

**Testimony of
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Before

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

On

Article One: Strengthening Congressional Oversight Capacity

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

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

Power of Oversight

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

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

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

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

Possible Oversight Reforms

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

(1) Establish System to Issue Congressional Legal Opinions.

Problem: For decades, the Department of Justice (DOJ) [Office of Legal Counsel](#) (OLC) has issued legal opinions that provide guidance to Executive Branch agencies on how to respond to congressional information requests and instruct courts on how to adjudicate interbranch conflicts. Those OLC opinions invariably favor the Executive Branch over the Legislative Branch, one stark example being OLC opinions that claim senior presidential advisors are immune to congressional subpoenas,² the exact opposite position that courts have taken on the issue. Criticisms of excessive secrecy,³ bias,⁴ and overreach⁵ in OLC opinions on congressional oversight issues have been growing. To date, however, Congress has allowed those OLC opinions to remain unanswered. Neither the House nor Senate has an equivalent process to issue official legal opinions providing guidance to congressional committees, federal agencies, and the courts on matters related to oversight. The result is a weakened and disadvantaged Congress compared to the Executive Branch.

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

² <https://www.justice.gov/olc/file/1183271/download>

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

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

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

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

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

(2) Strengthen Civil Enforcement of Congressional Subpoenas.

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

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

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

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

(3) Allow Only Bipartisan Committee Websites.

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

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

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

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

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

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

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

(5) Require Joint Compensation of Committee Clerks.

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

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

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

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

(6) Expand Bipartisan Oversight Training.

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

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

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

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

(b) Add Bipartisan Oversight to Congressional Staff Academy.

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

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

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

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

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

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

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

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

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

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

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

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

(9) Strengthen Congressional Norms Related to Oversight.

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

(a) Encourage a Public Commitment to Bipartisanship.

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

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

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

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

(b) Hold Fewer Hearings with Less Partisan Issues.

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

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

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

(c) Increase Social Interaction.

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

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

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

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

Conclusion

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

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