

Testimony of
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On the Modernization of Congress

On
Strengthening Oversight Investigations

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Members of the Committee, thank you for this opportunity to talk about steps to strengthen the ability of Congress to conduct effective oversight investigations.

Good Government Requires Good Oversight

Legislative oversight is fundamental to a sustainable democracy. Good government requires good oversight to ensure effective programs, intelligent spending of taxpayer dollars, and a government that can respond to the country's evolving conditions, needs, and values.

When done well, fact-based, bipartisan congressional oversight can identify problems, build a shared understanding of complex issues, bridge political divides, and provide a factual foundation for reforms. It can advance the American system of checks and balances envisioned in the Constitution. It can play a vital role in curbing abuses that limit or undermine individual liberty and opportunity. Because oversight hearings also provide a key lens through which the public views Congress, by modeling responsible, competent governance, congressional oversight hearings can help increase public confidence in the legislative branch of our government.

But today multiple problems impede effective congressional oversight. They include the absence of Congress-wide oversight standards and norms, which leads to confusion and disagreements among committees and Members. Executive Branch defiance of congressional information requests breeds conflict and diminishes Congress' Article I authority. Also problematic are the number of inexperienced and untrained investigative staff and the five-

minute time limit on questions during hearings that make it hard for Members to obtain meaningful information and for the public to fully understand the issues at stake.

When poorly done, oversight investigations can become a partisan brawl that deepens divisions, confuses the facts, and stymies reforms. Too often, highly partisan, fact-free oversight has damaged public faith in our democratic institutions while deepening public cynicism about elected officials. To strengthen government performance as well as increase its public standing, Congress needs to improve its oversight function.

Improving Oversight

We offer here six proposals – some easier, some harder to achieve – that hold promise for improving the state of oversight in Congress. Some require new House rules, others changes in practice, but none requires a new statute.

Congressional legal opinions on oversight matters. One key reform involves Congress developing a process for issuing bipartisan legal opinions on oversight issues. For decades, the Department of Justice (DOJ) [Office of Legal Counsel](#) (OLC)¹ has been issuing official legal opinions that provide guidance to Executive Branch agencies on how to respond to information requests from Congress and instruct courts on how to adjudicate interbranch conflicts. It is no surprise that 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.

DOJ has nevertheless continued to use its OLC opinions not only to unify how federal agencies respond to Congress, but also to try to persuade courts to favor the Executive Branch over the Legislative Branch when disputes arise. For too long Congress has allowed those OLC opinions to remain unanswered. Neither the House nor the Senate has an equivalent process or set of official legal opinions to sufficiently challenge the OLC and provide needed 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.

During the 116th Congress, this Committee issued a set of [bipartisan recommendations](#) that began to tackle this problem by, among other matters, advocating increased “legal resources” to “help strengthen the role of the legislative branch” and facilitate a “true system of checks and balances by ensuring the legislative branch is sufficiently represented in the courts.” Recommendations 81-82.⁶ During the 117th Congress, this Committee could take the next step and establish a bipartisan (even-numbered) task force to design and propose a process for issuing

¹ <https://www.justice.gov/olc>

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

⁶ <https://modernizecongress.house.gov/recommendations>

legal opinions on oversight matters that represent Congress as an institution. The opinions would need to articulate legal principles for resolving interbranch disputes and enable the House general counsel to cite those opinions in court proceedings.

If Congress as an institution were to issue thoughtful, well-supported, bipartisan legal opinions on oversight matters, Congress could help establish its own oversight norms, educate Members and staff, reduce committee disparities, inform the Executive Branch of Congress' oversight expectations, and advance oversight effectiveness. The opinions would also strengthen the hand of Congress in court.

More time to question witnesses. A second, much easier reform proposal focuses on how Members of Congress question witnesses during investigative hearings. 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 respect for the institution.

House rules could be amended to encourage committees, at the beginning of an investigative hearing and the start of each witness panel, to approve question periods that extend beyond the five-minute segments typical of most House hearings. For example, House Rule XI, clause 2(j)(2)(A), could be amended to allow committees holding an oversight hearing to permit the chair and ranking member, at the beginning of each witness panel, to each question the panel for an equal time period of not less than 15 minutes. After the initial round of questioning, the rule could require the committee to apply a ten-minute rule until every committee member seeking to question the witness has an opportunity to do so. The rule could also be amended to explicitly permit any committee member to delegate their time to another committee member.

The 116th Congress has already shown, on an ad hoc basis, how longer questioning periods can contribute to more coherent and decorous hearing exchanges. During the Senate hearings to consider a Supreme Court nomination, for example, each Senator was given a 30-minute period to question the nominee. The resulting respectful exchanges would have been difficult under a five-minute rule. On the House side, during the Intelligence Committee impeachment hearings, the majority and minority were each given a 45-minute block of time at the beginning of each session to question the witnesses. The longer periods enabled committee leadership to ask a series of questions to clarify the testimony provided and follow through on the points they wanted to make. The longer periods also made it easier to establish facts, explore important details, and prevent witnesses from engaging in evasive tactics. While the impeachment proceedings were marred by other problems, the longer questioning periods appear to have elicited better information and fewer uncomfortable moments than would have been possible using five-minute segments.

This relatively easy procedural change has the potential to deliver better outcomes for both committee members and observers of congressional oversight hearings.

Joint compensation of committee clerks. A third reform is more mundane, though no less valuable. Every House committee employs administrative staff, such as clerks, who provide support for congressional investigations. They are the unsung staff who send out the subpoenas, log in the documents, type up reports, compile hearing records, and archive investigative materials.

Currently, on some House committees and subcommittees, the majority and minority staffs each hire their own administrative personnel, meaning there are often two clerks, each hired on a partisan basis, to handle similar administrative duties. These House administrative personnel know they answer to only one party.

In contrast, in the Senate, the committee and subcommittee majority and minority staffs jointly hire their administrative personnel and typically split their compensation on a 50-50 basis. Senate administrative personnel know they are paid by both parties and thus answer to both sides. The Senate approach has strengthened its committees by saving them money (through hiring fewer clerks) and encouraging a more bipartisan, even-handed administration of oversight activities.

In the 116th Congress, this Committee explicitly recommended that committees “hire bipartisan staff approved by both the Chair and Ranking Member to promote strong institutional knowledge ... and a less partisan oversight agenda.” [Committee Recommendation 74](#).⁷ The resulting salary savings are an added benefit. During the 117th Congress, this Committee could take the next step and mandate this hiring practice for administrative personnel.

Investigative techniques that build bipartisanship. A softer set of reforms focuses on investigative techniques that foster bipartisanship in congressional oversight inquiries. They begin with a committee chair and ranking member making a public commitment to a bipartisan investigation and instructing their staffs to work together in good faith to reach consensus on the facts. Investigative techniques that encourage bipartisan factfinding should follow. Examples include issuing joint document requests; jointly attending key briefings and interviews to ensure everyone hears the same information at the same time; producing joint post-interview summaries to ensure a common understanding of what was said; and drafting joint investigative reports to cement consensus on the facts or at least narrow differences. Still another tactic is to issue joint press releases, with at least one quote from each side of the aisle, again to uncover and resolve differences.

One recent development that has damaged bipartisan oversight is the increasing use of separate committee websites for majority and minority members. As institutional entities, committees, particularly those engaged in investigative factfinding, should strive to speak with one voice. At a minimum, they should not require the public to find and compare two websites to understand committee activities. Separate party websites set up a destructive tension and confuse the public. This Committee should discourage their use.

Bipartisan investigative techniques and joint committee websites are not pie-in-the-sky wishful thinking. For years, the [Senate Permanent Subcommittee on Investigations](#) (PSI) has

⁷ <https://modernizecongress.house.gov/recommendations>

used them to conduct highly effective investigations.⁸ PSI’s track record has shown that when staffers who hold fundamentally different views investigate together in good faith, the staffers ask more questions, examine more issues, and engage in more challenging conversations with each other about what really happened and why. While conducting bipartisan investigations and reaching bipartisan consensus on the facts are neither quick nor easy, when motivated by Members who insist on their staffs working together, they can produce factfinding that is more accurate, thorough, thoughtful, and credible.

Enshrining these soft reforms in House rules is a tall order, but during the 116th Congress, this Committee took a meaningful first step by calling for “bipartisan pre-hearing committee meetings” and the piloting of “rules changes that could have a positive effect committee-wide.” [Committee Recommendations 75-76.](#)⁹ To advance further down that path, this Committee should take such additional steps as banning partisan committee websites (which would also save time and resources) and encouraging joint press releases prior to an oversight hearing. These small steps would further strengthen bipartisanship in House oversight investigations.

More training for Members and staff. The bipartisan investigative techniques just described often do not come naturally to congressional staff or Members of Congress; they benefit from training and support.

The Congressional Staff Academy, already supported by this Committee, could provide the needed staff training opportunities. The Levin Center, together with the Lugar Center and the Project on Government Oversight, already hold regular bipartisan training sessions called “[boot camps](#)” to hone the skills needed to conduct fact-based, high-quality inquiries.¹⁰ Our two-day boot camps combine staff from the House and Senate, and from both parties, in investigative exercises that have trained more than 260 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 oversight training. During the 116th Congress, this Committee called for an increase in “bipartisan learning opportunities for staff,” “bipartisan committee staff briefings,” and staff certifications in congressional skills. [Committee Recommendations 32-33, 63.](#)¹¹ During the 117th Congress, this Committee could take a more concrete step by directing the Academy to offer bipartisan training and certification opportunities enabling House staff to conduct more effective oversight investigations.

Similar considerations apply to House Members assigned to oversight committees. While some may have conducted oversight on the state or local level, or can draw on prosecutorial or other legal expertise, for many Members oversight investigations require a new skill set. Even a short oversight seminar at a new Members orientation session or Congressional Research Service retreat could help – especially if that seminar were bipartisan. During the 117th Congress, this Committee could, for the first time, require bipartisan oversight sessions to be offered to new Members.

⁸ <https://www.hsgac.senate.gov/subcommittees/investigations>

⁹ <https://modernizecongress.house.gov/recommendations>

¹⁰ <https://law.wayne.edu/levin-center/oversightbootcamps>

¹¹ <https://modernizecongress.house.gov/recommendations>

Committee budgets that better reflect House composition. This final reform suggestion – which enjoys bipartisan support – is a big one. It stems from the reality that the country is politically divided, and voters are producing narrow majorities in both the House and Senate in the range of 55, 52, or 51 percent. At the same time, the House has chosen to continue 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 50.5% gets 67% of the available committee funding. While that funding split may look good to the majority party today, that perception will change if a small political shift leads to a different House majority tomorrow. Under the current approach, a change in party control threatens dramatic funding changes and abrupt staffing shifts, including the loss of staff with oversight expertise.

The Senate, in contrast, 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. The resulting division of committee funds is not only fairer, it is generally less disruptive to committees when majorities shift, including committees exercising oversight authority. To reap the same benefits, the House should consider a similar committee funding allocation process.

Conclusion

This list of ways to strengthen Congress' capacity to conduct effective oversight is far from exhaustive. Other vital reforms include strengthening Congress' ability to enforce its subpoenas, recognizing Congress' authority to declassify information, and increasing the number and pay of congressional investigators. But all investigative improvements first require that Congress acknowledge the urgency and promise of better oversight. As Senator Carl Levin once put it: "You can't get good government without good oversight."

Thank you again for this opportunity to address the Committee.