



DEMAND PROGRESS

Recommendations to Strengthen Congressional Oversight

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Introduction

The following report summarizes four recommendations to strengthen Congressional oversight in advance of the upcoming House Select Committee on Modernization hearing on *Bolstering Congressional Oversight Capacity*. At this hearing, the Committee is expected to consider “using the budget process to re-assert congressional power, reforms to lower barriers to oversight, and regaining oversight powers that Congress previously abdicated.”

If implemented, the recommendations would—

- **Bolster Congress’s subpoena authority and contempt powers.**
- **Strengthen the House Office of General Counsel and the Bipartisan Legal Advisory Group.**
- **Ensure congressional staff have adequate support on classified matters.**
- **Empower GAO’s ability to access information.**

Subpoena Authority and Contempt Power

Background:

Congress traditionally has relied on two complementary authorities to enforce its subpoenas: statutory contempt law and inherent contempt powers. Historically, these authorities have served as a critical backstop in negotiations with Executive branch officials because they can generate political and material costs to noncompliance. By comparison, other tools available to the Legislative branch are too slow and cumbersome. However, Congress has developed a weak hand with respect to enforcing its contempt determinations. Neither chamber has enforced its inherent contempt power in more than a century and there is an open question as to what would happen if it did. Similarly, since the 1980s, the Executive branch has neutered Congress's statutory contempt powers by issuing legal interpretations that grants the Justice Department unfettered discretion regarding whether to enforce Congressional subpoenas against Executive branch officials. While we may disagree with the legal and factual basis of these opinions, their effect is to not only undermine enforcement of the law, but to undermine Congress's ability to conduct oversight of the Executive branch. This is an untenable situation.

Recommendation(s):

Congress should consider new statutory contempt legislation. The legislation should remedy the major failures in the current law by authorizing an independent special counsel to decide whether to prosecute findings of contempt by Congress and providing an expedited review and enforcement process in the courts that (as appropriate) narrow the issues presented.¹

Strengthening the Office of General Counsel

Background:

When the House of Representatives takes a position on legal questions, that determination is made by the Bipartisan Legal Advisory Group (BLAG) and, when appropriate, litigation is undertaken by the House General Counsel. However, unlike its Executive branch equivalent — the Department of Justice's Office of Legal Counsel — the BLAG generally does not publicly articulate its views on the Constitution (except in court) and the Office of the General Counsel does not publish advisory opinions. Moreover, with the exception of a cursory mention in the House Rules,² there is no public information about how BLAG exercises its responsibility, whether it meets regularly (or at all), or whether there are any rules governing its deliberations.

Through the Justice Department's Office of Legal Counsel, there has been great value for the Executive branch in pushing its opinions into the public domain to shape how the public and courts view the law. However, these opinions almost uniformly favor Executive Branch interests — often at the expense of Congressional powers — and contribute to the aggrandizement of Executive power. It is crucial that the House develop a process for issuing legal opinions on oversight issues, potentially via the House General Counsel.³

Recommendation(s):

¹ For more information on the statutory contempt proposal, see "Modernizing Congress's Subpoena Compliance and Enforcement Methods" Testimony of Anne Tindall and Grant Tudor Prepared for the Record Before the House Committee on the Judiciary Subcommittee on Courts, Intellectual Property, and the Internet, June 8, 2021, pg 9

<https://s3.documentcloud.org/documents/21048546/protect-democracy-testimony-subpoena-compliance-enforcement.pdf>

² See, Rule II, Clause 8(b), Rules of the House of Representatives of the One Hundred and Seventeenth Congress, page 393 <https://www.govinfo.gov/content/pkg/HMAN-117/pdf/HMAN-117.pdf#page=408>

³ This is consistent with recommendation 82 by the Select Committee on the Modernization of Congress, which advocates for the House to facilitate a true system of checks and balances by ensuring the legislative branch is sufficiently represented in the courts. <https://modernizecongress.house.gov/recommendations>

Congress should examine the feasibility of having the House General Counsel routinely publish its views about legal matters on its website, accompanied by the filings in the cases where it intervenes. Additionally, Congress should explore directing the Bipartisan Legal Advisory Group to publish basic information about its operations and how it determines when the House should intervene in litigation. Former counsel to the House of Representatives Michael Stern has specific recommendations that we endorse.⁴

Classified Information and Security Clearances

Background:

Member offices need improved access to information that the Executive has deemed classified. Over-classification of documents by the Executive branch — often for the apparent purpose of avoiding scrutiny — means that older institutional arrangement regarding the provision of clearances no longer suffices to provide members adequate support with dealing with classified matters; so too has the increasing use of classified annexes to legislation limited the ability of members to meaningfully participate in deliberations.⁵ Congress must rebalance the provision of access to sensitive information if it is to maintain its ability to conduct effective oversight.

Security clearances govern access to classified information. While members of Congress are entitled to access classified information by virtue of the constitutional offices they hold and do not need security clearances, they must rely on their staff to sift through reams of information and brief them on issues. Nowadays, personal office staff do not hold sufficient clearances to access the requisite information, thereby undermining the support they can provide to their superiors and weakening Congress's ability to conduct effective oversight. Ironically, many staff may hold higher clearances as a hold-over from previous positions of military service, but they are not allowed to use their higher clearances for their House duties.

Another aspect that must be addressed is tracking how long it takes for staff to obtain a clearance and the number of Congressional staffers who have the proper security clearance to review information. Unfortunately, there is currently no known public-facing detailed accounting of the length of time it takes to obtain a clearance — although, anecdotally, we have heard of disparate treatment among the various committees — and there is no public list of how many House staff are cleared and at what levels. Such reporting does exist in a public document for the Executive branch, and we are aware that the Office of House Security maintains a current list of all staff who are cleared. At times we have seen indications of the number of cleared staff in the support agencies. The FY 2020 Legislative Branch Appropriations committee report required the House Sergeant at Arms to report on March 1, for the next two years, on the average and median length of time it takes for a Congressional staffer to receive security clearances,⁶ but the OHS declined to release the information to the public.

Recommendation(s):

To help Congress recoup effective oversight powers, Congress should explore undertaking the following actions regarding access to classified information and security clearances:

⁴ Our recommendations are consistent with Mike Stern's testimony before the House Appropriations Subcommittee on the Legislative Branch for Fiscal Year 2022. For more information, see "Testimony of Michael Stern Before the House Appropriations Subcommittee on the Legislative Branch for Fiscal Year 2022" April 30, 2021 https://s3.amazonaws.com/demandprogress/testimony/Stern_Testimony_for_House_Legis_Appropriations_Subcommittee.pdf

⁵ From 2007 to 2017, the amount of information designated TS or TS/SCI more than tripled. See "2017 Report to the President" Information Security Oversight Office, National Archives and Records Administration, May 31, 2018, <https://www.archives.gov/files/isoo/reports/2017-annual-report.pdf>

⁶ See "Legislative Branch Appropriations Bill, 2020" Report 116-64, p. 9 <https://congress.gov/116/crpt/hrpt64/CRPT-116hrpt64.pdf>

TS/SCI Security Clearances for Staff

Each Member of the House of Representatives who sits on a committee should be afforded one personal office staffer with TS/SCI clearance to support the Member on relevant matters before that committee.⁷ Currently, members are allowed two personal office staffers at the TS level; this proposal would allow for one of them to apply for a TS/SCI. We note that provision of a clearance does not grant the staffer access to information, as an additional determination of need-to-know must also be made. Rather, this change would advance the question to whether a staffer has a need-to-know instead of the mechanical question of whether a staffer has the appropriate clearance.

Clearance Availability

The House should track and release to the public the number of staff who have clearances, how long it takes to receive a clearance, and the level of the clearance.⁸

Release of Classified Information

Any committee with jurisdiction over information deemed classified by the Executive branch should be empowered to recommend and prompt a vote on the House floor to release that information. Currently, this process is only available to the House Permanent Select Committee on Intelligence.⁹

Government Accountability Office Intelligence Oversight

Background:

The Government Accountability Office is charged with supporting Congressional oversight of the Executive Branch. Unfortunately, over the last several decades, that role has been stymied when it comes to the Intelligence Community.¹⁰ While GAO already has statutory authority to conduct oversight of all federal agencies and has since 1982, the IC has insisted — from the outset — that it is not subject to such audits.¹¹

In 2019, GAO Comptroller Gene Dodaro testified that IC cooperation is forthcoming *only* when HPSCI or SSCI supports the request, even though GAO works on behalf of the whole Congress.¹² Comptroller Dodaro has requested previously for Congress to make clear that GAO has authority over IC oversight.¹³

⁷ For greater background on clearances in the Congress, see “A Primer on Congressional Staff Clearances,” Daniel Schuman and Mandy Smithberger, February 5, 2020

https://s3.amazonaws.com/demandprogress/reports/A_Primer_on_Congressional_Staff_Clearances_2020-02-05.pdf

⁸ Appropriators mandated this reporting in the Legislative Branch Appropriations Committee report for FY 2020, but the non-classified report was withheld from public access by the Sergeant at Arms. A comparable report is publicly available for executive branch agencies. <https://www.govinfo.gov/content/pkg/CRPT-116hrpt64/pdf/CRPT-116hrpt64.pdf>. The requirement was repeated and expanded for FY 2021 to “also include, in the appropriate format, the number of clearances disaggregated by security level as well as clearances pending.” See page 10. <https://www.congress.gov/116/crpt/hrpt447/CRPT-116hrpt447.pdf>

⁹ For the HPSCI process, see House Rule X, clause 11(g), available on page 15.

<https://rules.house.gov/sites/democrats.rules.house.gov/files/documents/116-House-Rules-Clerk.pdf>

¹⁰ It has been stymied or otherwise undermined in other areas as well, which is why we support the enactment of the Congressional Power of the Purse Act (H.R.6628 and S. 3889 (116th)), which addresses a wide range of matters including updating GAO’s authorities with respect to impoundment. See <https://budget.house.gov/CPAct>.

¹¹ For more information on GAO intelligence community oversight, see “Kel McClanahan’s Testimony Before the House of Representatives Legislative Branch Appropriations Subcommittee”, May 7, 2021

https://s3.amazonaws.com/demandprogress/testimony/2021-05-07_-_House_Leg_Approps_testimony.pdf

¹² See, [1] “Statement of Gene L. Dodaro Testimony Before the Subcommittee on the Legislative Branch, Committee on Appropriations, House of Representatives: Fiscal Year 2020 Budget Request”, February 27, 2019

<https://www.gao.gov/assets/gao-19-403t.pdf> and [2] <https://www.youtube.com/watch?v=G3WU2uZMlyk>

¹³ See, [1] “Statement of Gene L. Dodaro Testimony Before the Subcommittee on the Legislative Branch, Committee on Appropriations, House of Representatives: Fiscal Year 2021 Budget Request”, February 27, 2020

<https://docs.house.gov/meetings/AP/AP24/20200227/110531/HHRG-116-AP24-Wstate-DodaroG-20200227.pdf> and [2] <https://www.youtube.com/watch?v=uaRnD62qun4>

Recommendation:

Congress should bolster GAO's powers. It should encourage the Congress to adopt language offered by the House of Representatives in its Intel Authorization Act for FY 2010 (HR. 2701, Section 335)¹⁴ that would give teeth to GAO's ability to conduct audits inside agencies that have an intelligence community.¹⁵

¹⁴ "Text - H.R.2701 - 111th Congress (2009-2010): Intelligence Authorization Act for Fiscal Year 2010." *Congress.gov*, Library of Congress, 7 October 2010, <https://www.congress.gov/bill/111th-congress/house-bill/2701/text>

¹⁵ We also strongly urge you to review *the Power of the Purse Act*, which addresses a broader range of issues regarding strengthening GAO. <https://budget.house.gov/CPPAAct>