

**Testimony of Liz Hempowicz, Director of Public Policy
Project On Government Oversight
for the Select Committee on the Modernization of Congress**

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Chairman Kilmer, Vice Chairman Timmons, and members of the Select Committee on the Modernization of Congress, thank you for the opportunity to testify today on how to improve the oversight capacity of Congress. I am Liz Hempowicz, director of public policy at the Project On Government Oversight (POGO). POGO is a nonpartisan independent watchdog that investigates and exposes waste, corruption, abuse of power, and when the government fails to serve the public or silences those who report wrongdoing. We champion reforms to achieve a more effective, ethical, and accountable federal government that safeguards constitutional principles.

Since 2006, POGO's Congressional Oversight Initiative has worked to help Congress perform one of its most important constitutional responsibilities: overseeing the executive branch. Over the past 15 years we have trained thousands of your staff—Democrats and Republicans, House and Senate, and from nearly every committee office and many personal offices—on the best practices of oversight and investigations.

POGO applauds the committee for its previous work to investigate, study, and develop recommendations to make Congress more effective, efficient, and transparent on behalf of the U.S. public. As the 117th Congress focuses in the coming months on high profile issues such as coronavirus pandemic relief, infrastructure reform, and climate change, POGO encourages members of this committee to expand its work by focusing on how Congress can more effectively oversee the executive branch. POGO stands ready to assist you in this effort.

This hearing today is particularly timely, as POGO recently published its biennial Baker's Dozen, a list of recommended actions based largely on findings from our own investigations to strengthen democracy, crack down on misconduct, and reduce waste and corruption. Since 2015, POGO has welcomed each new Congress with a Baker's Dozen that has formed an essential, nonpartisan "to do" list for that Congress. I urge the committee to support the following recommendations, which largely come from this year's Baker's Dozen¹:

- Require the Department of Justice to publicly post Office of Legal Counsel opinions.
- Provide congressional alternative analysis to Office of Legal Counsel opinions when warranted.
- Close a loophole that allows agencies to treat requests for information from Members of Congress as Freedom of Information Act requests.
- Improve how Congress works with whistleblowers.
- Improve congressional oversight enforcement mechanisms such as inherent contempt.
- Reassert Congress's power of the purse by requiring greater transparency from the Office of Management and Budget around apportionment issues.

¹ Liz Hempowicz, Project On Government Oversight, *The Baker's Dozen: 13 Policy Areas Critical to an Effective, Ethical, and Accountable Government* (February 18, 2021). <https://www.pogo.org/report/2021/02/the-bakers-dozen-13-policy-areas-critical-to-an-effective-ethical-and-accountable-government/>

- Enhance the role and efficacy of the Government Accountability Office.
- Strengthen national security oversight by ensuring an adequate number of security clearances for congressional staff.
- Increase legislative branch appropriations to enable Congress to better conduct oversight of the entire federal government.
- Improve congressional capacity to retain experienced congressional staff empowered to conduct rigorous oversight.

Office of Legal Counsel

The Department of Justice’s Office of Legal Counsel (OLC) was established to provide legal advice to the president and all executive branch agencies. It has, over time, abused that mandate and increasingly been instrumental in eroding the rule of law. Its legal interpretations frequently expand the power of the executive branch by encroaching on congressional authorities, like those that enable robust oversight. Because these interpretations are issued unilaterally by the executive branch and are considered binding on executive agencies, they also represent a dangerous usurpation of Congress’s responsibility to write the law. It is time for both Congress and the executive branch to rein the office in.

The OLC’s nearly unchecked legal interpretations have had a pernicious impact on congressional oversight. For instance, during the George W. Bush administration, the office took the position that the Department of Justice could not bring criminal charges against White House officials who refused to testify or supply documents in response to congressional subpoenas based on the president’s assertion of executive privilege, even when Congress referred the contempt citations to the United States Attorney for the District of Columbia for prosecution pursuant to the criminal contempt of Congress statute.²

This secretive office’s chipping away of congressional oversight enforcement mechanisms isn’t limited to the Bush administration. During the Obama administration, then-Attorney General Eric Holder urged President Barack Obama to exert executive privilege in Operation Fast and Furious to prevent handing over agency documents to the House of Representatives in response to a subpoena. Attorney General Holder used previous OLC opinions to argue that turning over this information would create an “unfair imbalance to the oversight process.”³ The Trump administration, too, reportedly used OLC opinions to articulate questionable interpretations concerning congressional oversight of the executive branch. For example, under the Trump administration, the OLC took the position that individual Members of Congress don’t have the authority to request information on government programs or activities unless they are a

² Letter from Office of Legal Counsel Principal Deputy Assistant Attorney General Steven G. Bradbury to U.S. Attorney General Michael B. Mukasey about “Whether the Department of Justice May Prosecute White House Officials for Contempt of Congress,” February 29, 2008, 1. <https://www.justice.gov/opinion/file/832851/download>

³ Memorandum from U.S. Attorney General Eric H. Holder, Jr. to President Barack Obama about “Assertion of executive privilege over documents generated in response to congressional investigations into Operation Fast and Furious,” June 19, 2012, 4. <https://www.justice.gov/file/20591/download>

committee or subcommittee chairperson, or unless either chamber of Congress has passed a resolution authorizing such investigation or inquiry.⁴

One of the key issues across administrations is that there are insufficient guardrails to keep the OLC from making binding decisions regardless of their (lack of) legal merit simply because a president desires more power than they already have. There are relatively few mechanisms to guarantee the rigor of OLC's legal analyses, and little accountability for attorneys who abuse their position.⁵ And while OLC's legal positions frequently infringe on Congress's prerogatives, Congress rarely fights back by asserting its constitutional authority or by articulating alternative legal analysis.⁶ While the courts would ordinarily serve as an impartial arbiter of the law when there are disagreements over the office's interpretations, it is rare for the underlying issues of an OLC opinion to end up before a court. This contributes to the outsized impact OLC legal interpretations have, even beyond the executive branch.

While Congress would ordinarily be an accountability check on executive power, it often takes OLC's interpretation at face value. Congress has even codified some of the office's questionable legal positions despite the lack of judicial review and the office's bias toward the executive. For example, the OLC asserted in 1974 that conflicts of interest laws don't—and in fact, couldn't—apply to the president and vice president.⁷ Congress then explicitly carved both positions out of criminal conflicts of interest law.⁸

Exacerbating all of these problems is the fact that the OLC does not have to inform Congress, much less the broader public, about its interpretations.⁹ The office effectively creates a body of secret law when it internally distributes a binding interpretation of a statute but then refuses to share that interpretation externally. Laws implemented in secret restrict Congress's ability to conduct oversight, engage in public debate, and make

⁴ Memorandum from Office of Legal Counsel Acting Assistant Attorney General Curtis E. Gannon for the Counsel to President Donald Trump about "Authority of Individual Members of Congress to Conduct Oversight of the Executive Branch," May 1, 2017. <https://www.justice.gov/olc/file/1085571/download>

⁵ Shalev Roisman, "Presidential Factfinding," *Vanderbilt Law Review*, vol. 72 (2019). https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3335156; Erica Newland, "I worked in the Justice Department. I hope its lawyers won't give Trump an alibi," *Washington Post*, January 10, 2019. https://www.washingtonpost.com/opinions/i-worked-in-the-justice-department-i-hope-its-lawyers-wont-give-trump-an-alibi/2019/01/10/9b53c662-1501-11e9-b6ad-9cfd62dbb0a8_story.html; David Luban, "Selling Indulgences," *Slate*, February 14, 2005. <https://slate.com/news-and-politics/2005/02/selling-indulgences.html>; Avidan Cover, "Supervisory Responsibility for the Office of Legal Counsel," *The Georgetown Journal of Legal Ethics*, vol. 25 (2012). https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3376100

⁶ Oona Hathaway, "National Security Lawyering in the Post-War Era: Can Law Constrain Power?" *UCLA Law Review*, vol. 68, no. 1 (2020). <https://ssrn.com/abstract=3530588>; Emily Berman, "Weaponizing the Office of Legal Counsel," *Boston College Law Review*, vol. 62, no. 2 (2021). <https://ssrn.com/abstract=3455556>

⁷ Memorandum from Deputy Attorney General Laurence H. Silberman to Richard T. Burgess, Office of the President, about "Conflict of Interest Problems Arising out of the President's Nomination of Nelson A. Rockefeller to be Vice President under the Twenty-Fifth Amendment to the Constitution," August 28, 1974, 2. <https://fas.org/irp/agency/doj/olc/082874.pdf>

⁸ 18 U.S.C. § 202(c) (2020). [https://uscode.house.gov/view.xhtml?req=\(title:18%20section:202%20edition:prelim\)](https://uscode.house.gov/view.xhtml?req=(title:18%20section:202%20edition:prelim))

⁹ Daniel Van Schooten, "Office of Legal Counsel Publishes New 'Secret Law' Opinions," Project On Government Oversight, September 26, 2018. <https://www.pogo.org/analysis/2018/09/office-of-legal-counsel-publishes-new-secret-law-opinions/>

legislative correction—ultimately threatening the foundations of our constitutional democracy and undermining our nation’s rule of law.

Presidential administrations across time and parties have treated OLC interpretations as their golden ticket to do whatever they want. It is past time for Congress and the executive branch to work together to mitigate the corrosive influence that office has on our system of government.

Congress should explicitly require the Department of Justice to publicly post all final interpretations of law issued by the OLC. Doing so would dramatically improve Congress’s ability to conduct oversight of the executive branch by removing the cloak of secrecy that has hidden the body of law created by the office. This transparency would also inform Congress about how it may need to legislate on the policies OLC has been deciding, and would help Congress better understand the scope of reforms necessary to rein in the secretive but influential office.

Furthermore, Congress should enhance its own capacity to provide alternative legal analysis when it disagrees with OLC opinions, either by tasking its general counsels or the Congressional Research Service with conducting that analysis or by establishing a new congressional office to do that work. Providing alternative legal arguments would help ensure that OLC does not have the final word, particularly on matters of congressional authority. While an alternative office would not be able to direct the executive branch to apply the law differently, it would at least guarantee that when OLC issues opinions that inappropriately infringe on congressional power there will be an authoritative alternative perspective put forth by another official body. This committee should examine the feasibility of such an office.

Closing FOIA Loopholes that Hinder Congressional Oversight

When the government is transparent about its operations it not only increases the public’s confidence in the government but also strengthens and enhances Congress’s ability to conduct oversight. Such transparency allows Congress and the public to assess whether the federal government is being a good steward of taxpayer dollars. Without access to information, the public is left in the dark, and Congress cannot fulfill its role under the Constitution to conduct oversight, risking ceding ever more power to the executive branch.

Congress has passed numerous laws requiring greater transparency and openness around federal records, meetings, advisory committees, rulemaking, spending, and more. Most notable among these open government laws is the Freedom of Information Act (FOIA), which enables the public to access information in possession of the government. It has been amended several times to improve performance. Yet, despite these efforts, there are still numerous issues that impact FOIA’s effectiveness, though this testimony will focus on the one that is most relevant to congressional oversight efforts.

Under current interpretation of the statute, the executive branch has used FOIA exemptions to justify withholding information from Members of Congress unless those members request documents while acting in the capacity of committee or subcommittee chairs. The Justice

Department's Office of Information Policy issued guidance in 1984 allowing agencies to respond to all other congressional requests for information with documents that have been subject to FOIA redactions.¹⁰ The limits that FOIA establishes to protect sensitive information (such as classified documents or personal information) do not apply to Members of Congress, who have the same requirements to protect government information that executive agencies have. These practices severely limit Congress's ability to conduct oversight and pass legislation to address issues facing the public. No Member of Congress should be denied access to the information they need to do their jobs regardless of otherwise applicable FOIA exemptions.

Congress should render the Office of Information Policy's 1984 guidance entitled "Congressional Access Under FOIA" moot by clarifying that FOIA exemptions cannot be used to withhold information from *any Member of Congress*. This clarification would ensure that executive branch agencies cannot use the law's exemptions to withhold information from Members of Congress.

Chairman Kilmer and Vice Chairman Timmons, while you may not run into problems when requesting documents from executive branch agencies or receive records with FOIA redactions because of your position as leaders of a committee, your fellow committee members, especially the freshman members of this committee, likely will. I encourage the committee to seriously consider this issue and how it would affect your ability to conduct oversight as rank-and-file members.

Working with Whistleblowers

The importance of preserving the relationship between Congress and whistleblowers cannot be overstated, and longstanding bipartisan support for fostering and sustaining that relationship cannot be denied. Congressional oversight benefits when individuals who see wrongdoing are able to speak up. Whistleblowers are fundamental to Congress's ability to exercise its oversight authority, and have been since our first steps as an independent nation. The Continental Congress recognized this fact when they passed the first whistleblower protection law in 1778.¹¹

One of the most recent efforts to protect the invaluable role whistleblowers play in the congressional oversight process was in 2019 when the House of Representatives created the nonpartisan and independent Office of the Whistleblower Ombuds to assist in educating congressional offices on how to effectively work with whistleblowers.¹² As part of the mission, the office offers virtual trainings on how to manage relationships with whistleblowers, establish effective case management systems, protect the identities of whistleblowers working with Congress, and navigate the complicated system of whistleblower protection laws.¹³ The office

¹⁰ Department of Justice Office of Information Policy, "FOIA Update: OIP Guidance: Congressional Access Under FOIA," January 1, 1984. <https://www.justice.gov/oip/blog/foia-update-oip-guidance-congressional-access-under-foia>

¹¹ Stephen M. Kohn, "The Whistle-Blowers of 1777," *New York Times*, June 12, 2011. <https://www.nytimes.com/2011/06/13/opinion/13kohn.html>

¹² H.Res. 6, 116th Cong., § 104(e)(3) (2019). <https://www.congress.gov/bill/116th-congress/house-resolution/6/text#H65575DEBC9484515B32968B7AF3ADCF5>

¹³ "Virtual Training: Best Practices for Working with Whistleblowers," Office of the Whistleblower Ombuds.

conducted 82 such trainings in 2020, educating more than 400 congressional staffers on how to best work with whistleblowers to support congressional oversight efforts.¹⁴ We urge the committee to explore supporting a requirement for all offices to participate in this training, so that every committee and personal office in the House of Representatives can institute best practice policies to effectively and safely work with whistleblowers.

While more education is necessary to ensure that congressional offices can effectively work with whistleblowers while minimizing the risk of retaliation to those whistleblowers, the laws facilitating this work also require attention. For example, the Lloyd–La Follette Act makes it unlawful to restrict communications between Congress and federal employees. Currently, the law states, “The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied.”¹⁵ Yet the mechanisms to hold those who violate that law to account are essentially nonexistent, creating a false sense of security for whistleblowers who want to work with Congress. The provision needs enforcement mechanisms that are reliable enough to encourage whistleblowers to come forward and to ensure wrongdoers are held accountable.

One mechanism Congress should include is independent due process relief for those whistleblowers who are retaliated against for communicating with Congress. This enforcement would ideally help whistleblowers safely and confidently make disclosures directly to Congress.

Furthermore, Congress should consider extending best-practice whistleblower protections to legislative branch employees. Such reforms would ensure that congressional employees can report waste, fraud, and abuse without putting their own careers on the line. This is especially important in the context of legislation aimed at addressing sexual harassment on Capitol Hill.

Inherent Contempt

While receiving documents with FOIA redactions is frustrating enough for Members of Congress, it pales in comparison to not getting the documents and testimony Congress requests altogether, and even more so when Congress subpoenaed those documents or testimony. The ever-increasing executive branch recalcitrance in responding to congressional subpoenas significantly hinders the legislative branch’s ability to conduct oversight.¹⁶

Congress should have the ability to enforce its own subpoenas to compel testimony and documents. The people’s branch should not have to rely on the executive branch or the

<https://whistleblower.house.gov/events/virtual-training-best-practices-working-whistleblowers> (accessed March 17, 2021)

¹⁴ Office of the Whistleblower Ombuds, *Annual Report 2020*, 6.

https://whistleblower.house.gov/sites/whistleblower.house.gov/files/wysiwyg_uploaded/Office%20of%20the%20Whistleblower%20Ombuds%20Annual%20Report%202020_0.pdf

¹⁵ 5 U.S.C. § 7211 (2020). <https://www.law.cornell.edu/uscode/about/how-current>

¹⁶ Liz Hempowicz and Anne Tindall, “Trump won’t cooperate with congressional oversight. Here are Congress’s options,” *Washington Post*, September 15, 2020. <https://www.washingtonpost.com/politics/2020/09/15/trump-wont-cooperate-with-congressional-oversight-here-are-congresss-options/>

courts to enforce its authority. But it currently does, because the institution has allowed its “inherent contempt” powers—which is the ability to enforce subpoenas on its own without the help of the courts or executive branch prosecutors¹⁷—to go dormant. This puts Congress in an untenable position. For instance, the Justice Department has refused to prosecute executive branch officials for refusing to testify if they do so at the order of the president, and the aforementioned Office of Legal Counsel has been churning out theories claiming many congressional subpoenas are invalid, which serves as permission for executive branch officials to disregard the legal summons.¹⁸ Going through the courts is also ineffective because it can take years to litigate, significantly delaying and often completely undermining Congress’s ability to conduct swift oversight. We’ve seen this in recent years as the House pursued testimony from former White House Counsel Don McGahn.¹⁹ And while Congress can use tactics such as withholding funding from agencies or refusing to confirm nominees until the executive branch complies with its subpoenas, a more targeted enforcement tool or tools would be better for Congress and for the country.

In an ideal world, the courts would pick up the pace and start treating Congress like the co-equal branch of government it is. But if the courts can’t or won’t expedite proceedings in order to account for the unique time constraints of a congressional investigation, Congress can step in to force them. The Constitution gives Congress a great deal of power over how the courts operate: Congress sets up all the federal courts except the Supreme Court, and it passes the laws that the courts apply. To speed up subpoena cases and to prevent people from obstructing investigations simply by filing a lawsuit, Congress could use its authority to impose time limits on how long the cases can last, or establish special procedures to fast-track the cases.

Alternatively, Congress already has that dormant tool in its arsenal—the power of inherent contempt—that it could utilize. To exercise this power, Congress used to arrest people who defied its subpoenas.²⁰ There’s no reason it couldn’t start doing so again. Or, rather than arresting those who ignore congressional subpoenas, Congress could also let the House or Senate general counsels issue fines or financial penalties, which may be a more feasible

¹⁷ Morton Rosenberg and William J. Murphy, Good Government Now, *The Case for Direct Appointment by the House of Outside Counsel to Prosecute Citations of Criminal Contempt of Executive Branch Officials*, (December 5, 2019). <https://goodgovernmentnow.org/wp-content/uploads/2020/02/The-Case-for-Direct-Appointment-by-the-House-of-Outside-Counsel-to-Prosecute-Citations-of-Contempt-v9.pdf>

¹⁸ See, for example: Memorandum from Steven A. Engel, Assistant Attorney General to the Counsel to the President, about the House Committees’ Authority to Investigate for Impeachment, January 19, 2020. <https://www.justice.gov/olc/file/1236346/download>; Memorandum from Steven A. Engel, Assistant Attorney General to the General Counsel of the Department of the Treasury, about Congressional Committee’s Request for the President’s Tax Returns Under 26 U.S.C. § 6103(f), June 13, 2019.

<https://www.justice.gov/olc/file/1173756/download>; Memorandum from Steven A. Engel, Assistant Attorney General to the Counsel to the President, about Testimonial Immunity before Congress of the Assistant to the President and Senior Counselor to the President, July 12, 2019. <https://www.justice.gov/olc/file/1183271/download>

¹⁹ Kyle Cheney, “DOJ says Dems are out of time to force testimony on alleged obstruction by Trump,” *Politico*, November 16, 2020. <https://www.politico.com/news/2020/11/16/justice-department-trump-obstruction-436914>

²⁰ Jan Wolfe, “Explainer: Congress no longer runs a jail, so just how powerful are its subpoenas?” *Reuters*, April 24, 2019. <https://www.reuters.com/article/us-usa-trump-congress-subpoena-explainer/explainer-congress-no-longer-runs-a-jail-so-just-how-powerful-are-its-subpoenas-idUSKCN1S02K8>

form of punishment.²¹ Whatever form a modern version of inherent contempt takes, it's time for Congress to dust off this power rather than leaving its prerogatives at the mercy of the executive branch or the courts.

Expediting litigation and reviving inherent contempt will clear some of the biggest obstacles to timely investigations.

Power of the Purse

The lack of transparency in how the executive branch handles taxpayer dollars not only undermines oversight but also poses a threat to Congress's most fundamental power: the power of the purse. Congress must take a more assertive approach in using its power of the purse as a means of promoting better oversight and accountability of the funds Congress approves and the executive branch spends.

The legislative branch, as set forth in Article I of the Constitution, was arguably intended to be the most powerful actor within the system, in part because it was the body closest to the people the government serves.²² This view is bolstered by the fact that the framers endowed Congress with the specific and exclusive authority to make laws, declare war, and control the nation's tax and spending decisions—better known as the “power of the purse.” Despite these facts, power between the legislative branch and the executive branch has steadily grown unequal, tilting heavily toward the latter. A balancing of that power is long overdue.

While there are several areas where Congress could reclaim the powers it has ceded to the executive branch, such as war powers and national emergencies, it is particularly important that Congress reassert its authority over how taxpayer dollars are being used. Under the current system, the executive branch through the Office of Management and Budget (OMB) allocates congressionally appropriated dollars largely in secret, keeping details even from Congress. This practice undermines Congress's ability to exercise its full power over spending decisions, resulting in wasteful spending or even law-breaking,²³ and eroding the public's trust that their hard-earned tax dollars are being spent effectively and in their interest.

Congress should require OMB to publicly post all apportionment schedules, which show how money is being allocated within an agency. This requirement should apply to all special footnotes in the apportionment documents. Congress should also require OMB and affected agencies to notify Congress when apportionments will delay, disrupt, or otherwise impact the dissemination of funds and the facilitation of projects, programs, or activities that Congress has

²¹ Rosenberg and Murphy, *The Case for Direct Appointment by the House of Outside Counsel* [see note 17].

²² Philip Bump, “The president was never intended to be the most powerful part of the government,” *Washington Post*, February 13, 2017. <https://www.washingtonpost.com/news/politics/wp/2017/02/13/the-president-was-never-intended-to-be-the-most-powerful-part-of-government/>

²³ Dylan Hedtler-Gaudette, “Secret Spending Decisions Undermine the Rule of Law,” Project On Government Oversight, June 17, 2020. <https://www.pogo.org/analysis/2020/06/secret-spending-decisions-undermine-the-rule-of-law/>; Government Accountability Office, decision in the matter of “Office of Management and Budget—Withholding of Ukraine Security Assistance,” B-331564, January 16, 2020. <https://www.gao.gov/assets/b-331564.pdf>

legislated. This would limit the means by which the executive branch can undermine Congress's constitutional role to appropriate funds and authorize their use.

Enhancing the Government Accountability Office

As you know, the legislative branch isn't made up of only Congress. It also includes legislative bodies, such as the Government Accountability Office (GAO), that play a significant role in supporting congressional oversight. Unfortunately, GAO has run into its own roadblocks when overseeing the executive branch that deserve congressional attention.

For example, in June 2020 United States Comptroller General Gene L. Dodaro detailed to the House Select Subcommittee on the Coronavirus Crisis how a lack of transparency and accountability in the federal response to the coronavirus pandemic was impeding GAO's oversight work. In regards to transparency in the Paycheck Protection Program, Comptroller General Dodaro testified that, "we didn't have access to the key program people ... so while they did make some officials available, they weren't the ones we really wanted to talk to." Dodaro emphasized that for GAO to do its job, "we need to have access to all the information and all the agency officials that are responsible for these programs."²⁴

Congress should enact rules that require federal agencies to respond to and cooperate with GAO when it is conducting audits and investigations, including with regard to potential violations of appropriations laws such as the Antideficiency Act or the Impoundment Control Act. By strengthening GAO, Congress will improve its ability to hold the executive branch accountable and enhance the mission to root out waste, fraud, and abuse.

Security Clearances

Another issue of importance is the lack of adequate security clearances for congressional staff.²⁵ Chairman Kilmer, I wanted to express our appreciation to you for your leadership in this space already, along with Representative Susan Davis. As you know, congressional committees play pivotal roles in overseeing our military and national security. In order to aid Members in their oversight work, committee staff generally have appropriate levels of security clearance, allowing them access to classified materials and briefings necessary to do their jobs. However, in the case of the House of Representatives, not every Member of Congress on committees that deal largely with classified information has a designated committee staffer.²⁶ Because personal office staff

²⁴ House Select Subcommittee on the Coronavirus Crisis, "GAO Director Testifies Lack Of Transparency And Accountability Is Hurting Federal Response To Pandemic," Press Release, June 26, 2020. <https://coronavirus.house.gov/news/press-releases/gao-director-testifies-lack-transparency-and-accountability-hurting-federal>

²⁵ Daniel Schuman and Mandy Smithberger, Demand Progress and the Project On Government Oversight, *A Primer on Congressional Staff Clearances: Which Staff Can Obtain Security Clearances, at what Levels, and Who Decides?* (February 5, 2020), 11-20. https://docs.pogo.org/report/2020/A_Primer_on_Congressional_Staff_Clearances_2020-02-05.pdf?mtime=20200207091019&focal=none&_ga=2.188863595.1911381501.1615816724-302230741.1573777870

²⁶ *FY19 Member Day & Outside Witnesses: Hearing before the House Committee on Appropriations Legislative Branch Subcommittee*, 115th Cong. (April 17, 2018) (testimony of Mandy Smithberger, Director of the Center for

rarely hold a security clearance at the necessary level, many Members on those committees are often overseeing the executive branch blindfolded.

The most recent publicly available information shows that nearly 4.2 million people hold clearances of any level.²⁷ In 2015, the National Counterintelligence and Security Center disclosed that 622,549 federal employees and 438,069 federal contractors held top secret clearance.²⁸ However, in the 2019 report, this specific breakdown has been redacted from public release.²⁹ Additionally, there is no publicly available information about clearances held by the legislative branch. However, we do know that there are fewer than 20,000 legislative branch staffers in total and only a relative handful of those hold top secret clearances.

Congress should, either through statute, internal rules, or its security manual, expand the number of congressional staff with security clearances while maintaining rigorous clearance process standards. By doing so, Congress will enable staff to effectively aid Members of Congress in overseeing some of the most pressing and consequential issues of the day, ranging from the conduct of war to the abuse of surveillance programs, thereby fundamentally transforming its capacity to conduct meaningful national security oversight.

Congressional Capacity and Empowering Oversight Staff

The federal government has grown to record size. Yet, even as the size of the federal government has grown exponentially, the size and capacity of Congress has barely budged. As an institution, Congress has a multifaceted mandate that includes everything from appropriating tax dollars to considering and approving international trade treaties to conducting oversight of the entire federal government. Despite this, Congress has a long history of paradoxically insisting on chronically under-funding itself and on shorting itself of the staffing and other non-budgetary resources necessary to conduct its work.³⁰

By the end of the Trump administration, the U.S. government had about 11 million employees, up from 8 million in 2002.³¹ The federal budget has ballooned, going from \$2.5 trillion in 2002 to over \$4 trillion in 2020, in constant dollars.³²

Defense Information at POGO). <https://www.pogo.org/testimony/2018/04/pogo-testimony-need-for-expanded-clearances-for-congressional-staffers/>

²⁷ National Counterterrorism and Security Center, *Fiscal Year 2019 Annual Report on Security Clearance Determinations* (April 2020), 7. <https://fas.org/sgp/othergov/intel/clear-2019.pdf>

²⁸ Office of the Director of National Intelligence, *2015 Annual Report on Security Clearance Determinations* (2015), 5. <https://www.dni.gov/files/documents/Newsroom/Reports%20and%20Pubs/2015-Annual-Report-on-Security-Clearance-Determinations.pdf>

²⁹ National Counterterrorism and Security Center, *Fiscal Year 2019 Annual Report* [see note 27].

³⁰ Kevin Kosar, “Congress must invest in its own capacity again,” R Street, March 9, 2019. <https://www.rstreet.org/2016/03/09/congress-must-invest-in-its-own-capacity-again/>

³¹ Paul C. Light, “The true size of government is nearing a record high,” Brookings Institution, October 7, 2020. <https://www.brookings.edu/blog/fixgov/2020/10/07/the-true-size-of-government-is-nearing-a-record-high/>

³² Historical Tables, “Table 1.3—Summary of Receipts, Outlays, and Surpluses or Deficits (-) in Current Dollars, Constant (FY 2012) Dollars, and as Percentages of GDP: 1940–2025,” The White House Office of Management and Budget. https://www.whitehouse.gov/wp-content/uploads/2020/02/hist01z3_fy21.xlsx (accessed March 18, 2021)

Currently, Congress has about 16,000 employees,³³ a number that has barely changed since 2001.³⁴ The whole of Congress only has a budget of about \$5 billion.³⁵ While that's up from \$2.7 billion in 2001,³⁶ it's a small increase compared to the dramatic growth of the executive branch Congress is meant to oversee. That failure to grow enough to effectively oversee federal agencies hides even worse news for oversight: Congress has actually been reducing its own oversight spending. Committees, whose staff conduct much of the work overseeing the executive branch, have had their budgets reduced in recent years. Total spending on committees is down by more than \$100 million from its peak just a decade ago.³⁷ And even a decade ago, it wasn't nearly enough.

Congress's ability to do its job suffers because it doesn't have enough staff to meet the growing size of the federal government; that problem is compounded by the high turnover of existing congressional staff, which has led to a decrease in office work capacity. When congressional staff, including oversight staff, are not compensated fairly they unsurprisingly leave the Hill to pursue other opportunities. This poses a risk to Congress, creating a shortage of experienced oversight staff who know how to utilize the various tools at their disposal to facilitate robust oversight. High turnover means you lose institutional knowledge about federal programs and the various offices involved in their implementation. Newer staff then have to take a significant amount of time to get up to speed on issues before they can even begin to help their Members conduct the necessary rigorous oversight.

In addition to offering a fair and reasonable salary to its staffers, Congress should do more to ensure existing oversight staff receive continuing education and training. It's in Congress's best interest to have the best overnight staff available. Better trained oversight staff can lead to a more effective and efficient federal government. POGO's Congressional Oversight Initiative stands ready to help you in this effort.

While it will never be politically convenient for Congress to increase its resources, Congress should do so anyway. It should robustly increase its annual budget by appropriating larger sums to line items directly linked to improving institutional capacity such as staff pay, technological modernization, accessibility improvements, and investments in congressional support services. By enhancing its resources, Congress will improve its ability to fulfill its mission to serve the people and increase its efficacy in doing so. This

³³ For the current count of Senate employees in the 117th Congress, see: "Congress By The Numbers," Legistorm. https://www.legistorm.com/congress_by_numbers/index/by/senate/term_id/64.html (accessed March 18, 2021); For the current count of House employees in the 117th Congress, see: "Congress By The Numbers," Legistorm. https://www.legistorm.com/congress_by_numbers/index/by/house/term_id/64.html (accessed March 18, 2021)

³⁴ For the count of Senate employees in the 107th Congress, see: "Congress By The Numbers," Legistorm. https://www.legistorm.com/congress_by_numbers/index/by/senate/term_id/60.html (accessed March 18, 2021); For the count of House employees in the 107th Congress, see: "Congress By The Numbers," Legistorm. https://www.legistorm.com/congress_by_numbers/index/by/house/term_id/60.html (accessed March 18, 2021)

³⁵ Ida A. Brudnick, Congressional Research Service, *Legislative Branch: FY2021 Appropriations*, R456469 (February 26, 2021), 8. <https://fas.org/sgp/crs/misc/R46469.pdf>

³⁶ Ida A. Brudnick, Congressional Research Service, *Legislative Branch: FY2011 Appropriations*, R41214 (June 2, 2011), 4. <https://crsreports.congress.gov/product/pdf/R/R41214>

³⁷ "How House Committees Get Their Money," First Branch Forecast, January 25, 2019. <https://firstbranchforecast.com/2019/01/25/how-house-committees-get-their-money/>

improved performance will, in turn, bolster the public's view of the institution as a whole, strengthen the policymaking process, and likely save money in the end.

Conclusion

Chairman Kilmer, Vice Chairman Timmons, and members of the Select Committee, thank you again for the opportunity to offer some suggestions on how the committee can best improve Congress's capacity to conduct oversight. I respectfully urge the Select Committee to build off its successes in the last Congress by prioritizing an increase in institutional capacity to conduct oversight and by addressing some of the most serious impediments standing in the way of that work. Congress not only has the right to conduct oversight of the executive and judicial branches—as well as of private companies and other institutions affecting the public's welfare—but also the constitutional responsibility to do so. The oversight functions of Congress are essential to creating an accountable federal government and to upholding our democracy's system of checks and balances.