

THE BROOKINGS INSTITUTION
BROOKINGS CAFETERIA PODCAST
CONGRESSIONAL OVERSIGHT IN THE TRUMP ERA
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DEWS: Welcome to the Brookings Cafeteria, the podcast about ideas and the experts who have them. I'm Fred Dews.

In our constitutional system, congressional oversight of the Executive Branch is an important tool. As a coequal branch of government and the one that passes legislation and appropriates funds to carry out public policy, Congress has an obligation to the Constitution and to citizens to hold the Executive Branch accountable.

On today's show Senior Fellow Molly Reynolds introduces the new House Oversight Tracker interactive, explains why oversight is so important, and shares her views on recent news about some of the Trump administration's responses to Oversight requests.

Also on today's episode, meet new scholar DJ Gribbin, who joined the Metropolitan Policy Program after serving in the White House as the nation's first special assistant to the president for infrastructure.

You can follow the Brookings Podcast Network on Twitter @policypodcasts to get information about and links to all of our shows, including our new podcast The Current which replaces our 5 on 45 Podcast, plus Dollar and Sense and our Events podcast, and now on with the interview.

Molly, welcome back to the Brookings Cafeteria.

REYNOLDS: Thanks. It's great to be here.

DEWS: I shouldn't actually even say welcome back, because I think you more than any other scholar has been in this studio contributing to the Brookings Cafeteria through your What's Happening in Congress segment, so thanks again for that.

REYNOLDS: Oh, it's my pleasure. It's really great to get a chance to regularly update people on what I think are the really important things happening in Capitol Hill.

DEWS: In fact, this interview is an extended What's Happening in Congress, so let's get right into it on this question of oversight.

First I wanted to ask you to introduce the new interactive feature that's on the

Brookings website that you've led, the House Oversight Tracker, what is it, where can people find it, how can people use it.

REYNOLDS: Yeah, so I really appreciate the opportunity to tell folks about it, because it's something we're really excited about, so it started during the 2018 midterm campaign. There was a fair amount of discussion about what Democrats would do if they took control of the House, and that included this idea that they would engage in a lot of investigations of the Trump administration.

We wanted to be able to track, one, whether or not that was actually happening, whether they were doing this oversight they had said they were going to do, and equally importantly we wanted to make sure that people had a way to look at oversight that was happening maybe below the headlines.

So much of what we've talked about when we talk about oversight in the 116th Congress, the really flashy things, many of which have to do with President Trump himself, but there's a lot of really important oversight going on of policy decisions made in the first two years of the Trump administration. We really wanted to give people a tool that would help them make sense of that as well.

So as you mentioned we developed this House Oversight Tracker, which is available on the Brookings website, and it tracks two things. It tracks hearings, oversight hearings conducted in the House of Representatives, and it tracks letters sent by committees or subcommittees in the House to Executive Branch officials or others with knowledge of the White House Executive Branch operations.

So as of this recording, we've tracked 63 hearings and 242 letters in the first couple of months of the new Congress. To make this information kind of the most usable to people, we've categorized it into different policy areas. So you can take a look at all of the oversight that's happening say in the immigration policy space related to the House's investigations into the violations of the rule of law, that sort of thing, and we've also given -- even below those general policy categories, we've given

people the ability to sort the data into different specific investigations, particularly when they might span policy areas.

So, for example, if you're really interested in what was happening across the federal government during the government shutdown in January and how were agencies implementing that, you can look at all of that even though it has to do with different substantive policy areas.

So that's what's out there and, like I said, it's on the Brookings website. We hope that people are using it to again really get a sense of what's happening beyond just the things you see in the headlines.

DEWS: I also note that it's full of links to House Committee websites and documents and the hearings themselves and the letters --

REYNOLDS: Yeah. So if you're extra curious and you want to learn and read say the letter that the Judiciary Committee sent to Attorney General Barr or you want to check out the written testimony that witnesses gave at a hearing, we provide the links that allow you to do that as well.

DEWS: Let's stay at this high level. I know there's a lot going on in Washington around oversight. There's a lot of news. Especially as we're recording this, Attorney General Barr is testifying at the Senate. We can talk about that if you want. But staying at the high level, how do you define oversight?

REYNOLDS: Sure. Here I like to borrow a phrase from Leeston Alborough, the legendary oversight expert named Mort Rosenberg who used to be at the Congressional Research Service who refers to oversight as the review, monitoring, and supervision of the implementation of public policy.

Obviously that's a really big broad definition. It's important to remember that Congress can and does conduct oversight of activities that take place in the private sector with an eye towards potentially writing new or revised laws in addition to overseeing actions of the Executive Branch.

A couple of examples of kind of high profile congressional oversight of private sector

behavior would be things like the oversight of the tobacco industry in the 1990s or the financial industry after the 2008 financial crisis.

Here in this project, I think certainly in the broader conversation right now, we're really interested in oversight of the Executive Branch. So we, again thinking about our Oversight Tracker, we had to figure out how to move from this very general idea of oversight into something that we can measure.

Because this is Brookings, we read a lot of the research that's already out there on how other people have done this, and we basically use key words that appear in hearing titles and letters, things like investigate, oversee, waste, fraud, abuse, that sort of thing, to really capture what we're trying to measure.

We also look at who's involved. So say if an agency Inspector General is testifying before Congress, that's a pretty good signal that that hearing is going to involve some oversight of something that's happening at that agency.

DEWS: So I think most listeners will be familiar with the way that a congressional hearing operates or how it looks at least, but talk about the role of letters in oversight.

REYNOLDS: Sure. This is actually really an important question, I'm glad you asked it, Fred, which is that letters are a really valuable way for congressional committees to try to get information from the Executive Branch or from another actor about something that's happening out there in the world, and importantly they can serve a little bit of a different function in the oversight process.

So if you really want to get a lot of attention to your oversight activity or really want to get say a high level administration and witness on record as saying something and have them on tape and it appear on the nightly news, you mentioned that Attorney General Barr is testifying as we speak, that sort of thing, hearings are really valuable for that.

But they're not necessarily as valuable if what you're trying to get is say a lot of written information, a lot of documents about how a particular decision was made, or they're not as valuable if you want to do something. It's a little bit more below the radar or kind of in service of developing a bigger body of evidence over time.

So letters are a really important tool that Congress has available to it, again particularly trying to get information out of the Executive Branch in a more comprehensive way than you might be able to do in a hearing which lasts two hours and each member has five minutes to question the witness, that sort of thing.

DEWS: I don't read the Constitution every day, but I'm pretty sure the last time I looked at it the word "oversight" is not in the Constitution as text, so where do we find the authority for Congress to do oversight?

REYNOLDS: Sure. So there are some things that are more explicitly discussed in the Constitution that are an important basis for Congress' oversight power when we think of it broadly, so things like the power of the purse.

So Congress has the power to decide what money the federal government is going to spend, and that can be a really important tool for overseeing the Executive Branch, both in terms of the process that Congress goes through to develop those spending bills. They have extensive hearings, they bring up administration witnesses, they ask them about the programs that they're looking to fund.

And on the other side if say Congress is not getting the information that it wants out of the Executive Branch about a particular program, it can always, and sometimes does, threaten to cut funding for that program or limit how the money can be spent.

Congress also has the power to organize the Executive Branch, and so that's another kind of important basis for its oversight power.

In the Senate, it has the power to confirm appointees, and those hearings and that

process is a really important way that Congress oversees what the Executive Branch is doing.

The power to investigate though is, as you point out, not specifically authorized in the Constitution, but the courts, including the Supreme Court, have established over time that oversight and investigations are essential to Congress' legislative power, which is part of the Constitution.

Courts upheld that Congress has a very broad oversight power, although it's not unlimited. Courts have said that oversight has to have some sort of underlying legislative purpose, but have generally read that purpose to be pretty broad.

So Congress can't do everything, but it can do a lot of things in service of this legislative function that it has, and that is specified in the Constitution.

I'll also say just that there are a couple of other laws that have helped set up Congress' oversight powers. We see them now over the course of the 20th century, so again things like establishing Inspectors General in the agencies. And then the internal rules of the House and the Senate also bear on what Congress can and does do in the oversight space.

DEWS: Let's return one more time to this question of the function of oversight. You've touched on many reasons why Congress has oversight power and some of the things that it aims to do.

Just so listeners can take away kind of at a high level for their civic knowledge, what is really the essential function of congressional oversight in our constitutional system?

REYNOLDS: Yeah. So congressional oversight has a number of sort of specific purposes, so things like making sure that the Executive Branch is doing what Congress intended when Congress wrote a law, identifying ways to make the government programs that the Executive Branch implements work better, uncovering waste, fraud, and abuse, mismanagement, that sort of thing, but undergirding all of that into your question about the Constitution is Congress' role as a coequal branch of government, whose job includes to check the power of the Executive Branch.

So if we think back to when we learned about the basics of the Constitution with three

separate branches, separation of powers, there are systems in place for them to check and balance one another. Oversight is a really important way that Congress fulfills that responsibility vis-a-vis the Executive Branch.

DEWS: Can you give some examples of when congressional oversight has resulted in good policy outcomes, as far as citizens are concerned, and good governance outcome?

REYNOLDS: So I mentioned earlier when I was talking about oversight of the private sector a couple good examples of things like the hearings that Congress had in the 1990s and the investigation they did into that tobacco industry. The congressional oversight of the financial industry after the financial crisis helped lay the groundwork for what became the Dodd-Frank banking legislation.

And then if we go a little bit further back in history, we can also see things like in the mid-'70s when a major congressional investigation of the intelligence community as part of the Church Committee set up -- or helped set up what we have now as our system for overseeing the intelligence community.

So those are some sort of high profile examples, but there's everyday examples where we see another sort of tool of oversight that Congress has, which is constituents calling their Member of Congress and saying I'm having this problem with the federal government, can you help me solve it. And sometimes when a Member gets enough of those complaints, it turns into legislative action.

So there was, for example, in the past couple of years an effort led by two House Members to establish certain benefit parity National Guard and reserve troops on one hand and active duty troops on the other that really bubbled up from constituent complaints, so that's another kind of important form of oversight that we see.

DEWS: Unless you're a citizen, member, of that particular community you probably wouldn't have known that Congress was doing this oversight, that's very important.

REYNOLDS: Yeah.

DEWS: So let's kind of ease into current affairs a little bit. This next question I think is going to be hard to separate out what's been happening over the past few years from any kind of broader, longer term analysis of this.

So the question is: Is there a difference in terms of priorities or intentions in the way that House Democrats conduct oversight versus House Republicans, are there differences between how the House does oversight versus how the Senate does oversight?

REYNOLDS: Sure. So I would start by saying that over a somewhat longer sweep of history, certainly most of the 20th century, the beginning of the 21st century, when we look at that kind of time frame, one of the biggest things that predicts differences in oversight behavior is whether we're in a period of unified or divided party control.

So the idea that when one or both Chambers of Congress are controlled by the Party that's not in the White House that we generally see more vigorous investigative work by Congress of an Executive Branch controlled by the other Party. That's not shocking or surprising, but there is some pretty good political science research that has established that as a historical pattern.

In terms of sort of differences across the Chambers, there are some that are important. So for example in the Senate, the Senate has a civil contempt mechanism that it can use against private parties, so not governmental actors, that the House doesn't have.

The two Chambers have made different choices about how to organize themselves internally in service of oversight goals. So again in the Senate, Homeland Security and Government Affairs Committee has a special subcommittee whose job is just to do a lot of oversight. It has no legislative jurisdiction, so that's again a different choice the two Chambers have made. They also made different choices about things like who to give subpoena power to.

So in the House, there are many more committee chairs who have the ability to issue subpoenas on their own without the approval of their full committee than in the Senate, so those are

some kind of different institutional choices.

In terms of Parties, that's a little bit harder to answer, but I will say that we did see sort of during the Obama administration a number of very high profile but very politicized investigations of things that were by congressional Republicans of the Executive Branch. So things like the Benghazi investigation is probably the best example of this.

I will say that we see good meaningful important oversight done in Congress by just one Party, but it's often the case that the extent you can get bipartisan buy-in on oversight activities that then they're seen as more credible, they have more buy-in from a broader group of people if you can get bipartisan support behind what you're trying to do.

Even in these very partisan polarized times, we've seen some in recent years important examples of bipartisan oversight. So one example of this involves efforts to investigate failures of the VA health system across the country. So that was something that members of both parties on Capitol Hill were really committed to overseeing and trying to find legislative solution in response to what they uncovered in that investigation.

DEWS: I can hear listeners asking the question what about the 115th Congress controlled by Republicans during the first two years of the Trump administration and thinking they probably didn't do any oversight whatsoever and now we have House Democrats in control doing lots of oversight.

Is it accurate to think about the 115th Congress, the House of Representatives specifically, as not doing any oversight?

REYNOLDS: So I'm not going to say they did no oversight. There's certainly a number of examples of things where we would have perhaps expected to see the House do more oversight especially that it did, so including a number of scandals involving administration officials, that sort of thing. So it's not the case that the 115th Congress did no oversight, importantly the Senate Intelligence

committee's oversight investigation into Russian interference into the 2016 election is a really important dynamic in that overall storyline. It was happening in Congress in the 115th Congress, but it's certainly the case that Republicans left plenty of things on the table for Democrats to pick up in the 116th Congress, and that's kind of what we've seen and what we've started to capture in our Oversight Tracker, for example.

DEWS: Well, the 116th Congress started its work in January. It was voted in in the 2018 midterm elections, after which Senate Majority Leader Mitch McConnell and President Trump both said that that incoming Democratic majority would engage in, quote, presidential harassment.

How do you respond to that, what are your thoughts on that?

REYNOLDS: So I would say again fundamentally oversight is an important constitutional responsibility of Congress in its role as the Legislative Branch and doing oversight investigative work serves that legislative purpose.

There are obviously better and worse ways to do oversight. As I mentioned earlier to the extent that you can get any bipartisan buy-in, that's going to mean your oversight is seen as more credible. But at the end of the day when there's evidence to be investigated of potential wrongdoing in the Executive Branch, again thinking about things like the Mueller Report that Attorney General Barr is talking about as we speak, that's Congress' job. Congress has to, if it's going to be a coequal branch of government, look into those things and to do so in a responsible way. So I think that's kind of the bottom line for me.

DEWS: Even very recently we've heard the president and other members of his administration saying things like, and I'm not quoting here, but basically saying that members of the Executive Branch are not going to cooperate with Congress and we've seen even Cabinet-level Secretaries missing important deadlines say for President Trump's IRS tax filings.

This kind of gets to this question of executive privilege, can you talk about what the role

of executive privilege is in the question of oversight from the Congress and the Executive Branch?

REYNOLDS: Sure. So the Supreme Court has recognized that the president can withhold certain information from Congress in order to protect the separation of power system. So again while Congress has a responsibility in the separation of power system to check the Executive Branch, that power is not absolute and there's certain information that the courts have said that the president is permitted to withhold from Congress.

There are a couple of different kinds of executive privilege that come up in interactions with Congress, including what we call the presidential communications privilege, which involves presidential decision making in what we call the deliberative process privilege, which involves decision making by the broader Executive Branch.

But at the end of the day, executive privilege is not an absolute privilege and we end up needing to kind of balance the need to protect information with Congress' need to get access to it.

These disputes really importantly aren't kind of purely legal. Resolving them often involves the courts, but they're often resolved as part of negotiations between Congress and the president where both sides try to come to an accommodation that makes both parties feel like their position is being respected.

There's a Wall Street Journal story from the other day that quoted former Virginia Congressman Tom Davis who described these kinds of interactions as when you're Congress, you ask for the moon and you end up with a moon rock, and I think that's a good way to kind of capture -- and that applies to thinking about executive privilege, but it applies more broadly to thinking about kind of information and witness appearances that Congress wants.

Historically what's really been important here is that Congress and the president engage in a series of negotiations. Sometimes the courts get involved, but sometimes they don't, and both parties historically have kind of negotiated in good faith to try to reach an accommodation.

DEWS: In picking up on this idea of good faith, there was an interesting piece on Lawfare Blog recently by John Bize. When he talked about how much of this interaction between Congress and the Executive Branch is based on good faith, it's based on accommodation, it's based on a lot of norms. But in the Trump presidency as we're seeing, there's a lot of norm breaking happening, if I may.

REYNOLDS: Yeah, I mean, it's certainly the case, though, what we've seen especially in the past several weeks that this notion that the Trump administration is interested in trying to assert executive privilege very broadly, and President Trump, again I'm not quoting here, has come out and said something like I'm going to fight all of the subpoenas, we're not going to listen to any of them. So sort of that as your starting position really does undercut the idea that maybe what you're trying to do is reach a good faith accommodation with Congress.

We've seen some -- a little bit earlier in this Congress, we saw some administration witnesses appear voluntarily after negotiations without actually a subpoena having to be issued, and that's the sort of more historical norm.

We'll just have to see over the next couple of weeks or months whether we start to move further away from that and congressional Democrats do turn increasingly to the courts to try and help them enforce these requests for documents and witness appearances.

DEWS: The Trump business organization has even gone so far as to file a lawsuit to stop the House Oversight committee from obtaining financial records from the business' accounting firm.

Is there any precedent for the president or his agents filing a lawsuit against the House of Representatives?

REYNOLDS: Yeah. So a couple of just sort of facts about this particular dispute to help listeners out here. So when Michael Cohen testified before the House Oversight committee earlier this year, in the aftermath of that, the committee asked a number of different institutions to turn over

documents, including this accounting firm called Mazars, hopefully I'm pronouncing that correctly, and the accounting firm actually came back to the committee and said we cannot turn these documents over to you unless you subpoena them. The law in our practice is such that we can turn them over if we're required to, we can't turn them over voluntarily. So we'll defer to this as a friendly subpoena.

So the oversight issued a friendly subpoena and then that's when Trump's personal lawyers got involved and tried to sue to stop this.

You mentioned Lawfare Blog piece before and another Lawfare piece by my Brookings colleagues, Margaret Taylor, which is really great on this, she does talk about how this is unprecedented and that Trump's lawyers are arguing here that there's no legitimate legislative purposes for subpoenaing the financial records from his accountant. So in their view, the subpoena should be deemed invalid and unenforceable.

But again as I mentioned earlier, courts have generally interpreted the legislative purpose standard very broadly and so we'll see what they do in this case, but it is yet another sort of front in this growing conflict between Congress and the president.

DEWS: Molly, as we wrap up this great conversation, what else do you think listeners should know about congressional oversight that we haven't already talked about?

REYNOLDS: One thing I'd say, just to echo something I said towards the top, is a lot of this conversation has been about President Trump and the Mueller Report and Attorney General Barr and the big flashy things that are in the headlines. But at the end of the day, a lot of important work is going on in Congress, oversight work that's not what we're seeing in the headlines.

So for example when I looked at our Oversight Tracker before this conversation and I looked at what are the issues that are most frequently the subject of oversight in this new Congress, the rule of law and those types of issues were ranked number one on the list, but second on the list is oversight activity involving environment and energy policy.

So some of that's getting attention, but a lot of it's not. So I would just like to remind listeners that we should pay a lot of attention to the really headline grabbing stuff, but there's other important work and work that's really important for the American people that's also happening in this context, and that's a large part of why we designed the Tracker and that's the other thing I'd hope listeners take away from this conversation.

DEWS: That's terrific and that's a great way to conclude this conversation. Molly, I thank you for joining me on the Brookings Cafeteria.

REYNOLDS: It's my pleasure. Thanks for having me.

DEWS: You can find the House Oversight Tracker on our website [Brookings.edu](https://www.brookings.edu).

Now meet DJ Gribbin and learn more about his path from the White House to Brookings.

GRIBBIN: My name is DJ Gribbin. I'm the former special assistant for the president for infrastructure. Currently I serve as a Nonresident Senior Fellow at Brookings as part of the Metropolitan Program. I'm also a senior operating partner for Stonepeak Infrastructure Partners and I'm a founder of my own consulting firm.

I grew up in the D.C. area actually, so I'm a Washingtonian. My parents came from Casper, Wyoming, when I was about four years old. But I lived in D.C. for a while, Maryland for a while, grew up in Bethesda for the most part, went to Georgetown Law School, Georgetown University, and currently live in Leesburg.

So I recently finished up a tour of duty as the special assistant to the president for infrastructure in the White House. And in that role, my job was to coordinate amongst a dozen different Cabinet members and senior White House staff, working with governors, mayors, every stakeholder in infrastructure to develop the president's infrastructure plan.

One of the things I found was that there was a shocking lack of knowledge generally

about how infrastructure works, how do we currently deliver it.

So I had worked with Brookings in the White House, became enamored with the team that they had on infrastructure, and decided it made a lot of sense to team up and have a conversation where we can start filling people in on how infrastructure works.

If you have a policy objective, in this case we want better infrastructure, it's hard to get there if you don't know where you are. So you would probably expect me to say the most important issue we're facing today is infrastructure, but I actually think it's debt and the way we think about debt.

Starting way back when Grover Norquist set up Americans for Tax Reform and had Republicans sign a pledge saying they won't increase taxes. The thesis was essentially if we don't increase taxes, government will have fewer resources and government will shrink.

The challenges of what that triggered in essence was we don't raise taxes, we just borrow. So what you have is there was a natural dynamic where Republicans would be resistant to increases in revenue and Democrats would be resistant to decreases in spending and services and that created a balance.

And the prevalence of debt, I think we're up at around 22 trillion now, and we just had a two trillion dollar infrastructure plan posed yesterday, so we could be 24 any minute. The challenge is then the hard choice that needs to be made between scarce resources and the quality of service has been bypassed by the ability to borrow very cheaply and to borrow at levels that I think in the last generation would have been unimaginable.

So now I'm working with the Metro team and we're trying to get a conversation started on infrastructure. And part of the challenge in talking about infrastructure is it's owned primarily at the state and local level. Federal government owns only about eight percent of our nation's infrastructure, so the challenge in Washington is that you have these conversations but no owner is at the table, because the governors, the mayors, and county executives actually own the infrastructure.

So we're working on pulling together a task force that will think about a new infrastructure partnership, how do we as a country change the way and make more efficient the involvement of the federal government in the delivery of infrastructure.

So I would recommend two books to your listeners. I know you guys only asked me to recommend one, but let me recommend two; the first is *Righteous Mind* by Jonathan Haidt, subtitle is "Why Good People Differ on Politics and Religion". It is absolutely the best book to help you understand why you can have very bright, very capable people look at a political situation and come to diametrically opposed opinions on whether that's right or that's wrong. Unlike a lot of social scientists he actually does research and data gathering and all that. It's unbelievably well written and very well researched and quite helpful.

The second book is different, but it's *Life on the Edge: The Coming Edge of Quantum Biology* by Johnjoe McFadden. It has nothing to do with infrastructure, it has nothing do with policy, but it is really interesting in terms of quantum effects that we thought early on would only be done in really extreme environments may be taking place in traditional day-to-day biological environments.

DEWS: The Brookings Cafeteria Podcast is the product of an amazing team of colleagues starting with Audio Engineer Gaston Reboredo and Producer Chris McKenna. Bill Finan director of the Brookings Institution Press does many of our book interviews, and Lisette Baylor and Eric Abalahin provide design and web support. Finally my thanks to Camilo Ramirez and Emily Horne for their guidance and support.

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You can listen to the Brookings Cafeteria in all the usual places. Visit us online at Brookings.edu. Until next time, I'm Fred Dews.

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