



Congressional Investigations

A Survival Guide

December 2019

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**The contents of this document are not intended to serve as legal advice related to individual situations or as legal opinions concerning such situations, nor should they be considered a substitute for taking legal advice.*



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Where the Power Resides

The Basics of a Congressional Investigation

What oversight and investigatory power does Congress have?

The U.S. Constitution does not specifically enumerate the Congressional power to investigate, but the Supreme Court has recognized the investigative authority as an implied power.

“The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad.”

- Chief Justice Earl Warren,
Watkins v. United States (1957)

What oversight and investigatory power does Congress have?

“The wisdom of congressional approach or methodology is not open to judicial veto. Nor is the legitimacy of a congressional inquiry to be defined by what it produces. The very nature of the investigative function – like any research – is that it takes the searchers up some ‘blind alleys’ and into nonproductive enterprises. To be a valid legislative inquiry there need be no predictable end result.”

- Chief Justice Warren Burger,
Eastland v. United States Servicemen’s Fund (1975)

How do most Congressional investigations begin?

- The investigative agenda is potentially broad
 - General oversight
 - Investigations
- Congressional interest can be triggered from many incidents, sources, or experiences

How do most Congressional investigations begin?

The power to investigate includes a power to obtain necessary information.

“A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information – which not infrequently is true – recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed.”

- Justice Willis Van Devanter,
McGrain v. Daugherty (1927)

How are Congressional investigations different from Executive branch and/or criminal probes?

- Time Schedules/Limits
 - Election Cycle vs. Statute of Limitation
- Rules for discovery
- Attorney Client Privilege
- Public/media exposure

How are Congressional investigations different from Executive branch and/or criminal probes?

- Investigations are inherently political
- Reputational risk is significant



How does investigatory power differ in the House and Senate?

- Rules and practices vary by chamber and committee
 - Subpoena authority
 - Privacy protections (Rule 29.5)
- 100 Senators vs. 435 Representatives
- Individual members vs. Committees



How to Navigate Congress

Saving Your Organization from Disaster

- Relationships with Committee Staff
 - Investigation often begins with a request for documents or information from the target – often without a subpoena
 - Counsel should seek to determine the motivations for the inquiry and gauge the seriousness of the investigation
 - What is staff willing to disclose?
 - What committee and lawmaker is heading the inquiry?
 - With no procedural rules for objection, defense counsel must utilize or establish good relationships with committee staff in order to best determine the information Congress is seeking
 - Congress is exempted from provisions of FOIA
- Caution: The Minority Staff

Best Practices for Interacting with Lawmakers and Staff

- Avoiding a Subpoena
 - Have honest and careful discussions with committee staff
 - Understand motivations
 - Inquiry letters
 - Use as scare tactic
 - Spur voluntary changes
 - Find out more information
 - Publicize a particular issue
 - Be aware of media
- When a Subpoena Arrives
 - Does it infringe on any protected rights or privileges?
 - With the exception of very few people, Fifth Amendment is not a viable option – although required under Constitution
 - Does the committee have jurisdiction over the issues involved?
 - Were proper procedural rules followed?
 - Is the subpoena overbroad or is the client unable to provide certain information?

Best Practices for Interacting with Lawmakers and Staff

- Preparing for Hearings
 - Is there any other option?
- If called to testify:
 - Know your audience
 - Prepare your responses
 - Anticipating the unknown
 - Communicate with staff for committee and members



Other Notable Actors

Government Agencies that Influence
Congressional Investigations

Congress's non-partisan public policy research institute.

- Assist throughout all stages of legislative process
 - Early considerations that precede bill drafting
 - Hearings and floor debate
 - Oversight of and compliance with enacted laws
- CRS Services include:
 - Reports, seminars and workshops on major policy issues
 - Confidential memoranda, briefings and consultations tailored to individual inquiries
 - Expert congressional testimony
- No Teeth but Can Still Bite
 - Can't compel data from private sector and generally relies on public information
 - Will report on potential benefits and concerns of private sector initiatives
 - Will identify information not currently required by law to be reported by industry
 - Don't have to communicate with "subjects" of an inquiry



Congress's independent, non-partisan investigative watchdog.

- GAO's Authority is Nearly a Century Old
 - The Budget and Accounting Act of 1921 formed GAO
 - Tasked with investigating the use of public funds
 - Required to report findings and make recommendations
- Investigations from Many Sources
 - Mandated by statute
 - Ordered by either House of Congress or a Congressional committee with jurisdiction
 - Audits and evaluations requested by any Member as needed, but put in long queue
 - Maintains a hotline to report waste, fraud, and abuse across federal government
- Robust Investigative Tools
 - Can investigate all matters relating to the use of federal funds
 - Can subpoena records from federal agencies and contractors
 - Members will come calling if GAO's efforts are frustrated



- Office of General Counsel also Identifies Oversight Targets
 - Adjudicates bid protests challenging the award and/or solicitation of a federal contracts
 - Issues legal opinions and decisions to Congress and federal agencies on appropriations law
 - Adjudicates potential violations of the Antideficiency Act
 - Advise agencies on compliance with the Congressional Review Act and the Federal Vacancies Reform Act
- Office of Special Investigations (OSI)
 - Specialized unit created to provide Congress with quick, focused responses to questions and issues of criminal activity, fraud, and abuse.
 - Staffed with senior criminal investigators, it investigates potential fraud, criminal conduct, and serious wrongdoing involving federal funds, programs, and activities.

The government's independent watchdogs

- The Inspector General Act
 - In the aftermath of Watergate, the IG Act of 1978 was enacted by President Jimmy Carter, to help “fight against fraud” in the executive branch.
 - The law has expanded and so has the number of IGs, which went from 12 IGs in 1978 to more than 70 now
 - IG Empowerment Act of 2016 confirms that IGs are entitled to full and prompt access to agency records.
- What Does Independent Mean?
 - Most can only be fired by President and only after congressional notification
 - Make their own audit and investigations decisions except for those mandated by statute
 - Can independently report findings to the public and to Congress
 - Latest reforms provide for direct access to agency documents without agency approval
 - Hire and contract their own staff and resources



- The Inspector General's Mandate
 - Conduct audits, inspections, evaluations, and investigations of programs and operations of their affiliated federal entities;
 - Recommend policies that promote the efficiency of agency programs and operations, as well as preventing and detecting waste, fraud, and abuse;
 - Keep the affiliated entity head and Congress “fully and currently informed” of fraud and “other serious problems, abuses, and deficiencies” in such programs and operations
 - Track and report on progress in implementing related corrective actions
- IG's have a range of investigative authority and tools including:
 - Direct access to all records and information of the agency,
 - Ready access to the agency head,
 - Deciding what issues or individuals to investigation (with limited national security and law enforcement exceptions),
 - Issue subpoenas for information and documents outside the agency (with some exceptions),
 - Administer oaths for taking testimony

- Law Enforcement Authorities for Presidentially Appointed IG Offices
 - Authority to carry a firearm while engaged in official duties
 - Authority to make an arrest without a warrant for any federal offense committed in the presence of the agent, or when the agent has reasonable grounds to believe that the person to be arrested has committed or is committing a federal felony
 - Authority to seek and execute Federal warrants for arrest, search of premises, or seizure of evidence under the authority of the United States.
- Legislative and Regulatory Review
 - Required to review existing and proposed legislation and regulations for their impact on the economy and efficiency of agency's programs and operations
 - Required to review for prevention of fraud and abuse
 - Must report the results of these reviews via their semiannual report
 - Congress often asks OIGs to provide technical assistance on draft or proposed legislation

Non-Profits and the Public as Watchdogs

Less power and fewer tools but ignore at your own peril.

- Lawsuits
 - CREW v. Trump
 - Washington v. Trump
- Freedom of Information Act
 - American Oversight v. State
 - Scott Pruitt's FOIA Foibles
- Administrative Complaints
 - Patrick Shanahan's Boeing ties
- Public pressure campaigns
 - Progressive groups sink Weiss at Treasury

Case 1:17-cv-00458 Document 1 Filed 01/23/17 Page 1 of 39

**IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK**

CITIZENS FOR RESPONSIBILITY AND
ETHICS IN WASHINGTON,

Plaintiff,

v.

DONALD J. TRUMP, in his official capacity
as President of the United States of America,

Defendant.

Civil Action No.



Case Study: Backpage.com

Senate Permanent Subcommittee on Investigations – Backpage.com



Senate Permanent Subcommittee on Investigations – Backpage.com

- Backpage ignored requests for information and documents
 - After repeated requests for information, PSI issued a non-public subpoena to Backpage on July 2015. Backpage failed to respond.
 - PSI withdrew the subpoena and issued a narrower, non-public subpoena on October 1, 2015, in a “good-faith effort to address Backpage’s expressed concerns.”
 - Backpage made a limited production in November 2015, and explained that it had not made a complete search.
 - Backpage CEO Carl Ferrer failed to appear at a PSI hearing, in violation of the subpoena issued for his appearance.
- The Senate successfully enforced its subpoena in federal court
 - In March 2016, the Senate approved a resolution authorizing Senate Legal Counsel to enforce the subpoena in federal court.
 - The district court rejected Backpage’s First Amendment arguments and ordered it to produce all responsive documents to the Subcommittee.
 - Backpage later sought an emergency stay of this order pending appeal from the U.S. Supreme Court, which the Court denied.

- Findings of the PSI Investigation:
 - Backpage automatically deleted incriminating words from sex ads prior to publication using a tool called the “Strip Term From Ad” filter. Filtered words included “lolita,” “teenage,” “rape,” “young,” “amber alert,” “fresh,” “innocent,” and “schoolgirl.”
 - Backpage also coached its users on how to post “clean” ads for illegal transactions.
 - Backpage employees were also aware that prostitution and child exploitation occurred on the site.
- Shortly after the report was released, Backpage announced that it was shutting down its adult services ads.

Senate Permanent Subcommittee on Investigations – Backpage.com



Senate Permanent Subcommittee on Investigations – Backpage.com

backpage.com and affiliated websites have been seized

as part of an enforcement action by the Federal Bureau of Investigation, the U.S. Postal Inspection Service, and the Internal Revenue Service Criminal Investigation Division, with analytical assistance from the Joint Regional Intelligence Center.

Other agencies participating in and supporting the enforcement action include the U.S. Attorney's Office for the District of Arizona, the U.S. Department of Justice's Child Exploitation and Obscenity Section, the U.S. Attorney's Office for the Central District of California, the office of the California Attorney General, and the office of the Texas Attorney General.

Additional information will be provided at around 6:00 pm EST on Friday, April 6, by the U.S. Department of Justice, and all media inquiries should be directed to the U.S. Department of Justice's Office of Public Affairs at 202-514-2007 and press@usdoj.gov.

Senate Permanent Subcommittee on Investigations – Backpage.com

- H.R. 1865, the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (FOSTA), was introduced by Congresswoman Ann Wagner in early 2017.
- In August 2017, Senators Portman, Blumenthal, McCain, McCaskill, Cornyn and Heitkamp along with 15 other senators introduced the *Stop Enabling Sex Traffickers Act* (SESTA).
- In February 2018, the House combined the Senate bill with aspects of the Wagner bill and brought that bill to the floor. It passed 388-25. In March 2018, the Senate passed that same bill 97-2. President Trump signed the bill into law on April 11, 2018.
- Key elements of the law:
 - Clarifies that websites are civilly and criminally liable for *knowingly* facilitating sex trafficking;
 - Allows victims to bring civil cases under federal law against websites that knowingly facilitate sex trafficking;
 - Enables state law enforcement officials, not just the federal Department of Justice, to take action against individuals or businesses that violate federal sex trafficking laws.



Case Study: Strong Castle Inc.

Case Study: Strong Castle Inc. and the House Oversight Committee

Strong Castle Inc.

- IT management firm founded in 2011
 - Secured \$500 worth of federal contracts with the IRS by 2012
- Multiple preferences yield contracting success
 - HUBZone status by SBA
 - Service-disabled veteran-owned small business (SDVOSB) status affirmed by Veterans Affairs
 - Minority-owned and woman-owned business
- Bid Protest Leads to Congressional Scrutiny
 - Alleged favoritism by IRS contract officer
 - Alleged improper or fraudulent certifications for preferences
 - GAO rejects protest bid
 - Competitor brings concerns to Congress



Case Study: *Chairman Issa sends letters to IRS, VA and Strong Castle*

KNOW YOUR AUDIENCE

- House or Senate: Different styles and tools
 - House: quicker and easier to get subpoenas
 - Senate: slower and more parochial
 - Bipartisan? Bicameral?
- Who is the Chair?
 - Who are they?
 - How did they get involved?
 - Why are they interested?
- Who is the Ranking Member?
 - Are they invested or along for the ride?
 - What's their relationship with the Chair?
 - What's their relationship to the issue?





Case Study: Committee Hearing

Case Study: Committee Hearing

KNOW YOUR AUDIENCE

- Advanced Preparation
 - What will the hearing look like?
 - Can you avoid being there?
 - Who else can you bring with you?
- What's the goal?
 - What story does the Majority want to tell?
 - What story does the Minority want to tell?
 - What stories are they already telling?
- Every Member Counts, but They Aren't Created Equal
 - Personal and Constituent Bios
 - Good questioners and lousy questioners
 - Who's invested?
 - Other witnesses
 - Wild Cards



Case Study: The Cautionary Tale



Questions?





THANK YOU FOR ATTENDING

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