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Fix Congress Cohort Listening Session
House Select Committee on the Modernization of Congress

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Thank you for inviting me to share Protect Democracy's perspective with the Select Committee.

One of Protect Democracy's primary concerns is the long-term degradation of Congressional power vis-a-vis the Executive Branch. When we look across American and world history, we see powerful executives that have developed increasingly authoritarian tendencies. That's what we want to stop. While many will blame particular presidents or the Presidency and the Executive Branch for this, we believe that much of the problem is that Congress has not taken care of itself.

You have not used the full scope of your legislative powers, you have given away many of the powers you do have, and you have not given yourselves adequate resources to do your job.

Protect Democracy views the Select Committee as a critical step toward Congress reasserting its role in the constitutional order. A key pillar of strengthening American democracy is strengthening our Congress, making you more effective.

Congress has reformed the way it operates in the past. The 1970 Legislative Reorganization Act made Congress more effective and responsive to the concerns of that day.¹ Congress also has enacted laws to strengthen checks and balances between it and the Executive. The 1973 War Powers Resolution increased Congress's power over the use of military force.² The 1974 Congressional Budget and Impoundment Control Act gave Congress more power over the purse—perhaps the greatest source of your power.³ And once President Nixon stepped down, Congress asserted its role over many areas of the federal government.

Congress is discussing these same issues now: The House Rules Committee⁴ and House Foreign Affairs Committee⁵ held hearings on Tuesday about war powers reform, for example, and the Bipartisan Congressional Budget Reform Act⁶ and the Congressional Power of the

¹ Legislative Reorganization Act of 1970, Pub. L. No. 91-510, 84 Stat. 1140 (codified as amended in scattered sections of 2 U.S.C.).

² War Powers Resolution of 1973, 50 U.S.C. §§ 1541–1548.

³ Congressional Budget and Impoundment Control Act of 1974, Pub. L. 93-344, 88 Stat. 297 (codified as amended in scattered sections of 2 U.S.C. 601–691).

⁴ *Article I: Reforming the War Powers Resolution for the 21st Century: Hearing Before the H. Comm. on Rules*, 117th Cong. (2021).

⁵ *Reclaiming Congressional War Powers: Hearing Before the H. Comm. on Foreign Affs.*, 117th Cong. (2021).

⁶ S. 2765, 116th Cong. (2019).

Purse Act⁷ chart a path forward for both budget process reform and power of the purse reforms. This committee, in particular, can and should lead to fundamental reforms that would look like a new Legislative Reorganization Act.

Please understand your moment in history and grab it.

The subject of this panel is oversight, but I think it is critical to understand the role of the institution in this moment and the opportunity in front of you. And the same core factors apply to most issues in front of the Select Committee.

In the end, oversight comes down to a set of questions. Does Congress have enough information, from the Executive Branch in particular? And what powers does Congress have to coerce behavior to provide that information?

So this is a conversation about your power. And you have four kinds of power.

First, you have self-validating powers for which you do not need the President. A budget resolution is a concurrent resolution *so that* the President has no role in the process.

Second, you have powers that are derivative of your core powers, most importantly the power of the purse. Your core oversight powers exist because you write the law, you spend the money, and you need information to do that.

Third, you have the power to write new laws, sunset existing powers, and rearrange powers. In the 1970s, Congress tried to do this with the “legislative veto.” Ultimately, this was struck down by the Supreme Court in 1983,⁸ but there’s a bipartisan template for how to do this again. Congress should sunset more powers automatically to give yourselves a forcing mechanism to act and to get information from the Executive Branch.

Finally, in our system of separated powers, you will sometimes need to team up with the Judiciary to get information and enforce your power.

I want to walk through these powers and how you can use them for oversight.

Self-validating powers

Congress’s authority to conduct oversight is “inherent in the legislative process.”⁹ Its ability to effectuate oversight should, therefore, be drawn in part from vindicating powers that don’t rely on the other Branches.

⁷ H.R. 6628, 116th Cong. (2020).

⁸ *I.N.S. v. Chadha*, 462 U.S. 919 (1983).

⁹ *Watkins v. U.S.*, 354 U.S. 178, 187 (1957).

Chief among these as it relates to oversight is Congress's constitutional authority to compel the production of information, such as through issuing subpoenas and enforcing compliance. As the Supreme Court reaffirmed just last year, Congress's power to secure information is indispensable to its legislative function. "Without information," the Court reasoned, "Congress would be shooting in the dark."¹⁰

But these authorities to compel compliance are meaningless unless Congress has the power to enforce them. Subpoenas for documents or testimony don't mean much if they are ignored without consequences. Early Supreme Court decisions therefore upheld the legislature's enforcement authorities through inherent contempt, including for defiance of its subpoenas.¹¹

Historically, a contempt citation for not cooperating with Congressional requests carried the threat of arrest by the sergeant-at-arms. For well over a century, Congress didn't rely on anyone else—including the courts—to determine whether its work had been obstructed and to coerce compliance; it did so itself. And the Supreme Court bluntly acknowledged that Congress's ability to vindicate its own contempt power was a matter of "self-preservation."¹²

I want to underline that since the founding, Congressional oversight has relied on *Congress's* powers to enforce its own requests.

Over time, Congress went even further. It complemented its inherent contempt power with a criminal contempt process, or statutory contempt, referring violations to the attorney general for enforcement.¹³ Until recently, these tools—one exclusively wielded by Congress, and the other by delegation of enforcement through statute—were effective at incentivizing cooperation with Congressional oversight. They functioned as credible threats that also encouraged the Executive Branch to accommodate Congressional requests for information in good faith.

These powers have eroded in recent decades through a combination of aggressive Executive action to undermine Congress's contempt powers and abdication of those powers by Congress itself. As committees across this body now know all too well, today, subpoenas are regularly disregarded by the Executive Branch. To enforce its requests, Congress has turned to the courts (a recent phenomenon), which have shied away from these interbranch disputes. As a result, enforcement now takes years, and final decisions are rarely clear 'wins' for Congress.¹⁴

¹⁰ *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031 (2020).

¹¹ See, e.g., *Anderson v. Dunn*, 19 U.S. 204 (1821) (holding that the House of Representatives may punish non-members for contempt); see also *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.").

¹² *Anderson v. Dunn*, 19 U.S. at 230. Similarly, the courts have used the same logic for protecting their own contempt powers, finding that the Judiciary would be "impotent" if it relied on the other Branches for enforcing its orders. See, e.g., *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 439 (1911).

¹³ 2 U.S.C. § 192 and 2 U.S.C. § 194.

¹⁴ Grant Tudor, *Another McGahn: Options to Modernize Congress's Subpoena Compliance Tools*, Lawfare (Oct. 16, 2020), <https://www.lawfareblog.com/avoiding-another-mcgahn-options-modernize-congress-subpoena-compliance-tools>.

Effective oversight will require Congress to revive its contempt powers, and do so in a way that relies on its own wherewithal.

But a mere wholesale readoption of your past methods for enforcement likely won't work: Congress probably shouldn't, say, start arresting inalcitrant officials. But it could, as some of your colleagues have proposed, levy monetary penalties on the most senior Executive Branch officers who refuse to accommodate requests in good faith.¹⁵ The House could design such an enforcement system through its cameral rules, another power reserved exclusively to Congress.¹⁶ Additionally, as outlined by the Congressional Research Service, the House could modernize its statutory contempt power through the use of an independent counsel mechanism, rather than rely on the Executive Branch to enforce subpoenas directed at itself.¹⁷

The point is not to regularly use your contempt power but rather to make it robust and credible enough that it doesn't need to be used. Effective oversight requires a cooperative Executive Branch, but that cooperation has to be incentivized. Thankfully, you have expansive inherent powers at your disposal to do so effectively. You simply need to use them.

Leveraging other powers

Unlike contempt, most Congressional powers are not self-evidently about oversight. But certain of those powers can be effectively used to achieve oversight ends—the most important of which is the power of the purse.

Article I, Section 7 of the Constitution says that “All Bills for raising Revenue shall originate in the House of Representatives.” Section 8 gives you the power to “lay and collect taxes,” “to make all Laws which shall be necessary and proper,” etc.

To be clear, to exercise *these* powers, the President has to sign the bill. (That's also Section 7.) *But you can attach conditions.*

Executive Branch agencies have to comply with your reporting and information requests. At the beginning of this Congress, you all voted, by voice, on the Congressional Budget Justification Transparency Act, and a Senate Committee reported it out unanimously last week.¹⁸ It would require information from the Executive Branch explaining why they want to spend your money before you appropriate it.

¹⁵ H.R. Res. 1029, 116th Cong. (2020).

¹⁶ See, e.g., *Inherent Contempt Fines Rule*, Good Gov't Now (last visited Mar. 18, 2021), <https://goodgovernmentnow.org/modified-inherent-contempt-enforcement-rule/>.

¹⁷ Todd Garvey, Cong. Rsch. Serv., R45653, *Congressional Subpoenas: Enforcing Executive Branch Compliance* 36 (2019), <https://fas.org/sgp/crs/misc/R45653.pdf>.

¹⁸ H.R. 22, 117th Cong. (2021); S. 272, 117th Cong. (2021).

Last Congress, you passed the Taxpayer Right to Know Act, demanding a list of federal government programs so that you knew where your money was going.¹⁹

This Congress, you should pass the Congressional Power of the Purse Act, introduced by Chairman Yarmuth last year, which is an attempt to increase the visibility that Congress has into how and when money is spent. It would also empower the Government Accountability Office to get more information from the Executive Branch to that end.

These are examples of Congress reasserting a core Article I power, and doing so in a way that enhances its oversight muscle. There is a long history of bipartisan cooperation to strengthen Congress along these lines, and we want to help you enact the next steps in that history.

Sunsetting and Rearranging Powers

Congress has freely given away myriad powers to the Executive Branch or to independent agencies. There are many understandable reasons for this, especially with the rise of problems requiring increasingly technical knowledge.

However, just because you once gave the power to the executive, it doesn't mean it needs to stay there forever. Congress can and should use the power of sunseting authorities more often to revisit the fundamental allocation of powers between Congress and the Executive Branch. Last year, Congress had an extensive debate over surveillance provisions in the Patriot Act and Section 215 surveillance authorities ultimately expired. The expiration forced the Executive Branch to answer hard questions, and Congress wasn't satisfied with the answers.

During this policy battle a former House Member told a group of advocates that Congress should embrace the power of sunsets. If Congress ends a power automatically, the executive needs something from Congress to get it back.

In 2019, Senator Mike Lee and a bipartisan group of Senators proposed a reform to the national emergencies system that would, at its core, end all emergencies declared by the President after 60 days and then annually unless Congress renewed them. The renewal requirement would give you leverage to demand more information and ensure that those emergencies were aligned with Congressional interest.

That reform, the ARTICLE ONE Act,²⁰ was also included in two Democratic bills, the Congressional Power of the Purse Act and the Protecting Our Democracy Act.²¹ Congress should pass those bills. In addition, you should replicate the sunset mechanism in other areas to enhance accountability over the powers you delegate.

¹⁹ H.R. 3830, 116th Cong. (2020).

²⁰ S.764, 116th Cong. (2019).

²¹ H.R. 8363, 116th Cong. (2020).

Sunset provisions are a powerful tool to give Congress and the country the best of both worlds, the capacity for robust and efficient executive action when it is needed and the ability and impetus for Congress to review those actions on behalf of the public.

Leveraging the Judiciary

Even when Congress passes a law, you may not get what you ask for. Indeed, the Executive Branch, as we have seen, may defy you. Congress will therefore need to turn to the courts in some cases for help in getting the Executive Branch to comply with the law, and Congress needs to situate itself to win when it does.

The Select Committee made two recommendations last year to address this very situation. Those were to:

81. Identify how increased regulatory and legal resources could help strengthen the role of the legislative branch.
82. Facilitate a true system of checks and balances by ensuring the legislative branch is sufficiently represented in the courts.²²

To implement recommendation 81, Congress should create a counter-weight to the Department of Justice's Office of Legal Counsel (OLC) with its own legal agency. This agency would articulate Congress's understanding of the meaning and constitutionality of the laws it writes. Congress created the Congressional Budget Office in 1974, as part of the Congressional Budget Act, to act as a counterweight to the Office of Management and Budget by providing its own analysis that Congress could rely on.

To implement recommendation 82, Congress should explicitly grant itself a cause of action in more legislative contexts so that it can use the courts more effectively to stop executive action. Protect Democracy has shared template legislative language with the Select Committee staff that could be used in other contexts. This could be especially important in cases where legislation or authorities sunset.

There is bipartisan legislation to accomplish this for subpoenas. In 2017, Republican Representative Darrell Issa introduced a bill to give the House more leverage in the courts to demand enforcement after the fights with the Obama administration. In 2019, Democratic Representative Madeleine Dean reintroduced the same bill, the Congressional Subpoena Compliance and Enforcement Act, due to fights with the Trump administration.²³ That bill was also included in the Protecting Our Democracy Act introduced in 2020, and it would strengthen Congress's hand on this issue.

²² *Recommendations*, H. Select Comm. on the Modernization of Cong. (last visited Mar. 18, 2021), <https://modernizecongress.house.gov/recommendations>.

²³ H.R. 3732, 116th Cong. (2019).

Finally, Congress could also make it easier to get help from civil society in these tasks by adding public disclosure provisions to reporting requirements. Last year, Protect Democracy sued the administration to secure the release of the “War Powers Transparency Report” on the “changes made to the legal and policy frameworks for the United States’ use of military force and related national security operations.”²⁴ You required this in Section 1264 of the FY 2018 National Defense Authorization Act.²⁵ However, the administration did not release it on time.

Ultimately, the Trump administration complied with the law and released the report before a federal court could decide on the legal claim. The Biden administration released the report on time at the beginning of this month.

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In conclusion, Congress has powerful tools at its disposal. Many of the organizations testifying today want to help you exercise your current tools and build better ones. While I have focused on the framework to think about how to exercise and expand your power in service of more robust and effective oversight, I have sprinkled through concrete recommendations that actually do so

- Modernizing enforcement of your contempt powers;
- Demanding more information from the executive, especially as part of the budget process;
- Passing the Congressional Power of the Purse Act to give Congress more control over how money is spent;
- Sun-setting legislation and delegations so that Congress has more power to demand more information from the executive when it acts;
- Creating a Congressional version of the Office of Legal Counsel;
- Adopting rules and laws to enhance Congressional standing;
- Passing the Congressional Subpoena Compliance and Enforcement Act; and
- Requiring that Executive Branch reports be made public, not just available to Congress, so that civil society can help ensure their release.

Thank you so much for your service on this Committee, to our Congress, and to our country. We look forward to supporting you in your efforts.

²⁴ *In Face of Lawsuit, President Trump Releases Report on War Powers Authority*, Protect Democracy (Oct. 21, 2020), <https://protectdemocracy.org/update/in-face-of-lawsuit-president-trump-releases-report-on-war-powers-authority>.

²⁵ National Defense Authorization Act for Fiscal Year 2018, Pub. L. 115-91, 131 Stat. 1283.