

**Testimony of
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**Before the Senate Committee on the Judiciary, Subcommittee on Crime and Terrorism
“Concurrent Congressional and Criminal Investigations: Lessons from History”**

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Chairman Graham, Ranking Member Whitehouse, and Members of the Committee, thank you for inviting me to testify today. My name is Danielle Brian, and I am the Executive Director of the Project On Government Oversight (POGO). Founded in 1981, POGO is a nonpartisan, independent watchdog that champions good government reforms. POGO’s investigations into corruption, misconduct, and conflicts of interest achieve a more effective, accountable, open, and ethical federal government.

POGO’s mission has long included working to strengthen the capacity of Congress to improve the quality and integrity of public policy through bipartisan, fact-based Congressional oversight investigations. Over the past decade, POGO’s Congressional Oversight Initiative has educated over 1,000 Hill staffers from both sides of the aisle and both chambers about the oversight powers—and responsibilities—of Congress. We have also partnered with the Levin Center at Wayne Law and the Lugar Center in our work to further the investigative and oversight capacity of Congress.

**CONCURRENCY OF CONGRESSIONAL AND CRIMINAL INVESTIGATIONS:
COMPLEMENTARY AND BENEFICIAL**

Congress and the executive branch are not only capable of conducting concurrent investigations, they have successfully done so in the past.

The oversight functions of Congress are constitutionally mandated. They are essential to legislating, holding the executive branch accountable, and ensuring that our democracy’s system of checks and balances endure. In my testimony today, I will discuss some noteworthy and applicable historical lessons from past Congressional investigations that proceeded concurrently with criminal investigations by the executive branch.

Clearly, the controversy and debate over Russian interference in the 2016 presidential election and the integrity of our democratic institutions demand Congressional attention. The American people have a right to know the truth. The lack of common understanding across the country on what did or did not happen, and whether our rule of law is being properly followed, is fueling a damaging rift in our democracy. It is the role of Congress to provide the facts to the public.

Whether or not an investigation ultimately results in findings of criminal wrongdoing with regards to the 2016 elections, Congress has a job to do. Congressional investigations can lead to policy reforms, a central purpose of Congressional oversight.

POGO recently released a report detailing best practices for Congressional investigations that lead to a much better chance of success. Our report found that concurrent Congressional and criminal investigations can be *complementary*, and history shows that the public can *benefit* when both the executive and legislative branches examine the same scandals and events at the same time. Investigations led by a Special Counsel can play a critical role in developing a criminal case. However, they are limited in scope, are not public, often take much longer than Congressional investigations, and of course remain vulnerable to executive branch pressure.

Congressional investigations play a constitutionally important, distinct, and complementary role. Congressional investigations often have a broader mandate, a quicker pace, and unearth information that may be significant, but not necessarily criminal, in nature. Congress is also uniquely positioned to consider legislative solutions to address systemic problems. Congressional committees investigated the Watergate, Iran-Contra, 1996 campaign finance, and Jack Abramoff lobbying scandals concurrently with criminal investigations. Many of those Congressional investigations led to needed reforms that would not have occurred had the inquiries been limited to law enforcement.

Further, concurrent investigations allow for Congress to responsibly share information with the public without impeding law enforcement investigations into similar matters. Sometimes, it is in the public's interest to get to the bottom of a systemic problem and to find solutions before criminal proceedings can be fully resolved. As former Independent Counsel Kenneth Starr testified before Congress, "When a scandal is eroding public confidence, speedy disclosure is preferable to slow justice." He went on to say that, "Citizens' political and policy judgments will be shaped, quite properly, by an unfolding Congressional investigation. The American people can get that information in a timely manner from a Congressional investigation. Not so with a grand jury investigation....When Congress defers to the criminal justice system, presidential accountability thus may suffer."¹

There are valid concerns that Congressional investigations could lead to tainted evidence and compromised prosecutorial investigative techniques and proceedings.² When multiple

¹ "Statement of Kenneth Starr before the United States Senate Committee on Governmental Affairs Hearing on the Future of the Independent Counsel Act," April 14, 1999. <http://www.hsgac.senate.gov/download/?id=93941BE8-37B8-4412-918C-F40BE3BC5ABF> (Downloaded July 10, 2017)

² "Congressional oversight may involve the criminal investigation process in three different ways. First, Congress may investigate a matter that is simultaneously being investigated by the DOJ. This type of oversight may raise concerns about the due process rights of the accused and the potential for interference with the criminal investigation and subsequent trial of suspected criminals. Second, Congress may investigate allegations of prosecutorial

investigations with differing scopes occur at the same time, there is always the risk that one group of investigators might inadvertently impede the efforts of another. However, if properly handled, concurrent investigations pose no such risk. As the United States Supreme Court ruled in 1962, “a Congressional committee which is engaged in a legitimate legislative investigation need not grind to a halt whenever responses to its inquiries might potentially be harmful to a witness in some distinct proceeding...or when crime or wrongdoing is exposed.”³

HISTORICAL EXAMPLES OF SUCCESSFUL CONCURRENT INVESTIGATIONS

There have been a number of occasions when Congress and the Justice Department successfully investigated matters concurrently, including high-profile issues involving senior administration officials and the president. These examples show the advantages of concurrent involvement, but they also provide illustrations of the challenges that may arise.

Teapot Dome

In the early 1920s, Secretary of the Interior Albert Fall leased the US naval petroleum reserve at Wyoming’s Teapot Dome to oil companies without competitive bidding. At the same time, he secretly received gifts and a no-interest loan from executives of those companies worth millions in today’s dollars.

The Senate Committee on Public Lands launched an investigation into this matter in 1922.⁴ The investigation uncovered the secret loan to Fall, which was revealed during Congressional hearing testimony by the oil company executive who provided the bribe. When President Warren G. Harding died in 1923, his successor, Calvin Coolidge appointed two special prosecutors—one Republican and one Democrat—to investigate. In 1929, Fall was convicted of taking a bribe from the oil executive—the only finding of guilt resulting from the scandal. According to

misconduct by DOJ officials. These types of investigations focus on the way in which the DOJ might violate the constitutional rights of the accused or use excessive force in responding to alleged criminal activity. These types of investigations may raise concerns that are similar to those in other executive privilege disputes, in particular, the concern that disclosure of deliberative information will discourage DOJ officials from expressing their views freely. Third, Congress may seek information concerning the failure of the DOJ to investigate or prosecute particular types of crime or specific allegations of criminal misconduct against identified suspects. This third type of investigation raises the same concerns about the deliberative process as the second category, but it also creates problems related to the potential for undue congressional influence over the decision to investigate or prosecute specific individuals.” Todd David Peterson, “Congressional Oversight of Open Criminal Investigations,” *Notre Dame Law Review*, Vol. 77, Issue 5, October 1, 2002, pp. 1373-1448.

³ *Hutcheson v. United States*, 369 US 599, 617 (1962).

<https://supreme.justia.com/cases/federal/us/369/599/case.html> (Downloaded June 2, 2017)

⁴ US Senate, “Senate Investigates the ‘Teapot Dome’ Scandal.”

https://www.senate.gov/artandhistory/history/minute/Senate_Investigates_the_Teapot_Dome_Scandal.htm (Downloaded June 2, 2017)

historian Robert W. Cherny, Fall was “the first Cabinet member convicted of a crime committed while in office.”⁵

The Senate also convened a select committee to investigate the Department of Justice on charges that it mishandled the Teapot Dome investigation.⁶

The select committee ran into roadblocks when the brother of the Attorney General refused to comply with a subpoena. The committee wanted to know why Attorney General Harry Daugherty failed to prosecute cases connected to the Teapot Dome scandal. It subpoenaed his brother, who was the president of a bank, to appear before the Senate and to produce bank records that would potentially shed light on the brothers’ dealings with oil companies. The issue ultimately wound up in the Supreme Court where, for the first time, Congress’s authority to investigate matters and to compel witnesses and testimony was explicitly recognized.⁷

Watergate

The Senate Select Committee on Presidential Campaign Activities, better known as the Watergate Committee, was established in February 1973 to examine campaign activities during the 1972 presidential election. A break-in at the Democratic National Campaign headquarters at the Watergate Hotel in June 1972 began a chain of events that led to the resignation of President Richard Nixon in August 1974. The committee investigation focused on “the break-in and any subsequent cover-up of criminal activity, as well as all other illegal, improper, or unethical conduct occurring during the Presidential campaign of 1972, including political espionage and campaign finance practices.”⁸ The committee’s work led to the passage of several good-government reforms, including stronger campaign finance, government ethics, inspector general, and Freedom of Information Act laws.⁹

⁵ Robert W. Cherny, “Graft and Oil: How Teapot Dome Became the Greatest Political Scandal of Its Time,” *History Now*. <https://www.gilderlehrman.org/history-by-era/roaring-twenties/essays/graft-and-oil-how-teapot-dome-became-greatest-political-scand> (Downloaded June 2, 2017)

⁶ US Senate, *Investigation of Illegal or Improper Activities in Connection with the 1996 Federal Election Campaigns: Final Report of the Committee on Governmental Affairs, United States Senate, Together with Additional and Minority Views, Volume 1 of 6*, March 10, 1998, 105th Cong., 2nd sess., 1998, S. Rep. 105-107. <https://www.gpo.gov/fdsys/pkg/CRPT-105srpt167/pdf/CRPT-105srpt167-pt1.pdf>; “Campaign Finance Probe Fizzles,” CQ Almanac 1997, 53rd ed., Washington, DC: *Congressional Quarterly*, 1998. <http://library.cqpress.com/cqalmanac/cqa1970000181143> (All downloaded June 2, 2017)

⁷ *McGrain v. Daugherty* 273 US 135, 136 (1927). <https://supreme.justia.com/cases/federal/us/273/135/case.html> (Downloaded June 2, 2017)

⁸ US Senate, “Select Committee on Presidential Campaign Activities.” <https://www.senate.gov/artandhistory/history/common/investigations/Watergate.htm> (Downloaded June 2, 2017)

⁹ Benjamin Civiletti, “Watergate Legislation in Retrospect,” (Remarks, Annual Dinner of the University of Chicago Law School and Alumni Association, Chicago, IL, April 25, 1980). <https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/04-25-1980.pdf>; Social Security Administration, “About OIG,” *Office of the Inspector General, Social Security Administration*, 2017. <http://oig.ssa.gov/about-oig> (All downloaded July 10, 2017)

The Watergate Committee’s work occurred while the Justice Department conducted its own probe into the matter, led by Special Counsel Archibald Cox, beginning in May 1973. Nixon ordered the firing of Cox in October 1973 for refusing to withdraw a subpoena for audio tapes kept by the White House, which led to the resignation of the Attorney General and Deputy Attorney General. A new Special Counsel was named, but the firing of Cox only “encouraged lawyers in the special prosecutor’s office to aggressively pursue the tapes. Their arguments convinced the Supreme Court that in a criminal case, every citizen — even a president — must comply with a subpoena, and the tapes were released,” according to Scott Armstrong, a staffer with the Watergate Committee.¹⁰ This case, *United States v. Nixon*, put limits on presidential claims of executive privilege.¹¹

The Special Counsel and the Watergate Committee “overcame partisan and jurisdictional conflicts to bring about the president’s resignation—and their work offers a valuable lesson for today, when hyper-partisanship dominates,” according to Armstrong. “While prosecutors prefer not having congressional competition, a mature special prosecutor and a well-led congressional inquiry can coordinate over issues like witness immunity,” he explains.

Armstrong concludes:

“Two lessons emerge. First: Congressional committees are powerful tools for investigating the full range of abuse of power by a president and for passing reforms to avoid repetitions of those abuses. (Unfortunately, reforms enacted after Watergate were eroded over subsequent decades.) But committees have limited power to compel presidential compliance with demands for evidence.

“Second, prosecutors can often obtain the critical evidence that committees can’t. But their job is to prosecute crimes. They are less likely to get to the bottom of executive abuses or to prevent their repetition. Most tellingly, special prosecutors, as part of the executive branch, can be dismissed by the president, while congressional committees are protected by the constitutional separation of powers.”¹²

Iran-Contra

In 1987, the Senate and House launched a special joint investigation into allegations that senior officials in the Reagan administration secretly facilitated arms sales to Iran in violation of an arms embargo, and used the proceeds to covertly fund Contra rebels in Nicaragua.

¹⁰ Scott Armstrong, “What to Remember About Watergate,” *The New York Times*, May 20, 2017. <https://www.nytimes.com/2017/05/20/opinion/sunday/trump-nixon-watergate-congress.html> (Downloaded June 2, 2017) (Hereinafter Scott Armstrong, “What to Remember About Watergate”)

¹¹ *United States v. Nixon*, 418 US 683 (1974). <https://supreme.justia.com/cases/federal/us/418/683/> (Downloaded June 2, 2017)

¹² Scott Armstrong, “What to Remember About Watergate”

Simultaneously, an Independent Counsel investigated the case for potential criminal acts. The committee's work led to several new laws imposing criminal penalties on government employees who transfer weapons to countries that support terrorism, and the creation of a statutory Inspector General at the CIA.¹³

When Congress and law enforcement simultaneously investigate a matter, communication between both sides is essential. Congress may determine that its priorities are as important as prosecution. With Iran-Contra, the Independent Counsel obtained two convictions, but these convictions were both reversed on appeal because of problems arising from immunity granted by the Congressional investigation.¹⁴ That instance can stand as a cautionary tale. The key lesson is that Congress can and should make a deliberate decision whether obtaining key information from witnesses outweighs potential harm to a criminal case. It is precisely this question that must be considered by Congress in regard to the current investigations. As Independent Counsel Lawrence E. Walsh observed, “[t]he legislative branch 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 that decision. It is not a judicial decision or a legal decision but a political decision of the highest importance.”¹⁵

Commenting on the dilemma, Congressional Research Service legal analyst Mort Rosenberg made a similar observation:

“It has been argued that the constitutional dimensions of the crisis created by the Iran-Contra affair required the type of quick, decisive disclosures that could result from a Congressional investigation but not from the slower, more deliberate criminal investigation and prosecution process. Under this view, the demands of a national crisis may justify sacrificing the criminal prosecution of those involved in order to allow Congress to uncover and make public the truth of the matter at issue. The role of Congress as overseer, informer, and legislator arguably warrants this sacrifice. The question becomes more difficult as the sense of national crisis in a particular circumstance is less acute, and the object is, for example, to trade-off a lesser figure in order to reach someone higher up in a matter involving ‘simple’ fraud, abuse or maladministration at an agency. In the end, case-by-case assessments by Congressional

¹³ David Scheffer, “Iran-contra: A legacy in new laws,” *Chicago Tribune*, December 12, 1989, Section 1, p. 23. <http://archives.chicagotribune.com/1989/12/12/page/23/article/iran-contra-a-legacy-in-new-laws> (Downloaded June 5, 2017)

¹⁴ US Library of Congress, Congressional Research Service, *Investigative Oversight: An Introduction to the Law, Practice, and Procedure of Congressional Inquiry*, by Morton Rosenberg, RL95-464, April 7, 1995, pp. 7-10. <https://fas.org/sgp/crs/misc/95-464.pdf> (Downloaded June 1, 2017) (Hereinafter CRS, *Investigative Oversight*)

¹⁵ US Library of Congress, Congressional Research Service, *Congressional Oversight Manual*, RL30240, December 19, 2014, p. 32. <https://fas.org/sgp/crs/misc/RL30240.pdf> (Downloaded July 10, 2017); Lawrence E. Walsh, “The Independent Counsel and the Separation of Powers,” *Houston Law Review*, Vol. 25, No. 1, 1988, p. 9.

investigators will be needed, guided by the sensitivity that these are political judgments.”¹⁶

1996 Campaign Finance Investigations

In the wake of the 1996 presidential election, allegations emerged that the Chinese government had attempted to gain influence over the US government through illegal donations to political campaigns, including that of President Bill Clinton, and to the Democratic National Committee. The Senate Governmental Affairs Committee launched an investigation in 1997, which ended in 1998.¹⁷ The Justice Department convened a Campaign Finance Task Force in 1996 that lasted until 1999.¹⁸

The Congressional and Justice Department investigations examined the same basic issue: whether foreign money illegally made its way into the coffers of candidates and political parties. The Senate’s investigation found that this was the case in several instances; at the same time, the Justice Department successfully obtained convictions and guilty pleas involving campaign finance violations and related crimes by many of the same individuals under Congressional scrutiny. For instance, John Huang, Charlie Trie, and John Chung all pleaded guilty in 1999. They were each investigated by the Senate and named in its final report.¹⁹

The Jack Abramoff Lobbying Scandal

In 2004, the Senate Indian Affairs Committee began an investigation into lobbyist Jack Abramoff’s exploitation of Native American tribal governments and casinos while representing them.²⁰ Over the next two years the Committee discovered a web of corruption that spread to Deputy Secretary of the Interior Steven Griles, the office of House Majority Whip Tom Delay, and Rep. Bob Ney. The Senate conducted its investigation concurrently with numerous criminal probes into Abramoff and his associates’ business dealings. Ultimately, the Justice Department obtained 20 guilty pleas and convictions from people associated with Abramoff on charges of

¹⁶ CRS, *Investigative Oversight*, p. 10.

¹⁷ US Congress, Senate, Committee on Governmental Affairs, *Final Report on Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns, Vol. 1*, 105th Cong., 2nd sess., 1996, S. Rep. 105-167. <https://www.gpo.gov/fdsys/pkg/CRPT-105srpt167/pdf/CRPT-105srpt167-pt1.pdf>; “Campaign Finance Probe Fizzles,” CQ Almanac 1997, 53rd ed., Washington, DC: *Congressional Quarterly*, 1998. <http://library.cqpress.com/cqalmanac/cqal970000181143> (All downloaded June 2, 2017)

¹⁸ “Campaign Finance Special Report Key Stories,” *The Washington Post*. <http://www.washingtonpost.com/wp-srv/politics/special/campfin/background.htm> (Downloaded June 2, 2017)

¹⁹ Roberto Suro, “Campaign Fund Probe Winds Down,” *The Washington Post*, May 30, 1999, p. A5. <http://www.washingtonpost.com/wp-srv/politics/special/campfin/stories/finance053099.htm> (Downloaded June 2, 2017)

²⁰ US Congress, Senate, “Gimme Five”—*Investigation of Tribal Lobbying Matters: Final Report before the Committee on Indian Affairs*, June 22, 2006, 109th Cong., 2nd sess., 2006, S. Rep. 109-325. <https://www.indian.senate.gov/sites/default/files/upload/files/Report.pdf> (Downloaded July 10, 2017)

corruption and bribery, including Griles and Ney, who both served jail time.²¹ That Congressional investigation not only resulted in the exposure of an extensive corruption ring, but also led to a number of new lobbying disclosure and ethics rules, as well as the creation of the Office of Congressional Ethics.²²

BEST PRACTICES FOR CONGRESSIONAL INVESTIGATIONS

While many Congressional investigations were successful and resulted in important findings, recommendations, and reforms, some have ended less successfully. Few remember the results of the 1977 House Committee on Standards of Official Conduct “Koreagate” investigation into the attempted bribery by South Korea of more than 100 Members of Congress, which ended “in a bang of hyperbole, a whimper of opprobrium and a mass of uncertainties about the future of the House ethics process.”²³ Other investigations got the attention of the public, but devolved into partisan disagreements with little long-lasting outcomes.²⁴

Why do some investigations yield no useful findings or results? What would make it more likely that a Congressional investigation will lead to uncovering the truth? There is no magic answer. However, there are four key best practices that can improve the chances of success:

- **True bipartisanship.** When both parties work together, the likelihood of success greatly increases. This usually means formal power-sharing between the Majority and Minority members of the committee, including sharing investigative documents, co-authoring committee reports, and bipartisan decision-making about hearing witnesses.
- **Adequate tools and resources.** Robust investigations need adequate numbers of staff with subpoena and deposition authority.
- **Clear focus.** A well-defined mission and realistic time frame will focus the investigation.

²¹ US Department of Justice, Criminal Division, “Former Lobbyist Jack Abramoff Sentenced to 48 Months in Prison on Charges Involving Corruption, Fraud, Conspiracy, and Tax Evasion,” September 4, 2008.

<https://www.justice.gov/archive/opa/pr/2008/September/08-crm-779.html>;

Terry Frieden, “20-Month, \$20 Million Sentence for Former Abramoff Associate,” *CNN*, February 12, 2011.

<http://www.cnn.com/2011/CRIME/02/11/dc.fraud.sentence/index.html> (All downloaded July 10, 2017)

²² Fred Wertheimer, “The House and Ethics: A Reality Check,” *Democracy 21*, August 16, 2010.

<http://www.democracy21.org/archives/whats-new/politico-the-house-and-ethics-a-reality-check-an-op-ed-by-democracy-21-president-fred-wertheimer/> (Downloaded July 10, 2017)

²³ “Congress Ends ‘Koreagate’ Lobbying Probe,” *CQ Almanac*, 1978.

<https://library.cqpress.com/cqalmanac/document.php?id=cqal78-1237310> (Downloaded July 10, 2017)

²⁴ For an analysis of federal investigations and their impacts, see: Paul Light, *Investigations Done Right and Wrong: Government By Investigation 1945 – 2012*, Brookings, December 2013. <https://www.brookings.edu/wp-content/uploads/2016/06/LightPaperDec2013.pdf> (Downloaded June 7, 2017)

- **Congressional leadership support.** Strong investigations will usually ruffle feathers. Congressional leaders from both parties will have to back the investigations and seek common ground.

For a complete discussion of these best practices, including historical examples of past Congressional investigations, see POGO's report, *Necessary and Proper: Best Practices for Congressional Investigations*.²⁵

CONCLUSION

Congress should fully exercise its power to oversee and investigate the executive branch. A properly conducted Congressional investigation *can* proceed concurrently with criminal investigations. Executive branch criminal investigations examine important issues that happened in the past. History shows us that Congress can examine a broader set of issues, including solutions that look to the future.

Even though a special counsel has been appointed to investigate the possibility of Russian interference in the 2016 presidential election, if Congress does not also continue to investigate the issue, significant public policy questions will remain unanswered: Is the Foreign Agent Registration Act working, or does it need to be reformed? Does the federal government need to implement measures to protect the integrity of elections? Are financial disclosure requirements for public officials being undermined by anonymous shell corporations and financial institution secrecy? Have there been non-criminal abuses of power by the Department of Justice or White House? Has the application of justice been politicized? None of these questions will be answered by criminal prosecutions.

I would respectfully note that this Subcommittee has been operating in an admirably bipartisan manner. As I mentioned earlier, this is one of the ingredients essential for successful investigations. I strongly encourage you to continue your work with vigor and confidence.

²⁵ Project On Government Oversight, *Necessary and Proper: Best Practices for Congressional Investigations*, June 7, 2017.

<http://www.pogo.org/our-work/reports/2017/necessary-and-proper-best-practices-congressional-investigations.html>