

**Testimony of
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Before

**House Select Committee
on the Modernization of Congress**

On

**Article One: Restoring Capacity and Equipping Congress
to Better Serve the American People**

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Thank you for this opportunity to address the Committee on ways to restore Congress as a co-equal partner to the Executive Branch and Judiciary.

I am representing the Levin Center at Wayne Law, where I work as co-director of its Washington office. The Levin Center is a nonprofit organization sponsored by Wayne State University Law School in Detroit, Michigan. The Center was established in honor of Senator Carl Levin who represented Michigan for 36 years in the U.S. Senate and who championed bipartisan, fact-based, high quality oversight during his career. The Center's primary mission is to strengthen Congressional oversight through training, research, internships, conferences, and other activities. Next week, for example, the Center is launching a new website to provide a one-stop resource for those tracking the current court cases examining Congressional oversight issues. Because of the Levin Center's mission and area of expertise, I have been asked to focus my remarks on how to strengthen the capacity of Congress to conduct bipartisan, fact-based, high-quality oversight investigations.

Power of Oversight

The power to investigate is a key legislative function assigned by the Constitution to Congress. A recent federal District Court opinion observed:

“[W]hen a committee of Congress seeks testimony and records by issuing a valid subpoena in the context of a duly authorized investigation, it has the Constitution's blessing, and ultimately, it is acting not in its own interest, but for the benefit of the People of the United States.”

The Court also stated:

“If there is fraud or abuse or waste or corruption in the federal government, it is the constitutional duty of Congress to find the facts and, as necessary, take corrective action. Conducting investigations is the means that Congress uses to carry out that constitutional obligation.”¹

Oversight is not only a constitutional duty, it can, when properly carried out, play an important role in bridging political divides. That’s because it provides Members of Congress with an opportunity to explore and reach consensus on the facts related to a particular issue and develop a factual predicate that can lead to legislation or other appropriate Congressional action.

Moreover, when conducted with respect for different points of view and a commitment to the facts, oversight inquiries can actually strengthen relationships between members of the two parties by helping them develop a mutual understanding of important issues. That is especially true when the focus of an oversight investigation is an area of common concern like cybersecurity, consumer fraud, health care innovation, transportation, or terrorism. Bipartisan, fact-based oversight, when undertaken in good faith, has great potential to help in the healing of Congress.

It is also important to note that oversight investigations provide a key lens through which the public views Congress. Highly partisan hearings or hearings that expose poor preparation by Members of Congress can damage public confidence in the institution. In contrast, bipartisan hearings that focus on problems of real concern, provide useful factual information, and demonstrate Member competence can strengthen public confidence in Congress. In short, to improve its standing with the public, Congress needs to improve its oversight hearings.

Varying Quality

The quality of Congressional oversight has varied dramatically over time and across the House and Senate. The reasons are many. Staff is often limited in number and inexperienced. Pay is below market. Training is minimal. Staff turnover is high. Inadequate technical expertise within committees and personal offices often makes it difficult for Members to investigate complex issues.

The list of problems extends beyond personnel. An absence of Congress-wide oversight standards and norms leads to fragmentation and division among and within 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. Partisan hearing topics often lead to unproductive sessions and estranged Members and staff. Five-minute limits on Member questions during hearings make it hard to obtain meaningful information, leading to frustration and disenchantment with oversight hearings. A lack of social

¹ *Comm. on the Judiciary, United States House of Representatives v. McGahn*, No. 19-CV-2379 (KBJ), 2019 WL 6312011 (D.D.C. Nov. 25, 2019).

interaction means many Members and staff don't know each other well, making it difficult for them to work together.

The problems plaguing oversight efforts are significant, but there is also a community of organizations committed to strengthening Congressional oversight. In addition to the Levin Center, they include the Federalist Society Article I Initiative, the Project on Government Oversight (POGO), the Lugar Center, American Oversight, Co-Equal Branch, and more. In addition, there are a range of steps that could be taken – some easier, some harder – that hold great promise for improving the state of oversight in Congress.

Bipartisan Oversight Proposals

First are the suggestions for addressing Congress' pressing staff problems, which other witnesses today are speaking to in detail. Their recommendations include increasing Legislative Branch appropriations, improving staff compensation, lifting staffing limits, expanding committee personnel, providing more training, and increasing staff expertise on technology and science issues, all of which would strengthen Congress as a whole as well as its ability to conduct oversight.

What I'd like to add to the conversation are a variety of recommendations focused specifically on oversight. I'd like to begin with four bipartisan proposals that were submitted to this Committee over the summer by four organizations committed to improving Congressional oversight investigations, the Levin Center, the Lugar Center, POGO, and American Oversight. A copy of our submission is provided along with this statement, and I ask that it be made a part of the hearing record. Here are the four proposals.

(1) Issue Congressional legal opinions on oversight matters.

Perhaps the most important of the four is the recommendation that Congress develop a process for issuing bipartisan legal opinions on oversight issues. For decades, the Department of Justice (DOJ) Office of Legal Counsel (OLC) has been issuing official legal opinions that provide guidance to Executive Branch agencies on how to respond to requests for information from Congress. It is no surprise that the OLC opinions have invariably favored the Executive Branch over Congress, one stark example being the OLC opinion that White House aides are immune to Congressional subpoenas, the exact opposite conclusion, I might add, of the courts that have ruled on the issue. DOJ has used its OLC opinions not only to control how agencies respond to Congress, but also to persuade courts to elevate the Executive Branch over the Legislative Branch.

Congress has for too long allowed those DOJ OLC opinions to remain unanswered. Neither the House nor Senate has an equivalent process or set of official legal opinions to provide guidance to Members of Congress, committees, federal agencies, or the courts on matters related to oversight. If Congress were to establish such a process and use it to issue thoughtful, well-supported, and bipartisan legal opinions on oversight matters, Congress could help establish oversight norms both within and outside of Congress, increase uniformity among Congressional committees, educate Members,

staff, and agencies, and advance oversight effectiveness. They would also strengthen the hand of Congress when forced to go to the courts.

(2) Require Joint Compensation of Committee Clerks.

A second bipartisan proposal is more mundane. It has to do with administrative staff, such as committee and subcommittee clerks, who provide support for Congressional oversight investigations. These are the unsung staff who send out the subpoenas, log in the documents, find rooms for the interviews, type up the reports, set up the hearing rooms, hand out the press releases, compile the hearing records, and archive the 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, hired on a partisan basis, to handle similar administrative duties. In contrast, in the Senate, committee and subcommittee chairs and ranking minority members jointly hire their administrative personnel and typically split their compensation on a 50-50 basis. The Senate approach has strengthened its committees by saving them money (through hiring fewer clerks) and encouraging a bipartisan, even-handed administration of oversight activities.

Senate administrative personnel know they are paid by both parties and know they are supposed to answer to both sides in an even-handed way. House administrative personnel, when hired on a partisan basis, know they answer to only one party. It is no surprise when partisanship follows where bipartisanship ought to prevail.

The bipartisan recommendation from our four organizations is to require the majority and minority on each House committee and subcommittee to jointly hire and split on a 50-50 basis the compensation paid to their administrative staff, including clerks, who support oversight investigations and hearings. The resulting savings in compensation costs could then finance other improvements.

(3) Encourage Longer Periods for Questioning Witnesses.

The next bipartisan recommendation focuses on investigative hearings. It recommends formally amending House rules to encourage a committee or subcommittee chair and ranking member, at the beginning of each witness panel, to question the panel for a longer period than the five minutes typical in most House hearings. This relatively easy change in the rules has the potential to deliver better outcomes for both committee members and observers of House hearings.

The format used in the recent House Intelligence Committee impeachment hearings gave both the majority and minority parties a 45-minute block of time at the beginning of each session. Most observers would agree that it produced a more coherent and meaningful exchange between the committee and its witnesses. The longer periods enabled committee leadership to ask a series of questions to clarify the testimony

provided and to follow through on the points they wanted to make. The longer periods also made it easier to establish facts, get into important details, and prevent witnesses from engaging in tactics to avoid answering questions. The longer periods also provided time for committee counsel to participate in the questioning, increasing the inquiry's professionalism.

The five-minute question periods used in most House hearings too often diminish the gravity and coherence of the session, and too often leave Members of Congress struggling to get answers to their questions, even while sometimes appearing rude or insensitive to witnesses. A series of short-duration questions at the beginning of a hearing can also lead to abrupt changes in topic that can make the hearing hard to follow for the audience and sometimes even confusing or chaotic. Those types of televised exchanges are not conducive to public respect for the institution. Allowing longer questioning periods at the beginning of an oversight hearing or at the start of each panel of witnesses is one way to alleviate those problems.

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

The final bipartisan recommendation is a big one. It stems from the reality that the country is politically divided, and voters are producing narrow majorities in the House and Senate in the range of 55, 52, or 51 percent. It appears that, for the foreseeable future, those narrow majorities could flip in a subsequent election, and flip back again in the following election, as has happened in the Senate.

Despite that political reality, 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 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 threatens dramatic funding changes and abrupt staffing shifts that may lead to losing staff with important institutional expertise, including staff experienced in oversight.

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. 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 receives 53% of the baseline, while Democratic staff receives 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 authority. To reap the same benefits, this Committee should consider a similar committee funding allocation process for the House.

Levin Center Proposals

So those are the four bipartisan proposals that were submitted to the committee over the summer, but of course, it isn't the end of ways to strengthen Congressional oversight. Speaking strictly on behalf of the Levin Center, here are a few more ideas.

--Public commitment to bipartisanship. 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 the leaders of the Subcommittee publicly and privately committed their staffs to joint investigations. Senator Levin, Senator Coburn, and others did so, because they were strong believers that bipartisan investigations were superior to partisan inquiries.

That was my experience as well. I found that an investigation conducted by people who held similar views was like investigating in an echo chamber. The staffers rarely challenged each other and often let issues slide. Investigating with people who held fundamentally different views, however, inevitably led to the investigators asking more questions, looking at more facts, interpreting those facts differently, and engaging in more conversations about what really happened and why. The resulting investigative process wasn't a quick or easy one, but it usually produced findings that were more accurate, more thorough, more thoughtful, and more credible.

That type of rich bipartisan experience is possible only when the chair and ranking member of the investigating committee direct their staffs to work together and to work out their differences. Congress needs House leadership and more committee leaders to make a public commitment to bipartisan investigations.

--Bipartisan investigative techniques. Making a public commitment to bipartisanship doesn't, of course, solve all problems. The staff also has to figure out how to investigate together so that their understanding of the facts matures together and makes consensus possible.

To achieve that type of outcome, the Levin Center recommends that committees employ a variety of investigative techniques that encourage consensus. They include requiring both sides of the aisle to attend initial briefings from experts and targets, to ensure everyone hears the same information at the same time. It includes both sides attending all key interviews together for the same reason. In fact, we recommend that staff from both sides of the aisle share their questions in writing before an interview and come up with a joint list so that everyone knows what questions will be asked in what order. That type of joint effort ensures both sides understand the questions of interest to

the other and commits to getting the answers. Another technique is to produce post-interview summaries with input from both sides to ensure both the majority and minority have the same understanding of what was said. Any disagreements should be resolved as soon as possible by going back to the witness or their lawyer.

Still another technique is to require committee staff to issue only joint press releases, with at least one quote from each side. Drafting those joint press releases often uncovers differences between the staffs and may require several revisions until common ground is found. A similar technique is to draft joint investigative reports to try to reach consensus on the facts. If no consensus exists, additional investigation should be undertaken to resolve or at least narrow the areas of disagreement.

These types of joint investigative techniques aren't easy and require a lot of time to put into practice. That's why bipartisan investigations typically take a lot longer than partisan inquiries. At PSI, we typically held only three to four hearings per year, because that's all we could manage on a bipartisan basis. But when we did hold hearings, they were organized, coherent, and reflected both sides of the aisle, which meant they often had a powerful impact.

--Fewer hearings with less partisan issues. Still another Levin Center recommendation is that committees and subcommittees consider holding fewer hearings. 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 with minimal cooperation between the parties. Fewer hearings would also enable Members and staff to gain needed familiarity with key documents and witnesses in each investigation. A related suggestion is that committees spend more time on topics that appeal to both parties and shy away from issues that may exacerbate party divisions. Congress' public ratings are currently painfully low; fewer hearings with more substance and less infighting could begin to restore public confidence.

--More training. The bipartisan investigative techniques advocated here often don't come naturally to Congressional staffers; they require training and support. The Levin Center, together with the Lugar Center and POGO, hold regular training sessions called "boot camps" to teach those same techniques. Our two-day boot camps combine staff from the House and Senate, and from both parties, in investigative exercises. We've trained more than 200 staffers to date, with the next boot camp set for February.

To be effective, our boot camps are limited to 20-25 staffers per session, which is only a small percentage of the staffers looking for training. In recent years, we've received over 100 applications for the spots available in each boot camp. That means many Congressional staffers are having to conduct complex investigations with minimal training. Much more training is needed, especially bipartisan opportunities that enable staff to discover they can work together. Let me add that when we ask attendees to evaluate our training sessions, almost to a person they rate the promotion of bipartisanship and the opportunity to work with staff across the aisle as one of the most valuable aspects of the training. We've found a consistent willingness and even

enthusiasm on the part of staff from both sides of the aisle to work with their counterparts.

Similar considerations apply to Members of Congress assigned to oversight committees. While some may have conducted oversight investigations on the state or local level, or can draw on prosecutorial or other legal experience, for many Members oversight investigations require a new set of unfamiliar skills. Even a short oversight seminar at a new Members orientation session could help – especially if that seminar were bipartisan. We would welcome the opportunity to help provide that experience.

--Increased social interaction. A final recommendation involves social interactions. During the Levin years, the Permanent Subcommittee on Investigations had a social gathering after work every few weeks. The Republican and Democratic staffs got together for drinks and snacks, sometimes joined by Senator Levin. No discussion of work was allowed, only PSI lore, funny stories, and the chit-chat that occurs among staffers working together. In addition, after most hearings, we had a bipartisan staff dinner at a local restaurant, usually joined by Senator Levin and his wife, in which we celebrated high points, low points, and poignant moments during the investigation. 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. They helped build bipartisan trust.

That type of regular social interaction would benefit not only staff but also Members serving on oversight committees and subcommittees. It is when every member of an oversight team begins to see every other member as a trusted partner that bipartisan, fact-based, high-quality oversight flourishes.

The Levin Center would like to thank the Committee for this opportunity to share some thoughts on how to strengthen Congress' ability to conduct bipartisan, fact-based, high-quality 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."
