

COUNTERTERRORISM AND HUMANITARIAN ENGAGEMENT PROJECT

Congressional Inquiries

Draft Background Briefing

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I. INTRODUCTION

The tradition of congressional oversight began primarily as a function of checks and balances, enabling Congress to monitor the activities of the Executive Branch. Over time, congressional oversight has become an important part of our constitutional system because it allows members of Congress to develop legislation, monitor the implementation of public policy, and provide the public with vital information on government performance.¹ Congressional investigations have examined a broad range of subjects, perhaps most notably Watergate, Iran-Contra, Whitewater, and the impeachment proceedings of President Bill Clinton. The Constitution Project describes the “rich history” of congressional investigations as establishing, “in law and practice, the nature and scope of the tools upon which Congress may rely to maintain its role in our constitutional scheme.”²

Following the attacks of September 11, 2001, Congress has increasingly used its investigative powers to examine national security and counterterrorism issues. For instance, the National Commission on Terrorist Attacks Upon the United States (the “9/11 Commission”) investigated and reported on the facts and causes related to the September 11 attacks, evaluated and reported on relevant evidence, and made recommendations regarding the country’s preparedness for future attacks.³ The 9/11 Commission also investigated the issue of terrorism financing, using the al Haramain Islamic Foundation as a case study of the issue.⁴ While Congress has not yet used congressional investigations to examine allegations that a non-governmental organization (NGO) has provided material support for terrorism, NGOs should be cognizant of the broad authority of House and Senate committee chairs to initiate and conduct congressional investigations. What’s more, some NGOs have recently begun using non-conventional tactics to impugn another organization’s work.⁵ In some cases, groups have called for

(and successfully initiated) a congressional investigation to examine possible wrongdoing, exposing the subject of the investigation to significant reputational and financial harm.⁶

This paper begins by providing an overview of congressional inquiries. It continues by discussing the legal authority for Congress’s investigative powers and how those powers have been interpreted and upheld by U.S. courts. The paper then discusses how Congress initiates a congressional investigation, as well as the procedure for investigations once initiated by Congress. This paper ends by discussing the potential ramifications of a congressional inquiry for those being investigated, including the effects on humanitarian organizations, noting that the risks extend beyond legal liability to include significant reputational harm.

II. CONGRESSIONAL INQUIRIES: AUTHORITY, SCOPE, AND CONSEQUENCES

What is a congressional inquiry?

A congressional inquiry is an investigation initiated by Congress into a particular area or person of interest. Congress delegates its investigative powers to House or Senate committees or subcommittees, so these bodies, rather than the entire Congress, tend to initiate congressional investigations. The congressional power to investigate is broad, and as long as Congress can demonstrate an investigation’s relevance to some legitimate legislative function, it may conduct an investigation. Different rules may govern the congressional investigation, based on the exact body initiating the investigation, be it a House or Senate committee or subcommittee. Each committee may adopt a special set of rules that govern investigations, and those rules may vary from committee to committee (or subcommittee to subcommittee).

1. *When Congress Comes Calling: A Primer on the Principles, Practices, and Pragmatics of Legislative Inquiry*, THE CONSTITUTION PROJECT (2009), at 1-2.

2. *Id.* at 2.

3. Richard F. Grimmert, *Terrorism: Key Recommendations of the 9/11 Commission and Recent Major Commissions and Inquiries*, CONGRESSIONAL RESEARCH SERVICE (Aug. 11, 2004), at 1. For other congressional investigations on counterterrorism issues, see Appendix A.

4. See John Roth, et al., *Monograph on Terrorism Financing: Staff Report to the Commission*, NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES (2004), at 114.

5. One example of this kind of use of public opinion involves the recent tactics of the Israel Law Center, which has used its knowledge of both U.S. law and social media to allege that certain NGOs have funded terrorist groups. See *Shurat HaDin Warns Charity Over Alleged Terror Ties*, JERUSALEM POST (Oct. 14, 2012) (reporting that the Israel Law Center has alleged that an Australian NGO has given AusAID funds to proscribed terrorist groups in the Gaza Strip). Although AusAID has found no

evidence to prove the Israel Law Center’s claims, the allegations have had an impact on the group’s work in the region.

6. In 2011, pro-life advocates and organizations, including Americans United for Life, called for a congressional investigation into Planned Parenthood, an organization that provides reproductive health services to men and women. These advocates and groups called for a congressional investigation into the possibility that Planned Parenthood used federal funds to finance abortions. Representative Cliff Stearns (R-FL), chair of the House Committee on Energy and Commerce Oversight, initiated the investigation in 2012. The congressional investigation led another organization, the Susan G. Komen Foundation, to withdraw its funding from Planned Parenthood. See, e.g., *Susan G. Komen Planned Parenthood Funding Decision Sparks Donation Spike, Strong Reactions*, WASH. POST (Feb. 2, 2012) (noting that “some analysts credit Americans United for Life as a major factor in the decision of the House subcommittee to investigate Planned Parenthood”).

What is the nature and scope of the congressional investigative power?

The Constitution does not provide Congress with the explicit power to conduct congressional investigations or inquiries, but numerous judicial decisions have found this power implicit in the vesting of legislative power in Congress.⁷ For instance, the U.S. Supreme Court has explained that “the power of inquiry – with the power to enforce it – is an essential and appropriate auxiliary to the legislative function.”⁸ In another case involving congressional investigations, the U.S. Supreme Court explained that Congress’s power to conduct investigations “is inherent in the legislative process.”⁹ The Court continued:

“That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic, or political system for the purpose of enabling Congress to remedy them.”¹⁰

The U.S. Supreme Court has noted certain limits to the congressional investigative power, however. For example, such power may be exercised only “in aid of the legislative function,”¹¹ and may not be used to “expose the private affairs of individuals without justification in terms of the functions of Congress.”¹² Moreover, congressional inquiries must be “related to, and in furtherance of, a legitimate task of the Congress.”¹³

According to the Constitution Project, Congress should make oversight a priority: “[I]t is critical to our system of checks and balances that Congress conduct effective oversight. Every standing committee should be encouraged to establish a subcommittee on investigations.”¹⁴ Additionally, the Constitution Project believes that investigative hearings “should not be held unless there is a compelling horror story, a smoking gun to reveal, or an important point to make publicly.”¹⁵

7. U.S. CONST. art 1, § 8 (giving Congress the power “to make all Laws which shall be necessary and proper”).

8. *McGrain v. Daughtry*, 273 U.S. 135, 181-82 (1927).

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

10. *Id.*

11. *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880).

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

13. *Id.*

14. *When Congress Comes Calling*, *supra* note 1, at 4.

15. *Id.* at 5.

How does an inquiry get started?

The House and Senate have given committee chairs broad powers to conduct oversight and investigative proceedings. For instance, House Rule X.2(b)(1) states:

“Each standing committee . . . shall review and study on a continuing basis, the application, administration, and effectiveness of those laws, or parts of laws, the subject matter of which is within the jurisdiction of that Committee . . . in order to determine whether such laws and the programs thereunder are being implemented and carried out in accordance with the intent of Congress and whether such programs should be continued, curtailed, or eliminated.”¹⁶

Furthermore, House Rule XI.1(b) states that “each Committee is authorized at any time to conduct such investigations and studies as it may consider necessary and appropriate in the exercise of its responsibilities under Rule X.”

Each congressional committee and subcommittee has its own rules that govern the process and procedure of its investigations. While committees may adopt rules that require a committee vote prior to initiating major inquiries, most committees have not implemented such a rule.¹⁷ Rather, House and Senate committees may require that the committee chair only consult with or receive the concurrence of the ranking minority member prior to initiating a formal investigation. Informal inquiries, however, may take place without committee votes or minority participation.¹⁸ The committee chair may initiate these “preliminary investigations” subject to the ultimate control and direction of the committee.¹⁹

One important caveat to the ability to initiate congressional investigations involves the authority of minority party members of Congress. While committees may provide their minority party members with some rights (for example, the ability to call witnesses and request documents), no House or committee rules authorize either ranking minority members or individual members acting on their own to institute official committee investigations, hold hearings, or issue subpoenas.²⁰ Senate rules, however, afford more

16. U.S. House of Representatives, Rule X.2(b)(1), available at <http://www.rules.house.gov/singlepages.aspx?NewsID=131&rsbd=165>.

17. *When Congress Comes Calling*, *supra* note 1, at 22.

18. *Id.*

19. *Id.*

20. Frederick M. Kaiser, et al., *Congressional Oversight Manual*, CONGRESSIONAL RESEARCH SERVICE (May 19, 2011), at 69.

Case Study: Representative Peter King (R-NY)

One powerful example of Congress's vast powers to investigate involves the hearings convened by Representative Peter King, a current member and former chair of the House Committee on Homeland Security. In 2011, when he chaired the committee, Representative King announced that he would hold a series of hearings entitled, "The Extent of Radicalization in the American Muslim Community and that Community's Response." The hearings ignited controversy in large part due to Representative King's statements about the Muslim community in the United States. Representative King announced that he was convening the hearings, in part, because 85 percent of Muslim leaders purportedly hold extremist views, and because most Muslim leaders in the United States failed to cooperate with law enforcement officials in fighting the threat of homegrown terrorism.

Because Representative King held substantial power as the chair of the House Committee on Homeland Security, and because the subject of the hearings, however incendiary, related broadly to the committee's jurisdiction, he was able to commence the hearings despite numerous protests, demonstrations, and appeals to House leaders to halt the proceedings.

rights to individual and minority party members, most notably the ability to filibuster. Additionally, courts have not recognized the authority of an individual member of Congress, other than a committee chair, to exercise a committee's oversight authority by initiating or conducting a congressional investigation.²¹ In practice, this means that committee chairs hold tremendous power in determining the subject and scope of congressional oversight.

Once Congress initiates an investigation, it may request information or testimony from individuals and organizations. Congressional committees have subpoena powers, which enable the committee or subcommittee to require an individual to appear before the committee or produce documents. Most committees, however, begin an investigation by requesting materials and witnesses by letter, avoiding the issuance of a subpoena unless an individual refuses to comply with a request. If a witness fails to comply with a subpoena (absent a valid privilege properly invoked, such as the Fifth Amendment privilege against self-incrimination), Congress may hold that witness in contempt.

Congressional investigations share many similarities with judicial proceedings. For instance, witnesses provide documents and other information to members of Congress, and hearings may be conducted where members of Congress may require witnesses to testify and answer questions. It is important to note, however, that congressional investigations are not judicial fact-finding proceedings; rather, they are proceedings often driven by political considerations and are

carried out in the midst of the political process.²² While rules govern the procedure and scope of congressional inquiries, certain aspects of the investigation, including the manner in which it is conducted, may be left to the discretion of the committee or subcommittee chair. Moreover, many hallmarks of the American judicial system, such as the role of counsel, the right to cross-examine adverse witnesses, and certain privileges, may not be available during a congressional investigation.

Unfortunately, determining what privileges or protections may be available to the subject of a congressional inquiry can be a difficult task. While Congress and U.S. Supreme Court decisions have recognized the availability of some privileges to all witnesses in congressional investigations, such as the Fifth Amendment privilege against self-incrimination,²³ the availability of other common-law privileges (i.e., those privileges recognized by judges rather than being codified in U.S. constitutional or federal law), such as the attorney-client privilege, may apply subject to the discretion of the committee. For instance, when determining the availability of the attorney-client privilege, the committee conducting the hearing will traditionally weigh various considerations, including legislative need, public policy, and the statutory duty of the committee to oversee the laws and policies that fall under that committee's jurisdiction.²⁴

22. *When Congress Comes Calling*, *supra* note 1, at 21.

23. *See* *Watkins*, 354 U.S. at 188; *Quinn v. United States*, 349 U.S. 163-65 (1955).

24. Frederick M. Kaiser, et al., *Congressional Oversight Manual*, CONGRESSIONAL RESEARCH SERVICE (May 19, 2011), at 41-42. Although case law on the availability of certain common-law privileges to witnesses in congressional investigations does not settle the issue, one reason why certain common-law privileges may not apply in a congressional

21. *Id.*

Potential consequences of a congressional inquiry

An entity involved with or the subject of a congressional investigation may face considerable expense, in time and resources devoted to preparing for interviews or hearings, providing documents and other information to committee members, and devoting personnel and other resources to the investigation. Investigations may last for months, or even years, increasing the costs to the individuals and organizations involved. Other harms may result from a congressional investigation, including reputational harm to the individuals and organizations involved in the inquiry, regardless of whether wrongdoing may have occurred.

For their part, humanitarian organizations may face substantial risks if they become the subject of a congressional investigation. The reputational harm that may result from the investigation, regardless of whether the organization or its employees acted inappropriately or illegally, may lead to a significant decrease in funding, including from both private donors and government entities. These harms may result from even an informal investigation by Congress. For that reason, should a congressional investigation occur into an organization's activities, that organization should be prepared to comply with the investigation and cooperate fully with requests for information. This cooperation could minimize costs to the organization by reducing the length of an investigation, demonstrating the organization's willingness to work with Congress to reach an appropriate solution, and assure any interested parties, including donors and members of the public, that the organization is committed to ensuring its compliance with the law.

For many humanitarian organizations, the risk of a congressional investigation may seem unlikely. Should an inquiry occur, however, either formal or informal, an organization will need to respond quickly and appropriately to minimize the reputational harm it may experience.

investigation stems from the fact that common-law privileges are a “judge-made exception to the normal principle of full disclosure in the adversary process, which is to be narrowly construed and has been confined to the judicial forum.” *Id.* at 43 (*citing* *Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1423 (3d Cir. 1991)).

APPENDIX A: EXAMPLES OF CONGRESSIONAL INQUIRIES SINCE 2001¹

National Commission on Terrorist Attacks Upon the United States (2002 – 2004)

The 9/11 Commission, a bipartisan commission created by Congress, examined and reported on the facts and causes of the September 11 attacks, evaluated evidence presented by government agencies regarding the attacks, and made recommendations to improve the United States' preparedness for future attacks.

Anti-Money Laundering: Blocking Terrorist Financing and its Impact on Lawful Charities (2010)

The House Committee on Financial Services' Subcommittee on Oversight and Investigations conducted a hearing on terrorist financing in 2010. An official from the Treasury Department, along with representatives from the Charity and Security Network and the ACLU, testified at the hearing.

The Extent of Radicalization in the American Muslim Community and that Community's Response (2011)

In 2011, Representative Peter King held a series of hearings entitled, "The Extent of Radicalization in the American Muslim Community and that Community's Response." Representative King announced that he was convening the hearings, in part, because 85 percent of Muslim leaders purportedly hold extremist views, and because most Muslim leaders in the United States failed to cooperate with law enforcement officials in fighting the threat of homegrown terrorism.

U.S. Vulnerabilities to Money Laundering, Drugs, and Terrorist Financing: HSBC Case History (2012)

The Senate Homeland Security and Governmental Affairs' Subcommittee on Investigations held a hearing to examine terrorism financing vulnerabilities created when a global bank, like HSBC, uses its U.S. affiliate to provide funds, services, and access to the U.S. financial system to high-risk affiliates. News reports highlighted the hearing as "the latest in a series of investigations by U.S. officials into how global banks have processed – and in some cases, intentionally hidden – financial transactions on behalf of countries which allegedly support terrorism"²

The Security Failures of Benghazi (2013)

The House Committee on Oversight and Government Reform convened hearings in 2013 to investigate the attacks on the American Embassy in Benghazi, Libya. Officials from the State Department, along with military representatives, were called upon to testify before the committee. The House and Senate Committees on Foreign Relations also convened investigative hearings on the events in Benghazi.

1. While certainly not an exhaustive list of all congressional investigations into national security and counterterrorism issues since 2001, this list provides some key examples of the types of investigations that Congress has conducted during this period.
2. Mollenkamp, Carrick, et al., *Exclusive: Senate Investigating HSBC for Money Laundering*, REUTERS (Jan. 25, 2012).