



Washington Legal Foundation
Advocate for freedom and justice®
2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302

**TRIAL BY ORDEAL:
A SURVIVAL GUIDE FOR
CONGRESSIONAL INVESTIGATIONS**
by
John F. Sopko and Constance D. O'Connor
Akin Gump Strauss Hauer & Feld LLP



Washington Legal Foundation
CONTEMPORARY LEGAL NOTE Series

Number 64
February 2010

TABLE OF CONTENTS

I. THE POWER TO INVESTIGATE.....	2
II. HOW IT STARTS.....	3
III. WHO DOES IT?	4
IV. THE RULES THAT GOVERN.....	6
V. THE ROLE OF THE PRESS	8
VI. THE PRODUCTION OF DOCUMENTS.....	9
VII. RAMIFICATIONS FOR FAILURE TO RESPOND	10
VIII. THE PROS AND CONS OF STAFF INTERVIEWS	12
IX. THE POLITICAL THEATER OF A HEARING	13
X. OVERSIGHT IN 2010	16

ABOUT WLF'S LEGAL STUDIES DIVISION

The Washington Legal Foundation (WLF) established its Legal Studies Division to address cutting-edge legal issues by producing and distributing substantive, credible publications targeted at educating policy makers, the media, and other key legal policy outlets.

Washington is full of policy centers of one stripe or another. But WLF's Legal Studies Division has deliberately adopted a unique approach that sets it apart from other organizations.

First, the Division deals almost exclusively with legal policy questions as they relate to the principles of free enterprise, legal and judicial restraint, and America's economic and national security.

Second, its publications focus on a highly select legal policy-making audience. Legal Studies aggressively markets its publications to federal and state judges and their clerks; members of the United States Congress and their legal staffs; government attorneys; business leaders and corporate general counsel; law school professors and students; influential legal journalists; and major print and media commentators.

Third, Legal Studies possesses the flexibility and credibility to involve talented individuals from all walks of life - from law students and professors to sitting federal judges and senior partners in established law firms.

The key to WLF's Legal Studies publications is the timely production of a variety of intelligible but challenging commentaries with a distinctly common-sense viewpoint rarely reflected in academic law reviews or specialized legal trade journals. The publication formats include the provocative COUNSEL'S ADVISORY, topical LEGAL OPINION LETTERS, concise LEGAL BACKGROUNDERS on emerging issues, in-depth WORKING PAPERS, useful and practical CONTEMPORARY LEGAL NOTES, interactive CONVERSATIONS WITH, law review-length MONOGRAPHS, and occasional books.

WLF's LEGAL OPINION LETTERS and LEGAL BACKGROUNDERS appear on the LEXIS/NEXIS® online information service under the filename "WLF" or by visiting the Washington Legal Foundation's website at www.wlf.org. All WLF publications are also available to Members of Congress and their staffs through the Library of Congress' SCORPIO system.

To receive information about previous WLF publications, contact Glenn Lammi, Chief Counsel, Legal Studies Division, Washington Legal Foundation, 2009 Massachusetts Avenue, NW, Washington, D.C. 20036, (202) 588-0302. Material concerning WLF's other legal activities may be obtained by contacting Daniel J. Popeo, Chairman.

ABOUT THE AUTHORS

John F. Sopko is a partner in the Washington, D.C. office of the law firm Akin Gump Strauss Hauer & Feld LLP. A veteran of decades of congressional oversight with extensive litigation experience as a state and federal prosecutor, Mr. Sopko focuses his practice on congressional and federal investigations. In both the U.S. Senate and House of Representatives, he has overseen investigations on matters ranging from online marketing, food and drug safety, health insurance, energy pricing and federal procurement to homeland and national security issues. Immediately prior to joining Akin Gump, Mr. Sopko was Chief Oversight Counsel for the House Committee on Energy and Commerce. He also served as the first Democratic General Counsel and Chief Oversight Counsel for the House Select Committee on Homeland Security as well as Senator Sam Nunn's Deputy Chief Counsel for over fifteen years on the Senate Permanent Subcommittee on Investigations in addition to a number of senior positions in the executive branch and private sector. Mr. Sopko received his B.A., cum laude, from the University of Pennsylvania in 1974 and his J.D. in 1977 from Case Western Reserve University.

Constance D. O'Connor is an associate in the Washington, D.C. office of Akin Gump Strauss Hauer & Feld LLP and focuses her practice on congressional and internal investigations and white collar criminal defense. She has represented corporations, institutions, and individuals in high-profile congressional, administrative, and judicial proceedings and investigations. Before joining the firm, Ms. O'Connor served as Legislative Director & Counsel to U.S. Representative Peter Welch. She was responsible for all matters before the Committee on Oversight and Government Reform, working closely with committee staff to prepare for various investigations. For three years prior to that, Ms. O'Connor was a litigation associate handling white collar and securities fraud matters at another Washington, D.C. firm. Ms. O'Connor earned her B.A., cum laude, from the University of Notre Dame in 1998 and her J.D., cum laude, in 2004 from Georgetown University Law Center. She is a member of the District of Columbia and Maryland bars.

TRIAL BY ORDEAL: A SURVIVAL GUIDE FOR CONGRESSIONAL INVESTIGATIONS

by

John F. Sopko and Constance D. O'Connor
Akin Gump Strauss Hauer & Feld LLP

“In colonial America, suspected witches were dumped in vats of water until they drowned or confessed, in which case they were hanged. Today, we have congressional hearings”¹

Your client has just been contacted by a congressional committee advising it that it is a target of a newly-opened investigation. Or worse, they read about the new inquiry on the front page of *The New York Times* or *The Wall Street Journal*. Within days or even hours, the client receives a letter from the committee demanding highly sensitive information about its business and often, thousands of pages of documents. The letter also requests the client make a witness available to testify before the Committee. What is happening? What do you do next?

Welcome to the world of congressional oversight and investigations. Throughout the last two decades, this topic has become one of the fastest growing, most important, and least understood areas of the law. Successfully navigating a congressional investigation requires an expertise in white collar

¹David Wessel, *Geithner Survives to Fight Another Day*, WALL ST. J., Jan. 28, 2010.

criminal defense, corporate litigation, lobbying and public advocacy, all while managing a very public environment with few rules and great risk.

We hope this CONTEMPORARY LEGAL NOTE provides an appreciation for some of the legal and political nuances of this important congressional function, and will hopefully allow you to avoid some of the pitfalls when Congress comes calling.

I. THE POWER TO INVESTIGATE

The first thing any corporate counsel should know is that a congressional committee’s power to probe is almost unlimited. Former Chief Justice Earl Warren observed, “the power of Congress to conduct investigations is inherent in the legislative process.” He continued:

That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them.²

Article I of the Constitution confers upon Congress the authority “To make all Laws which shall be necessary and proper” and this has been consistently interpreted as encompassing the power to investigate.³ The United States Supreme Court has ruled that “the power of inquiry—with the process to enforce it—is an essential and appropriate auxiliary to the legislative

²*Watkins v. United States*, 354 U.S. 178, 187 (1957).

³U.S. CONST. ART. 1, § 8.

function.”⁴

Thus, as long as a congressional committee can argue its inquiry is in pursuit of a “legislative function,” no matter how tenuous it may be, the courts will permit the investigation to continue and, where necessary, enforce any subpoenas that the committee has issued in furtherance of its investigation for individuals and documents.⁵ Likewise, what Congress may do with this information is also quite broad. Courts have long recognized that within certain constraints, the information obtained from an investigation may be made public at the discretion of the committee.

Next, it is important to remember that there is no legal or factual threshold required to start an investigation or hold a hearing. The media, political agendas, important constituent’s demands, corporate campaigns, and Member/Committee interest can each play an integral and often intertwining role in Congress’ decision to investigate. Unlike a criminal or civil action, Congress does not have to meet a burden of proof. It is almost exclusively the discretion of a committee Chairman whether or not and whom to investigate.

II. HOW IT STARTS

Congressional investigations typically begin when a committee sends a letter stating that the committee has initiated an investigation into a certain issue, and that they would like your client to provide relevant information. At

⁴*McGrain v. Daugherty*, 273 U.S. 135, 181-82 (1927).

⁵*Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880).

the discretion of the committee Chairman, the letter may at that time be made public and accompanied by a press release or other press event.

The committee will likely request that the client respond to a set of questions, produce documents related to those questions, make certain employees available for interviews and, eventually, make a witness available to testify at a hearing. The client should promptly notify counsel of the receipt of the letter and make arrangements for counsel to contact the particular congressional staff member handling the investigation.

The letter will provide an often unreasonably quick deadline for written responses and documents. This deadline is negotiable and is one of the first topics for discussion between the committee and counsel. While counsel for the client is likely to obtain an agreement for a rolling production and a later due date for written responses, the time frame for responding is still very short, and time is very much of the essence.

III. WHO DOES IT?

After receipt of the letter, an important early step is to gather information about the committee making the request. Counsel should identify the full committee and subcommittee chairs and review the members' biographies to better understand who is making the request and what their motivations might be.

Although any committee can conduct investigations, there are only a few who regularly do so and accordingly have developed the oversight staff and expertise to do it effectively. In the Senate they include the Homeland Security and Government Affairs Permanent Subcommittee on Investigations chaired by Senator Carl Levin (D-MI) as well as a new Ad Hoc Subcommittee on Contracting Oversight, chaired by Senator Claire McCaskill (D-MO), a former prosecutor. That committee is charged with overseeing and investigating federal contracting. Surprisingly for its size and limited jurisdiction, under the leadership of Senator Herb Kohl (D-WI), the Special Committee on Aging has also aggressively pursued a broad oversight agenda with a quite able staff including a former prosecutor and investigative journalist. In addition, under the Chairmanship of Senator Jay Rockefeller (D-WV), the Senate Commerce Committee has greatly expanded its oversight activities in an apparent strategy to rival the historically robust oversight power of the House Energy and Commerce Committee under its former Chairman, John Dingell of Michigan.

There are also indications that Senator Tom Harkin (D-IA), the new Chairman of the Senate Health, Education, Labor and Pensions Committee, has also decided to greatly increase the oversight focus of this powerful committee. Lastly, although not a committee Chairman, Senator Charles Grassley (R-IA), remains one of the most consistent sources of congressional oversight using his perch as ranking member on the Finance Committee to conduct his inquiries. Senator Grassley continues to be the master of utilizing

the press to push his investigative agenda and remains one of the most ardent practitioners of congressional oversight.

In the House, Chairman Edolphus Towns (10th-NY) leads the Committee on Oversight and Government Reform in a broad range of investigations along with a number of his Subcommittee Chairmen, including an especially aggressive Rep. Dennis Kucinich (10th-OH) as Chairman of the Subcommittee on Domestic Policy. Another powerhouse of congressional oversight, Rep. Henry Waxman (30th-CA), is expected to increase his investigative activities as Chairman of the House Energy and Commerce committee in the second session of this Congress. Waxman assumed this important chairmanship from Rep. John Dingell (15th-MI) who is regarded as the father of modern congressional oversight. Rep. Dingell's heir apparent for the role of aggressive inquisitor on the committee is Rep. Bart Stupak (1st-MI) who chairs the Oversight and Investigations Subcommittee. Given the ongoing turbulence facing the economy and the financial sector, the House Financial Services Committee, chaired by Rep. Barney Frank (4th-MA), has also increased its oversight role of banks and other financial services firms.

IV. THE RULES THAT GOVERN

The recipient of a congressional request letter should also research the rules that apply to the particular committee. The House of Representatives and the Senate operate under different rules and each body delegates the power to

investigate to its committees.⁶ In turn, each committee adopts its own rules and often individual subcommittees will adopt their own special rules for conducting investigations.

For example, the rules governing when and under what circumstances a Committee can issue a subpoena vary considerably by committee. Compare the subpoena rules of the House Energy and Commerce Committee with those of the Senate Permanent Subcommittee on Investigation (“PSI”):

House Energy & Commerce: “The chairman of the Committee may, after consultation with the ranking minority member, authorize and issue a subpoena...[i]f the ranking minority member objects to the proposed subpoena in writing, the matter shall be referred to the Committee for resolution. The chairman of the Committee may authorize and issue subpoenas without referring the matter to the Committee for resolution during any period for which the House has adjourned for a period in excess of 3 days when, in the opinion of the chairman, authorization and issuance of the subpoena is necessary...”⁷

Senate Permanent Subcommittee on Investigations: “Subpoenas for witnesses, as well as documents and records, may be authorized and issued by the Chairman, or any other Member of the Subcommittee designated by him or her, with notice to the Ranking Minority Member. A written notice of intent to issue a subpoena shall be provided to the Chairman and Ranking Minority Member of the Committee, or staff officers designated by them, by the Subcommittee Chairman or a staff officer designated by him or her, immediately upon such authorization, and no subpoena shall be issued for at least 48 hours, excluding Saturdays and Sundays, from delivery to the appropriate offices, unless the Chairman and Ranking Minority Member waive the 48 hour waiting period or unless the Subcommittee Chairman certifies in writing to the Chairman and Ranking Minority

⁶See Rules of the House of Representatives, 110th Cong., Rule X cl. 2(b)(1); *see also* Standing Rules of the Senate, Rule XXVI cl. 1.

⁷H. Comm. on Energy and Commerce, 111th Cong., Committee Rule 16 (Comm. Print 2009).

Member that, in his or her opinion, it is necessary to issue a subpoena immediately.”⁸

The House Energy and Commerce Committee requires a vote by the full committee if the Ranking Member objects to the subpoena whereas the Senate PSI only requires notice and a 48-hour waiting period for the issuance of a subpoena. Important differences such as these in committee rules should be considered when devising an effective strategy for responding to a congressional inquiry.

V. THE ROLE OF THE PRESS

Another early and important step is to locate and collect all media stories surrounding the issue being investigated. As a political body, Congress pays very close attention to what the media is covering and it is not unusual for a particular piece of news to trigger an investigation. It is important to remember that the purpose of the hearing is not always to gather new facts. The Committee, if they have done their job effectively, will already have gathered the facts they need from the client’s responses to the initial letter request. The hearing is largely for media—to showcase the committee’s efforts in exposing a particular issue.

Further, investigation targets should not ignore the close ties that the plaintiffs’ bar enjoys with the now-majority party in Congress. Indeed, there is a symbiotic relationship between the press, the plaintiffs’ bar, and Congress.

⁸155 Cong. Rec. S2415-16 (2009).

The interdependence of the media and Congress cannot be overstated and, if properly monitored and managed, can afford the client opportunities for rapid response to allegations and for the transmittal of the letter recipient's message to the public.

VI. THE PRODUCTION OF DOCUMENTS

A request from a committee will likely require the production of vast volumes of documents. As part of the ongoing process of cooperating with the request, counsel should negotiate which documents the client will produce and the timing for that production. Most committees appreciate that the process involved in identifying, collecting, reviewing, and preparing documents for production in a form consistent with the committee's request takes significant time to accomplish. The client, in any case, should be prepared for an invasive, complicated, and expensive undertaking.

While the law is not completely settled on the availability of common law privileges (i.e., attorney-client, work-product, and deliberative-process) in the context of congressional investigations, most committees will determine if a privilege applies on a case-by-case basis where the need for the information is weighed against the harm caused to the client by its production.⁹ Evidentiary privileges, like those that protect an individual from having to reveal trade

⁹See CRS Report RL30240, *Congressional Oversight Manual*, 46-50.

secrets, will not automatically be afforded protection because the Federal Rules of Evidence do not apply to congressional committees.

Counsel for the client, however, should as a preliminary matter set aside documents that are believed to be privileged. Counsel should then create a log that separately describes each document, without revealing that which makes it privileged, and the basis for it being withheld. Most committees that acknowledge a common law privilege will, at a minimum, require the production of the “privilege log.” In some instances, the committee will take issue with certain documents on the log, claiming that they are in fact not privileged for some reason, and insist on their production. At this point, counsel and the client must carefully weigh the possible damage caused by releasing the document against the likelihood of a committee subpoena and the attendant bad press.

VII. RAMIFICATIONS FOR FAILURE TO RESPOND

While it is advisable that targets of an investigation fully cooperate with the committee and be in regular and constant communication with them, it is important to be aware of the ramifications for failing to respond. Committees in both houses of Congress have the power to issue subpoenas to require the production of documents or the attendance of witnesses.¹⁰ Subpoenas issued

¹⁰See *Eastland v. United States Servicemen’s Fund*, 421 U.S. 491, 505 (1975), where the Supreme Court held that congressional subpoena power is “an indispensable ingredient of lawmaking.”

by committees operate with “the same authority as if they were issued by the entire House of Congress.”¹¹

If a recipient refuses to provide certain requested information or fails to do so in a timely manner, a subpoena may be issued demanding the production of the material or person by a certain date. Counsel should work with committee staff to avoid the issuance of a subpoena unless a “friendly” subpoena is deemed necessary to discuss a particular matter or release certain confidential information. While the threat of a subpoena normally provides sufficient leverage to ensure compliance, it is through its power to hold parties in contempt that Congress ultimately forces compliance.

The Supreme Court has long recognized Congress’ power to hold a witness in contempt as inherent to its legislative authority.¹² There are three different kinds of contempt proceedings: inherent contempt, statutory criminal contempt, and civil contempt. Under the inherent contempt power of Congress, an individual is physically tried before a body of Congress. This power has not been exercised in over seventy years, but was used over 85 times from 1794 to 1930 to compel the production of documents or testimony from a witness.

Statutory criminal contempt was enacted in 1857 as an alternative to the cumbersome practice of inherent contempt. An individual who refuses to

¹¹*Exxon Corp. v. FTC*, 589 F.2d 582, 592 (1978), *cert. denied*, 441 U.S. 943 (1979).

¹²*Anderson v. Dunn*, 19 U.S. 204, 227 (1821).

testify or produce documents subject to a subpoena may be found guilty of a misdemeanor carrying fines up to \$100,000 and imprisonment for up to one year.¹³ The Senate has enacted a civil contempt procedure whereby the U.S. District Court for the District of Columbia has jurisdiction to order a person to comply with a Senate subpoena.¹⁴ If the person continues to refuse, they are tried through summary procedures before the court and face judicial sanctions.

VIII. THE PROS AND CONS OF STAFF INTERVIEWS

Frequently, during the period when investigation targets are answering questions in writing and producing documents, committees often request an in-person interview. Most interviews are not as formal as a deposition and are always held in private. Committee staff attorneys will conduct the interview and, depending on their goals, may have the interview recorded. In either case, what is said can, and often will, be made public.¹⁵ Issues surrounding the interviews, including public disclosure, are often negotiable and should be addressed early in the process.

It is important to remember that all interactions with a congressional committee are conducted pursuant to an official government investigation. Federal criminal provisions apply to congressional investigative requests,

¹³2 U.S.C. §§ 192 and 194 (2008).

¹⁴28 U.S.C. § 1365 (2008).

¹⁵Witnesses and counsel should be particularly aware that transcripts of witness interviews, when made public, can be used against the client in possible private litigation. Counsel should take care to ensure the record of the interview is as clear and balanced as possible.

subpoenas, or questioning. In particular, any statements made must be true and complete. Federal perjury, obstruction of justice, and false statement provisions apply to statements and records produced during the course of a hearing, deposition, or even in an “informal” interview that is not recorded.

IX. THE POLITICAL THEATER OF A HEARING

The scene inside the hearing room will largely depend on the nature of the specific investigation and the witnesses appearing. If the issue itself (e.g., substandard conditions at Walter Reed) or the witnesses testifying (e.g., “gate crashers” at the White House State Dinner) is high profile, the client should expect a full hearing room. Most members of the committee will be present and sitting on a raised dais, staff will line the walls, public seats will be full, and throngs of print, video, and photo journalists will be jockeying to capture the moment. This is not typical of every hearing, but represents one extreme, especially if the congressional committee has leaked material beforehand to increase public interest. At the other extreme, some hearings may have only one or a handful of Members present with little or no press coverage.

Congressional hearings are often more akin to political theater and should not be confused with a court of law. Among other important differences, a witness cannot object to a line of questioning. The Federal Rules of Evidence do not apply and lawyers representing the witness are not typically allowed to interject on their client’s behalf or otherwise testify.

Congressional committees are generally bound by constitutional privileges, however. For example, the right to invoke the Fifth Amendment protection against self-incrimination is recognized, although committees will usually require witnesses to invoke that right in person and in public. The latest chapter in the imbroglio surrounding the “gate crashers” at the White House State Dinner is a recent example of how a committee is likely to require the targets of an investigation to come forward and publicly invoke the Fifth Amendment.¹⁶

The hearing will begin with an opening statement from the chairman, followed by an opening statement by the ranking member and other committee members. In most investigatory hearings, witnesses testify under oath and are publicly asked to stand and swear that the testimony they will give is true. Each witness will then deliver a short opening statement, usually limited to three to five minutes. A longer statement can be submitted for the record at the discretion of the committee.

At the conclusion of the witness’ statement, questioning will begin with the chairman. After those questions, majority and minority committee members will take turns questioning the witness at least until each member has had a turn. Members of the committee are usually only given a few minutes to question the witness, often only three to five minutes per round of questioning.

¹⁶Associated Press, *White House gate crashers invoke Fifth Amendment* (Jan. 20, 2010), available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/20/AR2010012001666.html?hpid=moreheadlines>.

Therefore, a witness who testifies before a committee hearing should prepare for many different questioning styles and will likely be forced to repeat his or her answers.

It is wise for a witness to be respectful to the committee members even if they are not respectful of the witness. A witness may not like the question or the tone of the Member, but visibly frustrated witnesses create further problems for themselves and their companies.

Thorough preparation is essential for the success of any appearance before a committee. Considerable time should be spent not only in selecting the appropriate witness but also in preparing the written and oral testimony. A successful appearance before a committee is rarely an accident but rather the result of hours of hard work including mock sessions where the witness responds to potential lines of questioning.

If not handled properly, a congressional investigation can be extremely costly to a client not only in financial terms, but also in terms of harm to the client's image. Congressional requests for information should be dealt with promptly, professionally, and with as much cooperation as possible. Many issues surrounding an investigation are subject to negotiation between the counsel and the committee. Early and regular contact with committee staff is strongly recommended.

Investigations can vary in length and complexity, ranging from a single hearing to an ongoing investigation lasting years. The latter can result in multiple requests for information and witness testimony. Navigating this process can be made easier by engaging an attorney familiar with congressional investigations who can skillfully negotiate with the committee on a variety of different legal, procedural, and political issues that are certain to arise.

X. OVERSIGHT IN 2010

With the second session of the 111th Congress underway, we expect that congressional oversight will be even more extensive and aggressive than last year. For a number of political and policy reasons, including the recent loss of a super-majority in the Senate, the Democratic-controlled Congress will likely emphasize its leadership to the electorate in 2010 less by legislating and more by investigating.

Last year was marked by investigations that followed on the heels of existing legislative proposals designed to advance a particular policy. This year, however, it is likely that we will see Congress pursuing investigations not because of a legislative initiative but because they want to expose problems confronting “working” Americans and prove that they are taking action to solve them. Many have accused Congress in the first session of being profligate and wasteful; accordingly in the second session it will behoove Congress to use its oversight tools to demonstrate that it is the protector of the public purse and a defender of strong middle class values.

For example, Congress will continue its analysis of the economic downturn and how various financial services companies participated in the collapse. In addition, Congress will continue oversight of defense contracting surrounding the ongoing wars in Iraq and Afghanistan. One “new” issue area that will likely receive congressional oversight attention is consumer protections. Congress will seek to demonstrate that it is on the side of American consumers by focusing on ways to defend and protect citizens who feel they are being ripped-off or otherwise unfairly treated by companies. Especially because 2010 is an election year, Congress will want to deliver the message that they are listening to their constituents and will return to a more traditional democratic emphasis on things that impact the consumer, and in this economy, especially the consumer’s pocketbook.

As a result, many companies will find themselves thrust into the strange and potentially dangerous world of congressional oversight. Overall, it is crucial for a client to take a congressional investigation seriously. Failure to professionally address document production or a witness’s testimony can turn one bad day of press coverage into a felony charge.

Although the best strategy is to avoid becoming the target of a congressional investigation in the first place, if your client finds himself in this situation, take the necessary time to fully understand the committee’s investigation and request and treat it with all due respect.