat, majority, minority, conservative, liberal--can make a point of order that the amendment, if enacted, would breach the Interior Subcommittee's allocation and the Chair would rule that amendment to be out of order. That is one form of enforcement where you have the Committee, the Congress, and the Congressional Budget Office working together on the enforcement side.

There is one other thing to realize about the appropriations process. In a perfect world, there is another rule of the House that says we are not supposed to legislate on an appropriations bill. Increasingly, in certain areas, it has become an

exception rather than the rule, where indeed authorization language finds its way into an appropriations bill. This causes huge headaches for my friend from CBO, trying to figure out why if this is an appropriations bill, why did the legislation not go through the regular authorization process?

One of the reports that I found most useful that CBO did year in and year out was the report that comes out in January each year on unauthorized expenditures. It's a very excellent report and you can read through that and find out which programs are expiring and which programs need congressional authorization for the appropriations process. It's one of the things that we as appropriators, and I use the word we as if I'm still working here, would look at and say why is it that certain programs in the Justice Department haven't been authorized in seven or eight years? Why is it that NASA hasn't had an authorization in about seven years?

Frequently, the answer to that is political problems between the House and the Senate. You will also have differences of opinion between how a program should be run, sometimes between the Congress and the Administration. And sometimes a presidential veto will answer why there isn't an authorization that is in place for many of the programs.

There are approximately 1200 budget accounts on discretionary spending within the thirteen appropriations bills. If you were to count what the Appropriations Committee refers to as PPA's, or Programs, Projects, and Activities, the number of those programs, projects, and activities are in the tens of thousands. So within a given account in the Department of Defense for some kind of weapons procurement, you might find PPAs listing each and every one of the individual weapons systems.

The other fact of life on the Appropriations Committees is often referred to as "riders" on an appropriations bill. Riders start off with the famous words, "None

of the funds in this act may be used for," and then you can fill in the blank. This, in recent years, has become much more of a problem for getting appropriations bills passed in a clean fashion.

One of the reasons for the increase is that when the Republican majority took over in 1995, there was a very strong desire to hit the ground running, to enact legislation quickly. And frequently, riders were added to appropriations bills. By their very nature, riders tend to be controversial. The most famous ones obviously are the abortion riders that find their way into a number of appropriations bills.

Last year we had a rider that actually went all the way to the Supreme Court on census sampling, the question of should you do sampling versus enumeration in the decennial census. There are other controversial riders, such as U.N. population planning--"None of the funds may be used by the United Nations for programs in countries that have coercive population planning programs." People frequently think about the down side of riders, their controversy. One of the things I always like to point out is that it was a rider on an appropriations bill almost thirty years ago that delimited the funding for the war in Vietnam. So I guess riders don't always have a bad side to them.

I'll conclude with a few thoughts about life under the caps. I had the honor of sitting across the table from Mr. Anderson in 1990 at Andrews Air Force Base amid the interminable M & M's that kept us up all night. It was the first big budget summit. Since 1990 there have been many revisions to the budget caps. The most recent came in 1997.

Typically, anytime there's a budget summit and everyone comes out smiling, you can generally interpret that as meaning a couple of things. One is that the negotiators front-end loaded the caps so that everybody gets a little something in the

first year or two and the pain will follow in years three, four and five. Well, ladies and gentleman, we're in year three of the five-year deal and people are finally realizing the fiscal pain that is being included on many of the thirteen appropriations bills. It is ironic to me that the one-third of the budget that is discretionary is being attacked given the strict caps. The way the discussion is being focused is in terms of if there was a surplus, how should it be dealt with, through the tax side or through some additional spending?

At the same time that the appropriators are under criticism for bringing bills to the floor that are at the caps, not over the caps but at the caps, we've seen in the last two years examples of massive spending increases in the ISTEA bill for highways and this year in the Air-21 bill for airport improvements. The argument there is made, "Yes, but they're trust fund dollars." That's correct. They are trust fund dollars, but they still add to the surplus or the deficit in just the way a regular discretionary dollar is spent. I think I'll end with that. Thank you.

MR. KEITH: Thank you very much, Dennis. Are there any questions for our panelist?

QUESTION: On the House side, there is a Surveys and Investigations staff for the Appropriations Committee. Who are they, and what do they do, and why are their reports very rarely publicly disclosed?

MR. KEDZIOR: Well, first of all, it's called the S & I Team. They are strictly on the House side, not the Senate side. They were created back in the 1950s. I couldn't tell you the exact date. Originally, they were pretty much exclusively FBI agents. Now they're a mix of people that are from the FBI, the General Accounting Office and elsewhere. It's a very small team of people. I believe there are something around nine or ten. They are located in the same building that CBO is, the Ford

Building, but they have authority to borrow people from federal agencies as the demand kicks in from the Appropriations Committee.

The largest number of studies that are done for the Committee through the S & I Staff are generated by the Defense Subcommittee and they tend to be on very technical weapons systems and so on. But, you know, we've done studies on food stamps and the WIC program, and so on. It is a bipartisan effort, and by that I mean if, for example, we were to do a study of the WIC program as we did a number of years ago, that study has to be requested by the Chairman and the Ranking Member of the subcommittee and be signed off by the full Committee Chairman and the Ranking Democrat on the Committee. Then the S & I Team kicks in.

Each Congress, the Committee on Appropriations publishes an oversight report. And in that oversight report every single study that S & I does is listed. Some are not released but the majority of them are released. Many of them find their way into the hearing documents. So if you're looking for a specific one, I'd recommend you take a look at the oversight report and look at the listing, as well as all the reports that are done at the request of the Committee by the General Accounting Office. GAO reports are also enumerated there.

MR. KEITH: Another question?

QUESTION: Dennis, I have a question for you. Barry mentioned the Government Performance and Results Act at the conclusion of his remarks. It establishes a statutory regimen for improving fiscal oversight by holding agencies accountable for their performance strategies and goals in the budget process. And that's the basis of my question. The goal is to feed this information into the budget and appropriations processes. But it's begun slowly and it's going through fits and starts. Do you have any views on the prospects for using the Results Act to

reinvigorate oversight by the authorizing committees and will it be used effectively in the appropriations process?

MR. KEDZIOR: I'm usually a cynic on things like that, having grown up with PPBS thirty years ago. I believe that people who are always looking to devise a system to fix a problem lack political courage or political will. I think what the Results Act is going to do is to organize the way people think and the way organizations think about themselves and what they do. Lots of the information that the Performance Act is requiring and is sifting through is out there. Agencies have been doing a lot of this for years. Hopefully, what this will do is put it together in one organized form so public officials can look across the government and say, "These programs are run well, or this agency is doing what it's supposed to be doing." Hopefully, those types of activities force people, every once in awhile, whether it's in your personal life or your bureaucratic life, to take a look-see about what are we doing? Why are we doing something the way we are doing it? So to that extent the Results Act is probably very useful. Will it be used by political leaders for saving their pet rock? I don't know.

MR. ANDERSON: Dennis mentioned his cynicism and I've been through the wars, too, and I share that. What was it, PPC, which one did you cite?

MR. KEDZIOR: PPBS.

MR. ANDERSON: Program, Budgeting —

MR. KEDZIOR: Program, Planning, Budget, and —

MR. KEITH: Planning, Programming, and Budgeting.

MR. ANDERSON: And of course, we've been through many more than that. We've been through MBO, which was Management By Objective. We had ZBB, which was Zero Based Budgeting for a while. One of my favorite acronyms, and I

like acronyms, was in the early eighties, the President's Private Sector Survey on Cost Control, or PPSSCC, which of course, we pronounced the "PISS" commission. I share Dennis' cynicism that we've been through these before. There is a difference in this one, however. Whether it will mean anything, I don't know, but there is a difference in this one. This one is a law. The others were efforts and not written into law. The Results Act was also bipartisan legislation. There's been a lot of support. Whether that will translate into anything, I just don't know.

MR. KEITH: Any other questions?

QUESTION: This deals with the authorizing committees' oversight activities. Their recommendations often are included in authorizing bills that may pass the House. Use NASA as an example. The House Science Committee has done some extensive oversight of NASA and routinely passes authorization bills that go nowhere in the Senate. How can we foster cooperation between authorizers and appropriators so that when an authorizing committee conducts oversight, but the authorizing legislation is not acted on, the appropriations process can reflect the results to be found through an oversight investigation?

MR. KEDZIOR: You know, I don't mean to be negative across the board. There are a lot of committees that are really doing their stuff. And as you mentioned, the NASA authorization, for example, passes the House every Congress. Frequently, the problem is on the other side of the Capitol. In terms of my advice, the best way to translate findings from congressional oversight that is being done by the authorizing committee and to have an impact on the appropriations process is really person-to-person. That works best around this building. Relationships that members have with each other. "Hey, Bob Livingston, did you know that blah, blah." I think

that personal relationships extend not just at the member level, but at the staff level. When those relationships are strong, you get very strong and good results.

MR. KEITH: Another question? Well, I have one of my own. Proposals to enhance Congress' procedures for conducting oversight and working the results of committee oversight activities into the legislative process have been advanced for many years. Two ideas that go back probably 20 years or so are kicking around today--one is "sunset" legislation and the other is biennial budgeting. The Nussle-Cardin bill in the House (H.R. 853), for example, was just recently ordered reported by both the Budget and Rules Committees. It has a sunset component that would establish a ten-year calendar for committees to review all of their programs. Biennial budgeting has been proposed in the Senate by Senator Domenici (S. 92 and S. 93).

What triggered my interest in this particular question was a report in the *Washington Post* today on a food aid program under which we've provided $600 million to Russia; the article seemed to suggest that this was a form of aid that, in this particular case, was not needed. I was wondering, how often is oversight reactive to things like these stories in the *Washington Post* versus a deliberate, planned-out process? Do you have any feeling about that?

MR. KEDZIOR: Well, this is a political institution. People get elected. And I think you're always going to have a situation where people respond to whether it's the tragic shootings in a high school, or whether it's an earthquake. In the case of an earthquake, we do hazardous mitigation or something like that. I think you're always going to have those kinds of reactive activities.

With respect to your point on sunset legislation, I've always been in favor of that personally. I think it's a good idea for Congress to periodically put programs and agencies on a regular oversight calendar and say, "Okay, every year we're going to

look at some of these things and see if the program needs to be tweaked. Is it doing what it was originally supposed to be doing?" I've always been on the side of sunset.

You won't find an appropriator, at least in the House, that is big on biennial budgeting. I've always maintained that in the appropriations process, an agency can get away with anything once. The reason they can't get away with it the second time is that they've got to be sitting at that witness table the next year, looking the Chairman in the face and say, "Well, we misspent this money, or we didn't spend it the way that Congress directed us to." So I think by taking going to a biennial system, you're going to lose one year of oversight.

MR. KEITH: I would like to thank our panelists for coming today and sharing their insights with us. And thanks to all of you for participating in this seminar.

CONGRESSIONAL OVERSIGHT: A "HOW-TO" SERIES OF WORKSHOPS

Monday, July 26, 1999

INVESTIGATIVE OVERSIGHT: AN OVERVIEW

Introductory Remarks

Richard Ehlke
CRS Assistant Director, American Law Division

Morton Rosenberg
CRS Legal Specialist

MR. EHLKE: My name is Dick Ehlke, Assistant Director, CRS' American Law Division. I want to welcome you to the third session in our Oversight Seminar. I first want to thank Mr. Dreier for remarks he made about CRS and this Oversight Workshop in the *Congressional Record* last week. CRS first conducted a workshop on Congressional Oversight and Investigations in 1978 at the request of Speaker O'Neill. Since then, we have sponsored and conducted various oversight seminars and have updated as needed an oversight manual to assist in this core constitutional function of the legislative branch.

As the 106th Congress undertakes its congressional oversight responsibilities and as CRS supports you with research and analysis in that function, we would like to provide you with specialized training in the process of congressional oversight and we have called together a series of experts to assist us. It is our intent to provide you with a foundation to conduct effectively oversight activities during the 106th

Congress. The speakers and panels that we've assembled are designed to place oversight in context, to explain the various components of this important constitutional function, and to provide you with practical information. The theme of today's workshop is Investigative Oversight. We've arranged two panels of experts to address two things. First, how outsiders to Congress influence the oversight process, and secondly, how one prepares for a congressional investigation.

Finally, as you undertake oversight activities and in your other legislative work, please remember that CRS attorneys and analysts such as Mort Rosenberg and Walter Oleszek, who organized this workshop, are available to assist you with your research and analysis. Let me turn it over now to Mort who will have a few more words to say about today's first panel.

MR. ROSENBERG: Thank you, Dick. As co-coordinator with Walter Oleszek, I would like to welcome you all to the third and last of this series of CRS workshops on Congressional Oversight. With unseemly modesty, I believe the first two were unqualified successes. For those of you who missed either of those sessions, they will be available, as will be today's, on audio and video tapes that will be made available from CRS, and will be seen on the House's broadcast system. In addition, in the near future, transcripts of these proceedings will be published as a committee print by the House Rules Committee. I might add that Congressman Lee Hamilton's keynote presentation at the opening session was reprinted in last Monday's *Congressional Record*. A summary of the essence of his remarks appeared in the *Christian Science Monitor* of July 15th, and is available as a handout at the give away table outside along with the new CRS oversight manual. I'm certain that Mr. Hamilton's remarks are going to be the benchmark reference in future debates on the efficacy and the propriety of particular congressional oversight exercises.

Today, we will explore two important oversight themes: the role of outside actors in the oversight process, and the preparation for oversight investigation from the perspective of both a committee and a target of a congressional investigation. To introduce and moderate our first panel, let me turn you over to my long-time friend and colleague, Walter Oleszek, whose books, articles, and lectures on congressional process over the last 30 years or more have been an unparalleled source of information and guidance to Congress and the public as to how the legislative process works. He is the one indispensable person in making this and all previous CRS oversight programs since 1978 possible and successful. Walter.

THE ROLE OF "OUTSIDERS" IN OVERSIGHT

Panelists: Timothy Clark, editor and publisher, Government Executive; Mario Carrera, Business Software Alliance; Patrick McLain, former counsel, House Commerce Subcommittee on Oversight and Investigations; and David Vladek, Visiting Law Professor, Georgetown Law School. Moderator: Walter J. Oleszek, CRS Senior Specialist

MR. OLESZEK: Mort, thank you very much for your kind remarks. My job is to introduce and moderate this panel. Before I introduce our four panelists, I want to make a point about oversight. Woodrow Wilson has been quoted in the past at a couple of these seminars, so let me start off as well with a quote by him. In his classic 1885 book entitled *Congressional Government*, Wilson said that legislation is, and I quote, "The oil of government." And we certainly know that the lawmakers on Capitol Hill in the House and Senate are pretty good at lubricating the machinery of government in terms of the legislation and the programs that they want to enact.

Today, we're fortunate to have four experts who are going to look under the hood and shed some insight as to whether or not this "oil" needs to be changed periodically through vigorous investigative oversight because, as we know, the purposes of investigative oversight are multiple. Investigative oversight not only serves to inform the public but also, of course, to inform the lawmakers so they can make and form judgments on public policy. To kick off this first panel, I'm delighted that we do have four very knowledgeable people, and we're going to go in the order of their presentation so I'll introduce all four and then they'll start.

We have Tim Clark on my far right who is the editor of *Government Executive* and its publisher. His magazine for Federal employees is in many respects the equivalent for business people of something like *Fortune* or *Business Week*, so you can be sure that high federal executives in both the civilian and military arena read *Government Executive* faithfully. And I commend it to you because it has a tremendous number of wonderful articles about how government is working or, as we know, isn't working on occasion. Tim was also one of the founders of *National Journal*, and he is a Harvard graduate. And I suppose I should also mention that he is married to Hannah Sistare, who is the Staff Director of the Senate Governmental Affairs Committee.

Secondly, we have on my far left Mario Carrera. We were going to have Rebecca Gould, of the Business Software Alliance, but she had to go to a meeting called by her bosses so, understandably, that took priority. But she did send her associate, Mario Carrera, who is the manager of trade policy at the Business Software Alliance. Prior to that, he worked for the Embassy of Australia on trade policy. He also served for seven years on Capitol Hill as an aide to Representative Constance

Morella. He is a graduate of Georgetown University and the London School of Economics and a native of Chile.

Next, alphabetically, is Patrick McLain. Pat is currently Vice President for Federal Governmental Affairs at Smith, Cline, Beecham and represents his firm in pharmaceutical and other business issues. But really, for us, his prime claim to fame is that he worked for 14 years as counsel to the House Oversight and Investigations Subcommittee headed by Chairman John Dingell, who was also Chair of the full Committee. As many of you know, John Dingell, through his bulldog determination, knowledge, intelligence, and so on, was one of the most vigorous and successful overseers of the Federal establishment. So Pat is going to speak from that particular perspective.

Last, but not least you can be sure, is David Vladeck, who is at the moment a visiting professor of law at Georgetown's University Law Center. But really, his claim to fame is, that he is one of the founders and for eight years the executive director of the Public Citizens Litigation Group, a nationally prominent public interest law firm based in Washington, D.C. Founded in 1972, the litigation group is best known for its work in separation of powers, First Amendment issues, safety, civil rights, health issues, and on and on. He's also argued a number of cases before the U.S. Supreme Court and as well as other Federal courts. A graduate of Columbia University Law School, Mr. Vladeck also holds a Master's degree from Georgetown University Law Center.

To start us off on the role of outside actors in oversight, I want to emphasize Mort's point. What we're trying to do in this session is to indicate that there's a broader political community that can assist committees, subcommittees, and Members of the House and the Senate in the conduct of oversight. People in the

media, people in interest groups, people in both the public and private sector can provide large assistance to committees and subcommittees in monitoring program performance. Let me turn to Tim Clark to start us off.

MR. CLARK: Thank you, Walter. Let me just add that my wife's last name is Sistare, actually, Hanna Sistare, and she is Staff Director and Counsel of the Senate Governmental Affairs Committee, which conducted a pretty wide ranging investigation of campaign finance activities last year. That was a difficult investigation and one that was frustrated by a variety of different factors, including the interplay between the White House and the media.

My assignment is to talk about the role of the media in investigative oversight. One question is what is investigative oversight? If you read Lee Hamilton's remarks, which I just did quickly, what he seems to be talking about is more routine legislative oversight than the kind of "investigative oversight" that the Senator Thompson hearings were about. I would argue that routine legislative oversight is needed more than the headline, "grab me" investigative oversight. I believe Congress is now doing a poor job of routine oversight of federal agencies and programs and it should do more. One reason for the grab-me kind of oversight is the interaction with the media. The media is interested in scandal. It's interested in headlines. The members are interested in headlines. The members can get headlines by turning up scandal. I have a few overheads I want to show quickly, though Walter accuses me of being overly high-tech. Nonetheless, he has provided me with this high-tech piece of equipment. When I mentioned powerpoint to him, he nearly fainted.

Can the media help oversight? Yes, the media can help. It frequently turns up instances of problems that then can be further investigated by Congress. Here's an

example from my colleagues at the *Weekly World News*. Twelve Senators are space aliens, and this is an old article actually, from 1994. It's a little out of date. Now one of them is Secretary of Defense. My colleagues got it wrong about John Glenn. He's really a space hero, not a space alien. But there has been no follow up on this story by Congress!

Here's another example. This is actually a cover that we did in 1989 on the hollow government. The theme addressed whether Congress is providing the resources to agencies to meet the promises that Congress has made for delivery of programs. And the answer was no. Congress enacts programs, creates agencies, and then doesn't fund them. Congress doesn't provide agencies with the resources, the staff, the computer equipment, or other resources with which to do the job. One example ten years ago was the $2 billion unfunded backlog of maintenance at the National Park Service.

If you read the *New York Times* yesterday, there was a front page piece about this same phenomenon. It's worse now than it used to be because visitorship at the national parks is up. There's been no maintenance and the parks are hurting. That's just one example. The reason I start with this example is that these kinds of issues are the types that Congress should be looking at with more regularity. Hollow government, I would argue quickly, is the result of political trends.

Here's a cover we did on the March Against Government. Presidential candidates and congressional candidates have been running against government for a long time, ever since George Wallace in 1964 advocated throwing the bureaucrats in the Potomac, their briefcases and all. Another cover we did depicts the various people who do run against government and criticize it routinely. There is Rush Limbaugh, the Militia Guy, the NRA, and so on.

The phenomenon of hollow government was aggravated, if you will, by the advent of the Republicans. They, of course, did not want to expand government, but cut it back. There's been a continuing problem about that, as you know. The budget caps right now are really pinching agencies. And the people who are running these agencies are having to go beg for more money to run them.

The head of the IRS, Charles Rosotti, is a good example. He comes out of the private sector and finds that there's been so much cutting in that agency over the years, that he can't run it with the resources he's been given. So he's argued for major increases. I'm arguing that Congress should be looking at these kinds of things.

Here's a recent cover we did, "Down to the Core. Paring Back to Essentials, the Pentagon Targets 230,000 Jobs for Auction to the Lowest Bidder." What is the core of government services that you must have in order to have a responsible government? Can you outsource everything? We're running a cover in August on NASA, which has got virtually everything for sale now and has privatized virtually everything that it can privatize. It is still continuing along that line. Maybe that's okay at NASA, but what about the Pentagon?

An interesting phenomenon is that agencies are now in the business of selling services to each other. "Agencies Land Blows In the Fight to Sell Services." This was a cover about the FAA. The story discusses how the Agriculture Department won an FAA contract to provide information technology services. FAA was in competition with various private sector organizations for the contract. There's a lot of this so-called franchising going on. There's a lot of privatization. An earlier NASA cover story we did, "The Glory of Space Exploration," talked about the drudgery of downsizing at NASA privatization, contracting out, and the consolidation of contracts the Kennedy Space Center and elsewhere.

There is some good news and one would argue that maybe Congress would once and a while highlight some good news. It doesn't happen often because it doesn't make many headlines, but there's a case where the Air Force and the contractor combined to rescue the C-17 program, which was a good thing that perhaps deserved more coverage. This is not investigative oversight, I admit, but these stories should be recognized from time to time.

Congress has given the agencies tools with which to do better and with which to give Congress information on the basis of which to judge what changes should be made in programs. The Results Act, the Government Performance and Results Act, is a prominent case in point. There should be follow-up hearings on the Results Act not only in the Senate Governmental Affairs Committee and its House counterpart, but also in the legislative committees of Congress which do not, I would argue, do a responsible job of oversight of individual agencies. The authorizing committees just don't do it and they don't produce legislation anymore that reauthorizes these programs. Now, all legislation runs through the appropriations process, through the spending bills. This is not a good way to do business.

Here's an interesting example of an agency that really is making substantial reforms. This is a cover story on the CIA, which has been doing very interesting business-type reforms within its own boundaries. Here's another phenomenon we've looked at, and Paul Light of the Brookings Institution has done a book on this: *The True Size of Government*. His book reflects on the huge changes that have happend over the years and how we organize to deliver private services.

Clinton has declared the era of big government is over. He bases that on the head count in civil service, which as you know has been coming down pursuant to laws that Congress has enacted. The true size of government, Paul Light argues,

would include not only the 1.8 or 1.9 million civil servants, but also the military and the postal workers, 5.6 million contractors, another 3 million working under grants, another 4 million working for state and local governments under mandates that the federal government has enacted.

This is a special issue we did in February under a grant from the Pew Charitable Trust and in cooperation with the Maxwell School at Syracuse University. This study rates the performance of 15 federal agencies. We did it in five categories of management: human resources, financial management, measuring for results, capital asset management, and information technology. We actually assigned letter grades to the agencies. This was a case where an external body, us (*Government Executive)* plus Maxwell, performed oversight on how these agencies were performing.

Let me say that I think that the media is increasingly influential in setting the oversight agenda. It used to be in the old days that members of the press would consult government leaders about what was going on. Now, government leaders look to the media to set the agenda and tell them what's interesting and what they should follow up in the way of hearings. One example is that Joe KCline, who is the head of the Anti-Trust Division in the Department of Justice, has hired a very capable young lawyer from Wilmer, Cutler, and Pickering. He spends half his day every day going through the news clips trying to figure out what is the climate of opinion as reflected in the media that would govern what KCline can do on major issues facing the Anti-Trust Division, including the Microsoft case, for example. I think it is increasingly true that if you can't get your story into the media, it doesn't exist, unfortunately. Take just for an example this CIA piece. I've never seen a cover story done with the cooperation of the CIA. In this case the CIA wanted to get a story out,

so they cooperated with us to some degree. The fact that it has now been published in a magazine gives the story additional credibility and reach both within the CIA itself and the intelligence community in general.

I'm going to stop now but I'm going to leave you with one message: leak first. If you have information that you think is of interest to the press, it's in your interest to get it out first, as opposed to letting someone else leak it. A case in point I would offer is the Senate Governmental Affairs hearings, the so-called Thompson hearings, on campaign finance. They were defused to a significant degree by the fact that the White House's Lanny Davis was leaking all the stuff that they were about to bring out in the hearings. This is an interesting example of the use of the media to effect government policy. I'm going to turn it over to my wiser colleagues now.

MR. OLESZEK: Thank you very much, Tim. Mario, the podium is yours.

MR. CARRERA: Thanks. It's nice to be here with you today. I appreciate the chance to come here and tell you about how industry groups off the Hill can help you in your oversight responsibilities. When I worked on the Hill a couple years back--and I spent about seven years here as Walter mentioned--I viewed interest groups as something to avoid at all costs I think that might have been partly because I worked for a very centrist member who balanced many interests despite her party affiliation.

I think all of you, to some extent or other, look on interest groups as something to be wary of. And in many cases, rightly so. So my job here today is to tell you that we can be a resource to you. We actually can help you further your oversight agenda; we aren't here just to advance our hidden agendas, although I'll talk about those as well.

The first issue to discuss is why go to outside interest groups for Oversight assistance given that there are these trust issues you all have as congressional staff.

I think the number one reason, and I'll use a high-tech cliché here, is bandwidth. Congressional staff handle the whole plethora of issues that the Hill deals with. Interest groups look at distinctive issues all day long and all year long. We handle a very limited set of issues in comparison to what you do. Basically, we just focus more on these issues and give more attention to them. Therefore, we can give you some background and perspective that otherwise would take you time to get up to speed on.

Secondly, we have access to expert witnesses. The Business Software Alliance is an organization that represents the U.S. software industry. We represent about 15 of the largest, and some small, U.S. software makers, or developers as they're called in the industry. Our work primarily focuses on anti-piracy. We try to curb software piracy, which results in losses of about $12 billion a year to the industry plus the consequent job losses that result from the pirarcy. Our organization has access to many witnesses who we can get from our companies. They often are people who would otherwise be loath to come to the Hill if they were to receive a call straight off from congressional staff. They would be a little frightened by the idea of appearing at an oversight hearing, a little frightened of what that could mean for them or for their companies. So outside interest groups like trade associations, or other groups can persuade witnesses who otherwise might be reluctant to testify, unless committees were to subpoena them which, of course, is their prerogative.

A third contribution of interest groups to oversight is that they have often asked and gotten answers to the same questions that committees will be asking. They'll be able to anticipate the kinds of questions and the kinds of responses that you'll get from executive branch agencies because these are the questions that we routinely ask of places like the Department of Justice, the Department of Commerce,

or the US Trade Representative. We have gotten answers from them already. So we can anticipate those answers and help you probe deeper into an area instead of having to stop once you've gotten the answer we know you'll get. We can say, "You know, they're going to say this to you. You should follow up with such and such questions." We can help you go deeper because we've heard all the answers before.

A fourth reason to use interest groups and outside resources in oversight is their access to the media. House committees and Senate committees and staff have press resources, but outside interest groups have additional press resources and contacts and access to the media. That's one of the things that surprised me when I left the Hill, the extent to which outside interest groups rely on the press and have ongoing operations with them. In short, you'll be able to tap into press resources that otherwise might not be available to you.

Another issue I want to talk about is how you might go about using these groups. Obviously, you want to use them in a balanced way. You don't want to go too far and entrust too much to them, since you're ultimate responsibility is to your boss. The first thing I would recommend is to do background research on groups. Make some calls around town to find out which groups have what kinds of agendas. Find out which of your colleagues on the Hill have used various interest groups, what their experience has been with them. You'll often hear about whether groups are too tilted in one direction or another, whether they have a hidden agenda that you might not otherwise know about. Much of this information can usually be found out by a couple of phone calls or a couple of web searchers where you'll find out what these folks have done or written about.

A second point in this regard is to seek out ex-Hill staffers who work for various interest groups. I think you'll find that if you work with interest groups

formed by ex-Hill staffers, you're less likely to get really long winded memos, questions that have no pertinence to your boss' interests, and things like that. An ex-staffer is just someone who has a better sense of the kind of stuff you're looking for.

My third point is to really put these groups to work. At the risk of creating more work for organizations like my own, interest groups see an opportunity in helping the Congress. They're willing to do much more work than you would ever anticipate. The thing is you don't have to use that work. You can have them create as many memos as you want, as many background questions and answers that you want. Committees and staffers may never use the material. If you choose not to, you're not beholden to what they produce for you. However, you do have a great amount of information that otherwise you would have to compile on your own.

I've given you some reasons why to use interest groups and how to use them. Here are a few points in terms of what to watch out for. One thing to think about is the protection of relationships. Interest groups have relationships with outside actors, the Department of Justice, USTR, Commerce, and so on. We will help you in your oversight responsibilities to the extent that we can and we will lead you to where we think your answers may come from. But we will protect our own relationships with outside agencies, with companies, and so on. So you have a think about the relationships interest groups won't want to tell you about. You'll want to think about how to ask questions of agencies that interest groups might not lead you to because they're protecting their relationships with those agencies. And that happens a lot in the case of oversight hearings with agencies which we have a lot of dealing with.

Second is the potential hidden agendas of interest groups, and that goes back to the question of researching your interest groups well to find out where they are coming from. I think you want to talk to the congressional staff that you work with

because congressional staff have worked with various trade associations. They have gone through the hearings process with different groups and their hidden agendas may have come out in the course of previous hearings. Congressional staff will be able to help you identify them. Those are some of the things that you want to look for.

MR. OLESZEK: Thank you, Mario. Pat.

MR. McLAIN: Thank you, Walter. I recall participating in the first CRS congressional oversight workshop conducted back in 1978. I think the fact that I'm still at it over 20 years later is a reflection of my fondness for the subject and still many years later, being involved in the process of congressional oversight in a couple of different capacities. In the letter inviting me to come and join you this morning, it talked about sharing my observations with you about how to prepare and represent a client and his interest to an oversight committee. That suggestion made me appreciate that there's probably a variety of ways to look at the role of outsiders in the congressional oversight process.

I plan to look at oversight in terms of stages in that process and suggest that the role of outsiders changes dependent upon what stage in the oversight process you're at. Also, the posture that outsiders, play and the roles that they play in the oversight process also varies. Their role is very different in the stage of the initiation and development of an oversight investigation or hearing than at the end of the process. The role of an outsider in the conduct of the hearings might evolve through a congressional oversight investigation from, for example, more of an offensive posture versus a defensive posture.

Some might think that in terms of initiating and developing subjects for congressional oversight that staff or members sit around and then all of a sudden they

have an idea of what would be a great subject for an investigation. While that may happen, the majority of instances are that an investigation will be prompted by some external or outside influence, and those external or outside influences can be many and wide ranging. Certainly consumers have and do play a vital role in the initiation and the development of a congressional investigation. Often times it's a consumer, who also might be a constituent, that might go to their particular member of Congress and make a case that through some governmental action or lack of action, they may have been harmed.

I recall one consumer group, this is many years ago, around the time of the first CRS oversight forum, in 1978, provided our committee with some documents alleging an international uranium cartel. These documents came from a consumer group, The Friends of the Earth, but it was Friends of the Earth in Australia. Those documents were sufficient to engage the committee in what turned out to be a very long and extensive congressional investigation that did develop and demonstrate an international uranium cartel.

The media is certainly a source for information that could lead to the initiation and development of a congressional investigation either indirectly--somebody reading an article or a series of articles that might interest a committee or a member to initiate an investigation--or directly. And that's perfectly appropriate. A relationship between somebody in the press and a congressional committee or a congressional staff might turn up an issue that warrants some investigation.

Business also plays, I think, an important role in this early stage of oversight. Business oftentimes will come to Congress, quite appropriately, suggesting that a governmental agency is doing something that exceeds their authority, or the agency is doing something inappropriately. Business concerns might serve as the basis for

the initiation of an investigation. Similarly, business may come to Congress, as they have done in the past, and allege that a governmental agency is doing something that is producing an un-level playing field, or a competitive disadvantage to a particular business.

There are as I suggested, a wide range of outside sources that could lead to the initiation of an investigation. When I talk about sources for the initiation of investigations, I'll only talk about those that are already public. I wouldn't want to disclose the sources of some investigations. I recall I had a very good relationship with a firm that were "short sellers" in the investment world. They had a financial stake in the securities of certain companies in economic difficulty. Part of their business was developing and exposing companies that were engaging in inappropriate and illegal activities. I recall working with these people. I told them that I was always more concerned about the quality of the information than the source of the information. While I always wanted to know the source of the information, if the quality of the information was sound, that was of much more concern than the source of that information.

Turn now to the conduct of an investigation from more of a defensive posture with outsiders representing clients before or individuals before a congressional oversight hearing or investigation. I think it's important in dealing with congressional oversight, as with any other endeavor, that you have an objective in mind before you even commence the activity. This is easily understood in the legislative process, having a legislative objective, but it's no less important in dealing with the oversight process. In my dealings with Congress, particularly on behalf of a client--and I did for eight years represent companies that did appear before and were the target of congressional investigations--the approach that I always liked to pursue is one where

I could try to identify and acknowledge the legitimate interest, needs, concerns, objectives of the congressional committee that is involved and try to help them satisfy their needs. At the same time, I wanted to maintain and protect the interests of my client, if not trying to advance the interests of my client.

As you talk about the practicalities of representing clients and dealing with congressional investigations, it is very important to understand that your first response will likely set the tone for the ultimate outcome of whatever your relationship is with the relevant committee, our short-term success is predicated a lot more on what you do and how you deal with a particular office or committee than it is how you or your client comports himself at a hearing. Likewise, long-term success is predicated more on what you've done before the hearings and what you do after the hearings than it is on what actually transpires in the congressional hearing. So, how you first respond will invariably establish what your relationship will be and in large part, influence the ultimate disposition of your case.

There are repeated examples of major missteps that have occurred at the very early stages of the congressional oversight process that have really set the stage and established the ultimate disposition. Oftentimes, those missteps involve process. How you respond to requests for information? How do you respond to a subpoena? Your responses to these questions could change the context of an investigation from one of substance to one of process. Any congressional committee of modest capability can always win a process inquiry regardless of what the substance might be. And I use the characterization, capable committee, intentionally. By that I mean not all committees are created equally. Committees and their membership, staff, and chairpersons vary greatly within and between the different houses, and it is important that you have an appreciation for the committee that you're dealing with.

I want to pick up for a moment on Tim's discussion of the role of the media and congressional oversight. My view is that the media plays a very important role in congressional oversight. It's often talked about in terms of a symbiotic relationship between Congress and the media. Without denying that there is a symbiotic nature to the relationship, it's also important to appreciate the proper and necessary role of the media in creating an effective investigative process. Public policy is not made in a vacuum. If one of the objectives of congressional oversight is to identify and change inadequacies in the existing process, it is only through exposure of those inadequacies that change can be brought about. That's an important role that the media plays.

Let me close by talking a little bit about other constituencies. It is important if you are coordinating from a defensive posture in dealing with Congress, that you coordinate different constituencies that may have an interest in the conduct and the outcome of a congressional investigation. Let me use the case, for instance, of a pharmaceutical company that I now work for. Coordination means involving patients, professional associations, other providers, and other companies. You should not look at your role narrowly but look at the role of outsiders very broadly and consider all the different constituencies that may be effected by the investigation. With that, I'll close. Thank you, Walter.

MR. OLESZEK: David.

MR. VLADECK: I'm actually going to use the podium because I can't see most of you. When Mort Rosenberg called and asked me to participate in a panel on a Monday morning in July at 9:00 a.m., I assumed we were going to hold this in a closet. I'm very gratified to see so many of you here.

Let me talk from my perspective as someone who comes to Capitol Hill, not as Mario said to help you, but to get something out of you. And I think in that sense, I stand in the shoes of most people who come to Capitol Hill seeking an investigative oversight hearing. My purpose is not necessarily to lay the ground work for legislation. My purpose is to try to enlist Congress' assistance in getting someone--an agency or an institution that isn't obeying the law--to tow the line.

I think that the topic today is an important one, because it's my perception that Congress is really in the ascendancy these days. It is much more difficult for people in my shoes to go to the courts to get a judicial order compelling an agency to obey the law. Judicial doctrine has changed over the last decade. It makes it much more difficult to enlist the courts in that kind of assistance. I also think that the executive branch, maybe due to the increasing power of Congress, but the executive branch seems to be a harder institution to go to and effect institutional change. Maybe it's because Congress is the institution of last resort. Maybe it's because of the decentralization of power in Congress. When Pat started doing oversight, it tended to be done much more through the full committee. Now, virtually every subcommittee can and has engaged in oversight of some kind. There are places to go when you need assistance and Capitol Hill often is the first stop.

Let me talk first about the kinds of oversight tools that we see that may not be obvious. The first is what I would call the "over the transom" tool. Congress has enormous information-gathering power. It is power that greatly exceeds the scope of FOIA (the Freedom of Information Act), or the Privacy Act, or the Government in the Sunshine Act. Oftentimes when institutions outside of government, public interest organizations or corporations, need to have a better sense of what government is doing and why they turn to Congress. It is very difficult for outside

entities to get that information directly from the agency. And oftentimes, we will come to Congress for assistance. I think of this as an integral component of oversight. It is persuading one of you that a sufficient problem exists, and that there ought to be some congressional demand for information. While many of you may be frustrated with the pace of agency responses to your information requests, let me tell you, you get an answer much more quickly than we would. It is hard work trying to pry lose information from the executive branch or from another institution.

The second step is what I would call the "position clarification" function. Oftentimes in dealing with an executive branch agency, it is very difficult to get a simple answer--yes or no, or what is your position on this? A very powerful weapon that you have as part of your arsenal is demanding a response. You may not always get it but, once again, it is much more likely that if a request comes from a congressional office, the agency will provide a clear-cut answer to the question of what is your position various on acts? You will get it.

Let me tell you, from my standpoint, it is often very difficult to pin down an agency as to its official position on a pending matter. Oftentimes there is a need for formal hearings, and I think that outside organizations play an important, maybe a pivotal, role in helping you select the topics for oversight hearings. Let me just give you a war story. Many of you are familiar with the disease Reye's Syndrome. It is still unclear what the etiology of it is, but there's an association with giving aspirin containing certain products. If you now look at any aspirin-containing products, there is a warning label that says, quite explicitly, do not give this product to a minor who may have flu or chicken pox. How did that label get on: congressional oversight. It became clear in the early 1980s that there was an association between this disease and taking aspirin-containing products. The Secretary who then headed HHS (Health

and Human Services) was reluctant to order the label on his own. We sued in court to try to compel the agency to mandate warning labels. That litigation was stalled in the court.

Ultimately, there were oversight hearings held by Congressman Henry Waxman, in which agency officials and industry officials were hauled before Congress and asked to talk about the evidence relating to this association. Within a few days of those oversight hearings, the industry "voluntarily" decided it would be prudent to start labeling its products. That is a classic illustration of the power of an oversight hearing. It was not necessarily staff- driven. This was a collaborative effort between congressional staff, outside industry groups, and public health organizations. All came to Congress because they wanted something. They worked collaboratively with congressional staff to organize a very effective oversight hearing that without legislation achieved what we wanted.

I think that in some ways, Waxman's hearing on tobacco is another illustration of an effective oversight hearing. The purpose of that hearing was not to build the case for legislation. The purpose of that hearing was not, I don't think, to educate members of Congress. I think the point of that hearing was to build public support for an agency initiative. And that hearing was a collaborative effort between committee staff and experts in the field and public interest organizations who had for quite some time been anxious that Congress get the industry on record about its views with respect to smoking and health.

I've used several illustrations that might suggest that there's some partisanship here. I don't think that is actually the case. We have, obviously, our political orientation. One would expect that we have been the drilling dry holes in terms of getting oversight hearings for the last six, eight years. That isn't necessarily so. For

example, we were very concerned at the beginning of the Gulf War about the administration providing certain drug products to American soldiers who were being stationed overseas without their informed consent. And we went to talk to some members of Congress who also were concerned, and we managed to persuade a Republican Subcommittee Chair to hold very good hearings on this issue.

That leads me to my next point, which is why should committee staff interact with outsiders? Well, for one thing, we do bring expertise and experience to the table. On the Reye Syndrome issue, we came along with epidemiologists, public officials, people who might otherwise be difficult for you to find, to marshall, to assemble sort of in a package, a ready made group for you who could take a hard look at the merits of that issue. For a second reason, many outsiders have been around Washington for an awful long time. And there are relationships that arise that are not necessarily purely partisan. I mean, I do work on tobacco issues and I talk regularly to Senator Hatch's people as well as to Senator Kennedy's. Why? Because we've been through battles together. We know one another. And even though we may disagree on some policy issues, there's mutual respect. And I think that helps everybody in terms of oversight. Indeed, it seems to me that you can learn more from talking to someone who may ultimately turn out to be your adversary, or your friend. In my view, Washington is a unique town because most people understand that today's enemy is going to be tomorrow's ally. And at least among the professionals, I think that partisanship is kept to a minimum.

The last point is that I think that our ties with the media often are very helpful. Most oversight hearings are held in part because the members of Congress want a headline. I don't think there's any mystery about that. I do think that they also want the right policy outcome. But it certainly feels better if you're doing the right

thing and you get the headline that you want. When you've been working on particular policy issues for a long time, it is simply a fact of nature that you end up having ties to the reporters who cover these issues. On Reye Syndrome, we dealt for years with the people who cover public health issues. That hearing was extremely well-covered by the media--extremely well covered. Maybe the committee staff could have done that on their own. I'm not sure that that's the case. So I do think that there are grounds for a symbiotic relationship between outsiders and the committees conducting oversight. In short, try to match what they want with your own institutional needs.

Let me close by agreeing with Tim on one matter. I do think that Congress is still doing a pretty good job of investigative oversight: the big hearing focusing on one issue. I think there are two areas where Congress has really dropped the ball and I would urge you to think about this. One is the area of long-term sustained investigations. Congressman Dingell was famous for conducting long-term investigations of a fairly broad scope. One of the best set of hearings I've ever seen were the hearings on the insurance industry held in the late eighties or early nineties. I have yet to see in the last five to ten years a sustained set of hearings on institutional problems like that. I think Congress would be well advised to get back in the business not simply of overseeing the administration of agencies, and I agree with Tim that there's a need for that as well, but for doing broader oversight of our basic industrial base. There is very little sustained congressional oversight of the basic programmatic functions of agencies. That is a real problem. We've litigated in one legislative veto case, and I think we were right about that. I thought the veto was a bad idea. I still think it's a bad idea. But the expectation was that the absence of the veto would not be perceived by Congress as a signal to stay out of watching the

sustained work product of the agencies. My sense is that once the veto disappeared, sustained oversight stopped pretty much as well. And I think we're all the poorer for it. Thank you.

MR. OLESZEK: Thanks very much, David. We've got about ten or fifteen minutes for questions, so the floor is open. Why don't you direct your questions to one or all of the panelists. We'll get started right now so who's ready to fire away? Sir.

QUESTION: Would you discuss the relationship between congressional oversight panels and some of the executive branch agencies, such as the FBI or DOJ? In other words, do you use FBI resources or personnel to assist in investigations? If subpoenas are issued to personnel or companies, are those individuals or cutities immune from further prosecution at some point in time? If there's criminal activity, who does the matter get handed over to?

MR. OLESZEK: Who wants to handle those questions?

MR. VLADECK: Well, I represented clients who have received congressional subpoenas and it is a terrifying event because unlike normal litigation, the rules that govern congressional oversight, in my view, are not very witness protective, nor are they clear-cut. I thought Pat was exactly right when he said that often times the pivotal point at the beginning of an investigation is what your initial response is and what kind of relationship you forge with your opposite number on committee staff. Where criminal activity is suspected, then you may invoke privilege but you've got to be very circumspect about doing that because that is simply putting blood in the water and unleashing the sharks. So, yes, you can invoke your Fifth Amendment privilege, but you've got to be very judicious about doing that.

MR. McLAIN: Yes to your questions. I think in terms of using and relying on the investigative powers and processes of other agencies, that can be done. It depends on what the nature of the inquiry is. At one point we did an inquiry on the use of illegal wire taps. We certainly want to rely on the Bureau in that case for their investigative processes. But bear in mind that the roles, and responsibilities of executive branch agencies are very different than the roles and responsibilities of the congressional overseer. Congress also has significant investigative authorities. The use of the General Accounting Office certainly is paramount: they have their own process. While it's not extraordinary to also use and rely on the investigative processes of other agencies, it's probably not the rule either.

I'd also agree with David with regard to your question about the relationship of immunity in congressional testimony. There is a process by which one can seek and obtain immunity. The rules of the House do provide certain protections to witnesses. If you get to that point in the process where you're going to be driven by concerns about immunity, constitutional privileges, and those kinds of things, you're in a very, very difficult position. I think the challenge is to try to avoid getting to that position in the process. Rules exist for the protection of witnesses, but they're somewhat cumbersome and rarely used.

MR. OLESZEK: Further questions?

QUESTION: Can the four panelist identify what they believe to be the top investigative priorities for this Congress? Who wants to start, Tim?

MR. CLARK: I think there's further work to be done on campaign finance issues but I would say that what Congress really ought to do is organize itself better to conduct oversight of existing laws. Existing laws are a jumble and a mess and when people complain about overlap and duplication, that is not as a result of any

action taken by administrative agencies. That is a result of the underlying laws. This may be a hopeless quest but, really, Congress should get its act together, organize its committees and subcommittees better, and create a body of laws including, for example, an organic act for the EPA, that better defines the role of the public sector in American society. So how's that for a modest agenda?

MR. CARRERA: I'd answer this from a perspective working in the software industry, which is that we're heading into a year when nations are trying to comply with international obligations to protect software and other kinds of copyrighted works under a treaty called the TRIPS agreement. Our focus as an industry this year, which drives our agenda in terms of what we'd like Congress to look at, is how countries are implementing their international obligations. We think that Congress has a role, and, in fact, we've worked with some of the committees this year to look at what other countries are doing in terms of their international obligations. We are interested in what other obligations our nations are entering into, whether it's WTO or something else. We are also interested in how nations are meeting their obligations today. From a software point of view, we'd like to look at that first and go to existing laws after that.

MR. McLAIN: Let me address not the substance of an agenda but I the oversight process itself. I agree with David, and I'm probably speaking against my own corporate interests right now. But the last several years have seen an almost total focus on oversight of the executive branch and the agencies. There is very little attention focused on, as David said, the industrial base. It is appropriate that Congress look at the private sector as well as it looks at the public sector. I think that has been lacking in the congressional process over the last several years. We've alluded to this before, but there is a need for more programmatic oversight rather

than the kind of episodic oversight, picking one particular area, that often occurs today. There's a role for both, to be sure, and both are important, but from my observations over the last several years, there's been less attention to programmatic oversight. Congress's attention has been on episodic oversight.

MR. VLADECK: Why we're all on our modest quest here, I think the most pressing problem facing Congress today is how to rationalize our health care delivery system. If I had my wish list, Congress would have a series of long hearings into exactly how health care is run in this country and what the quality of healthcare really is as well as its cost. Before we start enacting laws, we really need to have a better sense of where the friction points are and how things ought to be changed.

MR. McLAIN: There's another thing, excuse me for cutting in, but Congress continues to impose new responsibilities or mandates upon the executive branch and the independent agencies without similarly looking at their resource capability to carry out those mandates and responsibilities. I think it would certainly be appropriate to look at that question in a broader sense.

MR. OLESZEK: Further questions?

MR. ROSENBERG: One of the comments that's come up in our sessions and in my work--and David you pinpointed this out--is that there's been such a tremendous turnover over the last few years of staff and Members so that with respect to substantive and process areas institutional memory and competence has diminished tremendously. I wonder, do you see, do any of the other panelist see, that access is now easier? That someone with good information, good memory, is having that much more influence now on the process and is able to the oversight investigative, and legislative processes more easily because of the lack of experience and lack of memory of the people on the committees. Is this a problem?

MR. McLAIN: I do think there's something to that. Maybe it's a function of age, but I do get the feeling that this is deja vu all over again. That we're replowing the same field that we just plowed. There has been tremendous staff turnover. I also wonder about the staffing of congressional offices. In the olden days, when I first got to Washington, there were often investigative staff who were simply assigned to birddog an industry. There were people who worked for Congressman Dingell whose job it was to take a look at what was going on in the insurance industry on a sustained basis. I don't see that happening anymore. I think that that's a real loss for Congress because this is a major aspect of the congressional oversight role. So I do think the changing staffing patterns and the changing allocation of power within the committee structure has led to a much more balkanized system of oversight.

MR. OLESZEK: Does anybody else want to comment on that issue?

MR. CARRERA: I just have one quick example. I think that as the majority has become smaller, the Republican majority, I believe there's more at stake for both parties. There is a hesitancy to go to outside groups for oversight assistance because the stakes are so high. Today, it seems to be an internally focused sort of partisan war and debate here. There's a nervousness about going to outside groups who may have some agenda that you don't want to follow or who may bring something else to the table, good or bad. So I have found that as the majority party has shrunk, our access to congressional staff, our ability to convince them that this is an interesting area to go into in terms of oversight, has diminished, actually.

MR. OLESZEK: Further questions or comments?

QUESTION: In terms of problems with oversight and staffing, does anyone want to comment on how Speaker Gingrich has diminished committee staff in the House and the impact on oversight?

MR. MCLAIN: Without addressing what the current majority has or hasn't done, I'll address the question broadly. It takes a large and very capable staff to do effective oversight. If you look back historically at the oversight records of various significant investigations, I believe it is documentable that the best jobs were done when the committees were adequately staffed by knowledgeable and experienced people. I think there is a relationship between a large and capable staff and effective oversight. Whether or not you can make a direct correlation between what has happened with regard to current staffing, I don't know that anybody has undertaken an examination of that issue. I think it's probably the case, that oversight is probably less effective today than at other times.

MR. OLESZEK: I want to thank our four knowledgeable and experienced panelists who have shared a lot of wisdom with all of us. Some of you may want to contact them at some future point. But now we've reached the witching hour. Why don't we take ten minutes and reconvene at 10:30 for our second panel.

PREPARING FOR OVERSIGHT INVESTIGATIONS

Panelists: Peter Barash, former Staff Director (1978-1989), House Government Operations Subcommittee on Commerce, Consumer, and Monetary Affairs; Michael Barrett, former Chief Counsel and Staff Director (1981-1995), House Commerce Subcommittee on Oversight and Investigations; James Fitzpatrick, partner, Arnold and Porter; and James Wilson, Chief Investigative, House Government Reform Committee. Moderator: Morton Rosenberg, CRS legal specialist.

MR. ROSENBERG: The subject of our next panel is preparation for an investigative oversight proceeding. If there is a single insight above all others with respect to approaching an impending investigative inquiry that I could impart it

would be look to the past. What you do in response to particular issues and challenges in this area should be informed by the past, by your experiences and those of others who have gone before you. If you haven't had them on your own, you have to talk to those who have, or go back to the records recounting the famous or infamous encounters of the past.

There is virtually nothing new under the investigative oversight sun. Your job is to gather and assimilate that experience however you can and apply it in a commonsensical way. Our four panelists today are unique repositories of such experience. I have shared oversight adventures with each of them. Several of them taught me a hell of a lot more than I gave them in service. The opportunity to let them share with you their valuable insights is one way of my saying thanks to them all. We're going to do this in alphabetical order. On my far right is Peter Barash; on my near right is Jim Fitzpatrick; on my near left is Jim Wilson; and on my far left is Mike Barrett. I'll introduce all of them in turn before they get up so you can get a flavor of who they are and where they're coming from.

Peter Barash will be our first speaker. Peter, a graduate of Syracuse University and the University of Chicago Law School, was staff director of the House Government Operations Subcommittee on Commerce, Consumer, and Monetary Affairs from 1978 to 1989, where he served first under Representative Ben Rosenthal who, but for his untimely death in the early 1980s, would certainly have vied for the title as one of the most formidable oversighters of his era. He then served with Representative Doug Barnard who took the chairmanship after the passing of Mr. Rosenthal.

The Subcommittee's oversight jurisdiction in those days was very wide, encompassing financial services generally, the safety and soundness of the banking

industry, Securities Exchange Commission regulation of the stock markets, Federal Trade Commission consumer protection activities, and IRS tax administration, among others. He was responsible for planning and supervising hearings, issuing reports, and drafting legislation for both chairs. The hearings that he held were perhaps the most well-organized, focused, and productive I have ever been a part of. And at times, the most dramatic.

I remember one investigation of the Hunt brothers from Texas who had engaged in a worldwide effort to corner the silver market. And they almost succeeded. Mr. Rosenthal was doing an oversight investigation and called the Hunt brothers, indeed, subpoenaed them. On the day of the hearing, there was a lot of excitement-the hearing room was big and it was jammed, and the anticipation was tremendous. And when the time for the Hunt brothers to make their appearance arrived, a single, solitary figure showed up who identified himself as the Hunt brothers' attorney from Texas. He announced that the Hunt brothers were very busy gentlemen, and that rather than waste their time here, they had decided to go to some other committee hearing which perhaps would be more friendly.

Mr. Rosenthal gave a one-minute dressing down to this attorney; he wasn't accompanied by anybody else, and he explained that he just came up on the plane from Texas to present himself and to answer any questions that the subcommittee wanted. Mr. Rosenthal made it abundantly clear that if the Hunt brothers weren't in the room within a very short period of time, they would be held in contempt and beyond. And the dressing down was one of the best I've ever seen at a hearing. The Hunt brothers showed up a few days later. The same attorney was there, but this time they had a Washington attorney with them, which was a very wise move, and the first sign of enlightenment in these people. Since leaving the Hill, Peter has established

a government relations firm which represents clients very well before the Congress and federal agencies. Peter.

PETER BARASH: Thanks, Mort, for that overly generous introduction. In fact, listening to it, I was thinking to myself, I haven't had this much fun since I've been on the Hill and that was about ten years ago. Everything Mort said was essentially true. The one thing he—and sort of our ears all perked up when he said the Hunt brothers hired Washington counsel representation, to properly represent them here in Washington—my principal contact with their Washington lawyer in connection with the Hunt's appearance before the Subcommittee was when he called me up to tell me that the Hunt's needed a private holding room prior to the hearing so that they could have a quiet place in which to compose their thoughts so they could testify truthfully and fully before the Subcommittee. And I think I hesitated before I responded—there was about a ten or fifteen second hesitation—and I said nobody gets a private holding room. They're going to have to come in the front entrance, they're going to have to go through security and come into the hearing room like everyone else does, which they did do.

First, let me congratulate Mort and CRS on having this series of seminars on oversight. When I was here on the Hill as a part of what used to be called the Government Operations Committee, we almost were exclusively doing oversight. Since that time, of course, what is now the Government Reform Committee has taken on some important legislative responsibilities in addition to those that existed when I was here. But there was something, I think, that was very helpful under the oversight process in having a committee that had very little legislative authorizing jurisdiction, and certainly no appropriating jurisdiction whatsoever. And I'm going to talk about that a little bit as I get into my remarks. I'm going to assume that some

of you were not at prior seminars, and so I may just spend a little time building some context as to the way I saw the oversight process, and its strengths and weaknesses.

I think it's fair to say that historically, while oversight has been an essential and central part of the legislative process, it's also been regarded as a stepchild to that process. In some respects, and I think we can all understand, the way to political fame and fortune was to get on a legislative committee or on the Appropriations Committee. If you could be responsible for new public policy or changing public policy, if you could be responsible for appropriating or authorizing money, that was sort of the quickest way to fame and fortune, and again we can understand that. The power of the purse strings, the power to make law, to amend law, to cancel laws are all very important. And clearly something I've learned a little bit more about since I've been in the private sector. Lobbyists, I think, tend to flock to the authorizing committees and to the Appropriations Committee. That means interest and campaign contributions to tell it like it is and the like.

Nevertheless, oversight has been a vital part of the Congress and the work that Congress does. Clearly, it's self evident that unless Congress tracks what's happening to the laws it enacts—are they having the intended effects, are the federal agencies responsible for implementing and administering those laws doing the kind of job that Congress intended, are they implementing the intent as Congress intended it to be implemented and the like. No matter how carefully thought out legislation is, there's always the law of unintended consequences. So there's many a slip twixt cup and lip, much can happen between the time Congress enacts a bill and the President signs it into law, and what happens to that law after it's been in place for a year or two or three. And in large measure, that's what the oversight process is about.

The Supreme Court on one occasion back in 1927 put it this way, and I think it sums up what the oversight process is all about very well. The Court said in *McGrain vs. Daugherty*—you're probably familiar with that one, Mort—"we are of the opinion that the power of inquiry with process to enforce it is an essential and appropriate auxiliary to the legislative function. A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change. And where the legislative body does not itself possess the requisite information, which not infrequently is true, recourse must be had to others who possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete. So some means of compulsion are essential to obtain what is needed."

In my experience doing oversight on the Hill for many years, information rarely was volunteered. And information that was volunteered was frequently only part of the picture. I was renewing acquaintance with Jim Fitzpatrick who you'll be hearing from momentarily. The last time I met Jim on official business was when I was on the Hill. He was representing a client who was in the business of converting rental apartments to condominiums or co-ops. And the client was very successful at this. So successful that my subcommittee, which had broad oversight responsibility for consumer protection issues, decided to hold a hearing. Lots of elderly people—Jim might dispute this—were being thrown out of apartments they had lived in for years and years and years at very reasonable rents so that people, I guess like me, could buy condominiums or co-ops and move those people out. And one of the things that we did in the course of that investigation was to subpoena a great many documents that Jim's client had produced in the course of going about the country

buying and converting these apartment units. And I'll never forget, the boxes came over—and I don't know, there were probably 15 or 20 boxes full of documents. And one in particular caught my interest because it had a Playboy Magazine in it. And it just so happened that in the Playboy Magazine there was a very thoughtful article on the process of condominium conversions.

MR. FITZPATRICK: It was a very well-read piece of information we supplied the Committee. Probably more thoroughly considered than anything else we turned in in those 15 boxes.

MR. BARASH: No doubt about it. And so clearly on its most mundane level, oversight is extremely important. Oversight is about whether the laws are being faithfully executed. Oversight is about whether the laws Congress enacts are having their intended purposes in the private sector. And that in and of itself is a worthy goal. But oversight has another purpose. And that has to do with maintaining the checks and balances between and among the branches of government. I was reminded of that, I think, in a very interesting and even poignant way several years ago when I was invited by the Chilean legislature to come to Chile and to talk to them about the issues we're speaking about today: the issue of oversight and how oversight can be used as an instrument to keep an executive branch of government from assuming excessive power. We're all familiar with recent history in Chile and General Pinochet and the dictatorship that existed. In the 1990s, fortunately, Chile underwent an important democratization process. But the Chilean legislature was very interested in how in the United States oversight was used by Congress to check the power of the executive branch. I went down there and spoke to them about how we did it. Of course, we have certain constitutional and legal underpinnings to oversight which were not in place at that time in Chile. Hopefully they are today, and

the oversight process is serving them as well as it serves us in terms of keeping a check on the presidency and the executive responsibility.

I want to spend just a minute and talk a little bit about what I always regarded as the fundamental ironic contradiction in the oversight process. That is that the committees of Congress, which have the inherent power to do oversight and to make their oversight findings and recommendations stick—and by that I mean the committees that authorize executive branch agencies or that appropriate funds for executive branch agencies—sometimes find themselves in sort of a conflict of interest situation. The authorizing process and the appropriations process, in my view, require so much weekly, monthly, even day-to-day contact with the executive agencies for which the committees are also responsible on an oversight basis. Sometimes that kind of familiarity gets a little bit in the way. Now that's not universally true, and I want to say very clearly before I'm attacked by my colleagues and by some of you in the audience, that some of the best oversight that I've ever seen has been done by the legislative committees. But when I talked about the joy of being able to do oversight from a committee with little or no legislative responsibility, part of that sense was not having to deal with the heads of these agencies or the senior policymakers at these agencies on a weekly or monthly or daily basis in order to talk about authorizing issues or money issues. That distance, I think, was extremely helpful.

Now let me give you three examples of what I'm talking about. Mort mentioned, I believe, in his introduction that the committee I was on had oversight jurisdiction for the banking system and did pretty much the seminal oversight work on the S&L crisis and the banking crisis in the 1980s. Some of you will recall—hopefully not as depositors—the spate of S&L and bank failures in the

1980s. The Government Operations Committee, and my subcommittee in particular, held probably 15 or 18 hearings on why that happened. In part why it happened is that the bank regulators were asleep at the switch. They knew pretty much what was going on in the institutions. I was reminded of a story about a former head of a bank in Tennessee which was a little bit like the Hunt story, about how they had more important things to do.

The bank regulators were concerned about what was going on at their banks and wanted to go down for an emergency examination. The head of that institution told them that he was too busy. In fact, what he was doing was sponsoring a golf tournament. So, in that particular case, we had to do the oversight, and not the Banking Committee.

Just a final example on that is that the last hearing that I worked on before I left the Hill had to do with corruption at the senior levels of the Internal Revenue Service. That was an interesting experience because those of us on the subcommittee who did that investigation became the investigated. One morning when one of my children was quite young and my wife was up with him at about 4:30 in the morning, she looked out the window and saw someone photographing our house. Now I'm not given to those kinds of fantasies, and the fact of the matter is that there were several attempts made to investigate us and to back us down on this particular IRS investigation.

One sort of housekeeping item that made it more difficult for us on the Government Operations Committee is that we did not have access to tax return information. We tried to get the Ways and Means Committee to help us out, and the Ways and Means Committee politely declined. I think in large measure it was because they wanted to protect their jurisdiction and that's something that we can all

understand. There were occasions on the Government Operations Committee when we insisted on our jurisdiction as well.

I'm going to wrap up because I think I'm a little bit over my time and I haven't gotten into some of the nuts and bolts kinds of issues. Having said that oversight has been often a stepchild to the legislative process, I also want to point out obviously that it can create important changes in public policy, breakthrough changes. It can occasionally get members' names on the front page of newspapers or in the top of stories in the electronic media. The reverse of that is that doing oversight, not so much badly but, rather, unsuccessfully, can also backfire. So there are risks to doing oversight in a way that doesn't succeed. There are obviously political risks inside the institution. But there are also different risks, and I'm reminded of Senator D'Amato's efforts in the Senate Banking Committee to investigate the Whitewater matter. While there were many useful revelations that came out of that hearing, I think the general consensus was that it just kind of didn't work properly. It either was too partisan or they didn't really have the goods. And the consensus of opinion, I think, from friends of mine in New York is that that it hurt Senator D'Amato when it was time for him to run for re-election against then-Congressman, now Senator Shumer.

There was another instance I'm reminded of involving Senator Thompson when he undertook to look at campaign contributions issues. Again, many interesting and important revelations came out of those hearings, but in some respects I think they were regarded as not going all the way. Whether or not that took a little bit of the tarnish off of the Senator really remains to be seen.

I want to just finish up a couple of things. In my day doing oversight in the 70s and 80s, I think oversight tended to be a little bit less partisan. I think that we made a conclusion that like legislation, in order to get something done, it had to be

bipartisan or even nonpartisan. We had to get, at that time, the Republicans who were in he minority together with us. We had to work with them, we had to let them scope out the issues with us, and sort of be in on the take-off so that they would also be willing to be with us on the landing. I'm not sure that that's happening as much any more. Clearly, things can get done in a much better atmosphere. And I will say this, we treated Democrats when I was up here, even with a Democratic Congress, we treated Democratic administrations just as poorly as we did Republican administrations. It was the old Vince Lombardi adage about treating everybody the same, sort of like garbage. The other thing I want to say that's better about oversight today, is that we tended in doing oversight and in fashioning issues to sort of nibble around the edges of problems. I think we did a lot of good. We improved the bank regulatory system. I think we made IRS a little more responsible, although Senator Roth found some of the same problems when he enacted legislation a couple of years ago to deal with IRS corruption and inefficiency. But we basically tried to make existing programs work more efficiently and economically. Today, I think the focus is a little bit more, and properly so, on whether existing laws work at all. It's not just an issue of making what's out there...maybe it's working at 60 percent of the way it should work, and well, we'll make that a little better, we'll get it up to 70 percent. I think the attitude today on the part of the oversight folks is an improvement of our a little bit myopic attitude of keeping things in place and just trying to improve them. And with that, I will stop and thank you very much.

MR. ROSENBERG: Thank you, Peter. Our next panelist will be Mike Barrett. Mike Barrett was the boss of one of our first-session panelists, Pat McLain, as the chief counsel and staff director of Representative John Dingell's Subcommittee on Oversight Investigations starting in 1981, after a long career in the executive

branch with, among other executive agencies, the Securities Exchange Commission and the Federal Trade Commission. He spent ten years leading what many have said to have been the most feared, respected and effective oversight operations in congressional history. During his tenure, he directed extensive investigations targeted at banking and savings and loan problems, stock market manipulation and insider trading, mergers and acquisitions, insurance company insolvency, unfair foreign trade practices, defense contracting, and effective intellectual property.

During that period, I worked closely with that Subcommittee, and learned from Mike and his staff the nature of the kind of effort that produces effective oversight. When that Subcommittee held a hearing, it's purposes and objectives were well-defined, it's preparation intense and complete. Nothing was left to chance. No question was asked for which an answer wasn't known beforehand. Since leaving the Subcommittee in 1991, Mike has served as a consultant and strategic adviser to major corporations involved in a wide range of businesses, including commercial and investment banking, defense contracting, environmental restoration, insurance, health, tobacco, and nuclear power. Mike received undergraduate and law degrees from St. Johns University, and a Master of Laws and International Law and Taxation from Georgetown Law School. Welcome back.

MR. BARRETT: Thanks, Mort. Mort didn't tell you how much legal work we used to give him. He was always having to draft memos defending the latest subpoena we'd issued or the document demand we had made, or whatever. I thought I'd talk a little bit more about how oversight is fun. I always used to tell people I had more fun than God ever meant for a person to have just doing oversight.

I started doing oversight, I guess, 1970, when I came to the House Commerce Committee. One of our early investigations involved ITT and Hartford. ITT had

acquired the Hartford Insurance Company. There was an allegation that a $250,000 cash contribution to the Republican National Committee had influenced the decision. We had what was supposed to be an informant who was living in Denver who was going to tell us about how he had bugged the hospital room of the person who supposedly was involved in delivering the money from ITT. The last thing Chairman Harley Staggers said as we walked out the door was, "Now be discreet." Eighteen hours later our picture was on the front page of the *Rocky Mountain News.* So much for discreet.

The individual we went out to see was kind of interesting. He was a private detective who was about to lose his license. And he was trying to leverage us into somehow working a deal with the state so he wouldn't lose it. We didn't help him out at all; hence, that's why our cover got blown. But he did send flowers to this person in the hospital room with a little bug at the bottom of the vase. The vase had a lead base and it wasn't broadcasting. He put a little note on this vase, "from your good friends" and he made up the name of some make-believe association. When he found out he wasn't getting any news, any good scoop, he sent her another vase, this time with a different card from a different association. When that arrived, she had so many flowers she gave them away, and so he was bugging the wrong room. And by the third time, the third vase went, she had already checked out.

But following on from that, we had an informant in Hartford who had given us information over the years. At the time another fellow and I were in Ottawa. We were doing an FAA air safety investigation, and I said, "Well, let's stop back through Hartford and see if our informant has any more information. Then we can close out the matter." So we flew down from Ottawa to Hartford and the informant didn't have anything to help us with. But we went out to dinner that night. We were sitting next

to two insurance company executives. And they're saying, "You know, there's this committee in Washington that's investigating the DC-10 crash in Paris," which is what we were doing. Then this executive says, "We've got to make sure they don't find out about ...." And he rattled off a whole list of things. And I'm saying to my friend, Al, you keep talking, I'm listening over here. We went back with a whole list of things to ask for and leads to follow up. To this day, I'm sure they don't know where we got our ideas from. That was kind of fun.

The Alaska Pipeline. We did an investigation into the construction of the pipeline back in '76, '77, '78. A reporter came to us, and he said there's a red book about an internal investigation in the company and he could get his hands on the document. He wanted us to get it. He told us that what it did was document the fact that the x-rays of all the oioeline welds--the 800 miles, every 40 feet there was another weld--the x-rays had been falsified and that there were a number of defective welds in the pipeline. Pete Stockton and I and two people from the General Accounting Office went up to Alaska. We managed to obtain some state inspector credentials and we got on the pipeline. And for two weeks, we went up and down the pipeline, interviewing the workers on the pipeline, the welders, the radiographers, the kitchen help. We ate in the company camps, we flew in the company planes, and we rode in their trucks. The company had circulated photographs of us--if you see these men, please call. That was great. They were glad to hide us, and we went the whole 800 miles for two weeks without ever being caught. They would always find out two or three days after we had been there that we had, in fact, been there. That was also fun. One of the fallouts from that, one of the—a couple, actually, of the radiographers and welders that we wanted to talk to—lived in Henrietta, Oklahoma. And we decided we'd go to Henrietta and interview these two. And they said, oh, no, don't

come to Henrietta, we'll come out to meet you. So we actually met in Yale, which is I don't know how far away from Henrietta because I never got to Henrietta. The reason they didn't want us to come to Henrietta, they told us, was the last Fed who went in there drowned in six inches of water. I don't know whether that was a true story or made up, but if they were willing to come out, Yale was just fine.

Another investigation actually came out of *Forbes* magazine. They ran a two-part series on General Dynamics and some of the shenanigans that supposedly were going on there. One of the senior executives for General Dynamics, Takus Valiotus, had fled the United States just before the indictment came down charging him with taking bribes. He called them commissions. We went to Greece, which is the country of his birth and from which he could not be extradited. We interviewed him at some length. He was a rather interesting individual. He had, I'm sure, intentions of ultimately blackmailing the company. I can't prove that, but it sure seemed that way. He had made copies of the internal records of the company. He had made copies of three sets of books, and he walked us through a particular transaction. In the first set of books was the Internal Revenue information, the SEC-kind of information, pretty straight forward. The second set of books were the numbers that the company had provided to the Department of the Navy about a particular project. It showed how much it would cost in terms of time, and how much it would cost in terms of dollars. And the third set of books was what the company thought the numbers should have been in the case of the second set of books. We had a hearing. The morning of the hearing the president of the company came in and announced that they were voluntarily giving back $244 million to the taxpayers. By the end of the year, that number had been increased to $750 million. That was when I wished I had been on commission. That was a fun investigation.

But we did other investigations where they were handed to us. And one of the interesting ones was the Food and Drug Administration involving the generic drug division and the chemists in that division. One particular company that made generic drugs felt that they were being unfairly treated by one of the FDA chemists. They would file an application and nothing would happen on their application for months, and, meanwhile, some of their competitors would slip in ahead of them and get the approval. They hired a private detective. The private detective did a garbage watch for almost 9 months. Every morning, before the garbage truck came, at 4:00 in the morning he'd go out and sift through the garbage and collect information. At the end of about 9 months, he came back and presented evidence to the management of the company that felt it was getting screwed over that showed that this particular chemist had accepted a trip to Hong Kong courtesy of one of the competitors' employees. He'd gotten a TV set. These were all of the receipts that he had just carelessly thrown in the trash. The company was ready to go to the Department of Justice with this information, and somebody said, "Well, wait a minute, let's see if anybody on the Hill is interested." And of course they came to us, and, you know, that was manna from Heaven, that was perfect. We immediately went to subpoena, we descended on the agency, we had the Inspector General lock office doors. Ultimatel, not only that one chemist but a total of four people went to federal prison. There was an overall change in the generic drug program as a result. I think that was a very fruitful and productive exercise.

Well, I make it sound like fun, and it was fun. We really did a lot of good things for the taxpayer. But there was a lot of hard work there, too. I have always estimated that it takes 100 hours of staff work to produce a good hour of hearings. It takes a lot of reading of documents. You get half a million documents, how do you

ever sort them out, how do you ever make sense out of them. We got in the bathroom papers case, for instance, 750,000 documents. We had six GAO people work with us plus somebody from the USGS to help us analyze the information. But if you don't read the documents, you've got no business going into the hearing because you'd never know what might be there. I found that out the hard way when somebody said, "Well, Mr. Chairman, we provided such and such information." And sure enough, it was there; we hadn't read it.

So, you've got to spend your time, you've got to do your homework, you've got to interview people. You've got to know what they're going to say before they ever say it on the witness stand because surer than heck, if you don't know, what they're going to say, they're going to say something that embarrasses you. You only have to have that happen once to you. Those are some of my insights into where we find information and how we do oversight. Thank you.

MR. ROSENBERG: Thank you, Mike. I remember those days, and I didn't know it was so easy and so much fun. Seemed to me I was working very, very hard. Well, perhaps occasionally. Our next speaker is going to be Jim Fitzpatrick. Jim is a partner at Arnold & Porter in town here, and has been such since 1967. And since 1976, he has been at times an adversary, at times a collaborator, but always a mentor to me—even if he didn't know it. We first met when he was counsel to the Commissioner of major league baseball. I was counsel to the House Select Committee to Investigate Professional Sports, whose object was the first major attempt to get a baseball team back in Washington. Knowing that I had right and justice and the power of Congress behind me, I was supremely confident of attending opening day in RFK Stadium in April of 1977. But while I ran 26 great hearing sessions, wrote a terrific 700-page report, including a devastating critique of

baseball's anomalous antitrust exemption, I couldn't hurdle the most formidable obstacle—Jim Fitzpatrick. He simply ran circles around me, outmaneuvered me at every turn, and generally gave me lessons about the other side of oversight that I have never forgotten. And Washington still hasn't gotten that team.

What's the biggest lesson I learned from Jim? Be on his side. Which I was, for a short period, when he agreed to file an *amicus* brief in the District of Columbia Circuit for John Dingell and four other House chairs on the constitutionality of Reagan's Executive Order 12291, which established a centralized mechanism for reviewing rules of all agencies. My role was to feed him some of my half-formed constitutional notions and watch him and his extraordinary associates transform them into brilliant and plausible appellate arguments. Since then, I've limited my connection to him to persuading him to occasionally come to one of these CRS sessions, to regale us with the wisdom and experience he has accumulated representing a wide variety of clients before congressional committees, including, in addition to major league baseball, Stanford University and Bernie Nussbaum, President Clinton's First White House Counsel. I have heard it on the best of authority that Nussbaum believes that retaining Jim was the best decision he made in Washington. And some people agree that may have been the only good decision he made in Washington. Jim is an honors graduate from both Indiana University and Indiana Law School, and was a clerk to Seventh Circuit Judge John Hastings before joining Arnold & Porter.

MR. FITZPATRICK: What can I say to match the generosity of that introduction? Let me say it's a pleasure to be here with Peter and Mike. John Dingell and Ben Rosenthal were, indeed, two of the most formidable and successful investigative chairmen that this Congress has ever seen. I still have a lot of scars on

my back from extended confrontations and collaborations with them. But their oversight in large measure was quite serious business. They were looking at significant failings in the interplay between the Administration, the laws, and the private sector. And although this process oftentimes is painful and complicated, you had a real sense that at the end of the day one was engaged in the oversight process in a serious and sincere effort to improve the workings of the government, ultimately to the benefit of the commonweal.

What I want to talk about for a few moments is to look at this oversight process, not from the perspective of a government attorney and quite experienced and talented investigators, but on the private side--how does one go at the process of preparing for a congressional hearing when your client has been called. I want to go over seven rules that I think identify a working agenda for that process. The first thing, from the private side, one has to prepare. You've got to understand that basically, in an investigative hearing, this is an adversarial situation. An investigation from your client's point of view is not some abstract effort to find the truth, but oftentimes it is an effort to make that client look bad for the purposes of meeting the Committee's political or policy goals. Not only is it adversarial, but oftentimes one is dealing with an investigation as part of a political agenda. And Counsel has to understand how, as part of one's preparation, a particular hearing fits into the goals of the chairman and the ranking member. What Mike said was clearly true under the Dingell regime--a great handhold for a private counsel is working with the minority. But Dingell was a master at assuring the cooperation of the minority. Oftentimes we would find ourselves without a friend in sight because of Dingell's staff, and Dingell--the Chairman--had established a set of hearings and goals that were rational on both

sides of the street. So one has to at the outset know, as part of your preparation, where the hearing fits into the minority and the majority agenda.

One has to approach an investigation from a lawyering point of view as a quasi-trial. There's nothing that happens on the Hill that is closer to trial prep than an investigative hearing. The entire legislative process is Civics 101. An investigation gets you closer to an actual trial, and you have to prep witnesses; you have to anticipate tough questions; you've got to know what's in the documents. It's clear that such a hearing is different than a trial, but one's mindset has to be to prepare witnesses for a very tough cross-examination.

You also have to develop a strategy as part of your preparation on requested documents. The one iron rule of preparing for a congressional hearing is the most profound promises of confidentiality from a committee staff that the highly-sensitive documents will be kept confidential will invariably be broken. I have never been in a situation where I have negotiated with a staff involving very, very confidential documents where I was given the most clear guarantee that those documents would never see the light of day, except for above-the-fold of the *New York Times*, it turns out. So that means as part of your preparation on your document strategy, from my point of view, it's imperative very early on that you start to negotiate with the staff. Often you see an omnibus request for documents. You hopefully know what your documents say. And you try to make the best case that you can to staff that is burdensome and unnecessary to have a document request as broad as it is initially presented.

The one thing that you want to avoid in virtually every situation is being faced with a contempt citation. I've only been in that unhappy situation once, and that was a long time ago with Peter's committee where we had ultimately a situation that

was resolved only because Dan Rostenkowski intervened with Jack Brooks to find a negotiated settlement on a contempt situation. There we had a client who simply was unwilling to turn over profit-and-loss data and we were unable to negotiate a settlement; there was a confrontation. And that, from a private lawyer's point of view, is the worst situation you can be in--to end up running into a wall with a contempt citation. So the final element in your preparation is to talk with the staff and try to work through the way that documents are going to be requested and handled.

The second rule is that the audience in a hearing is generally not the members. The members essentially have made up their minds on either side of the issue. This is not an inflexible rule, but this happens most of the time. Particularly the majority knows what it believes, and you are a foil to help get it to a particular goal. So eloquence, an articulate presentation, a sincere approach is not generally going to be what you're after. What you are looking to in a presentation--since this is a public hearing--is the press, you are looking to a television audience, you are looking to other members of your coalition, you are looking to people who might be minority sympathizers on the Hill to make the best case that you can. To do that, you want to be alert to try and get onto a hearing early on since 10:30 is not the same as 4:30. Time in a hearing is not fungible. Dingell was a master at loading up on the front end his case in a hearing. One issue that Mike and I sparred on dealt with Stanford University, where there were serious questions raised about Stanford's use of indirect costs in its government contracts. The hearing started at 10. My client, the president of Stanford University, got on somewhere between 4:20 and 4:45. By that time, press stories had been written all day and television had closed up for the night. The Chairman controls the time, and one has to be alert to that and tactfully approach this situation to try and get on early. Oftentimes, you want to do that but that isn't going

to work, and you know that you're going to be at an immense disadvantage coming on late in a hearing.

The third thing you want to do is try to make your presentation memorable. The one fact about congressional hearings of any sort, legislative hearings or investigative hearings, it's words and words and words and words. You're just absolutely submerged in so much rhetoric, so much information. We have tried, on occasion, to do things that are counter-intuitive to break that mold. Jack Quinn, who is my partner and also has had his separate problems with the Congress in terms of document production when he was White House Counsel, were defending in an investigative hearing Mexican tomato growers. They were worried about import restrictions on Mexican tomatoes coming into this country at the behest of Florida tomato growers. It turned out, Mexican tomatoes were actually ripe when they got to the store; Florida tomatoes looked like they had a cardboard cover on them. We were before a consumer subcommittee attempting to show the stake that consumers have in bringing in Mexican tomatoes. Although we could talk about it, we thought of no better way to demonstrate the facts than to lay a plastic out on the floor, and at waist-level drop a Mexican tomato onto the plastic which splattered. The Florida tomato then was dropped onto the floor and bounced almost up to Jack's knee. That was our attempt at making our case through something other than words. It is an immense challenge from the private side to try to come into a hearing and to say something with bite or some twist, with some element of cleverness. Since one is involved in large degree to public reaction, you're trying to do something more than write a great piece of literature that no one listens to, and no one, God knows, will ever read in a printed transcript of a hearing.

The fourth thing is don't let the staff control you, to the degree that you can avoid it. Now you've got to deal with the staff straight, and you've got to deal with them honestly, but there are points at which you've got to say, "Wait a minute, we're going to exercise some control." One of the most dramatic illustrations of that came when I was representing Bernie Nussbaum in a Chairman Clinger hearing [House Government Reform Committee] involving Filegate. Filegate, as you might recall, was the instance where a number of White House employees ordered FBI files back to the White House, a couple thousand of them, to do a routine check with a change of administration from Bush to Clinton. It turns out that two- or three-hundred of those files that were turned back were former Republican appointees. The whole thing stunk to high Heaven. It just looked awful because there was no rational way one could explain this. And this was a very tight situation. We ended up with the sad situation that the document that requested the FBI to send the list of its files had Bernie Nussbaum's signature on the bottom. It was a xeroxed piece of paper, and it was the kind of form that had been used for 25 years, the President's counsel signed it at some early moment, and never saw it after that.

We had a very tough hearing coming up. The people who were testifying included one of Hillary's former partners from Little Rock; Craig Livingston, who is the notorious former bouncer who ended up head of White House security and was the punching bag of the day; a very, very bright woman who was on the White House staff who had blown the whistle and had told everybody to stop ordering files and was the heroine; and my guy, Nussbaum. When we came into the hearing room it was very clear what staff was doing in the way they placed the name cards at the witness table. The cameras were on the left; the Little Rock lawyer was seated on the

far left; Craig Livingston was in the middle; Bernie Nussbaum was next to him; and this very attractive DOD staffer to Bernie's right who had blown the whistle.

Immediately, I thought, we're going to watch an entire day's hearing and every moment that the camera is on Livingston, who is going to be the target, they're going to have Bernie in the picture as well. So just before the hearing I moved the nameplates around so Bernie was on the end. Anytime the camera was on him, they'd also get the picture of the heroine, not Livingston. Barbara Olsen, who was a very energetic member of the Clinger Committee, came down and said put those back. And I said, "No, Bernie, sit down." And that ended it. Happily, she didn't go back and ask the Chairman to make us change seats. That was a bit of self-protection which I didn't feel bad about, because the seating arrangement was not by alphabetical order or any other rational basis. This was an effort on the staff's part to reach their goal, a political goal, a visual goal. And there was an effort on our side to try to fight back. So there are times in the banter between the private lawyer and the staff where you are in an adversarial situation and you're trying to have the last word.

Rule five is that there needs to be, on occasion, creatively-controlled counterpunching. The general rule is you don't cross the chairman. You try to get on and off the hearing with as little blood on the floor as possible. That is the general rule you want to follow in virtually every circumstance. There is, though, a moment where for either political reasons or advocacy reasons you need to fight back. You have to pick those moments very, very carefully because that's quite dangerous ground, and that's breaking a normal standard of deference to the chairman. One instance was before this same Clinger Committee.

Earlier, after it initially came out publicly that these files had been transferred from the FBI back to the White House, Congressman Clinger, the chairman, had gone on television immediately and accused Bernie of a felony violation and said that he'd broken the law because he was invading the privacy of these government workers. This was a brutal charge that turns out, I mean genuinely, that it just wasn't true because the form with Bernie's signature was all a formality. Still, this change was personalized--that the former counsel to the President had broken the law and had committed a felony violation.

We approached the hearing with some concern about how to deal with that charge knowing that our client is a very proud guy who could be wrong on occasion but he wasn't a felon. He was very upset about this unjustified charge, and he wanted to do something to strike back. This was one of the situations where I think it was appropriate to have creative counterpunching. The first half of Bernie's statement was a total and complete and genuine apology for what had happened to the people whose records were brought from the FBI to the White House--particularly the Republicans who weren't there any longer. For the people who still were there, that was a normal process; the new administration looks at, reviews, their administrative record. But for long-departed Republicans, for [former Treasury Secretary] James Baker's files to go from the FBI to the White House, it was a dreadful thing, and all one could do is say this was awful and we apologize. The second half of Bernie's statement was that, on this day for apologies, the Chairman ought to apologize to Bernie for what Nussbaum said. And he went through, in chapter and verse, where the Chairman was off base. Now that created apoplexy on one side of the aisle and joy and thanksgiving on the other. That was, indeed one of the very, very few justifiable situations where it was

appropriate, in my judgment, to jump back and to say that the charge was wrong, and to do it quite dramatically.

The sixth law is that you're involved not only in the law of unintended consequences, but also the law of unintended preparation. The fact is that you prepare, but you can't prepare for everything. We had a hearing before Congressman Tom Lantos where a client had come to us after they had informed Congressman Lantos that they couldn't come to his hearing because they were otherwise occupied. Lantos sent a quite stout note--like the note to the Hunt brothers, referred to earlier--"Get your ass here or you're in really tough trouble." We spent the first two months of that representation simply trying to reestablish some client credibility with the committee.

This was a hearing on workplace safety. The beef processing business is not one of the safest occupations in our economy. Upton Sinclair first started telling us that at the turn of the century. So this was a hearing on workplace safety. And we had everybody prepared beautifully. As Counsel, I was sitting on the left, the head of public affairs was next, the president of the company was in the center. And next to him was the vice president for production, a guy who had come up through the ranks. The television cameras were all on these people, and they stood to be sworn in. I sat there and looked down the row. As everybody raised his right hand, the vice president in charge of production stood up and raised his right hand. His three fingers had been cut off at the knuckles. At that point, I think Tom Lantos said game, set, match, and it's all over. No matter how you prepare, you've never covered every eventuality, such as looking at your client's fingers.

The last thing is to know procedures and when you can use them. A great device in the House is the five-minute rule. And in the showdown between Ben

Rosenthal and Nick Golitas on the issue of condominium conversions that Peter referred to earlier, this was a highly publicized hearing. On the day of the hearing, the *Washington Post* business page had a picture of Rosenthal and an opposing picture of Golitas. This was going to be a great mano a mano. And it was a tough hearing because, as Peter indicated, there were very important public policy issues and there were very tough issues of human relations. One of the strategies that we used was to have Golitas accompanied by Andy Brimmer, who was a former member of the Federal Reserve Board and who was our economist who responded to the Committee's economic questions. And then we had Tom Lukin who has just retired, after a long and distinguished career, as a House committee chairman. Nick gave an opening statement and Brimmer gave an opening statement, and Lukin gave an opening statement. Then the Committee started around with questions under the five-minute rule. Ben asked some very tough questions but then had to stop after five minutes. There must have been 25 members at the hearing, and every member either wanted to pay his or her respects to Brimmer, who is a distinguished economist, or schmooze with Tom Lukin. This was his first appearance on the Hill since he had retired. So twenty people times five minutes, with a recess, we finally got back to Rosenthal about at hour and 45 minutes later to hear his five minutes of questions. After that, we did another half-round, and Ben decided this was not a fruitful hearing because everybody was more interested in Tom Lukin than they were in beating up our client. That was a use of the rule that one wants to be alert to.

Another use of the rules is the television camera. It's a quite notorious story that many years ago, before most of you were born, Ed Williams came down here and used the House rules to turn off the television cameras when one of his clients was before Dingell. That was a successful and creative use of a rule. But sometimes

you've got available rules but you can't politically use them. In this same Clinger hearing, when we considered a request to turn off the television cameras, it became absolutely clear--the Dems made it absolutely clear to us--that they were going to murder us if we invoked that rule because they could not be seen to be denying the public any information. This was a situation where we had paper rights, but where it would have been absolute folly for us to try and invoke it.

So, I'll stop with those seven rules. We can talk more later on. But the problem of oversight for private lawyers is that increasingly it has become, as others have said, a much more partisan exercise that has an element of a political agenda. Moreover, less and less in the past three or four years has there been an investigation of private activity. Its been much more directly Congress going after the executive branch. We can come back and talk some more about that particular change of focus at a later point. But that's it for now. Thank you.

MR. ROSENBERG: Thank you, Jim. As you know, recently the House took care of your camera ploy by eliminating that rule. But you have a bag of tricks that's obviously unending.

MR. BARRETT: I might just interject that sometimes we wanted to do that because we would then alert the TV cameras to photograph them sneaking into the room.

MR. FITZPATRICK: Or asserting their privilege. That's what we wanted to get. We wanted to get twenty minutes of asserting the privilege, and both the Dems and Republicans excoriating us. That's too heavy a price to pay.

MR. BARRETT: And debate as to whether or not they had claimed the Fifth Amendment or that sort of thing, that's right.

MR. ROSENBERG: Thank you. Our final panelist is Jim Wilson. Jim is one of my new generation clients, weaned into investigative oversight by Whitewater and its progeny. Jim graduated from Yale in 1982 and Columbia Law School in 1989. And after a clerkship with Judge John Terry of the D.C. Court of Appeals, with a short period with Shaw, Pittman, Potts, and Trowbridge. He then became deputy associate attorney general at the Department of Justice from 1991 to 1993, after which he returned to Shaw, Pittman. He decided to live more dangerously, however. He served as Republican counsel in the initial Whitewater investigation by the Senate Banking Committee, and then returned quickly to private practice with Pepper, Hamilton, and Sheats. But he is obviously a persevering man, and knowing no limits of pain, Jim returned again to the congressional investigative wars in 1997, this time with Representative Dan Burton's Government Reform Committee where he is currently serving as Chief Investigative Counsel. He has supervised various aspects of the Committee's campaign finance investigation. Jim, I know you bring some interesting perspectives to the table, and we're anxious to hear them.

JIM WILSON: Listening to Jim Fitzpatrick's presentation was deja vu all over again. The nightmares we live through on a daily basis, he recounts with such verve and mirth you can barely take it at this hour of the day. All the things that you work towards and struggle with, you can see how the other side of the aisle manages to obtain advantages that you fight against as much as you can. Well, I'm obviously the neophyte in this august group. My first oversight experience was just five years ago when I went to the Senate. So I do not, unlike Senator Robert Toricelli, have the blood of the Kefauver investigations flowing through my veins. But I have managed to live through some fairly tough times and bring, I think, to the table a limited, but interesting perspective. I was somewhat unhappy to learn that Jim Fitzpatrick had

seven rules because I could only come up with five. So I feel very inadequate at this point in time. Nevertheless, time is very limited so I'll cut short some of the more detailed remarks and try and get straight to observations that I've come up with recently.

MR. ROSENBERG: Age gives you wonderful perspective.

MR. WILSON: Well, maybe that's all the more reason to cut short the remarks. Originally, I know that Stan Brand was going to be on this panel, and one of my first experiences working in the House involved Stan Brand. I was taking a deposition and it was one of the last times I invoked the name of a United States Senator. Well, I did it in a deposition and he hit me with a Jefferson Manual objection so hard that I spun. I had no idea what he was talking about. I still have no idea what he was talking about. But he said it with such extraordinary authority that I knew he was probably right, or, if not, I was going to be terribly embarrassed so I moved immediately to another subject and never did find the answer to my question.

Clearly, the practitioners with great experience learn that they can achieve great things with people who do not have institutional memory. That's one of the recurring themes I'd like to talk about today: the importance of keeping staff with some degree of institutional memory, because not only does it lead to more effective oversight and investigation, but it's a fundamental aspect of fairness that's sometimes lost. It's the type of thing you hear the Department of Justice talk about in opposition of the Independent Counsel statute, forgetting the unconstitutionality aspect. You need people with an institutional memory to understand what can and can't be done. And I think this is something that's lost when you're bringing people in who don't have a depth of experience and haven't been through a number of wars on unrelated subjects.

I'd like to focus, as I said, on five things. The first one that I feel very strongly about is that you have to be prepared for the long haul. If you think the investigation will be like a Perry Mason episode and you'll acquire some information and put it in a neat package, bring some witnesses in, have them break down at the witness table, confess all their misdeeds and you'll go back to your lucrative law practice or to the welcoming arms of Terry Lenzner or Jack Paladino as an investigator, you're sadly mistaken. It just doesn't work that way. Sometimes when you've got a very simple matter, it's easy to explain the matter; the story appears the next day in the newspaper and away you go onto the next issue. But it doesn't generally work that way, and I think both from the perspective of the leadership, members of Congress, and from the staff, you'll do yourselves a great favor if you can resolve issues very quickly.

I was interested in the earlier panel when David Vladeck spoke about two very effective hearings that Mr. Waxman held in the past. They were successful from his perspective, not because good luck helped him along or good fortune landed in his lap, but because of extraordinary preparation and a great deal of substantive backgrounding on the part of the staff. He was able to track issues for a very long period, and I think it gets down to the point that was made earlier on this panel that if you have a one-hour hearing, it's going to take hundreds of hours of staff work. But it's more than that. It's not just the work over the week or two weeks prior to the hearing. I think it's the year or two or three years prior to the hearing where there's a great deal of institutional knowledge acquired and where people really do begin to understand the issues. And if you don't have that as a background, it makes it very difficult to move forward.

Second, obviously, you always have to make sure that your staff are up to the task. And you have to, I think, from a managerial perspective, do everything you can

to make sure they'll stay the course. One of the things that I've observed in the last five years that's been the most devastating, and I think one of the greatest boons to the counsel for people who appear before Congress, is the extraordinary turnover of staff and the destruction that has wreaked with institutional memory. Obviously, if you are pouring through thousands of pages of documents or tens or hundreds of thousands of pages of documents, and you have people who do acquire certain knowledge in a particular field, if they leave, it's almost impossible to start from scratch. And I've seen this both in the Senate and the House where a great deal of time and energy is expended on preparing for a particular investigation and suddenly it's dropped. And the reason it's often dropped is because the managers of the process haven't done what's necessary to insure that they have staff who are willing to stay and put up with what can sometimes be very difficult conditions.

The divine right of congressional perks simply doesn't apply to congressional staff who do oversight investigations. In my five years, I've yet to have a senior committee staffer call up and ask if I'd like to go down to the Capitol Grill and have a lavish meal with him or a good bottle of wine. It's just something that doesn't really happen and it makes it a very difficult environment for the congressional investigator. And I think that's something that really has to be thought about and in some respects compensated for.

In the first session of this proceedings, Lee Hamilton gave what I thought was a very insightful presentation, and one of the things he mentioned was the importance of staff travel. I think we heard that earlier. And we heard of the extraordinary benefit that that can confer. It's almost impossible to conduct an investigation in a vacuum. And unless you have staff who are not only good attorneys, good investigators, but

who understand more than the narrow parameters of that which they're looking at, then it's very difficult to put together an informative and useful oversight program.

The third point that is of great importance, I think, and often overlooked, is the need with document requests and any production issues to try and get things right from the beginning. Everybody that's been involved in oversight here no doubt has heard, sometimes on a daily basis, how their document requests are too broad and too burdensome and can't possibly be complied with. And a lot of times that's right. It's just flat out simply correct. Often, people do not think through clearly what they need and what will benefit the particular type of oversight that they're engaged in. And if you don't get off on the right footing, it's almost impossible to go backwards. Now the flipside of this, obviously, is if you do go down a road and you do make certain requests, you have to do everything you possibly can to ensure that those requests are honored. It does Congress a great disservice if you are not willing to commit the expenditure of time and resources to making sure that you obtain that which Congress should properly be privy to. And this has been the one recurring theme that I've seen both in the Senate investigations of recent years, House investigations, but even going further into history and into the '70s and '80s. If you make certain requests and then you back down, it's almost impossible to turn around and recover the ground that you've lost. You've essentially been derailed and you will never be able to recover that ground.

The fourth thing that I think is of some consequence is to work from the very beginning to develop a committee structure that's conducive to oversight. Obviously, and this is one thing I was going to point to that's of great consequence, if you have a very large committee--and this obviously applies more to the House than to the Senate--but if you have an extraordinarily large committee, it's almost impossible to

get any momentum. And it's virtually impossible to get people to answer questions. If five minutes are allowed, witnesses can easily get through five minutes without saying anything of note whatsoever. It's difficult to get somebody's name out of them in five minutes. Now, sometimes with extended questioning, you can make some progress but it is almost always the case that if the members are not involved to the extent that they are able to do the questioning themselves and to the extent that they get personally interested enough to learn the facts and to really push for answers to questions, then you often are not able to achieve very much. I think it does a great disservice to Congress and the taxpayers when you bring people in and they're permitted to get away with providing no answers to questions, provided the questions are fairly asked and make some sense, which often they don't.

The final thing that I think is important--when I go back to my office I'll rethink all this and decide where I'm wrong or where I disagree with myself--but the one thing that people have not spent a lot of time focusing on is that at the beginning of the oversight process, you should think long and hard about ultimate objectives from a legislative or an appropriations viewpoint. Obviously, there's no way to know where you're going to end up. But even in some of the very partisan investigations of the last few years, there are things that can be done that generally won't get done unless you go into the investigation thinking from the outset that you want to achieve something that will benefit everybody. Obviously, exposing wrongdoing or corruption is of great importance, and I think people often belittle some of the philosophical objectives of recent investigations. If the Department of Justice or other executive agencies are behaving improperly, that is of dramatic importance to the country both from a practical viewpoint and a philosophical viewpoint.

There are many things that can be done on a micro level as opposed to the macro level. For example, I got involved in the campaign finance investigation a couple of years ago, and it became clear from the very beginning that we had this rash of people with bags of cash wandering around the country dropping off $10,000 here, $10,000 there, distributing money orders, and using straw donors to put money into the political process. Notwithstanding the extraordinary controversy of campaign finance, everybody does agree, with some limited exceptions, that the origin of money should be known and disclosed. So one thing that we started working on early in the process was a very limited bipartisan type of legislative fix to augment the penalty for making knowing and willful campaign conduit violations. Things like this, if you think about them from the very beginning, can help provide some focus at the end of the day or at least some satisfaction. We should be doing more programatic oversight. Personally, I long for the day when I can do a hearing on furry bunnies or seal pups or things that people are genuinely supportive of. In those types of situations, it's relatively easy to come to some legislative conclusion or some appropriations conclusion. But I've tended to see that the lawyers that are involved in investigations and the investigators that participate generally don't spend as much time as they should thinking about the legitimate ultimate objectives of their investigations.

With that, I'll close. I think that as we see the fractured syntax and poor grammar that's in various public statements--protestations of cooperation or "I am doing everything I can"--you really have to realize that the of "no controlling legal authority" pronouncement doesn't really cut it when you come to Congress. You really have to push and protect the rights and prerogatives of Congress. And that's sometimes the most difficult thing to do. Without the background of people with

great expertise and institutional memory of history, as we've had here, it's very difficult for people to conduct fair and successful oversight. From my perspective, that's the one thing that has to be protected at all costs--the staff and the institutional memory that allows people to do their job and do a fair and decent job.

MR. ROSENBERG: Thank you, Jim. I think we've had an extraordinary session here and I'm sure it was provocative. Are there questions? Yes. Mr. Moschella.

MR. MOSCHELLA: Yes, I'd like to ask Mr. Barash to respond to a couple questions. First, Mr. Barash, the Congress in recent years, the last several congresses, even in the last couple of congresses controlled by Democrats, the number of investigative reports have declined dramatically. I would like you to address that decline, particularly because the committee you came from used to produce a substantial number of investigative reports, not necessarily long ones, 30 to 40 pages, but it would produce 100 per Congress or more. Those numbers have really decreased and I would like to get your thoughts on the importance of investigative reports and how they assist Congress in following through on their investigations. Mr. Barrett, I'd like to ask you to talk a little bit about the affidavit that you filed in the tobacco litigation in Massachusetts. I thought it was very interesting, your exposition, the way the Congress traditionally reviewed the attorney-client privilege. I'd like you to address that one, how Chairman Dingell addressed testimonial privileges and address the question of whether Congress, the House in particular, should have a civil contempt statute, because that issue has been raised a number of times.

MR. BARASH: I think the first point you made is that the volume of oversight has declined substantially and you then tied in the fact that there aren't

reports being written to the extent that they were. I don't know why. I've not kept a count at all of oversight hearings over the last several years, really, since I left the Hill. I don't know why the volume has decreased. The importance of oversight ebbs and flows. It may be that some don't believe that government is essential to much that goes on. The idea of overseeing, making something you basically don't like more effective, is just not done.

We had a fairly elaborate system in the House years ago to assure that there was follow up to congressional oversight. Almost invariably, a report was written. We just didn't do an investigation, hold a hearing, and go away. We issued a report. Those reports made findings and recommendations. So the findings and recommendations were memorialized by the Government Operations Committee. In those days, we had something called a "results from recommendations" report which was issued by the committee every year. What it was essentially was all of the oversight and all of the recommendations flowing from our oversight work. We had to determine whether the government agencies had implemented the kinds of changes, or the marketplace had implemented, the kinds of changes we recommended.

So there was really a tally sheet, a box score, for every oversight hearing and every oversight recommendation. Moreover, we made our oversight findings available to the relevant authorizing committees and the Appropriations subcommittees. So we kept careful track of that. I don't know whether they're doing that these days but I think that if you're going to do oversight, and its importance is vivid and vital, those are the kinds of follow up and follow through that need to be done.

MR. BARRETT: With regard to the testimonial privilege, of course I'm now in a different position from what may have been the case before, it might not be something I would agree with now. The House rules were very specific. The witness was entitled to have counsel represent him--to advise him on his constitutional rights. Period. And the committee adhered to that rule very closely. So if it was not determined to involve a constitutional right, the committee went forward and demanded production of documents, testimony, whatever. There was a change going on during the whole 1980's as to whether or not this rule should have been interpreted so strictly and rigorously. We actually had a situation in the late 1970's, where the committee determined to grant a witness immunity and in doing that, compelled him to testify. The Justice Department was not happy with that, but we on the committee made the decision and got what was regarded as good testimony. Before we ever compelled anybody to do that, we made sure that Justice did not object to our doing that. And certainly they didn't in the more notorious cases we had in the late 1980's. I'm not sure that the House would agree that that's the way we ought to proceed today. I would argue that perhaps the right against self-incrimination might be more broadly interpreted than they were at the time. You asked another question and I forgot to write it down.

MR. MOSCHELLA: Affidavit in the Massachusetts case about the client/attorney privilege.

MR. BARRETT: Well, that related to the whole attorney/client privilege. That whole issue was stating that the company had no right to withhold those documents even though they were attorney/client privileged. And I would certainly have pushed that issue if I had been committee counsel.

MR. MOSCHELLA: My other question was with regard to civil contempt statute.

MR. BARRETT: Yes, that's right. That was an issue that we debated back and forth over the years and I was strongly opposed to any such provision. There are three branches of government and certainly Congress is the first. And to submit itself to the vagaries of the third branch of government was never one that I thought made a whole lot of sense. I know Jefferson argued that there ought to be some sort of an enforcement procedure away from the House rules. To me, it was important that the House protect its own prerogatives. If they didn't have the guts to stand up and insist upon those prerogatives, they shouldn't be pushing it off on the courts and let it languish there forever. Congress is an 18-month, or certainly the House is an 18-month, body. You come back in the next congress and you may start something over again, but subpoenas expire. On January 3rd at noon on odd-numbered years, and that means you've got to start over from scratch. You can't wait for somebody to argue his case and have it go through the whole lengthy court procedure. Anyway, we debated that issue all the time, and I vigorously opposed ever having that kind of a process.

QUESTION: The Freedom of Information Act and Privacy Act defined what types of data can or can't be obtained by any Member of Congress. Any examples come to mind?

MR. BARASH: The Freedom of Information Act doesn't apply to Congress. Nor the Privacy Act.

QUESTION: Okay. What limitations are there to prevent Members of Congress from obtaining information defense contracts, for example, frequently have technical and financial proprietary information or government employees have

personnel records. And I guess another example might be, trade secrets in just the private world. Are there any limitations for members of Congress regarding data they can't obtain?

MR. BARASH: Not the categories that you've mentioned.

MR. BARRETT: Well, proprietary has one hammer which I always insisted upon with my staff. Release of proprietary, confidential information is a criminal offense and it applied to congressional staff every bit as much as it did to the executive branch.

MR. ROSENBERG: I have to disagree with you, Mike.

MR. BARRETT: I know you do, but I still want to indicate that.

MR. ROSENBERG: Section 1905 of Title 18 applies to Executive Branch disclosures and if Congress gets covered documents in a legitimate way, either by asking for them or subpoenaing them, any revelation by a congressional committee in the normal course of legislative business is protected. Those that release it on the committee, from the Chairman on down, are protected by the Speech or Debate Clause.

MR. BARRETT: Well, that's right but then it wasn't the way the information is usually released.

MR. FITZPATRICK: Leak versus dumping all the documents at the beginning of a hearing where then that information is fair game.

QUESTION: Are there limitations on Members of Congress from obtaining proprietary information, and, secondly, what are the ramifications if the staff releases that to the media or other sources?

MR. BARASH: There's got to be a legitimate legislative purpose to the obtaining of the documents. If the committee has no jurisdiction in a particular area,

that can be raised. I was fortunate enough that we had broad jurisdiction. But some committees couldn't get documents and information because they didn't have authority. Members don't get it as members. They get it as part of a committee with this legislative purpose.

MR. ROSENBERG: Members simply can't ask for documents. It has to be through the Chairman or through a committee process--getting that kind of confidential, proprietary information. Information can be disseminated and protected under the Speech or Debate clause if it's done through committee reports, on the floor, in a hearing, or in other various normal channels of legislative process. But press releases things like that, those kinds of leaks put both members and staff in jeopardy.

MR. FITZPATRICK: It seems the only way to protect information is, I think, through a negotiation process where you keep something out of the committee. You could go into court, you could refuse to turn something over. You could have a contempt citation. It would have to be enforced in the District Court and then that's where you would have the judicial decision as to whether a particular requested piece of information is within or without the committee's jurisdiction. That is not a case you want to take on a contingent fee. That is very, very tough stuff. And the fact is that the people on the private side have, to some degree, trust the discretion of the committee or you try to work politically within the context of a committee to get some limitation on the request.

If the majority is asking for this, you see whether there is a creditable minority antidote to this. But this is not lawyering as usual. This is not a federal district court where you can object to an overbroad subpoena and you get a district judge to answer. The powers of Congress are so broad a skillful advocate on the

congressional side is going to make a very powerful case as to the relevance of virtually anything to the committee's goals. So you can't look at this as an exercise of really good lawyering. It has to be viewed in a public affairs sense in terms of effectively limiting Congress's reach for information and for documents.

MR. BARASH: Just to comment on that. We used to love it when witnesses would refuse to give us documents because then it became not just one story, the story being the hearing, but it turned into three stories. The witness refused to turn over documents to the subcommittee. That's story one. Story two is the subcommittee meets to issue a subpoena for the documents. And then story three, of course, is the hearing and the aftermath of the hearing. Jim is right. Essentially, Congress's power of inquiry is almost limitless save for the fact that it has to be within the jurisdiction of the requesting committee.

QUESTION: I think Jim will agree, that the leverage of a potential contempt citation against a client is overwhelming because the only way to vindicate himself is to be indicted and go through a criminal trial. And who wants to do that for a document?

MR. FITZPATRICK: And who wants to do that to vindicate the lawyer/client privilege. I think that what has happened is--and Mort you would be more up to date on where the law is--for years and years and years, the Commerce Committee had the position that there was no lawyer/client privilege, which is a judicially-created doctrine, and it didn't apply in a congressional proceeding. I don't believe, at least when I last looked at it, there was a court decision that held this. What you have in all of the D'Amato hearings is the committee would say, maybe on the House side as well, there is no such privilege as a matter of law, but we will recognize it in these particular circumstances. So you slipped off the edge of a confrontation. There are

very few times and my partner, Jack Quinn, faced this on the Senate side on D'Amato documents, where one could have held the President's counsel in contempt and gone to a federal district judge on an enforcement proceeding, but who wants that? No Executive Branch official at the end of the day wants that and no private party wants that. You try to work it out. Lawsuits are not the vehicle for resolution.

MR. ROSENBERG: Jim, the infection of that theory has spread through almost every committee in the Congress and there still hasn't been a case testing it. The latest that I recall was when that fellow Haney was contempted for refusal to turn over documents by the Commerce Committee. They were going to contempt him on the floor and he gave them up. And that was only within the last year.

QUESTION: Just a followup in that area. So often since Congressman Burton exercised this broad power to obtain these documents, we often get pleas of confidentiality and I would be interested in the panels perspective on how Congress should go about making the determination of what documents will be released as opposed to those that should not be released.

MR. WILSON: That again is a matter of negotiation.

MR. ROSENBERG: I think negotiation is important, but again, it's a function of releasing things that are germane to something that's under a legitimate oversight umbrella. If it isn't, I think staff, both sides of the aisle, should take that very seriously and attempt not to maneuver.

MR. WILSON: We were only talking about proprietary stuff or things like that. The types of information that can be obtained are vast and what you would hope for is that the people behave responsibly with the types of information they obtain. And if you don't have folks who will behave responsibly, it's very difficult apart from political pressures or in the court of public opinion to force that type of conduct.

QUESTION: Just for clarification, did I hear someone early say that the criminal statute of 1905, Title 18, prevents proprietary information from being released from a member or staff.

MR. ROSENBERG: Mike said it but I'm not aware of any congressional staffer or member who has released such information through the legislative process--hearings or reports--ever being prosecuted, because of the Speech or Debate Clause.

MR. BARRETT: Yes, that information is protected. The question is a leak and the disclosure outside the acceptable process, namely hearings or committee reports.

MR. ROSENBERG: I view the statute as applying only to Executive Branch releases and not to releases of proprietary information that were gotten through legitimate congressional processes.

MR. BARRETT: On the other hand, you don't want proprietary information usually. Lots of times you'll look at it and say, "Keep it." It's not the sort of thing you're going to want to discuss in a hearing normally.

MR. WILSON: Again, that's the sort of thing you don't really want to get into needless skirmishing over. If you don't need it, you should try and keep it off the table from the very beginning because it's just as well not to have it if it's not going to serve any purpose in the oversight process.

QUESTION: Everyone seems to be talking about institutional memory. I'm just curious, as former staffers or supervisors of staffers, what do you think the cause of this turnover is? Is it changes in party power? Is it the economy?

MR. BARASH: Well, some of it certainly has to do with the change in control of Congress and that precipitated a rather substantial exodus, some voluntary, some forced. Other than that, I'm not sure there's a reason. The world is faster, the

marketplaces are faster. People tend to move increasingly from one position to another. I've been in the private sector for about ten years and I've had not nearly as much fun, to refer back to what Mike Barrett said, as I had in the Congress. There was something just terrific in and of itself to be in this place and to do investigations and to accomplish things and to see change. The work that the Government Reform Committee is doing and some of the other committees are doing on some of the security problems we have at our defense facilities, nuclear defense facilities, is just terribly important work. And anyone who has had any kind of a hand in it can be proud to see the changes that will come as a result of that. Why people tend to move on, I'm just not sure.

QUESTION: There is, as there may have been in years past, a sense of government service or that Congress is a place for a long term commitment. I think that there is a sense of the legislative process and perhaps the oversight process as being a quick hit kind of a thing and nothing you would want to do for a lifetime. Working for the legislature is not the Lord's work. It's just some station to go on to something better. The economy does have something to do with it, though. You people who come out of law school owe so much money that it's almost impossible not to go into the private sector immediately in order to start paying off those debts and so that you'll have them paid off before you retire. There are a lot of things conspiring against longevity. The one thing that conspires with it, I presume, is a sense of adventure, a sense that what you're doing has long-range importance and that it might be fun to do this for a long period of time.

MR. ROSENBERG: If I may chime in, the six year tenure for committee chairman also has a way of changing staff as well, very dramatically. We might put a plug in at the end of this hour for the Congressional Research Service. Their

analysts have about 18 and a half years of experience, so when you're preparing for an investigation, don't forget about the support agencies that can come to your assistance. One last question.

QUESTION: It's actually two parts. Mort, I understand that there has been a change, that some ethics panel of the D.C. bar has taken a restrictive view of attorney/client privilege in the congressional context. If one of the panelists can address that, I'd appreciate it. The other question would be, I wonder if I can get a quick responses from the panelists about staff depositions.

MR. ROSENBERG: With respect to Bar rules, certainly several Bar associations, have had strict rules about disclosing attorney/client confidences. The problem is that if a congressional committee has subpoenaed documents in the possession of a lawyer, and that lawyer is subject to potential contempt, I think most bars, if not all of them, recognize the jeopardy aspect of it and give it appropriate weight. I don't believe any bar will compel an attorney to go to jail in defense of a client's privilege. At a particular point, the restriction of the rule, even a strict restriction of the rule in any bar, I believe would stop at point of clear jeopardy for the attorney.

MR. BARRETT: That engenders too much sympathy on this poor attorney and changes the focus away from the client, which is what you're looking at anyway. You don't care about the attorney. If you're going to put anyone in the slammer for contempt, you want the client. That's just one of the practical things. And you don't want to put anyone in contempt on attorney/client.

QUESTION: Do any of the panelists who were on committees feel a lack of something or a tool that they didn't have, such as staff deposition authority?

MR. BARRETT: I think deposition authority is very important if it is not used in too heavy-handed a fashion. Maybe the greatest importance is that it allows you to move forward expeditiously. There is so much energy spent trying to slow things down, particularly in the House where attention spans are short.

MR. ROSENBERG: Well, that's about all the time we have. I thank the panelists and our patient audience.