Congress of the United States
Washington, DC 20515

Former Committee Chairman Henry Waxman Warns Against Republican Expansion of Unilateral Subpoena Power

February 10, 2015

Dear Colleague:

We want to share with you an important op-ed by former Rep. Henry A. Waxman, who is known as one of the most effective congressional investigators in history. Over his 40 year career, he served as the Chairman of the Committee on Energy and Commerce, the Chairman of the Committee on Oversight and Government Reform, and the Chairman of the Subcommittee on Health, where he spearheaded numerous investigations to root out waste, fraud, and abuse.

Rep. Waxman's work is widely respected by Democrats and Republicans alike. For example, Rep. Jason Chaffetz, the new Chairman of the Oversight Committee, said "I admire what he did." He said: "If you look at his effectiveness, ouch."

On February 6, 2015, Rep. Waxman published an op-ed in the *Washington Post* titled "Congressional Chairmen Shouldn't Be Given Free Rein Over Subpoenas." In his op-ed, Rep. Waxman warns about the recent effort by House Republicans to vastly expand the ability of committee chairmen to issue unilateral subpoenas with no debate and no vote. He writes:

> "This is an invitation to abuse that diminishes the prospect for responsible congressional oversight. Unfortunately, this ill-fated move has received virtually no attention."

For decades, responsible committee chairmen—both Democratic and Republican—recognized that the coercive power of subpoenas should be used only as a last resort, and they obtained the concurrence of the ranking member or called a committee vote before issuing subpoenas. But as Rep. Waxman explains, this year House Republicans are changing the rules to give some chairmen unfettered authority to issue subpoenas unilaterally, adopting an abusive model embraced only by Senator Joe McCarthy, former Rep. Dan Burton, and Rep. Darrell Issa. To their credit, some well-functioning committees, such as the Committees on Appropriations, Armed Services, Intelligence, and Veterans' Affairs, did not expand subpoena power for their chairmen.

We hope you will take a moment to read this thought-provoking perspective. We share his concerns that concentrating power in individual committee chairmen is an invitation to abuse.

Sincerely,

Elijah E. Cummings
Ranking Member, Committee on Oversight and Government Reform and Select Committee on Benghazi

Corrine Brown
Ranking Member, Committee on Veterans' Affairs

John Conyers, Jr.
Ranking Member, Committee on the Judiciary

Peter A. DeFazio
Ranking Member, Committee on Transportation and Infrastructure

Eliot L. Engel
Ranking Member, Committee on Foreign Affairs

Raul M. Grijalva
Ranking Member, Committee on Natural Resources

Eddie Bernice Johnson
Ranking Member, Committee on Science, Space, and Technology

Sander M. Levin
Ranking Member, Committee on Ways and Means

Nita Lowey
Ranking Member, Committee on Appropriations

Frank Pallone, Jr.
Ranking Member, Committee on Energy and Commerce

Adam Schiff
Ranking Member,
House Permanent Select Committee on Intelligence

Louise M. Slaughter
Ranking Member,
Committee on Rules

Adam Smith
Ranking Member,
Armed Services Committee

Bennie G. Thompson
Ranking Member, Committee on
Homeland Security

Chris Van Hollen
Ranking Member, Committee
on the Budget

Maxine Waters
Ranking Member, Committee on
Financial Services

The Washington Post

Congressional chairmen shouldn't be given free rein over subpoenas

By Henry A. Waxman February 5 at 8:20 PM

The writer, a Democrat, represented suburban Los Angeles in the House from 1975 to 2015.

I believe in strong, effective oversight. When I was chairman of the House Oversight Committee, I was called "the most feared Democrat on Capitol Hill." In Time magazine's 2011 list of the "top 10 corporate grillings" in the history of Congress, four are hearings I held.

But in my 20 years as a House committee chairman, I never issued a subpoena without the support of the ranking Republican or a majority vote of the committee.

I was not alone in avoiding unilateral subpoenas. In the past 60 years, only three chairmen have embraced issuing subpoenas without obtaining bipartisan or committee support: Sen. Joe McCarthy (R-Wis.), Rep. Dan Burton (R-Ind.) and Rep. Darrell Issa (R-Calif.). It is not a coincidence that these men led the most discredited, partisan and unfair congressional investigations in modern history.

Yet this year, six House committees are emulating the McCarthy-Burton-Issa model and giving their chairmen unilateral subpoena authority. This is an invitation to abuse that diminishes the prospect for responsible congressional oversight. Unfortunately, this ill-fated move has received virtually no attention.

Congressional subpoenas are not like other subpoenas. When a party in litigation or a federal prosecutor issues a subpoena, the recipient can appeal to a judge if he or she believes the subpoena is too broad or onerous. Even investigative demands in national security investigations are subject to judicial review if they are "unreasonable, oppressive, or otherwise unlawful."

But there is no judicial appeal of congressional subpoenas. The recipient of the subpoena has only two options: Comply with the committee's demands, or defy the subpoena and risk criminal prosecution for contempt of Congress. This gives a chairman with unilateral subpoena authority an absolute power to compel U.S. citizens to reveal information.

I had this vast power when I was chairman of the House Oversight Committee from 2007 to 2009 because it was part of the rules of the committee. But like my immediate predecessor, Thomas M. Davis III (R-Va.), and most others who have held this position, I sought a check on my power to prevent abuse. I adopted the policy of calling for a committee vote if the ranking Republican objected to a subpoena. In contested cases, it would be the committee's collective decision — not

mine unilaterally — that would determine whether to compel an individual to comply. And it meant that I had to justify the necessity of every subpoena.

When I became chairman of the Energy and Commerce Committee in 2009, I wrote these safeguards into the rules of the committee. They lasted until this year, when Chairman Fred Upton (R-Mich.) rewrote them to give himself unchecked authority.

When this restraint is missing, congressional investigations flounder. The record for unilateral subpoenas belongs to Burton, who issued more than 1,000 during his six years as chairman of the Oversight Committee. His overreaching demands and unfair treatment of witnesses, which often forced innocent officials to spend tens of thousands of dollars on legal fees, became his undoing. His sprawling, partisan investigation of the Clinton administration was a debacle, called "its own cartoon, a joke and a deserved embarrassment" by The Post and "a case study in how not to do a congressional investigation" by congressional scholar Norman Ornstein.

Issa, who issued more than 100 unilateral subpoenas, made similar mistakes in his endless pursuit of scandal in the investigations of Benghazi, the IRS and the "Fast and Furious" gun-tracking program. It was the absence of facts — not a lack of power — that prevented both chairmen from proving their outlandish theories.

This year, the House chairmen seeking the new authority promise to be more responsible. But checks are needed even for well-meaning people. Too often, people in power do things because they can, not because they should. Leadership or campaign pressure can also drive chairmen to take irresponsible actions.

The fact is, a chairman doesn't need absolute power to be effective. My 1994 hearings into the tobacco industry revealed decades of deceit and galvanized public sentiment — without the use of a single subpoena. The hearings I held with Davis on steroid use in baseball had a similar impact, causing sports at all levels to tighten their policies and triggering significant declines in the use of these dangerous drugs by children. During the years Davis and I chaired the Oversight Committee, it probed deeply into procurement abuses, the response to Hurricane Katrina, dangerous prescription drugs, White House misconduct and the collapse of Wall Street — all without any unilateral subpoenas. The discipline of having to substantiate our demands for information made both of us better investigators and better chairmen.

The secret to good oversight isn't concentrating power in the chairman and marginalizing the role of the committee. The best investigations have always been led by fair chairmen with a commitment to being thorough, fact based and careful in the use of congressional power. This is a lesson the new Congress already seems to have forgotten.