

# FULL OF SOUND AND FURY: CURBING THE COST OF PARTISAN OPPORTUNISM IN CONGRESSIONAL OVERSIGHT HEARINGS

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*As Congress creates bigger and broader federal programs and administrative agencies, appropriates larger sums on their behalf, and delegates more of its legislative authority to their leaders, it takes on a commensurate responsibility to diligently oversee those agencies. Because time and resources available for congressional oversight are limited, a committee’s decision to conduct a formal oversight hearing implicates a substantial opportunity cost. At the same time, oversight hearings present committees with considerable opportunities for grandstanding and political gamesmanship. The voting public should therefore demand that congressional committees use oversight hearings efficiently, pursuing benefits like agency accountability, transparency, and democratic legitimacy, rather than the committees’ own partisan electoral advantage. However, because congressional committees are complex political institutions and because legitimate oversight benefits can often coincide with partisan political objectives, the distinction is not always easy to discern from the outside. With these nuances in mind, I argue that the outside observer can infer a committee’s underlying motivations and predict a given hearing’s likely benefits by looking for specific patterns in the way the hearing is conducted—i.e., the hearing’s “operational functions.”*

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INTRODUCTION

On October 24, 2013, the House Energy and Commerce Committee held an oversight hearing<sup>1</sup> to discuss issues arising from the recently enacted Patient Protection and Affordable Care Act of 2010 (PPACA). The hearing, titled *PPACA Implementation Failures: Didn't Know or Didn't Disclose?*,<sup>2</sup> was convened three weeks into the troubled rollout of the Healthcare.gov website. At this hearing, committee members questioned contractors involved with the development of the website, inquired into the United States Department of Health and Human Services's (HHS) role in the website's troubles,<sup>3</sup> and contemplated the possibility of other undisclosed problems, such as Health Insurance Portability and Accountability Act (HIPAA)<sup>4</sup> violations and security breaches.<sup>5</sup> In addition, committee members spent considerable time expressing their own opinions.

An extended exchange between Congressman Frank Pallone, Democrat of New Jersey, and Congressman Joe Barton, Republican of Texas, stood out among the rest—both for its tone and its implications:

Pallone: I started out in my opening statement saying there was no legitimacy to this hearing, and the last line of questioning certainly confirms that. HIPAA only applies when there is health information being provided. That is not in play here today. No health information is required in the application process. And why is that?

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<sup>1</sup> Oversight hearings, conducted by various committees of the United States Senate and House of Representatives, typically focus on the efficiency and effectiveness of federal agencies and programs. WALTER J. OLESZEK, CONGRESSIONAL OVERSIGHT: AN OVERVIEW, CONGRESSIONAL RESEARCH SERVICE (Feb. 22, 2010).

<sup>2</sup> *PPACA Implementation Failures: Didn't Know or Didn't Disclose?: Hearing Before the H. Comm. on Energy & Commerce*, 113th Cong. (2013) [hereinafter *PPACA Hearing*].

<sup>3</sup> *Id.* at 76–77, 95–96.

<sup>4</sup> Among other things, the Health Insurance Portability and Accountability Act of 1996 “protects the privacy of individually identifiable health information” and “sets national standards for the security of electronic protected health information.” *Health Information Privacy*, U.S. DEP'T OF HEALTH AND HUMAN SERVS., <http://www.hhs.gov/ocr/privacy/> (last visited Oct. 7, 2014).

<sup>5</sup> *Id.*

Because preexisting conditions don't matter! So once again, here we have our Republican colleagues trying to scare everybody.

Barton: Will the gentleman yield?

Pallone: No, I will not yield to this monkey court or whatever this thing is.

Barton: This is not a monkey court.

Pallone: I am not yielding. I am trying to tell you the problem here.

Barton: Protecting American citizens is a legitimate concern of this committee.

Pallone: Preexisting conditions don't matter, HIPAA doesn't apply, there is no health information in the process. You are asked about your address, your date of birth. You are not asked health information. So why are we going down this path? Because you are trying to scare people so they don't apply . . . .<sup>6</sup>

Politically charged committee proceedings like this one raise important questions about the purpose and potential benefits of public oversight hearings in today's federal government. Executive branch agencies wield more delegated authority than ever before,<sup>7</sup> and congressional oversight is critical to the legitimacy, efficiency, and transparency of this administrative state.<sup>8</sup> But while the need for oversight is high, Congress's time and resources are limited. Because oversight can be carried out in various ways on a vast array of potential subjects, my argument assumes that the decision to conduct a formal oversight hearing—a resource-intensive exercise from both the committee's and the agency's perspective—on a given subject is only justified to the extent that the hearing offers more potential net oversight benefits than do alternative oversight activities.<sup>9</sup> Furthermore, having called a hearing, the committee should conduct the hearing so as to generate as many oversight benefits as possible.

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<sup>6</sup> *PPACA Hearing*, *supra* note 2, at 51–52.

<sup>7</sup> See Douglas Kriner, *Can Enhanced Oversight Repair "The Broken Branch"?*, 89 B.U. L. REV. 765, 769 (2009) ("As the scope of government grew dramatically in the early twentieth century, so too did the necessity for Congress to delegate increasing authority to the departments and agencies charged with administering the bureaucratic state. With each successive war and crisis, the power of the federal government grew, and . . . Congress was compelled to delegate ever more power and initiative to the executive branch." (internal footnote omitted)).

<sup>8</sup> See *infra* Part I.A (discussing the potential benefits of oversight and oversight hearings).

<sup>9</sup> See *infra* Part I.C.3 (discussing the opportunity costs of oversight hearings). Alternative oversight activities may include oversight on the same topic conducted via different means, see *infra* notes 97–100 and accompanying text (describing alternative methods of information-gathering), or oversight on a different topic altogether.

However, in today's polarized political environment,<sup>10</sup> congressional committees have strong incentives to initiate and misuse public oversight hearings for their own electoral benefit, rather than for purposes of good policy or good governance. Given the high stakes and the controversy surrounding recent oversight hearings,<sup>11</sup> the public<sup>12</sup> should ask questions like, "Are committees conducting these hearings to educate themselves on matters critical to the success of federal programs, or simply as vehicles for televised grandstanding?" and "Are oversight hearings legitimate features of our system of checks and balances, or have they become illegitimate 'monkey court[s]?"

While these questions are critical to evaluating Congress's performance, the answers are not black and white. Congressional committees are complex political institutions comprising individual members pursuing both personal and party objectives.<sup>13</sup> Furthermore, legitimate oversight benefits can often coincide with partisan political objectives. The costs, benefits, and legitimacy of congressional oversight hearings are therefore more nuanced than the exchange between Congressmen Barton and Pallone suggests.

These nuances should not dissuade us from attempting to hold Congress accountable for its oversight responsibilities. As a first step toward this goal, I argue that oversight activities, including oversight hearings, should be evaluated in terms of their opportunity costs. I then offer a basic framework through which outside observers can better evaluate these opportunity costs by analyzing the ways that committees are using oversight hearings. In essence, for a given oversight hearing, the outside observer can infer the committee's underlying motives and predict the hearing's likely benefits by looking for specific patterns in the way the hearing is conducted—i.e., the hearing's "operational functions." I argue that, in broad terms, oversight hearings are conducted via a combination of objective fact finding, policy-driven narrative development, and partisan electoral opportunism. In general, the former two operational functions offer

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<sup>10</sup> See PEW RESEARCH CTR., POLITICAL POLARIZATION IN THE AMERICAN PUBLIC 1, 5 (June 12, 2014), available at <http://www.people-press.org/files/2014/06/6-12-2014-Political-Polarization-Release.pdf> (concluding, on the basis of a survey of nearly 10,000 adults, that "Republicans and Democrats are more divided along ideological lines—and partisan antipathy is deeper and more extensive—than at any point in the last two decades").

<sup>11</sup> For examples of partisan disagreement over the purpose and legitimacy of recent oversight hearings, see *infra* Part II.C.

<sup>12</sup> Throughout this piece, I refer to "the public" to broadly include mainstream voters, constituents, and citizens who are not members of Congress and do not have a vested interest in the political success of any particular member of Congress or political party.

<sup>13</sup> See Ralph K. Huitt, *The Congressional Committee: A Case Study*, 48 AM. POL. SCI. REV. 340, 340–41 (1954) (discussing the complex group dynamics associated with congressional committees).

specific types of oversight benefits, such as informed congressional decisionmaking, administrative accountability, transparency, and democratic legitimacy. The latter function, in contrast, primarily offers benefits to committee members and their parties, in terms of electoral advantage. Ultimately, the public must demand better, more efficient oversight from Congress; I believe an opportunity cost approach and an awareness of the operational functions at play in oversight hearings can help make this a reality.

There is substantial literature available on the motivations underlying congressional committee actions and the value of oversight in general.<sup>14</sup> This piece is unique in taking an opportunity cost approach to congressional oversight activities and arguing that contemporary dynamics have increased the risk that oversight hearings will be carried on at great cost, with relatively little benefit to the public. It is also novel in presenting an operational function analysis: a basic framework that allows viewers to evaluate committee oversight hearings.

## I

### OVERSIGHT HEARINGS IN THE MODERN ADMINISTRATIVE STATE: BENEFITS OF USE AND COSTS OF ABUSE

#### A. *The Modern Administrative State and the Need for Congressional Oversight*

The federal government today employs more bureaucrats than there were residents of the United States in 1789.<sup>15</sup> Executive agencies were designed to have a limited role in the early years of the Republic,<sup>16</sup> and the federal government's designers "did not envision either a large state or a large corps of administrators, [and so] little

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<sup>14</sup> See, e.g., JOEL D. ABERBACH, *KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT* (1990) (measuring and demonstrating the growth of congressional oversight activity since the 1970s); MORRIS S. OGUL, *CONGRESS OVERSEES THE BUREAUCRACY* (1976) (exploring why and how congressional committees oversee the federal bureaucracy and the effects of such oversight); Kriner, *supra* note 7 (discussing the decline in congressional oversight and increased delegation of legislative power to the executive in the context of military policymaking); FREDERICK M. KAISER ET AL., *CONG. RESEARCH SERV., RL30240, CONGRESSIONAL OVERSIGHT MANUAL* (2007) (providing detailed guidance on the purpose, structure, and function of congressional oversight).

<sup>15</sup> BRIGID CALLAHAN HARRISON, JEAN WAHL HARRIS & SUSAN J. TOLCHIN, *AMERICAN DEMOCRACY NOW* 472–73 (Alternate ed. 2009).

<sup>16</sup> See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 582 (1984) ("The minimalist federal government outlined in Philadelphia in 1787 envisioned a handful of cabinet departments to conduct the scanty business of government, each headed by a Secretary responsible to the President and thinly peopled with political employees. Significant regulatory responsibilities were not in view . . .").

thought was given to problems of democratic control of bureaucracy.”<sup>17</sup> However, since the New Deal era, Congress has expanded the scope and authority of the executive branch through the creation and funding of administrative agencies.<sup>18</sup> Historical factors such as industrialization, globalization, technological developments, and public demand have all contributed to the increasing size and scope of federal programs and agencies.<sup>19</sup> As a result, executive branch agencies wield more delegated authority,<sup>20</sup> employ more regulators,<sup>21</sup> and consume and distribute more federal funds<sup>22</sup> than ever before.

Administrative agencies have come to occupy an ill-defined position in our constitutional system of separated powers. As institutions of the executive branch, they are tasked with executing the laws of the legislature. However, in modern practice, Congress generally operates by creating broad statutory frameworks and relies on agencies to promulgate and enforce specific regulations.<sup>23</sup> In effect, Congress delegates to agencies quasi-legislative power and often enormous discretion.<sup>24</sup> Meanwhile, the judicial branch, via the *Chevron* doc-

<sup>17</sup> ABERBACH, *supra* note 14, at 13.

<sup>18</sup> *See id.* at 187 (describing the growth of the administrative state “with special impetus from the New Deal, World War II, and the postwar period of world power and a maturing welfare state”); *id.* (arguing that the influence of the presidency grew relative to that of Congress as it assumed “major new responsibilities for coordinating and controlling the growing bureaucracies of the government”).

<sup>19</sup> OLESZEK, *supra* note 1, at 3; *see also* Richard W. Rahn, *Democracy Versus Bureaucracy*, WASH. TIMES (Dec. 5, 2011), <http://www.washingtontimes.com/news/2011/dec/5/democracy-versus-bureaucracy/> (describing the historical growth of the administrative state).

<sup>20</sup> *See* Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459, 467 (2012) (“Congress has continued to delegate broadly even as presidential control over administration has increased.”); Kriner, *supra* note 7, at 769 (“With each successive war and crisis, the power of the federal government grew, and . . . Congress was compelled to delegate ever more power and initiative to the Executive branch.”).

<sup>21</sup> HARRISON ET AL., *supra* note 15, at 474.

<sup>22</sup> *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2015: HISTORICAL TABLES 81 tbl.4.1 (2014) (providing outlays by agency from 1962 to 2019).

<sup>23</sup> Matthew C. Stephenson, *Statutory Interpretation by Agencies*, in RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 285, 285 (Daniel A. Farber & Anne Joseph O’Connell eds., 2010) (“Congress and the courts permit, even encourage, an expansive role for agencies in determining statutory meaning. Congress does this by drafting vague statutory language and by authorizing (explicitly or implicitly) agencies to fill statutory gaps.”). For a criticism of this system, and suggested policy reforms, see CATO INST., CATO HANDBOOK FOR POLICYMAKERS 83–90 (2008).

<sup>24</sup> *See* William V. Luneburg, *Retroactivity and Administrative Rulemaking*, 1991 DUKE L.J. 106, 106 (1991) (describing administrative agencies’ policymaking and rulemaking functions as “quasi-legislative”).

trine,<sup>25</sup> has abdicated a substantial piece of its authority to interpret statutes to administrative agencies.<sup>26</sup> This departure from traditional separation of powers gives administrative agencies unprecedented ability to create, adjudicate, and enforce the rights and responsibilities of the governed.<sup>27</sup>

The expansion of agency authority has been controversial. Critics argue that Congress's delegation of legislative and executive (and perhaps judicial) powers to administrative agencies is unconstitutional.<sup>28</sup> But even if observers accept broad delegation as a fact of modern governance, they have good reason to worry that "agencies, insulated from direct electoral sanction and equipped with informational advantages their overseers lack, will drift from their statutory obligations out of self-interest, vulnerability, or ineptitude."<sup>29</sup> As a result, "Congress's will has remained the touchstone of legitimacy even in those areas of maximum deference to administrative action."<sup>30</sup> And given the scope and complexity of the modern administrative state, the need for transparency and accountability has never been greater. All of these considerations support the conclusion that the elected members of Congress have a responsibility to, at a minimum, actively

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<sup>25</sup> See *Chevron, U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 842–43 (1984) (holding that "When a court reviews an agency's construction of the statute which it administers," the court first determines whether Congress "has directly spoken to the precise question at issue"—in which case the court must "give effect to the . . . intent of Congress"—or, where the statute is "silent and ambiguous with respect to the specific issue," the court should defer to an agency's "permissible construction of the statute"); Kenneth A. Bamberger & Peter L. Strauss, *Chevron's Two Steps*, 95 VA. L. REV. 611, 611 (2009) (describing this "two-step analysis" as a "framework for judicial review of administrative interpretations of regulatory statutes").

<sup>26</sup> Bulman-Pozen, *supra* note 20, at 467 ("[T]he judiciary has curtailed its own review of administrative action. Most notably, the Supreme Court in *Chevron* assigned to the executive branch the authority to determine the meaning of ambiguously worded statutes, suggesting it was desirable for agencies to pursue the President's regulatory agenda in interpreting such statutes." (internal citation omitted)).

<sup>27</sup> See Rahn, *supra* note 19 ("In the United States . . . the people are increasingly governed and regulated by unelected bureaucrats who create 'administrative law.'").

<sup>28</sup> See, e.g., Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1233 (1994) ("Congress frequently delegates [its] general legislative authority to administrative agencies, in contravention of Article I. . . . [T]hose agencies sometimes exercise the judicial power, in contravention of Article III."); Douglas Ginsburg, *Legislative Powers: Not Yours to Give Away*, FIRST PRINCIPLES SERIES, Jan. 6, 2011, at 3, available at <http://www.heritage.org/research/reports/2011/01/legislative-powers-not-yours-to-give-away> (arguing that the Supreme Court has "fail[ed] to prevent delegations of legislative authority" to administrative agencies and has "forgo[ne] a significant opportunity to maintain the structures of government prescribed by the Constitution").

<sup>29</sup> J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 TEX. L. REV. 1443, 1445 (2003).

<sup>30</sup> Jack M. Beermann, *The Turn Toward Congress in Administrative Law*, 89 B.U. L. REV. 727, 731 (2009).

oversee the administrative agencies that they have created, that they continue to fund, and to which they delegate their Article I powers.

Congressional oversight<sup>31</sup> offers multiple important benefits. First, the “review” aspect of congressional oversight facilitates informed congressional decisionmaking. By diligently investigating and evaluating program performance, committees “acquir[e] information useful in future policymaking.”<sup>32</sup> Information gathered in the oversight process is potentially relevant not only to the committee’s communications with the agency, but also Congress’s future legislation and appropriations.

Second, oversight encourages the faithful, efficient execution of federal law by administrative agencies. This includes “making sure agencies and programs are working in a cost-effective and efficient manner; ensuring executive compliance with legislative intent; . . . improving the economy of governmental performance; investigating waste, fraud, and abuse in governmental programs; reviewing the agency rulemaking process; . . . [and] determining whether agencies or programs are fulfilling their statutory mission.”<sup>33</sup> In essence, oversight committees want to know that agencies are doing their jobs, and doing them well. These benefits can be loosely described as “efficiency” and “accountability.”

Third, oversight has the potential to enhance transparency. When committees share the fruits of their information gathering efforts, the public gains insight into the otherwise obscure world of administrative agencies. Armed with this information, the public can draw conclusions about “how its government is performing its public duties.”<sup>34</sup>

<sup>31</sup> Professor Joel D. Aberbach defines congressional oversight as “congressional review of the actions of federal departments, agencies, and commissions, and of the programs and policies they administer, including review that takes place during program and policy implementation as well as afterward.” ABERBACH, *supra* note 14, at 2. This is not the only way that oversight can be framed. Morris Ogul, a prominent scholar on the topic of Congress, defines oversight more broadly: “Legislative oversight is behavior by legislators and their staffs, individually or collectively, which results in an impact, intended or not, on bureaucratic behavior.” OGUL, *supra* note 14, at 11.

<sup>32</sup> OLESZEK, *supra* note 1, at 5; *see also* PROJECT ON GOV’T OVERSIGHT, DOS AND DON’TS OF AN OVERSIGHT HEARING 1 (Nov. 2007) [hereinafter POGO], *available at* <http://www.pogoarchives.org/m/cots/Dos-and-Donts-of-an-Oversight-Hearing-sep2011.pdf> (“Remember that oversight is Congress’[s] constitutional responsibility. It’s also Congress’[s] obligation. Congress should be *checking* on executive institutions to keep the government *balanced*.”).

<sup>33</sup> OLESZEK, *supra* note 1, at 5; *see also* MORTON ROSENBERG, THE CONSTITUTION PROJECT, WHEN CONGRESS COMES CALLING 1, 1–2 (2009), *available at* <http://www.constitutionproject.org/documents/when-congress-comes-calling-a-primer-on-the-principles-practices-and-pragmatics-of-legislative-inquiry/> (describing the purposes of congressional oversight); POGO, *supra* note 32, at 1 (same).

<sup>34</sup> ROSENBERG, *supra* note 33, at 1.

Ideally, the informed public will be “empowered to make crucial decisions about policy.”<sup>35</sup>—such as whether to support or oppose official actions taken by executive officials, certain programs, and the appropriations associated with those programs.

Last, but certainly not least, oversight plays a critical role in maintaining constitutional checks and balances, thereby improving the democratic legitimacy of the administrative state. At a fundamental level, oversight helps “prevent executive encroachment on legislative powers and prerogatives,” and thus “sustains and vindicates Congress’[s] role in our constitutional scheme of separated powers and checks and balances.”<sup>36</sup> Oversight tethers executive agencies with broad regulatory powers to the will of the legislative branch, which helps to legitimate the exercise of delegated legislative authority.<sup>37</sup>

Congressional oversight therefore has the potential to create substantial benefits. These benefits can be loosely categorized as: (1) informed congressional decisionmaking, (2) administrative efficiency, (3) administrative accountability, (4) administrative transparency, and (5) democratic legitimacy.

### *B. The Potential Conversion of Oversight Activity for Partisan Advantage*

To anyone familiar with committee oversight activities in the modern era, the above explanation of oversight goals and benefits likely rings hollow, or at least incomplete. What about the politics, the agendas, the pet programs, and the witch hunts? The politically charged atmosphere in which oversight often takes place indicates that members of Congress likely use oversight to pursue more than just information gathering, accountability, and transparency. In practice, oversight—like legislation or public policy in general—cannot be examined in a vacuum: “[O]versight occurs in an ever-present political context in which Congress’s relationship with administrative entities can range from cooperation to conflict.”<sup>38</sup> Among other things, committees may use oversight activities to “generat[e] favorable publicity

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<sup>35</sup> *Improving Congressional Oversight*, SUNLIGHT FOUNDATION, <https://sunlightfoundation.com/policy/documents/improving-congressional-oversight/> (last visited Oct. 12, 2014).

<sup>36</sup> ROSENBERG, *supra* note 33, at 1–2.

<sup>37</sup> See Peter M. Shane, *Legislative Delegation, the Unitary Executive, and the Legitimacy of the Administrative State*, 33 HARV. J.L. & PUB. POL’Y 103, 108 (2010) (arguing that close legislative oversight enhances executive accountability, thereby legitimizing the delegation of regulatory power).

<sup>38</sup> OLESZEK, *supra* note 1, at 6.

for lawmakers, win[ ] the electoral support of constituents and outside groups, or rebut[ ] criticisms of favorite programs or agencies.”<sup>39</sup>

Evidence suggests that partisan politics is indeed often a major motivator in Congress’s oversight activities. It appears that shared party affiliation between a chamber of Congress and the President may disincentivize congressional oversight in general and public hearings in particular, whereas a division in party affiliation may have the opposite effect.<sup>40</sup> The 1994 shift of control of the House of Representatives provides an illuminating example: “[D]uring the first two years of the Clinton [A]dministration, no subpoenas were issued to executive officials by the panel with broad oversight jurisdiction. However, when Republicans captured control of the House, that same committee handed out ‘well over a thousand subpoenas to Clinton administration officials.’”<sup>41</sup> The implication is that oversight activities may operate not so much as a check on the executive branch, but rather as a check on the opposing political party.

Furthermore, “substantive policy preferences” may underlie some observers’ positions on the objective value of the oversight process in general:

These persons endorse whatever structure or procedure promotes their policy desires at the moment. If a policy position draws its support from the Congress, then extensive and systematic oversight is deemed crucial; if the executive branch most adequately articulates one’s policy preferences, then congressmen are deemed badgering bunglers who impose barriers on rational decision-making.<sup>42</sup>

Essentially, not only oversight activities, but also stakeholders’ views on the value of oversight, appear to be strongly influenced by political allegiances and policy positions.

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<sup>39</sup> *Id.*; see also OGUL, *supra* note 14, at 15 (“Few congressmen can resist an opportunity for promoting their careers. Hence, the greater the likelihood of increased political visibility from a particular exercise of oversight, the more probable it is that oversight will be undertaken.”).

<sup>40</sup> See OLESZEK, *supra* note 1, at 14–15 (discussing the effects of unified and divided government).

<sup>41</sup> *Id.* at 15 (quoting Representative Lee H. Hamilton). This dynamic did not necessarily originate in the 1990s. As Congresswoman Florence P. Dwyer noted in 1966, “It is unrealistic to expect the congressional members of a political party— . . . regardless of the party—to subject executive branch officials of the same party to the kind of complete and searching scrutiny required for the proper exercise of congressional oversight activity.” 112 CONG. REC. 16868, 16869 (1966), *quoted in* OGUL, *supra* note 14, at 18.

<sup>42</sup> OGUL, *supra* note 14, at 5–6.

### C. Oversight Hearings: Useful but Highly Corruptible

This Note focuses on one weapon in Congress's oversight arsenal: the congressional oversight hearing. Oversight hearings are the most visible and prominent of Congress's oversight activities. This visibility represents both their greatest advantage and their tragic flaw: While oversight hearings have much to offer in terms of furthering administrative accountability and transparency, they are also highly vulnerable to politicians who are likely to misuse oversight authority for purely partisan advantage.<sup>43</sup>

#### 1. Background: What Are Oversight Hearings?

Committees of the United States Senate and House of Representatives hold hearings for a variety of reasons and in various forms. Oversight hearings—the focus of this Note—typically “focus . . . on the efficiency and effectiveness of federal agencies and programs.”<sup>44</sup> These stand in contrast to legislative hearings which are conducted to discuss issues and solutions that may require legislation, or to markup a proposed legislation,<sup>45</sup> and confirmation hearings, in which the Senate vets the President's nominees for public office in furtherance of its constitutional “advice and consent” duties.<sup>46</sup>

In oversight hearings, individual members of congressional committees elicit testimony from witnesses.<sup>47</sup> This includes written testimony submitted in advance of the hearing and oral testimony at the hearing itself.<sup>48</sup> Where oversight targets and witnesses are uncoopera-

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<sup>43</sup> Congressional scholar Joel D. Aberbach recognizes this dynamic in his treatise on oversight: “[C]ongressional oversight surely serves the interests of Congress as an institution in relation to the president and his administration at least insofar as it implies that congressional committees are keeping abreast of administrative activity and are therefore in a better position to exert influence over agency behavior. What is still unclear is the extent to which other interests of Congress as a whole or of the polity are protected—good public policy in the broad sense—by the factors that apparently bring programs and agencies onto the committee oversight agenda.” ABERBACH, *supra* note 14, at 121 (referring to partisan political considerations that affect oversight agendas).

<sup>44</sup> OLESZEK, *supra* note 1, at 10. To the extent that some congressional investigations focus on the wrongdoings or failures of executive agencies, the terms “oversight hearing” and “investigative hearing” may be interchangeable, and this Note's discussion is intended to apply to both.

<sup>45</sup> *The Legislative Process: Committee Consideration*, CONGRESS, <https://www.congress.gov/legislative-process/committee-consideration> (last visited Oct. 6, 2014) (describing the legislative process, including markup).

<sup>46</sup> See U.S. CONST. art. II, § 2, cl. 2 (establishing Congress's advice and consent role); see also OLESZEK, *supra* note 1, at 13 (describing Senate confirmation hearings).

<sup>47</sup> KAISER ET AL., *supra* note 14, at 44.

<sup>48</sup> *Id.*; see also, e.g., *Obamacare Implementation: Who Are the Navigators?: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 113th Cong. 11–18, 21–27, 30–64 (2013) [hereinafter *Obamacare Implementation Hearing*] (displaying the scripted testimony of witnesses to be questioned in the hearing).

tive, committees have the power to subpoena documents and compel testimony.<sup>49</sup> Witnesses who lie to a committee may be charged with perjury and other criminal violations.<sup>50</sup>

Participants in oversight hearings also have an opportunity to express their viewpoints outside of formal question-and-answer. For example, in most hearings the chair of the committee will make an opening statement that establishes the context and objectives of the hearing.<sup>51</sup> The chair may allow an opening statement by the ranking member.<sup>52</sup> At the chair's discretion, other committee members may be granted an opening statement as well.<sup>53</sup> Witnesses generally give a prepared statement before answering questions from the committee members.<sup>54</sup> During the hearing, exchanges between committee members, sometimes adversarial, do occur as well.<sup>55</sup>

One of the hallmarks of the congressional oversight hearing is its public nature. Hearings are often televised in their entirety on C-Span<sup>56</sup> and—depending on perceived “newsworthiness”—portions may be aired in the mainstream media as well. Oversight hearings are physically open to the public.<sup>57</sup> Hearings are usually accompanied by committee press releases and other communication with the media.<sup>58</sup>

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<sup>49</sup> See KAISER ET AL., *supra* note 14, at 28 (“Senate Rule XXVI(1) and House Rule XI(2)(m)(1) presently empower all standing committees and subcommittees to require the attendance and testimony of witnesses and the production of documents.”).

<sup>50</sup> 18 U.S.C. § 1001 (2012) (prohibiting false statements and documents before the legislature); *id.* § 1621 (defining and prohibiting perjury generally); KAISER ET AL., *supra* note 14, at 31 (“If a committee wishes the potential sanction of perjury to apply, it should, in accordance with the statute, administer an oath and swear its witnesses, though it should be noted that false statements not under oath are also subject to criminal sanctions.” (internal footnotes omitted)).

<sup>51</sup> KAISER ET AL., *supra* note 14, at 31.

<sup>52</sup> See, e.g., *PPACA Hearing*, *supra* note 2, at 3 (demonstrating the practice of yielding time to a committee vice chair for an opening statement).

<sup>53</sup> See, e.g., *id.* at 4–12 (demonstrating the practice of yielding time to committee members for opening statements).

<sup>54</sup> KAISER ET AL., *supra* note 14, at 31 (establishing that witnesses usually make a statement, which is subject to committee rules on length).

<sup>55</sup> See, e.g., *PPACA Hearing*, *supra* note 2 (containing a multitude of adversarial interactions between committee members throughout).

<sup>56</sup> *Schedules*, C-SPAN, <http://www.c-span.org/schedule/> (last visited Oct. 9, 2014) (listing coverage of congressional hearings).

<sup>57</sup> See, e.g., *Frequently Asked Questions (FAQ) About Committee Meetings*, HOUSE COMMITTEE ON NATURAL RESOURCES, <http://naturalresources.house.gov/info/faq.htm> (last visited Oct. 9, 2014) (providing instructions for public access).

<sup>58</sup> See, e.g., Press Release, Ways and Means Committee Democrats, Levin Opening Statement at Hearing on the Affordable Care Act (Jan. 28, 2014) (publicizing a hearing taking place that day).

Finally, transcripts of oversight hearings are published by the Government Printing Office at a later date.<sup>59</sup>

## 2. *The Use and Misuse of Oversight Hearings*

Oversight hearings have much to offer. In their most basic sense, oversight hearings cause executive branch actors to appear in a public venue and discuss with elected legislators the activities of their agencies. As a firsthand information source, hearings support informed congressional decisionmaking. By allowing legislators to monitor and respond to agency performance, oversight hearings promote agency accountability.<sup>60</sup> Because these hearings are conducted in the open, they inherently create public transparency.<sup>61</sup> Finally, oversight hearings can enhance the legitimacy of delegated authority by connecting elected Congressmen to the regulatory process. I explore the specifics of how and when hearings actually deliver these benefits in Part II, below.

But oversight hearings also play an important role in the unofficial, political, partisan side of oversight—and this aspect may be growing more prominent. While congressional hearings have always had an “element of political theater,”<sup>62</sup> the advent of television has provided members with more opportunities “to get the spotlight for themselves and to cast their opponents as villains.”<sup>63</sup> Today’s political environment, characterized by polarization in both the government and the news media, may encourage this trend: A former White House aide remarks, “Congressional hearings have probably always reflected a political tone, but with the proliferation of news media and gerrymandered districts . . . these hearings take on a new role as a platform for grandstanding.”<sup>64</sup> Sarah Binder of the Brookings

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<sup>59</sup> *Congressional Hearings*, U.S. GOV’T PRINTING OFFICE, <http://www.gpo.gov/fdsys/browse/collection.action?collectionCode=CHRG> (last visited Oct. 9, 2014).

<sup>60</sup> Cf. POGO, *supra* note 32, at 3 (“[C]hange is unlikely unless you publicly ‘shame’ the troubled agency or department. Why should the agency fix the problem if nobody knows or seems to care about it?”).

<sup>61</sup> See WILLIAM S. COHEN and GEORGE J. MITCHELL, *MEN OF ZEAL, A CANDID INSIDE STORY OF THE IRAN-CONTRA HEARINGS* 305 (1988) (arguing that “a central function of democracy is to allow a free people to drag realities out into the sunlight and demand a full accounting from those who are permitted to hold and exercise power” and that hearings contribute to that ideal).

<sup>62</sup> John J. Pitney Jr., *Even with the Politics, Hearings Can Provide Answers*, N.Y. TIMES (May 8, 2013), <http://www.nytimes.com/roomfordebate/2013/05/08/are-congressional-hearings-serious-investigations-or-just-party-politics/even-with-the-politics-hearings-can-provide-answers> (last visited Oct. 11, 2014).

<sup>63</sup> *Id.*

<sup>64</sup> Keith Boykin, *Grandstanding and Hype*, N.Y. TIMES (May 9, 2013), <http://www.nytimes.com/roomfordebate/2013/05/08/are-congressional-hearings-serious-investigations-or-just-party-politics/grandstanding-and-hype>.

Institute attributes the politicization of congressional investigations to a combination of party organization and partisan polarization:

Today, committees have lost much of their autonomy to party leaders. As a result, investigations are often used in periods of divided government as a partisan tool to club the administration and its supporters. More often than not, committee investigations become arenas for majority party “message politics”—contests designed to score political points rather than to identify problems or to generate solutions that can garner bipartisan support. The higher the partisanship in Congress, the lower its committees seem to fall.<sup>65</sup>

These observations highlight the fact that the congressional oversight hearing—while certainly capable of producing oversight benefits—is uniquely vulnerable to misappropriation for partisan political purposes. As I argue in Parts II and III, this is an important consideration in evaluating a congressional committee’s choice of oversight activities.

### 3. *Real World Consequences: The Opportunity Costs of Oversight Hearings*

Congressional oversight hearings are time- and resource-intensive endeavors for committees and agencies alike. Because committee oversight activity and agency management are burdensome,<sup>66</sup> the opportunity costs<sup>67</sup> associated with these endeavors should be of critical concern to the general public.

For the congressional committee, the time invested in an oversight hearing extends far beyond the hours spent seated at the dais. First, committee staff and/or members must seek approval for a hearing, usually by preparing and submitting a memorandum to the committee chair outlining the need for the proposed hearing, its scope, and the potential witnesses.<sup>68</sup> Hearings must be coordinated with the schedules of committee members and key witnesses.<sup>69</sup> Before

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<sup>65</sup> Sarah Binder, *Both Parties Are Guilty of Using Hearings for Political Gain*, N.Y. TIMES (May 8, 2013), <http://www.nytimes.com/roomfordebate/2013/05/08/are-congressional-hearings-serious-investigations-or-just-party-politics/both-parties-are-guilty-of-using-hearings-for-political-gain>.

<sup>66</sup> See ABERBACH, *supra* note 14, at 105 (“With limited time and resources at their disposal, committee personnel must choose the matters they wish to pursue.”).

<sup>67</sup> Opportunity cost is “[t]he cost of an alternative that must be forgone in order to pursue a certain action. Put another way, the benefits you could have received by taking an alternative action.” INVESTOPEDIA, *Opportunity Cost*, <http://www.investopedia.com/terms/o/opportunitycost.asp> (last visited Oct. 10, 2014).

<sup>68</sup> VALERIE HEITSHUSEN, CONG. RESEARCH SERV., NO. 98-489, SENATE COMMITTEE HEARINGS: PREPARATION 1 (2012).

<sup>69</sup> *Id.*

the hearing, staff brief the committee members.<sup>70</sup> Staff members may prepare briefing books for committee members, which usually include:

[A] description of the subject, scope, and purpose of the hearing; copies and comparisons of measures under consideration; pertinent statutes and regulations, court decisions, and articles; a chronology of major events; suggested questions or talking points; and a list of witnesses, biographical information, and copies or summaries of written testimony.<sup>71</sup>

Committee members and staff may pre-interview witnesses or subpoena documents if necessary.<sup>72</sup> Depending on the importance of the hearing, this type of pre-hearing information gathering can be extensive. Members and their staff must also prepare opening statements.<sup>73</sup> Finally, the committee press secretary works with staff to distribute press releases and witness statements to media outlets.<sup>74</sup>

Today, the opportunity costs of oversight hearings are particularly high, given the value—and relative scarcity—of effective oversight in the federal government. Historically, “legislative oversight conducted by congressional committees has been one of the most powerful tools in Congress’s arsenal to exercise a check on the executive branch and defend its institutional prerogatives.”<sup>75</sup> In light of the unprecedented size and power of today’s administrative state, oversight must be viewed as “one of Congress’s principal responsibilities as it grapples with the complexities of the 21st century.”<sup>76</sup> It is also key to the legislative branch’s continued influence relative to the executive.<sup>77</sup>

Unfortunately, “[g]iven the complicated nature of this task, Congress generally seems to fall short of the goal of effective and con-

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 2.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 1.

<sup>74</sup> *Id.* at 2.

<sup>75</sup> Kriner, *supra* note 7, at 773.

<sup>76</sup> KAISER ET AL., *supra* note 14, at i; see also Anne Weismann, *With His Unbecoming Antics, Chairman Darrell Issa Makes a Mockery of Congressional Oversight*, CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON (Mar. 6, 2014), <http://www.citizensforethics.org/blog/entry/chairman-darrell-issa-antics-make-a-mockery-of-congressional-oversight> (“In the face of administration excesses and a judiciary that refuses to recognize few, if any, limits on presidential power, we desperately need a Congress that will exercise true oversight.”).

<sup>77</sup> See OGUL, *supra* note 14, at 3–4 (“Many observers of the Congress discern legislative oversight of the bureaucracy as one means by which competitive leadership can remain a reality in American politics.”).

sistent oversight.”<sup>78</sup> Professor Morris S. Ogul summarizes Congress’s predicament as follows:

No amount of congressional dedication and energy, no conceivable increase in the size of committee staffs, and no extraordinary boost in committee budgets will enable the Congress to carry out its oversight obligations in a comprehensive and systematic manner. The job is too large for any combination of members and staff to master completely.<sup>79</sup>

When Congress fails to conduct systematic review, the legitimacy of agency regulation is eroded<sup>80</sup> and the risk that agencies will not act in an accountable manner is magnified. Because congressional oversight is a precious resource, it is critical that time dedicated to oversight be spent efficiently.

For agencies as well, oversight hearings can be a serious distraction from managing program activities: Preparation requires substantial time and resources, particularly where high-level officials are called upon to testify. NASA’s Office of Legislative Affairs, for example, has created a bifurcated, 36-step process for preparing witnesses and drafting testimony.<sup>81</sup> Written testimony is created by the relevant NASA program office, reviewed and revised by NASA’s Administrator and Legislative Affairs Secretary (LAS), re-reviewed if necessary, submitted to the Office of Management and Budget (OMB)<sup>82</sup> for Administration clearance, revised again if necessary after negotiation between OMB and the program office, re-reviewed by an LAS, circulated to agency administrators, and filed according to protocol.<sup>83</sup> When agency witnesses are called to testify, the LAS identifies key issues, program offices prepare issue papers, the relevant authorities clear these papers, the LAS prepares and updates a briefing book for the witness, and the witness participates in practice

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<sup>78</sup> Jeffery C. Talbert, Bryan D. Jones & Frank R. Baumgartner, *Nonlegislative Hearings and Policy Change in Congress*, 39 AM. J. POL. SCI. 383, 400 (1995).

<sup>79</sup> OGUL, *supra* note 14, at 5.

<sup>80</sup> See Beermann, *supra* note 30, at 758 (arguing that oversight is a necessary prerequisite for the legitimacy of agency regulation).

<sup>81</sup> See OFFICE OF LEGIS. AFFAIRS, NAT’L AERONAUTICS & SPACE ADMIN., HQOWI 1311-L001, CONGRESSIONAL HEARING PREPARATION 7–10 (Aug. 24, 2000) [hereinafter *NASA*] (providing guidance on preparing for oversight hearings).

<sup>82</sup> OMB, a component of the White House, oversees the implementation and enforcement of Presidential policy government-wide. *The Mission and Structure of the Office of Management and Budget*, WHITEHOUSE.GOV, [http://www.whitehouse.gov/omb/organization\\_mission/](http://www.whitehouse.gov/omb/organization_mission/) (last visited Oct. 10, 2014). Its responsibilities include oversight of agency performance and the coordination and review of all significant Federal regulations by executive agencies. *Id.*

<sup>83</sup> *NASA*, *supra* note 81, at 7–9.

hearings with the relevant program offices.<sup>84</sup> Agency officials may be required to produce documents or discuss issues with committee staff before the hearing.<sup>85</sup> Finally, hearing preparation may require substantial participation by agency attorneys as well.<sup>86</sup>

These distractions are potentially costly, given the broad responsibilities delegated to agency leadership. For example, HHS Secretary Kathleen Sebelius—who was called to testify at three different hearings during the Healthcare.gov rollout<sup>87</sup>—was responsible for an agency whose budget topped \$970 billion in 2014.<sup>88</sup> Time siphoned away from agency management in favor of congressional oversight hearings may be especially costly at times when agency leaders would otherwise be trying to manage crises like those surrounding Healthcare.gov.

In deciding whether to engage in resource-intensive, time-consuming oversight hearings—rather than other, less formal oversight activities—committees should consider whether the potential benefits justify the substantial opportunity costs. Having decided to engage in oversight hearings, committees should conduct them so as to maximize their potential to create benefits like informed congressional decisionmaking and the accountability, efficiency, transparency, and democratic legitimacy of administrative agencies. In other words, a committee should, to the extent that it feels the need to engage in an oversight hearing at all, do so in furtherance of traditional oversight benefits, rather than a bump in the polls.<sup>89</sup>

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<sup>84</sup> *Id.* at 9–10.

<sup>85</sup> See *id.* at 9 (describing the possibility of needing to attain clearance from agency officials); *Preparing for Congressional Oversight and Investigation*, THECAPITOL.NET, <http://www.thecapitol.net/CustomPrograms/oversightagenda.html#Audience> (last visited Oct. 10, 2014) (offering trainings on handling document requests and preliminary communications with oversight committee).

<sup>86</sup> See, e.g., OFFICE OF LEGISLATIVE COUNSEL, DEP'T OF DEF., TESTIMONY CLEARANCE FLOWCHART, available at [http://www.dtic.mil/whs/esd/osr/docs/CongressionalTestimonyFlowChart\(OLC\).pdf](http://www.dtic.mil/whs/esd/osr/docs/CongressionalTestimonyFlowChart(OLC).pdf) (assigning the Office of Legal Counsel the responsibility of coordinating clearance of witness statements and testimony, and acting as a go-between for the Office of Management and Budget and Department of Defense Components).

<sup>87</sup> David Nather, *Kathleen Sebelius Back to the Hill for More Drubbings*, POLITICO (Dec. 11, 2013), <http://www.politico.com/story/2013/12/obamacare-kathleen-sebelius-100982.html> (last visited Oct. 10, 2014).

<sup>88</sup> U.S. DEP'T OF HEALTH & HUMAN SERVS., FISCAL YEAR 2014 BUDGET IN BRIEF: STRENGTHENING HEALTH AND OPPORTUNITY FOR ALL AMERICANS 1.

<sup>89</sup> Unfortunately, it is clear that traditional oversight goals do not always win the day. See ABERBACH, *supra* note 14, at 111 (surveying committee members and staff, and finding that “[s]ome agencies and programs are chosen for oversight because the choice seems to promise members direct and immediate electoral payoffs—the basis of most congressional behavior according to some scholars”).

This dynamic is particularly critical in the current political environment. On the one hand, the need for effective, comprehensive oversight is arguably at an all-time high in an era of expansive administrative authority and activity. On the other hand, political polarization in both Congress and the media has fueled partisan conflict.<sup>90</sup> At the same time, the proliferation of audiovisual content on cable and the Internet has increased the potential visibility of public hearings. As a result, there may be more temptation than ever to subvert oversight hearings for purely partisan agendas. As much as possible, Congress should be encouraged to avoid this temptation and focus exclusively on delivering much-needed oversight benefits.

Unfortunately, for various reasons, it can be difficult for an outside observer to accurately distinguish the good oversight from the bad. Therefore, in the next section, I offer a basic framework for identifying the underlying operational functions of actual oversight hearings as a means to assessing their potential benefits.

## II

### A BASIC FRAMEWORK FOR EVALUATING OVERSIGHT HEARINGS

As argued in Part I, *supra*, it is in the best interests of the general public that congressional committees be encouraged to invest their precious oversight resources in pursuit of benefits such as accountability, efficiency, and transparency—rather than partisan political advantage. But to hold Congress accountable for its oversight responsibilities, we must find a way to distinguish the “good” oversight from the “bad.” This may be difficult, as members of Congress can almost certainly maintain an air of selfless dedication to the responsibilities of oversight, whatever their underlying motivations might be. In fact, the louder they yell and the longer they carry on, the more credit they can claim for championing the cause of administrative accountability. In this section, I therefore offer one technique that outside observers may employ to analyze and evaluate congressional oversight hearings. I argue that oversight hearings can be broken down and viewed in terms of distinct operational functions, i.e., the distinct ways in which oversight hearings are conducted. Specifically, I identify three basic, operational functions of public oversight hearings: objective fact finding, policy-driven narrative development, and partisan electoral

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<sup>90</sup> See DAVID C. KIMBALL ET AL., POLITICAL IDENTITY AND PARTY POLARIZATION IN THE AMERICAN ELECTORATE 4, (Nov. 7, 2013), available at <http://www.uakron.edu/dotAsset/27367206-e6a4-4d04-8644-75c44840b8b4.pdf> (“[T]he rather dramatic increase in net partisan affect among the mass public over the past decade coincides with sharper ideological polarization in Congress during the same period.”).

opportunism. I describe each operational function and explain how they can be identified and distinguished in practice. I also describe the types of oversight benefits associated with each function. By identifying the functions that a committee chooses to employ, we can better understand what the committee is trying to achieve and what kind of benefits the hearing is likely to produce.

Before focusing on the specific details of these operational functions, I would like to offer a caveat: I describe the operational functions below at their “core,” i.e., distilled to a pure state rarely found in nature. Therefore, observers attempting to apply this framework should not treat these functions as mutually exclusive categories, but rather as reference points on a sliding scale, or as the partially overlapping circles of a Venn diagram. My goal is for observers to be able to analyze an oversight hearing, determine which operational functions are primarily or predominantly at play, and draw inferences about the oversight benefits likely to arise from that hearing.

### A. *Objective Fact Finding*

Information gathering is an important aspect of congressional oversight hearings.<sup>91</sup> One of the basic premises of these hearings is that a committee calls and questions witnesses who have information relevant to the operation of federal agencies and programs. Objective fact finding (OFF), as an operational function of oversight hearings, simply consists of eliciting previously unknown or unverified information relevant to the committee’s reasoned oversight of the agency in question. Two features in particular distinguish OFF from either policy-driven narrative development or partisan electoral opportunism, discussed below.

The first distinguishing feature of OFF is that the committee<sup>92</sup> is not limited to a specific policy position or course of action with regard to the agency in question. Instead, the committee is seeking facts to

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<sup>91</sup> See OGUL, *supra* note 14, at 153 (“The classic image of what legislative hearings do states that ‘their most important function has been to collect facts so as to enable committee members to make informed judgments regarding legislative proposals.’” (quoting GEORGE B. GALLOWAY, HISTORY OF THE HOUSE OF REPRESENTATIVES 9 (1961))); see also POGO, *supra* note 32, at 5 (“The goal of an oversight hearing is to discover information . . .”). *But see* OGUL, *supra* note 14, at 153–54 (noting that among academics, the focus on fact finding as the primary function of oversight hearings has largely been abandoned in favor of politically-driven functions). These “politically-driven” functions are accounted for in Parts II.B and II.C, *infra*.

<sup>92</sup> Committees, their majorities, and their members can all engage in the operational functions of oversight hearings. For the sake of simplicity, however, in this section I refer primarily to the committee as a whole.

educate itself as to the appropriate course of action.<sup>93</sup> The questioning is therefore objective in the sense that it is not contrived to elicit a response that supports a specific policy position.

Another key feature of OFF is the intended audience. When a committee engages in OFF, it does not know the answers to the questions it is asking, and therefore elicits testimony primarily for its own informational benefit.<sup>94</sup> Education of the interested public and the rest of the legislature is therefore only an incidental benefit. In contrast, when a committee engages in policy-driven narrative development or partisan electoral opportunism, discussed below, it already knows or believes it knows how the witness will testify.

For lack of a better analogy relevant to the legal profession, a committee engaging in OFF can be loosely compared to a judge in an inquisitorial court system who is examining a witness directly from the bench.<sup>95</sup> The judge is a neutral fact finder. She asks the witness questions that she believes are relevant to the case. Presumably, she prioritizes her questioning to ensure that the most relevant issues are addressed. She considers the testimony and the credibility of the witnesses in reaching a decision.

Certain circumstantial observations may indicate that OFF is taking place. Exchanges between the committee and witness, or within the committee itself, are less likely to be contentious or to arouse controversy. As one observer notes,

[M]ost Congressional hearings—the great silent majority, if you will—never make cable news or generate a single partisan tweet. They deal with workaday matters like school safety, egg inspections, fishery management and the business climate in Latin America. The questions are businesslike and the exchanges among lawmakers are often cordial. When Republicans and Democrats disagree, they are

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<sup>93</sup> See Huitt, *supra* note 13, at 342 (describing notions of the committee as a “fact-finding agency”).

<sup>94</sup> See Daniel Diermeier & Timothy J. Feddersen, *Information and Congressional Hearings*, 44 AM. J. POL. SCI. 51, 51 (2000) (describing “the provision of information to members” as the most obvious—though not, in practice, the most common—rationale for congressional oversight hearings).

<sup>95</sup> See WILLIAM J. KEEFE & MORRIS S. OGUL, *THE AMERICAN LEGISLATIVE PROCESS: CONGRESS AND THE STATES* 206 (1973) (“The traditional interpretation described the committee member as an impartial judge, charged with studying the facts, listening, weighing the evidence submitted by contesting parties, and deciding the case.”); NEW ZEALAND MINISTRY OF JUSTICE, *ALTERNATIVE PRE-TRIAL AND TRIAL PROCESSES FOR CHILD WITNESSES IN NEW ZEALAND’S CRIMINAL JUSTICE SYSTEM* 48 (2010), *available at* <http://www.justice.govt.nz/publications/global-publications/a/alternative-pre-trial-and-trial-processes-for-child-witnesses-in-new-zealands-criminal-justice-system> (in an inquisitorial system, “[t]he Judge assumes the role of principal interrogator of witnesses and the defendant, and is under an obligation to take evidence until he or she ascertains the truth”).

voicing sincere differences on public policy, not auditioning for a shout show on Fox or MSNBC.<sup>96</sup>

The type and source of information sought may also provide clues as to whether or not the committee is engaging in OFF. Committees have a variety of tools and resources at their disposal to provide them with information on executive agency activities. First and foremost, “[c]ommittee staff members can be used as effective communication links with administrative agencies for the purpose of keeping committee members informed on administrative developments and as a means of transmitting congressional views to specific agencies.”<sup>97</sup> As a result, congressional committees have utilized “staff level communication and contacts as well as other ‘informal’ attempts at gathering information—document requests, informal briefings, etc.—before initiating the necessary formalistic procedures such as issuing committee subpoenas, holding on-the-record depositions, and/or engaging the subjects of inquiries in open, public hearings.”<sup>98</sup> Committees can also tap substantial informational resources such as the Congressional Research Service, Inspectors General of specific agencies,<sup>99</sup> the Government Accountability Office, the Congressional Budget Office, and mandatory performance reports generated by the agencies.<sup>100</sup> The fact that the committee could have obtained most or all of the infor-

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<sup>96</sup> Pitney, *supra* note 62. See also ABERBACH, *supra* note 14, at 161 (“[M]any oversight hearings . . . are done in a fundamentally nonhostile, indeed a supportive, context.”).

<sup>97</sup> John F. Bibby, *Committee Characteristics and Legislative Oversight of Administration*, 10 MIDWEST J. POL. SCI. 78, 87 (1966); see also *id.* at 96 (“Another alternative source of assistance in exercising continuing influence over agency policy is for a senator to rely on his personal staff to keep him posted on agency policy.”).

<sup>98</sup> KAISER ET AL., *supra* note 14, at 28; see also, e.g., Letter from Lamar Alexander, Ranking Member, Senate Health, Education, Labor and Pensions Committee, and Darrell Issa, Chairman, House of Representatives Committee on Oversight and Government Reform, to Kathleen Sebelius, Secretary, U.S. Department of Health and Human Services 1 (Oct. 24, 2013) [hereinafter October 24 Letter] (“On numerous occasions over the last few weeks, Committee staff provided HHS staff with a list of priority areas for the Department’s response and answered numerous questions from HHS staff.”).

<sup>99</sup> By design, Inspectors General (IGs) are shielded from the direct influence of both the executive and legislative branches. IGs “conduct investigations and audits of their agencies to improve efficiency, end waste and fraud, discourage mismanagement, and strengthen the effectiveness and economy of agency operations.” OLESZEK, *supra* note 1, at 11. IGs author semiannual reports to agency heads and Congress. *Id.* In the cases of “particularly serious or flagrant problems,” IGs investigate and report immediately to the agency head and Congress. *Id.*

<sup>100</sup> See POGO, *supra* note 32, at 2 (suggesting that committees contact GAO, CRS, CBO, IG offices, and others to investigate whether or not the problem is systematic). The Government Performance Reform Act (GPRA) requires agencies to set performance goals and regularly report their progress to Congress. OLESZEK, *supra* note 1, at 7. The GPRA “strengthens legislative oversight by enhancing committees’ ability to hold agencies accountable for the implementation of their performance goals and actual outcomes . . . .” *Id.*

mation elicited at a hearing through less formal means—and with less work by the committee members themselves—is a strong indicator that functions above and beyond OFF are also at play.<sup>101</sup> This inference supports the widely held viewpoint that congressional hearings primarily serve purposes other than fact finding.<sup>102</sup>

But although there is reason for skepticism about the motive underlying hearings, there are indeed certain circumstances in which the oversight hearing could be the most efficient and reasonable tool for fact-finding. For example, when time is a critical factor or important events are unfolding, a committee may benefit from the ability to discuss high-level issues with agency leadership on the record and with relatively short notice.<sup>103</sup> This is especially true when dealing with a less-than-cooperative agency that drags its feet or responds evasively to requests for documents and information.<sup>104</sup> Furthermore, focused, reactive questioning on the record may be necessary to get to the root of a difficult question, evaluate the extent of an executive actor's knowledge, or judge an executive actor's honesty.<sup>105</sup>

Finally, the committee's prioritization of issues, witnesses, questions, and comments can provide clues as to the operational function at play. With OFF, the committee will prioritize its activities so as to obtain information most relevant to its oversight responsibilities. For example, the committee will seek witnesses for their ability to provide necessary information, rather than for their political profile.

Thus, in terms of oversight benefits, OFF primarily has the potential to support informed congressional decisionmaking and accountability. OFF provides committees with the information they need to assess whether federal programs are operating properly, and whether executive branch actors are working efficiently and in accordance with

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<sup>101</sup> See OGUL, *supra* note 14, at 161 (interviewing a group of Congressmen on the topic of oversight hearings and finding that “almost all . . . expressed an initial preference for informal discussion”).

<sup>102</sup> See, e.g., ROGER H. DAVIDSON & WALTER J. OLESZEK, CONGRESS AGAINST ITSELF 82 (1977) (arguing that congressional hearings are poorly suited to gathering information); 5 CLIFFORD S. FISHMAN, JONES ON EVIDENCE § 34:40 (7th ed. 2003) (“This ‘circus’ is hardly conducive to the development of facts, but more to entertainment of the television audience.”); Diermeier & Feddersen, *supra* note 94, at 51 (“The traditional literature has deemphasized what would seem to be the most obvious rationale for hearings: the provision of information to members.”).

<sup>103</sup> See POGO, *supra* note 32, at 3 (arguing that high-level agency actors can provide committees with “big picture” information).

<sup>104</sup> See OGUL, *supra* note 14, at 161 (“In oversight activities, the presence of formal hearings or of a formal investigation sometimes provides a clue to the breakdown of informal attempts to influence executive behavior.”).

<sup>105</sup> See, e.g., *id.* (reporting that one congressperson interviewed expressed a preference for initiating oversight through formal hearings because they create a formal record, making it “harder to evade questions”).

legislative intent. OFF may also offer side benefits, such as transparency and democratic legitimacy by allowing the interested public to access information and reach their own conclusions about executive branch performance.

A well publicized exchange that took place between Secretary Sebelius and Representative Lee Terry (R-Neb.) at an oversight hearing conducted by the House Energy and Commerce Committee may be helpful in illustrating the contours of OFF. At the hearing, Congressman Terry asked the Secretary how many people had enrolled or attempted to enroll for health insurance through Healthcare.gov.<sup>106</sup> The Secretary responded that certain malfunctions in the system made it impossible for her to get reliable numbers.<sup>107</sup> The Congressman responded that HHS's contractors said that they had the numbers but that HHS was prohibiting them from sharing those numbers.<sup>108</sup> He then asked the Secretary, "will you, on the record, right now, authorize them to give us those numbers and let us determine whether those are reliable?"<sup>109</sup> The Secretary declined.<sup>110</sup>

In terms of information gathering, the Congressman's line of questioning yielded some important facts. First, the Secretary allegedly did not know how many people had enrolled or tried to enroll. Second, technical malfunctions were responsible for unreliable data. Third, the Secretary was unwilling to share the allegedly unreliable numbers with the committee. Each of these pieces of information seems relevant to the committee's job of overseeing HHS's operations and making policy decisions with regard to the agency moving forward. These clues would seem to point to OFF.

However, other extrinsic facts indicate that Congressman Terry was probably not conducting OFF during this hearing. Given the high profile nature of this proceeding, it is highly likely that the committee or its staff had been in communication with the Secretary or her staff prior to the hearing. The committee certainly could have, and probably did, ask about the enrollment numbers and request that the Secretary allow HHS's contractors to reveal those numbers.<sup>111</sup> It also seems likely that the Secretary would have been happy to respond to

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<sup>106</sup> *PPACA Hearing*, *supra* note 2, at 38.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> For example, Senator Lamar Alexander and Congressman Darrel Issa, in a letter to Secretary Sebelius, requested the enrollment numbers two weeks prior to her testimony before the Energy and Commerce Committee. Letter from Lamar Alexander, Ranking Member, Senate Health, Education, Labor and Pensions Committee, and Darrell Issa, Chairman, House of Representatives Committee on Oversight and Government Reform,

these questions (i.e., deny possession of reliable numbers) outside the oversight hearing, rather than be forced to do so on camera and create an unfavorable video clip for the media to broadcast.<sup>112</sup> It stands to reason, therefore, that—despite the valuable information that may have been communicated—Congressman Terry was doing something other than, or in addition to, OFF when he asked Secretary Sebelius these questions as the cameras rolled.

The dynamics surrounding the committee hearings on the Healthcare.gov rollout make the presence of substantial OFF unlikely. These hearings were bound to attract media attention, and they related to a highly politicized topic—the Affordable Care Act—with regard to which the political parties had firmly drawn, preexisting positions. Under these circumstances, it is therefore unlikely that a political actor would take the stage and start asking questions without any idea how the witness is likely to answer. Nonetheless, even if Congressman Terry's line of questioning should not be characterized as OFF, that does not mean that it had no potential to generate official oversight benefits. I will therefore return to this exchange as a potential example of policy-driven narrative development in section II.B.

### B. Policy-Driven Narrative Development

Policy-driven narrative development (PDND), as an operational function of oversight hearings, occurs when a committee elicits testimony or discussion in an attempt to justify or garner support for its preferred policy position or course of action. This function is different from OFF in two fundamental respects.

First, when a committee or member pursues PDND, it has already determined its policy position on the issue in question and has a preferred course of action. The committee calls witnesses and crafts questions to develop a narrative tailored to this course of action.<sup>113</sup> The committee already knows, or should know, the answers to the

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to Kathleen Sebelius, Secretary, U.S. Department of Health and Human Services 2 (Oct. 10, 2013).

<sup>112</sup> See OGUL, *supra* note 14, at 162 (“The executive gets delirium tremens with the mere mention of a public hearing. They see the formal hearing as a threat to their activity.” (quoting an unnamed committee staff director)). Because Secretary Sebelius's staff indicated to Senator Lamar Alexander and Congressman Darrel Issa that it was unable to provide enrollment numbers as of October 24, the date of the Secretary's appearance before the Energy and Commerce Committee, see October 24 Letter, *supra* note 98, at 1 (quoting Secretary Sebelius's staff), it seems very likely that the Energy and Commerce Committee would have received the same response.

<sup>113</sup> See Huitt, *supra* note 13, at 354 (“Each group [of committee members] seemed to come into the hearings with a ready-made frame of reference. Facts which were compatible were fitted into it; facts which were not compatible, even when elaborately documented, were discounted, not perceived, or ignored.”).

questions it asks.<sup>114</sup> As a result, the process is narrative-driven: “Even more than in the case of bill-referral hearings, committee leaders stack the list of witnesses in nonlegislative hearings to insure that a certain viewpoint is heard.”<sup>115</sup>

This leads to PDND’s second differentiating feature: The committee or member questioning the witness is not the intended audience of the testimony being elicited. Through its opening statements, its selection of witnesses, its questions, and its responses, the committee is crafting a narrative to persuade others—including undecided members of the committee, the broader legislative body, or the interested public—of its policy position while developing a record to justify its preferred course of action. This function therefore reflects some of the key reasons why committee members choose to engage in oversight hearings, such as “seeking publicity for their views . . . and building a public record in support of a given course of action.”<sup>116</sup>

Here too, for lack of a better analogy relevant to the legal profession, a committee engaging in PDND can be loosely compared to an attorney examining witnesses in a jury trial. The attorney has a specific goal—to win the trial for his client—and should already be aware of the facts relevant to the case. The attorney selects witnesses and questions deliberately to elicit testimony on relevant topics that will persuade the jury of the narrative that he seeks to advance. Public oversight hearings provide similar opportunities for committees or members to publicly elicit evidence and introduce narratives in support of their own policy objectives. Like a trial, a public hearing allows the audience, i.e., the public and other legislators, to gauge the credibility of the witnesses and absorb other contextual information—potentially adding value over printed reports and secondhand analysis.

Several types of clues may indicate that PDND is the primary factor in a hearing or line of questioning. Is it likely that the committee or member already knows the relevant facts that it is

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<sup>114</sup> See WALTER J. OLESZEK, *CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS* (1989) (arguing that committee members use staff interviews and rehearsals with witnesses to craft questions that will elicit specific testimony); POGO, *supra* note 32, at 4 (instructing committee staffers to “[s]cript the questions. And anticipate the answers. While there will undoubtedly be some surprises in the hearing, you should be able to anticipate most of the testimony”).

<sup>115</sup> Talbert et al., *supra* note 78, at 401.

<sup>116</sup> DAVIDSON & OLESZEK, *supra* note 102, at 82–83 (1977); see also *Gravel v. United States*, 408 U.S. 606, 650 (1972) (Brennan, J., dissenting) (“Congressional hearings, moreover, are not confined to gathering information for internal distribution, but are often widely publicized, sometimes televised, as a means of alerting the electorate to matters of public import and concern.”).

attempting to elicit from a witness? Could it have reasonably acquired this information through other, more efficient means? If so, then above and beyond the value of information being gathered, the questioner may be attempting to advance her policy position by inducing this particular witness to respond—or refuse to respond—on the record and on camera. Do committee members express their policy positions during the hearing, or offer policy-related characterizations of the testimony given during the hearing? Does the hearing title itself reveal a predetermined policy position? Finally, does the committee or its members amplify the hearing's impact with press communications, either before or after the hearing?<sup>117</sup> These may all be indicators of PDND.

The historical and political context of the hearing may also point to the underlying goals of the hearing. Does the committee, its majority, or the individual posing the question have a well established position on the policy issue at hand? Does the public have a particular interest in that policy issue? Would legislative action regarding the program or agency in question require broad public support? If so, a committee might engage in PDND to increase public support for its policy position or preferred course of action.

Finally, the way a committee prioritizes its focus may indicate which function is primarily being employed. A committee engaging in PDND—in contrast to partisan electoral opportunism, discussed below—will tend to prioritize its efforts according to some measure of policy-related significance, rather than political bang-for-the-buck.

Even though PDND is largely orchestrated, it nonetheless offers important oversight benefits. For example, PDND enhances transparency, accountability, and the legitimacy of authority delegated to administrative agencies. By engaging with these agencies and attempting to exert influence upon them—either in their execution of the laws or their promulgation of rules and regulations—elected committee members help maintain an appropriate balance between the legislative and executive branches.<sup>118</sup> By bringing executive actors into the realm of public discourse, the committee “shines the spotlight of public attention on many significant issues, allowing lawmakers and the American people to make informed judgments about executive

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<sup>117</sup> See POGO, *supra* note 32, at 5 (“Give reporters enough time and information to do reporting *before* the hearing. Also consider running a story the day of the hearing to add energy—headlines work like a double shot of espresso.”).

<sup>118</sup> See KAISER ET AL., *supra* note 14, at 3 (“[O]versight hearings can halt executive misconduct and help to prevent its recurrence, either directly through new legislation or indirectly by putting pressure on the offending agency.”).

activities and actions.”<sup>119</sup> By eliciting testimony on issues relevant to policy and executive branch performance, committees “strengthen the American public’s ability to evaluate and reevaluate executive activities and actions.”<sup>120</sup> Finally, PDND supports informed legislative decisionmaking by bringing relevant information to the attention of legislators outside the committee and by allowing legislators to gauge “the scope and intensity of public support for government programs . . . .”<sup>121</sup>

On the other hand, a cogent argument can be made that PDND’s ability to increase transparency and informed congressional decisionmaking is limited by its inherently one-sided, or biased, nature. In other words, it may tend to give the legislature and the public only half the story. Though this is a legitimate concern, the danger of unfair bias may be mitigated to the extent that individual members or a minority coalition have the ability to rebut the majority’s narrative by commenting and eliciting their own testimony during the hearing.

While the facts surrounding the exchange between Representative Terry and Secretary Sebelius, described above in section II.A, suggested that Representative Terry was not conducting OFF, they *do* fit the description of PDND. In essence, Representative Terry was asking questions to which he either knew the answers, or could likely have ascertained the answers outside the context of a formal hearing. However, by forcing Secretary Sebelius to answer these questions in the spotlight of national media coverage, he was crafting a powerful narrative for the benefit of the broader public. Watching Secretary Sebelius fail to provide any figure whatsoever with regard to the number of people enrolled through Healthcare.gov, the viewer could, at best, conclude that the Secretary was uninformed about a performance metric critical to her responsibilities as the chief of HHS. More likely, the viewer could infer that the numbers, reliable or not, were so low that the Secretary preferred for the time being to hide them from Congress and the public. The congressman’s line of questioning—probably orchestrated for effect rather than simple information gathering—therefore provided valuable oversight benefits in the categories of transparency and accountability.

### C. *Partisan Electoral Opportunism*

The operational function of partisan electoral opportunism (PEO) consists of committees conducting hearings purely to achieve

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<sup>119</sup> OLESZEK, *supra* note 1, at 7.

<sup>120</sup> *Id.* at 6.

<sup>121</sup> *Id.* at 10.

an electoral advantage—either by garnering positive publicity for themselves and their parties,<sup>122</sup> stirring public sentiment against political opponents, or some combination of both. In other words, the committee uses its “oversight” duties, the specific issues under discussion, the witnesses, and any attendant publicity as vehicles for electoral gain in a partisan zero-sum game. When an oversight hearing consists largely of PEO, it may devolve into “administration bashing” and “publicity seeking.”<sup>123</sup> For example, looking as far back as the Clinton presidency, Norman Ornstein of the American Enterprise Institute notes, “[N]o chair of [the House Committee on Oversight and Government Reform] has shunned the spotlight or avoided the temptation, from time to time, to use administration figures as piñatas.”<sup>124</sup>

When a committee engages in PEO, its policy position is essentially fixed—although the policy may simply be to oppose or embarrass the executive as much as possible. The committee knows or believes it can predict how witnesses will testify, and knows what viewpoints it plans to express.<sup>125</sup> In PEO, any fact finding is incidental and will not affect the committee’s decisionmaking or policy position, except to the extent that it reveals new avenues for the committee or its allies to exploit for electoral advantage.

The intended audience for PEO is outside the hearing. Testimony is elicited to sway voters rather than to inform the committee. The committee’s statements are crafted to generate publicity and maximize electoral advantage. Oversight benefits associated with PEO are primarily of the “unofficial,” partisan variety. Any “official” oversight benefits such as informed decisionmaking or transparency that arise out of PEO are incidental rather than intentional. Similarly, PEO serves to check executive power for partisan rather than institutional purposes.

Though PEO is mechanically similar to PDND, several circumstantial indicators can help distinguish the two functions. For example, the official title of a hearing implementing PEO may appear biased

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<sup>122</sup> See DAVIDSON & OLESZEK, *supra* note 102, at 83 (listing “personal advertisement” as a motivating factor in oversight hearings).

<sup>123</sup> See Norman J. Ornstein, *Congress is Attracted to Scandal and Attack Mode*, N.Y. TIMES (Aug. 8, 2013), <http://www.nytimes.com/roomfordebate/2013/05/08/are-congressional-hearings-serious-investigations-or-just-party-politics/congress-is-attracted-to-scandal-and-attack-mode> (describing partisan opportunism in oversight hearings).

<sup>124</sup> *Id.*

<sup>125</sup> See POGO, *supra* note 32 (advising congressional staffers to pick their witnesses carefully and plan how they will highlight the important issues effectively).

and politically divisive.<sup>126</sup> Committee members may spend substantial time expressing their own views or feelings—particularly scorn and outrage regarding the behavior of executive actors—rather than eliciting testimony from witnesses. The hearing may devolve into intra-committee bickering as the minority objects to the majority’s tactics. And committee members may attempt to amplify their gains by following up on hearings with politically charged press releases, interviews, or speeches.

The committee’s prioritization of oversight targets also sheds light on a hearing’s function. A committee pursuing PDND will attempt to elicit the testimony most likely to garner public support for what it considers the best policy outcome; points scored against the opposing political party are an incidental benefit. In contrast, a committee pursuing PEO will prioritize its oversight targets according to their ability to generate negative publicity for its political rivals and/or positive publicity for its majority members and party; positive policy outcomes, if any, are incidental. The committee’s schedule of hearings may be revealing. Is the committee dividing its time in reasonable proportion to the key policy areas for which it is responsible? Or does its schedule seem to track the policy issues with the greatest potential to damage the opposition at a given moment?<sup>127</sup> Having struck a promising vein, the committee may also revisit certain questions or issues over the course of multiple hearings—not only beyond the point of any potential gain in information relevant to the committee’s decision-

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<sup>126</sup> The titles of several committee hearings in the House of Representatives concerning the implementation of the Affordable Care Act appear to reflect partisan phrasing and narratives. For example, on November 22, 2013, the House Committee on Oversight and Government Reform held a hearing titled, “Obamacare Implementation: Sticker Shock of Increased Premiums for Healthcare Coverage.” *Obamacare Implementation: Sticker Shock of Increased Premiums for Healthcare Coverage: Hearing Before the H. Comm. on Oversight & Gov’t Reform*, 113th Cong. (2013). Certainly, the cost of insurance premiums is a legitimate policy concern, but use of the name “Obamacare” indicates a fundamentally partisan approach to the proceeding.

<sup>127</sup> For example, in the midst of controversy and oversight activity regarding the botched rollout of the Healthcare.gov website, it became apparent that, contrary to the President’s previous assurances, certain health insurance policyholders would be forced to switch policies under the ACA. Soon thereafter, Chairman Upton (R-Mich.) focused a previously scheduled hearing on the issue of dropped policies. Representative Waxman (D-Cal.) noted, “Mr. Chairman. I had to smile at your line of questioning because everybody expected this hearing was about the Web site. . . . [N]ow we have [Secretary Sebelius] before the committee and [she’s] being asked . . . about individuals who have gotten notices that they’re going to have their individual . . . policies canceled.” *PPACA Implementation Failures: Answers from HHS: Hearing Before the H. Comm. on Energy & Commerce*, 113th Cong. 17 (2013). Certainly, the issue of dropped policies is a legitimate concern and within the committee’s jurisdiction, but the implication is that the committee is prepared to change course rapidly in order to capitalize on the hot button issue of the moment.

making process, but also beyond the point that additional testimony would be likely to affect an interested observer's policy position. The goal here is to create as many problems for the opposition as possible from a politically advantageous situation or occurrence.

Another example from the recent oversight hearings regarding the Affordable Care Act may help shed light on the more subtle distinctions between PDND and PEO. On December 16, 2013, the House Committee on Oversight and Government Reform held a field hearing in Richardson, Texas, titled "ObamaCare Implementation: Who are the Navigators?"<sup>128</sup> The hearing was nominally conducted to "explore the wide variety of concerns about the federal Navigator program and how Texas is acting to protect its citizens from a campaign of misinformation and potentially bad actors."<sup>129</sup> The Navigators are individuals, funded via HHS grants, who explain the ACA to members of the community and facilitate enrollment.<sup>130</sup>

The circumstances of the hearing indicate that the primary objective was not OFF. The committee called three witnesses. Mr. Kevin Brady, Chief of Staff of the Texas Department of Insurance, helped explain how Texas had proposed additional rules on the training and qualifications of Navigators to "address insufficiencies in federal regulations."<sup>131</sup> Ms. Carolyn Goodwin, the owner of an independent insurance agency in Dallas, explained the differences in qualifications between Texas's licensed insurance agents and the Navigators employed under the Affordable Care Act. In her written testimony, Goodwin professed she was "not here to slam the [ACA] as a whole," but did feel that "the administration would have been wise to consult with the experts."<sup>132</sup> Finally, the committee called CMS's Regional Administrator. It stands to reason that the committee could have elicited whatever information it needed—at least from the two friendly witnesses—without flying to Texas and holding a formal hearing. In addition, the committee released a staff report on the problems with the Navigator program on the same day as the hearing.<sup>133</sup> Thus, the

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<sup>128</sup> *Obamacare Implementation Hearing*, *supra* note 48.

<sup>129</sup> HOUSE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM, Chairman's Hearing Statement (Dec. 16, 2013), *available at* <http://oversight.house.gov/hearing/field-hearing-obamacare-implementation-navigators/>.

<sup>130</sup> *Id.*

<sup>131</sup> *Obamacare Implementation Hearing*, *supra* note 48, at 32 (written testimony of Kevin Brady).

<sup>132</sup> *Id.* at 13 (prepared statement of Carolyn Goodwin).

<sup>133</sup> *See* Press Release, House Committee on Oversight and Government Reform, Oversight Report on Obamacare Navigator Program Reveals Mismanagement and Lax Oversight (Dec. 16, 2013), *available at* <http://oversight.house.gov/release/oversight-report-obamacare-navigator-program-reveals-mismanagement-lax-oversight/> (announcing the committee's release of the new staff report that day).

committee had not only already gathered substantial information on the topic, but had also taken a position on the matter. It is reasonable to conclude that the committee was primarily conducting either PDND or PEO, but not OFF.

The next important question is whether the committee might have been conducting PDND. Given the money spent on the Navigator program, and the sensitive information to which Navigators have access, apparent problems with their qualifications would seem to be a reasonable topic for the committee to discuss publicly. Having concluded that there were serious problems with the way the HHS was conducting the Navigator program, developing a public narrative reflecting these problems would seem to serve the interests of transparency, accountability, and perhaps democratic legitimacy. These considerations would tend to weigh against Representative Cummings's accusation that the hearing was simply a "destructive political exercise."<sup>134</sup>

However, a variety of clues indicate that the committee's activities on December 16, 2013 might be best categorized as PEO after all. For example, the committee consistently used politically significant phrasing. As in past hearings, the committee referred to the Affordable Care Act as "Obamacare."<sup>135</sup> Similarly, in his opening statement, Chairman Issa said, "[T]he President's signature legislation . . . has faced one after another problem."<sup>136</sup> He then went on to describe a long list of perceived problems with the ACA and its implementation.<sup>137</sup> Likewise, in the meeting, questions were not limited to issues involving ACA Navigators, but instead addressed a wide range of complaints previously raised regarding the ACA and the Healthcare.gov implementation. This would seem to reflect an opportunistic approach: The issue of Navigators opened the door to a public denouncement of the politically significant ACA in general.

Beyond what was said in the hearing, the context of the hearing also indicates PEO. First, the fact that this was a field hearing con-

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<sup>134</sup> Press Release, House Committee on Oversight and Government Reform Democrats, Cummings Issues Statement on Oversight Committee Field Hearing on ACA (Dec. 16, 2013), available at <http://democrats.oversight.house.gov/news/press-releases/cummings-issues-statement-on-oversight-committee-field-hearing-on-aca-apache>.

<sup>135</sup> The instant hearing, like similar hearings before it, refers to "Obamacare" even in its title. See *Hearings*, HOUSE COMMITTEE ON OVERSIGHT & GOV'T REFORM, <http://oversight.house.gov/hearings/> (last visited Oct. 13, 2014) (listing, for example, hearings titled "ObamaCare Implementation: Sticker Shock of Increased Premiums for Healthcare Coverage" and "ObamaCare Implementation: The Rollout of HealthCare.gov").

<sup>136</sup> *Obamacare Implementation*, *supra* note 48, at 2 (emphasis added).

<sup>137</sup> *Id.* (emphasizing the website's price tag, the website's botched rollout, and health insurance policies dropped as a result of the ACA).

ducted in Texas suggests that the committee was seeking attention and additional contact with the electorate. Second, the committee included in the hearing four Texas Republican congressmen who were not committee members.<sup>138</sup> Third, the committee's hearing schedule in the months following the Healthcare.gov rollout indicates that they were likely prioritizing their oversight activities according to political, rather than oversight, value. In November and December of 2013, the Committee conducted eight full-committee hearings.<sup>139</sup> Seven of these were dedicated to "Obamacare" and Healthcare.gov; four were field hearings that required the committee to travel interstate.<sup>140</sup> While the ACA's implementation represents a very important agency activity, and the implementation has had substantial problems, the committee's fixation on the matter raises questions. It is particularly suspicious given the Committee's broad oversight mandate: As the Committee's website explains, "Our primary responsibility . . . is oversight of virtually everything [the] government does—from national security to homeland security grants, from federal workforce policies to regulatory reform and reorganization authority, from information technology procurements at individual agencies to government-wide data security standards."<sup>141</sup> It would seem that all non-ACA-related sectors of the federal government were at that time relegated to the oversight back burner.

HHS's mismanagement of the Healthcare.gov implementation cost the American public dearly. Vast sums of tax money were wasted and substantial personal inconveniences were endured by would-be enrollees. The responsible parties deserved to be held publicly accountable. In this, PDND (and perhaps OFF) in oversight hearings played a critical role. However, the executive branch's mammoth administrative machinery did not politely grind to a halt while certain committees flogged HHS on the steps of the Capitol for months on end. The danger of PEO is that, dazzled by the limelight, committee members will turn a blind eye to their many other oversight responsibilities.

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<sup>138</sup> *Id.* at 1–2 (admitting Representatives Pete Sessions, Michael Burgess, Randy Neugebauer, and Marc Veasey).

<sup>139</sup> Subcommittees also conducted seven hearings during this time period. *Hearings*, HOUSE COMMITTEE ON OVERSIGHT & GOV'T REFORM, <http://oversight.house.gov/hearings> (last visited Oct. 13, 2014).

<sup>140</sup> *Id.*

<sup>141</sup> *About the Committee*, HOUSE COMMITTEE ON OVERSIGHT & GOV'T REFORM, <http://oversight.house.gov/about-the-committee/> (last visited Oct. 13, 2014).

### III POTENTIAL APPLICATIONS

Congressional oversight hearings can either be very valuable or very wasteful, depending on how, when, and why they are employed. The ultimate goal of this Note is to benefit the public by encouraging better, more efficient oversight by the legislative branch. To that end, I have attempted to draw attention to the topic of congressional oversight hearings and have offered a basic tool for evaluating the way these hearings are conducted. Sadly, as Sarah Binder of the Brookings Institution notes, “[D]iagnosing the ills of a body politic is one thing; rousing the patient to seek treatment is another.”<sup>142</sup> For this tool to have any impact, it must find its way into capable hands.

The electorate is the ultimate judge and enforcer when it comes to Congress’s performance. For example, evidence suggests the electorate’s increasing demand for oversight since the 1970’s—in addition to political polarization and divided control of the legislative and executive branches<sup>143</sup>—motivated Congress to fundamentally alter its hands-off relationship with the administrative state.<sup>144</sup> This is encouraging because it supports the contention that public pressure, in voicing displeasure with Congress or voting unresponsive members out of office, can spur congressional oversight. The problem is that although electoral incentives have motivated oversight in the past, they did not necessarily motivate good oversight.<sup>145</sup> The time has come for the voting public to become a more discerning consumer;<sup>146</sup> it should not settle for an erratic approach whereby committees pursue whatever crusades they deem most politically inflammatory at any point in time.<sup>147</sup> Congress, after all, created the modern adminis-

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<sup>142</sup> Sarah A. Binder, *Going Nowhere: A Gridlocked Congress*, THE BROOKINGS INSTITUTION (2000), available at <http://www.brookings.edu/research/articles/2000/12/winter-governance-binder>.

<sup>143</sup> See *supra* section I.B (describing the effects of divided government and polarization on oversight).

<sup>144</sup> See ABERBACH, *supra* note 14, at 191 (“[I]n increasing oversight activity in the 1970s, Congress was responding to the demands of a citizenry frustrated by government growth and complexity . . . .”); *id.* at 46 (arguing that congressional oversight activity has increased since the 1960s as Congress perceived increasing political payoff for oversight activity, relative to other activities).

<sup>145</sup> See *id.* at 200 (“The political nature of [Congress] and its members’ preferences do not inhibit, or even much limit, the occurrence of oversight in its many manifestations, but they do tend to shape what occurs.”).

<sup>146</sup> See *id.* at 47 (“Objective evidence may well be used [in oversight activities], but it is likely to be used selectively to meet the political needs of committee overseers and their constituencies. So the increase in the level of oversight reported is not likely to satisfy many of the dissatisfied.”).

<sup>147</sup> See *id.* at 108 (quoting a Senate Commerce Committee member as saying that, “[T]oo often the subject of oversight work may relate to political goals and objectives of

trative state; voters should demand that Congress now supervise it in an objective, rational, and efficient manner.

Admittedly, it would be overly optimistic to expect most voters to invest substantial time in analyzing the details of various oversight hearings and attempting to identify specific operational functions. Nonetheless, there are some fundamental takeaways from Part II that might indeed be valuable and accessible to the average voter. First, voters should recognize the opportunity costs associated with congressional oversight hearings: Given the scope and influence of the administrative state as compared to Congress, congressional oversight is a scarce resource. Formal hearings take a serious toll on agency leadership as well. A lay observer should at least ask herself, “Do the committees in the news seem like they are investing oversight resources in areas that matter to me?” Second, to the extent that the mainstream public does in fact derive more value from “official” oversight benefits associated with OFF and PDND than “unofficial” political benefits associated with PEO, the operational function analysis described in Part II can be substantially truncated for the lay observer’s benefit. Essentially, the simplest way of discouraging wasteful use of oversight hearings is to identify and discourage PEO. Fortunately, many of the telltale signs of PEO can be found with relatively little effort. The key is to identify a combination of quality—i.e., media coverage of politically charged rhetoric delivered at hearings, committee websites with divisive messaging and hearing titles, committees following up hearings with politically charged statements to the press—and quantity—i.e., committees repeatedly holding hearings regarding the same issues or the same actors beyond the point that additional information is likely to affect reasoned decisionmaking. The mere fact that a congressperson is highlighted on the evening news, berating an agency employee, is not evidence of political opportunism; the congressperson may be vigorously pursuing traditional oversight benefits. But when the viewer notices the same congressional actors flogging dead horses week after week, she should begin to sense that something is amiss.

The media is also in a position to have a positive impact on congressional oversight practices. In a perfect world, the media would limit its coverage of PEO in oversight hearings, thereby reducing or altogether eliminating the incentive for committees to engage in these activities. Unfortunately, the media has little incentive do so at this

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the particular subcommittee chairman who . . . sees some publicity advantage perhaps in investigating in a particular area. It sort of depends on what’s going on at the time, what would make news”).

point; the drama associated with PEO appears to be a mainstay of late. PEO also seems to play into the hands of America's increasingly polarized news outlets.<sup>148</sup> Nonetheless, concerned viewers might attempt to limit coverage of PEO by voicing their dissatisfaction, or simply changing the channel. At the very least, responsible outlets should be cognizant of PEO and label it as such when they cover it.

Finally, there are a number of think tanks and watchdog groups that evaluate Congress's performance. These organizations have the resources to monitor and analyze congressional committees and report their findings to the public. The Heritage Foundation, for example, has published "report cards" for Congress.<sup>149</sup> However, these report cards appear to focus on performance with regard to key policy areas, such as property rights, Social Security reform, and tax reform.<sup>150</sup> Grades are based on the extent to which Congress has acted in accordance with the Foundation's own policy positions.<sup>151</sup> I would argue that a report card should not only reflect the policy positions of congressional actors, but also their commitment and integrity in carrying out critical duties like oversight. By evaluating members of Congress on how effectively and how faithfully they pursue responsibilities like oversight—rather than simply on their policy positions—think tanks and watchdog groups can provide at least some incentive for Congress to change its ways.

## CONCLUSION

It seems self-evident that, from the public's perspective, the subversion of committee oversight hearings for political grandstanding purposes is undesirable. However, my goal in this Note is to warn the reader that the risks associated with this trend are growing, to show that underlying goals and potential benefits of an oversight hearing are not always obvious on its face, and to offer a basic framework through which the public can navigate these ambiguities to identify signs of adulteration.

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<sup>148</sup> See James Carville, *Disturbing Polarization in Media Worsens Political Partisanship*, THE HILL (Oct. 15, 2013), <http://thehill.com/opinion/columnists/james-carville/328731-polarization-in-media-worsens-partisanship> ("Today, conservatives can get all their information from conservative outlets, and liberals can get all their information from liberal outfits.").

<sup>149</sup> See, e.g., Brian M. Riedl, Ronald D. Utt & Alison A. Fraser, *Third-Quarter Report Card for Congress: Improvement Needed*, THE HERITAGE FOUNDATION (June 27, 2006), available at <http://www.heritage.org/research/reports/2006/06/third-quarter-report-card-for-congress-improvement-needed> (grading the performance of the 109th Congress).

<sup>150</sup> See *id.*

<sup>151</sup> *Id.*

As Congress steadily creates bigger and broader federal programs and administrative agencies, appropriates larger sums on their behalf, and delegates more of its legislative authority to their leaders, it takes on a commensurate responsibility to diligently oversee those agencies. Congressional committees must avoid the temptation to squander their oversight resources in the pursuit of partisan electoral advantage in an era of polarized politics. The transparency, accountability, and legitimacy of the administrative state depend on it.

However, as recent oversight campaigns illustrate, when the stakes are high and the cameras are rolling, politicians have strong incentives to cross the thin line from PDND to PEO. It is therefore critical that the public—whether individual voters, the media, or watchdog organizations—be aware of the issue, be able to navigate the ambiguities, and be willing to take Congress to task for its performance. The public must oversee the overseers.