EXTRATERRITORIAL CONGRESSIONAL OVERSIGHT

ANDREW MCCANSE WRIGHT†

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† Associate Professor, Savannah Law School. To the extent I worked on the oversight matters referenced in this Article at the White House, in Congress, and in private practice, I rely solely on factual information contained in the public domain or otherwise non-confidential. I am grateful to The Levin Center at Wayne Law and the *Wayne Law Review* for inviting me to participate in the March 2018 Symposium "Congressional Oversight in the 21st Century." I would like thank Caprice Roberts and Kathleen Clark for her helpful comments. I would like also to recognize the outstanding research and editing support by my research assistants Katelyn Ashton and Erica Drew.

ABSTRACT

Congress has a myriad of legitimate interests in oversight that transcend national boundaries and extend to U.S. interests all over the world. Such interests can even reach as far as a foreign sovereign's stewardship of U.S. resources. Extraterritorial congressional oversight and investigations present a number of practical, legal, and diplomatic challenges. In this Article, I consider those challenges and offer some practical reforms Congress could undertake to enhance its ability to project its power of inquiry overseas.

I. INTRODUCTION

Congress has conducted legislative oversight of American foreign policy and overseas military activities since its founding.[1] American emergence as a global superpower further increased congressional oversight interests in overseas activities. Now, amidst multinational corporate consolidation, transnational national security threats, and technological revolution, Congress finds itself investigating fraud, waste, and abuse of U.S. resources in foreign jurisdictions. This Article focuses on jurisdictional and diplomatic issues implicated by congressional investigations that are not purely domestic in character.[2]

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1. In 1796, the House of Representatives passed a resolution calling on President George Washington to provide the instructions to John Jay to negotiate the Jay Treaty. *See* 4 ANNALS OF CONG. 1291 (1796). The House acquiesced to President Washington's refusal, but the episode is illustrative of Congress's appetite for oversight related to foreign policy matters in the Founding era. *See Washington's Response to a Congressional Request for Documents*, WASH. PAPERS (Mar. 30, 1796), http://gwpapers.virginia.edu/documents/washingtons-response-to-a-congressional-request-for-documents-30-march-1796/.

2. This project further develops themes advanced in prior papers. Andrew McCanse Wright, *Congressional Due Process*, 85 MISS. L.J. 401 (2016) (examining significant deficiencies in Congress's investigative practices that inadequately safeguard individual rights) and Andrew McCanse Wright, *Constitutional Conflict and Congressional Oversight*, 98 MARQ. L. REV. 881 (2014) (conceptualizing competing and incompatible interbranch views of Congress's constitutional role in oversight of the Executive). A work in progress, *Congressional Oversight Federalism*, explores congressional investigations of state and local government activities.

Extraterritorial congressional investigations present a number of unique diplomatic, jurisdictional, and practical challenges. A congressional investigation of the activities of a multilateral international institution that has received federal funds will raise issues of domestic law, federal jurisdiction, foreign relations law, and diplomatic norms. Similarly, United States contractors operating overseas also surface a range of such issues.

In this article, I propose practical legislative provisions that would facilitate Congress's legitimate oversight interests abroad. Many articles address the extraterritorial reach and limitations on criminal and civil litigation. Others examine the diplomatic sensitivities and international law associated with cross-border litigation. This Article offers a systematic analysis of congressional investigative interests in overseas activities and actors.[3]

II. EXAMPLES OF CONGRESS'S OVERSEAS OVERSIGHT INTERESTS

Congress's broad oversight power informs its legislative powers, which naturally lead its inquiries to foreign jurisdictions. This section offers some illustrative examples of U.S. government activities and other policy questions that give rise to congressional oversight and investigations.

A. Congressional Oversight Power and Scope

Congress's oversight power is grounded in its constitutional grant of "[a]ll legislative Powers."[4] In *McGrain v. Daugherty*,[5] the Supreme Court observed that "the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function."[6] While not unlimited, the scope of congressional oversight power is extremely broad because it covers review of the efficacy and administration of previously enacted laws as well as information that could serve as the basis of future legislative action.[7] Congress formulates

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3. This Article builds on a handful of prior works that address aspects of this topic. *See* Gary E. Davidson, *Congressional Extraterritorial Investigative Powers: Real or Illusory?*, 8 EMORY INT'L L. REV. 99 (1994); MORTON ROSENBERG, CONST. PROJECT, WHEN CONGRESS COMES CALLING: A STUDY ON THE PRINCIPLES, PRACTICES, AND PRAGMATICS OF LEGISLATIVE INQUIRY 139–146 (2017).

4. U.S. CONST. art. I, § 1.

5. McGrain v. Daugherty, 273 U.S. 135 (1927).

6. *Id.* at 174.

7. *See, e.g.*, Barenblatt v. United States, 360 U.S. 109, 111 (1959) (noting the "scope of the power of inquiry . . . is as penetrating and far-reaching as the potential power to

legislative policy and provides appropriations for the military, intelligence community, diplomatic corps, and foreign aid officers. Congress naturally, then, has myriad legitimate oversight interests that run overseas.

B. U.S. Government Operations Overseas

The United States conducts operations supported by military,[8] diplomatic,[9] and other U.S. government facilities[10] all over the world. Executive Branch officials stationed in the United States regularly travel overseas, incurring costs and presenting policy questions. Fiscal integrity, physical plant, personnel, and substantive policy issues abound in the U.S. footprint in foreign countries. Congress has the same legitimate oversight interests in U.S. facilities and operations abroad as it does domestically.[11]

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enact and appropriate under the Constitution"); Watkins v. United States, 354 U.S. 178, 187 (1957) (describing congressional oversight power as "broad" and recognizing it "encompasses inquiries concerning the administration of existing laws"); Quinn v. United States, 349 U.S. 155, 160 (1955) (observing "there can be no doubt as to the power of Congress...to investigate matters and conditions related to contemplated legislation"); *see also* Wright, *Constitutional Conflict*, *supra* note 2, at 891–914 (providing an in-depth discussion of the breadth and limitations of Congress's oversight power).

8. *See* MICHAEL J. LOSTUMBO ET AL., RAND CORP., OVERSEAS BASING OF U.S. MILITARY FORCES: AN ASSESSMENT OF RELATIVE COSTS AND STRATEGIC BENEFITS, 5–35 (2013) (recounting the history and presenting current U.S. global military force posture).

9. *See* ALEX TIERSKY & SUSAN B. EPSTEIN, CONG. RESEARCH SERV., R42834, SECURING U.S. DIPLOMATIC FACILITIES AND PERSONNEL ABROAD: BACKGROUND AND POLICY ISSUES, at Summary (2014) (noting the "United States maintains about 285 diplomatic facilities worldwide").

10. *See, e.g.*, MIKE ROGERS & DUTCH RUPPERSBERGER, U.S. HOUSE OF REPRESENTATIVES, 113TH CONG., INVESTIGATIVE REPORT ON THE TERRORIST ATTACKS ON U.S. FACILITIES IN BENGHAZI, LIBYA, SEPTEMBER 11-12, 2012, at Executive Summary (Nov. 21, 2014), https://fas.org/irp/congress/2014_rpt/benghazi-hpsci.pdf (discussing the attack on Central Intelligence Agency facilities in Benghazi).

11. *See, e.g.*, JON D. KLAUS, CONG. RESEARCH SERV., RS21975, U.S. MILITARY OVERSEAS BASING: BACKGROUND AND OVERSIGHT ISSUES FOR CONGRESS 2 (2004) (outlining the George W. Bush proposals to transfer some 70,000 U.S. troops permanently stationed overseas back to the United States); ROBERT D. CRITCHLOW, CONG. RESEARCH SERV., RS33148, U.S. MILITARY OVERSEAS BASING: NEW DEVELOPMENTS AND OVERSIGHT ISSUES FOR CONGRESS, at Summary (2005) (addressing the Bush proposal on overseas force posture against those of Congress's Overseas Basing Commission and Base Realignment and Closure Commission).

C. U.S. Foreign Assistance to Foreign Governments and Multilateral Organizations

The United States is the largest foreign assistance donor in the world.[12] Of the $48.57 billion in foreign assistance authority provided by Congress: 43% supported bilateral economic or political development programs, 35% for military and security assistance, 16% for humanitarian activities, and 6% funded multilateral organizations.[13] Assistance takes many forms, some of which operate at the program level and others at the national level.[14]

One of the methods Congress employs to deliver foreign aid is direct budgetary support by means of cash transfer.[15] Rather than supporting a nonprofit grantee or company contractor on a project-by-project basis, direct budgetary support is a bulk payment to a foreign government. Sometimes Congress will also appropriate funds for an international organization to disperse and manage direct budgetary support for the intended beneficiary.[16] Cash transfers designed to service a nation's debt or materially support a country's fiscal health tend to be very large. Congress's legitimate interests in the stewardship and efficacy of such payments create tension with the sovereignty of a foreign government.[17]

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12. CURT TARNOFF & MARIAN L. LAWSON, CONG. RESEARCH SERV., R40213, FOREIGN AID: AN INTRODUCTION TO U.S. PROGRAMS AND POLICY, at Summary (2016) (noting that the United States accounts "for about 24% of the total official development assistance from major donor governments in 2014").

13. *Id.*

14. *Id.* ("Assistance can take the form of cash transfers, equipment and commodities, infrastructure, or technical assistance, and, in recent decades, is provided almost exclusively on a grant rather than loan basis.").

15. *See, e.g.*, *id.* at 24 (noting that Congress appropriated cash transfers at various times to Turkey, Jordan, Egypt, Israel, Bangladesh, Liberia, and Mozambique); Sadika Hameed & Andrew Halterman, *Private Sector Development in Pakistan*, CTR. FOR STRATEGIC & INT'L STUDIES (Feb. 4, 2014), https://www.csis.org/analysis/private-sector-development-pakistan (noting that "U.S. foreign assistance efforts in Pakistan rely on large infusions of money, comprised of military aid, civilian development and relief programs, and direct budgetary support"); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-623 R, FOREIGN ASSISTANCE: U.S. ASSISTANCE TO THE WEST BANK AND GAZA FOR FISCAL YEARS 2008 AND 2009 3–4, 9 (2010), https://pdf.usaid.gov/pdf_docs/pcaac054.pdf (noting that the U.S. Agency for International Development (USAID) delivered $500 million across three separate cash transfers to the Palestinian Authority in Fiscal Years 2008 and 2009).

16. *See* BARNETT R. RUBIN, AFGHANISTAN FROM THE COLD WAR THROUGH THE WAR ON TERROR 252 (2013) (recommending that Congress fund direct budgetary support for the Government of Afghanistan by means of the Afghanistan Reconstruction Trust Fund managed by the World Bank and two other funds managed by the United Nations Development Programme).

17. *See infra* Part III.A.

Congress oversight of appropriation of funds for multilateral organizations presents similar legitimacy challenges.

D. Wartime U.S. Government Contracts

Congress routinely conducts oversight of waste, fraud, and abuse in government contracts.[18] Agencies with overseas missions engage in multitudes of government contracts. No government agency has larger contracting activity than the Department of Defense.[19] These contracts often require performance abroad, contemplate foreign-made constituent parts, or involve foreign contracting parties. Harry Truman rose to national prominence, in part, due to his aggressive oversight of profiteering government contractors during World War II.[20] More recently, Congress established a Commission on Wartime Contracting in Iraq and Afghanistan.[21]

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18. *See, e.g.*, COMM. ON OVERSIGHT AND GOV'T REFORM, U.S. HOUSE OF REPRESENTATIVES, 115TH CONG., AUTHORIZATION AND OVERSIGHT PLAN 1 (2017), https://oversight.house.gov/wp-content/uploads/2017/01/115th-Congress-Oversight-Plan.pdf ("The Committee will continue to examine instances of waste, fraud, abuse, and mismanagement of the activities of the federal government" including government contracts). In 2009, the Senate established a Subcommittee on Contracting Oversight "intended specifically to target waste, fraud, and abuse in government contracting." *See* Release of Sen. Claire McCaskill, Chairman, Subcommittee on Contracting Oversight, Senate Committee on Homeland Security and Government Affairs (on file with author), https://www.mccaskill.senate.gov/imo/media/doc/FightingForStrongerOversight1.pdf

19. *See Contracts*, U.S. DEP'T. OF DEF., https://www.defense.gov/News/Contracts/ (last visited Mar. 29, 2018) (noting contracts valued at $7 million or more are announced *each business day* at 5 p.m.) (emphasis added).

20. Sen. Truman chaired the Senate Special Committee to Investigate the National Defense Program, popularly referred to as the "Truman Committee." *See* DONALD H. RIDDLE, THE TRUMAN COMMITTEE: A STUDY IN CONGRESSIONAL RESPONSIBILITY (1964).

21. *See* COMM. ON WARTIME CONTRACTING IN IRAQ AND AFGHANISTAN, TRANSFORMING WARTIME CONTRACTING: CONTROLLING COSTS, REDUCING RISKS, at About the Commission (Aug. 2011), https://www.globalsecurity.org/military/library/report/2011/wartime-contracting_201108.pdf. During my time as a House subcommittee staff director, our major investigations focused on Afghanistan wartime supply chain contracts. *See, e.g.*, MAJORITY STAFF OF HOUSE SUBCOMM. ON NAT'L SEC. AND FOREIGN AFF., HOUSE COMM. ON OVERSIGHT AND GOV'T REFORM, WARLORD, INC.: EXTORTION AND CORRUPTION ON THE U.S. SUPPLY CHAIN IN AFGHANISTAN (June 2010), https://www.cbsnews.com/htdocs/pdf/HNT_Report.pdf (hereinafter "WARLORD, INC."); MAJORITY STAFF OF HOUSE SUBCOMM. ON NAT'L SEC. AND FOREIGN AFF., HOUSE COMM. ON OVERSIGHT AND GOV'T REFORM, MYSTERY AT MANAS: STRATEGIC BLIND SPOTS IN THE DEPARTMENT OF DEFENSE'S FUEL CONTRACTS IN KYRGYZSTAN (Dec. 2010), http://psm.du.edu/media/documents/congressional_comm/house_oversight_gov_reform/us_hosue_oversight_manas.pdf [hereinafter "MYSTERY AT MANAS"]. We faced many challenges obtaining access to documents and witnesses located overseas and under control of foreign businesses performing subcontracts for U.S. government contractors.

E. Global Commercial Regulation

The Foreign Commerce Clause grants Congress the power to "regulate Commerce with foreign Nations."[22] As Professor Anthony Colangelo observes, the Foreign Commerce Clause "underlies a tremendously broad and varied array of U.S. legislation."[23] Congress's authority to set legislative policy for trade leads to evaluation of trade practices by foreign governments and business organizations. Thus, the Foreign Commerce Clause paves the path of legislative inquiry right into foreign capitals and board rooms.

III. DIPLOMATIC SENSITIVITIES OF CONGRESSIONAL OVERSIGHT

This section outlines several issues of diplomacy related to Congress's exercise of its oversight powers. Extraterritorial oversight raises questions about Congress's institutional competencies within the constitutional structure. What is Congress's proper role in foreign relations in the separation of powers scheme? Overseas legislative inquiries also raise diplomatic sensitivities with respect to U.S. relations with foreign and international entities.

A. Diplomacy and Separation of Powers

The Executive Branch conducts formal diplomacy on behalf of the United States.[24] Presidential institutional advantages[25] and ability to

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We also had difficulty obtaining access to U.S. personnel located overseas. As noted in *Warlord, Inc.*, the Pentagon blocked our access to senior Department of Defense officials in Afghanistan. *See* WARLORD, INC., at Note on Methodology ("The Majority staff conducted preliminary interviews with three senior Department of Defense officials referenced in this report but were prohibited from conducting formal interviews by the Department's decision to resist access to military personnel deployed in Afghanistan.").

22. U.S. CONST. art. I, § 8, cl. 3.

23. Anthony Colangelo, *The Foreign Commerce Clause*, 96 VA. L. REV. 949, 950 (2010). Colangelo cites as examples: the Sherman Antitrust Act, 15 U.S.C. § 1 (2006); the Foreign Trade Antitrust Improvements Act (FTAIA) of 1982, 15 U.S.C. § 6a (2006); the Aircraft Sabotage Act,18 U.S.C. § 32 (2006); the Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (2006); the Child Pornography Prevention Act of 1996, 18 U.S.C. § 2252A (2006); and the Protection of Children Against Sexual Exploitation (PROTECT) Act, 18 U.S.C. § 2423 (2006).

24. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936) (describing the "very delicate, plenary, and exclusive power of the President as the sole organ of the federal government in the field of international relations").

25. *See* Zivotofsky ex rel. Zivotofsky v. Kerry, 135 S. Ct. 2076, 2086 (2015) ("The President is capable, in ways Congress is not, of engaging in the delicate and often secret

"'speak for the Nation with one voice'"[26] inform the traditional view that diplomatic power is the exclusive domain of the Executive. However, Congress communicates directly with foreign government through fact-finding oversight, congressional travel, and reception of visiting foreign government officials.[27] Congress also signals its foreign policy views through its legislative powers and other pronouncements, as well as its oversight activities.[28] Make no mistake: Congress and the judiciary can roil diplomatic relations.[29]

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diplomatic contacts that may lead to a decision on recognition [of a foreign government].").

26. *See* American Ins. Assn. v. Garamendi, 539 U.S. 396, 424 (2003) (quoting Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 381 (2000)).

27. *See* Ryan M. Scoville, *Legislative Diplomacy*, 112 MICH. L. REV. 331, 331 (2013) (arguing that the "sole organ" metaphor and reality are "more complicated than commonly assumed" in light of historical congressional practice and the original meaning of the Constitution).

28. *See* James A. Perkins, *Congressional Investigations of Matters of International Import*, 34 AM. POL. SCIENCE REV. 284, 284 (1940) (noting legislative investigations as a vehicle of congressional pressure but concluding, upon survey of nine investigations related to U.S. foreign policy, they had little influence on the Executive Branch).

29. Two episodes during the Obama Administration's effort to secure an Iran nuclear deal demonstrate the functional power the other branches have to complicate a presidential diplomatic initiative. Without consulting the White House, Speaker John Boehner invited Israeli Prime Minister Benjamin Netanyahu to speak about Iran before a joint session of Congress on February 11, 2015. *See* Jake Sherman, *Boehner's Bibi invite sets up showdown with White House*, POLITICO (Jan. 21, 2015), https://www.politico.com/story/2015/01/john-boehner-invites-benjamin-netanyahu-congress-iran-114439 (describing the White House spokesman's characterization of the invitation as a "departure" from diplomatic protocol). Prime Minister Netanyahu was a fierce critic of any nuclear deal with Iran. *Id.* Confronted by reporters about the diplomatic effects of his invitation to the Israeli Prime Minister, Boehner responded, "Congress can make this decision on its own." *Id.* In an earlier incident, a federal judge issued a $622 million damages judgment against the governments of Sudan and Iran for liability related to the bombings of U.S. embassies in Africa. Owens v. Republic of Sudan, 71 F. Supp. 3d 252, 256 (D.D.C. 2014), *aff'd in part, question certified,* 864 F.3d 751 (D.C. Cir. 2017). On the same day, Secretary of State John Kerry was in Vienna for six hours of nuclear deal talks with Iran's Foreign Minister and the European Union foreign policy chief. *See* Matt Spetalnick & Parisa Hafezi, *U.S. sees some progress in Iran nuclear talks, still aims for November deal*, REUTERS (Oct. 15, 2014), https://www.reuters.com/article/us-iran-nuclear/u-s-sees-some-progress-in-iran-nuclear-talks-still-aims-for-november-deal-idUSKCN0I40VX20141015. Uncoordinated acts by the American branches of government can be perceived as calculated acts by foreign governments that have no experience with the American scheme of separation of powers. From the executive branch perspective, efforts to undermine a diplomatic initiative or an added uncertainty of unintended mixed signals often create unwelcome complications. For a discussion of collateral diplomatic effects of non-coordination by the United States, see Andy Wright, *Bad Timing: The U.S., Iran, and the East Africa Embassy Bombing Judgment*, JUST SEC. (Oct. 16, 2014), https://www.justsecurity.org/16466/bad-timing-us-iran-east-africa-embassy-bombing-judgement.

Congress needs to navigate this rocky terrain. On one hand, it should vigorously pursue information that will aid it in its legislative function. Investigative threads will naturally cross borders, and Congress should follow them. On the other hand, Congress should temper its investigative zeal with due regard for the Executive Branch's primary role in the conduct of diplomacy. There is a premium on speaking with one voice in matters of diplomacy. Congress should also evaluate potential collateral diplomatic consequences of its oversight efforts, and it should take care not to create unintended international incidents.

B. Diplomacy and Partisanship

Partisanship also undermines the value of "speaking with one voice." Multipolarity defines Congress—it operates through bicameral chambers, leadership offices, committees, majority and minority staffs, personal offices, and individual members. However, it could be diplomatically damaging for Congress to project internal disharmony while conducting investigative activity overseas. To some degree, Congress recognizes this vulnerability. House travel policy has strongly favored bipartisan congressional delegations on foreign trips,[30] however that tradition has been undermined by recent hyper-partisanship.[31] A

30. In the House, a bipartisanship requirement is a function of the Speaker's policy. *See* H.R. RULE I, cl.10 ("The Speaker may designate a Member, Delegate, Resident Commissioner, officer, or employee of the House to travel within or without the United States"). To comply with the policy, I spent a lot of time as a committee staffer trying to recruit Republican members to join our planned foreign trip congressional delegations (CODELs) to engage in fact-finding oversight. Foreign travel by congressional staff operated under the same bipartisanship policy. In exceptional circumstances, the Speaker may grant an exception, but trip participation by only one member of the other party will satisfy the bipartisanship policy. *See* Susan Milligan, *One is the Loneliest Number: The House majority leader announced a 'bipartisan' congressional delegation – with only one Democrat*, U.S. NEWS & WORLD REPORT (Apr. 17, 2014), https://www.usnews.com/opinion/blogs/susan-milligan/2014/04/17/cantors-bipartisan-congressional-delegation-shows-washingtons-divide (criticizing the Speaker's characterization of a CODEL to Asia as "bipartisan" when it included only one Democrat).

31. In 2003, there was a dust-up between Congressional Indian Caucus Co-Chairs Joseph Crowley (D-N.Y.) and Joe Wilson (R-S.C.), in which they engaged in dueling partisan travel planning. *See* JULIET EILPERIN, FIGHT CLUB POLITICS: HOW PARTISANSHIP IS POISONING THE HOUSE OF REPRESENTATIVES 34 (2006) (describing partisan wrangling over the India trip to declare "[e]ven official congressional delegations known as CODELs became politicized"). In another breach of that protocol in the House Intelligence Committee's investigation of Russian interference in the 2016 presidential election, majority staff traveled to London without informing their minority staff counterparts or including them in the travel. *See* Julia Borger, *Secretive search for man behind Trump dossier reveals tension in Russia inquiry*, THE GUARDIAN (Aug. 7, 2017),

unified front overseas not only projects American strength as a diplomatic matter, it also fortifies Congress's oversight authority. Partisan daylight can be exploited by a party resisting a request for information. A foreign-based entity will take Congress's requests more seriously if it witnesses bipartisan resolve.

C. Foreign Sovereignty

Even if Congress had plenary authority to conduct all diplomacy on behalf of the United States, the equality of nations would limit Congress's oversight power as a matter of law, practicality, and diplomacy. Sovereignty[32] is one of the chief animating principles of the international order.[33] In matters of foreign relations, sovereignty connotes the equal standing of countries as juridical entities.[34] It also informs American constitutional doctrine on the extraterritorial reach of U.S. federal power. Chief Justice John Marshall viewed sovereignty as a fairly stark limitation on the reach of a nation's law: "No principle of general law is more universally acknowledged than the perfect equality of nations . . . It results from this equality that no one can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone."[35] Congress starts at a baseline of no authority in a foreign jurisdiction. Moreover, Congress recognized the sovereignty

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https://www.theguardian.com/us-news/2017/aug/07/donald-trump-russia-dossier-christopher-steele-devin-nunes. The purpose of the trip was to seek to interview a British national and former MI6 intelligence officer who had conducted opposition research related to Donald J. Trump potential ties to Russia. *Id.*

32. While there is no single agreed upon definition of "sovereignty," it has as its "core meaning, *supreme authority within a territory*." Daniel Philpott, *Sovereignty*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Mar. 25, 2016), https://plato.stanford.edu/entries/sovereignty/ (emphasis in original).

33. David Kennedy, *International Symposium on the International Legal Order: Introduction*, 16 LEIDEN J. OF INT'L L. 839, 846 (2003) (describing sovereignty as lying "at the root of international law"). The rise of international institutions such as the United Nations, the North Atlantic Treaty Organization, and the European Union suggest some evolution to pure country-level notions of sovereignty. *See generally* Winston P. Nagan & Craig Hammer, *The Changing Character of Sovereignty in International Law and International Relations*, 43 COLUM. J. TRANSNAT'L L. 141 (2004) (surveying the protean concept of sovereignty and its complicated relations with modern transnational entities).

34. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 287 (4th ed. 1990) (arguing sovereignty inheres in its relation to the "equality of states representing the basic constitutional doctrine of the law of nations").

35. The Antelope, 23 U.S. 66, 122 (1825). The case, in admiralty, was named after a ship that was the subject of accusation that it was being used for the illegal importation of African people as slaves. *See id.*

principle when enacting the Foreign Sovereign Immunities Act (FSIA).[36] It immunizes foreign governments from a variety of judicial and administrative processes, including judicial subpoenas.[37] Where Congress asserts coercive oversight authority over foreign nationals and governmental institutions, it risks ineffectuality and invites contempt for American arrogance. As Congress pursues facts overseas, it should be sensitive to foreign nations' sovereignty.

D. Congressional "Testimony" and "Hearings"

Congressional proceedings themselves also raise diplomatic sensitivities. Formal testimony and hearings have the imprimatur of government authority. Such formalities assert a power that could implicate respect for principles of comity between nations as well as deference to the Executive in diplomatic relations. Congress often seeks and, at times, compels formal hearing testimony from individuals, private entities, and government institutions. As noted above, foreign governments and international treaty organizations have information pertinent to legislative inquiry.[38] Congress does not recognize any internal or legal rules prohibiting formal testimony by foreign officials.[39] When Congress seeks information from officials of foreign governments and multilateral organizations, however, it traditionally sheds formalities as a nod to its lack of supervisory authority in the international scene. Hearings become briefings that dispense with the administration of testimonial oaths.[40] This is an important tradition that signals

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36. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94–583, 90 Stat. 2891 (1976) (codified across sections of Title 28 of the United States Code).

37. *Compare* Vera v. Republic of Cuba, 867 F.3d 310 (2d Cir. 2017) (granting a motion to quash a subpoena of a bank seeking worldwide information regarding Cuba's accounts once the Second Circuit held the district court lacked subject matter jurisdiction because Cuba was entitled to sovereign immunity under FSIA) *with* Republic of Argentina v. NML Capital, Ltd., 134 S. Ct. 2250 (2014) (upholding a bank subpoena for Argentina's account information as permissible under FSIA, in part, because the subpoena was not directed at Argentina's government directly).

38. *See* ROBERT A. PASTOR, CONGRESS AND THE POLITICS OF U.S. FOREIGN ECONOMIC POLICY, 1929-1976 350 (1980) ("In foreign policy issues where a particular American group has a dispute with a foreign government, it would also be helpful for Legislators to be able to hear the other side of the issue directly from foreign governments.").

39. That understanding traces to a Library of Congress study on this topic that was entered into the Congressional Record in 1976. *See* 122 CONG. REC. 18418–19 (daily ed. June 15, 1976) (reprinting Jonathan Sanford's study *Congressional Testimony by Foreign Officials and Citizens*).

40. I experienced this transformation process when contemplating a hearing on nuclear nonproliferation which included the participation of a counselor from France's Ministry of Foreign Affairs and a former Russian parliamentarian. The House

congressional respect for sovereignty interests while facilitating congressional oversight.

E. The Logan Act

The Logan Act prevents parties without the authority of the United States to seek to influence a foreign government's conduct "in relation to any disputes or controversies with the United States."[41] In 2015, forty-seven senators sent a letter to the Islamic Republic of Iran highlighting the reversibility of an executive agreement with President Obama on a nuclear deal.[42] That effort was pretty clearly calculated to undermine the likelihood of a deal, and renewed interest in the Logan Act's applicability to Congress. While that letter was not an act of oversight, Congress's exercise of extraterritorial oversight activities in conflict with Executive foreign policy goals could generate similar accusations related to the Logan Act.[43]

Because the Executive acts as the sole organ of formal diplomacy, members of Congress may be "without authority of the United States" for purposes of the Logan Act.[44] In a 1970s controversy regarding two senators' communications with the government of Cuba, the State Department concluded "[n]othing in [the Logan Act] would appear to restrict members of Congress from engaging in discussions with foreign officials in pursuance of their legislative duties under the Constitution."[45]

Subcommittee on National Security and Foreign Affairs downshifted to a briefing in light of diplomatic concerns. *See Hearing - U.S. House of Representatives Subcommittee on National Security and Foreign Affairs, Strengthening the Nonproliferation Regime,* CARNEGIE ENDOWMENT FOR INT'L PEACE (Dec. 10, 2007), http://carnegieendowment.org/2007/12/10/hearing-u.s.-house-of-representatives-subcommittee-on-national-security-and-foreign-affairs-strengthening-nonproliferation-regime-pub-19758.

41. 18 U.S.C.A.§ 953 (West 2010).

42. *See Letter From Senate Republicans to the Leaders of Iran,* N.Y. TIMES (Mar. 9, 2015), https://www.nytimes.com/interactive/2015/03/09/world/middleeast/document-the-letter-senate-republicans-addressed-to-the-leaders-of-iran.html?_r=1.

43. *See generally* Detlev F. Vagts, *The Logan Act: Paper Tiger or Sleeping Giant?*, 60 AM. J. OF INT'L L. 268 (1966) (recounting historical episodes in which members of Congress were accused in a public debate of Logan Act violations).

44. *Id*; *see also* MICHAEL V. SEITZINGER, CONG. RESEARCH SERV., RL33265, CONDUCTING FOREIGN RELATIONS WITHOUT AUTHORITY: THE LOGAN ACt, at Summary (2015) (noting the unresolved question of whether the Logan Act "applies to Members of Congress"); Saikrishna B. Prakash & Michael D. Ramsey, *Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 352 n.536 (2001) (concluding that its inclusive language suggests "the Act applied to all U.S. citizens and thus probably covered members of Congress").

45. Steve Vladeck, *The Iran Letter and the Logan Act,* LAWFARE (Mar. 10, 2015), https://www.lawfareblog.com/iran-letter-and-logan-act.

While the law is unresolved on the applicability of the Logan Act to Congress, senators and representatives enjoy the immunity of the Speech or Debate Clause as to their legislative acts.[46] As noted above, Congress has legitimate, constitutionally grounded oversight interests that reach extraterritorial topics. As such, Congress is on strong footing when engaged in fact-finding, rather than expressing policy preferences, when engaging foreign governments.[47]

IV. EXTRATERRITORIAL SUBPOENAS

Like federal civil litigants and grand juries, Congress uses subpoenas to compel testimony.[48] Subpoenas directed at witnesses and documents located in foreign jurisdictions present significant issues of domestic, foreign, and international law.[49] Civil litigants and prosecutors have had some success serving and enforcing extraterritorial subpoenas in federal court proceedings.[50] Congress, however, has had more difficulty.[51]

A. Extraterritorial Congressional Subpoena Authorities

Congress's standing rules do not authorize extraterritorial subpoenas.[52] There have been a handful of unsuccessful efforts to serve and enforce subpoenas abroad in the absence of express authority.[53]

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46. *See* U.S. CONST. art. I, § 6, cl. 1 ("The Senators and Representatives, . . . for any Speech or Debate in either House, . . . shall not be questioned in any other place").

47. *See* Scoville, *supra* note 27, at 382 (arguing that Congress's authority to engage in legislative diplomacy "comes primarily from Congress's implied power of investigation").

48. *See generally* JOHN C. GRABOW, THE LAW AND PRACTICE OF CONGRESSIONAL INVESTIGATIONS (1991); *see also* Wright, *Constitutional Conflict, supra* note 2, at 900.

49. This article briefly addresses these complicated and contested doctrines in an effort to make two points: (1) Congress, like courts, may permissibly exercise extraterritorial jurisdiction within the constitutional limits of due process; and (2) Congress could enhance its prospects of obtaining foreign judicial assistance.

50. *See, e.g.*, Blackmer v. United States, 284 U.S. 421, 443 (1932) (upholding the issuance of a subpoena to compel the return of an American citizen then located in France for testimony in a criminal trial); Balk v. New York Inst. of Tech., 974 F.Supp.2d 147, 156 (2013) (granting a motion to compel by issuance of a subpoena to a U.S. citizen in Egypt to appear at a civil deposition in New York).

51. ROSENBERG, *supra* note 3, at 139 ("Reliable judicial assistance, however, has not been readily available where sought-after individuals and information are in foreign jurisdictions.").

52. *See generally* MICHAEL L. KOEMPEL, CONG. RESEARCH SERV., R44247, A SURVEY OF HOUSE AND SENATE COMMITTEE RULES ON SUBPOENAS (2018) (describing the House Rules, Senate Rules, and House and Senate committees' rules on subpoenas).

53. *See* GRABOW *supra* note 47, at § 3.2[b] (recounting a 1985 attempt by a Senate committee to serve a subpoena on a member of the Soviet Navy while a Soviet ship was

Since Watergate, ten special investigative committees have been granted authority to seek judicial assistance in order to compel production of documents and access witnesses located in foreign jurisdictions.[54] These resolutions were designed to provide an imprimatur of authority so that committees could call on the State and Justice Departments to assist Congress in obtaining international judicial assistance processes.[55] While congressional authorization failed in that regard, it did enhance the legitimacy of "less formal ventures to obtain necessary information."[56]

B. Mutual Legal Assistance Treaties and Letters Rogatory

The two primary ways U.S. litigants secure foreign judicial assistance in obtaining evidence are letters of rogatory and mutual legal assistance treaties.[57] A letter of rogatory, or letter of request, is a formal

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docked in American waters and a 1986 effort by several House committees to serve former President of the Philippines, Ferdinand Marcos, with a subpoena).

54. ROSENBERG, *supra* note 3, at 141–42. According to Rosenberg, those investigations were: the Nixon Impeachment Proceedings, H.R. Res. 803, 93d Cong. (1974); Church Committee, S. Res. 21, 94th Cong. (1975); House Assassinations Inquiry, H. Res. 222, 95th Cong. (1977); Koreagate, H.R. Res. 252, 95th Cong. (1977); ABSCAM, H.R. Res. 67, 97th Cong. (1981); Iran-Contra, H.R. Res. 12 and Sen. Res. 23, 100th Cong. (1987); October Surprise, H.R. Res 258, 102d Cong. (1991); Whitewater, S. Res. 120, 104th Cong. (1995); Campaign Finance, H.R. Res. 167, 105th Cong. (1997); and Select Committee on National Security Concerns, H. Res. 463, 105th Cong. (1998). *Id.* at 142 n.14.

55. *Id.* at 142.

56. *Id*; *see also* George W. Van Cleve & Charles Tiefer, *Navigating the Shoals of "Use" Immunity and Secret International Enterprises in Major Congressional Investigations: Lessons of the Iran-Contra Affair*, 55 MO. L. REV. 43, 83 (1990) (recounting creative efforts by the Iran-Contra committees to obtain information located in foreign countries). The House Subcommittee on National Security and Foreign Affairs never had extraterritorial subpoena authority. We engaged at various times in persuasion, cajoling, and flattery to obtain access to foreign witnesses. In our *Warlord, Inc.* investigation, we finally convinced allegedly Taliban-affiliated, combat hardened targets of our investigation to meet us in Dubai so that they could have an opportunity to clear their names. We had one diplomatic security officer and one U.S. Army liaison, neither of whom was armed, act as our security as we met at a hotel chosen by our interviewees. It was a tense, but incredibly productive, encounter. *See* WARLORD, INC., *supra* note 22, at 69–79 (including multiple references to our interview of Ahmed Rateb Popal, Rashid Popal, and Commander Ruhullah on May 27, 2010). In our Kyrgyzstan fuel contractor investigation, we obtained cooperation of witnesses located in foreign countries only after issuing subpoenas on their U.S.-based holdings. *See* MYSTERY AT MANAS, *supra* note 21, at Note on Methodology.

57. *See* T. MARKUS FUNK, FED. JUD. CTR., MUTUAL LEGAL ASSISTANCE TREATIES AND LETTERS ROGATORY: A GUIDE FOR JUDGES 1 (2004), https://www.fjc.gov/sites/default/files/2017/MLAT-LR-Guide-Funk-FJC-2014.pdf.

request from one country's tribunal to another's for legal assistance.[58] Mutual legal assistance treaties, such as the Hague Convention on the Taking of Evidence Abroad (the "Hague Convention"),[59] the Inter-American Convention on Letters Rogatory,[60] and the U.S.-U.K. Treaty on Mutual Legal Assistance,[61] facilitate cross-border legal proceedings. However, Congress is generally excluded from the terms of the relevant treaties.[62]

Federal statutes implementing requests for foreign judicial assistance[63] also fail to empower congressional oversight. For example, by its terms, the Walsh Act authorizes "courts," not Congress, to subpoena a U.S. citizen located abroad.[64] In addition, legislative history of Section 1782 of Title 28 indicates that the term "tribunal" was limited to a government entity engaged in an adjudicative function.[65] Congress is further hampered by the United States' failure to reciprocate assistance

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58. The State Department defines letters of rogatory as follows:

> Letters rogatory are the customary means of obtaining judicial assistance from overseas in the absence of a treaty or other agreement. Letters rogatory are requests from courts in one country to the courts of another country requesting the performance of an act which, if done without the sanction of a foreign court, could constitute a violation of that country's sovereignty.

Preparation of Letters Rogatory, U.S. DEP'T. OF STATE-BUREAU OF CONSULAR AFF., https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/internl-judicial-asst/obtaining-evidence/Preparation-Letters-Rogatory.html (last visited Mar. 30, 2018).

59. *See Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*, HCCH, https://www.hcch.net/en/instruments/conventions/full-text/?cid=82 (last visited Mar. 30, 2018).

60. *See Inter-American Convention on Letters Rogatory*, DEP'T. OF INT'L L., OAS, http://www.oas.org/juridico/english/treaties/b-36.html (last visited Mar. 30, 2018).

61. Mutual Legal Assistance on Criminal Matters, Gr. Brit.-Ir., Jan. 6, 1994, S. Treaty Doc. No. 104-2 (1994).

62. *See, e.g.*, ROSENBERG, *supra* note 3, at 139 ("Most such treaties are either expressly unavailable to assist legislative investigations or have been so construed."); *Id.* at 141 (observing that "major international service conventions to which the United States is a party either expressly preclude their use by legislative entities or imply preclusion by their silence"); ALISSA M. DOLAN ET AL., CONG. RESEARCH SERV., RL30240, CONGRESSIONAL OVERSIGHT MANUAL 51–53 (2014) (outlining limitations on foreign judicial assistance related to global congressional investigations).

63. *See* 28 U.S.C.A. § 1781 (West 2017) (authorizing the Department of State to send and receive letters rogatory, including those issued by U.S. tribunals seeking assistance from foreign judicial assistance); 28 U.S.C.A. § 1782 (West 2017) (authorizing federal courts to assist foreign and international tribunals in obtaining discovery from people and entities located in the United States).

64. 28 U.S.C.A. § 1783 (West 2017).

65. *See* ROSENBERG, *supra* note 3, at 140 (recounting the legislative history and citing four federal appellate court opinions following that interpretation).

with foreign legislative inquiries.[66] Of course, to the extent that these limitations are driven by statutory exclusion, Congress could amend them.

C. Due Process Limitations on Extraterritorial Congressional Subpoenas

Federal courts have enforced congressional committee subpoenas through civil and criminal actions since 1935.[67] The Due Process Clause[68] limits the reach of extraterritorial subpoena to a party who does not have sufficient nexus to the United States.[69] Courts generally do not distinguish between civil and criminal subpoenas for purposes of Due Process extraterritoriality analysis.[70] Given that in *Blackmer v. United States,* [71] the Supreme Court viewed federal legislative jurisdiction as the touchstone limitation on the reach of extraterritorial subpoenas in federal court proceedings,[72] Congress's legislative interests in oversight should be roughly equivalent.[73] Where it undertakes responsible procedural

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66. *See* In re Letters of Request to Examine Witnesses, 59 F.R.D. 625 (1993), *aff'd* 488 F.2d 511 (9th Cir. 1994) (rejecting a Canadian fact-finding commission's request for assistance); *see also* ROSENBERG, *supra* note 3, at 139 (observing "principles of international comity are often trumped by judicial determinations that compliance will not be reciprocated"); Davidson, *supra* note 3, at 103 (discussing the "'shoe on the other foot' analogy" and quoting a Senate attorney asking how we "would feel if the [People's Republic of China's] Parliament tried to subpoena information from us here in the U.S.").

67. *See* ROSENBERG, *supra* note 3, at 139.

68. U.S. CONST. amend. V.

69. *See* Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982) (noting that the Due Process requirements on personal jurisdiction limit judicial power); In re Sealed Case, 832 F.2d 1268, 1272–73 (D.C. Cir. 1987) (holding that a party seeking the production of corporate documents must demonstrate the trial court has personal jurisdiction over the party in order to obtain an order compelling production). As a due process matter, personal jurisdiction turns on sufficient "minimum contacts" with the forum in which the government authority seeks to exercise jurisdiction. *See* Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 619–20 (1992) (a Fifth Amendment case adopting the Fourteenth Amendment 'minimum contacts' holding of Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)). For further discussion, see Gosia Spangenberg, *The Exercise of Personal Jurisdiction over Some Foreign State Instrumentalities Must Be Consistent with Due Process,* 81 WASH. L. REV. 447 (2006).

70. *See* Rhonda Wasserman, *The Subpoena Power: Pennoyer's Last Vestige*, 74 MINN. L. REV. 37, 104 (1989) (noting "in assessing whether an assertion of extraterritorial subpoena power violates the due process clause, the distinction between criminal and civil actions is not constitutionally significant"); *see also* Michael Farbiarz, *Extraterritorial Criminal Jurisdiction*, 114 MICH. L. REV. 507, 539 n.186 (2016) (observing Wasserman's thesis "makes sense").

71. 284 U.S. 421 (1932).

72. *Id.* at 438.

73. *See* Van Cleve & Tiefer, *supra* note 56, at 83 ("Presumably a Congressional subpoena, like a grand jury subpoena, would be held to reach the full constitutional limit.

safeguards, Congress should also receive judicial solicitude in federal courts.[74]

V. OTHER PRACTICAL TRAVEL CHALLENGES

There are a few other practical challenges to conducting effective oversight beyond U.S. borders that are worthy of brief mention. In many cases, congressional and staff fact-finding trips are essential to conducting penetrating oversight.[75] Depending on the subject matter and location, congressional investigators may require transcription and translation services, embassy workspace, security, and in-country travel support. Congress is reliant on the good offices of the State Department control officers assigned to the delegation,[76] and, in combat zones, the Department of Defense. These personnel deployed overseas have broad important portfolios beyond staffing congressional travel, and legislative travelers should be mindful of their burden on the mission. In addition, there is often an awkward dynamic in which the congressional delegation is conducting oversight over the very departments that are hosting it.[77] At times, the executive branch tries to dictate the legislative branch's trip agenda, which is not the appropriate dynamic. Therefore, there can be seemingly endless negotiations about access to sites, foreign government officials, combat zones, and various services.

VI. PROPOSALS FOR ENHANCED EXTRATERRITORIAL CONGRESSIONAL OVERSIGHT

Congress has numerous legitimate legislative interests in obtaining extraterritorial facts and testimony. As set out above, congressional investigators also face significant challenges and important

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. . Congressional subpoenas, like grand jury subpoenas, have the force of the federal government behind them . . .").

74. *See* Wright, *Congressional Due Process*, *supra* note 2 (arguing that Congress's poor track record with respect to witness treatment suggests that courts should engage in a more searching inquiry of congressional procedures before enforcing its subpoenas).

75. Member and staff travel was essential to the findings we were able to make in our reports *Warlord, Inc.* and *Mystery at Manas*; *see also* Davidson, *supra* note 3, at 101 ("Travelers on congressional fact-finding trips abroad often return with a plethora of detailed information on various problems in other states.").

76. *See How Does the Department of State Interact with Congress*, DISCOVER DIPLOMACY, https://diplomacy.state.gov/discoverdiplomacy/diplomacy101/places/206979.htm (last visited Mar. 30, 2018).

77. *See* ROSENBERG, *supra* note 3, at 142 (describing the difficulty of conducting overseas investigative activity with "a hostile administration that would not cooperate in facilitating any possible diplomatic accommodations").

considerations when trying to gather information from overseas sources. This section contains a number of practical recommendations should Congress decide to enhance its investigative reach.

A. Enact Express Extraterritorial Subpoena Authority

As an initial matter, the House and Senate should amend their rules to grant committees of relevant jurisdiction with extraterritorial subpoena authority. In addition, Congress should enact extraterritorial subpoena authority and extraterritorial long-arm statutes so its subpoenas extend to the extent "exercising jurisdiction is consistent with the United States Constitution and laws."[78] In order to enhance Congress's position under the Due Process Clause, the legislation should only authorize extraterritorial subpoenas of: U.S. nationals and lawful residents located abroad;[79] U.S. government employees, people performing work on U.S. government contracts, those administering U.S. government funds; a foreign employee of a U.S. company;[80] and foreign corporations doing business with sufficient contacts in the United States.[81] As a matter of sovereign comity, it should neither authorize subpoenas of foreign governments nor multilateral organizations.

House and Senate Rules should require leadership sign-off of extraterritorial subpoenas, perhaps even requiring bipartisan concurrence in order to ensure that Congress is projecting unity abroad. In addition, before issuing an extraterritorial subpoena, I would recommend that Congress provide the Executive Branch with a period (say, ten days) to

78. FED. R. CIV. P. 4(k)(2)(B).

79. The Walsh Act could serve as a model. It provides:

> A court of the United states may order the issuance of a subpoena requiring the appearance as a witness before it...of a national or resident of the United States who is in a foreign country...if the court finds that particular testimony...is necessary in the interest of justice, and...that it is not possible to obtain his testimony in admissible form without his personal appearance.

28 U.S.C.A. § 1783 (West 2017).

80. *See* Ronald S. Betman & Jonathan R. Law, *The (Too) Long Arm of the S.E.C.: When a Foreign Employee of a U.S.-Based Multinational Financial Services Client is Threatened with a Subpoena*, 10 BERKELEY BUS. L.J. 1, 2–3 (2013) (recounting, and criticizing, several examples of S.E.C. use of administrative subpoena power to leverage extraterritorial access to witnesses and information).

81. This type of subpoena target could also shed light on the activities of foreign governments. For example, in Republic of Argentina v. NML Capital, LTD, 134 S. Ct. 2250 (2014), the Supreme Court held that the Foreign Sovereign Immunities Act of 1976 did not bar a civil litigation subpoena of several banks for worldwide information about accounts held by the government of Argentina. Congress could similarly empower itself by express statutory language.

raise diplomatic or national security concerns.[82] This process would augment Congress's domestic legal authority to engage in overseas oversight, ensure consideration of diplomatic sensitivities by two branches, and enhance the legitimacy of the legislative inquiry in foreign jurisdictions.

B. Negotiate Legislative Inclusion in Mutual Legal Assistance Treaties

As advocated by Gary Davidson, Congress should press the Executive Branch for inclusion in mutual legal assistance treaties.[83] Congress can leverage its array of legislative powers to incentivize executive branch cooperation, including Senate treaty ratification, appropriations, hearings, and legislative policy expressions.

C. Mandate State Department and Defense Department Travel Support

Congress should pass legislation that formalizes its expectations of executive branch support for oversight travel. This legislation should not impose too many onerous obligations on Embassy or military staff. However, statutory mandates for facilitation of congressional oversight on transcription, translation, workspace, in-country mobility, and security could clarify interbranch relations and improve efficiency. Moreover, it could present an opportunity for Congress to codify an expression of the importance of its autonomy in setting its oversight agenda when traveling abroad.

D. Enact Congressional Accountability Provisions to U.S. Government Contracts

Legislation should mandate that U.S. government contracts contain provisions designed: (1) to ensure transparency of sub-contractual relationships, (2) to provide audit rights to appropriate U.S. government entities, including Congress's investigating committees, and (3) to condition contract awards on consent to jurisdiction of U.S. legal

82. In order to prevent undue delay and to discourage obstructionism, the statute should treat executive branch silence as acquiescence to the subpoena's issuance.

83. *See* Davidson, *supra* note 3, at 124 (arguing that Congress "could insist that the Executive seek to amend the Hague Convention" and that the "Senate could block new Mutual Legal Assistance Treaties unless these treatise provide for favorable congressional treatment").

process, including congressional subpoenas.[84] Such provisions would empower and legitimize congressional investigations involving U.S. government contracts performed overseas, foreign entities acting as prime contractors to the U.S. government, and foreign-based subcontractors.

E. Leverage Congressional Oversight through Suspension and Debarment

Congress should amend suspension and debarment statutes to strengthen Congress's ability to obtain contractor information overseas. Suspension and debarment are legal sanctions designed to protect federal agencies from conducting business with unreliable and unscrupulous vendors.[85] A debarred company is ineligible for new federal contracts for the duration of its debarment, whereas a suspended company is "generally ineligible for the duration of an investigation or litigation" matter that calls the contractor's conduct into question.[86] Statutes and the Federal Acquisition Regulation (FAR) set out the various standards for administrative exclusions authority.[87] The government may debar a contractor when it is held civilly liable, its agents have committed certain criminal offenses, or other conduct requires contractor accountability.[88] It authorizes suspension "when contractors are suspected of or indicted for specified offenses, or when there are other causes that affect contractor responsibility."[89]

Congress should enact a statute that expressly authorizes suspension of a contractor or subcontractor if Congress finds that it failed to comply with a formal request or subpoena for information from a committee of competent jurisdiction.[90] Congress could then refer that finding to the contracting agency of the U.S. government with either a mandatory or discretionary mandate to suspend the contractor. Like a court's power of

84. *See* WARLORD, INC., *supra* note 21, at 68 (recommending that host-nation trucking contracts "need to include provisions that ensure a line of sight, and accountability, between the Department of Defense and the relevant subcontractors").

85. *See generally* CONG. RESEARCH SERV., RL 34752, PROCUREMENT DEBARMENT AND SUSPENSION OF GOVERNMENT CONTRACTORS: LEGAL OVERVIEW (2015).

86. *Id.* at Summary.

87. *Id.*

88. *Id.*

89. *Id.*

90. As a deterrent, Congress could also authorize punitive debarment for contemptuous contractor behavior. However, suspension would incentivize cooperation with the congressional inquiry in real time.

civil coercive contempt,[91] suspension could create an acute incentive for a company to comply with Congress's inquiry.

F. Leverage Foreign Assistance Funds to Obtain Information

While it may be an affront to sovereignty to assert subpoena authority over a foreign government, Congress may surely choose to incentivize oversight cooperation with the power of the purse. [92] As Davidson notes, "congressional control of foreign aid purse strings can engender cooperation on the part of otherwise recalcitrant sovereigns."[93] One could imagine a provision in which aid is withheld at a certain percentage upon a finding of unsatisfactory provision of information about an oversight matter. However, this kind of act could be unduly provocative to diplomatic relations and could frustrate important U.S. national security goals. Given the stakes, I would recommend that Congress undertake a comprehensive study of information access from foreign governments receiving assistance as well as collateral consequences of such policy in consultation with the State Department and other executive branch agencies.

VII. CONCLUSION

From the founding, Congress's legislative power leads it to inquire about matters overseas. American world leadership, economic globalization, and the technological revolution will generate greater extraterritorial oversight activity. Congress faces significant legal, diplomatic, and practical challenges as it projects its power of inquiry abroad. However, as set forth in this Article, there are concrete steps Congress could take to strengthen its hand in its pursuit of evidence located in foreign countries that is essential to a well-informed legislative function.

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91. *See* DAN B. DOBBS & CAPRICE L. ROBERTS, LAW OF REMEDIES: DAMAGES, EQUITY, RESTITUTION § 2.8(3) (3d ed. 2018) (noting that a sanction is civil contempt "when it operates coercively to induce compliance with the court's decree") (footnote omitted).

92. *See* Jeffrey A. Meyer, *Congressional Control of Foreign Assistance*, 13 YALE J. INT'L L. 69 (1988) (noting Congress's ability to shape foreign assistance policy).

93. Davidson, *supra* note 3, at 102.