

AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 11: The Contemporary Era—Separation of Powers

Curtis E. Gannon, **Authority of Individual Members of Congress to Conduct Oversight** (2017)¹

In the early days of the Trump administration, Democrats in Congress were in a difficult position. Their electoral base was anxious that they mount an aggressive opposition to the unpopular president, but as the minority party they had few formal tools at their disposal to investigate the actions of the executive branch. Individual members of Congress began to submit requests for information to executive branch officials, and the acting head of the Office of Legal Counsel provided an opinion stating that the executive had no constitutional obligation to respect such requests.

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The Constitution vests “[a]ll legislative Powers” in “a Congress of the United States, which shall consist of a Senate and House of Representatives.” The Supreme Court has recognized that one of those legislative powers is the implicit authority of each house of Congress to gather information in aid of its legislative function. Each house may exercise its authority directly—for example, by passing a resolution of inquiry seeking information from the Executive Branch. . . .

In modern practice, however, each house typically conducts oversight “through delegations of authority to its committees, which act either through requests by the committee chairman, speaking on behalf of the committee, or through some other action by the committee itself.” As the Supreme Court has explained, “[t]he theory of a committee inquiry is that the committee members are serving as the representatives of the parent assembly in collecting information for a legislative purpose” and, in such circumstances, “committees and subcommittees, sometimes one Congressman, are endowed with the full power of the Congress to compel testimony.” *Watkins v. United States* (1957).

By contrast, individual members, including ranking minority members, “generally do not act on behalf of congressional committees.” Under existing congressional rules, those members have not been “endowed with the full power of the Congress” to conduct oversight. . . . *Exxon Corp. v. FTC* (D.C. Cir., 1978) (“[D]isclosure of information can only be compelled by authority of Congress, its committees or subcommittees, not solely by individual members; and

¹ Excerpt taken from Curtis E. Gannon, “Authority of Individual Members of Congress to Conduct Oversight of the Executive Branch” (2017).

only for investigations and congressional activities.”). Individual members who have not been authorized to conduct oversight are entitled to no more than “the *voluntary* cooperation of agency officials or private persons.”

The foregoing reflects the fundamental distinction between constitutionally authorized oversight and other congressional requests for information. When a committee, subcommittee, or chairman exercising delegated oversight authority asks for information from the Executive Branch, that request triggers the “implicit constitutional mandate to seek optimal accommodation . . . of the needs of the conflicting branches.” . . . Such oversight requests are enforceable by the issuance of a subpoena and the potential for contempt-of-Congress proceedings. Upon receipt of a properly authorized oversight request, the Executive Branch’s longstanding policy has been to engage in the accommodation process by supplying the requested information “to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch.” But a letter or inquiry from a member or members of Congress not authorized to conduct oversight is not properly considered an “oversight” request. . . . It does not trigger any obligation to accommodate congressional needs and is not legally enforceable through a subpoena or contempt proceedings.

Members who are not committee or subcommittee chairmen sometimes seek information about executive branch programs or activities, whether for legislation, constituent service, or other legitimate purposes (such as Senators’ role in providing advice and consent for presidential appointments) in the absence of delegated oversight authority. In those non-oversight contexts, the Executive Branch has historically exercised its discretion in determining whether and how to respond, following a general policy of providing only documents and information that are already public or would be available to the public through the Freedom of Information Act. Whether it is appropriate to respond to requests from individual members will depend on the circumstances. In general, agencies have provided information only when doing so would not be overly burdensome and would not interfere with their ability to respond in a timely manner to duly authorized oversight requests. In many instances, such discretionary responses furnish the agency with an opportunity to correct misperceptions or inaccurate factual statements that are the basis for a request.