ARTICLE ONE: STRENGTHENING CONGRESSIONAL OVERSIGHT CAPACITY

HEARING

BEFORE THE

SELECT COMMITTEE ON THE MODERNIZATION OF CONGRESS

OF THE

HOUSE OF REPRESENTATIVES

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THURSDAY, NOVEMBER 4, 2021

HOUSE OF REPRESENTATIVES,
SELECT COMMITTEE ON THE
MODERNIZATION OF CONGRESS,
Washington, DC.

The committee met, pursuant to call, at 9:01 a.m., in Room 310, Cannon House Office Building, Hon. Derek Kilmer [chairman of the committee] presiding.

Present: Representatives Kilmer, Perlmutter, Williams, Timmons, Davis, Latta, and Joyce.

The CHAIRMAN. The committee will come to order.

Without objection, the chair is authorized to declare a recess of the committee at any time. I now recognize myself for 5 minutes for an opening statement.

So Article I of the Constitution animates every aspect of this committee's work. Our hearings have focused on what steps we can take to restore Congress to its rightful place as first among coequal branches of government, and our recommendations have addressed the various problems and challenges that we have uncovered.

From day one, the committee's guiding principle has been to make Congress work better for the American people. We have sought to understand how and why Congress' ability to uphold its Article I powers have been weakened so that we can find meaningful and lasting ways to rebuild capacity and strengthen the legislative branch. Today's hearing continues this work and puts that Article I power recognized by the Supreme Court is fundamental to congressional operations in its power to conduct oversight.

Since World War II, under Presidents of both parties, executive branch has expanded tremendously in both size and scope. Between 1946 and 1997, an average of eight new agencies were created each year. And while there is no official count of all Federal agencies, one recent estimate puts the current total at 278. That is 278 agencies full of policy and budgetary experts charged with carrying out Federal law.

Executive branch expansion, along with huge increases in Federal spending, have undoubtedly intensified the need for rigorous oversight. There is no question that this boom in executive power tests the policymaking authority of Congress. The House's 21 standing committees and the Senate's 24 do an amazing job, but monitoring the work of every agency is a monumental task, and this task is made more difficult when the executive branch slow walks or denies congressional requests for information that Congress is constitutionally entitled to obtain.

There is nothing inherently partisan about oversight. Timely access to the information that Congress needs to fulfill its constitutional obligations is in the interest of both parties. I know our witnesses today have some recommendations for fast tracking requests, and I look forward to that discussion.

The oversight process is not just about holding the executive branch accountable, it is about how Congress comes to understand policy successes and failures. In order to legislate smarter on behalf of the American people, Congress needs to know whether the policies and programs it authorizes and funds are working as intended.

Oversight provides members with the information and agency†level feedback they need to make sound legislative and fiscal decisions. The experts joining us today have a lot to say about what Congress can do to strengthen its oversight capacity, and I am looking forward to hearing their ideas and recommendations.

The committee will once again make use of a roundtable format to encourage thoughtful discussion and the civil exchange of ideas and opinion, so we are ready. In accordance with clause 2

(j) of House Rule XI, we will allow up to 30 minutes of extended questioning per witness. And without objection, time will not be strictly segregated between the witnesses, which will allow for extended back†and†forth exchanges between members and the witnesses. Right?

Vice Chair Timmons and I will manage the time to ensure that every member has equal opportunity to participate. Any member who wishes to speak should signal their request to me or Vice Chair Timmons. Additionally, members who wish to claim their individual 5 minutes to question each witness pursuant to clause 2(j)2 of Rule XI will be permitted to do so following the period of extended questioning.

All right. I would like to now invite Vice Chair Timmons to share some opening remarks.

Mr. TIMMONS. Good morning. Thank you all for taking the time to come be with us here today. I think this is an extremely important issue. Really, in the last 20 years, we have seen a hyper partisanship, and it is—we have talked a lot about it in terms of civility, because I do think that depending on what party is in the White House, what party is in the Congress, Oversight Committee becomes just a huge bomb-throwing committee and they are really not doing their job.

I am going to go ahead and tell you that if in the next decade, the one party is in the Congress and the other party is in the White House, they are probably not going to be legitimately doing the things that they ought to be doing. And so the question then becomes what do we need to do to make changes to actually reinstitute the purpose of the role of Congress as it relates to oversight, as the chairman just said, both learning and holding them accountable. So part of that is civility, I think, and we have talked a lot about that, but I think you will have a lot of additional information that we can learn from on the subject and I am looking forward to hearing more about it.

But I am going to go ahead and throw out one thing. I had a meeting yesterday with somebody that started his career on the

Hill in 1974, and it was very interesting. He was on the Appropriations Committee for a while, and he proposed the idea of not even having an Oversight Committee because every—any committee has an Oversight Subcommittee, and that was an interesting thing that I had never thought of before.

So we are going to have a lot of interesting ideas that we are going to be talking about. I just wanted to throw that one out early. But I look forward to your testimony, and with that, Mr. Chairman, I yield back.

The CHAIRMAN. Thank you.

I am honored to welcome our three witnesses joining us this morning. Witnesses are reminded that your written statements will be made part of the record.

Our first witness is Josh Chafetz. Dr. Chafetz is a professor at Georgetown University Law School. Prior to his current position, he spent 12 years on the faculty at Cornell Law School. His research interests include constitutional law, American and British constitutional history, legislation and legislative procedure, and the intersection of law and politics. His recent book, "Congress" Constitution: Legislative Authority and Separation of Powers," explores how Congress uses the various tools at its disposal during conflicts with other branches of government.

Dr. Chafetz, you are now recognized for 5 minutes.

STATEMENTS OF JOSH CHAFETZ, J.D./PH.D., PROFESSOR, GEORGETOWN UNIVERSITY LAW SCHOOL; ELISE BEAN, J.D., WASHINGTON DIRECTOR, THE LEVIN CENTER, WAYNE STATE UNIVERSITY LAW SCHOOL; AND ANNE TINDALL, J.D., COUNSEL, PROTECT DEMOCRACY

STATEMENT OF JOSH CHAFETZ

Mr. CHAFETZ. Thank you very much. Chairman Kilmer, Vice Chairman Timmons, and members of the committee, thank you for the opportunity to testify today regarding the vitally important topic of congressional oversight. Although not explicitly mentioned in the text of the Constitution itself, oversight has been understood from the earliest days to be not only a constitutional power but a constitutional duty of the Houses of Congress.

Following the 18th century British House of Commons, members of the founding generation described Congress and especially the House of Representatives as the grand inquest of the Nation with a special duty to, in Founding Father James Wilson's words, "diligently inquire into grievances arising from both men and things."

This duty was exercised from the earliest days with the House conducting a major investigation in 1792 into the defeat of an Army force under General Arthur St. Clair by a confederation of Native American tribes at the Battle of the Wabash, an investigation that resulted in the passage of corrective legislation.

Oversight power became increasingly important, as the chairman noted, with the growth of the administrative state, beginning really in the late 19th century and accelerating into the first half of the 20th century. And Congress recognized this in various ways, including in the 1946 Legislative Reorganization Act's mandate that standing committees exercise continuous watchfulness of the agen-

cies within their jurisdiction, the creation of the House Oversight Committee and Senate Permanent Subcommittee on Investigations, and the growth and professionalization of member and committee staff and the congressional support agencies. It was also during this period that the Supreme Court issued its most important opinion blessing a broad power of congressional oversight in McGrain v Daugherty.

The recent years have seen congressional demands for information repeatedly stymied by the George W. Bush, Barack Obama, and especially Donald Trump administrations, and that experience has pointed to the limits of the methods that the congressional chambers have been using to enforce their demands for information.

In particular, the last decade and a half have made clear that Congress cannot and should not make itself reliant on the courts to help it get information out of an unwilling executive. When it comes to the criminal contempt mechanism, administrations have repeatedly declined to prosecute their own officials. And when the House has filed civil suits to secure testimony or documents, those suits have taken so long to resolve that even when the chamber nominally wins the information gets produced far too late to help that Congress oversee that administration.

Conflicts from the George W. Bush administration were not settled until President Obama was in office; conflicts from the Obama administration weren't settled until President Trump was in office; and a number of the conflicts from the Trump administration remain pending before the courts today.

In essence, simply by bringing a dispute to court, a congressional chamber is effectively giving up on forcing information from the executive on a useful timeframe. Fortunately, Congress does have other tools at its disposal for forcing information from the executive branch.

And I would like to suggest that the chambers would be well advised to think about how the power of the purse can be used in the service of oversight. Money can only be dispersed from the Treasury pursuant to statute, and every part of the executive needs money to function. This gives Congress significant leverage that it can use to pressure the executive to cooperate with information demands.

The simplest and in some sense crudest version of this is purely retrospective: If an administration stonewalls an information demand, then Congress makes it pay in the next appropriations cycle, perhaps by slashing funds for a misbehaving agency or even zeroing out the salary of a contumacious official. One can then take this sort of simple case and begin to add complexities to make it somewhat less crude.

So, for example, consider a change to House rules that would create a point of order against any appropriation to pay the salary of anyone who had been held in contempt by the House and hadn't purged that contempt. Now, of course, the point of order could be waived, but it would change the baseline, right. A simple application of the rules would withhold the official's salary, and anyone wanting to pay it would have to take an affirmative vote to do so and explain that.

But consider the use of oversight riders: Certain appropriations could be paired with riders requiring the provision of information to Congress on a timely schedule. This was used to some extent in the CARES Act a couple years ago. Failure to provide that information could automatically trigger cuts either to the underlying appropriation itself or to the salaries of the noncompliant firms.

And such riders could make use of non†severability clauses, so that if OLC were to declare, as it has done on a number of occasions, that the rider was unconstitutional, that would lead to the loss of the underlying appropriation as well that is putting some pressure on OLC to be more restrained in making those sorts of determinations.

Those suggestions I have just made rely on the threat of withholding funds to secure cooperation with oversight, and I do think that is a very potent threat. But I also want to suggest one way that Congress might spend money to better facilitate oversight and that is by engaging in capacity building.

As this committee well knows, staff number, staff tenure, staff pay, and staff training are all in need of more resources. This is true at both the member and committee level and even more so in the case of the support agencies like GAO, CBO, and CRS. This committee has already recommended increases in funding for congressional capacity, and the fiscal year 2022 leg branch appropriations bill passed by the House is a good start, but more could certainly be done on that front as well.

Oversight is one of Congress' most important functions, and it is under threat and has been for several decades now. Creative thinking about methods of enforcing information demands is sorely needed, and I submit to this committee that the appropriations process has the potential to offer some serious solutions. Thank you very much.

[The statement of Mr. Chafetz follows:]

"Article One: Strengthening Congressional Oversight Capacity"

Hearing Before the House Select Committee
on the Modernization of Congress

Thursday, November 4, 2021, 9:00 AM

Testimony of Josh Chafetz
Professor of Law, Georgetown University Law Center

Chairman Kilmer, Vice Chairman Timmons, and Distinguished Members of the Committee:

Thank you for the opportunity to testify today regarding the vitally important topic of congressional oversight. My name is Josh Chafetz, and I am a Professor of Law at Georgetown University Law Center and an Affiliated Faculty Member of both the Government Department and the McCourt School of Public Policy at Georgetown. My research and teaching focus on legislative procedure, the separation of powers, and the constitutional structuring of American national politics. In 2019-2020, I served on the American Political Science Association's Presidential Task Force on Congressional Reform, which produced a report for this Committee.[1]

CONGRESS'S POWER—AND DUTY—TO CONDUCT VIGOROUS OVERSIGHT

Although oversight is not explicitly mentioned in the text of the Constitution, its existence is a necessary structural inference from the powers that are enumerated. Congress is given the power to legislate on all matters within the purview of the federal government,[2] including matters dealing with the structuring and operations of other parts of the federal government itself;[3] to control the raising and disbursing of federal moneys;[4] to impeach and try impeachments;[5] and to propose constitutional amendments.[6] (The Senate is also given the power to confirm principal officers and ratify treaties.[7]) This is a *very* expansive remit.[8]

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[1] *See* AM. POL. SCI. ASS'N TASK FORCE ON CONGRESSIONAL REFORM, TASK FORCE REPORT 8-16 (2019), *available at* https://www.apsanet.org/Portals/54/APSA%20RPCI%20Congressional%20Reform%20Report.pdf?ver=2020-01-09-094944-627 [hereinafter APSA REPORT].

[2] U.S. CONST. art. I, § 8; *id.* art. IV, § 3, cl. 2; *id.* amend. XIII, § 2; *id.* amend. XIV, § 5; *id.* amend. XV, § 2; amend. XIX, cl. 2; *id.* amend. XXIII, § 2; *id.* amend. XXIV, § 2; *id.* amend. XXVI, § 2.

[3] *Id.* art. I, § 8, cl. 18; *id.* art. II, § 1, cl. 4; *id.* § 2, cl. 2; *id.* art. III, § 1; *id.* § 2, cl. 2; *id.* amend. XX, §§ 3-4; *id.* amend. XXV, § 4.

[4] *Id.* art. I, § 8, cl. 1-2; *id.* § 9, cl. 7.

[5] *Id.* art. I, § 2, cl. 5; id. § 3, cl. 6-7; id. art. II, § 4.

[6] *Id.* art. V.

[7] *Id.* art. II, § 2, cl. 2.

[8] *See* Josh Chafetz, *Nixon/Trump: Strategies of Judicial Aggrandizement*, 110 GEO. L.J. (forthcoming 2021) (manuscript at 18 n.113), *available at* https://ssrn.com/abstract=3788366 [hereinafter Chafetz, *Nixon/Trump*] ("Even if one accepts that any given exercise of the congressional investigatory power must be justified with respect to some explicitly enumerated congressional power, however, it does not follow that there is any matter beyond Congress's capacity to investigate.... [E]ven an investigation for a (currently) unconstitutional purpose could be

Each of these vital constitutional powers requires access to information if it is to be exercised effectively in the public interest. As Senator Fulbright put it, "The power to investigate is one of the most important attributes of the Congress. It is perhaps also the most necessary of all the powers underlying the legislative function."[9] As the great legal scholar (and later member of the Federal Trade Commission and member and chair of the Securities and Exchange Commission) James Landis elaborated,

> [K]nowledge is not an *a priori* endowment of the legislator. His duty is to acquire it, partly for the purposes of further legislation, partly to satisfy his mind as to the adequacy of existing laws. Yet the ultimate basis for the duty is the broader presupposition of representative government that the legislator is responsible to his electorate for his actions. Responsibility means judgment, and judgment, if the word implies its intelligent exercise, requires knowledge.[10]

Or, more succinctly, "To deny Congress power to acquaint itself with facts is equivalent to requiring it to prescribe remedies in darkness."[11] No sensible constitutional order would require its most representative institution, an institution tasked with carrying out the vital tasks listed above, to blind itself.[12]

Unsurprisingly, then, broad oversight powers have been understood to inhere in the congressional chambers from the earliest days of the Republic. In 1792, the House conducted the first major congressional investigation, inquiring into the defeat of an army force under the command of General Arthur St. Clair by a confederacy of Native American tribes at the Battle of the Wabash.[13] That investigation, conducted by a special committee, included taking testimony from St. Clair himself and Secretary of War Henry Knox, as well as examining St. Clair's personal papers and papers from the War Department and the Treasury Department (personally delivered by Treasury Secretary Alexander Hamilton). The committee's investigation spurred Congress to take remedial action, removing authority for procuring army supplies from the War Department and locating it in the Treasury Department.[14] Importantly, the House conducted the

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justified as an investigation that might potentially lead to a constitutional amendment, making that (formerly) unconstitutional purpose constitutional.").

[9] J.W. Fulbright, *Congressional Investigations: Significance for the Legislative Process*, 18 U. CHI. L. REV. 440, 441 (1951).

[10] James M. Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 HARV. L. REV. 153, 205 (1926).

[11] *Id.* at 209.

[12] *See also, e.g.*, JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 152-98 (2017) [hereinafter CHAFETZ, CONGRESS'S CONSTITUTION]; Josh Chafetz, *Congressional Overspeech*, 89 FORDHAM L. REV. 529 (2020) [hereinafter Chafetz, *Overspeech*]; Carl Levin & Elise J. Bean, *Defining Congressional Oversight and Measuring Its Effectiveness*, 64 WAYNE L. REV. 1 (2018).

[13] For accounts of the St. Clair investigation and the events giving rise to it, see ERNEST J. EBERLING, CONGRESSIONAL INVESTIGATIONS: A STUDY OF THE ORIGIN AND DEVELOPMENT OF THE POWER OF CONGRESS TO INVESTIGATE AND PUNISH FOR CONTEMPT 36-37 (1928); DOUGLAS L. KRINER & ERIC SCHICKLER, INVESTIGATING THE PRESIDENT: CONGRESSIONAL CHECKS ON PRESIDENTIAL POWER 9-12 (2016); George C. Chalou, *St. Clair's Defeat, 1792*, in 1 CONGRESS INVESTIGATES: A DOCUMENTED HISTORY, 1792-1974, at 3 (Arthur M. Schlesinger Jr. & Roger Bruns eds., 1975); Chafetz, *Overspeech*, *supra* note 12, at 537-38.

[14] An Act Making Alterations in the Treasury and War Departments, ch. 37, § 2, 1 Stat. 279, 280 (1792). *See* Chalou, *supra* note 13, at 13 (characterizing this statute as "a slap at Knox"). *See also* KRINER & SCHICKLER,

St. Clair investigation after *rejecting* a proposal that it instead "request[]" that President Washington initiate an investigation into the defeat.[15] As early as the Second Congress, then, it was vitally important to members of Congress that they, and not executive branch officials, be the ones who oversaw the executive branch and remedied any defects they found therein.

In conducting the St. Clair investigation, the House was calling on a long tradition of oversight by Anglo-American legislatures.[16] By the middle of the eighteenth century, it was common to refer to the British House of Commons as "the grand inquest of the nation,"[17] that is, the body tasked with inquiring into national affairs and righting any wrongs it might find. As William Pitt the Elder put it on the House floor in 1741, "We are called the Grand Inquest of the Nation, and as such it is our Duty to inquire into every Step of publick Management, either Abroad or at Home, in order to see that nothing has been done amiss."[18]

Early American constitutional thinkers picked up on this "grand inquest" language and applied it to Congress. Virginia delegate George Mason argued at the Constitutional Convention that Congress should be required to meet once a year because "the Legislature, besides *legislative*, is to have *inquisitorial* powers, which can not safely be long kept in a State of suspension."[19] In his famous 1790-1791 "Lectures on Law," Supreme Court Justice James Wilson (who had also played a major role as a Pennsylvania delegate to the Constitutional Convention) echoed: "The house of representatives, for instance, form the grand inquest of the state. They will diligently inquire into grievances, arising both from men and things."[20] And in the House itself in 1794, Massachusetts Federalist Fisher Ames, who had been a delegate to the Massachusetts ratifying convention, referred to "the character of this House as the grand inquest of the Nation, as those who are not only to impeach those who perpetrate offence, but to watch and give the alarm for the prevention of such attempts."[21]

Although oversight was understood to be an important congressional power from the earliest days of the Republic, as both early constitutional discourse and the St. Clair investigation make clear, it gained prominence and importance with the rapid growth of the administrative state beginning in the late nineteenth century. Indeed, it was this era that gave rise to the most important Supreme Court decision on the scope of the congressional oversight power, *McGrain*

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supra note 13, at 12 (noting that this investigation as a whole "embarrassed and politically damaged the Federalists" and emboldened the Jeffersonian faction in nascent partisan competition).

[15] H.R. JOUR., 2d. Cong., 1st Sess. 551-52 (Mar. 27, 1792).

[16] *See* Josh Chafetz, *"In the Time of a Woman, Which Sex Was Not Capable of Mature Deliberation": Late Tudor Parliamentary Relations and Their Early Stuart Discontents*, 25 YALE J.L. & HUMAN. 181, 188-91, 195-99 (2013) (noting the House of Commons' use of committees to take evidence and decide contested elections in the mid-sixteenth and early-seventeenth centuries); CHAFETZ, CONGRESS'S CONSTITUTION, *supra* note 12, at 48-49, 157-63, 268 (noting the Commons' use of their investigatory power as a tool in their clashes with the Stuart monarchs in the seventeenth century).

[17] *See* Chafetz, *Overspeech*, *supra* note 12, at 538-41 (tracing the development of the "grand inquest" formulation).

[18] 13 THE HISTORY AND PROCEEDINGS OF THE HOUSE OF COMMONS 172 (London, Richard Chandler 1743).

[19] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 199 (Max Farrand ed., rev. ed. 1966) (Madison's recounting); *accord id.* at 206 (King's recounting).

[20] JAMES WILSON, *Lectures on Law, Part II, Chapter 1: Of the Constitutions of the United States and of Pennsylvania—of the Legislative Department*, *in* 2 COLLECTED WORKS OF JAMES WILSON 829, 848 (Kermit L. Hall & Mark David Hall eds., 2007).

[21] 4 ANNALS OF CONG. 930 (1794).

v. Daugherty, which arose out of the Senate's investigation into the Teapot Dome scandal.[22] Justice Willis Van Devanter, for a unanimous Court (with Justice Harlan Stone recused), held that, "[w]e are of opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function."[23] He elaborated:

> 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 do 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 .... Thus there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised.[24]

Subsequent cases have reaffirmed this holding.[25]

Institutionally, Congress made a significant statement about the importance of oversight in the Legislative Reorganization Act of 1946, which tasked the standing committees in both chambers with an obligation to conduct oversight:

> To assist the Congress in appraising the administration of the laws and in developing such amendments or related legislation as it may deem necessary, each standing committee of the Senate and the House of Representatives shall exercise continuous watchfulness of the execution by the administrative agencies concerned of any laws, the subject matter of which is within the jurisdiction of such committee ....[26]

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[22] 273 U.S. 135 (1927).

[23] *Id.* at 174.

[24] *Id.* at 175.

[25] *See, e.g.*, Watkins v. United States, 354 U.S. 178, 187 (1957) ("The power of the Congress to conduct investigations is inherent in the legislative process. 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 the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste."); Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 504 (1975) ("This Court has often noted that the power to investigate is inherent in the power to make laws .... Issuance of subpoenas such as the one in question here has long been held to be a legitimate use by Congress of its power to investigate."); Trump v. Mazars, 140 S. Ct. 2019, 2031 (2020) (quoting *McGrain* and *Watkins* to similar effect).

[26] Legislative Reorganization Act of 1946, § 136, Pub. L. No. 79-601, 60 Stat. 812, 832. On the 1946 Act generally, see CHAFETZ, CONGRESS'S CONSTITUTION, supra note 12, at 292-95; ERIC SCHICKLER, DISJOINTED PLURALISM: INSTITUTIONAL INNOVATION AND THE DEVELOPMENT OF THE U.S. CONGRESS 140-50 (2001); Roger H. Davidson, *The Legislative Reorganization Act of 1946*, 15 LEGIS. STUD. Q. 357 (1990).

The Legislative Reorganization Act of 1970 reaffirmed this oversight obligation.[27] Equally importantly, in these acts and others, Congress began building out its own oversight capacity by regularizing and professionalizing both committee and member staffing;[28] directing increased staff and resources to nonpartisan institutions, including the Legislative Reference Service (renamed the Congressional Research Service in the 1970 Act), the Offices of Legislative Counsel, and the General Accounting Office (later renamed the Government Accountability Office);[29] and requiring that committees issue biennial oversight reports[30] and ensure that, to the greatest extent possible, programs within their jurisdictions were subject to annual appropriations.[31] Moreover, myriad other statutes contain provisions meant to encourage or facilitate oversight, ranging from protections for whistleblowers,[32] to the creation of the Congressional Budget Office,[33] to requiring departments and agencies to have inspectors general and chief financial officers.[34]

In 1927, the House created a unified Committee on Expenditures in the Executive Department, to replace the eleven committees that previously had jurisdiction to oversee executive expenditures in various departments; in 1952, the committee's name was changed to the Committee on Government Operations—the precursor of today's Committee on Oversight and Reform—in order to emphasize its broader oversight remit.[35] In 1948, the Senate likewise transformed its Special Committee to Investigate the National Defense Program (popularly known as the Truman Committee, due to then-Senator Harry S. Truman's chairmanship from 1941-1945) into its Permanent Subcommittee on Investigations.[36] Both of these committees are tasked by their

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[27] Legislative Reorganization Act of 1970, § 118, Pub. L. No. 91-510, 84 Stat. 1140, 1156 (requiring each standing committee to "review and study, on a continuing basis, the application, administration, and execution of those laws, or parts of laws, the subject matter of which is within the jurisdiction of that committee"). On the 1970 Act generally, see CHAFETZ, CONGRESS'S CONSTITUTION, *supra* note 12, at 294-95; SCHICKLER, supra note 26, at 213-17; Walter Kravitz, *The Legislative Reorganization Act of 1970*, 15 LEGIS. STUD. Q. 375 (1990).

[28] *See* CHAFETZ, CONGRESS'S CONSTITUTION, *supra* note 12, at 292-94; Davidson, *supra* note 26, at 367-69; Kravitz, *supra* note 27, at 379, 383, 388.

[29] *See* CHAFETZ, CONGRESS'S CONSTITUTION, *supra* note 12, at 293-94. On the congressional support agencies as a suite, see Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 U. PA. L. REV. 1541 (2020).

[30] Legislative Reorganization Act of 1970, § 118, 84 Stat. at 1156.

[31] Id. § 253(a)-(b), 84 Stat. at 1174-75. On the ways in which annual appropriations facilitate congressional control over the executive, see CHAFETZ, CONGRESS'S CONSTITUTION, *supra* note 12, at 61-66.

[32] E.g., Lloyd-La Follette Act, ch. 389, § 6, 37 Stat. 539, 555 (1912); Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 101(a), 92 Stat. 1111, 1116-17; Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16; Intelligence Community Whistleblower Protection Act of 1998, Pub. L. No. 105-272, §§ 701-02, 112 Stat. 2396, 2413-17.

[33] Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, tit. II, 88 Stat. 297, 302-05.

[34] Inspector General Act of 1978, Pub. L. No. 95-452, § 5(b), 92 Stat. 1101, 1103; Chief Financial Officers Act of 1990, Pub. L. No. 101-576, § 102(b)(3), 104 Stat. 2838, 2839; *id.* § 202, 104 Stat. at 2840; *id.* § 205, 104 Stat. at 2844; *id.* § 301, 104 Stat. at 2847-48; *id.* § 303(e), 104 Stat. at 2852.

[35] *See Guide to House Records, Chapter 11: Records of the Government Operations Committee and Its Predecessors*, NAT'L ARCHIVES & RECORDS ADMIN, CTR. FOR LEGIS. ARCHIVES, https://www.archives.gov/legislative/guide/house/chapter-11.html (last visited Oct. 31, 2021).

[36] *See Historical Background*, PERMANENT SUBCOMM. ON INVESTIGATIONS 1, https://www.hsgac.senate.gov/imo/media/doc/PSIHistoricalBackgroundto115th.pdf (last visited Oct. 31, 2021).

chambers with roving oversight jurisdiction,[37] further strengthening the chambers' commitments to vigorous and effective oversight.

INFORMATION DISPUTES BETWEEN CONGRESS AND THE EXECUTIVE

In service of this robust congressional authority to conduct oversight, discussed above, the chambers have developed a number of tools.[38] But it has become increasingly apparent across the first three presidencies of the twenty-first century that those tools, as the chambers have chosen to use them, have left a significant hole in Congress's oversight capacity. In particular, one question has arisen with increasing urgency: how can Congress force information from an executive branch that is unwilling to provide it? Any satisfying answer to this question must be sensitive not only to whether the information demanded is *eventually* provided to the chamber demanding it, but also to whether it is ultimately provided on a *timeframe* that is useful to that chamber.

In 2007, the House Judiciary Committee issued subpoenas to former White House Counsel Harriet Miers and then-White House Chief of Staff Joshua Bolten, in connection with the committee's inquiry into the firing of a number of U.S. Attorneys. After they refused to comply, the House voted to hold them in contempt in 2008; the Department of Justice refused to prosecute them;[39] and the committee sued, seeking injunctive and declaratory relief. Although the committee "won" before the district court,[40] the case was ultimately settled while on appeal in March 2009—a month and a half into the next Congress and the next presidential administration.[41] The ultimate resolution clearly did nothing to help Congress oversee the George W. Bush Administration.

In 2011, the House Oversight Committee subpoenaed a number of documents from the Department of Justice in connection with its investigation into the Bureau of Alcohol, Tobacco, Firearms and Explosives's "gunwalking" operation codenamed "Operation Fast and Furious." When DOJ turned over less than the committee thought it was entitled to, the House held Attorney General Eric Holder in contempt in 2012. Once again, DOJ refused to prosecute; once again the committee sued. It was not until 2016 that a trial judge ordered that most of the

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[37] RULES OF THE HOUSE OF REPRESENTATIVES, 117TH CONG., R. X(4)(c)(1)-(2) (2021); STANDING RULES OF THE SENATE, S. DOC. NO. 113-18, R. XXV(1)(k)(2) (2013).

[38] For discussions of these tools, see Chafetz, *Overspeech, supra* note 12, at 545-48; CHRISTOPHER M. DAVIS ET AL., CONG. RSCH. SERV., RL30240, CONGRESSIONAL OVERSIGHT MANUAL (2021); MORTON ROSENBERG, THE CONST. PROJECT, WHEN CONGRESS COMES CALLING: A STUDY ON THE PRINCIPLES, PRACTICES, AND PRAGMATICS OF LEGISLATIVE INQUIRY (2017).

[39] 2 U.S.C. § 194 provides that a U.S. Attorney "shall … bring" a contempt of Congress citation certified by a chamber's presiding officer "before the grand jury for its action." Despite the seemingly mandatory language, the Department of Justice concluded that Miers and Bolten had property invoked executive privilege; therefore "non-compliance … with the Judiciary Committee subpoenas did not constitute a crime, and therefore the Department will not bring the congressional contempt citations before a grand jury or take any other action to prosecute Mr. Bolten or Ms. Miers." Letter from Att'y Gen. Michael B. Mukasey to Speaker Nancy Pelosi (Feb. 29, 2008), *available at* https://www.documentcloud.org/documents/373620-mukasey-letter-to-pelosi-feb-29-2008.html.

[40] Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53 (D.D.C. 2008).

[41] *See* CHAFETZ, CONGRESS'S CONSTITUTION, *supra* note 12, at 185-88 (describing the lifecycle of the controversy).

documents had to be turned over (Holder had stepped down as Attorney General the previous year); fights over some of the remaining records stretched into the Trump Administration.[42]

While oversight conflicts between the House and the George W. Bush and Obama Administrations focused on particular, discrete issues, the Trump Administration engaged in more systematic, across-the-board stymieing of congressional oversight.[43] Even in situations where clear statutory text seemed to impose a duty to comply with congressional information demands, the administration refused. Consider the "rule of seven," which provides that any seven members of the House Oversight Committee or any five members of the Senate Committee on Homeland Security and Governmental Affairs can request information from any executive agency, which "shall submit any information requested of it relating to any matter within the jurisdiction of the committee."[44] In June 2017, eighteen members of the House Oversight Committee demanded that the General Services Administration turn over details of the contract by which the Old Post Office Building in Washington was leased to an entity owned by Trump and his children. That demand was ignored.[45] Or consider the statutory requirement that the Treasury "shall furnish" the Way and Means Committee with "any [tax] return or return information specified" in a written request from the committee chair.[46] The committee made such a request in 2019 for President Trump's tax returns, and once again the demand was ignored.[47]

In both of those cases, the House committees sued, and both of those cases remain tied up in litigation to this day. In the "rule of seven" case, the D.C. Circuit took until December 29, 2020—about three weeks before President Biden's inauguration—to rule that the committee members had standing to sue,[48] but the case has yet to be taken up by the district court on remand. In the tax returns case, six months into the Biden Administration, the Department of Justice's Office of Legal Counsel issued an opinion concluding that the Treasury "must comply" with the committee's demand.[49] Trump moved to block the Treasury from complying, and a hearing is currently scheduled for later this month.[50] Indeed, judicial pacing and other judicial choices served to slow oversight of the Trump Administration across the board to such an extent as to render it largely impotent.[51] To whatever extent information is eventually turned over, it will obviously come far too late to help with oversight of the Trump Administration.

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[42] *See id.* at 188-89 (describing the lifecycle of this controversy).

[43] *See, e.g.*, Charlie Savage, *Trump Is Setting Course to Battle House Oversight*, N.Y. TIMES, Apr. 25, 2019, at A1.

[44] 5 U.S.C. § 2954.

[45] The facts are recounted in *Cummings v. Murphy*, 321 F. Supp. 3d 92, 97-99 (D.D.C. 2018).

[46] 26 U.S.C. § 6103(f)(1).

[47] *See* Comm. on Ways & Means v. U.S. Dep't of the Treasury, No. 1:19-cv-01974, 2019 WL 4094563 (D.D.C. Aug. 29, 2019).

[48] Maloney v. Murphy, 984 F.3d 50 (D.C. Cir. 2020).

[49] Ways and Means Committee's Request for the Former President's Tax Returns and Related Tax Information Pursuant to 26 U.S.C. § 6103(f)(1), 45 Op. O.L.C. (slip op. at 39) (July 30, 2021), https://www.justice.gov/olc/file/1419111/download.

[50] *See* Docket, Comm. on Ways & Means v. U.S. Dep't of the Treasury, No. 1:19-cv-01974 (D.D.C.) (entry dated Oct. 25, 2021).

[51] *See generally* Chafetz, *Nixon/Trump*, *supra* note 8 (manuscript at Part II).

The experience of the last 15 years thus holds two important lessons for congressional oversight of the executive branch. First, and perhaps most obviously, the criminal contempt provision[52] is almost entirely useless as against the executive branch, because the executive branch will not prosecute its own officers. (One could imagine it having some effect if a contumacious official feared that some future administration might prosecute her, but thus far that has not happened and does not appear to have shaped the thinking of any executive-branch contemnor.)

Second, mechanisms for enforcing congressional information demands that rely on the courts are fool's errands.[53] Even an eventual substantive "victory" in the courts will almost always come too late for purposes of overseeing the executive branch. And presidents, knowing this, will have every incentive to draw out court fights for as long as possible.

As a result, Congress is very much in need of creative thinking about nonjudicial avenues for forcing the executive branch to produce information.

APPROPRIATIONS-BASED OVERSIGHT

I would suggest that some of the most promising mechanisms for enforcing congressional information demands rely on Congress's power of the purse.[54] Because only Congress can control the disbursal of money from the Treasury,[55] and because every part of the executive needs money to function, Congress can use its power of the purse to put significant pressure on the executive to change its behavior in all sorts of ways—including in how the executive responds to congressional information demands.[56]

The simplest and crudest form this might take would be purely retroactive: during an extended controversy with some part of the executive branch over access to information, a chamber could use the next appropriations cycle to put pressure on that agency by squeezing its funding, including perhaps by zeroing out the funding for a particular contumacious official. Of course, the other chamber might not agree with this approach, and the president almost certainly would not. But appropriations bills are must-pass: if the choice is between accepting a bill that funds a substantial portion of the government but also slashes the funding of some targeted agency or office in response to its stonewalling oversight demands, on the one hand, or refusing to pass or vetoing that bill, thereby creating lapses in appropriations for every program covered by that appropriations bill, on the other, simply accepting the bill with the retaliatory cuts may be the least-bad option. In this regard, the practice of annual appropriations of discretionary spending is significantly empowering to each house of Congress.[57]

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[52] 2 U.S.C. §§ 192, 194.

[53] *See generally* Chafetz, *Nixon/Trump*, *supra* note 8.

[54] For a broader, historically grounded analysis of Congress's power of the purse generally, see CHAFETZ, CONGRESS'S CONSTITUTION, *supra* note 12, at 45-77.

[55] *See* U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law ....").

[56] These proposals draw on testimony I submitted to the House Budget Committee last year. *See Protecting Congress' Power of the Purse and the Rule of Law*, Hearing Before the H. Comm. on the Budget, 116th Cong. 11-74 (March 11, 2020), *available at* https://www.govinfo.gov/app/details/CHRG-116hhrg41966/context.

[57] *See* CHAFETZ, CONGRESS'S CONSTITUTION, *supra* note 12, at 61-73.

One can take this basic insight and then begin to add complexities that might make it less crude and perhaps at the margins less politically fraught. Consider, for example, a change to the standing rules of the House that would create a point of order against an appropriation to pay the salary of anyone who had been held in contempt by the House and whose contempt had not been purged. Of course, as with any point of order, it could be waived, but it would flip the presumption: vigorous use of the power of the purse to enforce information demands would simply be applying House rules, whereas paying the salary of a contumacious official would require an affirmative vote.

Consider also the use of oversight riders: as Senator Blumenthal and I have proposed,[58] certain appropriations could come with riders requiring that some official or officials provide specified information to Congress. If they fail to provide that information, it could trigger automatic cuts, either to the underlying appropriation or to the salaries of the officials who have failed to comply. And, importantly, these riders should come with explicit *non-severability clauses*, insisting that the rider and the appropriation stand or fall together. Without such a clause, if the Office of Legal Counsel decides that an appropriations rider is unconstitutional, then the executive considers itself free to spend the appropriated funds without the restrictions imposed by the rider.[59] In effect, the OLC's determination acts as a de facto line-item veto of the rider alone. A non-severability clause would significantly up the cost to the executive of making this determination: it would, in effect, say, "You can decide that this rider is unconstitutional, but in that case you lose the appropriation to which it was attached, as well." (The enforcement of such provisions would be facilitated by a requirement that OLC publish its budget and appropriations law opinions, a requirement that was included in the Congressional Power of the Purse Act introduced in the last Congress.[60])

While the above suggestions all rely on the threat of *withholding* money as a way to change executive branch behavior, I would also suggest one way Congress might *spend* money to enhance its oversight capabilities: internal capacity building. By increasing its own ability to find facts and uncover abuses, Congress can make itself both less dependent on information shared by the executive and also more aware of when the executive is withholding important information. And yet congressional capacity—as measured by the number of member and committee staff, the number of staff at nonpartisan institutions like the Congressional Budget Office, Government Accountability Office, and Congressional Research Service, staff tenure in office, and staff pay—has been in decline for decades.[61] The American Political Science Association Presidential

[58] Richard Blumenthal & Josh Chafetz, *Trump is Already Trying to Get Around CARES Act Oversight*, SLATE (Apr. 16, 2020), https://slate.com/news-and-politics/2020/04/richard-blumenthal-trump-cares-act-oversight.html.

[59] For published examples of OLC deciding just that, see, e.g., Unconstitutional Restrictions on Activities of the Office of Science and Technology Policy in Section 1340(a) of the Department of Defense and Full-Year Continuing Appropriations Act, 2011, 35 Op. O.L.C., 2011 WL 4503236 (Sept. 19, 2011); Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act, 33 Op. O.L.C., 2009 WL 2810454 (June 1, 2009).

[60] Congressional Power of the Purse Act, H.R. 6628, 116th Cong., § 214 (introduced in the House Apr. 28, 2020).

[61] *See* Josh Chafetz, *Delegation and Time ... And Staff*, REGULATORY REV. (Mar. 4, 2020), https://www.theregreview.org/2020/03/04/chafetz-delegation-time-staff/; Josh McCrain, *Congressional Staff Salaries Over Time* (May 31, 2017), http://joshuamccrain.com/index.php/2017/05/31/congressional-staff-salaries-over-time/; R. ERIC PETERSON & SARAH J. ECKMAN, CONG. RESEARCH SERV., R44682, STAFF TENURE IN SELECTED POSITIONS IN HOUSE MEMBER OFFICES, 2006-2016 (2016); R. ERIC PETERSON & SARAH J. ECKMAN, CONG.

Task Force on Congressional Reform recommended significant increases in capacity across the board,[62] as has this Committee. The FY2022 Legislative Branch Appropriations bill, passed by the House in July,[63] would make significant strides in this direction,[64] but more can still be done, and whatever is done to increase capacity will redound significantly to Congress's benefit overall, and in conducting oversight in particular.

CONCLUSION

Oversight is an absolutely crucial function of Congress in our constitutional order. And to conduct oversight effectively, Congress needs to be able to force information from an executive branch that is at times reluctant to provide it, as the growing conflicts over information between congressional houses and the executive in the last two decades have made increasingly clear. Congress's power of the purse provides it with levers that it can use in these conflicts, and it would be well advised to make creative use of those levers going forward, so as to maintain its proper role in our constitutional system.

Thank you.

RESEARCH SERV., R44688, CONGRESSIONAL STAFF: CRS PRODUCTS ON SIZE, PAY, AND JOB TENURE (2016); MOLLY REYNOLDS ET AL., BROOKINGS INST., VITAL STATISTICS ON CONGRESS ch. 5 (Mar. 2019), *available at* https://www.brookings.edu/wp-content/uploads/2019/03/Chpt-5.pdf.

[62] APSA REPORT, *supra* note 1, at 8-16.

[63] Legislative Branch Appropriations Act, 2022, H.R. 4346, 117th Cong. (passed the House July 28, 2021).

[64] *See generally* H.R. Rep. No. 117-80 (2021).

The CHAIRMAN. Thanks, Dr. Chafetz.

Our next witness is Elise Bean. Ms. Bean is the Washington Director of the Levin Center at Wayne State University Law School. From 1985 to 2014, she worked for Senator Carl Levin, including 15 years at the Senate Permanent Subcommittee on Investigations.

Ms. Bean was appointed PSI staff director and chief counsel in 2003 where she handled the wide range of investigations hearings and legislation. In 2014, after Senator Levin retired and the Levin Center at Wayne Law was established in his honor, she joined the center to work on strengthening legislative capabilities at the Federal, State, local, and international levels to conduct investigations and oversight.

Ms. Bean, welcome back. You are now recognized for 5 minutes.

STATEMENT OF ELISE BEAN

Ms. BEAN. Thank you so much. Seems to be all right now. How about that? Okay. I think I am all right. All right. So we will get further away.

Well, thank you so much for this opportunity to talk about strengthening Congress' Article I powers to do oversight. As people have mentioned, oversight is key to enacting the constitutional system of checks and balances, and it is key to getting the information that Congress needs to do its job.

My prepared statement has a whole menu of things that could be done large and small to try to strengthen congressional oversight authority, procedures, staffing, but I would like to concentrate on just one particular recommendation that has to do with the ability of Congress to issue legal opinions on oversight issues.

As we know, for decades, the executive branch has been able to issue legal opinions through the Department of Justice Office of Legal Counsel, and they have issued a whole bunch of them on oversight issues. For example, they have said that presidential aides are absolutely immune to congressional subpoenas.

I don't know of anyone in Congress who agrees with that, and the few courts that have looked at that issue haven't agreed that such an immunity exists either; and yet, Presidents on both sides of the aisle have taken that position and continue to take that position. Congress has no ability to issue its own legal opinion as a whole as an institution explaining why such immunity should not exist. We don't have that mechanism right now.

In the last Congress, this committee recognized that weakness and said that Congress needs to strengthen its hand in court. And I know that the committee is considering this Congress to send a letter to the GAO asking them to do a study, but how exactly would you do this? How would you set up an office that allows Congress as a whole to issue legal opinions? Should they be done by the House and the Senate separately? Should there be bicameral opinions?

I think they would not be worthwhile unless they were bipartisan and they contained careful legal analysis. How would you staff that office? How would they draft those opinions? How would they finalize and approve those opinions? Those are all difficult questions but they can be worked out.

Some people think, well, you are never going to have the two sides agree on anything, much less the two Houses, and yet, I would submit that there are a lot of areas where consensus is possible, one being obviously that presidential aides are not absolutely immune to congressional subpoenas and don't even have to appear at a congressional hearing when called.

Executive privilege might be another area, requiring the President, if he wants to withhold documents, has to have a list of those, a privilege log that has to be given to the committee that has asked for the information.

Another area, minority requests. Right now, there is an opinion that is within the Office of Legal Counsel that says if a ranking member of a committee requests information, the agencies can simply ignore it. I think both sides of the aisle would agree that minority members, ranking members of committees, aren't going to be able to get information as well. So there are a lot of areas where bipartisan, bicameral agreement is possible if we set up a procedure, an office, mechanism to get those issued, and we haven't done that right now.

I would like to also offer just one other thought from the menu of possible options, and that is enforcing—getting better civil enforcement of congressional subpoenas in court. Josh is absolutely right that it has been very difficult over the last few years, processes almost broken down, and there are a lot of things that Congress could do to improve it.

There is a bill that has been introduced, the Protect Our Democracy Act, title 4, that actually had some bipartisan language that has been worked out. I think it is pretty good language, and I would encourage this committee to take a look at it—it was developed with Congressman Issa, among others, so it is bipartisan—and to think about endorsing that approach in that bill to title 4.

So thank you very much for your attention, and I am available to answer your questions.

[The statement of Ms. Bean follows:]

Testimony of
Elise J. Bean, Levin Center at Wayne Law

Before

House Select Committee
on the Modernization of Congress

On

Article One: Strengthening Congressional Oversight Capacity

November 4, 2021

Thank you for this opportunity to address the Committee on ways to strengthen bipartisan, fact-based oversight by Congress.

I represent the Levin Center at Wayne Law, where I work as director of its Washington office. The Levin Center, which is part of Wayne State University Law School in Detroit, was established in honor of Senator Carl Levin who championed effective oversight during his 36 years representing Michigan in the U.S. Senate. The Center's primary mission is to strengthen congressional oversight through research, training, internships, conferences, and other activities.[1]

Power of Oversight

Last year, at your invitation, the Levin Center testified about the power of oversight to fix problems plaguing our communities, save taxpayer dollars, strengthen federal programs, and carry out Congress' constitutional responsibility to provide checks and balances among the branches of government. Oversight can also help bridge political divides by providing legislators with an opportunity to develop a mutual understanding of a problem and reach consensus on the relevant facts. Reaching consensus on the facts can then facilitate bipartisan reforms.

Effective oversight can help Congress forge progress in many areas of common concern, from fighting ransomware, consumer fraud, and terrorism to supporting health care innovation, infrastructure, and small business. It also has great potential to help in the healing of Congress by providing a mechanism for productive bipartisan interaction, which is why today's hearing is so important. In addition, as we noted last year, oversight investigations provide a key lens through which the public views Congress. Highly partisan hearings or hearings that expose poor preparation by legislators can damage public confidence in government, while bipartisan

[1] The Levin Center is affiliated with Wayne State University Law School, but our views do not necessarily present the views of either the University or the Law School.

hearings that examine problems of real concern with a commitment to the facts can strengthen public confidence in Congress. The bottom line is that one way to improve Congress' standing with the public is to improve its track record on oversight.

Possible Oversight Reforms

The Committee asked the Levin Center to offer suggestions for oversight reforms in the 116th Congress as well as this Congress. Below are nine new and updated suggestions, drawing on concepts generated by a community of organizations committed to strengthening congressional oversight. In addition to the Levin Center, that community includes the Federalist Society Article I Initiative, Project on Government Oversight (POGO), Lugar Center, American Oversight, Co-Equal, a wide array of academic experts, government investigators, public interest groups, investigative reporters, and more. The following reforms – some easier, some harder – are proposed by the Levin Center as mechanisms to improve the state of oversight in Congress.

(1) Establish System to Issue Congressional Legal Opinions.

Problem: For decades, the Department of Justice (DOJ) Office of Legal Counsel (OLC) has issued legal opinions that provide guidance to Executive Branch agencies on how to respond to congressional information requests and instruct courts on how to adjudicate interbranch conflicts. Those OLC opinions invariably favor the Executive Branch over the Legislative Branch, one stark example being OLC opinions that claim senior presidential advisors are immune to congressional subpoenas,[2] the exact opposite position that courts have taken on the issue. Criticisms of excessive secrecy,[3] bias,[4] and overreach[5] in OLC opinions on congressional oversight issues have been growing. To date, however, Congress has allowed those OLC opinions to remain unanswered. Neither the House nor Senate has an equivalent process to issue official legal opinions providing guidance to congressional committees, federal agencies, and the courts on matters related to oversight. The result is a weakened and disadvantaged Congress compared to the Executive Branch.

Solution: Congress needs to take steps, as an institution, to issue thoughtful, well-supported, bipartisan legal opinions on oversight matters. Those legal opinions would help Congress establish its own oversight norms, educate Members and staff, improve committee oversight practices, inform the Executive Branch of Congress' oversight expectations, and advance oversight effectiveness. The opinions would also strengthen the hand of Congress in court. During the 116th Congress, this Committee issued Recommendations 81-82 calling for identifying "how increased ... legal resources could help strengthen the role of the legislative branch" and facilitating "a true system of checks and balances by ensuring the legislative branch is sufficiently represented in the courts."

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[2] https://www.justice.gov/olc/file/1183271/download

[3] https://www.washingtonpost.com/outlook/2019/09/26/how-one-secretive-justice-department-office-can-sway-whole-government/

[4] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3455556

[5] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3477699

Implementation: The next step is for this Committee to send a letter to GAO requesting a study to be completed within six months on options for moving forward. The study could identify a menu of options, present their positive and negative features, and offer recommendations for this and other committees to consider, including with respect to:

--Whether the House and Senate should establish one joint or two separate bipartisan task forces to propose a process for issuing legal opinions by Congress as an institution as well as procedures to select task force members and a possible due date for a report;
--Whether the House and Senate should establish one joint office or two separate chamber offices for the purpose of issuing congressional legal opinions;
--How the leadership, size, budget, and organizational and physical location of the key office or offices should be determined;
--Whether the key office or offices should be staffed by lawyers from the House General Counsel's office, the Senate Legal Counsel's office, CRS, GAO, or some combination and whether they should work on a full or part time basis;
--How staff working on congressional legal opinions should be selected and compensated and what ethics or post-employment restrictions should apply to them;
--What measures should be taken to ensure congressional legal options are developed in a bipartisan manner and produce opinions with bipartisan support;
--Whether congressional legal opinions should be confined to matters involving congressional oversight or address a broader scope of issues and, if so, what that broader scope should be;
--How congressional legal opinions should be finalized;
--Whether legal opinions should be voted on by one or both chambers and how;
--Whether and how congressional legal opinions should be made public, circulated, and stored;
--What current laws, rules, or procedures should be taken into consideration; and
--How the procedures for issuing congressional legal opinions should be drafted, proposed, finalized, and specified within House and Senate rules.

(2) Strengthen Civil Enforcement of Congressional Subpoenas.

Problem: Over the past few years, Congress has experienced great difficulty, on a bipartisan basis, acquiring information needed to support its legislative responsibilities. In some cases, Congress has asked the federal courts to support its oversight efforts but encountered lengthy judicial delays and repetitive litigation over whether courts have jurisdiction to hear interbranch subpoena disputes, whether Congress can state a valid cause of action to enforce its subpoenas, and whether the executive branch has properly invoked executive privilege. Under current law, civil enforcement of congressional subpoenas is slow, unpredictable, and undermines the ability of Congress to conduct oversight and act as an effective check on the Executive Branch.

Solution: In the 117th Congress, a group of House members have introduced the Protecting Our Democracy Act, H.R. 5314, which includes some well-crafted provisions to strengthen civil enforcement of congressional subpoenas. Title IV of the bill, which was developed with bipartisan support, would (among other provisions) explicitly authorize federal courts to hear congressional subpoena enforcement cases; provide Congress with a specific civil cause of

action to enforce compliance with its subpoenas; require expedited judicial consideration of congressional enforcement lawsuits and implementing rules of procedure to be issued by the Supreme Court and Judicial Conference; direct recipients of congressional subpoenas to provide a privilege log with respect to withholding covered information or waive the privilege by failing to do so; and enable courts for the first time to impose monetary penalties for noncompliance. These provisions would revitalize Congress' ability to obtain information for its work, especially from the Executive Branch.

Implementation: This Committee could issue a bipartisan endorsement of Title IV of H.R. 5314 and send a letter urging House leadership to enact provisions to strengthen civil enforcement of congressional subpoenas.

(3) Allow Only Bipartisan Committee Websites.

Problem: Increasingly, House committees are creating partisan websites, in which majority and minority committee staff post information wholly disconnected from their colleagues across the aisle. Partisan websites encourage more extreme rhetoric, make it more difficult for viewers to learn about the activities of the committee as a whole, and have led to some minority oversight reports, press releases, or entire websites disappearing when committee leadership or majorities change. Partisan committee websites also discourage joint efforts and can lead to the tribalization of work that might otherwise be of common purpose.

Solution: A House rule allowing only bipartisan committee websites would encourage the bipartisan operation of the committee. Where opinions differ, a common website could ensure that both parties have input and that viewers can see and compare materials from both parties at the same time. The majority and minority would not be required to approve each other's postings; instead, the committee could be required to allow both sides to post, for example, press releases in the same section of the committee website, as is now done in the Senate. The requirement for bipartisanship would apply only to committee (and subcommittee) websites and not to individual House member websites. Requiring bipartisan committee websites would not only assist the public but also help ensure that materials from both parties are preserved as House records and save money by enabling committees to pay for one instead of two online efforts. Bipartisan websites might also help tamp down partisan rhetoric and miscommunications between the parties. This solution would align with 116th Congress SCMC Recommendations 55 and 76 which call for committees to "develop bipartisan plans on how technology and innovative platforms can be best incorporated into daily work" and for piloting "rules changes that could have a positive effect committee-wide."

Implementation: This Committee could amend House rule X, clause (2)(d)(1)(E), to specify that committees and subcommittees shall maintain a single committee website that includes postings from both the majority and minority parties; that they may not form or support, directly or indirectly, any partisan website; and that they shall prohibit committee members from creating or supporting a partisan website that purports to represent a House committee.

(4) Reform Five-Minute Rule for Questioning Witnesses.

Problem: Right now, the five-minute limit routinely placed on Member questions during oversight hearings too often diminishes the gravity and coherence of the sessions, leaves Members struggling to get answers to their questions, and gives the impression that legislators are rude or insensitive to witnesses. Short-duration questioning also produces abrupt topic changes that can make an oversight hearing seem confusing or even chaotic. The resulting exchanges are not conducive to producing a useful hearing record or promoting public understanding of issues or respect for Congress.

Solution: This Committee has already experimented with and modeled procedures allowing Members to engage in more extended questioning periods at oversight hearings than normally permitted by the five-minute rule. The next step is to amend House rules to encourage all committees, at the beginning of an oversight hearing and the start of each witness panel, to utilize question periods that extend beyond the five-minute segments typical of most House hearings. For example, the committee chair and ranking member could agree, at the beginning of each witness panel, to allow each side to question the panel for an equal time period of not less than 15 minutes. After the initial round, the rule could require the committee to apply a 10-minute interval until every committee member seeking to question the witness has an opportunity to do so. Committee members could also be encouraged to delegate their time to a fellow committee member. Longer periods of time to question witnesses would make it easier to establish facts, explore important details, and prevent witnesses from engaging in evasive tactics. Longer periods would also align with 116th SCMC Recommendations 73, 75 and 76 which call for "committees to experiment with alternative hearing formats to encourage more bipartisan participation," "bipartisan pre-hearing committee meetings" and piloting "rules changes that could have a positive effect committee-wide."

Implementation: This Committee could take the next step by supporting an amendment to House Rule XI, clause 2(j)(2)(A), (B) and (C), to encourage committees to consider other arrangements in addition to the 5-minute rule for witness questions.

(5) Require Joint Compensation of Committee Clerks.

Problem: Currently, in some House committees and subcommittees, the majority and minority staffs each hire their own administrative personnel, producing two clerks handling similar duties. These House employees know they answer to only one party and may feel under pressure to insert partisanship into what should be nonpartisan tasks such as sending out subpoenas, logging in documents, releasing deposition transcripts, preparing reports, announcing hearings, compiling hearing records, and archiving investigative materials. In contrast, administrative personnel on Senate committees know they are paid by both parties and are supposed to answer to both sides in an even-handed way.

Solution: House rules requiring committee and subcommittee majority and minority staffs to hire administrative personnel jointly and split their compensation on a 50-50 basis would ensure that new employees realize they answer to both sides and should operate in a nonpartisan manner. It would also save committees money through hiring fewer administrative staffers. This

approach is already used in the Senate and has promoted a more bipartisan, even-handed administration of oversight activities. This solution would also align with 116th Congress SCMC Recommendation 74 which calls for committees to "hire bipartisan staff approved by both the Chair and Ranking Member to promote strong institutional knowledge, evidence-based policy making, and a less partisan oversight agenda."

Implementation: This Committee could take the next step and support an amendment to House rule X, clause (9), that would require the majority and minority on each committee and subcommittee to jointly hire and each pay 50% of the compensation paid to administrative staff.

(6) Expand Bipartisan Oversight Training.

(a) Add Bipartisan Oversight Session to the New Member Orientation, Bipartisan Member Retreat, and Leadership Academy.

Problem: Too often, Members view oversight investigations as a partisan exercise, are inexperienced in bipartisan investigative techniques, and are never informed about how to use oversight investigations to build cross-party trust and produce more accurate, thoughtful, and credible investigative results. Worse, highly partisan hearings have often damaged committee and Member relationships, encouraged negative media portrayals of Congress, and diminished public and voter respect for the institution. Currently, no regular Member-level workshops encourage or offer expertise on how to conduct bipartisan oversight.

Solution: This Committee has already transformed the New Member Orientation by including more bipartisan events; adding a workshop on bipartisan oversight would help alert and encourage new Members to try bipartisan oversight. In December 2020, for the first time, an hour-long oversight session was provided to new Members with presentations by GAO, the House whistleblower ombuds, Levin Center, and POGO, but no new Democratic Members attended due to mandatory attendance at partisan activities. Time should be set aside for all to attend a session on bipartisan oversight. Providing bipartisan oversight training would also align with 116th Congress SCMC Recommendations 12-14 which call for "offering new-Member orientation in a nonpartisan way," providing "opportunities for members to collaborate in small groups," "[m]aking new-Member orientation more comprehensive," and "[p]romoting civility during new-Member orientation." In addition, this Committee supported a $500,000 FY22 Legislative Branch appropriation for a Bipartisan Member Retreat. Including an oversight session at the retreat as well as at any new Congressional Leadership Academy would help elevate bipartisan oversight as a congressional goal.

Implementation: This Committee could work with the House Administration Committee to require the New Member Orientation to schedule a workshop on bipartisan oversight at a time when all new Members can attend and include a bipartisan oversight session in the 2022 Bipartisan Member Retreat and any new Congressional Leadership Academy.

(b) Add Bipartisan Oversight to Congressional Staff Academy.

Problem: The same problem just discussed for Members also applies to congressional staff. Too many staffers misperceive oversight investigations as a partisan exercise, fail to employ bipartisan investigative techniques, and remain unaware of how to use oversight inquiries to build cross-party trust and produce more accurate, thoughtful, and credible investigative results. Currently, the Congressional Staff Academy offers no training on using bipartisan oversight to strengthen rather than weaken committee and Member relationships, civility, and collaboration.

Solution: Since 2015, the Levin Center, POGO, and the Lugar Center have held regular bipartisan training sessions for congressional staff, called "Oversight Boot Camps," to hone the skills needed to conduct bipartisan, fact-based, high-quality inquiries. Our two-day boot camps combine staff from the House and Senate and both parties in investigative exercises that have trained nearly 300 staffers to date. In recent years, we've received over 100 applications for the 25 spots available in each boot camp, demonstrating the strong demand for civil, bipartisan oversight training. The Congressional Staff Academy could make use of these existing training opportunities or design its own. This solution would align with 116th Congress SCMC Recommendations 32 and 63 which call for increasing "bipartisan learning opportunities for staff" and "staff certifications" in congressional skills.

Implementation: This Committee could direct the Congressional Staff Academy to offer staff training and certifications related to conducting bipartisan oversight.

(7) Use Bulk Purchasing to Lower Cost of Document Software.

Problem: Conducting congressional investigations often involves collecting and reviewing a large volume of documents and using them in hearings and reports. Reviewing, analyzing, and organizing those documents is made much easier by using sophisticated discovery and document management software. But choosing an effective software system among the many available options -- CloudNine, Concordance, Everlaw, Relativity, ZyLAB, and more -- is difficult and, once purchased, is expensive and time consuming to maintain and utilize.

Solution: The House could help address this problem by setting up a process to winnow the options for procuring an effective discovery and document management software system, negotiate a House-wide or Congress-wide price for each option, negotiate a training component as part of each package, and help oversight committees evaluate, purchase, and use the software.

Implementation: This Committee could direct House Information Resources (HIR) to initiate a project to make it easier for oversight committees to select, pay for, and use effective discovery and document management software systems in their oversight investigations.

(8) Require Committee Budgets to Better Reflect House Composition.

Problem: Today, the country is politically divided, and voters are producing narrow majorities in the House and Senate in the range of 51 percent. It appears that, for the foreseeable future, narrow majorities could flip back and forth between the parties during successive elections, as

has happened in the Senate. Despite that political reality, the House continues to allocate two-thirds of committee funding to the majority party and only one-third to the minority. Today, that means a House majority of 51% gets 67% of the available committee funding. While that funding split may look good to the majority party today, it won't if a small political shift leads to a different House majority tomorrow. The current approach also threatens dramatic funding and staffing shifts that may lead to losing experienced staff with important institutional expertise, including staff skilled in oversight.

Solution: The Senate long ago replaced the one third-two thirds funding split between the parties with a committee allocation process that more closely reflects the actual composition of the majority and minority parties in the Senate. Under the current Senate approach, committees first take care of shared expenses, such as administrative personnel whose compensation is typically split on a 50-50 basis. The remaining committee funds are then designated as the "majority and minority salary baseline." The majority staff receives 10% of that baseline to take care of other administrative expenses. The remaining 90% of the baseline is then divided according to the percentage of seats attributed to each party. For example, in the 116th Congress, Republican Senate committee staff received 53% of the baseline, while Democratic staff received 47%. In addition, the Senate imposes an outer bound limit on the division of funding, limiting the majority committee staff to receiving no more than 60% of the relevant baseline and the minority from receiving no less than 40%. The Senate also permits committees to adopt a different allocation of funds by agreement of the chair and ranking member. The resulting division of committee funds more fairly reflects the composition of the Senate and is generally less disruptive to committees when majorities shift, including committees exercising oversight.

Implementation: This Committee could send a letter to House leadership and the appropriate House committees supporting a committee funding allocation process for the House that more closely reflects the composition of the parties in the House.

(9) Strengthen Congressional Norms Related to Oversight.

Our final set of suggestions involves strengthening congressional norms related to bipartisan, fact-based oversight. Strengthening norms is a slow and difficult process but essential to improving congressional culture. Weak oversight norms now contribute to divisive, overly partisan, and ineffective oversight by congressional committees.

(a) Encourage a Public Commitment to Bipartisanship.

Problem: Today, too many Members and staff see oversight as a partisan exercise and don't even attempt to engage in bipartisan oversight practices, contributing to internal committee friction, ineffective oversight, and poor public perceptions of Congress.

Solution: Committee Members and staff are more likely to attempt a bipartisan inquiry if committee leaders make a public commitment to conduct a bipartisan inquiry. The Senate Permanent Subcommittee on Investigation (PSI), where I worked for so many years, has a long tradition of bipartisan investigations, not only because our rules encourage them, but also because PSI leaders publicly and privately committed their staffs to joint investigations. Senator

Levin, Senator Coburn, and many others did so, because they were strong believers that bipartisan investigations were superior to partisan inquiries. They viewed investigations conducted by people holding similar views to be equivalent to acting in an echo chamber in which staffers reinforce their preconceptions and rarely think creatively. In contrast, investigations conducted by staffers holding fundamentally different world views lead to those investigators asking more questions, looking closely at more facts, challenging each other, and engaging in more conversations about what really happened and why. While the resulting investigative process isn't quick or easy, it usually produces findings that are more accurate, thorough, thoughtful, and credible. That type of rich bipartisan experience is possible only when the chair and ranking member of the investigating body direct their staffs to work together to reach a consensus on the facts.

Implementation: To strengthen congressional norms favoring bipartisan oversight, this Committee could develop a model public statement expressing a commitment to bipartisan oversight and encourage more committee and subcommittee leaders to make a similar public commitment to bipartisanship when initiating a new oversight investigation.

(b) Hold Fewer Hearings with Less Partisan Issues.

Problem: On too many committees, too many hearings per week leave Members and staff with insufficient time to understand the intricacies of the issues at stake and gain familiarity with key documents and witnesses. In addition, partisan hearing topics often lead to unproductive hearings, committee friction, and irritated Members and staff.

Solution: Holding fewer hearings on less partisan topics would reduce internal committee friction, encourage more productive hearings, and help make progress on issues of concern to both parties. Less is more, when a committee does the hard work of conducting a bipartisan investigation that produces at least a partial consensus on the facts, instead of holding multiple hearings on partisan issues that exacerbate differences between the two sides. Fewer hearings would also enable Members and staff to gain needed familiarity with key documents and witnesses in each investigation and possibly pave the way for factual consensus and progress on reforms. Congress' public ratings are currently painfully low; fewer hearings with more substance and less infighting could begin to restore public confidence.

Implementation: This Committee could help strengthen congressional norms favoring bipartisan, fact-based oversight by openly calling for fewer hearings on less partisan issues.

(c) Increase Social Interaction.

Problem: In many cases, Members and staff on the same oversight committee don't know each other well, making it difficult for them to work together, especially across the aisle.

Solution: A good way to break down committee barriers is to arrange for greater opportunities for social interaction among committee staff. During my years on the Permanent Subcommittee on Investigations, the subcommittee held a social gathering after work every few weeks for staff. Republican and Democratic staffers gathered in a conference room to swap PSI lore, funny

stories, and the chit-chat that occurs among staffers working together. In addition, after most hearings, staff convened a bipartisan staff dinner at a local restaurant to celebrate the conclusion of a joint inquiry. In later years, we also took a photograph of the bipartisan staff that worked on each investigation, so that everyone could remember how they worked together. Those social events and photographs may have done more to knit together the bipartisan fabric of the subcommittee than almost anything else. That type of regular social interaction would benefit not only staff but also Members serving on oversight committees and subcommittees. When every member of an oversight team begins to see every other member as a trusted partner, bipartisan, fact-based, high-quality oversight can flourish.

Implementation: This Committee could help strengthen congressional norms favoring bipartisan oversight by recommending that all House committees encourage social gatherings for committee staff and social opportunities for Members to get to know each other personally.

Conclusion

Despite the length of this list of possible oversight reforms, many other alternatives would also help improve congressional oversight. They include, for example, strengthening the ability of Congress to use its inherent contempt authority; increasing committee appropriations to hire more investigators; increasing committee access to technology and science expertise; strengthening Congress' partners in oversight, including GAO, CRS, and the IG community; toughening whistleblower protections, especially when disclosing information to Congress; identifying and revising statutes that impede or fail to advance Congress' ability to get important information; strengthening Congress' authority to obtain security clearances for staff and override decisions by Executive Branch officials to classify information; and designing new ways to improve oversight hearings such as by holding bipartisan, pre-hearing meetings of committee Members and even conducting practice oversight sessions. As this menu of reform options indicates, much more can be done to elevate bipartisan, fact-based oversight by Congress.

The Levin Center would like to thank the Committee for this opportunity to share some thoughts on how to strengthen Congress' Article I capacity for oversight. It is a critical function at the center of Congress' constitutional responsibilities. As Senator Carl Levin once put it: "You can't get good government without good oversight."

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The CHAIRMAN. Thank you, Ms. Bean.

And our final witness is Anne Tindall. Ms. Tindall is counsel at Protect Democracy where she leads a team to secure accountability for abuses of power and counter antidemocratic activity at the Federal and State level. Prior to joining Protect Democracy, she served as assistant general counsel for litigation and oversight at the Consumer Financial Protection Bureau. She has also served as counsel to the House Committee on Energy and Commerce.

Ms. Tindall, you are now recognized for 5 minutes.

STATEMENT OF ANNE TINDALL

Ms. TINDALL. Chairman Kilmer, Vice Chairman Timmons, members of the select committee, thank you for the opportunity to testify at this timely hearing.

At Protect Democracy we work to prevent and respond to threats to our democratic system for those acutely concerned with presenting abuses of executive power and reinvigorating Congress' ability to function as an effective check on the President, which requires being able to compel compliance with this demand for information.

Today I will address two opportunities for strengthening congressional oversight capacity. This morning, my written testimony goes to many more. First, modernizing Congress' subpoena compliance tools, and, second, ensuring access to sensitive information by congressional staff.

There are three ways in which Congress can force the executive branch to comply with its oversight demands: Civil contempt litigation in the courts, inherent contempt, and the criminal contempt of Congress statute. I want to highlight the first two of these for you this morning.

For most of the century, Congress has primarily sought subpoena compliance from the executive branch through civil litigation, but as the previous two witnesses highlighted, that path has failed to meet Congress' oversight needs. Oversight requests issued in one presidential administration often span several administrations and certainly span several Congresses.

As Elise Bean referenced, the Protect our Democracy Act, of which several members of this select committee are cosponsors, seeks to address this deficiency by expediting judicial consideration of congressional subpoenas and creating a cause of action for their enforcement to eliminate jurisdictional disputes that slow courts down.

The expedited procedure would have civil contempt suits heard by a three†judge panel convened at Congress' request and reviewable only by direct appeal to the Supreme Court. Protect Democracy urges enactment of these measures.

If there is one thing you take from my testimony today, I hope it is that PODA is necessary—PODA, Protecting Our Democracy Act—is necessary but not sufficient to address Congress' oversight needs. Civil litigation, no matter how expedited, often will be too slow for consideration of sensitive and voluminous information requests, and it hands decision†making authority to the courts, which have never given Congress an unequivocal win at disputes with the executive branch.

By all means, send PODA to the President's desk, but you can't stop there. The executive branch has learned that it can slow walk response to oversight demands and watch the courts run out the clock. Congress must get the executive branch back to the negotiating table, and the best way to do this is by invoking inherent contempt powers.

This used to mean sending the Sergeant at Arms to arrest and imprison holders of information until they complied. While the Supreme Court has upheld this means of effecting compliance, it is likely both practically and politically today.

But a system of fines of contempt could modernize Congress' inherent contempt powers and turn them into a credible lever for compliance. And unlike expedited civil litigation, it could be effected simply through a change in the House rules. The congressional inherent contempt power resolution introduced in May would do just that.

Finally, Congress should act on the compensation, training, and technology recommendations the select committee issued in the last Congress and also consider increasing the number of congressional staff with access to top secret, sensitive compartmented information security clearances.

At a minimum, the House should allow all Members of the House Permanent Select Committee on Intelligence to hire a staffer with such a clearance, as their Senate counterparts may. This would ensure that members have staff to support effectively in their oversight of the Federal government's most sensitive and consequential programs.

I want to close with a compliment and a warning. The most important thing Congress could do to strengthen its hand in oversight is to follow the example set by this committee, which has committed itself to work collaboratively in supporting Congress as an institution. This, as you know, is not the way Congress always works.

Across Democratic and Republican administrations, the executive branch vigorously defends its interests and adheres to an increasingly radical vision of executive power, unrestrained by Congress. As long as legislators act first in the interest of their political party rather than the institutional interests of Congress, Congress will lose battles against Presidents who stand shoulder to shoulder defending the recalcitrants of their predecessors. Our system of checks and balances, the foundation of our democracy, requires that Members of Congress also stand shoulder to shoulder in defense of the first branch's constitutional authorities.

Thank you, and I look forward to your questions.

[The statement of Ms. Tindall follows:]

Testimony of Anne Tindall Prepared for the Record

"Strengthening Congressional Oversight Capacity"

House Select Committee on the Modernization of Congress

November 4, 2021

Chairman Kilmer, Vice Chairman Timmons, Members of the Select Committee, thank you for the opportunity to testify at this important and timely hearing.

I serve as counsel at Protect Democracy, a nonprofit working to prevent and respond to actions that undermine our democratic system. We are thus acutely concerned with preventing abuses of executive power.

A key component of that effort is ensuring Congress functions as an effective check on the Executive Branch. That is why Protect Democracy has led a cross-ideological coalition to support the Protecting Our Democracy Act, which includes provisions to strengthen lawmakers' ability to secure documents and testimony and reassert Congress's power of the purse, among other provisions focused on reclaiming Congress's Article I responsibilities and authorities.[1]

Congress's oversight authorities have been under assault for some time. Although the Trump White House took the practice of refusing to comply with congressional inquiries farther than any prior administration,[2] Administrations of both parties frequently have refused to accommodate congressional requests for information in good faith and worked to undermine Congress's institutional authority to enforce those requests. But the Executive Branch is not solely to blame for the forces impeding legislative oversight. Congress, too, shares much of the responsibility for the abdication of authorities and underinvestment in oversight capacity.

Today, I would like to cover three general areas of concern regarding opportunities for strengthening congressional oversight capacity: mechanisms for securing information from the Executive branch, including options for modernizing Congress's subpoena compliance and enforcement tools; consideration of a congressional Office of Legal Counsel, akin to the Justice Department's Office of Legal Counsel; and more efficient and appropriate access to sensitive material by congressional staff.

The weakening of critical oversight mechanisms have steadily diminished Congress's leverage over the Executive Branch, leaving congressional oversight to happen largely on the President's

[1] Protecting Our Democracy Act, H.R. 5314, 117th Cong., tits. IV, V (2021).
[2] *See, e.g.*, Charlie Savage, *Trump Vows Stonewall of 'All' House Subpoenas, Setting Up Fight Over Powers*, N.Y. Times (Apr. 24, 2019), https://www.nytimes.com/2019/04/24/us/politics/donald-trump-subpoenas.html.

terms. This state of affairs undermines our constitutionally mandated system of checks and balances. Protect Democracy therefore views the strengthening of Congress's oversight capacity as essential to the health and survival of our democratic system.

Securing Information

As Members of this committee know all too well, it is often precisely when the Executive Branch is least likely to accommodate congressional requests that Congress is most in need of information. Lawmakers rely not just on the use of subpoenas, but on the credible threat of subpoena enforcement, to compel cooperation with requests for records and testimony from a reluctant Executive Branch.

Traditionally, lawmakers have turned to robust enforcement options when necessary, including Congress's inherent contempt power and a statutory contempt procedure. Because these enforcement tools generated political and material costs to noncompliance with congressional requests, they served as effective incentives during negotiations with their executive counterparts, encouraging officials to accommodate congressional access to pertinent information in good faith. This is by and large no longer the case. As Congress's inherent contempt power fell into disuse, and the Justice Department declined to prosecute executive officials for contempt of Congress as a matter of institutional policy, both enforcement options became largely symbolic. The declining power of these two tools has led Congress in recent years to pursue a third option—civil enforcement of its subpoenas through the courts—which has proven to be neither timely nor effective.

Although Congress currently struggles to enforce its subpoenas against the Executive Branch, this is not because it lacks the power to do so. Congress has at its disposal a robust constitutional toolbox to compel cooperation with its requests, but those tools are in need of reform.

As I outline in greater detail below, Congress should strengthen its enforcement mechanisms within each of the three frameworks for securing compliance: enforcement through its inherent contempt power, through federal law enforcement, and through the courts. Specifically, the Select Committee should consider proposals to modernize Congress's inherent contempt power by levying fines instead of deploying the sergeants-at-arms to detain contemnors; establish a cause of action that expressly provides for the civil enforcement of House subpoenas; and expedite judicial proceedings in the event that disputes over congressional subpoenas reach the courts.

The Select Committee also should move forward with its prior recommendation to have the Government Accountability Office (GAO) examine the viability of a Congressional Office of Legal Counsel. That office could serve as a counterweight to the Justice Department's Office of

Legal Counsel (OLC), the opinions of which outline the legal basis for the Executive Branch's noncompliance with certain congressional requests and the Justice Department's refusal to enforce certain legislative subpoenas through the statutory contempt process. Creating a single office to articulate Congress's institutional prerogatives, and to issue opinions that respond to the OLC positions often cited by the Executive Branch, could help strengthen Congress's hand in oversight disputes.

Finally, to minimize the informational disadvantage Congress confronts in its oversight of executive operations, especially defense and national security programs, the Select Committee should consider reforms to increase the number of congressional staff with access to Top Secret/Sensitive Compartmented Information (TS/SCI) security clearances, along with adopting a number of the excellent proposals regarding staff capacity, training, compensation, and technology included in the Select Committee's recommendations in the 116th Congress.[3] At a minimum, the Committee should recommend that the House pass a resolution allowing each member of the House Permanent Select Committee on Intelligence to hire a personal staffer with a TS/SCI clearance, as their Senate counterparts may. But more broadly, the Committee should consider the viability of allowing every member of Congress to designate one personal office staffer to be cleared at the TS/SCI level. This would help ensure that members of Congress have the staff support they need to understand and effectively oversee some of the federal government's most sensitive and consequential programs.

1. Subpoena Compliance and Enforcement

Before examining proposals to strengthen Congress's subpoena compliance and enforcement tools, it is worth dissecting the flaws in the current inherent and statutory contempt processes and why civil litigation has proved to be an ineffective alternative.

Congress's inherent contempt power enables either chamber to punish nonmembers for obstructing its work. Historically, Congress did so by deploying the sergeants-at-arms to arrest those individuals.[4] Although the Supreme Court has repeatedly upheld the constitutionality of inherent contempt and its enforcement,[5] neither chamber has exercised that power and tried a

[3] Select Comm. on Modernization of Cong., *116th Congress Recommendations*, https://tinyurl.com/m4zv8hns.

[4] Following an arrest, the sergeant-at-arms brought the contemnor before the House or the Senate where the individual was tried before the bar of the body; and the entire chamber sat for the testimony at trial, after which lawmakers voted to adopt a resolution adjudicating the guilt of the individual. If convicted, the contemnor would be imprisoned or otherwise sanctioned; the resolution affirming the contemnor's guilt specifies his punishment. Cong. Rsch. Serv., RL34097, *Congress's Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure* 10-11 (2017), https://tinyurl.com/4ryvvmtb; Rex Lee, *Executive Privilege, Congressional Subpoena Power, and Judicial Review: Three Branches, Three Powers, and Some Relationships*, 1978 B.Y.U. L. Rev. 231, 253-54 (1978); *see also Anderson v. Dunn*, 19 U.S. 204 (1821) (upholding House's exercise of inherent contempt, outlining arrest and trial procedures for contemnor).

[5] *Anderson*, 19 U.S. 204; *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927) ("[T]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.").

contemnor before the bar of Congress since 1945.[6] This was largely due to the cumbersome nature of the process, which Congress itself has described as "time consuming," and also given the availability of a statutory contempt procedure as a practical alternative for lawmakers, which had since 1857 served as complement to inherent contempt.[7]

In recent decades, OLC has argued that Congress may not use the inherent contempt power to compel the testimony of Executive Branch officials who decline to cooperate because they are complying with an assertion of executive privilege or a presidential directive not to testify.[8] By not contesting these arguments in practice, Congress has, in effect, acquiesced to them.

Congress's second enforcement option—statutory contempt—is also today largely ineffective. Congress passed the criminal contempt statute in 1857 as a complement to its inherent contempt authority, which refers contempt citations to a U.S. attorney for prosecution.[9] These referrals and the threat of prosecution historically served as effective means of encouraging cooperation with congressional requests, including among senior government officials.[10] Indeed, the historical record is clear that Congress intended the statute be used to compel compliance among executive officials. But since the 1980s, the Justice Department has abandoned its obligation to enforce contempt citations when they implicate Executive Branch officials.[11] For instance, in 2008, the House issued criminal contempt citations for Harriet Miers, President Bush's former White House Counsel, and Joshua Bolten, Bush's White House Chief of Staff, for refusing to comply with House Judiciary Committee subpoenas to testify and produce documents in an investigation

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[6] S. Rep. No. 95-170, at 97 (1977), https://www.ojp.gov/pdffiles1/Digitization/63796NCJRS.pdf.

[7] *Id.*; Cong. Rsch. Serv., *Congress's Contempt Power and the Enforcement of Congressional Subpoenas*, *supra*, at 12; Lee, *supra*, at 254.

[8] Prosecution for Contempt of Cong. of Exec. Branch Official Who Has Asserted a Claim of Exec. Privilege, 8 Op. O.L.C. 101, 131 (1984); Testimonial Immunity Before Cong. of the Former Counsel to the President, 43 Op. O.L.C., slip op. at 20-21 (2019), https://www.justice.gov/olc/opinion/file/1215066/download.

[9] 2 U.S.C. §§ 192, 194.

[10] From 1975 to 1988, "there were 10 votes to hold cabinet-level executive officials in contempt. All resulted in complete or substantial compliance with the information demands in question before the necessity of a criminal trial." Morton Rosenberg & William J. Murphy, Good Gov't Now, *The Case for Direct Appointment by the House of Outside Counsel to Prosecute Citations of Criminal Contempt of Executive Branch Officials* 35 (Dec. 5, 2019), https://tinyurl.com/hdpdz83p. In at least some of these cases, "[t]here is evidence… that the contemnors were reluctant to risk a criminal prosecution to vindicate a presidential claim of privilege or policy, which led to settlements." *Id.*

[11] *See, e.g.*, Prosecution for Contempt of Cong., 8 Op. O.L.C. 101; Dan Eggen & Amy Goldstein, *Fight Over Documents May Favor Bush, Experts Say*, Wash. Post (July 21, 2007), https://tinyurl.com/t8v3j78s (The Clinton administration "contended, as the Bush administration did this week, that Congress has no power to force a U.S. attorney to pursue contempt charges in cases in which a president has invoked executive privilege to withhold documents or testimony."); Nicholas Fandos, *House Holds Barr and Ross in Contempt Over Census Dispute*, N.Y. Times (July 17, 2019), https://www.nytimes.com/2019/07/17/us/politics/barr-ross-contempt-vote.html ("There is no real risk the department will pursue" Congress's criminal contempt charges against Attorney General William Barr and Commerce Secretary Wilbur Ross.); Todd Garvey, Cong. Rsch. Serv., R45653, *Congressional Subpoenas: Enforcing Executive Branch Compliance* 3 (2019), https://crsreports.congress.gov/product/pdf/R/R45653 ("Four times since 2008, the House of Representatives has held an executive branch official (or former official) in criminal contempt of Congress for denying a committee information subpoenaed during an ongoing investigation. In each instance the executive branch determined not to bring the matter before a grand jury.").

into the firing of several U.S. Attorneys.[12] The criminal contempt statute directs congressional citations to be referred "to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action."[13] But the Justice Department, first under Bush and then under President Obama, declined to impanel a grand jury to consider the contempt citations. Instead, the department relied on more than three decades of OLC opinions to justify its refusal to enforce the law.[14]

The Justice Department's declinations to prosecute Executive Branch officials for contempt of Congress—a federal crime—and lawmakers' decisions not to resort to the vestigial process of inherent contempt in its place, have forced the legislature to use an alternative and historically novel means to enforce its subpoenas against executive officials: judicial enforcement. However, the resulting lawsuits have neither proceeded quickly nor gone especially well for Congress.

Congress filed a civil action to enforce a subpoena against the Executive Branch for the first time in 1973.[15] The courts swiftly ruled for the Executive Branch.[16] Congress did not initiate a second civil suit for more than three decades.

The House Judiciary Committee's 2008 effort to enforce its subpoena for the testimony of Harriet Miers, President Bush's former White House Counsel, kicked off the current period in which civil litigation has become the default method of attempting to compel compliance with congressional subpoenas.[17] That lawsuit and subsequent litigation point to at least three overarching challenges hampering civil enforcement. First, the slow pace of litigation prevents Congress from gaining expedient access to the documents and testimony it needs.[18] Second,

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[12] H. Res. 979, 110th Cong. (2008).
[13] 2 U.S.C. § 194.
[14] See Whether Dep't of Just. May Prosecute White House Offs. for Contempt of Cong., 32 Op. O.L.C. 65 (2008), https://www.justice.gov/opinion/file/832851/download.
[15] R.W. Apple, Jr., *Nixon Contests Subpoenas, Keeps Tapes; Hearing Set Aug. 7 on Historic Challenge*, N.Y. Times (July 27, 1973), https://tinyurl.com/4sd9t4vv; *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 370 F. Supp. 521 (D.D.C. 1974).
[16] *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974) (affirming district court's dismissal of committee's lawsuit).
[17] *See Committee on Judiciary v. Miers*, 542 F.3d 909 (D.C. Cir. 2008).
[18] In *Committee on the Judiciary v. Miers*, 542 F.3d 909, the dispute between Congress and the Executive Branch was resolved more than two years after the House issued the subpoena for Miers's testimony, when both a new President was in office and a new Congress was in session. *Miers, Rove Will Testify to Judiciary*, Politico (Mar. 5, 2009), https://www.politico.com/story/2009/03/miers-rove-will-testify-to-judiciary-019644. Similarly, the House Judiciary Committee's effort to secure the testimony of former White House Counsel Don McGahn concluded after almost two years of litigation, and only once a new President had taken office and a new Congress was in session. Ann Marimow, *Biden Administration, House Democrats Reach Agreement in Donald McGahn Subpoena Lawsuit*, Wash. Post (May 11, 2021), https://tinyurl.com/7z39n8fn. These timelines are relatively short compared to the duration of other subpoena enforcement fights. For instance, it took the House Oversight and Reform Committee and the Justice Department seven years of litigation to resolve their dispute over the committee's effort to obtain access to records related to the "Fast and Furious" Operation. Josh Gerstein, *Subpoena Fight Over Operation Fast and Furious Documents Finally Settled*, Politico (May 9, 2019), https://tinyurl.com/w47y5r83.

unlike the Senate,[19] the House has not enacted a statutory cause of action that expressly enables it to seek judicial enforcement of its subpoenas. This has left thorny jurisdictional issues unresolved, leaving courts greater room to decline to intervene.[20] And finally, seeking judicial intervention in disputes with the Executive Branch renders Congress vulnerable to courts ruling against Congress's institutional interests and expanding judicial power at the expense of Congress. In essence, resorting to civil enforcement actions leaves the delineation and protection of congressional interests to another branch of government when Congress is better suited and constitutionally empowered to vindicate itself.[21]

The Supreme Court's decision in *Trump v. Mazars USA, LLP* demonstrates these pitfalls.[22] Although the court affirmed "Congress's important interests in obtaining information through appropriate inquiries," it established a new, four-factor test for assessing the validity of congressional subpoenas.[23] This ensured additional rounds of judicial review in that and future lawsuits, provided the Executive Branch with a new defense when contesting legislative subpoenas, and increased Congress's dependence on the courts to effectuate its powers.[24]

A. Judicial Enforcement: Strengthening Civil Actions

Congress's current, and novel, default method of subpoena enforcement is civil litigation. In the wake of the collapse of its two other longtime enforcement methods—congressional enforcement through inherent contempt and Executive Branch enforcement through statutory contempt—Congress has turned to the third branch: the judiciary.

Congressional lawsuits have encountered several major obstacles. These include the slow pace of litigation, which allows noncompliant individuals to run out the investigative clock; the House's failure to enact an express cause of action empowering it to clearly seek judicial enforcement of its subpoenas; and the now well-evidenced possibility that federal courts will rule in ways that undermine Congress's institutional interests and diminish congressional power. Although the first two obstacles may be addressed through legislation, the third is a much more difficult nut to

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[19] 28 U.S.C. § 1365.
[20] *See, e.g.*, *Committee on Judiciary v. McGahn*, 973 F.3d 121 (D.C. Cir. 2020).
[21] *See generally* Josh Chafetz, *Nixon/Trump: Strategies of Judicial Aggrandizement*, 110 Geo. L. Rev. (forthcoming) (2021), https://tinyurl.com/3v3j87j5; Molly Reynolds & Margaret Taylor, *The Consequences of Recent Court Decisions for Congress*, Lawfare (Oct. 5, 2020), https://tinyurl.com/ytd3epk5 (describing *Mazars* as "a mixed bag for Congress" that "set[] a new—and much higher—standard for establishing the legitimacy of congressional investigations generally").
[22] 140 S. Ct. 2019 (2020).
[23] *See Mazars*, 140 S. Ct. at 2036 (setting out four factors for courts to consider when evaluating separation-of-powers issues implicated by congressional subpoenas).
[24] *E.g.*, Letter from Ryan M. Kaldahl, Acting Assistant Sec'y of State, Bureau of Leg. Affs., to Hon. Eliot Engel, Chairman, H. Comm. on Foreign Affs. (Aug. 7, 2020), https://tinyurl.com/5xbh3xxb (citing *Mazars* twice to dispute validity of House subpoena).

crack, and should generally caution against the overreliance on judicial intervention to vindicate legislative authority.

As several cosponsors on the Select Committee already know, the Protecting Our Democracy Act includes provisions to expedite the consideration of congressional subpoenas and create an express cause of action for their enforcement.[25] The expedited procedure outlined in the bill requires an enforcement suit to be heard by a three-judge panel convened at the request of Congress; the suit would be reviewable only by direct appeal to the Supreme Court.[26] Protect Democracy urges the Members of the Select Committee to support the enactment of these measures.

While Congress should work to expand and sharpen its enforcement toolkit broadly, including correcting for the deficiencies of civil litigation where possible, it should also be acutely aware of each tool's practical limits. For example, expediting consideration of civil actions may in practice have a limited effect on quickening the pace of litigation, as disputes involving complex (and often necessarily voluminous) requests for information and an array of privilege claims take considerable time to parse. In *Committee on Oversight and Government Reform v. Holder*, even when a court mandated compliance with the underlying subpoena and the "Justice Department finally disgorged more than 10,000 documents originally withheld, totaling more than 64,000 pages," it "took a special master over a year to pore through and address" the relevant privilege claims before the documents could be delivered to the committee.[27]

Congress also assumes considerable risks in seeking judicial enforcement of its subpoenas, namely precedential case law that diminishes congressional power. Indeed, in no case to date in which a chamber of Congress has brought suit against the Executive Branch in order to enforce a subpoena has the Judiciary unambiguously sided with Congress.

For example, the 2016 ruling that eventually mandated compliance in the "Fast and Furious" case also, and for the first time, validated the Executive Branch's underlying privilege claims

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[25] Protecting Our Democracy Act, H.R. 5314, 117th Cong., tit. IV, § 403. The Protecting Our Democracy Act also reinvigorates Congress's ability to extract both information and policy concessions from the Executive Branch through the constitutional power of the purse. This once robust oversight tool has diminished in our current era of omnibus appropriations and badly needs modernizing *See* Molly Reynolds, *Improving Congressional Capacity to Address Problems and Oversee the Executive Branch*, Brookings Inst. (Dec. 4, 2019), https://tinyurl.com/ytyxkywc; Ella Nilsen & Li Zhou, *The Government Is Headed to a Partial Shutdown After the Senate Rejected Trump's $5 Billion in Border Wall Funding*, Vox (Dec. 21, 2018), https://tinyurl.com/sv7akkt2; Andrew Restuccia et al., *Longest Shutdown in History Ends After Trump Relents on Wall*, Politico (Jan. 25, 2019), https://tinyurl.com/w3vn558v (shutdown ends on day 35).

[26] *Id.* § 403(b).

[27] Morton Rosenberg, *Why Enacting H.R. 4010, the Congressional Subpoena Compliance and Enforcement Act of 2017, Is a Big Mistake*, LegBranch (Jan. 9, 2018), https://tinyurl.com/2xc339j6.

as having a constitutional foundation.[28] As the Congressional Research Service concluded, despite the technical (albeit delayed) victory for Congress, "the court's reasoning may affect Congress's ability to obtain similar documents from the executive branch" in the future.[29] As Senator Chuck Grassley reflected, the ruling may have been a victory for the House in practice, but it gave the Executive Branch "a victory on the principle."[30]

B. Congressional Enforcement: Modernizing Inherent Contempt

Congress's past efforts to outsource enforcement of its subpoenas demonstrates the pressing need for crafting an effective way for the legislature to vindicate its interests on its own. To improve Congress's ability to take effective action unilaterally, Congress should consider modernizing enforcement of its inherent contempt power. It could do so by replacing the practice of deploying the sergeant-at-arms to arrest contemnors with levying fines against them.

The Congressional Inherent Contempt Power Resolution, reintroduced last May, is one proposal to that effect. This reform, which amends House Rule XI, would impose a schedule of monetary penalties on an official whom the House has held in contempt and who has authority to effect compliance with the subpoena at issue.[31] To give bite to this proposal, the House would have to establish a mechanism to implement it, such as directing the sergeant-at-arms or Office of General Counsel to employ collection agencies if contemnors fail to pay the sum they have been fined. But because the authority to levy penalties derives from a power inherent to Congress, establishing such a mechanism would require a change only to House Rules, not new legislation.

The threat of monetary penalties and a clear mechanism for collecting them could establish a material incentive among senior executive officials to negotiate with Congress and cooperate with requests in good faith. Protect Democracy has joined with numerous organizations across the ideological spectrum to support this enforcement option.[32]

To minimize the likelihood of partisan abuse of this enforcement mechanism, the House could specify that only senior officials may be fined if held in contempt. In addition, Congress could provide an express cause of action to allow contemnors to challenge in court the validity of the congressional demands at issue in a subpoena, ensuring that a clear remedy exists if lawmakers misuse this tool.

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[28] *Committee on Oversight & Gov't Reform v. Lynch*, 156 F. Supp. 3d 101 (D.D.C. 2016).
[29] Garvey, Cong. Rsch. Serv., *supra*, at 9.
[30] *Hearing on Operation Fast and Furious: Obstruction of Congress by the Department of Justice Before the H. Comm. on Oversight and Gov't Reform*, 115th Cong. (2017) (statement of Sen. Chuck Grassley, Chairman, S. Comm. on the Judiciary, at 9-10), https://tinyurl.com/3cd57n3r.
[31] H. Res. 406, 117th Cong. (2021).
[32] *Bipartisan Coalition Letter Urging Congress to Include Inherent Contempt Fines Provision in House Rules Package*, Good Gov't Now (Oct. 22, 2020), https://tinyurl.com/njk7prwj.

Although untested, this modernization of Congress's inherent contempt power would likely pass constitutional muster. The Supreme Court has upheld Congress's authority to enforce its contempt power on a number of occasions.[33] Whether Congress may impose fines to effectuate that authority is less certain, as it never has attempted to do so. But support for that proposition may be found in dicta.[34] For instance, in *Jurney v. MacCraken*, the Supreme Court stated that Congress's inherent contempt power "is governed by the same principles as the power of the judiciary to punish for contempt,"[35] which includes the ability to levy fines. Indeed, the judicial branch has long emphasized the importance of self-enforcement in this area. The Supreme Court has asserted that "[c]ourts cannot be at the mercy of another Branch in deciding whether [contempt] proceedings should be initiated; rather, it is "essential" that "the Judiciary has a means to vindicate its own authority without complete dependence on other Branches."[36]

Of course, modernizing only Congress's inherent contempt power would likely be an insufficient step toward increasing Executive Branch compliance with congressional subpoenas. Monetary enforcement alone may fail to secure cooperation, as fines levied on a wealthy official may not impose sufficient costs to change behavior. However, adopting the Congressional Inherent Contempt Power Resolution would provide the legislature with an additional and meaningful tool to vindicate its own oversight authority. And it would send a powerful signal that Congress is committed to drawing on its own powers to defend its institutional prerogatives.

C. Executive Enforcement: Modernizing Statutory Contempt

Amending the statute criminalizing contempt of Congress may make congressional contempt referrals a better complement to the legislature's inherent contempt authority. Although the House has held seven current and former Executive Branch officials in criminal contempt of Congress since 2008,[37] the Justice Department has determined in six of those instances not to bring the matter before a grand jury,[38] in contravention of the statute's plain language and intent.

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[33] *See Anderson*, 19 U.S. at 230-31 (determining enforcement of contempt power to be a matter of "self-preservation" for the House); *McGrain*, 273 U.S. at 174 ("[T]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function."); *Jurney v. MacCraken*, 294 U.S. 125, 148-49 (1935) (Congress may punish acts "of a nature to obstruct the performance of the duties of the Legislature."); Cong. Rsch. Serv., *Congress's Contempt Power and the Enforcement of Congressional Subpoenas*, *supra*, at 10-11; *Inherent Contempt Fines Rules*, Good Gov't Now, https://tinyurl.com/2zwjdsda ("The Supreme Court has sustained the constitutional validity and necessity of inherent contempt as a self-protective institutional mechanism at least four times between 1821 and 1935.").

[34] Cong. Rsch. Serv., *Congress's Contempt Power and the Enforcement of Congressional Subpoenas*, *supra*, at 12.

[35] *Jurney*, 294 U.S. at 127.

[36] *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 796 (1987).

[37] H. Res. 979, 110th Cong. (2008) (former White House Counsel Miers and White House Chief of Staff Joshua Bolten); H. Res. 711, 112th Cong. (2012) (Attorney General Holder); H. Res. 574, 113th Cong. (2014) (former Internal Revenue Service official Lois Lerner); H. Res. 497, 116th Cong. (2019) (Attorney General Barr and Commerce Secretary Ross); H. Res. 730, 117th Cong. (2021) (Steve Bannon, former adviser to President Trump).

[38] In the seventh case, that of Steve Bannon, the Justice Department is still weighing whether to prosecute. Sadie Gurman & Andrew Restuccia, *Steve Bannon Case Poses Test for Merrick Garland After Biden Weighs In*, Wall St. J. (Oct. 20, 2021), https://tinyurl.com/4ew6n7bc.

Congress therefore requires a mechanism to ensure the law is faithfully executed, even when the contemnor is an executive official.

The Congressional Research Service has summarized proposals previously introduced in Congress that would statutorily amend the criminal contempt process to establish a procedure for referring citations concerning executive officials to an independent counsel.[39] The Select Committee should consider these proposals as part of a comprehensive effort to sharpen Congress's subpoena enforcement tools.

For example, under these proposals, updated statutory language would allow an independent counsel to make litigation and enforcement decisions pursuant to 2 U.S.C. §§ 192, 194, which outline the criminal contempt of Congress process. Shifting enforcement decisions to an independent attorney significantly more insulated from political pressure would address the longstanding problem of U.S. attorneys facing "subtle and direct pressure" when the contemnor is an executive official.[40] The independent counsel would, of course, retain prosecutorial discretion and could elect not to pursue charges against executive contemnors if those charges were purely partisan in nature, thereby limiting the potential abuse of that tool.

Several options have been proposed for determining the independent counsel's selection, including a congressional request of appointment from a three-judge panel. This was the model prescribed in the now-lapsed post-Watergate Independent Counsel Act,[41] which the Supreme Court upheld in *Morrison v. Olson*.[42] It is worth noting that the Independent Counsel Act faced valid bipartisan criticisms for which Congress would have to account if it provides for an independent counsel's enforcement of contempt citations against executive officials. Chief among those concerns was that the independent counsel's jurisdiction was too broad.[43] Congress could address this concern by narrowly tailoring new statutory language to limit the independent counsel's remit only to the investigation and prosecution of contempt and efforts to obstruct that work. And as with the ICA,[44] Congress could subject the independent counsel to the Attorney General's supervision and for-cause removal, subject to judicial review. As the Congressional Research Service has counseled, "it would seem prudent to mirror the Independent Counsel framework approved in *Morrison*, subject to some potential adjustments."[45]

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[39] Garvey, Cong. Rsch. Serv., *Congressional Subpoenas: Enforcing Executive Branch Compliance*, *supra*, at 36-39.
[40] *Prosecution of Contempt of Congress: Hearing Before the Subcomm. on Admin. Law and Governmental Relations of the H. Comm. on the Judiciary*, 98th Cong. 30 (1983) (statement of Stanley F. Brand, former Counsel to the Clerk of the House of Representatives).
[41] 28 U.S.C. § 591 et seq.
[42] 487 U.S. 654 (1988).
[43] *E.g.*, 149 Cong. Rec. S12160, 12162 (2004) (statement of Sen. Schumer) (asserting that "the independent counsel law expired because people were worried about" a "runaway counsel").
[44] 28 U.S.C. § 596.
[45] Garvey, Cong. Rsch. Serv., *Congressional Subpoenas: Enforcing Executive Branch Compliance*, *supra*, at 38.

However, this Committee should also be aware that any of these proposals may, today, be unlikely to withstand scrutiny by the Supreme Court, at least as currently composed. In particular, many commentators have observed that should *Morrison* be challenged today, the high court would be unlikely to come to its defense. Indeed, after many decades of both executive and judicial branch trimming of congressional authority, particularly on matters of congressional oversight, there appears to be a pressing need for Congress to devise a method for more clearly and forcefully articulating its constitutional prerogatives and responsibilities.

2. Establishing a Congressional Office of Legal Counsel

To aid Congress's ability to assert and vindicate its institutional interests, the Select Committee should move forward with its recommendation that GAO examine the "feasibility and effectiveness" of a Congressional Office of Legal Counsel.[46] Such an office could provide a useful counterweight to the Justice Department's OLC, which has issued the opinions supporting the Executive Branch's noncompliance with certain legislative requests for documents and testimony and the Justice Department's refusal to prosecute certain executive officials for criminal contempt of Congress. Although this subject undoubtedly is worthy of further study, as it has been the subject of limited scholarly inquiry, the creation of a Congressional Office of Legal Counsel likely would present a number of constitutional and practical issues. I outline some of these below.

Congress has weighed whether to establish a Congressional Office of Legal Counsel on several prior occasions, including during extensive deliberations in the 1970s.[47] Although the Senate supported one such proposal and sought to include it in the Ethics in Government Act of 1978, the House rejected the idea,[48] fearing the joint office "would not reflect House preferences on matters that divided the two chambers."[49] In lieu of a joint Office of the Congressional Legal Counsel, the Senate created an Office of the Senate Legal Counsel to assert and defend its interests in court, establishing this office and an express cause of action to enforce Senate subpoenas via the Ethics in Government Act.[50] The House did not establish its Office of General Counsel until 1992; it incorporated the Office into House Rules in 1993.[51] These House and Senate offices represent the institutional interests of their respective chambers to this day. However, the narrow jurisdiction of those offices has left the legislative branch without a single entity to champion its overarching institutional interests and opine on the scope of critical

[46] H. Rep. No. 116-562, at 215, 232 (2020), https://tinyurl.com/2mcejhz3.
[47] S. Rep. No. 95-170, at 18-20 (outlining history).
[48] 124 *Cong. Rec.* 35,672 (1978).
[49] Tara Leigh Grove & Neal Devins, *Congress's (Limited) Power to Represent Itself in Court*, 99 Cornell L. Rev. 571, 612 (2014). The Congressional Research Service also has stated that the House rejected the joint office because it "perceived the House and Senate to have somewhat different legal concerns." Cong. Rsch. Serv., RS22891, *Office of Senate Legal Counsel* 1 (2014), https://tinyurl.com/y34kb6.
[50] Ethics in Government Act of 1978, Pub. L. No. 95-21, §§ 701-15, 92 Stat. 1824, 1875-85 (1978); 2 U.S.C. § 288; Pub. L. No. 95-21, § 705(f)(1), 92 Stat. at 1879 (cause of action); 28 U.S.C. § 1365 (cause of action).
[51] H. Res. 423, 102d Cong. (1992); Rules of House of Reps., 103d Cong., Rule II(8).

legislative authorities. The accretion over the years of OLC opinions that narrowly construe Congress's powers and offer expansive interpretations of executive authority evince the need for a single congressional office capable of responding forcefully in kind.

As Congress examines whether to establish and how to structure such an office, it should keep several things in mind. First, the Executive Branch has lodged a number of objections to earlier legislative proposals to create a Congressional Office of Legal Counsel. One proposal, outlined in the Separation of Powers Revitalization Act of 1975, would have created an office with the power to defend and prosecute, and to intervene or appear as amicus in, certain civil suits implicating the institutional interests of Congress.[52] The Congressional Legal Counsel created in the bill would have been jointly appointed by the President Pro Tempore of the Senate and the Speaker of the House, pending the approval of the full House and Senate in a concurrent resolution.[53]

OLC identified "substantial constitutional infirmities" in that proposal.[54] First, it contended that the appointment of the Congressional Legal Counsel must be subject to the Article II, Section 2, Clause 2 of the Constitution because the Constitution provides no alternative process "for the appointment of officers serving Congress as such rather than its components."[55] The opinion notes that other joint congressional officers—including the Comptroller General (the head of GAO), the Librarian of Congress, and the Public Printer (known now as the Director of the Government Publishing Office)—are appointed precisely in this manner.[56] OLC added that because the Counsel would be subject to appointment by the President, she also would be subject to the President's removal.[57]

Second, OLC cast doubt on whether a single office should represent the interests of legislative chambers designed by the framers to be separate. The opinion quotes James Madison,[58] who argued:

> "In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their

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[52] S. 2731, 94th Cong. (1975).
[53] *Id.*
[54] Constitutionality of Bill Creating an Off. of Cong. Legal Counsel, # Op. O.L.C. 384, 392 (1976), https://www.justice.gov/file/20871/download.
[55] *Id.* at 387-88 (stating "Article I, Sections 2 and 3 of the Constitution provide that the House… and the Senate choose their respective officers," but not joint officers).
[56] *Id.* at 389; 31 U.S.C. § 703 (Comptroller General); 2 U.S.C. § 136-1 (Librarian of Congress); 44 U.S.C. § 301 (Director of Government Publishing Office); 2. U.S.C. § 1801 (Architect of the Capitol).
[57] Constitutionality of Bill Creating an Office of Congressional Legal Counsel, # Op. O.L.C. at 390.
[58] *Id.* at 388.

> common functions and common dependence will admit.... [T]he weight of the legislative authority requires that it should be thus divided....[59]

In short, OLC suggested that an Office of Congressional Legal Counsel may contravene the framers' intent to fragment legislative power by creating a bicameral body.

Despite these objections, history shows that it is possible to get executive signoff on a Congressional Office of Legal Counsel. The Senate managed to do so in 1978, after modifying its proposal "in certain aspects to meet all objections raised by the [Justice] Department."[60] A detailed description of the resulting office (which the House ultimately refused to support) and its proposed legal authorities can be found in Senate Report 95-170 (1978).[61]

The Select Committee should, however, take note of an additional concern. Although lawmakers might intend a Congressional Office of Legal Counsel to represent the institutional interests of the entire legislative branch, it may, in practice, end up highlighting the branch's acute internal divisions over key legal and constitutional questions.[62] For instance, it seems not only possible but likely that the Office of Senate Legal Counsel or the House Office of General Counsel may contest opinions issued or positions taken by a Congressional Office of Legal Counsel where those offices' views of their chambers' institutional interests differ. Given such contestation—which likely would arise during the thorniest of legal, constitutional, and political disputes—it is difficult to ascertain whether a court would consider Congress's institutional interests meaningfully clarified by the Congressional Office of Legal Counsel.

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[59] The Federalist No. 51 (James Madison).

[60] S. Rep. No. 95-170, at 8.

[61] *Id.* at 82-108; *see also id.* at 8-18 (need for the office), 18-21 (past congressional concern regarding the office).

[62] Internal disputes over Congress's institutional interests are quite common. For instance, the Speaker of the House, represented by the House Office of General Counsel, and a large portion of the House Republican caucus are engaged in an ongoing dispute over the constitutionality of the House's proxy voting system. Pet. for Writ of Cert., *McCarthy v. Pelosi*, No. 21-395 (U.S. Sept. 9, 2021). Though courts have dismissed House Republicans' lawsuit on the ground that the Constitution's Speech or Debate Clause bars consideration of the suit, *McCarthy v. Pelosi*, 5 F.4th 34 (D.C. Cir. 2021), the merits issue at the heart of the case is whether the House may change its rules to adapt to a crisis. *See, e.g.*, Br. for Appellees at 1-2, *McCarthy*, No. 20-5240 (D.C. Cir. Sept. 30, 2020) ("This process permits the House to conduct vital business during the crisis and promotes bedrock principles of representative government."). To preserve maximum discretion for the House, the House General Counsel has sought to vindicate "the House's authority 'to determine the Rules of its Proceedings.'" *See id.* at 2. House Republicans, on the other hand, have sought judicial intervention to block the exercise of that authority and establish that courts may second-guess Congress's rulemaking authority to an unprecedented degree. *Cf. United States v. Ballin*, 144 U.S. 1, 5 (1892) (allowing for judicial review of congressional rules only where they "ignore constitutional restraints or violate fundamental rights," or bear no "reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained"). It follows that just as House Republicans have contested the House General Counsel's view of the chamber's institutional interests and authority, so too may the House Office of General Counsel or the Office of the Senate Legal Counsel dispute a Congressional Office of Legal Counsel's conclusion.

These questions, the relevant legislative history, and the Justice Department's objections to the office are worth GAO's close study, in accordance with the Select Committee's recommendation at the close of the 116th Congress.

3. Security Clearances for Congressional Staff

Although executive refusals to comply with legislative subpoenas offer the highest profile examples of the challenges Congress faces in securing the information it needs to conduct oversight, lawmakers face a second (self-imposed) challenge: strict limitations on the number of congressional staff with access to high-level security clearances.

Both chambers restrict who may receive security clearances and the level of clearance particular staff may receive. In the House, each member may have no more than two cleared staff in their personal office; those individuals may receive only a Top Secret (TS) clearance and therefore cannot access Sensitive Compartmented Information (SCI).[63] Senators are subject to identical restrictions on personal staff clearances, unless they sit on the Armed Services, Foreign Relations, or Homeland Security and Governmental Affairs Committees, or on the Appropriations Subcommittees on Defense or State, Foreign Operations, and Related Programs.[64] Senators on those panels may employ an additional cleared staffer to assist with their committee work.[65] Although committee staff in both chambers may, at the request of committee leadership, receive approval for a TS/SCI clearance,[66] lawmakers on the Senate Select Committee on Intelligence (SSCI) enjoy a notable staffing advantage over their House counterparts. Each SSCI member is afforded a "staff designee," who is hired by, and serves at the individual direction of, the member; may receive a TS/SCI clearance; and is paid by SSCI to assist the member's committee work.[67]

Members of the House Permanent Select Committee on Intelligence (HPSCI) have decried that they cannot also hire a personal, TS/SCI-cleared "staff designee"—emphasizing the "onerous burden" the lack of such staffers places on members, who "are unable to have the assistance of staff at the most crucial times."[68] Former Rep. Susan Davis, who sat on the House Armed

[63] Mandy Smithberger & Daniel Schuman, Proj. on Gov't Oversight, *A Primer on Congressional Staff Clearances* (Feb. 7, 2020), https://www.pogo.org/report/2020/02/a-primer-on-congressional-staff-clearances/; Mandy Smithberger, Proj. on Gov't Oversight, *Testimony Before the House Appropriations Committee's Legislative Branch Subcommittee* 1 (Apr. 2, 2019), https://tinyurl.com/hzxatx5z; Rep. Susan Davis, *Written Testimony for the House Committee on Appropriations Subcommittee on the Legislative Branch* (Apr. 2, 2019), https://tinyurl.com/42w3f92c.
[64] Smithberger & Schuman, *supra.*
[65] *Id.*
[66] *Id.*
[67] S. Res. 445, 108th Cong. § 201(g) (2004); Daniel Schuman, *Schiff's First Order of Business for the House Intelligence Committee*, Just Security (Jan. 29, 2019), https://tinyurl.com/2d5skbae; Phillip Lohaus et al., *Improving Congress's Oversight of the Intelligence Community*, The Hill (Jan. 24, 2017), https://tinyurl.com/k5are3th.
[68] Letter from Eight Members of Cong. to Hon. Tom Graves, Chairman, Subcomm. on Legis. Branch, H. Comm. on Appropriations, and Hon. Debbie Wasserman Schultz, Ranking Member, Subcomm. on Legis. Branch, H. Comm. on Appropriations (Mar. 22, 2016), https://irp.fas.org/congress/2016_cr/hpsci-hac.pdf; Gopal Ratnam, *Staff Security*

Services Committee, similarly attested that the highly classified nature of certain aspects of committee work and the tight restrictions on access to TS/SCI clearances meant that "there are times when I cannot rely on… my personal office staff" to "conduct research for me… and act as a sounding board."[69] Davis suggested that this undermined her ability to meet "the obligation to keep abreast" of relevant issues.[70]

In short, the limited staff support lawmakers have at their disposal when dealing with highly classified information severely impedes their capacity to conduct effective oversight of executive defense and national security programs. Unlike lawmakers on other panels, members of congressional national security committees are less able to lean on support from journalists or civil society groups in their efforts to uncover misconduct or oversee the agencies in their jurisdiction. As Rep. Adam Schiff, then the ranking member of HPSCI, explained in 2017: "[B]ecause of the classified nature of the [Intelligence Community], we cannot rely on outside interest groups to raise issues to our attention as other Committees can. We have to find them ourselves—often from agencies very good at keeping secrets."[71] This underscores the need for members to have personal staff cleared at a level that allows them to undertake the most consequential, and therefore highly classified, oversight work.

To address this issue, the Select Committee should consider reforms aimed at increasing the number of congressional staff with TS/SCI clearances. At a minimum, the Select Committee should support a proposal to provide HPSCI members—like their SSCI counterparts—with "staff designees," cleared at the TS/SCI level, to support individual members' committee work.[72] It appears that all the House must do to make this change is pass a resolution, as the Senate did before it.[73]

Although this modest adjustment would put intelligence oversight in the House and Senate on similar footing, it would make little dent in the broader lack of lawmaker access to personal staff cleared at the TS/SCI level. Congress could take several further steps to address this problem. It could permit members serving on committees handling defense and national security matters to "designate one staffer at the TS/SCI level," as Rep. Davis has proposed.[74] But it also could allow every member of Congress, regardless of their committee assignments, the option to designate

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Clearances May Vex House Intelligence Members, Roll Call (Oct. 2, 2019), https://tinyurl.com/ut32cub5 ("Rank-and-file members of the House Intelligence Committee, who are at the nucleus of the impeachment inquiry into President Donald Trump, likely have no personal aides to consult on the most sensitive information handled in the high-stakes probe.").

[69] Rep. Susan Davis, *Written Testimony for the House Committee on Appropriations Subcommittee on the Legislative Branch* (Apr. 2, 2019), https://tinyurl.com/42w3f92c.

[70] *Id.*

[71] Rep. Adam Schiff, *Statement Before the Committee on House Administration: Committee Budget Request for the 115th Congress* 1 (Feb. 15, 2017), https://tinyurl.com/5fv6vwkk.

[72] Letter of Eight Members of Cong., *supra*.

[73] *Cf.* S. Res. 445, 108th Cong. § 201(g).

[74] Davis, *supra*, at 4.

one personal staffer to be cleared at the TS/SCI level.[75] Each chamber could make these changes individually and with only minor increases in annual appropriations to the legislative branch to accommodate the costs associated with the security clearance process.[76]

This recommendation compliments many of the recommendations the Select Committee made during the 116th Congress concerning staff capacity, training, and access to technologies that would streamline oversight and make it more effective.[77]

Conclusion

Despite the challenges Congress faces in strengthening its oversight capacity, lawmakers have a number of options at their disposal to vindicate the legislature's clear constitutional authorities. It is critical that Congress takes swift action to enact some of these proposals, particularly those outlined in Titles IV and V of the Protecting Our Democracy Act, to ensure that the Article I branch of government reclaims its position as a meaningful check on executive power.

I look forward to answering your questions.

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[75] *Id.*; Smithberger, *supra*, at 1.

[76] As a former congressional national security staffer has testified, it seems "that the cost for providing staff a TS/SCI clearance is largely borne by the CIA, and the cost of investigating and adjudicating TS/SCI clearances is around $5,000 for someone who has never had a clearance. We do anticipate there would be some funding needed for the legislative branch to maintain records of nondisclosure agreements, store classified documents, and track individuals granted clearance, and we urge the Committee to increase funds for the Sergeant at Arms accordingly. As most of the personal office staff of the relevant committees likely already have TS clearances, providing additional access should not be burdensome." Smithberger, *supra*, at 2-3.

[77] *See* Select Comm. on Modernization of Cong., *116th Congress Recommendations*, *supra*; H. Rep. No. 116-562, at 155-62.

The CHAIRMAN. Thank you, Ms. Tindall.

I want to now recognize myself and Vice Chair Timmons to begin a period of extended questioning of the witnesses. Any member who wishes to speak should just signal their request to either me or Vice Chair Timmons.

So, I guess, one of the things I wanted to ask about was much of your testimony appropriately was about where the executive branch basically isn't playing ball. I want to actually just take a step back and look at how the legislative branch approaches oversight.

You know, Vice Chair Timmons in his opening statement sort of spoke to, you know, I think there is almost two kinds of oversight in this place. There is the kind of gotcha oversight where the party that controls Congress, if the executive branch is under a different party, it is about kind of really trying to get headlines, trying to embarrass that administration politically.

You know, and then there is the day-to-day sort of oversight of the administrative state, where you are trying to make sure that policy decisions that have been made are efficient and effective, you are trying to make sure taxpayer's dollars are being spent appropriately.

I want to get your assessment, one, of how Congress does on that second piece, and if there is things that you think our committee ought to be thinking about recommending to incentivize more of that second type of oversight or make more effective that second type of oversight.

I am sure members of the committee will have questions about the kind of stalemate between the executive branch and the legislative branch, but I kind of want to take a step back and just start with, how is the legislative branch doing? Go ahead.

Ms. BEAN. So at the Levin Center, we do a lot of work on oversight, and actually bipartisan oversight is alive and well. It is not covered by the media. And I say to my reporter friends, are you going to cover this great bipartisan hearing that is impacting the real problem? They are like, no.

So the only things that people see, that the media covers, have a partisan—and actually there is enormous amount of bipartisan oversight going on all the time. And it is not even on the committee level. Sometimes it is individual members. I remember a report that came out of Congress years ago——

The CHAIRMAN. Oh, you may have to use a mike. I am sorry. You can try yours again if it is not possessed.

Ms. BEAN. Yeah, let me try that.

The CHAIRMAN. Yep, still possessed. Let's borrow Dr. Chafetz's.

Ms. BEAN. Okay. I apologize for not turning that on. But I was just going to say, I remember a report that came out——

The CHAIRMAN. Yeah, I would use that one, yeah.

Ms. BEAN[continuing]. Years ago from a Democrat and Republican office that looked at pain relief issues and the World Health Organization. These two offices had no subpoena authority, they didn't have a committee, they simply looked at documents that had come out of litigation. They looked at the pain relief recommendations of the World Health Organization and showed over time how

the World Health Organization had taken on the same policies as Big Pharma and opioids.

They put out a report disclosing this. The World Health Organization responded by withdrawing their pain relief recommendations, which had recommended very strong opioids very early in the process, and that was just two offices working together on oversight. So my answer is, there is a lot of good-faith, bipartisan, fact-based oversight that goes on right now.

As for what you can do, we have a couple of suggestions, sort of soft suggestions. One is trying to popularize the idea of making a public commitment to bipartisan oversight. So you just announce publicly at the beginning of an investigation, we are going to do this together.

And that worked for the Permanent Subcommittee on Investigations. We regularly did that. And our bosses instructed the staff to work together, and guess what? We did. When your boss tells you to do it, you do it. And that—maybe you could develop a model statement or just popularize the notion of having a public commitment to bipartisan oversight.

Another idea that we have suggested is have fewer hearings on less partisan topics. Right now there is so many hearings that go on, people have a tough time even tracking all of the intricate issues that are going on. And the more partisan the issue, often the less productive the hearing, the less progress you make. So that is another idea.

And the third idea that we suggest is increasing social interaction. On the Permanent Subcommittee on Investigations' staff had a running cocktail party every 2 weeks, and weren't allowed to talk about work. You could just talk about—if I in the past or, you know, just sort of the chitchat that goes on with people that work together. We found that that social interaction—we also took photographs of the teams that work together on a bipartisan basis on each investigation. We found that that social interaction and those photographs did more for our committee than almost anything else. So those are just a couple of ideas.

The CHAIRMAN. Thank you.

Mr. CHAFETZ. If I could just follow up on that. So Elise is exactly right about the tremendous amount of bipartisan oversight that actually does go on, and the Levin Center has done tremendous work tracking that. And it is consistent with a small but real body of political science literature that suggest that there is still a fair amount of bipartisan oversight that happens.

I think, you know, it is wonderful to the extent that that is possible. It is also, I think, worth stepping back and perhaps saying that bipartisan doesn't always mean good, and partisan doesn't necessarily mean bad, right.

So one reason that certain things are partisan issues is simply because there are ideological disagreements about what it means for some part of the executive branch to be doing a good job or a bad job. And if there is disagreement about that, and in an increasingly sort of partisan, polarized age, that disagreement is likely to track party lines, then we actually should expect to see the parties taking a different view on oversight of that particular part of the executive branch.

And sort of further than that, you know, oversight is one—so, you know, the two kinds of oversight that you mentioned at the beginning, right, the sort of—you called it gotcha. I would perhaps use a less pejorative term, but the sort of gotcha on the one hand and the day-to-day on the other in some sense could also be separated out as, you know, the day-to-day oversight being oversight of things that are perhaps lower level down in the executive branch whereas a lot of the gotcha or sort of more communicative or performative uses of oversight tend to be things that are closer up to the White House level, right.

And it is actually an important function that Congress serves as a way of pushing back against presidential power that when another party controls one or both of the Houses of Congress that they actually do serve as a sort of rhetorical counterweight.

So we tend to forget that a lot of the earliest committee hearings surrounding Watergate were on party lines. By the time you get closer to the House Judiciary Committee reporting out the impeachment articles, it was somewhat bipartisan although not all that bipartisan. But at the very beginning they are party-line votes in the House Judiciary Committee.

So I don't think that partisan oversight is necessarily a bad thing. I think bipartisan oversight when it can be made to work and when it is appropriate is a good thing, and I share Elise's recommendations on that. But I wouldn't want us to say that just because something is happening on party lines that necessarily makes it a bad thing.

The CHAIRMAN. Ms. Tindall, do you want to take a swing at this pitch too?

Ms. TINDALL. Just one short comment here. I agree with Professor Chafetz that partisan oversight does not have to be an empty affair, but I do think some of the recommendations this committee has made over the structure of oversight hearings could reduce the sort of gotcha feeling that we all get when we watch these hearings and have the conversation go back and forth ping-ponging between what is made largely for YouTube, for social media, and less for engaging with the witness.

To get the sort of productive and really effective oversight you want, both on the bipartisan oversight on, you know, issues where there can be agreement and even where there are ideological disputes and there may be conflict, being able to actually engage with the witness in extended period of time, not, you know, the sort of 30-minute questions, perhaps even handing questioning over to staff who have really mastered all the facts of the investigation and can offer followup questions and the like could lend substance to the hearings that now often feel more full of finger pointing.

The CHAIRMAN. Vice Chair Timmons.

Mr. TIMMONS. Thanks, Mr. Chairman.

I have been doing a lot of research while we have been sitting here. So the House has both the full Committee on Oversight and Government Reform, and it has at least seven subcommittees for E&C; Financial Services; Homeland; Natural Resources; Veterans Affairs; Ways and Means. The Senate, interestingly, the word "oversight" only appears one place in all of their committees and subcommittees.

My time in the House, in my just life experience, would lead me to feel that maybe—well, I feel like a lot of the things that the House does—again, this is on both sides of the aisle at different points in the last 30 years—have devalued the purpose of our ability to actually engage in oversight in the House. Is the Senate doing it better, or there are fewer of them? It is harder to tell a Senator no? I don't know. Talk me through your—the difference between the two, whoever wants—whoever knows the most about it.

Ms. BEAN. So I don't think the Senate is doing better than the House. Just whether you call something oversight or not doesn't really, you know, control whether somebody is doing oversight. And there is this law that now requires every committee to do oversight as part of its work. You are not just supposed to produce laws; you are also supposed to produce oversight. And, of course, the two go hand in hand, because how do you know what a law should look like, how it should function, if it should be modified unless you get more information?

You raised an earlier question about why do we need a general Oversight Committee, why not just leave it to each of the authorizing committees. And the answer to that is, all of those other committees have a lot of legislative responsibilities. An Oversight Committee is less about legislation and more about fact finding.

So I worked on the Permanent Subcommittee on Investigations. We had no legislative authority at all. We had nothing to do with passing laws. We were only about fact finding. And one of the things we looked into was money laundering. Why did we do that? The Senate Banking Committee had a lot of legislative responsibilities. They never had time to get to money laundering. They just didn't have time on the order of their priorities, and I couldn't argue with them. They had more important things to do than money laundering. And, yet, that is a really serious problem in a whole variety of ways. And so we spent time doing that money laundering and then eventually we helped to produce a bill, but then it went to the banking committee that then considered it and eventually passed it.

So that is one reason you have an Oversight Committee so that they can function, take on that constitutional responsibility that Members of Congress are not just about legislating, they are also about figuring out how the government is working, how can we improve it.

Mr. TIMMONS. In your experience, do authorizing committees facilitate or help the full committee on oversight with its pursuit of information? I mean, theoretically they are going to have better relationships, better subject matter experts, and they might be able to more effectively pursue information. Is that something that happens or are they pretty separate?

Ms. BEAN. Occasionally it happens. Occasionally an Oversight Committee will go to, say, the Armed Services Committee, can you help us get this information from DOD on this particular issue. But a lot of times the full committees are kind of jealous of their relationships with their agencies, and they develop very strong agencies, sometimes even agency capture, and they don't want to help an Oversight Committee that is pointing out problems. So it is a mixed bag.

Mr. TIMMONS. When the full Oversight Committee pursues information, whether through subpoena or what other the mechanism may be, does it ever happen that they go to the subcommittee on the authorizing committee and request to do a joint request as opposed to just—I think that would be stronger. Is that something that——

Ms. BEAN. Yes, it would be stronger. And I think people try to do that wherever they can, and you will see joint letters and requests for information.

I think one of the big things about oversight, what distinguishes an oversight hearing versus a legislative hearing is it is more about fact finding as opposed to evaluating legislation. And fact finding, I mean, we found on PSI that if you fact find with somebody who has the same world view as you, generally agrees with you, you don't challenge each other. You miss a lot of facts. You just don't get it right.

It is only when you investigate with people who have fundamentally different views than you have that you start to look at more facts, you are more critical about them, you challenge each other. And at the end of the process your results are usually more accurate, more thoughtful, and certainly more credible because you had a range of views in the process.

I think the Oversight Committees really take that to heart and when they are doing bipartisan oversight to try to use those disparate views to come up with a better set of facts that you can then use to think about what you should do about the problem.

Mr. TIMMONS. One last question. Dr. Chafetz, you talked about using the power of the purse to better engage in oversight. I really like that idea, but, I mean, at the end of the day, I feel like it is probably going to be very challenging. Obviously we have lived in CRs for forever and then, you know, you are going to have to figure out getting the Senate and the House to agree. And, I mean, talk me through that a little more. I mean, is that a great idea that probably will never work? But, I mean, expound on it, please.

Mr. CHAFETZ. So part of the sort of intuition it calls on is that appropriations must pass in some sort of central sense. And so the basic idea is that if, you know, one House or the, you know, Appropriations Committee of one House feels very strongly about a particular rider that there is a decent chance they can get that into the final bill, because what is the alternative, right, if you are actually willing to sort of insist on that being in a final appropriations bill.

And I am just going to back up for a second to the question of CRs now. If you are willing to sort of insist on that rider being in a final appropriations bill, the other Chamber, either by refusing—either the other Chamber by refusing to go along with the President by threatening to veto is essentially threatening to defund, you know, a 12th of the Federal Government.

And so there is—you know, a House that is willing to really insist strongly on that could actually I think get a lot of those riders through. It wouldn't always win the fight, but it might win the fight. It would have to think sort of carefully about the sort of political optics of doing it as well, right?

Obviously, just because you are having a fight with, you know, the Department of Agriculture doesn't mean you want to defund the Department of Agriculture, but it might mean you go after sort of targeted officials, or if you have a situation where, say, you think the White House Counsel's Office is, you know, telling the President, hey, you don't have to respond to any oversight demands from anyone ever, maybe the American people don't need to be paying for the White House Counsel's Office in that moment, right?

So I think there are sort of targeted things that the House could do that it could insist on. Now, that becomes harder as the sort of normal appropriations process breaks down, right? So part of what I would advise—and I gave this testimony to the Budget Committee last year—is it is important to try to return to regular budgeting order. It is important to try to bring back that process, because that is the way that the Houses of Congress exercise finder and control over not just spending but a whole host of issues that are collateral to——

The Chairman. I want to call on Mr. Latta, but can I just pull that thread real quick. So it is also hard because it is a really partisan place, right? How do you prevent sort of gaming of that, right? Like, whatever party is in charge in Congress has agencies they love and agencies they don't love so much.

So how do you keep—if you go that route of withholding funds, how do you make sure that a legislative party that is in power doesn't say, I am going to ask for something ridiculous from this agency to squeeze their budget?

Mr. CHAFETZ. And to some extent, that is the congressional power of the purse, right? That when people who are sort of more sympathetic to certain government functions are in control, they tend to fund those government functions and defund the ones that they are less sympathetic to.

So, to some extent, that is a problem that is not sort of specific to oversight, but is really endemic to the idea of congressional control over spending. But I think the check on sort of specific demands here is a political check. It is that ultimately when you are doing these things, you are setting up a political fight. You are setting up a confrontation with the other House, with the Presidency.

And so you have to be able to go out in public and make a plausible claim for why you should win that fight, in the same way that, you know, when these fights have gotten out of hand and we have gotten to lapses in appropriations, right, what ultimately settles those lapses in appropriations is some sense that one side or the other is losing the public fight, and that side then eventually caves.

So I think ultimately, the check has to be that you have to be able to go out and defend what you are trying to do.

The CHAIRMAN. Mr. Davis.

Mr. DAVIS. Mr. Latta.

The CHAIRMAN. He left.

Mr. DAVIS. Even better. That is great. That happens to make this place work better when your colleagues in front of you just step out at the exact right time.

Look, I love the recommendations you all have. The power of the purse, great. I would love to get back to our approps process. And,

as a matter of fact, we are trying to teach the next generation about the appropriations process.

I got a tour of a new exhibit in the Capitol Visitor Center not too long ago where they have an interactive table where, when we open this place up again and people can start coming here again, they are going to be able to argue and debate the 12 appropriations bills.

Well, my staff director asked the question, where's the CR button? Because, frankly, that is where we are at right now. We can talk in philosophical terms about what worked and what didn't, but this place has never been more of a hot political temperature. In my time as a staffer for 16 years and my time now 9 years as a Member of Congress, I have never seen it this bad.

And we have had committees like the committee I lead, House Administration for our side, swear in witnesses. Never done it before. I mean, the dirty little secret is if you testify, you are already swearing in anyway. You are already saying you are not going to lie to us. So don't lie, we will come after you. We will jointly exercise our oversight responsibility if you say anything untrue today.

But social media, you want that news pop, want to be able to get out there. And I noticed there hasn't been a discussion about how our normal media environment, other than the fact that you are absolutely right, Ms. Bean, that the media doesn't want to cover us talking about things where we agree. They just want to see me punch Perlmutter, which could be in about 5 minutes, you know, because he is a Broncos fan. They are terrible.

But in the end, what does that have to do? How can we get back to better bipartisan oversight, because everything you all say is great, but, I mean, the only hope I have is that we have gotten better, because I remember when, you know, I was told Chairman Dingell used to exercise his own oversight when he had proxy capability. We got rid of that in 1995.

Now we are back to proxy voting on the floor. What is the next step, back in committees? No. No. I don't think that will help us whatsoever. And, frankly, I am a little frustrated with proxy voting right now, because it stops somebody like me from going to talk to all of my colleagues about legislative ideas or even oversight ideas that they have, and I think it helps break down the institution and not in a very good way.

Social media, how is that impacting our ability to exercise our bipartisan oversight? I don't care who answers.

Mr. CHAFETZ. Should I take a quick crack at that? Because I have looked at oversight in a lot of different eras, and it is not clear to me that the fights are particularly more—are particularly stronger now.

So I have looked at, for example, the Nye committee in the Senate in the 1930s, which was the Munitions Committee or the Merchants of Death Committee. You look at the McCarthy hearings and the Army-McCarthy hearings in the late forties and fifties. You look at some of the hearings in the 1990s.

These are all different media environments, right? The first one is radio. The second one is television. The third one is internet but presocial media. Now we are in the social media era. And they are all nasty, and they are nasty in different ways. Sometimes the nas-

tiness is cross-partisan, so there are factions of both parties fighting within themselves, and then sometimes it is more partisan.

I would suggest that, you know, to whatever extent we are in a moment of sort of high political passion, the fault isn't with the media and it is not even with—I mean, there are things that Congress as an institution can do to turn down the temperature in Congress, but the truth is that the American public is more polarized than it has been in over a century along political lines. And if the American public is polarized, we not only should expect Congress to be polarized, in some sense we should want it, right, because Congress is meant to represent the people.

Now, again, that doesn't mean we shouldn't try to figure out ways that where there is agreement or might be agreement forged across those lines that we should do it, but we shouldn't expect sort of agreement across party lines when what we have in the underlying public is the American people that have been getting increasingly polarized since the mid 1960s.

Mr. DAVIS. Very good point. Somebody else? Yeah, don't waste that. Don't try the middle one again, no matter what he says. We don't listen to him either.

Ms. BEAN. I would like to point out that what you are talking about is the norms in Congress, and it is very hard to change those norms. And I think one thing that, you know, it is not a sexy answer, but training, workshops. If you have from the very beginning for new Members orientation, if they have a session talking about how oversight can bring the parties together, I mean, that is a message that you don't hear very often.

Mr. DAVIS. You told the right person. We will duly note that for orientation after this next election cycle.

Ms. BEAN. And then if there is ever a Members academy, leadership academy. And on the staff level, the Levin Center, working with POGO and the Lugar Center, for 5 years now has been doing staff-level training on oversight, fact-based, bipartisan. We have a hundred applications for each 25 spots that we do. We do it twice a year.

There is tremendous interest in bipartisan, fact-based oversight. And not only that, when you work with the staff, they love it. What we do is we get Democrats, Republicans, House and Senate, we put them on bipartisan, bicameral teams, give them a fake scandal and then take them through the legislative oversight process.

And they find that they can't even tell who is from which party, and they find everybody has good ideas, and they find they can work together. But you don't find that out unless you do it.

Mr. DAVIS. Right.

Ms. BEAN. And workshops are important. Right now, there isn't a single oversight offering from the Congressional Staff Academy. We have been trying to get them to think about it. No luck so far. But I am hoping one of the things that this committee could do is tell the Congressional Staff Academy you have to have something about bipartisan, fact-based oversight.

Mr. DAVIS. I will tell them right now. You need to have something about bipartisan, fact-based oversight in the Congressional Staff Academy.

Ms. BEAN. Or you can just send people to our, you know, oversight boot camps.

Mr. DAVIS. Where's my team on House Admin? Hey, tell them, all right? Ms. Bean.

Hey, Ms. Tindall, I do have to apologize. I see you worked on Energy and Commerce with my former boss, Mr. Shimkus. I apologize for the many years you had to put up with him. He is in town today, so if you see him tell him I said that too. But what are your thoughts on the media environment?

Ms. TINDALL. I think the media environment is not something that we here are going to solve or that you in Congress are going to solve, but I think that what Ms. Bean is describing is a way to build the sort of institutional interest that I was talking about in my opening statement, where you provide staff and you provide Members with ways to get what feels like wins, get what feels like progress and fulfilling work together, and help them to understand that it is the institution of Congress they are representing rather than their political party across all investigations.

You know, certainly not all of our oversight on Energy and Commerce was bipartisan, but a good chunk of it was. And when I look back on the time I spent in Congress as an investigator, it is those bipartisan investigations that were the most successful, that were most likely to lead to reform legislation, and that were most fulfilling to the folks involved.

Mr. DAVIS. Thank you. Thank you.

One last question, observation I want to talk about and have you all address if you have the opportunity is you talk about minority rights. I really care about minority rights right now because I am in the minority.

And we are learning a valuable lesson about how to create more of a bipartisan work environment in the committees that I serve on. And compared to the years I served when we were in the majority versus the years I have served in the minority, I am learning a lot.

I don't think it is going to be—but here is the problem I have: We talk about minority rights. We talk about how do we exercise that bipartisan oversight. This place is based on precedents, right? The precedent has been set by this majority to actually not allow Members of the minority to serve on committees that the minority names them to, be it a select committee or be it a committee. That precedent is going to be taken by any new majority too.

How do we stop that? How do we stop—how do we get back to a point where the minority rights means being able to appoint their own Members to committees, and then focus on bipartisan oversight rather than focusing on politics? We can make that a Staff Academy one too, if you would like.

Ms. BEAN. Well, I think as it becomes more and more clear that the majorities can flip back and forth, each side is going to become a lot more interested in minority rights, because one Congress you are in the majority, the very next one you are in the minority.

When I was in the Senate, I was in the majority and minority back and forth over the years. And so, as you say, you start to gain an appreciation for why the minority is important and why you

need two vibrant parties working together to solve problems. So I think there is going to be a fix automatically.

When I saw some Republicans write to the Department of Justice saying, we don't like your legal opinion that Federal agencies don't have to respond to committee requests made by ranking minority members, but hallelujah, right, that is true. And that is another reason why Congress itself needs the ability to issue legal opinions on a bipartisan, fact-based way. That is how you are going to tackle that problem.

Mr. DAVIS. Go ahead, Dr. Chafetz.

Mr. CHAFETZ. I am not sure I have too much to add on that except that, yes, you know, precedents can be important, but they also are not sort of determinative, right? The ways in which Members get appointed to committees have changed radically over the course of the history of this institution. And I think you can also sort of distinguish perhaps between a general rule that continues to be operative, right, and a few exceptions.

That said, you know, I think, like everyone up here, I would be very dismayed if the sort of general rule were changed to take away significant amounts of power from each party to [inaudible.]

The CHAIRMAN. Did you want to pull on one of the threads from Mr. Davis? Okay. Mr. Perlmutter.

Mr. PERLMUTTER. Thanks. And just to follow up on Rodney's point on the—he has a legitimate point on the taking somebody off the committee. You really do. But also, your point is being about the executive branch more or less giving you, you know, the thumbing your nose at congressional oversight.

And I am sorry, I missed your initial remarks, but how do we deal with that? I don't care. It could be could be the Biden administration, you know, talking to a Republican majority saying, sorry, we are not showing up. How do you deal with that?

Ms. BEAN. I think, as we have all said, there is a number of things. There is not one silver bullet. One thing is you have to have a strong congressional position, bipartisan, bicameral. There is no such thing as executive branch immunity to congressional subpoenas. And then you use that opinion. You have to go to court. You are going to have to get a court decision.

When we have gone to court, there are two district courts that have considered that opinion, and they both said there is no such thing as absolute immunity. But that is only a district court. It hasn't gone up the process yet. So you have to set up a way to get better or quicker, better court consideration of these issues.

We talked about Title IV of the Protect Our Democracy Act that has been developed, with bipartisan input, that has some really terrific provisions that could help address this issue. And I think Anne has also talked about inherent—why don't I just—there is another option.

Ms. TINDALL. Congress' inherent contempt power has been upheld by the Supreme Court numerous times. I don't think that we need to return to arresting recalcitrant witnesses in order to effectuate it. I think that a system of fines that could bring the administration back to the table, bring the executive branch back to the table could be very effective.

And the idea should be, just as with, you know, our Criminal Code, the system of fines will be most effective if it is never used. You know, the goal isn't to fine executive branch officials. The goal is to create a credible threat that forces them to the table to return to an accommodations process that worked for many, many years, but has since broken down.

Mr. CHAFETZ. I just have one—you know, one way to sort of effectuate the fines in a way that it does, to a large extent, sort of keep this out of court, at least at the front end, is that when we are talking about executive branch officials, we are talking about people who are drawing a salary from the Treasury, right? You can set up a system of fines so that they simply don't get paid at all. And I think that is why I wanted to sort of emphasize in my testimony the importance of using the appropriations power, the power of the purse more generally.

One area where I do disagree with Ms. Tindall is on the hope of getting this through the courts in a satisfactory way. I think both the timing, even on expedited procedures, of trying to get these things through the court——

Mr. PERLMUTTER. It is a rope-a-dope.

Mr. CHAFETZ. And, frankly, the Federal judiciary has been hostile to Congress for decades. It has been hostile to any kind of assertion of congressional power. You see this as early as the Senate Select Committee case in Watergate. You see it in the Mazars opinion just last year. The Federal judiciary—the Federal judiciary is pro executive and anti-Congress and it has been for decades, and I think putting Congress' hopes in them is largely [inaudible.]

Mr. PERLMUTTER. Just one more question, if I could.

So, Dr. Chafetz, you say, well, the citizenry is polarized; therefore, we should be polarized. It is a very fatalistic kind of conclusion. And, I mean, Abraham Lincoln talked about knowing where people are. You can't just say, you know, we really need to get there tomorrow and even though they are way over here. You have got to recognize where they are and lead as you can to a point that is positive, I guess.

And I think what we are trying to do on this committee in these kinds of conversations is to be leaders towards back—towards the civility, towards the collegiality, towards, you know, coming up with solutions as opposed to arguments and fights.

So, I mean, that is just how I kind of felt by your remarks. And you are right, we are polarized as a Nation. It is more than I have ever seen. But we have a responsibility not to be appeasers, but to be leaders in trying to work together.

We had a funny experience yesterday, Mr. Timmons and I, in the Financial Services Committee, where it had been a completely bipartisan committee. I mean, you couldn't tell whose witness was what. It was on cybersecurity, which is a common concern of all of us. And it was funny, because most of us understood, you know, we were just trying to get to the elements of the cybersecurity, but the memo didn't quite get to everybody on either side.

So the last couple guys who were asking questions, it was like right out of the message machine, both sides. We turned to each other and said, essentially, I guess they didn't get the memo that

this really is a bipartisan committee hearing. I mean, we are so told to stay on message, and that message is a very combative one.

Ms. TINDALL. If I could just make one comment on that, Senator Levin did bipartisan oversight for his entire 36 years. And when he was on the Permanent Subcommittee on Investigations, he started off with Susan Collins, had a very bipartisan relationship. Everybody said, well, that is Susan Collins. Then we had Tom Coburn come on our subcommittee, and they all said, you are never going to be able to work with him. They had a wonderful working relationship.

And that is really the good news about oversight is that two Members, the ranking and the chair, can get together. And it doesn't matter what anybody else is saying or doing, they can choose to work together. They can order their staffs to work together. And when that happens in good faith, you find out the facts. Once you find out the facts, you might find out solutions that are acceptable to both sides.

So oversight is an area where bipartisanship really can work, because you just close the doors on what everybody else is doing and have your staffs work together to find out the facts. And that is why this hearing to me is so important.

Mr. TIMMONS. Can I jump in there real quick? Theoretically, Congress could pass a law that said that if the ranking member and chairman of the Oversight Committee issued a subpoena to a Federal employee and that Federal employee refused to comply, they would be denied compensation until they complied. Could that happen?

Ms. TINDALL. I think that would just go to the courts. Whenever you have all of these things about imposing fines or stopping appropriations——

Mr. TIMMONS. You could bar them from Federal property. I mean——

Ms. TINDALL. You know, but what would the courts do? And would the courts say—and I don't think they have been uniformly hostile to Congress. When you look at a number of the decisions over the years, they have been very supportive of Congress.

So I think that is why it is—you don't know what the courts are going to do or what a particular judge is going to do. So I don't know how they would analyze that, if they would say a blanket, you know, whenever you don't comply with a subpoena even if that subpoena is improper in some way.

Mr. TIMMONS. You can create a 30-day window with an expedited appeals process.

Ms. TINDALL. You know, there are all kinds of ideas like that. I know Josh wants to——

The CHAIRMAN. But again, I mean, what does that look like? Ms. Tindall, can you say a bit about what an expedited judicial consideration would look like, and how do we legislate that?

Mr. CHAFETZ. I just wanted to come in on the initial proposal, because I think, you know, one thing that it would accomplish—you are right, it would wind up in court, because anyone can sue about anything and it can always wind up in court.

But the thing is, you are flipping sort of whose ox is being gored while the process is going on. Right now, the House issues a sub-

poena. The subpoena gets defied. Then the House sues. Then the case takes 6 or 8 years. And then by the time it is resolved, however it is resolved, everybody has forgotten about it.

If you do something like withholding salary, then, yeah, so the person whose salary has been withheld is going to sue. And while they are suing, their salary is being withheld. That is an incentive for them to cooperate, and I think that would be [inaudible.]

Mr. TIMMONS. You could also facilitate an expedited appeals process without taking 6 to 8 years. I mean, you could say, when a congressional subpoena is denied, it takes priority over the docket.

Ms. BEAN. So, just so you know, that that is—how can you legislate that? That is exactly what they have done. They have said that you have to expedite any time there is a congressional subpoena involved. And very cleverly, they also required the Supreme Court and the Judicial Conference to write rules for their courts to follow so that that expedition happens.

Because I think that is very critical. If you don't have rules that are in place, I think it wouldn't happen. That is something new that hasn't been suggested before. As Josh has said, there are all kinds of—you know, courts kind of ignore the rules sometimes. You are never going to have a perfect system, but there are ways to make it better than it is right now.

Mr. TIMMONS. Yeah, but do we give the Supreme Court original jurisdiction or remove an appellate process?

Ms. BEAN. Well, actually, in the bill what they do is they say, you can request a three-judge district court and then go straight from there to the Supreme Court. So you would skip an entire appellate level, which would save you a year or two. So that is one of the proposals.

Mr. CHAFETZ. And that is modelled on things like there are certain election law controversies that go straight to a three-judge panel with an appeal to the Supreme Court. You couldn't give the Supreme Court original jurisdiction, at least if we think Marbury v. Madison was rightly decided. It says you can't expand the Supreme Court's original jurisdiction.

But there would be ways to tell the courts to expedite these cases. The question is just what the courts would do with those. The courts have shown such an incentive or such an interest in slow-walking these cases when they don't have to that I am skeptical that you could write a statute that would actually force the courts to decide these things on a really tight timeframe, right, because Congresses only last 2 years.

Mr. PERLMUTTER. Withhold their pay too. Can I just ask a basic question?

The CHAIRMAN. Yes, go ahead.

Mr. PERLMUTTER. I mean, how we in the legislative branch say to the executive branch, so if somebody in Health and Human Services isn't showing up, do we write a letter to Secretary Becerra and say, you have got to withhold that person's pay, that salary?

We are already at odds with the executive branch. He says, I don't have to follow that. Well, then we are going to withhold all of the money to go to Health and Human Services. Is that how you see this working?

Mr. CHAFETZ. Well, there is a point at which, you know, if the executive branch simply—I mean, you know, the Constitution says that no money can be expended from the Treasury except in consequence of appropriations authorized by law.

If the executive branch is willing to ignore that—and there have been times that it has ignored that—then we are sort of at a moment where, you know, law has basically run out, right? We are at a moment where the executive branch has just announced that it is willing to behave lawlessly. We are borderline at a moment where there has been a coup.

And I know that is sort of strong language, but I would say that, you know, the power of the purse has been understood from the earliest days as the bedrock of congressional power. Whatever else it needs to accomplish, it can accomplish that, in part, by using its power of the purse.

And if you have a Treasury that is willing to disburse money when those disbursals haven't been authorized by law or are contrary to an Appropriations Rider, which are exactly the same thing, then you have a situation in which our constitutional order has fundamentally broken down.

Mr. TIMMONS [presiding]. Any final thoughts?

Ms. TINDALL. I just wanted to draw out what Professor Chafetz is saying here a little bit and respond to Representative Perlmutter. You are right that we have a challenge in the executive branch following through here.

And, Mr. Timmons, you are right that we have a challenge in effecting the sort of penalties you were discussing, such as, you know, barring someone from Federal property or deducting their salary, because these things depend on the executive branch.

And so I want to point you back to the inherent contempt power, where you could establish a system of fines and a means of executing them through a House resolution. You do not have to depend on the executive and you could enforce it yourselves. And that may be the way that you have to go.

Ms. BEAN. I would just like to say there is a whole menu of things that can be done, large and small, in the testimony that we have given you.

I.THINK THIS IDEA OF SENDING A LETTER TO GAO TO TALK ABOUT OPTIONS AND RECOMMENDATIONS FOR SETTING UP A SYSTEM FOR CONGRESS TO ACTUALLY MAKE UP ITS MIND IN A BIPARTISAN, BICAMERAL WAY ABOUT CERTAIN LEGAL PRINCIPLES IS A REALLY IMPORTANT PART OF THAT CHANGING NORMS, DECIDING HOW CONGRESS WANTS TO OPERATE. SO I RECOMMEND DOING THAT.

Mr. CHAFETZ. Nothing in particular.

Mr. TIMMONS. We are going to close it out. I would like to thank our witnesses for their testimony today, and I would also like to thank our committee members for participation.

Without objection, all members will have 5 legislative days within which to submit additional written questions for the witnesses to the chair, which will be forwarded to the witnesses for their response. I will ask our witnesses to please respond as promptly as you are able.

Without objection, all members will have 5 legislative days within which to submit extraneous materials to the chair for inclusion in the record.

This hearing is now adjourned.

[Whereupon, at 10:07 a.m., the committee was adjourned.]